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Constitutional protection of freedom of contract in the European Union, Poland and the United States and its potential impact on the European contract law

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ABSTRACT

The purpose of the present thesis is to present current status of freedom of contract as fundamental right in the EU, its potential future developments and impact on the EU contract law and domestic laws of the Member States. To achieve these goals I analyze different approaches of the Supreme Court of the United States, the Constitutional Tribunal of Poland and the European Court of Justice. I also present reasons decisive for the level of protection of freedom of contract in each jurisdiction. I argue that several factors suggest that contractual liberty may play important role in the case law of the ECJ and could often prevail over social rights. Therefore, it cannot be excluded that it would lead to erosion of the level of social protection in domestic law of the Member States. On the other hand, due to reluctance of the ECJ to invalidate EU secondary law it is improbable that art. 16 of the Charter would be used to invalidation of consumer protection or anti-discrimination guarantees at the EU level. As to the impact of the constitutionalization of freedom of contract on the harmonization of EU contract law I argue that although so far the jurisprudence of the ECJ had not played important role in the harmonization process, growing importance of art. 16 of the Charter may contribute to resolution of debates in the legal doctrine and would probably require reconsideration of the proposals presented by the European Commission.

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LIST OF ABBREVIATIONS

CESL	Common European Sales Law
CFR	Common Frame of Reference
CFREU	Charter of Fundamental Rights of the European Union
DCFR	Draft Common Frame of Reference
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Union (formerly: the European Court of Justice)
ECtHR	European Court of Human Rights
EU	European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
US	The United States of America

INTRODUCTION

The harmonization of European contract law is one of the most hotly debated topics in the EU legal doctrine. For many years, EU contract law was limited only to sector-specific instruments,[1] particularly in the area of consumer law or anti-discrimination law. However, since 2001 the Commission has been working on a comprehensive harmonizing instruments which in future potentially may constitute a basis for a common European Civil Code.[2]

The shape of European contract law may have great impact not only on the economies of Member States, but also on the level of protection of fundamental rights in the EU. It is therefore not surprising that each subsequent document concerning harmonization of contract law in the EU issued by the European Commission[3] raises serious controversies among legal scholars. These controversies relate in particular to the role of freedom of contract in the common European contract law and its relations with values such as social justice or fairness.

We can divide participants of the debate over European contract law into two groups. The first group argues that the proposal that freedom of contract should be a guiding principle of European contract law is based on false, neoliberal principles.[4] According to these scholars, there is nothing in EU primary law which could justify strong protection of contractual liberty[5] and that it should be necessarily limited by such values as fairness or social justice.[6]

[1] Hugh Beale and others (eds), *Contract Law* (2nd edn, Hart Publishing 2010) 4.
[2] See: Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press 2011) 106–146.
[3] See: Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' COM(2001) 398 final; Commission, 'Communication from the Commission to European Parliament and the Council, A more Coherent European Contract Law. An Action Plan' COM(2003) 68 final; Commission, 'Communication to the European Parliament and the Council. European Contract Law and the Revision of the acquis: The Way Forward' COM(2004) 651 final; Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses', COM(2010) 348 final.
[4] Martijn W Hesselink, 'The European Commission's Action Plan: Towards a More Coherent European Contract Law?' (Social Science Research Network 2004) 16 <http://papers.ssrn.com/abstract=1098851> accessed 17 March 2014.
[5] Jacobien W Rutgers, 'The European Economic Constitution, Freedom of Contract and the DCFR' (2009) 5 European Review of Contract Law 95.
[6] Martijn W Hesselink and others, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 European Law Journal 653; Jacobien W Rutgers, 'An Optional Instrument and Social Dumping' (2006) 2 European Review of Contract Law 199.

The second group indicates that freedom of contract has to be a guiding principle of common European contract law and argues that mandatory provisions and strong antidiscrimination rules may lead to erosion of private autonomy and excessively restrict an individual's liberty.[7]

Surprisingly, each side of this discussion relatively rarely perceives freedom of contract as a fundamental right which restrictions have to necessary, appropriate and proportionate.[8] If the EU Charter of Fundamental Rights[9] is invoked, it is usually presented as a factor limiting contractual liberty in order to protect fundamental social rights.[10]

There are, of course, authors who use constitutional arguments to analyze the position of contractual freedom in the EU. For instance, Carsten Herresthal contends that existing EU law excessively restricts the constitutional right to contractual freedom. However his paper is rather a postulate to include explicit guarantee of freedom of contract in CFREU.[11] Jürgen Basedow indicates that freedom of contract has strong bases in the EU primary law, but he builds his criticism of EU contract law on different arguments.[12] Extensive analysis of the role of private autonomy in the ECJ's case law could be found in an article by Guido Comparato and Hans-W. Micklitz, however their paper focuses on the connection between freedom of

[7] See, e.g.: Horst Eidenmuller and others, 'The Common Frame of Reference for European Private Law-Policy Choices and Codification Problems' (2008) 28 Oxford Journal of Legal Studies 659, 678; Horst Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' (2009) 5 European Review of Contract Law 109, 130; Matthias E Storme, 'Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law' [2008] Journal of South African Law 179, 192–195.

[8] But see, e.g.: Chantal Mak, 'Unchart(er)ed Territory: EU Fundamental Rights and National Private Law' (Social Science Research Network 2013) 7 <http://papers.ssrn.com/abstract=2254799> accessed 8 February 2014.

[9] Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

[10] See, e.g.: Martijn W Hesselink, 'The Horizontal Effect of Social Rights in European Contract Law' (Social Science Research Network 2002) <http://papers.ssrn.com/abstract=1098923> accessed 10 February 2014; Hesselink and and others (n 6) 667–668.; Hugh Collins, 'The Constitutionalization of European Private Law as a Patch to Social Justice' in Hans W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing Limited 2011) 158–164.

[11] Carsten Herresthal, 'Constitutionalisation of Freedom of Contract in EU Law' in Katja S Ziegler and Peter M Huber (eds), *Current Problems in the Protection of Human Rights. Perspectives from Germany and the UK* (Hart Publishing 2013) 89–116.

[12] Jürgen Basedow, 'Freedom of Contract in the EU' (2008) 16 European Review of Private Law 901, 907–909, 916–923.

contract and four fundamental freedoms and not on the analysis of contractual liberty as an autonomous right protected in CFREU.[13]

The necessity of a more comprehensive reflection on the protection of contractual freedom as an independent fundamental right and its impact on EU contract law is visible especially in the light of recent developments in the jurisprudence of the ECJ. In the case of *Sky Österreich*, the ECJ explicitly held that freedom of contract is a fundamental right protected by CFREU under art. 16, and its limitations of have to be consistent with the strict proportionality test.[14] Moreover, in the subsequent decision in *Alemo-Herron* case, the ECJ used constitutional freedom of contract to disallow the domestic court to interpret law transposing EU directive in a way more friendly to employees and trade unions.[15]

The purpose of the present thesis is not to argue in favor or against a particular vision of European contract law but to fill the abovementioned gap in legal doctrine by answering the question what is the current state of protection of freedom of contract as a fundamental right in the EU and what are its potential future developments. Moreover, the aim of the thesis is also to present the possible impact of the constitutionalization of freedom of contract on the domestic laws of the Member States, EU secondary law and harmonization of the European contract law. In this regard, I put emphasis on the analysis of potential impact of constitutional protection of freedom of contract on the erosion of social protection in the EU.

To address these questions I use a comparative analysis of the jurisprudence of the US Supreme Court, the Constitutional Tribunal of Poland and the European ECJ. The case law of the first serves as an example of two radically opposite approaches to constitutional protection of contractual liberty – before 1937 very strict, almost libertarian and after that year completely deferential towards legislature's choices. I analyze the reasoning of the US

[13] Guido Comparato and Hans W Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 121–153.
[14] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] OJ C 71/05.
[15] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ldt.* [2013] OJ C 260/06.

Supreme Court and its criticism in the American constitutional doctrine in order to present the main flaws of old and modern American jurisprudence and their reasons.

This in turn allows me to present differences and similarities between European and American jurisprudence and to answer the question whether, similarly as in the US before 1937, constitutionalization of freedom of contract may be used by the ECJ to block developments of social guarantees or to damage the existing level of social protection. The approach of the ECJ will be compared also with the case law of the Polish Constitutional Tribunal. The jurisprudence of domestic constitutional courts and the ECJ interact with each other, therefore the approach of the two courts to presented matters is relatively similar. However, as will be presented, subtle differences between "economic constitutions" of Poland and EU may lead to different practical results in the judgments of the two compared courts.

Although I see the potential usefulness of the application of economic analysis of law or analysis of extralegal factors which may have an impact on the constitutional protection of economic liberties, due to necessary limitations resulting from the nature of the present paper, I limit my methodology mostly to the abovementioned comparative analysis. In the analysis of the jurisprudence of the ECJ I concentrate primarily on cases involving art. 16 CFREU. Moreover, I also analyze current EU contract law as well as drafts and policy papers regarding harmonization of contract law.

The main conclusion of my paper is that the constitutional protection of contractual freedom in the EU has to be placed in between two contradictory approaches of the US Supreme Court. Constitutional guarantees of free market economy and protection of freedom of contract in CFREU do not allow on a completely deferential approach. On the other hand, protection of social values, underlined in the Lisbon Treaty, prevents absolutization of contractual liberty. The approach of the ECJ, similarly to the Constitutional Tribunal of Poland, is based on balancing of conflicting values, therefore practical results of the judicial

protection of freedom of contract and its impact on the law, will depend on the importance that the Court attaches to contractual liberty on the one side and social values on the other.

I argue that due to characteristics of the EU economic constitution, that is the fact that EU competences in the area of social policy are still seriously limited, it cannot be excluded that often freedom of contract will prevail over social justice. This possibility is further strengthened by the connections between art. 16 CFREU and four market freedoms, which in the past were interpreted by the Court in a very liberal way, as well as by the fact that the ECJ adopted formal understanding of freedom of contract. At the same time, I underline that due to traditional reluctance of the ECJ to strike down EU secondary law on the grounds of fundamental rights, it is improbable that its case law will lead to sudden, radical change of current EU contract law. On the other hand, even though so far the Commission's legislative proposals did not contain comprehensive analysis of the compliance with the art. 16 CFREU, further substantiation of the contractumal freedom by the ECJ may influence the shape of future harmonization of the European contract law,

The thesis is divided into four chapters. In the first I briefly present theoretical foundations of the freedom of contract, evolution of its understanding and its relations with fundamental rights. The Second chapter discusses the evolution of the jurisprudence of the US Supreme Court and its critical analysis. In the third chapter I compare the American approach to jurisprudence of the Polish Constitutional Tribunal and the ECJ. In the four sections I discuss provisions forming the economic constitutions of Poland and the EU, the existence of explicit or indirect constitutional guarantees of contractual freedom, the level of scrutiny applicable to interferences with freedom of contract and the approach of the courts to balancing conflicting rights. The last chapter focuses on impact of the constitutionalization of freedom of contract in the EU on the domestic laws of Member States, EU secondary law and future harmonization of European contract law.

CHAPTER I: FREEDOM OF CONTRACT AND CONSTITUTIONAL LAW

1.1. Different visions of contractual freedom

Freedom of contract is widely considered as a guiding principle of contract law.[16] It is based on the premise that "a party to a contract is a better arbiter of his or her interests than the legal system, and is better qualified to assess the fairness and reasonableness of the ways chosen to give effect to that interest".[17] Therefore, the essence of contractual freedom is linked to liberal concept of individual autonomy.[18] However, legal developments in 20-th and 21-st century[19] showed that freedom of contract does not have to be interpreted only in a formal, "libertarian" way and may be reconciled with social justice.

Although the principle of freedom of contract has its roots in antiquity[20], its theoretical foundations were established in 17-th and 18-th centuries. In this period, primarily under the influence of the ideas of Thomas Hobbes and John Locke, freedom of contract was considered as a part of natural law.[21] But a person who is widely considered to be a father of liberal theory of contractual freedom is Adam Smith,[22] who laid down the foundations of the economic liberalism.[23] Smith treated freedom of contract as a sacred and inviolable principle:

> The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain

[16] Comparato and Micklitz (n 13) 121–122; Norbert Reich, *General Principles of EU Civil Law* (Intersentia 2014) 19;
[17] Arthur Chrenkoff, 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 Austl. J. Leg. Phil. 36, 37.
[18] Thomas Gutmann, 'Theories of Contract and the Concept of Autonomy' [2013] Preprints and Working Papers of the Centre for Advanced Study in Bioethics, Westfälische Wilhelms-Universität Münster, 3 <http://www.uni-muenster.de/imperia/md/content/kfg-normenbegruendung/intern/publikationen/gutmann/55_gutmann_-_contract_and_autonomy.pdf>.
[19] Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) 681–779; Patrick S Atiyah and Stephen A Smith, *Atiyah's Introdution to the Law of Contract* (Clarendon Press 2005) 11–20.
[20] Chrenkoff (n 17) 41.; Paul Vinogradoff, *Outlines of Historical Jurisprudence*, vol 2 (Oxford University Press 1922) 237 <https://archive.org/details/outlinesofhistor02vinouoft> accessed 21 March 2014; Philip Shuchman, 'Aristotle's Conception of Contract' (1962) 23 Journal of the History of Ideas 257; Fritz Schultz, *Principles of Roman Law* (Clarendon Press 1956) 146.
[21] Atiyah (n 19) 70.
[22] Chapin F Cimino, 'Virtue and Contract Law' (2009) 88 Oregon Law Review 703, 724.
[23] See, e.g.: Eray Canterbery, *A Brief History of Economics: Artful Approaches to the Dismal Science* (2nd edn, World Scientific 2011) 39–60.

> violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him.[24]

Smith's views had a great impact on the classical theory of contract developed in the 19-th century. It was based on the premise that freedom of contract, understood as "the power to decide whether to contract and to establish the terms of the bargain", is inevitable to protect "individual welfare and the common good".[25] The state's interference with contractual freedom was rejected as a limitation of natural right – duty of a government was to "exercise restraint and (…) protect the right of the individual to contract freely".[26]

Liberally understood contractual liberty gives parties freedom to decide about all elements of their contractual relation. First, it protects freedom to take initial decision as to conclude an agreement with other party.[27] Second, it implies "freedom to select contractual partner".[28] Third, it grants parties "freedom of classification and content".[29] The former means that parties can base their contract on one of the types regulated in the law or conclude so-called "innominate contract", while the latter relates to the right to decide about the shape and content of the contract.[30] "Freedom of form implies that binding nature of contract cannot depend "on adherence to any particular contractual form" while "freedom of modification" gave to the parties right to freely amend their agreement.[31] In addition, freedom of contract implies also freedom from contract, that is right to not to conclude a contract.[32]

In the late 19-th and in the 20-th century classical formal concept of freedom of contract became the subject of significant criticism. It was argued that "contract theory did not reflect the harsh realities of the marketplace in the late nineteenth century. Equal parties did

[24] Adam Smith, *Wealth of Nations* (Hayes Barton Press 2001) 106–107.
[25] Carolyn Edwards, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues' (2008) 77 UMKC Law Review 647, 654.
[26] Ibid 655.
[27] Basedow (n 12) 905.
[28] Ibid 906.
[29] Ibid.
[30] Ibid.
[31] Ibid 906-907.
[32] Todd D Rakoff, 'Is Freedom from Contract Necessarily a Libertarian Freedom' [2004] Wisconsin Law Review 477.

not exist and strong parties were able to impose unfair and oppressive bargains upon those who were weak and vulnerable".[33] Many scholars began to question the ideological foundations of the freedom of contract. Leonard Hobhouse, for example, argued that contract between unequal parties cannot be free, because "the weaker man consents as one slipping over precipice might consent to give all his fortune to one who will throw him a rope on no other terms. This is not true consent".[34]

P. S. Atiyah contended that this criticism of liberal doctrine and its failure to address many important economic and social problems which emerged in the 19-th century led to eventual decline of the classical theory of contract.[35]

The legal developments in 20-th century brought not only significant limitations of freedom of contract, such as consumer law, anti-discrimination law, affirmative action, minimum wages,[36] but also emergence of new definitions of contractual liberty. Especially important is the concept of substantive freedom of contract according to which in order to ensure that weaker party has true autonomy and is not subordinated to stronger party, law has to intervene.[37] As a consequence, certain regulations of contractual freedom are no longer considered as its limitations but rather "as an endeavour which is aimed at maximizing substantive freedom (…) of both parties to the contract".[38]

1.2. Freedom of contract and constitutional law

In addition to this evolution, 20-th century brought yet another very important development which had significant impact on the shape of contractual liberty and contract law

[33] Edwards (n 25) 647–648.
[34] Leonard T Hobhouse, *Liberalism* (Oxford University Press 1964) 50.
[35] Atiyah (n 19) 693–715.
[36] See, e.g.: E Allan Farnsworth, *Contracts* (3rd edn, Aspen Publishers 1999) 20–21.
[37] Olha O Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Sellier 2007) 10–11.
[38] Stefan Grundmann, 'The Future of Contract Law' (2011) 7 European Review of Contract Law 490, 505; See also: Mark Pettit Jr, 'Freedom, Freedom of Contract, and the Rise and Fall' (1999) 79 Boston University Law Review 263, 297; Roger Brownsword, 'Freedom of Contract, Human Rights and Human Dignity' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2001) 187.

as a whole. This factor is so-called "constitutionalization of private law"[39], that is growing influence of constitutional law, especially fundamental rights, on private law. Paradoxically, constitutionalization of contract law may both strengthen and weaken the level of protection of freedom of contract. Limitations may be consequence of horizontal application of fundamental rights[40], while strengthening may be result of conferring a status of fundamental right upon a freedom of contract itself.[41]

Explicit protection of freedom of contract in constitutions happens rather rarely but if it does it is usually a sign of commitment of the framers to a strong neoliberal economic policy. One of the examples of this relation is the Constitution of Chile, which art. 19(16) provides that "[a]ny person has the right to freely contract [for] and to the free choice [of] work, with a just compensation". The reason for constitutionalization of contractual liberty in Chile is obvious – the Constitution was adopted in 1980 and its content was aimed at safeguarding radically liberal economic policy pursued by the gen. Augusto Pinochet.[42] Also in Peru explicit constitutionalization of freedom of contract can be linked to neoliberal reforms conducted by the then president Alberto Fujimori.[43]

Constitutions of all European countries do not contain any direct references to contractual freedom. This does not mean that they are completely neutral towards this principle. In many European states freedom of contract, understood as a fundamental right, was derived by the constitutional courts from other constitutional provisions.

