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The Political De-Determination of Legal Rules and the Contested Meaning of the 'No Bailout' Clause

Abstract

Traditional debates on legal theory have devoted a great deal of attention to the question of the determinacy of legal rules. With the aid of social sciences and linguistics, this article suggests a way out of the 'determinate-indeterminate' dichotomy that has dominated the academic debate on the topic so far. Instead, a dynamic approach is proposed, in which rules are deemed to undergo processes of political 'de-determination' and 're-determination'. To illustrate this, the article uses the example of Art. 125 of the Treaty on the Functioning of the European Union, the 'no bailout' provision, which played a major role in the management of the Euro-crisis. As will be shown, with the start of the crisis, this provision, whose meaning was once scarcely controversial, became the object of intense interpretative disagreement. As it became politically relevant, the rule also became the site of interpretative competitions, until the intervention of the European Court of Justice disambiguated and redefined its meaning.

Key Words

Art. 125 TFEU – Euro-bailouts - Determinacy of Rules – Law and Politics – Juridical field

The Political De-Determination of Legal Rules and the Contested Meaning of the 'No Bailout' Clause

Introduction

From 2009, the depth of an ever-increasing crisis in the Eurozone led to the creation of mechanisms of assistance for countries experiencing severe financial difficulties. Member States such as Ireland, Portugal and Greece, to note only a few examples, were the objects of so-called 'bailouts', by which financial support was provided in exchange for profound, often socially contested, economic and political reforms. This idea of financial assistance was foreseen by Art. 125 of the Treaty on the Functioning of the European Union[1](TFEU) – the 'no bailout' clause – which in fact had gone relatively unnoticed before 2009. Legal literature in the pre-crisis period about the meaning and role of this rule in the general context of European Union economic governance had been scarce, at least in relation to its far-reaching political relevance (but see, *inter alia*, Hessel and Mortelmans, 1993; Herdegen, 1998: 26). Analyses had usually been limited to brief descriptions of the clause, suggesting that it prohibited bailouts within the Union without further discussion of difficult scenarios or 'hard cases' (see on this concept Dworkin, 1975: 1057).

The outbreak of the Euro-crisis and the creation of the first mechanisms of financial assistance dramatically changed the situation (Wendel, 2014: 268). Art. 125 TFEU

[1] Former Art. 104b EC Treaty under the Maastricht Treaty regime and Art. 103 EC Treaty under the Amsterdam Treaty regime.

suddenly became the object of intense debate. The provision was at the core of political disputes regarding the convenience and legality of the granting of bailouts to European Union Member States undergoing financial problems. Parallel to debates among politicians, academics began to focus on the provision and polarized into two opposed groups: those asserting that the bailouts were forbidden under Article 125 TFEU and those who argued that they could be allowed, at least under certain circumstances (see *inter alia*, Louis, 2010: 976; Athanassiou, 2011:558; Palmstorfer, 2012; Lupo Pasini, 2013). The debate still endures. A provision whose meaning was once uncontroversial had become the object of intense interpretative disagreement. The 'no bailout' clause seemed to have suddenly become a paradigmatic example of an 'indeterminate' legal provision, whose application to the difficult case of the 'euro bailouts' was polemic from all perspectives.

This article analyzes the process through which the meaning of Art. 125 became contested. To do so, the article proposes changing the traditional approaches to the analysis of the determinacy of rules in legal theory. Instead of considering legal rules as either determinate or indeterminate, or anything in between,[2] I shall argue that they are subject to processes of political 'de-determination' and 're-determination' in which their meaning is the object of political struggles. More generally, drawing on the contributions of socio-legal literature (*inter alia*, Bourdieu, 1987 and 1991; Schepel and Wesseling, 1997; Picciotto, 2015), the article replaces the traditional static approach to the determinacy and meaning of rules for a dynamic one, capable of acknowledging their mutability and contestability. As I will show, when a formerly uncontroversial rule

[2] The contributions to this debate are extremely abundant. See *inter alia* Greenawalt, 1990; Leitier, 1995; Kutz, 1994; Maxeiner, 2006; Zapf and Moglen, 1995.

