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Towards normatively limited judicial sanction [structured discretion] as a proportional response to the defectiveness of legal action (contract) in modern legal transactions

Abstract
The primary purpose of the legal considerations herein is to indicate the direction of the modernization of the legality of control mechanisms in modern legal transactions. At the base of these transactions there is still the traditional, dogmatic sanction of nullity (invalidity) regulated by law (*ex lege*), and the legal effects of a defective legal action (contract), i.e. an action contrary to law or moral norms. In consideration of disproportionality and ineffectiveness of the nullity sanction under new conditions, jurisprudence and legislation have directed their attention to the limited judicial sanction (structured discretion) originating from the common law tradition as a proportional and flexible response to the defectiveness of legal action (contract). The statutory judicial sanction, which became the basis of the reform on the concept of illegality in common law countries, have found expression in the model rule of European private law. The Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), the latter of which revises and updates the PECL, are the primary references for the model rules of contract law in the EU. The PECL and the DCFR have affected the concept of the defective sanction of legal action (contract) in the new Civil Code, drafted by the Polish Civil Law Codification Commission.

1. Traditional defectiveness sanction of legal action (contract) by law (*ex lege*) as a disproportional and ineffective legality control instrument in legal transactions

In times of global economic turnover, contemporary private law is transformed and called upon to respond to various challenges. As modern private law is subject to internationalization, such as strong influences from Anglo-Saxon law, traditional law deriving from Roman law, and the positivist legality check mechanism, at the base of which are rigid invalidity sanctions (*ex lege*), private law is becoming increasingly ineffective, impractical and expensive[1]. Unsurprisingly, the phenomenon of globalization has called for a new turn in European legal culture, moving away from the formalistic and dogmatic structures, in favour of pragmatic ones giving more weight to judicial law-making[2].

In European jurisprudence assessment, disproportionality and ineffectiveness of the traditional legality control mechanisms are changing economic turnover. These changes primarily derive from the multitude of sources of contemporary private law (a term known as "multicentricity"). In particular, the far-reaching publicization of private laws causes limitations to private autonomy (freedom of contract) in favour of protecting social interest. At the same time, private law-making is under increasing influence and pressure from pressure groups (lobbyists). Numerous (legal) regulations are orientated towards ensuring fairness and non-discrimination, such as enhanced protection of the weaker party to the contract (i.e. employees, consumers, tenants, and small business entrepreneurs). These regulations exist to supplement traditional contracts which are no longer the only instruments towards achieving private autonomy[3].

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1 On the Roman origin of the invalidity sanction (*ex lege, ex initio* and *erga omnes*) see: R. Zimmerman, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford 2001; W. Dajczak, T. Giaro, F. Longchamps de Berier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009; W. Wołodkiewicz, *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej*, Warszawa 2009.

2 M.W. Hesselink, *The New European Legal Culture*, Kluwer 2001; P. Skorupa, *Nieważność czynności prawnej z perspektywy systemów prawnych common law*, "Studia Prawnicze" 2018, no. 4, p. 7; A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2015, p. 178.

3 On contract transformation see W. Dajczak, *Amerykańska zapowiedź "śmierci umowy" na tle tradycji romanistycznej* [in:] F. Longchamps de Berier (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa 2017; A. Doliwa, *O istocie i przyszłości umowy na tle współczesnej praktyki obrotu i przepisów kodeksu cywilnego o zawarciu umowy* [in:] Z. Kuniewicz, D. Sokołowska (ed.), *Prawo kontraktów*, Warszawa 2017; J. Mazurkiewicz, *„Wszystko na sprzedaż!" Prawo umów wobec mizerii moralnej współczesnego Zachodu* [in:]Ibid.

As contemporary private law is transformed and numerous regulations threaten the safety of contractual transactions, interpretation of law is becoming a legal issue/matter. Hence, the subject of lively interest in the doctrine, judicature and legislation is the defective legal action sanction, – adequate (proportional) to the violation, – which may pave the way for contemporary legality control mechanisms in legal transactions. As part of the academic debate, including discussions on private law unification (harmonization) in the EU, the traditional dogmatic doctrine of nullity/ineffectiveness and the corresponding sanctions are critically measured, particularly as they become automatically null and void. At the same time, the traditional doctrine of nullity seeks to establish a more flexible and effective sanction of a proportional response to the defectiveness of legal action, to achieve 'fair and reasonable results' without eliminating legal action (contract) per se[4].

Generally, improving the efficiency of legality control mechanisms in legal transactions is seen as being founded on the profound modernization of the traditional sanction of nullity in lieu of extended judicial discretion, within, however, a normatively specified framework (known as "limited" and "normatively ordered" judicial sanctions). There are indications that the complexity of contemporary private law requires shifting the weight of "illegality" and "immorality" control in legal transactions towards the judiciary. The settling of disputes within the judicial framework, especially those concerning private rights, may result in the application of sanctions in a more creative way. At the same time, the defectiveness and purpose of the action are more appropriately balanced by the courts based on the principles of proportionality and fairness[5].

The controversies in jurisprudence fundamentally affect the legislation, as the rules of proportional response to defectiveness of legal action (contract), which are expressed in the violation of law or moral norms (known as

4 Within the national literature see: M. Gutowski, *Nieważność czynności prawnej*, Warszawa 2017; P. Skorupa, *Nieważność czynności prawnej w prawie polskim na tle prawnoporównawczym*, Warszawa 2019; R. Trzaskowski, *Skutki sprzeczności umów obligacyjnych z prawem. W poszukiwaniu sankcji skutecznych i proporcjonalnych*, Warszawa 2013.

5 On the matter of the law-making role of the Court see: T. Giaro, *Interpretacja jako źródło prawa – dawniej i dziś*, "Studia Prawnoustrojowe" 2007, no. 7, pp. 243–253; L. Leszczyński, *Precedens jako źródło rekonstrukcji normatywnej podstawy decyzji stosowania prawa* [in:] I. Bogucka, Z. Tabor (ed.), *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego*, Kraków 2003, pp. 149–162; R. Piotrowski, *O znaczeniu prawa sędziowskiego w polskim ustroju państwowym* [in:] T. Giaro (ed.), *Rola orzecznictwa w systemie prawa*, Warszawa 2016, pp. 39–63; T. Stawecki, *Precedens jako zadanie dla nauk prawnych* [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa. Materiały z Konferencji Zakładu Praw Człowieka Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, zorganizowanej 24 czerwca 2008 roku,* Warszawa 2010, pp. 59–98.

"non-system values"), are becoming the new guiding principles for a balanced assessment between the protection of private interests and public interests.

The advancement of the rule of proportional response by European lawmakers in the context of defectiveness of legal action in the normatively defined framework, such as the adjudication directives, is meant to enable the courts to apply adequate and flexible rules and sanctions. This flexibility may cause, depending on the degree of defectiveness, the limitation or elimination of the legal effects intended by the parties. However, this judicial direction is to maintain the legal action (contract) in force[6].

As part of European inquiries into invalidity, including European codification drafts, and the achievements of the Polish jurisprudence and legislation, the concept of normatively (statutorily) limited judicial sanction (structured reasoning, deriving from the common law tradition, is the furthest-reaching normative model that would entitle the judge to apply *ad casum*, in a normative framework, judicial discretion in considering appropriate sanctions for defective contracts. Permission to change the content of the contract or its legal effects (known as reformation) would also fall under judicial discretion[7].