[39] See: Olha Cherednychenko, 'The Constitutionalization of Contract Law: Something New under the Sun?' (2004) 8 Electronic Journal of Comparative Law <http://www.ejcl.org/81/art81-3.html> accessed 8 February 2014; Collins, 'The Constitutionalization of European Private Law as a Patch to Social Justice' (n 10) 135–141.

[40] See: Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International 2008) 281–286.

[41] See: Chantal Mak, 'Unchart(er)ed Territory: EU Fundamental Rights and National Private Law' (Social Science Research Network 2013) 5–7 <http://papers.ssrn.com/abstract=2254799> accessed 8 February 2014.

[42] Teodoro Ribera Neumann, 'Constitutional Basis of the Economic Public Order in Chile' [2010] Revista Dreptul 236.

[43] Geoffrey P Miller, 'Choice of Law as a Precommitment Device' in Francis H Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999) 366–367; Oscar Dancourt, 'Neoliberal Reforms and Macroeconomic Policy in Peru' [1999] CEPAL Review 51.

The most notable example of indirect protection of contractual freedom is the jurisprudence of the Federal Constitutional Court of Germany. In its case law, freedom of contract was derived from provisions protecting property (art. 14), freedom of occupation (art. 12) and in particular art. 2 the Basic Law which guarantees general freedom of action.[44]

The constitutional freedom of contract in Germany has two dimensions. First dimension is based on a classical concept of freedom of contract and protects against excessive government's interferences in the contractual relations.[45] The Court underlines that the legislature has a wide discretion in choosing goals in the sphere of social and economic policy and thus it upheld many laws interfering with contractual freedom.[46] However, legislature's discretion is not unlimited[47].

But the constitutional freedom of contract has also a second dimension, based directly on the concept of substantive contractual freedom. The Constitutional Court established this principle in the *Suretyship* case:

> (…) if there is a typical case scenario, which reveals a structural inferiority of one contracting party and the consequences of the contract for the inferior party are unusually onerous, then the civil law must react and enable corrective measures. That follows from the fundamental guarantee of private autonomy (Article 2(1) GG)15 and the principle of the social state (Articles 20(1), 28(1) GG) (…) civil courts (…) are under a duty to interpret and apply the general clauses so as to ensure that contracts shall not serve as a means to hetero-determination.[48]

In two more recent *Life Insurance Contracts* cases[49] the Constitutional Court even expanded the scope of substantive freedom of contract by resignation from the requirement that inequalities between parties have to lead to "unusually onerous" consequences for the

[44] Axel Flessner, 'Freedom of Contract and Constitutional Law in Germany' in Alfredo M Rabello and Petar Sarcevic (eds), *Freedom of contract and constitutional law* (Sacher Inst 1998) 88–89.
[45] Ibid 90-96.
[46] Ibid 92-93.
[47] Ibid 93-96.
[48] BVerfG 19 October 1993, BVerfGE 89, 214, quoted in: Aurelia Colombi Ciacchi, 'Party Autonomy as a Fundamental Right in the EU' (2010) 6 European Review of Contract Law 306–307.
[49] BVerfG 26 July 2005, 1 BvR 782/94 and 1 BvR 957/96, Neue Juristische Wochenschrift 2005, 2363; BVerfG 26 July 2005, 1 BvR 80/95, Neue Juristische Wochenschrift 2005, 2376.

inferior party.[50] It follows, that now "every situation where one contracting party (…) can no longer exercise its substantive self-determination and is therefore dominated by the other party (…) gives rise to a State's duty to intervene and provide a legal remedy."[51] Therefore, two factors which contributed to adoption by the German Constitutional Court concept of substantive freedom of contract were the principle of social state, which is one of the foundations of German "economic constitution", and theory of positive duties of state.

Also in France protection of freedom of contract was derived from guarantee of individual's liberty[52] and, additionally, – art. 16 of the Declaration of the Rights of Man and of the Citizen which provides that "[a] society in which human rights are not guaranteed and separation of powers not determined does not have a Constitution".[53]. Constitutional freedom of contract can be limited by legislature only on grounds of general public interest.[54]

Unlike in France and Germany, in Italy constitutional protection of freedom of contract is derived not from the provisions guaranteeing general freedom of action, but from the freedom of economic initiative.[55] The constitutional protection of the latter is weaker than in case of other rights and freedoms – "the need to achieve social utility justifies both the setting of restrictive conditions for the operation of freedom of contract, and the modification or elimination of contract terms which conflict with social utility".[56]

Another important tendency which emerged in 20-th century is growing impact of fundamental rights on private law.[57] Contrary to older approach which recognized only vertical applicability of fundamental rights, currently it is accepted that constitutional

[50] Colombi Ciacchi (n 48) 307–308.
[51] Ibid 308.
[52] 2 2000-47 DC, December 19, 2000, p. 190.
[53] Roger Errera, 'The Right of Property and Freedom of Enterprise in French Constitutional Law' (Institute of Law and Public Policy 2009) 22.
[54] 2011-177 QPC October 7th 2011, para 6.
[55] Colombi Ciacchi (n 48) 313.
[56] Ibid 313-314.
[57] See: Mak, *Fundamental Rights in European Contract Law* (n 29); Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (n 26); Lorenz Fastrich, 'Human Rights and Private Law' in Katja S Ziegler (ed), *Human Rights and Private Law : Privacy as Autonomy* (Hart Publishing 2007) 23–34.

fundamental rights may be horizontally applied to private law disputes either directly or indirectly.[58] Direct application "implies that fundamental rights are used in contract law in the same way as in the State-citizen relationship".[59] Indirect horizontal application of fundamental rights implies that although human rights are not directly enforceable against other party in private law dispute, "[e]ach provision of private law should (…) be formulated as well as interpreted in accordance with the fundamental values [of the Constitution]".[60]

Direct model can be criticized on various grounds. For instance, some legal scholars argue that fundamental rights cannot be applied against private persons in the same way as against the state because "the law allows more freedom to individuals than to the state and permits individuals to live in ways that depart from the requirements of neutrality and equal respect that govern all actions of the state".[61] What is more, in cases of disputes between two individuals, both parties are protected by human rights, what makes it impossible to use classical proportionality test.[62] For these reasons direct model is relatively rarely accepted in practice.[63]

Theory of indirect horizontal effect of fundamental rights is definitely more frequently accepted in the practice of constitutional courts.[64] However, some legal scholars argue that differences between direct and indirect models of horizontal application of constitutional rights are only theoretical.[65] In this context, Olha Cherednychenko underlines that the German doctrine of substantive freedom of contract implies that "contractual parties are in reality

[58] Aharon Barak, 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2001) 14–42.
[59] Mak, *Fundamental Rights in European Contract Law* (n 40) 46.
[60] Ibid 59.
[61] Collins, 'The Constitutionalization of European Private Law as a Patch to Social Justice' (n 10) 144.
[62] Ibid 145–146.
[63] Barak (n 58) 22–25.
[64] See jurisprudence of the German Federal Constitutional Court, especially: BVerfG 15 January 1958, *BVerfGE* 7, 198 (so-called "Lüth case").
[65] Mattias Kumm, 'Who's Afraid of the Total Constitution-Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German Law Journal 341, 352–359.

bound by constitutional rights and may have a claim or a defence on the basis of a constitutional right (…)".[66]

Constitutionalization of contract law implies that in order to deserve constitutional protection, freedom of contract "needs to be used for worthwhile purposes or for the collective good".[67] Consequently, it strengthens position of weaker party of contract but weakens formal contractual liberty.[68] It is therefore not surprising that constitutionalization of contract law often leads to redefinition of freedom of contract by adopting its substantive understanding.[69] In those countries which did not adopt substantive concept of freedom of contract[70] constitutionalization implies necessity of balancing formally understood private autonomy and social rights or consumer rights.

1.3. Freedom of contract and ECHR

In contrast to domestic constitutions, international human rights instruments, with exception to CFREU, usually do not protect freedom of contract at all or recognize it in a very narrow aspect. This is true in particular in the context of the ECHR which covers some aspects of contractual liberty under art. 1 of the Protocol 1.

Protection of some aspects of contractual freedom by the ECHR comes as little surprise. As Markus Emberland correctly points out "[i]t would be meaningless to disconnect the Convention's democratic model from core values of a capitalist system since it embraces the value system of the liberal state, in which the company as protagonist of private enterprise has a natural place".[71]

Traces of protection of freedom of contract could be found primarily in the jurisprudence over the art. 1 of the Protocol No. 1 which guarantees protection of property. In

[66] Cherednychenko, 'The Constitutionalization of Contract Law' (n 39).
[67] Collins, 'The Constitutionalization of European Private Law as a Patch to Social Justice' (n 10) 162.
[68] Ibid 160-161.
[69] Maria R Marella, 'The Old and the New Limits to Freedom of Contract in Europe' (2006) 2 European Review of Contract Law 257, 267–268.
[70] For instance: Italy or Poland.
[71] Marius Emberland, *Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006) 42.

several cases the ECtHR ruled that disproportionate regulations on rent control, which severly restricted rights of landlords to increase rent or terminate lease contract, can be qualified as violation of the right to property.[72] In the case of *Ghigo v. Malta* the ECtHR clarified that to assess compatibility of given regulation with art. 1 of Protocol No. 1:

> the Court must make an overall examination of the various interests in issue (…) that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the State's interference with freedom of contract and contractual relations in the lease market but also the existence of procedural safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. (…).[73]

Henricus Snijders argues that in addition to art. 1 of Protocol No. 1, protection of freedom of contract could be derived from art. 8 of the ECHR which guarantee right to privacy.[74] According to him, broadly defined privacy includes "not only the right to intimacy (…) but also the right to personal autonomy (the right to self-determination)"[75] which "can be concretised as the right to freely enter into certain contracts".[76] Such interpretation of art. 8 might seem plausible, however it had not yet been confirmed in the case law of the ECtHR.

It follows that protection of contractual freedom on the grounds of ECHR is seriously limited and cannot be compared to level of protection granted by domestic constitutions. At the same time rights and freedoms provided in the ECtHR can function as factors which significantly restrict freedom of contract.

The most notable example is here the case of *Pla and Puncernau v. Andorra*[77] which concerned enforcement of the testament in which testatrix discriminated descendants who were not born in "a legitimate and canonical marriage". The problem was whether child who had been adopted satisfied requirement specified in the will. The Andorran courts ruled that it

[72] See: *Hutten-Czapska v. Poland* ECHR 2006-VIII; *Scollo v. Italy* (1995) Series A no 315-C; *Edwards v. Malta* app no 17647/04 (ECtHR, 24 October 2006); *Bitto and others v. Slovakia* App no 30255/09 (ECtHR, 28 January 2014).
[73] *Ghigo v. Malta* App no 31122/05 (ECtHR, 26 September 2006), para 62.
[74] Henricus J Snijders, 'Privacy of Contract' in Katja S Ziegler (ed), *Human Rights and Private Law : Privacy as Autonomy* (Hart Publishing 2007) 105–116.
[75] Ibid 106.
[76] Ibid 108.
[77] *Pla and Puncernau v. Andorra* ECHR 2004-VIII.

did not because the law of Andorra at the moment of making a will did not recognize the institution of adoption.[78] The ECtHR held that although it "is not in theory required to settle disputes of a purely private nature" it nevertheless:

> cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or (…) blatantly inconsistent with the prohibition of discrimination established by Article 14.[79]

The ECtHR ruled that in the instant case the domestic courts erroneously interpreted the testament only in the light of the social and economic realities existing at the moment of death of testatrix, and ignored changes which happened later.[80] Moreover, the Court added that domestic courts cannot overlook "the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law." [81]

Although the judgment concerned testation, one could easily imagine that the Court would apply similar reasoning to cases dealing with interpretation of discriminatory contracts.[82] Olha Cherednychenko argued that horizontal application of the Convention in purely private law disputes may have "disastrous consequences" for the contractual freedom and private autonomy.[83] In my opinion such statement is exaggeration. It is undoubtedly true that growing impact of fundamental rights on private law restricts formal contractual freedom, however one have to keep in mind that, as was discussed above, indirect horizontal application of certain fundamental rights has been accepted for a long time in the

[78] Ibid, para 18.
[79] Ibid, para 59.
[80] Ibid, para 62
[81] Ibid.
[82] Hugh Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (2013) 76 Law & Contemporary Problems 71, 86.
[83] Olha Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights' (2006) 13 Maastricht Journal of European & Comparative Law 195, 207; see also: Richard S Kay, 'The European Convention on Human Rights and the Control of Private Law' (2005) 5 European Human Rights Law Review 466, 479.

jurisprudence of certain domestic courts. Moreover, it is also accepted by the ECJ.[84] Having on mind that domestic constitutional courts and the ECJ have much greater influence on the national contract laws than the ECtHR, it is difficult to agree with the opinion that emergence of similar tendencies in the jurisprudence of the ECtHR could lead to catastrophic results.

1.4. Conclusions

In conclusion, statements of some legal scholars who announced "fall of liberty of contract"[85] are undoubtedly exaggeration. Freedom of contract is still treated as a guiding principle of a contract law and the relevant question is not whether it should be completely abandoned but how to find proper balance between autonomy and social justice.[86] On the one hand too strong protection of contractual liberty may lead to its absolutization and can block reforms of private law aimed at protection of weaker parties. On the other, its excessive restrictions may lead to violation of individual's liberty and have negative impact on the economy.

Constitutional position of freedom of contract in 20-th and 21-st century is therefore a result of a struggle between classical, liberal interpretation of this principle and tendencies to limit in the name of protection of fundamental rights and social justice. In many countries contractual freedom is considered as a fundamental right what strengthens its position and protects against excessive encroachments of the legislature. However, at the same time constitutionalization of private law and possibility of horizontal application of human rights implies necessity of imposing far reaching restrictions on freedom of contract, which would be definitely rejected by classical liberals as violation of a sacred human's liberty.

[84] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981; Thomas Papadopoulos, 'Criticizing the Horizontal Direct Effect of the EU General Principle of Equality' (2011) 5 European Human Rights Law Review 437.
[85] Atiyah (n 19).
[86] Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (n 37) 10–11.

CHAPTER 2. JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT – TWO DIFFERENT APPROACHES TO CONSTITUTIONAL PROTECTION OF FREEDOM OF CONTRACT IN THE US

The Supreme Court of the United States was the first constitutional court in the world which adopted doctrine of constitutional protection of contractual freedom. This doctrine, known as the "economic due process", was criticized by many as an absolutization of contractual liberty and usurpation of lawmaking powers by the courts.[87] For many years the American experiences served not only as an argument against constitutionalization of contractual liberty but also against the whole concept of judicial review.[88] Even today, when many European countries and the ECJ accept constitutionalization of freedom of contract, the jurisprudence of the US Supreme Court is seen as an "anti-model" which by no means should be followed.[89] The economic due process was eventually abandoned and now all restrictions of contractual liberty enjoy almost irrebuttable presumption of constitutionality.[90]

In the following chapter I will discuss the evolution of the case law of the US Supreme Court and analyze critical opinions presented by American legal scholars in order to identify the main flaws in the reasoning of the Court and to establish what were their causes. This will allow to answer the question why the Supreme Court was unable to develop consistent and moderate doctrine of protection of freedom of contract and whether complete abandonment of the economic due process was the only one and the best solution.

2.1. Protection of freedom of contract in the US Constitution

The US Constitution does not contain any provision which would explicitly protect freedom of contract or generally economic liberties. Moreover, unlike many European constitutions, it does not expressly declare what shall be the economic system of the country.