becomes the object of political struggles, a number of actors begin to compete with different interpretations about its meaning and application to real cases. In this interpretative competition, juridical actors, such as legal scholars, play a core role. Taking inspiration from Bourdieu (1987; 1991), the juridical field can be deemed to convert political struggles into legal ones, in which legal actors compete through their doctrinal interpretations and manage conflict through legal procedures. As Picciotto stated (2015:171), 'law operates to defuse social conflicts and depoliticize them, shifting political and legal conflicts on to the terrain of debates over the symbolic power of texts'. In this article, these processes by which the meaning of rules becomes contested will be called 'political processed of de-determination of legal rules'. Their definition as 'political' is due not only to the fact that political actors play a role in the processes but also to the fact that the driving force of such processes is a struggle for power: the power to impose a certain interpretation of a rule and to exclude the interpretation of the rival, be it a political adversary or a fellow academic. As they engage in a struggle for interpretative power, in these episodes, legal actors, such as courts[3] or legal scholars, must also be considered, simultaneously, as political actors.

With this background, in the next pages, I will explain the role of Art. 125 TFEU in the frame of the Euro-crisis. It will be shown that the 'no bailout' clause first underwent a process of de-determination as a consequence of the political controversy about the European financial instruments and subsequently underwent a process of judicial re-determination before the Court of Justice as a consequence of the famous *Pringle* case. To do so, this article is structured as follows. After this brief introduction, I will explain my theoretical framework and discuss the dominant approaches to the determinacy of

[3] In this regard, see also Judicial Politics literature.

rules in legal theory, summarize the debates about the conventional nature of language in linguistics, and explain in detail my proposal for a dynamic approach to the problem of the meaning of legal rules. Next, I will briefly discuss the research design of this article, showing that it follows essentially a social science positivist qualitative approach. Subsequently, I will offer an empirical analysis, which constitutes the core of the article, discussing the politicization of Art. 125 TFEU in the period subsequent to 2008, the academic debates around this provision and how the controversy was finally judicialized. It is only in this empirical section that the article engages with European Studies literature on the EMU, engaging particularly with legal literature about the 'no bailout' provision. The article finishes with some conclusions.

De-determination and re-determination of legal rules. Theoretical framework.

This section presents a theoretical framework to account for the interpretative controversies around Art. 125 TFEU. It is divided into three subsections. In the first subsection, I summarize the traditional static approaches to the determinacy of legal rules in legal theory, and I propose replacing them with a dynamic one. In the second subsection, using linguistics and sociology, I assert that legal language is mutable and that the meaning of rules is subject to political pressures, and I describe how these pressures operate in what I call processes of 'de-determination'. In the third subsection, I finally analyze how legal systems address these de-determined rules, and in particular I scrutinize the role of judicial actors in formally fixing their meaning.

In some parts in this section, and especially in the first two subsections, the discussion of some important theories and schools of thought is very concise. The reason, in addition to space constraints, is that those schools of thought are only relevant to my argument to the extent that they address the topic of the determinacy of rules, and as a result, I deliberately overlook their other important aspects. Other theories that are more central to my argument, particularly Bourdieusian sociology of law, are discussed in more detail. Altogether, this section gives a theoretical grounding to the research hypothesis of the article, namely that increasing political polarization around the topic regulated by a rule, and not simply ambiguous wording of the rule, can explain why the meaning of the latter becomes contested (see also Picciotto, 2015).