The foundation of proportionality in the context of illegality of contracts, including safe and flexible judicial sanction, is formed by European and Polish private law. However, it would be difficult to consider that these are fully developed and flexible legal solutions (sanctions) which can sufficiently achieve 'fair and reasonable results' in an optimal way as regards the limits of legal effects in the context of defective legal actions.

Undoubtedly, the expression of the principles of proportionality and flexibility in contemporary approaches to the sanction of nullity by lawmakers involve both nullity's external and internal limits.

These principles reflect an 'escape' from the dogmatism of nullity as a sanction. For example, nullity's external limits are expressed in the form of milder procedures (such as annulment of an action, suspended ineffectiveness, relative ineffectiveness) when specific circumstances occur (e.g. defects in a declaration of will, and refusal to confirm the act performed by the proxy). At the same time, the internal limits of nullity involve a normative structure of partial invalidity and its special types (e.g. reduction upholding effectiveness, conversion, and validation). In practice, the external and internal applications of this sanction result in many problems (including disputes in the court) as they are not applied consistently and they often overlap. At the same time both applications

6 More about the proportional reaction to defectiveness by means of normatively limited judge's sanction, P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 773; R. Trzaskowski, *Skutki sprzeczności umów…*, p. 797.

7 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 773.

are considered to lack sufficient flexibility to establish proportionality in relation to a sanction (legal effects)[8].

The introduction of judicial sanction *sensu stricto* into statutory law, i.e. of creative, reformative nature, which allows the judge to intervene in the content of the contract, finds its expression in many legislative drafts (codifications) in the area of private law. Primarily, EU model law, including the PECL and the DCFR, is in favour of such limited judicial discretion in the context of sanctions[9]. The Polish legislator, similarly follows the same path, which is reflected in the draft of the first book of the Civil Code, elaborated by the Civil Law Codification Commission[10].

The abovementioned drafts, although not revolutionary in nature, they are evolutionary as they attempt to legally organize judicial discretion (judicial sanction) in terms of legality control in legal transactions. In adopted models of legality control, as shown by the reaction of lawmakers to defectiveness, there appears to be a compromise in respect to the sanctions in relation to a defective legal action between the traditional approach, i.e. softening the nullity sanction *ex lege*, and the more contemporary approach, which is oriented towards the limited, normatively ordered, yet creative form of judicial sanction[11].

8 As for critical evaluation of nullity sanction *ex lege* P. Skorupa, Ibid., p. 425 and R. Trzaskowski, *Skutki sprzeczności umów…*, p. 111.

9 Draft Principles of European Contract Law (PECL) and Draft Common Frame of References (DCFR). M. Wilejczyk, *Zasady Draft Common Frame of Reference na tle zasad polskiego prawa prywatnego*, "Państwo i Prawo" 2018, no. 1, pp. 51–65.

10 *Komisja Kodyfikacyjna Prawa Cywilnego działająca przy Ministrze Sprawiedliwości. Księga pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem*, https://webcache.googleusercontent.com/search?q=cache:YE42_wx3frwJ:https://arch-bip.ms.gov.pl/Data/Files/_public/kkpc/projekty-na-stronie-ms/ksiega_pierwsz_kodeksu_cywilnego-2008.rtf+&cd=4&hl=pl&ct=clnk&gl=pl [access: 05.12.2019]; R. Trzaskowski [in:] *Kodeks cywilny. Księga I. Część ogólna. Projekt Komisji Kodyfikacyjnej Prawa Cywilnego przyjęty w 2015 r. z objaśnieniami opracowanymi przez członków zespołu problemowego KKPC*, Warszawa 2017, p. 96.

11 Drafted models of judge's sanction are still evolving, giving rise to numerous questions, such as those related to the negative or positive regulation of defectiveness, as well as in terms of restitution claims (restitution in integrum).

2. Limited judicial sanction according to EU model law as a model for national law-making

2.1. Anglo-Saxon roots of limited judicial sanction in EU model drafts

National pursuit for an effective normative model of a sanction for a defective legal action (contract) has been inspired, not only by European models of invalidity, but also by international legislative drafts (codifications), particularly drafts drawn up in the context of unification/ harmonization of private law in the EU[12].

In international codification drafts, especially in the context of the PECL and the DCFR, there is a noticeable departure from the traditional complete sanctioning of every (any) violation, even of a technical or organizational nature, in favour of proportional (in terms of the degree of defectiveness) application of sanctions, i.e. depriving the defective legal action of its legal effects by the court.

Proportionality of a (judicial) response is meant to be based on the concept of statutorily limited judicial discretion, and more precisely on the flexibility which is regulated by the law on judicial sanctions, which is promoted in drafts of the EU model law. The concept of normatively (statutorily) limited judicial sanction is modelled on the common law tradition, particularly on the drafts drawn up in Great Britain[13].

2.2. The concept of normatively-limited judicial sanction in the PECL model draft

The first set of EU model law rules, i.e. the PECL draft, which contains model rules that have developed based on the existing achievements *ius commune* and have been adopted with reference to the requirements of contemporary legal transactions, does not introduce a radical change to the normative model of defective legal actions in the substantive sense. In fact, as far as the terminology is concerned, the ambiguous term of 'invalidity' was dropped in favour of the 'no legal effects' term. However, as a rule(?) the classic concept of normative invalidity (as a sanction) was retained for cases where the legal action is found to be

12 With the exception of the drafts of the EU model law (PECL and DCFR), e.g. draft on UNIDROIT Principles of International Commercial Contracts (UPICC); draft on European Contract Code (Gandolfi draft) and draft of AHC group – SLC Revised Principles of European Contract Law.

13 Report by The Law Commission, Illegal transactions: The effect of illegality on contracts and trusts, Consultation Paper 1999, No 154; P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 30.

unlawful (against the law) or immoral (not compliant with the norms which correspond axiologically to the clause of good morals or public order)[14].

Academics have drawn attention to the fact that the PECL, despite that, as a rule, provides a conservative and abstractive model of sanction for defective legal action, it introduces an essential exception to the automatic (mechanical) elimination of all legal effects (*ex lege* and *ex ante*) in favour of greater flexibility. It is expressed in the "limited, normatively ordered judicial sanction", which is treated as a judicial discretional competence, to determine the consequences of violating statutory provisions. These statutory provisions do not provide an explicit sanction in this respect (*lex imperfecta*), nor in the event of invalidity of part of a legal action[15].

The PECL draft, which introduced a limited judicial sanction, placed an obligation on the judiciary to take into account the intentions of the legislator (i.e. the adjudication directives) in the imposition of sanctions. Primarily, the scope of judicial discretion was defined by stating that if a provision of mandatory nature (*lex cogentis*) does not provide the effects of its violation, the contract may be considered fully effective, partly effective, ineffective, or subject to change[16]. Secondly, the court should take into account all relevant circumstances, while bearing in mind the criteria defined in the act. These considerations will enable the court to impose a sanction that is proportional to the violation in question[17].

