Katarzyna Południak-Gierz

Defects of Consent in Consumer E-Commerce from the Polish Law Perspective

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Preface

The monograph is a translation of *Wady oświadczenia woli w umowach zawieranych na internetowym rynku konsumenckim* published by C.H.BECK in 2020, with the basis being the doctoral thesis *The usefulness of the regulation of defects of consent to contracts concluded on the consumer online market* (*Przydatność kodeksowego unormowania wad oświadczeń woli do umów zawieranych na internetowym rynku konsumenckim*) defended with distinction at the Jagiellonian University's Faculty of Law and Administration in 2019.

The thesis was written under the supervision of Professor Fryderyk Zoll and Mateusz Grochowski, Ph.D., as the assistant supervisor. I would like to take this opportunity to express my gratitude to them – without their academic supervision, countless discussions and invaluable advice this work would never have been completed. In preparing it for publication, the comments of the thesis reviewers – Professor Ewa Rott-Pietrzyk and Professor Mariusz Załucki – were of crucial importance. Finally, I would like to thank my colleagues at the Jagiellonian University's Civil Law Department for their support and advice. The research, the results of which are presented here, was partially carried out as a part of the Polish National Science Centre (Narodowe Centrum Nauki) financed project "Personalized agreements in the light of civil law" (project No. 2016/21/N/HS5/00167).

As this monograph is addressed to readers unfamiliar with the Polish legal system, several amendments in comparison to the Polish version were necessary in order to make the argumentation clear and easy to follow. I have also taken the opportunity to update certain passages and footnotes as neither EU legislature nor academic commentators remained idle in 2020.

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The regulation on vice of consent in the Polish Civil Code in the consumer e-commerce – setting the scene

The study's main objective is to verify whether, due to the evolution of the concept of the declaration of intent and the development of non-individual consumer protection instruments, the code regulation of defects in the declaration of will remains useful in the case of contracts concluded by consumers on the Internet.

The Internet plays an increasingly important role in modern commerce. The number of online transactions is growing not only in times of economic prosperity. The online environment makes it easier for entrepreneurs to search for potential counterparties, while reducing the costs associated with running a traditional shop. However, changes in the manner of conducting business activities cannot be perceived as purely technical – they also cause numerous legal challenges. There emerge doubts as to the scope of the parties' autonomy, protection standards, party rights and obligations, the interpretation of declarations of will. Changing the transaction environment entails a need for legislative intervention.

The European Union legislature, the national legislatures of individual Member States, are taking steps to adapt the legal framework to these technological innovations. There are initiatives and proposals aimed at stimulating the development of trade within the European Union: simplify cross-border commerce, promote fair competition and unify the consumer's situation across Member States. The legislative activity of the European Parliament and the Council significantly affects the situation of civil law entities. Along with raising consumer protection standards, the usefulness of traditional institutions of civil law of a protective nature – the defects of the declaration of will – becomes questionable.[1]

In the case of distance contracts (and, therefore, also those concluded via the Internet), the entrepreneur is obliged to fulfill numerous information obliga-

1 R. Schulze, F. Zoll, *European Contract Law*, 3rd ed., Baden-Baden 2021, p. 150–152.

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tions. He[2] is forbidden to undertake actions that constitute unfair market practices, including those that may be misleading, may frighten or put pressure on a potential counterparty. In addition, there are also rules aimed at preventing a disloyal entrepreneur from influencing the content of a future legal relationship by including standard terms or other contractual provisions leading to an imbalance between the entrepreneur and the consumer into the contract. Interpreting declarations of intent shaping the content of the contract to the advantage of the consumer is commonly accepted. Detailed regulations that shape a seller's liability also favor the consumer – the properties of the good are determined by taking into account the legitimate expectations of the consumer as well as his subjective aim, known to the seller at the time of concluding the contract. Finally, the consumer is granted an essentially unconditional right to withdraw from a distance contract. This leads to the question of whether, under the current regulatory framework, there is still room for the institution of defects of consent. Perhaps other instruments that guarantee further-reaching protection render the provisions on vice of consent, those that make it possible to avoid the legal consequences of a defective declaration, practically useless?

Scope of the research

The study focuses on those scenarios in consumer e-commerce where the regulation on the defect of consent could be applicable. The analysis has been organized in a manner corresponding to the structure of Section IV of Book One of the Polish Civil Code (later as: CC). In addition, situations in which one could find protection under the rule on exploitation have also been identified.

The aim of the study is to assess whether the regulation on vice of consent within the Polish Civil Code remains useful in consumer e-commerce – and, therefore, the institution of defects in declarations of will are at the center of considerations. Their main function is to protect the decision-making processes of civil law entities. An issue-based approach, which makes it possible to assess the usefulness of the regulation of individual defects in consent and to indicate any possible alternative protection mechanisms, forces one to broaden the scope of the analysis. In consequence it is not limited to the verification of the applicability of rules on individual defects in declarations of will but covers an analysis of the functioning of other legal instruments performing the same function. Such a delineation of the scope of research allows one to grasp the essence of the problems discussed in each chapter.

2 'He/his/him' is used to represent all individuals of either sex.

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The research focuses on consumer contracts only because the legislator has a special approach to agreements concluded by this category of market participants. In addition to traditional individual protection instruments, consumers tend to be protected also by alternative mechanisms. These are of a standardized and objective character, and the conditions for their application are less stringent than in the case of regulation on defects in the declaration of will. Thus, a consumer who finds himself in a situation justifying protection under the provisions on vice of consent is, at the same time, protected under specific consumer law regulations.

Despite the fact that only some of the provisions that may reduce the usefulness of the CC regulation of defects in the declaration of will apply exclusively to contracts concluded via the Internet, only these online consumer contracts were analyzed. The reason being that, in the author's opinion, the specificity of the online environment affects the factual and legal situation of network users so deeply that it justifies limiting the subject of research to contracts concluded via the Internet.

The structure and theses of the work

Previously, the emergence of new communication tools has only simplified and adjusted the mechanisms of concluding contracts to the expectations of trading participants. Currently, the Internet, initially perceived as another invention enabling more convenient communication, has evolved to become a separate environment, a new platform of activity for civil law entities.

In principle, it should not affect the applicability of the traditional institutions of civil law. However, the peculiarities of this environment lead to a loss in functionality for some of them – which may also be the case in regard to the rules on vice of consent. The defectiveness of a declaration of will under CC covers situations in which there is a discrepancy between the internal sphere of a person (the manner in which he perceives the existing state of affairs or the content of a legal act) and its manifestation, or where the process of decision-making was disturbed.[3]

The reasons for the gradual decrease in the usefulness of the CC regulation of the defects of consent in the case of online consumer contracts may be related not only to the development of technology, but also to the change in the understanding of the purpose of these norms. For this reason, in the first chapter, before starting the analysis of individual groups of typical situations, it is nec-

3 P. Nazaruk, in: *Kodeks cywilny. Komentarz*, ed. J. Ciszewski, Warszawa 2019, Art. 82, Marginal No. 1.

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essary to define what the purpose behind regulating defects of the declaration of will was, and to examine whether this purpose has not changed since the introduction of the provisions in question. If at the stage of designing this protection mechanism, the legislature had a specific goal in mind, then it will determine the functionality of the norms in question. Therefore, applying them to achieve a different objective may not lead to optimal effects. This, in the long run, could trigger the emergence of alternative legal mechanisms.

The further analysis has been divided into five chapters. Each time, the starting point is to define the scope of the situations in which a specific defect in the declaration of will may occur. Then, factors of a legal or factual nature that reduce the usefulness of the CC regulation are indicated. Subsequently, alternative legal mechanisms which may be applied in these circumstances are presented. The comparison of the premises and effects of the application of the CC provisions on a particular defect in the declaration of will and the alternative mechanism is aimed at proving whether, in the case of contracts concluded within the online consumer market, this CC regulation can be replaced by alternative mechanisms.

The second chapter is devoted to the effects of the actions of a person incapable of submitting a declaration of will on his own, i. e. acting in a state that excludes conscious or free decision-making and the expression of will, lacking legal capacity or being resticted in his legal capacity. The issue-based approach made it possible to observe the key challenge related to the analyzed processes: the changes caused by the development of the Internet limited the adequacy of the CC regulation, which aimed to ensure the protection of the declarant's decision-making processes in the case of a lack of discernment (Articles 14–22 CC and Article 82 CC).

The next part of the work is devoted to situations in which an action which seems to be a declaration of will is performed without the intention of producing legal effects. The analysis covered the issue of the attributability of messages (also in scenarios where these were generated and sent by a computer program), errors at the stage in concluding the contract, and the impact of circumstances unknown to the declarant on the content of the emerging contractual relationship (incorporation of a standard contract). According to the initial assumption, the current CC regulation of appearances cannot be used to solve typical problems occurring in consumer trade. However, there are other effective mechanisms. Some of them focus on prevention – they aim at reducing the likelihood of situations in which a declaration of will is submitted despite the lack of declarants' will (the obligation to confirm the order, control of the incorporation of standard terms). Others allow one to decide about the legal effects of messages that are not traditionally understood declarations of will, but perform their function.

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The next chapter of the study tackles error (also caused by the messenger) and fraud. These vices of consent are not examined separately for two reasons: in both cases there are no significant differences as to the possibility of undermining the legal effects of the declaration of will submitted under their influence, and the determination of the intentional element is often extremely difficult in the case of contracts concluded via the Internet, which makes the proving of other's fraud especially problematic. On the other hand, situations where the discrepancy between reality and the way it is perceived by the declarant is a consequence of failure to exercise due diligence by the declarant and those in which the error is caused by the unreliable or disloyal behavior of the person to whom the declaration is made are investigated separately. Finally, analyzed are the cases of distortions of messages that are neither caused by the actions of the declarant nor the addressee of the statement – they arise as a result of the operation of technological tools.[4] The aim of this part is to verify whether the regulation of information obligations, unfair market practices, abusive clauses and the standard of justified consumer expectations could supersede the regulation of error and fraud in consumer e-commerce.

Chapter five deals with acting under pressure – threats and other types of extortions. It has been divided into three parts, because the legislature's reactions depend on the status of the person from whom the pressure comes. The preliminary assumption was that the regulation of a threat loses its usefulness only in cases where the threat is formulated by the consumer.

The last chapter is devoted to situations in which the declaration of intent is caused by the abuse of special circumstances on the part of the declarant, i. e. primarily the institution of exploitation. Despite the dispute as to its legal qualification, this was discussed together with other defects of declarations of will and their functional equivalents in consumer legislation. Due to the hybrid nature of the institution of exploitation and the tendency to broadly interpret its premises as specified in Art. 388 CC, it is assumed that this regulation should remain useful in e-commerce as a tool for controlling the content of contracts.

Each of the chapters concludes with a summary and general conclusions regarding the possibility of CC regulation on vice of consent being fully replaced with alternative mechanisms.

4 Technical distortions that occur when submitting statements via teleinformatic networks are a type of error which is typical only for these statements that are submitted electronically. A. Bieliński, M. Pannert, *Wady oświadczenia woli na tle elektronicznego obrotu prawnego – rozważania o błędzie*, Pal. 2012/5–6, p. 51.

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Research methods

The research is primarily based on the doctrinal legal research of civil law regulations covering: the Polish Civil Code as well as other national acts, especially those forming part of consumer law, selected EU legal acts, and DCFR,[5] CESL[6] and the Academic Project of the Civil Code.[7] The subject of the thesis required an interdisciplinary approach and the application of various research methods.

Research methods complementing the dogmatic analysis differed between chapters. This diversification resulted from the striving for a comprehensive analysis of the phenomenon of displacement of the CC regulation of defects in declarations of will by code and other institutions in the consumer e-commerce. Each time the research methods were adjusted to the nature of the investigated situations, and were selected to enable the effective falsification of theses. Consequently, in the first chapter, devoted to the analysis of the evolution of the purpose of regulation on vice of consent, the historical-comparative method dominates, and the act that was analyzed is the Code of Obligations of 1933. In the second chapter, numerous comparative elements appear. Such a choice of research method is related to the fact that the issue of the legal effects of a declaration made by a person incapable of submitting a valid and non-defective declaration of will of a particular content on his own is solved in a completely different way in common law systems. The analysis of the Polish model was complemented by contrasting it with the common law approach, which made it possible to identify the main reasons for the limited usefulness of the CC regulations as well as to formulate *de lege ferenda* postulates. In the third chapter, dealing with the lack of intention to produce legal effects, the analysis of legal scholarship and *the acquis communautaire* as to the concept of the declaration of will and responsibility for evoking the appearance of a declaration of will (the theory of legitimate expectations, the construction of the institution of appearances) was of the utmost importance. This method enabled assessment of the applicability of the current regulation of apparentness and to indicate what kind of modifications are necessary to make it useful to resolve the new legal challenges that have arisen due to the development of the Internet. In the fourth

5 *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (Acquis Group)*, C. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll, 2009, https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf (accessed: 31.5.2021), further as: DCFR.

6 Proposal for a regulation of the European Parliament and of the Council on the Common Sales Law, COM (2011) 635 final https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF (accessed: 31.5.2021), hereinafter referred to as: CESL.

7 https://www.projektkc.uj.edu.pl (accessed: 31.5.2021).

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chapter, where acting in confidence in a false image of reality is discussed, numerous elements of economic and behavioral analysis appear. This has made it possible to indicate the specific phenomena that cause mistakes in the online environment, as well as to indicate and justify why certain protective mechanisms supersede the regulation on error and fraud. In contrast, in the chapter on acting under pressure, the dogmatic analysis is supplemented by research on the Internet environment, because in this case it is mainly the specificity of the environment that limits the usefulness of the regulation on threat. In the chapter on declarations of will submitted because of the abuse of special circumstances on the part of the declarant, the analysis of the views of the judicature and legal authors was of particular importance as it allowed one to the determine the core reasons behind the limited usefulness of the institution of exploitation (the tendency to use exploitation as a standardized tool for controlling the content of the contract).

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1. Evolving purpose of the defects of consent regulation

First, it is necessary to assess whether the legislature, when regulating defects of consent in the Polish Civil Code, had a unanimous goal in mind. The legislative rationality principle allows for the presumption to be made that every legislative interference aims to achieve a specific outcome. Usually, provisions are structured so that their application could lead to a result that is as close to the legislature's aim as possible. However, as time passes, problems appear that are similar to those that indicated institutions were initially designed to solve. Yet, their context is different, as are the values, which should be taken into account when regulating this new sphere. In such a situation, applying old provisions is possible but may not lead to optimal solutions – these provisions have a different functionality encoded into their structures. Thus, although they are still applicable within a new framework, they neither grant the same level of protection for the values at hand as in the typical scenario nor they adequately balance the interests of the parties involved.

Has the emergence of mass consumer market influenced the perception of what the purpose of defects of consent is? If so, does the defects of consent regulation in the Polish Civil Code – which is shaped in a different socio-economic reality – allow for current objectives of the Polish legislature to be achieved?

The aims of the defects of consent regulation may differ, depending on the concept of the declaration of will adopted in a given legal system. Until now, various concepts of the declaration of will have been presented – generally, either a more subjective[8] or objective approach[9] was taken. If a central element in a given

8 S. Gołąb, *Oświadczenie woli w prawie prywatnym*, in: *Encyklopedia podręczna prawa prywatnego*, Vol. 3, Warszawa 1931, p. 1334–1335; A. Kozaczka, *Błąd jako wada oświadczenia woli (od błędu w pobudce do błędu usprawiedliwionego)*, Kraków 1961, p. 16; W. Flume, *Allgemeiner Teil des bürgerlichen Rechts*, Berlin 1992, p. 30; F. C. Savigny after W. Flume, *Allgemeiner…*, p. 50, 54.

9 E. Till, *Polskie prawo zobowiązań: (część ogólna): projekt wstępny z motywami*, Lwów 1923, p. 57; L. Domański, *Instytucje kodeksu zobowiązań. Część ogólna*, Warszawa 1936, p. 226;

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legal system is the autonomous will to cause legal effects, then the defects of consent regulation would be perceived as an instrument intended to protect the will of individuals (a subjective approach). If, in contrast, the focal point is to assure objectively justified and socially desirable effects of individuals' activities, then the defects of consent regulation becomes a tool for combating undesirable systemic phenomena, especially those caused by contractual imbalance (an objective approach).

The concept of a statement of will – based on an act of will that is actually experienced by a person[10] – appeared in the civil law of pandectists and is inseparable from the idea of human freedom.[11] The principles embedded in private law aim to protect free will and its free expression. Among those legal authors who followed this concept,[12] the fundamental significance of the subjective factor was widely accepted. It was not possible to cause legal effects unintentionally, even if a third party could perceive the act in question as a declaration of will.[13] Thus, a statement of will of a given content could not be made without or against the actual will of the declarant.

At the end of the 18th century, in Austrian law, a new theory of declaration of will was developed, focusing on the observable element – namely, behavior of the declarant.[14] Although initially considered to be groundbreaking and an antitype for the theory of will,[15] it was based upon the same foundation: the dichotomy of declaration of will (separating the will from its manifestation). According to this approach, seeing a subjective internal phenomenon – in the form of the good

R. Longchamps de Bérier, *Zobowiązania*, Poznań 1948, p. 78; K. Gandor, *Konwersja nieważnych czynności prawnych*, SC 1963/IV, p. 59; A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1963, p. 208–209; J. Gwiazdomorski, *Próba korektury pojęcia czynności prawnej*, ZNUJ 1973/1, p. 57, 65–66; B. Lewaszkiewicz-Perykowska, *Wady oświadczenia woli w polskim prawie cywilnym*, Warszawa 1973, p. 25; Z. Radwański, *Teoria umów*, Warszawa 1977, p. 37; B. Gawlik, *Procedura zawierania umowy na tle ogólnych przepisów Kodeksu cywilnego (art. 66–72 k.c.)*, Kraków 1978, p. 8–12, 29, 41; S. Grzybowski, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, 2nd ed., Ossolineum 1985, p. 484; A. Jędrzejewska, *Koncepcja oświadczenia woli w prawie cywilnym*, Warszawa 1992, p. 174.

10 Z. Radwański, *Teoria…*, p. 37.

11 K. Mularski, Z. Radwański, in: *System Prawa Prywatnego*, Vol. 2, *Prawo cywilne – część ogólna*, ed. Z. Radwański, A. Olejniczak, Warszawa 2019, p. 7–8, 13.

12 A. Kozaczka, *Błąd…*, p. 16; S. Gołąb, *Oświadczenie…*, p. 1334–1335.

13 A. Kozaczka, *Błąd…*, p. 16. Also according to some legal authors leaning towards the objective concept of the statement of will, it was impossible to submit a statement of will unconsciously, without awareness as to its legal significance. F. Studnicki, *Działanie zwyczaju handlowego w zakresie zobowiązań umowy*, Kraków 1949, p. 100, 102; S. Grzybowski, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, Ossolineum 1974, p. 471.

14 A. Jędrzejewska, *Koncepcja…*, p. 16.

15 It was underlined that in the theory of will and the theory of statement, opposing points of view were adopted: either a subjective or an objective one. B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 10.

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faith of the recipient of the statement – as being decisive for its legal existence also meant that whether an act constituted a statement of will depended on the picture of reality in one's mind.[16]

Neither the theory of will nor the objective theory were fully adopted by European legislatures. Instead, a trust based theory was developed, bringing about a subtle compromise between the extreme concepts of its predecessors. The decisive meaning was attributed to an external expression of will, indicating the need to protect the trust of persons who could become familiar with this objectively perceptible behavior. Protecting the trust of the declaration's addressee was considered to be of key importance and, in principle, the correctness of their interpretation was not questioned.[17]

The dualistic concept of the statement of will was abandoned with the development of a new theory in the 1930s – *Geltungstheorie*.[18] The declaration of will began to be seen as a conventional social act, a uniform normative statement constituting an individualized legal norm.[19] Its key element was the role it plays in shaping social relations: it allows private law subjects to incur obligations on favorable and consistent terms.[20] The need to protect trust in the behavior of other private law entities was accepted and, thus, the principle of primacy of subjective significance (what meaning of the declaration of will was intended by the declarant or how the communication was understood by its addressee) became obsolete.[21] As a result, the objectified meaning was considered to be legally binding because it was possible to establish only this understanding by referencing the circumstances of a case. An act should, then, be interpreted as meaning either what the declarant and the addressee of the statement mutually agreed upon or what could objectively be understood by this act by the parties in given circumstances.[22]

In the Polish legal scholarship, the evolution of the concept of the statement of will is clearly visible.[23] Naturally, how the aim of the defects of consent regulation is perceived also changes accordingly. During the interwar period, a mixed

16 W. Kocot, *Wpływ Internetu na prawo umów*, Warszawa 2004, p. 54–55.

17 W. Kocot, *Wpływ…*, p. 54. Some legal comentators claimed that protection of trust should mean that the declarant's behavior ought to be interpreted as having the significance which a third party could attribute to it in the given circumstances (objectification tendency). R. Longchamps de Bérier, *Zobowiązania*, p. 146, 149, 150; B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 25.

18 K. Larenz, *Methode der Auslegung des Rechtsgeschäfts*, Frankfurt, Berlin 1966, p. 69; Z. Radwański, *Teoria…*, p. 43–44.

19 K. Larenz, *Methode…*, p. 44–45, 53.

20 W. Kocot, *Wpływ…*, p. 55.

21 K. Larenz, *Methode…*, p. 72.

22 K. Larenz, *Methode…*, p. 77; A. Wolter, *Prawo…*, p. 266.

23 A. Jędrzejewska, *Koncepcja…*, p. 56–58.

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concept of the declaration of will was adopted – the volitional concepts were abandoned and a shift toward an objectivizing approach appeared.[24] Post-war, by the end of the 1960s, a regression began and the importance of subjectivizing theories grew again.[25] Since the 1970s, the theories underlining the significance of the objective elements re-appeared, however, the dichotomy of the statement of will (an act of will and its external manifestation) was still widely accepted.[26] Subsequently, the normative element of the declaration of will was first noticed and the declaration of will finally became an act of establishing an individual norm that shapes the legal situation of a person.[27] The beginning of the 21st century brought the possibility of creating granular, personalized law and, with it, the question of what the purpose of the defects of consent regulation should be in an artificial intelligence-empowered private law system.

1.1. Historical context: The autonomy of will as a protected value at the stage of creating the defects of declarations of will regulation in the 1933 Polish Code of Obligations

While working on the Code of Obligations of 1933 and shortly after it came into force, legal authors[28] saw secret reservation, simulation, error, mental coercion, and exploitation as typical examples of the inconsistency between the true (in-

24 F. Zoll, T. Sołtysik, *Prawo cywilne w zarysie*, 2nd ed., Warszawa, Kraków 1921, p. 19; E. Till, *Polskie…*, p. 56–57; L. Domański, *Instytucje…*, p. 226; R. Longchamps de Bérier, *Zobowiązania*, p. 78.

25 S. Szer, *Prawo cywilne. Część ogólna*, Warszawa 1967, p. 310; S. Grzybowski, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, Ossolineum 1974, p. 473; A. Kozaczka, *Błąd…*, p. 16.

26 J. Gwiazdomorski, *Próba…*, p. 57, 65–66; A. Szpunar, *Uwagi o pojęciu czynności prawnej*, PiP 1974/12, p. 13–14; S. Grzybowski, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, 2nd ed., Ossolineum 1985, p. 481.

27 Z. Radwański, *Teoria…*, p. 44. The idea that reason behind the effectiveness of a statement of will is a particular legal norm can be traced back to the views presented already in the 1950s, according to which the decision whether a particular behavior could have legal effects is not taken by the person making the statement, but by the law which may consider it as intended by the declarant. R. Longchamps de Bérier, *Zobowiązania*, p. 75–76.

28 Differently: F. Zoll who claimed that the contradiction between the actual will and its manifestation may be caused by three types of phenomena: error, physical coercion, and simulation (understood as: joke, false appearanaces statement which was not taken seriously). Separately, he discussed situations in which the decision-making process is disturbed: namely, threat and fraud. In these two scenarios the motive of a person played an important role when assessing the validity of a statement of will. Finally, he saw the exploitation as a kind of act contrary to the law and established customs, and thus qualified it (along with the obligation to provide the impossible) as a defect in the content of the contract. F. Zoll, T. Sołtysik, *Prawo…*, p. 119–125, 126; F. Zoll (*et al.*), *Prawo cywilne opracowane na podstawie*

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ternal) will of a person and its external manifestation.[29] It was assumed that, in case of simulation and secret reservation, this discrepancy was created with full awareness, deliberately, and that it was thus unnecessary to protect the internal will of the declarant.[30] In contrast, this protection was vital when the declarant was not aware of the inconsistency or did not cause it freely (e. g., due to coercion, error, deception, or exploitation).[31] In these instances, the compatibility of the will and its manifestation was merely an illusion – as it was caused by factors that should not be tolerated by the legal system.[32] Hence, in these situations, the protection of the autonomy of will principle should prevail over the protection of trust.[33] The internal element also determined the validity of the statement when the statement of will was made under physical coercion as well as when it was incomprehensible, internally contradictory, or submitted in a state that precludes a conscious or free decision-making or declaration of intent. Here the protection of trust principle justified the liability for damage arising in connection with false appearances only.[34] Therefore, the purpose of the defects of consent regulation, in this approach, was to protect the autonomy of the declarant's internal will.

In the Code of Obligations of 1933, the Polish legislature decided to combine the protection of the internal will of the declarant principle with the protection of addressee's trust in its manifestation principle[35] (so-called theory of trust[36]). Wherever there was a need to protect the expectations of the addressee of a statement, primacy had to be given to the meaning of the manifestation of will. Otherwise, the internal will of the declarant was considered to be decisive.[37] According to the academic legal writings of that time, adopting the concept of a declaration of will that was partly based on the theory of the statement also shaped the aim of the defects of consent: they were designed to allow for the

przepisów obowiązujących w Małopolsce przy współudziale J. Gwiazdomorskiego, L. Oberlendera i T. Sołtysika, T. 1 Część szczególna, 5th ed., Poznań 1931, p. 203.

29 R. Longchamps de Bérier, in: *Encyklopedia podręczna prawa prywatnego*, ed. H. Konica, Vol. 1, Warszawa 1931, p. 167–169.

30 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 169.

31 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 169.

32 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 172.

33 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 172.

34 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 165.

35 F. Zoll, *Prawo cywilne w zarysie, Vol. 1, Część ogólna*, Kraków 1948, p. 201, 204.

36 I. Rosenblüth, *Błąd i podstęp w kodeksie zobowiązań*, GP 1934/7–8, p. 450.

37 F. Zoll, *Prawo…*, p. 201, 204; F. Zoll, *Zobowiązania w zarysie według polskiego kodeksu zobowiązań. Podręcznik poddany rewizji i wykończony przy udziale Stefana Kosińskiego*, Warszawa 1945, p. 15. S. Gołąb, when drafting provisions on coercion, error and declarations not taken seriously, also adopted the theory of trust. L. Górnicki, *Prawo cywilne w pracach Komisji kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939*, Wrocław 2000, p. 169.

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protection of the internal will of a private law subject.[38] The Polish legislature, by adopting the theory of trust when regulating defects of consent, intended to balance the protection of the internal will of the declarant with the protection of the trust of its addressee.[39] In subjective theories on statement of will (theory of will, statement, and trust), the defects of consent regulation aims at protecting the subjective, internal element: being either the will of the declarant or the trust of the addressee. Hence, the purpose of this protective mechanism is to promote the principle of private autonomy.[40]

In addition, to establish what the objective of the Polish legislature was when regulating defects of consent, two groups of situations can be distinguished. In the first one, where the sanction of invalidity was foreseen, there is no legally effective statement of will because the declarant's will to cause legal effects is lacking. In the absence of freedom or awareness of the declarant, the legislature refrained from protecting the trust of the addressee of the statement due to individual circumstances related only to the declarant. It was assumed that, in this particular situation, the burden of minimizing the risk associated with the choice of the contractor should be borne by the person making that choice – namely, the addressee. Finally, in case of simulation, the need to protect trust does not appear at all.[41]

When other defects of consent are considered (the second group of defects of consent), the will to cause legal effects arises as a result of factors that should not be tolerated by the legal system (i. e., violence, deception, or disloyalty). The legislature balanced the interests of the declarant and addressee of the statement, particularly examining to which of these parties the responsibility for this undesirable factor, causing the defect of consent at hand, should be assigned.[42] When setting the premises for defects of consent, the legislature referred to strictly individual features and circumstances, making the defects of the declaration of will regulation a tool for individual protection.

This leads to the conclusion that the purpose of the defects of consent regulation in the Polish Civil Code, at the stage of creating these norms, was to protect the internal will of a particular individual in a specific, atypical situation in which general rules did not lead to a legitimate result in light of private law principles.

38 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 169; R. Longchamps de Bérier, *Polskie prawo cywilne. Podręcznik systematyczny w opracowaniu członków Komisji Kodyfikacyjnej R. Longchamps de Bérier, K. Przybyłowskiego, J. Wasilkowskiego. Tom II Zobowiązania*, Lwów 1939, p. 75.

39 F. Zoll, *Prawo…*, p. 201.

40 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 169, 172.

41 A. Ohanowicz, *Wady oświadczenia woli w projekcie Kodeksu Cywilnego*, P. Not. 1949/1, p. 37–38.

42 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 172.

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1.2. The need to balance contractual positions of the parties in B2C transactions

Along with the development of mass consumer market, the legal relationships in this sphere were standardized due to the use of unilaterally created general contractual terms and conditions. The party with a weaker market position would lose its capability to shape particular contract clauses.[43] Thus, the freedom to shape a contractual relationship started to disappear[44] and the choice of the other party became limited as did the freedom to decide on the contract conclusion.[45] At the same time, the inequality between private law entities deepened, which was caused by information[46] as well as economic and market asymmetries.

1.2.1. Shaping the objectified concept of statement of will based on legitimate expectations

Market developments change the way in which the statement of will is perceived. Attempts to depart from subjective statement of will theories and to develop a more objective approach, as well as to focus on the social function of the statement of will,[47] redefine the aim of the defects of consent regulation.

Since the 1970s,[48] the volitional models of the statement of will have been abandoned. Private law subjects, when undertaking certain actions, focus on their practical rather than legal effects. Frequently, the will or awareness of the declarant does not cover the legal sphere but only the economic or socio-economic aspect of the behavior at hand.[49] Thus, the search for an intention to produce legal effects in the internal will of the declarant seems pointless. The legal effectiveness of a statement of will should not, therefore, depend on the

43 On the emergence of standard contracts see: E. Łętowska, *Problematyka ogólnych warunków i wzorów umów w świetle poglądów doktryny obcej*, Studia Prawnicze 1974/3, p. 123–124. On the first doctrinal concepsts: M. Bednarek, *Wzorce umów w prawie polskim*, Warszawa 2005, p. 10–11; P. Mikłaszewicz, *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej*, Warszawa, Kraków 2008, p. 211–216.

44 E. Łętowska, *Problematyka…*, p. 151–152. W. Czachórski explicitly claimes that the use of standard terms turns the principle of freedom of contracts into a fiction. W. Czachórski, *Zobowiązania. Zarys wykładu*, Warszawa 2009, p. 146–147.

45 W. Kocot, *Wpływ…*, p. 56.

46 P. Mikłaszewicz, *Obowiązki…*, p. 17, 55–56.

47 J. Gwiazdomorski, *Próba…*, p. 65–66; A. Jędrzejewska, *Koncepcja…*, p. 174–177, 183.

48 J. Gwiazdomorski, *Próba…*, p. 57–70; A. Szpunar, *Uwagi…*, p. 14; S. Grzybowski, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, 2nd ed., Ossolineum 1985, p. 484.

49 J. Gwiazdomorski, *Próba…*, p. 60.

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mental state of the declarant or addressee of the statement but should stem from the existence of a common socio-economic interest of these entities.[50]

Over time, the concepts based on the autonomy of will principle give way to theories in which the principle of responsibility for evoking the trust of other trading participants is pivotal. In the 1980s, a tendency to ensure fair risk distributioncan be observed[51] in the Polish judiciary[52] – it did not only justify the legal classification of the agreement at hand but it also influenced its content. The content of the contract could either be interpreted in accordance with the meaning attributed by the non-professional (i. e., the content of the contractual relationship is determined by actual, justified individual expectations of the weaker party) or against the actual consensus of the parties but in a manner that ensures a fair risk distribution (i. e., objectification of the contract via referencing of the standard expectations).[53]

The answer to the evolution of the mechanisms for making declarations of will is the concept[54] that assumes the wide understanding of the concept of a statement of will, based on the theory of justified expectations,[55] where the context of the addressee of the declaration is decisive.[56] Provided that the individual constantly interacts with others, sometimes being the declarant and sometimes the recipient of the statement,[57] choosing this context favors establishing social bonds, instead of facilitating their disruption. The binding power of behavior and the possibility of considering it as a declaration of will is determined by the normative criterion of a reasonable market participant.

In relations where private law entities constantly assume the same roles – as in the case of consumer transactions – specific measures are needed to restore

50 J. Gwiazdomorski, *Próba…*, p. 61.

51 A. Jędrzejewska, *Koncepcja…*, p. 147–165.

52 Judgment of the Supreme Court of 20. 03. 1978, III CZP 10/78, OSNCP 1979/1, item 2; judgment of the Supreme Court of 3. 05. 1980, I CR 2/80, OSNC 1980/10, item 196; judgment of the Supreme Court of 26. 10. 1984, III CZP 64/84, OSNCP 1985/7, item 87; judgment of the Supreme Court of 17. 12. 1984, IV PR 225/84, OSPiKA 1986/6–7, item 168; judgment of the Supreme Court (7 judges) of 26. 03. 1985, III CZP 71/84, OSNCP 195/11, item 166; judgment of the Supreme Court of 20. 02. 1986, III CRN 443/85, OSNCP 1986/12, item 211.

53 A. Jędrzejewska, *Koncepcja…*, p. 160–163.

54 The development of this model was preceded by significant achievements of German and Austrian legal thought: the theory of legally significant behavior aimed at explaining the meaning of acts, distinguishing legal acts and legally significant behavior, and a concept of a declaration of will based upon the assumption that the declarant is responsible for making another person believe that this behavior was a declaration of will. F. Bydliński, *Privatautonomie und objektive Grundlagen des verpflichtenden Rechtsgeschäftes*, Wien – New York 1967, p. 16–17, 117; W. Flume, *Allgemeiner…*, p. 61, 114, 133.

55 A. Jędrzejewska, *Koncepcja…*, p. 218.

56 On the rule of three senses see: Z. Radwański, *Teoria…*, p. 51; A. Jędrzejewska, *Koncepcja…*, p. 181–182.

57 A. Jędrzejewska, *Koncepcja…*, p. 184–185, 186–191.

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contractual balance. These can include peculiar interpretation mechanisms: e. g., the declaration of the professional can be interpreted objectively, while the statement of the other party can be interpreted subjectively; alternatively, the content of the contractual relationship can be shaped by the normative expectations of the weaker party. In case of the first approach, the trust that a consumer bestows upon the entrepreneur because of his professional activity becomes fundamental. Nevertheless, it is not possible to interpret the declaration against its wording (and the consensus of the parties) even if the contractual terms are more unfavorable to the weaker entity than the provisions that could have been objectively expected.[58]

According to the theory of Jędrzejewska, the content of the statement of will[59] should be decoded based on a picture of behavior that constitutes a manifestation of the internal will but keeping in mind the circumstances of its submission as well as the prior actions of the parties. Consequently, when interpreting the statement of will, its entire context should be taken into account. The content of the statement equally includes the behavior and circumstances known to the recipient of the message, preceding the submission of that statement. Thus, the statement of will covers a number of behaviors[60] (which, per se, cannot separately constitute a manifestation of will aimed at producing legal effects) prior to the submission of the statement of will and the final act – behavior that is a manifestation of the intention to cause legal effects. The trust caused by the overall behavior of the other party influences the final meaning of the statement of will and can modify the understanding of the final act at hand.[61]

Although this theory was coined using consumer market as a model environment, it could become the main theory of the statement of will.[62] The rationale behind extending the scope of application of Jędrzejowska's theory is the need to assure that the core institutions of private law are equally understood, regardless of their context. Furthermore, this approach corresponds with "the moral aspect of responsibility for the meaning others can reasonably attribute to one's own behavior."[63] Its main advantage is that it allows existing contractual bonds to be maintained but redefines their content so that it corresponds with

58 A. Jędrzejewska, *Koncepcja…*, p. 209–210.

59 The theory of legitimate expectations can be used equally when interpreting the content of a statement of will and when verifying whether a given behavior constitutes a declaration of will at all. Z. Radwański, *Teoria…*, p. 55–56; A. Jędrzejewska, *Koncepcja…*, p. 78; K. Mularski, Z. Radwański, in: *System…*, p. 73.

60 A. Jędrzejewska, *Koncepcja…*, p. 220.

61 A. Jędrzejewska, *Koncepcja…*, p. 221.

62 A. Jędrzejewska, *Koncepcja…*, p. 222.

63 A. Jędrzejewska, *Koncepcja…*, p. 222, 223.

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what should, in general, be socially and economically beneficial.[64] This result is particularly valuable in the case of contracts concluded between non-equivalent entities.

In situations in which the objectified concept of the declaration of will, based on legitimate expectations, does not lead to the restoration of contractual balance, individual protection instruments should be applied – namely, the defects of consent regulation.[65] As a result, in cases in which the expectations of the declarant about the content of the legal act are not justified but are known or could easily have been noticed by the other party, it is possible to take these expectations into account when establishing the meaning of the legal act at hand. The theory developed by Jędrzejewska serves as a reference point for further analysis in the context of simulation,[66] mistake, and fraud.[67]

1.2.2. The purpose of defects of consent regulation in light of the values protected in consumer transactions

Today, when examining the meaning currently attributed to the defects of consent regulation, two groups of situations can also be distinguished. In the absence of internal will – i. e., where, without applying the rules on attributing the meaning of a statement of will due to the trust of its recipient to a declaration, behavior cannot be considered to be a legally effective statement of will – the legislature provides for a sanction of invalidity. It seems that the purpose of the regulation has not changed in this respect. It is intended to protect the autonomy of will of entities that were either in a state precluding conscious or free decision-making and declaration of intent, or that did not have the intention to cause legal effect but, at the same time, it was unnecessary to protect the trust of the addressee of the statement at hand.

In cases of defects of consent that allow for evading the legal consequences of the declaration, it was already claimed in the 1970s[68] that *ratio legis* of this regulation is to grant balance in private law relations by providing market participants with mechanisms that enable them to restore equity between entities of different market position. In order to do so, first, the importance of parties' interests is assessed and then it is verified whether one of the parties requires, in

64 A. Stelmachowski, *Środki usuwania sprzeczności między układem stosunków faktycznych a układem stosunków prawnych w prawie cywilnym*, ZNUJ 1973/1, p. 148.
65 On the interplay between the interpretation based on the consumer's legitimate expectations on the usefulness of regulation on defects of consent see: Chapter 4.4.
66 Chapter 3.3.1.2.
67 Chapter 4.4.1.
68 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 17.

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light of the principles of private law, increased protection at the expense of the other party. The aspects that are taken into account include, in particular, the actual inequality of the parties, the conflict of their interests, the reprehensible behavior of one of them that has disturbed the decision-making process, as well as the need to counteract disloyalty.[69] Hence, the nature and type of the premises for every defect of consent are shaped to correspond with the type of defect and its reprehensibility,[70] character of the legal act at hand,[71] and the severity of the misconduct that leads to the defect of consent.[72]

Thus, in this approach, the framework for the defects of consent turns out to be created in order to provide special protection to the person who, in light of the principles of the Polish legal order, deserves such protection due to special circumstances or individual features and not in order to remedy the defectiveness of the act of will. In relations between the consumer and the entrepreneur, the entity that requires such special protection is always the consumer.

As a result, the defects of consent regulation is given a new aim: it is no longer intended to protect the autonomy of will in the event of special, individual circumstances that cause an imbalance in contractual relationship but it becomes a tool for restoring the contractual balance in relations in which the asymmetry between contractors is permanent.

1.2.3. Same framework, new objective: Applying a traditional private-law mechanism to achieve a new goal

Applying the regulation on defects of consent (error, fraud, and threat in particular) and on exploitation in order to restore the contractual balance in relations in which the asymmetry between contractors is permanent seems possible because issues, which the legislature tried to solve by introducing these norms, coincide with concerns that are common in mass consumer transactions to a large extent. Some of these issues deepen the contractual imbalance between the parties, thus endangering the vital interests of the weaker party.

69 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 17.

70 The defect must have a specific gravity, e. g. the error should be significant and concern the content of the legal act, it is not enough for it to be subjectively considered as such by the declarant.

71 Hence, a slightly different construction of error appears in the provisions on the will, marriage, and in the case of gratuitous contracts.

72 It is the case of fraud and threat.

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Acting under false impression – which constitutes the cornerstone for mistake and fraud – is often caused by information asymmetry[73] between the consumer and the trader. On the other hand, the inequality between the contractual position of the business and the consumer allows the former to influence the decision-making process of the weaker party at different levels – through pressure, persuasion, or exploitation of technological advantage[74] – in a similar manner as in the case of threat or exploitation.[75]

The issues at hand, in principle, remain the same (the statement of will is submitted either under false impression or pressure); however, the scale of the phenomena is changing. Previously, we had to deal with an atypical situation regarding the individual, while now this issue appears on a massive scale, becoming a permanent element in consumer relations. The defects of consent regulation was conceived to be an instrument of individual protection, allowing the above-mentioned problems to be solved in order to protect the autonomy of will. However, at present, Polish legal authors see this regulation as a tool for removing contractual inequalities.[76] It is not possible to achieve this new target by applying the defects of consent regulation due to the very nature of this protective instrument. Individual protection, which depends on subjective, specific premises, cannot become a widely-applicable instrument for combating negative effects of a particular structural phenomenon.[77]

In principle, individualized protection mechanisms, whose premises are established with the use of vague terms, are inadequate in the case of relations between entities with very different market positions. They turn out to be unfavorable for the weaker party.[78] First of all, consumers are often unable to assess whether they are entitled to protection in a given situation, especially if they lack a rigid reference point (e.g., the protection depends on meeting numerous or incomprehensible – for a person without legal education – conditions, in-

73 G. De Geest, M. Kovac, *The Formation of Contracts in the Draft Common Frame of Reference*, ERPL 2009/17, p. 119–120.

74 R. Brownsword, *The E-Commerce Directive, Consumer Transactions, and the Digital Single Market – Questions of Regulatory Fitness, Regulatory Disconnection and Rule Redirection*, in: *European Contract Law in Digital Age*, ed. S. Grundmann, Cambridge 2018, p. 169–172.

75 The possibility of influencing the consumer's decision by exercising all kinds of pressure and persuasion, exploiting the technological advantage in order to reach him at a specific moment through a communication channel that makes him especially vulnerable.

76 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 17.

77 On the consumer market, this phenomenon is the deepening disproportion between the consumer and the entrepreneur. P. Mikłaszewicz, *Obowiązki*…, p. 208.

78 M. Grochowski, *Obowiązki informacyjne w umowach z udziałem konsumentów a nadmierny formalizm prawa*, in: *Kierunki rozwoju europejskiego prawa prywatnego. Wpływ europejskiego prawa konsumenckiego na prawo krajowe*, ed. M. Jagielska, E. Rott-Pietrzyk, A. Wiewiórowska-Domagalska, Warszawa 2012, p. 195.

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formation requirements that are not clearly defined, or a catalog of misleading or threatening practices is simply not available).

In the case of individual protection mechanisms, the protected entity – in this scenario the consumer – cannot be passive.[79] First, he needs to verify whether the premises of protection are fulfilled and then to use the toolset provided – namely, to declare that he evades legal consequences of his previous statement. However, in order to do so, he must be aware of his own rights and know how to exercise them.

If the other party contests the effectiveness of a declaration of evasion of the legal consequences of the statement, the consumer is charged with the burden of proof. However, the value of a product or service in question will often turn out to be marginal in comparison to the costs, time, and effort associated with a possible litigation.[80] Eventual benefits resulting from a favorable judgment might not balance the costs associated with enforcing one's rights.

Thus, it should be assumed that consumers would rarely benefit from the protection that arises from the defects of consent regulation. For this reason, attempts to diminish the asymmetries commonly found in the market between the consumer and the entrepreneur using individual protection mechanisms provide inadequate results.

1.2.4. Searching for an alternative: Standardization attempts

At the beginning of the 21st century, the search for alternative protective models began. Consequently, non-individual protective tools begin to appear in consumer law. They are detached from specific circumstances of the weaker party and are designed to protect socially desirable expectations in relation to the content of the contract.[81] "The priority should be granted not to what is fair and beneficial for the individual (the declarant) but to what is just from the perspective of common interests."[82] Nearly unlimited freedom in shaping the content of the contract, which is acceptable in professional trading, turns out to be especially problematic in situations in which there are significant disproportions between contracting parties.[83] Hence, imposing certain minimal standards under consumer contracts is proposed. "Freedom to describe the object of sales as one pleases makes it possible to deprive the consumer of protection by describing the

79 P. Mikłaszewicz, *Obowiązki…*, p. 208.
80 M. Grochowski, *Obowiązki…*, p. 194.
81 W Kocot, *Wpływ…*, p. 64.
82 Author's own translation. W. Kocot, *Wpływ…*, p. 63.
83 F. Zoll, *Problem negatywnego uzgodnienia cech rzeczy sprzedanej – w oczekiwaniu na wspólne europejskie prawo sprzedaży*, TPP 2012/2, p. 168.

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object as lacking basic characteristics necessary to use it in accordance with the typical aim."[84] It is claimed that, in mass transactions, consumers can be effectively protected by limiting their autonomy.[85] Thus, a tendency to implement protection through standardization appears.

The standardization can be carried out in two different manners, either by referring to the objectified legitimate expectations of the consumer or by normalization – establishing standards regarding the quality of the service and linking them with the assumption that, since the entrepreneur uses a certificate confirming the quality of the service issued by a specific entity, he thereby undertakes to comply with the requirements set by those specific standards when performing the service.

1.2.4.1. Objectified expectations of the consumer

The "legitimate expectations" category began to appear in European law in the first consumer directives (1980s–1990s).[86] In the EU consumer law literature, it is common to refer to the legitimate expectations of consumers principle. However, both the character and the functions of this principle are disputable.[87] It can be perceived as a heuristic tool for analyzing and interpreting EU consumer law. It can be seen as a political postulate, helpful for verifying the content of an individual legal norm and its compliance with the main assumptions of EU consumer law as well as for determining further spheres that require the interference of the legislature. It can be regarded as a rule of interpretation.[88] It can be used as a tool to define the due diligence in a given relationship (especially in the case of tort liability and fiduciary contracts).[89]

It may also act as a "guideline" when exercising discretionary powers (contractual or statutory), especially in the case of asymmetrical contracts, where the

84 Author's own translation. F. Zoll, *Problem…*, p. 169.

85 S. Grundmann, *European Contract Law(s) of What Colour*, ERCL 2005/2, p. 188–210; F. Zoll, *Problem…*, p. 173; M. Jagielska, *Prawo konsumenckie w przyszłym kodeksie cywilnym*, TPP 2017/2, p. 29.

86 Art. 6.1 Council Directive 85/374/EEC of July 25, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States relating to liability for defective products (OJ L 210, p. 29); Art. 2 Directive 1999/44/EC of the European Parliament and of the Council of May 25, 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, p. 12); Art. 3.3 Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11) p. 4–17 – the latter on reasonable expectations as to safety.

87 B. Heiderhoff, *Europäisches Privatrecht*, Heidelberg 2012, p. 115–116.

88 J. Balarin, *The Principle of Legitimate Expectations in the New Czech Civil Code*, Elte L. J. 2014/2, p. 36.

89 J. Balarin, *The Principle…*, p. 36.

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weaker party agrees to grant the stronger one a certain right, without specifying the conditions under which it can be exercised.[90]

The idea of using standardization to protect the weaker party[91] – by referring to the legitimate expectations of the consumer – is clearly visible when analyzing the discussion on the definition of defects of goods in consumer sales law, especially with respect to the negative description of the sold goods. Objectivizing elements already appeared in the Directive 1999/44,[92] implemented in Poland by the Act on Special Terms and Aconditions of Consumer Sales.[93] It defines the minimum standard of goods by referring to the purpose for which a certain type of good is usually used, the typical characteristics of such a good, and the rational expectations of the average consumer based on public assurances about the features of this good.[94] Also, it allows the parties to agree that the good does not meet this standard only if the agreement on this matter is concluded individually (as a rule, such an individual agreement lacks in the case of mass contracts).[95]

A solution based on the same assumption is also provided by the CESL project in Art. 99.3. Lowering the standard established in Art. 100 and 102 becomes possible only if, at the time of contracting, the consumer knew about this specific feature of the good or digital content at hand and accepted the good or digital content as being consistent with the contract at the time of its conclusion. In order to demonstrate that the traits of the good can, according to the contract, depart from the standard, the trader has to prove that the consumer could not reasonably expect a specific feature, neither at the time the contract was concluded nor afterward but only before the item's delivery. In practice, this norm should hinder the reduction of legitimate consumer expectations below the objective standard.[96]

90 For example: the right to withdraw or to change the characteristics or method of performance. J. Balarin, *The Principle…*, p. 36.

91 F. Zoll, *Problem…*, p. 167; E. Habryn-Motawska, *Niezgodność towaru konsumpcyjnego z umową sprzedaży konsumenckiej*, Warszawa 2010, p. 65; F. Zoll, in: *System Prawa Prywatnego*, Vol. 6, *Prawo zobowiązań – część ogólna: suplement,* ed. A. Olejniczak, Warszawa 2010, p. 133–134.

92 F. Zoll, *Problem…*, p. 168.

93 Act of 27.07.2002 on Special Terms and Conditions of Consumer Sales and Amending the Polish Civil Code (Journal of Laws of 2011, No. 80, item 432).

94 M. Pecyna, in: *Komentarz do niektórych przepisów kodeksu cywilnego, zmienionych ustawą z dnia 14 lutego 2003 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Dz.U.03.49.408),* ed. M. Olczyk, M. Pecyna, Lex/el. 2003, Art. 4.2, point 6; E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 20004, p. 286–288.

95 Art. 2.2 and 2.3 dir. 1999/44/EC; Art. 4.3 Act of 27.07.2002 on Special Terms and Conditions of Consumer Sales and Amending the Polish Civil Code.

96 F. Zoll, *Problem…*, p. 172–173.

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Further objectification resulted from the introduction of Art. 556^1 to the Polish Civil Code.[97] According to the previous Art. 4.3 of the Act on Consumer Sales, the non-conformity of a good was assessed while bearing in mind the subjective element in the form of buyer (consumer) expectations based on the content of public assurances.[98] In contrast, Art. 556^1 CC refers to the objective premise – the incompatibility of the sold item's characteristics with the content of public assurances.[99] Thus, the key question here is whether, by this change, the legislature still aims to protect buyer's legitimate expectations, striving for their maximum objectivity by direct reference to public assurances, or whether it includes public assurances into the content of the contract.

This regulatory change could mean that, in the case of consumer warranty, the content of publicly made assurances about the properties of goods constitute the content of the contract.[100] If that were so, then it should be considered whether ensuring the application of standards by placing a quality certificate on the seller's website is sufficient for claiming that the seller publicly ensures compliance with the standard in question and, therefore, the content of the rules set by the certifying entity become a part of the content of the contract. For the effect provided for in Art. 556^1 § 2 CC, the statement of the seller must be public – directed *ad incertas personas*.[101] As a rule, this requirement is met because certificates and quality marks are generally posted on websites so that they are visible to an unlimited number of people – i. e., to all who access this website. This could mean that the Polish legislature allows for normalization in the area of sales contracts.

On the other hand, Art. 557 § 3 CC excludes the liability of the seller for the fact that the item does not have the properties that are claimed by public assurances, inter alia, when such assurances could not have affected the consumer's decision to conclude the contract. This means that the seller is not liable if the consumer was not aware of the content of these assurances. The mere existence of public

97 This article was introduced by Art. 44 point 13 of the Act of 30. 05. 2014 on Consumer Rights (consolidated version, Journal of Laws 2020, item 287). Objectivization of the interpretation criteria consists in referring to the typical features of things of a given type (due to the purpose specified in the contract or resulting from its circumstances or purpose) and the content of public assurances. J. Jezioro, in: *Kodeks cywilny. Komentarz*, ed. E. Gniewek, P. Machnikowski, 9th ed., Warszawa 2019, Legalis, Art. 556^1, Marginal No. 10–11.

98 However, also here striving for objectification was visible – it was not the expectations of a specific buyer that mattered, but the expectations of a model consumer. C. Żuławska, *Znaczenie reklamy w świetle kodeksu cywilnego*, PiP 1977/1, p. 51 and footnote No. 25.

99 K. Kopaczyńska-Pieczniak, *"Rękojmia konsumencka" według znowelizowanych przepisów Kodeksu cywilnego*, in: *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, ed. M. Boratyńska, Warszawa 2015, point 4.

100 K. Kopaczyńska-Pieczniak, *"Rękojmia…,* point 4.

101 E. Habryn-Chojnacka, in: *Kodeks cywilny. Tom II. Komentarz do Art. 353–626*, ed. M. Gutowski, Warszawa 2019, Art. 556^1, point III.2, Marginal No. 39.

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assurances, therefore, does not affect the content of the contract between the trader and the consumer. It is essential that a given public statement could have an impact on the consumer's choice regarding contract conclusion – by evoking consumer expectations.[102]

Consumer's expectations must be objectively justified – if the content of the public assurances on the basis of which these expectations arose was not corrected before the conclusion of the sales contract (if they were corrected, then the need to protect consumer belief would no longer exist), and the entrepreneur had to or could have known them (if the content of a given statement is not objectively available to the model seller, then he is unable to adjust to the resulting requirements – this premise guarantees a certain objectification of expectations).[103]

Majority of the private law scholarship,[104] despite the changes in the wording of the provision, still claims that the seller's responsibility should reflect the perceptions of the consumer that result from actions or omissions of professionals – persons for whom he is responsible – or other people, provided that this impact was perceptible to the seller. Public assurances should, therefore, shape the content of the contract if they were covered by the legitimate expectations of the consumer.

Determining the objectified expectation standard in the context of selected contract types is a special mechanism for interpreting statements of will. It aligns with the objectified concept of the statement of will and allows for taking into account legitimate expectations. The theory of legitimate expectations, as provided in Art. 556^1 CC, becomes a mechanism that allows the interpreter to reach beyond the parties' statements of will when determining the content of a legal act (i. e., taking into account declarations of the third parties referred to in Art. 556^1 § 2 CC).[105] It diminishes the contractual asymmetry that cannot be

102 E. Habryn-Chojnacka, in: *Kodeks…*, Art. 557, point IV.4, Marginal No. 13.

103 E. Rott-Pietrzyk, *Klauzula generalna rozsądku w prawie prywatnym*, Warszawa 2007, p. 342–343.

104 J. Janeta, in: *Kodeks cywilny. Komentarz do zmian wprowadzonych ustawą z dnia 30 maja 2014 r. o prawach konsumenta*, in: *Ustawa o prawach konsumenta. Komentarz*, ed. D. Lubasz, M. Namysłowska, Warszawa 2015, Art. 556^1, point 2, 4, 7; R. Trzaskowski, in: *Kodeks cywilny. Komentarz. Tom IV. Zobowiązania. Część szczegółowa*, ed. J. Gudowski, Warszawa 2017, Art. 556^1, point 4; E. Habryn-Chojnacka, in: *Kodeks…*, Art. 556^1, point III.11, Marginal No. 48; K. Haładyj, M. Tulibacka, in: *Kodeks cywilny. Komentarz*, ed. K. Osajda, Warszawa 2019, Art. 557, point 6.

105 On the discussion on the correctness of the interpretation aimed at specifying the content of the declaration of will by referring to objective elements other than the intention of the declarant: E. Rott-Pietrzyk, *Ogólne dyrektywy wykładni umów w projekcie wspólnych europejskich przepisów dotyczących umowy sprzedaży (CESL)*, in: *Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego. Księga pamiątkowa dedykowana Profesorowi Bogusławowi Gawlikowi*, ed. J. Pisuliński, P. Tereszkiewicz, F. Zoll, Warszawa 2012, p. 5–6.

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removed by applying the defects of consent rules due to the consensus explicitly expressed by the parties in the contract, through the reference to a common standard disregarded in the actual agreement.

Directive 2019/771, instead of further objectification, seems to emphasize the volitional aspect again.[106] Focusing on counteracting the negative description of things, the EU legislature refrains from further implementation of the standard of legitimate expectations. Instead, it makes a distinction between the subjective and objective requirements for conformity with the contract.[107] Thus, it departs from the standardization in consumer sales contracts, while emphasizing the importance of volitional elements.[108] Objective requirements regarding the characteristics of goods become an additional point of reference. The subject of the contract should not only meet the subjective compliance requirements but should also comply with an objective standard that should be established on the basis of the criteria listed in Art. 7 of Directive 2019/771.[109]

The Polish legal authors[110] tend to see the justified expectations theory as a rule of interpretation that is applicable when assessing warranty-based liability of the seller for a defective good (Art. 556^1 CC).[111] However, if the theory of legitimate expectations in Poland has a subsidiary nature and applies only in special cases provided for by law (currently, sales contracts and contracts to which the warranty on sales provisions apply accordingly[112]), then the possibility for the weaker party to invoke standardized protection may depend on, for example, technical elements related to the contract conclusion. The same need might be fulfilled by entering into a contract of sales, a service contract, or a contract for

106 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, p. 28). Different conclusions in this regard are drawn by D. Staudenmayer who underlines that the dominant importance is played by the elements related to the objective features of the object and subjective criteria are complementary, (D. Staudenmayer, *The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy*, ERPL 2020/2, p. 236) and J. Vanherpe (J. Vanherpe, *White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content*, ERPL 2020/2, p. 262).

107 Art. 6 and 7 dir. 2019/771.

108 K. Południak-Gierz, *Personalization of consumer contracts – should we personalize interpretation rules*, in: *Legal Challenges in the New Digital Age*, ed. M. D. Green, A. Mercedes, M. Kubica, Leiden – Boston 2021, p. 274–275.

109 Rec. 29 dir. 2019/771.

110 J. Janeta, in: *Kodeks…*, Art. 556^1, point 1–2; R. Trzaskowski, in: *Kodeks…*, Art. 556^1, point 3; F. Zoll, *Rękojmia…*, Chapter II, §2 point II.

111 Under Polish law the non-compliance of the thing sold with the contract is referred to as the defectiveness of the good. Art. 556^1 § 1 CC.

112 Contract for specific work, contract for construction works, partly also civil law partnership agreement (the provisions apply accordingly).

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the supply of digital content – e. g., a music album can be sent on a CD, in an e-mail, or be transmitted by simply granting access to it (as in the case of Spotify[113] and Google music[114]). Due to the purpose of protection, limiting it only to specific types of contracts concluded by the consumer appears to be unjustified.

The assumption that the concept of legitimate expectations is the principle of interpretation that applies only to the types of contracts indicated by the legislature may affect the usefulness of defects of consent regulation in this respect. For these types of contracts the application of the regulation of these defects of consent where the process of taking and expressing will has been distorted by external circumstances (mistake,[115] fraud, threat, exploitation) is limited. In the case of a legally relevant mistake or fraud, the other party caused the error, knew about it, or could easily have noticed it. Hence, it can be assumed that this person knew the context of the declarant and, as a result, also the content of the declaration that would have been made had the error not occurred.[116] The situation is similar in the case of a threat, provided that the addressee of the statement either knew about the threat or was the one making it. As far as exploitation is concerned, it should be noticed that the core premise of this institution is to act with the awareness of using a forced position, adultery, or inexperience of the other party. In such a case, the content of the contract may be adjusted by referring to objectified legitimate expectations of the addressee of such a statement, reconstructed on the basis of general standards.

This manner of reasoning turns out to be beneficial for the consumer in many ways. First and foremost, it does not threaten the existence of a contract as such – the consumer can, thus, use the object of the contract as planned. Nevertheless, it becomes possible to correct the content of the contract in accordance with the consumer's legitimate expectations – he would, therefore, be able to claim performance in accordance with legitimate expectations (especially his subjective aim). Performance not meeting the legitimate expectations benchmark would, as a result, be qualified as either improper or non-performance. The correction of the content of the contract makes it possible to adjust it to current standards. In addition, the application of this protective mechanism does not depend on the fulfillment (and, in the event of a dispute, proof) of subjective and individual premises.

However, it is worth noting that, as the theory of legitimate expectations becomes commonly accepted, the question about its place in the private law framework arises. Although it is the consumer who is protected under Directive

113 www.spotify.com/pl/ (accessed: 31. 5. 2021).

114 https://play.google.com/music/listen?u=0#/sulp (accessed: 31. 5. 2021).

115 F. Zoll, *Rękojmia…*, Chapter III, §6. On the interplay between the provisions on error and seller's liability see: Chapter 4.4.2.2.

116 A. Jędrzejewska, *Koncepcja…*, p. 196.

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1999/44, the Polish legislature unified the norms that determine the defectiveness of the subject of the contract – Art. 556^1 § 2 CC equally applies to both consumer and non-consumer sales contracts.[117] Thus, the method of determining the content of the contractual relationship does not differ depending on the status of the parties involved but applies only in the case of one type of contract.[118]

This current solution is irrational. First, the problem of abusing the legitimate expectations of the other party does not arise solely in the case of sales contracts. In appears equally – in service, work, and unnamed contracts.[119] Second, it primarily concerns the relations in which there is a significant disproportion between the contracting parties.

However, the regulation at hand might be seen differently. It might be marking the beginning of another shift in the concept of the statement of will in Polish law. This time, the change does not only appear in the legal academic writings but is also reflected in the legislation. The concept of legitimate expectations may become a "new" theory of will, gradually replacing the theory of trust. It is not clear, however, whether this phenomenon would be observed only within consumer law or whether it should spread, becoming a new theory of the statement of will that is applicable in the case of all legal transactions.[120]

In light of the unity of civil law principle,[121] maintaining one concept of the statement of will for all private law relations and all private law entities is justified.[122] Furthermore, the general application of this theory – consistent with the universal sense of justice – should incite the establishment of private law relations.[123]

On the other hand, the concept of legitimate expectations was designed to eliminate the inequalities between entities which are constantly assuming the

117 F. Zoll, *Rękojmia…*, Chapter III, §1 point 2.

118 F. Zoll underlines that, despite the wording of the provision, when verifying whether an item is defective in a given case, different perspectives could be adopted depending on whether the contract was concluded by the consumer. This is because in mass trade, the traditional mechanism of shaping the content of a legal relationship (the content of unanimous declarations of will is decisive) is being replaced by justified consumer expectations. F. Zoll, *Rękojmia…*, Chapter II, §1 point 2.

119 The above-mentioned case of an album. In addition, there is also a problem related to the qualification of contracts, the subject of which are things with a software that, for example, provides services of a specific type. If it is considered that the physical object is the main subject of the contract, then it will be justified to consider this contract as a sale contract. However, it can be indicated that here the main subject of the agreement is the provision of the program, and thus the contract should be qualified as a license agreement.

120 E. Rott-Pietrzyk, *Klauzula…*, p. 356–359.

121 Z. Radwański, M. Safjan, in: *System Prawa Prywatnego*, Vol. 1, *Prawo cywilne – część ogólna*, ed. M. Safjan, Warszawa 2012, p. 36–37, 44.

122 A. Jędrzejewska, *Koncepcja…*, p. 222.

123 A. Jędrzejewska, *Koncepcja…*, p. 221–223.

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same roles on the market. Hence, keeping in mind the aim of this instrument, extending its scope of application beyond consumer trade could be considered unjustified because the constant, deep asymmetry between the contracting parties lacks outside the consumer context. At the same time, the content of the advertisement, the public assurances of the seller, or the persons referred to in Art. 556^1 § 2 CC may shape the justified expectations of the buyer, regardless of his contractual status.[124] For this reason, in the case of non-consumer contracts, it is also recommended to take into account legitimate expectations when interpreting the content of the contract.

1.2.4.2. Standardization by setting non-legal points of reference: Problematic standards with respect to the quality of the service

Although the tendency to set expectation standards (and, thereby, to depart from the protection model based on individual premises) can mostly be observed in the case of sales regulation, it is worth noting that, in practice, a similar problem also appears in the context of services. Additionally, agreements that combine features typical for sales and service contracts become common on the consumer market. Consequently, is limiting standardization-based protection for sales contracts justified? Can this lead to the achievement of the goal intended by the legislature?[125]

The EU legislature, in Regulation 1025/2012 on European standardization,[126] calls for the standardization of products, production processes, and the service sector in general. Its purpose is to reduce the differences between the provisions on sales and services.[127] However, the introduction of effective standardization through legislative interference in the field of services proves to be extremely difficult.[128] This is due to the very essence of the service contract – namely, its lack of a homogeneous nature. The interests that should be balanced by the regulation

124 F. Zoll, *Rękojmia…*, Chapter II, §1 point V.

125 In favor of standardization in consumer law: C. Busch, *Towards a "New Approach" in European Consumer Law: Standardisation and Co-Regulation in the Digital Single Market*, EuCML 2017/6, p. 228; Research group on the Law of Digital Services, *Discussion Draft of a Directive on Online Intermediary Platforms*, EuCML 2016/5(4), p. 165–167.

126 Regulation (EU) No. 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No. 1673/2006/EC of the European Parliament and of the Council (OJ L 316, p. 12).

127 Rec.1 reg. 1025/2012.

128 F. Zoll, *Die Normung im Bereich der Dienstleistungen als Zeichen des Versagens moderner Gesetzgeber? Auf dem Weg in ein modernes Mittelalter*, in: *Normschaffung*, ed. J. Stelmach, R. Schmidt, P. Hellwege, M. Soniewicka, Warszawa 2017, p. 89–98.

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are very diverse. In consequence, attempts to create a positive definition and detailed regulation of the rights and obligations of the service contract parties have not yet been successful.[129] This issue could be solved by standardization – setting minimum standards for the provision of specific types of services by certifying entities (an idea that is commonly used on the Internet: user rating systems, quality certificates, and standard terms and conditions of online platforms).

Standardization does not mean establishing technical standards only; standards also specify, sometimes in great detail, the rights and obligations arising from a given legal relationship.[130] At the same time, these are not legal norms[131] because they are not set forth by democratically legitimatized entities. Nonetheless, they can constitute a tool for European integration.[132] The functioning of such norms does not depend on whether, within the meaning of the law of obligations, they shape the content of legal relationships between the parties nor on whether legal claims might be based on them.[133] Their effectiveness is related to the reputation capital of the certification, assuring that the entity complies with a given standard.

The key advantage of this model over a classic statutory regulation is its volatility. Standards do not need to constitute a coherent system; they can be changed faster than legal norms so that they meet current trading requirements – or, rather, the objectified expectations of the service recipients about the behavior of service providers at the time being.[134]

However, the proposed model is not flawless.[135] It leads to the replacement of legal norms by standards, which means that establishment and execution of rules that define the rights and obligations of the parties lies in the hands of entities that lack constitutional legitimization. Once this new "rules market" appears – free from state supervision – the risk of manipulation rises. In particular, the interests of weaker, non-affiliated entities who are unable to influence the content of the standards may be threatened. Since the actual content of the parties' agreement is superseded by the adopted standard, the significance of the autonomy of will is also greatly reduced. Therefore, legal commentators postulate state-coordinated standardization, underlining that directions, principles, and

129 F. Zoll, *Die Normung…*, p. 93.
130 F. Zoll, *Die Normung…*, p. 90–91.
131 F. Zoll, *Die Normung…*, p. 91.
132 F. Zoll, *Die Normung…*, p. 91.
133 F. Zoll, *Die Normung…*, p. 91–92.
134 F. Zoll, *Die Normung…*, p. 95.
135 F. Zoll, *Die Normung…*, p. 96.

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restrictions regarding standardization should be set beforehand by a legitimate legislature.[136]

Normalization does not affect the usefulness of these defects of consent regulations that result in statement invalidity. In contrast, it could significantly reduce the number of cases in which the legal effects of a defective statement could be avoided.

The content of legal relations between the parties is to be shaped by the standards that are consistent with the will of the legislature, taking into account the need for special protection of the persons in a weaker market position. Thus, the content of the parties' arrangements should always comply with, at least, the minimum that is specified in these standards. To the extent that erroneous beliefs or irregularities in the consumer decision-making process are related to the entrepreneur's attempt to go below a certain standard (regardless of whether it would be a case of legally relevant error, fraud, threat, or exploitation), normalization would automatically standardize the content of the contract. Therefore, the defects of consent regulation would remain useful only in those situations where the element about which the consumer was mistaken or which caused irregularities in the consumer's decision-making process does not set the content of the contract below these standards.

In light of the above, it becomes obvious that the purpose of regulation could change again. Balancing contractual inequalities could be achieved, in part, through the use of normalization. As a result, the defects of consent regulation could regain its previous function and, once more, be used only in special cases, where the general standards cannot effectively protect the interests of individuals.

1.3. Technology-driven evolution of the defects of consent regulation

When addressing the possible impact of technological changes on further development of law, including the defects of consent institution, it is worth noting that technology might simultaneously influence the current legal framework at two different levels.

First, the discrepancy between the contracts concluded by the consumers within the online and offline environments deepens with the development of the Internet.[137] The initial assumption that consumer contracts can be regulated equally, regardless of the environment of their conclusion, can be challenged.

136 F. Zoll, *Die Normung…*, p. 96.
137 R. Brownsword, *The E-Commerce…*, p. 169–172.

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Growing differences between online and offline trading also affect the usefulness of the defects of consent regulation in the case of consumer contracts concluded on the Internet.

Second, technological development can also be leveraged by the legislature. There are two main issues that need to be considered: 1) the possibility of using technological tools to create (and then to apply) the law and 2) the benefits and risks associated with it.[138] Although there is still an ongoing discussion about the very possibility of establishing granular law,[139] it is worth considering whether it could affect the usefulness of the defects of consent regulation and, perhaps, indirectly, also its purpose.

1.3.1. Impact of the changes taking place in consumer e-commerce on the functionality of the standards designed to govern contracts concluded offline

According to previous assumptions made by European legislature,[140] traditional instruments of private law can be used – in a substantially unchanged form – to regulate consumer contracts concluded via the Internet.

138 Regardless of the scope of personalization, from the point of view of the weaker entity – usually the consumer on whom the new mechanism is to be applied – it carries risks at the stage of: data processing, formulating premises for differentiating the legal situation of legal entities, determining the threshold of the minimum amount of data necessary for personalization, setting the boundary of the right to privacy, consenting to profiling. Additionally, the lack of transparency, limitation of the autonomy of individuals, merger of the stages of norm creation its application, the transfer of legislative powers to entities without democratic legitimization, and the coexistence of various systems defining rights and obligations of the parties might also pose certain difficulties. K. Południak-Gierz, *Dangers and Benefits of Personalisation in Contract Law: Big Data Approach*, Q M L. J., Special Conference Issue: Autumn 2017, p. 30–35.

139 A. Porat, L. J. Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, Mich. L. Rev. 2014/112(8), p. 1417; C. Busch, *The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data* in *Research Handbook on EU Consumer and Contract Law*, ed. C. Twigg-Flesner, Chelten, Northampton 2016, p. 231–238; P. Hacker, *Personalizing EU Private Law from Disclosures to Nudges and Mandates*, ERPL 2017/3, p. 651–677.

140 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, p. 1); Digital Single Market innitiative (Directive of the European Parliament and of the Council amending council directive 93/13/EEC and directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of union consumer protection rules; Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC); Directive (EU) 2019/770 of the

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There are three main reasons behind this approach. First, the differences between online and offline environments do not affect the functional similarity of the contracts – the sales contract remains essentially identical, regardless of whether it is concluded online or offline. Second, a comparison of the two environments leads to the conclusion that there are no discrepancies regarding the nature of the context of these contracts. What is more, existing differences, in principle, work in favor of the consumer (he can familiarize himself with the information provided by the other party in favorable circumstances, compare offers using specialized price comparison websites, etc.).[141] Third, the same legal standards that are applicable to traditional transactions should also apply online (postulate of normative equivalence).

Currently the adequacy of this approach is being challenged.[142] The ongoing changes within the online environment deepen the differences between the online and offline contexts. The architecture of the network is expanding and the importance of e-commerce is increasing, which influences the situation and status of the parties (the number of issues determined by the network functionality and algorithms, such as electronic agents,[143] is growing). Technological progress also influences the role of the consumer – the previously active contractual party (making the actual choices and decisions) slowly transforms into an entity that exclusively consumes the subject of a contract.[144] The nature of the objects of contracts does not stay the same either. More and more products, apart from basic, traditional functionality, gain "new skills" – they are becoming "smart".[145] In practice, the selection of an offer can be made by personalization

European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, p. 1–27).

141 These differences may even lead to the disappearance of information asymmetry between the trader and the consumer. M. Jagielska, *Prawo…*, p. 26–29.

142 R. Brownsword, *The E-Commerce…*, p. 165.

143 A program which actions are determined by its previous "experience", not being externally programmed. The most important features of programs of this type are: ability to operate without direct human intervention, social ability and proactivity. S. Russel, P. Norvig, *Artificial Intelligence: A Modern Approach*, New Jersey 1995, p. 35; S. Chopra, L. F. White, A *Legal Theory for Autonomous Artificial Agents*, Ann Arbour 2011, p. 10; R. Michalczak, *Podmiotowość agentów programowych w ujęciu teoretycznoprawnym*, PhD dissertation 2016, not published, p. 95.

144 M. Jagielska, *Prawo…*, p. 27.

145 By adding the term "smart" to the traditionally used item name the devices that have been equipped with complex software with Internet connection, e. g. smartphone, smartwatch, smart washing machine, are re-named (in Poland, in some collocations the term "intelligent" is used interchangeably – e.g. *inteligentny dom*). Equipping everyday objects with such software leads to the emergence of a new type of legal problems, primarily in the field of personal data processing, but also, inter alia, liability for damage. It also results in the development of a specific relationship between the consumer and the used object, which has not existed so far. C. A. Tschider, *Regulating The Internet Of Things: Discrimination, Privacy,*

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mechanisms and the conclusion of the contract may become automatic – the relevant statement attributed to the consumer may be sent via a smart item, e. g., a washing machine or a particular program.[146] Hence, the question arises whether, in this environment, the legislature should still regulate the behavior of the entrepreneur who performs the contract or that of the architect providing the system that shapes the manner of contract conclusion and their content.[147] Although elements that shape the classic disproportion between the consumer and the entrepreneur do not differ in essence, they appear in a coordinated manner online, which means that their influence on the autonomy of the weaker entity may be far greater than on traditional market. Consequently, although network practices – assessed separately in light of the currently applicable legal framework – should be considered admissible, their correlation significantly influences the contractual balance between the entrepreneur and the consumer.[148]

Similar doubts appear in the context of the defects of consent regulation. Functional differences are beginning to arise between contracts concluded online and offline.[149] A person who wants to listen to album X at home would conclude a sales contract in a stationary store. Online, this person can choose between a sales, services, or digital content contracts. Furthermore, some of contracts concluded via electronic platforms, such as Uber[150] or Airbnb,[151] are nearly impossible to categorize due to the difficulties related to determining the subject of the contract at hand (information society service or integrated service – the so-called "composite service")[152] and its parties (platform as an intermediary or as a party to a contract for a special service – e. g., passenger transport).[153] Difficulties associated with identifying the actual subject of the contract make it problematic to claim that an error in this regard appeared. Usually, the discrepancy appears

And Cybersecurity In The Artificial Intelligence Age, Den. L. Rev. 2018/96(1), p. 87, 89–91; T. P. Novak, D. L. Hoffman, *Relationship Journeys in the Internet of Things: A New Framework for Understanding Interactions Between Consumers and Smart Objects*, p. 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3059093 (accessed: 31. 5. 2021).

146 For example, by a personal assistant: https://assistant.google.com/intl/pl_pl/?hl=pl_pl&utm_source=pl_hasem_BKWS&gclid=CjwKCAiAqaTjBRAdEiwAOdx9xh2BIDpnq6dUtpI4ISDl9hNKASfqP76epO5ZClaicRo1RVTfoCK-bxoC1j0QAvD_BwE (accessed: 22. 4. 2021); https://www.apple.com/siri/ (accessed: 31. 5. 2021).

147 R. Brownsword, *The E-Commerce…*, p. 172.

148 R. Brownsword, *The E-Commerce…*, p. 165–172.

149 M. Jagielska, *Prawo…*, p. 27–28.

150 www.uber.com/pl/pl/ (accessed: 31. 5. 2021).

151 www.airbnb.pl/ (accessed: 31. 5. 2021).

152 Judgment of CJEU of 10. 04. 2018, C-320/16, *Uber France*, ECLI:EU:C:2018:221.

153 V. Katz, *Regulating the Sharing Economy*, BTLJ 2015/30(4), p. 1070–1073; C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll, *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, EuCML 2015/1, p. 5; P. Tereszkiewicz, *Digital Platforms: Regulation and Liability in the EU Law*, ERPL 2018/6, p. 2, 6–17.

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between the content of the platform's statements and the consumer's expectations. The court decision on this matter may vary, depending on what criteria distinguishing the provision of the information society from the integrated service are adopted. The second doubt concerns which of the entities in this tripartite relationship should bear the risk associated with the occurrence of a defect of consent on the side of the declarant (e. g., mistake of the consumer): the platform or the user offering a specific service?[154] Another issue relates to whom the statement regarding the avoidance of legal effects of the declaration should be addressed.

Increasing differences between the online and offline environments translate into a growing discrepancy between the contexts of the contracts concluded within these two environments. Big data technology allows professional entities to personalize marketing mechanisms, as well as the content of their offers, in order to maximize their profits at the expense of the consumer (e. g., with the use of persuasion profiles or dynamic pricing).[155] Nevertheless, the use of technology, as a rule, does not impose on the trader any additional contractual obligations. Currently, the use of mechanisms based on big data is primarily associated with additional obligations regarding the processing of personal data by the processor but does not affect the contractual situation of the parties. Meanwhile, the entrepreneur's toolset potentially enables him to get to know the consumer well enough to notice, for example, inconsistencies between statements made by him and the facts – even before the consumer realizes that he has committed a mistake (e. g., when the owner of printer X buys a non-matching cartridge). According to the law, in such a case, the burden of proof that the trader knew about the error or could easily notice it would be borne by the consumer,[156] although, in practice, the consumer would not be able to assess whether the entrepreneur had appropriate data and processing mechanisms to detect the errorin question.[157]

The specificity of the Internet network makes it necessary to challenge the adequacy of balancing the interests of the parties by the current legal provisions on defects of consent in relation to contracts concluded online. Some of the typical circumstances that the legislature takes into account when deciding on balancing the parties' interests when regulating defects of consent cannot occur in the online environment. The key factor here is flow of information – if the

154 On the platform's liability for non-performance or improper performance: P. Tereszkiewicz, *Digital…*, p. 6–17.

155 On the abuse of unjustified beliefs and behavioral biases when personalizing prices: O. Bar-Gill, *Algorithmic Price Discrimination When Demand Is A Function Of Both Preferences And (Mis)Perceptions*, U Chi L Rev 2019/86, p. 228–232, 241–242.

156 The general rule on the burden of proof will apply (Art. 6 CC).

157 K. Południak-Gierz, *Personalization of Information Duties Challenges for Big Data Approach*, ERPL 2018/3, p. 307.

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consumer successfully consents to the processing of his personal data by the trader, then the latter would usually have very detailed information about him. On the other hand, if the consumer does not consent to personalization, then the data processed by the trader are limited to the information that the consumer is willing to provide him with.[158] In the case of defects of consent causing absolute nullity, one of the reasons for granting the primacy of autonomy of the declarant's will is the fact that, in most cases in the ordinary course of action the addressee of the statement is able to realize that the declarant is in a state that prevents him from effectively submitting any declaration of will.[159] If the consumer is not profiled, then the entrepreneur would be deprived of this opportunity.

Hence, the development of technology and the specific nature of the Internet is conducive to the intensifying the differences between traditional and online trading.[160] This affects the usefulness of the defects of consent regulation for the latter. New hurdles at the stage of verifying the fulfillment of the premises of particular defects of consent appear – even determining the entity with whom the contract was concluded can be problematic. In practice, this translates into fewer consumers being able to use individual protection instruments. Finally, key arguments for the current shape of liability for defective statements cannot be substantiated online.

1.3.2. Question about the purpose and subject of protection in the case of the defects of consent regulation in the era of granular law

Legal authors propose the use of technology, big data in particular,[161] to personalize: the pre-contractual information obligations in case of consumer transactions,[162] *ius dispositivi*,[163] the procedural provisions,[164] or even private law

158 Data processing in case of the profiling and personalization process will depend on the consent of the person whose data is to be processed. Art. 4.2, Art. 6, Art. 22 GDPR. So in the context of price personalization: C. Kuner, *European data protection law. Corporate Compliance and Regulation*, 2nd ed., Oxford 2007, p. 234–235; R. Steppe, *Online price discrimination and personal data: A General Data Protection Regulation perspective*, CLSR 2017/33, p. 768–785; F. J. Zuiderveen Borgesius, J. P. Poort, *Online Price Discrimination and EU Data Privacy Law*, J. CP 2017/40(3), p. 360.

159 Discussed in detail in Chapter 2.3.

160 In the context of e. g. maintaining the function of the form of the will and various electronic tools: W. Bańczyk, *The Electronic Devices Used for Testamentary Disposition Under Polish Law*, in: *Legal Challenges in the New Digital Age*, ed. M. D. Green, A. Mercedes, M. Kubica, Leiden – Boston 2021, *passim*.

161 Personalization based on information of a different type was porposed e. g. personalization of procedural law based on data collected during previous proceedings, in which the party

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in general.[165] The use of technology to create and apply the law could, on the one hand, affect the usefulness of defects of consent regulation and, on the other hand, indirectly, their purpose.

Personalization of law could mean its re-individualization, including, for example, granting efficiency of individual protection mechanisms (depending on the specific characteristics of the parties and the circumstances of a particular case) on a mass scale. If an individual set of norms for every person is generated in real time – already taking into account subjective and individual elements – then the division between individual and mass protection would disappear and all norms would be individual. On the other hand, automation in the field of law application would simplify the process of verifying compliance with statutory requirements. It would be carried out by a personalization mechanism and the consumer would be notified that, for example, in this particular case, he is entitled to evade the legal effects of his previous statement because the data analysis shows that he – most likely – acted under an error.

Re-individualization that is achieved using granularization could also have an impact on the purpose of some regulations – when defects of consent are considered, this could mean that the institutions would be once again used to protect the parties' autonomy of will. It is worth noting, however, that the purpose of personalization is not to adapt private law and the process of its application to the situations, needs, or characteristics of individuals (resulting from the use of personalization) or to eliminate system inequalities between private law entities taking permanent social roles (consumers or entrepreneurs). Instead, the aim of granularization is to minimize transaction costs. This purpose of personalization in private law becomes evident when analyzing the arguments of the majority of its advocates.[166]

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for which personalization is to be carried out participated. G. Mora, *Personalized law: using information from previous proceedings* https://www.studocu.com/it/document/universita-degli-studi-di-milano/diritto-internazionale/saggio/fulltext-dirittoprivatoedanni/2666055/view (accessed: 31. 5. 2021).

162 C. Busch, *The Future…*, p. 231–238; C. Busch, *Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law*, U Chi L Rev, 2019/86, p. 315–319.

163 M. Grochowski, *The majoritarian concept of default rules: towards a shift in paradigms?*, STPP 2020/1, p. 70–71; A. Porat, L. J. Strahilevitz, *Personalizing…*, p. 1423.

164 G. Mora, *Personalized….*

165 P. Hacker, *Personalizing…*, p. 654. Currently, a discussion on the personalization of public law and its individual branches begins: A. J. Casey, A. Niblett, *A Framework for the New Personalization of Law*, U Chi L Rev 2019/86, p. 333; D. W. Denno, *Neuroscience and the Personalization of Criminal Law*, U Chi L Rev 2019/86, p. 359; A. Libson, G. Parchomovsky, *Toward the Personalization of Copyright Law*, U Chi L Rev 2019/86, p. 527.

166 Differently: P. Hacker who sees the personalization of law as a chance for a fuller implementation of the principle of equality before the law. Hacker, *Personalizing…*, p. 654, 659–660.

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The personalization of information obligations using big data aims to eliminate the information overload effect[167] and, thus, to increase the effectiveness of protection through an information model.[168] This model was introduced in order to level the information asymmetry between the entrepreneur and the consumer and, hence, to reduce the transaction costs in consumer trading.[169] As a result, it would not be unjustified to claim that the personalization of information obligations in consumer transactions is intended to contribute to the efficient[170] allocation of transaction costs. On the one hand, in principle, it can minimize the expenditures of the consumer who is becoming acquainted with the information (less data, enhanced data adequacy, more adjusted data presentation manner). On the other hand, it should diminish the costs of generating and transmitting information (an automated process allows the trader to reach, optimally, only the entities who are relevant for the marketing strategy in question) while, at the same time, reducing information asymmetry. In turn, decreasing asymmetries should translate into a reduction in market irregularities and a more efficient allocation of resources.[171]

The goal of personalization of *ius dispositivi* is similar.[172] If the non-mandatory norms do not correspond with the needs or goals of a given group of entities, then a significant part of them would decide to establish their own contractual clauses, which would generate higher transaction costs and would, therefore, be inefficient from the economic perspective. However, the purpose of introducing non-mandatory norms in private law is precisely to reduce trans-

167 Excessive increase of information reduces the ability to make rational decisions. J. Jacoby, D. E. Speller, C. A. Kohn, *Brand Choice as a Function of Information Load*, JMR 1974/11(1), p. 68–69; M. Eppler, J. Mengis, *The Concept of Information Overload: A Review of Literature from Organization Science, Accounting, Marketing, MIS, and Related Disciplines*, The Information Society 2004/20(5), p. 271; B. Scheibehenne, R. Greifeneder, P. M. Todd, *Can there ever be too many options? A meta-analytic review of choice overload*, JCR 2010/37(3), p. 409–410, 421.

168 C. Busch, *The Future…*, p. 231–238.

169 P. Mikłaszewicz, *Obowiązki…*, p. 63. Transaction costs are understood as costs related to the conclusion of the contract. C. J. Dahlman, *The Problem of Externality*, JLE 1979/22(1), p. 141–162; D. W. Allen, *Transaction costs*, in: *Encyclopedia of Law & Economics*, https://reference.findlaw.com/lawandeconomics/literature-reviews/0740-transaction-costs.html (accessed: 31. 5. 2021).

170 In economic analysis of law, various ways of defining economic efficiency are distinguished. In this work, efficiency is understood as such a use of available resources of society in the process of satisfying one's needs, that it is no longer possible to improve the welfare of any consumer without worsening the welfare of another person, and there is no possible exchange that would be mutually beneficial (Pareto efficiency). J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007, p. 26.