Revisiting the debate about the determinacy of legal rules

Legal and political scholarship has long debated the degree of determinacy of legal rules. The old French *École de la Exegese* considered legal systems to be so determinate that judges could apply the law to the cases by simply following a syllogism (La Torre, 2007: 94). Twentieth-century positivism changed the approach because it generally accepted a certain degree of indefiniteness in the law. For Kelsen (1960: 351), 'the interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value, though only one of them in the action of the law-applying organ (especially the court) becomes positive law'. In the

same vein, H.L.A. Hart spoke about the 'penumbra of legal meaning'[4] and the 'open texture of law'. For him, 'Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases (..) Canons of "interpretation" cannot eliminate, though they can diminish, these uncertainties' (Hart, 2012[1961]: 126). To illustrate these uncertainties, Hart (2012[1961]: 127) used the example of the rule prohibiting the use of vehicles in a park in relation to the concrete case of an electrically propelled toy motor-car because both its inclusion and its exclusion from the definition of 'vehicle' are controversial. I will return to this example later on.

Other schools of legal thought had been even more radical. For one of the founders of the 'free-law movement', Eugen Ehrlich (2005[1906]: 91-92), legal rules were characterized by ambiguity. For the Austrian scholar, the meaning and literal wording of a rule was only one of many forces that influence judges (Ehrlich, 2005[1903]: 84). A young Carl Schmitt also emphasized the indeterminacy of law, integrating this idea into an intellectual discourse that Scheurman (1996 590) considered an anticipation of his embrace of German National-Socialism. A less sinister contribution to these debates was that of American Legal Realism, which is in fact essential to understanding contemporary skeptical approaches to the determinacy of law. For Oliver Wendell Holmes Jr. (1897), legal language was indeterminate, and the real explanation for judicial behaviour lay in variables beyond legal rules: 'The language of judicial decision is mainly the language of logic (…) But certainty generally is illusion (…) the decision can do no more than embody the preference of a given body in a given time and place'. Critical Legal Realism, and more recently the subdiscipline of Judicial Politics, have

[4] See for a discussion Coleman and Leitier, 1993: 565.

also emphasized this indeterminacy and therefore judges' capacity to make unconstrained decisions, which would be explained with reference to political, social, psychological or institutional variables instead of legal ones (see Coleman and Leitier, 1993: 549; Shapiro, 1964). Although probably not dominant among legal scholars, the 'indeterminacy thesis' enjoys a certain popularity among social scientists. In this regard, Coleman and Leitier distinguished a number of different varieties of this thesis and discussed their implications in terms of what they call 'legitimate governance by law' (Coleman and Leitier, 1993:559 ff.).

As the reader can observe, the different schools of thought presented in the previous paragraphs disagree regarding the degree of determinacy of legal rules. However, all these approaches have something in common: Whatever their stance regarding the ontological nature of legal rules might be, it is always static. Rules are considered to be either determinate or indeterminate; however, once they are so, they remain so forever. In these approaches, the degree of determinacy of rules is deemed to be a quality of the very rules or of language, disconnected from the community of speakers and the changing system of conventions that said community of speakers reproduce. This article proposes radically questioning this premise. The idea that I want to defend is that legal rules are actually subject to processes of de-determination and re-determination. In this article, thus, I take a dynamic approach to the question of determinacy of legal rules. To ground it, I will focus on socio-political and socio-legal processes in which a plurality of actors competes for the construction of hegemonic interpretations of the law and the control of processes of constitutional mutation.

The politicization of the meaning of legal rules

In Kripke's reading of Wittgenstein, the meaning of a rule cannot be established with reference to objective facts (truth-conditions) but rather with reference to the conditions in which a community of language users permits the assertion of a certain sentence (assertability-conditions) (Coleman and Leitier, 1993:570). This approach suggests that we should understand rules as linguistic enunciates whose meaning is 'socially' constructed by the community of speakers of the language. As argued by Picciotto (2015:169), 'linguistic signifiers (words) do not have an intrinsic meaning. Meaning depends on the linguistic context. Because language is social, this also means its social context and that meaning is constructed through social interaction'. The social construction of meanings is indeed, like many sociological phenomena, cross-cut by political processes and struggles for power. In this subsection, with the aid of linguistics, sociology and political science, I will propose a dynamic approach to the question of the determinacy of rules capable of accounting for the political nature of the process of construction of meanings.