Despite the positive reception of the PECL rules within the literature, many doubts have been raised as regards concerning the accurate generalization of legal achievements in the area of fighting against defectiveness of legal action, including the availability of restitution claims (after depriving legal action of legal effects). These doubts are particularly founded on concerns over the requirement of predictability of judicial sanctions, including legal certainty and flexibility, which further cast a shadow upon the procedural layer[18].

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14 As for the evaluation of the PECL, in particular O. Lando, H. Beale, *Principles of European Contract Law: parts I and II*, The Hague/London/Boston 2000; H.L. MacQueen, *Illegality and Immorality in Contracts: Towards European Principles*, 2010; P. Meijknecht, *Tworzenie zasad europejskiego prawa kontraktów*, "Państwo i Prawo" 2004, no. 2, pp. 39–56.

15 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 14.

16 Art. 15: 102 § 2 PECL.

17 According to Art. 15: 102 § 3 PECL the court should take into account all circumstances, and in particular, a) the purpose of violated regulation; b) categories of persons who are supposed to be protected by the regulation; c) other sanctions which may result from violation of the regulation; d) the degree of violation; e) intentional or unintentional violation; f) connection between the contract and violation.

18 H.L. MacQueen, *Illegality and Immorality…*, p. 422.

2.3 Judicial sanction in the DCFR

The typology and scope of the sanctions adopted in the PECL have largely been taken over by the DCFR. The main part of the regulation method of defectiveness sanction of contracts, the principle of proportional response to defectiveness, and particularly the structurally-limited judicial sanction, have been maintained in a comparable way/range[19].

The DCFR rules, which promote the directive of proportional response/ Proportionality Directive? and an approach towards flexible sanctions in the event of illegality or immorality of legal action, take as a starting point the partial validity of the contract. If a regulation is breached, and the sanction is not specified for this violation, as *lex imperfecta*, then the judicial sanction should be appropriate/ proportional?, which in respect of its structure, is greatly based on the proposals of the English Codification Commission[20].

The model of defectiveness of a legal action adopted in the DCFR is considered controversial concerning the regulation of invalidity sanction, and, particularly the partial invalidity of abusive clauses. Although these clauses 'are not binding', they contain numerous solutions which promote the judicial sanction and the teleological (purposeful) interpretation. In the system of judicial sanction adopted in the DCFR, it is the judge who should decide the validity and effects of the legal action which violates the law or morality. However, the judge is first expected to investigate the contradiction of the legal action, not on the basis of statutory? law but rather on the basis of fundamental principles (such as on morality). This judicial approach allows the judge to establish whether there has been a violation of a specific prohibition or order introduced by the legislator[21].

According to the DCFR, the model of judicial competence is based on a constitutive verdict which functions as a legal ground for invalidity (no legal consequences). Until the court's decision is given, the legal action is considered binding[22].

The judicial decision, which is based on the model of limited and ordered discretion, may be expressed in such a way that the court:

a) considers the contract binding;

b) annuls the contract with retroactive effect fully or partially;

c) changes the contract or its legal effects[23].

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19 Charter 7 Book 2 DCFR.

20 H.L. MacQueen, *Illegality and Immorality…*, p. 6; P. Machnikowski, *Przepisy dotyczące czynności prawnych w projekcie Common Frame of Reference i w Principles of the Existing EC Contract Law (part I)*, "Rejent" 2008, no. 4, pp. 22–54.

21 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 54.

22 Art. II-7: 2012.

23 Art. II-7: 302 (2) DCFR.

At the same time, in accordance with the DCFR, the court in delivering a judgment (adequate and proportional) should take into consideration, as per the so called adjudication directive, all necessary circumstances of the case specified in the act (in a manner comparable to the PECL)[24].

In consideration of the broadly defined judicial sanction, which gives the possibility of reformative interference in the content of the contract or of its legal effects, doubts have been raised as to whether such judicial competences are excessive and whether it is possible to uphold predictability of the verdicts. To provide an answer to these questions, it must be kept in mind that it is important to prepare the adjudication directives as well as the criteria of limits of excessive court discretion, including substantive check rules of judicial decisions, taking advantage of, hitherto, achievements of the judiciary in relation to contract adjustment criteria (e.g. as in the event of exploitation or the, so-called, extraordinary circumstances- *rebus sic stantibus*)[25].

In the trend of promoting judicial discretion there is also the concept of "partial invalidity"[26]. As a rule, the DCFR accepts the classic approach that the remaining part of the contract provisions, following the annulment of defective provisions, retains its effectiveness unless it cannot reasonably stay in force without the invalid or ineffective part. Maintaining in force the remaining part of the contract may be based on a clause of reason, rather than on the hypothetical will of the parties. The advantage of objective criteria may also be connected with the postulate suggestion to thoroughly justify the effect of partial invalidity regarding the balance of mutual obligations between the parties to the contract[27].

An expression of the innovative character of the judicial sanction as specified in the DCFR is the introduction of the judicial discretion concerning the modification of the contract or change of its legal effects in the event of a violation of its imperative provisions (*iuris cogentis*). This judicial discretion provides the possibility to correct the content of the contract or its legal effects. That includes the settlement rules between the contractual parties in the context of invalidity, which further allows the court to adjust the settlement rules to a specific case[28].

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24 According to Art. II-7: 302 (3) DCFR the court, while making a judgement, should specifically take into consideration such circumstances as: a) the purpose of violated regulation; b) categories of persons protected by violated regulation; c) other sanctions possible to be applied on the basis of violated regulation; d) seriousness of violation; e) whether the violation is intentional; f) degree of connection between violation and contract.

25 Art. II-1: 108 DCFR. P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 68.

26 Art. II-1: 108 DCFR. P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 71.

27 Ibid., p. 72.

28 II-7: 303 (1) DCFR.

3. Manifestations of proportional response to defectiveness of a legal action (contract) in national private law subject to unification (harmonization) with EU law

3.1. General comments about the direction of transformations of invalidity sanction as a basis of national legality control mechanism in legal transactions

The invalidity sanction for a defective legal action (contract) by (virtue of) law (*ex lege*), which constitutes the basis of the national legality control mechanism in legal transactions[29], is subject to – as in other European countries – the evolution towards proportional (flexible) response to defectiveness of a legal action (contract).

The turn towards proportionality and greater flexibility of rigid invalidity sanction of a legal action (*ex lege*) stimulates EU law, while it is open to the Anglo-Saxon tradition and law-making role of the court, and further reflects a global business practice. The rigid invalidity sanction *ex lege* is subject to far-reaching evolution.

The limits of the current law (*de lege lata*) of invalidity sanction *ex lege* are heading towards special models of judicial discretion with separate normative foundations. On the one hand, those limits are expressed in a catalogue of other sanctions pertaining to the effectiveness of a legal action, which, in accordance with the principle of proportional applying invalidity sanction, are indeed normatively defined forms of the procedure of depriving a defective legal action of legal effects (so called external limits of applying invalidity sanction). On the other hand, however, further-reaching limits of applying the invalidity sanction are expressed by the expanding range of other effects of "partial invalidity" of a legal action. Partial invalidity, increasingly takes the form of detailed/more specific limits (so called internal limits of invalidity sanction)[30].