[87] Infra 27-29.
[88] Miguel Schor, 'Judicial Review and American Constitutional Exceptionalism' (2008) 46 Osgoode Hall Law Journal 535, 554; Arthur Dreyre, 'France: Patterns of Argumentation in Constitutional Council Opinions' 40–42 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026396> accessed 23 March 2014.
[89] Anthony Ogus, 'Property Rights and Freedom of Economic Activity' in Albert Rosenthal and Louis Henkin (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press 1990) 142–143, 144.
[90] Infra 26.

Because of that, question whether and to what extent the US Constitution protects freedom of contract has always raised serious controversies.

According to one view, the Constitution does not embody any particular economic theory[91] and so the legislature is not obliged to take "for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other".[92] Some legal scholars believe that even though Founding Fathers of the US were "generally committed to the Liberal State and to minimal government (…) [they] did not deem it necessary or proper to write that commitment into the Constitution."[93] It is argued that judicial protection of the freedom of contract "(…) rested neither upon any specific constitutional principle, nor upon any well-established precedent".[94]

Many others, however, believe that economic neutrality of the US Constitution is a myth. Constitution contains many provisions which limit powers of government and protect individual liberty[95], e.g. contracts clause,[96] prohibition of "making anything but gold and silver legal tender",[97] due process clause[98] or takings clause[99]. Some scholars even conclude that the Constitution was "essentially an economic document" which primary aim was to protect property rights and economic liberties.[100] Supporters of this position also argue that views of the Founding Fathers were based on free market principles and classical liberalism, especially thought of John Locke. [101]

[91] *Lochner v. New York*, 198 US 45, 47 (1905) (Holmes, J., dissenting).
[92] *Ferguson v. Skrupa*, 372 US 726, 731-732 (1963).
[93] Louis Henkin, 'Economic Rights under the United States Constitution' [1994] Columbia Journal of Transnational Law 97.
[94] Alfred H Kelly and Winfred Harbison, *The American Constitution: Its Origins and Development* (WW Norton 1948) 518.
[95] Ellen F Paul, 'Freedom of Contract and the "Political Economy" of Lochner v. New York' (2005) 1 NYU Journal of Law & Liberty 515, 535.
[96] Article 1, section 10, clause 1 of the U.S. Constitution.
[97] Ibid.
[98] 5-th Amendment and 14-th Amendment section 1.
[99] 5-th Amendment.
[100] Charles A Beard, *An Economic Interpretation of the Constitution of the United States* (The Macmillan Company 1921).
[101] James W Ely Jr., 'The Constitution and Economic Liberty' (2012) 35 Harvard Journal of Law & Public Policy 27, 29–32.

As to the question of freedom of contract, it is argued that in times of drafting the Constitution it was perceived as a part of natural law,[102] and indeed among early jurisprudence of the Supreme Court one can find judgments which justified constitutional protection of contractual freedom by referring to the natural law.[103] Yet another scholars refer to the libertarian values of the 19-th century antislavery movement.[104]

Regardless of these theoretical disputes, it is worth to underline that among legal scholars who support the idea of protection of contractual freedom as a fundamental right there is no consensus as to which constitutional provision could provide proper basis for it.

One of potential candidates is "contracts clause" of art. 1 section 10 which provides that "[n]o State shall (…) pass (…) Law impairing the Obligation of Contracts". The interpretative problem regarding this provision concerned question whether it protects only existing contracts or maybe it also has prospective effect what would be equivalent to the protection of contractual freedom.[105] The Supreme Court resolved this question in the *Ogden v. Saunders* in which it ruled that the Constitution prohibits States retroactive interferences with existing contracts but does not preclude regulation of terms of prospective contracts.[106] Although some legal scholars argue that this restrictive approach is erroneous,[107] the Supreme Court continued this interpretation in more recent cases.[108]

Others believe that proper constitutional basis for the protection of freedom of contract is provided in "privileges or immunities clause" of the 14th Amendment.[109] It is argued that the provision according to which "no State shall make or enforce any law which

[102] Bernard H Siegan, *Economic Liberties and the Constitution* (University of Chicago Press 1980).
[103] See, e.g.: *Calder v. Bull*, 3 US 386, 388 (1798).
[104] William E Nelson, 'The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America' (1974) 87 Harvard Law Review 513, 556–557.
[105] Geoffrey R Stone and others, 'Implied Fundamental Rights', *Constitutional Law* (6th edn, 2009) 962.
[106] 25 US 213 (1827).
[107] Richard A Epstein, 'Toward a Revitalization of the Contract Clause' (1984) 51 University of Chicago Law Review 703, 724–730.
[108] Erwin Chemerinsky, *Constitutional Law: Principles and Policies.* (Aspen Publishers 2006) 635–639.
[109] See, e.g.: Randy E Barnett, 'Does the Constitution Protect Economic Liberty?' (2012) 35 Harvard Journal of Law & Public Policy 5, 5–12; Kimberly C Shankman and Roger Pilon, 'Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government' (1998) 3 Texas Review of Law & Politics 41, 41–48.

shall abridge the privileges or immunities of citizens of the United States" should be interpreted as "intended to protect a broad range of natural and common law rights against interference by states"[110], including – economic liberties and freedom of contract. Such understanding of "privileges or immunities clause" was however rejected by the Supreme Court in the *Slaughter-House cases*.[111]

*2.2. "***Lochner** *era" and "economic due process" – judicial activism in protection of economic liberties*

The most important provision proposed as constitutional basis for protection of freedom of contract is "due process clause" of the 5th and the 14th Amendments. Unlike previously discussed interpretations of "contract clause" or "privileges and immunities Clause", using "due process clause" to protect economic liberties has not always been rejected in the jurisprudence of the Supreme Court. On the contrary, between 1897 and 1937 the Supreme Court developed doctrine of so-called "economic due process", which although rejected and widely criticized after New Deal period, is still debated among legal scholars and to some extent influenced judicial review of economic legislation also in Europe.

Way of interpreting "due process clause" in which the content of this provision is not limited only to procedural matters but includes also substantive requirements is known in the doctrine of American constitutional law as "substantive due process".[112] Consequently, "economic due process" should be defined as a doctrine of substantive due process applied to protect economic liberties.[113]

[110] Timothy Sandefur, 'Privileges, Immunities, and Substantive Due Process' (2010) 5 NYU Journal of Law & Liberty 115, 172.
[111] 83 US 36 (1873).
[112] Otis H Stephens Jr. and John M Scheb II, *American Constitutional Law* (3rd edn, Thomson/West 2003) 344–345.
[113] See: Michael J Phillips, 'Another Look at Economic Substantive Due Process' [1987] Wisconsin Law Review 265, 269. It is however worth underlining that neither phrase "substantive due process" nor "economic due process" were used by the Supreme Court justices in the "Lochner Era" – Edward G White, *The Constitution and New Deal* (Harvard University Press 2000) 243–244.

The Supreme Court has not always accepted the idea of "substantive due process". In the early jurisprudence it explicitly underlined that "due process clause" imposed only procedural, and not substantive obligations on the government.[114] This attitude of the Supreme Court was substantially changed during so-called "*Lochner* era"[115], however even before that period one can find several Supreme Court's judgments with the application of that doctrine, including the infamous *Dred Scott* case.[116] Substantive due process was to a large extent rejected together with the Supreme Court's departure from the "*Lochner* jurisprudence", criticized by many as excessive intrusion of the judicial power in the sphere of legislature and executive.[117] However, in 1960's, during the period of judicial activism of the "Warren Court",[118] the idea of substantive due process was revived and currently "substantive due process is alive and well".[119] This revival, however, did not include "economic due process".

It is believed that the "economic due process" was established in 1897 with the Supreme Court's judgment in the case of *Allgeyer v. Louisiana*.[120] However, even before the Supreme Court fully endorsed that doctrine, it was widely accepted by state courts.[121] Moreover, in several earlier cases the Supreme Court despite upholding the law in question, noted as *obiter dicta* that it cannot be excluded that in some circumstances economic regulations may violate due process.[122]

In the *Allgeyer* the Supreme Court explained that the notion of "liberty" used in the "Due Process Clause" could not be interpreted only as freedom from unwarranted detention but should rather:

[114] See: *Murray v. Hoboken Land & Improvement Co.*, 59 US 272 (1856).
[115] *Lochner* (n 91).
[116] *Dred Scott v. Sandford*, 60 US 393 (1856); Austin Allen, 'Rethinking Dred Scott: New Context for an Old Case' (2007) 82 Chicago-Kent Law Review 141, 141–176.
[117] Infra 27-28.
[118] Bernard Schwartz, *A History of the Supreme Court* (Oxford University Press 1993) 275–276.
[119] William R Musgrove, 'Substantive Due Process: A History of Liberty in the Due Process Clause' (2008) 2 U. St. Thomas JL & Pub. Pol'y 125, 140.
[120] 165 US 578 (1897).
[121] Siegan (n 102) 41–58.
[122] See: *Munn v. Illinois*, 94 US 113, 125 (1877).

> (…) embrace the right of citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; (…) to pursue any livelihood or avocation and for that purpose to enter in to all contracts which may be proper, necessary and essential to his carrying out to a successful completion of the purposes above mentioned.[123]

Doctrine formulated by the Supreme Court in that case was developed in subsequent judgments, especially in the *Lochner v. New York*.[124] In this case, the Supreme Court struck down state law which set maximum working hours for bakers. The Supreme Court reiterated that "the general right to make a contract", which included "right to purchase or to sell labor", is protected as a "liberty" within the meaning of the 14th Amendment.[125]

At the same time the Court underlined that constitutional contractual freedom is not absolute – it may be limited by the states' police powers if it is necessary to protect "safety, health, morals, and general welfare of the public".[126] The mere protection of employees as a weaker party was not considered as legitimate purpose because the legislature did not have any right "to assume that one class has the need of protection against another".[127]

According to the Supreme Court, courts should review laws interfering with freedom of contract using following test:

> [i]s this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[128]

The Supreme Court also clarified that the relation of the law to the legitimate aim cannot be merely remote but hast to be direct.[129]

Applying this test in the *Lochner*, the Supreme Court held that the New York's law was not related to any valid purpose. In particular, the Court underlined that it was not related

[123] *Allgeyer v. Louisiana*, 165 US 578, 589 (1897).
[124] *Lochner* (n 91).
[125] Ibid 53.
[126] Ibid.
[127] Bernard Schwartz, *A Commentary on the Constitution of the United States. Part II: The Rights of Property* (Macmillan 1965) 174.
[128] *Lochner* (n 91) 56.
[129] Ibid 57.

to the protection of public health as there was no evidence that the excessive number of working hours of bakers have negative impact on quality and cleanness of bread. At the same time, the Court rejected the argument that desire to protect health of bakers could justify the law. Such reasoning could lead to regulation of working hours of all professions, what would be excessive interference with the contractual freedom.[130]

Proper exercise of police powers by states was not the only one exception to the protection of freedom of contract. In the *Adkins v. Children's Hospital*[131], the Supreme Court several other categories: regulations "fixing rates and charges to be exacted by businesses impressed with a public interest", "statutes relating to contracts for the performance of public work", "statutes prescribing the character, methods, and time for payment of wages", and "statutes fixing hours of labor".[132] Especially important, because allowing government to interfere with the freedom of contract to the largest extent, was the first category. In the *Wolff Packing*[133] clarified what businesses shall be deemed as "impressed with a public interest":

> (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
> (2) Certain occupations, regarded as exceptional (…) Such are those of the keepers of inns, cabs, and gristmills.
> (3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. (…)[134]

Having on mind this wide range of exceptions, it seems that, at least in theory, the Supreme Court did not absolutize the freedom of contract but rather treat it as a "general presumption in favor of liberty".[135]

One cannot ignore, however, that the Court used principles formulated in the *Lochner* to invalidate many laws[136] which interfered with the liberty of contract through protection of

[130] Ibid 59-64.
[131] 261 US 525 (1923).
[132] Ibid 546-547.
[133] *Charles Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 US 522 (1923).
[134] Ibid 535.
[135] David N Mayer, *Liberty Of Contract. Rediscovering a Lost Constitutional Right* (Cato Institute 2011) 63–67.

trade union rights[137] or setting minimum wages[138]. But on the other hand, many economic regulations were upheld. For instance, in the *Muller v. Oregon*[139] the Supreme Court ruled that law setting maximum working hours of workers employed in extraordinarily dangerous professions, and women employees, realized valid police power's purpose, i.e. protection of public health[140] what seems inconsistent with the reasoning presented in *Lochner*. Similarly, in *Bunting v. Oregon* the Court upheld maximum working hours regulation for manufacturing jobs.[141] These jurisprudential inconsistencies are often marked as one of the main weaknesses of the "economic due process doctrine" and the reason for its eventual abandonment.[142]

*2.3. The demise of "***Lochner** *Era" and Post-New Deal judicial restraint*

The demise of "*Lochner* Era" was strictly connected to the emergence of the Great Depression. President Roosevelt's policy of New Deal had to lead to conflict with a judicial doctrine founded on the principles of classical economic liberalism.[143] As a result, the Supreme Court, under pressure exerted by the President and his "court packing plan",[144] endorsed radically different policy of judicial restraint in the field of economic regulations.

The first signs of departure from the "economic due process doctrine" could be observed in the case of *Nebbia v. New York*.[145] The Supreme Court upheld the law which established Milk Control Board with powers to issue orders fixing milk prices. Moreover, the

[136] According to Justice Frankfurter, the Supreme Court invalidated 220 acts on the basis of the 14th Amendment: Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Harvard University Press 1938) 97. This number is sometimes questioned: Michael J Phillips, 'How Many Times Was Lochner-Era Substantive Due Process Effective?' (1997) 48 Mercer Law Review 1049.
[137] See: *Adair v. United States*, 208 US 161 (1908); *Coppage v. Kansas*, 236 US 1 (1915).
[138] See: *Morehead v. New York ex rel. Tipaldo*, 298 US 587 (1936).
[139] 208 US 412 (1908).
[140] Ibid 421-422. See also: *Holden v. Hardy*, 169 US 366 (1898).
[141] 243 US 426, 438-439 (1917).
[142] David N Mayer, 'The Myth of Laissez-Faire Constitutionalism: Liberty of Contract during the Lochner Era' [2008] Hastings Constitutional Law Quarterly 217, 275–280.
[143] Lawrence M Friedman, *American Law in the 20th Century* (Yale University Press 2002) 151–183.
[144] See, e.g.: Gregory A Caldeira, 'Public Opinion and the US Supreme Court: FDR's Court-Packing Plan' (1987) 81 American Political Science Review 1139, 1139–1153.
[145] 291 US 502 (1934).

Court set new standard of scrutiny which replaced general presumption in favor of liberty by presumption of constitutionality of economic regulation.[146]

In the later judgment, *West Coast Hotel Co. v. Parrish*,[147] the Supreme Court went even further. The decision overruled one of the leading cases of the "*Lochner* Era", *Adkins v. Children's Hospital*,[148] and upheld a state law setting minimum wage for women. The Court explicitly criticized and rejected basic principles founding economic due process:

> (…) the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. (…) the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people (…) regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[149]

The Supreme Court argued that protection of health of women employees constituted legitimate end and requirement of minimum wage is an appropriate mean to realize this aim.[150] Socially sensitive arguments used by the Court starkly contrasted liberal reasoning in the "*Lochner* era" and heralded beginning of completely new judicial approach to the protection of economic liberties.

The new doctrine was clarified in the subsequent case of *Carolene Products*.[151] The Supreme Court reviewed there the federal statute which prohibited, on the basis of necessity of protection of public health, selling filled milk in interstate commerce. The Court upheld the law and explained that regulations which interfere with economic liberties were to be subject of rational basis test with strong presumption of constitutionality.[152] Even if the Congress did not present evidences supporting necessity and appropriateness of the regulation, existence of

[146] Ibid 538-539.
[147] 300 US 379 (1937).
[148] *Adkins* (n 131)
[149] *West Coast Hotel Co.* (n 147) 391.
[150] Ibid 397-398.
[151] *United States v. Carolene Products Company*, 304 US 144 (1938).
[152] Ibid 152.

facts supporting legislature's decision had to be presumed "unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis".[153] Moreover, the Supreme Court introduced differentiation of the level of protection of various individual rights – restrictions of fundamental rights, defined in the footnote four to the judgment, had to be reviewed with a strict scrutiny.[154]

The Supreme Court continued this restrained approach also after the end of New Deal. In the *Williamson v. Lee Optical*,[155] it underlined that although the law which prohibited an optician to fit or duplicate lenses without a prescription from an optometrist or ophthalmologist in many situations may be needless or wasteful, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[156] In the subsequent case of *Ferguson v. Skrupa*, the Supreme Court reiterated this position and underlined that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation".[157]

Practice showed that this strong presumption of constitutionality is almost irrebuttable – since 1937 the Supreme Court has never struck down any economic legislation on the basis of due process.[158] On the level of the federal Supreme Court the economic due process is therefore dead and there are no signs indicating that it could be revived in the close future.