Because law is language (see Coleman and Leitier, 1993: 568 ff.), linguistics has much to tell us about the question of the determinacy of rules. Prior to structuralist linguistics, meanings were deemed based upon the relationships between words and facts. In this period, 'language was not understood to create meaning, but rather to operate as a tool

to uncover and manipulate a concealed, but already known or knowable, order' (Heller, 1984: 134). From this perspective, the relation of the speaker with language was instrumental because the latter was deemed to adapt over time to fit the needs of its users (Heller, 1984: 139). The emergence of structuralism at the beginning of the 20th century was marked by the de-centring of human agency in the process of creation of meaning (Barker and Galasinki, 2001: 4). It 'relocated the production of meaning within the network of relations that was the language itself', so that now 'the speaker is dependent on language itself to engage in meaningful activities' and that the subject is understood as a product of culture (Heller, 1984: 140). The conventional roots of language were not, however, entirely challenged. For Saussure, meaning was still 'a social convention generated by signifying practices that organize the relation between signs' (Barker and Galasinki, 2001:4). In structuralism, 'meaning is culturally and historically specific' and 'the relations between signifiers and signifieds are organized (and maintained) through social conventions into cultural codes' (Barker and Galasinki, 2001: 4-5). Although in a very different and more complex way, for structuralism language continues to be a social convention, 'a social institution composed of forms that pre-exist the individual speech acts' (Heller, 1984: 141).

Post-structuralism takes a radically different direction. For post-structuralists, such as Laclau and Mouffe, 'meaning can never be finally fixed; it is always in flux, unstable and precarious. The being of objects and people can never be encapsulated, once and for all, in a closed system of differences' (Wetherell, 1998: 393). This has enormous implications for legal language. If, as proposed by post-structuralists, meaning is always in dispute, it is a task of legal theory to understand the social processes through which the meaning of legal rules is established, contested and mutated. Because these

processes imply struggles over meaning and power relations (see Picciotto, 2015: 169), they are political processes. Pierre Bourdieu might help us understand them. The French sociologist is difficult to classify in any school of thinking. Although law was not his main topic of research, he devoted some writings to what he called 'the juridical field' (espec. Bourdieu, 1987 and 1991; see also Dezalay and Madsen, 2012). Bourdieusian sociology of law acknowledged the power of individuals, at least of certain 'qualified' individuals, to create and recreate the meaning of legal rules. According to Bourdieu (1987: 817), 'The juridical field is the site of a competition for the monopoly of the right to determine the law' (see also Schepel and Wesseling, 1997: 170). For García-Villegas (2006: 347), 'such struggle is not only intellectual but also political, given the fact that most legal debates have direct implications for the distribution of power and goods that occurs in the political field'.

In Bourdieusian sociology of law, the elasticity of legal texts gives the operation of judgement considerable freedom, so that *ex post facto* rationalization of decisions becomes usual (García-Villegas, 2006: 827). McCormick's' (2001:396) definition of 'decisionism' in the work of Derrida can indeed be useful to understand this point of the theory of Bourdieu because in the view of the Scottish legal philosopher, decisionism 'emphasizes the ultimately ungrounded nature of human choices (..) The moment or fact of decisions takes precedence over justification'. However, in Bourdieu (1987: 827), the decision of a judge is never her solitary act: 'The practical content of the law which emerges in the judgement is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence'. The juridical field converts direct conflict between parties into regulated debate between (legal) professionals who accept the rules of the field (Bourdieu, 1987: 831).

To illustrate this, I will use the example of Hart's prohibition of vehicles in the park. From a Bourdieusian perspective, first, one would find competing definitions of what is a vehicle. These competing definitions would be provided by specialists possessing 'a particularly rare form of cultural capital which we term juridical capital' (Bourdieu, 1987: 842), which would translate a social conflict around the use a toy motor-car in the park into a juridical conflict regulated by law. The conflict would then be resolved by a court, which is relatively unconstrained by legal texts given the elasticity of the latter but which must make a decision in the frame of, and as a product of, a struggle between the different interpretations of the law put forward by legal professionals. In the view of this article, legal scholars fulfil a core role in this regard because they provide interpretations of the law and are, so to speak, 'producers of meaning'.