3.2 External limits of applying invalidity sanction *ex lege*

The ongoing theoretical search for proportional and flexible sanctions for defective legal actions, aimed at excluding disproportional application of invalidity sanction *ex lege*, may sometimes result to the detriment of the protected party; in practice this has led to the creation of a catalogue which is somehow external

29 Art. 58 Polish Civil code.

30 More about distinguishing the external and internal limits of applying absolute invalidity sanction (*ex lege*) P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 403.

to the invalidity sanction and its models, and which limits the automatic annulment of legal effects intended by the parties[31].

In accordance with softer procedural sanctions of annulment (of legal effects), which grant, according to the proportionality principle, greater possibilities to private parties to make use of legal protection measures (legal remedies) in legal transactions, the initiative in terms of invalidity (annulment of legal effects) is entrusted upon the parties to the contract (participants in legal transactions), who are better aware of the potential benefits of restoring the previous state (*restitutio in integrum*) of the contract instead of annulling it altogether.

In the event of specific, defined in the statute additional circumstances, national jurisprudence and legislations, are inspired greatly by the tradition *ius civile*, and approve that next to the rigid invalidity sanction by virtue of law (*ex lege*) its softer forms may be applied, as expression of proportionality *ad casum* of that basic sanction. They are: a) the possibility of annulment of such an action; b) suspended ineffectiveness; and c) relative ineffectiveness[32].

The above-mentioned sanctions may indeed lead to invalidity (annulment of legal effects) of a legal action (contract) but generally they create a better possibility of avoidance of invalidity and of maintenance of legal status intended by the parties. The decision to initiate a court case is taken by the participants of legal transactions, and not *ex officio* by the court.

Undoubtedly, those well-established, softer models of applying the invalidity sanction *ex lege*, (and more precisely, the specific types of procedures of depriving a defective legal action of its legal effects) implement, within a certain range, the directive of proportional response to defectiveness. However, the farther-reaching proportionality of invalidity sanction is expressed by the concept of "partial invalidity" of a legal action and its special forms, which allow, in a wider scope, for limited and normatively-ordered judicial discretion.

31 M. Gutowski, *Nieważność czynności…*, p. 45; T. Liszcz, *Nieważność czynności prawnych w umownych stosunkach pracy*, Warszawa 1971; J. Preussner-Zamorska, *Nieważność czynności prawnej w prawie cywilnym*, Warszawa 1983; Z. Radwański, *Jeszcze w sprawie bezwzględnie nieważnych czynności prawnych*, „Państwo i Prawo" 1986, no. 6, pp. 93–98; T. Zieliński, *Znaczenie terminu nieważność w języku prawniczym*, "Krakowskie Studia Prawnicze" 1970, no. 3, pp. 55–74.

32 More about it M. Gutowski, *Nieważność czynności…*; Id., *Wzruszalność czynności prawnej*, Warszawa 2010; Id., *Bezskuteczność czynności prawnej*, Warszawa 2013; A. Bierć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2018, p. 829.

3.3 Internal limits of the invalidity sanction *ex lege* and special types of the concept of partial invalidity of a defective legal action (contract)

3.3.1 General comments about the nature of "internal limits" in applying the invalidity sanction

Axiological and pragmatic considerations (the first referring to the protection of the party's autonomy and implementation of the justice principle, while the latter refers to the concern for the effectiveness of legal regulations), lead the legal systems domestically, as well as in other European countries, towards the tendency to avoid full annulment of the legal effects of a defective legal action (contract). That tendency is connected with the principle of proportional response to defectiveness of a legal action (contract), which, as a result, make the range of judicial discretion expand within a normative framework[33].

In theory, it is accepted that the effects of invalidity, based on the violation of law or morality, may be excluded by circumstances (events) that partially, or fully neutralize, the primary level of defectiveness, and exclude, *ex post*, the possibility of making a plea of a violation. Based on that consideration, the first step is considered to be the promotion of "partial validity", i.e. the preservation of the legal effects based on the proportional application of sanctions[34].

The expression of proportional (flexible) response of the legislator in the context of defectiveness of a legal action (contract) is, within classic model of invalidity sanction *ex lege*, the concept of "partial invalidity", and, in particular, the latter's special forms accepted under the influence of EU law and practice. In other words, the normatively defined exceptions from the invalidity sanction *ex lege*, allow the limitation of full invalidity of a legal action, i.e. the automatic exclusion of legal effects intended by the parties, as well as a law-making interference in the content of a legal action (contract). However, because of the inconsistencies of the empirically informed regulations, and in particular the overlapping of the range of exceptions from the invalidity sanction *ex lege*, these solutions may result in litigations and turn out to be ineffective.

The legislator expressly allows for the possibility of the partial limitation of the invalidity sanction *ex lege*, and the partial preservation of legal effects not only normatively but also in special provisions often created by the judiciary/judicature. Within national private law, *de lege lata*, the concept of reservation

33 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 275.

34 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 630.

of a different effect of violating law or moral norms is concurrent with the concept of judicial sanction[35].

Jurisprudence, however, makes attempts to classify the expanding catalogue of legal instruments aiming to maintain partial validity of a legal action (contract) but not without classification discrepancies[36].

3.3.2 The concept of invalidity of part of a legal action (contract)

The concept of partial invalidity, which allows for annulment of some of the legal effects of a defective legal action (contract) by preserving the remaining ones, constitutes one of the most important manifestations of the tendency of the national legislator to ensure the effectiveness and proportionality of the invalidity of sanction. Nowadays, the concept of invalidity is evolving, although not so much towards the legal presumption of limiting the application of general invalidity sanction *ex lege*, but rather towards an independent and quasi-independent sanctioning norm which increases judicial discretion[37].

In judicature and legislation there is a clear tendency to differentiate between new types of *sui generis* sanctions, i.e. different procedural tracks, leading to the partial invalidity referred to as "normative legal action". Independent norms are increasingly becoming the chosen mode of sanctioning in invalidity cases and apply only partially to the legal action[38].

Regarding the impact of invalidity of part of a legal action on the validity of the whole legal action the prevailing academic opinion is that the decisive factor is the individualized analysis of the situation of the persons performing the legal action, and the objective evaluation of how a reasonable person would act under the same circumstances.

The criteria of invalidity of a part of legal action are subject to objectivity. The tendency towards objectivity refers to the procedure of applying partial invalidity, by limiting the premise of the "hypothetical will" of the parties towards which it is postulated to accept the priority of objective criterion. The assessment made by the judiciary should determine, by a majority, the hypothetical will of the parties, based on the actions of a reasonable person acting on the specific

35 Art. 58 § 3 Civil code; Z. Radwański, *Prawo cywilne – część ogólna*, vol. 2, Warszawa 2008, p. 439; A. Bierć, *Zarys prawa prywatnego…*, pp. 827–828.

36 M. Gutowski, *Nieważność czynności…*, p. 435.; P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 607.

37 J. Pisuliński, *Sankcja zamieszczenia w umowie niedozwolonego postanowienia w świetle dyrektywy 93/13/EWG i orzecznictwa TSUE* [in:] M. Romanowski (ed.), *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości UE*, Warszawa 2017, p. 95.

38 Ibid., p. 99.

circumstances, assuming that there is no other relevant information available indicating the real intentions of the parties[39].