On the state level, however, the economic due process had never completely declined – by 1988 "all but three states have refused to follow the lead of the US Supreme Court in its rejection of substantive due process and equal protection in the area of economic

[153] Ibid 152.
[154] Ibid 153, footnote 4.
[155] 348 US 483 (1955).
[156] Ibid 487-488.
[157] *Ferguson v. Skrupa* (n 92) 729.
[158] Chemerinsky (n 108) 625.

regulation".[159] Moreover, one can find also judgments of the federal inferior courts which invalidated economic regulations on the basis of due process.[160]

2.4. The debates over Lochner

Both "*Lochner* Era" jurisprudence and modern judicial restraint have their supporters and opponents. The first of scholars group criticizes post-New Deal approach as based on false distinction between personal and property rights[161], ignoring of framers intent[162] and founded on weak doctrinal bases[163]. The second group perceives Lochner jurisprudence as time of dangerous judicial activism during which the Court became "superlegislature"[164] and protected interests of capital[165].

Critical opinions regarding "*Lochner* Era" jurisprudence can be grouped into two categories: institutional one and substantive one.[166] First argues that judicial activism presented by the Supreme Court is a threat to separation of powers because the Court *de facto* engaged in policymaking.[167] This criticism is based on the premise that strict judicial review poses a threat to democracy.[168] This position, however, cannot be sustained in the light of the modern developments of the Supreme Court's jurisprudence. As it was indicated above, the concept of substantive due process was revived in the 1960's and it is still used to invalidate

[159] Peter J Galie, 'State Courts and Economic Rights' (1988) 496 Annals of the American Academy of Political and Social Science 76, 81.
[160] *Craigmilles v. Giles*, 312 F.3d 220 (6th Cir. 2002).
[161] Max McCann, 'The True Cost of Economic Rights Jurisprudence' (2010) 6 The Journal Jurisprudence 149, 149–197; Joseph Becker, 'Procrustean Jurisprudence; An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United States' (1994) 15 Northern Illinois University Law Review 671, 671–718.
[162] Ely Jr. (n 101) 33–35.
[163] Mayer, 'Myth of Laissez-Faire Constitutionalism' (n 142) 281–283.
[164] See, e.g. Barry Friedman, 'The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner' (2001) 76 New York University Law Review 1383, 1385; Michael R Antinori, 'Does Lochner Live in Luxembourg? An Analysis of the Property Rights Jurisprudence of the European ECJ' (1995) 18 Fordham International Law Journal 1838–1839.
[165] James L Kainen, 'Historical Framework for Reviving Constitutional Protection for Property and Contract Rights' (1993) 79 Cornell Law Review 87, 92; Melvin I Urofsky, 'Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era' [1983] Yearbook of the Supreme Court Historical Society 58; David E Bernstein, 'Roots of the Underclass: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation' (1993) 43 The American University Law Review 85, 89.
[166] Stone and others (n 105) 755.
[167] See: Ian H Eliasoph, 'A Switch in Time for the European Community - Lochner Discourse and the Recalibration of Economic and Social Rights in Europe' (2007) 14 Columbia Journal of European Law 467, 467.
[168] See: Jeremy Waldron, 'The Core of the Case against Judicial Review' [2006] The Yale Law Journal 1346.

state or federal regulations violating fundamental rights. Some legal scholars even argued that reasoning presented by the Supreme Court in the landmark abortion case *Roe v. Wade*[169] is so similar to *Lochner* that two cases should be considered as "twins".[170]

Second group of opponents of the "*Lochner* Era" argue that the Supreme Court was wrong because there is nothing in the Constitution what could justify protection of contractual freedom as a fundamental right. This position has its roots in the dissenting opinion of the Justice Holmes to the *Lochner*.[171] Supporters of this view may therefore accept judicial activism, but they believe that cases involving economic liberties were not appropriate for such approach.[172]

However, as it was indicated above, it is difficult to agree that protection of economic liberties does not have any foundation in the Constitution. Text of the Constitution, beliefs of the Founding Fathers as well as importance of the freedom of contract for the protection of individual's liberty indicate that judicial protection of it had serious justification.

Between these two groups based on the radical criticism of the economic due process, there is also third, more moderate group of critics. They believe that Lochner Court was wrong because it treated economic liberties absolutely and did not balance them with social values pursued by interventionist legislation. That was the position of, among others, Justice Harlan, expressed in his dissenting opinion to *Lochner*.[173] Relatively similar arguments were presented by C. Sunstein.[174] According to him the Supreme Court was wrong because it treated common law principles as pre-political state of nature. Therefore, the governmental

[169] *Roe v. Wade*, 410 US 113 (1973).
[170] John H Ely, 'The Wages of Crying Wolf: A Comment on Roe v. Wade' [1973] Yale Law Journal 920, 940.
[171] Note, 'Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered' (1990) 103 Harvard Law Review 1363; Rebecca L Brown, 'The Fragmented Liberty Clause' (1999) 41 William & Mary Law Review 65.; Geoffrey R Stone, 'Selective Judicial Activism' (2011) 89 Texas Law Review 1423. Similar reasoning was presented in the footnote 4 of the *Carolene Products*.
[172] Note, 'Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered' (n 171) 1375.; Brown (n 171).; Stone (n 171) 1424. Similar reasoning was presented in the footnote 4 of the *Carolene Products*.
[173] *Lochner* (n 91) 68.
[174] Cass R Sunstein, 'Lochner's Legacy' (1987) 87 Columbia Law Review 873.

inaction and respect for economic status quo was chosen as "natural, unchosen baseline"[175]. Such an approach explains rigid test of constitutionality applied by the Supreme Court.[176]

This criticism, however, ignores the fact, that the jurisprudence of the Lochner period was largely diversified[177] and that besides protection of economic liberties, the Supreme Court issued also several important judgments protecting civil liberties[178] invalidating, for instance, regulations restricting establishment of private schools[179] or foreign language schools[180].

2.5. What was the true failure of the "Lochner Court" and whether modern approach is the best solution

In light of these considerations, the most reasonable seem the arguments used by the fourth group of "*Lochner* Era's" critics which focuse on the excessive inconsistencies in the Supreme Court's case law.[181] In times of the economic crises and growing inequality of bargaining position between employers and employees, the Supreme Court had to revisit traditional legal concepts regarding contractual liberty and labor law which had their roots in the 19th Century free labor ideology.[182] However, setting boundaries between permissible interventionism and protection of individual's autonomy was not an easy task. On the one hand the Supreme Court did not want to block all forms of interventionism and protectionism, but on the other it was worried that "the protectionist ideology could easily get out of hand".[183]

This task was even harder taking into account that the US Constitution does not have provisions which would require or at least authorize federal or state authorities to protect

[175] Ibid 881.
[176] Ibid 877.
[177] See: David E Bernstein, 'Lochner's Legacy's Legacy' (2003) 82 Texas Law Review 1, 22–43.
[178] Ibid 44-48; Mayer, 'Myth of Laissez-Faire Constitutionalism' (n 142) 270–275.
[179] *Pierce v. Society of Sisters*, 268 US 510 (1925).
[180] *Farrington v. Tokushige*, 273 US 284 (1927).
[181] Mayer, 'Myth of Laissez-Faire Constitutionalism' (n 142) 275.
[182] Charles McCurdy, 'The "Liberty of Contract" Regime in American Law' in Harry N Scheiber (ed), *The State and Freedom of Contract* (Stanford University Press 1998) 161–173. Arthur F McEvoy, 'Freedom of Contract, Labor, and the Administrative State' in Harry N Scheiber (ed), *The State and Freedom of Contract* (Stanford University Press 1998) 201–211.
[183] Gregory S Alexander, 'The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism' in Francis H Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999) 110–113.

socio-economic rights. Moreover, strong protection of freedom of contract and reluctance to paternalism and "class legislation" were deeply rooted in the American legal thought.[184]

Jurisprudential divergences concerning constitutionality of laws on minimum wages, labor hours or degree of scrutiny prove that the Supreme Court was unable to develop coherent doctrine regarding balancing freedom of contract and social values. Decisions such as *Lochner*, in which the Court invalidated reasonable legislation aimed at protection of health of employees, are consequences of this weakness.

D. Strauss correctly suggests that the main reason for the failure of the Supreme Court was lack of understanding of the role the contractual freedom in the society.[185] Contractual liberty protects autonomy of the person and allows him/her to freely make choices which are the most beneficial for him or her.[186] Thus, if one party is unable to freely decide about the contract because of coercion, monopolization or information asymmetries, the formalistic interpretation of the contractual freedom may lead not to realization of the personal autonomy, but harm weaker party.[187] Without acknowledgment that all industrial problems cannot be treated as "if it were only a matter of two neighbours bargaining in the rural, agricultural community of a century ago", the Supreme Court could not adjust its doctrine to the "reality of modern industrial society".[188]

Paradoxically, the modern jurisprudence is based on similar lack of understanding of the significance of contractual freedom. Protection of freedom of contract is not always beneficial for business and detrimental for working class the same as judicial restraint does not always promote interests of the employees. Some of the judgments issued after 1937 show that new approach may lead to results which are contrary to the public interest.

[184] Ibid.
[185] David A Strauss, 'Why Was Lochner Wrong?' [2003] The University of Chicago Law Review 373, 383.
[186] Ibid 384-385.
[187] Ibid 383–386.
[188] Schwartz, *A Commentary on the Constitution of the United States. Part II: The Rights of Property* (n 127) 174.

For instance, in the *Carolene Products* the Supreme Court upheld the law prohibiting selling filled milk on the grounds of protection of public health. But in fact, the product was completely safe for human's health and the law was the effect of lobbying of dairy industry to eliminate dangerous competitors from the market.[189] Cases such as *Williamson v. Lee* in which the Supreme Court expressly admit that it will accept even unwise or illogical regulations and allowed on legislative entrenchment of professional monopolies, ignoring that "[t]o the average citizen, the freedom to enter a trade may be at least as important as many liberty interests currently included in the pantheon of personal rights"[190]. Having these on mind it is not surprising that large group of US legal scholars criticizes current Supreme Court's case law and calls to heightening the level of scrutiny applied to economic regulations.[191]

Furthermore, abandonment of economic due process does not imply stronger protection of rights of employees or consumers. Post-New Deal jurisprudence is based on the premise that it is for the legislature, not for the judiciary, to decide about the shape of economy and contract law. Legislature is not obliged to protect contractual liberty but at the same time it is not obliged to protect weaker groups. The Supreme Court has never endorsed theory of positive obligations of the state,[192] which on the grounds of contract law could contribute to adoption of a doctrine of substantive freedom of contract. This, as well as lack of constitutional guarantees of social or consumer rights,[193] did not allow on development of more moderate and coherent concept of constitutional protection of freedom of contract, which could contribute to greater protection of all citizens.[194]

[189] Geoffrey P Miller, 'The True Story of Carolene Products' (1987) 1987 Supreme Court Review 397.
[190] Austin Raynor, 'Economic Liberty and the Second-Order Rational Basis Test' (2013) 99 Virginia Law Review 1065, 1090.
[191] See: Timothy Sandefur, 'Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough' (2004) 24 Northern Illinois University Law Review 457. Siegan (n 102) 318–330.
[192] Kai Moller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 17–18.
[193] Cass R Sunstein, 'Why Does the American Constitution Lack Social and Economic Guarantees' [2005] Syracuse Law Review 1.
[194] On the necessity of adoption by the Supreme Court coherent and free from Lochnerian flaws doctrine of protection of economic rights see: Richard E Levy, 'Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights' (1995) 73 North Carolina Law Review 329.

CHAPTER 3. BETWEEN LOCHNER AND JUDICIAL DEFERENCE: EUROPEAN APPROACH TO CONSTITUTIONAL PROTECTION OF FREEDOM OF CONTRACT ON THE EXAMPLE OF POLAND AND THE EU

As was indicated earlier, the US Supreme Court's jurisprudence from the "*Lochner* era" is still widely considered in Europe as a symbol of distortion of the role of courts in democratic state. It is therefore a paradox that European constitutional courts adopted doctrine of constitutional protection of contractual freedom which under many aspects resembles the older American approach much more than the new one. It is visible in particular in conferring upon freedom of contract status of fundamental right what implies that all its restrictions have to pass proportionality test. However, at the same time European constitutions contain many provisions which prevent against absolutization of contractual liberty and require its mitigation through balancing with social values.

In this chapter I will compare doctrines of protection of freedom of contract in the case law of the Polish Constitutional Tribunal and the ECJ. I will also show differences and similarities between European and American approaches and present how do they affect the level of protection of contractual freedom. The first three sections will be dedicated to presentation of constitutional bases for such protection and requirements regarding restrictions of freedom of contract while the last one will focus on balancing of contractual freedom with other fundamental rights. In particular I will discuss what factors may influence protection of freedom of contract in each jurisdiction.

3.1. Constitutional regulations of economic system – Poland and the EU

Unlike the US Constitution, the European constitutions often contain explicit provisions which declare free market as a basis for state's economic system.[195] At the same time they also contain provisions referring to social values which exclude radical libertarian

[195] See: art. 49 of the Constitution of Croatia, art. 135 of the Constitution of Romania, art. 55(1) of the Constitution of Slovakia.

interpretation of the constitution. These provisions co-create so-called "economic constitutions" of the Member States and the EU.[196]

Both constitution of Poland[197] and Treaty on the EU[198] declare that their economic systems shall be based on the "social market economy". Doctrine of social market economy was developed in Germany after II World War and:

> refers to an economic and political order, which is designed on the basis of the rules of a market economy, that is however enriched with institutionalized assured social complements limiting the negative consequences of a free market economy (…).[199]

The social market economy is therefore composed of two elements: free market and social values. Necessity of protection of both of them is reflected in substantive provisions of the two compared acts. As to the Constitution of Poland, besides art. 20, free market values are protected especially in art. 22 which provides individual freedom to conduct a business and art. 21 and art. 64 which guarantee protection of property and inheritance and just compensation for expropriation. The obligation of the state to respect free market rules was underlined by the Constitutional Tribunal, according to which:

> [t]he primary driving force behind the development of the social market economy are free market mechanisms which cannot be replaced by the government, but on which the government may and shall influence in order to mitigate social effects of functioning of free market (…).[200]

Provisions declaring free market and protecting classical negative economic liberties are counterbalanced with rules of a more social character. Such provisions may have either character of social rights or principles of state's policy which impose on the state certain positive obligations but do not create any enforceable individual rights.

[196] Hugh Collins, 'The European Economic Constitution and the Constitutional Dimension of Private Law' (2009) 5 European Review of Contract Law 71, 73–79.
[197] Art. 20 of the Constitution of Poland.
[198] Art. 3 of the Consolidated Version of the Treaty on the European Union [2012] OJ C326/01.
[199] Sylvain Broyer, *The Social Market Economy: Birth of an Economic Style* (WZB, Forschungsschwerpunkt Arbeitsmarkt und Beschäftigung 1996) 7.
[200] Decision of the Constitutional Tribunal of 9 July 2010, ref. no. SK 32/09, OTK-A ZU, No. 5/2010, pos. 55, 7.

In the EU, significance of the free market results from the fact that the main purpose of this organization has always been economic integration through establishment and protection of internal market. Capitalistic values are reflected in particular in the four market freedoms which constitute the bases of the European economic constitution[201] and which in the past were used by the ECJ to struck down protective, interventionist state regulation[202]. Moreover, also several articles of CFREU are aimed at protection of free market values, especially art. 16 (freedom to conduct a business) and art. 17 (protection of property).

The role of social values in the EU economic constitution was less clear, what was caused primarily by lack of, with exception to guarantee of equal pay for men and women, explicit social provisions in the founding treaties.[203] Subsequent treaties expanded social dimension of the European integration[204]. It is visible especially in the Treaty of Lisbon, which explicitly refers to social market economy, mentions social goals of the European integration and grants binding force to CFREU which contains many social rights.[205]

However, some legal scholars correctly argue that most of references to social values contained in the Treaty of Lisbon are "just about some beautiful social phrases which are not concrete and not legally binding"[206] because in fact the EU does not possess sufficient competences to develop "Social Europe".[207] Moreover, social rights contained in CFREU did

[201] Wolf Sauter, 'The Economic Constitution of the EU' (1998) 4 Columbia Journal of European Law 27, 63–64, 67–68.
[202] Infra 47-48.
[203] Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (2nd ed, Oxford University Press 2012) 23.
[204] Dagmar Schiek, 'Re-Embedding Economic and Social Constitutionalism: Normative Perspectives for the EU' in Dagmar Schiek, Ulrike Liebert and Hildegard Schneider (eds), *European economic and social constitutionalism after the Treaty of Lisbon* (Cambridge University Press 2011) 33–36.
[205] Ibid 34–35; E Szyszcak, 'Building a Socioeconomic Constitution: A Fantastic Object' (2011) 35 Fordham International Law Journal 1364, 1366–1370.
[206] Antoine TJM Jacobs, 'The Social Janus Head of the EU: The Social Market Economy versus Ultraliberal Policies' in Jan Wouters, Luc Verhey and Philipp Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia 2009) 122.
[207] Constanze Semmelmann, 'The EU's Economic Constitution under the Lisbon Treaty: Soul-Searching among Lawyers Shifts the Focus to Procedure' (2010) 35 European Law Review 516, 521–522; Loïc Azoulai, 'The ECJ and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) 45 Common Market Law Review 1335, 1337–1338.

not encourage the ECJ to abandon its "neo-liberal" approach[208] to balancing four market freedoms and social values, and the case line initiated by *Viking*[209] and *Laval*[210] was continued even after Lisbon.[211] This led some scholars to the conclusion that CFREU does not guarantee sufficiently effective protection of social rights and so the EU should adopt additional "social progress protocol".[212]

These considerations does not mean, of course, that EU law is based on *laissez-faire* principles – both ECJ as well as other EU institutions have to balance economic freedoms and social rights. However, as will be discussed below, unbalanced construction of the European economic constitution may possibly lead to prioritization of the freedom to conduct a business and contractual liberty at the expense of social protection.[213]

3.2. Constitutional guarantees of freedom of contract

Similarly to the US Constitution, neither EU treaties nor Polish Constitution explicitly guarantee contractual freedom. However, thanks to relatively detailed constitutional economic regulations, the Constitutional Tribunal and the ECJ could derive principle of protection of freedom of contract from different constitutional provisions, without arousing controversies similar to those known from the "*Lochner* debate".