171 P. Mikłaszewicz, *Obowiązki…*, p. 63.

172 A. Porat, L. J. Strahilevitz, *Personalizing…*, p. 1423.

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action costs.[173] A greater diversity (granularity) of standards than before would mean that they could be further tailored to the needs of individual groups of private law entities. In this model, the created groups should achieve such homogeneity that establishing other norms instead of applying the ones proposed by the legislature would economically be unjustified from the perspective of their members.

A different vision is presented by Hacker[174] who sees personalization of law as a tool to implement the principle of equality more fully before the law. He postulates the personalization of private law in general. According to his findings, a narrower designation of the categories differentiating private law entities can lead to a fuller implementation of the principle. Granulation allows for more characteristics of individual entities to be taken into account at the norm creation stage. Potentially, a different set of norms could be generated in each situation because taking into account the almost unlimited range of different circumstances relating to the case makes finding identical situations impossible.[175] This extreme approach could mark the beginning of the end of standardization in law. However, it should be noted that this does not mean that a higher level of the autonomy of will protection would be achieved. Instead, individualization leads to the disappearance of the general and abstract norms.[176]

The last theory[177] explores the idea of procedural law personalization. Here, the use of the information collected about specific entities during legal proceedings is recommended, instead of big data. In this regard, the rules on the burden of proof could primarily be subject to personalization. Furthermore, in this context, the economic benefits of personalization are also highlighted: it can increase court efficiency and reduce costs associated with court proceedings.

The development of granular law could increase the usefulness of the defects of consent regulation. This, however, would primarily depend on whether the personalized mechanisms for applying the law would also be implemented. They could verify whether the individual prerequisites for the application of a particular defect of consent are met. The algorithm would check whether the conditions – of a legally relevant threat, for example – are met and would then inform the consumer that he is entitled to evade the legal consequences of a specific declaration of intent. Yet, in order for technology to be used to apply the law, it would be necessary to first objectify the statutory premises (the algorithm cannot check whether a person was wrong because it is not possible to verify the image of

173 M. Grochowski, *The majoritarian…*, p. 65; A. Porat, L. J. Strahilevitz, *Personalizing…*, p. 1422–1423.
174 P. Hacker, *Personalizing…*, p. 651–678.
175 P. Hacker, *Personalizing…*, p. 660.
176 K. Południak-Gierz, *Dangers…*, p. 25–36.
177 G. Mora, *Personalized….*

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reality in one's mind, but it can assess whether the person was likely to be mistaken).

Personalization of law could also indirectly influence the aim of the defects of consent regulation. In most of the presented models, the limit for granularization is economic efficiency[178] – if creating more personalized standards would not minimize transaction costs, then it should not be undertaken. A personalized law system might, as a result, be lacking the norms that – until now – were considered to be crucial for protecting the autonomy of will of private law entities who were, for some reason, acting in a state that limited their ability to make a free contract decision (e.g., due to error or threat). The absence of these norms would be a result of their economic inefficiency. Such a system would include only such individualized (non-general) norms that regulate defects of consent, which would also contribute to the effective allocation of resources. Thus, although the use of personalization could translate into private law entities making more informed contractual decisions,[179] this would rather be a side effect of personalization.

It should be noted, however, that contract law is intended to provide a framework for market transactions. As a result, its economic efficiency can be considered to be one of its primary values.[180] The same applies to the rules that safeguard the autonomy of will – inter alia, the defects of consent regulation. Consequently, the thesis according to which granularization of the law changes the purpose of regulation on the defects of consent as a result of its focus on economic efficiency is false. These institutions have always been intended to enable the effective allocation of resources. Therefore, although personalization of the law may exclude, in some cases, the possibility of invoking protection provided for by the defects of consent regulation, this would be due to the increased flexibility of the regulation and not to a change in its purpose.

178 C. Busch, *The Future…*, p. 238–239 (C. Busch underlines it is necessary to study the intensity of granularization – he claims that the the standard of granularization of information obligations should correspond with the scope of customer information already collected by a given entity); A. Porat, L. J. Strahilevitz, *Personalizing…*, p. 1423, G. Mora, *Personalized…*, p. 4, 24.

179 The granularity of provisions specifying information obligations should, in principle, minimize the risk of creating an erroneous image of reality in the mind of the consumer.

180 R. H. Coase, *The Problem of Social Cost*, JLE 1960/3, p. 27–28; G. Calabresi, *Some Thoughts on Risk Distributions and the Law of Torts,* YL.J. 961/70(4), p. 499–500; R. A. Posner, *Economic Analysis of Law*, New York 2014, Part I, Chapter II, § 2.1.

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1.4. Conclusions

In Poland, the perception of the statement of will has evolved since the implementation of the first defects regulation. In the 1930s, and then until the 1970s, the subjective element was emphasized – the purpose of the defects of consent regulation was to protect the autonomy of will.

With the development of mass market, the significant disproportions between civil law entities became problematic. The existing protection of the autonomy of will was insufficient to eliminate these inequalities. Since the 1970s, the statement of will concept began to change. Gradually, the standard understanding of its content began to play an important role – the actual will, knowledge, and expectations of the person ceased to be the core determining elements. As a consequence, the perception of the purpose of defects of consent also changed – they became a tool for removing the effects of contractual inequality.

The use of old instruments to achieve new goals did not bring about the intended results; hence, other protective instruments were implemented. They were designed to be applied en masse to combat the negative consequences of inequalities on the consumer market.

The development of these tools was accompanied by an increasing emphasis on objective elements – primarily, minimum standards. An alternative regime for the protection of the weaker party appeared: a model in which its real will or expectations lose their meaning. They are replaced by the minimum standards established for the content of the legal relationship (the contract "adjusts itself" to the minimum requirements[181] and standard entitlements (consumer right to withdraw).

Assigning primacy to objective elements and minimal standards developed in a given sphere may mark the twilight of the traditional statement of will concept. The analysis suggests that traditional statements of will are being replaced – at least in case of consumer transactions – by strongly differentiated standards. Consumer law gives less and less importance to how individual consumers really wanted to shape a specific legal relationship – the protection of their internal will is no longer of the utmost importance.[182] Instead, the legislature focuses on how to shape the content of a given type of relationship in order to achieve the desired social and economic result. This is accomplished with the use of various mechanisms. The first one is a specific manner of interpreting the statement of will itself, based on the concept of legitimate expectations.[183] The second is the unfair

181 On the role of standards, see: Chapter 1.2.4.2.

182 Z. Radwański, *Teorie oświadczeń woli w świetle najnowszych zjawisk społecznych – komunikacji elektronicznej i ochrony konsumentów*, in: *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Poznań 2005, p. 264.

183 Chapter 4.4.1.

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market practices regulation, which is focused on preventing and combating undesirable behavioral patterns toward consumers.[184] Finally, there is also an instrument for controlling the content of contracts – namely, the unfair clauses regulation.[185]

184 Chapter 5.1.
185 Chapter 6.4.2.

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2. Legal effects of the behavior of persons who are unable to make a statement of will on their own

The purpose of this chapter is to examine whether Polish regulation on the consequences of the statement of will that is submitted by a person in a state that excludes conscious or free decision-making and expression of will (Art. 82 of the Polish Civil Code) is still useful in case of consumer contracts concluded via the Internet. In order to investigate this, a problem approach was adopted, enabling identification of alternative mechanisms that could replace the CC's defects of consent regulation. This approach allows us to notice that the fundamental question should not be limited to the consequences of a statement of will submitted by a person in a state that excludes conscious or free decision-making and expression of will only but that it should also address the legal consequences of a statement submitted by a person to make a valid, non-defective statement of will on one's own. This is due to the fact that essentially the same issues arise when the declarant is in a state that excludes conscious or free decision-making and expression of will, when he is a minor, or has been either fully or partially incapacitated.[186]

Therefore, although the title of this dissertation may suggest that the analysis shall focus on the defects of consent institution only, the scope of the research is broader – it also includes those situations in which the inability to independently declare one's will is associated with age or incapacitation (partial or total) of the declarant. This makes it possible to see the nub of the occurring phenomena: diminishing adequacy and usefulness of instruments aimed at ensuring protection of decision-making processes of the declarant due to his special circumstance (actual[187] or presumed[188] incapacity of understanding[189]) in consumer

186 This is a simplification, in Polish law also natural persons for whom a temporary advisor has been appointed in proceedings for their incapacitation are limited in their legal capacity (Art. 549 § 1 Polish Code of Civil Procedure).

187 Art. 82 CC. Judgment of the Appeal Court in Białystok of 15. 10. 2015, I ACa 491/15, Legalis; judgment of the Supreme Court of 20. 04. 2017, II CSK 435/16, Legalis.

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online trading. Limiting the analysis only to Art. 82 CC, though theoretically justified because of the CC structure,[190] would render it incomplete.

From the perspective of having the addressee of a statement be a person who is unable to make it valid, it is irrelevant what traits of the declarant cause this inability. In addition, the limited flow of information on consumer market may, in practice, hinder or exclude the verification of the existence of such a trait by the other party. In the simplified, automated contracting process, there is no place or time for a confirmation system or questionnaires regarding, for example, the incapacitation or the origin of funds in the case of persons who are limited in legal capacity.[191]

Moreover, in many European legal systems, both the state that excludes conscious or free decision-making and minority are perceived to be typical causes for the lack or limitation of legal capacity.[192] The transborder nature of the Internet and the free movement of goods and services within the European Union are conducive to the development of cross-border consumer trade. In this context, the problem approach proves to be the most adequate. Hence, the analysis covers all typical scenarios, where a statement of will is submitted by a person who is unable to make a valid, non-defective statement of will on one's own – regardless of the reasons behind this inability.

The Polish solution, divided into the regulation on legal capacity and on the defects of consent, is contrasted with the solution of the common law system. The choice of such a reference point is justified because Polish and common law models differ substantially, being rooted in different legal traditions.

First, the Polish legislature, by regulating the effects of a legal act of a person who is unable to independently submit a valid declaration of intent, grants absolute primacy to the protection of that person. In contrast, the English model

188 So in the case of minors and persons who are fully or partially incapacitated: M. Gutowski, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–352*, ed. M. Gutowski, 2nd ed., Warszawa 2018, Art. 82, point II A.1.

189 Failure to achieve or losing the level of mental fitness that allows for the correct reception and processing of information, and then making decisions accordingly. A. Olejniczak, in: *System Prawa Prywatnego*, Vol. 2, *Prawo cywilne – część ogólna*, ed. Z. Radwański, A. Olejniczak, 3rd ed., Warszawa 2019, p. 488.

190 In the Polish Civil Code the regulation of the legal effects of a declaration made by a person unable to independently submit an effective, non-defective declaration of will of a specific content is separate from the regulation on the defects of consent.

191 Art. 22 CC. If the statutory representative of a person with limited capacity for legal acts gives him specific property items for unrestricted use, that person acquires full capacity for legal acts concerning these property items.

192 It is so i.a. in common law system, in Swiss (Art. 13 in conjunction with Art. 16 of the Swiss Civil Code), Austrian (§ 21 in conjunction with § 24 of the Austrian Civil Code) and German law (§ 104 of the German Civil Code). M. Pazdan, in: *System Prawa Prywatnego*, Vol. 1, *Prawo cywilne – część ogólna*, ed. M. Safjan, 2nd ed., Warszawa 2012, p. 1076–1077.

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aims to assure a high level of trust in trading.[193] Second, the Polish legislature takes the position that minority or incapacitation preclude full legal capacity, while a state of a person that precludes conscious or free decision-making constitutes a vice of consent.[194] The common law system distinguishes between three circumstance groups that affect one's legal capacity. Third, the Polish model is invariable – the act at hand is null or suspended *ex lege*.[195] On the contrary, the common law model is flexible – the act may be annulled by the protected person.[196] Fourth, Polish law, when assessing the fulfillment of the conditions for the validity of a legal act carried out by a person without full legal capacity, does not take into account the fact that the other party did not and could not have known these circumstances even if acting with due diligence.[197] Finally, in the Polish academic writings, the impact of new information technologies on the adequacy of national solutions has not been noticed yet, whereas in common law (where invalidity in the case of mental incapacity and intoxication depends on the awareness of the other party) the legitimacy of the solution that unconditionally grants the right to cancel the contract to a minor is questioned in the context of online contracts.[198]

The analysis of national regulations is supplemented by the presentation and assessment of the postulates formulated in relation to both solutions. In this context, legal mechanisms and institutions that reduce the practical usefulness of these regulations in the case of consumer e-commerce are explored.

2.1. Defect of consent or lack of contractual capacity

The issue of the effectiveness of legal acts carried out by persons who are in a state that excludes the ability to understand the meaning of their own or other people's actions as a result of a mental disorder appears regardless of the legal order. This state is perceived differently by various legal systems; hence, the legal effects of

193 Section 7 Mental Capacity Act 2005, In re Walker [1905] 1 Ch 160; Imperial Loan Company Ltd v. Stone [1892] 1 QB 599; Hart v. O'Connor [1985] 1 A. 1000.

194 This was the case in the Code of Obligations of 1933 (Art. 31), then in the General Civil Law Provisions of 1950 (Art. 69) and in the current Polish Civil Code from 1964 (Art. 82 CC).

195 This sanction is explicitly provided for in Art. 82 CC.

196 So in case of intoxication and lack of mental capacity (although there is a disagreement in this respect, as commented in Chapter 2.3.2.

197 K. Piasecki, *Kodeks cywilny. Komentarz. Księga pierwsza. Część ogólna*. Kraków 2003, Art. 82 point 1.2.; A. Janas, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 82, point 6.

198 J. Chang, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, U.C. Irvine L. Rev. 2012/2, p. 645–647.

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the statement made in such a state also differ.[199] In principle, two classification approaches can be distinguished: either that this state causes a defect of consent or the inability of a natural person to perform legal acts (i. e., lack of mental capacity).[200]

In common law, the effects of legal acts by a person suffering from a mental disorder are taken into account during the assessment of the legal capacity of that natural person.[201] There are three categories of persons who, as a rule, lack full legal capacity: minors, intoxicated individuals, and persons without mental capacity. Although the law differentiates the legal situation of a protected person, depending on the reason for one's inability to perform legal acts, legal scholarship postulates partial unification in this regard.[202]

In Poland, after the end of the doctrinal dispute in the 1950s,[203] it was assumed that a mental illness, as well as other mental disorders that result in the inability to recognize the significance of one's actions, may affect the validity of a legal act; however, they do not, per se, cause the legal incapacity of a person or the defectiveness of the submitted declaration. Every person who has full capacity (e. g., not incapacitated) is seen by the law as being competent to submit statements of will. Thus, a declaration submitted in a state that precludes conscious or free decision-making and declaring of intent, although invalid,[204] is still considered to be a statement of will. Once it is determined that, in a particular system, these conditions constitute a defect of consent, their separate regulation is required.

However, this matter can also be approached differently.[205] It can be argued a lack of mental capacity is a form of exploitation, provided that exploitation is a defect of consent. According to Art. 51 of the CESL, a party may avoid a contract if, at the time of the conclusion of the contract: (a) that party was dependent on,

199 *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). Full version*, p. 2275 http://www.transformacje.pl/wp-content/uploads/2012/12/european-private-law_en.pdf (accessed: 31. 5. 2021).

200 At the time of concluding the contract, the person is not able to understand the meaning of the activity performed or to rationally assess its impact on his interests.

201 Imperial Loan Company Ltd v. Stone [1892] 1 QB 599.

202 The postulate was formulated in the context of e-commerce. J. Chang, *Gaming…*, p. 645–647.

203 In detail: M. Pazdan, in: *System…*, p. 1076–1080; in regard to Art. 31 of the Code of Obligations – equivalent of current Art. 82 – R. Longchamps de Bérier, *Zobowiązania*, Poznań 1948, p. 80; J. Gwiazdomorski, *Zawarcie małżeństwa*, PiP 1949/4, p. 45–47; B. Walaszek, *Uznanie dziecka w polskim prawie rodzinnym*, Kraków 1958, p. 55; J. Gwiazdomorski, *Wyjaśnienie w związku z artykułem M. Piekarskiego "Wpływ zakłócenia czynności psychicznych na tok procesu"*, PiP 1961/12, p. 108; J. Gwiazdomorski, *Prawo spadkowe w zarysie*, Warszawa 1968, p. 115; A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, p. 161–162.

204 B. Lewaszkiewicz-Petrykowska, in: *Kodeks cywilny. Komentarz. Część ogólna*, ed. P. Księżak, ed. M. Pyziak-Szafnicka, Warszawa 2014, Art. 82, point 2.

205 Art. 51 CESL.

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or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage. A weak position of one of the parties could result from that party's particularly unfavorable circumstances, its relation to the other party, or be caused by special features of this person (in the English version of the text: improvident, ignorant, inexperienced, in Polish: *nieprzezorna* [unwise], *nieświadoma* [unaware], *niedoświadczona* [inexperienced]). Unconsciousness, in this context, should be understood as the inability of a person to understand the contract, its part, or effects.[206] *A minore ad maius*, this condition could also be considered fulfilled if, at the time of contract conclusion, the person was in a state that excludes the ability to understand the meaning of one's own or other persons' actions due to a mental disorder.

In principle, the purpose of regulations regarding the legal effects of persons' lack of insight, caused by mental disorders, is to protect them. However, safeguarding the interests of such persons can and usually does preclude the protection of the trust of others. This conflict of interest is resolved differently in various legal systems, which becomes clearly visible if one analyzes the premises of the legally relevant state of mental disorders of the declarant. These conditions may either be connected only to the internal sphere of the declarant or to both the internal sphere and the external circumstances.

In English and Italian law, there is a balance between protected interests – a lack of mental capacity is legally relevant only if the other party knew about it at the time of contract conclusion.[207] In contrast, in Polish, German, and French legal systems, it is assumed that the mere fact that a person is in a state in which he is unable to recognize the significance of one's own actions or the actions of others is sufficient to grant him extraordinary protection.[208] The external factors, such as knowledge of the addressee of the statement or the circumstances of the case, are, therefore, irrelevant. The only exception to this is the conflict-of-laws rule, known as the Lizardi principle in international private law,[209] which aims to protect the confidence in the legal capacity of another person against the ex-

206 T. Pfeiffer, in: *Common European Sales Law. Commentary*, ed. R. Schulze, Baden-Baden 2012, p. 281; *Principles…*, p. 68, 532, 535–536.

207 Section 7 Mental Capacity Act 2005, In re Walker [1905] 1 Ch 160; Imperial Loan Company Ltd v. Stone [1892] 1 QB 599; Hart v. O'Connor [1985] 1 A. 1000; Art. 428 Italian Civil Code, C. Ulessi, *Capacity and Contract: National Law and Proposal for a Common European Sales Law,* EUT Edizioni Università di Trieste 2012 http://hdl.handle.net/10077/8194 (accessed: 31.5.2021).

208 Art. 414–1 of the French Civil Code, § 105–105 BGB, Art. 82 CC.

209 Art. 12.1 of the Act of 4.02.2011 Private International Law (consolidated version, Journal of Laws 2015, item 1792).

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ploitation by the other party (by the one who acts without full capacity). It impedes invoking the lack of capacity by the latter provided that: the parties were in the same country when concluding the contract; the natural person without full legal capacity (according to his personal status) would be able to conclude a given contract according to the law of the country in which the contract was concluded, and, at that time, the other party was unaware of this inability, although he was not acting negligently.

2.2. Legally relevant lack of internal will or defect of the act of will: The Polish solution

The Polish civil law system clearly gravitates toward the objectified concept of a statement of will. It is assumed that the observable behavior of the declarant – despite being contrary to his will or not constituting a statement of will in light of his intentions but received as such by his addressee – should be considered fully effective.[210] Despite the lack of a constitutive element of the statement of will (namely, the actual will of the declarant), the behavior is considered a valid statement of will because the legislature aims to protect trust and certainty on the market.

An exception from this interpretation rule is allowed only in extraordinary circumstances – namely, when the statutory requirements of one of the defects of consent are met. In principle, depriving a defective statement of will of its legal effectiveness occurs after considering the interests of the parties.[211] Any deviation from the protection of trust principle is possible only once the behavior of the addressee is negatively assessed – he should be at least jointly responsible for the defectiveness of the legal act at hand and be aware of the defect or profit from this act without incurring any costs.

Lack of freedom or awareness at the stage of decision-making and expression of will is the only defect of consent for which the legislature gives absolute priority to the protection of the declarant, at the expense of the addressee's trust. According to Art. 82 CC such declaration is, *ex lege*, invalid. External factors, as well as the ones causing such a state, remain irrelevant – the premise for the invalidity of the statement is the internal state of the declarantonly.[212]

210 T. Targosz, W *poszukiwaniu…*, p. 44–45.

211 B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 25.

212 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 82, point 5; A. Janas, in: *Kodeks…*, Art. 82, point I.2; A. Grzesiok-Horosz, in: *Kodeks cywilny. Komentarz*, ed. M. Załucki, 1st ed., Warszawa 2019, Art. 82, point I.2.

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The meaning of unconsciousness is widely disputed in Poland. According to the first view, the literal wording of the provision suggests that it must be complete.[213] The legislature foresees the sanction of invalidity only in the case of a complete lack of awareness and, thus, considerations regarding the extent to which the declarant could have understood or perceived one's actions to claim their invalidity under Art. 82 CC are, as a rule, excluded.[214] Hence, a person who is not completely unconscious but – because of the number of disorders or the strength of a particular disorder – is no longer able to recognize the importance of his and others' actions would not be protected. Such a narrow scope of application of the provision significantly limits its usefulness and is, in practice, untenable. The purpose of the regulation is to protect a person who cannot reasonably assess the significance of one's statements. In light of this goal, protection should cover not only those persons who are completely unconscious but also those who are unable to grasp the meaning of their own or other persons' actions. For such a state to occur, in light of the regulation's justification, it is not necessary to be completely unconscious. The above suggests that the literal interpretation of the provision should be rejected.

The opposite approach has also appeared. It is claimed that the lack of awareness premise, despite its the literal wording, cannot be understood as total unconsciousness but only its significant limitation.[215] This is based on the assumption that complete unconsciousness means complete inability to act and, thus, to be in this state means that it is not possible to make any statement at all.[216] The focal point here is on the supposition that complete unconsciousness leads to the invalidity of the contract because of the lack of one of its constitutive elements – namely, the will. However, there is a kind of paradox to be observed here. If we accept that the protection under Art. 82 CC depends on, at least, a residual consciousness of the declarant – as there is no statement at all otherwise and there can be no question about its defectiveness – then the person who, despite a complete lack of consciousness sends a message, which might be perceived as the manifestation of the statement of will, remains unprotected. Since the conditions of Art. 82 CC are not met, the general rule that is based on the theory of trust would be applied. Consequently, the declaration would be considered a valid

213 S. Rudnicki, R. Trzaskowski, in: *Kodeks cywilny. Komentarz. Księga pierwsza. Część Ogólna*, ed. J. Gudowski, Warszawa 2014, Art. 82, point 1; judgment of the Supreme Court of 21.04.2004, III CK 523/02, Legalis; judgment of the Appeal Court in Warsaw of 20.08.2014, VI ACa 1180/13, Legalis.

214 M. Gutowski, Z. Radwański, in: *System Prawa Prywatnego,* Vol. 2, *Prawo cywilne – część ogólna*, ed. Z. Radwański, A. Olejniczak, 3rd ed., Warszawa 2019, p. 490–491.

215 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 82, point 9; P. Nazaruk, in: *Kodeks…*, Art. 82, point 3.

216 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 82, point 8.

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statement of will.[217] Meanwhile, keeping in mind the life experience and the purpose of the norm, a person in such a state needs protection even more than the one acting despite limited consciousness.

According to the last theory,[218] for the premise of unconsciousness to be fulfilled, complete unconsciousness is not required. It is sufficient for a person to act in a state in which one's ability to recognize the meaning of one's own or other people's actions, to understand the meaning of statements, etc., is missing. Attributing the decisive importance of the ability to make a reasonable assessment is especially important for those who do not suffer from a mental illness or are not mentally disabled but, for example, are unable to recognize the meaning and effects of the statement at hand due to long- or short-term disorders.

Furthermore, the premise of a lack of freedom does not refer to external circumstances. Instead, it concerns the state of mind and the intellectual capabilities of the declarant. In judiciary, it is ascertained that "the reason behind the preclusion of conscious and free decision-making and expression of will must be found in the declarant himself, and does not stem from the situation he encounters himself."[219] However, it seems more adequate to say that the state of mind of the declarant is crucial and must represent the impediment to conscious or free decision-making and expression of will in order for the premise to be met. The reason for this state is irrelevant. In practice, however, the distinction between internal and external factors can be difficult[220] especially if the declarant is subject to both types of agents, and which of them was dominant in a given situation should be determined. Provided it was not possible to assess, it should be presumed that the impact of the internal factor was decisive because its occurrence had a further-reaching effect.

In conclusion, if the external circumstances of the case are disregarded, the fact that the defective statement of will was made in connection with a consumer contract concluded online would not affect the possibility of invoking the protection under Art. 82 CC in any way. Consequently, it would not be justified to separately examine the cases in which a person, who is in a state that excludes conscious or free decision-making, was a consumer acting online. Neither the status of the consumer nor the fact that the contract was concluded via Internet (off-premises) cannot, at the slightest, influence the situation of the parties under Art. 82 CC.

217 The question arises whether it would be permissible to invoke the absence of a declaration of will in a trial based on Art. 189 of the Code of Civil Procedure.

218 K. Piasecki, *Kodeks…*, Art. 82, point 1.3; A. Jedliński, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna*, ed. A. Kidyba, Warszawa 2012, Art. 82.

219 Judgment of the Supreme Court of 1.07.1974, III CRN 119/74, OSP 1976/2, item 30, with commentary of A. Cisek, J. Kremis, Pal. 1980/8–9, p. 131.

220 Judgment of the Supreme Court of 14.12.2011, I CSK 115/11, Legalis.

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2.3. Situations typical for the online environment: The lack of contractual capacity

Situations in which the contract is concluded by a person without a full legal capacity and those in which the declarant is in a state that excludes conscious or free decision-making and expression of will are recognized by the Polish legislature as belonging to separate legal categories. However, especially if the considerations are narrowed down to consumer contracts concluded via the Internet, it can be noted that, in both cases, the essence of the problem remains the same. It amounts to deciding on the legal consequences of a statement made by a person who is unable to make a valid and non-defective statement of will.

The Polish legal model is adapted to the realities of the traditional market. In case of contracts concluded face-to-face, the risk of abusing the addressee's trust regarding the contractual capacity of the declarant is marginal – seeing the other party should allow for an estimation of the risk associated with the contract conclusion based on the observable characteristics of the potential contractor and the circumstances of the case. Situations in which the declarant's very young age, mental illness, disability, or condition that causes unconsciousness or lack of freedom of decision-making passes unnoticeably, despite the party's due diligence, are rare. Usually the circumstances suggesting the above are easy to notice. Hence, the regulation that provides, as a principle, the sanction of invalidity should neither endanger the other's trust nor decrease the general certainty of transactions. Therefore, the provisions are adjusted to the typical scenario – an entity concluding the contract with a person without full legal capacity or in a state excluding conscious or free decision-making, if acting with due diligence, should be aware of the risks associated with this decision.

In the case of consumer contracts concluded online, this possibility would be, as a rule, excluded. The automation and simplification of the content and the way of generating and then sending messages online means that the data that reaches the addressee of the statement of intent does not allow for any conclusions to be drawn about the age or mental state of the declarant. This may speak against the granting of absolute primacy to the principle of protection of a person without full legal capacity at the expense of the trust of the addressee of that statement in the case of consumer e-commerce.[221]

221 Chapter 2.3.1.2.

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2.3.1. Contracting with persons who do not have full legal capacity

Lacking or limited legal capacity, which results in a person's inability to perform a given legal act,[222] generally makes it impossible to properly enter into a contractual relationship – instead, it results either in the invalidity of the contract or its so-called suspended effectiveness (*negotium claudicans*).[223]

In case of offline transactions, it does not cause any substantial inconvenience – the contracting parties, which are in the same place at the time of contract conclusion, are, as a rule, able to obtain enough data to verify the legally relevant characteristics of the other party. Knowing the appearance or voice of a person, as well as the circumstances in which the conversation is taking place, the entity seeking to conclude the contract can pre-assess whether the future contractor is a person with a full or limited capacity (i. e., due to age or mental condition). The above is considered to be sufficient for minimizing the risk of concluding an invalid or ineffective contract without being aware of it. Thus, in the regular course of action, due diligence at the contracting stage should protect one from entering into an invalid or ineffective contract.

Provided that the entity decides to contract with a person who does not have a full legal capacity, the relevant provisions of the CC apply. The legal situation of a person without a full legal capacity, as well as the addressee of the declaration made by him, would be reconstructed under Art. 14, 17–22 CC.

2.3.1.1. The aims of the regulation on legal capacity

The design of the solution adopted in the CC is justified by the need to protect persons who do not have a full legal capacity, either due to young age or incapacitation. These persons require protection against having their weaker position exploited by other entities but also against the consequences of their own irrationality. The purpose of the regulation, commonly repeated by legal

222 The inability to perform a given legal act is not understood as the lack of postulative capacity, but it defines the scope of activities that a person with limited legal capacity or deprived of legal capacity cannot validly perform under the provisions of the Polish Civil Code.

223 Suspended effectiveness of the contract means that it is still unknown whether it is valid or not – it is yet to be determined: e. g. a contract concluded by a minor without necessary permission of his legal representative can become valid *ex tunc* only after it is confirmed by that representative or by the minor after coming of age. If this representative refuses to confirm the contract, it becomes null and void *ex tunc.* If it is a person with limited legal capacity who submits an offer to the other party, there is additional doubt as to whether the offer as a unilateral legal act is invalid under Art. 19 CC, or will it be assessed only as an element of the contract. Z. Radwański, in: *System Prawa Prywatnego,* Vol. 2, *Prawo cywilne – część ogólna*, ed. Z. Radwański, A. Olejniczak, 3rd ed., Warszawa 2019, p. 449–450.

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scholars[224] and recognized as being crucial, results from the legislature's paternalistic approach.

When assessing the adequacy and usefulness of existing regulation, its historical context should also be taken into consideration. Equally, in the case of minors and persons whose legal capacity is limited or excluded due to mental illness, disability, or other type of disorders, it can be observed that the perception of the subject of protection has evolved over time. At present, it is indicated[225] that immature persons, as well as the ones with limited knowledge or with a reduced ability to represent one's own interests, should be protected. It is necessary to introduce instruments that prevent the abuse of their naivety, lack of experience, or insight by others. Yet that was not always the function of these mechanisms.

From a broader historical perspective, a shift from protecting family interests (to secure property) to individual protection can be observed. In the case of minors, the evolution of the objective of these norms took centuries,[226] while in the case of incapacitation, the changes were initiated only over the last few decades.

In the feudal system, the decision to deprive a minor of legal capacity enabled his legal guardian to manage the minor's feudum and to benefit from it until the minor came of age.[227] At first, the guardian was not even obliged to account for the expenses made with the minor's assets when handing the property over to the owner once he reached the age required by law.[228] In addition, as a rule, children contributed to improving their family's financial standing. In principle, only the father of the family had the authority to administrate the funds of his house. The institution of non-operation (*niedział*),[229] as well as the prohibition for sons to

224 R. Strugała, in: *Kodeks cywilny. Komentarz*, ed. E. Gniewek, 8th ed., Warszawa 2019, Art. 13 point 5; P. Księżak, in: *Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające Kodeks cywilny. Prawo o notariacie (art. 79–95 i 96–99)*, ed. Osajda, 21st ed., Warszawa 2019, Art. 13, point 18 (Author in point 17 underlines that the protection of turover should be considered), Art. 14, point 4–5, Art. 16, point 10; J. Regan (Balcarczyk) , in: *Kodeks cywilny. Komentarz*, ed. M. Załucki, 1st ed., Warszawa 2019, Art. 14, point 4; M. Gutowski, in: *Kodeks…*, Art. 13, point 5, Art. 16, point 4. With regard to the purpose of requiring confirmation of the contract by a legal representative of a person with limited legal capacity: M. Pazdan, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–449[10]*, ed. K. Pietrzykowski, 9th ed., Warszawa 2018, Art. 18, point 2.

225 P. Nazaruk, in: *Komentarz…*, Art. 14, point 2; M. Serwach, in: *Kodeks cywilny. Komentarz. Część ogólna*, ed. P. Księżak, M. Pyziak-Szafnicka, Warszawa 2014, Art. 14, point 1; R. Strugała, in: *Kodeks…*, Art. 14 point 2.

226 S. Płaza, *Historia prawa w Polsce na tle porównawczym*, cz. 1, Kraków 2002, p. 253–255.

227 R. G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, Ga L. Rev. 1966–1967/1, p. 205.

228 In Poland, such a requirement appeared in the 16th century.

229 Form of collective ownership of a family subject of which was real estate. The family members did not have individual ownership of the ideal parts of thing, the ownership was

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use seals, factually limited the legal capacity of children.[230] This framework was designed to secure the status of the father as the sole administrator of the family's property. The purpose of the norms that shaped a limited scope of the descendants' legal capacity was not to protect the minors from making a contractual decision that might not be in their best interests. These rules were clearly beneficial for the parent or other legal guardian only – sometimes even at the expense of the minor.

In the case of persons fully or partially incapacitated, it is underlined that, in principle, the purpose of the regulation is to protect the personal or financial interests of this person. Initially (in the 1960s), there were doubts about whether the institution of legal incapacitation should also serve the interests of the people close to the incapacitated. Those in favor of such an approach[231] claimed that, when deciding on incapacitation, the legitimate social considerations or the public interests,[232] as well as the need to "resist disorganization in economic relations",[233] should be taken into account.

Over time, however, another view surfaced, according to which incapacitation can only be decided for the benefit of the incapacitated[234] because the crucial function of this institution is to help a person manage one's personal and property-related matters. It should not, however, aim to exclude one from society or to protect interests (including the financial ones) of others.[235] The institution of incapacitation is not intended to protect persons whose goods or interests might be threatened by the person whose incapacitation is being considered.

held by everyone in relation to the whole thing. As a rule, the father of the family was the only one entitled to administrate the real estate.

230 S. Płaza, *Historia…*, p. 253–255.

231 Judgment of the Supreme Court of 12.11.1956, 3 CR 440/56, OSNCK 1957/4, item 115; S. Wójcik, *Glosa do orzeczenia SN z 12.11.1956 r., 3 CR 440/56*, PiP 1957/12, p. 1150–1152. Similarly M. Pazdan who states that when verifying the premises of incapacitation in addition to the need for protection of one's financial interests the social context in which a given person functions should be also taken into account. M. Pazdan, in: *Kodeks…*, Art. 13, point 9. Incapacitation was seen as justified only if there was property that needed protection. A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1986, p. 164–165.

232 Judgment of the Supreme Court of 30.05.1968, I CR 167/68, Legalis. Providing assistance to other members of society lies in social interest, hence the interests of the individual and of the society should not be seen as antagonistic values.

233 Author's own translation. Judgment of the Supreme Court of 16.01.1964, I CR 32/63, OSNCP 1965/2, item 28.

234 The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) adopted on 13 December 2006 (Journal of Laws 2012, item 1169); judgment of the Supreme Court of 26.04.1968, II CR 70/68, Legalis; judgment of the Supreme Court of 30.05.1968, I CR 175/68, Legalis, judgment of the Supreme Court of 14.02.1974, I CR 8/74, Legalis.

235 K. Piasecki, *Kodeks…*, Art. 13, point 1; judgment of the Supreme Court of 29.12.1983, I CR 377/83, Legalis.

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Therefore, even if the premises for incapacitation are met, the limitation of the legal capacity of a particular person is not allowed if it weakens the position of that person rather than helping him in daily life.[236]

In the above context, the question arises whether the financial interest of the person under consideration may be understood as the preservation of one's assets – e. g., maintaining them for one's legal successors. This issue often arises when incapacitation of the elderly who suffer from typical age-related disorders (e. g., atherosclerotic process typical for advanced age, Parkinson's, and Alzheimer's) is requested. Even then, however, the incapacitation decision that aims to preserve the assets of a person for his relatives would oppose the principle that incapacitation may only be instituted for the benefit of the incapacitated person and never for the sake of his family or third parties.[237]

The sole condition for incapacitation is that the person being considered is unable to control one's conduct or, due to circumstances specified in Art. 16 § 1 CC, that this person needs assistance to handle everyday matters.[238] The prodigal character of a person, drunkenness, or drug addiction are not premises for incapacitation. They can, however, be symptoms of a mental disorder, which constitutes grounds for incapacitation.[239] Currently, it is only indicated that, when assessing the interest of the person concerned, an objective approach should be taken and the adjudication should not be based solely on the subjective opinion of the person suffering from the disorder in question.[240]

Despite the clear position of the jurisprudence and legal scholarship regarding the interpretation of the statutory prerequisites for incapacitation and for the purpose of the institution, the judicial practice of the first decade of the 21st century seemed to pursue different goals. The institution was used to protect the property interests of the family of the person concerned – sometimes, it was even directly oriented at obtaining material benefits. Incapacitation was also declared due to the pressure from state institutions, such as social welfare homes or the Social Insurance Institution (incapacitation as a condition of granting, e. g., social aid).[241] The need to change the above practice was emphasized by the

236 Judgment of the Supreme Court of 14. 02. 1974, I CR 8/74; judgment of the Supreme Court of 28. 09. 1999, II CKN 269/99, Legalis.

237 K. Piasecki, *Kodeks…*, Art. 13; judgment of the Supreme Court of 29. 12. 1983, I CR 377/83.

238 Judgment of the Supreme Court of 29. 12. 1983, I CR 377/83.

239 Judgment of the Supreme Court of 5. 02. 1965, I CR 399/64, OSNCP 1966/1, item 5; judgment of the Supreme Court of 23. 02. 1968 r., II CR 32/68, OSNPG 1968/7, item 42; judgment of the Supreme Court of 18. 05. 1982 r., II CR 138/72, Legalis.

240 S. Dmowski, R. Trzaskowski, in: *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, ed. J. Gudowski, Warszawa 2014, Art. 13, point 9.

241 U. Ernest, *Ubezwłasnowolnienie*, TPP 2010/4, p. 27; M. Zima-Parjaszewska, *Artykuł 12 Konwencji ONZ o prawach osób z niepełnosprawnościami a ubezwłasnowolnienie w Polsce*, Studia prawnicze 2013/2, p. 79.

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Constitutional Court in 2007,[242] and subsequently by the Foundation of the Institute of Regional Development,[243] the Ombudsman,[244] and the legal academic writings.[245] Focusing on striving to secure the interests of the person – and not only the property or interests of the family or third parties – is associated with changes in constitutional axiology: mainly, the priority of protecting human dignity and freedom, which may be endangered due to incapacitation.[246]

The above-mentioned actions brought a fundamental change to the perception of the incapacitation institution in Poland.[247] How far the understanding of this institution has been transformed can be seen in the following example. The Gdańsk Appeal Court,[248] in a 9 March 2010 judgment, stated that:

> "Incapacitation, especially a full one, limits the possibility of self-deciding and managing one's own life and it excludes a person at hand from a number of important life activities….incapacitation deeply interferes with the legal position of a natural person and causes a number of serious consequences for his status and rights."[249]

In this manner, the negative impact of incapacitation on the possibility to participate in social life was finally noticed – it is a protection tool that can bring more harm than benefits to the person to whom it is applied.

Currently, the model based on restricting the rights and freedoms of the disabled, mentally ill, or addicted is being abandoned. It is argued that the court should decide on the types of activities that should be entrusted to the guardian. In every scenario, limiting the independence of such a person is allowed only in

242 Judgment of the Constitutional Tribunal of 7.03.2007, K 28/05, Journal of Laws 2007 No. 47, item 319.

243 *Polska droga do konwencji o prawach osób niepełnosprawnych ONZ*, Kraków 2008 https://psoni.org.pl/wp-content/uploads/2015/09/polska_droga_do_konwencji_www.pdf (accessed 31.5.2021).

244 Letters to the Minister of Justice no. RPO-509359-IV/05/MK, RPO 647849-I/10/AB.

245 U. Ernest, *Ubezwłasnowolnienie*, p. 28.

246 Komisja Kodyfikacyjna Prawa Cywilnego działająca przy Ministrze Sprawiedliwości, *Księga pierwsza kodeksu cywilnego – projekt z uzasadnieniem*, Warszawa 2009, p. 3–4 https://bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf (accessed: 31.5.2021); judgment of the Appeal Court in Katowice of 11.09.2015, V ACa 109/15, Legalis.

247 The substantive legal premises of incapacitation have not changed since the introduction of this institution in 1964. Procedural regulations were amended three times (2001, 2009 and 2010) in order to strengthen the procedural guarantees available to the person who is the subject of a petition for incapacitation.

248 In Poland common courts are divided into: Regional Courts (in Polish *sądy rejonowe*) – they are courts of the first instance, District Courts (*sądy okręgowe*) – they function as both first and second instance courts, and Appeal Courts (*sądy apelacyjne*) – they are the second instance courts.

249 Author's own translation. Judgment of the Appeal Court in Gdańsk of 9.03.2010, I ACa 72/10, Legalis.

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case that they pose a significant danger to oneself or one's property.[250] Similar changes were postulated by the Civil Law Codification Commission (*Komisja Kodyfikacyjna Prawa Cywilnego*).[251] They proposed to replace the institution of full and partial incapacitation with care – the scope of which would be individually determined by the court so that it corresponds with the actual needs of the mentee.[252]

The current goal of the regulation of the institution of incapacitation can be indicated only when taking into account the above jurisprudence and legal scholarship as well as the European context. The key function of the institution is to grant assistance to a person, to protect him from being exploited by others, and to protect him from making irrational decisions in situations in which they could drastically endanger his interests.

In conclusion, the protection model has evolved in the case of both persons who have not reached the age of majority and those who are incapacitated. Previously inseparable from the social context, now it becomes a mechanism for protection of an individual only.

Deprivation or limitation of legal capacity is not, in itself, beneficial for the entity concerned. On the contrary, it impedes the protected person from concluding any kind of agreement, regardless of the contract's effect on their situation. Thus, this person is either fully or partially excluded from being active on the market,[253] becoming completely dependent on his representative.[254] Such a strict – if not for additional rules – protection model turns out to be disproportionate and, consequently, unfavorable for the person being protected.

250 U. Ernest, *Ubezwłasnowolnienie*, p. 30; E. Varney, *Redefining contractual capacity? The UN Convention on the Rights of Persons with Disabilities and the incapacity defence in English contract law*, LS 2017/37(3), p. 493–519.

251 Projekt założeń projektu ustawy o zmianie ustawy – Kodeks cywilny, ustawy – Kodeks rodzinny i opiekuńczy, ustawy – Kodeks postępowania cywilnego, ustawy o wspieraniu rodziny i systemie pieczy zastępczej oraz niektórych innych ustaw, http://legislacja.rcl.gov.pl/docs//1/208000/208041/208042/dokument152071.pdf (accessed: 31.5.2021). Work on the draft was suspended after the dissolution of the Civil Law Codification Commission by the Minister of Justice in 17.12.2015.

252 It was planned to introduce four types of care: assistant (the guardian only supports the pupil in decision-making), with "parallel" representation (the guardian is authorized to represent the pupil in certain type of situations, previously determined by the court), with co-decision powers (the guardian's consent or confirmation is required for the validity of certain types of legal actions), combined with the power to exclusively represent the person (the court determines the scope of legal actions that the guardian only is authorized to perform). Projekt założeń projektu ustawy o zmianie ustawy – Kodeks cywilny, ustawy – Kodeks rodzinny i opiekuńczy, ustawy – Kodeks postępowania cywilnego, ustawy o wspieraniu rodziny i systemie pieczy zastępczej oraz niektórych innych ustaw, p. 11.

253 P. Księżak, in: *Tom I…*, Art. 12, point , Art. 13, point 1.

254 R. Strugała, in: *Kodeks…*, Art. 12, point 2.

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Hence, the thesis that the limitation of a person's legal capacity is beneficial for him is unfounded.

The general rule was supplemented by detailed regulations and case law, reducing its severity and unilaterality. The institution of incapacitation ceased to primarily protect the interests of the representative of the person deprived of full legal capacity and began to perform a protective function in relation to that person. Thus, it has become possible for a person who is incapable of a legal act to conclude a contract of a type that is commonly executed in minor current day-to-day matters (such contracts become valid the moment they are performed, unless they cause serious harm to the person who does not have capacity for a legal act).[255] Such a person is excluded from concluding contracts that go beyond the scope of daily needs.

The persons with limited legal capacity are, on the other hand, allowed to conclude agreements pertaining to the category of contracts concerning minor current day-to-day matters, to dispose of their earnings and the property given for free use by a statutory representative. In the case of contracts outside this scope, the legislature entitles the person with a limited legal capacity to conclude the contract and bind the other party for a certain period, allowing for communication with the legal representative or, potentially, even for obtaining a full legal capacity by the protected person.[256] In principle, therefore, participation of such a person in legal and economic transactions is limited only by his or her psychophysical abilities. The legislature entitles others to control[257] the contracts concluded by a person with a limited contractual ability only exceptionally, making the effective conclusion of the contract dependent on the confirmation by a statutory representative or the permission of the court.[258]

2.3.1.2. Effectiveness of regulation in the case of consumer online contracts

As a rule, the protection of a person without a full legal capacity in traditional trading neither leads to a breach of trust nor increases uncertainty on the market. If a person fails to, e. g., check the age of the other party or ignores circumstances that indicate the other's inability to perform a given activity, then – according to the principle of *volenti non fit iniuria* – he would have to bear the risk associated with it.[259] Situations in which nothing suggests that the other party might not be able to conclude a contract and, thus, the fact that there is an increased risk

255 Art. 14 § 2 CC.
256 Art. 18 CC.
257 T. Sokołowski, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna*, ed. A. Kidyba, Warszawa 2012, Art. 18, point 6.
258 Art. 101 § 3 the Polish Family and Guardianship Code.
259 K. Piasecki, *Kodeks…*, Art. 18, point 15.

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associated with the transaction would pass unnoticed, are only an exception.[260] In light of the above, there was no need to introduce additional protective regulations.

The situation may differ when the contract is concluded via the Internet. Online, the addressee of a statement of will or the legal act only has access to the data that the other party decided to share. In addition, interactive websites do not provide any information about the legal status of the other party – e-mail and delivery address, chosen method of payment, or even personal data from the registration form[261] do not enable the addressee to assess whether the other party has full legal capacity. Very young people may also have skills that allow them to perform legal transactions online. Due to their proficiency in using internet tools, they are able to make a declaration of will in a technically non-defective manner; therefore, the other party has no reason to suspect that the message sender is still too young to perform a specific legal act.

Hence, since the addressee of a statement of will by a person without a full legal capacity does not have any grounds on which to make a preliminary assessment of that person's ability to submit a declaration of will of this type, is the Civil Code regulation (Art. 14, 17–22) still adequate? The effect of nullity or suspended effectiveness of the contract occurs by virtue of law. In addition, a party who has entered into an agreement with a person who is limited in legal capacity cannot invoke the lack of consent of that person's legal representative. He can only reduce the period during which he remains bound by the agreement, without being certain about its validity, by setting a deadline by which the representative must confirm the contract.[262]

On the other hand, the term "a contract of a type commonly executed in minor current day-to-day matters" is vague. This leads to its significant relativization and, consequently, to an uncertainty among the parties regarding the validity of the concluded agreement. Depending on the circumstances of the case, the scope of competence of a person without a legal capacity would be determined differently.[263] The factor that is decisive for the qualification of the contract con-

260 Mental disorders causing the state of lack of freedom or awareness, not showing the symptoms that are easy to observe, incapacitation in the event that the symptoms causing its declaration has recessed.

261 The form usually includes: the name and surname of the natural person or the company name of the legal person. As a rule the date of birth, age or other circumstances enabling the verification of the legal capacity of the person are not requested.

262 Art. 18 § 3 CC.

263 There is a dispute whether the construction of Art. 14 § 2 CC is based on granting limited and conditional competence (A. Doliwa, *Prawo cywilne*, Warszawa 2010, p. 197; Z. Radwański, in: *Prawo cywilne – część ogólna*, Warszawa 2015, p. 265; M. Serwach, in: *Kodeks…*, Art. 14, point 6; K. Piasecki, *Kodeks…*, Art. 14, point 11; M. Strugała, in: *Kodeks…*, Art. 14 point 5), or it is a case of validation of an absolutely invalid legal act (J. Preussner-

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cerning minor current day-to-day matters can be the value of the subject of the contract, the fact that this type of contract is common, and the uncomplicated procedure of its conclusion or performance – but also the characteristics of the person without a full legal capacity, e. g., his age.[264] Some legal scholars indicate that the type of social environment (i. e., whether a person's place of residence is a village or a city) and the financial situation of that person, his parents, or guardians, should also be taken into consideration.[265]

The purpose of the rules that allow persons without a full legal capacity to conclude contracts about minor, current matters of everyday life (Art. 14 § 2 and 20 CC) is to protect a person who does not have sufficient insight against the sanction of the invalidity of the contract when it would prevent his ordinary needs from being met.[266] In light of the teleological interpretation, the category of contracts concluded in petty, current matters of everyday life should, therefore, be interpreted as widely as possible because it provides the most effective protection for a person without a full legal capacity.[267] However, can it be automatically assumed that online consumer contracts usually fall within the category of contracts commonly concluded in minor day-to-day matters of everyday life? If that were the case, nullity or suspended effectiveness would only appear incidentally and considerations regarding the need to limit the scope of application of these sanctions would be unnecessary.

Clearly, complex, occasional contracts that lead to the disposition of significant value or are not related to satisfying the typical needs of a person would not be considered contracts concluded in small, current matters of everyday life.

How problematic it is to assess whether a given contract falls into this category can be seen in the example of a contract for providing an e-mail account service. In 2000, legal authors categorically excluded these types of agreements from the scope of agreements commonly concluded in minor, current matters of everyday

Zamorska, *Nieważność czynności prawnej*, Warszawa 1983, p. 182–185, 198; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, 3rd ed., Warszawa 2018, p. 203; M. Pazdan, in: *Kodeks…*, Art. 14, point 2). The compromise is proposed by M. Gutowski, who points out that Art. 14 § 2 CC grants the parties the power to perform a specific type of legal action, where the action is deemed valid upon performance. Thus, it is correct to refer to this institution with the term "validation", but this validation does not lead to retroactive recognition of the act. M. Gutowski, *Nieważność…*, Chapter III §1.IV; M. Gutowski, in: *Kodeks…*, Art. 14, point II.2–3.

264 M. Serwach, in: *Kodeks…*, Art. 14, point 3.

265 T. Sokołowski, in: *Kodeks…*, Art. 14, point 8; J. Regan (Balcarczyk) , in: *Kodeks…*, Art. 14, point 4; P. Nazaruk, in: *Komentarz…*, Art. 14, point 4; S. Kalus, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 14, point 2.

266 Interplay suggested by: P. Nazaruk, in: *Komentarz…*, Art. 14, point 4; M. Serwach, in: *Kodeks…*, Art. 14, point 3.

267 M. Watrakiewicz, *Wiek a zdolność do czynności prawnych*, KPP 2003/3, p. 514.

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life.[268] It was argued that such agreements, although commonly concluded (as evidenced by the number of account holders), do not constitute an agreement on everyday matters. Such contracts are not concluded on a daily basis or even regularly – setting up an e-mail account is usually a one-off, singular activity – and having a large number of e-mail accounts or frequently changing the e-mail address are generally inconvenient for the user.[269]

This reasoning should, however, be challenged. The provision does not require the contract to be concluded on a daily basis but for it to concern current day-to-day matters. This means that the frequency of concluding such contracts should be disregarded and, instead, it should be verified whether the subject of the contract is closely related to conducting daily, current affairs (also satisfying the needs) of the protected entity. Therefore, if a situation requires a person to have an e-mail address to deal with everyday matters and to meet the needs inherently related to them (e.g., sending homework), then the contract for setting up an e-mail account should be considered as concerning current day-to-day matters.

The main doubt concerns the next premise – does such a contract concern a minor matter? The assumption that all information sent using a given electronic address would have marginal importance to its owner is irrational.[270] This could suggest that a contract for providing e-mail account services should not be seen as regarding minor current day-to-day matters.

It should, however, be noted that this argumentation was built in the context of the effectiveness of incorporating standard terms in the case of a contract concluded via the Internet. Thus, this interpretation, in principle, leads to conclusions that are desirable and favorable for the protected person in the case of standard contracts regulation.[271] It does not cause the invalidity of the agreement but only impedes the incorporation of standard terms into the contract if they were not provided previous to its conclusion.[272] Since, as a rule, the purpose of standard terms is to strengthen the position of the proposer at the expense of the oblate, the lack of its incorporation and its replacement with default rules should be beneficial for the consumer.

At the same time, adopting a narrow understanding of the concept of contracts concluded in petty, current matters of everyday life leads to adverse effects

268 F. Wejman, *Wzorce umów na stronach WWW i w poczcie elektronicznej*, TPP 2000/4, p. 51–52.

269 This assumption does not seem to be fully correct, taking into account the practice of setting up incidental accounts – in order to, for example, redirect spam correspondence, obtain a discount for a "new user" or obtain other types of benefits (setting up artificial accounts on gaming portals for the purpose of linking them with the main account or transferring funds received automatically when starting the game by a new player).

270 F. Wejman, *Wzorce*…, p. 52.

271 Art. 384 § 1 CC.

272 Art. 384 § 2 CC.

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in the case of persons without a legal capacity (Art. 14 CC). The contract for the provision of an e-mail account service concluded by a person without a legal capacity would be void in accordance with Art. 14 § 1 CC – and yet, having an e-mail address is necessary for this person to perform one's daily tasks. Currently, having an e-mail account is expected even from primary school children so that they can receive and send homework.[273]

On the other hand, in the case of a person with a limited legal capacity, the question arises about whether such a contract falls within the full competence of that person? The contract for providing an e-mail account service, if it does not entail an obligation to pay, does not increase the liabilities or decrease the assets of the user – it neither creates an obligation nor leads to the transfer of an asset. Hence, the consent of the statutory representative of the person at hand is not required – he is entitled to conclude this contract on his own.[274]

Due to the divergence between the sanctions stipulated in the regulations protecting persons without a full legal capacity and the regulations protecting consumers, the interpretation of the premise "contracts concluded in minor current day-to-day matters" should differ in these two cases.[275] In the first scenario, a broad interpretation would usually be appropriate. However, the hypothesis that it can be automatically assumed that online consumer contracts would usually fall within the category of contracts commonly concluded for minor everyday matters is too far-fetched.

First, the catalog of consumer contracts concluded via the Internet changes and the subject variety of these contracts is increasing. This is clearly visible when analyzing online purchases. Typical products bought over the Internet are items that are easy to deliver (e. g., books, music, small electronics, accessories, and clothing) – namely, objects whose purchase is frequently considered to be related to "minor current day-to-day matters." However, there is a significant increase in the percentage of the number of transactions regarding items of large size and considerable value, previously purchased in stationary stores (e. g., household appliances, furniture, etc.).[276] Second, the elements taken into account when interpreting the above concept are the characteristics of the protected person and his situation.[277] Thus, it is not reasonable to assume that the manner of contract conclusion or even purchase of a specific item type would always fall under the category of "minor current day-to-day matters."

273 Information systems such as e-journal, e. g. Polish Librus.
274 M. Watrakiewicz, *Wiek…*, p. 527–528.
275 Tak: F. Wejman, *Wzorce…*, p. 51.
276 https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/01/the-truth-about-online-consumers.pdf (accessed: 31. 5. 2021).
277 R. Strugała, in: *Kodeks…*, Art. 14, point 3.

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In light of the above, do the sanctions of nullity and suspended effectiveness, which are provided for in the provisions regulating the legal situation of persons without a full legal capacity, allow for achieving the purpose of these norms?

Nullity and suspended effectiveness – provided for by the legislature in case of a lacking or limited legal capacity of one of the parties – does not threaten the certainty in traditional trade. A solution, where the risk that arises from the conclusion of a contract that may be ineffective is borne by the contractor for a person without a full legal capacity, is justified because this contractor is usually aware of them.[278] Online, the risk of concluding a contract that is invalid due to a lack of or a limited legal capacity of the other party – and the occurrence of related negative consequences – increases. This begs the question whether the aim of the legislature was to establish permanent protection standards in this respect, granting persons without a full legal capacity additional legal protection regardless of the circumstances? In light of the legislature's aim (granting private law subjects an equal contracting position), it would be more reasonable to assume that the focal point of these institutions is to prevent the weakness that is typical for special group of people from being abused by other market participants.

Setting a formal age requirement in law, although common across Europe,[279] is criticized.[280] It does not allow for taking into account the actual mental and intellectual capacity of a person in question, despite the fact that the age at which limited and full understanding of legal acts, respectively, are obtained can differ for every individual.

Inflexible protection regulation, construed upon a fixed age benchmark, currently does not fulfill its function in the online environment. The true age of the other party is frequently impossible to verify for other network users and failure to adapt websites to meet the requirements of civil law[281] encourages persons without a full legal capacity – but fluent in using online tools – to circumvent the law. In the case of a person who has not yet reached the age that would enable him to make statements of will regarding specific content – but who is already an informed network user – such a restriction seems unnecessary in light of the purpose of the regulation.

If a person is able to reasonably assess the effects of a statement of will, refusing him the ability to make it is unjustified. Nowadays, minors become

278 T. Sokołowski, in: *Kodeks…*, Art. 18, point 4.

279 M. Pazdan, in: *System…*, p. 1074–1075.

280 M. Serwach, in: *Kodeks…*, Art. 10, point 2; Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2015, p. 263–264.

281 Lack of instruments adapted to the implementation of the requirement of consent or confirmation of a legal act of a person with limited legal capacity by a statutory representative.

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active members of society much earlier than before, frequently assuming an active role in the market despite their age. Being active network users, they gain experience much faster than people their age did in the days before the Internet[282] when the current regulation was shaped. Thus, if someone is able to use online tools in a manner that enables him to consciously submit a statement of will, should they not be granted legal capacity in this regard?

The number of contracts concluded by minors on the online consumer market is growing and, with it, so is the percentage of agreements that are invalid from the legal perspective.[283] This can become a serious obstacle for further development of e-commerce. One typical issues that arises here appears in the case of a contract regarding an item that can either be consumed or whose release gives the other party an opportunity to definitively satisfy one's need – e.g., a computer game (manner of delivery: the game can be downloaded from the seller's website). As the contract is invalid, the buyer is entitled to demand a price devolution despite the advantage obtained (he was able to use the game – not to mention to copy it for later use), while the seller can only demand the removal of the subject of the contract from the buyer's computer.

A solution might be to grant a conditional contractual capacity to all persons who are able to use the Internet in a way that does not lead other network users to suspect that the declarant may not have a full legal capacity – e.g., due to age (because an incorrect birth date was provided by the user when registering on the website). All contracts concluded by such persons would be valid but could be voided due to a lack of proper understanding of the consequences of the acting person – either by a court, after examining the person's degree of maturity, or by a representative of such a person. This solution seems even more adequate when taking the specificity of the online environment into account. Online, the addressee of the declaration made by a person who does not have a full legal capacity would, as a rule, only have access to the information about the declarant that the declarant himself decides to make available to him. Another argument in favor of this proposal is the design of the sales websites and the ongoing automation of the entrepreneur's online activity. Since the acceptance of the consumer's offer is sent automatically, even if the consumer adds an appropriate comment with information about lacking or limited legal capacity to the order, the entrepreneur would not be able to react to this message in practice.

282 J. L. Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract through the Cyberscope*, G. L. Rev. 2007/43(2), p. 254–255; C. B. Preston, *CyberInfants*, Pepperdine L. Rev. 2012/39, p. 267–268.

283 J. L. Daniel, *Virtually…*, p. 225; C. B. Preston, *CyberInfants…*, p. 268; C. B. Preston, B. T. Crowther, *Infancy doctrine inquires,* SCLR 2012/52(1), p. 49; C. B. Preston, *The infancy doctrine for off- and online contracts – draft*, p. 1–2 https://www.law.berkeley.edu/files/bclt_IPSC2010_Preston(1).pdf (accessed: 31.5.2021).

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At the same time, standardization of contracts reduces the risk a person's weaknesses being abused (related to their age and lack of experience). The entrepreneur does not usually know the specific characteristics of the consumer – thus, it is not possible for him to introduce particularly unfavorable contractual provisions to contracts concluded only with minors. On the other hand, including particularly unfavorable clauses in all contracts should, in principle, be considered disadvantageous from the long time perspective because it would affect the trader's reputation and reduce his attractiveness in a given market.[284]

2.3.2. Contracting with persons who are in a state that excludes conscious or free decision-making

The contract concluded by a person who is in a state that precludes conscious or free decision-making and the ability to declare one's intent is *ex lege* invalid. The legislature excludes the protection of trust of the addressee of such a statement. External circumstances, including those related to the specifics of the environment in which the contract is concluded, are irrelevant when assessing the fulfillment of the premises of Art. 82 CC.[285]

The purpose of the regulation is to protect those entities who, in a given factual situation, are unaware of their behavior or, when undertaking a given action, are not able to behave differently.[286] The literal wording of the provision suggests that the only purpose of the regulation is to protect the autonomy of will of the declarant.

The question arises whether Art. 82 CC is not an anachronistic remnant of the subjective concept of a statement of will (according to which the inner will of the declarant is decisive). The protective function of this provision is questionable, given that the legislature does not provide for any exceptions to the sanction of invalidity of a statement of will submitted in these circumstances. A person suffering from mental disorders, which put him in a state that prevents conscious or free decision-making, would not be able to conclude a valid contract at all – even to the extent determined by his basic needs.[287] This puts him into a situation

284 This argument loses its force in the event that the entrepreneur personalizes individual contractual provisions with the use of profiling mechanisms. The use of technology allows, for example, to distinguish a group of minors and abuse their inexperience.

285 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 82, point 5; A. Janas, in: *Kodeks…*, Art. 82, point I.2; A. Grzesiok-Horosz, in: *Kodeks…*, Art. 82, point I.2.

286 B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 25.

287 P. Sobolewski, in: *Kodeks cywilny. Komentarz*, ed. K. Osajda, 27th ed., Warszawa 2020, Art. 82, point 1.

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in which, from a legal point of view, he is excluded from entering into any transaction.

A narrow determination of the scope of the provision is the result of weighing the protection of the autonomy of a private law subject in a state that precludes conscious or free decision-making against the trust of other persons as well as the certainty of trade. Typically, the entity contracting with a person under the state described in Art. 82 CC, if acting with due diligence, should note that the other party might not be capable of concluding the agreement.

It was already observed[288] that this institution is not solely based on the protection of the autonomy of the declarant principle and, thus, that it should not depend solely on a specific condition of the protected entity. It is argued that particular external circumstances should also be taken into account: the reasons for the state of the declarant and the knowledge of the addressee of the declaration. Analysis of Art. 96 § 2 of the Academic Draft of the Civil Code[289] leads to the conclusion that granting absolute protection to the interests of the declarant at the expense of the interests of the other party is being challenged. This is the case when a person, through their own fault, causes a mental disorder that precludes reasonable assessment of the effects of the statement of will. Hence, if the addressee of the statement did not know and would not be able to know about this condition, despite acting with due diligence, then passing the negative effects related to the invalidity of the defective statement onto him seems to be contrary to the reasons of equity principle. For instance, if a person – who is in a state of intoxication that was induced by his own actions and in accordance with his own will – behaves in a way that prevents the recipient of the statement from knowing about this state (e. g., a statement of will send via the Internet), it seems unreasonable to assign primacy to the protection of the declarant.

The factor that is decisive for repealing the special protection of the autonomy of will of the declarant would be the negative assessment of the behavior of the protected entity – namely, that this special state was intentionally induced by

288 Academic Project of the Civil Code (*Akademicki Projekt Kodeksu Cywilnego*) http://www.projektkc.uj.edu.pl/index.php/projekty (accessed: 31. 5. 2021).

289 Art. 96. Declaration of will made in a state of mental disorders
§ 1. A declaration of will made in a state of mental disorders excluding a reasonable assessment of the effects of this declaration is invalid. If at the time of submitting the statement in the state of mental dysfunction, this statement was grossly unfavorable for the declarant, it is presumed that the disorders excluded a reasonable assessment of the effects of that statement.
§ 2. The above provision shall not apply if the declarant caused the mental disorder himself, unless: 1) the declarant could not foresee the mental disorder or 2) the addressee of the statement knew or would have known about this condition if he exercised due diligence, or 3) the declaration leads to a gratuitous benefit of another person, with the exception to minor benefits. http://www.projektkc.uj.edu.pl/index.php/projekty (accessed: 31. 5. 2021).

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him.[290] It seems that such a solution, although in principle appropriate, would be suboptimal. First, it would be a step toward a more casuistic regulation – a very specific exception would be derived from an already existing exception. Second, typical situations (distant, automatically concluded contracts for which the other party has no reasons to suspect that the declarant is in a state that prevents him from submitting a valid statement of will), where applying a traditional exception would bring about a highly questionable solution, would not be addressed.

The current solution is designed to balance the autonomy of will, contractual fairness, legal certainty, and certainty of trade in the context of offline transactions. It is underlined[291] that the sanction of invalidity that is provided for in Art. 82 CC, although very far-reaching, does not threaten the certainty of trade as a rule. Situations in which it is justified to invoke protection under Art. 82 CC are relatively rare and, offline, the addressee of the statement can usually easily notice that he is dealing with a person who is acting in mental distress. Therefore, there is no need to protect the trust of the addressee of such a statement.

This is different in consumer e-commerce. Here, the rule is that the addressee cannot verify the state in which the person submitting the declaration is. The transfer of information is usually automated and limited – the addressee of the statement does not receive information that could, in direct contact, raise doubts regarding the state of the declarant. In addition, it is very simple to send a message that looks like a statement of will via the Internet. It can easily be done by a person who is in a state that precludes conscious or free decision-making or even unintentionally – i. e., by accident.

Hence, one of the main arguments for burdening the addressee with the risk associated with entering into an invalid contract as a result of the specific condition of the other party disappears when the online context is taken into account. It is, therefore, justified to look at another regulatory model.

Currently, in the common law system, there are two coexisting views regarding the impact of mental inability on the legal effectiveness of a statement of will. According to the first one, a person without mental capacity is unable to submit a valid statement of will and, consequently, cannot conclude a contract.[292] The logical consequence of this view is that it is not necessary to demonstrate that the other party was aware of the contractor's mental incapacity. The contract is not concluded at all due to the lack of a valid declaration of intent by one of the parties. In essence, this model is consistent with the solution adopted by the Polish legislature; hence, its further analysis is unnecessary.

290 *Komentarz do Art. 96 Akademickiego Projektu Kodeksu Cywilnego*, p. 127 http://www.projektkc.uj.edu.pl/index.php/projekty (accessed: 31. 5. 2021).

291 K. Piasecki, *Kodeks…*, Art. 18, point 15.

292 Blackbeard v. Lindigren [1786] 1 Cox Eq Cas 205; Birkin v. Wing [1890] 63 LT 80; Manches v. Trimborn [1946] 174 LT 344.

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According to the second view, the lack of mental ability does not prevent (there is no need for it to prevent) the conclusion of the contract; however, such a contract may be voided by the declarant.[293] When seeking to annul the voidable contract, he must prove that the other party was aware of the other's lack of mental capacity. This puts persons without a mental ability into a similar situation[294] as the one in which persons acting under intoxication find themselves.[295] In that case, the legislature makes the right to void the contract subject to the knowledge of the other party about the state of the declarant. This is justified in light of the equity principle, which aims to prevent abuse of law or inequality between its entities.

This solution limits the protection of the autonomy of will of the declarant who cannot make a free and conscious decision in order to promote trust in the market. The adoption of this model by the Polish legislature seems justified in light of the purpose of Art. 82 CC (in particular, if it is assumed that the contract could be voided not only when the addressee of the declaration knew about the special state in which the declaring person was but also when, acting with due diligence, he should have known about it). This would allow for balancing protected values, regardless of the environment in which the contract is concluded. In traditional trade, a high probability of noticing the special condition of a counterparty would make this institution relatively easy to apply. On the other hand, the possibility to void the contract in case of transactions concluded via the Internet would be relatively rare – e.g., if the other party would use a user profiling mechanism.

2.3.3. Misleading the other party about one's legal capacity

The inadequacy of risk distribution, in light of the aim of the regulation, is particularly evident in cases in which a person without a full legal capacity is the one responsible for the other's mistaken assumptions regarding his ability to validly perform the legal act in question.[296] Naturally, the situation in which a

293 Molton v. Camroux [1849] 4 Exch 17, 19, Ex Ch, obiter per Patteson J; Imperial Loan Co Ltd v. Stone [1892] 1 QB 599; Baldwyn v. Smith [1900] 1 Ch 588; Hart v. O'Connor [1985] AC 1000, [1985] 2 All ER 880, PC.

294 Molton v. Camroux [1849] 4 Exch 17,19, Ex Ch, obiter per Patteson J.

295 Imperial Loan Co Ltd v. Stone [1892] 1 QB 599; Cooke v. Clayworth [1811] 18 Ves 12; Rich v. Sydenham [1671] 1 Cas in Ch 202; Johnson v. Medlicott (1734) 3 P Wms 130n.

296 This problem has been noticed in the common law: C. B. Preston, B. T. Crowther, *Infancy*…, p. 59–62; C. B. Preston, *CyberInfants*…, p. 233, 248–252. On the other hand, the Polish legal authors assum that the possibility of claiming damages in terms of negative contractual interest is sufficient to protect the interests of a person that was misguided. R. Longchamps

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person, using the addressee's lack of information, performs a legal act that he is not entitled to perform could be considered a case of error or fraud. Could the addressee void the contract under error of fraud, provided that the person inducing or consciously benefitting from this mistake is protected under Art. 14–22 CC or Art. 82 CC? In such a scenario, is it justified to guarantee protection to the declarant at the expense of the addressee due to a supposed lack of full understanding of the legal situation or insufficient awareness regarding the legal effects of the activities performed?

An error, in order to be legally relevant, must relate to either legal or factual circumstances of the case. However, it must also be essential (meaning objectively important: if the person making the declaration of intent had not acted under the influence of the error and had judged the case reasonably, he would not have made such a declaration) and refer to the content of the declaration of intent. The ability to perform a given legal act is a fact. Sometimes, this feature of the other party would be decisive – especially if the subject of a contract represents a significant value and/or can lose this value before the contract can be rectified. In other scenarios, the lack of contractual capacity of the other might be of marginal importance – i. e., when the subject of a contract is an item of little value, purchased daily, and the contract is performed immediately. Therefore, the essentail character of the error should be assessed *ad casu.* As a rule, the error regarding the contractual capacity of the contractor should be considered essential because it undermines the uncertainty about the effectiveness of the legal act. The question remains whether such an error is related to the content of a legal act at hand.

As a rule, the content of a legal act is determined by taking into account both the effects expressed therein but also those that stem from the law, principles of community life, and established customs – in accordance with Art. 56 CC. In addition, the objective and subjective aims of the contract should be considered as stipulated in Art. 556^1 § 1 CC.[297] In case of doubt regarding whether the mistake was, indeed, related to the content of the legal act, it should be verified whether there is a close structural link between the error at hand and the content of the act. If the error distorts the practical or legal sense of the act, then it should be considered to be an error regarding the content of the legal act even if not reflected in the statement of will.[298]

de Bérier, *Polskie prawo cywilne. Zobowiązania*, Poznań 1999, p. 80–81; F. Zoll, *Zobowiązania…*, p. 31.

297 Art. 556^1 § 1 point 1 and 3 CC, although included in the part of the Polish Civil Code regulating the sales contract, supplements the rules on interpretation of declaration of will provided for in Art. 65 CC. F. Zoll, *Problem…*, p. 168.

298 Judgment of the District Court in Wrocław of 4. 04. 2016, II Ca 16/14, Legalis.

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Thus, if the conclusion of a given contract would not make sense due to a lack of full legal capacity of the other party (sanction of invalidity or suspended effectiveness of the contract), the error in this regard should be classified as concerning the content of the legal act in question. Assuming, a priori, that each mistake regarding legal capacity would be a mistake as to the content of a legal act is, therefore, unjustified. This is the case mainly because, if certain conditions are met, then a lack of legal capacity or its limitation does not affect the validity of the contract.[299] In this respect, an error regarding the legal capacity of the other party shall not constitute a mistake in relation to the content of the legal act. The problem arises when the lack or limitation of legal capacity can result in the invalidity of the contract. Although, in this case, an error regarding the legal capacity of the other would be legally relevant, it can be controversial whether or not the addressee would be entitled to void the contract by claiming that he acted under an error at all.

Limiting the possibility of claiming an error to only when it concerns the content of a legal act does not appear in the case of fraud (Art. 86 CC). However, here, the examination of the fulfillment of statutory conditions also turns out to be problematic. As a rule, legally relevant fraud consists of the subjective (attitude of a person who intentionally strives to elicit a false image of reality in another person's mind) and objective elements (action leads to the other's error by directly causing it, by confirming one's false belief, or by failing to fulfill one's information obligations).[300] A person without a full legal capacity may, e.g., provide false information about one's own age (during registration on the website) or may not provide such information at all.

In the first situation, in order to qualify this behavior as a legally relevant fraud, it would have to be accompanied with the intention of misleading the other party regarding the age of the user. Irrespective of whether the person entering the false data acted with a direct intention of causing an error of the other party or was only aiming to effectively set up an account by "cheating" the registration system (a situation typical in the case of a minor's lack of full legal capacity), it should be considered that the subjective premise is fulfilled. Another common scenario is slightly different: a person does not provide any data on the basis of which the other party could assess one's legal capacity (this typically occurs when a user is either incapacitated or in a state that excludes conscious or free decision-making). Here, due to the lack of information obligation provided in law, it would be unreasonable to assume that such a person caused an error.[301]

299 Art. 14 § 2, Art. 20–22 CC.

300 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 86, point 5–8; P. Nazaruk, in: *Komentarz…*, Art. 86, point 2.

301 On the possibility of considering non-disclosure of information as misrepresentation see Chapter 4. and especially 4.2.2.

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Claiming that the act was made under the influence of an error or fraud by a person without full legal capacity should be admissible in some instances. The legislature introduces an exception regarding the rule that statements of will submitted by a person without a legal capacity are invalid – namely, when a person without legal capacity executes a contract of a type commonly concluded in minor current day-to-day matters, this contract becomes valid the moment it is performed unless it causes serious harm to the person who does not have the capacity for legal acts (Art. 14 § 2 CC). Once the above premises are met, the contract becomes valid with its performance. There is no other way to rectify the contract. The disloyal behavior of the party, consisting of the use of tools that enable one to conceal certain circumstances, does not influence the existence of circumstances that fulfill the premises of Art. 14 § 2 CC.

If the legislature regulates matters regarding the limitation or lack of legal capacity separately from defects of consent, then it should be presumed that these circumstances are so different in nature that they should not be examined together but separately, one after the other.[302] The fact that the contract is invalid due to the lack of legal capacity of one of the parties makes it impossible to void it on the basis of error or fraud.[303] Thus, circumvention of the law by a person without a legal capacity does not have negative legal effects for him – it does not lead to an exclusion or limitation of the protection provided by law.

A similar solution is also provided for in common law. The fact that the minor misled the other party about his legal capacity does not render him unable to rely on the entitlements provided for minors in law.[304] In this context, the A.V. v. iParadigms ruling is particularly interesting.[305] The minor sent some homework using a service that required the acceptance of a number of contractual provisions. The court ascertained that failure to return even a small advantage (even one as trivial as the possibility to send homework) by the minor precludes his right to void the contract.[306] It is, therefore, not permissible for a minor, after benefiting from the contract, to free himself of his obligation by annulling it.

The above-mentioned issue cannot occur under Polish law in this form due to the fact that Polish law provides for the sanction of invalidity or suspended

302 A good example is a situation where the legislature provides for *ex lege* nullity as a result of a defect of consent (Art. 82 CC, Art. 83 CC), while the regulation of the lack of legal capacity or its limitation does not provide for such a far-reaching effect.

303 The sanction provided for by the legislator in the event of a declaration of intent made by a person deprived of the capacity to perform such a legal act (invalidity) goes further than the sanction provided for in case of fraud (voidability). The institution of fraud will not be applied in a situation where a further-reaching sanction is foreseen. M. Gutowski, *Wzruszalność czynności prawnej*, Warszawa 2019, Chapter II § 4.III.

304 J. Chang, *Gaming*…, p. 635.

305 http://pub.bna.com/eclr/07cv293_031108.pdf (accessed: 31.5.2021).

306 iParadigms, 544 F. Supp. 2d, 481. p. 9–10.

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effectiveness *ex lege*, instead of granting the minor the right to void the contract or to limit its effectiveness as a result of lacking a full legal capacity. Nevertheless, an invalid or suspended contract can be performed by the parties. Therefore, it is possible for contractual obligations to be fulfilled despite the agreement's (eventual) invalidity, which would render the benefit of both undue. A person without a full legal capacity may, however, consume or use the object that he obtained. Pursuant to Art. 409 CC, the obligation to hand over the benefit or return its value is extinguished if the person who obtained the benefit has used it up or discarded it in such a manner that he is no longer enriched unless, when discarding or using up the benefit, he should have taken into account the obligation to return it. As a result, at the time when the legal representative of this person refuses to confirm the contract – after the time for confirmation set forth by the other party elapses or when the other party demands the return of the undue benefit – this person would no longer be enriched. Does this release this person from the duty to return the benefit or its value in this regard, pursuant to Art. 409 CC, *in principio*, or should it be assumed that the lack of a full legal capacity means that such a person should return the undue benefit because, when discarding or using it up, he should have taken into account the obligation to return it?

However, this leads to another question – could the person, whose legal capacity is limited due to age and the assumed inability to act with due discernment, be expected to take into account that this lack of legal capacity might lead to the invalidity of the contract and, consequently, also to the invalidity of the obligation to return the benefit? The scope of the benefit that should be returned is not determined by his actual knowledge but by the obligation to consider what part of the benefit he might be obliged to return. This obligation should be understood objectively, as "encompassing both situations – when the person obliged to return the benefit knew about the undue character of the benefit and when he was convinced that there were legal grounds for the enrichment but, in light of the events, he should have taken into account the obligation to return it."[307] The subjective belief of a person that he is entitled to the benefit at hand, should be, thus, disregarded.[308] The condition of the "obligation to take into account the obligation to return it" would be met if the circumstances of the enrichment, which were or should have been known to the unjustly enriched, were, in principle, sufficient for him to notice the obligation to return the benefit.[309]

307 Author's own translation. Judgment of the Supreme Court of 2.03.2010, II PK 246/09, Legalis.

308 Judgment of the Supreme Court of 2.03.2010, II PK 246/09.

309 K. Kołakowski, in: *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania T. 1–2*, ed. G. Bieniek, Warszawa 2011, Art. 409, point 1.

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Part of legal scholarship and judiciary underlines that this obligation is not related to the fault of the enriched[310] and does not depend on whether he is able to act with due discernment.[311] The obligation to take into account the obligation to return the benefit is connected to the bad faith of the enriched[312] – his psychological features are, therefore, irrelevant. It should be assessed whether an average person, being in the situation like the one in which the enriched found himself, would be aware of the obligation to return the benefit. It is indicated that persons without a legal capacity or those who are mentally disabled cannot be considered to be aware of an obligation to return – in their case, it should be examined what their legal representative should have known.[313] However, it should not be automatically assumed that, in the case of all persons incapable of submitting a valid statement of will, their legal representatives' knowledge should always be the point of reference. For instance, persons who do not have a full legal capacity because of their age are often fully aware of the reprehensibility of his behavior.

If a person misleads the other party regarding the existence of a feature on which the validity of the contract depends, then it can be presumed that this action was not accidental. Therefore, if a person with a partial legal capacity provides, for example, an incorrect date of birth when registering on a website, this indicates that this person was aware of the other's mistake and his own inability to conclude a contract. Consequently, he should at least suspect that the contract might not be valid and, thus, that the enrichment that follows is unjust. This excludes the assumption that a person with a partial legal capacity acted in good faith. Thus, he should take into account the obligation to return the undue benefit resulting from performing an invalid contract.[314]

According to Art. 18 § 3 CC, a party that enters into a contract with a person who has a limited in legal capacity cannot claim that the contract is invalid due to the lack of the consent of the legal representative of that person. However, he may set an appropriate deadline for this representative to ratify the contract and shall

310 In the context of doctrinal approach at the stage of shaping these institutions in the Code of Obligations from 1933: J. Halberda, *Instytucja niesłusznego zbogacenia w polskim Kodeksie zobowiązań z 1933 roku na tle współczesnych kodyfikacji*, KS HPiP 2012/5(4), p. 317, 326.

311 G. Karaszewski, in: *Kodeks cywilny. Komentarz*, ed. J. Ciszewski, Warszawa 2019, Art. 409, point 11; differenty: P. Mostowik, in: *System Prawa Prywatnego*, Vol. 6, *Prawo zobowiązań – część ogólna*, ed. A. Olejniczak, Warszawa 2018, p. 318; P. Księżak, *Bezpodstawne wzbogacenie: Art. 405–414 KC: komentarz*, Warszawa 2007, p. 162.

312 A. Ohanowicz, *Niesłuszne wzbogacenie*, Warszawa 1956, p. 351; A. Ohanowicz, *Bezpodstawne wzbogacenie*, Katowice 1965, p. 28; E. Łętowska, *Bezpodstawne wzbogacenie*, Warszawa 2000, p. 129.

313 P. Księżak, *Bezpodstawne…*, p. 162.

314 Similarly in the case of a partially incapacitated person: judgment of the Supreme Court of 29.06.2016, III CSK 267/15, Legalis.

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not be bound by the agreement when this date passes to no effect. If the contract is not confirmed within this period or, provided that such a period had not been set, after the party has reached the age of majority, the contract would be invalid. Hence, it would not be possible for the other party to void the contract due to the defect of consent. The question is whether it would be possible to void the contract during the period when the validity of the contract is still undetermined (i. e., when the contract has not yet been ratified by the legal representative of the minor)?

Primarily suspended effectiveness of the legal act refers to the statement of will rather than to the legal act as a whole because the latter comes into existence only after the ratification.[315] This conclusion can be drawn from Art. 63 CC, which distinguishes the moment in which the statement is submitted from the moment in which the legal act is performed.[316] Furthermore, the concept of an "incomplete legal act" (*negotium claudicans*,[317] the notion describing the act after submission of a statement of will and before its ratification) should not be understood as referring to a specific type of legal act but to its phase.[318] Although it does not cause the effects stipulated in its content, it binds the parties – none of them can effectively withdraw their statement.[319]

On the one hand, it can be argued that, since the effect of the statement (namely, contract conclusion) has not yet occurred, the other party has nothing to avoid. However, this reasoning seems to be an oversimplification – at this stage, the result of submitting statements of will is that the parties are bound by them.[320] The person could, then, instead of voiding the contract, void this temporary quasi-contractual bond.[321] Especially, the existence of this bond should not, per se, exclude or limit the possibility to claim protection under the defects of consent regulation in the case of legal relationships in which one of the parties has not yet come of age.

This issue can easily be illustrated through the following example. A sixteen-year-old person has found a new seller (no feedback yet) on the largest internet portal that gathers sellers from a particular industry. According to the portal's regulations, users whose overall rating falls below 3/10 are automatically removed from the portal, without possibility of re-registration. This 16-year-old sends an offer to the seller, according to which he buys a product for 1/100 of its

315 Z. Radwański, in: *System…*, p. 575; M. Gutowski, *Nieważność…*, Chapter II § 4.III.1.
316 Z. Radwański, in: *System…*, p. 575.
317 In Polish *czynność prawna niezupełna* or *czynność prawna kulejąca.*
318 Z. Radwański, in: *System…*, p. 575.
319 M. Gutowski, *Nieważność…*, Chapter II § 4.III.1.
320 Z. Radwański, in: *System…*, p. 576; M. Gutowski, *Nieważność…*, Chapter II § 4.III.1.
321 This seems to be allowed by M. Gutowski, in: M. Gutowski, *Bezskuteczność czynności prawnej*, Warszawa 2017, p. 210.

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price (exceptions from Art. 20–22 CC do not apply). In the order commentary, the boy threatens the entrepreneur that if he does not conclude a contract with him under these conditions, he will give him a 1/10 rating, thus leading to his removal from the portal, which is objectively possible. The seller concludes the contract. After three months, the seller's reputation on the website is established (he received a lot of positive feedback) and he is no longer afraid of bogus negative reviews. Since then, he has a year to void the contract. However, as the other party is a minor, he should set a deadline for his representative to ratify the contract. Once this time frame elapses to no effect, the seller becomes free. On the other hand, if the legal representative of the minor ratifies the contract, the seller would be entitled to void it under the defects of consent regulation.

The state of being bound by the statements prevents the parties from withdrawing their declarations of will only. The law *expressis verbis* impedes a party who has entered into a contract with a person of limited capacity for legal acts only to plead lack of consent of the statutory representative. This understanding of the provision at hand seems justified, provided that the aim of the norm is to protect the minor because of his peculiar weakness (lack of understanding) and not to exempt him from complying with other private law requirements. In the context of the purpose of the regulation, which is to protect persons from having their weaknesses in terms of lacking understanding of the circumstances exploited, it is not justified to interpret this protection in a manner that would exclude or limit, even temporarily, the protection against, for example, the disloyalty or abuse granted under other provisions to other market participants.

Thus, it should be concluded that, in the case above, the seller may void the contract concluded under threat once he is no longer afraid, without requesting the representative of the other party to ratify the contract.

2.3.4. Conclusions and alternative mechanisms

The purpose of the norms – both in terms of the lack or limitation of legal capacity (irrespective of whether it is conditioned by the age of a person or his total or partial incapacitation) and the state that excludes conscious or free decision-making – is to protect persons whose ability to assess the effects of their acts is limited from having their weaknesses exploited by others. The provisions primarily aim to protect the property interests of such persons. The question is whether it should be assumed that they also intend to protect these persons from bad contractual choices in general.[322] The wording of these provisions (the use of concept of the contracts commonly concluded in minor matters of everyday life)

322 S. Dmowski, R. Trzaskowski, in: *Kodeks…*, Art. 14, point 2.

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suggests that it is more appropriate to assume that the legislature decides to provide protection only in situations in which a contractual decision could significantly worsen the financial situation of protected entities.

The purpose of the regulation is not to exclude a group of persons from the market nor enable their statutory representatives to control the property transfers but to protect the vulnerable from being exploited by others. The current design of the norms in question does not allow the aforementioned objective to be achieved.

In the case of persons who do not have a legal capacity, the protection goes too far, preventing them from participating in trade to the extent that is currently widely accepted – the scope of their legal capacity being delineated by the notion of "petty matters of everyday life" turns out to be too narrow. The key issue is not the interpretation of this term but the inadequacy of the consequences stipulated by law for the legal acts performed by persons who are unable to make a valid statement of will on their own. In the context of online consumer trading, this protective instrument could, in practice, do more harm than good to protected entities. The sanction of invalidity turns out to be particularly disproportionate in situations in which the contractual provisions do not harm the person who is legally incapable but the contract does not fall within the scope of Art. 14 § 2 CC and the benefit that is provided for therein is of great importance to the protected. The invalidity of the contract would automatically impede demanding its performance or claiming damages in the event of improper or non-performance. Hence, the legal situation of a person who is deprived of a legal capacity and is under protection would be worse than if that person had not been protected at all.