In principle, it is becoming increasingly common for partial annulment of legal effects of a defective legal action to not only be limited by the institutional framework, i.e. partial invalidity, but also by other specialized sanctions to address defectiveness, within the normative area. The system of defectiveness sanctions should be flexible, while individual cases of partial invalidity should be stressed/highlighted in order to clarify the procedural track (*ex officio* or upon request) or capacity to sue or be sued[40].

In particular, it is assumed not to allow, in accordance with the principle of deterrence and sanctions in favour of the weaker party, for avoiding sanctions by a party responsible for defectiveness. /In particular, it is common practice according of the principle of deterrence and the imposition of a sanction in favour of the weaker party, to avoid sanctions against a party who is responsible for defectiveness. The admissibility of the judge's interference in the content of the contract and in reshaping it are also not excluded. Additionally, it is said that such a form of proceedings cannot be blocked where the court, together with the parties to the contract, work out a position to issue a verdict[41].

The lawyers' pursuit to the possibility of proportional and flexible response to defectiveness of a legal action (contract) has resulted in creating, not without the influence of EU law, special forms of partial invalidity, without however implying that there are no further discrepancies in applying new forms of partial invalidity.

3.4 Special forms of partial invalidity

3.4.1 The ineffectiveness sanction of non-permitted (abusive) contractual provisions in consumer transactions (i.e. 'consumer not bound' by unfair contractual provisions)

The legal nature of ineffectiveness sanctions of non-permitted (abusive) contractual provisions, is an important issue in national consumer protection law, whose regulations are the result of the implementation of EU directives[42]. These non-permitted contractual provisions are also defined in terms of the consumer not being bound by unfair contractual provisions and with the parties bound by

39 e.g. Verdict of Supreme Court dating 12th May 2000, V CKN 1029/00, OSNC 2001/6, position 83.

40 P. Skorupa, *Nieważność czynności prawnej w prawie…*, pp. 656, 771.

41 Ibid., pp. 621, 636.

42 Art. 385 [1] § 1 i § 2 Civil code; M. Bednarek [in:] E. Łętowska (ed.), *Prawo zobowiązań – część ogólna*, vol. 5, Warszawa 2006, p. 595; E. Łętowska, *Prawo umów konsumenckich*, Warszawa 2002, p. 344.

other contractual provisions. The evaluation of juridical nature of that sanction causes numerous disputes both in European, as well as national, doctrine but opinions in that matter are evolving in the direction of partial invalidity. This development in the field of judicial sanctions has occurred because the effect of partial invalidity is the ineffectiveness of a defective provision *ex lege* or *ex tunc* and the distinguished differences do not justify the position that it is about a new type of sanction for a defective legal action[43].

The case law of the CJEU (Court of Justice of the European Union), which is significantly transformed, leaves it up to the national legislations to select the specific statutory standards with the aim to achieve the purpose of the directive and the effect of sanction (the consumer not being bound), This liberty, however, has contributed to a mismatch in European legal traditions and even resulted in introducing a sanction with specific formal characteristics, i.e. protective invalidity (*nullita di proteztione*)[44].

The case law of the CJEU has played an important part in defining the sanction of "ineffectiveness of non-permitted contractual provisions" in credit contracts when credits were granted in the amount regulated by the "valorization clauses" in case of credits indexed or denominated to a foreign currency exchange rate (Swiss franc). As a result of that, a problem concerning the evaluation of the legal nature of (the influence of) the defectiveness of such valorization clauses (on the legal fate of the entire contract) arose. Generally, it was assumed that acceptance of the allegation of abusiveness would not lead to the invalidity of the entire contract if the consumer had not agreed to that[45].

The jurisprudence of the CJEU, as well as of national courts, shows that the problem of being bound by the contract after eliminating the non-permitted contractual clauses and completing its content with relatively binding regulations under limited judicial sanction is an important practical issue. Another

43 M. Safjan [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, vol. 1, Warszawa 2002, p. 180; M. Romanowski, *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości UE*, Warszawa 2017, p. 8; M. Skory, *Klauzule abuzywne w polskim prawie ochrony konsumenta,* Kraków 2005.

44 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 646.

45 Verdict CJEU dating 3.10.2019 in the matter Dziubak v. Raiffeisen C260/18, as well as verdict CJEU dating 30.04.2014, C26/13; Verdict Supreme Court 14.05.2015r., II CSK 768/14, OSNC 2015/11, position 132 and verdict Supreme Court dating 8.09.2016, II CSK 750/15, LEX 2182659; M. Jabłoński, K. Koźmiński, *Bankowe kredyty waloryzowane do kursu walut obcych w orzecznictwie sądowym*, Warszawa 2018; M. Korpalski, *Co wynika z wyroku TSUE w sprawie frankowiczów,* Rzeczpospolita, 8.10.2019, https://www.rp.pl/Opinie/310089982-Co-wynika-z-wyroku-TSUE-w-sprawie-frankowiczow.html [access: 04.12.2019] and A. Wiewiórowska-Domagalska, *Trybunał nie rozwiązał wszystkich problemów frankowiczów*, Rzeczpospolita, 17.10.2019, https://www.rp.pl/Konsumenci/310179993-Trybunal-nie-rozwiazal-wszystkich-problemow-frankowiczow.html [access: 4.12.2019].

critical element is the prevention of invalidity by completing a consumer contract, as well as in which track it could proceed[46].

In European and national literature, except for the traditional model, which is trying to assign the sanctioning norm to pre-existing types of the defectiveness sanction (i.e. from partial invalidity to suspended ineffectiveness, or the situation of lack of incorporation of a contract template)[47] the theoretical model is becoming increasingly significant. This development means that in case of non-permitted contractual provisions, we are dealing with a *sui generis* norm which may be foreign to the Polish civil law. In particular, it is postulated to break free 'from the chains of thinking in traditional categories of civil-law sanctions' and to recognize the solution provided in consumer law as a specific sanction applicable only in this area of law, whose essence is expressed in the fact that the consumer is not bound by a non-permitted clause but with the entrepreneur being bound by it[48].

Without excluding the sanction of "suspended ineffectiveness" as the closest to achieve the objective of 'the consumer not being bound'[49], a farther-reaching solution would be to widen the competence of the judiciary to modify the content of the consumer contract (within limited and ordered discretion)[50].

3.4.2 Reduction preserving effectiveness

"Reduction preserving effectiveness", as internal limits of invalidity sanction *ex lege* but respecting the autonomy of the will of the parties, is associated with judicial sanction, i.e. accepting the competence of the court to define the content of the contract in the way of reducing the part of the content of a legal action which violates the law. Such a change may produce legal effects for the future[51].

De lege lata in the context of the "reduction preserving effectiveness" does not have an explicit ground in national regulations but it results from the analysis

46 M. Bławat, K. Pasko, O zakresie zachowania mocy wiążącej umowy po eliminacji klauzul abuzywnych, "Transformacje Prawa Prywatnego" 2016, no. 3, pp. 5–28; Review of CJEU Jurisprudence; M. Romanowski, *Życie umowy konsumenckiej…*, p. 35.

47 Not excluding application of a different civil law remedy, beneficial for the protected party (e.g. Art. 5 civil code, Art. 58 civil code). E. Łętowska, *Prawo umów konsumenckich…*, p. 338.