In the Constitution of Poland there are two provisions which could constitute basis for protection of contractual freedom. First, art. 22, which provides constitutional freedom to conduct a business and second, art. 31 section 1 and section 2, which guarantees general freedom of action. Proper choice of the constitutional basis has a great significance because the Constitution provides different scope of permissible limitations of these two rights.

[208] Infra 47-49.
[209] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.
[210] Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.
[211] Case C-271/08 *European Commission v Federal Republic of Germany* [2010] ECR I-07091.
[212] Andreas Bücker, 'A Comprehensive Social Progress Protocol Is Needed More Than Ever' (2013) 4 European Labour Law Journal 4.
[213] Similarly: Collins, 'The European Economic Constitution and the Constitutional Dimension of Private Law' (n 196) 91.

The Constitutional Tribunal responded to this issue in the judgment SK 24/02.[214] It underlined that although contractual freedom is not explicitly provided in the Constitution, it should be seen in the light of the guarantees of individual liberty.[215] On the grounds of private law, these guarantees correspond to the concept of "autonomy of will" and require that no one shall be forced or prohibited to conclude a contract or to choose a particular contractor or to include certain conditions in a contract, unless the law provides otherwise.[216] Such "liberty of contract" constitutes part of the constitutionally protected individual's freedom.[217] This interpretation is similar to the US Supreme Court's approach presented in e.g. *Adkins,*[218] and to the case law of the German Federal Constitutional Court.[219]

At the same time, the Constitutional Tribunal rejected argumentation that contractual freedom is primarily derivative of the freedom to conduct a business. Constitutional contractual freedom is applicable to all agreements concluded by persons and not only to those which are related to business. Thus, only these contracts which can be concluded only between professional entrepreneurs should be reviewed in the light of the art. 22.[220] This approach is accepted in the constitutional law doctrine[221], but in the more recent judgments the Constitutional Tribunal tends to focus on the connection of freedom of contract to freedom to conduct a business, without mentioning general individual's liberty.[222]

[214] Judgment of the Constitutional Tribunal of 29 April 2003, ref. no. SK 24/02, OTK-A ZU, No. 4/2003, pos. 33.
[215] Ibid 10.
[216] Ibid.
[217] Ibid.
[218] *Adkins* (n 131).
[219] Supra 10-11.
[220] SK 24/02 (n 214) 14; however, in the case K 47/04 the Tribunal rejected the challenge under art. 22 against the statute which restricted contractual freedom regarding typically business-to-business contract, arguing that proper constitutional basis of review would be art. 31(2) of the Constitution (Judgment of the Constitutional Tribunal of 27 November 2006, ref. no. K 47/04, OTK-A ZU, No. 10/2006, pos. 153, 16).
[221] See, e.g.: Adam Karczmarek, 'Wolność działalności gospodarczej i jej ograniczenia – uwagi na tle nowelizacji Ustawy o transporcie drogowym z 11 Maja 2012 r.' ['Freedom to conduct a business and its restrictions - comments to the novelization of the Act of 11 May 2012 on road transportation'] [2012] Zeszyty Prawnicze Biura Analiz Sejmowych 208, 210–211.
[222] See: judgment of the Constitutional Tribunal of April 5, 2011, ref. no. P 26/09, OTK-A ZU, No. 3/2011, pos. 18, 14; judgment of the Constitutional Tribunal of 22 May 2013, ref. no. P 46/11, OTK-A ZU, No. 4/2013, pos. 42, 12.

In addition to art. 22 and art. 31 of the Constitution, contractual liberty may be in some situations protected also under art. 64(1) of the Constitution which guarantees the right to protection of property. The Constitutional Tribunal confirmed it in the series of judgments concerning rent control legislation[223], what resembles the approach of the ECtHR.[224]

In the EU, the constitutional position of the freedom of contract was subject to significant evolution. Before adoption CFREU, the position of freedom of contract in primary law was not clear. Legal scholars did not agree as to what could be the basis for the protection of contractual liberty – some of them argued that principles of free movement[225] while others that it "is included in the notion of a free market economy as well as in the general freedom of action as part of the general principles of European primary law".[226] Others even claimed that there is no justification to treat contractual liberty as part of the EU primary law at all.[227]

The case law of the ECJ did not contribute to resolution of these disputes – in early jurisprudence the ECJ invoked the principle of contractual liberty only occasionally and used it in "a descriptive rather than normative role"[228]. However, in 1990's the EU courts began to refer to this freedom much more often.[229] For instance, in 1992 the Court of First Instance held that as long as there are less intrusive means, the Commission cannot impose on a violator of EU competition law an obligation to enter into contractual relations because "the freedom of contract must remain the rule".[230] Also the ECJ in several pre-Lisbon cases recognized

[223] See: judgment of the Constitutional Tribunal of 12 January 2000, ref. no. P 11/98, OTK ZU, No. 1/2000, pos. 3; judgment of the Constitutional Tribunal of 10 October 2000, ref. no. P 8/99, OTK ZU, No. 6/2000, pos. 198; judgment of the Constitutional Tribunal of 2 October 2002, ref. no. K 48/01, OTK-A ZU, No. 5/2002, pos. 62; judgment of the Constitutional Tribunal of 12 May 2004, ref. no. SK 34/02, OTK-A ZU, No. 5/2004, pos. 42.
[224] Supra 13-14.
[225] Stefan Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 Common Market Law Review 269, 269–271.
[226] Herresthal (n 11) 98.
[227] Jacobien W Rutgers, 'The European Economic Constitution, Freedom of Contract and the DCFR' (2009) 5 European Review of Contract Law 95, 95-108.
[228] Basedow (n 12) 911..
[229] Ibid 911–913.
[230] Case T-24/90 *Automec Srl v. Commission of the European Communities* [1992] ECR II-02223, para. 51.

constitutional rank of the contractual liberty.[231] Nonetheless, the EU courts "did not develop a coherent approach to freedom of contract"[232].

The constitutional position of the contractual liberty was strengthened in 2010, when the Lisbon Treaty conferred binding character on CFREU.[233] Even though CFREU did not recognize freedom of contract explicitly, many legal scholars argued that it could be derived from other provisions, particularly art. 15 (occupational freedom), art. 16 (freedom to conduct a business) and art. 17 (property).[234] The recent jurisprudence of the ECJ shows that it derives freedom of contract from the freedom to conduct a business [235]

It is worth to note that both analyzed courts seem to focus on the formal aspect of freedom of contract and they have not explicitly endorsed concept of substantive contractual freedom. According to the Polish Constitutional Tribunal the constitutional freedom of contract guarantees, among others, freedom to enter into contract and freedom from contract,[236] freedom to choose contractual partner[237] and freedom to shape the content of contract[238] including freedom to set the price.[239] Similarly, in the EU it includes freedom to enter into a contract[240], freedom from contract,[241] freedom to choose contractual partner[242], freedom to amend the contract[243] and freedom to determine content of the contract.[244] Adoption of formal understanding of freedom of contract may affect the way of balancing this

[231] Case C-240/97 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-6571, para. 99.
[232] Herresthal (n 11) 98.
[233] Dorota Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 182.
[234] Herresthal (n 11) 99; Basedow (n 12) 908.
[235] See: *Sky Österreich* (n 14), para 42; Case C-426/11 *Alemo-Herron* (n 15), para 32; see also: Explanations relating to the Charter of Fundamental Rights of the European Union [2007] OJ C 303/02.
[236] SK 24/02 (n 214).
[237] Ibid.
[238] Judgment of the Constitutional Tribunal of 7 May 2001, ref. no. K 19/00, OTK ZU, No. 4/2001, pos. 82, 12.
[239] Judgment of the Constitutional Tribunal of 24 January 2006, ref. no. SK 40/04, OTK-A ZU, No. 1/2006, pos. 5, 22.
[240] *Automec* (n 227).
[241] Case C-441/07 P *European Commission v Alrosa Company Ltd.* [2010] ECR I-05949, Opinion of AG Kokott, para 227.
[242] Joined Cases C-90/90 and C-91/90 *Jean Neu and others v. Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1991] ECR I-03617, para 13.
[243] *Kingdom of Spain v Commission* (n 228)
[244] Case C‑437/04 *Commission v Belgium* [2007] ECR I‑2513, para 51.

right with social or consumer rights by limiting possibility of introducing limitations of contractual liberty aimed at strengthening position of weaker party.[245]

Lack of explicit recognition of substantive dimension of freedom of contract by the ECJ may be caused by the fact that it derives contractual freedom from freedom to conduct a business and not from the general individual's liberty. Protection of business requires primarily elimination of undue legislative obstacles and not guaranteeing the right to personal autonomy, therefore concentration on negative aspect of contractual liberty seems natural.

In Poland, on the other hand, this might be caused by the fact that usually legislative acts which do not sufficiently protect weaker parties can be reviewed under other constitutional provisions, in particular art. 76 which declares protection of consumers. Moreover, unlike in Germany, competences of the Polish Constitutional Tribunal are limited to constitutional review of legislative acts, what excludes possibility of reviewing constitutionality of interpretation and application of law by the ordinary courts and by thus limits horizontal effectiveness of the Constitution.

3.3. Judicial scrutiny in reviewing constitutionality of interferences with freedom of contract

The position of two courts regarding recognition of the status of freedom of contract as a fundamental right, is definitely more similar to the US Supreme Court's approach to the contractual liberty during the "*Lochner* Era" than to its modern case law which *de facto* rejects constitutional protection of this freedom. Also proportionality test used by the European courts to review interferences with the contractual liberty is in its theoretical framework comparable to the economic due process review.

The test applied by the US Supreme Court in *Lochner* consisted of two requirements: first, the law at stake had to pursue one of the narrowly set legitimate aims and second, the

[245] Mak, 'Unchart(er)ed Territory' (n 8) 6.

means adopted to pursue these aims had to be appropriate and reasonable.[246] This approach is relatively similar to the proportionality test used by the European courts which requires four steps. First, examination of aims of the law, second and third examination of appropriateness and necessity of the means adopted to pursue legitimate aim and fourth – proportionality *sensu stricto*, that is balancing between public interest and individual's right or freedom.[247] In addition both compared legal systems prohibit violating the essence of the right or freedom.

In Poland level of constitutional protection of the freedom of contract depends on constitutional basis from which it was derived. In case of non-business contracts, proper basis is art. 31(1) and (2) of the Constitution. In that situation, question of judicial scrutiny is regulated in art. 31(3), which formulates formal and substantive requirements as to limitations of rights or freedoms. First, limitation has to be imposed only in the form of statute. Second, it may be enacted only when it is "necessary in a democratic state" to protect one of the aims enumerated in the Constitution, that is: security, public order, natural environment, health, public morals, freedoms and rights of other persons. The art. 31(3) forbids also infringements of the essence of constitutional rights or freedoms.[248]

Closed catalogue of public aims contained in the Polish Constitution is similar to list legitimate goals of police power mentioned by the *Lochner* court with two important differences – protection of environment and protection of freedoms and rights of others. Especially important is the latter because it allows to limit contractual liberty in order to protect constitutionally guaranteed socio-economic rights of employees or rights of consumers, what was rejected in the *Lochner*.

Level of protection is lower in case of business contracts, where the Constitutional Tribunal applies art. 22 of the Constitution, which provides that "[l]imitations upon the

[246] Supra 22-23.
[247] Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013) 15–39.
[248] The same rules are applicable if the contractual freedom is derived from art. 64 of the Constitution (protection of property).

freedom of economic activity may be imposed only by means of statute and only for important public reasons". According to the Constitutional Tribunal this provision is a *lex specialis* towards art. 31(3) and thus the notion of "important public reasons" includes all aims enumerated in art. 31(3) as well as other public purposes of constitutional importance. [249]

It may seem that the Tribunal introduced similar differentiation of level of protection of different constitutional rights as the US Supreme Court in the *Carolene Products*[250]. However, the level of scrutiny applied by the Tribunal is much higher than that used by its American counterpart. In order to defend constitutionality of law, legislator has to prove that the law pursues particularly important public aim, is appropriate to realize legitimate aim, that the aim could not be achieved with less restrictive means and that restrictions of contractual freedom are proportionate to burdens imposed on the individual.[251] Moreover, the essence of contractual liberty cannot be violated.

In the EU law, limitations of contractual freedom have to be consistent with the art. 52(1) CFREU. Similarly as the Polish Constitution, this provision of CFREU provides certain formal and substantive requirements regarding restrictions of all fundamental rights. As to the former, CFREU specifies that the restrictions must be provided by law and as to the latter, it provides that "[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

Although requirements set in art. 52(1) CFREU are applicable to all fundamental rights, one have to keep in mind that freedom to conduct a business is recognized "in accordance with Union law and national laws and practices". This reference suggests that "the grounds of justification [of the restriction of freedom to conduct a business] are broader than

[249] See e.g.: judgment of the Constitutional Tribunal of 13 October 2010, ref. no. Kp 1/09, OTK-A ZU, No. 8/2010, pos. 74, 21-22.
[250] *Carolene Products* (n 151).
[251] Judgment of the Constitutional Tribunal of 8 July 2008, ref. no. K 46/07, OTK-A ZU, No. 6/2008, pos. 104, 10.

they otherwise would be"[252]. And in indeed, the ECJ in several cases underlined that freedom guaranteed in the art. 16 CFREU "may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest".[253] Aims which may justify limitations of freedom to conduct a business include protection of consumers,[254] public health[255] or international peace and security.[256]

However, similarly to Poland, although CFREU protects freedom of contract to a lesser extent than other rights, level of protection is still higher than in the US. The case of *Sky Österreich*[257] shows that the ECJ examines proportionality of economic regulations very thoroughly. The ECJ reviewed there legality of the provisions of the directive which obliged television channels, holding exclusive rights to broadcast events of high interest to the public, to allow other channels in the EU to use extracts to transmit short news reports on those events. Moreover, the broadcaster "was not entitled to demand remuneration greater than the additional costs directly incurred in providing access to the satellite signal".[258]

The ECJ noticed that the Directive restricted two aspects of contractual freedom: "the freedom to choose with whom to do business" and "the freedom to determine the price of a service". It held that the law did not infringe the essence of the freedom to conduct a business because it: "does not prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights. In addition, it does not prevent the holder of those rights from making use of them(…)".[259]

[252] Peter Oliver, 'What Purpose Does Article 16 CFREU Serve' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 295.
[253] *Sky Österreich* (n 14), para 46; Case C-101/12 *Herbert Schaible v. Land Baden-Württemberg* [2013] OJ C 367/07, para 28.
[254] Case C-12/11 *Denise McDonagh v Ryanair Ltd.* [2013] OJ C 86/02.
[255] Case C‑544/10 *Deutsches Weintor eG v. Land Rheinland-Pfalz* [2012] OJ C 331/03.
[256] Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*, [2013] OJ C 39/06.
[257] *Sky Österreich* (n 14).
[258] Ibid, para 18.
[259] Ibid, para 49.

As to the legitimate aims, the ECJ held that the Directive pursued two objectives: safeguarding freedom to receive information and promoting pluralism of media. Both of them were legitimate in the light CFREU. The law passed also test of appropriateness – the Court argued it would be effective in realization of the aims pursued because it guaranteed access of all television stations to extracts, irrespective of their financial capacity. Moreover, the ECJ held that none of less restrictive means would be equally efficient. The law respected also proportionality *sensu stricto*: it applied only to certain materials and the extracts could be used only in news programs, the station which used extracts had to identify the source and broadcasters were not obliged to share extracts completely for free.[260]

Although proportionality test used by the ECJ might seem very strict, the final decision was less favorable for freedom of contract than judgments of the constitutional courts of Austria and Germany which in the past had invalidated similar domestic laws.[261] Moreover, the ECJ is not always consequent and in some cases[262] it did not review proportionality of interferences with the art. 16 CFREU as thoroughly. Nevertheless, as a rule, the ECJ has to examine comprehensively purpose and proportionality of legislative acts interfering with freedom of contract. This starkly contrasts with modern case law of the US Supreme Court which explicitly held that even illogical restriction of contractual liberty would not violate the Constitution and that the legislator can pursue any public aims it wants.[263]

3.4. Balancing of freedom of contract with other fundamental rights

Abovementioned similarities between the European courts and US Supreme Court of the "*Lochner* Era" do not determine that "European economic due process" leads to similarly detrimental effects for the social guarantees. Level of protection of the contractual freedom in Europe is constrained by the existence of well developed socio-economic rights and consumer

[260] Ibid, paras 51-68.
[261] Ibid, para 23.
[262] *McDonagh* (n 251), paras 45-49, 60-64; *Deutsches Weintor* (n 252), paras 54-60.
[263] *Ferguson v. Skrupa* (n 92).

rights which not only allow on far reaching limitations of liberty of contract but sometimes even imply positive obligations to impose such restrictions.