Furthermore, with regard to contracts concluded by persons with limited legal capacity, the aim of the provisions and the actual achieved effects diverge. The norms, in their present form, instead of protecting persons with a limited legal capacity against having their weaknesses abused by others, instead focus on allowing their statutory representatives to retain the right to control the actions of the protected persons, which may significantly affect the financial situation of the latter. This thesis stems from the historical analysis of the aim of the regulation on the effects of legal acts of minors and from the dogmatic analysis of the current provisions. In the Polish Civil Code, the validity of the act in question predominantly depends on the premises that can be fulfilled only by a minor's statutory representative – his consent (Art. 17–19 CC) – giving the minor a specific property item for unrestricted use (Art. 22 CC). The legislature significantly reduces the scope of independence for persons with a limited legal capacity, enabling them to only undertake trivial obligations – either falling into the category of contracts commonly concluded for minor everyday matters and those relating to the earnings of these persons.

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Therefore, the above regulation, despite a commonly indicated purpose, is not aimed at protecting persons with a limited legal capacity against having their lack of knowledge or experience abused. It precludes the persons with a limited legal capacity from incurring obligations and from disposing of their rights in instances in which this could interfere with the legal acts of their statutory representatives. As a result, this model neither meets the needs of persons without a full legal capacity (a questionable thesis about the lack of discernment and experience) nor does it correspond with the current socio-economic transaction reality (they actively participate on their own in market transactions, e.g., micropayments for games and applications, contracts "for data,"[323] creative activity,[324] etc.).

Only Art. 82 CC seems to be well suited for achieving its purpose (protection of autonomy) despite technological and social changes. This is the result of designing it as a protective mechanism so that it remains insensitive to external factors and focuses merely on subjective elements (person's state of mind). However, this conclusion also turns out to be unjustified if we take into account the second essential purpose of regulating defects of consent – namely, balancing the protection of autonomy against the protection of trust in trading. The specificity of the Internet environment significantly changes the situation of the addressee of the declaration of a person deprived of a full legal capacity or in a state that excludes conscious or free decision-making and expression of will. The addressee receives information that the declarant decides to make available to him and that is transferable via the communication system used by the parties. He cannot simultaneously verify the accuracy of this information by assessing it in light of additional data obtained and regardless of the will of the declarant. As a rule, he is not aware of the specific features of the contractor and cannot obtain information about them even if acting with due diligence. This deprives him of the possibility to adequately assess the risk related to contracting with a given person.

In addition, in the online environment, most activities tend to be automated. Consequently, even a person who has significant difficulties in expressing one's will in an understandable way (he is very young or acts in a state that excludes conscious or free decision-making) would be able to send a message that would not necessarily contain any special features. Thus, the addressee would not have any indication about the specific features or circumstances of the declarant.

323 Agreements where the consumer "pays" with his personal data. The model is discussed in detail in Chapter 6.4.5.

324 For example, blogging and vlogging, creating short films, comic characters, designs and icons of various types, etc.

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In consumer transactions, process of submitting and receiving declarations is automated for both parties. Normally, there is no functionality that would enable the entrepreneur to automatically refuse to conclude a contract once indications regarding the lack of contractual capacity of the contractor are revealed. The addressee of the declaration, even if its content or related information indicates that it was submitted by a person without a full legal capacity, would usually not be able to refrain from concluding the contract – commonly used systems send order acceptance responses automatically. Elements that have thus far balanced the legal situation of the parties and reduced the actual severity of the sanctions (the protection of one party in form of a sanction of invalidity or suspended effectiveness, the possibility of an a priori assessment of the risk related to the conclusion of a contract with a given person, and the possibility to refuse to conclude the contract) do not exist in consumer e-commerce.

Consequently, the protective mechanism becomes distorted in this environment. Theoretically, the protection of persons without a full legal capacity or those who are in a state that excludes free and conscious decision-making process is too broad and becomes burdensome for the protected. In practice, however, the *ex lege* effect would shape the situation in which the parties find themselves – but only if invalidity of the contract is desired by the protected and, possibly, his legal representative. On the other hand, due to the lack of knowledge about the specific features of the declarant, the right to set a reasonable deadline for contract rectification – provided for in Art. 18 § 3 CC – loses its significance.

The usefulness of the regulation on the consequences for lacking a full legal capacity and for statements of will made in a state that excludes conscious or free decision-making also turns out to be limited, together with its adequacy for fulfilling its statutory goal. At the same time, there are other legal mechanisms that aim to protect weaker entities, including minors, those who are incapacitated, and those acting in a state that excludes conscious and free decision-making and expression of will, against abuse from other market participants – which are sufficient and adequate in light of the above purpose.

These are instruments of individual protection (error, fraud, threat, and exploitation) and the mechanisms of standard consumer protection. In case of consumer contracts concluded via the Internet, this list should be supplemented with protective regulations that are applicable to distance contracts.

According to the legislature's assumption, the objectives of Art. 14–22 and Art. 82 CC regarding the instruments of individualized protection (error, fraud, threat, and exploitation) and of the institutions of standard consumer protection should coincide. In all these cases, the essence of the regulation is to protect the weaker person against having their weaknesses abused by other entities. Assuming that Art. 14–22 and Art. 82 CC are only intended to protect minors and those in special internal states against having their weaknesses abused, the cur-

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rent model would coexist together with protective instruments that have a similar function but a broader (error, fraud, threat, and exploitation) and intersecting subjective scope (consumer protection).[325]

Currently, however, the effects achieved by Art. 14–22 and Art. 82 CC remain incompatible with the goal set forth by the legislature. Code norms that regulate the situation of minors, the incapacitated, and those who are in a state that excludes free or conscious decision-making and expression of will do not protect these persons but exclude them from market participation and subordinate them to other market participants. Meanwhile, the purpose of these regulations is to protect these groups because of their specific vulnerabilities.[326] In order to achieve this purpose, the decision-making autonomy of these persons should not be limited but, instead, adequate tools that would prevent others from exploiting their weaknesses ought to be provided.

In light of private law principles, the sole risk that an entity in question might make a "bad" contractual decision cannot be considered to be a reason for limiting this person's autonomy. Such interference could be justified only in cases in which, due to a person's own irrationality, his personal or property interests could be significantly endangered by this choice.

The use of standardized protective instruments to counteract contractual asymmetry is a more reasonable solution than automatic invalidation of the legal act. These instruments are better suited for protection than sanctions of invalidity or suspended effectiveness of the act, as the latter are insensitive to the content of a declaration or to the contractual relationship.

The individualized protection instruments make it possible to avoid legal effects of a statement of will. In contrast, standard mechanisms primarily enable adjustment of the obligation to the purpose and interest of the consumer. This outcome, in principle, should be more favorable for a consumer who belongs to a group of particularly protected persons due to age, incapacitation, or state that excludes free or conscious decision-making. Depending on what would be more convenient for the protected entity, he could either void the contract (Art. 88 CC)

325 Similar observations are formulated in relation to minority incapacity doctrine and avoidance doctrine (misrepresentation, undue influence, duress and unconscionability – showing significant similarity to the Polish concept of legally relevant error and fraud, threat and exploitation) C. B. Preston and B. T. Crowthe. These are indicated as an alternative to the annulment of the contract due to the minor's under-age (infancy doctrine as a starting point) – it is a protective instrument and should only be used as a defense tool when the other party acts improperly to the detriment of the minor. J. L., Daniel, *Virtually…*, p. 258–259; C. B. Preston, B. T. Crowther, *Infancy…*, p. 71; C. B. Preston, *The infancy…*; M. A. Sargent, *Misplaced Misrepresentations: Why Misrepresentation-of-Age Statutes Must Be Re-interpreted as They Apply to Children's Online Contracts*, Mich. L. Rev. 2013/112(2), p. 307–322.

326 Chapter 2.3.1.1.

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or demand that the service be performed in the expected manner (according to the standard of legitimate consumer expectations). These mechanisms effectively protect the interests of persons with a potentially reduced ability to recognize the meaning of their actions.

The conclusion is that, currently, the above-listed alternative instruments are more suitable for achieving the intended purpose of Art. 14–22 and Art. 82 CC than the Civil Code regulations themselves.

Nonetheless, these mechanisms cannot be considered to be an alternative to the protection provided for in Art. 14–22 and Art. 82 CC because the latter are applied automatically. Yet, giving an absolute priority to legal mechanisms that force *ex lege* invalidity or suspended effectiveness is not an optimal solution. In the case of consumer e-commerce, in combination with the specificity of the internet environment (the possibility of effectively concealing the features that can determine the legitimacy of the application of Art. 14–22 or Art. 82 CC), it motivates minors, the incapacitated and the persons in a state that excludes free or conscious decision-making to exploit the other party's lack of awareness of the existence of these features.

This leads to the conclusion that a legal regulation, which limits the possibility of valid and effective conclusion of contract by persons with a reduced ability to recognize the meaning of their acts, ceases to achieve its purpose in the case of online consumer transactions. At the same time, it is still not possible to apply standard consumer protection nor individual protection instruments allowing to avoid the effects of a legal act.

2.3.5. The need to protect trust in the legal capacity of the other party

The concept of protecting trust regarding the legal capacity of the other from being exploited by a contractor is also reflected in private international law. It appears in the European legal system[327] under the influence of the judgment of the French Court of Cassation in 1861 in the Lizardi case.[328] The case concerned a Mexican who, being over 21 (the age of majority in French law at that time), concluded a sales contracts in France for a total amount of more than 695,000 gold francs. When concluding the contracts, he did not disclose that he lacked full legal capacity under Mexican law. The lack of legal capacity was pleaded by his

327 Art. 11 of the Rome Convention, then Art. 1.2 letter a in connection with Art. 13 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, p. 6–16), in Polish law, Art. 11 Private International Law.

328 www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007074337 (accessed: 31.5.2021).

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legal representative but the French Court of Cassation found the complaint to be unjustified.

The main problem was the friction between protecting the minor due to his lack of legal capacity, resulting from personal statute, and protecting the other party's trust. In the case at hand, both parties were in France at the time the contract was concluded. One of them was a foreigner. The personal statute and the *lex loci contractus* differed regarding the legal capacity of a natural person – the declarant did not have legal capacity under his personal statute but would have had it if the *lex loci contractus* was the point of reference in this regard. The court stated that the possibility of relying on personal status should be subject to certain limitations in such situations, otherwise there would be a constant risk of error or surprise for a person trusting the legal capacity of the other party.

Hence, while it is necessary, in principle, to verify the legal capacity of the other party, this obligation may be waived in particular circumstances. In this case, a foreigner would have had full legal capacity under French law. Furthermore, a French citizen should not be required to know the provisions of foreign law as they relate to minority, adulthood, and the scope of the obligations that foreigner can assume according to his capacity. Consequently, a citizen should not suffer negative consequences stemming from not knowing another state's laws. The trust of a citizen of the country in which the contract was concluded should be protected as long as he or she acted in good faith and not recklessly. In order to achieve this result, the Court indicated that, in the aforementioned circumstances, the *lex loci contractus* should be applied to assess the legal capacity of a natural person, instead of his personal statute.[329]

This solution was adopted on EU grounds, as evidenced by Art. 13 of the Rome I Regulation. In the case of an agreement concluded between persons who are in the same country, a natural person who would have legal capacity under the law of that country may rely on the lack of legal capacity resulting from the law of another country only if, at the time of contract conclusion, the other party knew or should have known about it if not acting negligently. This norm becomes applicable when: 1) there is a conflict-of-laws (a discrepancy between the personal statute of one of the parties and the law of the place in which the contract is concluded); 2) the contractual parties are in the same country at the time of its conclusion; and 3) the contractor of the person without a full legal capacity acted in good faith at the time that the contract was concluded.

329 M. Zachariasiewicz, in: K*omentarz do rozporządzenia Parlamentu Europejskiego i Rady (WE) no. 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I)*, M. Zachariasiewicz, Ł. Żarnowiec, M. A. Zachariasiewicz, M. Kropka, M. Jagielska, Lex/el. 2013, Art. 13, point 3.

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The concept of "legal capacity," under Art. 13 of Regulation, should be understood autonomously, regardless of the meaning attributed to this term in substantive law.[330] It should cover the features of a natural person that affect his competence to submit a statement of will. Nevertheless, Polish legal scholars indicate that circumstances affecting the validity of a legal act (a lack of awareness or freedom of the declarant) are excluded from this scope.[331] This reasoning seems to contradict the principle of the autonomous interpretation of EU acts.[332]

A problem similar to the one resolved in the Lizardi case also appears today in the context of online consumer contracts. As a rule, the legislature protects the person who does not have a full legal capacity or is in a state that excludes a conscious or free decision-making. However, the specificity of the technology used for communication (narrow scope of data that reaches the addressee of the statement, automatic submission of statements, etc.) makes the features that reveal the limited contractual capacity of this person unnoticeable to the other party. Even if the entrepreneur attempts to verify the consumer's age (posing a requirement to disclose the date of birth when registering on the website), the result of his efforts primarily depends on the will of the consumer. Could the fact that the entrepreneur acted in belief that the other party had a legal capacity exclude the protection of the party without a legal capacity despite the absence of a conflict of laws?

In the Lizardi case, the trader was convinced about the validity of the contract because he did not know the foreign law governing the legal capacity of natural persons in another country. At the same time, in light of circumstances of the case, he could not have reasonably been expected to know the relevant norms. Thus, it was concluded that he should not bear the negative consequences associated with his lack of knowledge. The contract was concluded in France, where a person with such characteristics would have a full legal capacity – hence, the error regarding the legal capacity of the other party was justified. Additionally, the seller was acting in good faith at the time that the contract was concluded.

In the case of an online consumer contract, the entrepreneur's conviction is related to the factual circumstances that suggest the legal capacity of the contractor and not to the law that is applicable to his personal status. However, in this scenario, it also does not seem appropriate to expect the entrepreneur to undertake activities that aim to establish the legal capacity of the other party, exceeding the scope of due diligence. Therefore, if the information provided to him by the other party in connection with the contract or to which he already has

330 L. D. Loacker, in: *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, ed. G.-P. Calliess, Alphen aan den Rijn 2011, p. 267.
331 M. Zachariasiewicz, *Komentarz…*, Art. 13, point 9.
332 L. D. Loacker, in: *Rome…*, p. 267.

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access does not indicate that the other party is or may be deprived of a full legal capacity, the error regarding the legal capacity of that party is justified. Moreover, the entrepreneur's mistake is often caused by false information that is directly provided by the protected person. In this case, the following paradox becomes particularly visible: the applicable Polish Code provisions protect the person who does not have a full legal capacity at the expense of the other party's trust – even if the other party acts in good faith while the protected person acts in bad faith.

The EU legislature, in order to avoid the above paradox, decides to supplement the conflict-of-law so that it also determines the substantive legal effects. However, this applies only when the contract is concluded between entities who are acting in the same country but the personal statute of one of them is, in principle, determined by the law of another state. The main purpose of the regulation is to guarantee protection to the person who could be surprised by the invalidity of the contract despite exercising due diligence. Currently, this risk appears not only in contracts with foreigners but also in the case of online consumer contracts.

The problems related to the existence of numerous invalid contracts in consumer e-commerce could easily be solved by setting a standard analogous to the Lizardi rule and applicable to consumer contracts concluded via the Internet. This would create the possibility of ascertaining the declarant's ability to conclude a specific contract based on the justified expectations of the addressee of that statement. For a contract to be valid, the following conditions should be met: 1) the declarant is incapable of independently submitting a non-defective statement of will of a specific content due to age, incapacitation (partial or total), or the state in which he or she is at the time of the declaration; 2) the addressee of the declaration, despite acting with due diligence, does not know and could not know that the other party cannot conclude the contract for the above-mentioned reasons;[333] and 3) the contract is concluded online.

The legitimacy of implementing such a norm into the legal system, which corresponds to the Lizardi rule but is also applicable to the Internet environment, depends on the acceptance of the premise that the differences between online and offline trading are so deep that these spheres should be regulated separately.[334] Hence, it could be claimed that, online (as is the case in the transactions between entities with different personal statutes), it is unjustified to burden the addressee of the statement with the risk related to the declarant concealing his inability to

333 For example, he uses a mandatory form in which there is a question about age and incapacitation – entering data suggesting the lack or limited legal capacity automatically prevents or restricts the scope of contracts that may be concluded by such a person or a personalizing mechanism that allows to detect behavior of a person which deviate from the standard actions taken by such or this particular user.

334 Chapter 1.3.1.

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contract. Consequently, an exception to the standards that govern the ability to enter into a contract by private law entities should be set.

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3. Lacking intention to produce legal effects

This part of the analysis focuses on one of the classic interpretation questions, namely, when is it possible to assign legal effect to a message that, although it may objectively be perceived as a statement of will, is not an expression of the will of the subject to whom it could be assigned?[335] There are two aspects to be considered. The first is related to the rules of assignment: When can a given message be attributed to a given person and when should it be treated as if it came from him? The second concerns liability: When and to what extent should a person be responsible for expectations that another person's message has triggered in the minds of different market participants?[336] Assigning communication to a specific person introduces the possibility of classifying it as a statement of will.[337] Alternatively, it can be assumed that the person to whom a given message can be attributed is liable in tort for any damage caused by this statement.

Relevant in this respect are Art. 65[338] and Art. 83 § 2[339] CC. Both norms define the scope of situations in which a communication that, owing to the lack of will of the actor, does not constitute a statement of will, but nevertheless produces legal effects because another private law entity believed in it.[340]

335 This applies in all the situations in which a person who comes into contact with a given message may reasonably recognize that as coming from a specific person.

336 Possible attribution criteria: declarant's awareness (F. Studnicki, *Działanie…*, p. 100, 102; A. Kozaczka, *Błąd…*, p. 16; S. Grzybowski, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, Ossolineum 1974, p. 471; Z. Radwański, *Wykładnia oświadczeń woli składanych indywidualnym adresatom*, Wrocław–Warszawa–Kraków 1992, p. 24), inducing trust (A. Jędrzejewska, *Koncepcja…*, p. 190; M. Gutowski, Z. Radwański: *System Prawa Prywatnego*, Vol. 2; *Prawo cywilne – część ogólna*, ed. Z. Radwański, A. Olejniczak, 3rd ed., Warszawa 2019, p. 35–38).

337 M. Gutowski, Z. Radwański: *System…*, p. 40.

338 Provision on interpretation.

339 Provision on legal consequences of declarations of intent made to another party with his approval for the sake of appearances.

340 F. Zoll, *Klauzule dokumentowe. Prawo dokumentów dłużnych ze szczególnym uwzględnieniem papierów wartościowych,* Warszawa 2004, p. 204; M. Gutowski, Z. Radwański: *System…*, p. 504.

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In traditional trade, assigning a message to a specific person is rather simple. Rarely the actions of one person are objectively perceived as the behavior of someone else and it is virtually impossible to establish *post factum* who really performed the act in question. In contrast, online it is often impossible to determine whose behavior created a particular message. Are the current rules on the effects of a communication that can objectively be regarded as a declaration of will well suited for consumer e-commerce, where the autonomy of the consumer is limited by his position in the market and the submission of declaration of will is automated?[341]

The chapter is divided into three parts. The first presents the current design of the institution of an ostensible declaration of intent and changes in the way it is perceived. The second assesses the rules of assignment. The third discusses elements limiting the negative effects of the inadequacy of the CC regulation to resolve typical issues related to messages that may be assigned to a specific person, despite the lack of intention to produce legal effects in the Internet environment.

3.1. The regulation on an ostensible declaration of intent and its application in consumer e-commerce

The regulation on an ostensible declaration of intent, although set out in Section IV of the Civil Code, entitled "Defects in declaration of intent", does not constitute a defect of consent.[342] As a rule, the statement of will must be founded on the will to bring about specific legal effects. This element is missing in the case of ostensible legal acts. Since, in their case, it is unnecessary to protect the trust of a person to whom such an act was directed, they are not regarded as declarations of will at all. This is a normal consequence of adopting the mixed theory in Polish

341 Assigning a declaration to the person whom the other entity claims to be is allowed when there is a particular risk of false identity (electronic trading) and the trust is founded on a strong basis (the actor used a secure electronic signature). Before 7. 10. 2016: Art. 6 of the Act of 18. 09. 2001 on Electronic Signature, currently *a contrario:* Art. 21 f of the Act of 5. 09. 2016 on Trust Services and Electronic Identification (consolidated version, Joural of Laws 2020, item 1173 with changes). P. Machnikowski, *Prawne instrumenty ochrony zaufania przy zawieraniu umowy*, Wrocław 2010, p. 116.

342 Z. Radwański, *Wykładnia…*, p. 167 (modification of common semantic rules understood as a problem of interpretation, not appearances); W. Wąsowicz, *Obejście prawa jako przyczyna nieważności*, KPP 1999/1, p. 85; K. Mularski, *Pozorność oświadczenia woli. Zarys problematyki semiotycznej*, KPP 2007/3; T. Targosz, *W poszukiwaniu…*, p. 50; differently: B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 54; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej,* Warszawa 1999, p. 305; A. Jedliński, *Pozorność jako wada oświadczenia woli*, Rej. 2005/5, p. 67; A. Janas, in: *Kodeks…*, Art. 83, point 1; P. Nazaruk, in: *Kodeks…*, Art. 83, point 4; S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 83, point 1.

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law: in order to determine the content of the obligation relationship, the actual will of the parties should be examined, rather than the objective wording of the statements.[343] Only if it is impossible to decode the unanimous will of the parties can the objective interpretation be used.[344] The regulation on an ostensible declaration of intent is redundant in this respect.

Choosing the regulation of appearances in consumer e-commerce as the subject of analysis would be justified if its application were likely to bring about new legal challenges. Depending on the model adopted by the legislature to regulate the effects of a declaration submitted despite the lack of intention to produce legal effects and of the appearance of a declaration of will, its impact on the legal situation of consumers concluding contracts via the Internet may differ. In systems leaning toward the objective concept of a declaration of will, the need to regulate appearances may not arise at all (common law). In contrast, in systems where the volitional element is still present, the need to protect trust is well recognized, either by the legislature or by legal commentators (German law system).

The combined (mixed) method of interpretation adopted in Polish law is based on both the subjective and the objective criterion.[345] On the one hand, it allows to take into account the autonomy of will of the declarant and, on the other, to protect the legitimate trust of the addressee of the declaration in question.[346] Internal will is a constitutive element of the statement of will, as long as it remains consistent with its external manifestation. The lack of compatibility between these two means that, in order to protect the trust of recipients of such a message, the meaning of the observable behavior should be given priority. This should, as a rule, lead to a rational and fair outcome. However, the wording of these provisions does not make clear whose perspective should be taken: the declarant's, the addressee's, their common context,[347] or the usual context of a situation of a given type.[348]

In the light of the above, supplementing the rules of interpretation by regulating the legal effects of an ostensible declaration of intent may be justified. The ostensible declaration of intent under Art. 83 § 1 CC is composed of three

343 See: Art. 65 § 2 CC. In contracts, the common intention of the parties and the aim of the contract should be examined, rather than its literal meaning.

344 Z. Radwański, in: *System…*, p. 139.

345 E. Rott-Pietrzyk, *Ogólne…*, p. 4–7.

346 S. Wyszogrodzka, *Dyssens w polskim prawie cywilnym*, KPP 2004/4, p. 965–966.

347 A. Jędrzejewska, *Koncepcja…*, p. 54–55.

348 A. Jędrzejewska, *Koncepcja…*, p. 181; W. Kocot, *Wpływ…*, p. 67, 73. These authors, analyzing the issues related to the application of the theory of legitimate expectations in the online consumer trade, argue for recognizing standard expectations ("generally accepted normative expectations"), not the actual expectations, justified in the context of a specific individual consumer.

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elements: the declaration is made solely for the sake of appearances, it is submitted to the other party, and its addressee agrees to perform the legal act to create the appearance. Only if these conditions are met, a third person who acted based on the appearance of the legal act and who thereby acquired a right or was released from an obligation shall be protected.[349]

The Internet environment does not affect the possibility of fulfillment of the conditions set forth by Art. 83 CC. At best, it brings about some differences in terms of the medium through which the participants of an ostensible act operate or the aforementioned legal act of a third person is performed. As a result, there are no problems specific to the application of Art. 83 CC in cases when the declaration is made online.

Such a conclusion is justified if the institution of the ostensible declaration of intent is understood as a normative defect of consent, and not as a manifestation of the legislator's desire to solve issues related to the determination of the legal consequences of behaviors that seem to be statements of will attributable to private law entities, despite the lack of will to bring about legal effects, if another person acts under the influence of these appearances. It is this broader approach to the issue that turns out to be crucial when assessing the usefulness of the institution in question in the case of consumer e-commerce. It reveals the tension[350] between the traditional, dualistic concept of the statement of will (the

349 Art. 83 § 2 CC. A declaration of intent made to another party with its approval for the sake of appearance shall be null and void. If such a declaration was made in order to conceal another act in law, the validity of the declaration shall be assessed according to the character of that act in law.

350 The regulation on defects in declarations of will is one of the basic instruments supporting the autonomy of private law entities (understood as the possibility of making free, informed decisions, free from pressure and the influence of erroneous beliefs). It is a protective regime adapted to the reality in which contracts are individually negotiated. In light of the development of mass contracting, the *acquis communautaire* has developed alternative protective mechanisms, not so much based on the assumption that the autonomy of the parties must be protected, but rather focused on providing the weaker party (usually the consumer) with the opportunity to make an informed contract decision. The key instrument adjusting consumer contracts to the consumer's justified (and objectified) expectations is the standard of the consumer's legitimate expectations. Once this standard is applied, claiming mistake or fraud is no longer possible. C. Twigg-Flesner, in: *Cases, Materials and Text on Consumer Law*, ed. H.-W. Micklitz, J. Stuyck, E. Terryn, Oxford and Portland 2010, p. 321–322; R. Schulze, F. Zoll, *European…*, p. 151; F. Zoll, *Rękojmia…*, Chapter II § 1, point II. This friction, noticed also in other normative systems, e.g., in the Spanish legal scholarship, is defined as occurring between *buena fe y autonomia de la voluntad* – good faith and the autonomy of will. It is recognized in the Spanish system that the tension between the principles of the autonomy of will and of good faith is growing in contract law. The initial assumption about the absolute primacy of the autonomy of will is rejected – it is argued that the limits of the autonomy of will are also determined by the trust of the other party, which gives the final shape to individual declarations of will. Spanish school of academic thought is presented comprehensively in J. M. Rivera Restrepo, *La Propuesta de Modernización del*

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constitutive elements being the internal will and its external manifestation) and the principle of protection of the legitimate expectations.

The mixed theory of statement of will is conducive to determining the content of contracts in accordance with the principles of equity. The primacy of trust over consensus serves, in particular, to protect the interests of the weaker party.[351] However, this theory does not explain the problem of the statement's attribution. In the case of consumer e-commerce, questions in this regard are relatively common – typically, when a message sent from an online account is not written by its owner. Could the current CC regulation apply in such cases? Is the protection of third parties provided for in Art. 83 § 2 CC sufficient and adequate in situations when the appearance of the statement of will is produced?

3.2. Submitting a statement with no intention to produce legal effects – defect of consent or lack of a constitutive element of the statement of will

Within the context of submitting a statement without the actual will to produce legal effects, three typical scenarios may be distinguished: *reservatio mentalis*, declarations not made seriously, and ostensible declarations of intent. Private law systems react differently to these appearances of acts.

3.2.1. The European context

An actor's lack of intention to produce legal effects may pass unnoticed by the legal system. This is the case in English law, which, while granting primacy to an externalized manifestation of will, has no concept of an apparent act.[352] This system clearly leans toward the objective concept of a statement of will[353] and tends to protect trust in trade over the autonomy of will. Situations in which a party acts without the will to produce legal effects are resolved under the ob-

Código Civil Español en materia de Obligaciones y Contratos de la Comisión General de Codificación, Sección Civil, en lo que se refiere al derecho de opción del acreedor por incumplimiento contractual, Revista de la Facultad de Derecho 2017/42, p. 249, 257–260 http://www.scielo.edu.uy/scielo.php?pid=S2301-06652017000100180&script=sci_arttext (accessed 31.5.2021).

351 W. Kocot, *Wpływ*…, p. 64.

352 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 48–49.

353 P. S. Davies, *Rectification versus interpretation: the nature and scope of the equitable jurisdiction*, CJLl 2016/75(01), p. 63.

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jectified principles of interpretation[354] and the rule of estoppel, which does not allow the party to refer to facts or circumstances contrary to its previous statements or actions[355] (taking into account compliance with the provisions on the purpose and nature of the act). When decoding the contract, the decisive factor is the formulation of contractual provisions and how they would be understood by a reasonable person, having as a point of reference the commonly accepted meaning thereof.

The context of contract conclusion (negotiations, declarations on the subjective purpose of the parties), which may indicate a discrepancy between the internal will of the parties and the wording of the contract, is not taken into account.[356] Subjective elements that indicate a different internal will can be considered during judicial[357] rectification of errors in the document in which the parties' agreement was recorded. As a rule, it is only then that it becomes possible to take into account the actual will of the parties, and not only its external manifestation in the form of a contract document. However, this exception is strictly limited – it is impossible to correct a document to conform to the will of the parties if a third party acted believing the content of that document.[358] The above rule is set aside when a sale and subsequent lease of the subject of that sale take place – in order to verify whether the agreement was a security transfer, the jurisprudence allows the internal will of the parties to be examined.[359] Generally, however, it can be concluded that, since the internal sphere is beyond the scope of legal assessment, the problem of the appearance of a legal act does not arise in English law.

The law of continental Europe seeks to regulate making declarations for the sake of appearances[360] – it is considered either an element related to the binding force of the contract[361] or a defect of consent.[362] The first solution appears, *inter*

354 P. S. Davies, *Rectification…*, p. 73.
355 J. E. Murray, *Murray on Contracts*, 4th ed., Newark 2001, p. 415.
356 P. S. Davies, *Rectification…*, p. 64.
357 A court procedure is appropriate in the event of a disagreement between the parties and to ensure a retrospective effect of the rectification.
358 Bell v. Cundall [1750] Amb. 101; Garrard v. Frankel [1862] 30 Beav. 445; Smith v. Jones [1954] 1 W.L.R. 1089; Thames Guaranty Ltd. v. Campbell [1985] Q.B. 210; P. S. Davies, *Rectification…*, p. 69.
359 P. V. Pantaleo, H. S. Edelman, F. L. Feldkamp, J. Kravitt, W. McNeill, T. E. Plank, K. P. Morrison, S. L. Schwam, P. Shupack, B. Zaretsky, *Rethinking the Role of Recourse in the Sale of Financial Assets*, BL 1996/52, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.pl/&httpsredir=1&article=2453&context=faculty_scholarship (accessed: 31. 5. 2021).
360 B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 50.
361 As in the Italian (Art. 1414–1417), Spanish (Art. 1276), and French Civil Code (Art. 1109 and following).
362 As in the Polish (Art. 83), German (§ 117), and Austrian Civil Code (§ 116).

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alia, in Italian and Spanish law. In the Italian legal system, the regulation of appearances is between the provisions on a contract for a third party and nullity, which suggests that an ostensible agreement should be seen as a specific form of the contract.[363] In contrast, the Spanish legislature included the regulation on appearances in the part of the code regarding the causality of contracts (Art. 1276 of the Spanish Civil Code). The apparent character of the act should be regarded as its defect[364] when a legal institution designed to be used for a particular purpose is applied to indirectly achieve non-typical effects.[365] Seen from the perspective of a legal *causa*,[366] an ostensible agreement turns out to be similar to a trust deed,[367] so-called indirect agreement,[368] and an agreement aimed at circumventing the law. In each of these scenarios, *causa*, understood as the objective, economic goal of this type of agreement, is changed by the parties. The fragmentary regulation of the appearances is found in the French Civil Code[369] – in this case, the institution of the ostensible contract was, in principle, created by legal academis writings.[370]

The apparent character of the act is perceived as a defect of consent in German, Austrian, and, partly,[371] also in Polish law. In all these systems, the legislature deems the ostensible declaration of intent invalid. What makes it a defect of

363 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 50.

364 An example might be a case where a car is sold at a significant discount in order to achieve the effect foreseen for the contract of donation (*causa donandi*).

365 F. Arnau Moya, *Lecciones de Derecho Civil II. Obligaciones y contratos*, UJI 2008/2009, p. 206 http://libros.metabiblioteca.org/bitstream/001/142/8/978-84-691-5640-7.pdf (accessed 31.5.2021).

366 F. Arnau Moya, *Lecciones*…, p. 206.

367 This is contrary to the view presented in legal academics writings, where the lack of similarity between the sham declaration and the fiduciary act is emphasized, stressing that in the latter "declarations of will as to the transfer of rights (obligations) and the emergence of an obligation between the parties to the contract actually corresponds to the decisions made by them" (judgment of the Supreme Court of 8.09.2011, III CSK 349/10, Legalis), even if their aim is to hide the identity of persons performing legal acts from other people.

368 The term is used to denote the use of a certain type of contract to achieve a purpose other than a sham (no appearances are created) or a fiduciary contract. Typical examples include: an indirect donation (a sales contract for a price so low that the item "sold" is actually given for free); proxy in *rem suam*, where the commercial proxy acts in his own interest, not only in the client's interest (the commercial proxy collects the debt on behalf of the client, but includes it in his propertyresulting in an effect typical of the assignment of receivables); *sociedad de favor* (*cómodidad*), a partnership, owing to the requirement for multiple partners, established with fictitious partners – usually family members – to avoid personal liability.

369 Art. 1321 and Art. 1321–1 of the French Civil Code.

370 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 51.

371 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 54; A. Jedliński, *Pozorność*…, p. 67; P. Nazaruk, in: *Kodeks*…, Art. 83, point 4; S. Rudnicki, R. Trzaskowski, in: *Kodeks*…, Art. 83, point 1; A. Janas, in: *Kodeks*…, Art. 83, point 1.

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consent[372] is the discrepancy between the internal will and its manifestation.[373] It is induced intentionally by the parties; thus, their decision-making process is undisturbed, which distinguishes this defect of consent from the others.[374]

In Austrian civil law, although the appearances are referred to as a defect of consent, their regulation is divided between two parts of the Civil Code – one dealing with the defects of consent (§ 869, sentence 3 ABGB[375]) and the other on interpretation of contracts (§ 916 ABGB[376]).

In the German Civil Code, the effects of a lack of will to bring about legal effects are explicitly regulated in Title II of the part entitled "Statement of Will". A distinction is made between a secret reservation (§ 116), appearances (§117), and a statement made not seriously (§ 118). The legal effects of *reservatio mentalis* depend on the knowledge of the person to whom the declaration is to be submitted – the statement of will is not invalid just because the declarant does not want what he says, unless the other person knows about this reservation. Likewise, a declaration of intent made for the sake of appearances to another person with his approval is invalid. The same applies to a declaration of intent made not seriously, since it is expected that the lack of will to bring about legal effects cannot escape the attention of the other person or persons. Such an explicit regulation was necessary because of the controversial concept of a statement of will – the subjective element still plays an important role in this legal system.[377]

The need to protect the trust of third persons gave rise to the development of the theory of appearance (*Rechtsscheintheorie*) in German law, complementing the theory of the declaration of will. The party's conduct, which, in the light of the principles of equity and reason, is objectively understood as an expression of the will aimed at producing legal effects, should be treated as such. The theory of appearance, having first appeared in the early 20th century in relation to securities,[378] evolved. The greatest impact on the development of the legal thought

372 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 50.
373 Differently: Z. Radwański, in: *System*…, p. 494.
374 B. Lewaszkiewicz-Petrykowska, *Wady*…, p. 54.
375 § 869. Die Einwilligung in einen Vertrag muß frey, ernstlich, bestimmt und verständlich erklärt werden. Ist die Erklärung unverständlich; ganz unbestimmt; oder erfolgt die Annahme unter andern Bestimmungen, als unter welchen das Versprechen geschehen ist; so entsteht kein Vertrag. Wer sich, um einen Andern zu bevortheilen, undeutlicher Ausdrücke bedient, oder eine Scheinhandlung unternimmt, leistet Genugthuung.
376 § 916. (1) Eine Willenserklärung, die einem anderen gegenüber mit dessen Einverständnis zum Schein abgegeben wird, ist nichtig. Soll dadurch ein anderes Geschäft verborgen werden, so ist dieses nach seiner wahren Beschaffenheit zu beurteilen.
(2) Einem Dritten, der im Vertrauen auf die Erklärung Rechte erworben hat, kann die Einrede des Scheingeschäftes nicht entgegengesetzt werden.
377 T. Targosz, *W poszukiwaniu*…, p. 39.
378 T. Targosz, *W poszukiwaniu*…, p. 38.

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was exerted, among others, by the following: Müller-Erzbach,[379] who underlined that the reason why the appearances should bind the declarant is that the declaration is submitted to the other person, thus creating a conflict between the interests of the sender and the recipient of the message, which should be resolved using the criterion of the value of the protected interest; Coing,[380] according to whom the culpability of the declarant is necessary to assign the appearances to him; the concept of "legally relevant behavior", developed by Flume,[381] which was based on the assumption that the act "fakes" declarations of will owing to the correctness of the possible effect – the interests of persons worthy of protection are taken into account. The fully developed theory was proposed by Canaris.[382] He turned it into a specific system of liability for breach of trust, under which there is a distinction between negative responsibility (a person whose trust is protected is to be put in such a situation as if he did not trust false appearances) and positive responsibility (this person is to be placed in such a situation as if what he trusted in was true). However, even if circumstances justify trust in a legal appearance, it does not make it become true (e.g., validation of an invalid contract). It can, nevertheless, make the person to whom the responsibility for creating a legal appearance is attributed liable toward a third party to the extent that the trust in the legal appearance was justified.[383]

3.2.2. Evolution of the Polish approach

Adopting the mixed theory of statement of will allows consideration of the postulate of protecting trust on the market and making it unnecessary to refer to other theories when assessing the legal effects of a declaration submitted, despite the absence or defectiveness of the will. Also, the legal consequences of *reservatio mentalis* and non-serious declarations do not need to be expressly regulated –

379 R. Müller-Erzbach, *Kundgebungen in fremden Interessenbereich,* ZAIP 1927/5–6(1), p. 567–579 https://www.jstor.org/stable/27871452?seq=1#page_scan_tab_contents (accessed: 31.5.2021).

380 T. Targosz, *W poszukiwaniu…*, p. 39–40.

381 W. Flume, *Das Rechtsgeschäft und das rechtlich relevante Verhalten*, AcP 1962/161(1), p. 52. W. Flume postulated dividing civil liability into three types, depending on the source of its origin: contractual liability (source: declaration of will), liability for legally significant behavior (no declaration of will, a legal appearance being the source of liability), and non-contractual liability. The weakness of the concept is revealed in the context of mass contracts: in order to justify accepting the existence of a declaration of will despite the lack of real awareness of the legal commitment, the concept was extended by an indirect reference to custom.

382 C.-W. Canaris, *Die Vertrauenshaftung im deutschen Privatrecht*, Munich 1971, p. 412, 428.

383 F. Zoll, *Klauzule…*, p. 209.

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except in the case of an act performed by a third party who believes a fiction created by persons concluding an ostensible contract to be true.

The Polish regulatory approach to situations where a declaration is submitted by a person without the will to bring about legal effects has changed over time, despite the early reception of the concept of a mixed theory of a statement of will (while work was proceeding on the Code of Obligations of 1933).[384] Four normative concepts can be distinguished as to the manner of regulating the legal effects of an act that has only the appearance of a declaration of will. These correlate with the stages of the development of the concept of the statement of will in Polish law.[385]

The first regulatory approach can be observed in the inter- and post-war period, when the earliest legislative project of the Code of Obligations[386] was prepared (quite similar to the Austrian Code in its approach).[387] In the Code of Obligations, the need to regulate the issue of appearance or its classification as a defect of consent was not challenged.[388] Cases in which the declaration was not serious (Art. 33 Code of Obligations) or was ostensible (Art. 34 Code of Obligations) were explicitly regulated. On the other hand, there were no provisions indicating the effects of *reservatio mentalis.* The justification was that only the defects of consent that influence the validity of the act should be explicitly addressed. Since *reservatio mentalis* does not influence the validity of the declaration in any way, it was argued that it should not be referred to in the legal provision.[389]

There was no equivalent of Art. 33 of the Code of Obligations in the General Civil Law Act, which rendered this argumentation no longer convincing. Hence, the *a contrario* argument from the provision on ostensible declarations was raised[390] – since the declaration made for the sake of appearances to the other person with his consent is invalid, the lack of this consent will result in the validity of the declaration in question. Nevertheless, it was stressed that the regulation of declarations that are not serious should have not been erased from the General Civil Law Act. Instead, a clear definition of the effects of *reservatio mentalis* (similar to the German regulation) should have been provided, in order to make

384 A. Jędrzejewska, *Koncepcja…*, p. 58.
385 A. Jędrzejewska, *Koncepcja…*, p. 56–84.
386 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań (Journal of Laws No. 82, item 598).
387 A. Jędrzejewska, *Koncepcja…*, p. 58.
388 It was assumed that the content of the contract is determined by the will "disclosed," which the other party may reasonably recognize as true, and not the internal will. The intention to produce legal effects was not considered an element constituting a declaration of will by the vast majority of legal authors. A. Jędrzejewska, *Koncepcja…*, p. 61.
389 A. Ohanowicz, *Wady…*, p. 37–38, 47.
390 A. Ohanowicz, *Wady…*, p. 48.

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the regulation of the defects of consent complete.[391] The above reasoning indicates that, in the 1950s, legal commentators, justifying the lack of an explicit regulation of the legal effects of statements made to another person in the absence of will to produce legal effects, but objectively perceived as statements of will, preferred arguments unrelated to the objective approach to the declaration of will. This is especially meaningful, because the second stage of the development of Polish legal scholarship (1950s and 1960s) was characterized by a strong emphasis on the will as a constitutive element of a declaration of intent.

As to the provision on the ostensible declaration of intent, the General Civil Law Act[392] introduced only minor editorial changes. The legal authors' strong attachment to theories that subjectivize declarations of will was also evident in academic papers[393] until the end of the 1960s. An awareness of causing attributable legal effects was identified as a key element of the declaration of will, without which the fiction of a statement of will was created.[394] The legal nature of silence is also worth noting – it could be considered a statement of will only if the person is aware of its legal effect.[395]

Once the current Civil Code entered into force, discussion ceased about the accuracy of the classification of creating appearances as a defect of consent and the explicit regulation of the acts having only the appearance of a declaration of will, despite the lack of will on the part of the sender to produce legal effects. No attempt was made to construct a general definition of defects of consent. Instead, their individual types were regulated, determining the normative nature of the defects of consent.[396] It was commonly accepted[397] that "Appearance is a defect of consent – which results, for example, from the title of section IV of the first part of the Civil Code".[398] It was argued that also this defect of consent consists in "the inconsistency between the act of will and its external manifestation, with the parties agreeing that the said declaration should not produce legal effects".[399] A special feature of this defect is that it may also apply to a legal act; hence, it would

391 A. Ohanowicz, *Wady*…, p. 48.
392 Act of 18 June 1950 General Civil Law Provisions of 1950 (Journal of Laws No. 34, item 311).
393 A. Wolter, *Prawo cywilne, zarys części ogólnej*, Warszawa 1963, p. 208; A. Kozaczka, *Błąd*…, p. 11–12.
394 A. Kozaczka, *Błąd*…, p. 13–14.
395 A. Kozaczka, *Błąd*…, p. 13–14.
396 Z. Radwański, in: *System*…, p. 486.
397 J. Ignatowicz, K. Stefaniuk, A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1999, p. 305; S. Rudnicki, R. Trzaskowski, in: *Kodeks*…, Art. 83, point 1; M. Gutowski, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–352*, ed. M. Gutowski, 2nd ed., Warszawa 2018, Art. 83, point 9.
398 Author's own translation. Judgment of Supreme Court of 9.12.2011, III CZP 79/11, OSNC 2012/6, item 74.
399 Author's own translation. Judgment of Supreme Court of 23.06.1986, I CR 45/86, Legalis.

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be more accurate to call it a defect thereof.[400] The trust of others is protected only when, as a result of an apparent act, a third party acquires a right or is released from the obligation, unless he has acted in bad faith.

A different legislative concept appeared in the draft of the new Civil Code by the Civil Law Codification Committee by the Minister of Justice and, after the Committee was dissolved, in the Academic Draft of the Civil Code. The idea of placing the regulation of the lack of will to produce legal effects in the section on defects of consent was questioned. It was suggested that this issue concerns the very essence of the statement of will, perceived precisely as an expression of the will to bring about legal effect.[401] This in turn stressed that the mixed theory, requiring the rational understanding of the acts of other people to be taken into account, allows assessment of most situations in which the declaration was submitted despite the lack of will on the part of the declarant (*reservatio mentalis,* ostensible declaration of intent or statements that are not serious).[402] The starting point is the claim that the apparent declaration is not in fact a statement of will within the meaning of the Civil Code, owing to the lack of its constitutive element, namely the intention to create legal effects. The lack of this norm-creating element means that such behavior cannot be considered a statement of will – it is only an appearance thereof.[403]

The existing regulation of appearances provided for in Art. 83 § 1 CC is, thus, a *superfluum.*[404] Since the declarant did not have the will to bring about legal effects, nor was the addressee reasonably convinced of its existence, there are no grounds at all for the declaration of will to come into existence. Therefore, since the declaration of will did not exist at all, the assessment of its validity is unjustified.

The fundamental issue is, however, the protection of third parties who are convinced that the legal act has been performed. Such a situation may occur when all participants in an event having the external features of a legal act do not actually have the will to bring about legal effect, but their behavior has made a

400 A. Jedliński, in: *Kodeks…*, Art. 83, point 11.

401 http://www.projektkc.uj.edu.pl/dokumenty/Projekt_Komisji_Kodyfikacyjnej_Ksiega_I_z_uzasadnieniem.pdf commentary to the Art. 52 of the Project, p. 65 (accessed: 31.5.2021).

402 http://www.projektkc.uj.edu.pl/dokumenty/Projekt_Komisji_Kodyfikacyjnej_Ksiega_I_z_uzasadnieniem.pdf commentary to the Art. 52 of the Project, p. 66. (accessed: 31.5.2021).

403 A. Cempura, A. Kasolik, *Metodyka sporządzania umów gospodarczych*, 3rd ed., Warszawa 2016, p. 34.

404 K. Mularski, *Zarys…*, p. 621; Z. Radwański, in: *System…*, p. 495. Differently, M. Gutowski questions the possibility of applying the sanction of invalidity based on the rules of interpretation (Art. 65 CC); M. Gutowski, *Nieważność…*, Chapter III § 4.1.

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third party believe that a valid legal act was performed.[405] The project[406] broadens the scope of protection.

First, it is not limited by the statutory concept of appearances, as described in Art. 83 § 2 CC. This means that the provision is applicable not only when a statement was made to another person, but also in the case of, for example, resolutions. One of the premises of ostensible declaration of intent under Art. 83 § 1 CC is to make a statement to the other party for the sake of appearances – the lack of this intention makes it impossible to invoke the protection provided for in § 2.[407] The project does not require the intention to simulate a legal act. It is sufficient if the actual behavior can be objectively understood as a legal act. Such a solution, being a consequence of an objectified approach to statements of will, increases the consistency of the normative framework.

In the project, the subjective criterion (bad faith) was replaced by the objective one (rationality).[408] In contrast, in Art. 83 CC, the third party's good faith is presumed. Good faith is understood as acting in confidence regarding the external manifestation of the will of the parties (the conviction that the act is valid and effective) and the unawareness of the lack of will to cause legal effects on the part of the parties. Since the key characteristics of the institution are that the actual will of the parties is kept secret from other persons, it is presumed that the second of the aforementioned conditions is met unless proven otherwise. Therefore, it is assumed that a person acted in bad faith only if he or she knew about the appearances of the legal actin question.[409]

Another difference between the project and Art. 83 CC is that the protection no longer depends on whether the protected entity performed a legal act. The need for protection arises not only once the third party performed a legal act under the false belief as to the appearances but, in general, when a person derives legal consequences from the apparent act. This offers protection for a person who could claim that he benefited from the apparent act (e. g., the beneficiary of an ostensible contract for the benefit of a third party). The consequence of such a solution is that it becomes irrelevant whether the behavior of the third party can be classified as performed free of charge.[410]

405 http://www.projektkc.uj.edu.pl/dokumenty/Projekt_Komisji_Kodyfikacyjnej_Ksiega_I_z_uzasadnieniem.pdf p. 66 (accessed: 31. 5. 2021).

406 Art. 52 § 3. The lack of will to bring about legal effects of all parties to a legal transaction may not be raised against a third party who reasonably considered that the act was performed. Author's own translation.

407 M. Gutowski, *Nieważność…*, Chapter III § 4.I.

408 E. Rott-Pietrzyk, *Klauzula…*, p. 62.

409 B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 76.

410 As postulated by B. Lewaszkiewicz-Petrykowska. B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 75.

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Also, part of the legal commentators challenged the qualification of the ostensible declaration of intent as a defect of consent – it was claimed that a separate regulation was unnecessary in this regard.[411] In the case of creating false appearances, there is no inconsistency between the will of the person and the actual statement.[412] Moreover, the function of this institution is different from cases of other defects of consent, in that it does not protect any of the participants of an apparent legal act.[413] In addition, partial appearances[414] do not preclude one of the parties from relying on other defects of consent (e. g., error or threat) and, consequently, avoiding the legal consequences of the dissimulated declaration of will.[415] In contrast, the other defects of consent cannot appear together.[416]

Recently, however, a new way of understanding appearances has been proposed. It is based on the assumption that the parties in the case use communication signs in a different way from that commonly accepted[417] in commerce.[418] Creating appearances under Art. 83 CC, therefore, consists in establishing new rules of interpretation, different from the regular ones,[419] which makes the message completely incomprehensible to average users of that language. There is no defect of consent as such, because the parties agree on introducing personalized interpretation rules for these particular statements of will. Yet, as a rule, in order to determine the actual content of the contract, it is always necessary to check whether the participants in the legal transaction did not agree on a meaning other than the one that can be decoded using commonly accepted semantic rules. If so, this particular way of using language signs must be applied for interpretation of this contract. The objective rules of interpretation become applicable only if the actual meaning of the parties cannot be established.[420] In the light of the above, it can be stated that Art. 83 § 1 CC is a *superfluum* to Art. 65 CC.

Adopting this understanding of the concept of appearances does not cause any difficulties if a third party wishes to prove that the legal act was ostensible and, as a result, invalid. Regardless of the approach, the simulated act does not have any legal effects (*de lege lata* – it is invalid and, under the presented theory, it

411 K. Mularski, *Pozorność…*, p. 627–630, 643; T. Targosz, *W poszukiwaniu…*, p. 50.
412 K. Mularski, *Pozorność…*, p. 628.
413 K. Mularski, *Pozorność…*, p. 628–629.
414 When parties create an appearance of one legal act in order to disguise another one.
415 K. Mularski, *Pozorność…*, p. 628.
K. Mularski, *Pozorność…*, p. 629.
416 B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 5.
417 K. Mularski, *Pozorność…*, p. 615.
418 K. Mularski, *Pozorność…*, p. 619.
419 K. Mularski, *Pozorność…*, p. 617.
420 Z. Radwański, *Wykładnia…*, p. 196.

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simply does not exist).[421] Also, the adoption of this theory does not in any way influence the legal situation of a third person convinced that he was released from the obligation or that he acquired the right as a result of an ostensible act. It means only that Art. 82 § 2 CC should be seen as a special rule of interpretation, constituting an exception to the rule provided for in Art. 65 CC.[422]

The manner of regulating situations when the declarant did not have the will to bring about legal effects is determined by balancing partially opposing principles: autonomy of will and respect for the true will of the parties, freedom of contracts and its protection, the principle of a market economy,[423] and the protection of trust in trade. In Polish law, the model for regulating appearances, strongly rooted in the theory of will and absolute primacy of the principle of the autonomy of will, is evolving toward a more objective approach. Attention is finally drawn to the need to take into account trust in trade. The analysis of the regulatory proposals concerning institution of appearances exhibits a tendency to depart, to a great extent, from the regulation respecting the internal will, with a very narrow delineation of the scope of situations in which a third party will be protected, to a more objective understanding of the statement of will. The rational conviction of a third party about the lack of appearances becomes sufficient to trigger protection. This means that the institution is being detached from the subjective context of the declarant (the agreement of the participants in creating appearances).

Therefore, the question remains whether the regulation of appearances, understood as the legislator's response to situations in which a declarant lacks will to produce legal effects, remains useful in the case of consumer e-commerce. What could be the consequences of adopting the provision in the form proposed under the Academic Draft of the Civil Code?

421 K. Mularski, *Pozorność…*, p. 638.
422 K. Mularski, *Pozorność…*, p. 639.
423 Judgment of the Supreme Court of 17.12.1998, II CKN 849/98, OSNC 1999/7–8, item 128.

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3.3. Submitting a statement of will in the absence of the intention to produce legal effects in the case of online consumer transactions

3.3.1. Attribution of the declaration

The problem of attribution of a statement,[424] which occasionally arises in traditional trading, is relatively common in e-commerce. It is often difficult to determine who actually made the declaration, even though it can easily be tracked back to a specific computer, e-mail address, or electronic account. In addition, the person who receives this statement has access to a limited scope of data – as a rule, it is only the information that the actor has decided to add to the message. The third problem is related to the growing automation in the online environment, appearing also in regards to the process of submission of statements of will. In e-commerce, a significant number of messages serve as declarations of will but cannot be considered statements of will in the classic sense owing to the vagueness of the will of the party to whom they might be attributed (for example, "I want the sniper[425] to act in the last second of the auction, placing a bid that is 1 cent higher than the previous one, but not higher than X, and if it is not possible to raise the offer, he should not bid at all.").

Such communication is designed to produce the same effects as traditional statements of will. On the other hand, the human factor is gradually playing a smaller role in the process of their construction. There may be different scenarios to be considered. The declaration may be submitted by the program, but its content and the timing of its submission may be decided by the person using it (as in the sniper case). However, it may also be the case that, although the content of the statement made by the program is determined by a person, neither the time nor the frequency of making such a statement is set (for example, "smart" washing machines ordering washing powder). A person may also specify the content of the declaration only in terms of scope, requiring the program to assess whether the conditions for submitting the declaration are met (as in the case of an auction program based on the model "beat the last bid by X, and the proposed price cannot be higher than Y, but if the price proposed in the last offer is higher than Y, do not bid"). It is also possible that the declaration is made by the program, while the human input is limited only to the determination of the goal

424 K. Mularski, Z. Radwański, in: *System…*, p. 35–42.

425 A program for submitting bids during an online auction, usually a few seconds before their end. The user who wants to use it enters the address of the auction site (or the item number) into the program, specifying the maximum price and when the program should send the bid.

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to be achieved (programs that autonomously choose the way of reaching the goal are currently used in driverless vehicles).

As a person loses his influence over the functioning of the program, the message generated becomes less and less similar to the traditionally understood declaration of will.[426] Polish civil law does not grant legal capacity to anyone other than natural and legal persons or unincorporated entities with no legal personality that are accorded legal capacity by specific regulations.[427] Computer programs do not fall into any of the aforementioned categories and thus are unable to make a statement of intent at all. Once a declaration generated by a computer program is assigned to a person, it may be considered a statement of will. Yet, from the perspective of the addressee of such a declaration, there are no observable differences between such a message and a traditional statement of will such as would alert the addressee to the fact that the message was generated by a computer system. Thus, having in mind trust in trade, it would be reasonable not to differentiate the legal effects of these two kinds of statements. Even a declaration generated by a highly autonomous program (in which the user specifies only the purpose that should be achieved) should, in principle, bring about the same effects in the legal sphere of the program user as a declaration made personally by him.[428]

In this part of the analysis, the difficulties related to the assignment of the message sent via the network are discussed.[429] Once these specific issues are considered, it becomes possible to assess the usefulness of the current institution of appearances in consumer e-commerce. Two typical scenarios need to be distinguished. In the first, the legal act is made by a person using another's account,[430] gaining access with the login and password that have been disclosed to him (the person could be instructed to perform a specific action or could act without instructions, either against the will or without the knowledge of the owner of the account). In the second scenario, the act is performed by a person

426 The existing concepts of the declaration of will do not construct a definition of a declaration of will in isolation from the behavior of the private law subject. R. Longchamps de Bérier, *Polskie prawo cywilne. Zobowiązania*, Poznań 1999, p. 68–69; J. Gwiazdomorski, *Próba…*, p. 60; A. Jędrzejewska, *Koncepcja…*, p. 65, 67, 71, 73, 219–220; K. Mularski, Z. Radwański, in: *System…*, p. 29–34.

427 M. Pazdan, in: *System…*, p. 1022.

428 J. Gołaczyński, *Oświadczenie woli składane przez sztuczną inteligencję*, in: *Prawo sztucznej inteligencji*, ed. L. Lai, M. Świerczyński, Warszawa 2020, Chapter IV.5.7. On the possibility of granting some computer programs legal capacity and exceptions, in which the operation of the program will not cause legal effects on the part of the person using it, see: Chapter 4.5.1.2.

429 The other two factors will be discussed in the section on the standard of legitimate expectations.

430 The term "user's account" is broadly understood as individual communication mechanisms: an e-mail inbox, an account on the internet portal, or a configuration account of the program submitting the statements.

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who, without the user's consent or knowledge, gains access to the user's account. The usefulness of the current code-based regulation of appearances is assessed in the context of these two models. The main arguments for a normative intervention, especially in relation to consumer e-commerce, are formulated.

3.3.1.1. Current legal situation – a reflection on the theory of legal appearances

The first of these scenarios has already been discussed in Polish jurisprudence.[431] In this case, the father entrusted his son to put the vehicle up for sale via an online sales platform (an auction) without specifying a minimum price. Once the first bids were made, the seller added the reserve price. The winner of the auction demanded the vehicle to be delivered and was ready to pay the winning price, which was lower than the seller's minimum. The seller refused, arguing that his son was acting as an attorney and had exceeded his mandate. In contrast, the courts of the first and the second instance ascertained that the son was acting as a messenger.

The fact that the seller provided his son with the login and password to his account, entrusting him with putting the car up for auction, could support the thesis that the son was supposed to act as a proxy. On the other hand, the auction participants could not see that the person actually setting an auction was not the seller himself. The current provisions governing the institution of representation, including power of attorney, do not explicitly establish the principle of the public character of representation. Nevertheless, it is widely accepted[432] that a representative, when performing a designated legal act, should disclose that he is acting on behalf of another person. Anyone who concludes an agreement with another person acting through an attorney must be aware of that – the power of attorney must be made known to the third parties in order to guarantee the minimal security of private law transactions.[433] In addition, it was underlined that the son did not submit his own statement of will (as a proxy would do) but only passed on the parent's will.[434]

Thus, it should be verified whether the seller's son could have been acting as a messenger. The role of the messenger is to transfer, without alterations, someone else's statement of will to the chosen person. However, the non-disclosure of the

431 Judgment of the District Court of Lublin of 10.02.2011, II Ca 26/11, Legalis.

432 J. Grykiel, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–352*, ed. M. Gutowski, 2nd ed., Warszawa 2018, Art. 95, point IV.C.1; M. Pazdan, in: *Kodeks…*, Art. 95, point 3; M. Pazdan, in: *System…*, p. 634; P. Sobolewski, in: *Kodeks…*, Art. 95, point D.11; R. Uliasz, in: *Kodeks cywilny. Komentarz*, ed. M. Załucki, 1st ed., Warszawa 2019, Art. 95, point III.1.

433 S. Rudnicki, in: *Komentarz do kodeksu cywilnego. Księga Pierwsza. Część Ogólna*, Warszawa 1998, p. 233; Judgment of Supreme Court of 12.09.2003, I CK 60/02, Legalis.

434 P. Nazaruk, in: *Kodeks…*, Art. 95, point 2, 4.

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fact that the son did not act in his own name speaks against considering him a messenger.[435] While using his father's internet account, the son did not reveal his own identity: the other persons could, therefore, reasonably assume that the declarant was the person to whom the account from which the messages were sent was registered. Therefore, since the son did not correct them, it can reasonably be assumed that, claiming to be his father, he acted under his name.

To whom should therefore be assigned the declaration in question: the person who acted or a user to whom a password-protected account was registered? In Polish law, it is assumed that legal consequences directly affect the person operating under someone else's name.[436] Such an approach offers protection to the autonomy of will of the person under whose name a legal transaction was performed, at the expense of the one who acted believing in the false appearances. In the aforementioned case, the court decided, despite the theoretical incorrectness of such classification,[437] to recognize a person using someone else's internet account as a messenger, which allowed to thereby avoid the undesirable effect from the point of view of certainty in trading, effect.

It is possible to achieve a similar goal directly, by referring to the German[438] theory of appearances (*Rechtsscheintheorie*).[439] It allows the one responsible for the appearances to be established – the scope of his liability determined by justified belief triggered by the appearance in question. In this manner, although the problem of attribution of the declaration itself is not directly resolved, alternative rules that are formulated that mean liability for its consequences can be assigned.

That said, the question arises whether the liability for the consequences in this case means that the declarant is obliged to pay damages or that his legal situation is shaped by the declaration. This in turn raises the question whether, in Polish

435 B. Gawlik, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, 2nd ed., Ossolineum 1985, p. 748; Z. Radwański, in: *System…*, p. 512. At the same time, it is worth noting that some legal authors support a functional understanding of this institution, recognizing the means of communication (fax, computer program) as messengers.

436 Differently, for example, in German law, where part of legal commentators allow the assumption that legal effects arise directly on the part of the person whose name was used, if it is in accordance with the will of the other party, and if the person under whose name the actor was acting is the principal of the actor or confirmed the given activity. M. Smyk, *Pełnomocnictwo według kodeksu cywilnego*, Warszawa 2010, p. 285–286.

437 M. Giaro, *Glosa do wyroku z 10. 02. 2011 r., II Ca 26/11*, PiP 2012/2, p. 135.

438 On the possibility of transferring this theory to Poland or developing a similar one: T. Targosz, *W poszukiwaniu…*, p. 33. Although this theory is not unknown to the Polish legal scholarship (see also M. Giaro, *Glosa…*), it was not widely recognized. The discrepancy of the concepts formulated by German legal commentators with regard to the legal appearances allows the assumption that only when a coherent basis of the theory of the protection of legal appearances has been set can its practical application be considered.

439 M. Giaro, *Glosa…*, p. 136.

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law, the theory of appearances should give rise to negative liability (the person whose trust is protected should be put in a situation as if he did not trust – in this scenario, compensation claims in terms of negative contractual interest emerge) or to positive liability (this person is to be placed in a situation as if what he trusted in corresponded to reality – in this scenario, a claim for performance arises).[440]

The argumentation presented in legal academic writings supports the adoption of positive liability: "Whoever uses another's password creates the appearance of legitimacy, and the statement he gives has the legal appearance of authenticity of authorship, i. e., the appearance that the author is the legitimate holder of the password."[441] This means that someone who acts in good faith, trusting the appearances thus created, should be protected. He should find himself in the position as if the legal situation he thought to be true was indeed true at the time of the act in question. Thus, the declaration should be assigned directly to the owner of the account.

The main issue related to the theory of appearances it that it is difficult to say what the appearance should be like in order to justify the liability of the person who is responsible for its creation.[442]

This theory also turns out to be inappropriate when the action is performed by a person who, without the user's consent or knowledge, gained access to his account. Therefore, it is proposed[443] to limit the applicability of such an assignment principle to situations where the owner of the account is at least indirectly responsible for the appearance (he disclosed – voluntarily or by omission – the data enabling another person to log in to his account). This does not exclude the user's recourse to claims against a person acting under his name. If the use of the account by another person was not related to its improper protection by the user, the latter should be able to extricate himself from the effects of the action performed under his name, proving the unauthorized use of the password.[444] The statement should be assigned to the person who really sent the message.

440 This is how the guarantee of public faith in the land and mortgage registers works. Thus, although the appearance does not become true (e. g., the disposer does not acquire the right of ownership, the declaration of will does not come into existence), the occurrence of a state that justifies trust in this appearance produces the same effects as if the appearance concerned was true (effective acquisition of ownership by the person protected by the warranty).

441 Author's own translation. M. Giaro, *Glosa…*, p. 136.

442 F. Zoll, *Klauzule…*, p. 214.

443 M. Giaro, *Glosa…*, p. 136.

444 M. Giaro, *Glosa…*, p. 136.

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It would also be possible to limit the attribution of appearances to situations in which the person consciously created the appearance in question.[445] This approach leads to the same result as the mixed concept of a statement of will. In Poland, more lenient criteria for attribution could only be allowed by analogy, if referring to a specific provision.[446]

Some of the legal authors assert that the general (not limited to securities) theory of legal appearances has not been developed in Polish law to the extent that enables its practical application,[447] apart from the situations explicitly provided by law (e. g., Art. 83 § 2, Art. 97, Art. 105, Art. 169, Art. 464 CC).[448] In these instances, however, as detailed and exhaustive regulation already exists, there are no grounds to refer to the general assumptions of the theory.

According to another view, the theory of appearances is directly linked to the principle of the protection of trust.[449] It is stressed that the theory of legal appearances is the cornerstone for most of the theories on the legal acts.[450]

> "When defining the concept of a statement of will, one accepts the theory of trust, and then the liability of the person to whom the effects of the declaration are attributed arises precisely because this person caused the legal appearance of the declaration and therefore should be treated as if he submitted such a statement of will."[451]

Both the theory of appearances and the code-based institution of appearances serve only to reinforce the general rule: a person can be held responsible for the appearance that he created. The fact that a person, through his carelessness, submitted a declaration of will to another private law entity, also in the light of a mixed theory (based, after all, on the objective theory and the theory of trust), justifies assigning that declaration of will to this particular actor.

The discrepancy between the scope of cases where the mixed concept of the declaration of will applies and the scope of situations covered by the theory of legal appearances becomes obvious when the principles of assigning responsibility for appearances caused either by the declarant and a third party or by a third party only are examined. In light of the mixed theory, the appearance of a

445 T. Targosz proposes a division according to the criterion of conscious creation of appearances. T. Targosz, *W poszukiwaniu…*, p. 54.

446 T. Targosz claims that Art. 169 § 1 CC can be an example thereof (possession as a state that justifies trust in the apparent right to dispose of a thing). However, this is an exception to the rule provided for by statute that no one can transfer a right that is not his or hers, and as such it cannot be interpreted extensively or applied by analogy. Therefore, the fact that the password has, for example, been stolen or lost will not lead to liability within the limits of the positive contractual interest. T. Targosz, *W poszukiwaniu…*, p. 57.

447 T. Targosz, *W poszukiwaniu…*, p. 57.

448 T. Targosz, *W poszukiwaniu…*, p. 59.

449 F. Zoll, *Klauzule…*, p. 204.

450 F. Zoll, *Klauzule…*, p. 214–215.

451 Author's translation. F. Zoll, *Klauzule…*, p. 204.

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declaration of will must be caused by the acts of the declarant in order to assign it to him. Thus, if the declarant and the third party acted together and their joint action created appearances, the declarant may be held liable for the results of their actions. The problem arises if the appearance was caused by the action of another person but its creation was possible only thanks to the prior behavior of the person under whose name the act was taken.

The mere fact that the person under whose name the act was performed did not exercise due diligence (did not log out of the electronic account, saved the password on a public device), which allowed a third party to submit a statement under his name, does not justify assigning this statement to that person (the appearance is caused directly by the action of somebody else) or even liability for the statement in question. This is so because of Art. 361 § 1 CC, according to which the person is liable only for the normal consequences of the act or omission from which the damage resulted. Here, first, the damage will not be caused by failure to log out, but by the actions of another person. Second, it is doubtful whether having a statement of will sent from one's account by another person is a normal consequence of not logging out of the account by its owner. *A minori ad maius*, according to the Polish law, it is impossible to assign the appearance of a declaration of will to a person who acted with due diligence if the appearance was, in fact, created by someone else.

This problem could be (depending on the adopted concept) solved differently under the theory of legal appearances. Currently, however, relaxing the criteria of attribution by reference to the theory of appearances is not permissible under Polish law, if the provisions that could be applied by analogy in a specific scenario do not provide for less stringent criteria of assignment.[452]

3.3.1.2. The new regulation of appearances in the Academic Draft of the Civil Code – the growing impact of the theory of legitimate expectations

The main question is whether the change of the provisions on appearances as proposed in the Academic Draft of the Civil Code[453] would make this institution more useful in consumer e-commerce.

Since it is proposed to separate the protection of a third party from the performance of a "sham act", it should be assumed that this institution focuses on protecting justified trust in the observable behavior that objectively appears to be a statement of will, regardless of whether the appearance was caused con-

452 T. Targosz, *W poszukiwaniu…*, p. 57.

453 Art. 52 § 3. The lack of will to bring about legal effects of all parties to a legal transaction may not be raised against a third party who reasonably considered that the act was performed. Author's own translation.

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sciously or not. In addition, the institution in this form not only does not guarantee the effectiveness of a legal action specified in the provision on appearances (made on the basis of an apparent declaration, for consideration, leading to the acquisition of a right or exemption from obligation by a third party not acting in bad faith), but it also protects legitimate trust in appearances (the justified expectations of a third party).

Provided that the proposed provision regulates an exception to the usual rules of interpretation,[454] it should not be interpreted broadly. As a result, it should not encompass the rules of attribution. Then the new regulation would fail to solve the above cases. If, on the other hand, it is regarded as an emanation of a general principle that is becoming increasingly more important in private law (namely, the concept based on the protection of legitimate expectations),[455] then consideration should be given to whether it could be applied also when deciding on the qualification of behavior as a statement of will, the interpretation of its content, and issues related to its attribution.

The rules on interpretation of a declaration of will should be applied not only when interpreting its content, but already at the stage of verifying whether a given behavior is a declaration of will.[456] However, whether it could be applied also to solving issues relating to the message's attribution is still a matter for debate. The general considerations about accuracy of the objective rules of attribution, presented along with the evolution of the concept of a statement of will in Polish law, need to be recalled here.[457]

The application of objective assignment rules leads to beneficial effects, both from the perspective of an individual and in the context of the organizational function of contract law. The risk associated with a specific action should be borne by the active party, not the person to whom the action is addressed.[458] This

454 Such an understanding would be in line with the theory of K. Mularskiego, according to which Art. 83 §2 CC is an exception to the general rules of interpretation. *Exceptiones non sunt extendendae* – extension of the protection resulting from the standard is unacceptable. Therefore, it is not possible to protect a person who acted in a belief in the appearances if the conditions of none of the protective provisions are met, e. g., by using analogy. The adoption of Mularski's concept means that the provision in question cannot be the basis for resolving the problems arising in the aforementioned scenario (in the above case, it seems that the account user acts on his own).

455 A. Jędrzejewska, *Koncepcja…*, p. 218–224; W. Kocot, *Wpływ…*, p. 65; F. Zoll, *Problem…*, p. 167–168; Z. Radwański, in: *System…*, p. 38.

456 This approach is, in principle, undisputed. Z. Radwański, *Zagadnienia ogólne wykładni oświadczeń woli*, NP 1986/9, p. 27–28; Z. Radwański, *Wykładnia…*, p. 22; A. Janiak, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna*, ed. A. Kidyba, 2nd ed., Warszawa 2012, Art. 65, point 2; differently: M. Safjan, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–449[10]*, ed. K. Pietrzykowski, 9th ed., Warszawa 2018, Art. 65, point 4.

457 A. Jędrzejewska, *Koncepcja…*, p. 185.

458 A. Jędrzejewska, *Koncepcja…*, p. 187.

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solution also appears desirable from a societal point of view – it does not lead to the atomization of society, but, by requiring the addressee's context to be taken into account, it fosters trust on the market.[459]

The concept of a declaration of will covers the behaviors that, in the eyes of the recipient of the message, indicate the will of the declarant. Then, when deciding whether a message is a declaration of will, the eventual fault of the declarant is irrelevant.[460] The declarant is responsible for causing a certain appearance, not because he can be accused of violating some standards (even due diligence) but in order to ensure that smooth transaction process.[461]

The above arguments do not explicitly answer the question whether the concept of legitimate expectations can be applied in a situation where a statement made by a given person appears, in the eyes of other entities, to be a statement made by someone else. At the same time, however, the indicated benefits resulting from the application of objective assignment rules at the stage of assessing whether a given behavior constitutes a declaration of will also appear in the context of the search for a person responsible for the message, if the declaration causes in others a justified expectation as to the person of its author.

Let us return to two typical situations that constitute the background of the analysis. Extending the concept of legitimate expectations to include assignment rules leads to the following. Regardless of how a person who made a declaration of will under someone else's name gained access to the other's account, a declaration of will sent from a secured account will be assigned to the person to whom this account is registered. The fault of the owner is irrelevant. It does not matter whether the person entrusted the login and password to another entity, whether he was careless, or whether, despite due diligence, a third party hacked into his account. In all these cases, the communication will be attributed to the owner of the account.

Broadening the concept of legitimate expectations so that it covers also the issue of attribution increases certainty in consumer e-commerce. It reduces the risk related to the authorship of a message sent from a source assigned to an individual person (secret login and password).

Important reservations regarding the above concept may be formulated in relation to the second typical scenario (hacking into another person's account despite the due diligence of its owner). If someone impersonates another person without his knowledge and consent (e. g., identity theft), then, in the light of the proposed theory, the legal consequences of statements made by someone else will be borne by the person whose identity was stolen.

459 A. Jędrzejewska, *Koncepcja*…, p. 187–188.
460 A. Jędrzejewska, *Koncepcja*…, p. 188–189.
461 A. Jędrzejewska, *Koncepcja*…, p. 189.

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It is indicated that such a person could seek protection of his interests in a recourse complaint[462] against a person acting under his name.[463] The practical value of this argument is limited, owing to the difficulties in identifying a person acting under someone else's name – the chances of getting satisfaction in this way are relatively small. In addition, determining the legal basis for such claims may also be a problem, especially when it is not possible to prove the damage (the contract, though unwanted, will not be unfavorable for the person under whose name it was concluded) – economic or ethical motivation alone does not give rise to a claim. In practice, therefore, this means transferring the risk associated with the use of an account by another person from the addressee of such a message to the person who decides to use a given tool (electronic account, e-mail, etc.).

Alternatively, if the security of the system would not be sufficient in the light of the market standards, the *in solidum* liability of the hacker (*ex delicto*) and the person providing the account service for improper performance of obligation can be considered. Polish law lacks the general concept of a further causal link that could bring to justice not only the direct perpetrator of the damage but also the person whose action allowed or led to the damage caused by the direct perpetrator. Thus, the basis for claims in these situations may be Art. 376[464] or 441 § 2 and § 3[465] CC, applied by analogy.[466]

The question is whether the broad approach to the standard of legitimate expectations, including objective attribution rules, may lead to a solution unfavorable to the consumer in the case of e-commerce. The theory of legitimate

462 In a broad sense, covering claims for damages (*ex contractu, ex delicto*) of the debtor who, after satisfying the creditor, tries to obtain compensation from a third party.

463 Recourse claims against a person acting under someone else's name may, depending on the circumstances, be based on contractual provisions (the actions of the person using someone else's account are not consistent with the contract between him and the entity entrusting him with passwords) or tort (identity theft). M. Giaro, *Glosa…*, p. 137.

464 § 1. If one of the joint and several debtors has performed the obligation, the contents of the legal relationship among the co-debtors shall be decisive for whether and in what part he may demand the refund from the co-debtors. If nothing else follows from the contents of that relationship, the debtor who has performed the obligation may demand the refund in equal parts.

465 § 2. If the damage was a result of an act or omission on the part of several persons, he who redressed the damage may demand from the remaining persons the refund of the appropriate part according to circumstances, especially according to the fault of a given person and the degree in which the latter contributed to the emergence of the damage.
§ 3. He who redressed the damage for which he is liable in spite of a lack of fault shall have a recourse claim to the perpetrator if the latter is guilty of the damage.

466 The Supreme Court allows the application, *per analogiam*, of Art. 441 § 2 and § 3 CC to the recourse claims. Judgment of the Supreme Court (7 judges) of 25.03.1994, III CZP 5/94, OSNCP 1994/7–8, item 145; judgment of the Supreme Court (7 judges) of 21.10.1997, III CZP 34/97, OSNC 1998/2, item 19; judgment of the Supreme Court of 27.04.2001, III CZP 5/01, OSNC 2001/11, item 161.

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expectations is not based on responsibility for appearances combined with the principles of attribution (lack of materialization of appearances, negative or positive liability for its consequences). Here, the objectified approach to the declaration of will, which encompasses justified expectations (when someone's behavior raises a justified expectation as to its meaning, the behavior acquires this meaning), is the starting point. Therefore, assigning a declaration actually made by another person to the owner of the account will change the legal situation of the latter according to the content of that declaration. Thus, the person under whose name the declaration was made is put in the legal position as if he had made the declaration himself.

That person may therefore exercise his statutory right of withdrawal, thus avoiding what he believes are the negative consequences of the declaration in question. Such a protective mechanism seems sufficient when the person acting under someone else's name is, for example, a child of that person, but not in the context of identity theft. This broad approach to legitimate expectations will lead to unfavorable consequences for the consumer when, for example, somebody concludes a bank account agreement under other's name and then withdraws the funds as an overdraft. The consumer will therefore have to bear all costs related to the reimbursement of these funds and pay fees related to the maintenance or closure of the account.

This leads us to the conclusion that adopting a broad concept of legitimate expectations, including objectified assignment rules, brings about undesirable consequences. It deprives the private law subject of the indirect protection traditionally provided for by the rules of attribution in situations where it is impossible to identify the person acting under someone else's name, and the behavior of the person under whose name the act was performed is perfectly correct in the light of the principles of the private law (due diligence did not protect him from identity theft). Suitable remedies could be achieved by adopting a broad concept of legitimate expectations, including attribution rules based on the fault criterion.[467]

3.3.1.3. Attribution of the declaration and the institution of appearances – a proposed solution

In the context of consumer online transactions, the adoption of the proposed concept of legitimate expectations, covering the assignment rules based on the criterion of fault, seems to be more justified than creating exceptional provisions detailing the theory of legal appearances.

467 Understood as the objection that, under given circumstances, a person should have behaved in accordance with a certain standard and objectively could have done so but decided not to.

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First, it allows a contractual relationship to be established – each party may demand contract performance in addition to claiming damages in terms of a negative or positive contractual interest. Second, the consumer retains a statutory right to withdraw, which in most cases should be sufficient to avoid any legal consequences of the attributed declaration of intent.

Adopting assignment rules based on the fault criterion does not increase the risk of using electronic means of communication (objective assignment rules mean that a person using, for example, an e-mail account must reckon with the fact that he will bear all the consequences of unauthorized use of this account). The fault criterion permits assignment of a message also when the person using an account is not aware that his behavior differs from generally accepted standards, because, for example, he does not use electronic means of communication on a daily basis (a "reasonable person" model would be the point of reference when verifying whether the behavior of the account owner was faulty). At the same time, application of this theory unjustifiably burdens the person to whom the account is registered, provided that he acted with the due diligence.

In the presented model, the sanction for failure to exercise due diligence is the assignment of a statement of will. The main difficulty in practice would be to define criteria for due diligence *ad casu* (measures that constitute due diligence vary depending on the context). These criteria should allow to decide in each case whether, in a given factual state, the behavior of the person to whom the message may be assigned justifies holding him responsible for appearances.

Numerous arguments speak in favor of this approach. It is ethically justified to see the freedom of a person as correlated with responsibility for his actions.[468] Also, the statement of will is a social instrument, intended for communication by members of the community.[469] Limiting the freedom of individuals by disregarding the subjective understanding of a declaration of will is beneficial for them, because it protects their trust when they become addressees of someone else's statements – only then are they able to make autonomous decisions regarding their legal sphere.[470] This favors the formation of social bonds, preventing the atomization of society.[471]

An alternative solution could be liability for causing damage under the tort regime. Here, the starting point is the assumption that the message, in order to constitute a statement of will, must indeed come from the person indicated in it as its sender.[472] Therefore, it is not possible for someone else's behavior to lead to an effect such as the submission of a declaration of will by a designated subject of

468 Z. Radwański, *Teoria*…, p. 47; A. Jędrzejewska, *Koncepcja*…, p. 187.
469 A. Jędrzejewska, *Koncepcja*…, p. 189.
470 A. Jędrzejewska, *Koncepcja*…, p. 185.
471 A. Jędrzejewska, *Koncepcja*…, p. 187; K. Mularski, Z. Radwański, in: *System*…, p. 38.
472 F. Zoll (*et al.*), *Prawo*…, p. 203.

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private law.[473] Provided that the message does not come from that person, but causes the addressee's legitimate expectation that he is dealing with a declaration of will and, therefore, that addressee takes some action, it would be permissible to hold the person under whose name he was acting responsible for damage. The liability of the person under whose name the act was made would depend on the following factors:

- person X did not make a declaration of will,
- the appearance of a declaration of will by person X was created,
- the appearance was caused by the action of another person,
- this action would not be possible if person X had exercised due diligence,
- trust in appearances was the cause of a specific action taken by person Y,
- as a result of this action, person Y suffered damage.

This solution can also be challenged,[474] mainly because it favors breaking the contractual ties emerging between private law actors. The possibility of claiming damages arises only when a person to whom the declaration may be assigned did not act with due diligence. However, the issue is irrelevant from the perspective of the addressee of a declaration. Another question concerns the scope of compensation. It can be assumed that it covers either the negative contractual interest only or also the profit that this person would have had from the transaction.[475] Another issue is the difficulty of proof – particularly significant in the case of e-commerce (for example, the problem of determining whether the activity was performed by the person to whom the account is registered or someone else, since the account can be accessed from any device and the data enabling additional identification of the person logging in may not be available).[476]

Additionally, adopting this solution would result in inconsistency of the rules concerning declarations of will. The current norms regulating the effects of a statement of will provide for a general rule, according to which the negative effects associated with causing a legal appearance should be borne by the person

473 In the context of physical pressure (the case of raising someone else's hand during an auction in a wine cellar), see K. Mularski, Z. Radwański, in: *System…*, p. 41.

474 The argumentation formulated by A. Jędrzejewska in the context of the assignment rules based on the fault criterion remains valid also in the case of replacing the imputation penalty with a compensation penalty. A. Jędrzejewska, *Koncepcja…*, p. 190.

475 A. Jędrzejewska, *Koncepcja…*, p. 190.

476 For example, in the case of a gmail account, it can be seen that the account was accessed from another device – an alert is sent to the user, but it is not possible to determine whether it was made by an unauthorized person. Currently, tests in the field of behavioral biometrics are being carried out that may allow verification of the identity of the person logging in by comparing his behavior with the behavior of the registered owner of the account (e. g., how a given person moves the mouse, how he types on the keyboard). www.spidersweb.pl/2018/12/mbank-biometria-behawioralna.html (accessed: 31. 5. 2021).

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responsible for this appearance.[477] The negative effects can be understood in two ways: either as granting another entity the right to break the legal relationship, which was created thanks to his trust in the legal appearance, or the emergence of a contractual relationship that corresponds to the image of reality created in the other's mind by the appearance.

The wording of the Polish regulation on defects of consent suggests that the legislature opted for the first solution. Such a conclusion stems from Art. 88 CC, which allows the effects of a declaration of will made under the influence of a mistake or deception only to be evaded. However, the adequacy of this statement becomes easier to challenge as the standard of legitimate expectations develops. The rules on declarations of will should ensure protection of legitimate expectationsrather than lead to the materialization of an individual's will.[478] The standard of legitimate expectations is not a rule of interpretation applicable only at the stage of verification of the defectiveness of things, but becomes an inherent element in the present concept of a declaration of will in general.[479] If a person acts under the influence of an appearance for which somebody else is responsible or co-responsible (caused a mistake, knew or should have known about it but did not correct the declarant), the content of the contract will be shaped by the justified expectations of that person – and, therefore, by his belief in appearances.[480] Thus, the content of the contract should adapt to the expectations of the declarant; in this manner, the legal appearance should determine the content of the legal relationship.

A similar solution was adopted regarding making a declaration of will to another person for the sake of appearance. According to § 2 Art. 83 CC, the ostensible nature of a declaration of intent does not influence the effectiveness of a legal act against payment performed on the basis of an ostensible declaration if, as a result of the legal act, a third party acquires a right or is released from an obligation, unless he has acted in bad faith. This means that the appearance of a statement of will, responsibility for which can be attributed to a specific person, changes this person's situation in relation to the entity who acted in belief of the appearance. The person to whom the statement is attributed is put in such a situation as if the declaration of will was actually made.[481] Thus, also in this case,

477 Art. 65, Art. 83§ 2, Art. 84–86 in conjunction with Art. 88 CC, Art. 105. T. Targosz lists the provisions that may contribute to the protection of trust in the legal appearance: Art. 97, 105, 168, 164, 512, 515 CC. T. Targosz, *W poszukiwaniu…*, p. 50.

478 K. Mularski, Z. Radwański, in: *System…*, p. 38.

479 Chapter 4.4.

480 P. Machnikowski, *Prawne…*, p. 135.

481 B. Lewaszkiewicz-Petrykowska, in: *Kodeks cywilny. Komentarz. Część ogólna*, ed. P. Księżak, ed. M. Pyziak-Szafnicka, Art. 83, point 38.

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the appearance shapes the legal situation of the entity acting under the legitimate expectations that a valid declaration of will had been made.[482]

It seems that the exception to this rule is when a person acts under the influence of a false belief in the legal capacity of another person. Then, the legitimate expectations alone cannot lead the legal relationship to emerge.[483] A person who has acted in confidence in the image of reality in his mind will be entitled to claim damages only in terms of negative contractual interest.[484] The issue of legal capacity has been regulated separately by the legislature, by *ius cogens*; hence, the appearance cannot, in this particular case, lead to the assignment of a statement of will.[485]

Examples where the key purpose of the norm is to attribute the appearance of a statement of will to a specific person are Art. 97 and Art. 105[486] of the Polish Civil Code. Art. 97 CC[487] resolves the issue of attribution by granting primacy to the protection of legitimate expectations. A person active on the premises of an enterprise whose purpose is to serve the public shall be considered, in case of doubt, authorized to perform acts in law which are customarily concluded with persons availing themselves of the services of that enterprise. Thus, the entrepreneur is bound by activities performed on the premises by another person in accordance with the appearances.[488] He bears the full risk that somebody else will be acting on the premises as his representative. This approach is justified by the need to protect the trust of customers – it is unreasonable to expect them to verify the competences of a person active on the premises each time they want to conclude a contract.[489] On the other hand, such a legislative decision is a de-

482 However, it is indicated that the protected entity should be able to choose the legal consequences of his declaration – despite the fulfillment of the conditions set forth in § 2 of Art. 83 CC, that person should be able to invoke the nullity of that act if that was in his interests. B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 83, point 45.