48 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 633; however, J. Pisuliński, *Sankcja zamieszczenia w umowie…*, p. 103.

49 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 606.

50 M. Łemkowski, *Materialna ochrona konsumenta*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, no. 3, pp. 67–96.

51 F. Zoll, *Kilka uwag o tzw. redukcji utrzymującej skuteczność*, "Transformacje Prawa Prywatnego" 2000, no. 1–2, p. 10; P. Skorupa, *Redukcja utrzymująca skuteczność na tle projektu księgi pierwszej kodeksu cywilnego*, "Studia Prawnicze" 2010, no. 3, pp. 93–146; A. Bierć, *Zarys prawa prywatnego…*, p. 837.

of the nature of the violation which may rely on qualitative or quantitative transformation of contractual balance. Its application requires general premises of admissibility to complete the content of the contract for its validity[52].

In national doctrine, it is assumed that the "reduction preserving effectiveness" aims to protect the party to the contract against adverse effect of applying partial invalidity. The result of its application may not be contrary to a statute, clause of reason, or justice[53].

In the literature and in the context of the judicature, it is generally accepted that the "reduction preserving effectiveness" is not admissible in relation to contracts concluded with consumers, where a non-permitted provision may only be replaced by relatively binding regulations[54].

However, exceptionally, the view is presented that in consumer trading, the reduction would be admissible as a unilateral sanction, applied when its effect would be more beneficial for consumer than the annulment of a non-permitted clause[55].

In Polish law, the "reduction preserving effectiveness" is combined with Article 58 of the Polish Civil Code which states that where a legal act is inconsistent with statutory law it shall be rendered null or void, unless the relevant provision foresees a different effect. This approach allows for a quantitative reduction when the contractual balance has been violated against the "principles of the social cohabitation" (principle of justice)[56].

A milder form of the "reduction preserving effectiveness" is the "interpretation preserving effectiveness", as a result of which part of the contract is questioned as unlawful and may be considered valid by way of interpretation[57]. In practical terms, the "interpretation preserving effectiveness" is treated as a combination of "partial invalidity" and "conversion", which complement each other[58].

52 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 275.

53 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 98.

54 E. Łętowska, *Prawo umów konsumenckich…*, p. 344.

55 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 683.

56 Ł. Węgrzynowski, *Sądowe ustalenie treści stosunku umownego*, "Przegląd Prawa Handlowego" 2007, no. 5, p. 45.

57 F. Zoll, *Kilka uwag o tzw. redukcji…*, p. 11.

58 T. Wiśniewski [in:] G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania*, vol. 2, Warszawa 2007, pp. 497–532.

3.4.3 Salvatory clause as a "parties to the contract protection instrument" against its (the contract's) invalidity

Generally, salvatory clauses constitute a protection instrument against the invalidity of a whole contract because in the event of partial invalidity of a contract they may prompt the court to recognize effectiveness of the remaining part of the contract[59].

Admittedly, their application depends on the free assessment of the court but they improve evidentiary proceedings since they contain solutions agreed by the parties to the contract in order to preserve validity of the contract.

Bearing in mind the functions of those clauses, three of their functions are indicated within the Polish literature, which serve to fill in gaps which arise in the text of the contract as a result of partial invalidity. The first function is referred to as the "preserving clauses", in which the parties express their will to uphold the validity of the remaining part of the contract in the event of the application of the invalidity sanction *ex lege* of one or more clauses in the contract. The second function refers to the "replacing clauses", which as reservation provisions define the replacement mechanism of invalid provisions. The third function is related to the "complementary clauses", which refer to the obligation of the parties to negotiate in order to change and complete the contract for obtaining the effects as closely as possible, in economic terms, to the original provisions[60].

The application of salvatory clauses is not allowed in consumer trading because of the duty of transparent and one-sided formulation of the general terms of the contract, and the statutory priority of relatively binding provisions, performing substitution functions[61].

3.4.4 Conversion of an invalid legal action into a different legal action corresponding to the hypothetical will of the parties

Conversion, as a legal instrument serving to save a partially invalid legal action through its 'interpretative switching to new tracks', constitutes a special/particular type of partial invalidity with a high degree of judicial discretion. It corresponds to general axiological assumptions that the consequences of violating an act (a statute) or good morals shall have an impact on the effectiveness of a legal action in a proportional way[62].

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59 Z. Radwański, *Prawo cywilne…*, Warszawa 2008, p. 267.

60 P. Drapała, *Wpływ klauzul salwatoryjnych na ocenę skutków nieważności części umowy* [in:] M. Pazdan, M. Szpunar, E. Rott-Pietrzyk, W. Popiołek (ed.), *Europeizacja prawa prywatnego*, vol. 1, Warszawa 2008, p. 165; R. Strugała, *Standardowe klauzule umowne: adaptacyjne, salwatoryjne, merger, interpretacyjne oraz pactum de forma*, Warszawa 2013, p. 196.

61 F. Zoll, *Kilka uwag o tzw. redukcji…*, p. 15.

62 K. Gandor, *Konwersja nieważnych czynności prawnych*, "Studia Cywilistyczne" 1963, no. 4, p. 30; A. Bierć, *Zarys prawa prywatnego…*, p. 838; M. Rzewuski, *Konwersja testamentu*

Conversion, which aims to protect the legitimate interests of the parties (against too severe invalidity sanction *ex lege*), is logically combined with the interpretation of the declaration of will (intent), as well as with the performance of a legal action. Conversion is founded on the interpretation of a declaration of will (intent), and more particularly, on the reduction inference, which posits that if an invalid action meets the acceptable requirements of a different type of a legal action, then it is assumed that another non-defective and less demanding action has been accomplished. It (the conversion) requires, however, identification of permissible legal effects with hypothetical will of the parties[63].

Despite the lack of a general legal ground/framework in Polish regulations based on normatively defined premises, the national doctrine sees the normative basis of conversion in the rules on the interpretation of declarations of intent determined in the Civil Code (Art. 65 Civil Code), pointing out, in particular, the directive-friendly interpretation. In this respect, the essence of conversion, aiming to "save" legal action is an interpretative treatment intending to reproduce the real, though implied (hypothetical) will of the parties, by weighing the interests of the parties. As a rule, it requires enriching linguistic interpretation with functional interpretation[64].

However, conversion of an invalid legal action into a valid legal action (through friendly interpretation of declarations of intent) may only be applied as a last resort measure, i.e. if it is not possible to uphold the validity of a legal action employing a concept, such as convalidation, which is similarly applied restrictively[65,66].

Indicated in the doctrine scope of application of conversion is often usedin practice. Generally, judicature connects conversion with interpretation with the aim to keep the declarations of intent in force, albeit in a modifimanner. Conversion is commonly applied in the area of contract law and commercial companies law, and it is particularly relevant in the context of invalidity of a legal action,

[in:] P. Stec, M. Załucki (ed.), *50 lat kodeksu cywilnego. Perspektywy rekodyfikacji*, Warszawa 2015, pp. 401–416.

63 M. Gutowski, *Konwersja umowy stanowczej w przedwstępną wobec zmian kodeksu cywilnego*, "Państwo i Prawo" 2004, no. 11, p. 52.