At the same time, freedom of contract cannot be seen as completely marginal right. The outcome of proportionality test depends on the result of balancing of conflicting rights which in turn is to a large extent determined by the economic constitution but also economic views taken by judges.[264] This would mean that especially in the context of ECJ, which in the past was often accused of "neo-liberal bias", one cannot exclude that constitutionalization of the contractual liberty may lead to erosion of the labor law guarantees.[265]

As was indicated, unlike the US Supreme Court in the "*Lochner* era", both European courts hold that leveling of unequal position of parties is permissible and sometimes even required. The Constitutional Tribunal confirmed this in the judgment K 38/04.[266] It noticed that some formal restrictions of the contractual freedom are aimed not at limiting the autonomy of will of parties, but at restoring a balance between them to ensure that weaker party is not completely subordinated to stronger contractor.[267] Imposition of such restrictions is sometimes required by other constitutional provisions, e.g. art. 76 (consumers protection).[268]

The Constitutional Tribunal applied these principles to the statute which allowed parties of the business-to-consumer contracts and employment contracts to choose language of the contract. It noticed that the statute did not contain any safeguards protecting interests of the consumers and thus business party could abuse its stronger position and easily persuade consumer to agree, for instance, that the basis for interpretation of the contract should be the version of the agreement in a foreign language which the consumer did not know good

[264] Clemens Kaupa, 'Maybe Not Activist Enough? On the Court's Alleged Neoliberal Bias in the Recent Labor Cases' in Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial activism at the European ECJ* (Edward Elgar Publishing Limited 2013) 61.
[265] Chantal Mak, 'Unchart(er)ed Territory: EU Fundamental Rights and National Private Law' (Social Science Research Network 2013) 7 <http://papers.ssrn.com/abstract=2254799> accessed 8 February 2014.
[266] Judgment of the Constitutional Tribunal of 13 September 2005, ref. no. K 38/04, OTK-A ZU, No. 8/2005, pos. 92.
[267] Ibid 18-19.
[268] Ibid 19-20.

enough.[269] Therefore the legislator failed to realize its positive obligation to protect weaker party of the contract through restrictions of contractual freedom.[270]

In the sphere of labor law the Constitutional Tribunal seems to accept even further reaching limitations of the contractual liberty. In the judgment K 38/04 the Tribunal stated that in the labor law the restrictions of the autonomy of will of contracting parties are so strong that it is not clear whether the freedom of contract can still be regarded as a guiding principle in this area of law.[271] Therefore, according to the Tribunal, justifying liberalization of the employment law by referring to the contractual liberty has very weak basis.[272] However, in more recent jurisprudence, the Tribunal departed from such view and adopted more liberal position.[273]

Also the ECJ has never absolutized contractual liberty or freedom to conduct a business and since the very moment of their recognition underlined their social nature.[274] Therefore, the interpretation of art. 16 has to strike "a balance between freedom of enterprise and social objectives and values", in order to prevent the risk of social dumping.[275] Having these on mind, certain legal scholars argue that competition law, internal market rules or even some socio-economic rights should not be perceived as limitation of the freedom to conduct a business but as inherently included in the definition of this right.[276]

Similarly as in Poland, freedom to conduct a business in the EU is limited by other fundamental rights and freedoms. In case of liberty of contract the most important are art. 38 CFREU (consumer protection) and principle of equality. The ECJ conducted balancing of art.

[269] Ibid 20-21.
[270] Ibid 21-22.
[271] Ibid 19.
[272] Ibid.
[273] Infra 51.
[274] Case C-4/73 *Nold KG v. Commission* [1974] ECR 491, para 14; Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 32.
[275] Alberto Lucarelli, 'Article 16 - Freedom to Conduct a Business' in William BT Mock (ed), *Human Rights in Europe: commentary on CFREU* (Carolina Academic Press 2010) 103.
[276] Andrea Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration' (2013) 14 German Law Journal 1867, 1876–1881.

16 and art. 38 CFREU in the case of *McDonagh*[277]. It ruled that the regulation obliging airlines to provide care to passengers in the event of "cancellation of a flight due to 'extraordinary circumstances'" did not violate art. 16, because "the importance of the objective of consumer protection (…) may justify even substantial negative economic consequences for certain economic operators".[278] In all, the ECJ conducted balancing process rather superficially and decisively gave priority to protection of consumers.

The restrictive impact of the principle of equality on the contractual liberty was shown in the case of *Mangold*[279] where the ECJ confirmed the possibility of horizontal application of principle of equal treatment in private law.[280] The case concerned a fixed term employment contract concluded between 56-years old man and private employee, on the basis of statute which made it easier to conclude this type of employment contracts with persons over 52-years old. Such law was inconsistent with the Directive 2000/78[281] but the deadline for transposition of this Directive had not passed yet. The ECJ ruled that principle of equal treatment in respect of age constituted the general principle of EU law and thus the domestic court was obliged to guarantee its full effectiveness "(…) setting aside any provision of national law which may conflict with Community law".[282]

Horizontally applied prohibition of discrimination implied necessity of treating fixed-term employment contract as a permanent despite lack of violation by the employer any rule of domestic law or even secondary EU law what was a very far-reaching limitation of the contractual liberty.[283] It is therefore surprising that the ECJ had not referred to the art. 16

[277] *McDonagh* (n 251).
[278] Ibid, para 48.
[279] *Mangold* (n 84)
[280] See also: Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00365.
[281] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 ("Framework Directive").
[282] *Mangold* (n 84) para. 77.
[283] Basedow (n 12) 920–921.

CFREU and freedom of contract at all. It is noteworthy that in Germany *Mangold* raised serious controversies and even led to the litigation before the Federal Constitutional Court.[284]

However, the conclusion that in practice balancing contractual liberty and social values will always lead to outweighing the former by the latter would be an exaggeration. On the contrary, especially in the EU context one cannot exclude that often the contractual liberty would prevail. Such possibility is realistic especially taking into account characteristic features of EU economic constitution and the ECJ's judgments concerning basic market freedoms which even led to accusations of the ECJ of being "neo-liberally" biased.[285]

It is symptomatic that several legal scholars analyzed jurisprudence of the ECJ regarding free movement principles in the light of the "Lochner debate" and concluded that there are significant similarities in the reasoning of the two courts. For instance, Ian Eliasoph argued that before 1990's the ECJ used principle of the free movement of goods (art. 28) and EU competition law to pursue neo-liberal agenda in the manner similar to the US Supreme Court before 1937.[286] It is worth to mention, for instance, that in some cases the ECJ held that domestic law prohibiting trading Sunday trading may constitute excessive restriction of internal market[287] what was position much more pro-market than that of German Constitutional Court which refused to strike down similar law on the grounds of violation of freedom of contract.[288] Daniel Caruso, on the other hand, found traces of Lochnerism in the

[284] BVerfG 6 July 2010, 2 BvR 2661/06, <http://www.bverfg.de/en/ decisions/rs20100706_2bvr266106en.html>; see also: Matthias Mahlmann, 'The Politics of Constitutional Identity and Its Legal Frame - the Ultra Vires Decision of the German Federal Constitutional Court' (2010) 11 German Law Journal 1407.
[285] Kaupa (n 264).; Michelle Everson, 'From Effet Utile to Effet Neoliberal. Why Is the ECJ Hazarding the Integrity of European Law?' in Christian Joerges and Tommi Ralli (eds), *European Constitutionalism Without Private Law, Private Law Without Democracy* (2011) 37–53.
[286] Eliasoph (n 167) 478–493.. See also: Miguel Poiares Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in Philipp Alston, Mara R Bustelo and James Heenan (eds), *The EU and Human Rights* (Oxford University Press 1999) 451–455.
[287] Case C-145/88 *Torfaen Borough Council v B & Q plc.* [1989] ECR 03851.
[288] Flessner (n 44) 92–93.

Franzen case[289] in which the ECJ struck down Swedish statute creating a state monopoly over the distribution of alcohol and restricting importing alcohol from abroad[290].

Accusations of the ECJ of the Lochner-like tendencies were even strengthened in 2007 and 2008 when the ECJ issued series of controversial judgments in cases of *Viking*[291], *Laval*[292] and *Ruffert*[293]. Cases of *Viking* and *Laval* concerned limitation of the economic freedoms by collective action. In the *Viking*, Finnish company wanted to reflag its vessel to Estonia to legally pay lower salaries to the crew. Such an attempt was condemned by the International Transport Workers' Federation which officially called all its affiliates to not to enter any negotiations with Viking. *Laval*, on the other hand, concerned Latvian company which sent its employees to work on building sites in Sweden but refused to sign a Swedish collective agreement. As a protest, the Swedish trade union blocked building sites.

In both cases the ECJ recognized fundamental character of the right to collective action but at the same time underlined that collective action which is "liable to deter it [company] from exercising freedom of establishment" should be qualified as a restriction of free movement principle.[294] As such it may be justified only "by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective."[295] In the *Viking* the ECJ left task of balancing social rights and economic freedoms to the domestic court,[296] but in the *Laval* it explicitly ruled that collective action of the Swedish trade union violated the EU law.[297]

[289] Case C-189/95 *Criminal proceedings against Harry Franzén* [1997] ECR I-05909.
[290] Daniela Caruso, 'Lochner in Europe: A Comment on Keith Whittington's "Congress Before the Lochner Court"' (2005) 85 Boston University Law Review 867, 872–873.
[291] *Viking* (n 209).
[292] *Laval* (n 210).
[293] Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-01989.
[294] *Viking*, point 1 of the operative part of the judgment; similarly: *Laval*, para 99.
[295] *Viking*, para 90.
[296] Ibid, para 80.
[297] *Laval*, para 120.

Viking and *Laval* were strongly criticized in the legal doctrine. It was argued that "the Court is reading the market freedoms exclusively from the a neoclassical perspective".[298] Moreover, legal scholars criticized the strict proportionality review presented by the ECJ – requirement of using the least restrictive means "can undermine the effective exercise of trade union rights".[299] Anne Davies pointed out that reasoning of the Court leads to paradox: "the more effective it [collective action] is from the union's perspective — the harder it will be to justify".[300] Unsurprisingly, several scholars found "striking similarities" between reasoning of the ECJ and Supreme Court in the *Lochner*, especially regarding strict proportionality test applied by both courts.[301]

Despite this criticism, the ECJ continued this approach in the subsequent judgments. From the perspective of the present paper especially interesting is the *Ruffert* case.[302] The ECJ reviewed the domestic law according to which public contracts shall be awarded only to these undertakings which undertake to pay their employees at least remuneration prescribed by collective agreement applicable at the place of works. On the basis of this provision, Land Niedersachsen terminated the contract with the company which used as a subcontractor Polish company which employed workers at a wage lower than this set in the collective agreement. The ECJ argued that such legislative measure constituted restriction of the freedom to provide services which could not be justified by any legitimate aim and thus violated the EU law.[303]

Although the ECJ reviewed the case under freedom to provide services, similar results could be achieved with application of art. 16 CFREU. The measure could be viewed as a limitation of the contractor's freedom to choose subcontractor or to set working conditions of its employees. As was indicated before, restrictions of the contractual liberty have to pass

[298] Kaupa (n 264) 67.
[299] Nikolett Hos, 'The Principle of Proportionality in Viking and Laval: An Appropriate Standard of Judicial Review' (2010) 1 European Labour Law Journal 236, 248.
[300] Anne CL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 Industrial Law Journal 126, 142–143.
[301] See, e.g.: Danny Nicol, 'Europe's Lochner Moment' [2011] Public Law 308, 313–316.
[302] *Ruffert* (n 293).
[303] Ibid, para 40.

proportionality test similar to that used on the grounds of free movement principles. Thus, if the aim pursued by the law was insufficient to justify limitation of the freedom to provide services, it is highly probable that it would not be sufficient to limit the contractual liberty.

These possible parallels between reasoning of the ECJ presented in the free movement cases and cases involving freedom of contract are confirmed in the recent judgment of *Alemo-Herron*.[304] The case concerned clauses contained in the contracts of employees in public sector according to which their employment conditions were to be set from time to time by the third party, without participation of the employer. The public undertaking in question was acquired by private company, which according to Council Directive 2001/23/EC,[305] was bound by the obligations arising both from the employment contracts and collective agreements. The applicable working conditions set by the third party expired month before the privatization of the undertaking, but one month after new conditions were set. The question was whether the new owner was bound by such conditions set without its participation.

The ECJ ruled that "dynamic clauses" constituted such a far reaching limitation of the freedom of contract of the employer that their enforcement would lead to violation of the essence of this freedom:

> [t]he transferee in the main proceedings is unable to participate in the collective bargaining body at issue. In those circumstances, the transferee can neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity.[306]

Similarly as Viking or Laval, also *Alemo-Herron* was criticized in the labor law doctrine. It was argued, that the judgment was not only incompatible with previous cautious jurisprudence over the freedom to conduct a business but it also showed that art. 16 has a

[304] *Alemo-Herron* (n 15).
[305] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16.
[306] *Alemo-Herron* (n 15), para 34.

potential "to disrupt existing employment law norms".[307] Other commentators underlined that it was striking that the Court completely ignored fundamental right of employees to engage in collective bargaining protected under art. 28 CFREU.[308]

In this aspect, the approach of the ECJ could be possibly more liberal than that of Polish Constitutional Tribunal, which used contractual liberty to invalidate law only few times. In the case SK 40/04[309] it struck down the statute which gave the exclusive right to propose project of scheme of minimum prices for rebroadcasting of television materials, to organization representing authors. Broadcasters were not authorized to participate in the drafting process. The Constitutional Tribunal underlined that the legislator was constitutionally authorized to make efforts to level inequalities between authors and huge broadcasters, but complete exclusion of the broadcasters from the process of setting the prices was unnecessary and disproportionate to the aim pursued.[310]

The Constitutional Tribunal used freedom of contract, derived from the right to property, also to invalidate disproportionate rent control legislation.[311] It is also worth to mention, that in the recent case the Constitutional Tribunal seemed to present more liberal approach to the role of contractual freedom in the labor law than in the earlier case law. It emphasized that principle of social market implies that legislator has to take into account contractual character of the employment and to find a compromise between interests of employers and employees and not to favor any of the parties.[312] This may suggests that in the future the Tribunal may use contractual freedom more actively.

[307] Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law Case C-426/11 Alemo-Herron and Others v Parkwood Leisure Ltd' (2013) 42 Industrial Law Journal 434, 443.
[308] Lydia JB Hayes, 'Onlabourlaw: New Holes in the Floor of Labour Rights? Alemo-Herron v Parkwood Leisure' <http://onlabourlaw.blogspot.hu/2014/01/new-holes-in-floor-of-labour-rights.html> accessed 13 February 2014.
[309] SK 40/04 (n 239).
[310] Ibid 22.
[311] P 8/99 (n 223); P 11/98 (n 223); K 48/01 (n 223).
[312] P 46/11 (n 222), 30-32.

3.5. Conclusions

To conclude, in theory doctrine of constitutional protection of freedom of contract in Poland and the EU in many aspects resembles American "economic due process". All compared courts accept fundamental character of contractual freedom understood primarily as a negative liberty. Moreover, the same as the US Supreme Court, two European courts limit the aims which can justify restriction of freedom of contract to those which are constitutionally important. Furthermore, all restrictions have to be necessary and appropriate to achieve legitimate aim and cannot violate the essence of contractual freedom.

However, in practice actual level of protection of freedom of contract depends on the result of balancing of this freedom with other fundamental rights. I showed that both courts accept even far reaching intrusions into freedom of contract in order to protect consumer rights or right to equal treatment.

I argued however, that some factors indicate that the ECJ may eventually endorse more liberal approach. In this regard I underlined role of economic constitution of the EU which is determined by the lack of serious EU competences in the sphere of social policy. Moreover, previous case law of the ECJ shows that in case of clashes between economic freedoms and social rights the Court very often gave priority to the former. Having on mind that art. 16 CFREU and freedom of contract provided therein are deeply connected to four market freedoms, it seems plausible that the ECJ may present similar approach also to its protection. Such possibility is confirmed by the controversial case of *Alemo Herron*.

These factors differ the EU from Poland where freedom of contract had not played any important role in the case law of the Constitutional Tribunal so far. The future will show whether recent judgment in which the Tribunal seems to present much more liberal approach to labor relations by underlining contractual nature of employment is a sign of change of its approach to constitutional protection of freedom of contract on more active.