483 P. Machnikowski, *Prawne…*, p. 115.

484 R. Longchamps de Bérier, *Polskie…*, p. 80–81.

485 Chapter 2.3.3.

486 If, after expiry of his authorization, an attorney-in-fact performs a legal act on the principal's behalf within the scope of the original authorization, the legal act is valid unless the other party knew or could easily have learned about the expiry of the authorization.

487 It is indicated that this construction can be seen as: an implied power of attorney (S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 97, point 1, 2), a statutory power of attorney (P. Nazaruk: in *Kodeks…*, Art. 97, point 1), an interpretation rule (W. Robaczyński, in: *Kodeks cywilny. Komentarz. Część ogólna*, ed. P. Księżak, M. Pyziak-Szafnicka, Warszawa 2014, Art. 97, point 1), or as a statutory assignment to the entrepreneur of the effects of actions carried out by a person active on the business premises (T. Targosz, *W poszukiwaniu…*, p. 51–52).

488 P. Pinior, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 97, point 1, 5.

489 S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 97, point 2.

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rivative of the assumption that the entrepreneur should exercise due diligence to ensure professional performance of the company's activities.[490]

The situation is similar in the case of a legal act performed by a representative within the limits of the original authorization but after its expiry. The arguments for this approach are the need to protect third persons, safety in the commerce,[491] and the protection of trust.[492] The sanction of assigning the effects caused by this declaration to the principal is also based on the assumption that, if one decides to use a representative, one should choose him with particular diligence. Attributing the appearance is risk-based[493] – the consequences of appearances should be borne by the person who, in principle, can prevent creation of this appearance.[494]

This leads to the following conclusion: adopting a solution according to which the message – which objectively may be perceived as a declaration of will but is not the manifestation of the will of the subject to whom it could be assigned – may be assigned to this person, provided that he is at least co-responsible for causing a legal appearance, does not contradict other norms of attribution. Such a model favors further development of e-commerce (it justifies acting in confidence in response to messages that may be assigned to specific users), without, however, leading to unjustified shifting of responsibility on to the person to whom the message may be assigned.

3.3.2. Situations typical for the Internet environment – mistakes at the time of concluding a contract

As submitting a statement of will is relatively easy online, it can often happen unintentionally.[495] A person who has accidently performed such an action may not be aware of it at all, or may be aware of his behavior but perform it mechanically (for instance double-clicking a given feature on the screen or causing a statement to be made because the hyperlink was placed in the same place in the popup window). Thus, this person, being not guided by internal will or not even being aware of what he is doing, may perform actions commonly considered as making a declaration of will. The legitimate trust of the addressee automatically

490 P. Pinior, in: *Kodeks…*, Art. 97, point 1.
491 P. Pinior, in: *Kodeks…*, Art. 105, point 1.
492 R. Uliasz, in: *Kodeks…*, Art. 105, point 3.
493 T. Targosz, *W poszukiwaniu…*, p. 52.
494 P. Machnikowski, *Prawne…*, p. 117.
495 On the effects of the clauses on web-wrap (browse-wrap) and click-wrap on concluding a contract, see: M. Jagielska, I. Rauch, *Klauzule abuzywne w umowach standardowo zawieranych przez Internet*, in: *Media elektroniczne. Współczesne problemy prawne*, ed. K. Flaga-Gieruszyńska, J. Gołaczyński, D. Szostek, Warszawa 2016, II.A.

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changes the legal qualification of the communication – it is perceived by law as a declaration of will.

Cases in which the declaration, owing to the lack of internal will or inconsistency between the internal will and its manifestation, will not produce legal effects or in which the declarant will be able to evade them are specified by the law. When the statement of will was made unintentionally, the legal basis for avoiding its legal consequences may be Art. 84 CC.

In order for the declarant to evade the legal consequences of a statement of will submitted (partly or fully) by accident, the declarant's mistake must be objectively noticeable by the addressee.[496] This condition will rarely be met – for instance, when the content of the statement of will in question differs so much from the content of statements usually made in such circumstances that the error should be obvious to the other party (e. g., consumer orders 10 identical pairs of shoes in the same size). The standard – typical wording of statements made under these kinds of circumstances – will be the point of reference.

The situation may differ when the addressee has specific data on the declarant and tools enabling him to monitor the declarant's activity (a personalization system). The key question is whether, in this situation, the fact that the entrepreneur stores data on potential customers means that he should be considered aware of certain characteristics of that consumer. This information is used by the professional when performing business activities (for example a decision to send an offer, shaping its content, or the time and selection of a communication channel).[497] Since the trader benefits from collecting and processing data about consumers, the onus of the obligations related thereto should also be on him. Provided that the professional has detailed information about a particular client, an atypical activity of the latter, one that seems unreasonable in the person's circumstances, should draw the entrepreneur's attention. Then, although the information closely related to the message will not indicate that the client acted under the influence of the error, the entrepreneur will know enough about the client's background to be able to detect or at least suspect the error. In these cases, therefore, the point of reference should be not the ordinary content of the statements made in such circumstances, but the standard content of statements made by a given person (if X always buys a cartridge for printer A and then purchases a cartridge incompatible with this printer, and the data in the entrepreneur's system does not suggest that X changed the printer).

The second type of situation in which the legal consequences of a declaration of intent made by accident may be evaded is related to causing a mistake to be made by the addressee. If the addressee shapes the active website in such a way

496 P. Sobolewski, in: *Kodeks…*, Art. 84, point 22.1.
497 K. Południak-Gierz, *Personalization of Consumer…*, p. 268.

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that it will be misleading as to its functionality (e.g., it gives no indication that clicking on a given hyperlink means ordering a product or consenting to the standard terms), then it should be stated that the error or mistake was caused by the addressee of the statement. The dereliction and untrustworthiness of the behavior of the addressee may, thus, limit the scope of application of interpretation rules resulting from the theory of trust.

Hitherto, situations in which a person mistakenly made a declaration of will have been relatively rare and the solutions presented above were seen as sufficient. Currently, however, as submitting a statement of will using various technological tools becomes easier (with tablets, smartphones, iPads, or other devices), the risk of submitting a statement by accident, unintentionally, or even unknowingly, increases. A consumer who forgets turn off the touch screen when sliding a device into his pocket may accidentally press the hyperlink, the activation of which will signify his will to conclude a contract.[498]

Bearing in mind these threats, a debate[499] has been initiated on the implementation of an additional mechanism, protecting the autonomy of a declarant's will, even when there are no grounds for claiming an error or a fraud. Some legal commentators argued that submitting a legal act by mistake by a network user is so easy in practice that a detailed regulation in this respect is necessary.[500]

Apart from the classic, individual mechanism of evading the legal effects of a defective statement of will, additional rules have been provided for a consumer who submits a declaration of will by accident.

Currently, in the context of input errors in the case of online consumer contracts, general preventive instruments for controlling the content of the

498 This is a simplification. Currently, in most cases, submitting a declaration of will in order to conclude a contract by a consumer is preceded by the requirement to complete the form, approve it, and then re-confirm the order generated after approval, e.g., in a separate window. In practice, it is also common to confirm the order by clicking the "Confirm Order" link sent by the entrepreneur after placing the order via the website.

499 *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Book 2, Study Group on a European Civil Code, Research Group on the Existing EC Private Law, Sellier 2008, II.–3:201, United Nations Convention on the Use of Electronic Communications in International Contracts, Art. 14 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-18&chapter=10&clang=_en (accessed: 31.5.2021).

500 It could require the implementation of a self-review mechanism that would allow the declarant to notice the mistake before sending the declaration or the double confirmation mechanism – the consumer would first accept the offer, which would result in a declaration of will, which, however, would be revocable until the consumer confirmed that acceptance. D. Kot, *Zawarcie umowy za pomocą elektronicznych środków porozumiewania na odległość (uwagi na tle projektowanych zmiana kodeksu cywilnego)*, ZNUJ PWiOWI, Kraków 2002/80, p. 73, 79, 92–95.

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declaration can be distinguished, as well as special instruments allowing the elements accidentally incorporated into the contract to be erased. The first category includes the common mechanism enabling the consumer to double-check the data for the order and the entrepreneur's obligation to confirm the order resulting from legal standards. Both should reduce the risk of submitting a declaration of will by accident. On the other hand, there are specific rules on the incorporation of standard terms, which allow for eliminating the possible influence of unintentional actions on the contractual relationship. Finally, there is the right to withdraw from the contract, allowing the consumer to terminate the *ex tunc* contractual relationship, without giving any reason.[501]

3.3.2.1. Confirmation system as a preventive measure

Guaranteeing the consumer the opportunity to check and, if necessary, remove mistakes made when entering data before placing an order (so-called input errors) was identified as being of pivotal importance during the debate on the regulation of contracts concluded via the Internet.[502] In the original draft of Directive 2000/31, the concept of handling error appeared. It was not a proposal for a different institution but a technical term adopted during work on the directive to denote errors in entering data into the order by the consumer. The notion of handling error was used before specifying the stage at which the consumer should be able to correct the content of his statement of will.

During the debate on Directive 2000/31[503] introduction of a two-step submission of a declaration of intent was considered. The idea was to add an extra obligation on the part of the consumer: in order to submit a statement of will, he would be supposed to approve the confirmation received from the entrepreneur. In this way, the moment of submitting the statement of will would be postponed until the second confirmation was sent by the consumer. Although finally this proposal was not accepted by the EU legislature, the model of double confirmation of orders found its way into e-commerce.

However, owing to the lack of legal regulation in this regard, there are no grounds for assuming that in such circumstances the legal action is suspended

501 W. Kocot, *Nowe zasady zawierania i wykonywania umów z udziałem konsumentów (I)*, PPH 20/11, p. 50.

502 The need to implement mechanisms that reduce the risk of input error and enable their correction was highlighted in: *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Book 2, Study Group on a European Civil Code, Research Group on the Existing EC Private Law, Sellier 2008, II.–3:201, United Nations Convention on the Use of Electronic Communications in International Contracts, Art. 14.

503 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) (OJ L 178, p. 1–16).

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until the second confirmation. *Lege non distinguente*, the consumer's statement of will is submitted the moment he sends the first message indicating the will to conclude a contract (depending on the way the website is organized – it can be either the offer or the acceptance of the offer). Distance contracts concluded by telephone are an exception to this rule. In this case, pursuant to Art. 8.6 of Directive 2011/83, Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member States may also provide that such confirmations have to be made on a durable medium.

Art. 11 of Directive 2000/31 imposed on the recipient of the order placed via the Internet an obligation to acknowledge its receipt without undue delay, by electronic means (such as by e-mail). An order or an acknowledgment of receipt is deemed received when the parties to whom it is addressed have access to it. A requirement directly aimed at eliminating input errors is included in recital 39 Directive 2011/83: it is important to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. The same requirement also appears in the normative text in Art. 8.2 first sentence Directive 2011/83, but is, however, limited only to those distance contracts concluded by electronic means that impose an obligation to pay on the consumer. Owing to the growing popularity of the "service for data" model, such a limitation may be seen as unjustified. Legal authors postulate applying the norm by analogy in the case of contracts under which the consumer is to perform a non-pecuniary obligation.[504] In the light of the purpose of the regulation, it is justified to impose the obligation to confirm the content of the order (or, more broadly, the consumer's declaration), regardless of whether the contract entails an obligation to pay or not and how its conclusion might benefit the entrepreneur.

It was considered crucial to ensure that the consumer was able to determine the moment when he assumed the obligation to pay the trader.[505] Thus, the entrepreneur is requested to shape the ordering mechanism in such a way that placing an order entails activating a button or a similar function, labeled in a readily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order en-

504 T. Czech, *Prawa konsumenta. Komentarz*, Warszawa 2017, Art. 17, point 7; I. Małobęcka, *Prawna ochrona konsumenta w sieci na przykładzie zagadnienia darmowych usług platform internetowych*, iKAR 2017/3(6), p. 35–36.

505 Rec. 39 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, p. 64–88).

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tails an obligation to pay the trader.[506] Failure to comply with this obligation under the Directive 2011/83 results in the consumer's not being bound by the contract or order.

The literal wording of the provision suggests that the EU regulation is unilateral – only the consumer is not bound by the agreement.[507] As a consequence, the consumer would be released from the obligation to pay, while the entrepreneur would still be obliged to perform the contract. Failure to meet the information duty would transform the contract into a gratuitous one. A similar issue has already been discussed in the context of Art. 6.2 Directive 93/13,[508] according to which unfair terms used in contracts concluded with a consumer shall not be binding on the consumer. Although the EU legislature expressly stipulated that the remaining part of the contract shall continue to bind the parties, if it is possible after excluding the unfair terms, it is assumed that, even if the provision specifying the price turns out to be an unfair contractual term, the conversion of the contract into a donation is not permitted.[509] In order to maintain the consistency of the legal system, or in the event of the entrepreneur's failing to inform the consumer about the obligation to pay, the possibility of converting a pecuniary contract into a free one should be excluded.

Alternatively, it could be assumed that the sanction of not being bound by a contract or an order means that the contract is not concluded: the failure to inform about the payment means that the declaration of intent made by the consumer and interpreted in accordance with his internal will does not correspond to the declaration of the other party. Thus, the trader's non-compliance with his information obligations makes it impossible for the consumer to submit a binding offer within a given electronic procedure.[510] In this approach, the discussed norm would constitute an unusual, standardized mechanism for protecting the autonomy of the consumer's will.[511] Regardless of whether the consumer was in fact aware of the pecuniary character of the contract, the legislation protects him from concluding a contract without being aware that it (despite its wording) entails an obligation to pay.

The national legislator takes this approach in the Act on Consumer Rights (ACR), providing that failure to fulfill the information duty will result in the

506 Art. 8.2 dir. 2011/83.

507 B. Kaczmarek-Templin, in: *Ustawa o prawach konsumenta. Kodeks cywilny (wyciąg). Komentarz*, ed. B. Kaczmarek-Templin, P. Stec, D. Szostek, Warszawa 2014, Art. 17, point I.1, p. 122.

508 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, p. 29–34).

509 Chapter 6.4.2.

510 T. Czech, *Prawa…*, Art. 17, point 25.

511 T. Czech, *Prawa…*, Art. 17, point 1.

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contract's not being concluded. Such a solution should not be considered beneficial for the consumer, as it deprives him of the possibility to claim the performance by the other party, even if, despite the entrepreneur's failure to fulfill the information obligations, he wants to remain bound by a contractual relationship.

The provisions in question are *ius cogens* – the effect provided for by the law occurs *ex lege*, setting aside the possibility for the consumer to appeal to the regulation of defects of consent.

Despite the above remarks, it can be claimed that the current shape of the national regulation, together with common practice, are conducive to reducing the number of input errors. The currently widely used model enables the declaration of intent to be corrected before it is sent. The obligation to confirm receipt of the order and formal requirements in case of distance contracts of Directive 2011/83[512] eliminate the risk of concluding a contract by accident, with a single click or by mistake, e.g., when browsing the website or reading product data.

3.3.2.2. The mechanism of incorporation of standard terms – remedying the influence of circumstances unknown to the party on the contractual relationship

The mechanism that provides for the elimination of the influence of actions taken unintentionally or by accident, on the content of the contractual relationship without its disruption is the regulation on the incorporation of standard terms.[513] Here, too, the provisions apply *ex lege*.

Properly delivered (made available)[514] – that is, in a way that makes it possible to store and reproduce them in the normal course of action – standard terms be effectively incorporated into the content of the contract. This premise includes

512 Art. 2, 2nd sentence dir. 2011/83.

513 The matter is governed by national law, for the purpose of the analysis a Polish private law perspective is taken, however the findings within this chapter tend to have a general character – the challenges related to the development of the consumer e-commerce are present regardless of the jurisdiction. On the different tactics applied by online entrepreneurs in order to assure that their standard terms bind the consumer see: V. Viglione, *Standard Terms Incorporation in The Global Market: A Holistic Analysis*, ERCL 2019/15(3), p. 281.

514 The prerequisite of making standard terms available is not different from the premise of their delivery under Art. 384 § 1 CC; the aim was simply to adjust the wording of the statutory requirement to the terminology appropriate for electronic data transmission. M. Pecyna, in: *Komentarz…*, Art. 384 § 4, point 3.

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two obligations: making them easy to read and making them available in a way that allows their storage and retrieval.[515]

In order to assure that the standard terms are easy to read, the entrepreneur must inform the other party about them, make them clear, unambiguous, comprehensible, and available. As a rule, this first obligation excludes the possibility of effectively incorporating standard terms without the consumer's knowing about them. Thus, the risk of including these provisions without the consumer's knowledge, by accident, is significantly limited. If the consumer has not been informed about the use of the standard terms by the entrepreneur, then the terms cannot be considered effectively delivered. The fact that a person using standard terms acted with due diligence when aiming to make the template available to the other party, in the event that this goal has not been achieved for objective reasons, e. g., technical issues, is irrelevant.[516] The risk of unreliability of the tools used and the chosen communication channel is borne by the proponent. It is the responsibility of the person imposing the pattern to provide it in such a form and manner that the other party can read it without taking any additional action. For example, sending a template in a format that cannot be supported by a standard file reader (currently, e. g., Adobe Reader) or opened by a web browser should not be considered sufficient. Also, the methods of delivering the standard terms, which, for technical reasons, may not be noticed by the user (automatic background download), should be considered insufficient.

Thus, in order to meet the premise of delivery, an entrepreneur should first notify a potential contractor about the existence and use of standard terms in a way that objectively eliminates the risk of overlooking such information. Each case of a justified error as to the existence of a pattern excludes its incorporation – the declarant is put in a situation as if the said mistake did not occur at all (since he did not know about the pattern, it is to be treated as non-existent).

515 The standard terms that are made available should be possible to be stored and retrieved in the normal course of action, without the need to install custom software or perform any specific activities. To fulfill this premise, it is not enough to place the template on the proposer's website, because he may in such a circumstance still have the possibility of interfering with its content after the conclusion of the contract. (Changes of the template may result from circumstances unrelated to the concluded contract – modification of the form of the entrepreneur's activity, amendment of the template because of new legal requirements coming into force, or a new commercial policy of the entrepreneur.) The purpose of the norm, on the other hand, is to provide the other party with permanent access to the standard terms in their original form. Thus, the consumer should have at his disposal a medium that is not accessible to the proposer, on which the template content has been permanently recorded in a way that enables its multiple access. This requirement was emphasized in the judgment of the CJEU of 5.07.2012, C-49/11, Content Services Ltd v. Bundesarbeitskammer, point 37, ECLI: ECLI:EU:C:2012:419.

516 M. Pecyna, in: *Komentarz…*, point 3.

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3.3.2.3. The right to withdraw from the contract

In the case of distant consumer contracts, there is an additional legal mechanism that provides for the elimination of legal consequences related, among other things, to the accidental conclusion of a contract, namely the right to withdraw.[517]

Even if the consumer entered into an agreement by mistake, he can benefit from the entitlements granted under consumer law, in particular in the ACR. Thus, in order to avoid the legal consequences of a statement submitted by accident, the consumer will not have to prove the fulfillment of the premises of a particular defect of consent, but will be entitled to withdraw from the contract without giving any reason. There is no need to refer to the provisions regulating the defects of consent, because the ACR guarantees the consumer further-reaching protection, which does not depend on the fulfillment of any specific conditions.[518]

The consumer may withdraw from the contract within 14 days of the date of concluding the contract or the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last good (sales), the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece (a good consisting of multiple lots or pieces), or the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first good (contracts for regular delivery of goods during a defined period of time).[519] Thus, if the statement was submitted by accident, and the conditions for avoiding the contract under Art. 86 in conjunction with Art. 88 CC are met, but the deadline for consumer withdrawal has not elapsed, it is much easier to withdraw from the contract.

For some time, there was a specific paradox in the Polish law. The consumer had to wait to receive the subject of the contract to be granted the right to withdraw from the agreement. Currently, this right is granted earlier – namely, once the contract is concluded. According to Art. 12 Directive 2011/83, the exercise of the right of withdrawal shall terminate the obligations of the parties to conclude the distance or off-premises contract, in cases where an offer was made by the consumer. During the Directive's implementation, the national legislature shaped this norm as follows:[520] if the consumer submits a declaration of with-

517 R. Schulze, F. Zoll, *European…*, p. 151. On the consumer right of withdrawal as an element supporting consumer autonomy, see: P. Hellwege, in: *Commentaries on European Contract Laws*, ed. N. Jansen, R. Zimmermann, Oxford 2018, p. 509, 511–513.

518 R. Schulze, F. Zoll, *European…*, p. 157.

519 Art. 9.2 dir. 2011/83 implemented into Polish law by Art. 27–28 ACR. Kocot, J. Kondek, *Nowe zasady zawierania umów z udziałem konsumenta (cz. II)*, PPH 2014/12, p. 6.

520 Art. 31.2 ACR.

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drawal from the contract before the entrepreneur accepts his offer, the offer ceases to bind.

The aim of the legislator was to grant the consumer the right to stop the procedure for concluding the contract after sending his offer. This approach, however, is not flawless.[521] First of all, the right to withdraw from the contract cannot be exercised if the contract has not yet been concluded. It would be more appropriate to introduce full cancellation of the offer in consumer trade, so that, in e-commerce, the consumer could cancel the offer without the consent of the trader. Additionally, founding the structure upon a preliminary assumption that it is always the consumer who submits the offer is irrational.[522]

The current provision states that the consumer may exercise the right to withdraw from the contract[523] in the time between sending the offer by himself and its acceptance by the other party and after receiving the subject of the contract. The question is whether it is possible to withdraw from the contract in the period between the conclusion of the contract and the delivery of its subject. *A maiori ad minus*, if it is permissible to withdraw from a contract that has already been performed, it should also be possible to withdraw from a contract before the performance takes place. The consumer should be entitled to withdraw from a contract throughout the period starting with the contract conclusion and ending once 14 days, counted, for example, from taking possession of the item, elapse.[524] This interpretation is also supported by recital 40 of Directive 2011/83, which provides that, in the case of sales contracts, the withdrawal period should expire after 14 days from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods. In addition, the consumer should be able to exercise the right to withdraw before acquiring physical possession of the goods. This interpretation is in line with the guidelines of the European Commission's Directorate-General for Justice on the Consumer Rights Directive.[525]

521 W. Kocot, J. Kondek, *Nowe…*, p. 5.

522 Often the entrepreneur invites an unlimited group of people to submit offers in order to avoid being bound by the offer himself.

523 This term can be misleading. Directive 2011/83 uses the term "right of withdrawal" (*derecho de desistimiento* in Spanish, *Wiederrufsrecht* in German), but it has not been defined for the purpose of the directive. It can be understood as termination or annulment, as well as withdrawal or termination of the contract. W. Kocot, J. Kondek, *Nowe…*, p. 4.

524 Art. 27 ACR.

525 http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_pl.pdf (accessed: 31.5.2021).

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3.4. Conclusions

The institution of appearances as regulated in Art. 83 CC is of limited use in consumer e-commerce. However, its implementation into the legal system should be seen as an attempt to solve the problem related to the determination of the legal consequences of behaviors that appear to be statements of will when another person acts in trust to this appearance. In this regard, there are basically two problems in e-commerce. First, a message that could objectively be perceived as a declaration of will may come either from a person or a computer program that is not subject to civil law (in which case it cannot be considered a traditional declaration of will). Second, the recipient of the message is usually unable to assess whether it actually comes from the person indicated in the content of the message (as in the case of the use of an Internet account by a person to whom the account is not registered).

These issues could be solved by the concept of legitimate expectations, including the rules of assignment based on the criterion of fault. It should be applied already at the stage of verifying whether a given communication could constitute a declaration of will. This would make it possible to assign a message to the person using the program, regardless of the scope of autonomy of that program, which makes it possible to recognize such a message as a statement of will. Then, such a concept of legitimate expectations would make it possible to determine who should be responsible for a statement made from another person's account in a manner consistent with the principles of equity. It would also promote the model of online behavior that supports e-commerce certainty.

In consumer e-commerce, the regulation of appearances is supplemented by standardized protective mechanisms preventing the creation of a false image of reality in the consumer's mind (confirmation system, pattern incorporation requirements) and providing for the effects of statements of will submitted in error (the consumer's right to withdraw) to be avoided. Although it is possible to imagine a situation where a consumer, in order to achieve the intended purpose, will be able to rely either on Art. 83 § 1 CC or to exercise the consumer right of withdrawal,[526] these mechanisms do not constitute an alternative to the current regulation of appearances.

This leads to the following conclusions. The current regulation of appearances is not suitable for solving typical problems related to situations where the message only appears to be a declaration of will. Despite this, the legislature has

526 As in the case of a consumer who, acting as agreed with the entrepreneur, makes a higher bid at auction, so that the item is not sold too cheaply, and consequently – although he does not want to – wins the auction.

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not introduced any other legal instruments that could be applied in such circumstances.

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4. Acting under the false impression of reality

The starting point for this part of analysis is the situation when a network user submits a declaration of will under the influence of a false perception of reality. The legislature permits evading the effects of a declaration of will made in such circumstances under the regulation of error and fraud. As the issue-based approach has been adopted, the usefulness of these two institutions in case contracts concluded on the online consumer market is examined jointly – according to the preliminary assumption, their applicability and adequacy should be limited by the same alternative mechanisms.

The legitimacy of joint examination of Art. 84–86 of the Polish Civil Code may be challenged due to a doctrinal dispute as to the legal nature of fraud. According to the first theory error and fraud are separate defects in the declaration of will.[527] The purposes of the regulation on error and on fraud are different – the application of the provision on fraud is supposed to reverse the effects of deceptive behavior of a person. The institution is built around the assumption that these activities are faulty[528] – fraud cannot, thus, exist without the fault of the perpetrator. Also, error and fraud tend to be recognized as two independent defects of consent because Polish law adopted the normative concept of defects in the declaration of will – the institution of fraud is created by all its statutory premises,[529] which, after all, do not coincide with the premises of error within the meaning of Art. 84 CC. The second approach is based on the assumption that deception is, in fact, a qualified error.[530]

527 A. Ohanowicz, *Wady…*, p. 44; B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 132–134; B. Lewaszkiewicz-Petrykowska, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, 2nd ed., Ossolineum 1985, p. 681–682; A. Szpunar, *Glosa do wyroku SN z 4. 07. 1986 r., III CZP 36/86*, NP 1989/1, p. 112; J. M. Kondek, *Podstęp a błąd. Wybrane zagadnienia*, PS 2015/2, p. 35–37; M. Gutowski, Z. Radwański, in: *System…*, p. 521–522.

528 A. Ohanowicz, *Wady…*, p. 44; J. M. Kondek, *Podstęp…*, p. 37.

529 B. Lewaszkiewicz-Petrykowska, in: *System…*, p. 681.

530 S. Grzybowski, in: *System Prawa Cywilnego*, Vol. 1, *Część ogólna*, ed. S. Grzybowski, Ossolineum 1974, p. 218; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej,* Warszawa 1999, p. 311; A. Jedliński, in: *Kodeks…*, Art. 86, point 1; K. Piasecki,

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Especially in the case of consumer contracts, the line between error and deception becomes blurred. Changing the way of decoding the content of the contract by taking into account the justified expectations of the average consumer means that more factors will have a direct impact on the content of the contract. Depending on the circumstances, application of the justified expectations standard may result in the content of the contract including, among others, the standard purpose of a given type of contract, the specific purpose of the consumer, identity or specific features of the other party. Incorporating all these elements into the contract makes the division between these two institutions artificial, because one of the core differences between them is that the error applies only if the mistake was related to the content of the contract, whereas the fraud can be invoked even if the declarant's mistake was unrelated to the content of the contract at hand. If the concept of the content of a contract is interpreted that broadly, then fraud ceases to have a wider scope of applicability (most of the errors become related to the content of a legal transaction investigated). In relation to the next element that differentiates the premises of these two provisions (the condition of the essential character of the mistake – meaning that the mistake must be objectively important),[531] it should be stated that a person intentionly causing the mistake should always take into account that the element the declarant is mistaken about is significant from the perspective of the contract decision. Otherwise, it would be irrational to induce the error in this regard in the first place.

In practice, the dispute as to the legal nature of fraud has little importance.[532] The fraudulent character of the act does not change the scope of the declarant's entitlements – in both scenarios he can only avoid the legal effects of the declaration of will. Regardless of the adopted theory, the constitutive element of fraud is that the error is caused fraudulently.[533] Proving this intention would be particularly difficult in the case of contracts concluded online.

In principle, if the mistake of the declarant is related to his lack of diligence, failure of IT systems or other electronic tools, as well as third parties' interference, one will not be allowed to void the statement of will made under the influence of that error. Claiming fraud would be possible only under certain

Kodeks…, Art. 86, point 1; judgment of the Supreme Court of 4.07.1986, III CZP 36/86, OSN 1987/8, item 107; judgment of the Appeal Court in Katowice of 19.10.1995, I ACr 514/95, Wokanda 1996/12, p. 54; judgment of the Appeal Court in Lublin of 8.02.2001, I ACa 4/01, LEX No. 1681308.

531 Art. 84 § 2 CC. One may refer to an error only if it justifies the supposition that if the person making the declaration of intent did not act under the influence of the error and had judged the case reasonably he would not have made such a declaration of intent (essential error).

532 S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 86, point 1; M. Kondek, *Podstęp…*, p. 35.

533 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 86, point 5.

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circumstances, i.a. if the addressee of the declaration or a third party whose behavior the addressee had known and did not notify the declarant about it, will trick the declarant not to comply with the requirements of due diligence – for example by providing information that is inconsistent with the data on the page through which the contract is to be concluded. It will also be admissible to invoke fraud if the addressee of the declaration had known about the unreliability of the IT system or electronic tools or third party's interference and did not warn the declarant.

Then, since the person seeking protection needs to prove that the conditions of Art. 86 CC are met,[534] the effectiveness of evading the legal consequences will depend on whether the intent of the person who caused the mistake can be vetted.

If the declarant's error is a consequence of the party's dishonest or disloyal behavior, it will be possible to claim error or fraud in similar, if not identical, scenarios. Distinguishing situations where it is appropriate to invoke an error from these where it is better to refer to fraud is highly difficult in the case of transactions concluded through interactive websites due to the obligation to assess intentions of the another person.

The decisive factor in choosing the legal basis for evading the legal consequences of a defectively submitted declaration of intent will be the scope of information on the internal sphere of its addressee (motivation and knowledge). Protection under Art. 86 CC (fraud) could be successfully applied only when the fraudulent intention of the other person is clear and possible to prove. Yet, demonstrating circumstances related to the mental state, motivation or knowledge of the other person, considered problematic in the ordinary trade, turns out to be extremely difficult online due to limited data flow.

The question is, therefore, can the fraudulent intention be presumed?[535] If the error is caused by a dishonest or disloyal behavior of the entity operating through the website, is it not reasonable to assume that this alone should be sufficient to fulfill the premise of a fraudulent behavior?

First of all, it should be assessed whether the condition of fraudulently causing an error is automatically fulfilled when the mistake of the declarant is caused by the unreliable or disloyal behavior of the entity acting through the website (usually the addressee of the declaration of will). Deceitful behavior is always faulty and intentional (the person either aims to achieve this effect or knows it is

534 M. Gutowski, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–352*, ed. M. Gutowski, 2nd ed., Warszawa 2018, Art. 84, point IX.2.

535 On the possibility of using factual presumptions when assessing whether the declarant's mistake was known to the other party (Art. 84 CC) and when verifying intention of that party in case of fraud: M. Królikowski, *Błąd jako wada oświadczenia woli strony umowy*, Warszawa 2014, IV § 2.4. B and IV § 5 II.2.B; judgment of the Supreme Court of 12. 2. 1998, I CKN 497/97, Legalis.

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likely to happen).[536] Thus, in order to conclude that the addressee of the declaration of will has acted deceitfully, it is sufficient for the content or form of the website to cause a false image of reality in the mind of its user.[537]

The dishonesty or disloyalty of the addressee of the declaration of will in online trading may manifest itself in the acts he takes[538] (e. g., causing an error as to identity by impersonating someone else, suggesting connections with other entities, causing a false belief in relations to addressee's characteristics, or using surprising clauses) or in his omissions (e. g., non-disclosure of information about his characteristics, especially concealing information about the lack or limitations in legal capacity, failure to provide information on the obligation to pay at the appropriate stage of contract conclusion).

If the person's dishonesty and disloyalty is reflected in his actions, it seems permissible to presume the fraudulent nature of such behavior.[539] It seems justified to assume that a person who acts in a way that deviates from the principle of contractual loyalty, and, thus, intentionally misleads the declarant causes the error of that person deceitfully.

Situations in which the addressee of the declaration does not provide the declarant with information that may significantly affect his contractual decisions should be assessed differently. Until the 1990s, it was assumed that omission (not informing about something) could not be classified as a fraud.[540] As a rule, a person is not obliged to provide the potential contractor with details about himself that are not related to the content of the future contract. It would be even less justified to burden him with the obligation to inform others about all circumstances that may affect one's contractual decision.[541]

Eventually, invoking deception could be considered if presentation of specific information was required by law[542] or resulted from the nature of the contract or the principles of social coexistence.[543] Yet, claiming that any breach of the information duty is tantamount to a fraud would be a simplification – the intentionality of the act would not need to be verified.[544]

536 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 86, point 6; A. Janas, in: *Kodeks…*, Art. 86, point 2.
537 P. Nazaruk, in: *Kodeks…*, Art. 86, point 1.
538 In some legal systems at least minimal activity of a person is required to assign him a fraud. P. Tereszkiewicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, Warszawa 2015, p. 535.
539 M. Gutowski, Z. Radwański, in: *System…*, p. 522–523; P. Sobolewski, in: *Kodeks…*, Art. 86, point 1, 4, 9.
540 P. Tereszkiewicz, *Obowiązki…*, p. 535.
541 P. Mikłaszewicz, *Obowiązki…*, p. 209.
542 P. Mikłaszewicz, *Obowiązki…*, p. 209.
543 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 86, point 18.
544 P. Tereszkiewicz, *Obowiązki…*, p. 538.

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Nowadays, when examining this theory, it is necessary to take into account the manner in which network users behave. As the scope of information openly presented by users is shrinking, many opinions and decisions of the online market participants are based on presumptions and assumptions. Thus, failure to provide standard, non-individualized information, which can be deduced from the type, nature of the contract or circumstances and does not differ from the information usually provided in such situations, should not be perceived as a fraud. Furthermore, a rational network user presumes the existence of standard information. In addition, the *contra proferentem* rule is applied.[545] If the norm contained in or derived from standard terms is ambiguous, it shall be interpreted in favor of the user. Similarly, if the description of the subject of the contract is prepared by the seller in an ambiguous manner, then it shall be interpreted in accordance with the buyer's interests.

Users' beliefs are shaped not only by the available information, but also by misperceptions of facts and by false presumptions about the content of the information. These might be caused indirectly, by suggestions and nudges. Mistakes might be caused by a graphic design, colors, similarity of the expressions used. Lack of noticeable warning about specific, non-standard or unexpected circumstances or characteristics of the other party will result in a belief that such do not exist. Therefore, by intentional concealment of an atypical information, the user can easily abuse thet tendency. Failure to provide information will often lead other online market participants to make false assumptions. As a result, the question is whether online the requirement of contractual loyalty should have a broader meaning than offline?

The nature of the contract, the principles of social coexistence or the principle of contractual loyalty can be referred to, in order to broaden the scope of information obligations resulting from the applicable law. Nevertheless, such operation could be acceptable only, if it is aimed at safeguarding values which are insufficiently protected under the applicable provisions.[546]

545 K. Skubisz-Kępka, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, ed. M. Fuchs, M. Habdas, Warszawa 2018, Art. 385, point 12. On the legitimacy of the application of the indicated interpretation mechanism for the subsidiary correction of the content of those contractual terms that have been correctly incorporated and have not been found unfair: P. Gorzko, *Glosa do wyroku Europejskiego Trybunału Sprawiedliwości z dnia 9 września 2004 r. w sprawie Komisja UE vs. Królestwo Hiszpanii, C–70/03 (krytyczna)*, TPP 2013/1, p. 11–20.

546 Such an approach was reflected in the Draft of the First Book of the Civil Code of 2008 of the Civil Law Codification Commission at the Ministry of Justice. Under Art. 117 of the Draft, it was allowed to avoid legal consequences of a juridical act when the other party: caused the error by failing to provide information that was required by law, contract or good customs, or by not fulfilling the obligation to provide means or methods for correcting input errors, or he knew about the error or could easly notice it and, contrary to good customs, this party did not notify the person who was mistaken.

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Yet the most problematic scenario in this regard is the situation where a careless behavior of the addressee of the statement causes declarant's error. In principle, person's lack of due diligence is insufficient to assume that he causes other's mistake with the intent to deceive fraud, as deliberate intent cannot be presumed.[547] Moreover, in case of consumer e-commerce, the trust of the declarant is protected by rules of interpretation as well as specific consumer law provisions.[548]

The analysis of issues related to fraud and the identification of typical circumstances inducing mistake as to the facts or the content of the legal act of the declarant leads to the conclusion that the restricted flow of information between the parties to the online contract drastically reduces the possibility of claiming protection under Art. 86 CC. Moreover, due to the identity of the legal consequences of error and fraud, their differentiation seems to be devoid of practical importance.

Thus, the subject of analysis will encompass all the situations where a person submits a declaration of consent under the false image of reality existing in his mind. The instances where the differentiation between the error and fraud may have significant impact on the situation of the parties will be underlined.

4.1. Lack of due diligence at the side of the declarant

The cornerstone for the institution of error is the causal link between the content of the legal act and the event that caused the error.[549] If a declaration of intent has been made to another person, the error – to be legally relevant – must be correlated with the reprehensible behavior of the addressee of this declaration. It is the fact that the behavior of the addressee is improper (he caused the error, he knew about it or could easily notice it) in the light of the requirements of due diligence and contractual loyalty that allows to limit *pacta sunt servanda* principle. Thus, traditionally, in line with the literal wording of Art. 84 CC, when verifying the fulfilment of the premises of error, the circumstances related to the knowledge, diligence and loyalty of the addressee of the declaration are examined in detail.[550]

547 P. Tereszkiewicz, *Obowiązki…*, p. 537.

548 Information obligations, standard of legitimate consumer expectations, unfair market practices framework, rules on seller's liability, right of withdrawal.

549 M. Królikowski, *Błąd…*, Chapter IV § 3.III.4.A; M. Gutowski, in: *Kodeks…*, Art. 84, point V.2.

550 A. Grzesiok-Horosz, in: *Kodeks…*, Art. 84, point III.1; M. Gutowski, in: *Kodeks…*, Art. 84, point V, VI.

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This solution, consistent from the perspective of the protected values, is, however, distorted by the legislature. Even provided the error was caused by the addressee of the declaration without his fault – his behavior cannot be negatively assessed – it is permissible for the declarant to avoid the effects of this declaration. As a result, it is possible that the declarant voids the act because of the error despite that he is the one to blame for the mistake because he did not understand the legible message of the other party.[551]

The declarant is neither required to proceed with due diligence nor to maintain contractual loyalty. Both the jurisprudence[552] and the legal commentators[553] claim that the fact that the declarant was negligent, careless or even ignorant is irrelevant. It is emphasized that in the light of Art. 84 CC only the impact of the addressee's on the declarant's statement[554] should be taken into consideration. This significantly strengthens the position of the declarant at the expense of the addressee of a declaration, which seems unjustified especially in situations where the declarant does not show even minimal care of his own interests, while the other party acts loyally and in accordance with the requirements of due diligence.[555]

An opposite view on the impact of the declarant's negligence on the possibility of contract avoidance was presented in the Polish case law.[556] If a person signs a statement without reading it, then he should be attributed the declaration of will in the shape that can be decoded from the document that was signed. The neg-

551 S. Sołtysiński, *Niedbalstwo błądzącego i inne uwagi na temat Art. 84 k.c.*, in: *Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego. Księga pamiątkowa dedykowana Profesorowi Bogusławowi Gawlikowi*, ed. J. Pisuliński, P. Tereszkiewicz, F. Zoll, Warszawa 2012, p. 144.

552 Judgment of the Supreme Court of 12.02.2004, II CK 157/04, Legalis; judgment of the Appeal Court in Warszawa of 7.07.2006, I ACa 143/06, OSA 2008/2, item 8; judgment of the Appeal Court in Białystok of 9.12.2008, III AUa 997/08, OSAB 2009/1, p. 63–71; judgment of the Supreme Court of 20.01.2017, I CSK 66/16, Legalis.

553 B. Lewaszkiewicz-Petrykowska, in: *System…*, p. 675; S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 84, point 5.

554 B. Lewaszkiewicz-Petrykowska, in: *System…*, p. 675.

555 S. Sołtysiński, *Niedbalstwo…*, p. 144.

556 Judgment of the Appeal Court in Kraków of 8.12.1999, I ACa 661/99, TPP 2004/3–4, p. 107; judgment of the Supreme Court of 30.06.2005, IV CK 799/04, OSNC 2006/5, item 94 (in the context of failure to exercise due diligence in determining the actual condition of the probate estate). Similarly in legal scholarship: P. Sobolewski, in: *Kodeks…*, Art. 84, point 16; W. Bańczyk, *Powołanie się na błąd co do przedmiotu spadku lub co do prawa w razie przyjęcia spadku z dobrodziejstwem inwentarza na skutek niezłożenia w terminie oświadczenia o odrzuceniu spadku – nowe wyzwanie prawa spadkowego?*, Rej. 2019/9, p. 43–44.

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ligence of the declarant should not worsen the legal situation of the addressee of the declaration.[557]

If the behavior of the declarant has made the addressee believe that he has submitted a statement of will, the rule resulting from the theory of trust should be applied.

> "This is justified in the light of the legitimate trust of the addressee of the declaration, as well as the lack of sufficient reasons to protect those market participants who do not exercise due diligence in legal transactions. In order to assess whether a declaration of will has been submitted, the behavior of the declarant, which is available to its addressee, must be examined. Declarant's knowledge as to the fact that his behavior reveals the will to elicit legal effects is irrelevant. Whoever takes an action which can be reasonably interpreted as making a declaration of will of a specific content by its addressee, may not effectively claim that he lacked the will to cause legal effects by this action. The normative basis for such a rule of assessing behavior which is presented "outside" as a declaration of will is the Art. 65 § 1 CC as this provision ought to be applied not only to the interpretation of the content of the declaration of will, but also when assessing whether the behavior undertaken by a given market participant may be interpreted as making a declaration of will."[558]

Such interpretation allows to protect the legitimate trust of the addressee. It is precisely this legitimate trust that sets the boundaries for the voidability of a defective declaration of will. Therefore, if the addressee of the declaration was aware or should be aware of the inconsistency between what declarant believed he stated and the actual content of the signed communication, then he does not deserve protection.

The fact that the person signing a statement of will did not read its content beforehand and therefore did not know what he declared or mistakenly believed that the submitted declaration had a different content, does not constitute, in the light of Art. 84 CC, a legally relevant error.[559] The person signing the declaration without knowing its content could not be mistaken in this regard. Although he was unaware what the communication was, he was well-aware of his own lack of knowledge and did not take steps necessary to familiarize himself with the message he had signed as his own statement. In such a situation, declarant is not mistaken but ignorant.

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557 B. Lewaszkiewicz-Petrykowska, *Wady…*, s.105; similarly in the context of consumer e-commerce: A. Bieliński, M. Pannert, *Wady…*, p. 56. Differently: M. Królikowski, *Błąd…*, p. 138–141.

558 Author's own translation. Judgment of the Appeal Court in Kraków of 8.12.1999, I Aca 661/99, p. 112.

559 Judgment of the Supreme Court of 30.06.2005, IV CK 799/04; judgment of the Supreme Court of 14.01.2009, IV CSK 358/08, Legalis; judgment of the Supreme Court of 18.03.2010, V CSK 337/09, Legalis.

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The situation is similar when a declarant signs a statement without reading it but is convinced that this communication has a different content. If a person submitting a declaration of will consciously resigns from reading the document containing the statement he is signing – and does not even exercise minimal care in this respect – he does not deserve protection. Thus, such person should not be entitled to avoid the legal consequences of a carelessly made declaration of will.

Therefore, to incite the security of trade and assure contractual balance, it is reasonable to assume that only these individuals who exercise at least minimum diligence can be protected by the regulation on error. However, it is problematic to indicate legal grounds which might impose an obligation to verify the facts on the declarant. The provisions governing the possibility of voiding the constract entered intu under an error fail to address this issue.

According to the Supreme Court[560] this obligation may stem from Art. 472 CC and Art. 355 § 1 and 2 CC (these provisions oblige the debtor to proceed with due diligence). Under these provisions it is possible to solve a case of a person purchasing a car on an internet portal at a price level that differs so far from the market value of such a vehicle that an ordinary person should realize that there must have been a mistake. The fact that the buyer, being a careless individual, does not know what a market price of such car is, does not exclude the possibility for the declarant to void the contract under the regulation of error, as it is assumed that in these circumstances the buyer could have easily noticed the mistake.[561] It is doubtful, however, whether this general clause can be interpreted as imposing a duty of due diligence on the part of the declarant.

Alternatively, the declarant could be obliged to undertake appropriate measures to establish the true state of affairs in order to fulfil the requirement of due diligence. Moreover, it could be argued that this situation is similar to the one regulated by provisions on seller's liability for the goods' inconformity, where due diligence (examining the good) determines who bears the risk of defect (Art. 563 § 1, Art. 638, Art. 709^{17} and Art. 655 CC).

However, should the negligence of the declarant exclude the possibility of invoking the error in every scenario, thus constituting a kind of sanction for failure to observe the due diligence requirement? As underlined by the Supreme Court,[562] if the error was caused by the addressee of the declaration of intent, the negligence of the person acting under the error (namely insufficient examination of the true state of affairs) does not exclude the right to refer to the error. In a situation where the addressee of the declaration of will did not fulfill his in-

560 Judgment of the Supreme Court of 6.06.2003, IV CK 274/02, Legalis.

561 B. Gadek, *Rozważania o błędzie na tle umów zawieranych przez Internet*, in: *Prawo umów elektronicznych*, ed. J. Gołaczyński, Kraków 2006, p. 217–218.

562 Judgment of the Supreme Court of 19.11.2015, IV CSK 11/15, Legalis.

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formation duties and thus misled the declarant, the carelessness of the latter (failing to obtain the necessary data from another source) does not exclude his protection under the provisions on error.

Therefore, when assessing the impact of the negligence of the declarant on his entitlement to void the contract it must be verified whether it was the declarant or the addressee who failed to fulfil one's obligations. If it was the addressee and his omission caused the declarant's mistake, declarant's negligence is irrelevant.

According to the approach adopted by the Supreme Court, the behavior of the misleading party is decisive for a legally significant error in a bilateral act.

> "(…) even if there are certain circumstances on the side of the person acting under the influence of error supporting his mistake, he is not deprived of the right to avoid the effects of a declaration of will made under the influence of an error. (…) Causing an error within the meaning of Art. 84 CC can take form of any behavior of the addressee of the declaration which triggers a false image of the legal act at the side of the declarant, and there is no requirement that the behavior of the other party to the legal relationship was the sole cause of the error; it is sufficient if it was a co-cause."[563]

Although the problem of the legal consequences of the negligence of a person who acted under the error has been noticed in the jurisprudence, a commonly accepted approach has not yet developed. However, if this error is not only a result of the negligence of the mistaken party, but also a breach of obligations by the addressee of this declaration, then protection will not be excluded. Failure to fulfill the obligation by the addressee of the declaration of will at hand, which led to the declarant's error, is viewed as worse than negligence and lack of care for one's own interests.

Despite the fact that the literal wording of Art. 84 CC remains the same, there is a strong tendency to change its interpretation. The aim is to compensate for the disproportion between the rights of the mistaken and the addressee of the declaration of will made under the influence of error. When assessing the legal situation of these actors the most important question is whose behavior was more inappropriate from the perspective of the private law principles.[564]

563 Author's own translation. Judgment of the Supreme Court of 19.11.2015, IV CSK 11/15; judgment of the Supreme Court of 12.10.2000, IV CKN 144/00, OSNC 2001/4, item 60.

564 M. Gutowski, *Konstrukcja wad oświadczenia woli w projekcie kodeksu cywilnego*, PiP 2009/8, p. 19–20.

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4.1.1. The mechanism of standard terms incorporation – a specific model of protection by information

If standard terms have been effectively incorporated into the contract in the manner required by law,[565] it is irrelevant whether the consumer actually familiarized himself with these provisions. It is not up to the professional party to assure that the consumer acts with due diligence, so consumer's negligence should not hinder trader's situation.

The requirement to inform the consumer about the use of standard terms and to make them available in such a way, that it is objectively impossible to overlook, should enable the consumer to make an informed decision when concluding a contract. The consumer must be able to store that document in an unchanged form. The above suggests that this protective measure is, in fact, based on the fiction of informing, allowing for *ex post* control of the content of these terms. As a result, failure to comply with these requirements results in the lack of incorporation of standard terms, whereas their fulfillment makes it possible to control their content.

4.1.2. The impact of website hyperlinks on the legal situation of the parties

A similar problem arises when the declaration of will is made intentionally and in accordance with the internal will of the declarant, but he is not aware of the existence of additional elements that may affect the content of the contract at hand. Typically, these elements may be clauses modifying the content of the contract or hyperlinks leading to the content that changes the standard suggested by the website through which the declaration of will is made.

If there are e. g. links on the website that the consumer accepts without understanding their content, which, in principle, should form part of the declaration of intent due to the principle of the trust protection of the addressee of the message (that message has all the features of a non-defective statement of will). The content of the resulting contractual relationship should be conditioned by how a rationally acting addressee should understand the statement of the other party in the given circumstances. Due to the need to protect the addressee of the declaration, this situation should therefore be assessed in the same way as submitting a statement of will by accident.

At the same time, it is assumed that it is not permissible to refer to an error if the person has signed a message constituting a declaration of will without

565 On premises for the incorporation of standard terms see: Chapter 3.3.2.2.

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comprehending its content.[566] If someone signs a document that he has not read, he cannot be mistaken as to the content of the legal act he performs, since he knowingly makes a declaration of will without knowing its content. And yet the essence of the institution of error is the unawareness of the inconsistency between the belief about the situation and the reality at the side of the declarant. Therefore, if someone intentionally resigns from knowing the facts, it shall prevent him from benefiting from protection granted under the regulation of error.

The question is whether the situations whereaforementioned links were automatically agreed to by a network user, even without making an attempt to read their content, should be treated in the same manner. Nowadays, it is doubtful whether network users can be expected and required to actually read the content of standard terms, attachments and links before entering into a contract.[567] Basically, the fact that the professional party placed a link to a standard contract or even a single clause on his website is not sufficient for its incorporation (the consumer has no access to its unchanging version).[568]

However, not all links and communication on the seller's website will be irrelevant when decoding the content of the online contract. Here, references and warnings regarding delivery limitations and payment methods accepted by the entrepreneur constitute an exception.[569] The EU legislature sees the information to which countries the goods are not delivered as well as warnings on limitations in the scope of accepted methods of payment as required under Art. 8.3 Directive

566 A. Szpunar, *Glosa do uchwały SN z 31.05.1994 r., III CZP 75/94*, OSP 1995/2, item 33; judgment of the Supreme Court of 14.01.2009, IV CSK 358/08.

567 For instance: H. Schulte-Nölke, *Incorporation of Standard Contract Terms on Websites Observations on the American Law Institute's Restatement of Consumer Contract Law*, ERCL 2019/5(2), p. 129.

568 F. Wejman, *Wzorce…*, p. 54; M. Pecyna, *Kontrola wzorców umownych poza obrotem konsumenckim*, Kraków 2003, p. 98; D. Szostek, *Treść umowy zawieranej w postaci elektronicznej*, in: *Handel elektroniczny. Problemy prawne*, ed. J. Barta, R. Markiewicz, Zakamycze 2005, p. 157; F. Zoll, in: *Prawo bankowe. Komentarz do Art. 92 A-194*, ed. F. Zoll, Vol. 2, Zakamycze 2005, Art. 109, p. 298; A. Olejniczak, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna*, ed. A. Kidyba, Warszawa 2014, Art. 384, point 15; K. Zagrobelny, in: *Kodeks cywilny. Komentarz*, ed. E. Gniewek, P. Machnikowski, 9th ed., Warszawa 2019, Art. 384, point 22; A. Kubiak-Cyrul, *Udostępnianie wzorca umownego w elektronicznym obrocie konsumenckim z perspektywy prawa unijnego i orzecznictwa TS*, iKAR 2017/6(3), p. 16–17; judgment CJEU of 5.07.2012, C-49/11, Content Services Ltd v. Bundesarbeitskammer, point 37, ECLI: ECLI:EU:C:2012:419. Differently: K. Kryczka, *O zawieraniu umów drogą elektroniczną – polski kodeks cywilny a prawo europejskie*, PS 2006/7–8, p. 112; M. Bednarek, in: *System Prawa Prywatnego*, Vol. 5, *Prawo zobowiązań – część ogólna*, ed. E. Łętowska, Warszawa 2013, p. 692–695. In that vein Szczurowski, who, however, differentiates the incorporation requirements depending on whether a party to a standard contract is a consumer. T. Szczurowski, *Udostępnienie wzorca w postaci elektronicznej*, PPH 2005/7, p. 39.

569 Art. 18 ACR.

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2011/83 (implemented into Polish law by Art. 18 ACR). This provision extends the scope information obligations required under Art. 6.1–3 Directive 2011/83 (Art. 12 ACR), at the same time constituting a *lex specialis* in relation to the general rule, according to which the information required by the law should be provided to the consumer at the latest when he expresses his will to conclude a contract.[570] Information on payment and delivery restrictions should be provided no later than at the beginning of the process of placing an order by the consumer.

The legislature's aim is to draw the consumer's attention to the fact that his actions may not bring about the intended effect. If, despite these restrictions, the consumer submits an offer via the website, it might not be accepted by the other party. Similarly, if it is the consumer who accepts an offer, the obligations arising from the contract will not be performed, because either the buyer will not be able to pay the price or the seller – to send the item. The consumer, informed about the above-mentioned limitations before placing the order, will be able to easily verify whether he belongs to the target group to whom the seller directs his activities.

As indicated,[571] this information should be provided in a clear and legible manner[572] – in contrast to these required under Art. 6.1–3 Directive 2011/83, which ought to be provided in a clear and comprehensible way.[573] The difference in the literal wording of the provisions is caused by the fact that the legislature had different goals in mind when drafting these provisions.[574] Information listed in Art. 6.1–3 Directive 2011/83 are to be communicated to the consumer in such a way that he can read and understand them – in this way he gets to know the content of the contract which he is intending to conclude. On the other hand, the data that should be made available by the seller pursuant to Art. 8.3 Directive 2011/83 are not intended to contribute to the consumer's understanding of the content of the contract, and should protect the consumer from performing activities that will not lead to the desired result.

It can be argued that it is sufficient for information on delivery and payment restrictions to be posted on the website in the form of a link or message of another type, without being included into the standard terms. Due to the different *ratio legis* of the commented provisions and the fact that they fulfill completely different functions, in author's opinion, there are no arguments for the need to apply by analogy Art. 7.1 or Art. 8.1 Directive 2011/83 (Art. 14 ACR) to these

570 D. Lubasz, in: *Ustawa o prawach konsumenta. Komentarz*, ed. D. Lubasz, M. Namysłowska, Warszawa 2015, Art. 18, point 3.

571 D. Lubasz, in: *Ustawa…*, Art. 18, point 7.

572 In the Spanish language version of dir. 2011/83: *claro y legible*, German: *klar und deutlich.*

573 In the Spanish language version of dir. 2011/83: *clara y comprensible*, German: *klar und verständlich.*

574 Compare aims indicated by Czech and Lubasz in: T. Czech, in: *Prawa…*, Art. 12, point 11, Art. 18, point 12; D. Lubasz, in: *Ustawa…*, Art. 12, point 5, Art. 18, point 5.

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information requirements. Thus, it should be sufficient to place information on delivery and payment restrictions on the website – in such a way that it is noticeable and legible to network users at the latest when placing an order.

In this regard it must be also noted that fulfillment of the information obligation regarding delivery limitations and accepted methods of payment, and the content of the contract concluded by the parties are two separate issues. Although the legislature includes the information provided to the consumer at the pre-contractual stage into the content of the contract, even if it was not repeated in the contract document,[575] this only applies to the information listed in Art. 6.1–3 Directive 2011/83.[576] Thus, pre-contractual information provided on a different basis, especially those describing limitations in delivery and methods of payment, are not automatically included in the content of the contract.[577] In other words, if the contract does not imply any limitations in this regard, there is no reason to state that these limitations shape obligations of the parties resulting from the contract.

The imposition of information obligations on the trader constitutes a unilateral guarantee that protects the consumer. This mechanism is asymmetrical by nature. Thus, the entrepreneur's fulfillment of the information obligations resulting from Art. 18 ACR does not translate into an effective modification of the content of the contract. Although placement of information on delivery and payment limitations on the website in the form of links or messages, visible at the time the consumer opens an order, meets the information obligation, it does not shape the content of the contract. In order to do so, this information would have to be covered by the agreement of the parties – e.g., included in the standard terms or added to the agreement as individually agreed clauses.

If the contract is concluded despite reservations regarding the method of payment and the consumer is unable to pay the price, the other party may, first, withhold its performance and, second, withdraw from the contract. Yet, if the inability to deliver results from applicable regulations, it can be assessed as a case of a primary impossibility to perform and the contract will be *ex lege* invalid.[578] In contrast, in situations where delivery restrictions result only from the will of the other party to the contract – then, if these restrictions have not been included in the contract, the entrepreneur will be obliged to deliver the goods in the manner specified in the contract. If he refuses to do so, the consumer will be entitled to claim compensation (the scope of the claim to be established under Art. 471 CC).

575 W. Kocot, J. Kondek, *Nowe…*, p. 13–14.

576 Art. 6.5 dir. 2011/83 implemented into the Polish law by Art. 22 ACR.

577 D. Lubasz, in: *Ustawa…*, Art. 22, point 10. Czech proposes even narrower understanding of the provision, arguing that only information with a normative dimension should be included into the content of the contract in this manner. T. Czech, *Prawa…*, Art. 22, point 5.

578 Art. 387 CC.

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The above issues, although currently worth considering, will lose their importance with the popularization of CRM systems.[579] The goal of the these is to collect the most accurate information about each customer, which allows to use and improve[580] consumers' life cycle.[581] The obtained data allows the entrepreneur to create a customer profile and monitor and influence consumer's activity. Based on these information, clients could be sent offers tailored to their interests, needs, expectations or related to their current situation – which, in principle, should eliminate the problem of sending an offer to a person outside the target group by accident.

4.2. Pre-contractual information obligations – regulating the distribution of risks related to information asymmetry

The need to protect the consumer by providing information arises in cases where transaction risks are not obvious. When the risk remains inherent in the perception of a given scenario then there is no need to implement protection by information mechanisms. The situation is different if the consumer has no objective reasons to presume the existence of a given type of risk. Then, the other party, abstaining from disclosing information about this risk, may exploit other's lack of information (the use of a positive presumption as to circumstances un-

579 Customer relationship management is a set of tools and mechanisms for contact with the client, including: instruments for communication with customers, for the automation of basic business processes, and for the analysis of customer behavior based on the collected data. As an example see: Sugester (https://sugester.pl/?pp accessed: 31.5.2021), OroCMR (https://oroinc.com/orocrm/ accessed: 31.5.2021), LiveSpace (https://www.livespace.io accessed: 31.5.2021).

580 The contact between the consumer and the entrepreneur, previously incidental (limited to individual, separate transactions) becomes constant, giving rise to a stable relationship between these entities. J. Maciejewski, *Customer Relationship Management – strategia biznesowa i technologia informatyczna*, ZNWI WPZ 2012/1, p. 111. Improving the customer's life cycle means, among others: increasing his loyalty to the company, preventing customer loss, increasing the profits that a given customer generates for the entrepreneur. F. Bahari Ta, S. Elayidom, *An Efficient CRM-Data Mining Framework for the Prediction of Customer Behaviour*, PCS 2015/46, p. 725–726.

581 The theory of consumption proposed by economists I. Fisher and R. Harrod, according to which individuals spend on consumption a constant fraction of their present income throughout their lives. It allows to explain the relationship between consumption and savings and the consumer's life stage. The use of CRM systems aims at enabling verification at which stage of life the client is and to adjust the marketing strategy accordingly. C. Rygielski, J.-C. Wang, D. C. Yen, *Data mining techniques for customer relationship management*, TS 2002/24, p. 493–494; W. Wróblewska, *Zarządzanie relacjami z klientami jako źródło sukcesu organizacji*, Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach. Seria: Administracja i Zarządzanie 2013/97, p. 234–235.

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known to the consumer). Another issue is that the risk associated with a specific situation may also remain objectively unnoticeable to the average consumer. Finally, there may be a tendency to overlook certain types of risks.[582] Therefore, in the abovementioned scenarios, it is reasonable to implement a regulation imposing an obligation on the entrepreneur to provide information.[583]

It is widely accepted that there is a deep information asymmetry between professional and non-professional market players.[584] As a rule, consumers have less knowledge and experience in matters related to a particular contract than entities whose professional activity is concluding and performing a given type of agreements. This phenomenon is not *per se* negative – after all, small differences could be corrected by market mechanisms. However, the mass character of the consumer transactions, globalization, and specialization in the professional environment accompanied by the growth of entrepreneurs lead to a significant increase of the information asymmetry. Vast differences in the knowledge, experience, and market position of the average consumer and the entrepreneur can lead to market failures and emergence of negative selection as well as moral hazard.

In case of a negative selection, when deciding to conclude a contract, one of the parties relies on the information available exclusively to him, while the other – uninformed – cannot assess if the transaction will, in fact, be beneficial. Thus, the uninformed is reluctant to make any significant commitment (not knowing if the contract would benefit him anyhow, he wants to minimize its costs). Therefore, the other party's advantages coming from the agreement turn out to be independent of the actual value of the subject of the contract, since it cannot be effectively verified by the uninformed party. Better offers – unprofitable under these circumstances – will be driven out of the market.

Significant disproportions between trading participants may turn out to be unfavorable not only for consumers, but also for the professionals. This is clearly visible in case of the moral hazard. Consequently, the information asymmetry makes it possible for one of the parties to change his behavior after contract conclusion in order to maximize his profits at the expense of the other. A typical

582 M. Trebilcock, *Rethinking Consumer Protection Policy*, in: *International Perspectives on Consumers' Access to Justice*, ed. Charles E. F. Rickett, Thomas G. W. Telfer, Cambridge 2003, p. 71 https://poseidon01.ssrn.com/delivery.php?ID=172086089029007065124118096007071000059080034086059056072085072074118096074093097027060049049026019123051111002105067112011074111025007016051087112014086090001123032081012103070005113023086114027102108019087080090071070127123123111087088070031180 64&EXT=pdf (accessed: 31.5.2021).

583 M. Trebilcock, *Rethinking…*, p. 71.

584 P. Mikłaszewicz, *Obowiązki…*, p. 39; P. Mankowski, *Formation of contract and pre-contractual duties to inform in a comparative perspective*, in: *The Architecture of European Codes and Contract Law*, ed. S. Grundmann, M. Schauer, Haga 2006, p. 331.

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example here are insurance contracts – after having insured an item, a person changes his behavior, e. g. starts parking a car on a unguarded car park instead of renting a garage.[585]

In order to counteract these market failures, disproportions between trading participants are corrected by legislative interference[586] – usually – by imposing disclosure obligations.[587] The aim of the consumer protection mechanisms is to reduce the information asymmetry between the consumer and the professional so that the former can consciously make choices on the market, being fully aware of their legal consequences.[588] Protection by information model seems to be an adequate tool for that – the weaker entity, who has obtained reliable and comprehensive information about his legal and factual situation and knows what the content of the contract is, should be able to make an informed contractual choice, as in these circumstances he knows what he actually declares and what the effect of such a declaration of will is.

4.2.1. Protection by information – various protection models[589]

Various methods of implementing protection by information model and reducing information asymmetries were proposed.[590] For instance, information obligations might be imposed on the professional together with specific standards as to the quality of service provided (licenses, permits, regulations on access to the profession).[591] Another solution is to oblige the entrepreneur to use warnings about certain (unexpected) features of the service[592] or to require the

585 P. Mikłaszewicz, *Obowiązki…*, p. 58.

586 P. Mikłaszewicz, *Obowiązki…*, p. 58.

587 C. Busch, *The Future…*, p. 221; R. Sefton-Green, *General introduction*, in: *Mistake, Fraud and Duties to Inform in European Contract Law,* ed. R. Sefton-Green, Cambridge 2005, p. 12.

588 P. Mikłaszewicz, *Obowiązki…*, p. 129, 214.

589 Parts of the analysis of traditional model of sanctioning lack of fulfilment of information obligations were published in the article on personalization of contracts in consumer e-commerce: K. Południak-Gierz, *Sanctions for lack of fulfilment of obligation duties. Searching for an adequate regulatory model for personalized agreements*, ERPL 2020/4, p. 817–839.

590 M. Trebilcock, *Rethinking…*, p. 75–80; K. Południak-Gierz, *Personalization of Information…*, p. 297–310.

591 The effectiveness of this mechanism depends on whether these standards are linked with appropriate control mechanisms enforcing compliance with normative standards. Otherwise, the difference between the reality (known to the entrepreneur) and the consumer's expectations (based on the letter of the law) will deepen even further.

592 This method effectively reduces information asymmetry, because *ex definitione* warnings should be easily noticeable and easy to digest, and they should not generate additional costs for the consumer. The disadvantage of this method is the small amount of information that can be effectively disclosed in this manner (in the case of a large catalog of information

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parties to use the help of qualified intermediaries when concluding a contract.[593] Alternatively, quality marks and experience rating systems might be introduced, enabling the consumer to become acquainted with the feedback on i.a. the quality of the subject of contract or the security of transaction. Other possible solution is to standardize the structure of a given type of contracts in a way that facilitates their comparison.[594]

Regardless of the chosen protection by information model, it is necessary to supplement it with an empirical research structure – so that its functionality can be constantly verified. The issues that should be assessed include the following: does the selected model brings the expected results and at what cost? Who is burdened with expenditures? Are these costs excessive in the light of the principle of proportionality? Finally, does the introduction of a given protection model lead to competition restrictions?[595]

The sectoral nature of the regulation on consumer law means that within this branch of law the discrepancy in the applied legislative technique, the legislature's tendency to adapt the regulation to a specific phenomenon, typical for a given sphere, as well as terminological and structural inconsistencies are particularly visible. The consequence of this differentiation are difficulties at the stage of implementing EU directives and applying the law.

In the case of distance and off-premises contracts, the most appropriate mechanism from the EU perspective is to impose information obligations on the trader.[596] Striving to guarantee contractual balance by removing the information asymmetry between the consumer and the entrepreneur, the EU legislature, and consequently also the national ones, make efforts to enumerate the information ought to be provided on a given contractual level. However, the optimal model is still being sought. The methods of imposing disclosure obligations proposed so far include:[597] establishing a general duty to inform,[598] indicating categories of information that must be made available by the entrepreneur at a given contractual stage, introducing detailed lists of information that should be made

described as a warning such a message becomes a mere set of information about the offered good or service). C. Busch, *The Future…*, p. 231.

593 The consumer may conclude a specific contract only with the participation of an intermediary with expertise in the subject of the contract and the consumer. This model is commonly used in the drug trade (an intermediary is a doctor giving a prescription and/or a pharmacist concluding a sales contract with a consumer).

594 M. Trebilcock, *Rethinking…*, p. 77.

595 M. Trebilcock, *Rethinking…*, p. 77.

596 It is indicated that they assure the consumer's actual autonomy, allowing him to make informed choices, without violating the essence of the principle of freedom of contract but supporting the development of fair competition and innovation. C. Busch, *The Future…*, p. 222–224.

597 M. Grochowski, *Obowiązki…*, p. 188.

598 P. Tereszkiewicz, *Obowiązki…*, p. 540–550.

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available, sometimes arranged in a specific order and displayed in a particular manner (content requirements are correlated with formal requirement to improve the transparency of information and facilitate comparison between contracts proposed by various entities), and finally indicating that the scope of information which should be made available must be established taking into account general rules so that flexibility and rationalization of the imposed disclosure obligations becomes possible.

Questioning the effectiveness of the protection by information model[599] did not change the EU legislative approach as to the importance of information obligations for consumer protection. Protection by information remains one of its key elements. The thesis that the development of the regulation on information duties led or may lead to an ideal state in which the risk of creating a false image of reality in the consumer's mind will disappear and the regulation on mistake or fraud will become obsolete is unrealistic. Likewise, it is undesirable to assume that the legislature has foreseen and regulated all possible situations in which the need for protection by information may arise.[600] Nevertheless, the idea of protection by information spreads, changing the perception of other civil law protection instruments – in particular the regulation on defects of consent. There are already tendencies[601] to perceive deception as a by-product of protection by information. This change of optics is evidenced by the continuously expanding understanding of the information obligations and their link with the scope of warranty,[602] which will be discussed in the following part of the analysis.[603]

4.2.2. Limiting the practical usefulness of the institution of error by imposition of the pre-contractual information duties on the entrepreneur

A typical error that occurs when consumer concludes an online contract regards the subject of the legal transaction at hand. The mistake is caused by the fact that the party can get acquainted only with the virtual representation of the subject of the contract and its description. With the development of technology, the risk of

599 A. Porat, L. Jacob Strahilevitz, *Personalizing…*, p. 1417–1478; K. Południak-Gierz, *From Information Asymmetry to Information Overload – Technological Society of Consumers*, in: *Contemporary issues of societal development*, ed. P. Kaplanova, Novo Mesto 2017, p. 31–47.

600 P. Tereszkiewicz, *Obowiązki…*, p. 549.

601 P. Tereszkiewicz, *Obowiązki…*, p. 533.

602 Art. 44 ACR imposed on the seller an obligation to provide the consumer with the necessary explanations about the legal and factual relations regarding the goods at the pre-contractual stage (Art. 546 CC). F. Zoll, *Pre-contractual Duties to Provide Information and Their Violation from the Perspective of Polish Private Law – Selected Issues*, in: *The Architecture of European Codes and Contract Law*, ed. S. Grundmann, M. Schauer, Haga 2006, p. 355.

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this type of error has been reduced, e. g. by: photos of the subject of the contract, specifications, the possibility of reproducing part of the work.

Seeking protection under the regulation of error is admissible when this error was caused by the other party (even without its fault) or if it was or could have been noticed by him. The first of these situations may, in practice, be a consequence of the entrepreneur's failure to update the website or particular item's specification, incorrect description of the good, or misplacing items' descriptions or pictures. Consumer's mistake may also be caused by lack or unclear information on the number of items that can be purchased via the website (no indication as to the units of measures). Such lack of due diligence in conducting business activity would be seen as causing consumer's error under Art. 84 CC.

According to some legal authors the regulation of information obligations may fully replace the regulation on vice of consent. The issue of information asymmetry can be solved entirely by an adequate design of information obligations: these can balance risks associated with information asymmetry (namely: when the declarant is likely to be mistaken) between the parties in an economically justified manner.[604] This can be achieved if the rules are shaped in accordance with the following assumptions:

- A did not have the information but he should have obtained it, being the least cost information gatherer[605] – then he should bear the negative consequences of the lack of information (no need for the legislature's intervention),
- A did not have adequate information, and the other party had or could have gathered this information at a lower cost for him – in this case an appropriate information obligation should be imposed on the other party (it is necessary to define sanctions for breach of the information obligation),
- in the third scenario, neither of the parties is able to obtain information at reasonable cost – it must be decided who should be exposed to the risk of lack of information.

In this model, there is no need to refer to the regulation on error, as the consequences of lack of information are solved by regulation on information duties.[606]

The imposition of highly specified information obligations should decrease the likelihood of the consumer being mistaken. The fulfillment of the information duties as specified in law should, in principle, guarantee the consumer access to all information necessary for an adequate perception of the situation.

604 G. De Geest, M. Kovac, *The Formation…*, p. 119–120.
605 G. De Geest, M. Kovac, *The Formation…*, p. 115–116.
606 On the issues related to defining disclosure obligations: K. Południak-Gierz, *Personalization of Information…*, p. 297–309.

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Even if he does not read or understand thet information, it will shape the content of the contractual relationship between the parties provided that they were effectively included into the contract (e. g., as standard terms or an element of the offer, see also Art. 6.5 of Directive 2011/83).

The analysis of typical scenarios leads to the conclusion that consumer's misconception as to the content of a legal transaction may be related to following types of circumstances. The consumer might not exercise due diligence – his error is thus irrelevant from the legal perspective. The professional entity might provide misleading information to the consumer or might fail to provide the information necessary for an adequate perception of the situation.[607] Finally, the professional might fail to provide the information necessary to correct consumer's error if the circumstances of the case suggest that the consumer is mistaken.

Despite the fact that all the above issues relate to pre-contractual information, there is currently no coherent, comprehensive regulation on information obligations, their scope and the consequences of failure to provide them.[608]

There are two main approaches towards how the lack of fulfilment of information obligations that might cause consumer's error should be sanctioned.[609] The first is the regulation on vice of consent (individual protection model). The second leans towards the standardization of protection – this model can be observed during analysis of the statutory instruments for counteracting unfair market practices.[610] When the scopes of application of the regulation of unfair market practices and the provisions on error or fraud coincide, the consumer can either benefit from the protection granted by the provisions governing defects in the declaration of intent and avoid the legal effects of the declaration made under the influence of an error or seek protection under the standardized protection regime[611] of the Act on Combating Unfair Commercial Practices[612] (later: ACUCP).

607 The consumer may be mistaken because of trader's failure to fulfill the information obligation or inappropriate manner of providing necessary data – this aspect raises no major doubts due to the correlation of information obligations with the formal requirements as to the form of their disclosure.

608 F. Paolo Patti, *'Fraud' and 'Misleading Commercial Practices': Modernising the Law of Defects in Consent*, ERCL 2016/12(4), p. 310; P. Mikłaszewicz, *Obowiązki…*, p. 141–289.

609 S. Grundmann, *The future of contract law,* ERCL 2011/7, p. 520–521.

610 Art. 17, Art. 23, Art. 29.1 ACR , Art. 36 and Art. 40.5, Art. 41 ACR act in a similar way.

611 M. Grochowski, *Wadliwość umów konsumenckich (w świetle przepisów o nieuczciwych praktykach rynkowych)*, PiP 2009/7, p. 70; differently: Targosz with regard to the rights resulting from the regulation of defects in declarations of will, warranty and claims for invalidation of the contract specified in Art. 12.1 point 4 ACUCP. "The system of liability under the seller's liability for inconformity of the good is the most detailed solution that the law provides for the resolution of conflicts arising from the fact that the subject of the sales

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4.2.3. Individual protection mechanism as a sanction for non-compliance with information obligations – mistake and fraud

As the importance of information obligations in consumer law grows, the need to adjust the code regulation of the defects of consent and provisions on information obligations appears.[613] Both these groups of norms address the same issue[614] – namely, who should bear the risk that one of the parties does not have sufficient information to make a non-defective decision as to the conclusion of the contract.[615] The aim of regulation of vice of consent and of information duties is to protect parties' autonomy, foster trust, enable control of contractual loyalty, promote the moral obligation to tell the truth, protect legitimate expectations, set standards of behavior in the market and lead to optimal risk allocation.[616] Therefore, there are no obstacles preventing the regulation on defects of consent from being used in situations where information obligations have not been complied with.[617]

Consumer protection against taking actions under the influence of error may be shaped as an individual protection mechanism – failure to comply with information obligations may be qualified as provoking a mistake. Such inter-

contract does not meet legitimate expectations of the buyer. When designing this system, the legislature took into account to the fullest extent both competing interests (of the seller and of the buyer), and tried to find the most appropriate solution. Therefore, it should not be permissible to circumvent these rules by applying other institutions of civil law (e. g., by referring to an error as a defect of consent and, thus, voiding the contract without the necessity to fulfill the conditions for withdrawing from the contract) under the seller's liability regime." T. Targosz, *Wpływ reklamy na prawo umów na przykładzie wprowadzenia w błąd co do cechy towaru*, in: *Reklama. Aspekty prawne*, ed. M. Namysłowska, Warszawa 2012, p. 169.

612 Act of 23. 08. 2007 on Combating Unfair Commercial Practices (consolidated version, Journal of Laws of 2017, item 2070 with changes), translation available on the website of the Polish Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*) https://www.uokik.gov.pl/download.php?plik=7636 (accessed: 31. 5. 2021).

613 F. Paolo Patti, *'Fraud'*…, p. 325; R. Schulze, *The Formation of Contract. New Features and Developments in Contracting*, in: *The Formation of Contract. New Features and Developments in Contracting*, ed. P. Perales Viscasillas, R. Schulze, Baden-Baden 2016, p. 16; S. Grundmann, *The future*…, p. 520–521.

614 R. Sefton-Green, *General*…, p. 12–14, 24–30.

615 R. Schulze, *Pre-Contractual Duties. A Brief Introduction*, in: *The Formation of Contract. New Features and Developments in Contracting,* ed. P. Perales Viscasillas, R. Schulze, Baden-Baden 2016, p. 28.

616 R. Sefton-Green, *General*…, p. 14.

617 S. Lohsse, *Information Duties and Defects in Consent*, in: *The Formation of Contract. New Features and Developments in Contracting*, ed. P. Perales Viscasillas, R. Schulze, Baden-Baden 2016, p. 74.

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pretation is particularly appropriate in cases when the lack of fulfilment of obligations causes no specific consequences.

In this regard, the issues related to the implementation of Directive 2005/29 may serve as an illustration – in states where the national legislature decided not to add individual protection instruments during the implementation of Directive 2005/29 the legal situation of the consumer against whom an unfair practice was applied depends on whether the premises of individual protection, specified in the norms on defects of consent, are fulfilled. As a rule, their premises tend to be more stringent than the conditions for recognizing the entrepreneur's behavior as an unfair market practice. As a result, it is argued that the interpretation of the premises of the regulation vice of consent needs to be changed.[618] Both the omission of information[619] as well as providing information in an unclear, incomprehensible, ambiguous or delayed manner[620] should qualify as causing the mistake.

PECL and DCFR attempted to adapt regulation of error and deception into a system in which the information protection paradigm played a central role.[621] Art. 4:103 PECL[622] requires the party that notices a contractual partner's error to warn him about it, if failure to do so would be contrary to good faith and fair dealings requirements. Art. 4:107 PECL and Art. II. – 7:205 DCFR[623] go even further, explicitly stating that such warning avoidance may constitute misleading conduct. Thus, failure to provide information is not the cause of the error, except when there is an obligation to provide information. This obligation may result from law, contract, or requirements of good faith and contractual loyalty.[624]

618 F. Paolo Patti, *'Fraud'*…, p. 322–328.

619 Art. 7.1 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, p. 22–39).

620 Art. 7.2 dir. 2005/29.

621 S. Lohsse, *Information*…, p. 82–87.

622 https://www.trans-lex.org/400200/_/pecl/ (accessed: 31. 5. 2021), II. – 7:201 DCFR, p. 210 https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf (accessed: 31. 5. 2021).

623 https://www.trans-lex.org/400200/_/pecl/ (accessed: 31. 5. 2021); II. – 7:205 DCFR, p. 211 https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf (accessed: 31. 5. 2021).

624 Good faith and fair dealing would have required a party aware of the mistake to point it out – Art. 48 1. (iii) CESL; the other party caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake – II. – 7:201 (I) b (ii); A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose. DCFR; II. – 7:205 (1); A party may avoid

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The method of limiting information duties built upon the requirements of good faith and contractual loyalty is specified in Art. II. – 7:205 (3) DCFR, which obliges the interpreter to take into account: (a) whether the party had specialized knowledge,(b) the cost of obtaining relevant information, (c) whether the other party could reasonably obtain this information by other means, and (d) the obvious meaning of the information for the other party. The aim of this norm is to ensure an appropriate balance between the obligation of one party to provide information and the duty of the other to seek information on his own.[625] Economic justification is a key element of the obligation: a party that can obtain information at a lower cost should share it with the other one. The scope of information duty does not encompass situations in which it becomes economically unjustified from a perspective of effective allocation of goods.[626]

The Polish legislature takes a different approach to the above issue. A legally relevant error or fraud may be caused by failure to comply with the information obligation or a defective method of providing information required by the law – this aspect raises no major doubts due to the correlation of information duties with the formal disclosure requirements.[627] Also, providing additional information, which is not directly related to the fulfillment of the information obligation, may also be seen as a misrepresentation or a fraud, as under the contractual loyalty principle one is obliged to refrain from misleading behavior (being both actions and omissions).

The main discrepancy between the solution adopted in the Polish Civil Code and in the model law can be observed when the other party fails to warn the consumer about his error. In order to prevent a situation in which the entrepreneur will not be forced to correct the consumer's error, positive regulation in the form of exhaustively listed information obligations is not sufficient. It would be unreasonable to assume that the legislature is able to foresee all possible future scenarios and to precisely define *ex ante* information obligations, the implementation of which could fully eliminate the risk of consumer concluding a contract due to an error. In this respect, casuistic regulation would not be sufficiently flexible. Instead, introducing a general information obligation could be a solution.

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a contract for mistake of fact or law existing when the contract was concluded if the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error – Article 4:103 PECL; A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed – Article 4:107 PECL.

625 F. Paolo Patti, *'Fraud'*…, p. 327.

626 F. Paolo Patti, *'Fraud'*…, p. 327; P. Mikłaszewicz, *Obowiązki*…, p. 76–78.

626 Art. 6.1 dir. 2011/8.

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According to Art. 84 § 1 CC the fact that the other party knew about the error or could have easily noticed it (in the case of legal acts that are not performed for free and when other conditions for the error are fulfilled) will be sufficient to enable the declarant to evade the legal effects of the declaration of will that was made to another person under an error. Thus, the other party's omission in the case of identifying the error is enough to transfer the risk related to the influence of information asymmetry onto the addressee of the statement.[628] It does not matter whether the undisclosed information was covered by a special information obligation – it is sufficient that it concerned the content of the contract and was essential. In this manner, the legislature sanctions failure to comply with the information obligation resulting from the general principle of contractual loyalty as to the elements which are pivotal for reaching a real consensus. The economic justification of individual obligations resulting from the principle of contractual loyalty is, thus, irrelevant.

The situation differs in case of fraud. In order for the omission to be considered a fraud, two aspects need to be examined: first, failure to disclose information should play a causal role – it must cause the mistake, and second, it should be analyzed what obligations can be derived from the general duty of loyalty.[629] As for the first matter – it is possible to assume that the omission committed by another person was the cause of the error of the declarant only if the addressee was obliged to prevent such situation. Obligation of that nature may result from the law (special information obligation), contract (also from the nature of the contract – e. g., in the case of an insurance contract), and – in exceptional cases – from the principles of social coexistence.[630]

Thus, it can be concluded that the element differentiating the effects of omission is whether the information, the lack of which causes an error, is related to the main element determining the consensus – the content of a legal act performed under the influence of this error. The Polish regulation on error and fraud, although matching the regulation on information, is based on the assumption that the main purpose of these norms should be to ensure an appropriate response of the law to the defectiveness of the declarant's will and, by this, support their autonomy.[631]

If the error was caused by a lack of fulfilment of an information obligation, then the declarant is entitled to avoid the consequences of a defectively submitted

628 B. Lewaszkiewicz-Petrykowska, in: *Kodeks cywilny*, ed. P. Księżak, M. Pyziak-Szafnicka, Art. 84, Marginal No. 2.

629 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 86, Marginal No. 15–20.

630 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 86, Marginal No. 15–20; Z. Radwański, in: *System…*, p. 413.

631 Critically on referring to the will and consensus theory when regulation the institution of error: G. De Geest, M. Kovac, *The Formation…*, p. 120.

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declaration of will. Such a solution makes it possible to see the regulation of vice of consent as one of the tools for sanctioning failure to comply with information duties.[632] At the same time, however, specific norms that constitute other consequences of failure to comply with information duties emerge. They appear because the regulation of defects of consent turns out to be suboptimal: the defect of consents' sanctions are inflexible (binary model),[633] and the traditional causality of defects in the declaration of will means that it is required to for the error to be caused by the other's failure to provide information.[634]

The aforementioned model is based on the correlation between information obligations and individual protection instruments. However, it is also possible to link information duties with objectified, standardized and non-causal mechanisms.

4.2.4. Sanctions for non-compliance with information obligations: Towards standardized protection

In the second model, failure to comply with pre-contractual information duties, being undesirable from the legislature's point of view, constitutes the sole prerequisite for applying sanctions. The cornerstone of this approach is that the sanction should not depend on the consequences of such behavior, e.g., the actual impact on consumer's contractual decision in a particular case. Therefore, the premises of protection should be constructed upon objective elements concerning the person obliged to fulfil the pre-contractual information duty. Also, sanction execution should not depend on the activity of the weaker entity, but should be exercised *ex lege*. A representative example of this approach can be found in Polish law. The national legislature introduced elements of the presented model into consumer law in the Act on Combating Unfair Commercial Practices, during the implementation of Directive 2005/29, and then, to a greater extent, in the Act on Consumer Rights, implementing Directive 2011/83.

Directive 2005/29 does not provide for tools for individual consumer protection, which caused two major problems in the European context. The first one appears in systems where the national legislature, during the implementation of the directive, did not add individual protection instruments – and, therefore, the implementing acts do not contain tools that would make it possible to produce

632 F. Paolo Patti, *'Fraud'*…, p. 326.
633 S. Lohsse, *Information*…, p. 80–81.
634 S. Lohsse, *Information*…, p. 81, 87.

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legal effects at the contractual level.[635] The fact that the practice is considered unfair does not allow the consumer to avoid the consequences related to the declaration of intent he submitted under its influence. The right to evade the legal effects of this declaration of will arises only if, in a given factual state, the conditions for avoidance under other provisions are met (these could be found in the CC, namely, the regulation on error, fraud or threat) or beyond the civil code.[636]

In Poland, the legislature decided to introduce instruments of individual consumer protection as part of the act implementing Directive 2005/29.[637] The activity of the national legislature was questioned, as it was raised that such action could constitute an incorrect implementation of the directive (introduction of personal protection instruments, not covered by the directive, understood as adopting more stringent protection mechanisms than these required by the Community law).[638] In the Polish legal scholarship this argumentation is rejected but with different justification – Directive 2005/29 allows the implementation of national individual protection mechanisms by national legislatures in recital 9,[639] while the other argue that individual protection instruments remain outside the scope of the directives.[640]

As a result, deciding on the interplay between these provisions of ACUCP and other regulations with a similar function became indispensable. Polish legal authors focuse mostly on the interplay between the regulation on vice of consent and ACUCP.[641] Initially, the possibility of claiming mistake or fraud was questioned when the misperception was caused by an unfair market practice (e. g., a conclusion prompted by a misleading advertisement).[642] However, new tendencies in European consumer law (development of the concept of legitimate ex-

635 The issue is emphasized in Spanish legal scholarship, see: L.M. Miranda Serrano, J. Pagador López, *La necesidad de establecer conexiones entre el Derecho de la competencia desleal y el Derecho de contratos*, DLL 2015, No. 8464.