64 Z. Radwański, *Prawo cywilne…*, p. 433.

65 K. Gandor, *Konwersja nieważnych czynności…*, p. 81.

66 First, if invalidity of a legal action results from other than the constructive premises of invalidity with the exception of the legal form *ad solemnitatem*. Second, if a defective legal action meets the essential requirements of a replacement legal action which makes it possible to achieve a social – economic goal of a converted action and does not go beyond its legal effects. Third, from the interpretation of the declaration of intent it may be assumed that parties would perform a replacement the legal action if they knew that the legal action performed by them was defective (i.e. the "hypothetical will of the parties") M. Gutowski, *Nieważność czynności…*, p. 406.

particularly concerning formalities/ for formal reasons, i.e. in the event of a violation of *ad solemnitatem* form[67].

It is estimated that in the new civil code, conversion will gain a legal ground closer to the "effect formula", which derives from the Dutch Civil code, i.e. so that the effects of violation of law or good morals (fair dealings) influence the validity of a legal action in a proportional way. In particular, it is highlighted that conversion, used *ex officio*, and which is based on the "hypothetical will" of the parties may not be applied if this is contrary to the purpose of the violated norm[68].

3.4.5 Convalidation as a normatively limited "salvation" (regularization) of a defective legal action

In the process of counteracting the tendency towards the mechanical application of invalidity sanction by (virtue of) law (*ex lege*), in particular, with the violation of the proportionality principle, convalidation takes an important place. This is because convalidation complements the process of the application of sanctions based on (limited) judicial discretion, which enables a legal action to stay in force (considered effective) in the event of a subsequent change of circumstances (specific event), but only in situations which are clearly defined and regulated by law[69].

Admittedly, the convalidation mechanism coincides to some extent with the conversion mechanism although, there is a difference in practice. In the case of conversion, the final effects which will be upheld/stay in force will only be similar to the intended effects since they are not the ones which formally result from a legal action. Convalidation, however, concerns only such situations where the legal effects are known and defined. In the latter scenario, it is only necessary to find a legal ground to uphold them (the effects?) in force due to important arguments of axiological nature (e.g. the protection of good faith of persons acting in trust in legal action, the performance of an obligation)[70].

The directive of proportional reaction (just like in the case of other limitations) refers to the admissibility of convalidation and the exclusion of the invalidity sanction *ex lege*. The total elimination of legal effects of a "defective

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67 M. Grochowski, *Skutki braku zachowania formy szczególnej oświadczenia woli*, Warszawa 2017, p. 45.

68 R. Trzaskowski, *Skutki sprzeczności umów…*, p. 420.

69 Ibid., p. 435.; M. Grochowski, *Skutki braku zachowania…*, p. 115; S. Grzybowski, O rzekomej konwalidacji nieważnej czynności prawnej, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1974, no. 3, pp. 37–49.

70 S. Czepita, Z. Kuniewicz, *Spór o konwalidację nieważnych czynności prawnych*, "Państwo i Prawo" 2002, no. 9, pp. 79–87; A. Szpunar, *O konwalidacji wadliwych czynności prawnych*, "Państwo i Prawo" 2002, no. 7, pp. 5–17.

declaration of intent", particularly in the absence of the required special form, would be incompatible with some of the fundamental principles.

In the absence of a global convalidation norm integrated into Polish national law, convalidation, as a way of preserving an invalid legal action, is admissible only in strictly defined cases (i.e. those which derive from Civil code or the Commercial Companies code), and it is defined as "statutory convalidation"[71].

According to the prevailing view, the most important effect of convalidation is that the legal action becomes valid from the moment of its performance. The sanction of the legal action follows *ex tunc* by virtue of a special event, although the legal action is valid as a non-defective one. Lack of defectiveness also refers to the legal effects caused up to the moment that a salvatory event takes place[72].

As in the case of last will, the performance of a contract next to passing time (expiration) is a basic statutory premise of "omission of allegation of violation of law" which is sanctioned by invalidity *ex lege*. Convalidation of a defective form, i.e. replacing the requirement of maintaining a special form (*ad solemnitatem*) by fulfilling a/the commitment (performing an obligation), is a European standard[73].

At the time of the performance of the contract, the requirement of a special form loses its validity. Hence, it is possible to have all kinds of claims.

The introduction of a general normative ground of convalidation of "an invalid legal action" in the national law is found in the draft of the First book of Civil code (dating 2015). According to that draft, the convalidation norm turns an invalid action into valid by virtue of law, from the moment at which the reasons for invalidity lose their meaning[74].

4. Normative model of a limited judicial sanction in the work of the national Civil Law Codification Commission

In the work of the Codification Commission and, in particular, in the subsequent drafts of the First Book of Civil Code (from 2008 and 2015), inspired by the EU model law (PECL and DCFR) there has been a pursuit of flexibility

71 S. Rudnicki [in:] *Komantarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2001, p. 190.

72 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 731; A. Bierć, *Zarys prawa prywatnego…*, p. 840.

73 M. Grochowski, *Skutki braku zachowania…*, p. 178.

74 Art. 76 Draft First Book Civil code dating 2015 r. drafted by Civil Law Codification Commission, Warsaw 2017; Z. Radwański, *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, Warszawa 2006; R. Trzaskowski [in:] *Kodeks cywilny. Księga I…*, p. 119.

of the premises of a traditional concept of invalidity sanction of a legal action (contract) *ex lege* and of expanding the range of the judge's discretion within statutory limits[75].

As a rule, maintaining, a traditional model of invalidity sanction *ex lege*, in the event of a violation of law (illegality) or morality (violation of good morals), greater flexibility has been granted to the current concept of reservation of a different effect of a defective legal action ("unless otherwise stated in the content or purpose of the contract")[76].

Judicial sanction (*structered discretion*), treated as a sanction which allows for proportional response to defectiveness and for more flexibility than the current general invalidity sanction (and external or internal limits), has become an extension of the existing concept of the reservation of a different effect of violation of law or morality[77].

Extending the role of reservation within the context of "different effect and approval" when applying discretionary judicial sanction, there is conviction of the need to break the present dogmatic (narrow) understanding of the effect of invalidity sanction, in particular – rejection of automatism in applying that sanction. It is particularly necessary to understand the concept of reservation of a different effect of violation in a dynamic (creative) way, comprising not only the situations in which an explicit legal norm provides for a different effect but also where the purpose of a violated norm is contrary to the invalidity sanction of a legal action (contract) as too far-reaching.

Establishing an appropriate sanction for violation of the law or moral norms should be informed by judicial interpretation of the violated norm, as it falls within the duty of the judiciary to define such a sanction whose effect will best reflect the purpose of the violated norm. As a result, this interpretation will serve best implementation of justice and market honesty. That means that the characteristics of other defectiveness sanctions, even the *sui generis* sanction, may inspire the judge in deciding/imposing a sanction[78].

Structured discretion, defined as a limitation to the judge's discretion, refers not only to model regulations of the EU (PECL and DCFR) but also to the regulation of judicial sanction in *common law*, without losing the feature of originality, at least in the area of *ius civile*[79].