CHAPTER IV. IMPACT OF THE CONSTITUTIONALIZATION OF FREEDOM OF CONTRACT ON DOMESTIC LAW OF THE MEMBER STATES AND THE EU SECONDARY LAW

Primary consequence which follows from the constitutionalization of freedom of contract in the EU is requirement for both Member States and the EU legislator to respect principle of proportionality in all regulations restricting contractual liberty. Therefore, legislators have to prove that all limitations are appropriate and necessary, do not violate essence of freedom of contract and properly balanced conflicting rights. Such requirements may have influence domestic laws of the Member States and the EU secondary law.

In the present chapter I will analyze possible impact of constitutionalization of contractual freedom on laws of Member States and EU secondary law, focusing especially on possibility of *Lochner*-like deterioration of level of social protection. Chapter is divided on two sections. In the first I discuss possible impact of constitutionalization of freedom of contract on legal systems of Member States and in the second on the EU secondary law. The second part is further divided on two subsections analyzing possible influence on the existing EU law and on the future harmonization of the European Contract Law.

4.1. The constitutionalization of freedom of contract and domestic law of the Member States

As all other rights and freedoms provided in CFREU, freedom of contract is applicable to Member States "only when they are implementing Union law".[313] However, the ECJ's broad interpretation of the term "implementation of Union law" together with wide range of state's legislative interferences with contractual liberty may cause that art. 16 CFREU would be frequently invoked by parties of domestic legal disputes.

Traditionally, legal doctrine mentioned three situations in which Member States were bound by EU fundamental rights. These categories were: "application of provisions of EU

[313] Article 51(1) CFREU.

legislation based on protection for human rights", implementation of enforcement of EU measures and "derogation from EU rules or restricting EU rights".[314] However, according to the ECJ, the notion of "implementation of EU law" used in CFREU cannot be limited only to these three circumstances. It should rather include "all situations governed by EU law" or, in other words, "falling within the scope of EU law".[315]

The case of *Akerberg Fransson* proves that even remote relation between domestic legislation and EU law may justify applicability CFREU to Member State's actions. The ECJ held that the Swedish law penalizing VAT frauds fell within the scope of the EU law, although it was not enacted directly on the basis of any provision of EU law.[316] The fact that VAT was regulated on the EU level[317] and that art. 325 TFEU[318] "obliges the Member States to counter illegal activities affecting the financial interests of the EU through effective deterrent measures" was sufficient to justify applicability CFREU.[319]

In the recent *Siragusa* judgment, the ECJ further clarified that:

> [i]n order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 CFREU, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law (…); and also whether there are specific rules of EU law on the matter or capable of affecting it.[320]

Having on mind that many domestic limitations of contractual freedom have their roots in the European law[321] especially in such areas as anti-discrimination law,[322] consumer

[314] Paul P Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2008) 382–388.
[315] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] OJ C 114/08, para 21.
[316] Ibid.
[317] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.
[318] Consolidated Version of the Treaty on Functioning of the European Union [2012] OJ C326/01.
[319] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] OJ C114/7, §§19-23, paras 24-31.
[320] Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* (ECJ, 6 March 2014), para 25.
[321] S Grundmann, W Kerber and S Weatherhill, 'Party Autonomy and the Role of Information in the Internal Market - an Overview' in S Grundmann, W Kerber and S Weatherhill (eds), *Party autonomy and the role of information in the internal market* (De Gruyter 2001) 6.
[322] See e.g.: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of

protection law,[323] or insurances[324], and thus "fall within the scope of EU law", art. 16 CFREU has a great potential to be frequently invoked in domestic legal disputes.

The scale of impact of the ECJ's jurisprudence on domestic law will depend on the way of interpretation of freedom of contract it chooses. Significance of art. 16 CFREU on the domestic law will be strengthened if the ECJ' interprets contractual liberty in a more neo-liberal way than it is accepted by domestic constitutional courts. Interpretation strongly emphasizing social nature of the freedom of contract and accepting its wider limitations justified by protection of fundamental social rights, gives more leeway to the Member States and reduces potential impact of the art. 16 CFREU.

As was indicated in the previous chapter, characteristic features of the EU economic constitution, previous case law of the ECJ over balancing of economic freedoms and social rights as well as adoption by the ECJ formal understanding of contractual freedom indicate that the ECJ may endorse more liberal interpretation of contractual freedom than that accepted in domestic legal systems of the Member States. It cannot be therefore excluded that in some situations art. 16 CFREU may lead to erosion of the level of protection of social rights.

This may happen in several situations. For instance, the ECJ may rule that transposition of EU directive is incorrect because it excessively restricts contractual liberty.[325] Consequently, discretion of Member States in transposition of directives would be narrowed by exclusion of possibility of more "social" implementation.

employment and occupation [2006] OJ L204/23 ("Recast Directive"); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 ("Goods and Services Directive"); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 ("Race Discrimination Directive"); Directive 2000/78/EC (n 281)

[323] See e.g.: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, [1994] OJ L280/83;

[324] See e.g.: Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators [2004] OJ L138/1.

[325] See, e.g.: *Alemo-Herron* (n 15).

Moreover, having on mind connections between freedom of contract and market freedoms, art. 16 CFREU could be used to strengthen argumentation of the ECJ in cases concerning protection of internal market. This is possible especially in cases in which mere reliance on free movement principles would not be convincing enough[326] or in which market freedom clashes with fundamental social right. In the latter situation, even if Member State held that certain restriction of market freedoms was justified by necessity of protection of fundamental social right, what was accepted for instance in *Schmidberger* case,[327] the ECJ could argue that case involves not only conflict between market freedom and social right but also equally fundamental freedom of contract and thus the state was obliged to find a balance between them. By using this argumentation the ECJ would be able to avoid criticism that it ignores fundamental rights and focuses only on protection of internal market because limitation of one fundamental right would be justified by protection of the other.

Furthermore, liberal interpretation of contractual freedom would influence also interpretation of national private law by domestic courts which have a duty to interpret the law in accordance with EU primary law.[328] The ECJ's jurisprudence can also indirectly influence lawmaking process and adjudication even in those spheres which fall outside of the scope of the EU law.

4.2. Impact of the constitutionalization of freedom of contract on the EU law

4.2.1. Existing law

At the same time, one have to remember that many limitations of contractual freedom, aimed for example at protection of consumers, are set in the EU secondary law. Therefore, to

[326] See e.g. case C-339/89, *Alsthom Atlantique SA v. Sulzer*, [1991] ECR I-107 and case C-93/92, *CMC Motorradcenter GmbH v. Baskiciogullari*, [1993] ECR I-5009 in which the ECJ held that limitations of contractual freedom at stake do not distort free movement of goods. Today cases could be resolved differently because the ECJ could refer not only to market freedoms but also to art. 16 CFREU.

[327] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659, para 74.

[328] For instance, the Polish Constitutional Tribunal in the case P 16/06 underlined that the interpretation of the freedom of contract guaranteed in the Constitution has to be consistent with the *acquis communaitaure* and the jurisprudence of the ECJ (judgment of the Constitutional Tribunal of July 17, 2007, ref. no. P 16/06, OTK-A ZU, No. 7/2007, pos. 79, para 7).

assess potential impact of constitutionalization of freedom of contract on level of social protection in EU we will have to analyze how realistic it is that jurisprudence of the ECJ over art. 16 CFREU may lead to liberalization of EU contract law.

Although the EU has never had an explicit competence to regulate contract law[329] it developed a wide range of secondary acts of law which together constitute so-called "European contract law".[330] Usually the EU legislators indicated art. 114 TFEU (former art. 95 EC) as a basis for such legislation, although some legal scholars questioned correctness of such choice arguing that some EU directives regulate contract law matters which do not have explicit internal market implications.[331] Art. 114 also does not provide proper basis for a more comprehensive harmonization of the contract law which "would extend far beyond those areas necessary for the functioning of internal market"[332]. It is therefore suggested, that legal basis for enactment of such legislative measures could be found in art. 352 TFEU.[333]

Regardless of these disputes, it cannot be ignored that currently shape of domestic contract law is to a large extent determined by the EU law. The EU has not yet enacted comprehensive, uniformed regulation of contract law[334], therefore the law in this matter is mostly sector-specific.[335] The area of contract law which is to a largest extent designed at the EU level is definitely consumer protection law.[336]

Characteristic feature of EU contract law is extensive usage of mandatory provisions, what limits various aspects of contractual liberty, for instance: freedom to enter into contract,

[329] See e.g.: L Miller, 'European Contract Law after Lisbon' in D Ashiagbor, N Countouris and I Lianos (eds), *The EU after the Treaty of Lisbon* (Cambridge University Press 2012) 236.
[330] Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (n 225) 271.
[331] Miller, *The Emergence of EU Contract Law* (n 2) 48.
[332] Ibid 147.
[333] Miller, 'European Contract Law after Lisbon' (n 329) 244–245; Miller, *The Emergence of EU Contract Law* (n 2) 147–148; Kathleen Gutman, 'The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of the Proposed Options' (2011) 7 European Review of Contract Law 151, 159–161; Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (Routledge 2013) 185.
[334] This type of uniformed, comprehensive rules of European contract law are currently contained in non-binding documents such as Unidroit Principles of International Commercial Contracts or Principles of European Contract Law.
[335] Beale and others (n 1) 4.
[336] Miller, *The Emergence of EU Contract Law* (n 2) 50–52.

freedom of form or freedom of shaping a content of contract.[337] Carsten Herresthal argues that "mandatory provisions have assumed an ever increasing significance in EU legislation, resulting in a far-reaching intrusion into freedom of contract" and underlines that EU law gives priority to social regulation at the expense of protection of contractual liberty.[338] Jürgen Basedow, on the other hand, contends that EU law cannot be criticized for overregulation because restrictions of the contractual liberty on the EU level "barely exceed what has been commonplace in national law for decades".[339] What may raise serious concerns is lack of coherence of various secondary law measures.[340]

Besides mandatory provisions, yet another important factor limiting freedom of contract is development of the EU non-discrimination law.[341] The EU anti-discrimination law significantly limits crucial aspect of the contractual liberty, i.e. freedom to choose contractual partner. This is particularly controversial in case of non-discrimination in access to and supply of goods and services which implies that "anyone who offers goods or services to the public has no right to discriminate (…) either in the decision to enter the contract or in the terms offered".[342]

EU anti-discrimination directives and their implementation into domestic laws were criticized especially in Germany.[343] Dagmar Coester-Waltjen underlined, for example, that in order to strike a fair balance between contractual freedom and the principle of equal treatment, the latter should be applied only when it is required by "the needs of society and

[337] Basedow (n 12) 916–918.
[338] Herresthal (n 11) 110.
[339] Basedow (n 12) 915–916, 918.
[340] Ibid 918.
[341] Supra (n 319).
[342] Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (n 82) 81.
[343] See: Franz C Ebert and Tobias Pinkel, 'Restricting Freedom of Contract through Non-Discrimination Provisions? A Comparison of the Draft Common Frame of Reference (DCFR) and the German "General Equality Law"' (2009) 10 German Law Journal 1417, 1424; Eduard Picker, 'Anti-Discrimination as a Program of Private Law' (2003) 4 German Law Journal 771; Nuno M Pinto Oliveira and Benedita MacCroire, 'Anti-Discrimination Rules in European Contract Law' in Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party autonomy and the role of information in the internal market* (De Gruyter 2001) 112–117.

social peace".[344] This could happen when "goods and services are made available to the public commercially and professionally on the basis of mass transactions" but not in case of transactions between consumers.[345] Also J. Basedow criticized developments in the EU anti-discrimination law. He rightly observed that negative impact of the secondary EU law on the contractual liberty is further strengthened by the acceptance by the ECJ horizontal effect of general principle of non-discrimination in the private law.[346] This, according to the Basedow, is incompatible with principles of the market economy in which "it is primarily the role of competition to punish the unequal treatment and to discipline the discriminating party (…)".[347]

This criticism undoubtedly shows that current shape of EU contract law would be very difficult to reconcile with recognition of freedom of contract as a fundamental right. One should not expect, however, that the ECJ will suddenly start to strike down all restrictions of contractual liberty in the EU secondary law in a *Lochner*-like manner. The ECJ's approach to judicial review of the compatibility of EU secondary law with fundamental rights has always been extremely deferential.[348] Before Lisbon Treaty, the only exception in this regard was *Kadi*,[349] which concerned EU anti-terrorist measures. Granting binding force to CFREU has not changed this situation. Since 2009 the ECJ used Charter to invalidate EU secondary law only twice, in cases: *Volker und Markus Schecke*[350] and *Test-Achats*[351]. On the other hand, for instance in the case of *Association Kokopelli*[352] the ECJ refused to invalidate EU even though Advocate General argued that it infringed art. 16 CFREU.[353]

[344] Dagmar Coester-Waltjen, 'Discrimination in Private Law - New European Principles and the Freedom of Contract' in KS Ziegler (ed), *Human Rights and Private Law : Privacy as Autonomy* (Hart Publishing 2007) 126–127.
[345] Ibid 128.
[346] Basedow (n 12) 919–921.
[347] Ibid 921.
[348] Craig and Búrca (n 314) 372–373.
[349] Joined Cases C-402/05 and C-415/05 *Kadi v. Council* [2008] ECR I-6351.
[350] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2010] ECR I-11063.
[351] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.
[352] Case C-59/11 *Association Kokopelli v Graines Baumaux SAS* [2012] OJ C287/9.
[353] Ibid, Opinion of AG Kokott, paras 105-111.

Carsten Herresthal criticized this approach and argued that the ECJ should scrutinize EU legislative interferences with freedom of contract more actively.[354] He emphasized that lack of judicial review of EU legislative interferences with freedom of contract causes that "there is yet neither a coherent concept of freedom of contract nor a strong mechanism against its undue restriction in EU law".[355] If this situation does not change, freedom of contract in the EU will "amount to mere law in the books and to a hypothetical limit on legislative acts".[356]

This argumentation is certainly justified: it is paradox that although theoretically all interferences with freedom of contract have to pass very demanding proportionality requirement, in fact EU legislation drafts very often are not even analyzed in terms of compliance with it.[357] Moreover, lack of effective judicial review of EU secondary law may lead to creation of double standards in protection of contractual freedom – stricter for laws of Member States and almost much lower for the EU law.

It follows, that constitutionalization of contractual liberty probably would not lead to sudden liberalization of EU contract law. On the other hand, the ECJ may influence contract law not only through invalidation of acts of secondary law. To avoid necessity of striking down EU law, the ECJ may interpret it in the light of fundamental rights. Therefore, the jurisprudence of the ECJ may give EU regulations and directives more liberal meaning to reconcile them with the requirements of contractual liberty.

Moreover, substantiation of the freedom of contract by the ECJ may influence also EU lawmaking process. It is worth to note that Strategy Paper[358] and Operational Guidance[359] issued by the Commission require examination of the compliance with CFREU of all EU

[354] Herresthal (n 11) 111–113.
[355] Ibid 102.
[356] Ibid 112.
[357] For instance, neither the text of Directive on consumer rights (n 321) nor explanatory memorandum to its project (Commission, 'Proposal for a Directive of the European Parliament and of the Council on consumer rights' COM (2008) 614 final) contain any reference to art. 16 CFREU and freedom of contract.
[358] Commission, 'Strategy for the effective implementation CFREU by the EU' COM (2010) 573 final.
[359] Commission, 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments' SEC (2011) 567 final.

drafts of secondary law. However, current effectiveness of such examination is questioned in the legal doctrine[360] and indeed, as will be discussed later, analysis of compliance of the Commission's legislative proposals with art. 16 CFREU is usually very superficial.

4.2.2. Harmonization of the EU contract law

Currently ongoing works over more comprehensive harmonization of the contract law in the EU have triggered a debate as to what extent the EU contract law should be based on freedom of contract and how to reconcile it with the requirements of fairness and social justice. It is therefore worth to consider whether constitutionalization of contractual freedom and the ECJ's case law may contribute to resolution of these debates and consequently have impact on the future harmonization projects.

The works over harmonization of contract law in Europe started in 2001 with a publication of European Commission's "Communication on European Contract Law"[361]. The purpose of the Communication was to stimulate a debate as to whether existing divergences in contract law between Member States negatively affect internal market and if so, what measures the EU can undertake to harmonize contract law.[362]

After receiving contributions and responses from various interested parties, the Commission issued in 2003 yet another policy document entitled "A More Coherent European Contract Law. An Action Plan"[363] which it presented more concretized plans regarding harmonization of contract law. The Action Plan described two important harmonizing instruments: Common Frame of Reference and Optional Instrument.