636 E. g. Art. 6.1.2 Ley 34/1988, de 11 de noviembre, General de Publicidad (BOE No. 274, 15. 11. 1988 with changes).

637 Art. 12.1 ACUCP.

638 W. Jarosiński, B. Widła, *Odpowiedzialność cywilna według ustawy z dnia 23 sierpnia 2007 r. O przeciwdziałaniu nieuczciwym praktykom rynkowym w świetle dyrektywy 2005/29/WE o nieuczciwych praktykach handlowych*, TPP 2009/1–2, p. 45–47.

639 M. Sieradzka, *Ustawa o przeciwdziałaniu nieuczciwym praktykom. Komentarz*, Warszawa 2008, Art. 12, Marginal No. 2.

640 W. Jarosiński, B. Widła, *Odpowiedzialność…*, p. 46.

641 J. Szwaja, A. Tischner, *Implementacja dyrektywy 2005/29/WE o zwalczaniu nieuczciwych praktyk handlowych do prawa polskiego*, MoP 2007/20, p. 1121; W. Jarosiński, B. Widła, *Odpowiedzialność…*, p. 63; M. Grochowski, *Wadliwość…*, p. 63.

642 M. Późniak-Niedzielska, *Przesłanka wprowadzenia w błąd*, in: *Studia z prawa prywatnego*, ed. A. Szpunar, Łódź 1997, p. 203.

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pectations, norm on the impact of public statements on the content of an act in Directive 1999/44) have rendered the relevant argumentation obsolete.[643]

The introduction of a private law sanction for unfair market practices has created competition between protective instruments. A consumer who was not adequately provided with information that is objectively relevant to the perception of reality may choose between claiming protection under regulation on mistake or fraud or under the ACUCP. The premises of individual protection tend to be more stringent than those of the objectified ACUCP mechanism.

To avoid the legal consequences of the statement of will under Art. 88 CC a person must be mistaken (i. e., acting under misperception),[644] which is not required under ACUCP.[645] The error must appear in regard to the content of the legal act or be provoked intentionally: thus, either the scope of the error is limited, or a special, subjective circumstance is required on one side (i. e., insidious action). In contrast, premises of Art. 5–7 ACUCP are: disseminating untrue information or truthful information in a manner that may be misleading, failing to provide information that is required by law or is needed by the average consumer to make a decision as to the contract.[646] Thus, these requirements drift away from the character of the information and subjective circumstances of the entrepreneur.[647]

Another premise is the essential character of the error: only errors without which a reasonable person would not make a specific statement are legally relevant.[648] An analogous requirement is found in ACUCP. Misleading practices significantly distort or may distort the market behavior of average consumers: its impact must be significant enough to steer consumers towards decisions they would not make otherwise.

Therefore, the premises of defects of consent correlate with subjective circumstances related to both the declarant and the addressee of the statement: the

643 A. Kołodziej, *Cywilnoprawne konsekwencje wypowiedzi wypowiedzi reklamowych w obrocie konsumenckim,* AUWr PPiA 2005/ 73, p. 26, 36–37; R. Stefanicki, *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*, Warszawa 2009, Art. 12, Marginal No. 5.

644 M. Gutowski, in: *Kodeks cywilny*, Vol. I, ed. M. Gutowski, 2018, Art. 84, point V.2.

645 A. Michalak, *Przeciwdziałanie nieuczciwym praktykom rynkowym Komentarz*, Warszawa 2008, Art. 5, Marginal No. 7; I. Oleksiewicz, *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym. Komentarz*, Warszawa 2013, Art. 5, Marginal No. 1.

646 Art. 5 ACUCP contains a general clause specifying objective criteria for classifying an action as misleading. A. Michalak, *Przeciwdziałanie…*, Art. 5, Marginal No. 4.

647 In the context of intent to mislead: M. Późniak-Niedzielska, *Naśladownictwo produktów jako akt nieuczciwej konkurencji*, PPH 1992/1, p. 9.

648 M. Królikowski, *Błąd…*, p. 200–205. In the legal academics writings, the significance of an error is assessed either based on an objective criterion (B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 115; A. Olejniczak, in: *System…*, p. 509–510) or both an objective and subjective one – K. Pietrzykowski, in: *Kodeks cywilny*, Vol. I, ed. K. Pietrzykowski, Warszawa 2018, Art. 84, Marginal No. 7; P. Sobolewski, in: *Kodeks…*, Art. 84, No. 13.

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declarant's perception of reality and the motivation of the addressee are examined. In contrast, the requirements for protecting consumers from misleading market practices are objectified, meaning that their fulfilment should be easier to establish and, if necessary, to prove. In the case of error and fraud, causal link between mistake and statement is required, while in the case of misleading practices, the risk of limiting consumer decision-making autonomy will suffice. The scope of protection provided for in ACUCP is wider than in the case of error or fraud, and the assessment of the fulfillment of the conditions on which this protection depends should be much easier.

If an entrepreneur used an unfair market practice against a consumer, thereby infringing or threatening his interests, the consumer is entitled to demand that the entrepreneur: refrains from the practice, mitigates its effects, makes a statement (e. g., publishes an apology or explanation), repairs the damage caused, or makes a donation to a specific social purpose.[649] Such sanctions should, in principle, be more adequate for protecting consumer's interests: this allows him to choose the solution which is best from his perspective.[650]

In turn, in Directive 2011/83, and then in the Act on Consumer Rights implementing it into the Polish law system, the violation of selected information obligations was correlated with an *ex lege* private-law sanction, being an objective circumstance.[651]

In the case of distance contracts within the meaning of Art. 2.1 ACR, concluded using electronic means of communication, the entrepreneur's failure to ensure that the consumer, at the time of placing the order, clearly aknowledges that the order entails an obligation to pay results in contract not being concluded.[652] Failure to meet the information obligations related to additional fees or other costs referred to in Art. 12.1 point 5 ACR, or the cost of returning the items referred to in Art. 12.1 point 10 ACR, results in the consumer being exempted from incurring them.[653] Similarly, Art. 36 and 40.5 ACR as a sanction for failure to provide the information, exempt the consumer from an obligation to pay. Finally, breach of the information duty regarding the right to withdraw increases the cooling-off period for the buyer.[654]

649 Art. 12 ACUCP.

650 On the sanctions see: Chapter 5.1.2.

651 On particular sanctions see: M. Wyrwiński, *Konsekwencje naruszenia obowiązków informacyjnych wynikających z ustawy o prawach konsumenta*, in: *Aktualne wyzwania prawa własności intelektualnej i prawa konkurencji. Księga pamiątkowa dedykowana Profesorowi Michałowi du Vallowi*, ed. D. Kasprzycki, J. Ożegalska-Trybalska, Warszawa 2015, p. 913–924.

652 Art. 17.2–4 ACR. Chapter 3.3.2.1.

653 Art. 23 ACR.

654 Art. 29.1 ACR, Art. 41 ACR.

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The protection provided for by the norms described above is general, standardized and objective in nature – the fulfillment of protection conditions depends on objectively verifiable events. There is no need to examine the will or motivation of the parties. The non-compliance with the obligation is sanctioned *ex lege*, regardless of the actual will and activity of the protected entity. At the same time, the content of the legal relationship changes automatically – it is adapted to what normally should be beneficial for the weaker party in such circumstances.

4.3. Disloyal behavior of the other party – anonymity, presumptions and trust in the online environment

Disloyal behavior of the person to whom the declaration of intent is addressed, causing the declarant's mistake as to the facts or the content of the contract, may take very different forms. Depending on this form, the legal effects of the contract concluded under the influence of error may vary. As a rule, the legislature penalizes the behavior of a person who misleads other civil law entities and tries to take advantage of their error. The civil law sanctions are diversified, they include: invalidity or voidability of a legal act, obligation to pay compensation or to return unlawfully obtained benefits.

4.3.1. *Error in persona*[655] – the anonymity on the Internet

Obviously, the parties to the contract concluded with the use of remote communication tools are not in the same place at the same time. This type of communication requires the transfer of data that is absolutely necessary for the conclusion and performance of a given contract. The inclusion of supplementary information will usually depend on the will of the declarant and the functionalities of the communication tool. Usually, the possibility of obtaining verifiable information about the other party will, therefore, be very limited. Online anonymity and the ease of creating avatars make participants of e-commerce more prone to error than the persons contracting offline.

655 The author adopts a broad understanding of error *in persona*, covering situations in which an error is related to the other party to the contract – regardless of whether it concerns his identity or other features. Similarly: J. Byrski, *Wadliwość oświadczenia woli składanego drogą elektroniczną*, PTN 2008/2, p. 74.

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Under these circumstances, the economic position of an entity on the online market will often be determined by its reputation capital[656] – developed within a given portal or a specific community of network users. Entities without an established market position will adopt various strategies to gain trust of Internet users. Some of them will try to fool the other party as to their identity. Others will try to make potential contractors believe that they are linked to a third party with an established market position or significant reputation capital. Finally, some online entities will use the possibilities offered by the network in order to hide some of their features from other market participants. Each of these typical models of disloyal behavior is correlated with different legal effects. The differentiation of the latter depends on the degree of reprehensibility of such practice and the value of the protected interest.

4.3.1.1. The party claims to be someone else

Usually, the discrepancy between the identity of the person who acted and the one indicated as a party to the contract is noticed when the price is not paid or the service is not provided although the founds were already transferred. In Poland the validity and effectiveness of the contract concluded in such manner is questioned.[657] *De lege lata* three different approaches can be considered. It can be argued that the contract, during the conclusion of which one of the parties impersonates another entity, may not cause legal effects if the erring person evaded the consequences of such a legal act (voidability).[658] It may be claimed that such an agreement, due to the manner of its conclusion, is against the law and contrary to the principles of social coexistence,[659] and, thus, invalid *ex lege*. The third option is to argue that sending a message to another person marked as coming from another entity is similar to forging a written declaration of will –

656 On the impact of reputation capital on entrepreneur's income: M. Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Working Paper, https://poseidon01.ssrn.com/delivery.php?ID=758094094127082008085018069002122100117048027015062035073082088022110005074030123024022049040100011047021031066094010027092010014090074078042004094094110024073074072077052110121004008100064101024005078122109075124023068031112021073083118085073029074&EXT=pdf (accessed: 31.5.2021); A. Thierer, C. Koopman, A. Hobson, C. Kuiper, *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem"*, Univ. Miami Law Rev. 2016/70(3), p. 841.

657 A. Harla, *Ważność umowy zawartej z osobą fizyczną, która przy zawarciu umowy podała się za kogoś innego,* Pal. 2002/11–12, p. 54–62.

658 Judgment of the Appeal Court in Kraków of 22.5.2002, I ACa 299/02, Legalis; A. Harla, *Ważność…*, p. 56–58.

659 A. Harla, *Ważność…*, p. 61–62; B. Lewaszkiewicz-Petrykowska, in: *Kodeks cywilny*, ed. P. Księżak, M. Pyziak-Szafnicka, Art. 86, Marginal No. 10.

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such a message does not constitute a declaration of will at all.[660] As a result, the identity theft impedes contract conclusion.

Theoretically, it would be possible to consider that a situation when a declaration of intent is made by a person mistaken as to the identity of the other party because of the impersonation fulfils the premises of Art. 84 or Art. 86 CC. When concluding a contract, the identity of the other party may either be of major importance – especially if it is a high value contract or the contract performance is associated with a significant risk, or it may be almost irrelevant – e. g., when the subject of the contract is a frequently purchased item, of low value, or performance of the contract entails virtually no risk. Hence, the fulfillment of the premises of error should be assessed *ad casu*.[661]

If a mistake as to the identity of the other party occurs in the Internet environment, then when assessing whether this mistake should be considered essential (as required by Art. 84 § 2 CC), the importance of the entity's reputational capital at the stage of selecting the offer must be taken into account. The reputation of the online entrepreneur has a significant impact on his market position and, thus, it should be taken it into account when verifying the essential character of the error. If the reputation of the trader is one of the factors determining the attractiveness of the offer in the eyes of the consumer, causing a false belief as to the identity of a professional should, in principle, be classified as an essential error.

It should also be examined whether a mistake as to the identity of the other party is an error as to the content of the legal act. In the legal academic writing two possible ways of interpretation can be found:[662] according to the first one subjective elements of the contract form an integral part of its content,[663] according to the second the content of the contract covers the substantive provisions only. Transactional logic is indicated as an argument in favor of adopting the first of these concepts.[664]

What is also assessed is whether the error was caused by the other party, even without his fault, and whether it was easy to notice. As a rule, it should be assumed that when a person pretends to be someone else, he aims directly to mislead the other party as to his identity. In principle, such behavior can be

660 M. Królikowski, *Błąd…*, Chapter IV § 3.II.5.F; W. Dubis, *Wady elektronicznych oświadczeń woli*, in: *Prawne i ekonomiczne aspekty komunikacji*, ed. J. Gołaczyński, Warszawa 2003, p. 232–233.

661 M. Królikowski, *Błąd…*, Chapter IV § 2.II.2

662 A. Harla, *Ważność…*, p. 58.

663 A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo…*, p. 393; K. Pietrzykowski, in: *Kodeks…*, Art. 84, Marginal No. 4; M. Gutowski, Z. Radwański, in: *System…*, p. 506, 508.

664 A. Harla, *Ważność…*, p. 58.

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considered a fraud,[665] which entitles a person acting under the influence of error to avoid legal consequences of the contract, even if in the given circumstances the mistake as to identity cannot be considered essential or does not concern the content of the legal transaction at hand.

Thus, it should be stated that evading legal consequences of an act carried out under the influence of an error as to the identity of the other party could be admissible. However, the erring's right will often prove insufficient to protect his interests. According to Art. 88 § 1 CC, evasion of the legal consequences of a defective declaration of intent made to another person should be done in writing and delivered to that person. The fulfillment of the latter requirement is practically impossible if the mistaken party neither knows the real identity nor the contact details of the person with whom he contracted.

Some legal commentators indicate that there is no need to refer to a mistake or fraud, because such an act is null and void *ex lege*, as it is contrary to the basic principles of law and the principles of community life.[666] A furthest-reaching sanction (nullity) absorbs other sanctions.[667] *De iure* invalidity results from Art. 58 CC, according to which a legal act inconsistent with the statutory law is invalid (*ius cogens*).[668] The concept of the statutory law is broadly interpreted in this context and covers general binding sources of law.

However, there is no provision in the civil law that would explicitly prohibit an entity from pretending to be someone else when contracting.[669] Nevertheless, it is possible to derive a general rule from the other legal norms, according to which a subject of civil law may not pretend to be another person. As a rule, private law entities shall, generally, act on their own behalf only. Acting on behalf of someone else is allowed provided that the representative was explicitly entitled to do so. The legislature penalizes typical situations in which the person acts as another entity.[670] In the light of the above, it can be concluded that the use of the identity of another person when concluding a contract is inconsistent with the main principles of private law, and therefore may result in the invalidity of such a contract.

In addition, the validity of the contract is also verified in the light of compliance with the principles of social coexistence. The scope of activities contrary

665 M. Ziemiak, *Kradzież tożsamości osoby fizycznej – wybrane zagadnienia cywilnoprawne*, GPS 2018/39, p. 99.

666 A. Harla, *Ważność…*, p. 61–62; B. Lewaszkiewicz-Petrykowska, in: *Kodeks cywilny*, ed. P. Księżak, M. Pyziak-Szafnicka, Art. 86, Marginal No. 10.

667 P. Księżak, in: *Kodeks cywilny. Komentarz. Część ogólna*, ed. P. Księżak, M. Pyziak-Szafnicka, Warszawa 2014, Art. 58, Marginal No. 4.

668 R. Trzaskowski, *Granice swobody kształtowania treści i celu umów obligatoryjnych. Art. 353[1] k.c.*, Kraków 2005, p. 229; M. Gutowski, *Nieważność…*, Chapter III § 1.VI.

669 A. Harla, *Ważność…*, p. 59.

670 Art. 190a Criminal Code, Art. 275 Criminal Code, Art. 286 § 1 Criminal Code, Art. 39 CC.

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to these principles remains undefined and variable, as does the social environment in which these activities are performed and in the context of which they should be examined.[671] Due to the lack of a catalog or definition of the rules of social coexistence, the conclusion and content of the contract should be assessed separately in each case.[672] It is claimed that the principles of fair trading require that no private law actor should hide his identity, let alone pretend to be another person – neither real nor fictitious.[673] Thus, due to the non-compliance with the principles of social coexistence, a legal act performed by a person who claims to be someone else is invalid *ex lege*.

Another approached developed in the context of the identity theft.[674] If the declaration was made by a person who claims to be someone else, then such communication does not constitute a declaration of will at all. Such situation is treated similarly to the falsification of a signature under a document, which could be objectively perceived as containing a declaration of will. Such a message cannot lead to contract conclusion. As a consequence, it is not possible to verify the agreement's compliance with the statutory law or with the principles of social coexistence. This solution leads to the desired effects both from the point of view of the person whose identity was used and the addressee of the message in question. The non-existence of a declaration of will does not depend on taking any action and it does not require the identification of the person who committed the identity theft.

Regardless of the legal validity of the contract, it does not give rise to any legal consequences on the part of the person whose identity was used. Such a person neither makes a declaration of will in person nor through an authorized representative, and therefore cannot be considered a party to the contract.

It should be noted, however, that identity theft and the counterparty's mistake as to the other person's oneness do not always occur simultaneously. Often it will be unnecessary to use someone else's identity. Instead of committing an identity theft or misappropriating company's name, it will be enough to choose a name, design a page or develop an offer in such a manner that it misleads the consumer as to the identity of the trader. An activity of the trader that is likely to mislead customers as to his identity will usually be considered a misleading practice.[675]

671 P. Księżak, in: *Kodeks…*, Art. 58, Marginal No. 48.

672 It is "the question of the facts, i. e. the circumstances of a specific case, and any attempt to generalize in advance would be doomed to failure". Judgment of the Supreme Court of 29. 9. 1987, III CZP 51/87, Legalis.

673 A. Harla, *Ważność…*, p. 60.

674 J. Gołaczyński, *Umowy elektroniczne w obrocie gospodarczym*, Warszawa 2005, p. 46.

675 Art. 5–7 ACUCP.

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For this reason, the sanction of invalidity of the contract should not be applied in such situations, because the law provisions sanctions of a different type.[676]

4.3.1.2. The entrepreneur suggests connections increasing his reputation capital

An entrepreneur, who does not want to commit an identity theft, may however aim at making potential customers believe that there is a connection between him and another professional entity with significant reputation capital. Thus, this entrepreneur can be seen as more credible. In order to achieve it, links, references or other content can be posted on the website through which the trader operates, suggesting e. g. collaboration with a trader of significant reputation. A similar practice is to suggest that a particular website is recommended by another entity – either a well-known entrepreneur or a consumer organization (e. g., by placing a mark which is associated with. a given organization). In both of the above-mentioned cases, the consumer can avoid the legal consequences of the act carried out under the influence of error or fraud.

It should be noted, however, that the consumer's misconception as to the specific characteristics of the entrepreneur often arises as a result of misperception.[677] The entrepreneur does not publish content that indicates connection with a recognized entity but only suggests these. Frequently, reading the content carefully is enough to avoid making a mistake. Then it could be argued that the error was, in fact, caused solely by the buyer's lack of diligence. In such case, the question is whether it is permissible to presume that the entrepreneur acted fraudulently. Fraudulent behavior of the entrepreneur weakens his legal situation: in such scenario it is no longer required that the error of the other party was essential or that it concerned the content of the legal act to void the contract. Adopting such presumption would significantly improve the situation of the declarant at the expense of the addressee of a statement of will without any axiological justification. As a result, it should not be allowed.

However, in a situation where the entrepreneur suggests the existence of a link between himself and another entity with an established position on a given market or within a particular online platform, or uses the quality mark unlawfully, specific provisions may apply. They protect consumers also when evading the legal consequences of the act under regulation on error or fraud may be problematic. In most instances, such behavior of a professional entity will be

676 Art. 12.1 ACUCP.

677 Various types of behavioral and cognitive biases, which make people interpret information in a way inconsistent with its actual wording but in line with their own expectations are particularly important in this regard. M.G. Faure, H.A. Luth, *Behavioural Economics in Unfair Contract Terms Cautions and Considerations*, JCP 2011/34, p. 349.

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assessed through the prism of the ACUCP. If the entrepreneur falsely acknowledges compliance with a code of conduct, that the code has been approved by a public authority or other body, that he has obtained the appropriate authorization from a public body or private entity, or that the market practices or the product have been officially approved or obtained other relevant authorization from a public body or a private entity, while failing to meet the conditions of approval or other appropriate authorization, uses a certificate, quality mark or an equivalent mark without authorization, he commits an unfair market practice within the meaning of the ACUCP.[678] Such action may result in the consumer being entitled to raise claims based on Art. 12.1 ACUCP. This, in practice, reduces the usefulness of regulations on error and fraud.[679]

4.3.1.3. Causing a false impression as to one's characteristics, including legal capacity

Network users falling for the virtual image of another entity are particularly vulnerable to error as to the specific characteristics of the person with whom they want to conclude a contract. In practice, two typical scenarios can be observed. In the first one, the trader provides false information about himself to increase his attractiveness, or withholds data that could hinder it. In the second, the consumer conceals or misleads the other party as to the circumstances which may raise doubts as to his ability to conclude a particular contract.

As to the former case, the consumer's mistake as to the characteristics of the entrepreneur (his qualifications, knowledge, operability) may be caused by professional's failure to comply with information obligations or the use of a misleading practice. For example, the consumer often has no physical possibility to check whether the ordered service is provided by a person having the required knowledge – he confides in the information made available to him by the entrepreneur. Therefore, if he submits a declaration of will while being mistaken as to the characteristics of the entrepreneur, he will be able to evade its legal effects, provided that other conditions of error (in particular – essential character of the error) or fraud are fulfilled.[680] Alternatively, he can seek protection under

678 Art. 7 ACUCP.

679 The comparison of the premises specified in Art. 12 ACUCP and in the rules on evasion of the legal consequences of a defectively submitted declaration of will as well as remarks on the adequacy of the sanctions are in Chapters 4.2.4. and 5.1.2.

680 In regard to the offline trade, Królikowski assumes that an error as to the characteristics of the contractor, concerning e. g. reputation or qualifications, will usually not justify relying on Art. 84 CC, as it is not a mistake as to the content of the contract. In contrast, an error as to the other party's qualities is legally relevant if the mistake was caused fraudulently. M. Królikowski, *Błąd…*, Chapter IV § 3.II.5.F.

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ACUCP. In this way, the consumer is provided with instruments appropriate to protect his interests against the dangers of increased anonymity in the online environment.

In online trading, situations when the trader is mistaken as to the legal capacity of the other party are also common. The inability to perform a given legal act essentially makes it impossible to properly form the contractual relationship between the parties.

In traditional trade, this does not cause too much inconvenience – the parties are in the same place during the conclusion of the contract or are in direct contact (telephone call, Skype, etc.) and thus they are usually capable of obtaining data which should enable them to pre-verify the legal status of the other party. Knowing the appearance or voice of a person, circumstances in which the conversation is conducted and seeing how it evolves, the entity aiming to conclude the contract may suppose what are the chances that the future contractor is deprived of legal capacity or has only limited capacity due to age or mental state. Knowing these circumstances is considered sufficient to minimize the risk of concluding a contract with a person who does not have full legal capacity unknowingly. Exercising due diligence by the entrepreneur should protect him from concluding an invalid or ineffective (case of suspended effectiveness – *negotium claudicans*) contract.

If a professional decides to conclude a contract with a person without full legal capacity or acting in a state that excludes conscious or free decision and expression of will, the relevant provisions of the CC will apply (Art. 14, 18 or 82 CC). In principle, pleading an error as to the legal capacity or the mental state of the contractor is out of question in such circumstances.

The distribution of risk related to concluding a contract with a person without full legal capacity or in a state excluding conscious or free decision-making and expression of will, shaped taking into account the circumstances typical for traditional trading, remains (despite different characteristics)[681] the same in consumer e-commerce.

4.3.2. Error as to the obligation to pay – legitimate expectations of the consumer, information obligations under ACR and personal data as a payment

An error as to the obligation to pay constitutes a specific example of a legally relevant error. In the context of Polish law, a misconception as to the obligation to pay should be associated with a lack of will to be bound by a mutual agreement

681 Chapter 2.3.1.2.

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– in such situation the declarant does not want to be charged with the obligation to perform a consideration for the other party.

In the case of digitized goods and services provided electronically, the sales offer often takes the form of a download or save link, without any additional information regarding the payment entailed by the contract thus concluded. The notification about the obligation to pay the price may appear later, in the pop-up window,[682] along with the standard terms or the license agreement, or only when the user intends to open or access the product for the first time.[683]

Lack of notification about the payment obligation at the pre-contractual stage will usually lead to the non-professional party believing that the service is free of charge. This assumption would be justified due to the specificity of the internet environment – online users frequently come across products or information shared or presented free of charge by other users – entrepreneurs (e. g., for advertising purposes), academics and scientists (e. g., wanting to popularize research results or discoveries) and artists (e. g., wishing to obtain an international reputation while minimizing promotion expenditures).

A failure to provide information on the obligation to pay, in particular to specify the price, should be treated, taking into account the circumstances described above, as indicating a lack of the obligation to pay. Thus, lack of information about the necessity to provide consideration could be interpreted by an average, rationally operating and relatively informed user of the Internet as meaning that the content is free of charge.[684] Therefore, if the entrepreneur at the pre-contractual stage did not provide any information on the expected payment, and, as a result, the other party became convinced that he would not be obliged to pay the price, and then the entrepreneur causes an error as to the existence of the obligation to pay.

It is irrelevant whether the entrepreneur knew or could have known that the other party was in mistaken, because he caused this error – consciously or not – by failing to provide information on payment beforehand.

The error as to the obligation to pay is essential – it is always of importance whether the contract is free of charge or entails an obligation to pay. The latter obligation in many cases will mean that the legal relationship between the parties

682 It is an animation that is displayed at the moment of undertaking a specific action by a network user, hiding the main content of the page.

683 The Polish case of an online platform Pobieraczek.pl. Departament Polityki Konsumenckiej UOKiK, *Raport dotyczący przestrzegania praw konsumentów w wybranych transakcjach zawieranych na odległość*, p. 19–21 https://www.uokik.gov.pl/download.php?plik=8312 (accessed: 31. 5. 2021).

684 It is common that products are temporarily available free of charge. After a specified period elapses the user who has already become acquainted with the product may decide to purchase it. However, it is recommended to notify the buyer that the product is made available without incurring fees or paying the price for a trial period only.

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is subject to the CC provisions on mutual agreements – and thus the rights and obligations of the parties will be different. As a result, since the obligation to pay significantly affects the legal situation of the parties, it can be assumed that the error in this regard should be considered essential in every scenario, regardless of the amount of the consideration.

The notion of the error as to the content of a legal act includes an error as to the object of a legal transaction and an error as to the type of legal transaction.[685] When describing types of legal activities, it is common to distinguish between legal acts that are free of charge and these against payment[686] – thus, *a completudine*, an error as to the obligation to pay will always be an error as to the content of a legal act.

Situations in which the offered product is not digitized or is saved on a physical medium and in order to be used, and must be delivered to the other party via traditional methods of shipping tangible goods (post office, courier, delivery personally by the seller etc.) should be examined separately. If the delivery of the product requires expenditure from the party making it available or delivering it in any way, it is unreasonable to assume that the seller wishes to transfer ownership of the product to another person and bear the associated costs without gaining any material benefit.

This assumption remains valid also in the online environment. There are no general rules which would allow to presume that an online seller or creator is seeking to reduce his assets. Thus, if the product cannot be transferred to the buyer free of charge e. g. via the Internet, the average user has no reasons to believe that the seller is willing to hand over the product and pay for the delivery. Providing the other party before the conclusion of the contract with information that indicates that shipment of a given product will require incurring delivery costs speaks against the possibility of the buyer claiming an error as to the obligation to pay. Therefore, if the presented data shows that the contract performance will require yo incur costs, the user's belief that the contract is free of charge and does not entail the obligation to pay the price of the product or cover shipping costs is unjustified.

Consequently, it must be assumed that, in these circumstances, the buyer's mistake as to the obligation to pay will not be caused by the action of the other party. Thus, in order for a person convinced of the complimentary character of the agreement to refer to the error, he will have to prove that the contractor knew about this error or could easily notice it. Due to the aforementioned lack of

685 M. Królikowski, *Błąd…*, Chapter IV § 3.II.5.E,G.

686 J. Grykiel, A. Olejniczak, Z. Radwański, in: *System Prawa Prywatnego*, Vol. 2, *Prawo cywilne – część ogólna*, ed. Z. Radwański, A. Olejniczak, Warszawa 2019, p. 249, 282–286.

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information about the other party, proving the fulfillment of any of the above-mentioned conditions will be associated with significant difficulties.

Currently, the number of errors as to the obligation to pay should gradually decrease. The EU legislature, under Directive 2011/83, implemented to the Polish law by ACR, imposed on the entrepreneur an obligation to provide the consumer with a clear and visible information about the obligation to pay entailed by the contract.[687] Failure to fulfill this information obligation means that the consumer is not bound by the contract or order, which leaves no place for referring to defects in the declaration of will.

The assessment of the character of the contract becomes problematic in situations where the consumer receives a benefit for providing his personal data. In general,[688] such contracts could be classified as for charge, arguing that the consumer's payment takes the form of consent to the processing of personal data.[689] The conclusion is that the entrepreneur informing the consumer about the free character of such contract or withholding that the payment on the part of the consumer is non-pecuniary will violate the obligation specified in Art. 17.2–3 ACR. In addition, the entrepreneur's behavior misleading the consumer as to the payment for the service may[690] constitute an unfair market practice within the meaning of ACUCP[691] and entitles the consumer to raise these of the claims listed in Art. 12 ACUCP[692] which may be raised despite lack of contract conclusion.

687 Art. 12.1 point 1, 5 and 7; Art. 17.2–4 ACR.

688 Chapter 6.4.5.

689 J. M. Newman, *Antitrust in Zero-Priced Markets, Foundations*, U. Pa. L. Rev. 2015/164, p. 167; Preliminary Opinion of European Data Protection Supervisor. Privacy and Competitiveness in the Age of Big Data: The interplay between data protection, competition law and consumer protection in the Digital Economy, p. 3, 6, 10, https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf (accessed: 31. 5. 2021); I. Małobęcka, *Prawna…*, p. 34; A.D. Chirita, *The Rise of Big Data and the Loss of Privacy*, p. 3, 5, 14–15, https://poseidon01.ssrn.com/delivery.php?ID=656004084115001024072122001022011071023008077017062005096023077096117097106000070000024056016012056112062067112073108119001098105083064042055000020092065028127079093030023086094018125118093002067077117026021084088007025006090025112075113016099117083&EXT=pdf (accessed: 31. 5. 2021).

690 In practice, it will be difficult to prove that the consumer would not have made the decision to conclude the contract if he had known that the provision of personal data constituted a specific price of the service. I. Małobęcka, *Prawna…*, p. 37. Alternatively, the practice of defining a service provided for data could be classified as free of charge pursuant to Art. 7 point 20 ACUCP.

691 Art. 5.2 point 1 and 5, Art. 6.1,2, 4 point 3 and 4 ACUCP.

692 Article 12.1. In the case of unfair commercial practices, the consumer whose interest has been jeopardized or violated, may request that:
1) such a practice be discontinued;
2) the effects of such a practice be removed;
3) a single or multiple statement of appropriate content and appropriate form be made;

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4.3.3. Surprise clauses – protection of trust through regulation on unfair terms

When concluding click-wrap agreements, which are common in the Internet trade, the person, before accepting the offer or submitting a declaration of will, must scroll through the content of the contract or standard terms and then confirm them. This action constitutes consenting to their wording. Currently, this manner of proceeding has become very popular and is frequently considered[693] to meet the condition of making it possible to read the content of the contract before its conclusion.

There are, however, a few practical issues that need to be addressed. A common practice among Internet users is to scroll and confirm the content without actually reading it. Theoretically, the assessment of such practice does not pose any difficulties – the user did not exercise due diligence as he abstained from reading standard terms when he had the chance.

However, it should be assessed whether the requirement to actually read standard terms before concluding the contract by the consumer is fit to the current social and economic reality. The popularity of online consumer contracts is growing and so does their number. Using search engines, positioning tools and comparison engines (Ceneo,[694] Skąpiec,[695] etc.), consumers compare offers, taking into account e. g. properties of the object of the contract, price, costs and time of delivery, the possibility of returning the goods, the deadline for withdrawing from the contract and whether the entity aims its offer at consumers from a given geographic area.

It is unreasonable to expect the consumer to always read the entire terms and conditions, standard terms or other types of references prepared by the other party when entering into a contract. Frequently, after reading standard terms presented by potential contractors the consumer will still be unable to assess how the differences in their content might actually affect his legal situation. Still, he will not be in a position allowing him to negotiate individual provisions. Thus, accepting standard terms without reading them should be perceived as a customary and reasonable practice of an average consumer. It is justified not only because it saves user a considerable amount of time but also because of low

4) the damage as per general terms and conditions be redressed and, in particular, to request that the contract be cancelled and the benefits mutually returned and the costs associated with the purchase of the product be reimbursed by the trader;
5) an adequate amount of money be adjudicated for a specific social cause related to supporting the Polish culture, national heritage or consumer protection. Translation published by Polish consumer protection authority (*Urząd Ochrony Konkurencji i Konsumentów*) https://www.uokik.gov.pl/download.php?plik=7636 (accessed: 31. 5. 2021).

693 A. Kubiak-Cyrul, *Udostępnianie…*, p. 9, 13–14.

694 https://www.ceneo.pl/ (accessed: 31. 5. 2021).

695 https://www.skapiec.pl/ (accessed: 31. 5. 2021).

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chances of drawing correct conclusions as to one's legal situation from the provisions at hand. In consequence, there are no reasons to believe that this practice should be negatively assessed – e.g., as lack of due diligence or passive attitude.

The fact that today's consumers do not read provisions of standard terms and then confirm that they have read them creates a following fiction: it is assumed that the consumer has read and agreed to standard terms which resulted in their incorporation into the contract. At the same time, however, the consumer, during the discussed process, acts in trust towards the other party – he assumes that the contractual fairness of the professional guarantees that the template includes only these provisions that can be reasonably expected in a given type of contract. Due to the popularity of the described practice, it was necessary to protect the consumer against disloyal behavior of the entrepreneur, in particular against including in standard terms clauses which – not being expected in the contract of a given type – worsen the legal situation of the weaker party.[696]

In principle, European legislature recognizes the need to protect the trust of the contracting party if surprising clauses are added to the content of a standard contract.[697] Some legal systems aim at supplementing the regulation on unfair contract terms and adhesive agreements with a norm explicitly referring to non-standard provisions.[698] Within EU this approach has been taken by Austria[699] and Germany.[700]

The surprise clause is understood to be a contractual provision which the acceding party has no grounds to expect in an agreement of a given type, and which leads to a contractual imbalance between the parties in favor of the pro-

696 The matter is broadly discussed in common law. W.R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: in Defence of Restatement Subsection 211(3)*, Wash. L. Rev. 2007/82, p. 227; I. Ayres, A. Schwartz, *The No-Reading Problem in Consumer Contract Law*, St. L. Rev. 2014/66(3), p. 555–562. See also: E. Terryn, in: *Cases, materials*, ed. H.-W. Micklitz, J. Stuyck, E. Terryn, p. 285–286.

697 N. Jansen, in: *Commentaries on European contract laws*, ed. N. Jansen, R. Zimmermann, Oxford 2018, p. 276–277.

698 See the Spanish CC Project, Art. 988c; R.S. Stiglitz, *El contrato por adhesión en el Proyecto de Código Civil y Comercial*, PC 2015/1, p. 73 https://www.pensamientocivil.com.ar/system/files/2015/01/Doctrina414.pdf (accessed: 31. 5. 2021).

699 § 864a ABGB stipulates that contractual clauses in the standard contract do not form the content of the contract if they are unfavorable to the other party, and that party could not objectively expect them, unless he was informed about them in a specific manner.

700 M. Loos, *Transparency of standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law*, ERPL 2015/23(2), p. 183–184; § 305c (1) BGB provides that contractual provisions, which in the given circumstances should be considered non-standard, as the other party to the contract could not have expected, are not part of the contract. It is underscored that usually surprise clauses will be considered abusive as well. J. Basedow, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München 1993, § 305c, point 3, Rn 4.

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poser.[701] This concerns, in particular, clauses deviating from standard provisions of a specific type of contract. Verification whether the provision is a surprise clause should, therefore, be performed taken into account the type of contract, its subject and standard content of such agreements. In addition, this clause must shape the legal situation of the parties in a way that disrupts the contractual balance.

Therefore, in order to assess whether a given provision of a standard contract constitutes a surprise clause, the circumstances of the contract conclusion need to be reconstructed, with particular emphasis on the manner and scope of information provided by the proposer (advertising materials, proposer's assurances, situation in which the parties acted). Then, it can be determined which contractual provisions would normally shape the relationship between the parties in such situation. If the provision in question is clearly outside the scope of issues normally tackled it this type of contracts or is inconsistent with standard contractual provisions for contracts of this type, then it should be considered a surprise clause.[702] Due to the fact that the assessment of the nature of such provision depends, to a large extent, on the context, it will not be possible to create even an exemplary catalog of surprise clauses (e. g., similar to the catalog of unfair terms).[703]

Surprise clauses may be regarded as a kind of unfair contract terms.[704] It is worth noting, however, that due to the lack of a legal definition of surprise clauses in EU law, such a classification depends on the understanding of the concept of a surprise clause adopted in the national legal system at hand. If only these provisions that the consumer could not expect and that are so unfavorable to him that they cause contractual imbalance are considered to be surprise clauses, then each surprise clause will also be an unfair term. Once this approach is adopted, a separate regulation of surprise clauses could constitute a regulatory *superfluum* – with such an understanding of this term, a general regulation on abusive clauses is sufficient.

701 G. De Cristofaro, in: *Towards a European Contract*, ed. R. Schulze, J. Stuyck, Munich 2011, p. 108; R.S. Stiglitz, *El contrato…*, p. 74; in the model adopted in § 864a ABGB, a surprising provision is not included into the content of the contract if it is unfavorable to the other party.

702 It does not mean that automatically it is not possible to include such clauses in a standard contract. For their effective incorporation, it is necessary for the proposer to make adequate effort so that the addressee is aware of their existence when concluding the contract. It is stated, for example, that a provision of this type should be highlighted in the text (using a special font, e. g. colored, bold) or placed on the first page of the text and marked with a reference visible or alarming to the reader. Only such formatting will justify the assumption that the consumer got acquainted with the clause before concluding the contract, and was not surprised by the subsequent reference to it by the other party.

703 www.rejestr.uokik.gov.pl/ (accessed: 31. 5. 2021).

704 R.S. Stiglitz, *El contrato…*, p. 73.

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In Poland, there is no specific regulation of surprise clauses. According to Art. 385^1 CC[705] a clause that the consumer could not expect in the contract, and which shapes his rights and obligations in a manner contrary to morality, grossly violating his interests, is simply an abusive clause. There are no obstacles to call such a provision a surprise clause. On the other hand, it would be pointless to distinguish as surprise clauses these provisions which the consumer could not expect in a given contract, but which do not shape his rights and obligations in a manner contrary to good customs,[706] because the mere fact that the consumer may be surprised when he notices a given clause in the contract has no legal consequences.

It should be underlined that the incorporation of surprise clauses is aimed at making the other party believe that the accepted pattern does not deviate from the contractual standards, and in consequence abuse the other party's trust. Therefore, as a rule, placing this type of provision in the content of a standard contract, where the other party does not expect it, should be treated as an intentional act aimed at producing a specific effect, namely causing an error as to the content of the contract.

Under Polish law, the intentional behavior undertaken to cause other party's error should be considered a fraud. Introducing an atypical provision to a contract will automatically result in the other party being entitled to void the contract, even if the mistake was not essential or it did not concern the content of the legal act. Thus, in this case, the disloyal behavior of the proposer, leading to the other party's false belief about the facts or the content of the legal act, is sufficient for the consumer to be entitled to avoid the effects of a legal act carried out under the influence of fraud.

The question is whether the consumer can choose between maintaining the contractual relationship, modified in accordance with the regulation on unfair terms, and voiding the contract pursuant to Art. 88 in connection with Art. 86 CC. It could be argued that Art. 385^1 CC specifies all the consequences of including an abusive clause into the contract – such an agreement is to stay in effect, unless it would be impossible without the unfair term in question.[707] According to this approach, if the entrepreneur's action consisted in including a surprise clause in

705 Provisions of a contract concluded with a consumer, which have not been individually agreed with him, shall not be binding thereupon, if his rights and duties have been stipulated in conflict with good customs and in flagrant violation of his interest (wrongful contractual provisions).

706 It seems that in practice such provisions will be an exception – e. g. if the entrepreneur wants to award bonuses to consumers who read the contract template and places in it a provision under which the other party to the contract is entitled to a specific bonus. Also, life experience suggests that the provisions favorable to the consumer will not be hidden in the content of the standard.

707 Chapter 6.4.2.

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a contract with a consumer, Art. 385[1] CC would constitute a *lex specialis* in relation to the provisions on fraud and their application would be excluded.

It should be noted, however, that here the institution derived from EU law overlaps with a national law one. Consequently, it is not certain that the formal *lex specialis – lex generalis* rule has priority in this case over more specific methods of resolving concurrence of legal provisions.[708] First of all, it should be taken into account what the purpose of introducing a given norm by the EU legislature was. If the legislative interference was to enrich the spectrum of instruments used to protect consumers[709] when they conclude contracts which provisions are not individually negotiated, then it would be inappropriate to deprive protected persons of the choice between the existing protection mechanisms by invoking the general principle of *lex specialis derogat legi generali*.

Alternatively, it can be argued that Art. 385[1] CC determines only the effects of the abusive clause itself and its impact on the remaining content of the contract. The act of fraudulently misleading the consumer as to the inclusion of such clause in the content of the contract would then constitute a separate issue. As a result, a consumer who has been fraudulently misled, despite the fact that he is protected against the negative effects of a fraudulent act of a professional entity (Art. 385[1] CC), may still want to void the contract. Such an interpretation seems especially justified if, due to the fraudulent nature of the other party's actions, the consumer no longer trusts the other party (which is probable if, for example, the contract gives rise to a continuous obligation, which could expose the consumer to further fraudulent attempts during the duration of the obligation relationship).

To sum up, the use of a surprise, abusive clause by an entrepreneur in a consumer contract will automatically result in the consumer not being bound by this clause. At the same time, such behavior of a professional entitle the consumer to void the contract under the fraud regulation. The norms on abusive clauses will probably suffice to protect rights of the weaker party in most cases, but, although in this respect it will reduce the usefulness of the code regulation of fraud, it will not fully displace it.

708 E. Łętowska, K. Osajda, in: *System Prawa Prywatnego*, Vol. 1, *Prawo cywilne – część ogólna*, ed. M. Safjan, Warszawa 2012, p. 626–627.

709 If the legislature provides for several different protective instruments, one of which is general and the other one specialized, the rightholder should be entitled to choose between them. In the context of the rules on error and seller's liability see: M. Grochowski, *Zbieg norm w zakresie rękojmi za wady rzeczy sprzedanej oraz błędu i podstępu*, MoP 2012/19, p. 1049.

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4.4. Excluding the possibility of a discrepancy between the reality and its image in the mind of the consumer

One of the rules on interpretation of declarations of will seems to be of particular importance in the context of the shortcomings of the regulation on defects of consent – it is the consumer legitimate expectation standard.[710] Its application may significantly reduce the practical significance of the provisions on vice of consent (error and fraud), while reducing the severity of problems related to accessibility to a limited scope of data in the online environment.

4.4.1. The legitimate expectations of the consumer as an interpretation mechanism adjusting the actual legal situation of the parties to the consumer's misperception

Adapting the theory of legitimate expectations[711] in the civil law is justified provided that the declaration of will is perceived as an act of a social nature. The concepts of declaration of intent based on balancing two opposing values (self-determination and trust) are, thus, replaced by constructions based on the assumption that the principle of autonomy of will should be supplemented by the principle of responsibility for action.

In Poland, the need to protect legitimate interests by adjusting the concept of a declaration of will was noticed in the 1990s.[712] If, according to semantic rules, a given message can be understood in various different manners then it should be interpreted in a way that allows to achieve the optimal (in the light of the principles of social coexistence) effect.

The mixed theory of the declaration of will is limited when there is a need to protect legitimate interests. In this regard various solutions were proposed. According to the first, it is permissible to refer to the internal will of one of the parties – at the interpretation stage, priority should be given to how the consumer understood the content of the statements.[713] According to the second approach, it is necessary to refer to the concept of a fair distribution of risk (e. g., the *contra proferentem rule*). The third way is to modify the content of the declaration from the outside – by excluding some of its elements (provisions contrary to the principles of social coexistence) and adding others, not contradictory to the

710 The obligation to take into account legitimate expectations is derived from Art. 556^1 CC, but can also be associated with the evolution of the concept of a declaration of will.

711 On shaping an objectified concept of a declaration of will, taking into account the importance of legitimate expectations see: Chapter 1.2.1.

712 A. Jędrzejewska, *Koncepcja…*, p. 149–155.

713 A. Jędrzejewska, *Koncepcja…*, p. 80, 95.

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legally significant will of the declarant[714] (pursuant to Art. 56 CC resulting from the statutory law, principles of social coexistence, and customs). In the consumer trade, it was also proposed to apply two different methods of interpretation[715] – when decoding a declaration of intent made by a consumer, the internal theory of a declaration of will is used, and in relation to a professional's statement – an objective one (alternatively, the statement of the entrepreneur can be understood through the prism of the consumer's justified expectations). An objectified concept of a declaration of will, considering the importance of legitimate expectations, is indicated as the most accurate solution.[716]

When decoding the content of the contract, the interpreter must take into account legal norms regulating the relationship of a given type, the content of the contract and principles of interpretation. The contract should be interpreted having in mind two opposing principles – freedom of contract and solidarity,[717] thus balancing and protecting the interests of the parties to the contract. European legislation is inclined towards the principle of solidarity, providing higher protection standards to entities perceived as the weaker parties to concluded contracts[718] – mostly consumers.[719] This approach gave rise to the postulate of including justified expectations of the average consumer during the interpretation of the content of the contract concluded between the consumer and the entrepreneur.

Thus, the point of reference element is reversed – it is no longer the model of a rational addressee that constitutes the point of reference when interpreting declarations of will forming the contract. It is the consumer's perception of the content of the contract, justified by the circumstances of a specific case that becomes a decisive factor when decoding the content of the legal relationship

714 E. Łętowska, *Problemy źródeł prawa cywilnego*, Zeszyty Naukowe Instytutu Badania Prawa Sądowego 1983, p. 98.

715 A. Jędrzejewska, *Koncepcja…*, p. 95, 96, 98.

716 A. Jędrzejewska, *Koncepcja…*, p. 174–177, 218–224.

717 M. Pecyna, *Naruszenie zobowiązania w świetle harmonizacji prawa zobowiązań. Studium prawnoporównawcze*, Warszawa 2009, p. 77–78.

718 E. g. Directive 2011/83 (consumer protection), Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, p. 1–8) (air passenger protection), Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, p. 1–33) (passenger protection).

719 Within the EU law also other protection models develop (the groups of entities requiring protection are determined in various ways). K. Południak-Gierz, *Konsument czy klient? Zmiana sposobu wyznaczania podmiotów wymagających ochrony w kontekście wybranych rynków regulowanych*, TPP 2016/2, p. 61.

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between the parties.[720] Justified expectations are those that were known or should have been known to the debtor at the time the obligation arose.[721]

When determining the consumer's legitimate expectations, the points of reference are the model consumer and the reasonableness of the expectations. The model consumer[722] is an average consumer who is reasonably well-informed, sufficiently observant, and cautious (accounting for social, cultural and linguistic factors).[723] However, if the subject of the contract is aimed at a specific group of consumers, the model of an average consumer must include the characteristics of this particular group – hence it is necessary to consider whether the entrepreneur's activity is directed to a selected group of consumers.[724] In addition, the expectations of the model consumer must be justified, that is also rational. Rationality should be assessed having in mind what a person acting in good faith would expect in such circumstances. In particular, it is necessary to take into account: type of business, customs, common practices, applicable codes of conduct, type and purpose of the contract and to whom the activity is directed.[725]

It is debatable whether the factors influencing legitimate expectations in online trading remain the same. The key difficulty is setting the benchmark when determining legitimate expectations of an online consumer. On the Internet the consumer is more susceptible to suggestions, acts on the basis of factual presumptions resulting from circumstances (also these seemingly completely unrelated to the contract at hand). He is not inclined to read the information provided by entrepreneurs, but rather relies on heuristics, one's own life experience and common standards. Although he is able to access a significant amount

720 Till 25.12.2014, pursuant to Art. 2 dir. 1999/44/WE, since 26.12.2014 CC provisions on seller's liability.

721 Art. 556^1 § 1 point 1–3 CC, Art. 557 § 3 CC.

722 On the definitione of consumer: M. Pecyna, *Komentarz do zmiany art. 22^1 Kodeksu cywilnego wprowadzonej przez Dz.U. z 2003 r.*, in: *Komentarz do niektórych przepisów kodeksu cywilnego, zmienionych ustawą z dnia 14 lutego 2003 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Dz.U.03.49.408)*, M. Olczyk, M. Pecyna, Lex no. 8289; E. Rott-Pietrzyk, *Klauzula…*, p. 343–348; A. Tischner, *Model przeciętnego konsumenta w prawie europejskim*, KPP 2006/1, p. 199–244; F. Zoll, *Rękojmia…*, p. 57–61; H. Schebesta, K.P. Purnhagen, *Island or Ocean Island or Ocean. Empirical Evidence on the Average Consumer Concept in the UCPD*, ERPL 2020/28(2), p. 304–306.

723 R. Stefanicki, *Zapewnienia reklamowe jako kryterium oceny zgodności towaru konsumpcyjnego z umową sprzedaży*, KPP 2004/1, p. 173.

724 E. Łętowska, *Europejskie…*, p. 288; M. Pecyna, *Naruszenie…*, p. 101; E. Habryn-Motawska, *Niezgodność…*, p. 74; R. Trzaskowski, in: *Kodeks cywilny. Komentarz*, Vol. IV, *Zobowiązania. Część szczegółowa*, ed. J. Gudowski, Art. 556^1, Marginal No. 4.

725 T. Pfeiffer, M. Ebers, in: *Contract I: Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, Research Group on the Existing EC Private Law*, München 2007, p. 71.

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of information, he appears to be less capable to use it effectively in decision-making compared to offline transactions.[726]

This makes the consumer more passive once he enters the online environment. As a result, he may require higher protection.[727] It appears that, when determining the legitimate expectations of an online consumer, it would be reasonable to include specific circumstances of contract conclusion (the context known to both parties, supplemented with a reference to the typical context of such a contract), e. g. whether the entrepreneur uses tools only suggesting certain features of the good.

Expanding the range of factors considered when decoding the content of the contract may significantly limit the practical usefulness of the regulation on defects of the declaration of will, namely error and deception. The contract, to some extent, adjusts itself to the consumer's misconception of reality. His mistake, if justified in the light of the circumstances of the case, will shape the content of the contract – the contract adapts itself to consumer's misperceptions (provided that these were justified in a given scenario). Thus, the error disappears as it reshapes the content of the contract. Thus, at the interpretation stage, the discrepancy between the consumer's misperception and the actual content of the contract will disappear. Claiming an error will remain an option only in cases when the consumer's misconceptions were not objectively justified, but the addressee of the statement knew or could have easily notice the mistake.

4.4.2. Provisions on the seller's liability for inconformity of goods and on defects of consent

The performance of the contract by the trader does not put an end to consumer protection. The impact of the protective function of consumer law is visible also in the warranty regulation – the assessment of possible liability for defects of goods is made taking into account the standard of legitimate consumer expectations.[728] In this manner, consumer's actual legal situation (the content of the contract) becomes linked to the image of reality in his mind. This means that consumer's misconceptions may affect the contract – lead to the interpretation of its content that coincides with the justified (even if incorrect, e. g. according to the literal content of the contract) expectations of the consumer. Adopting the standard of legitimate consumer expectations when decoding the content of the

726 J. Luzak, *Online Disclosure Rules of the Consumer Rights Directive. Protecting Passive or Active Consumers?*, EuCML 2015/4(3), p. 79–87; K. Południak-Gierz, *From…*, p. 31–47.
727 J. Luzak, *Online…*, p. 87.
728 F. Zoll, *Rękojmia…*, Chapter II § 1.II.

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contract may remove the discrepancy between the consumer's belief in the features of the subject of the contract and the literal wording of the statements made. In all the scenarios where the consumer's expectations are justified, the possibility of voiding the agreement is excluded. Instead, it is feasible to demand performance in line with consumer's expectations. However, it can also be argued that a legitimate expectation based interpretation becomes applicable only when the consumer asserts his rights under the seller's liability regime. Then, first of all, the interplay between the provisions governing seller's liability and error and fraud should be examined.

4.4.2.1. The design of the regulation on seller's liability in Polish law – between legitimate expectations and standardization

In Article 556^1 § 1 CC, the legislature explicitly states that a physical defect consists in the non-compliance of the item sold with the contract. The concept of a defect is based on the subjectivizing assumption[729] – namely, the non-compliance with the contract. Therefore, liability under this regulation covers these features of the subject of the contract that constitute the content of the contract – agreed directly by the parties, resulting from established customs and the principles of social coexistence. Therefore, decoding of the content of the contract, i. e. the interpretation of the parties' declarations of will, becomes crucial. As one of the examples of non-compliance of the item sold with the contract, the legislature indicates situations in which it does not have the properties which this kind of thing should have as regards the purpose indicated in the contract or resulting from circumstances or its intended use.[730] The properties that this type of object should have due to the purpose specified in the contract, resulting from the circumstances or intended use in Art. 556^1 § 1 point 1 CC are rather a point of reference when interpreting the content of the contract than the objective standard of such subject of the contract.[731]

Pursuant to Art. 556^1 § 1 point 1 CC, the content of the contract is influenced by the standard purpose of its conclusion, which may be specified in the contract, result from the circumstances of its conclusion or the intended use of the item. Thus, when determining the ordinary properties of things of a given type, the equivalence of benefits, the quality of the thing, its purpose, aesthetics or func-

729 Z. Gawlik, in: *Kodeks cywilny*, Vol. III, ed. A. Kidyba, Art. 556^1, Marginal No. 6, 9; J. Janeta, *Kodeks…*, Art. 556^1, No. 1; similarly W. Bańczyk, *Zmiany przesłanek odpowiedzialności sprzedawcy odpowiedzialności sprzedawcy w prawie polskim (od wady rzeczy sprzedanej do jej niezgodności z umową)*, AIS 2018/3, p. 17; differently K. Kopaczyńska-Pieczniak, "*Rękojmia…*, *passim.*

730 Art. 556^1 § 1 point 1 CC.

731 F. Zoll, *Problem…*, p. 168.

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tionalities are considered.[732] If the subject of the contract is an item indicated as to its identity, applicable quality requirements should be derived from the content of the contract, circumstances of its conclusion, as well as the unanimous intention of the parties, the principles of social coexistence, and established customs (Art. 65 § 2 CC). In the case of objects marked as to their type, the determinants will be: legal regulations (usually technical standards), the contract (description included in it), circumstances (e. g., needs of the buyer known to the seller), and the average quality of this type of item (Art. 357 CC). The criterion related to the purpose of the thing turns out to be particularly interesting. In order for an item to be considered compliant with the contract, it must have properties that result from its intended use,[733] and the latter may either relate to a particular purpose specified in the contract, or to the typical purpose of this type of item. Therefore, in the event that the parties did not explicitly specify the purpose of the item in the contract, the criterion for assessing the compliance of the good with the agreement will be whether the item is fit for ordinary use. This condition will – to some extent – re-objectify the concept of a defect of a thing. The buyer's subjective conviction will no longer be relevant, the customary standard will become the benchmark instead. When assessing whether the item is suitable for ordinary use it should be considered what use could be reasonably expected by the seller (given the nature of the subject of the contract).

The content of the legal relationship is also shaped by the purpose about which the buyer informed the seller at the contract conclusion and the seller did not raise any objections as to the intended use of the subject of the contract (Art. 556^1 § 1 point 3 CC). Thus, the subjective goal of the buyer starts to shape the agreement. The item is not in conformity with the contract if it is not suitable for the specific purpose, underlined by the buyer at the conclusion of the contract, for which he intends to use it. The same happens if this subjective aim differs from the purpose indicated in the wording of the agreement, resulting from the circumstances or typical for that object.

Therefore, the buyer's expectation that the thing has certain properties necessary for achieving his subjective aim, even if these are contrary to the wording of the contract, also influence the legal situation of the parties. If the item is not suitable for this subjective purpose, then two conditions must be met to demonstrate item's the non-compliance with the contract – the subjective goal of the buyer should be specified and communicated to the other party at the latest when concluding the contract.[734]

732 E. Habryn-Chojnacka, in: *Kodeks*…, Art. 556^1, point II.B. 2, 3, 10, 11, Marginal No. 7, 8, 15, 16.
733 E. Habryn-Chojnacka, in: *Kodeks*…, Art. 556^1, point II.B.9, Marginal No. 14.
734 J. Janeta, *Kodeks*…, Art. 556^1, No. 5.

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Thus, it should be recognized that the conformity with the contract, due to the legislature's subjective concept of the defect, will be determined by the justified belief of the consumer. However, this approach may entail several challenges.

Adopting the subjective concept of a defect strengthens the principle of freedom of contract but it also makes a negative description of the subject of the agreement possible. In practice, therefore, it seems acceptable to describe the subject of the contract as lacking of its typical features[735] and even to go below the generally accepted quality standards. Thus, in order to secure the legitimate expectations of the consumer, a broader objectivization of the notion of a defect is proposed i.a. by introducting quality standardization in consumer contracts.[736]

In the context of the discussed regulation, the situation is particularly problematic when the justified expectations of the consumer differ significantly from the seller's statement, i. e. although the thing at hand seems to have average features (pictures posted on the auction, the page header, name of the subject of the contract posted on the website), according to the description it lacks these characteristics. Such a situation can often occur in contracts concluded remotely, primarily via the Internet. In this case, the legitimate expectations of the consumer grow based on uncertain premises (various types of presumptions, e. g. that the content of the contract will not differ from the standard content of this type of agreements), without taking into account the detailed information provided by the other party (consumers will rarely read it).

Consequently, the entrepreneur may intend to exclude his liability for the defects of a good by introducing a negative description of the latter, in this manner abusing the positive presumptions of the consumer. If the good has been described as lacking features necessary for the use of a given type of good, and the consumer has been informed about it, he is no longer protected in this regard. The ability to freely define the features of the good means that the seller can actually deprive the consumer of the protection resulting from the rules on seller's liability in case of inconformity of the good. Thus, the contractual freedom may be easily abused by a professional party.

It is therefore necessary to determine what will be the effect of the negative description of the characteristics of the subject of the contract – first of all, whether the consumer will still be protected despite the lack of due diligence.

The ineffectiveness of the negative description of the good at hand could result from Art. 58 § 1 CC; the argument in this case is based on the assumption that it is an attempt to circumvent the law – excluding or limiting seller's liability for

735 M. Koszowski, *Indywidualne uzgadnianie właściwości towaru w przypadku sprzedaży konsumenckiej*, AUWr PPiA 2013/93, p. 91.

736 F. Zoll, *Problem…*, p. 169.

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inconformity of the good is prohibited.[737] Alternatively, it is possible to assume that the parties have established at least the average quality of the service (in line with the consumer's reasonable expectations), and the entrepreneur's actions are not legally significant according to the principle of *venire contra factum proprium nemini licet.*[738] Potentially, such provisions in the description of the subject of the contract could also be considered surprise clauses and, thus, have no binding power over the consumer.

If the quality of the good does not meet the standard requirements for this type of things, a mechanism which could protect the consumer against overlooking this discrepancy is required. Here imposing an obligation to introduce a system of warnings or to shape this type of negative definition of the subject of the contract as an opt-in clause could be considered. In case of a dispute, the entrepreneur should be obliged to prove that the consumer knew about the negative description of the subject of the contract and actually agreed to it.[739]

Previously, a similar function could have been performed by Art. 4.2 and 3 of the Act 27. 7. 2002 on on Special Conditions of Consumer Sales. These provisions, however, were only interpretative guidelines and did not include objective criteria regarding the good.[740] Currently, if the parties do not clearly define the purpose of the contract, the criterion of the suitability of the item for ordinary use, resulting from the circumstances or the standard purpose of the item will be the point of reference. Then, if there is a discrepancy between the objective aim and the provisions of the contract which negatively define properties of the thing, due to the standard of protection of the consumer's legitimate expectations, the objective standard should be the decisive.

It seems, however, that the fact that the consumer could potentially challenge the effectiveness of a negative definition of the subject of the contract should not exclude seller's liability for non-conformity of that good rarely suffice to protect consumer's interests. In principle, a negative definition of the characteristics of the subject of the contract is allowed in the light of the principle of freedom of contract. What is more, information about lacking characteristics of the good is, as a rule, available.

Stating that the parties' agreement as to the features of the good constitute the basic criterion for assessing the defectiveness (inconformity) of the subject of the contract will not be sufficient to protect the legitimate expectations of the consumer. Re-objectification of the concept of a defect in goods may be a solution. A practical limitation of the autonomy of will of the parties, preventing them from

737 F. Zoll, *Rękojmia…*, Chapter II § 1.III–IV.
738 F. Zoll, *Problem…*, p. 170.
739 Qualified consensus on the part of the consumer is required.
740 M. Pecyna, *Ustawa o sprzedaży konsumenckiej*, Warszawa 2007, p. 118.

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setting the contractual point of reference below a certain standard, seems justified in case of consumer transactions. The main argument for this approach is that the principle of autonomy of will does not function correctly in the case of consumer transactions where the trader – being the active party – shapes all the contractual provisions. The consumer's impact on the wording of the contract is marginal. Provisions deviating from the standard, in practice nearly always formulated by an active party (the professional), are generally aimed at improving his situation – in this case they allow to limit his contractual liability. The autonomy of will of the parties in the case of mass contracts is beneficial, above all, for the professional, which deepens the asymmetry between the parties.[741] Hence, limiting parties' autonomy by anchoring the content of the obligation to the quality standards shall, in fact, contribute to restoration of contractual balance.

4.4.2.2. Interplay between provisions on error and fraud and on seller's liability

The concurrence of the provisions on error and fraud with the rules on seller's liability will occur if the consumer did not know about the defect at the time of contract conclusion.[742] There is a debate as to the interplay between the provisions on seller's liability and the provisions on error (fraud). Some legal authors[743] claim that the entity seeking protection can choose which mechanism to use. Others[744] argue that the provisions on error and deception should not apply when the party's error is related to the non-compliance of the good with the contract.[745]

Those in favor of the first view, referring to the principle of autonomy of will of private law entities, underline that excluding one of the protective regimes would

741 Ł. Węgrzynowski, *Ekwiwalentność świadczeń w umowie wzajemnej*, Warszawa 2011, p. 303.
742 F. Zoll, *Rękojmia…*, p. 214.
743 Judgment of the Supreme Court of 14.2.1967, I CR 521/66, OSNCP 1967, No. 9, item 164, Judgment of the Supreme Court of 26.1.2012, III CZP 90/11, Legalis; M. Pecyna, in: *Komentarz…*, Art. 4.2, point 13; J. Jezioro, in: *Ustawa o sprzedaży konsumenckiej*, ed. J. Jezioro, Warszawa 2010, p. 183; E. Habryn-Motawska, *Niezgodność…*, p. 93; M. Podrecka, *Rękojmia* za *wady prawne rzeczy sprzedanej*, Warszawa 2011, p. 444–448; M. Gutowski, *Glosa. Zbieg uprawnień na podstawie rękojmi oraz na podstawie przepisów o wadach oświadczenia woli*, MoP 2013/2, p. 104–108; F. Zoll, *Rękojmia…*, p. 214–220.
744 S. Gołąb, *Projekt ustępu polskiego kodeksu cywilnego o przymusie, błędzie i oświadczeniu nie na serio z motywami i tabelą porównawczą*, Poznań 1920, p. 54, 56. In favor of the approach according to which provisions on seller's liability are *lex specialis* for the regulation on error: H. Berman, *Kilka uwag do przepisów Kodeksu zobowiązań o rękojmi i błędzie*, Przegląd Sejmowy 1934/8, p. 243; A. Kozaczka, *Błąd…*, p. 32–34, 126; Z. Nowakowski, *Ochrona nabywcy rzeczy z wadami*, RPEiS 1967/2, p. 6–8.
745 According to the third, isolated approach, the conflict of these rules should be resolved by interpretation. S. Grzybowski, in: *System Prawa Cywilnego*, Vol. I, Ossolineum 1985, p. 126.

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have to result either from an explicit prohibition or a rule excluding multiple assessments.[746] Pursuant to the principle of autonomy of will, subjects of civil law should have the right to choose between different protection measures provided for by the legislature.[747] Therefore, if, in a particular case, the conditions for avoiding the effects of a declaration of will made under the influence of error and for exercising rights provided for by the seller's liability regulation are met, there are no grounds to limit buyer's right to choose between these two.

The regulation on seller's liability should not be seen as a *lex specialis* in relation to the provisions on error.[748] The hypothesis of a legal norm on seller's liability for inconformity does not fit into the legal hypothesis of the error regulation.[749] Circumstances which constitute premises for claiming a legally relevant error – the seller's knowledge of the error (here: about the defect) or its noticeability – do not matter from the perspective of seller's liability. In contrast, the existence of a defect in the sold item is relevant. Thus, the fact that an item which was purchased was defective will not always justify voiding the contract under the regulation of error.

The scopes of application of these groups of norms overlap[750] – in some situations it is possible to apply only one of the protective instruments, in others – both of them (then it will be up to the buyer to choose a better one).

The *lex consumens derogat legi consumptae* rule, based on the assessment of the sanctions of the norms in question (the further-going sanction absorbs the other one), cannot be applied either.[751] As no rule excludes the application of the provision on error in situations where the person is also protected by the regulation on seller's liability, it is unauthorized to exclude any of the aforementioned protection regimes only because some other instrument may also be applicable. The rights stemming from these two groups of norms are not the same.[752] What's more, even if only the farthest-reaching rights are compared (evading legal consequences and withdrawing from the contract) their effects differ.[753] In case of the former the buyer may claim damages within the limits of negative contractual

746 E. Łętowska, K. Osajda, in: *System*…, p. 578–579, 586–588.
747 M. Gutowski, *Glosa*…, p. 104.
748 M. Gutowski, *Glosa*…, p. 105–107; F. Zoll, *Rękojmia*…, Chapter III § 6.
749 Judgment of the Supreme Court of 26. 1. 2012, III CZP 90/11.
750 M. Podrecka, *Rękojmia*…, Chapter VII.7.4; Judgment of the Supreme Court of 26. 1. 2012, III CZP 90/11.
751 M. Gutowski, *Glosa*…, p. 107.
752 In case of error and fraud the declarant can only avoid legal consequences of the act (void the contract) whereas under regulation on seller's liability he can claim: repair, replacement of the item, price reduction or contract termination (he can unilaterally withdraw from the contract).
753 It is worth noting that these differences will be uncommon in practice, because usually claims will only cover the refund by the seller and the return of the goods by the buyer.

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interest within the tort regime. In contrast, after withdrawing from the contract he can claim the compensation within the limits of positive contractual interest pursuant to Art. 494 § 1 in connection with Art. 471 CC.[754] Additionally, evasion of the legal effects of a declaration of will submitted under the influence of a mistake will annul the *causa* for the transfer of ownership. In consequence the ownership of the good will be transferred to the vendor retroactively.[755] The legal effects of withdrawal are disputable.[756] To trigger the *lex consumens derogat legi consumptae* rule the final implications of the application of seller's liability rules and of the regulation of error would have to be the same.[757] Moreover, the error may only be invoked in those cases where the seller knew or could have easily notice other's mistake, i. e. he could spot a defect of the good. This will be irrelevant when assessing the admissibility of exercising buyer's rights under the warranty.

The function of the institutions in question also differs.[758] The possibility to void the act due to an error is designed to strengthen the autonomy of will of individuals and should enable them to make informed choices directed at causing specific legal effects. The warranty, on the other hand, is aimed at restoring the balance between the price and value of the good which is impacted due to the defectiveness of the subject of the contract.

The *lex primaria derogat legi subsidiariae* rule cannot be applied either.[759] The provisions on seller's liability should not be seen as an intended exception from the protection granted under the provisions on vice of consent. The legislature designed both these instruments to be optional. A situation in which alternative manners of protecting the same legal interest coexist is not something abnormal for the private law systems. Although usually the legislature provides specific

754 F. Zoll, *Rękojmia…*, p. 215–216.

755 F. Zoll, *Rękojmia…*, p. 216.

756 According to some views the ownership of the good is automatically transferred to the previous owner: Judgment of the Supreme Court of 3. 7. 1980, II CR 190/80, OSNCP 1981/1, item 18. The other view is that in case of the movables the ownership of the good is automatically transferred to the previous owner whereas in case of real estate only the obligation to transfer the ownership onto the previous owner arises: Judgment of the Supreme Court of 17. 11. 1993, III CZP 156/93, OSNCP 1994, No. 6, item 128; Judgment of the Supreme Court (7 judges) of 30. 11. 1994, III CZP 130/94, OSNC 1995/3, item 42; E. Drozd, *Glosa do uchw. SN z 30. 11. 1994 r., III CZP 130/94*, p. 109; A. Szpunar, *Odstąpienie od umowy o przeniesienie własności nieruchomości*, Rej. 1995/6, p. 9; P. Szafarz, *Odpadnięcie podstawy prawnej prawnej w kontekście reguły kauzalności*, PUG 1996/4, p. 12; Judgment of the Supreme Court (7 judges) of 27. 2. 2003, III CZP 80/02, OSNC 2003/11, item 141; G. Stojek, in: *Kodeks cywilny. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 491, Marginal No. 21.

757 M. Gutowski, *Glosa…*, p. 107.

758 M. Grochowski, *Zbieg…*, p. 1048.

759 M. Gutowski, *Glosa…*, p. 107.

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rules on the interplay between overlapping protective mechanisms (Art. 443, 579 and 566 CC), the lack of these should not be interpreted as excluding the applicability of one of these mechanisms. On the contrary, since the private law is founded upon the assumption that the persons are free to choose means provided for by the law in order to achieve their aims, only an express prohibition in this regard could exclude one's choice.

Another approach is based on the assumption that the provisions on the seller's liability exclude the application of general norms,[760] as they comprehensively and exhaustively regulate the issues related to a sale of a defective item. Therefore, there is no need to refer to the general rule. An argument for considering rules on seller's liability *lex specialis* is the fact that Art. 562 CC determines the effects of the seller's fraudulent actions consisting in concealing the defect differently than in the case of vice of consent.

However, withdrawing from the contract under the seller's liability rules and evading of the effects of a declaration of will made under the influence of error may, in some cases, allow the protected person to achieve a similar goal – namely, to terminate the contract. In the light of the classic view of the rationality of the legislator, it is illogical to assume that he provided two legal mechanisms allowing to achieve the same goal, one having much more stringent premises (the error: essential mistake as to the content of the legal act and a subjective circumstance concerning the addressee of the declaration; deception: mistake and a subjective circumstance of higher intensity), than the other (inconformity with the contract).[761]

As a rule, the protection stemming from rules on seller's liability is perceived as more appropriate for safeguarding the interests of the buyer who was mistaken because of its premises and the scope of application. The fulfilment of the conditions of Art. 84 and 86 CC will, in principle, be more difficult to prove, and the right provided under Art. 88 CC has a binary character. Nevertheless, the provisions on defects in the declaration of will may turn out to be more favorable from the buyer's perspective when the defect of the item is insignificant and the error was caused fraudulently (in accordance with Art. 560 § 4 CC, withdrawal from the contract will then not be allowed, while Art. 86 in conjunction with 88 CC provide grounds for voiding the contract) or when the time limit provided for in Art. 568 § CC has already elapsed.

Moreover, the values protected by the rules on defects of consent and the liability of the seller regime are different. While the protection under the regulation of vice of consent is somehow one-sided, the seller's liability regime ensures protection of both: the legitimate interests of the buyer and of the seller (if

760 Z. Nowakowski, *Ochrona…*, p. 6–8; compare with: F. Zoll, *Rękojmia…*, p. 214–220.
761 M. Królikowski, *Błąd…*, Chapter VI § 3.

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he is not acting fraudulently, his liability for defects in goods covers only the period specified in the act commencing with the delivery of the goods). Allowing the buyer to choose between these protection regimes means that he can select a more favorable protective framework – and, in consequence, he can circumvent the rules aimed at protecting the seller by voiding the contract because of vice of consent.[762]

The assumption that the seller's liability regulation, being a *lex specialis*, overrides the provisions on error and deception, leads to the conclusion that after the period for exercising rights resulting from the provisions on seller's liability passed, it is not possible to abolish the legal existence of the contract by evading legal effects of a declaration of will made under the influence of an error or fraud. Defining a relatively short window for seller's liability and excluding the possibility of seeking protection under the rules on vice of consent shortens the period in which the parties remain uncertain as to their legal situation. It can be seen as beneficial for the certainty of trade.

This approach, however, should not be adopted. The aim of the seller's liability regime is to guarantee the seller a right to repair the good, and not to limit the time during which finding an error may result in the right to nullify the legal existence of the contract.[763]

The assumption that the seller, during the period in which he is liable for the inconformity, may block the withdrawal of the other party, while after that time he loses the ability to counteract the annulment of the legal relationship, is irrational. In practice, if the buyer did not notice the defect of the item for the period specified in Art. 568 CC,[764] then most likely either this defect is not significant (which prevents the declarant from voiding the contract under Art. 84 § 2 CC), or the buyer was not careful enough to check the features of the item (his negligence also impedes him from benefiting from the protection granted under the provisions on the vice of consent). Although the above minimizes the risk of noticing this legislative inconsistency in practice, it does not justify it.

Deep differences as to the design of the protective instruments in question, as well as a teleological interpretation, lead to the conclusion that currently seller's liability regime consumes protection granted under the regulation of error and deception. However, it is necessary[765] to supplement the regulation of the defects of the declaration of will by granting the seller the right to block the right to void

762 F. Zoll, *Rękojmia…*, p. 215.

763 F. Zoll, *Rękojmia…*, p. 218.

764 In case of immovable properties: 5 years, second-hand movables: not less than 1 year, otherwise: 2 years.

765 F. Zoll, *Rękojmia…*, p. 217. This issue has already been discussed in the context of the Code of Obligations of 1933. A. Ohanowicz, *Uchylenie się od skutków prawnych oświadczenia woli w Kodeksie zobowiązań*, RPEiS 1938/2, p. 135; I. Rosenblüth, *Błąd…*, p. 458.

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the defective contract by performing the contractual obligation in accordance with the buyer's expectations.[766] What is more, sanctions of error and fraud should be differentiated. In case of fraud the buyer should be entitled to bring the contractual relationship to an end, provided that he no longer trusts the other party due to his previous behavior (reprehensible from the point of view of the principles of social coexistence). Second, the person who caused the mistake fraudulently should not be entitled to block other's right to void the contract.[767]

To sum up, protection under the provisions on error and fraud require, compared to the warranty conditions, the implementation of relatively stringent statutory requirements – between these, a subjective condition on the part of the addressee of the statement appears to be particularly problematic to demonstrate in the consumer e-commerce.

The regulation of error and fraud gives the mistaken person the right to void the contract entered into due to one's misperception. Once this right is exercised, the consumer shall not receive the object of the contract and the entrepreneur becomes obliged to process the refund. Voiding the contract pursuant to the provisions of the CC on error and fraud does not fully satisfy the interests of the consumer – he is entitled to compensation within the limits of the negative contractual interest only.[768] The possibility of avoiding legal effects of an agreement concluded under the influence of error constitutes a partial protection, as it does not allow the consumer to achieve the purpose of the contract.[769] It also does not effectively counteract e. g. misleading advertising practices. A consumer who, in accordance with the advertisement, was convinced that at a given time and place he can purchase the cheapest product, and after purchasing the item he realizes that he was deceived, may request the cancellation of the contract with the obligation to reimburse benefits, but cannot claim the refund of the price difference.

The standard of the consumer's legitimate expectations and following adjustment of the content of the contract means that the consumer may still demand the performance, but in line with his justified expectations. If the subject of the contract does not meet these expectations, the consumer may exercise his rights under the seller's liability regime. Such a solution guarantees the consumer more extensive protection than the provisions on defects of the declaration of will, in case of which consumer's needs remain unfulfilled. This leads to the

766 A similar instrument can be found in the Draft of the Codification Commission Book I with justification, p. 135, https://www.projektkc.uj.edu.pl/index.php/projekty (accessed: 31.5.2021). Art. 101 of the Draft grants the erring person the right to choose a protection regime only if the error was caused intentionally.

767 F. Zoll, *Rękojmia*…, p. 217, 219–220.

768 M. Późniak-Niedzielska, *Przesłanka*…, p. 210.

769 E. Łętowska, *Europejskie*…, p. 162.

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conclusion that the provisions on error and fraud remain useful only in situations where the consumer's expectations about the content of the legal act were not justified but the other party knew about these expectations or could easily notice them.

4.5. Distortion of the declaration of will: New technologies as a medium of communication or as a messenger?

Due to the difficulties in distinguishing actual behaviors of the persons active online from the unintended and unforeseen influence of the Internet environment, sometimes it is argued that the provisions on the distortion of the statement of will by the person communicating it should be applied in situations where that distortion of is caused by technical reasons specific for online environment.[770] In this case the notion of the messenger is understood broadly – as an entity involved in the transmission of a declaration of will.

Since numerous online programs provided by various entities (sometimes highly problematic or impossible to identify) are used to submit a declaration of will, it should be allowed to consider an element of the telecommunications infrastructure, e. g. a specific program, a messenger under the meaning of Art. 85 CC. Indicating the entity responsible for the functioning of a given tool should not be necessary to void the contract due to the distortion of the declaration by the messenger.[771] Finding the liable one becomes an issue at the stage of formulating a claim for damages.

When referring to the Art. 85 CC, good or bad faith on the part of the messenger is irrelevant, just like his personal characteristics (e. g., age or contractual capacity). Since the subjective elements are irrelevant, does the messenger need to be a legal personality at all? The fact that someone or something (a natural or legal person, an entity which is granted legal capacity or an instrument) acts as a messenger seems sufficient to fulfil the premises of this norm.

The functional interpretation leads to the following conclusion: if the only factor relevant for the application of Art. 85 CC is that the distortion of the declaration of intent occurs during its transmission leveraging a given tool, the situations in which the modification of the content of the message is caused by an action of a third party, by computer virus or errors in data transmission are

770 M. Drozdowicz, *Błąd w elektronicznych czynnościach prawnych. Wybrane zagadnienia na tle pojęć z zakresu handlu elektronicznego*, PPH 2001/9, p. 29–30; M. Królikowski, *Błąd…*, Chapter IV § 4.II.2; R. Strugała, in: *Kodeks…*, Art. 85, Marginal No. 2; P. Sobolewski, in: *Kodeks…*, Art. 85, point 9 (except where the declarant is also the creator of the messaging program).

771 Differently: P. Sobolewski, in: *Kodeks…*, Art. 85, point 9.

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classified as a distortion of the declaration of intent by the person used to communicate it. Thus, voiding the contract under Art. 85 CC should be permissible in every case when there was a distortion of the declaration of will during its transmission, provided that it took place outside the sphere governed by the person submitting the declaration and by its addressee.

However, a question arises whether such a broad interpretation of the concept of a messenger is justified under the current legal framework. Art. 85 CC states that a distortion of the declaration of intent by the person used to communicate it shall have the same effects as an error in the declaration. Therefore, there is no doubt that both natural or legal persons as well as organizational units not being legal persons which have been granted the legal capacity by virtue of statutory law[772] can be the messenger in the light of this provision.[773]

However, there are also other theories in this regard. It is argued that the messenger is everything that enables the transmission of the declaration of will to the addressee. According to this approach (rejecting the literal interpretation of the provision) it is permissible to consider as a messenger e. g.: the tool used to transmit the message (e. g., telephone), the post office or any person participating in this activity.[774] Functionally, the term messenger should be understood as a carrier of a declaration of will, playing a technical role only.[775]

The postulate to allow for the application of Art. 85 CC in the online context is not commonly accepted.[776] The functional understanding of the provision is rejected. No device, even if used for browsing the Internet and submitting declarations of will in the online environment should be attributed will or legal capacity. Likewise, it is unjustified to claim that a computer program can have autonomy of will. Additionally, when transmitting a message, it is unreasonable to look for a single program, tool or mailing mechanism that could be considered a messenger – data is sent through a network of computers, in packages. It is, therefore, not possible to directly apply the provisions on the messenger's error in case of distortion of the declaration of will that appeared during the data transfer.[777]

However, the above interpretation seems to be contrary to the rule's objective and disregards current changes in the methods of submitting declarations. In

772 Art. 33^1 CC.

773 P. Nazaruk, in: *Kodeks…*, Art. 85, point 1; B. Lewaszkiewicz-Petrykowska, in: *Kodeks cywilny*, ed. P. Księżak, M. Pyziak-Szafnicka, Art. 85, Marginal No. 2.

774 K. Piasecki, *Kodeks…*, Art. 85, Marginal No. 2; S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 85.

775 A. Jedliński, in: *Kodeks…*, Art. 85, Marginal No. 3.

776 J. Janowski, *Elektroniczny obrót prawny*, Warszawa 2008, p. 362–363; M. Węgierski, *Charakterystyka prawna prawna umów zawieranych drogą elektroniczną*, Warszawa 2020, Chapter II § 5 IV.

777 W. Kocot, *Wpływ…*, p. 134.

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order to solve the dispute, it would be justified to modify the wording of the provision by removing the term "person" (being the main source of doubts in legal scholarship) and founding the structure upon the functional element.[778]

4.5.1. Reliability of information systems and automated electronic tools

The discrepancy between the entity's belief as to the content of declaration of intent submitted and the message that was actually sent may be caused by circumstances unrelated to the declarant or the addressee and their behavior. This incoherence may be result from the unreliability of the technology that is used for communication purposes, including information systems and automated electronic tools of individual network users. Distortions may be caused by imperfections of program or website of the entrepreneur through which declarations of will are received, by transmission errors (loss or change of data during transmission of a message through a network of servers) or by flaws of tools used by the declarant.

Entities conducting business activity through active websites use platforms written in specific programming languages and characterized by specific functionalities to receive and submit declarations of will. These sites – web documents – are stored on the server. In order for a network user to make a declaration of intent to another person through this IT system, a sequence of actions must occur. After launching the browser and searching for the desired hypertext link, the user's local computer asks the server computer to send the appropriate document. The process of quering and then receiving the requested www document often involves several servers within the network. A web document downloaded to the local computer is translated and displayed by the web browser used by this person.

4.5.1.1. Transmission errors

The first category of errors as to the content of the statement includes cases where the discrepancy between the party's conviction as to the content of the submitted declaration and the actual the message will be caused by disturbances at the stage of data transmission, and not by the flaws of the tool used by the declarant or the addressee of the message. Disruptions in this process may have

778 Such a solution has already been proposed in the Draft of the First Book of the Civil Code of 2008 of the Civil Law Codification Commission active by the Ministry of Justice in Art. 118: a distortion of a declaration of will in the course of its transmission has the same effects as an error in submitting the declaration.

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its source, for example, in overload of the servers or transmission errors.[779] As a result of communication distortions, the statement may not reach the addressee at all, may be only fragmentary received, its content may be modified or it may be sent to the wrong addressee.

In Poland, the assessment of the legal consequences of transmission errors requires reference to the so-called theory of delivery. Pursuant to Art. 61 § 1 CC, a declaration of intent which is to be made to another person shall be deemed made at the moment when it has reached that person in such a way that he could have acquainted himself with its contents. Therefore, in principle, if the communication fails to reach its addressee or is so distorted that it is impossible to decode its meaning under the rules on interpretation of declarations of will, no effective declaration of intent is made. What follows is that the declaration of will of one party to the contract is missing[780] and, thus, the agreement is not concluded at all. Consequently, there are also no grounds for evading the legal consequences of that declaration, as it has not been submitted. If the message has been transmitted in part, it will be necessary to consider *ad casu* whether the content available to the addressee is sufficient for him to understand the message as a declaration of will. Basically, for example, errors causing a change in the graphic layout will not make it impossible to recognize the message as a declaration of will, while errors making it impossible to read the content or to identify the sender will prevent the message from being considered an effectively submitted declaration of will.

The distortions prevent a declaration from having any legal effect.[781] The risk of delay, distortion or loss of a message at the stage of its transmission via a given communication tool is borne by the declarant.[782] Thus, it is the declarant that is exposed to the risk associated with the functioning of the chosen communication medium – in case of e-commerce being also the risk of a transmission error.

On the Internet, the data set composing the message is sent to the recipient in packages via various active router computers, which increases the risk of errors at

779 The issues related to the technological model of the operation of the Internet network are beyond the scope of this analysis and from the point of view of civil law assessment, they remain irrelevant.

780 Currently, in the e-commerce, there are contracts in case of which the classically understood declaration of will is not submitted – e.g. when both messages are generated and sent by automated systems, without the knowledge of the entities using them. It should be considered whether in such instances we are dealing with an anticipated submission of a declaration of will. The person using the automated tool sending messages determines the manner in which this tool is supposed to work – this person wants the program to make statements on his behalf and for him – the content of these statements being calculated (determined) by the device.

781 W. Kocot, *Wpływ…*, p. 93.

782 K. Mularski, Z. Radwański, in: *System…*, p. 388.

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the data transfer stage. However, due to the constant development of safety mechanisms, currently transmission errors are relatively rare.

4.5.1.2. Errors of tools used by the entrepreneur. Controversial legal status of software agents

The discrepancy between the web user's belief as to the content of the submitted statement and the actual message may be caused by errors in the code of the entrepreneur's website. These errors can have three different kinds of effects. First, a network user may be assigned a declaration of intent he has not submitted. Incorrect responses may be correlated with certain inquiries – e. g., user's request for information about a product may be interpreted by the website as a declaration of concluding a contract with an obligation to pay. Second, a declaration of will which seems to be submitted for the declarant, in fact might not be sent. The entrepreneur's website may fail to process or to save the information received in an appropriate manner – the entrepreneur will not receive a declaration of intent at all. Third, an error in the website's code leads to a modification of the submitted declaration of will. For example, a product displayed on a website may be incorrectly assigned in the entrepreneur's product database, a web document sent to a network user may contain a price inconsistent with the entrepreneur's will – not updated, not related to this product or incorrectly processed during entrepreneur's data entery.

Assessment of the situation may be even more difficult in cases where the entrepreneur uses a software agent – an extensive IT tool based on algorithms designed to make decisions about submitting the content of a declaration of will on behalf of and for the benefit of the entity that uses it.[783] The automation of the process of submitting a declaration of will takes various forms – the IT systems used have different scopes of independence.