In the case of an illegal action (contract) the judge's competence does not depart far from the EU model law in terms of functionality, although from

75 Reasons for the Draft dating 2015r. First Book of civil code Civil Law Codification Commission, pp. 106 and R. Trzaskowski [in:] *Kodeks cywilny. Księga I…*, p. 97.

76 Art. 58 § 1 Civil code.

77 P. Skorupa, *Nieważność czynności prawnej w prawie…,* p. 773.

78 R. Trzaskowski [in:] *Kodeks cywilny. Księga I…*, p. 97.

79 In particular P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 778.

a procedural perspective it more closely reflects/resembles-*common law*. In particular, the draft of the new Civil Code is oriented, as a rule, not towards the total elimination of legal effects but towards the preservation of at least some of their effects. Particularly/For example, a sanction outside the ambit of invalidity may consist of blocking or modifying legal effects of a defective legal action.

In the Draft of the Codification Commission the following sanctions are mentioned:

a) invalidity of a legal action with effects for the future;
b) instead of a provision contrary to law validity of a provision arising from an act or from good morals or the nearest will expressed in the content of a legal action;
c) no claim possible;
d) ineffectiveness of a legal action or a part thereof until an additional premise is fulfilled, including the consent of a designated person;
e) one or both parties have the right to withdraw or terminate a legal relationship;
f) ineffectiveness of a legal action against a person protected by the violated norm;
g) liability for damages of one of the parties towards persons whose interests were protected by the violated norm[80].

The draft of the Codification Commission, based on an approach normatively ordered (structured) and procedurally limited, does not only point to a catalogue of possible modifications of the characteristics of a sanction (sanctioning norm) but also determines the circumstances which limit (setting out) the court's discretion as grounds for the choice of a particular sanction (sanctioning norm). According to the draft, which was inspired by model law (Art. 15:102 (2) PECL), expresses that the court in determining the appropriate sanction, given the purpose of the violated norm, should consider in particular the following:

a) the interests protected by the violated norm as well as the interests of the parties to the contract but also third parties worthy of protection;
b) other legal effects which follow from the violation of the law;
c) awareness or lack of awareness of a violation of the law or of good morals on behalf of the persons performing the legal actions;
d) determining whether a legal action obliges to respect proceedings prohibited by law or good morals;
e) whether the contradiction of a legal action with the law or good morals results from the abuse of a stronger contractual position by one of the parties;

80 Art. 71 § 1 Draft Civil Law Codification Commission.

f) whether the performance of the parties' obligations leads to a result which was to be prevented by the violated norm[81].

In the literature, it is emphasized that the indicated proposal goes beyond the EU model law concerning some provisions (points). For example, it differs in departing from the examination of the criterion of the degree of violation in favour of an indication of the circumstances (point d-f), concerning not only the degree of the violation but also the dependence of the sanction on the status of the legality of the service[82].

Limiting the discretion of the court and increasing legal certainty is also reflected in the proposals for sanction of a different nature, which are defined more precisely. The initial proposal is a sanction of suspended ineffectiveness. It refers to the conclusion of a contract by a person not authorized by the public authority or the professional powers required by law, as well as to perform a legal action without the consent of the public authority[83].

Considering the normatively limited judicial sanction as a mechanism for proportionality of sanctions, one cannot ignore the discussion in the doctrine on its codification in the context of the general invalidity sanction. In the discussion, the view seems to prevail that the generally approved postulate of proportionality of the invalidity sanction should allow, in addition to the sanction specified by the court, the possibility of defending the parties to a legal action (contract) against unwanted legal effects resulting from the court's assessment by way of instance control. It is assumed that the limits of the discretionary power according to the criteria set out in the legal provisions should be obligatorily indicated in the grounds for the decision so that they can realistically constitute the basis for an instance control[84].

The draft of the Civil Code Codification Commission, providing for a normatively limited judicial sanction as a proportional response to a defective legal action (contract), is the basis for a lively discussion as to the normative approach, maintained by the Commission, of the general invalidity sanction by law (*ex lege*). As part of this discussion, the following issues are pointed out:

Firstly, in the sphere of legislation, the emphasis is on the need to limit the legislator's practice of creating law without an explicit sanction, as this leads to ambiguity of the law. The remedy for this is to provide legal provisions with subsections, which should specify relationships to specific premises for the concept

81 Art. 71 § 2 points 1–6 Draft Civil Law Codification Commission.

82 P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 782; R. Trzaskowski, *Skutki sprzeczności umów…*, p. 110.

83 P. Skorupa, *Nieważność czynności prawnej w prawie…*, pp. 788–789.

84 Ibid., p. 837.

of invalidity (no legal effects). This (providing legal provisions with subsections) may occur by completely excluding the application of the general invalidity sanction in favour of other sanctions or by indicating the direction of modification of the features of the sanctioned norm (e.g. invalidity for the future, compensation for recognition as *ex tunc*). Secondly, in addition to the invalidity specified in the global norm and the proposal of norms specified in "subsections", tailored to specific areas of law (e.g. commercial companies law, labour law), it is necessary to assign the effects of violation of acts (statutes) to one model of formal features of sanctions. The same applies to the violation of moral norms and the violation of formal requirements *ad solemnitatem*.

Thirdly, in order to control the correct use of judicial discretion, it is considered necessary to determine accurately what the court should do when assessing a dispute when seeing disproportions in the consequences of the state of invalidity for participants (parties to the contract). The proportionality of sanctions should be defined from the perspective of the need to reject the extremely non-objective effects of restoring the previous state (*restitutio in integrum*); in particular, whether the grounds for damages are grounds of equity (justice).

The proposal of the Civil Law Codification Commission aimed to modernize the general (abstract) invalidity sanction *ex lege* by exemplary pointing out the direction of the modification of the characteristics of that sanction and determining the procedural position of the court. This practice is generally met with approval in the doctrine, as this solution is part of shaping the new European legal culture, which is expressed in pragmatism and not dogmatic attitudes[85].

85 In the literature it is accurately indicated that the legislative proposals of the Civil Law Codification Commission may increase the efficiency and effectiveness of the invalidity sanction of a legal action (contract), and/but they may also be counterweight for far-reaching influence of pressure groups (lobbyists) on law making in contemporary times. P. Skorupa, *Nieważność czynności prawnej w prawie…*, p. 837; A. Bierć, *Lobbing w prawodawstwie*, "Nauka" 2000, no. 4; Id., *Racjonalna procedura prawodawcza jako podstawa dobrego prawa* [in:] W. Czapliński (ed.), *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk. Praca zbiorowa*, Warszawa 2006, pp. 85–105.

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SUMMARY

In this essay there is an analysis of the reasons for the inefficiency of the traditional sanction of defectiveness of legal action (contract) by (virtue of) law (*ex lege*) as a traditional legality control instrument in legal transactions. The essay further indicates the desired direction of the modernization of that sanction in modern legal transactions. In particular, the concept is shown of the limited and normatively ordered judicial sanction, promoted by the EU model law (through the PECL and the DCFR), to expose the manifestations of proportional reaction to defectiveness of a legal action (contract) in national private law. This manifestation is also subject to unification (harmonization) with EU law. In the final part, there is description of a normative model of limited and normatively ordered judicial sanction, accepted by the Civil Law Codification Commission in Poland.

Key words: legal action, defectiveness (invalidity, nullity), judicial sanction, contract