A Common Frame of Reference (CFR) was supposed to be a form of a code containing "common principles and terminology in the area of European contract law" which would "help the Community institutions in ensuring greater coherence of existing and future

[360] Israel de Jesús Butler, 'Ensuring Compliance with CFREU in Legislative Drafting: The Practice of the European Commission' (2012) 37 European Law Review 397.
[361] COM (2001) 398 final (n 3).
[362] COM(2001) 398 final, 6-7.
[363] COM(2003) 68 final (n 3)

acquis in the area of European contract law".[364] In the communication of 2004 the Commission clarified that CFR would be composed of three parts – first would contain common principles of contract law, second – definitions of key concepts and the third one model rules.[365] The 2004 Communication provided also that preparation of the CFR would be divided on two phases: first, academic researchers would provide so-called "academic" Draft CFR which would constitute a basis for the Commission to elaborate final, "political" CFR.[366]

Second instrument described in the Action Plan was "Optional Instrument", which was described in the document as a "non-sector-specific-measure (…) in the form of a regulation or a recommendation, which would exist in parallel with, rather than instead of national contract laws".[367] The Action Plan did not determine whether Optional Instrument would be applicable to "all contracts, which concern cross-border transactions or only to those which parties decide to subject to it through a choice of law clause".[368] The content of the Optional Instrument would be based on the CFR.[369]

Discussing potential shape of the Optional Instrument and CFR the Commission underlined the role of freedom of contract:

> (…) contractual freedom should be one of the guiding principles of such a contract law instrument. Restrictions on this freedom should only be envisaged where this could be justified for good reasons. (…) Only a limited number of rules within this body of rules, for example rules aiming to protect the consumer, should be mandatory (…)[370]

This expression of strong commitment to the contractual freedom raised serious controversies among some legal scholars, who accused Commission of using "neo-liberal rhetoric".[371] The most notable example of such a criticism was the Manifesto by the Study

[364] Ibid 16.
[365] COM(2004) 651 final (n 3), 14-16.
[366] Ibid 8-13.
[367] COM(2003) 68 final, 23.
[368] Ibid.
[369] Ibid 16.
[370] Ibid.
[371] Martijn W Hesselink, 'The European Commission's Action Plan: Towards a More Coherent European Contract Law?' (Social Science Research Network 2004) 16 <http://papers.ssrn.com/abstract=1098851> accessed 17 March 2014.

Group on Social Justice in European Private Law.[372] Authors of the Manifesto underlined that harmonization of the contract law in the EU cannot be perceived only as a tool of fostering internal market. Common contract law would be "a significant step towards the construction of such an [shared European] identity" and thus similarly as domestic codifications of private law, will "have to strike a balance between, on the one hand, the weight attached to individual private autonomy (…) and on the other hand, principles which respect other equally important demands for social solidarity".[373] They also criticized the Commission's proposal of setting contractual freedom as a guiding principle of EU contract law:

> Why should the principle freedom of contract have such a privileged position, so that proposals for constraint must satisfy the heavy burden of proof that they can be justified with good reasons? Why not reverse the burden, so that those who wish to deregulate market transactions should have the burden of explaining the potential advantages to be gained by the parties to these transactions from the absence of mandatory rules?[374]

The authors of the Manifesto proposed that EU contract law should be based on fairness and distributive justice in order to prevent exploitation and social exclusion.[375]

Similarly, Jacobien W. Rutgers argued that Optional Instrument which would be based on the contractual freedom instead of looking for a balance between private autonomy and social justice could lead to "social dumping".[376] According to him, contractual freedom as a fundamental right cannot be inferred either from primary EU law, in particular four market freedoms, or from the ECJ's case law and therefore "the European economic constitution does not require freedom of contract as an absolute starting point for future legislative measures".[377] Aurelia Colombi-Ciacchi, on the other hand, argued that freedom of contract could be

[372] Martijn W Hesselink and others, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 European Law Journal 653.
[373] Ibid 656.
[374] Ibid 663–664.
[375] Ibid 664–665.
[376] Jacobien W Rutgers, 'An Optional Instrument and Social Dumping' (2006) 2 European Review of Contract Law 199.
[377] Rutgers, 'The European Economic Constitution, Freedom of Contract and the DCFR' (n 5) 108.

reconciled with social justice and fairness if its definition is not limited to merely a formal aspect but embraces also its substantive dimension.[378]

While the Commission's Action Plan was criticized by the supporters of more socially oriented private law, more recent developments in harmonization of contract law in EU faced serious criticism of liberal legal scholars. In 2008 the "academic" Draft CFR was published[379] and one year later it was modified by the final Outline Edition of DCFR.[380] Although the document declared that contractual freedom should be considered as a point of departure,[381] its specific provisions, full of mandatory clauses and exceptions to contractual freedom[382] were assessed by many as excessively restrictive. Group of German legal scholars pointed out that:

> [t]he DCFR-provisions furthermore dwarf the amount of regulation and bureaucracy thus far accomplished by Community Directives in respect of private law. (…) these Directives are limited to business-to-consumer (b2c) transactions, and they apply only in specific situations (…). The DCFR, in contrast, puts in place global and incalculable limitations on the scope of the freedom enjoyed by parties under private law.[383]

According to German authors, the risk of "massive erosion of private autonomy" is further strengthened by widely diverged and imprecise general principles contained in the first part of DCFR which cannot provide any real assistance for interpretation of specific provisions of DCFR.[384] M. Storme, on the other hand, criticized DCFR's anti-discrimination provisions which, in his opinion, would lead to undue limitation of contractual freedom and in practice would be counterproductive.[385] Even one of the authors of the "Manifesto" noticed that:

> [i]f the content of an instrument on European contract law is going to be broadly similar to the DCFR, a libertarian probably would not be too pleased (…) The reason is, of course, that from his perspective the text

[378] Colombi Ciacchi (n 48) 303–305, 318.
[379] Christian von Bar, Eric M Clive and Hans Schulte-Nolke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference Interim Outline Edition* (Sellier 2008).
[380] Christian von Bar, Eric M Clive and Hans Schulte-Nolke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference Outline Edition* (Sellier 2009) <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf> accessed 17 March 2014.
[381] Ibid 62.
[382] See: Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' (n 7) 116–117.
[383] Eidenmuller and others (n 7) 678.
[384] Ibid 670–672.
[385] Storme (n 7) 192–195.

> gives insufficient prominence to formal party autonomy and to freedom of contract. There are just too many mandatory rules. Therefore, the instrument would probably be rejected as being socialist.[386]

In 2010 the Commission issued yet another Green Paper in which it presented possible options regarding the "legal nature of the instrument of European Contract Law".[387] According to the Green Paper there were seven possible alternatives in this regard. The first three options, proposed issuing merely a soft-law instruments.[388] Four further included issuing binding EU secondary law. Options four and five were respectively: regulation setting up an Optional Instrument and Directive on European Contract Law.[389] The most ambitious projects were Regulation establishing a European Contract Law and Regulation establishing European Civil Code.[390] The Commission presented also questions regarding the scope of the document, in particular whether the it should cover both business-to-business and business-to-consumer relations and whether it should be applicable also to purely domestic contracts.[391]

Eventually, the Commission has chosen the fourth option, that is Optional Instrument in the form of regulation. In 2011 it published a "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law".[392] According to the Commission this instrument will be beneficial both to business, by simplifying cross-border transactions and reduction of their costs, as well as to consumers by providing same high level of protection in the whole EU.[393] The regulation would be applicable to business-to-consumer and business-to-business contracts, however in the latter case at least one contractor would

[386] Martijn W. Hesselink, 'Five Political Ideas of European Contract Law' (2011) 7 European Review of Contract Law 295, 306.
[387] Commission, 'Green Paper on policy options for progress towards a European Contract Law for consumers and businesses' COM(2010) 348 final.
[388] Ibid 7-9.
[389] Ibid 9-10.
[390] Ibid 11.
[391] Ibid 11-12.
[392] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM(2011) 635 final.
[393] Ibid 4.

have to be a small or medium enterprise.[394] The optional character of the CESL implies that both parties of contract have to agree on its application.[395] The Regulation would be applicable primarily to cross-border contracts[396] but the Member States may choose to extend it also on domestic contracts.[397] The material scope of CESL would be limited to contracts for the sale of goods, digital content contracts and related service contracts.[398]

The substantive content of CESL raised similar discussions over the role of freedom of contract as all previous Commission's proposals. For instance, Richard Epstein criticized the proposal as leading to overregulation of sales law[399] and underlined that if "the European Commission believes that freedom of contract is the preferred solution, it should do what all sound regulators do to achieve that goal: step out of the limelight as quickly as possible".[400] Also Horst Eidenmüller criticized CESL for its restriction of freedom of contract through inclusion "many mandatory and inefficient consumer rights".[401] Similarly, Oren Bar-Grill and Omri Ben-Shahar indicated that although CESL declares general principle of contractual freedom, it contains eighty-one provisions which "cannot not be excluded and can only be modified to favor consumers".[402]

All these debates show that the Commission has to solve fundamental problems of a constitutional nature regarding the role of freedom of contract and its proper balance with social values. It is therefore worth to consider whether constitutionalization of contractual

[394] Ibid 26, art. 7(1). Member States would be able to extend applicability of the CESL also on the contracts between two business parties none of which is small or medium enterprise – ibid 28, art. 13 lit. b.
[395] Ibid, art. 8.
[396] Ibid 25, art. 4.
[397] Ibid 28, art. 13 lit. a.
[398] Ibid 25-26, art. 5 and art. 6.
[399] Richard A Epstein, 'Harmonization, Heterogenity and Regulation: CESL, the Lost Opportunity for Constructive Harmonization' (2013) 50 Common Market Law Review 207.
[400] Richard A Epstein, 'Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Should Be Scrapped' <http://www.law.uchicago.edu/files/files/RAE%20paper.pdf> accessed 23 March 2014.
[401] Horst Eidenmüller, 'What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool' (2013) 50 Common Market Law Review 69, 80.
[402] Oren Bar-Gill and Omri Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 Common Market Law Review 109, 112.

freedom in CFREU and its substantiation in the jurisprudence of the ECJ may have, or whether it already had, a practical impact on the harmonization process.

Chantal Mak underlined that to establish whether Charter Fundamental Rights may be able to guide the process of harmonization of contract law, it has to be considered whether "the EUCFR sufficiently define[s] the conceptions of 'consumer protection', 'freedom to conduct a business' and 'effective remedies' (…)".[403] If not, CFREU "would not be able to further guide the substantive harmonisation of matters of private law in Europe".[404] In the context of freedom of contract, we could reformulate this question and ask whether art. 16 CFREU, as interpreted by the ECJ, sets sufficiently precise standards to provide any assistance in the harmonization process.

The jurisprudence of the ECJ has not yet resolved definitely all questions regarding interpretation of art. 16 CFREU. However, even on the basis of currently existing case law, some of the most radical opinions regarding the role of freedom of contract in the EU contract law have to be rejected as incompatible with the art. 16 CFREU. For instance, statements made by J. W. Rutgers that contractual freedom does not have to be considered as a guiding principle of harmonizing instruments because it has no basis in the EU primary law[405] are no longer justified in the light of the recent judgments of the ECJ.[406]

Similarly, also position of the authors of the "Manifesto", who questioned Commission's proposals regarding privileged position of the freedom of contract and requirement of heavy burden of proof to justify its limitations,[407] is difficult to defend. Proportionality test used by the ECJ in *Sky Österreich*[408] or *Alemo-Herron*[409] implies that the

[403] Chantal Mak, 'Europe-Building through Private Law. Lessons from Constitutional Theory' (2012) 8 European Review of Contract Law 326, 339.
[404] Ibid.
[405] Rutgers (n 5) 95.
[406] Supra 38, 42-43, 50-51.
[407] Hesselink and others (n 372), 663-664.
[408] *Sky Österreich* (n 14).
[409] Ibid.

freedom of contract is a point of departure and all its restrictions have to be justified by important legitimate aim, be proportionate and must respect essence of contractual liberty.

The most important problem which has to be solved by the ECJ concerns balancing freedom of contract with social rights or consumer rights. Currently the case law is a bit contradictory but I suggested that it cannot be excluded that ECJ would eventually endorse more active approach to the protection of contractual freedom. If that was true, the leeway of the EU legislator certainly would be narrowed because all restrictions of freedom of contract will have to be properly justified. Therefore, some of proposals contained in the DCFR or CESL, criticized by legal doctrine as excessively restricting freedom of contract and at the same time inefficient in protecting consumer rights, would have to be reconsidered.

On the other hand, analysis of the documents issued by the Commission indicates that art. 16 CFREU and its interpretation in the ECJ's judgments have not played any significant role in the legislative process so far. For instance, although the Commission conducted an assessment of the impact of CESL on art. 16 CFREU,[410] this examination was rather superficial. The Commission just stated that CESL "would remove obstacles for (…) companies which currently experience difficulties to conduct cross-border business" and that it "contains no restrictions on the freedom of the parties to conclude contracts (…)".[411] There were no references to the jurisprudence of the ECJ, analysis of proportionality of restrictions of contractual freedom nor any explanation of its balancing with consumer rights.

Therefore, in case of CESL, the jurisprudence of the ECJ may influence not the content of the Regulation but the process of its interpretation. In this context, it is worth to underline that according to the recital to CESL "Regulation respects the fundamental rights and observes the principles recognised in particular by CFREU and specifically Articles 16,

[410] Commission, 'Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law on a Common European Sales Law' SEC(2011) 1165 final, 128.
[411] Ibid.

38 and 47 thereof".[412] Thus, the domestic courts will have to take into account interpretation of freedom of contract by the ECJ while adjudicating contractual disputes governed by CESL.

Moreover, it can be expected that eventual adoption of CESL would not end the process of harmonization of European contract law, especially having on mind that European Parliament limited its cope to cover only "distance contracts, including online contracts".[413] Such a limited document may turn out to be insufficient and in future the Commission may return to idea of enactment of a more comprehensive instruments, including even European Civil Code. Therefore, the debate over the role of freedom of contract in the common European contract law will probably not cease and it cannot be excluded that together with growing importance of contractual freedom in the jurisprudence of the ECJ, art. 16 CFREU will have greater impact on the legislative works than so far.

[412] COM(2011) 635 final 21, para 37 of the recital.
[413] European Parliament, 'Legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law' P7_TA-PROV(2014)0159, amendments 60-62.

CONCLUSIONS

Constitutional protection of contractual freedom as a fundamental right has always raised serious theoretical and practical controversies caused by tensions between respect to individual liberty on the one hand and necessity of protection of social justice on the other. Depending on interpretation of this freedom adopted by given constitutional court, contractual liberty may become either powerful tool in protecting free market and blocking social welfare reforms or right without any practical significance.

In the present paper I presented different approaches to constitutional protection of freedom of contract. The position of the US Supreme Court evolved from very liberal, but also full of inconsistencies, to very restrained after New Deal. European approach is definitely more moderate and is based on reconciliation between conflicting values. This reconciliation may imply either adoption of the concept of substantive freedom of contract (Germany) or focusing on its formal understanding but counterbalanced by social rights and consumer rights (Poland, EU).

The comparison indicated several factors which determine level of constitutional protection of freedom of contract. First important factor is the construction of economic constitution of state. Second, level of protection of freedom of contract may depend on the constitutional bases from which it is derived. Moreover, also existence of strong constitutional guarantees of social and consumer rights mitigates protection of contractual liberty, especially if the courts accept their horizontal effectiveness in private law.

Although recognition of fundamental status of freedom of contract in the EU certainly will not lead to outcomes known from the American "*Lochner* Era", I argued that there are two factors which suggest that it will not remain an illusory right but often may prevail over social rights. First, in the EU economic constitution free market still plays greater role than social values, what is a consequence of rather limited EU competences in the sphere of social

policy. Second, jurisprudence of the ECJ over protection of four market freedom shows that for the ECJ point of departure is still protection of internal market and not promotion of social rights. Having on mind connection between market freedoms and contractual liberty, one can expect that the ECJ may use similar reasoning also on the grounds of art. 16 CFREU.

Due to the fact that many domestic contract law regulations "fall within the scope of EU law", what is a condition of applicability CFREU, more active protection of contractual freedom by the ECJ may influence domestic laws of Member States. Liberally interpreted art. 16 CFREU may be used by the ECJ, for example, to narrow discretion of states in transposition of directives by excluding possibility of more social implementation or to struck down protective domestic legislation. It follows that the risk of erosion of social guarantees, indicated by some legal scholars, cannot be excluded. On the other hand many important guarantees of protection of consumer rights are now set in the EU secondary law, which is even criticized by some legal scholars as excessively restrictive for freedom of contract. Taking into account traditional reluctance of the ECJ to invalidate EU secondary law on the basis of violation of human rights, it is rather unlikely that these guarantees would be struck down as excessively restricting freedom of contract. At the same time, however, the ECJ may use art. 16 CFREU to give EU secondary law more liberal meaning.

The constitutionalization of freedom of contract and its substantiation in the jurisprudence of the ECJ may also influence future harmonization of European contract law. One have to keep in mind that all Commission's proposals raised serious controversies among legal scholars. Some of them argued that proposals are too neo-liberal while others that they may lead to further erosion of private autonomy. In light of the recent case law of the ECJ some of arguments used in these debates have to be rejected – it cannot be hold any longer that freedom of contract is not protected in the EU primary law and thus it does not have to be a guiding principle of common European contract law. On the contrary, conferring upon

contractual liberty status of fundamental right means that it should be treated as a point of departure for all legislative works. It follows, that some of the Commission's proposals, criticized by many as too restrictive for freedom of contract and at the same time not necessary for effective protection of consumers, would have to be reconsidered in the light of principle of proportionality. Although so far art. 16 CFREU and jurisprudence of the ECJ had not played any important role in a drafting process, it can be expected that together with growing importance of this right in the case law of the ECJ and further development of the doctrine of its protection, its impact on harmonization process would raise.

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