There is a hard (fixed) automation, where communication is carried out with the use of inter-connected forms. It is possible either to accept or reject proposed provisions. This kind of processes are relatively frequent in online e-commerce. There are also more advanced instruments which enable soft (programmable) automation, in which it is possible to create content by selecting preferred options. The highest level of automation of legal transactions – adaptive automation (flexible) – allows one to create a new content through smart, self-programming software. The higher the level of automation, the more doubts arise when it comes to the legal qualification of activities performed through or by the program.[784]

783 Examples of such programs are AuctionBot, Tete-a-Tete, http://agents.media.mit.edu/projects_previous.html (accessed: 31. 5. 2021).

784 J. Janowski, *Elektroniczny*…, p. 346.

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Thus, the assessment of situations in which the discrepancy between the conviction of the declarant and the content of the declaration that reaches the addressee is caused by the unreliability of the communication system and the tools used along this process turns out to be problematic.

In Polish legal scholarship,[785] it is believed that the automated submission of declarations of will is just another form of communication. Generating the statement by the system is preceded by numerous activities performed by the user. This person must decide to use a specific program, install it, configure it to suit his purpose, enter data that will clarify the scope of the program's operation, and then connect it to the Internet. If the program does not generate the content of the declarations independently, it is the user who decides on the content of the communication that will be submitted to the other party in each scenario, e. g., after an activation of a hyperlink. If, on the other hand, the software agent is to make independent declarations of will, generated thanks to the self-learning functionality, it is necessary to define the scope within which the content of individual elements of the declaration may be modified.[786]

Due to the decisive role played by the user, it can be argued that statements made via the network, also by software agents, do not constitute a new normative category. The way of saving, sending or reproducing declarations of will changes. It does not lead, however, to the emergence of a new model of concluding contracts. Technological changes do not force changes in the normative structure of the declaration of will. It has to be noted, however, that different approach to this matter has been also proposed.[787]

Currently, due to the development of artificial intelligence[788] – in the context of civil law, especially programs for the automated receipt and submission of declarations of will – the question arises whether steps should be taken to redefine the concept of a person in civil law. Another important issue is whether, for the description and assessment of the legal effects of these activities, it would

785 W. Kocot, *Wpływ*…, p. 92, J. Janowski, *Elektroniczny*…, p. 353.

786 J. Janowski, *Elektroniczny*…, p. 356–357.

787 R. Michalczyk, *Czy programy komputerowe mogą mieć intencje?*, in: *Między nowoczesnością a ponowoczesnością*, ed. A. Samonek, Kraków 2013, p. 179.

788 The concept of artificial intelligence is virtually undefined. We can distinguish four main groups of views on artificial intelligence. The first of them assumes the gradability of artificial intelligence, which allows the assumption that artificial intelligence has already been created. The second approach is based on the assumption that although it is known what artificial intelligence should be, it is impossible to invent one, because intelligence can only arise on a biological basis. According to the third theory although we do not know what artificial intelligence is, it is possible to know its essence and then, perhaps, it will be possible to construct it. The last approach is that artificial intelligence is a contradictory concept, since computer operation will never be able to simulate human-like intelligence, because the computer is only a tool.

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be reasonable to distinguish – apart from natural and legal persons – the third category, namely e-persons.[789]

The key argument in favor of setting apart this category is the decision-making autonomy of software agents. They operate without ongoing supervision or external interventions, based on programmed algorithms. It is recognized that software agents are characterized by: autonomy,[790] adaptability,[791] and specialization.[792] The development of the semantic web allows the query to be analyzed not only in terms of form, but also as to its content. The software agent collects information about factors that may affect the achievement of the goal set by the user. It performs multi-faceted analysis and, based on its results, it determines the optimal solution, making a decision on behalf of the person who uses it. If this system fails – the algorithm turns out to be wrong, not adapted to the purposes of the person or too simplified – determining the legal situation of the user it proves to be problematic.[793]

The current conceptual framework does not allow for an adequate description of the process accompanying functioning of this type of programs. It is assumed that any disruptions in its operation fall within the contractual risk of the entity that made the decision to use the said tool for the automated submission and receipt of declarations of will.[794] The user of the program bears the consequences of its application – regardless of whether the tool functions properly or not.

If the program functions improperly the person using it will be able to claim damages for defects of the program. However, the concept of the defect in a work (understood as a manifestation of creative activity of an individual) has not been defined in the statutory law. The prevailing view of the legal authors and jurisprudence is that it has a meaning similar to the concept of a physical defect under the provisions of the Civil Code concerning seller's liability.[795] The key difference is that if a work is defective, the creator can be held liable only if he is responsible for the defect. Furthermore Art. 55.1 of the Act on Copyright and Related Rights[796] introduces fault-based liability in this regard.

789 R. Michalczyk, *Czy programy…*, p. 137–144, 179.
790 Understood as the ability to make independent choices.
791 The program improves with use.
792 In this context, specialization means access to knowledge.
793 K. Południak-Gierz, *Personalization of Consumer…*, p. 264.
794 W. Kocot, *Wpływ…*, p. 151.
795 K. Włodarska-Dziurzyńska, in: T. Targosz, K. Włodarska-Dziurzyńska, *Umowy przenoszące autorskie prawa majątkowe*, Warszawa 2010, p. 321; M. Kępiński, in: *System Prawa Prywatnego*, Vol. 13, *Prawo autorskie*, ed. J. Barta, Warszawa 2017, p. 738–739; J. Barta, R. Markiewicz, in: *Prawo autorskie*, ed. J. Barta, R. Markiewicz, Warszawa 2011, p. 378; judgment of the Appeal Court in Warszawa of 17.11.2005, VI ACa 372/05, Legalis.
796 Act of 4.02.1994 on Copyright and Related Rights (Journal of Laws of 2019, item 1231, with changes).

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The fact that the program is, to certain extend, autonomous makes it difficult to assess its defectiveness. The solution found by the program may be compatible with the implemented software or with the properties configured by the user, but it may still lead to unsatisfactory results. So far, four methods of resolving the issue of liability for the functioning of the software agent have been proposed.

First, the thesis about the autonomy of the program can be rejected.[797] According to this approach the program is seen as a mere medium of communication. It is assumed that the actions performed by the program can be considered a simple transmission of a declaration of will – the program is, thus, just another mean of communication, such as a piece of paper or a telephone. The program, while not being an independent entity, cannot have a legal capacity. The main flaw of this concept is that is does not reflect the reality. In practice, the entity using the program does not intend to make a declaration of intent of specific content, but only wants to conclude the most advantageous agreement of a given type and, in order to do so, decides to use the agent. Is it possible to speak of an anticipated acceptance of an offer or submission of a declaration of will in this scenario? The problem is that the content of the declaration is not specified by the person – only its scope is set. Thus, the main argument against this approach is related to the autonomy of a program of this type – the fact that it selects the method of achieving the goal set by the user, searches for an environment in which it is possible to achieve this goal and takes actions leading to its implementation.

The second (historical) concept is modeled on a structure derived from Roman times.[798] In ancient Rome, it was possible to have legal capacity without being recognized by law as a person (this was the case of slaves). The outcome here is similar as in the previous theory – the legal effects of actions performed by the program (in Rome: by the slave) are attributed to those who use it. Currently, however, in civil law it is not allowed to grant legal capacity without recognizing one as a law subject at the same time, hence this solution, for structural reasons, should be considered unacceptable.[799]

A modern approach, widespread in common law systems,[800] suggests assigning a legal personality to the program. The software agent is seen as a rep-

797 W. Kilian, in: *Prawne i ekonomiczne aspekty komunikacji elektronicznej*, ed. J. Gołaczyński, Warszawa 2003, p. 212; W. Kocot, *Wpływ…*, p. 86, 69; J. Janowski, *Kontrakty elektroniczne w obrocie prawnym*, Warszawa 2008, Chapter I.2.5. Obawa zastąpienia w procesie kontraktowania człowieka przez komputer.

798 S. Wettig, E. Zehender, *A legal analysis of human and electronic agents*, AIL 2004/12, p. 127; R. Michalczyk, *Czy programy…*, p. 183.

799 S. Wettig, E. Zehender, *A legal…*, p. 127.

800 Model law Uniform Computer Information Transactions Act, Section 112, Section 206 www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=107f6e10-0aa0-f616-5a6c-34750be7d247&forceDialog=1 (accessed: 31.5.2021); model

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resentative of its user.[801] Thus, any computer program or other online mechanism that sends and receives messages for and on behalf of the user is considered an electronic agent. Under this theory, every active website should be treated as an electronic agent.

This approach is supported by the fact that the construct of a legal person is a conventional creation of the legislature. Its main disadvantage is that it changes, in a manner that can be surprising for an average language user, the meaning of the term already functioning in law. In this context, reaching a consensus on the meaning of the concept of a person becomes problematic. This can cause several negative consequences, in particular reducing legal certainty[802] and disturbing the contractual balance.[803]

A more progressive solution is also proposed – it is argued that a new category of persons should be distinguished, namely electronic ones.[804] This would allow to avoid qualifying software agents as tools or as works under the meaning of the copyright law (such description contradicts the reality). These in favor of introducing the category of e-persons underline that modern conceptual apparatus does not allow to grasp the specificity of the functioning of the discussed programs.

The consequences of discrepancies between the perception of the content of the declaration of intent by the user and the message generated by the software

law UNCITRAL of 1996 (Model Law on Electronic Commerce) Art. 11.1 sentence 2 www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed: 31. 5. 2021).

801 S. Wettig, E. Zehender, *A legal…*, p. 123–127.

802 R. Michalczyk, *Czy programy…*, p. 183.

803 If a software agent were considered user's representative (without considering the legal capacity of the program at this stage), this would only partially solve the problem of attribution of liability for the software agent's actions. In principle, the responsibility for the agent's performance rests with the principal. However, if the agent has acted without authorization and the contract has not been confirmed by the person on whose behalf it was concluded, it is invalid. Only the attorney-in-fact is responsible, and the principal is not bound by the attorney's declaration of intent (except in cases falling under Art. 105 CC). The risk of misconduct of the agent is shifted from the person using it onto the entities contracting with the agent. However, it does not seem justified to allow for the risk related to the specific way of conducting professional activity to be transferred onto other entities, including consumers. Moreover, assuming that software agents do not have legal capacity, this results in the appearance of legal actions that cannot be assigned to any entity. Thus, the above interpretation turns out to be unacceptable due to the values protected by civil law. Also, it seems inappropriate to look for an analogy between a software agent and a minor. In this case, the main problem is the discrepancy between the objectives of the regulation. The provisions on effects of a minor's actions are intended to protect him as an entity without experience and sufficient discernment. The educational function of regulation is also underlined – the range of minor's rights gets wider over time, which allows him to gradually adapt to the legal and economic reality. Thus, the analogy between the software agent and the minor is only apparent.

804 R. Michalczyk, *Czy programy…*, p. 184; S. Wettig, E. Zehender, *A legal…*, p. 127–128.

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agent vary. Depending on the approach and current statutory law, either the relevant provisions on representation, on agency agreement and on electronic person will apply, or it will be necessary to take into account the provisions regulating defects of the declaration of will.

Distinguishing the category of e-persons can also be challenged. Regardless of the degree of the program's autonomy, the source and addressee of the declaration are, respectively, the person using the program and the person to whom the declaration is addressed. Also, claiming that the user lacks control over the program seems unjustified. Basically, the user of the tool may freely change its configuration, the scope of decision-making autonomy or stop using this kind of tools at all. At the time of making a decision to use the aforementioned program, its user makes an anticipated declaration of will, the final content of which will be specified randomly or algorithmically – by the program. There is no need to search for an additional entity to which legal personality should be assigned in this context.[805]

Under the Polish law[806] there are no grounds to consider a computer program as capable of making declarations of will – this right is granted only to natural and legal persons as well as legal persons without corporate status.[807] It is not admissible to treat the software agent as a representative of the person using it, and its configuration as granting a power of attorney.

The current level of technological development does not allow for creation of artificial consciousness and fully autonomous intelligence – a computer program cannot, therefore, be assigned the status of a person. Moreover, the power of attorney cannot be granted to a person without at least limited legal capacity.[808] It is inherent to this institution that a person's representative may exceed the limits of his authority. For a program, this is impossible. Additionally, under the Polish law, representation may only be based on a statutory law act, a legal act or a court decision. In contrast, the activities performed by a person during the installation, configuration and launch of the program, as well as accompanying its daily use are only factual actions.

Moreover, assigning legal personality to the program would create many practical problems related to liability for damage – the entity responsible would essentially be the program, which, after all, does not have any assets against which

805 The matter concerns issues related to the understanding of the concept of artificial intelligence and possibility of its creation. Currently, we can observe only the weak intelligence – the computing power of the tool can create the impression of communing with an intelligent being. This is not sufficient to claim that such tool should be attributed legal personality.

806 J. Janowski, *Elektroniczny*…, p. 362–363.

807 Art. 8, 33, 33^1 CC.

808 Art. 100 CC.

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the enforcement could be carried out. This would lead to an absurd situation in which to escape from the liability the private law person could just use an appropriate program. Similarly, if the software agent was recognized as a proxy, and the action performed by this program would not be confirmed by the user who used it, only that program would be liable for the damage.[809]

The fact that the program generates and submits statements on behalf of its user without the knowledge and will of the latter is irrelevant for the attribution of these statements.[810] The statement can be assigned to the user if he has or had control over the program. Even if a full artificial intelligence is developed, it would not affect the issues of holding responsible for such message generated by the program under the current Polish law. It is assumed that an entity acting with confidence in a declaration of intent needs to be protected. The scope of this protection includes the attribution of this declaration to the entity indicated as the declarant.

Taking into account the professional nature of the activities of people who use software agents, it should be noted that the entrepreneur's liability for the damage incurred by the other party is a strict liability. The use of new technologies in the course of business (software agent) should not be assessed otherwise. The uncertainty or the inability to verify some circumstances of the case does not mean that a professional entity will be able to exculpate himself from liability (see the seller's liability for inconformity of the good with the contract). Even if the state of uncertainty was deeper in case of the use of software agents and, therefore, the associated risks were higher, it would not mean that they should be distributed differently. The decision to use a software agent rests with entrepreneur. Due to the higher requirements as to the due diligence, knowledge, experience in regards to professionals, it does not seem necessary to implement a new mechanism to protect them from their own decisions on how to conduct business.

809 In order for the person whose rights were infringed to be able to successfully claim damages from the agent, it would be necessary to consider the program as the rightholder. It could be listed in a register of electronic persons or it would be possible to create a guarantee fund, similar to the Polish Insurance Guarantee Fund. In each of these cases, the level of protection would not be high – due to the speed of the program, it would be very difficult to ensure sufficient funds to cover all damages should the agent act unlawfully. A model which would require informing the other party before concluding a contract about the agent's assets and the amount of his current liabilities would be equally ineffective. A solution could be to impose a statutory prohibition on incurring liabilities above a certain amount (equal to e. g. the value of the program assets). Then, however, the utility of the software agent would decrease significantly.

810 F. Wejman, *Wprowadzenie do cywilistycznej problematyki ustawy o podpisie elektronicznym*, PB 2002/2, p. 47.

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It is possible that with the development of technology, considerations about the legal personality of the programs used for automation of communication will acquire a practical dimension. Then, probably more appropriate than creating a new legal institution (an e-person-proxy) will be to adopt modified theory of the authority (body) of a legal person. It may be particularly interesting to recall here the organic theory of Otto von Gierke, which shows the analogy between the concept of a body of a legal person and human organs of movement, speech, etc.:[811]

> "[…] as a natural person has organs in which decisions are born (brain, heart), and organs with the help of which these decisions are manifested (mouth, hands, etc.), a legal person has its own organs (management board, superiors, departments, general meetings, etc.) which create, reveal and carry out the will of a legal person."[812]

Such approach to the software agent would correspond with his manner of functioning, and would allow to avoid problems related to attributing them with legal personality.

A software agent would not be a subject to a legal relationship when acting on behalf of the person using it. The legal or natural person represented by the agent would be the party to this transaction. The operation of an organ (program) should be treated as the action of the person using it. Setting the limits of the competences of the program should be done slightly differently than in the classic theory on bodies of a legal person. Apart from the scope of the program's autonomy, it would be desirable to take into account the customs and legitimate expectations of the other party. A legal act performed beyond the program's scope of autonomy should not be invalid – the risk of using a defective tool should rest with the person who decides to use it. Only exceptionally, if there are circumstances allowing the transfer of this risk onto the other party (e. g., a defect in the statement generated by the program within the meaning of the rules of vice of consent), it should be possible for person using the software agent to avoid the consequences of a legal act performed by it.

Currently, however, it is sufficient to refer to the rules on attribution. The discrepancy between the will of the entity using the software agent and the statement that was made to another person will result from the fact that the entity, on behalf of which the statement was made, decided to specify the content of the message in such a way (if the software agent is given some scope of autonomy) and to submit it in this specific manner (automatized).

Therefore, in principle, as the *volenti non fit iniuria*, it should be assumed that the entity using a software agent accepts the risk that the program may make a

811 A. Opalski, *Pojęcie organu osoby prawnej*, PiP 2009/1, p. 29.
812 F. Zoll, *Prawo…*, p. 117.

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statement that does not meet user's expectations. The user should bear the risk of a possible discrepancy between his belief in what declarations are made on his behalf and the real ones. In particular, such entity should be responsible for the fulfillment of the obligation in accordance with the justified expectations of the other party. Avoiding legal consequences of a declaration submitted by the program should be allowed only under exceptional circumstances e. g., if the premises specified in the provisions governing the defects of the declaration of will are met.

4.5.2. Interference by third parties

When discussing typical situations in which the person making a declaration of will is mistaken as to the facts which are relevant from the legal perspective or about the content of the statement made in the Internet environment, it is also necessary to mention errors caused by interferences by third parties. Practices that may cause declarant's error in this regard can differ substantially.[813] Network users are exposed to cyberattacks and computer viruses, while information about them is downloaded by spyware. The lack of caution, carelessness or credulity of network users is exploited.

Entities deciding to use the Internet may reduce the risk associated with this medium by acting with due diligence. The installation of an antivirus program is a standard – failure to do so can be considered a lack of due diligence within the meaning of Art. 355 § 2 CC. Improper behavior of the user means that he will be burdened with the effects related to the modification, interception or loss of data caused by a third party,[814] e. g. statements that, though received by the addressee, cannot be read due to its features or elements (especially malware or macros,[815] that may cause damage to the recipient of the content) are considered not delivered.

However, determining the scope of activities which the entity using the network needs to undertake to fulfill the due diligence requirement, turns out to be difficult. It is doubtful whether the highest diligence including the acquisition of

813 E. g. phishing – attempts to obtain data (e. g., e-mails with a request to log in to a specific website) in order to use them unlawfully, e. g. to conclude a contract, publish false or confidential information about a specific person, create fictitious accounts of that person on platforms in order to influence his reputational capital or to act under his name.

814 This does not exclude recourse claims against a third party responsible for the practice, program or other disruptive tool.

815 The person receives an e-mail with a .doc file attached – opening the file starts a malicious macro. For example, the macros Locky, Cryptowall, JobCrypter or TeslaCrypt ransomware encrypt all files on the computer – to recover them, the victim must pay a ransom.

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the latest and most efficient software on the market (being the least susceptible to external interference) should be required in each case. It would generate expenditures that would be disproportionate in the context of the value of the contract, the risks associated with it, let alone the potential benefits. It seems reasonable to assume that the network user should make an effort to ensure that the environment over which he can exercise control is relatively safe (the safety requirement should be adjusted so that it corresponds with the circumstances of the case).

From the legal perspective, situations in which the functioning of the automated system used to receive and submit declarations of will is disturbed by a third party need to be addressed. This foreign influence may make it difficult or impossible to read online statements or disturb the process of generating content by the user's infected system. The main question is whether such factor should be considered when assessing if a given message constitutes a declaration of will. In addition, it should be considered whether a person using the automated system will be able to effectively contest the conclusion of a contract in such circumstances because of lack of consensus.

Lack of consensus appears when the parties declarations of will aimed at contract conclusion differ as to the essential provisions of the contract and at least one of the parties is convinced that the contract is concluded.[816] It is crucial to recreate the content of each of the statements that were made. In practice, it will be highly problematic – the adaptive functions of the software make it possible to view the agreement as a whole only, it is impossible to distinguish between the statements made by the software and the other party.[817] Thus, situations in which a person using an automated system will be able to claim that consensus was not reached, thus, the contract did not come to existence, will occur incidentally.

When classifying a communication as a declaration of will, the decisive factor is the justified expectation of the addressee as to the existence of declarant's firm intention to commit. Circumstances related to disruptions of the process normally leading to the submission of a declaration of will shall not alter the nature of the declaration. At the same time, however, a modification of the content, its submission method or change of declaration's addressee caused by third party interference should be taken into account when assessing legal effects of such communication.

In order to determine the effects of these disruptions, it is crucial to verify whether, despite the changes, the generated declaration is still within the scope of the tool's discretion, determined previously by the user of the program. Only

816 S. Wyszogrodzka, *Dyssens…*, p. 973.
817 W. Kocot, *Wpływ…*, p. 122.

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these declarations that fall within this scope can be considered in line with will of the program user. Otherwise, such message shall, as a rule, not be recognized as a declaration of will. In these instances it should be considered whether, in the specific circumstances of the case, it is necessary to protect the trust of the other person, to whom the declaration was made. If that is the case, legal consequences which the law associates with declarations of will of this content could arise.

The fact that the statement has been generated under the influence of, for example, a computer virus may be objectively noticeable to the addressee (e. g., the message makes no sense, is illogical, inconsistent, there are language errors, it is written in a foreign language, when it is unnecessary in light of its context). First of all, therefore, in each case it should be assessed whether a statement of this specific content could be understood by the addressee as a declaration of will. The more unusual or unclear the message is, the less likely it is that it will cause recipient's reasonable expectation as to the will of the other party. Thus, there will be no trust to protect, and as a result, there will be no grounds to consider the message a declaration of will.

With the growing popularity of the Internet and the awareness as to the risks associated with its use, elements that may indicate interference of a third party in the content of the statement should raise doubts of a rational recipient as to the nature of such statement. Therefore, if it has features that indicate that the statement was modified during its generation or submission, it can be presumed that its addressee can easily notice these distortions. In such case, it should be possible to avoid the legal consequences of this declaration by a person using the automated system, provided that the other conditions of a legally relevant error are also met. As a result of the action of a third party, there will be a discrepancy between the true state of affairs or the content of the submitted declaration of will and their image in the declarant's mind.

Situations in which changes made by a third party to the content of declarations cannot be detected by their addresses are slightly more problematic. Modification of the declaration may be tempting for its addressee, but the performance of the obligation specified in it might be problematic for the declarant. The declarant's legal situation will depend on the content of the contract thus concluded. Akin agreement will be assessed in terms of its validity. If, as a result of disruptions in the functioning of the program, changes made influence the essence, purpose or economic sense of the declarant's obligation, it may be permissible, for example, to refer to the construction of the primary impossibility to perform.[818] It is also viable to consider supplementing online contracts with

818 W. Kocot, *Wpływ*…, p. 119.

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clauses aimed at protecting the parties against the effects of interferences by a third party.[819]

In the case of errors caused by transmission disruptions or interference by third parties, proving one's claims will be particularly difficult. A user submitting a declaration via an active website usually, without giving much thought, enters data into forms and activates the appropriate hyperlinks. He can only create a message for which the layout of the website allows. The data contained in the declaration thus produced is very limited, usually do not allow for drawing any conclusions about the circumstances surrounding its submission. Therefore, it will be problematic to demonstrate that the content generated and accepted by the user is not consistent with what he believed his declaration was. In principle, it seems permissible to adopt here a factual presumption that if the cause of the distortion was the system used by the addressee of the declaration of will, even without his fault, the error should be seen as caused by that person. If, on the other hand, the error was caused by transmission disruptions (also due to interference by third parties), the recipient of the message should not be held responsible for the error.

4.6. Conclusions

There are many legal mechanisms that reduce the practical utility of rules on error and fraud in case of consumer e-commerce. Most of them are aimed at prevention – removing or at least significantly reducing the risk of a false image of reality appearing in the consumer's mind. The first group of protective instruments are the mechanisms based on the information protection paradigm. The purpose of the rules on the incorporation of standard terms and on the impact of links placed on the entrepreneur's website is to ensure that the consumer, even if he fails to comply with the due diligence requirements, should be aware of what shapes the content of the contract he concludes. In principle, they prevent the entrepreneur from exploiting the passive attitude of the other party and shaping the content of the legal relationship without consumer's awareness.

Another mechanisms with a preventive function are pre-contractual information duties. These should be fulfilled before a legally relevant error or fraud may take place. Full regulation of disclosure obligations entails defining the distribution of all costs and risks related to information asymmetry. *Inter alias*, they should also determine which party bears the risk of creating a false image of reality in the mind of the consumer. Therefore, if the norm provides not only for the obligation, but also a sanction related to its non-performance, there is no

819 W. Kocot, *Wpływ*…, p. 125.

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need to refer to Art. 84 or 86 CC, because the rules on information duties apply first.

The sanction for non-compliance with the information obligation can be designed in three ways. The lack of fulfillment of information obligations may be correlated with individual protection instruments – rules on error and fraud (failure to fulfill the information obligation seen as causing an error). It can be also synchronized with standardized protection instruments, i. e. Art. 12.1 ACUCP (failure to fulfill the information obligation seen as an unfair market practice). Alternatively, individual disclosure obligations can be linked with *ex lege* private law sanctions (some disclosure obligations under ACR).

The main flaw of the first model is its inflexibility (influencing the content of the legal relationship is impossible), causality (problematic, e. g., in the context of the failure to give information leading to other's error) and the need for the weaker participant to be active.

The second model is based on objectified premises and it only requires a threat to decision-making autonomy of a person (therefore, the mere possibility of causing an error is sufficient). Also here, although the legislator authorizes the consumer to formulate various demands, as a rule it is not possible to modify the content of the contract. Additionally, the activity of the weaker entity is still necessary to activate protection.

The third model assumes the sanctions apply *ex lege* – failure to meet a specific obligation results in a change in the content of the legal relationship. It is an optimal solution from the perspective of the protective goal – the consumer does not have to take any actions, and all individual and subjective circumstances are irrelevant.[820] The main weakness of this approach is related to its inherent casuistic nature (failure to comply with a specific obligation results in the occurrence of a specific sanction) and the fact that it restricts the decision-making freedom of protected entities.

The lack of complete and comprehensive regulation of information obligations, as well as the unreliability of the model of protection-by-information (the person, though informed, will not always be able to absorb and use this information) are the main weaknesses of these protection mechanisms.

The second group of instruments consists of mechanisms supplementing the protection of the network user (primarily the consumer) included in Art. 84 and 86 CC against abuse of his beliefs, patterns of behavior and presumptions, as well as anonymity on the Internet. Their importance in the consumer e-commerce is related to the specific features of this environment: the role of reputational

820 The adequacy of this model, however, may be significantly reduced because of the growing popularity of personalized contracts in online consumer trading. K. Południak-Gierz, *Sanctions…*, p. 830.

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capital, the power of presumptions and suggestions, as well as the anonymity on the Internet. Typical situations in which claiming an error may be possible but other provisions provide further-reaching protection include cases of: impersonation,[821] suggesting a different identity,[822] affiliation with another entity,[823] free character of the transaction at hand,[824] having certain features,[825] and abusing the presumptions as to the standard content of the statement.[826]

The third protection model is based on interpretation in line with the legitimate expectations of the consumer. If the consumer's expectations are justified, the content of the legal transaction will be adjusted accordingly. Thus, it is not possible for the consumer to void the contract due to error or fraud. Instead, he is entitled to demand a performance in accordance with his justified expectations. The regulation of error and fraud will remain useful only in those cases where consumer's expectations are unjustified, but were known or should have been known to the other party. However, it is possible to assume that the indicated method of interpretation will only apply when the consumer decides to assert his rights under the seller's liability regime. Then there will be a concurrence of the provisions regulating the seller's liability for inconformity of the good and error or fraud – currently, it seems reasonable to assume that the seller's liability regulation consumes the institution of error and fraud.

An additional element, which, in practice, may reduce the usefulness of the code provisions on error and fraud, is the uncertainty as to who should be assigned responsibility for the incorrect content of the message in the event of failure of communication systems or third parties' interference. As a rule, if the declarant has exercised due diligence and the conditions of a legally relevant error or fraud have been met, he should be allowed to avoid the legal effects of the declaration of will due to a distortion of the statement by the messenger. The fact that the statement was generated by a program with a considerable degree of autonomy should not be taken into account.

821 The sanction of the statement of will being null and void – Art. 58 CC.
822 A misleading practice – Art. 12.1 ACUCP.
823 A misleading practice – Art. 12.1 ACUCP.
824 The contract is considered not concluded – Art. 17.4 ACR.
825 In the case of an entrepreneur, a misleading practice – Art. 12.1 ACUCP; in the case of a consumer – the problem of legal capacity.
826 Surprising clause – 385^1 CC.

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5. Acting under pressure – threats and other ways to force person's behavior

As a rule, the application of the provision on threat in case of consumer e-commerce does not cause any new legal problems which would require to be addressed. However, if the usefulness of this institution in the online environment is to be tested, it should be noted that, depending on who forms a threat, various elements may affect the efficiency of the code regulation.

The analysis is divided into three sections – depending on whether the threat comes from the entrepreneur, a third party or the consumer. This manner of approaching the issue seems especially justified by the fact that depending on who performs actions aimed at limiting the autonomy of the consumer or the entrepreneur, mechanisms that may limit the usefulness of the institution of threat will be different. If threats are formulated by an entrepreneur, the consumer will be able to demand protection of his interests under a specific statutory regulation – namely the Act on Combating Unfair Commercial Practices. When the threat comes from a third party, there are no alternative protective instruments. Finally, if the person traditionally considered to be weaker in the consumer-entrepreneur relationship ventures to threat the entrepreneur, the source of additional protection could be found in standard terms, internal instruments of the portal, stem from marketing strategies, and (as a supplement) the code provisions on the protection of personal rights.

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5.1. Threat coming from the entrepreneur – aggressive market practices[827]

The scope of application of the provisions aimed at counteracting unfair market practices and of the rules on defects of consent overlap. The consumer may seek protection because he was mistaken, deceived or threatened, or because of an aggressive or misleading market practice was used against him.

There are significant differences between the conditions of individual protection against threat and standardized protection provided in the Act on Combating Unfair Commercial Practices, regarding: the design of the institution, the state that disrupts the decision-making process, the link between protection and the fact that a declaration of will was actually submitted under the influence of another person, causal relationship between the action aimed at disrupting decision-making process and the behavior of the person against whom this action was taken, the declarant's interest that is safeguarded. The above issues affect practical usefulness of both protection models.

5.1.1. Premises of protection

The first difference lies in the design of the mechanisms in question. Avoidance of the legal consequences of a declaration of will made to another person under the influence of a mistake or a threat is an entitlement – exercising this right changes legal situation of that person. Theoretically,[828] this excludes the need for court interference.[829] The situation is different in the case of the ACUCP, containing in Art. 12.1 a catalog of claims that a consumer may be entitled to lodge if an unfair market practice was used against him.

In the case of behaviors that distort consumer decision-making process, the scope of situations where the provisions can be applied, is relatively wide.

According to the Art. 87 CC, a threat to be legally relevant must be unlawful and cause a person to whom it is addressed to fear that he or some other person is at risk of serious personal or property injury. In order for this person to be able to evade legal consequences of a declaration of intent that was made to another

827 The analysis of the functionality of individual consumer protection instruments in the Act on Combating Unfair Commercial Practices, undertaken in this subchapter, was partially published in the article: K. Południak-Gierz, *Instrumenty indywidualnej ochrony konsumenta w ustawie o przeciwdziałaniu nieuczciwym praktykom rynkowym a Nowy ład dla konsumentów*, iKAR 2018/6(7), p. 88–103.

828 Unless the effectiveness of such a declaration is not questioned by its addressee.

829 M. Gutowski, Z. Radwański, in: *System…*, p. 538.

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person under the influence of a threat, this fear must force the declarant to submit such a statement.[830]

Claims specified in Art. 12.1 ACUCP arise if an unfair market practice was applied, the person against whom the practice was committed was a consumer, and it either infringed or threatened his interests. An unfair market practice is, *inter alia*, an aggressive market practice which is understood as a practice that by unacceptable pressure significantly limits or may limit the freedom of choice of the average consumer or his behavior towards the product, and thus causes or may cause him to make a decision regarding the contract that he would have not taken otherwise.[831] Any type of use of an advantage over the consumer is considered an unacceptable pressure (in particular the use or threat of physical or mental coercion in a way that significantly limits the average consumer's ability to make an informed decision regarding the contract). Additionally, Art. 9 ACUCP contains a list of typified aggressive practices that should be considered unfair under any circumstances.[832]

Pursuant to Art. 87 and 88 CC the protection of the individual's autonomy is ensured by granting him the right to avoid the effects of a declaration of will. This means that the possibility of benefiting from this protection mechanism appears, at the earliest, when the declaration is made. In contrast, ACUCP is aimed at prevention. In principle, the protection does not depend on whether the protected entity submitted a declaration of intent while having limited decision-making autonomy. In the light of the wording of Art. 9 and Art. 12.1 ACUCP the person does not need to make a statement while being under pressure – from the perspective of this protective mechanism, it is enough that the interests of such a person are threatened.

However, while anybody can benefit from the protection provided in the CC, the ACUCP protects consumers only.[833] Here, the main doubt emerges – on the one hand, the protection extends to the pre-contractual stage, but on the other, due to the lack of a specific statutory definition of a consumer in ACUCP,[834] in accordance with the general rule of Art. 22^1 CC a natural person becomes a consumer only when he performs a legal transaction which is not directly related to his business or professional activity with an entrepreneur.[835] Thus, in the

830 M. Gutowski, Z. Radwański, in: *System…*, p. 531–537.
831 Art. 8.1 ACUCP.
832 I. Oleksiewicz, *Ustawa…*, Art. 9.
833 A. Tischner, *Model…*, p. 199–244.
834 Art. 2 point 2 ACUCP.
835 B. Gnela, *Uwagi o kodeksowej definicji konsumenta oraz jej zgodności z prawem unijnym*, in: *Kierunki rozwoju europejskiego prawa prywatnego Wpływ europejskiego prawa konsumenckiego na prawo krajowe*, ed. M. Jagielska, E. Rott-Pietrzyk, A. Wiewiórowska-Domagalska, Warszawa 2012, point 4; M. Jagielska, *Prawo…*, p. 30. Differently in Art. 2 letter a dir. 2005/29: "consumer" means any natural person who, in commercial practices covered

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period between the application of the unfair (aggressive) market practice and performing a legal action not directly related to consumer's business or professional activity (being, as a rule, contract conclusion), the individual against whom the practice has been exercised does not have the status entitling him to raise claims based on Art. 12.1 ACUCP.[836]

The above manner of reasoning should be rejected and a pro-EU interpretation should be adopted instead. In accordance with the postulates already appearing in the legal academic writings,[837] natural persons who act for purposes unrelated[838] to his trade, business, craft or liberal profession, should obtain the status of a consumer already at the moment of becoming an addressee of activities aimed at selling consumer goods, undertaken by a professional party.[839] Art. 2 letter a of Directive 2005/29 implemented by the ACUCP (maximum harmonization) states that "consumer" means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. Tendency to make the status independent from the contract conclusion can be observed also in Polish law: in ACUCP (Art. 9 point 6, which refers to a consumer also when no agreement has been concluded between the parties) and ACR (Art. 17.1 – the trader is obliged to provide the consumer with certain information in a clear and visible manner before the consumer places his order).[840]

Thus, while the protection provided in the event of a defect in the declaration of will in the form of a threat is activated only at the time of performing an act in a state of limited autonomy, in the case of ACUCP protection does not depend on whether the consumer actually submitted a declaration of will desired by another person or not.

Another element is related to the negative assessment of the other party's actions. In case of a threat its unlawfulness[841] is required, whereas in case of aggressive market practices – unacceptable pressure. Unlawfulness within the meaning of Art. 87 CC tends to be interpreted as broadly as possible – so that it

by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

836 W. Jarosiński, B. Widła, *Odpowiedzialność…*, p. 52–53.

837 A. Michalak, *Przeciwdziałanie…*, p. 52, 54.

838 On the notion of consumer: M. Jagielska, *Ile przedsiębiorcy jest w konsumencie?*, in: *Ius est ars boni et aequi. Księga pamiątkowa dedykowana Profesorowi Józefowi Frąckowiakowi*, Wrocław 2018, p. 337.

839 M. A. Dauses, M. Sturm, *Prawne podstawy ochrony konsumenta na wewnętrznym rynku Unii Europejskiej*, KPP 1997/1, p. 34–35.

840 On the time for which a person maintains the status of consumer: judgment CJEU of 25.01. 2018, C-498/16, Maximilian Schrems against Facebook Ireland Limited, EU:C:2018:37, further as: judgment C-498/16 Schrems v. Facebook Ireland Limited.

841 The translation of this premise differs in official CC translations: 2019 it is "unlawful" and in 2020 – "illegal".

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covers instances where a threat is contrary to the legal order or to the principles of social coexistence.[842] For this reason, actions contrary to the law (so-called unlawful measures) or to the principles of social coexistence, as well as actions that are not illegal but aimed at achieving an unlawful goal (referred to as unlawfulness of a goal) are covered by this provision.[843] Thus, the condition of unlawfulness is fulfilled if the right is exercised not to satisfy the legitimate interest of the rightholder but in order to exert pressure in another case, especially if that other situation is not related to the legal relationship under which the right was created – the content and purpose of the right are strictly related to each other.[844]

The premise of unacceptable pressure also contains an element of unlawfulness. The entrepreneur's behavior must be against the law. This premise is interpreted in a similar manner as in the case of threat – "the law" meaning both legal norms and the principles of social coexistence.[845] However, concepts of unacceptable and of unlawful pressure are not equivalent.[846] The category of unacceptable pressure is broader and covers all types of undue influence (unlawful and not), as long as it can force a market decision (limiting the freedom of choice of an average consumer and, thus, distorting his market behavior). The concept of unacceptable pressure encompasses an unlawful threat (action contrary to the law and/or good morals) and formally lawful behavior which is aimed at forcing a particular decision of the consumer.[847]

Thus, both in the case of provisions on threats and on aggressive market practices, the premise of unlawfulness is understood broadly – it covers the unlawfulness of the measure and of the aim.

A threat must be serious, and cannot relate solely to the usual hardships and inconveniences of one's daily life. There is no similar requirement in the case of aggressive market practices, although its impact must be strong enough to limit the freedom of choice of an average consumer or his behavior towards the product and, thus, to force him to make a contractual decision that he would not have made otherwise. Cases where the entrepreneur's activity should be classified

842 See: announcing a suicide. Judgment of the Supreme Court of 18.02.1970, I CR 571/69, Legalis; judgment of the Supreme Court of 25.11.1981, IV CR 406/81, Legalis.

843 Judgment of the Supreme Court of 2.03.2012, I PK 109/11, Legalis.

844 B. Lewaszkiewicz-Petrykowska, in: *System…*, p. 693.

845 K. Pietrzykowski, *Bezprawność jako przesłanka*, in: *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara*, ed. M. Pyziak-Szafnicka, Zakamycze 2004, p. 179.

846 The Polish legislature uses the term unacceptable pressure, while the European legislator defines this premise by listing forms of unacceptable pressure. M. Namysłowska, *Czarna lista nieuczciwych praktyk handlowych a granice prawa zwalczania nieuczciwej konkurencji w Unii Europejskie*, Warszawa 2014, p. 261.

847 Judgment of the Supreme Court of 19.03.2002, I CKN 1134/99, OSNC 2003/3, item 36.

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as an aggressive practice pursuant to Art. 9 ACUCP are an exception in this regard – if the practice falls under Art. 9 ACUCP it is not necessary to test whether it meets the general conditions listed in Art. 8 ACUCP.[848]

The threat must make the subject to whom it is addressed to fear that himself or another person is in danger of serious personal or property risk. The Polish Civil Code provides for a two-stage process of verification of the above-mentioned condition. First, it should be ascertained whether the state of fear actually occurred (a subjective element) and, second, whether it was objectively justified (an objective element).[849]

The ACUCP, in turn, requires that the freedom of choice of the average consumer or his behavior towards the product is or can be limited. Thus, only the objective criterion is applied (it is checked whether such a practice could limit decision-making autonomy of the average consumer – it is irrelevant if the individual consumer's autonomy was actually limited). Therefore, the causal link between the action aimed at disrupting the decision-making process and the behavior of the person against whom the action was taken is not examined. As a rule, claims under Art. 12.1 ACUCP[850] shall arise also when consumer's decision-making process has not been disturbed but, *post factum*, he considered the decision he made suboptimal and, therefore, he wants to avoid its legal consequences. For reasons of equity, such a solution seems to be the most justified – since the entrepreneur performs an unfair market practice, he should not be protected at the expense of the person whose decision autonomy he wanted to limit just because of the *pacta sunt servanda* principle.

The Civil Code allows a declarant to avoid legal consequences of a statement of will only when this person acted because he was afraid that a specific value was endangered (property or personal safety). In contrast, the protection provided in ACUCP is triggered as soon as the freedom of choice of the average consumer is limited or endangered: this limitation must be caused by unacceptable pressure exerted by the other party but it does not matter whether this causes fear (for any good), overwhelming feeling of compassion, hope, or exploit another type of intense impulse.[851] Thus, a legally relevant threat (under Art. 87 CC) should, in principle, always meet the premise of limiting or endangering the freedom of choice of the average consumer or his behavior towards the product.

848 D. Kasprzycki, *Prawna regulacja spammingu – zagadnienie ciągle aktualne*, in: *Reklama. Aspekty prawne*, ed. M. Namysłowska, Warszawa 2012, p. 463–464.

849 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 87, point 5, 20.

850 A claim for compensation for the damage based on general rules, in particular a request for cancellation of the contract with the obligation of mutual reimbursement of benefits and reimbursement by the entrepreneur of costs related to the purchase of the product, discussed later in this chapter, might be an exception (Art. 12.1 point 4 ACUCP).

851 W. Ciupa, *Reklama zakazana skierowana do niepełnoletnich*, MoP 2002/22, p. 1040.

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In the case of a threat, the action that the person is forced to do does not have to be against his interests.[852] The legislator clearly seeks to protect decision-making autonomy, and not only property interests. This seems to differ in regard to the rules on unfair market practices. Both in the context of Directive 2005/29 and the act implementing it, it is indicated that it directly protects the economic interests of consumers against the effects of decisions made under the influence of unfair market practices.[853] However, while in recital 8 of Directive 2005/29 there is a direct reference to the economic interest of the consumer, the national ACUCP lacks a similar clarification. Moreover, the EU legislature only indicates that the directive is aimed at granting a direct protection of the economic interest but it does not exclude the indirect protection of other interests. In addition, it points out situations in which the need for protection arises because certain elements of the practice that may limit the autonomy of the consumer's will, though they do not adversely affect his financial situation. This property-related element appears only at the stage of listing claims that arise once an unfair practice is applied.

The Polish legislature, while regulating the instruments of individual consumer protection, decides that this protection depends on whether the consumer's interest were threatened or infringed. It is unclear whether it had in mind the consumer's material interest only, or his interest in general (including, for example, preserving his autonomy of will – freedom from the influence of others, that could exclude his conscious and free decision-making).[854] Interestingly, Polish legal authors underline that the purpose of the ACUCP is solely to protect consumer's financial interests and, therefore, the premise of violating or threatening the consumer's interests contained in Art. 12 ACUCP should be considered fulfilled only if the damaged or threatened interest is the material one. However, the scope of interests that are protected by these rules should not be limited but cover his legal interest "understood as specific consumer needs that have been recognized by the legislature as worthy of protection."[855] At the same time, however, it is claimed that:

> "only finding that a legal interest was infringed, as provided in ACUCP, allows to apply procedural protection mechanisms of the Act (…) The above allows for the conclusion that the intention of the legislature was to specify in ACUCP these practices of the entrepreneur (actions and omissions) that are aimed at infringing the economic in-

852 B. Lewaszkiewicz-Petrykowska, in: *System…*, p. 691.

853 M. Sieradzka, *Ustawa…*, Art. 12, point 2, 4; R. Stefanicki, *Ustawa…*, Art. 12, point 1.

854 It is so when submitting a declaration of a specific content is requested. I. Oleksiewicz, *Ustawa…*, Art. 12, point 4.

855 Author's own translation. Judgment of the Supreme Court of 13.07.2006, III SZP 3/06, Legalis.

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terests of consumers and to provide effective and appropriate legal measures to protect them."[856]

The wording of ACUCP does not justify the conclusion that unfair market practices can be aimed solely against consumer's property interest.

The analysis of both the national and EU legal regulations on aggressive market practices shows that the decisive factor in qualifying a given practice as an unfair one is its possible impact on the consumer's decision-making autonomy. Any form of unlawful pressure violates consumer's sovereignty[857] – protection of which lies at the center of all the consumer protection instruments. Accepting that claims specified in Art. 12.1 ACUCP arise only if consumer's property interest are infringed means that forcing a consumer to buy a good at price significantly lower than the market one shall never justify the consumer's claim under ACUCP. The material interest of a consumer who purchases goods below their market price is never violated – he is enriched by this transaction.

Committing an unfair market practice may directly threaten or infringe non-pecuniary interests of the person – e.g., his personal rights.[858] This leads to the conclusion that if a national law provides for individual consumer protection measures, granting him specific claims, these measures should include claims appropriate for the protection of interests that may usually be threatened or infringed by an unfair market practice. Contrary to what the judicature tends to state[859] the catalogue of Art. 12.1 ACUCP includes equally pecuniary and non-pecuniary claims. The consumer is entitled to demand refraining from further application of that practice (e.g., not displaying advertisements on websites covering 3/4 of the screen) or publishing a single or multiple declarations of appropriate content and appropriate form (for this the obligated person might need to incur some costs, but the fulfilment of that request does not affect the property of the claimant[860]).[861]

856 M. Sieradzka, *Ustawa…*, Art. 12, point 3.

857 R. Longchamps de Bérier, *Polskie prawo cywilne. Zobowiązania*, Poznań 1999, p. 459.

858 For example, creating an impression that the consumer cannot leave the entrepreneur's premises without concluding the contract; persuading the consumer to purchase products by telephone, fax, e-mail or other means of distance communication which is inconvenient for the consumer and is not caused by consumer's actions or omissions. R. Stefanicki, *Ustawa…*, Art. 12, point 5.

859 Claims specified in Art. 12.1 ACUCP have pecuniary character (in the context of Art. 18.1 point 1 of the Act of 16.06.1993 on Combating Unfair Competition (consolidated version, Journal of Laws 2020, item 1913) see: judgment of the Supreme Court of 8.03.2007, III CZ 12/07, OSNC 2008/2, item 26).

860 P. Zakrzewski, in: *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 117, point 16.

861 It seems that in a situation where this claim is made by a consumer, then, due to the fact that the subject of the claim is to publish information that corrects the popular opinion about goods, services or entrepreneurs, satisfying consumer's demand shall have no economic

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In summary, in principle, the claims referred to in Art. 12.1 ACUCP arise in case of the threat or violation of the consumer's property interest. Yet, in some cases it is justified to grant the said claims when consumer's non-material interests are violated. In particular, lack of influence or even a beneficial effect on the financial situation of the consumer should not automatically exclude the possibility of demanding actions specified in Art. 12.1 ACUCP if the application of an unfair market practice affected or could have affected consumer's decision-making autonomy.

Such an approach is justified for reasons of equity, as well as in the light of the purpose of the act, which is to prevent unfair market practices. Additional premises, justifying the formulation of a specific request (in the case of, for example, continuation of a practice – request to stop the practice at hand, causing property damage – a compensation claim) should be examined later, at the stage of verifying the legitimacy of a specific claim against the entrepreneur.

A comparison of the premises of the rules on threat and on aggressive market practices leads to the conclusion that the behavior limiting the decision-making autonomy of a consumer operating on the Internet by an unacceptable pressure, even if it does not fulfil the premises of a threat, may be classified as an aggressive market practice.

5.1.2. Preventive function of unfair market practices regulations

Protection mechanisms provided by the provisions on defects of consent in the Civil Code and the Act on Combating Unfair Commercial Practices also differ. The code regulation allows only for avoiding legal consequences of the defective act (consumer's financial interests are safeguarded by appropriate provisions regulating unjust enrichment),[862] while 12.1 ACUCP provides for a non-exhaustive catalog that specifies five main types of claims which can be lodged if an unfair market practice is used against the consumer.[863]

The consumer may demand that the practice is stopped, its effects are removed or a declaration of an appropriate content is submitted in an appropriate form. He may also claim compensation for the damage, in accordance with the general CC provisions, in particular the contract he concluded under the influence of such practice may be annulled – then the parties would be obliged to the return of what the performance consisted in, and the entrepreneur would be also

impact on his individual situation. Hence, to the extent that the consumer is entitled to this claim, it will be devoid of any pecuniary character.

862 Art. 405 CC in conjunction with Art. 410 CC.

863 The consumer may be entitled to lodge other claims also under the Civil Code. M. Sieradzka, *Ustawa…*, Art. 12, point 7.

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obliged to compensate the consumer the costs related to the purchase of the product. Finally, the consumer may demand that an appropriate amount of money is paid by the entrepreneur for a specific social purpose related to supporting Polish culture, national heritage or consumer protection.

The wording of this provision suggests that these claims may, as a rule, be raised not only in order to eliminate the state of infringement but also when the consumer's interest has only been threatened, provided that the unfair market practice has been committed. The prerequisites for protection (infringement or threat to the consumer's interest caused by unfair market practice) shall not be mistaken with the premises of application of a particular protection mechanism, corresponding with circumstances of the individual case. Therefore, first of all, it is always necessary to assess whether the conditions causing the "activation" of the protection provided in the ACUCP are met. Only then, it can be examined which of the provided protection mechanisms can be applicable in a specific situation (here, the legitimacy of a specific claim will be assessed).

The first group of claims includes claims for refraining from further application of the practice in question, submitting a declaration of appropriate content and in an appropriate form, paying a determined by court amount of money for a specific social purpose related to supporting Polish culture, national heritage or consumer protection. Although they may be raised by an individual, their mechanism is aimed rather at producing effects on a non-individual level – they serve to protect a wider group of consumers.[864] Their premises focus only on the circumstances related to the entity against which they are formulated, namely, the entrepreneur.

If the consumer requests that the entrepreneur ceases to apply a particular practice, it is sufficient if one of the following conditions is met: (i) the act of unfair market practice has been committed, (ii) it is probable that an unfair market practice is going to be applied and the existing conditions threaten or violate the interest of another consumer, although the market practice itself has not been committed,[865] (iii) there is a risk of reoccurrence of unlawful activities, despite the fact that the state of infringement has already been removed.[866]

Moreover, claims for discontinuation of a practice can be made regardless of entrepreneur's fault or actual damage, which means that the assessment of the fulfillment of its conditions will require only the verification of objective circumstances of the case.

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864 R. Stefanicki, *Ustawa…*, Art. 12, point 4, 6; I. Oleksiewicz, *Ustawa…*, Art. 12, point 3, 4.

865 J. Szwaja, K. Jasińska, in: *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, ed. J. Szwaja, Warszawa 2019, p. 829; differently: M. Sieradzka, *Roszczenie o zaniechanie działań stanowiących czyn nieuczciwej konkurencji*, AUWr PPiA 2006/2950, p. 224.

866 M. Sieradzka, *Ustawa…*, Art. 12, point 8; J. Szwaja, K. Jasińska, in: *Ustawa…*, p. 829.

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A claim to make a declaration of a specific content, which depends solely on whether an unfair market practice was applied, forms a part of the protection-by-information model. It should enable consumers to obtain information about unfair market practices of the trader and, thus, on the one hand, support making informed and rational choices by eliminating false information, and on the other, affect the reputation of the entity that committed such a practice, thereby becoming a reputational sanction for inappropriate market behaviors. It is argued that this claim should not be seen as having a repressive function. Its purpose is merely to remove effects of the infringement and, therefore, it is unacceptable for the request to include repressive elements, e. g. to be aimed at humiliating the entrepreneur.[867] However, even without such elements, the publication of a statement of this type will have an impact on the entrepreneur's reputation capital, as it means that the entrepreneur used an unfair market practice, which is an activity negatively assessed by other market participants.

Also the claim for transferring a sum of money for a specific social purpose related to supporting Polish culture, national heritage or consumer protection has a general dimension. Originally, such a claim arose when the aggrieved party resigned from compensation for moral harm.[868] In practice, however, since the consumer cannot obtain a measurable benefit for himself on this basis but he would have to incur expenses related to court proceedings and bear the risk associated with an unfavorable adjudication, the effectiveness of this provision may be limited. In the case of this claim, there are no additional premises related to the injured party – however, it is indicated that in order to adjudicate the aforementioned sum, it is necessary that the entrepreneur can be attributed fault for the application of practice.[869] It is the degree of fault that will be taken into consideration when determining the amount that should be awarded.

The second group of claims includes claims primarily affecting the situation of the individual consumer. Also here the tension between the general aim of the norm – prevention and standardization – and the principle that a person is responsible for one's behavior (the traditional understanding of harm and causality) becomes evident.

867 A. Szpunar, *Ochrona dóbr osobistych*, Warszawa 1979, p. 244.
868 J. Panowicz-Lipska, *Majątkowa ochrona dóbr osobistych*, Warszawa 1975, p. 125.
869 M. Sieradzka, *Ustawa…*, Art. 12, point 11; R. Stefanicki, *Ustawa…*, Art. 12, point 6.

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5.1.2.1. Demanding that the effects of unlawful activities of the entrepreneur be removed

The consumer may demand that the effects of unlawful actions are removed if the application of the unfair practice has resulted in factual or legal consequences, consisting in injury or a threat of injury to a specific good. Legal commentators[870] add that these consequences should be negative for the consumer. However, it does not specify whether it is sufficient that this particular consumer actually thinks they are disadvantageous (subjective perspective) or whether the consequences of the practice need to be considered negative by an independent observer (objective perspective). The essence of the request is that the state before the violation or the threat is restored by the entrepreneur. The legislature makes this claim independent from the actual damage, referring to a wider category instead (negative consequences). However, this is not a compensation claim and therefore, the consumer is not required to prove a causal link between the use of unfair market practice and its effect. The question, thus, is how to determine the scope of the effects of unfair market practice within the meaning of Art. 12.1 point 2 ACUCP.

Based on this provision, the consumer may demand that the entrepreneur removes the consequences of unfair market practices. As a consequence, the claims formulated pursuant to Art. 12.1 point 2 ACUCP may, to a large extent, overlap with the demands formulated under Art. 12.1 point 4 ACUCP (claim for damages).[871] In particular, the consumer could request termination of a contract that has not yet been performed (Art. 77 § 1 CC), annulment of the contract or reimbursement of expenses incurred as a result of the unfair market practice (e. g., the cost of an SMS in case of a false assurance that each SMS "wins a prize" – Art. 9 point 8 ACUCP).

This would mean that the consumer may pose the same demands, relying on two different legal bases. In case of the first one, conditions are general – it is sufficient that the practice caused certain effect (Art. 12.1 point 2 ACUCP), while the second requires fulfilment of strictly defined prerequisites (Art. 12.1 point 4 ACUCP). Such a solution is unreasonable – if the same effect can be achieved under less and more stringent premises, it is natural that the second basis of the claim will rarely be invoked. Thus, there will be no reason to introduce it in the same legal act.

The legislature, entitling the consumer to demand removal of the effects of the practice as well as the compensation (subject to general rules), did not give him the right to choose whether he would pursue the claim for damages within the

870 M. Sieradzka, *Ustawa…*, Art. 12, point 8.

871 K. Włodarska-Dziurzyńska, *Sankcje w prawie konsumenckim na przykładzie wybranych umów*, Warszawa 2009, p. 97.

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compensation regime or outside of it. However, the purpose of the claim specified in Art. 12.1 point 2 is not to remove the effects of such practice, but only to restore the previous state – before the practice was applied.[872] Having in mind the assumption of the rationality of the legislature, it should be assumed that he strove to guarantee the consumer protection both in terms of non-restitutional claims and typical claims for damages. In the case of the former, the appropriate basis is Art. 12.1 point 2 ACUCP, and the latter Art. 12.1 point 4 ACUCP.

A similar problem has already been discussed in the context of the scope of the restitution (restoration of the state that corresponds with the law is requested) and compensation claims. Some legal authors believe that a restitution claim may include both a request to perform activities that are necessary for the claimant to regain use of the property as well as some other activities as a part of natural restitution.[873] This means that the line between the restitution claim and the claim for damages is getting blurred.[874] At the same time, however, aims and nature of these claims are different (compare restitution and compensation claims, as well as claims for the removal of the effects of unfair market practice and restitution claims). Thus, the differentiation of their premises should be seen as a logical consequence thereof.

5.1.2.2. Claiming compensation in accordance with general principles

There is no consensus as to the nature of the compensation claim under the general terms (i. e. specified in Art. 361–363, 415 CC) and, in particular, of the request for cancellation of the contract and the benefits mutually returned and the purchase costs reimbursed as provided in Art. 12.1 point 4 ACUCP. Two different positions appeared in legal scholarship. According to the first one the legislature aimed at introducing in Art. 12.1 point 4 ACUCP two separate instruments: one being a compensation claim and the other – a right to demand cancellation of the contract.[875] Those in favor of this approach indicate that a claim for annulment of a contract does not constitute a claim for damages.[876]

872 S. Wójcik, in: *System Prawa Cywilnego*, Vol. II, *Prawo własności i inne prawa rzeczowe*, ed. J. Ignatowicz, Warszawa 1977, p. 533; M. Sieradzka, *Ustawa…*, Art. 12, point 10; I. Oleksiewicz, *Ustawa…*, Art. 12, point 4.

873 E. Gniewek, *Kodeks cywilny. Księga druga. Własność i inne prawa rzeczowe. Komentarz*, Warszawa 2001, Art. 222, point 16–18; J. Gudowski, in: *Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe*, ed. J. Gudowski, Warszawa 2016, Art. 222–223, point 17.

874 T. Dybowski, *Ochrona własności w polskim prawie cywilnym (rei vindicatio- actio negatoria)*, Warszawa 1969, p. 337; J. Gudowski, in: *Kodeks…*, Art. 222–223, point 17; J. Kozińska, in: *Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe (art. 126–352)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 222, point 33.

875 M. Grochowski, *Wadliwość…*, p. 60; A. Michalak, *Przeciwdziałanie…*, p. 124.

876 M. Grochowski, *Wadliwość…*, p. 60.

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Otherwise, the ACUCP would introduce a new liability regime, combining elements typical for redress and these characteristics for unjust enrichment regulation with a request for the contract to be canceled by court.[877] The consequence of this view is that the claim for annulment of the contract is not limited in time.

The second approach is based on the assumption that the possibility of requesting cancellation of the contract is a form of restoring the previous state of affairs and should be considered a specific form of claim for damages.[878] Its aim is to assure that the consumer finds himself in a situation he would have been if the act performed by the consumer under the influence of unfair market practice had not taken place at all.[879] The claim, therefore, covers the cancellation of the contract and the reimbursement of costs incurred in connection with its conclusion, as in case of *culpa in contrahendo*.[880] This interpretation of the provision is suggested by its wording ("in particular").

Premises for a claim for damages under Art. 12.1 point 4 ACUCP are:[881] the entrepreneur uses an unfair market practice, there is some material or non-material damage and a causal link between the event causing the damage and the damage itself. Finally, the entrepreneur has the fault for the unfair market practice.

There are no doubts as to how the fault[882] or the unfair practice should be interpreted in this regard. Yet, it is not clear how to understand damage under this provision. As a rule, under Polish law the damage is interpreted as material damage but non-material damage (harm) should not be excluded from the scope of compensation claim based on Art. 12.1 point 4 ACUCP.[883] In the Polish law, it is indicated that while compensation for material damage is a general obligation, the obligation to compensate for harm arises only when it has been expressly

877 M. Grochowski, *Wadliwość…*, p. 60.

878 This is, currently, the majority view. A. Ohanowicz, *Glosa do wyroku SN z 13.02.1970 r., III CRN 546/69,* OSPiKA 1971/82, p. 184; M. Sieradzka, *Ustawa…*, Art. 12, point 11; W. Jarosiński, B. Widła, *Odpowiedzialność…*, p. 45–47; K. Włodarska-Dziurzyńska: *Sankcje…*, p. 103; T. Targosz, *Wpływ…*, p. 166–167; I. Oleksiewicz, *Ustawa…*, Art. 12, point 6.

879 On the possibility of demanding the termination of a contract as a form of*restitutio naturalis* in German jurisprudence in the context of *culpa in contrahendo* see: judgment BGH of 26.09.1997, V ZR 29/96, NJW 1998, p. 302; judgment BGH of 19.12.1997, V ZR 112/96, NJW 1998, p. 898; judgment BGH of 4.07.2002, IX ZR 153/01, NJW 2002, p. 2774.

880 T. Targosz, *Wpływ…*, p. 166.

881 M. Sieradzka, *Ustawa…*, art. 12, point 10.

882 Due to the professional character of the entity whose behavior is being examined, a high level of due diligence required. K. Włodarska-Dziurzyńska, *Sankcje…*, p. 104.

883 B. Gadek, *Szkoda wyrządzona czynem nieuczciwej konkurencji. Zagadnienia wybrane*, in: *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora A. Szpunara*, ed. M. Pyziak-Szafnicka, Kraków 2004, p. 647–654; M. Sieradzka, *Ustawa…*, art. 12, point 10.

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provided by a specific provision.[884] The non-material damage is related to the infringement of personal rights.[885] At the same time, however, it should be noted that EU law does not distinguish between harm and damage, dividing damage into material and non-material one.[886] As a rule, if an EU act providing for maximum harmonization imposes an obligation on the Member States to ensure that a person has the right to claim compensation for damage, the implementation should not limit the right to compensation to the material damage, but should also provide for mechanisms allowing the person to claim compensation for the non-material one.

Additionally, it is worth noting that in Directive 2005/29, the EU legislature does not impose an obligation on Member States to guarantee persons who have been subject to unfair market practices the right to seek redress for the damage caused by their application. Hence, even in the context of a pro-EU interpretation, there are no premises to interpret the notion of damage in a provision that is not an implementation of an EU regulation as encompassing both material and non-material damage. Introducing personal protection instruments to Directive 2005/29 by adding Art. 11a in the wording proposed under the New Deal for Consumers[887] initiative may speak for the need to modify the understanding of the concept of damage under the provisions implementing the directive by accepting that it covers both material and immaterial damage.

Another issue is whether the very conclusion of the contract can be considered a damage. This could be the case if the contract was economically disadvantageous for the consumer.[888] A different approach, according to the legal scholarship, is incompatible with the concept of damage. If the contract is economically beneficial for the consumer (e. g., the value of the sold item is higher than the price paid), then compensation for the damage in nature would improve the economic situation of the entrepreneur (the perpetrator of the damage) at the

884 G. Bieniek, in: *Komentarz do Kodeksu Cywilnego. Księga Trzecia. Zobowiązania. Tom 1*, Warszawa 2009, p. 597.

885 The concept of damage also includes non-pecuniary damage: J. Panowicz-Lipska, *Majątkowa…*, p. 35; M. Kaliński, in: *System prawa prywatnego*, Vol. 6, *Prawo zobowiązań – część ogólna*, ed. A. Olejniczak, Warszawa 2018, p. 95.

886 The concept of harm covers various types of emotional damage, damage to the image and reputation, as well as losses resulting from personal injury. Judgment of CJEU of 14. 06. 1979, C-18/78, Mrs V. v. Commission of the European Communities, EU:C:1979:154; judgment of CJEU of 8. 10. 1986, 169/83 and 136/84, Gerhardus Leussink and others v. Commission of the European Communities, ECR 1986, p. 801; judgment of CJEU of 12. 03. 2002, C-168/00, Simone Leitner v. TUI Deutschland, EU:C:2002:163.

887 Art. 3 point 5 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, p. 7–28).

888 T. Targosz, *Wpływ…*, p. 166–167.

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expense of the consumer, who would be impoverished as a result of satisfying his claim for damages.

This leads to the paradox which can be easily illustrated with a powerful example. The entrepreneur who wants to sell the entire stock of the product forces the consumer to conclude an objectively very advantageous contract by using aggressive market practice. The product is sold at a price significantly lower than its market value. If we assume that it is necessary for effects of the unfair market practice to be objectively recognizable as negative for the weaker party, in this scenario the consumer could not demand termination of the contract because he objectively benefited from it.

Such an interpretation would not allow for counteracting unfair market behavior but only allow consumers to avoid damage caused by these – which is incompatible with the preventive function of regulation. The consumer's subjective belief that a given contract constitutes damage (regardless of its objective impact on his economic situation) could be considered sufficient due to the sanctioning nature of the claim for cancellation of the contract. Once such a broad concept of damage is adopted, actual or potential limitation of the consumer's decision-making autonomy by unfair market practice could be considered a damage. This issue has already been discussed under German law.[889] It was underlined that taking a subjective understanding of the concept of damage actually leads to a situation in which it is "created" by the interpretation of declarations of will, in isolation from the facts of the case. This can bring about arbitrariness in the adjudication of damage.

Thus, it should be considered that if the consumer's performance is worth more than the trader's one or the obligations of the parties entail the same or comparable value, or the consumer's performance is worth less than the trader's performance, the conclusion of the contract may constitute damage only if it is objectively unfavorable to the consumer because of his individual situation. When deciding whether the conclusion of the contract constitutes a damage, it is therefore necessary to apply an objective measure at all times, but to extend the scope of the circumstances taken into account during this assessment to include elements unrelated to the content of the contract but concerning individual situation of the consumer.

At the same time, however, the provision includes a reference to the general principles of restitution. This indicates that the intention of the Polish legislature was to guarantee that the premises for compensation claims under Art. 12.1 point 4 ACUCP are understood in a traditional manner. Thus, in the light of the current wording of the norm, both broadening the concept of damage and adopting its subjective understanding seem unjustified.

889 Judgment of BGH of 26.09.1997, V ZR 29/96, p. 302.

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In addition, one of the premises of the claim is the damage. As a result, this is the only claim under Art. 12.1 ACUCP which appears once a specific good is infringed not endangered.[890]

Another premise for a claim to arise under Art. 12.1 point 4 ACUCP is that the entrepreneur uses an unfair market practice. It is disputable whether a single application of such a practice is sufficient to establish the fulfillment of this condition. The consumer should not have to prove that the trader applies a given practice in general, it is sufficient if he demonstrates that it was applied in his case.[891] The adoption of such an interpretation is supported by both the literal wording of the provision (in the event of an unfair market practice) and the need to avoid causing excessive evidential difficulties on the part of the consumer.[892]

It is also necessary to examine whether there is a causal link between the event giving rise to the damage and the damage that occurred. As in the case of the request of removal of the effects of an unfair practice, it seems justified to adopt a specific understanding of the causal link under the ACUCP. According to the general rule of Art. 361 CC, when examining whether there is a causal link between the event and the damage, the first thing to do is to determine whether there are any objective connections between them. The verification of the existence of a causal link is twofold: the first step is the *conditio sine qua non* test, and the second – verification if the effect in question is a "normal" (usual) consequence of the event in question. In the context of the ACUCP doubts arise when determining whether the first fact or event (the cause) was a necessary condition for the second event (the effect) to occur. If the above test is applied without any modifications, then the claim will not arise if the consumer did not make a decision under the influence of an unlawful market practice but in an undisturbed decision-making process. In this scenario, even if the application of this practice may distort the market behavior of the average consumer, the consumer would be deprived of the possibility to demand the restoration of the previous state, as in his case the application of the unfair market practice did not have the effect intended by the trader.

Such an interpretation does not allow for achieving the preventive aim of the regulation – namely, counteracting unfair market practices. Once the unfair market practice is applied, the consumer, whose interests are at risk, should be able to take actions to oblige the entrepreneur to stop the practice or to remove its effects. The preventive nature of the act depends on whether the market par-

890 Similarly: M. Sieradzka, *Ustawa*…, Art. 12, point 10.

891 M. Grochowski, *Wadliwość*…, p. 64; differently: A. Michalak, *Przeciwdziałanie*…, p. 59.

892 See Art. 13 ACUCP, in which the legislature decides to shift the burden of proof as to the nature of a market practice that may be misleading. In the draft act on counteracting unfair market practices, this rule also included aggressive practices. R. Stefanicki, *Ustawa*…, Art. 12, point 2.

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ticipants are entitled to combat unfair market practices at the moment when their negative impact becomes possible. In order for this goal to be achieved, it should be assumed that to create rights on the part of the consumer it is sufficient that, objectively assessing the matter, a given practice could have a specific effect.

Investigating whether, in a specific case, the consumer's actions resulted from the unfair market practice applied to him will be contrary to the essence of this protection mechanism. Its special nature lies in the standardization of protection: making it conditional on the fulfillment of purely objective conditions (practice may distort the market behavior of an average consumer). The legislature's striving to standardize protection is manifested both by the use of the word "may" (bringing about separation from the *sine qua non* condition) and the indication that the reference point is the model of an average consumer, and not a specific person.

Therefore, it should be assumed that when determining the effects of an unfair market practice on a consumer, only the normal range of effects of its application should be taken into account, without verifying whether, in a given scenario, that "effect" actually occurred because the unfair market practice was applied. It should be enough to demonstrate that this damage is a normal consequence of the application of a particular unfair market practice (omission of the *sine qua non* test). Therefore, if the normal consequence of applying an aggressive market practice to an elderly, sick person (the entrepreneur's activity is aimed at this group of consumers), consisting in causing a state of very strong agitation is a sudden deterioration of the health of this person, the consumer's claim for damages pursuant to Art. 12.1 point 4 ACUCP will arise even if the direct cause of the deterioration was another event that happened at the same time.[893] A person whose behavior is contrary to the law, in particular it infringes or may infringe upon the interest of another person, should take into account the consequences of causing damage.

In the light of the current wording of the provision, which refers to the general principles of restitution, this modification of the understanding of the causal link, although consistent with the sense of rightness and allowing for a more effective implementation of the preventive function of the act, is unacceptable. In practice, demonstrating what was the reason for making a specific contractual decision by a consumer against whom the trader applied an unfair market practice may consist in making an appropriate declaration by that consumer. Then it will be in the interest of the entrepreneur to prove that the unfair market practice did not (could not have) affect the behavior of the consumer and did not cause the damage suffered by the latter.

893 It does not mean that the consumer will be able to obtain redress for the same damage twice.

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It is also worthwhile to address the specific form of a claim for damages explicitly mentioned in the provision, consisting in a request to cancel the contract. Legal authors do not agree on the legal nature of this claim. According to Michalak,[894] Art. 12.1 point 4 ACUCP does not constitute an independent substantive basis for the declaration of invalidity, as it is only a procedural provision.[895] Declaring that a contract concluded under the influence of unfair market practice is null and void is allowed only if the conditions for nullity are met on based on the general provisions (Michalak only indicates the legal bases which provide for absolute nullity of a juridical act – Art. 58 or Art. 82 CC). This leads to the conclusion that, in order for the consumer to be able to claim the invalidity of the contract in the context of claims for damages, it must result from another legal provision.[896] Such reasoning could be considered admissible only if the claim for cancellation of the contract referred to in Art. 12.1 point 4 ACUCP was a separate type of claim, not a form of claim for damages. However, even then, it is incorrect to say that the claim for annulment of the contract arises only if that contract is null and void *ex lege*.[897] Such an approach is incorrect – the claim for cancellation of the contract is in this case an element of the compensation claim in the form of *restitutio naturalis* and it is based on Art. 363 § 1 CC.[898]

Since the legislature allows to demand cancelling the contract, the question is whether it is also possible to demand modification of the content of the contractual relationship pursuant to Art. 12.1 point 4 ACUCP. The main argument for this approach is that if the trader had not used the unfair market practice, the contract would have been more advantageous for the consumer. Therefore, the contract should be modified to correspond with the content of the contract that could have been concluded if the unfair market practice had not been applied. This solution would be the most beneficial for the consumer, because avoiding the legal effects of the declaration of will, termination of the contract or decla-

894 A. Michalak, *Przeciwdziałanie…*, p. 123–124.

895 Differently R. Stefanicki, who claims that this provision constitutes an independent normative basis for the annulment of the contract. He does not, however, justify taken position, indicating only that it has the same consequences such as withdrawal from the contract. R. Stefanicki, *Ustawa…*, Art. 12, point 5.

896 Introducing such a norm would contradict the principle of rationality of the legislator (under Art. 58, 82, 83 CC such actions are null and void *ex lege*). Granting a claim for annulment pursuant to Art. 12.1 point 4 is pointless – the declaration of invalidity would be purely declaratory. Even then, however, such an additional provision would not be necessary, since according Art. 189 of the Code of Civil Procedure a person may request the court to establish the existence or non-existence of a legal relationship or a right if he or she has a legal interest in doing so.

897 K. Włodarska-Dziurzyńska, *Sankcje…*, p. 101.

898 K. Włodarska-Dziurzyńska, *Sankcje…*, p. 103.

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ration of its invalidity does not allow one to achieve the purpose because of which the contract was concluded.[899]

It is indicated that a specific legal basis would be necessary to modify the content of the contract (e.g., Art. 357^1, 385^1 and 385^3, 388 CC). This procedure could be applied in the case of abusive clauses (Art. 385^1 and 385^3 CC), especially if it is assumed that unfair market practices are applied, then the parties do not agree on the individual clauses because the consumer acts under the state of a significantly limited decision-making autonomy. It might be permissible to replace an abusive clause with a standard norm, resulting from dispositive provisions. Moreover, in consumer law there is already an instrument that allows to achieve an analogous effect if the applied market practice is or may be misleading, namely the theory of legitimate expectations. It would be advisable to guarantee a mechanism which application would lead to a similar result in case of an aggressive market practice. Otherwise, depending on the form of unfair practice, protective mechanisms are different – causing an undesirable differentiation of normative solutions.

Since both the Polish and European legislatures strive to standardize individual consumer protection, the question is whether the standardization of sanctions (not only the premises) should be implemented. When formulating *de lege ferenda* postulates, it is worth referring to the proposal of Grochowski, who, although incorrectly assumes that the claim to cancel the contract the contract does not constitute a claim for damages, proposes an interesting concept as to the premises for that claim.[900] The premise for cancelling the contract would be that the entrepreneurs' act indeed constitutes an unfair market practice. If the trader's behavior is considered an unfair market practice, which has infringed the interests of the consumer, the consumer should always be entitled to have the contract voided.[901]

Such a standardization of "the minimum" claim for damages, allowing to evade examining the amount or even the occurrence of damage when a specific infringement has been committed, is not a mechanism unknown to the private law. A similar instrument is provided by copyright law in Art. 79.1 point 3 letter b:[902] the rightholder whose copyrights have been infringed may demand that the

899 E. Łętowska, *Europejskie…*, p. 162.

900 M. Grochowski, *Wadliwość…*, p. 64.

901 In favor of this approach: K. Włodarska-Dziurzyńska, *Sankcje…*, p. 105.

902 However, there was some doubt as to whether it was a compensation or a criminal instrument, which would be unacceptable under Art. 13 and Rec. 26 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, p. 45–86), according to which the directive is not intended to introduce punitive damages. In the judgment the Court of Justice accepted that although the compensation calculated on the basis of twice the hypothetical license fee is not exactly proportional to the damage actually suffered by the injured party, this feature is an inherent

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person who infringed these rights redress the damage caused by payment of a sum of money in the amount corresponding to two, and if the infringement was caused because of the infringer's fault, three times the normal remuneration for use of the work in question.[903]

Abstaining from the analysis of individual elements of the case would be justified in the context of mass relations. The question remains whether such an extension of liability is not too burdensome for the entrepreneur. It seems that if someone violates the general rules in order to force the other party to enter into a contract, giving that other party the right to demand contract termination will always be proportionate.

None of the claims within the mechanism of individual consumer protection against unfair market practices should depend on whether the aggressive market practice actually influenced the behavior of an individual consumer. The fact that objectively the practice could deform consumer behavior should be sufficient. Therefore, the protection should also cover those persons whose autonomy of will was not infringed. Due to the negatively assessed behavior of the other party, they should be granted analogous rights, as if the infringement had occurred.

The simplest and, in fact, the most beneficial solution would be to grant the consumer the right to withdraw from the contract concluded with an entrepreneur who applied an unfair market practice against him. Granting of this type of right should not depend on actual damage at the side of consumer, and it should be sufficient to demonstrate that the conclusion of the contract is objectively unfavorable to the consumer due to his situation or, possibly, even the subjective belief of that consumer in this regard.

Alternatively, the consumer could be entitled to request the content of the contract relationship to be modified so that it corresponds to the relationship which could have emerged if the unfair commercial practice had not been applied. It is worth noting that such a right would have an analogous effect as the

aspect of any lump-sum compensation permitted under the provisions of the directive. The lump sum marked in this way does not exceed the compensation that a person could claim on general terms, including: payment of a hypothetical license fee, reimbursement of any expenses related to the investigation and identification of possible infringement acts, compensation for possible harm and interest for the amounts due. If in a specific scenario a lump-sum compensation exceeded the amount of compensation due in the light of general terms, then the claim of lump-sum compensation could be considered an abuse of law. Judgment of CJEU of 25.01.2017, C-367/15, Stowarzyszenie "Oławska Telewizja Kablowa" v. Stowarzyszenie Filmowców Polskich, ECLI:EU:C:2017:36, point 26, 30, 31; compare judgment of the Supreme Court of 7.12.2017, V CSK 145/17, Legalis; judgment of the Appeal Court in Warszawa of 2.08.2018, V ACa 631/17, Legalis.

903 This provision partly lost its binding force on July 1, 2015, based on the judgment of the Constitutional Tribunal of 23.06.2015, SK 32/14 (Journal of Laws, item 932) it is no longer allowed to demand the sum three times the relevant remuneration if the infringement was caused by fault.

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currently functioning interpretation in accordance with the justified expectations of the consumer which should be applied in the case of misleading market practices.

The above solution seems to be particularly justified in the context of the entrepreneur conducting his activity based primarily on the use of unfair market practices.[904] In this case, the individualized protection system turns out to be inadequate. First of all, the possibility of avoiding legal effects of a statement made under the influence of such a practice depends on individual, subjective elements – related to the person to whom a given practice is applied (a person must be mistaken or afraid). Meanwhile, the factor which speaks in favor of the right to void the contract by a person against whom the entrepreneur has committed an unfair market practice is primarily the fact that the legislature negatively assesses the way in which that professional entity operates in general – not that a singular act of that entity was e. g. disloyal.

In practice, the choice of the form of the protection mechanism may also be of great importance in the context of its effectiveness: the consumer can be entitled to change the legal situation of the parties individually or to lodge a claim for cancellation of the contract. The necessity to bring an action, even if consumers would have an advantageous procedural position because of established presumptions and shift of the burden of proof in regards to the unfair character of the market practice on the trader, may discourage consumers from exercising the right in question, especially since their material damage will often be marginal. It is claimed[905] that this drawback is compensated by the fact that issuing a judgment definitively puts an end to the case (the effectiveness of unilateral modification of the contractual bond may be questioned in the future by the entrepreneur). However, this argument is not convincing in the context of the significant imbalance between the expenditures necessary to exercise the right and the potential value of the dispute at hand.

5.1.3. Amendments to Directive 2005/29: Implementation of individual protection instruments

In 2007 the Polish legislature, deciding to introduce a protective mechanism allowing an individual consumer to pursue civil law claims due to the use of unfair market practice against him, already anticipated the actions of the EU law maker. The implementation of similar protection mechanisms was considered

904 For example, Cocomo clubs in Kraków or "free" streaming platforms, where only the "trial" period is free, and after its expiry the contract is automatically extended and fees – charged.
905 K. Włodarska-Dziurzyńska, *Sankcje…*, p. 107.

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within EU – under the New Deal which aims to amend four EU directives protecting the economic interests of consumers,[906] *inter alias* Directive 2005/29. The new model is, in principle, two-fold – it covers protection by representative and by individual actions.

The introduction of a representative action is intended to secure and enforce the interests of consumers, primarily by reducing the number of situations in which individual consumers refrain from seeking compensation before courts due to high costs of proceedings, especially in the case of low-value claims.[907] It does not hinder individual consumers' access to justice, but is rather intended to facilitate the pursuit of claims arising from unfair market practice against the trader.

The provisions of the draft of the directive on representative actions are intended to supplement the procedural framework in the event of specific claims being made by individual consumers,[908] and not constitute their legal basis. Actions for compensation may be brought by individual consumers as part of a representative action under this directive or under other collective redress mechanisms under national law. The substantive basis for claims pursued by consumers individually is to be guaranteed by the implementation of the amendment to Directive 2005/29, also proposed under the New Deal.[909]

The proposal of 1 April 2018[910] called for the introduction of Art. 11a is worded as follows:

906 Directive 93/13; Directive 98/6/EC of the European Parliament and of the Council of February 16, 1998 on consumer protection by indicating the prices of products offered to consumers (OJ L 80, p. 27–31 as amended); Directive 2005/29/EC; Directive 2011/83. Most of the changes concern Directives 2005/29/EC (individual consumer protection measures in case of unfair market practices) and 2011/83 (consumer right to withdraw from the contract).

907 Individual proceedings are rare. M. Strzelecki, *Nieuczciwe praktyki handlowe a ustawa o zwalczaniu nieuczciwej konkurencji*, iKAR 2016/3(5), p. 64. One of the reasons behind it is the financial risk: the costs of the proceedings (including the costs of legal representation of the other party) are borne by the losing party. R. Stefanicki, *Ustawa…*, Art. 12, point 2.

908 Rec. 64, 65, Art. 15, 16 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409, p. 1–27).

909 Dir. 2019/2161.

910 Proposal for a directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules COM/2018/0185 final – 2018/090 (COD) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185 (accessed: 31.5.2021).

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"Article 11a
Redress

1. In addition to the requirement to ensure adequate and effective means to enforce compliance in Article 11, Member States shall ensure that contractual and non-contractual remedies are also available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair commercial practices in accordance with their national law.
2. Contractual remedies shall include, as a minimum, the possibility for the consumer to unilaterally terminate the contract.
3. Non-contractual remedies shall include, as a minimum, the possibility of compensation for damages suffered by the consumer."

Finally, a different version of this provision was adopted, namely:

"Article 11a
Redress

1. Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.
2. Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law."

Both solutions leave the Member States a wide scope of freedom during the implementation process.[911] At the same time, they are similar to the mechanism introduced into the Polish law during the implementation of Directive 2005/29 in Art. 12.1 ACUCP. In Art. 12.1 point 4 ACUCP the Polish legislature included a basis for claiming damages – among various forms of a claim for damages explicitly mentioning the claim for restoration to the previous state by canceling the contract. In the draft, the EU legislature distinguished between contractual remedies (Spanish: *medidas correctoras contractuales*, German: *Vertragliche Rechtsbehelfe*), among which it mentioned the right to unilaterally terminate the contract and non-contractual measures (Spanish: *medidas correctoras no contractuales*, German: *Außervertragliche Rechtsbehelfe*) that were supposed to cover at least the right to compensation. It seems that contractual measures were supposed to be understood broadly in this context, as legal measures related to

911 Member States are obliged to adopt the provisions implementing the directive by November 28, 2021 (these provisions will apply from May 28, 2022).

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the legal existence of the contract and not only as those guaranteed in the contract, while non contractual measures could have been understood as claims not directly related to the duration of the contract but e. g. to the resulting damage. Thus, there would be no obstacle for a claim for damages to arise when the contract is concluded but the consumer suffers from an unfair market practice, e. g. in order to conclude the contract, the consumer bears travel costs to a specific place where he finds out that he was misled so he resigned from concluding the contract, or the contract is concluded but it turns out to be economically unfavorable for the consumer.[912]

Although the wording of the draft and the content of the amended provision differ (e. g., in the adopted Article 11a there is no distinction between contractual and non-contractual measures), the EU legislature's intention has not changed. The norm requires that proportionate and effective remedies are introduced by the Member States, including compensation for damage suffered by the consumer (irrespective of the conclusion of the contract) and, where appropriate, termination of the contract. In addition, the catalog of protective measures has been extended to include the right to price reduction. There is some doubt as to whether the possibility of terminating a contract or reducing the price is to be foreseen "where appropriate" means that national legislators are free to determine the scope of situations where the consumer should be entitled to terminate the contract or reduce the price. It seems more appropriate to assume that the EU legislature obliges the Member States to introduce mechanisms granting these rights to the consumer in all the scenarios where it is possible to exercise them. As a result, when the contract has been concluded, the consumer should be entitled to terminate it and, if the contract entails an obligation to pay, the consumer should be entitled to lower the price.

Obliging the Member States to implement contractual and non-contractual protection measures will enable the consumers towards whom unfair market practices were applied to seek redress not only from the party to the contract, but also from other persons responsible for the practice.[913]

The main discrepancy between the solution currently in force in Poland and the EU draft concerns the qualification of an activity that allows the consumer to abolish the legal existence of the contract. By differentiating contractual and non-contractual protection measures, the EU legislature stated that the right to abolish the legal existence of a contract should not be understood as an instrument of protection of a compensatory nature. In the amendment, however, this division does not appear.

912 C. Twigg-Flesner, *Bad Hand? The 'New Deal' for EU Consumers*, ERPL 2018/15, p. 5, 6 https://ssrn.com/abstract=3178952 (accessed: 31. 5. 2021).

913 C. Twigg-Flesner, *Bad…*, p. 5.

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Article 11a states that the consumer should have the right to terminate the contract.[914] A comparison of the different language versions of the directive (Spanish: *la resolución delcontrato*, German: *Beendigung des Vertrags*) leads to the conclusion that the legislature's aim was to allow the consumer to abolish the legal existence of a legal relationship by granting him an appropriate right, admissible in within the national law system. Within the Polish law, the consumer could be granted a statutory right to withdraw from the contract (effect *ex tunc*)[915] or to terminate it *ex nunc*. The question arises whether the effect of exercising this right should be the termination of the obligation relationship (causing an effect for the future) or leading to a situation as if the contract had not been concluded at all.[916]

It seems that granting the right to terminate the contract *ex nunc* would be an effective protection measure only in the case of continuous obligations. The consumer could terminate the contractual relationship established as a result of applying unfair market practice, keeping what he has already received from the other party, without the need for additional settlements. In contrast, once the right to withdraw from the contract is exercised, the parties to the contract are obliged to return the benefits, which may not be optimal from the consumer's perspective.

However, the right to terminate the contract with an *ex nunc* effect does not actually give the consumer any protection in the case of contracts that consist of a singular performance if that has already taken place.[917] In such a situation, the right to withdraw from the contract could be an appropriate protection mechanism.[918] The most advantageous solution from the perspective of the protected entity would be to have both the right to withdraw from the contract as well as the right to terminate it.

It should be noted that in the context of the Polish act, as well as the EU amendment, the same questions arise. Firstly, it should be assessed whether the possibility of benefitting from the protection mechanism should appear regardless of whether the entrepreneur's use of a practice constituting an unfair market practice was intentional.[919] General striving to objectify protection speaks for making individual protection instruments independent from the occurrence

914 In the draft it was specified that the consumer can terminate the contract unilaterally.
915 P. Machnikowski, in: *System Prawa Prywatnego*, Vol. 5, *Prawo zobowiązań – część ogólna*, ed. K. Osajda, Warszawa 2020, p. 171–174.
916 W. Kocot, J. Kondek, *Nowe…*, p. 4; A. Olejniczak, in: *Kodeks…*, Art. 365[1], point 8.
917 Compare: considerations regarding the admissibility of termination of the executed real estate sale agreement: judgment of the Supreme Court (7 judges) of 30.11.1994, III CZP 130/94; E. Drozd, *Glosa…*, p. 109.
918 On the possible implications of exercising the right of withdrawal: W. Kocot, J. Kondek, *Nowe…*, p. 7–8.
919 C. Twigg-Flesner, *Bad…*, p. 6.

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of subjective premises, e.g. the intention of the entity using unfair market practice. In addition, it is unclear whether the potential impact on the decision-making process of the average consumer is sufficient, or whether it is necessary to demonstrate that in a specific situation, the unfair market practice had a significant impact on the decision made by a given person. Assuming that this instrument is to have a preventive function and provide for a general protection mechanism, it would be advisable to refrain from examining the actual impact of a practice in a specific case. Another question is whether the right to terminate the contract or to withdraw from it should be limited in time. If we assume that time limitations should be introduced, then allowing individual states to establish a time limit for the exercise of this right on their own will result in discrepancies between the legal situation of the consumers acting under different legal systems of the Member States. Finally, there is also the problem of determining the scope of claims for damages, in particular with regard to the causal link and the nature of the damage that can be compensated (material, non-material damage).

5.2. Threats coming from a third party

Pursuant to Art. 87 CC a legally relevant threat may come from the addressee of the declaration, a third party or from an unidentified group of people.[920] This means that, theoretically, it should be possible to evade legal consequences of a declaration of intent submitted under the influence of a threat coming from an unidentified group of network users, if it aims to force a specific person or group of people to behave in a particular way.

Due to the characteristics of the online environment,[921] content generated by individual Internet users is starting to play a significant role in shaping the market.[922] Individuals become capable of shaping public opinion and influencing the reputation of entities with a stronger market position. Persons who until now have been unable to persuade entrepreneurs to undertake individual negotia-

920 Judgment of the Appeal Court in Łódź of 3.12.1992, I ACr 428/92, OSA 1993/7, item 49.

921 Anonymity, disappearing geographic and time barriers, interactivity, ease of creating, duplicating and publishing content. I. Schulze Horn, T. Taros, S. Dirkes, L. Huer, M. Rose, R. Tietmeyer, E. Constantinides, *Business Reputation and Social Media: A Primer on Threats and Responses*, J. DDD 2015/16(3), p. 193–197.

922 On the Internet, the consumer's position is strengthened from the technological (access to various markets, the ability to participate in, track and control transactions), economic (ability to create C2C value), social (access to many diverse communities) and legal perspective (special regulation, access to diverse entities offering support to consumers. S. Umit Kucuk, S. Krishnamurthy, *An analysis of consumer power on the Internet*, Technovation 2007/27(1–2), p. 48.

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tions while entering into a contract may influence not only single decisions but also the policies of professional entities. An example in this regard might be a story of a short recording, during which a cyclist uses a pen to open the Kryptonite Evolution 2000 bicycle lock – the video was viewed over 2 million times during the first week, or the hashtag #McDStories, which, contrary to the initial assumption of the entrepreneur, was used primarily to tag critical comments.[923]

Typical phenomena in online consumer trade are: anti-marketing websites,[924] online firestorms[925] and consumer boycotts.[926]

Anti-marketing websites are websites that connect people who are reluctant to a given company,[927] often creating integrated communities,[928] which, for example, help to undertake a collective action against a particular entrepreneur.[929] Contrary to websites containing traditional reputation mechanisms, where consumers share their opinions about products or performance of trader's obligation, here the goal of the portal's activity is to create a negative image of the entrepreneur.[930] Therefore, the criticism focuses not only on entrepreneur's contractual behavior but may also be related to other aspects of his activity – ethics, attitude to employees, environmental impact, etc. The threat to the reputation should incite the entity to adjust the applied standards to the expectations of a given community.

Online firestorms are a wave of negative criticism directed against a person, entrepreneur or institution on social media.[931] It is characteristic that although at the initial stage the criticism centers on a specific feature or behavior of the subject against whom it is directed, it quickly loses its connection with real events, turning into a flood of aggressive comments, offensive and virtually devoid of content.[932] In principle, this activity is not aimed at achieving any specific purpose.

923 J. Pfeffer, T. Zorbach, K. M. Carley, *Understanding online firestorms: Negative word-of-mouth dynamics in social media networks*, JMC 2014/20(1–2), p. 117.
924 S. Krishnamurthy, S. Umit Kucuk, *Anti-branding on the internet*, JBR 2009/62(2), p. 1119–1122.
925 J. Pfeffer, T. Zorbach, K. M. Carley, *Understanding…*, p. 117–128.
926 Although consumer boycotts do not take place exclusively online, their popularization is related to the expansion of the Internet sphere. K. Braunsberger, B. Buckler, *What motivates consumers to participate in boycotts: Lessons from the ongoing Canadian seafood boycott*, JBR 2011/64, p. 97.
927 A. Bailey Ainsworth, *Thiscompanysucks.com: the use of the internet in negative consumer-to-consumer articulations*, JMC 2004/10(3), p. 169–182.
928 J. Hagel, *Net gain: expanding markets through virtual communities*, JIM 1999/13(1), p. 55–65.
929 S. Krishnamurthy, S. Umit Kucuk, *Anti-branding…*, p. 1119.
930 S. Krishnamurthy, S. Umit Kucuk, *Anti-branding…*, p. 1120.
931 J. Pfeffer, T. Zorbach, K. M. Carley, *Understanding…*, p. 118.
932 J. Pfeffer, T. Zorbach, K. M. Carley, *Understanding…*, p. 118.

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A consumer boycott, in turn, means that a group of consumers refrains from concluding specific contracts with a designated entity in order to achieve a common goal – usually to influence the behavior of that entrepreneur.[933]

Each of the above phenomena forces the entrepreneur against whom the criticism is directed to take specific actions – a significant part of these are related to adapting an appropriate marketing technique to minimize the damage.[934] Some, however, may constitute in submitting a declaration of will, the content of which will be imposed by people participating in the boycott, active on the anti-brand website, or a message that initiated a firestorm (e. g., termination of a contract with a producer who does not comply with socially desirable standards). The question is whether it would be permissible to evade the legal consequences of the declaration of intent made by the entrepreneur under the pressure exerted by the above mechanisms pursuant to Art. 87 CC.

In the Polish Civil Code a threat is understood as announcing a future evil, which may be brought upon a person by an entity who poses that threat. It is unawful and serious, and raises concerns for property or personal safety in the person to whom it is addressed.

In the context of consumer boycotts, it is clear what the future evil would be – consumers would refrain from concluding contracts with a given entity until their demand is fulfilled, which is assumed to worsen the economic situation of the entrepreneur. If, to satisfy this demand, it is necessary to submit a declaration of will, it can be argued that although the threatening party did not explicitly request this declaration, the statement was made under the influence of a threat.[935] However, there are doubts as to whether failure to act in the absence of a legal obligation to do so[936] (i. e. not buying goods from an entrepreneur X) may be seen as a threat. Legal commentators exceptionally allow to recognize as a threat a conditioned refusal to provide help, when, in the light of the principles of social coexistence, the person who is threatening should help the one in need (e. g., a captain of a ship refuses to rescue a person who is drowning unless he is paid for it).[937] Yet, it refrains from extending the concept of a threat onto situations in which a person proposes saving someone else's property only if the owner makes

933 A. John, J.G. Klein, *The boycott puzzle: consumer motivations for purchase sacrifice*, MS 2003/49(9), p. 1198; K. Braunsberger, B. Buckler, *What…*, p. 96–97.

934 J. Pfeffer, T. Zorbach, K. M. Carley, *Understanding…*, p. 123–125; I. Schulze Horn, T. Taros, S. Dirkes, L. Huer, M. Rose, R. Tietmeyer, E. Constantinides, *Business…*, p. 204–208.

935 Judgment of the Supreme Court of 15.10.1946, III C 597/46, OSN(C) 1947/2, item 48, sentence 1.

936 If a person is under an obligation to act, omission fulfills the premises of a threat. B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 157–159; S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 87, point 1.

937 S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 87, point 1; Z. Radwański, in: *System…*, p. 532.

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a declaration of will of a specific content, even if he is obliged to do so.[938] All the more, announcing that one will refrain from performing a particular act to which he is not obliged and which does not constitute the help necessary to save other's life or health should not be considered a threat. To sum up, in the context of a consumer boycott, the fact that a person says that he will refrain from concluding certain contract cannot be treated as a legally relevant threat. Yet, if he announces that he will persuade others to refrain from concluding these contracts, such behavior may be seen as threat under Art. 87 CC.

In the case of anti-marketing websites or online firestorms, no threat of future evil is explicitly formulated. These websites are intended to create a negative image of the entrepreneur, which should, in principle, affect his position on the market. They may be a place for consumers to express their disappointment after a particular transaction, regarding business practices of that entrepreneur, or may just be a forum for expression of beliefs of a given group of people.[939] Therefore, it is not justified to assume *a priori* that users active on such a portal, even indirectly, announce to bring a future evil on the entrepreneur unless he submits a declaration of will of a specific content – they will often aim at influencing the entrepreneur's policy in a given scope rather than at forcing a specific behavior.

Online firestorms, on the other hand, can be triggered by certain behavior of the entrepreneur[940] but do not focus on one issue. As a rule, they are an expression of users' dissatisfaction. Although both of these phenomena pose a threat to the reputation of the professional and, in consequence, may bring about some property risk. This (being negative from entrepreneur's perspective) is not anyhow dependent from his failure to submit a specific declaration of intent, which prevents him from being protected within the meaning of Art. 87 CC. Only under two types of circumstances the content published on anti-marketing websites or during online firestorms could be seen as a threat under Art. 87 CC. First, the user on that anti-marketing website or in the comments that make up the online firestorms can announce that the trader will face a particular misfortune unless he performs a specific action Second, the criticism may relate to a specific aspect of the entrepreneur's activity and it can be responded only by submitting a specific declaration of will.

However, even if such announcement or criticism takes place, the question is whether the threat of attacking entrepreneur's reputation or refraining from concluding contracts with him can be considered a serious threat. A given action

938 S. Rudnicki, R. Trzaskowski, in: *Kodeks…*, Art. 87, point 1.
939 S. Krishnamurthy, S. Umit Kucuk, *Anti-branding…*, p. 1121–1122.
940 A firestorm can be initiated by a rumor or by an actual event. J. Pfeffer, T. Zorbach, K. M. Carley, *Understanding…*, p. 118.

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may be counterproductive (e. g., a boycott may lead to brand promotion). In addition, the negative effects of an action (serious property or personal threat) are related not to individual actions of individual persons (a specific comment or failure to conclude a contract) but caused by their mass scale – therefore only a comprehensive assessment of the circumstances makes it possible to determine whether a particular threat should be considered serious. It is not possible to formulate a closed catalog of criteria that should be taken into account when assessing the seriousness of a threat. Elements that definitely should be considered include: the popularity of the entity formulating the threat (e. g., the number of subscribers in the case of a YouTuber), whether the entity has already threatened to take such actions and what their effect was, and the current social interest in the topic at hand.

Another issue is whether the activities undertaken as part of anti-marketing websites, e. g. a threat of consumer boycott or disclosure of information that may negatively affect entrepreneur's reputation can be considered unlawful. Unlawfulness in the context of Art. 87 CC means not only that the action at hand contradicts the law (understood as statutory law and the principles of social coexistence) but also that making such use of the mechanism in question contradicts its purpose. When a person announces that he will exercise his right not to obtain the effect which was foreseen by the legislature at the time of granting him that right but to force another entity to do something, his action will be seen as unlawful.[941] As a result, also a seemingly legal behavior aimed at forcing someone to submit a declaration of will should be considered unlawful.[942]

However, the premise of unlawfulness should not be interpreted so broadly to lead to an unjustified restriction of contractual freedom – for example, denying market participants the opportunity to refrain from entering into contractual relations with other entities (case of boycotting LPP SA brands after the collapse of a Bangladesh factory).[943] In addition, fulfilling the threat may just mean that an instrument intended for a specific purpose was applied to achieve it, e. g. to combat specific behaviors of the entrepreneur (e. g., anti-marketing website

941 For example: a consumer has ordered a large number of headphones with a jack plug. Then mini jack plugs started to be installed in the phones for which this model of headphones was usually purchased. The buyer of the headphones asks the seller to give him a set of headphones with a mini jack plug, threatening to withdraw from the sales contract (he has not been informed about the consumer right to withdraw, therefore the withdrawal period has not yet expired). The consumer knows that the trader will most likely not be able to re-sell the headphones.

942 Judgment of the Supreme Court of 19. 03. 2002, I CKN 1134/99.

943 M. Rabaj, *LPP potwierdza: Produkowaliśmy odzież Cropp w Rana Plaza*, www.newsweek.pl/swiat/cropp-w-bangladeszu-zawalona-fabryka-z-polskimi-ubraniami-lpp/q1lyt37 (accessed: 31. 5. 2021); M. Krukowska, *Syndrom LPP, czyli echo z Bangladeszu*, www.forbes.pl/csr/syndrom-lpp-czyli-echo-z-bangladeszu/4dw1lr4 (accessed: 31. 5. 2021).

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users may encourage consumers against whom abusive clauses or unfair market practices have been applied on to take legal action). Situations where the users threat of disclosing information on the entrepreneur's behavior if the latter continues the practice should be also considered lawful (protection by information under the name and shame model).[944]

Therefore, although there are phenomena in the e-commerce that seem functionally similar to a threat coming from a third party within the meaning of Art. 87 CC, as a rule, it will not be possible for an entrepreneur to evade legal consequences of a declaration of will made under their influence. Anti-marketing websites and consumer boycotts are mechanisms designed to influence the entrepreneur's business patterns, not an instrument of individual extortions. Actions taken by users are not, in principle, unlawful. On the other hand, online firestorms do not contain any element that could make them a threat within the meaning of CC. In their case, the occurrence of negative effects does not depend on undertaking of any specific behavior by the entrepreneur. Additionally, it is not possible to make an *a priori* assessment as to whether given activities actually pose a serious property risk to the entrepreneur against whom they are directed.

5.3. Threats coming from the person traditionally considered as a weaker party

In consumer law it is the consumer who tends to be perceived as the weaker party, requiring protection against abuse – both standardized and general (regulation of aggressive market practices) as well as individualized (provisions on threat). The entrepreneur is seen as the stronger one, limiting consumer's ability to actually make decisions autonomously. Hence, traditionally, the consumer is identified as an entity exposed to unlawful pressure from a professional, also taking the form of a threat within the meaning of Art. 87 CC. However, in the Internet environment the opposite model has appeared – it is the consumer who tries to exert pressure on the entrepreneur in order to force him to do something. There are three typical situations that can be distinguished:

– the consumer threatens to take actions aimed at influencing entrepreneur's reputation (through comments and ratings within reputation systems), in

944 The model consists in encouraging members of the Internet community to check which entities use practices that are undesirable in a given context and then sharing the results of their inquiries with other network users. The reputational risk related to the dissemination of information on practices negatively perceived by consumers is intended to discourage entrepreneurs from using them. This information protection model is proposed in the context of personal data protection requirements. F.J. Zuiderveen Borgesius, J.P. Poort, *Online…*, p. 363.

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order to force trader to undertake a specific action – this phenomenon tends to be referred to as social media or consumer blackmailing,[945]
- the consumer threatens to exercise his unilateral right so that to force the entrepreneur to undertake a specific action,
- the consumer threatens to undertake actions directed at third parties, usually of state origin (e. g., the Consumer Ombudsman, the Office of Competition and Consumer Protection, the Tax Control Office).

Another criterion for the division of consumer threats may be the actual conclusion of the contract. First, the consumer has actually concluded a contract with the entrepreneur and is not satisfied with its performance, so he demands specific behavior on the part of the entrepreneur. Second, the consumer has not concluded the contract at all, but hopes that he will manage to persuade the entrepreneur to grant him undue benefit.[946]

In all the aforementioned cases, the person threatening the entrepreneur still acts as a consumer in the light of the Polish Civil Code definition. Moreover, this person abuses his special position, above all the one-sided character of consumer protection mechanisms, in order to exert pressure and ultimately force the other party to act in a specific way. The fact that a person with the status of a consumer in a given contractual relationship, after successfully using the protection mechanism, will specialize in this type of activities and then become a professional in this field (e. g., start a business or professional activity in the field of consumer interest protection), will not change its consumer status.[947] The concept of "consumer" should be interpreted strictly by referring to the position occupied by a given person within a specific contract, taking into account the nature and purpose of that contract, and not the subjective situation of that person.[948] Having the status of a consumer is independent of the knowledge or

945 M. Steggemann, *Customer Misuse of Social Media Power in the Hospitality Sector – Threats and Strategies*, https://essay.utwente.nl/67291/1/Steggemann_BA_Management%20and%20Governance.pdf (accessed: 31. 5. 2021).

946 K. M. R. Raas, *The Threat of Social Media Blackmailing in the Hospitality Industry – when Customers misuse their Power*, p. 6 https://essay.utwente.nl/67284/1/Raas_BA_BMS.pdf (accessed: 31. 5. 2021).

947 Art. 15 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, p. 1–23) should be interpreted as meaning that the user of a private Facebook account does not lose the qualification of a "consumer" within the meaning of the said provision if he publishes books, gives lectures, runs websites, organizes donation collections and becomes the assignee of the claims of numerous consumers for the purpose of pursuing them in the court proceedings. Judgment C-498/16 Schrems v. Facebook Ireland Limited, statement 1.

948 Judgment C-498/16 Schrems v. Facebook Ireland Limited, point 29, judgment of CJEU of 3. 07. 1997, C-269/95, Francesco Benincasa v. Dentalkit Srl., EU:C:1997:337, point 16;

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information that a given person has.[949] As a result, neither the professionalism of the person in the field in which the contract is concluded, nor the involvement of that person in activities aimed at protecting the interests of persons being parties to such type of contracts deprive the person from the status of the consumer.[950]

Consumer status must be objectively determined in accordance with the protective purpose of consumer law. The consumer cannot renounce from his status.[951] Similarly, the disloyalty of the consumer's behavior should not result in the loss of the protection provided by consumer law – the status of the consumer does not depend on whether the other person knew about the status of the contractor, but only on the fulfillment of objective statutory conditions.[952]

So far, it has been indicated[953] that the hotel[954] and catering industry are the most exposed to actions aimed at forcing certain behavior on entrepreneurs. In both cases, the products or services offered, being experience goods, are virtually impossible to assess before contract performance (prior to using the hotel service or having a meal in a restaurant). This motivates potential clients to look for other people's opinions about the product before purchasing it, for example by checking the guesthouse's ratings on Booking.com[955] or revising the opinions on

judgment of CJEU of 20.01.2005, C-464/01, Johann Gruber v. Bay Wa AG., EU:C:2005:32, point 36.

949 Judgment of CJEU of 3.09.2015, C-110/14, Horaţiu Ovidiu Costea v. SC Volksbank România SA, EU:C:2015:538, point 21.

950 Judgment of CJEU of C-498/16 Schrems v. Facebook Ireland Limited, point 39.

951 Report on the Joint Meeting of the Commission. The European Parliament and the national parliaments of the Member States on "EU consumer law – transposition and implementation", Brussels, 2.04.2009 http://ww2.senat.pl/k7/ue/wspolne/2009/023.pdf (accessed: 31.5.2021) p. 9–10.

952 Differently: judgment BGH of 22.12.2004, VIII ZR 91/04, NJW 2005, p. 1045. The subject of the ruling was the possibility of benefitting from consumer protection by a consumer (prohibition to exclude guarantees in sales contracts concluded with consumers § 475 BGB) who, at the time of conclusion of the contract, misled the other party as to his status. The court stated that it was not clear whether the premise of performance of a legal transaction being not directly related to business or professional activity should be understood objectively or subjectively. It concluded that when a consumer deliberately misleads the other party as to his status, he cannot then claim consumer protection. The protection could be excluded because of the principle of good faith. If the seller does not address his offer to consumers and then the consumer misleads him to conclude the contract in question, adopting an objective understanding of the concept of the consumer will extend the seller's liability towards the other party to the contract beyond the scope that could be expected at the time of concluding the contract. In this way, the consumer remains bound by the legal appearance he has created. Therefore, while a minor, due to his immaturity, will be protected from the legal consequences of his own actions, even if he pretends to be an adult, an adult consumer who pretends to be an entrepreneur does not deserve similar protection.

953 K. M. R. Raas, *The Threat…*, p. 5.

954 In a broad sense – understood as covering all entities providing services related to offering accommodation.

955 www.booking.com/index.pl.html (accessed: 31.5.2021).

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restaurants on Tripadvisor.pl.[956] While, in the case of catering services, internet portals are still primarily used to find a place to eat at, in the hotel industry, booking of a stay as well as payment are made via the website.

5.3.1. The threat of taking actions aimed at influencing entrepreneur's reputation

There are no tools in the private law for standardized protection of entrepreneurs that could be used in the event of an attempt to influence their behavior by the mis-use reputation mechanisms. Consumers' activity within reputation systems is generally considered a desirable phenomenon,[957] creating a soft extrajudicial and enforcement system,[958] supplementing statutory instruments of protection through information.[959] Protection against abuse of the possibilities offered by a given system, in particular through activities aimed at forcing a specific behavior on an entrepreneur,[960] may result from the statutory law. Here, incidental and individual protection instruments are of the greatest importance (in the Polish law being Art. 87 in conjunction with Art. 88 CC and Art. 23 in conjunction with Art. 24 CC); or from the rules governing a given sales website.

956 https://pl.tripadvisor.com/ (accessed: 31. 5. 2021). Tripadvisor is an aggregator of opinions on: hotels, accommodation facilities, restaurants, tourist attractions and companies related to travel, etc. This is a typical example of an online platform that collects and processes opinions and reviews of market participants.

957 On consumer empowerment see. V. DiMauro, D. Bulmer, *The Social Consumer Study. The Society for new Communications Research 2014* https://www.researchgate.net/publication/277140552_The_Social_Consumer (accessed: 31. 5. 2021); N. Victoria Ezechukwu, *Consumer-generated reviews: time for closer scrutiny?*, p. 1, https://www.cambridge.org/core/journals/legal-studies/article/consumergenerated-reviews-time-for-closer-scrutiny/D5532DB035660F65E69AF28BCC216A13 (accessed: 31. 5. 2021).

958 C. Rule, H. Singh, *ODR and Online Reputation Systems Maintaining Trust and Accuracy Through Effective Redress*, in: *Dispute Resolution: Theory and Practice A Treatise on Technology and Dispute Resolution*, ed. M. S. Abdel Wahab, E. Katsh, D. Rainey, Online Haga 2012, p. 183–193; A. E. Vilalta Nicuesa, *Los sistemas reputacionales como mecanismos de compulsión privada*, in: *La resolución de conflictos de consumo: La adaptación del derecho español al marco europeo de resolución alternativa (ADR) y en línea (ODR)*, ed. F. E. de la Rosa, Pamplona 2018, p. 443–464.

959 A. Thierer, C. Koopman, A. Hobson, C. Kuiper, *How…*, p. 873–875; S. Ranchordás, *Online reputation and the regulation of information asymmetries in the platform economy (working paper)*, p. 6–13 https://ssrn.com/abstract=3082403 (accessed: 31. 5. 2021).

960 C. Rule, H. Singh, *ODR…*, p. 190–191.

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5.3.1.1. Protection under the regulation of threat (Art. 87 CC)

If the entrepreneur complies with the request, he may then consider avoiding the effects of the declaration of will made under the threat. However, it is doubtful whether consumer's threat to take any action within the reputation system may fulfill conditions of Art. 87 CC.

It is commonly assumed[961] that the unlawfulness of the threat may result either from the inadmissibility of a given measure (unlawfulness of the measure) or consist in the unlawful use of the permissible measure – it is exercised to reach the effect for which it should not be used (unlawfulness of the aim). Therefore, while the publication of a negative comment by the consumer should, in principle, be considered permitted, the use of the possibility of expressing an opinion in the reputation system in order to force an entrepreneur to behave in a certain manner is unlawful. In such a situation, the mechanism provided by the system is not used to pursue the goal typically associated with it, recognized as in accordance with the common interest.

Assessment whether the threat is real will require basic technical information regarding the functioning of the portal. Depending on the adopted platform model, the implementation of the threat may not be possible at all (e. g., when the threatening party has not yet concluded any contract with the entrepreneur, and the system allows publishing comments only after concluding a contract).

In the light of the Art. 87 CC, the fear incited by the threat must be caused by a serious personal or property risk. The legislature's goal here is to avoid a situation in which the person would be entitled to void the contract though implementation of the threat would bring only ordinary life difficulties and inconveniences.[962]

The question is whether any actions under the reputation system can go beyond this scope, causing serious personal or material threat. As a rule, they directly affect only the reputation of a given entrepreneur within a specific website environment. Therefore, they do not pose personal or property threat for the entrepreneur. Currently, however, the thesis that the online ratings are only informative (they allow the professional party to learn whether the other party is satisfied with the performance of the contract) and do not affect trader's situation on a given market is untenable.[963]

961 Judgment of the Supreme Court of 19.03.2002, I CKN 1134/99, B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 87, point 9; R. Strugała, in: *Kodeks…*, Art. 87, point 2; M. Gutowski, Z. Radwański, in: *System…*, p. 535.

962 R. Strugała, in: *Kodeks…*, Art. 87, point 3; M. Gutowski, Z. Radwański, in: *System…*, p. 536; P. Sobolewski, in: *Kodeks…*, Art. 87, point 19.

963 M. Narciso, *The Regulation of Online Reviews in European Consumer Law*, ERPL 2019/27(3), p. 559.

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An entrepreneur's reputation capital is one of the values that determine his success on the Internet market. Reputation is a part of an enterprise's intangible assets and it is one of the most important elements in ensuring a competitive advantage in the online environment.[964] Reduction in reputational capital may result in significant material losses, and even lead to the entrepreneur being driven out of a given market. What's more, online opinions about an entrepreneur also affect their reputation offline.[965]

The key difficulty is to *a priori* assess what consequences a low rating or bad opinion published by the consumer will have. The impact of a negative feedback will depend on many different factors, related to:

- the communication itself (where it is published, what its content and form are – as these elements may influence the visibility and the credibility of that message);
- rules of the functioning of the platform (e. g., whether a given information can be flagged as unreliable, whether the information posted is verified by a program or a natural person, whether it is presumed that every comment should be regarded as false until confirmed in a special procedure, what the importance of a single opinion is, or whether a decrease in the ratings of the entrepreneur may lead to his expulsion from the website);
- the availability of other platforms where a specific entrepreneur can post his offers (is it possible for the entrepreneur to transfer to another portal of comparable popularity);
- the size of the entrepreneur (smaller entities, just starting to conduct their activities via the Internet are more exposed to the negative effects associated with reputational attacks).

Another issue is that the threat arising from the negative feedback is unspecific – a person forming a threat may, and often will, indicate that if the other person refrains from fulfilling his demand, he will publish a very negative comment about this entrepreneur, without specifying content or place of publication of that feedback. Under such circumstances it will be virtually impossible to assess whether a given threat should be considered serious. A negative feedback may be posted on the entrepreneur's profile on a given platform, on the site of a specific

964 G. Aras, D. Crowther, *Sustaining business excellence*, TQ&BE 2010/1(5), 565–576.

965 M. Luca, *Reviews…*, p. 18, table 8 https://poseidon01.ssrn.com/delivery.php?ID=758094094127082008085018069002122100117048027015062035073082088022110005074030123024022049040100011047021031066094010027092010014090074078042004094094110024073074072077052110121004008100064101024005078122109075124023068031112021073083118085073029074&EXT=pdf (accessed: 31. 5. 2021); B. Hollenbeck, *Online Reputation Mechanisms and the Decreasing Value of Chain Affiliation*, JMR 2018/55(5), p. 636–654.

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product or service only, on a platform not related to the entrepreneur's activity (e.g., where consumers report unfair market practices, warning each other).[966]

The financial consequences that could be triggered by the execution of the threat will depend on all of the aforementioned factors. The assessment whether a specific threat should be considered serious should therefore be made *ad casu*.[967] In particular, the content of the message, the functionality of the platform and the importance of a review of a given type in specific factual circumstances should be taken into account.

The next issue concerns the consequences of evading legal consequences of a statement made under a threat. Avoidance of the effects of the declaration of will makes the contract void and null. Thus, the parties are obliged to return the benefits they obtained. Even if these benefits were lost or used up, the obligation to return the benefit or its value does not expire, because the threatening person should take into account the obligation to return the benefit from the moment of contract conclusion.[968]

It is worth noting, however, that, as a rule, the trader ceases to be afraid of the threat once he decides to stop conducting business via the network or strengthens his position on a given market so that a single negative feedback, regardless of its content, cannot significantly affect his reputation.

As a consequence, in case of a contract of sales, it may turn out that at the time of voiding the contract by the seller, the subject of the contract has already lost (some of) its value. Then, the entrepreneur is entitled to claim the return of the goods and an additional payment which would compensate him for the difference between the current value of the product and its value from the time of contract conclusion. However, it is not in the interest of the entrepreneur to recover the item, but to obtain a full price.

Therefore, the question is whether the entrepreneur could evade only this declaration in which he granted the other party a discount or only this one provision of the contract according to which the consumer was exempted from the obligation to pay the price, so as not to cause the contract to collapse, but only to change its content.

First of all, the Polish Civil Code does not provide for the possibility of evading the effects of a factual act, and, for example, providing the user with a discount code should be considered as such. Then the right to evade legal consequences of the declaration of will, which was made to another person under the threat, will arise only after the conclusion of the contract during which the user decides to

966 E.g. Wykop.pl, zaufanatrzeciastrona.pl.

967 On the need to consider both the subjective and objective seriousness of the threat: B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 167; M. Gutowski, in: *Kodeks cywilny. Tom I. Komentarz art. 1–449*[11], ed. M. Gutowski, Warszawa 2018, Art. 87, point D.2.

968 Art. 88 in conjunction with Art. 405, 409 and 410 CC. P. Księżak, *Bezpodstawne…*, p. 158.

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use that discount. In addition, as a rule, the threat affects the entire juridical act[969] (e. g., concluding a sale contract at a reduced price). It is therefore not possible to only partially evade the effects of such an agreement[970] – e. g. only to the extent to which the benefit of the threatened person is reduced.[971]

Thus, although in theory it would be permissible for the entrepreneur to avoid the effects of a declaration of intent made under the influence of consumer's threat, this instrument will, in practice, grant only an illusion of protection.

5.3.1.2. Protection under personality rights regime (Art. 23 and 24 CC)

The subject of protection of Art. 23 and 24 of the Polish Civil Code are the personality rights, including person's good name and his reputation. Any person whose personality rights are threatened or infringed by another person's actions may demand that the actions be ceased; the person committing the infringement perform the actions necessary to remove its effects, in particular that the person make a declaration of the appropriate form and substance; monetary recompense or that an appropriate amount of money be paid to a specific public cause. If, as a result of infringement of a personal interest, financial damage is caused, the aggrieved party may demand that the damage be remedied in accordance with general principles[972] – here it would be necessary to show and calculate the damage.

On some platforms, however, the author of the feedback cannot remove or alter it after the publication – it is impossible due to the design of the platform or/and inconsistent with its terms and conditions (hence website administrators in most cases refuse to remove certain content upon request).[973] The comment, however, may be marked as unreliable and circumstances indicating its credibility may be described in response to it. Nevertheless, this does not prevent other people from accessing the original feedback.

969 Judgment of the Supreme Court of 26.06.2006, II PK 337/05, Legalis; M. Gutowski, *Wzruszalność…*, Chapter II § 6.

970 B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 178; R. Trzaskowski, *Wady oświadczenia woli w perspektywie kodyfikacyjnej*, SPP 2008/3(10), p. 62; R. Strugała, in: *Kodeks…*, Art. 88, point 5; M. Gutowski, Z. Radwański, in: *System…*, p. 517. Differently: A. Kozaczka, *Błąd…*, p. 122–124.

971 A possibility to partially withdraw from the contract is introduced under Art. 16.2 dir. 2019/771. However, it is limited to situations where the lack of conformity relates to only some of the goods delivered under the sales contract, the consumer may terminate the sales contract only in relation to those goods and any other goods which the consumer acquired together with the non-conforming goods if he cannot reasonably be expected to accept to keep only the conforming goods.

972 Art. 24 § 2 CC.

973 Tripadvisor.pl.

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On the Internet some information is easy to find, often shared by users via links and duplicated; other – less popular – quickly disappears among what was published later.[974] If some content violating the interests of a person was made available in a way that could potentially reach an indefinite number of people, then activities aimed at stopping the infringement should also be able to reach an unlimited number of people.[975] According to this approach if the content infringing personality rights of a given individual has been published, than the statement aimed at removing the effects of this infringement (correction of the information, apology) should also be posted on the website in question. Such a manner of fulfilling the statutory obligation could be considered sufficient in the light of the principle of proportionality. In the case-law it is indicated that the adequacy of the requirement to submit a declaration, *inter alia*, in an appropriate form means that the place and time of the infringement should be taken into account. In contrast, it does not mean that the content should have the actual potential of reaching the same (group of) addressees. It is not necessary for that new information, if published in the same place where the incriminated contents, to reach the same size of audience. However, such an interpretation results from lack of understanding of the online environment. The number of people who could read the material containing personal data turned into a "viral", and the audience who will be presented with e. g. apology for violating the data subject reputation is incomparable.[976]

In addition, submitting a declaration by the infringer does not automatically restore the reputation of the other person nor it automatically rebuilds users trust. Therefore, compensation claims may seem more adequate. Once the damages are paid, the loss, estimated based on the situation in which a given entity was at the time of the infringement, is compensated.

974 The issue how problematic it may be to remove specific content from the web is illustrated by the case of the person who reported the fire of "haystacks" to the Police. The recording of this call – specific in form and content – in which the full personal and address data of the woman appeared, found its way to satirical websites, quickly becoming a "viral". Judgment of the Supreme Court of 15. 01. 2015, II CSK 747/13, OSNC 2016/1 item 9.

975 Judgment of the Supreme Court of 20. 01. 2011, I CSK 409/10, Legalis; judgment of the Supreme Court of 19. 05. 2011, I CSK 497/10, Legalis; J. Panowicz-Lipska, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–352*, ed. Gutowski, 2nd ed., Warszawa 2018, Art. 24, point 4 (decisive for the adequacy of the measure is the potential scope of the statement dissemination).

976 B. Baran, K. Południak-Gierz, *Perspektywa regulacji prawa do bycia "zapomnianym" w Internecie. Zarys problematyki*, Zeszyty Naukowe Towarzystwa Doktorantów UJ Nauki Społeczne 2017/2, p. 154.

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5.3.1.3. Online platform protective mechanisms – does the e-commerce have a self-regulatory potential?

In the consumer e-commerce, protective mechanisms are usually applied by online platforms rather than individual entrepreneurs. These instruments can have preventive (they make it difficult to publish a false content) and reactionary character (they allow for the subsequent verification of the credibility of the message and reducing its harmful effects once the content is classified as a so-called bogus review).[977]

These instruments can be human-based – such a solution is relatively popular in the case of platforms with a small "population". A group of people, whose task is to verify the IP addresses from which messages are uploaded, as well as to control the content of individual comments can moderate the users-originated content.[978] In this way, feedback sent massively from one IP, created in order to improve one's own score or to deteriorate the competitor's rating, or is drastically different from the standard one can be identified.

The activities of the users of larger platforms cannot be effectively controlled in the above manner – here, algorithm-based mechanisms are used.[979] They can verify IP addresses, carry out text analysis and, when they find content of low credibility, send a request to its author to provide, for example, a confirmation of booking an accommodation in a given hotel. Failure to do so in a timely manner will result in removal of the comment or flagging it as unreliable.[980]

Another solution is to grant users certain level of protection through the appropriate design of the portal architecture. An effective method is to reduce the anonymity of users by making the publication of a comment dependent on the provision of detailed data individualizing its creator[981] (e.g., the platform IgoUgo.com). Such disclosure requirement may often suffice for discouraging a person from posting a bogus review.

Among the currently functioning reputation systems there are those that offer each user the opportunity to comment on or evaluate another user, service or product (low review cost systems, e.g. TripAdvisor) and those that make the

977 This manner of differentation chosen after: M. Steggemann, *Customer…*, p. 6.

978 E.g. Kieskeurig.nl. M. Steggemann, *Customer…*, p. 6.

979 In practice, especially with regard to the protection of personal rights and copyright infringement on the Internet, they are often supplemented by mechanisms based on the notice and takedown model. A. Kuczerawy, *From 'notice and take down' to 'notice and stay down': risks and safeguards for freedom of expression*, in: *The Oxford Handbook of Intermediary Liability Online*, ed. G. Frosio, 2020, p. 3–5 www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198837138.001.0001/oxfordhb-9780198837138-e-27 (accessed: 31.5.2021).

980 E.g. Zoover.nl. M. Steggemann, *Customer…*, p. 6.

981 For example, a platform that was aggregating opinions about travel-related services: IgoUgo.com. M. Steggemann, *Customer…*, p. 6, 8.

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possibility of publishing feedback on a specific service conditional on its prior use (high cost review, e. g. Expedia). The second solution is conducive to reducing the number of cases in which the person did not conclude a given contract at all but hopes to force entrepreneur to benefit him by threatening to publish a negative feedback.

Another preventive measure is a presumption that all reviews that have not been approved in a particular procedure are false (reviews marked as unreliable). Such a restriction may, however, mean that the number of reliable ratings within a given website will be relatively small, which may automatically reduce its usefulness.

Currently, some portals encourage reporting extortion attempts immediately before the unfair comment or rating is published.[982] Providing information about the person who threatened the entrepreneur, the circumstances of the case or the content of the threat allows the platform to monitor the activity on that user's profile. Once a comment containing information analogous to the one in the notification is published, the platform administrator is automatically informed about it.

In parallel, there are also mechanisms that aim at reducing the impact of false feedback. In this regard systems which encourage the users to leave feedback after concluding a contract (e. g., by awarding "points" for leaving feedback after the stay at a given facility or sending e-mails with a request for opinions)[983] are relatively common. The architecture of a given portal may also provide for other mechanisms to minimize the adverse effects associated with a negative feedback, e. g. allowing to respond to a comment so that the answer of the entrepreneur is visible to other portal users; marking the comment as unreliable or even removing it by the platform administrator.

At the same time, it is emphasized that cooperation between online platforms can play a significant role, which can counterbalance electronic word of mouth.[984] Here, sharing the content of the threat, data about the person placing it, and the circumstances in which the extortion took place is particularly important.

The above mechanisms of checking the credibility of feedback are aimed at reducing the risk of abusing reputation systems by some users (primarily consumers), e. g. to force certain behaviors of professional entities. On the one hand, they make threats within the meaning of Art. 87 CC less likely. Instruments that reduce anonymity discourage online users from making threats in general. Due to the mechanisms aimed at finding and removing or marking false feedback or messages aimed at threatening somebody, their publication no longer constitutes

982 https://www.tripadvisor.com/TripAdvisorInsights/w592 (accessed: 31. 5. 2021).
983 E. g. Booking.com.
984 K. M. R. Raas, *The Threat…*, p. 4–5.

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a real and serious threat. In addition, if the person to whom the threat was addressed succumbs to it, informing the platform about the situation should allow to minimizing the risk of such a situation recurring both within the given website and on other platforms with a similar profile.

This leads to the following conclusion: limited usefulness of the current Polish Civil Code framework (namely, Art. 87 in conjunction with Art. 88 CC and Art. 23 in conjunction with Art. 24 CC) leads to the emergence of alternative protective mechanisms. They are triggered before the CC institutions – they reduce the possibility of a declaration of will being made under the influence of a threat or that one's personality rights are infringed. Thus, the mechanisms that have appeared in e-commerce solve the problems previously dealt with under the Civil Code regulation – the self-regulatory potential of internet portals becomes clearly visible.[985]

5.3.2. Threatening with exercising one's unilateral right in order to force a specific behavior of the entrepreneur

Another manner in which consumers can exercise undue pressure on the entrepreneur within online environment is by threatening to make use of consumer's unilateral right – e.g. withdraw from the contract if the entrepreneur does not grant them a discount for the next purchase. It is commonly accepted that a threat under Art. 87 CC is understood also as an announcement to make use of one's unilateral right it is not intended to bring about the aim for which this right was granted by the law. This is the case when the rightholder exercises his right not to satisfy his legitimate interests but to exert pressure in another matter, unrelated to the legal relationship within which this right arose.[986] Thus, if one announces that he will exercise his unilateral right, even if it is justified by the circumstances of the case, in order to force the other person to take a specific action, not directly related to the typical function of right at hand, such behavior

985 On the self-regulation on the Internet see *inter alias:* Y. Poullet, *How To Regulate Internet: New Paradigms For Internet Governance Self-Regulation: Value And Limits*, in: *Variations sur le droit de la société de l'information*, ed. C. Monville, Bruxelles 2002, p. 84–91 http s://www.crid.be/pdf/public/4656.pdf (accessed: 31.5.2021); T. Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interfaces*, EJIL 2008/19(4), p. 829–837; K. Południak, *Normy regulaminowe internetowych serwisów sprzedażowych – autonomiczny system prawny*, IPP TBSP UJ 2016/1, p. 51–60; M. Grochowski, *Spontaneous Order in the Sharing Economy? A Research Agenda*, SPP 2018/2, § 2.

986 Judgment of the Supreme Court of 4.02.1957, 3 CR 834/55, NP 1957/7–8, p. 187; judgment of the Supreme Court of 6.01.1997, I CKN 375/97, LEX No. 610210; judgment of the Supreme Court of 19.03.2002, I CKN 1134/99, commented by P. Granecki, MoP 2006/10, p. 556; judgment of the Supreme Court of 17.02.2004, I PK 253/03, Legalis.

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will be considered unlawful. Therefore, although it will not be possible to stop the rightholder from exercising his right, the entrepreneur will be able to evade the effects of a declaration of will submitted under the influence of a threat, provided that the other conditions of Art. 87 CC are met. Yet, this will rarely be the case – the fact that a consumer exercised his unilateral right, as a rule, will not cause a serious material risk for the entrepreneur. There are no alternative protection mechanisms which could be used by the trader in such circumstances.

5.3.3. Threat of taking actions before supervisory authorities

A typical example of a threat in consumer commerce is a situation where the consumer threatens the business to undertake some actions directed at supervisory authorities (e. g., informing them about unfair market practice used by the entrepreneur) unless the entrepreneur acts in a manner specified by that consumer. Such a behavior would be lawful as long as the supervisory involvement mechanism is used to achieve the purpose for which it was established – e. g. in order to persuade the entrepreneur to stop processing personal data without a legal basis, applying unfair market practices or abusive provisions.

In contrast, if the person aims at reaching an effect unrelated to the purpose of the protective mechanism – e. g. a consumer threats the entrepreneur that he will lodge a complaint to the Personal Data Protection Office unless his subscription fee is reduced or unless he is made a donation – his behavior will be considered unlawful and could constitute a threat under Art. 87 CC. However, there are no special protective tools that could be used in such circumstances.

5.4. Conclusions

In cases where it is the entrepreneur who threatens the consumer, the regulation of the Polish Civil Code on threat may be displaced by the instruments of individual protection provided in the Act on Combating Unfair Commercial Practices. These instruments have a broader scope of application, as they can be invoked regardless of whether the consumer actually experienced fear and the protection is triggered once consumer interests are threatened. It is independent from subjective elements on the part of the consumer, and in the case of a claim to abandon the practice – also on the part of the entrepreneur (the claim arises regardless of the fault of the entrepreneur. It is diversified (differentiated claims are available to choose from), while – in the light of the amendments to Directive 2005/29 provided under the New Deal for Consumers – the EU legislator's in-

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tends to standardize both the conditions and sanctions of the protection mechanism.

In the online environment there are phenomena functionally similar to a threat formulated by a third party within the meaning of Art. 87 CC, namely anti-marketing websites, consumer boycotts and online firestorms. However, this similarity is only apparent and, in principle, it is not possible to apply in these cases provisions on evading the legal effects of a declaration made under a threat.

In situations where the entity who is formulating a threat is a person traditionally considered to be the weaker party to a particular contractual relationship – that is the consumer – the civil law does not provide for specific protective tools.

In the event of a threat to undertake certain actions that may affect entrepreneur's reputation capital under the feedback system,[987] the entrepreneur may be able to evade legal effects of a declaration of will submitted under that threat. The protection provided by Art. 87 and 88 of the Polish Civil Code will, however, not be effective in this case due to the difficulty of estimating the negative effects related to the fulfillment of the threat, the indeterminacy of the threat, the time that passes before the state of fear ceases, and the fact that it will usually be in the interest of the entrepreneur not to void the contract concluded under the threat but to obtain full consideration.

Once the threat is fulfilled and results in personality rights infringement, the entrepreneur might become entitled to claim that the infringer performs acts necessary to remove effects of that threat and, in particular, that he makes a statement of an appropriate contents and in an appropriate form (e. g., publishes an apology) under Art. 23 in conjunction with Art. 24 CC. He may also demand pecuniary compensation or an appropriate sum of money to be paid to a specified public purpose. However, even if the above claims are satisfied, the state from before the infringement will not be restored due to the specificity of the functioning of reputational capital in the network. Thus, the only protection mechanism that seems effective in such scenario are internal mechanisms of a given portal.

When the consumer threatens to exercise his unilateral right or take action before supervisory entities, the only instrument to protect the entrepreneur is Art. 87 CC. However, even evading the legal consequences of a declaration of intent made under the influence of a threat does not effectively protect trader's interests.

This leads to the conclusion that the legal situation of person acting under pressure which is aimed at forcing his specific behavior differs, depending of the status of that person. If the threat is formulated by the entrepreneur and ad-

987 Feedback on the website on which the entrepreneur operates or on an external system that aggregates user opinions.

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dressed to the consumer, the Polish legislature provides, apart from the individual protection regime, an effective and extensive catalog of standardized protection instruments. This additional protection is aimed at prevention, its scope is wider than in the case of Art. 87 CC, and the catalog of entities authorized to initiate proceedings aimed at protecting the consumer's interest is broad. As a result, the protective instruments provided outside the CC should, in practice, supersede the regulation of threat of Art. 87 CC.

The situation is different when the entity who is threated is an entrepreneur – then, regardless of whether that threat comes from a consumer or a third party, only instruments of individual protection can be applied – first of all, Art. 87 CC in conjunction with Art. 88 CC and additionally Art. 23 in conjunction with Art. 24 CC. There are no standardized protection tools. However, the individual protection provided in the Polish Civil Code remains unadjusted to the specific nature of e-commerce and it does not guarantee effective protection of the interests of the entrepreneur who was faced with a threat. The lack of adequate instruments of protection under civil law is compensated in the Internet environment by existing reputation mechanisms.

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6. Declaration of will caused by the abuse of special circumstances on the part of the declarant – methods of regulation

The last group of standard situations in which the regulation of defects in the declaration of will may be a typical mechanism of legal response, includes instances of abuse of special circumstances occurring on the part of the declarant. Here, the tool of individual protection (the institution of exploitation) in case of consumer transactions is getting replaced by alternative instruments – mostly, standardized protection tools.

First, the reasons for the hybrid nature of the institution of exploitation in Polish law will be presented (different understanding of the purpose of that institution, possibility of drawing conclusions as to the character of the institution based on the place of its regulation and the wording of the provision), then its effects (scope of application) and attempts to increase its usefulness (postulates of broadening interpretation of the current provision). In the second part of the chapter, alternative mechanisms which limit practical usefulness of the institution of exploitation in case of consumer transactions will be described.

The legislature can react to the problem of abuse of declarant's special circumstances by another person in three different ways – by regulating exploitation based on:

- objective premise – the disproportion of benefits (*laesio enormis*);
- objective and subjective premise – special circumstances concerning the aggrieved party and moral reprehensibility of the exploitation (qualified *laesio enormis)*
- subjective premise – abuse of circumstances.[988]

Emphasizing the subjective premise unifies the aim of exploitation and institutions traditionally considered to be defects in the declaration of will – it is the protection of the autonomy of will.[989] Under this approach, the possibility of protection arises due to the reprehensibility of the other party's conduct, con-

988 R. Trzaskowski, *Wady*…, p. 75.
989 E. Till, *Polskie*…, p. 79.

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sisting in exploiting the weaknesses of the declarant or the circumstances which prevent him from making a contractual decision freely, regardless of the content of the contract. Since a justification for the protection of the declarant is that the other party abused limitation of the declarant's decision-making autonomy, it should be assumed that the said autonomy is the value under protection.

Emphasizing the importance of the objective element in the form of disproportion of benefits favors the standardization of protection and makes the structure of exploitation similar to the structure of a typical instrument for controlling the content of a contract. The effect of the application of the protective mechanism should lead to restoring of the correct proportion of benefits within a given legal relationship[990] – or rather, restoring the balance between the said benefits.[991] It is worth noting that the examination of the objective equivalence of benefits becomes more justified and desirable as the contractual mechanism of shaping the rights and obligations of participants in economic transactions grows less reliable.[992] If one of the entities has a significantly stronger negotiating position, prioritizing the subjective criteria (will, content of contract provisions) may lead to the acceptance of actual inequalities. This will be the case of adhesive contracts. The weaker party, not having the power to actually negotiate the content of the contract, will be able to either accept it as is (e. g., despite the negative definition of features of good or reservation that the quality of services provided may periodically fall below the level specified in contract) or refrain from its conclusion. In relations between entities with strongly asymmetrical market positions, a real protection may be granted by objective criteria for controlling the content of the contract. In this regard, the main objective of the objectification of protection, in the case of a significant disproportion of benefits,becomes visible. It is removing the negative effects of contractual asymmetry between different private law subjects.

Depending on which approach prevails, the purpose of the institution of exploitation becomes different and its function changes. If the institution of exploitation starts to resemble the vice of consent, its dominant goal becomes the protection of autonomy. It begins to function as an individual protection mechanism. In contrast, if the objective element outweighs, the institution of exploitation becomes an instrument for controlling the content of contract. The more objective and abstract criteria for its application are, the more effective in removing contractual inequalities in mass transactions this instrument becomes. Hence, in order to assessusefulness of the institution of exploitation in consumer

990 A. Olejniczak, in: *Kodeks…*, Art. 388, point 1.
991 G. Karaszewski, in: *Kodeks…*, Art. 388, point 1.
992 Ł. Węgrzynowski, *Ekwiwalentność…*, p. 303.

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e-commerce, it should first be examined how this institution is perceived today and whether it is undergoing any changes.

In the 1930s, the prevailing view in Polish legal scholarship was that exploitation was a defect of consent. The importance of a subjective premise (a significant limitation of the contractual freedom at the stage of decision-making) was emphasized. As a result, the main reason for the legal reaction was the defectiveness of decision-making process.[993] In consequence, the provision on exploitation was included into the chapter on vice of consent in the Code of Obligations of 1933.[994] The regulation of exploitation, however, was no longer included in General Provisions of the Civil Law of 1950. Current Polish Civil Code regulates exploitation in Art. 388 CC,[995] in section containing general provisions on contractual obligations.[996] In light of the normative concept of vice of consent, exploitation cannot, therefore, be considered a defect in the declaration of will, as it is regulated outside of the Section IV of Book I of the Polish Civil Code.[997] Thus, most legal authors claim that exploitation should be seen as an institution of defectiveness of content of the contract, not of declaration of will.[998]

Those in favor of seeing the institution of exploitation as a vice of consent[999] claim that the location of provision should not be decisive – it follows from the

993 R. Longchamps de Bérier, *Polskie prawo cywilne. Podręcznik systematyczny w opracowaniu członków Komisji Kodyfikacyjnej R. Longchamps de Bérier, K. Przybyłowskiego, J. Wasilkowskiego. Tom II Zobowiązania*, Lwów 1939, p. 94, 95.

994 Art. 42 the Code of Obligations of 1933.

995 For the historical overview see: J. Andrzejewski, *Laesio enormis i wyzysk. Tradycja prawna a przeciwdziałanie nieekwiwalentności świadczeń w prawie prywatnym Austrii, Niemiec i Polski*, PhD dissertation, https://repozytorium.amu.edu.pl/bitstream/10593/13070/1/LAESIO%20ENORMIS%20I%20WYZYSK.J.A.DOKTORAT_2015-PDF.pdf (accessed: 31. 5. 2021).

996 In May 2020 Art. 387^1 was added to CC. According to this provision, the contract which obliges a natural person to transfer the ownership of the immovable property used to meet his housing needs in order to satisfy the claims under this or another contract not related directly to the economic or professional activity of that person is invalid when: 1) the value of the immovable property is lower than the value of the pecuniary claims secured by this immovable property increased by the amount of the maximum interest on this value, for a delay, for the period of 24 months or 2) the value of said pecuniary claims is not stipulated; or 3) conclusion of this contract was not preceded by making the valuation of the market value of the immovable property by a property expert. This instrument could be viewed as a specific form of exploitation (A. Grebieniow, in: *Kodeks cywilny. Komentarz*, ed. K. Osajda, 28^{th} ed., Warszawa 2021, Legalis, Art. 387^1, A.2.) but it does not refer to specific circumstances increasing vulnerability of the individual. Instead, it focuses on the objective elements, which is typical for consumer protection mechanisms and for standardized instruments of content of contract control (e. g. provisions on interests).

997 Z. Radwański, in: *System…*, p. 486.

998 A. Ohanowicz, *Wady…*, p. 48, 49; K. Buczkowski, M. Wojtaszek, *Lichwa pieniężna – zagadnienia cywilnoprawne*, PPH 1999/8, p. 41; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warszawa 2006, p. 135.

999 B. Lewaszkiewicz-Petrykowska, *Uwagi o konstrukcji wad oświadczenia woli w kodeksie cywilnym*, SPE 1971/VI, p. 61–61, 67–68; B. Lewaszkiewicz-Petrykowska, *Wady…*, p. 180; B.

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fact that exploitation is possible only under contracts.[1000] Additionally, in Title III of Book Three of the Polish Civil Code includes provisions on various issues related to contracts. Thus, the fact that legislature decided to place the provision on exploitation not among the regulation on vice of consent, but among general provisions on contractual obligations allows to draw conclusions only as to the scope of its application, not as to its legal nature.[1001]

The legislator focuses on one who was exploited, not on exploiter or on the contradiction between the content of contract and legal order.[1002] This conclusion stems, on the one hand, from the specific definition of the state of person who was exploited, and, on the other hand, from the fact that exercising sanctions resulting from Art. 388 of the Polish Civil Code is up to the exploited. The difference between sanctions under Art. 388 CC and under the vice of consent does not mean that these institutions function differently. It is just a consequence of the assumption that in case of exploitation, typically, in the interest of the exploited would be to eliminate the disproportion of benefits, while maintaining validity of the contract. Moreover, voiding the contract is a remedy of the last resort which should only be applied if existing harm cannot be removed otherwise. And yet, economic interests of the exploited can be satisfied by changing the content of contract and removing the disproportionate.[1003]

In a recent research, there is a view that exploitation should be considered a defect in the declaration of will, as it has all characteristics of this legal category: it is associated with defectiveness of process of making a decision and expressing one's will, negatively assessed behavior of another person, its sanction is intended to protect the autonomy of will and there is a deadline for leveraging thid protective instrument.[1004]

Reasons why legal commentators do not want to see exploitation as a vice of consent vary. The first argument is related to the normative concept of defects of the declaration of will – basically the fact that exploitation is regulated outside

Lewaszkiewicz-Petrykowska, *Wyzysk jako wada oświadczenia woli*, SPE 1973/X, p. 51; judgment of the Appeal Court in Poznań of 23.11.1995, I ACr 483/95, Legalis; A. Szpunar, *O zastrzeżeniu nadmiernych odsetek umownych*, PPH 2001/10, p. 34; judgment of the Supreme Court of 8.01.2003, II CKN 1097/00, Legalis; A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2012, p. 415, 428; judgment of the Supreme Court of 19.09.2013, I CSK 651/12, Legalis.

1000 B. Lewaszkiewicz-Petrykowska, *Wyzysk…*, p. 53. Differently: R. Trzaskowski, *Wady…*, p. 77. Also, a unilateral legal act can be made under the influence of exploitation – for example a person can be made to withdraw from the sales contract after the price of good sold has increased (Trzaskowski).

1001 B. Lewaszkiewicz-Petrykowska, *Wyzysk…*, p. 54.

1002 B. Lewaszkiewicz-Petrykowska, *Wyzysk…*, p. 54.

1003 Explained in detail in: Chapter 6.4.2.

1004 M. Robaczyński, M. Wojewoda, *Wyzysk, Art. 58 kodeksu cywilnego i problem zastrzegania nadmiernych odsetek umownych*, PS 2004/XIV(11–12), p. 37–39, 42.

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Chapter IV of Book I of the Polish Civil Code means that it cannot be regarded as a defect in the declaration of will. In addition, the exploitation may be observed together with a defect of consent[1005] – whereas it is impossible for more than one vice of consent to occur at the same time.

Currently, according to the dominant view[1006] exploitation should be regarded as a case of defectiveness of the content of a contract – the provision sets the statutory limit to freedom of contracts. The location of Art. 388 CC is, therefore, not only related to the scope of its application. The provision was placed among other norms defining statutory limitations of freedom of contracts – namely, Art. 385^{1-3} and 387 of the Polish Civil Code.

The question is whether this approach does not turn out to be internally incoherent. If we assume that the existence of an objective gross disproportion between benefits of parties to the contract means that it contradicts the nature of a given type of contract, the legal order or good customs. Such situation should result in contract's absolute invalidity or automatic adjustment of benefits (as in the case of excessively high interest rates in accordance with 359 § 2^2 CC), and not to authorize the party to seek a reduction of its performance or an increase of the performance due to it, and if both are excessively difficult it may demand that the contract shall be declared null and void.

In case of norms aimed at protection of legal order (Art. 58 CC), the traditional sanction is an absolute nullity of a juridical act, while Art. 388 CC entitles the victim to decide whether to challenge a contract which was concluded under exploitation. This suggests that the sanction under Art. 388 CC is intended to protect the autonomy of will of the author of a defective declaration,[1007] as in the case of defects in a declaration of will.

This inconsistency is only apparent. If a juridical act is contrary to the statutory law, it does not always have to mean that it is invalid, as an act may sanction it differently. It is so in case of exploitation which replaces the absolute nullity by

1005 A. Cisek, J. Kremis, *Z problematyki wyzysku w ujęciu Kodeksu cywilnego*, RPEiS 979/XLI(3), p. 66.

1006 F. Zoll, T. Sołtysik, *Prawo…*, p. 124; J. Rajski, *Prawo o kontraktach w obrocie gospodarczym*, Warszawa 1994, p. 46; Z. Radwański, A. Olejniczak, *Zobowiązania…*, p. 135; D. Bierecki, *Regulacja prawna wyzysku. Uwagi de lege lata oraz de lege ferenda*, Rej. 2015/7, p. 32. The arguments for the thesis according to which exploitation is a special case of an activity contrary to the principles of social coexistence and for the one under which exploitation is recognized as a limitation of freedom of contract are presented jointly. Ultimately, under both these theories exploitation is perceived as a violation of the legal order – either being principles of social coexistence, or the statutory law – namely, Art. 353^1 CC.

1007 B. Lewaszkiewicz-Petrykowska, *Wady…*, s.181–182, 190; B. Lewaszkiewicz-Petrykowska, *Wyzysk…*, p. 54.

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voidability, being a *lex specialis* in relation to Art. 58 CC[1008] – exploitation is therefore a specific form of an act contrary to the law.[1009]

It is also underlined that rights of a person who acted under a vice of consent and of a person that was exploited differ – in the first scenario the declarant is granted a unilateral right whereas the exploited may demand to have the content of the obligation shaped by the court.[1010] In case of defects in the declaration of will, the legal action collapses when the effects of the declaration are effectively evaded or not arise at all (in case of declaration of intent being null and void), while in case of exploitation, the legislature provides that effects of the submitted declaration will cease or be changed in connection by a constitutive decision.

The institution of exploitation does not focus on the person who was exploited. Sanction of the norm is not aimed solely at protecting aggrieved one, but is supposed to balance interests of both parties.[1011] The essence of exploitation is related to disproportion of benefits[1012], and thus, the content of contract. In the case of defects of consent, elements of the content of declaration – except for the price – are, as a rule, irrelevant.[1013]

At the same time, however, when delimiting the scope of admissible interference of a court with the content of obligation, also legal authors who believe that exploitation is a defect of the content of contract emphasize the defectiveness of the will of the exploited: in case of exploitation contract is not an expression of the actual autonomy of will of parties, therefore the court is not obligated to maintain the original meaning of the agreement.[1014]

It is clearly visible that Polish legal authors hesitate, initialy emphasizing that the features of exploitation are typical for the vice of consent, then underlining the differences between these two and seeing a strong similarity to the mechanisms of assessment of the content of contract. The institution of exploitation is still perceived as a hybrid – related both to the defectiveness of will and of the

1008 K. Buczkowski, M. Wojtaszek, *Lichwa…*, p. 36; Z. Radwański, A. Olejniczak, *Zobowiązania…*, p. 124; judgment of the Supreme Court of 8.10.2009, II CSK 160/09, Legalis. The interplay between Art. 388 CC and Art. 58 CC has already been extensively analyzed in legal academics writings, especially in the context of possibility of invoking invalidity resulting from a contradiction to the principles of social coexistence after expiry of the period specified in Art 388 § 2 CC. See *inter alias:* M. Safjan, *Zasada swobody umów (Uwagi wstępne na tle wykładni art. 353[1] k.c.)*, PiP 1996/4, p. 19; A. Stelmachowski, *Zarys…*, p. 129; T. Justyński, *Relacja między art. 58 § 2 a art. 388 k.c. w kontekście nadmiernych odsetek umownych*, PS 2004/1, p. 95; R. Trzaskowski, *Wady…*, p. 65.

1009 A. Ohanowicz, J. Górski, *Zarys prawa zobowiązań*, Warszawa 1970, p. 87.

1010 D. Bierecki, *Regulacja…*, p. 28.

1011 P. Machnikowski, in: *System…*, p. 640–641.

1012 P. Machnikowski, in: *System…*, p. 631, 636–637.

1013 P. Machnikowski, in: *System…*, p. 639–640.

1014 R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem*, Warszawa 2013, p. 662.

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content of contract.[1015] Depending on whether a given group of legal commentators recognizes defectiveness of the process of decision-making, or a contradiction with the nature of the contract as vital, exploitation is either placed among the defects of declarations of will, or considered a defect in the content of contract.[1016] It is claimed that exploitation can occure only in case of particular kinds of contracts. Some claim that the provision on exploitation appies to the mutual contracts only,[1017] others that the contract must create monetary obligation[1018] or that it is sufficient if the agreement creates obligations for both parties, leading to the exchange of goods.[1019] Also, the fundamental purpose of Art. 388 CC has not yet been clearly defined.[1020]

Since the analysis of doctrinal views does not allow one for resolving doubts as to the character of institution of exploitation, it seems justified to examine the way in which this institution functions in practice and what postulates as to how it should function are already formulated. These two should illustrate what the purpose of this institution is at the time being and what goals legal scholarship would like to achieve with its application. Answering the first of these questions will help to determine whether the institution of exploitation in its current form remains useful in the consumer e-commerce. The second part of analysis will make it possible to determine whether the usefulness of this institution in the online environment will increase or, on the contrary, diminish.

1015 The view expressed in the 1930s by Longchamps de Bérier. R. Longchamps de Bérier, in: *Encyklopedia…*, p. 87.

1016 R. Longchamps de Bérier, in: *Encyklopedia…*, p. 189.

1017 Z. Radwański, in: *System Prawa Cywilnego*, Vol. 3, Part. 1, *Prawo zobowiązań – część ogólna*, ed. Z. Radwański, Ossolineum 1981, p. 387.

1018 P. Zakrzewski, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 388, point 7. The above "extension" of scope of application of provision is related to the lack of consensus as to the nature of certain types of contracts, e. g. contract of mandate for remuneration (S. Grzybowski, in: *System Prawa Cywilnego*, ed. W. Czachórski, Vol. 1, *Prawo cywilne – część ogólna*, Ossolineum 1974, p. 493; A. Szpunar, in: *System Prawa Cywilnego*, Vol. III, Part 2, *Prawo zobowiązań – część szczegółowa*, ed. S. Grzybowski, Ossolineum 1976, p. 391) or loan agreement with an interest (W. Czachórski, *Zobowiązania…*, p. 150).

1019 R. Trzaskowski, *Granice…*, p. 451; judgment of the Supreme Court of 22.07.2005, III CZP 49/05, Legalis; P. Machnikowski, in: *System…*, p. 633.

1020 P. Tereszkiewicz, *Obowiązki…*, p. 569.

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6.1. Abusing the circumstances of the declarant in the absence of a gross disproportion of benefits

In the Polish Civil Code of 1964 the institution of exploitation was designed to be used to eliminate extreme cases of contract defectiveness from the market – hence, the combination of the subjective premise (a particular situation of the exploited, awareness of the exploiting) with an objective premise – an element directly related to the content of contract (gross disproportion of benefits).[1021] This duality of premises means that between area of protection covered by the provisions on the defects of the declaration of will and between the scope of application of the institution of exploitation there is a sphere within which the basis for protection may be Art. 58 CC or 353^1 CC in connection with § 1 or 2 of Art. 58 CC (depending on whether the limiting criterion is a statute or a general clause). This is the case of situations in which one takes advantage of other's state of necessity, his incompetence or inexperience, but there is no gross disproportion in mutual benefits.

While the above-mentioned gap in the scope of protection does not seem to be problematic at the level of individual protection, it may be a significant problem in the case of mass relations. General clauses do not provide effective protection in case of consumer transactions. Their vague character means that firstly, they are interpreted by an active entity with a stronger market position, and this interpretation is imposed on weaker entities. If a consumer would like to challenge the other party's judgment, he may demand that this interpretation of the general clause is re-examined in the court proceeding. However, this solution is not optimal due to the fact that usually the costs related to enforcement of one's rights in court may be disproportionately higher than the costs that a consumer would be willing to incur in a given case.[1022] This gap in protective framework is used in consumer trade.

1021 This manner of perceiving premises of exploitation (one subjective and one objective premise) adopted after: R. Trzaskowski, C. Żuławska, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna*, ed. J. Gudowski, Art. 388, point 5–6. Some legal authors agrue that there are, in fact, three premises: one objective and two subjective ones or an objective, a subjective and a mixed one (the special situation of the exploited, namely forced position, inefficiency, inexperience assessed from the point of view of the exploited). W. Popiołek, in: *Kodeks cywilny. Tom I. Komentarz do Art. 1–449[10]*, ed. K. Pietrzykowski, 9th ed., Warszawa 2018, Art. 388, point 2. In turn, the jurisprudence sees there two objective premises (gross disproportion of mutual benefits and compulsory position, infirmity or inexperience of exploited, and one subjective premise (abuse of the exploited in one's own interest). Judgment of the Appeal Court in Katowice of 10.01.1995, I ACr 839/94, OSA 1997/7–8, item 46; judgment of the Appeal Court in Białystok of 27.10.2004, I ACa 530/04, Legalis.

1022 M. Grochowski, *Obowiązki…*, p. 194–195.

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Additionally, it is indicated that the current design of provision on exploitation in practice gives only an illusion of protection:[1023] the burden of proof rests on a person who is impotent, inexperienced or being in a state of necessity and the possibility of lodging a claim is strictly limited in time.[1024] Moreover, need to initiate a court proceeding to exercise one's right may discourage the exploited from taking steps necessary to protect his rights when that person is unsure whether the premises of Art. 388 CC are fulfilled or he perceives the potential defendant as being comperatively stronger (the disproportion may concern various issues, including: negotiating and contractual position, resources at the disposal of the parties, knowledge and skills).

6.2. Exploitation of the state of necessity, inefficiency or inexperience – towards broader interpretation

In the Polish Civil Code, the legislature decided to set a closed catalog of circumstances relating to the exploited, in which he is entitled to demand a reduction of his performance or an increase of the performance he is supposed to receive, and if both are excessively difficult – declaring the contract null and void. It is underscored that the subjective premise should cover all those situations in which the subjective factor makes a person susceptible to exploitation on par with intellectual weakness and inexperience.[1025] Establishing a closed list of subjective circumstances means that – in situations not covered by the statutory enumeration – the general clause on nullity of legal acts contrary to good customs needs to be applied. As a result, cases similar as to their essence might be adjudicated differently.[1026]

Art. 388 CC indicates the state of necessity, inefficiency and inexperience as subjective premises. The state of necessity[1027] tends to be understood as a situation in which a person is faced with the need to obtain a benefit, otherwise he or

1023 J. Andrzejewski, *Czy Art. 388 k.c. jest potrzebny? Wyzysk w Kodeksie cywilnym oraz w tzw. perspektywie kodyfikacyjnej – spojrzenie krytyczne i wnioski de lege ferenda*, in: *Wokół rekodyfikacji prawa cywilnego. Prace jubileuszowe*, ed. P. Stec, M. Załucki, Kraków 2015, p. 191–193; R. Trzaskowski, *Wady…*, p. 76; R. Trzaskowski, *Skutki…*, p. 639–668.

1024 The same arguments, yet against recognizing exploitation as a defect in the declaration of will, were presented by A. Ohanowicz, in: A. Ohanowicz, *Wady…*, p. 48, 49.

1025 P. Tereszkiewicz, *Obowiązki…*, p. 444.

1026 https://www.projektkc.uj.edu.pl/dokumenty/Projekt_Komisji_Kodyfikacyjnej_Ksiega_I_z_uzasadnieniem.pdf p. 129 (accessed: 31.5.2021).

1027 Translated also as a forced situation. (The Civil Code of 23 April 1964 consolidated version of 16 May 2019 (J.L. translation UK 2019, item 1145).

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his relatives may be in a serious property, personal or family danger,[1028] no matter what caused such situation.[1029] Legal authors[1030] postulate a functional interpretation of the condition of state of necessity, so that it covers situations in which the exploited is subject to the unauthorized influence of another person (case of the surety dependent on the main debtor). Cases in which there is a special relationship of trust between the exploited and the exploiting should be qualified in the same manner.[1031] The state of necessity may also be caused by the fact that a person concluding a grossly unfavorable contract could not conclude a better one, e. g. due to the lack of actual competition on a given market, excessive transaction costs of finding another offer or conducting negotiations with another entity.[1032]

At the same time, however, the necessity should be absolute – only then it renders the declaration of will of the exploited defective. Therefore, in the context of a state of necessity caused by economic circumstances, it is emphasized that the discussed premise is fulfilled when the exploited concludes a contract, e. g. in the face of a shortage that threatens either him or his close one, or, if necessary, to obtain funds to meet his most urgent obligations if failure to fulfill them entails far-reaching sanctions,[1033] as circumstances of this nature have a special effect on the party's motivation.

In principle, it is assumed that when assessing whether a given situation already constitutes a state of necessity within the meaning of Art. 388 CC, objective potential of these circumstances to influence motivation of a person should be taken into account (may this person consider himself forced by circumstances to conclude an unfavorable contract). It is irrelevant whether, in a given situation, different behavior was really impossible. It was suggested that the understanding of the state of necessity should be broadened by change to the point of reference – it should no longer be the actual circumstances of the person who was exploited[1034] and how they could have objectively influenced his motivation, but the subjective belief of the exploited about the state he is in.[1035]

1028 Judgment of the Supreme Court of 28.01.1974, I CR 819/73, Legalis; P. Zakrzewski, in: *Kodeks…*, Art. 388, point 15.
1029 Judgment of the Supreme Court of 8.10.2009, II CSK 160/09; A. Olejniczak, in: *Kodeks…*, Art. 388, point 5.
1030 P. Tereszkiewicz, *Obowiązki…*, p. 443.
1031 P. Tereszkiewicz, *Obowiązki…*, p. 444.
1032 R. Trzaskowski, *Granice…*, p. 449.
1033 E. Bagińska, *Glosa do wyroku SN z 27.09.2005 r., I CK 191/05*, OSP 2007/7–8, item 87.
1034 M. Wilejczyk, *Umowy nacechowane wyzyskiem*, in: *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka*, ed. J. Gołaczyński, P. Machnikowski, Warszawa 2010, p. 667.
1035 Judgment of the Regional Court in Brzeziny of 27.04.2017, I C 81/17, Legalis.

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Thus, it is clearly visible that legal commentators strive for broadening the interpretation of condition of the state of necessity – regardless of whether it was caused by external or internal causes.

Inexperience tends to be understood as the inability to predict consequences of one's declaration, caused either by lack of specific experience or experience in general. Inefficiency means that one is unable act efficiently and properly conduct his affairs: he is not able to cope with daily difficulties, needs to seek others' help, or suffers from weakened psycho-physical activities. All of the above can result from the physical or mental health issues or ageing. Inefficiency also means the inability to make independent decisions, being reliant on the environment one's functioning in, particularly being susceptible to the pressure exerted by other people, especially those with whom one has a relation based on trust or dependence, which influences the conclusion of the contract.[1036]

Thus, while the existence of a special relationship linking the exploiter with the exploited can be considered a forced position (the overwhelming influence of the exploiter is crucial), excessive susceptibility to the influence of the person will be qualified as his inefficiency (the reduced decision-making capacity of the exploited and one's psychological weakness is the core element here).

The jurisprudence[1037] also considered the admissibility of recognizing alcoholism and the state of craving as inefficiency, as long as these significantly disturb the motivational sphere and the decision-making process, resulting in the lack of sufficient knowledge as to the circumstances, legal and property consequences of the act performed at the side of the exploited. While the first can be reasonably regarded as fulfilling the condition of inefficiency, the state of craving for alcohol seems to fulfill the condition of forced situation due to its transient nature.[1038]

It is clear, therefore, that the legal authors and jurisprudence both aim at extending an interpretation of condition of the exploitation of a state of necessity, inefficiency or inexperience of the other party by gradually departing from a literal understanding of these categories in favor of functional interpretation. According to some views, they should generally cover all situations in which the exploited cannot have a real impact on the content of contract, even if acting with due diligence.[1039]

The second element of the subjective premise concerns an exploitation of the state or characteristics of a person indicated in the act by the exploiting one – he must be aware of these characteristics and the gross disproportion of benefits

1036 Judgment of the Appeal Court in Warszawa of 14.03.2014, VI ACa 1183/13, Legalis.
1037 Judgment of the District Court in Poznań of 24.11.2016, XVIII C 320/15, Legalis; Judgment of the Supreme Court of 27.09.2005, I CK 191/05.
1038 Judgment of the Appeal Court in Gdańsk of 15.12.2016, I ACa 1035/16, item 1, Legalis.
1039 R. Trzaskowski, *Granice*…, p. 450.

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and, for these reasons, strive to conclude a contract.[1040] The essence of this premise is moral reprehensibility of the behavior of the person aiming at exploiting his contractor. However, the exploiter is not required to act with the intention of harming the other party – it is enough that he uses the opportunity at hand in his own interest.[1041]

Due to the proof difficulties related to demonstrating the fulfillment of a subjective premise concerning the exploiting person, factual presumptions apply. Thus: the more pronounced the disproportion of benefits, the more justified is factual presumption that the exploiting person was aware of it; the more the exploited person's behavior deviates from a standard one, the more justified the presumption in fact that the exploiter noticed (or should have noticed if acting with due diligence) other's inexperience or inefficiency. Similarly – if the exploiter knows about circumstances that force the exploited into the state of necessity or has caused these circumstances himself, it should be presumed that he knows about the forced position of the other party.

As a rule, since exploitation is a tool of individual protection, it should be assumed that the premise of exploitation must be individual – the exploiter should have an intention to exploit specific circumstances concerning an individual.

This becomes an issue in situations where someone decides to use, in a standardized manner, circumstances indicated in Art. 388 CC which are affecting an unspecified group of people. A typical example here is of an entity that lends money to people in a particularly disadvantaged financial situation, e.g. in a spiral of debt, or sell food products in flooded areas, reserving a grossly disproportionate benefit from individuals affected by the flood.[1042] The gross disproportion of benefits might be a standard element in this system, inserted into the contract regardless of the actual situation or characteristics of a specific contractor. Persons offering overpriced services or goods do not know the specific circumstances of individual contractors, but they are aware that potentially all applicants willing to conclude a contract despite such disproportion of benefits will be acting under the state of necessity, being inexperienced or inefficient – they intentionally direct their business activities towards this group of in-

1040 P. Zakrzewski, in: *Kodeks…*, Art. 388, point 22.

1041 M. Gutowski, *Wzruszalność…*, p. 167–168; A. Olejniczak, in: *Kodeks…*, Art. 388, point 4.

1042 It is assumed that cases that do not fall under Art. 388 CC should be examined under Art. 58 CC. Judgment of the Appeal Court in Katowice of 14.07.2015, I ACa 114/15, Legalis. Whether Art. 58 CC can effectively protect the consumer are of limited relevance from the perspective of aim of this analysis, which focuses on the standardized protection mechanisms replacing one of typical elements of individual protection, namely, regulation of the defects of the declaration of will.

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dividuals. Therefore, they seek to exploit the abovementioned circumstances in order to obtain disproportionate benefits.

In many cases, it will be obvious that the person acts under the state specified in Art. 388 CC because of circumstances of the contract (case of food sold to flood victims) – then the subjective premise concerning the exploiter will be fulfilled. The remaining cases turn out to be problematic. In such business model, it is often in the interest of the exploiter not to take any actions that could reveal specific circumstances, so that he cannot be accused of being aware of the existence of the state of necessity, inexperience or inefficiency of the other party.

Therefore, in this case the lack of knowledge of the specific facts of the case should not exclude the possibility of invoking exploitation. This would mean broadening the subjective premise further – this time by accepting that it is not necessary to be aware of the circumstances indicated in the act regarding a particular exploited person. The fact that a person should be aware of them would be sufficient. Therefore, if someone directs his activity to a group of individuals in a state of necessity, inexperienced or ineffective, it should be assumed that he should take into account the fact that his contractors act under such circumstances.

6.3. Gross disproportion of benefits – problematic assessment of the equivalence and postulates to take into account not only the main performances of the parties

As a rule, the disproportion of benefits (in performance itself), provided that they were freely determined by the parties, does not infringe contractual balance.[1043] However, the verification of the proportionality of benefits may entail some difficulties.

First, objective equivalence is required – the point of reference is the market value of the benefits in question[1044] – but this is not always easy to assess. Agreements on financial products of a speculative nature turn out to be particularly problematic.[1045] In such instances, it is suggested to examine whether, according to the contract, one party is disproportionally privileged.[1046] Then, in fact, the scope of the elements which are compared is extended – all the rights and

1043 Judgment of the Supreme Court of 4.10.2001, I CKN 328/99, Legalis; Z. Radwański, in: *System…*, p. 327.

1044 Judgment of the Appeal Court in Białystok of 27.10.2004, I ACa 530/04; G. Karaszewski, in: *Kodeks…*, Art. 388, point 11.

1045 P. Tereszkiewicz, *Obowiązki…*, p. 577–579.

1046 P. Tereszkiewicz, *Obowiązki…*, p. 579.

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obligations of the parties are taken into account. In addition, in some types of contracts, their random nature makes it impossible to assess the equivalence of benefits at the time of concluding the contract – this will be the case, for example, of an annuity contract due to the fact that at the time of concluding the contract, the life expectancy of the beneficiary is not known.[1047]

Second, the market value cannot measure the real value of the service unless it is shaped by the free and fair competition.[1048] If it is not so, then it is justified to refer to other criteria, e. g. elements that normally should affect the price of such good or service or prices on similar markets, but of a competitive nature.[1049]

Another problem concerns the entities who use the circumstances listed in Art. 388 CC affecting an unspecified number of persons. In this model, the problem of assessing the equivalence of benefits is related to the impact of the risk associated with concluding contracts with persons in a special situation on the value of the subject of the contract. In the case of a flood, the price of food may grow significantly, exceeding the usual price, but it is justified, as the value of these products in the given circumstances is clearly higher (e. g., due to numerous problems related to delivery, risk of damage, time and effort necessary on the part of the entrepreneur, high demand and low supply). Therefore, if the price set by the entrepreneur is justified due to the increase in the value of the item at hand, there will be no grounds for stating that the benefits are disproportionate. In this model, a person in a forced situation pays more for the good because its value is higher.

A different situation is the one where an entrepreneur makes his capital available to persons which are less likely to return it then it is generally accepted on the market. These persons pay more for the possibility to use the capital not only because the value of this service is higher, but also because this benefit should cover costs associated with the contracts concluded by other entities (those who fail to give back the money). In this case, there is a special cross-financing. Since a significant part of borrowers will not return the loan or possibly not even pay the entire provision fee, the lender transfers these costs onto the borrowers who pay the debt. On the one hand, therefore, also in this model, the performance of the entrepreneur has an increased value – when assessing the equivalence of benefits, the increased risk related to the provision of funds should be taken into account. On the other hand, the essence of such a model is that the borrower compensates the losses caused by failure to pay the debt by others.

1047 Judgment of the Appeal Court in Warszawa of 17. 09. 2014, VI ACa 1851/13, Legalis.
1048 R. Trzaskowski, *Granice*…, p. 449.
1049 R. Trzaskowski, *Granice*…, p. 449.

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Thus, from a functional perspective the performance to which the borrower is committed comprises two elements. The first is the "surplus" resulting from the increased risk of granting this particular loan – equivalent or not in the light of the amount of the increase in the value of the benefit in the form of the provision of funds. The second element is the "surplus" resulting from cross-financing. It is not associated with the risk related to this contract but the risk related to the other contracts concluded by the lender, and therefore will always be non-equivalent to the value of the benefit consisting in making a specific sum available (a quasi-guarantee element, only the guarantor's liability is not activated by a particular event, but the assumption that some debts will not be paid). In this case, the provision on exploitation could be applied if this surplus was grossly disproportionate.

In addition, the jurisprudence shows a tendency to graduate the requirements of the conditions of exploitation. When the disproportion in the value of the benefits is extreme, the courts tend to apply factual presumptions when examining the fulfillment of the subjective premises.[1050] Similarly, in the context of assessing the compliance of a legal act with the principles of social coexistence, it is indicated that the higher the degree of reprehensibility of an exploitative act, the smaller the difference in value will be seen as gross.[1051] On the other hand, the lack of due diligence at the side of the exploited speaks against recognizing even a very significant disproportion of benefits as a gross one.[1052] The above stays in line with the postulate of applying the idea of a mobile system to the conditions of exploitation – this allows to take into account the variability of the threshold of acceptable disproportion of benefits depending on the degree of implementation of other conditions.

1050 P. Tereszkiewicz, *Obowiązki…*, p. 574; judgment of the District Court in Gdańsk of 12.04.2016, XV C 380/15, Legalis (in case of exceptionally gross non-equivalence of benefits the court presumed that the the subjective premise at the side of the exploiting is fulfilled: "In the opinion of the Court, the defendant consciously exploited the claimant's situation. The mere fact that the defendant did not have any social or professional relations with the claimant does not mean that he did not take advantage of her forced position. It should be underlined that the Court knows from professional experience that some people borrow money taking a flat as a security, because from the fact that the borrower does not use the services of a banking institution they can deduce that this borrower is in a difficult financial situation.") E. Bagińska, *Glosa…*, p. 87.

1051 R. Trzaskowski, *Granice…*, p. 444; judgment of the Appeal Court in Szczecin of 28.01.2016, I ACa 922/15, Legalis. As the exploiting's behavior was the extremely reprehensible, the assessment of the fulfilment of the objective condition was made disregarding the precise value of this property, having in mind the life experience and widely known indicative real estate prices.

1052 Judgment of the Appeal Court in Warszawa of 14.03.2014, VI ACa 1184/13, Legalis.

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6.4. New context and effects of asymmetry between subjects of civil law – alternative protection mechanisms

Traditionally, the institution of exploitation was aimed at eliminating effects of a significant disproportion between the parties,[1053] strengthen contractual justice.[1054] These effects consisted, in essence, of using the circumstances of the weaker party to induce it to accept an unjustly high price of goods or services – leading to an imbalance between the main performances. This disproportion was assumed to be caused by extraordinary circumstances which forced a person to act in a state limiting his ability to effectively take care for own interests.[1055] Traditionally it was assumed that the disproportion of benefits is property-related.[1056]

In the consumer trade, the disproportion between the parties leads to slightly different results. The stronger entity shapes the entire contractual relationship in a way that is grossly disadvantageous for one of the parties. This effect is achieved by set of provisions that do not directly define the main performance of the parties or by abusing the information asymmetry in order to define the main performance so that they become disproportionate. Typical situations include exerting pressure or exploiting by the trader a particular weakness of the consumer in order to persuade him to conclude the contract. A stronger entity may also take advantage of its actual situation on a given market in order to overprice the good or service. Yet, the price determined in such manner is not grossly disproportionate from the perspective of an individual. Another manner of exploiting consumer's weakness is by setting the price of the good or service in a way which makes it impossible to assess in terms of proportionality.

1053 *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) Outline Edition*, ed. C. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll, Munich 2009, p. 67 https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf (accessed: 31.5.2021).

1054 R. Trzaskowski, *Wady…*, p. 74.

1055 *Principles…*, p. 67 (accessed: 31.5.2021).

1056 A. Rzetecka-Gil, in: *Kodeks cywilny. Komentarz. Zobowiązania – część ogólna*, Lex/el. 2011, Art. 388, point 18; R. Trzaskowski, C. Żuławska, in: *Kodeks…*, Art. 388, point 5; P. Zakrzewski, in: *Kodeks…*, Art. 388, point 10.

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6.4.1. An attempt to use the institution of exploitation to achieve a new goal. A case study

Despite the various effects of asymmetry, the institution of exploitation is seen as one of the tools to combat the common effects of inequality between entrepreneur and consumer.[1057] An example of an attempt to use the institution of exploitation as a tool to counteract undesired, in the light of the principles of civil law, behaviors in B2C contracts may be the judgment of the Regional Court in Brzeziny[1058] in a case concerning a credit agreement concluded by a consumer.

The facts of the case were as follows: the consumer concluded a loan agreement with the entrepreneur on very unfavorable terms. At the time of concluding the contract, the consumer was not yet in a spiral of debts, although his financial situation was difficult – and objectively he had not yet fulfilled the condition of being in the state of necessity. The consumer himself, on the other hand, believed that he was in a situation where he was forced to conclude a contract regardless of its conditions, what he expressed to the other party when concluding the contract.

In order to make this institution fit for the implementation of the indicated goal, the court interpreted the subjective and objective premise in a manner which was, in principle, inconsistent with the current case-law and legal scholarship. In the first place, he broadened the traditional interpretation of the subjective premise by assuming that the condition of forced position should be understood subjectively – a point of reference was what the consumer thought, not what his actual situation and its objective possibility on influencing one's beliefs was.[1059] Such interpretation seems justified in the light of the purpose of the norm – the possibility of exploitation appears as soon as the exploited starts to believe that he is forced to make a suboptimal decision because of the state of necessity he thinks he is in, and not because of the objective circumstances of his case. Therefore, whether the belief of the exploited is objectively justified should not be assessed.

Then, during the examination of the equivalence of benefits, the court compared the value of the capital provided by the entrepreneur to the scope of the consumer's liability, taking into account all contractual provisions. Yet, it is the equivalence between the benefit in the form of making the capital available for a specified period of time and interest which the debtor should pay for that.[1060] The obligation to reimburse the capital which was made available cannot be qualified

1057 E. Bagińska, *Glosa…*, p. 87.
1058 Judgment of the Regional Court in Brzeziny of 27.04.2017, I C 81/17.
1059 A. Rzetecka-Gil, *Kodeks…*, Art. 388, point 43; G. Karaszewski, in: *Kodeks…*, Art. 388, point 13; A. Olejniczak, in: *Kodeks…*, Art. 388, point 5; P. Zakrzewski, in: *Kodeks…*, point 15–17.
1060 T. Justyński, *Relacja…*, p. 103; W. Robaczyński, M. Wojewoda, *Wyzysk…*, p. 45.

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as part of the consumer's consideration – or more broadly, as a component of the contract fee.

At the same time, the court extensively discussed that the consumer had no real impact on the content of the contract, that individual provisions of this agreement were contrary to the law, that the entrepreneur failed to comply with the obligation of contractual loyalty because he exploited information asymmetry. Finally, the court underlined the need to protect consumer's trust in relations with professional entities. Therefore, it seems that the decisive factor for the application of Art. 388 CC was not that the premises of this norm were fulfilled but the fact that the entrepreneur abused the disadvantageous situation of the consumer in order to make him conclude a contract in which the rights and obligations of the parties – including the main performance – were grossly disproportionate.

Also, the direct effects of applying the provision turned out to be inconsistent with the purpose set forth by the court. Once the contract is declared null and void, both parties are obliged to reimburse benefits. In this case (loan agreement), it would mean that the consumer would be obliged to pay the entire debt immediately, which would be highly problematic from his perspective. To avoid this, the court stated that the exploited, by using up the enrichment before the proceedings began, did not have to reckon with the obligation to return it pursuant to Art. 409 of the Civil Code.[1061]

However, this manner of reasoning may also be challenged. First of all, it is assumed that Art. 409 CC should be applied only under exceptional circumstances in the case of pecuniary enrichment. Spending the money that was obtained is not considered sufficient in this regard.[1062] What is more, in practice, normally it will be impossible to demonstrate what exactly happened to the sum in question. Therefore, rarely the recipient of the benefit will be able to prove that he has used it for current expenses or for non-production purposes[1063] (broadly understood current consumption needs). In consequence, seldom the premise of consuming benefits in such a way that the person is no longer enriched will be considered met.

In the case law it is indicated that saving other expenses should also be considered an enrichment.[1064] Moreover, a person in question continues to be enriched when he has used the money obtained without legal basis at the expense of

1061 Art. 409 CC states that the duty to return the benefit or to return its value shall expire if the person who has gained the benefit, used it up or forfeited it in such manner that he is no longer enriched, unless if relinquishing the benefit or using it up he should have considered the duty to return it.

1062 Judgment of the Supreme Court of 4. 04. 2008, I PK 247/07, Legalis.

1063 A. Szpunar, *Glosa do wyroku SN z 14. 07. 1998 r., III CKN 578/97*, OSP 1999/4, item 85.

1064 Judgment of the Appeal Court in Warszawa of 27. 03. 2014, VI ACa 1186/13, Legalis.

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another entity to pay his own debt.[1065] Thus, the question is how to qualify the consumption of enrichment for current expenses related to periodic payments incurred to fulfill needs of one's daily life (e.g., to pay the rent). It could be argued that a timely payment (current expenditure) should be distinguished from the payment of an overdue debt (no longer being a current expenditure).[1066]

In the presented case, the court refrained from examining what the funds from the loan had been used for. It only stated that they had been spent and the defendant had no means to repay the debt.

To sum up, in order to make the institution of exploitation fit for reducing the effects of inequality in consumer trade and combating undesirable behavior of entrepreneurs, the court has proposed a creative interpretation of the subjective premise of exploitation. Then, it incorrectly determined which benefits should be compared when assessing the fulfillment of the objective condition. Thus, it escaped from considering the permissibility of transferring the risk related to the failure to pay the debt by other persons who borrowed the money from that entrepreneur onto an individual consumer. Finally, in an attempt to protect the consumer and penalize the entrepreneur's behavior as well as to correct the risk distribution,[1067] it presumed that the premises of consuming the enrichment under Art. 409 CC.

Non-standard interpretation allowed in this case to protect the consumer against abuse of the position by the trader. However, even if the proposed interpretation is commonly adopted and the admissibility of applying the presumption is not questioned, it will not turn exploitation into an effective tool to combat undesirable systemic phenomena. It is mainly because even so the institution of exploitation will not become a tool of general protection – only the scope of its application on an individual level will be broadened.

1065 Judgment of the Supreme Court of 5.10.2012, I PK 86/12, Legalis.

1066 Similarly regarding utility bills: D. Fuchs, A. Malik, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, ed. M. Fras, M. Habdas, Warszawa 2018, Art. 409, point 4.

1067 "In this circumstances the Court dismissed the claim in its entirety. Even if a claim for unjust enrichment was admissible, the defendant was no longer enriched as she had used up the enrichment when she believed that the contract was binding. The claim of the plaintiff who committed a tort against her, if admitted, would drastically worsen her financial and life situation, which would be against the principles of social coexistence. Since the plaintiff, as a professional with the term "bank" in the name, which suggests trust, treated the defendant consumer in this manner, then he should bear the entire responsibility for it, and not share it with the defendant who actually used the plaintiff's capital, but is not currently able to return it in any part, nor will be able to do it in the future." Judgment of the Regional Court in Brzeziny of 27.04.2017, I C 81/17.

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6.4.2. Exploitation of the weaker party by imposing abusive clauses – supplement and *lex specialis* to the institution of exploitation

The stronger entity shapes the content of the contract using standard terms. Created asymmetry does not concern the main benefits, but the remaining elements of the obligation relationship. What is more, it does not occur occasionally but is a common phenomenon. It becomes a standard in consumer trade. In this regard, a tool for removing the negative effects of one of the parties' weakened negotiating power is the regulation of abusive clauses. It is an instrument of increased (in relation to general principles – Article 58 § 2, Article 353^1, Article 388 of the Polish Civil Code) control of the content of provisions imposed by a professional entity.[1068] Its purpose is to replace the formal balance of the parties' rights and obligations established in the contract with a material one.[1069]

The question is whether the regulation of abusive clauses only supplements the protection provided for by the institution of exploitation. In principle, these institutions should be complementary. Art. 388 CC protects the weaker party against the business imposing a gross disproportion as to the main performance, and the provisions governing the effects of unfair contract clauses – against shaping the remaining contractual provisions in a manner contrary to good customs, grossly violating the interests of the consumer. However, the legislator does not introduce a disjointed division, allowing for the examination of the clauses specifying the main performance, provided that they are non-transparent. As a result, there are cases where the conditions for protection under Art. 388 CC and under Art. 385^1 CC will be met. This may reduce the practical utility of one of these protection regimes – being rather Art. 388 CC. In order to assess to what extent the competition of protection regimes will affect the usefulness of the institution of exploitation, it is necessary to check how the interpretation of the term "main performance" affects the scope of situations in which the convergence of norms will be observed. Then, it is necessary to consider the effects of granting the primacy[1070] to the norm on abusive clauses – above all,

1068 R. Trzaskowski, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna*, ed. J. Gudowski, Warszawa 2017, Art. 385^1, Art. 385^2, Art. 385^3, point 2.

1069 Judgment of the CJEU of 26.10.2006, C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL, point 36; judgment of the CJEU of 6.10.2009, C-40/08, Asturcom Telecomunicaciones v. Cristinie Rodríguez Nogueir, ECLI:EU:C:2006:675, point 30, further: judgment C-40/08, Asturcom; judgment of the CJEU of 9.11.2010, C-137/08, VB Pénzügyi Lízing v. Ferenc Schneider, ECLI:EU:C:2010:659, point 47; judgment of the CJEU of 15.03.2012, C-453/10, Jana Pereničová, Vladislav Perenič v. SOS financ, spol. s o., ECLI:EU:C:2012:144, point 28, further: judgment C-453/10, Pereničová, Perenič.

1070 In legal scholarship two approaches were proposed: according to the first one Art. 385^1 CC excluded applicability of Art. 388 CC (P. Machnikowski, W Czachórski), and according to the second, it does not (M. Bednarek, E. Łętowska, K. Osajda). E. Łętowska, K. Osajda, in:

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whether its application will actually make invoking the protection provided in Art. 388 CC senseless.

The Polish legislature in Art. 385^1 § 1 sentence 2 CC excludes the possibility of examining the abusiveness of clauses which are clearly defining the main performances of the parties. This norm should be interpreted in accordance with Art. 4.2 Directive 93/13, excluding from the scope of control both the main subject of the contract and the ratio of the quality of the goods and services to their price.[1071] The rationale for this restriction is the assumption that these provisions are consciously adopted by the parties[1072] and embody both the will to conclude a contract and agreement's economic purpose.[1073] They are usually the result of individual arrangements and negotiations.[1074] In addition, it is indicated that these elements usually constitute a point of reference for the consumer at the time of deciding on contract conclusion, hence – if they meet the requirement of transparency[1075] – their content shall not surprise the consumer.[1076] The above mean that the understanding of the concept of "main performance" begins to play a key role.

It is commonly assumed that when interpreting this norm of the domestic law, this concept should be understood narrowly (exception to the principle of controlling the content of a contract). In the Supreme Court's case law a permanent, commonly used set of criteria determining the nature of a given clause

System…, p. 652–653. On the doubts as to the application of the *lex specialis derogat legi generali* rule in this regard: Chapter 4.3.3.

1071 M. Grochowski, *"Postanowienia określające główne świadczenia stron" (art. 385^1 § 1 k.c.): kryteria kwalifikacji w orzecznictwie Sądu Najwyższego*, Pal. 2017/9, p. 89–90.

1072 Otherwise, the agreement would not be concluded due to lack of consensus.W. Czachórski, *Zobowiązania…*, p. 171.

1073 R. Trzaskowski, in: *Kodeks…*, Art. 385^1, Art. 385^2, Art. 385^3, point 16.

1074 A. Olejniczak, in: *Kodeks…*, Art. 385^1, point 6.

1075 On the principle of transparency in consumer law: J. Luzak, *Doprecyzowanie zasady transparentności w polskim prawie konsumenckim*, SPP 2020/1, p. 43–59. In the context of online platfoms see also: Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186) p. 57–79; Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM(2020) 825 final 2020/0361 (COD) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en (accessed: 31. 5. 2021); Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM (2020) 842 final 2020/0374(COD) https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN (accessed: 31. 5. 2021); P. Iamicelli, *Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity*, ERPL 2019/15(4), p. 392.

1076 For a comprehensive analysis on the matter see: M. Grochowski, *"Postanowienia…*, p. 89–93.

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has not yet been developed.[1077] However, the tendency for a narrow interpretation of the aforementioned category led to the emergence of the principle of controlling the abusiveness of clauses – it is presumed that every provision is subjected to control, unless the content of the contract or the circumstances of the case support the opposing conclusion.[1078] Two main points of reference have been established. When assessing the nature of a given clause, it should be verified whether it specifies the subject-matter essential elements of the contract (if so, this will support the assumption that the provision specifies the main performances of the parties). Next, it is necessary to check what is the function of the performance specified in this provision – what is its place in the structure of the contractual bond and what will be its importance from the perspective of the economic interests of the party[1079] – therefore, whether this performance meets the main purpose of the contract.

Nowadays, the view is that clauses specifying mechanism for determining the performance (e. g., calculating the price) should be subjected to control, as they do not define the main benefit, but only the method of calculating the amount.[1080] However, even if such provision was seen as defining the main performances of the parties, the transparency of this way of describing performance should be assessed. The requirement of transparency should be interpreted broadly[1081] – so that it covers: the language of the clause (it should be simple and understandable[1082] to a consumer who on the one hand does not know the professional vocabulary, and on the other is a native speaker of a particular language),[1083] the structure of the provision (references to other sources reduce transparency of the norm at hand)[1084] and with the economic effects of such method of determining the main performances[1085] (the consumer should be able to estimate, based on unambiguous and understandable criteria, the economic consequences arising for him from the contract).[1086]

1077 M. Grochowski, "*Postanowienia*…, p. 82.
1078 M. Grochowski, "*Postanowienia*…, p. 82.
1079 M. Grochowski, "*Postanowienia*…, p. 83.
1080 M. Grochowski, "*Postanowienia*…, p. 83.
1081 Judgment of the CJEU of 30. 04. 2014, C-26/13, Árpád Kásler & Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt ECLI:EU:C:2014:282, point 72, further judgment C-26/13, Kásler.
1082 Art. 5 dir. 93/13, regarding contractual conditions set forth in writing.
1083 M. Loos, J. Luzak, *Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers*, JCP 2016/39(1), p. 87.
1084 M. Loos, J. Luzak, *Wanted*…, p. 87.
1085 This information about contractual conditions and the consequences of concluding the contract is of fundamental importance for the consumer.
1086 Judgment C-26/13, Kásler, point 75.

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The lack of transparency of provisions of the contract concluded with the consumer, which were not individually negotiated, justifies the assumption that they are, indeed, unfair.

Legal authors indicate that, when consumer protection against violations of the principle of contractual equity is considered, Art. 385^1 § 1 CC may[1087] constitute a *lex specialis* to Art. 388 CC, provided that the provisions describing main performances have been specified in a non-transparent manner.[1088] If these provisions are abusive, the agreement will be annulled in its entirety due to the lack of consensus.[1089] The same happens, if the clause determining that a contract at hand belongs to a specific type of agreements (e.g. is a sales agreement) is considered abusive.[1090]

This solution may turn out to be less beneficial for the consumer than changing the content of the contract by the court or even than leaving the unfavorable contract terms as they stand.[1091] Therefore, legal authors[1092] draw an analogy from Art. 388 CC, which then gives an opportunity for the judicial adjustment of the parties' performances. It would consist in changing the clause while maintaining some parts of its original effects of the decision – the court could find the clause ineffective insofar as it goes beyond the permissible content.

Hence, provided that the non-transparent provision specifying the main performance was to shape parties contractual obligations in a non-equivalent manner, they would be "reduced" so that the parties' performance could become proportionate. It is indicated, however, this would be contrary to the principle of transparency and, from the long-time perspective, also against the interests of consumers – the possibility of filling the gap by the court means that the norms on abusive clauses cease to play their dissuasive function.[1093] Allowing for such

1087 So: P. Machnikowski, *Swoboda umów według Art. 353^1 k.c. Konstrukcja prawna*, Warszawa 2005, p. 372; R. Trzaskowski, *Skutki…*, p. 604. Differently: M. Skory, *Klauzule abuzywne w polskim prawie ochrony konsumenta*, Zakamycze 2005, p. 182–185.

1088 A. Olejniczak, in: *Kodeks…*, Art. 385^1, point 1. Differently: M. Bednarek, in: *System…*, p. 761–762.

1089 F. Zoll, in: *Prawo…*, Art. 109, p. 316; M. Bednarek, in: *System…*, p. 759.

1090 R. Trzaskowski, *Skutki…*, p. 317–318.

1091 Ł. Węgrzynowski, *Niedozwolone postanowienia umowne jako środek ochrony słabszej strony umowy obligacyjnej*, Warszawa 2006, p. 75–76.

1092 F. Zoll, in: *Prawo…*, p. 342.

1093 It is also not allowed to divide the content of the examined clause and to find that only part of it is abusive. A. Wiewiórowska-Domagalska, *Bułgarski standard*, Gazeta prawna 21.08.2015; M. Bławat, K. Pasko, O *zakresie zachowania mocy wiążącej umowy po eliminacji klauzul abuzywnych*, TPP 2016/3, p. 12–13; Na temat funkcji odstraszającej: F. Cafaggi, P. Iamiceli, *The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions*, p. 28–29 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2898981 (accessed: 31.5.2021).

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change of the content of contract could constitute an incentive for entrepreneurs to use non-transparent contractual clauses specifying the main performances of the parties, because the sanction would not be the annulment of the contract, but its adaptation to the requirements of the legal order.[1094]

Another solution that has been proposed is based on the theory confirmation, according to which a consumer who does not want the contract to be annulled may confirm the abusive clause and then request modification of the content of the contract pursuant to Art. 388 CC.[1095]

This interpretation results from the specific understanding of the sanction of suspended effectiveness, specified in Art. 385^1 § 1 CC, according to which unlawful contractual provisions are not binding for the consumer.[1096] This sanction applies *ex lege* and *ab initio*, but it allows for the contract to be confirmed by a person specified by law. With this confirmation, the contract becomes effective *ex tunc*.[1097] In principle, the Polish legislature sanctions in this manner situations where one of the parties is especially vulnerable i. e. in a situations similar to these regulated by Art. 385^1 CC.[1098] Thus, also here, it should be possible for the consumer to confirm the unfair contract term once the circumstances which caused his particular weakness disappeared.[1099] Mentioned confirmation of the unfair term should, therefore, be allowed only after the conclusion of the contract (at the earlier stage, the consumer has no position that would allow him to negotiate

1094 The possibility of clause reduction was considered in the jurisprudence and legal scholarship: Judgment of the Supreme Court of 14. 05. 2015, II CSK 768/14, OSNC 2015/11, item 132; M. Romanowski, *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe* in *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości UE*, ed. M. Romanowskiego, Warszawa 2017, p. 38–39, 75–83; I. Karasek-Wojciechowicz, *Wpływ niedozwolonego charakteru klauzuli na związanie stron umową*, TPP 2018/2, p. 59–66.

1095 R. Trzaskowski, *Skutki…*, p. 605.

1096 It is not possible to assume that the provision provides for a sanction of invalidity or ineffectiveness of part of the contract, because such effect by its nature works *erga omnes*. The literal wording of the provision indicates that the abusive contract provisions do not bind the consumer but bind the entrepreneur. Similarly, it is unjustified to argue that the legislator, stating that a provision does not bind the consumer, allowed for the rebuttability of such provision. This interpretation would be contrary to the CJEU case-law, according to which consumer protection should apply *ex officio*. The provision does not provide for a sanction of relative ineffectiveness, as Polish law knows only relative ineffectiveness in relation to a third party only, and not in relation to the other party to the contract. (R. Trzaskowski, *Skutki…*, p. 598–600). On the character of this sanction see: M. Bławat, K. Pasko, O *zakresie…*, p. 12–13; J. Pisuliński, *Sankcja zamieszczenia w umowie niedozwolonego postanowienia w świetle dyrektywy 93/13/EWG i orzecznictwa TSUE,* in: *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości*, ed. M. Romanowski, Warszawa 2017, p. 91–102.

1097 R. Trzaskowski, *Skutki…*, p. 600.

1098 R. Trzaskowski, *Skutki…*, p. 601.

1099 R. Trzaskowski, *Skutki…*, p. 601.

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the contract without the clause indicated) and when the consumer becomes aware of the unfair nature of the provision and its ineffectiveness.[1100]

An alternative is to supplement the content of the legal relationship with other norms. It is claimed that it is permissible to fill gaps of the contract if there is a clear normative basis for doing so[1101] e.g. Art. 537–538, 628, 735 and 836 CC.

The reasoning of the EU legislature differs, which is clearly visible in the analysis of the CJEU judgments in the cases of Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt[1102] and Banco Español de Crédito, SA v. Joaquín Calderón Camina.[1103] The EU legislature provides for the national legislatures to limited autonomy in determining the fate of an unfair contract term, as long as the application of national law provisions grants the effect that the provision in question does not bind the consumer.[1104] At the same time, however, the EU legislature, in the second part of the sentence of Art. 6.1 of Directive 93/13 and its twenty-first recital stipulates that a contract concluded between a trader and a consumer shall continue to bind the parties upon those terms if it is capable of staying in existence without the unfair terms. Hence, it can be inferred that sole effect of the application of domestic provisions should be the elimination of unfair provisions, so that they do not shape the legal situation of the parties. National courts are therefore obliged not to take into account the content of the unfair contract term when decoding the obligatory effects of the contract on the consumer. EU law does not, however, authorize national courts to change the content of such a provision.[1105] Power of that nature could jeopardize the achievement of the long-term objective of Directive 93/13, as defined in Art. 7 (preventing the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers). The possibility of supplementing the contract

1100 The consumer's weakness is related to his contractual position, which excludes the possibility of determining the content of the contract through individual negotiations, as well as to the lack of awareness of the legal and economic effects of individual contractual provisions. The conclusion of the contract makes the first of reasons behind consumer's weakness irrelevant (after the conclusion of the contract, the consumer's position is not strengthened, but it is no longer possible to force him to accept individual provisions by threatening him than otherwise the stronger party will not enter into this contract). Therefore, it is justified to allow the consumer to aknowledge an abusive clause only after he learns about its ineffectiveness and understands how it influences his contractual situation. Then he will be able to compare the effects of annulment of the contract and of its further existence (with unchanged contractual rights and obligations). If he finds that it is in his best interest to be bounded by the abusive clause, then he should be able to confirm it.

1101 Ł. Węgrzynowski, *Niedozwolone*…, p. 75–76.

1102 Judgment C-26/13, Kásler.

1103 Judgment of the CJEU of 14.06.2012, C-618/10, Banco Español de Crédito SA przeciwko Joaquínowi Calderónowi Caminie, ECLI:EU:C:2012:349, further: Judgment C-618/10, Banco Español.

1104 Judgment C-40/08, Asturcom, point 58; Judgment C-453/10, Pereničová, Perenič, point 30.

1105 Judgment C-618/10, Banco Español, point 64–65.

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could constitute an incentive for entrepreneurs to continue using unfair terms in contracts with consumers – their lack of binding power would not, in principle, lead to the annulment of the contract, as it would be possible for the national court to supplement the agreement so that it can still bind the parties.[1106] Therefore, it is assumed that Art. 6.1 of Directive 93/13 must be interpreted as precluding a provision of a Member State which, in the annulment of an unfair term, allows the said contract to be supplemented by amending that contractual clause by a national court.[1107]

However, in the case of some contracts, excluding an unfair term and, consequently, the annulment of the contract may have more negative consequences for the consumer than for the entrepreneur.[1108] This will be the case of, among others, contracts for the provision of funds, when the consumer will have to pay back the money much earlier than he expected. Thus, the application of the protection provided for in the provisions of national law implementing Art. 6.1 of Directive 93/13 may lead to an effect which is contrary to the interests of the protected entity. Then – from the longer perspective – such interpretation of the provision will be encouraging application of unfair contract terms, because the effects of invoking protection will be much more detrimental to the consumer than remaining in a defective contractual relationship.

For this reason, in the light of the purpose of the directive pursuant to Art. 7 (to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers) and Art. 6.1 of Directive 93/13 (replacing the formal balance between the rights and obligations of the parties to a consumer contract with the material one), under these special circumstances, it should be considered permissible to replace the unfair term with a provision of national law of an optional nature, if it is in the consumer's interest.[1109] However, it is not permitted to fill gaps in the content of the contract under national law provisions if these are of a general nature (e. g., a norm provides only that the content of the legal transaction should correspond with the principles of equity or established customs). The fact that the parties to the contract consented to the court supplementing the agreement in this manner is irrelevant.[1110]

Summing up, the tendency to narrowly interpret the concept of "main performance" with the broadest possible understanding of the transparency re-

1106 Judgment C-618/10, Banco Español, point 69.
1107 Judgment C-618/10, Banco Español, point 73.
1108 Judgment C-26/13, Kásler, point 84.
1109 Judgment C-26/13, Kásler, point 80; compare with: judgment of the Supreme Court of 14. 07. 2017, II CSK 803/16, OSNC 2018/7–8, item 79 and M. Romanowski, *Życie*…, p. 75–83 on the application of *ius dispositivi per analogiam.*
1110 Judgment of the CJEU of 3 October 2019, C-260/18, Dziubak, ECLI: EU: C: 2019: 819, point 62.

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quirement, leads to the conclusion that the scope of the situation in which it would be possible to invoke Art. 388 and Art. 385^1 of the Polish Civil Code it is relatively wide. In these cases, the regulation of prohibited contractual clauses should always be applied first.

Currently, it should be assumed that after the provision is declared not binding, it is not allowed to convert the contract into an agreement of a different type (e. g., a sale contract, which after the recognition of the provision specifying the price becomes a donation contract).[1111] Similarly, it is not permissible to supplement the missing provision with the term decided upon by the court (e. g., a court is not allowed to determine the price in accordance with the market value of the item),[1112] or to reduce the contractual provision. It is only allowed to replace the unfair contract term with a dispositive provision. Due to the lack of price regulation, the usefulness of the above rule turns out to be limited.

In principle, once the provision specifying the main performances of the parties is found abusive, it impossible for the contract to continue to exist, which automatically excludes the possibility of invoking Art. 388 CC. However, this effect is not always optimal for the protected entity. Thus, from the perspective of the protected one, it would be recommended to assume that Art. 385^1 CC provides for a sanction of suspended effectiveness, which makes it possible for the consumer to confirm an abusive clause. Such solution, allowing the consumer to prevent the contract from being annulled, remains consistent with the indications of the CJEU. Furthermore, it opens the possibility for the consumer to consider seeking a reduction in his performance or an increase in the benefit due. This leads to the conclusion that the rules on the abusive clauses, although may limit the usefulness of the institution of exploitation in consumer trade, should not lead to disappearance.

6.4.3. A model of the regulatory reaction to the abuse of information asymmetry by an entrepreneur – an example of consumer credit framework

The information asymmetry by the entrepreneur becomes a problem in the case of highly complex contracts, where the consumer, as a rule, does not have the knowledge or experience necessary to understand the content of the contract and its economic consequences without the help of a professional. Thus, the business can easily abuse of this information asymmetry in order to introduce disproportion between the rights and obligations of the parties, including the main

1111 I. Karasek-Wojciechowicz, *Wpływ…*, p. 48–49; judgment of the CJEU of 3 October 2019, C-260/18, Dziubak, point 45.

1112 I. Karasek-Wojciechowicz, *Wpływ…*, p. 58.

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performances, or in general to persuade the consumer to conclude a contract objectively unfavorable for him. The legislature may counteract these abuses either by implementing instruments aimed at enabling the weaker party to make an informed contractual decision (first and foremost, by providing mechanisms aimed at mitigating information asymmetry such as pre-contractual information obligations), or by limiting the contractual freedom of the parties so that a specific type of abuse becomes impossible.

In some cases, the peculiar nature of a given type of contract incites the legislature to implement both protection models at once – on the one hand, for example, specific information obligations are imposed on the entrepreneur,[1113] and on the other relatively rigid, objectified protection mechanisms, precisely defining the criteria for the admissibility of concluding a specific type of contract are introduced. Rules on consumer credit agreements are an excellent example of such practice. In addition to the information obligations,[1114] the EU legislature has foreseen a mandatory creditworthiness checking procedure, which is intended to protect consumers against incurring debts that they will not be able to pay off.[1115] Therefore, if the consumer is not creditworthy, the bank should not, in principle, grant him the credit.[1116] Thus, the legislature establishes a personalized[1117] ban on contract conclusion – it only applies to this consumer as long as he is in a situation defined by the act (lack of creditworthiness).

The requirement of creditworthiness is, however, of the public law nature – the fact that the consumer was not creditworthy does not lead to the contract being null and void. Consequences related to concluding an agreement with a person lacking that quality (apart from the necessity to take into account the higher credit risk)[1118] can only be drawn against the bank as part of supervision measures,[1119] therefore the above-mentioned regulatory model will not be further discussed.

1113 On the invalidity of a legal transaction due to the breach of the information obligation in this model: P. Tereszkiewicz, *Obowiązki…*, p. 584–585.

1114 Art. 4–6 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, p. 66–92).

1115 Art. 8 dir. 2008/48, judgment of the CJEU of 27. 03. 2014, C-565/12, LCL Le Crédit Lyonnais SA v. Fesih Kalhan, ECLI:EU:C:2014:190, point 42, 43.

1116 Art. 9.1 of the Act of 12. 05. 2011 on Consumer Credit (consolidated version, Journal of Laws 2019, item 1083 with changes) in connection with Art. 70.1 of the Act of 29. 08. 1997 Banking Law (Journal of Laws 2020, item 1896 with changes), an exception to the rule specified in Art. 70.2 of the Banking Law.

1117 Its infringement triggers a public law sanction.

1118 A. Kawulski, *Prawo bankowe. Komentarz*, Warszawa 2013, Art. 70, point 6.

1119 Z. Ofiarski, *Prawo bankowe. Komentarz*, Warszawa 2013, Art. 70, point 2.

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6.4.4. The stronger entity exploits its position on a given market in order to impose onerous contract terms

A typical example of situations in which a stronger entity abuses its position on a given market to its own benefit is when a dominant entrepreneur imposes onerous contract terms. The outcome of that practice may be similar to the effects specified in Art. 388 of the Civil Code, but in the case of Art. 9 paragraph 2 point 6 of Act on Competition and Consumer Protection[1120] the benefits gained by the stronger party do not have to be of a material nature. For this reason, it is claimed that in the event of an abuse of a dominant position by imposing onerous contract terms by a dominant entity, there are no grounds for applying Art. 388 CC.[1121]

6.4.5. The payment with data model – proportionality evaluation dilemmas

Another typical situation is that the entrepreneur determines the price in a manner that renders it difficult or impossible to assess the proportionality between the price and his specific performance. Such tendencies can be commonly observed in digital content contracts, where the "paying with personal data" model is commonly used.[1122] The main question is related to the nature of this type of contract – are the contracts in which the entrepreneur undertakes to provide a service in return for the consumer's consent to personal data processing[1123] a gratuitous contract?

First, it depends on whether the provision of data can be considered a service at all, and then – whether the consumer actually decided to provide data of that kind.[1124] Data provided by consumers, usually constituting personal data within the meaning of the GDPR,[1125] have certain value[1126] – their disclosure leads to

1120 Journal of Laws 2021, item 275.

1121 K. Kohutek, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, K. Kohutek, M. Sieradzka, 2nd ed., Warszawa 2014, Art. 9, point 7.9.

1122 M. Narciso, '*Gratuitous' Digital Content Contracts in EU Consumer Law*, EuCML 2017/5, p. 198.

1123 The consumer may disclose some of their personal information or consent to information about him being gathered (e. g., by cookies). C. Bedir, *Contract Law in the Age of Big Data*, ERCL 2020/16(3) p. 353–356. On the consent as an object of obligation: M. Schmidt-Kessel, *Consent for the Processing of Personal Data and its Relationship to Contract*, in: *Digital Revolution – New Challenges for Law*, ed. A. Franceschi, R. Schulze, M. Graziadei, O. Pollicino, F. Riente, S. Sica, P. Sirena, München – Baden-Baden 2020, p. 82.

1124 M. Narciso, '*Gratuitous*'…, p. 204–205.

1125 Art. 4.1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal

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enrichment of the entrepreneur. On the other hand, however, data disclosure itself does not impoverish the consumer. The enrichment does not occur at the expense of the other party.[1127] Thus, a contract in which the main obligation of the consumer is to provide data is a hybrid in some way – is cannot be easily classified as a paid contract or a gratuitous contract. Under EU law it is assumed that such contract can be considered a paid contract, as long as the obligation to provide data has been effectively incorporated (that is individually agreed).[1128]

The provision of data may be made directly (by completing a form) or indirectly (by sending a message containing this information via the messenger X to the entrepreneur Y, when in the contract for the use of this tool the consumer agreed to provide the data to the entrepreneur Y) – it does not matter when qualifying the contract. The decisive factor is the way in which consent is given. The consumer may give his consent actively, intentionally and consciously – if he wilingly discloses certain information to the entrepreneur, knowing that his behavior will have such effect (filling in the form). The consent may also be given actively, but unintentionally – if the consumer, by his own actions, discloses certain information to the other party in return for its service, but without being aware that the data serves as a benefit (downloading a free application and consenting to sharing the data). Finally, the consent may be seen as passive and unintentional – e. g. when the mere use of the website is, according to the entrepreneur's regulations, tantamount to consent to the data disclosure (this is how the use of pre-ticked boxes by the entrepreneur should be qualified).

In the first and second cases, the consumer's consent is considered to be expressed through action – the provision of data can therefore be treated as actually agreed by the parties. If the consumer remains passive (the third scenario), there is no effective consent to the processing of personal data, and therefore there will be no grounds to believe that the parties have effectively indicated that the provision of data was designed to be the performance of the consumer. Such contracts will therefore be classified as the gratuitous ones, which, from the point of view of contractual protection, will usually be unfavorable to the consumer.[1129]

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data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, p. 1–88).

1126 W. Eggers, R. Hamill, A. Ali, *Data as currency*, Deloitte Review 2013/19; C. Langhanke, M. Schmidt-Kessel, *Consumer Data as Consideration*, EuCML 2015/6, p. 220.

1127 M. Narciso, '*Gratuitous*'…, p. 200, 201.

1128 Rec. 18 Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF (accessed: 31. 5. 2021); Art. 3.1 dir. 2019/770.

1129 M. Narciso, *'Gratuitous'*…, p. 204–205; M. Narciso, *Consumer Expectations in Digital Content Contracts – An Empirical Study*, Tilburg Private Law Working Paper Series 2017/1, p. 2–3 https://ssrn.com/abstract=2954491 (accessed: 31. 5. 2021).

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However, stating that the provision of data by the consumer constitutes a specific performance does not facilitate the assessment of the proportionality between data disclosure and the other party's performance. The key factor is the assessment of the value of the shared data – and, as a rule, the consumer will not be able to judge it on his own because the final value of that data will depend on their usefulness to the other party. In addition, at the time of the contract conclusion, the value of the obligation to provide data may be impossible to estimate, because e.g. sharing information will take time (e.g., data can be shared throughout the duration of the contract – at the beginning the consumer's data will have a negligible value, but it will increase over time), the amount of data shared may depend on the future activity of the entrepreneur, subsequent consents to profiling of that user or even the applicable regulations (the scope of data that the other party is authorized to process under applicable law).

Thus, the premise of exploitation being a gross disproportion of benefits (assessed at the time of contract conclusion), in most contracts based on the "pay with data" model, will not be met due to the inability to determine the value of the consumer's performance (data sharing). It is crucial to choose the method of assessing the value of sharing data and granting consent to their processing already at the stage of concluding the contract. The elements that should undisputedly be taken into consideration are: the suitability of this type of data to generate profit if used by an entrepreneur; who determines the final scope of the consumer's performance (whether the consumer is free to decide how much and what data he will provide, whether the provision of a minimum amount of data will be forced by the system architecture, and whether the consumer will be making decisions about disclosing every piece of information separately or whether the data will be downloaded automatically, despite consumer's passivity).

6.4.6. Exercising pressure or exploiting a particular weakness of the consumer in order to persuade him to conclude a contract – chosen market practices in consumer e-commerce

In the consumer e-commerce there are some practices which cannot be regarded as fulfilling the premises of threats or exploitation but nevertheless lead to a significant limitation of the autonomy of a person's will. They either generate unlawful pressure on the person or aim at exploiting the pressure which has already been caused by another entity or by the circumstances in which this

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person finds himself. In both cases, these practices are related to the personalization of the content made available to the consumer.[1130]

Content personalization means that there are mechanisms collecting data – some of them can be directly linked to the process data gathering carried out by entrepreneur (e. g., cookies, forms, surveys), while others tend not to be seen as such (e. g., quizzes, customization options, evaluation systems, analysis of search results). Based on that data, potential customers are profiled. Subsequently the next step is to provide the consumer with the tailored content. This personalization, however, does not have to entail actual individualization. Depending on the personalization mechanism, the individualization might be only an illusion – the presented content may actually correspond to the situation or expectations of a specific person, but be the result of the effective segmentation of potential customers: assigning potential consumers to appropriate groups and then sending them a message addressing the feature which is common for all of them. It is also possible to base the mechanism on an individual reaction to a person's behavior – his action may trigger system's response, the content of which will be compiled considering the data about him which has already been collected. In this case, the responsiveness of the tool is of the utter importance because the content needs to reach the consumer before he makes a contractual decision or before the circumstances which are pushing him to a particular choice cease to affect him.

The most interesting element from the point of view of this analysis[1131] is how the use of personalization can lead to an effect similar to the threat and exploitation:[1132] by an unacceptable pressure, it significantly limits or may limit the

1130 On the impact of personalization on the consumer's decision-making autonomy see: G. Wagner, H. Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences. Regulating the Dark Side of Personalized Transactions*, U Chi L Rev 2019/86, p. 592–593, 597–600. On the legal consequences of the application of personalization techniques: K. Południak-Gierz, *Consequences of the use of personalization algorithms in shaping an offer – a private law perspective*, MU J. L. T. 2019/13(2), p. 164–178; K. Południak-Gierz, *Personalized agreement – a new contractual model*, Vestnik of Saint-Petersburg University. Law 2020/11, 1015–1017; K. Południak-Gierz, *Personalization of consumer contracts…*, 270–272.

1131 The issues related to the processing of personal data, the impact of personalization on the information obligations of the entrepreneur, the civil law effects of the use of algorithms in shaping the offer on the content of the obligation relationship remain beyond the scope of the analysis. K. Południak-Gierz, *Dangers…*, p. 25–37; K. Południak-Gierz, *Personalization of Information…*, p. 297; C. Busch, *The Future…*, p. 221; P. Hacker, *Personalizing…*, p. 651.

1132 A graduate who suffers from a very strong fear of exclusion and at the same time is easily influenced by authority, receives an advertisement which shows that research confirms that the vast majority of people who enter a particular university ad their teeth whitened. Advertising makes the person believe that not using the teeth whitening treatment will significantly reduce their admission chances. Another example is the case of a person who

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freedom of choice of the average consumer or his behavior towards the product, and thus causes or may cause him to take a contractual decision that he would not have taken otherwise. These practices either generate an unlawful pressure leading to a significant limitation of the decision-making autonomy of the person at whom they are directed, or aim at exploiting a particular situation of the person or pressure caused by another factor.

6.4.6.1. The special relationship between the sender and recipient of the message – intimacy

Among the mechanisms generating unlawful pressure on the person to whom they are directed, the ones which are based on authority-related pressure are particularly interesting. It is claimed that influencing the declarant by a person in the position of authority (a parent, a cleric, respected older colleague, etc.) does not constitute a threat under the Art. 87 CC even if it pushes the declarant to make a declaration of a given content (*timor reverentialis*).[1133] On the other hand, it is postulated that this type of situation should be considered sufficient to fulfill the premise of forced position in the context of exploitation (Art. 388 CC).

A market practice based precisely on the exploitation of this type of relationship has already emerged in the Internet environment. Chatbots are becoming more and more popular nowadays. In general, they can be divided into those based on a set of rules and the more advanced ones using machine learning. The first model responds only to specific commands – if the question is formulated in an unusual way, the bot will not be able to identify the context. The second type of chatbot plays the role of a permanent communicator, activated once a question is asked by a potential customer. Chatbot can act as an automated, virtual representative of an entrepreneur, dealing with customer service, sales and marketing – it answers questions in real time and uses natural language, imitating a natural person.[1134]

has just learned about their disease and receives advertising for a treatment that allows avoiding ailments identical to the symptoms of that disease.

1133 B. Lewaszkiewicz-Petrykowska, in: *Kodeks…*, Art. 87, point 2.

1134 Examples of chatbots: Sephora (Sephora Virtual Artist on Facebook) – offers the user make-up tips and suggests product based on their answers to questions about the products used so far, links offers; H&M–creates a user's fashion profile, recommends products, it is possible to conclude a contract in a conversation with a bot; eBay (ShopBot) – helps you find items for the price set by the user. Similar functions are performed by personal assistants such as Google Assistant or Alexa, which are used for voice control of the phone and other integrated devices (e.g., a smart home), but are also able to conduct an ordinary conversation with the user. The main difference (beyond the scope of functions) is that currently assistants still do not weave sponsored content into spoken messages. For a description of the Alexa assistant functionality presented from the user's perspective see: https://www.spidersweb.pl/2017/01/alexa-w-polsce-opinie.html (accessed: 31.5.2021).

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Contrary to spam materials or pop-out windows, the marketing strategy here is based on the opt-in, pull model, which encourages users to obtain content related to the entrepreneur, product or service via instant messaging. It is the potential consumer who initiates contact with the bot, who each time decides about the course of the conversation and the type and content of the information provided. He can also end the conversation at any time. Unlike spamming practices, which may be considered an aggressive market practice, regardless of whether they are based on the opt-out or opt-in system, due to their nuisance,[1135] the intensity of contact here depends on the consumer's activity and individual preferences.

There is currently some discussion on whether the bot should reveal at the beginning of the conversation that it is not a natural person.[1136] Often, users finding out that they are talking to AI deviate from their original goal to check the functioning of the mechanism – without this knowledge they would have limited themselves to solving the original issue. In the case of the classic use of a chatbot by a trader, the functionally justified default could be that the AI reveals its nature only if questioned by the consumer. As a rule, in these cases, the consumer does not require special protection. There is, however, a case that should be treated separately, namely the application of buddybots.

In this scenario an artificial intelligence is registered as a user on a portal intended (officially or actually) for people from a given social group, with the purpose to make connections with other portal users.[1137] Artificial intelligence can also pretend to be a natural person who, through interactions with other users of a given portal, builds permanent bonds with other users, similar to traditional interpersonal relationships, from time to time recommending certain content or products to its interlocutors.[1138]

The goal of the buddybot is to establish a trust-based relationship imitating friendship with the user, so that his suggestions are treated by the user on an

1135 D. Kasprzycki, *Prawna…*, p. 465.

1136 Art. 52 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts (COM/2021/206 final); N. Mozafari, W. H. Weiger, M. Hammerschmidt, *Resolving the Chatbot Disclosure Dilemma: Leveraging Selective Self-Presentation to Mitigate the Negative Effect of Chatbot Disclosure*, Proceedings of the 54th Hawaii International Conference on System Sciences 2021, p. 2916.

1137 V. Steeves, I. R. Kerr, *Virtual playgrounds and buddybots: a data-minefield for tweens*, CJLT 2005/4(2), p. 91.

1138 ELLEgirlBuddy, 24 the vRep. The AI introduced herself as a 16-year-old ginger-haired girl who loves kickboxing and French lessons, and who would like to design handbags, be a café shop owner and work somewhere far away as an overseas media correspondent when she grows up.

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equal level to the recommendations of a close one, whom this user trusts both because of the personal relationship and their knowledge and experience.[1139]

The above practice under EU law[1140] could be considered an unfair commercial practice (misleading omission – Art. 7.2 Directive 2005/29), namely surreptitious advertising (under Art. 6.3. point 2 of the Act on Combating Unfair Commercial Practices) consisting in a trader hiding or presenting in an unclear, unintelligible, ambiguous or untimely manner such material information or fails to identify the commercial intent of the practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Therefore, such practices should be considered inadmissible.

6.4.6.2. Timing

The second category of practices commonly used in consumer e-commerce are practices aimed at exploiting consumer's reaction to a short, highly intense stimulus.[1141] Under the provisions of the Civil Code, such actions do not fulfill the definition of fraud (no misperception of reality in the mind of the consumer), threat (even if a certain danger arises, does not have to be caused and usually will not be caused by an unlawful and serious threat to a person) or exploitation (lack of disproportion of benefits). Their key characteristic is that the entrepreneur intentionally aims to reach the consumer at a very particular moment and if the situation (usually relatively quickly transient) had not occurred, the consumer would not be willing to conclude the contract.

It may be considered whether such commercial practice should not be seen as involving harassment, coercion, the use of physical force, or unlawful pressure. When verifying whether a given action constitutes an aggressive market practice, Directive 2005/29 requires to take into account if the trader abuses of a specific mishap or unfortunate circumstances that are serious enough to limit the consumer's ability to make contractual decision in order to influence the consumer's decision regarding the product.[1142] This type of activity has already been the subject of court rulings in the context of activities of a professional party in the

1139 V. Steeves, I. R. Kerr, *Virtual…*, p. 94.

1140 The cited studies were conducted in North America (they relate to practices applied in Canada and the United States).

1141 The context and duration of such stimulus can differ substantially, this category may include: a deep sense of regret and loss after losing a loved one, feeling euphoric after winning a high prize in a game of chance, a sudden need for acceptance in a person who has become a victim of a wave hatred, overwhelming thirst after a long run, sudden craving for sweets in a person who is used to go to a pastry shop after leaving work.

1142 Art. 9 letter c. dir. 2005/29/EC.

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offline trade:[1143] a tombstone trader sent a letter containing an advertisement for tombstones to the family members of the person who had just died. The court considered this action to be an unfair market practice, because it could hurt the feelings of the bereaved and, additionally, it could be considered immoral due to the fact that it was aimed at using mourning for commercial purposes of third parties (contrary to morality). At the same time, the court indicated that sending such advertising letters two weeks after the death of a person would no longer constitute an unfair commercial practice.

Conscious use of the consumer's forced position or other circumstances limiting his ability to make an educated market decision is considered to be an aggressive market practice if this behavior concerns: proceedings pending against the consumer, his indebtedness, difficult financial or family situation.[1144]

Similarly, it is indicated[1145] that a practice that generates a strong emotional pressure based on a feeling of love or aggression should be considered an unfair market practice, especially if it is aimed at young people who want to impress their peers. In this case, the factor that makes it possible to exercise strong emotional pressure is related to the circumstances that last for some time or the relatively permanent features of the person.

The use of mechanisms that can analyze the situation of the consumer in real time allows to exploit not only factors that affect a person for a longer period of time, but also strong and short-lived impulses.[1146] On the one hand, this makes it difficult to assess *post factum* what circumstances have been exploited by the entrepreneur (difficulty in verifying the criterion of inconsistency with good customs), and on the other, to determine the gravity of the impact of these circumstances on the consumer's ability to decide freely. The market mechanism based on quick reaction may favor the consumers' emotional choices, reducing their rationality (exploiting behavioral tendencies, especially behavioral biases).[1147] Thus, the question is whether the market practices based on responsiveness should be considered an unfair market practice in general.

1143 Judgment of Higher Regional Court of Frankfurt am Main (Oberlandesgericht Frankfurt am Main) of 29.01.2009, Case No. 6 U 90/08, ECLI:DE:OLGHE:2009:0129.6U90.08.0 A.

1144 M. Sieradzka, *Ustawa…*, Art. 8, point 6.

1145 R. Stefanicki, *Ustawa…*, Art. 8, point 4.

1146 For example, a person trying to recover from alcohol addiction passes by a liquor store or a student who has just realized that he will not be able to apply for an international exchange he wanted due to lacking knowledge of a foreign language, receives an offer of a "German in three months" course.

1147 These are so-called cognitive errors – irrational perception of reality that affects the way of formulating views or making decisions, e.g. the authority effect (relying primarily on authority), confirmation effect (the tendency to look only for facts confirming a given thesis or opinion). A. Tversky, D. Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, Science, New Series 1974/185(4157), p. 1124–1131; M. G. Faure, H. A. Luth, *Be-*

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First of all, acting in response to the consumer's need arising from the circumstances does not have to limit his freedom of choice or be contrary to good customs (A is looking for a flight between cities B and C, but before making a purchase, an advertisement with an offer of sharing economy services is displayed – this type of travel is only slightly more time-consuming, taking into account the time needed for check-in at the airport, but also noticeably cheaper). Additionally, depending on what circumstances caused the condition that the entrepreneur intends to make use of, the period of the consumer's particular susceptibility to content will differ (if we consider the case of the death of a loved one, it can be assumed that the state of mourning limiting the ability to make free decisions will last for relatively long time, while in the case of winning a significant amount of money in a game of chance, the state of euphoria causing comparable disturbances in the ability to make decisions should be shorter). As in the case of the funeral service offer, also here it seems necessary to establish a time frame within which the entrepreneur's activity, exploiting the influence of a given stimulus on the ability to make a free market decision, should be considered as an unfair market practice. Intents to standardize the time that needs to elapse between the stimuli and the offer, for the entrepreneur's behavior not to constitute an unfair market practice is unjustified and inadvisable, as is the complete prohibition of this type of practice.

As a rule, practices based on an immediate reaction to the occurrence of circumstances resulting in a restriction of the consumer's ability to freely make decisions should be considered acceptable. Only when the exploitation of such circumstances may be seen as contrary to the morality or good customs, then a particular practice could be considered unfair.

6.4.6.3. Intimacy and timing – personalization of content

The personalization of market practices applied to the consumer based on big data allows for the combination of the above two elements – getting closer to the consumer (matching the communication channel, content and form of communication) and benefitting from the specific situation in which he is (adjusting the time of sending a particular message). Due to this multi-faceted person-

havioural Economics in Unfair Contract Terms Cautions and Considerations, JCP 2011/34, p. 345; S. Huck, J. Zhou, C. Duke, *Consumer Behavioural Biases in Competition. A Survey Final Report. May 2011*, p. 15–53 https://londoneconomics.co.uk/wp-content/uploads/2012/06/Consumer-behavioural-biases-in-competition-OFT1.pdf (accessed: 31.5.2021).

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alization, the practices in question may be considered unfair because they are likely to violate consumer's privacy.[1148]

A commercial practice shall be regarded as aggressive if, in its factual context, taking into account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise (Art. 8 dir. 2005/29). Any type of taking advantage of the consumer in order to limit his ability to make an informed contract decision is perceived as a form of pressure.[1149] In particular, the pressure may be related to the violation of the consumer's privacy. For this reason, when setting the boundaries for privacy interference, the place where the consumer reads the information sent by the entrepreneur (e. g., the consumer's home), the physical location of device used to receive the message (e. g., whether the device is worn by the consumer) and the time, when the message is to be received (e. g., morning hours when the recipient of the message usually eats breakfast) should be taken into account. In some cases informing the consumer about the offer by phone or e-mail is considered too invasive, therefore sending the content directly to devices that are assumed to be very close to the consumer (smartwatch, smartphone), especially during the time which is, in principle, considered to be dedicated for activities related to the private sphere, should also not be allowed.

In case of personalization, it will also be necessary to each time determine whether the practice is based on inducing mental coercion. Profiling allows not only to infer about the consumer's features or needs, but also about his weaknesses, complexes, fears and behavioral deviations.[1150] Any type of abuse of an advantage over the consumer is considered an unacceptable pressure – that includes techniques that allow to exercise pressure over the consumer without the use of physical force or the threat of its use, but in a way that significantly limits the consumer's ability to make an informed decision.[1151] It is assumed that the use of mechanisms based on persuasion in some situations can be considered technique of that nature.[1152] *A priori* determination of the permissible limits of

1148 On the need to protect consumer privacy as one of the motives for introducing consumer protection regulations by the European legislator, see: E. Łętowska, *Prawo umów konsumenckich*, 2nd ed., Warszawa 2002, p. 32–34, 167–172.

1149 M. Sieradzka, *Ustawa…*, Art. 8, point 5; R. Stefanicki, *Ustawa…*, Art. 8, point 3.

1150 O. Bar-Gill, *Algorithmic…*, p. 228–232.

1151 Art. 2 letter j dir. 2005/29/EC.

1152 R. Schulze, H. Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices (Report Commissioned by the European Commission*, DG Sanco, 2003), p. 37 https://core.ac.uk/download/pdf/34409024.pdf (accessed: 31. 5. 2021).

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persuasion seems highly difficult and impractical. It is, however, reasonable to indicate circumstances that should be considered each time when assessing a specific factual situation. First and foremost, it should be analyzed whether the consumer was aware that persuasive techniques are used against him and whether he could turn off profiling and ad targeting.[1153]

Another characteristic of an unfair commercial practice is that it limits consumer freedom of choice or behavior towards the product. To what extent does the use of profiling, personalization and targeting by the entrepreneur affect the consumer's contractual decisions? Is the decision-making process actually impacted? Can the use of these technologies significantly limit the ability of a profiled person to make an autonomous decision – causing a restriction of the freedom of choice? Giving a definite answer in this respect depends primarily on the results of empirical research on consumer behavior and at present it still would not be premature.[1154]

The last premise of an unfair commercial practice is that it either causes or may cause the consumer to take a decision regarding the contract that he would not have taken otherwise. Here the issue of demonstrating how severely the marketing techniques used may limit the consumer's freedom of choice appears again. Due to profiling and subsequent personalization, the offers presented to the consumer will, as a rule, be more tailored to his needs, traits and situation, and therefore also more often selected than non-profiled offers. It is difficult to distinguish effective personalization (offers presented to the consumer are adequate – they allow him to conclude beneficial and intended contracts faster and more conveniently) from abusing the knowledge of the consumer in order to limit his decision-making freedom and force contract conclusion. In each case the consumer should prove that if the marketing strategy had not been used, he would not have concluded the contract – i. e. that he had no intention of entering into it, but the tool forced him to change his decision.

In this context, the legal assessment of persuasion profiles turns out to be particularly problematic. It is a marketing strategy based on analyzing a person's

1153 Profiling and personalization are based on the processing of personal data, and therefore must be performed on the basis and in the manner specified in the regulation 2016/679. Thus, profiling must be based on the consent of the person whose data is processed (Art. 6a GDPR), this consent must be given after receiving clear and understandable information on the purposes, method and consequences of data processing (Art. 13.2 letter f and Art. 14. 2 letter f GDPR). Similarly, in the context of price personalization: R. Steppe, *Online…*, p. 768–785; F. J. Zuiderveen Borgesius, J. P. Poort, *Online…*, p. 356; I. Borocz, *Clash of Interests – Is Behaviour-Based Price Discrimination in Line with the GDPR*, SIA U. PP 2015/153(37), p. 50–52.

1154 N. Helberger, *Profiling and targeting consumers consumers in the Internet of Things – A new challenge for consumer law* in *Digital revolution: challenges for contract law in practice*, ed. R. Schulze, D. Staudenmayer, Baden-Baden 2016, p. 135.

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previous reactions to various types of messages and determining which type of content they are most likely to respond to. The algorithms make it possible to tell which type of persuasion a given person is most susceptible to. Then it is possible to personalize the persuasive profile accordingly.[1155]

In the current legal state, the protection against abuses may be granted by the prohibitions resulting from the act on unfair market practices. This protection will be triggered if the practice based on personalization generates unacceptable pressure that will limit or will be able to significantly limit the freedom of choice of the average consumer or his behavior towards the product, and thus will cause or may cause him to make a decision concerning a contract that he would not have entered into otherwise. However, these criteria turn out to be particularly difficult to assess in the case of practices based on personalization.[1156] Their effectiveness will depend on both how successful the personalization tool is and on the individual characteristics of the person to whom the practice has been applied. Also, the assessment of inadmissibility of such undertaking will be difficult – it will be necessary to decide whether such interference with privacy is permissible (provided the profilee consented to profiling and resulting personalization). Finally, it is worth noting that the choice of the time, content and communication channel are intended to influence the consumer's decision-making process so that it ends with the conclusion of the contract – not necessarily because it will be forced on the consumer, but only due to the offer meeting his needs. The probability of concluding a contract will therefore be increased compared to non-personalization-based practices, which will make it even more difficult to demonstrate that if the personalization practice were not unfair, the consumer would not conclude the contract in question. Therefore, the fact that it is the consumer who has to prove that the above conditions have been met may mean that protection under the Unfair Commercial Practices framework turns out to be an illusion.[1157]

1155 M. Kaptein, P. Markopoulos, B. de Ruyter, E. Aarts, *Personalizing persuasive technologies: Explicit and implicit personalization using persuasion profiles*, IJHCS 2015/77, p. 38–51.

1156 R. Brownsword, *The E-Commerce…*, p. 184–189.

1157 On the alternative protection methods, see: P. Hacker, *Personal Data, Exploitative Contracts, and Algorithmic Fairness: Autonomous Vehicles Meet the Internet of Things*, Int. Data Priv. Law 2017, Vol. 7(4), p. 266–286; K Południak-Gierz, *Consequences…*, p. 170–173; M. Namysłowska, A. Jabłonowska, *Personalizacja oparta na sztucznej inteligencji – nowe wyzwanie dla prawa konsumenckiego*, in: *Prawo sztucznej inteligencji*, ed. L. Lai, M. Świerczyński, Warszawa 2020, Chapter VIII 3.2.3.

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6.5. Choosing a protection model – a new defect of consent or a standardized control tool?

The Polish regulation of exploitation combines two opposing regimes: individual – subjective and general – objective. In the case of the former, legally relevant is the fact that one person takes advantage of the weakness of another one and forces the conclusion of a contract – the purpose of the institution is to protect the autonomy of will of the exploited one. In turn, under the general, objective regime, it is enough to compare the impartial value of benefits – the legislature prevents conclusion of economically unjustified contracts. Striving to separate the regulation from the subjective element and assessing only the objective value of the performances could be justified in case of consumer transactions. Limiting the autonomy of shaping the content of the contract by standardization may lead to the elimination of the effects of inequalities between a professional entity and a consumer in scenarios where the entrepreneur tries to impose the conclusion of a contract on the other party, according to which the value of the parties' benefits differs significantly.

By combining both these elements, the legislature neither effectively protects the autonomy of the will, nor implements an effective mechanism for removing the effects of inequalities between private law entities. By including subjective and objective premises the scope of protection is narrowed. The situations in which there is a gross disproportion of benefits, but the conclusion of a contract with this content was caused by a special relationship between the parties (e. g., based on trust) are not covered. Similarly, outside the cases where the benefits are objectively equivalent, but if it was not for the compulsory situation, ineffectiveness or inexperience of one of the parties, the contract of the given content would have not been concluded (e. g., purchase of a house from a widow just after the death of a spouse with whom she lived there).

This issue has already been recognized by Polish legal scholarship.[1158] Both in the EU[1159] and in the national context, there is a clear tendency to modify the institution of exploitation so that it becomes more sensitive to the subjective elements, while reducing the importance of the objective element.

The exploitation was regulated as one of the vice of consent both in Art. II. – 7: 207.1 DCFR and in Art. 51 CESL.

The function of the norm set forth in the DCFR is to provide the party who concluded the contract in circumstances significantly restricting the freedom to decide, the possibility of avoiding the legal consequences of that legal act.[1160]

1158 P. Tereszkiewicz, *Obowiązki…*, p. 441–444.
1159 Art. 4:109 PECL; II. – 7:207 DCFR; Art. 51 CESL.
1160 *Principles…*, p. 87.

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Thus, it differs from the classically understood exploitation, which assumes the existence of a gross disproportion of benefits – instead, there is a premise that the exploiter obtains either an excessive benefit or a grossly unfair advantage.

A similar modification of the objective premise is included in Art. 51 of the CESL project. The norm is construed upon three premises: first – related to the particular weakness of the exploited person, the second – negatively assessed behavior of the other party (consisting in knowledge about the weakness of the other party and its abuse), and the third – obtaining an excessive benefit or unfair advantage by the exploiter.[1161]

Thus, in both of the above models, the protection under the regulation of exploitation should also cover situations where there was no disproportion of benefits but due to the exploitation of the weakness of one of the parties, the advantage of the other would be unfair.[1162] The question is how this "unfair advantage" should be understood. It is indicated that when assessing fairness, not only individual contractual provisions should be examined, but also the contract as a whole.[1163]

The draft of the new Polish civil code of the Civil Law Codification Commission operating at the Ministry of Justice was heading in a similar direction.[1164] The proposed Art. 121 § 1[1165] did not contain a closed catalog of subjective circumstances on the side of the exploited, and additionally extended the substantive scope of application of the institution of exploitation – it also covered cases in which the morally reprehensible use of the other party's position does not lead to a gross disproportion of mutual benefits.[1166] The above changes have been preserved in the course of further works,[1167] as part of the Academic Draft of the Civil Code.

1161 Chapter 2.1.

1162 S. Lohsse, in: *Commentaries on European contract laws*, ed. N. Jansen, R. Zimmermann, Oxford 2018, p. 705.

1163 T. Pfeiffer, in: *Common…*, p. 282.

1164 https://www.projektkc.uj.edu.pl/dokumenty/Projekt_Komisji_Kodyfikacyjnej_Ksiega_I_z_uzasadnieniem.pdf (accessed: 31.5.2021).

1165 Art. 121. § 1. Whoever made a declaration of will in special circumstances, such as: forced position, dependence, inexperience, helplessness in life, may evade the legal consequences of the declaration, if the other party knew about these circumstances or, if acting with due diligence, he should have known about them and, against good morals, used this situation to obtain a grossly excessive or unfair advantage.
§ 2. However, a declaration of intent is invalid if due to the circumstances it is required by good morals, and especially when it cannot be expected that the abused party will take action sufficient to protect their interests. Author's own translation.

1166 https://arch-bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf p. 132 (accessed: 31.5.2021).

1167 https://www.projektkc.uj.edu.pl/dokumenty/Projekt_Komisji_Kodyfikacyjnej_Ksiega_I_z_uzasadnieniem.pdf p. 129 (accessed: 31.5.2021).

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The institution of exploitation was designed as a tool of individual protection in special cases of disproportionality in contractual relationships. The reasons for this disproportion were the peculiar traits of an individual which made it necessary to protect this person against the reprehensible behavior of the exploiter. In the consumer transactions, the reasons for disproportions are no longer related to the specific features of different individuals – these disproportions are not caused by their particular weaknesses. This is a phenomenon of a systemic nature. As a tool of individual protection, exploitation is not suitable for systemic protection against the exploitation of circumstances of general nature, occurring always on the same side of the legal relationship – on the part of the consumer. Therefore, the function of leveling systematic inequalities in consumer transactions was largely taken over by alternative instruments, the purpose of which is to ensure balance in contractual relations between entities with significantly different contractual positions. On the one hand, this control is based on the verification of the content of the contractual relationship (abusive clauses), and on the other – on setting standards of behavior of stronger entities, in isolation from the individual circumstances of the consumer (unfair market practices). Thus, in the consumer trade, the need to control the content of contracts with the use of individual protective instruments disappears. Similarly, introducing effective standards of entrepreneurs' behavior should eliminate the need to rely on instruments of individual protection against these practices of entrepreneur which are misleading, or essentially similar to fraud, threats or exploitation.

The emergence of mechanisms that protect the weaker entity from the same risk as the institution of exploitation, but of a standardized nature, means that the function of the institution of exploitation is fulfilled by these mechanisms. Thus, the institution of exploitation is no longer needed in the consumer trade. Thus, it should no longer be advised to use this regulation to mitigate the effects of

Art. 97. § 1. A legal act granting another person a grossly excessive or grossly unjustified benefit is invalid to the extent that the benefit is excessive or unjustified, if it was performed by the person acting under special circumstances such as forced position, dependency, inexperience or helplessness in life, and the other person or the beneficiary knew or would have known, if exercising due diligence, about these circumstances and used them in a manner contrary to good morals. The persona who was exploited, however, may also withdraw from the contract or terminate the contract, if justified by reasons of equity.
§ 2. If the contract concluded in the circumstances described in § 1 provides for grossly understated performance for the exploited, the contract is invalid. However, at the request of the exploited, it may be considered valid and the benefit may be increased accordingly, unless it is excessively difficult.
§ 3. The right to withdraw from the contract, to terminate it or to request increase of the benefits shall expire one year from the date on which the exploited regained freedom of action, and in the event of inexperience or life helplessness – from the day on which he learned about the possibility of exercising said rights. Author's own translation.

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disproportions between the consumer and the entrepreneur (e. g., by expanding the interpretation of subjective premises and attempts to use a mobile system in relation to the premises of exploitation).

The above allows the institution of exploitation to evolve towards the traditional defect of will – separating it from the objective element, which is the mutual relation of benefits, and focusing on the verification of the process of taking and expressing one's will. Such transformation of the institution of exploitation turns out to be justified not only because of the limited usefulness of the current norm, but also because it is necessary to guarantee an effective protection mechanism for these consumers against whom personalization mechanisms are applied in a manner that influences their autonomy of will in an individualized way. The main criterion for the admissibility of personalization techniques should be the assessment of whether the consumer is "tricked into a contract".[1168] To achieve this goal, due to the individual nature of the practice and the need to assess subjective elements, the most adequate tool seems to be the institution of exploitation, provided it is transformed into a classic defect of consent.

1168 M. G. Faure, H. A. Luth, *Behavioural…*, p. 345.

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Conclusions

The work's main thesis is that in consumer e-commerce, the regulation on defects of consent within the Polish Civil Code loses its usefulness and is replaced by specific regulations, more suited to the requirements of mass transactions.

From protecting the autonomy of will to striving for equal opportunities in B2C relations

The first stage of the analysis is to determine whether there is one main reason for this phenomenon. For this purpose it was necessary to verify whether the regulation of vice of consent currently pursues the same goal as at the time of its introduction. The results of a dogmatic analysis of the provisions of the Code of Obligations of 1933 and of a review of the legal scholarship of that time prove that, at the stage of shaping these institutions, their main goal was to protect the autonomy of will of the individual. The pursuit of this goal pushed the legislature to design the regulation on defects of the declaration of will as an individual protection tool. With the development of mass trading, there have been changes in the perception of the purpose of this institution. It began to be used in order to balance asymmetries between entities with significantly different market positions and constantly assuming the same roles on the market. However, these instruments are inadequate to counteract the negative effects of asymmetries between the entrepreneur and the consumer on a mass scale.

One of the alternative mechanism of protection is standardization – either by referring to legitimate consumer expectations or by creating non-legal reference points. Currently, the reference to the objectified expectations of the consumer plays the role of an interpretation rule applicable when the scope of the seller's liability for defects in the subject of the contract is verified – it allows one to define the content of the legal relationship created by the conclusion of the contract. However, such an understanding of the role played by the standard of

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consumer legitimate expectations is systemically inconsistent and unjustified in the light of the goal it is supposed to achieve. The standard of legitimate expectations should be considered the dominant method of interpretation in the case of consumer transactions, regardless of the category of contracts to which the agreement concluded by the consumer belongs. This might be the beginning of the transformation of the concept of a declaration of will – now clearly visible mainly during the analysis of consumer contracts. The application of this standard reduces the usefulness of regulation on defects in the declaration of will in those scenarios where a consumer's misconceptions concern the content of the legal act at hand. Decoding the content of the contract under the legitimate expectations standard leads to the adjustment of the content of the legal relationship to the erroneous (but justified) expectations of the consumer. This method of interpretation could also be applied when the literal content of the contract was imposed by the entrepreneur (by a threat or exploitation). Also then, the content could be corrected by referring to the said standard – what contract content the entrepreneur could expect, if not for the threat or exploitation.

At the same time, in Europe, there is a tendency towards standardization through normativization – which consists in setting standards as to the quality of service outside the legislative process. This solution would make consumer protection more rigid and would effectively protect the weaker party from, for example, a negative description of the good or service. The fact that the standards are easy to modify means that the reference point could evolve along with the current, objectified expectations of consumers. On the other hand, however, replacing legal norms with standards translates into a law being set by non-legitimized entities. The implementation of standards would not affect though the usefulness of the rules on these defects in the declaration of intent which result in the absolute invalidity of the declaration. However, it could significantly reduce the usefulness of the institution of error, fraud, threat and exploitation – if causing an erroneous image of reality or pressure were aimed at leading the consumer to agreeing to a contract which would not meet the minimum standards as, for example, to the quality of the good or service, then the content of that contract would be automatically adjusted to that minimum. Thus, in these instances, the consumer would no longer need to rely on the regulation of these defects of consent.

The analysis of the evolution of the aim of the regulation and the manner in which its function is perceived concludes with considerations about the possibility of further changes. The purpose of this part of the study is to indicate how the changes taking place in online consumer trade are affecting the functionality of norms regulating the vice of consent in the case of online consumer contracts nowadays, and how their impact may evolve. Even now, the differences between

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traditional and internet trading make the application of the same provisions online and offline problematic and, sometimes, unjustified. In the case of the application of the CC provisions on the defects of contracts to contracts concluded by consumers on the Internet, the core challenges are related to: difficulties in determining the subject of the contract (and, consequently – verifying whether the consumer is in error in this respect) and the parties to the contract, new possibilities and methods of influencing the consumer's decision-making autonomy, as well as requiring the consumer to prove circumstances which they cannot be aware of. Doubts as to the legitimacy of applying the same rules are also caused by the different context of on-line and off-line contracts – the factors which pushed the legislature to choose a given method of risk distribution when regulating the vice of consent are missing in the Internet environment.

In the future, it will also be necessary to decide on the use of technology to make and apply the law – such a transformation of private law could also affect the usefulness of the provisions on the defects in the declaration of will. Personalizing law and its application could make individual protective mechanisms flourish again. On the other hand, the fact that the economic efficiency limits the granularization of provisions may prevent norms protecting weaker entities from being included in individual legal systems, as long as they do not, in given circumstances, lead to an efficient allocation of resources. At present, however, it would be premature to assess this matter as the personalization of the law still remains a fragmented vision in the legal academic writings.

These considerations lead to the following conclusions: there are reasons that make the CC provisions on the defects of the declaration of intent in general lose their practical usefulness in the consumer e-commerce. The main reason behind this is the change in the perception of the purpose of these institutions – attempts to use an instrument in which a certain functionality is encoded to achieve other goals lead to suboptimal results, the development of alternative protective mechanisms tailored to the specifics of consumer transactions, and the deepening of differences between the online and offline environment.

Influence of the specificity of the Internet on the adequacy of regulation of the effects of actions performed by a person incapable of submitting a declaration of will by themselves

In the further part of the thesis, those circumstances which reduce the usefulness of particular regulation on defects of consent are addressed. The second chapter discusses situations in which the statement comes from a person who is unable to submit a valid, effective declaration of will of a particular content: the person acts

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in the state defined in Art. 82 CC, has not reached the age of majority or is partially or completely incapacitated. The current regulatory model is adapted to the circumstances typical for traditional trading – due diligence of the addressee of the declaration of will should prevent them from concluding an invalid or suspended contract. In the online environment, however, in a typical scenario, compliance with these requirements will not allow the entrepreneur to notice special circumstances related to the consumer. Due to the limited flow of information, the rule in online trading is that the state and characteristics of the declarant cannot be verified by other users.

In Polish law the goal of regulation on the ability to contract has evolved significantly. Currently, it is assumed that the purpose of these rules is to protect a designated group of people against making a contractual decision that could significantly worsen their financial situation, as well as against the exploiting of their particular weakness on the part of other trading participants. A less obvious but equally important aim of these norms is to appropriately balance protected values: the protection of the weaker party must not weaken the legal situation of the other party without axiological justification. In the online environment these objectives cannot be met – an entity contracting with such a person bears the full risk associated with the conclusion of an invalid or void contract, while at the same time the contractual freedom of the protected person is unjustifiably limited.

In the context of Art. 82 CC (a lack of consciousness or freedom making any declaration submitted in this state null and void) a solution could be to limit the applicability of this norm only to situations in which the other party knew about the state precluding a conscious or free making of a decision and declaration of intent, or should have known about it. When examining Art. 14–22 CC (the legal capacity of minors and persons of limited or lacking legal capacity) it is worth noting that the strict age limit is a standardized instrument that prevents the individual examination of legal capacity. Meanwhile, it is common practice to mislead other online users as to one's age. As a result, many of the contracts concluded online are null and void or require a confirmation to become valid. A solution could be to grant conditional legal capacity to those persons who use internet tools in such a manner that other network users have no grounds to suspect that they do not have full legal capacity. Contracts entered into by such a person would be valid but could be voided if the person was in a state that did not allow a proper understanding of the effects of such a contract. An alternative could be to introduce a standard modeled on the Lizardi rule in relation to contracts concluded by consumers in the Internet environment. The determination of whether a contract concluded by a given person is valid despite their lack of legal capacity would then be made, taking into account the legitimate expectations of the addressee of such a declaration.

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Although the current regulation of Art. 14–22 and 82 CC does not allow one to achieve the legislature's aim in the case of online consumer trade, no alternative mechanisms that would allow for its fuller implementation have emerged.

Deciding on the legal effects of messages which appear to be a declaration of will

The third chapter concerns the lack of intention to create legal effects – analyzing the usefulness of Art. 83 of the Polish Civil Code. However, the deliberations are not limited to the false appearance as a normative defect of consent. They cover all the situations where there is a need to determine the legal consequences of a message that seems to be a declaration of will and that can be assigned to a particular person if another entity acts believing in the created appearance. In consumer e-commerce one of the main issues that emerges in this regard is the attributability of the message. It is necessary to decide on the attribution of a message generated and sent by a computer program or a specific person from an account of another network user. In the first case, such a declaration should be considered as coming from the person using the program in question. In the second scenario, the decision depends on who should be assigned responsibility for creating the appearance that the statement comes from a specific person. The use of the concept of legitimate expectation has been proposed, including assignment rules based on the criterion of negligence: if the message comes from a given source, it can be reasonably presumed that it comes from a person assigned to that source, and therefore the presumption of the addressee of the statement should be protected. On the other hand, the criterion of negligence allows the person to avoid the legal consequences related to a message that seems to be a declaration of will, in a situation when it was generated against his will, despite his due diligence.

The second group of issues are situations in which the assignment of a message to a given person is unquestionable as the message was created as a result of a given person's actions, but without the participation of their will (by accident or contains elements about which they did not know). In e-commerce the risk of submitting a statement of will by accident is relatively high, therefore the legislature intends to reduce it. A mechanism that has emerged from the discussion on input errors is the double confirmation system. Moreover, EU legislature, followed by national legislature, has imposed on entrepreneurs the obligation to confirm the acceptance of the order, and then the obligation to clearly inform the consumer when they accept the obligation to pay (regardless of whether the payment will be made in money or otherwise, e. g. by providing access to certain

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data). Failure to comply with this obligation means that the contract is not concluded. This instrument can be viewed as a standardized mechanism for protecting the consumer's autonomy of will. Regardless of what the consumer knows, the legislature prevents them from concluding the contract in a way that generates the risk of an error on the part of the consumer as to payment. This is a mandatory provision – its application makes it impossible for the consumer to refer to an error as to the existence of the obligation to pay. Additionally, there is a mechanism aimed at preventing the content of the contractual relationship from being shaped by elements the consumer is aware about (provisions on the incorporation of standard terms). The requirement to inform the consumer about the use of standard terms should, in principle, eliminate the risk of the consumer concluding a contract without being aware of them.

The analysis leads to the conclusion that the CC provision on apparentness in its current form cannot be applied when resolving typical issues related to situations in which e-commerce participants act in confidence to the apparent declaration of will created by a message that can be assigned to a specific person. The main problems of these scenarios are addressed by referring to the rules of assignment, information obligations and the rules on the incorporation of standard terms. Frequently, the consumer may avoid the legal consequences related to the conclusion of the contract under the influence of trust in appearances by withdrawing from this agreement (consumers' right to withdraw introduced by Directive 2011/83).

Misperceptions of reality – reducing the risk of error

The fourth chapter deals with acting in trust to a false image of reality. The analysis is divided into five parts. First, mechanisms that reduce the possibility of claiming that a declarant acted under error in the event of a lack of due diligence on his part are discussed, together with preventive instruments that reduce the likelihood of a consumer overlooking elements that could affect the content of the agreement or the other party's ability to perform the contract. When assessing whether it is admissible to refer to an error in the case of a declarant's negligence, the decisive factor should be whose behavior – the declarant's or that of the declaration addressee's – is worse from the perspective of the principles of civil law. The preventive function is, on the one hand, performed by the rules for the incorporation of standard terms (minimizing the risk of the consumer concluding a contract without being aware that the entrepreneur uses standard terms), and on the other hand, by the information obligations specified in Art. 18 of the Act on Consumer Rights, implementing Directive 2011/83. Under the rules on incorporation, the lack of due diligence on the side of the consumer does not

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affect his legal situation. The requirement to inform the consumer, in a clear and legible manner, about delivery limitations and accepted methods of payment, at the latest at the stage of placing the order, is intended to protect the consumer from concluding a contract which would be difficult or impossible to fulfill.

The mechanism that affects the usefulness of the protection provided for under the provisions of error and deception are, above all, pre-contractual information obligations. A complete regulation of these obligations could mean that in every case it is clear who should bear the risk of a consumer's mistake as the function of the regulation of information obligations is to indicate who bears the risk of information asymmetry. In practice, however, it is impossible for these norms to fully replace the regulation of error and fraud. On the one hand, the mere fact that the consumer was informed about something does not exclude the possibility of them committing a mistake, and on the other hand, it is unrealistic to assume that the legislature is able to foresee and regulate all the situations in which information asymmetry may appear.

Nevertheless, a comprehensive regulation of information obligations may significantly reduce the usefulness of the CC regulation of error and fraud. To what extend the regulation of pre-contractual obligations can affect the usefulness of Art. 84–86 of the Civil Code depends on the sanctions correlated with the breach of these obligations. There are two possible solutions. The first one is to sanction a lack of fulfillment of information obligations with individual protection instruments – the regulation of error and fraud (violation of the obligation constitutes a misleading act, and therefore results in the other party being entitled to void the contract). In this model the usefulness of the CC regulation of error and fraud rises. Yet, this solution is rather suboptimal due to the uniformity of sanctions. What is more, both the institution of error and fraud require the mistake to lead to a contract conclusion – only then it is possible to void the agreement at hand. The failure to provide information needs to be viewed as causing a mistake which seems unintuitive. The second solution is to link information obligations with the objective protection mechanism – either the one provided for under the Act on Combating Unfair Commercial Practices or created specifically for a given information obligation. The wider scope of protection and less stringent requirements provided for in the Act on Combating Unfair Commercial Practices (objectification, a state of threat to the autonomy of will is sufficient to trigger protection, no causality is needed), as well as the differentiation of sanctions, make this regulation more beneficial for the consumer than the CC regulation of the defects of the declaration of will. However, the solution that is optimal from the consumer's perspective is to be found in the Act on Consumer Rights, where selected disclosure obligations are linked with ex lege sanctions. The prerequisites for protection are fully objectified and standardized, and the manner in which they are formulated allows anyone without

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legal education to verify their fulfillment on one's own. In this case, the possibility to void the contract under mistake or fraud may be excluded.

The further part of chapter four addresses the mechanisms that diminish the usefulness of the CC regulation of error and fraud when the misperception of reality is caused by the dishonest behavior of the other party. Three groups of typical situations have been distinguished: the error is related to the identity or characteristics of the other party (especially frequent in e-commerce due to the anonymity of online users), the consumer is mistaken as to the obligation to pay and, finally, surprising clauses are intended to be incorporated into the content of the contract.

The error as to the contractor may be constituted in the mistake as to his identity or characteristics. Identity theft means that a message sent under someone else's name does not constitute a declaration of will at all, while suggesting that one has a different identity will constitute an unfair market practice. In turn, leading to a false belief about one's own characteristics will have different effects, depending on who is misleading the other party. By such an action, the entrepreneur will commit an unfair market practice. In contrast, if it is the consumer who deceives the business, then the latter would be able to void the contract under the regulation error or fraud. It is also worth noting that frequently in e-commerce the appearance created by the consumer will concern his legal capacity – then this behavior, though negatively assessed from an axiological point of view, will not affect the legal situation of the consumer anyhow. In the event of causing an error with regard to the obligation to pay, the CC regulation is replaced by a special provision, which imposes on the entrepreneur an obligation to provide the consumer with information about the payment in a clear and visible manner. Failure to comply with the above obligation results in a lack of contract, and therefore makes it unjustified to refer to the rules on error or fraud.

In turn, surprise clauses in the text of the contract imposed by the entrepreneur will not bind the consumer. In principle, therefore, despite the fact that such an action fulfills the conditions of Art. 86 CC, there is no need to seek protection under this provision – the result of not being bound by those clauses occurs automatically, therefore the consumer's interest shall be fully protected. In consequence, Art. 385^1 CC should in these cases supersede the CC regulation of fraud. The possibility of avoiding the legal consequences of a declaration of will due to the fact that the entrepreneur intended to include a surprise clause into the contract remains useful and justified only in scenarios where the entrepreneur's fraudulent activity leads to a loss of trust on the part of the consumer.

The last mechanism that reduces the usefulness of CC regulation on error and fraud is the interpretation consistent with the legitimate expectations of the consumer. Its application means that the content of the contract adjusts itself to

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the erroneous but legitimate expectations of the consumer, thus eliminating the discrepancy between the content of the contract and its image in the consumer's mind. In the case of contracts concluded via the Internet, the specificity of the online environment affects the concept of a model consumer (an online consumer is passive and more vulnerable to exploiting weaknesses due to profiling mechanisms). Additionally, there is a need to decide whether this interpretation can be applied only in the case of sale contracts and in instances where the legislature explicitly allows for application of the regulation on sales. Despite the fact that the rule on the legitimate consumer expectations standard is found in Art. 556^1 § 1 point 1 CC, within the rules on sales contract, limiting its application to specific types of contracts should be considered unjustified. Similarly, it is not permissible for a consumer concluding a contract whose content differs from his legitimate expectations to choose between applying the interpretation of the contract in line with these legitimate expectations and voiding the agreement entered into under an error. The contract should be automatically interpreted in line with the legitimate expectations of the consumer. Therefore, the provision error may apply only when the consumer's expectations are not objectively justified and, at the same time, the trader knew about the error or could easily have noticed it. It should also be decided what the line of reasoning should be when both the provisions on seller's liability and on vice of consent could be applicable. In practice, due to the less stringent conditions and the flexibility sanctions, the rules on seller's liability displace the regulation of error. Nevertheless, the majority of the Polish legal authors[1169] indicate that the consumer is free to choose which protection mechanism they want to use. This solution is not optimal. It is recommended to align the provisions on seller's liability and on error. The seller should be granted the right to block voiding the contract concluded the buyer under the influence of error (but not fraud) by providing the good (performing the service) in accordance with the buyer's mistaken vision of the contract.

In addition to alternative consumer protection instruments, technical issues also affect the usefulness of regulation on error and deception in the case of online transaction. Messages that fulfill the function of declarations of will are sent, and often also generated, by electronic tools. It is not clear whether the regulation on error can be applied in these instances. Regardless of the degree of autonomy of the communication program, it is permissible to assign a statement generated and submitted by it to the entity using this tool. If the content of this message turns out to be incorrect in the opinion of this person, or it is distorted,

1169 Judgment of the Supreme Court of 14.02.1967, I CR 521/66, judgment of the Supreme Court of 26.01.2012, III CZP 90/11; M. Podrecka, *Rękojmia*…, p. 444–448; M. Gutowski, *Glosa*…., p. 104–108.

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and the conditions for a legally relevant error are met, it is permissible to invoke Art. 85 CC to void any contract concluded thereof.

Acting under pressure exerted by another person – interplay between the status of the person formulating a threat and the protection mechanism

The subject of the analysis in the fifth chapter is a group of situations typical in the Internet environment, when a person acts under the influence of another entity. Depending on who the pressure comes from, there are different protective mechanisms that reduce the practical utility of the institution of threat. When the pressure is exerted on the consumer and generated by the entrepreneur, then the consumer is entitled to choose between the CC regime of individual protection and the standardized protection regime, provided for in the Act on Combating Unfair Commercial Practices. The wider scope of application, less rigorous conditions of protection and the differentiation of sanctions provided for in the Act should lead to the displacement of the threat by this alternative mechanism. Nevertheless, the sanctions listed in Art. 12 of the Act on Combating Unfair Commercial Practices should be supplemented by giving the consumer the right to terminate the contractual relationship established as a result of the unfair market practice applied to them irrespective of whether they were harmed.

When the pressure comes from a third party (anti-marketing websites, consumer boycotts, online firestorms), we search in vain for alternative protective mechanisms. Also protection under Art. 87 in connection with Art. 88 CC is possible only exceptionally. The aforementioned phenomena, although apparently similar to threats within the meaning of Art. 87 CC are often aimed only at expressing the dissatisfaction or negative opinion of the users. As a rule, causing a negative effect does not depend on the entrepreneur undertaking any action and even if such a threat was formulated, it would be highly problematic to assess whether this threat was, in fact, unlawful, possible to fulfill and did put in serious danger a person or his property.

In e-commerce the pressure may come also from the weaker party – the consumer. This pressure may be associated with the threat of taking actions that may affect the entity's reputation, of exercising a unilateral right or taking actions directed at supervisory entities. In the first scenario the protection mechanisms are to be found in Art. 87 and Art. 23 in connection with Art. 24 CC. Both of these solutions are, however, not optimal for the protected entity.

It is difficult to prove that a reputation oriented threat can be considered unlawful, possible to fulfill and that it puts a person or his property in serious

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danger (the problem of estimating the negative impact turning such a threat into action might have, the imprecise nature of the threat, the time that will elapse before the state of fear ends, the inadequacy of the sanction specified in Article 88 of the Civil Code). If the entrepreneur does not succumb to pressure, they may demand that the consequences of violating his reputation be removed, in particular, that a declaration of appropriate content and in an appropriate form is made (e. g., an apology is published), compensation is paid or a sum of money is paid for an indicated social purpose. However, the fulfillment of these claims will not lead to the entrepreneur regaining his lost reputation. The effective protection against this type of behavior is granted by the internal regulatory mechanisms of the internet portal on which the entrepreneur operates and through electronic word of mouth.

This leads to the conclusion that in consumer e-commerce the institution of threats may be, to a certain extent, superseded by the regulation of aggressive market practices. However, in cases where the threat is not directed at the consumer, there are no effective protection mechanisms in civil law. This problem is solved by the architecture of the electronic platforms and the standards regulating their functioning.

Exploitation – should this become a traditional defect of consent?

In the last chapter, addressed are situations in which the declaration of will is made under the influence of an abuse of special circumstances on the side of the declarant by another person. The institution of exploitation can be seen either as an instrument of protection of the autonomy of will, or as a tool for controlling the content of contract, allowing for the removal of the effects of contractual asymmetry between entities. Due to the lack of a common consensus as to the aim of this regulation, there is a tendency to broadly interpret the individual premises of Art. 388 of the Civil Code, in order to increase its usefulness in its present form. Among the alternative mechanisms that protect the weaker entity from the same risk as the institution of exploitation, the most important are: the regulation of abusive clauses (control of the content of contracts) and on aggressive market practices (control of the behavior model of a stronger entity). They are standardized and adapted to the specifics of mass trading, in which the disproportions between contracting parties are permanent. They fulfill the function of regulation on exploitation in the consumer e-commerce.

The chapter concludes with addressing typical online scenarios where pressure is exerted or the particular weakness of the consumer is exploited in order to persuade them to conclude a contract. Online personalization makes the consumer more exposed to persuasion, exploiting his weaknesses and cognitive

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biases. The alternative protection mechanisms turn out to be inadequate to solve problems related to the use of artificial intelligence and big data technology in online consumer trading. The solution could be to transform the concept of exploitation into a classic defect of consent. The subjectivism of the protective mechanism would make it possible to take into account those individualizing elements that determine the impact a given practice has on a specific consumer.

These considerations lead to the conclusion that the institution of exploitation in its present form has lost its usefulness in consumer e-commerce. At the same time, however, the new challenges faced by the legislatures due to the development of technology make the adjustment of this instrument to the current needs of civil law entities wholly reasonable.

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