Recent literature on European Judicial Politics has also noted the important role of legal scholarship. For Dyevre (2010: 322), in developing doctrines and normative arguments, legal scholars fulfil at least two functions: They help the courts persuade their audience, and they help litigants persuade the court. From the perspective of this article, the function of legal scholars is directly connected to the conventional nature of language that the field of linguistics has acknowledged, as well as to the disputed nature of meaning emphasized by post-structuralism. I return to the example of Hart's prohibition of vehicles: Whether a toy motor-car is considered a vehicle (and hence forbidden in the park) depends on the socially constructed definition of vehicle, which may change over time and which may be (as in this case) contested. If the rule prohibiting vehicles in the park is deemed indeterminate, it is because there is no consensus about its application to

the case because its interpretation is controversial, and different actors compete with their different interpretations of the meaning of the prohibition in relation to the toy motor-car.

In real-life legal cases, the more influential interpretations are those made by those actors considered by Bourdieu as having more 'juridical capital', such as legal scholars. Legal scholars may compete in the juridical field with different interpretations of the law, and it is precisely the existence of these diverging interpretations that renders law indeterminate. In terms familiar to some streams of post-structuralism, the interpretations about the meaning of rules *constitute* the meaning of the rules, particularly if they are provided by more influential specialists: These interpretations are performative in that they create the meaning that they interpret (see also Schepel and Wesseling, 1997: 167). Rules are determinate as long as there is consensus around their meaning. If this consensus is contested, they may undergo a process of 'de-determination'.

As specialists whose opinion is deemed to have an additional technical legitimacy, legal scholars thus play a prominent role in 'de-determining' or 're-determining' the meaning of rules through their interpretations. However, in performing their functions, they are not isolated. Following Picciotto (2015: 172), scholarly interpretative competitions must be analyzed in their wider political context. The relationship between the legal field and other social forces was underlined by Bourdieu (1987: 850):

> *'Given the determinant role it plays in social reproduction, the juridical field has a smaller degree of autonomy than other fields (...) External changes are more directly reflected in the juridical field, and internal conflicts within the field are more directly decided by external forces (...) It is as if the positions of different specialists in the organization of power within the juridical field were determined by the place occupied in the political field by the group whose interests are most closely tied to the corresponding legal realm'.*

Politics thus have an essential function in processes of de-determination or re-determination, especially regarding constitutional rules. Once a topic enters into the political agenda, political actors may develop diverging preferences regarding the topic, and in parallel may propose diverging interpretations of a formerly uncontroversial legal rule. Consensus around meaning may change or disappear, with political actors defending new interpretations coherent with their changing policy preferences. Politics interfere with language by making the meaning of legal rules a contested question. Instead of regulating political conflict, both law and the meaning of rules become the very object of politics. Here is where the interaction between political struggles and legal academia becomes more visible. For Bourdieu, law is a discipline with clear socio-political applications, and academic jurists often use their knowledge to seek practical solutions to societal problems (Dezalay and Madsen, 2012: 438). In translating political preferences regarding the application of a rule to legal arguments about its interpretation, they can use 'the symbolic power of law as a tool for ordering politics without necessarily doing politics' (Dezalay and Madsen, 2012: 438). In these and similar cases,

scholarly interpretation becomes part of a wider political battle, in which legal rules and their meaning play a privileged role.

Political and judicial mechanism of disambiguation of rules

We have seen that, in the frame of a process of politicization of a topic, the interaction between political and legal actors may give rise to dynamics of interpretative contestation of the meaning of legal rules. Norms once uncontroversial became de-determined when disagreement about their meaning vis-à-vis a concrete case arises. Controversial legal rules may nonetheless also be subject to processes of disambiguation. In principle, there are two main ways to give a clear meaning to a rule whose interpretation is – or *has become* – controversial. One is political and is carried out mainly by political actors, and the other is judicial and takes place via judicial interpretation. When controversial rules are constitutional in nature, legal doctrine usually refers to these processes as constitutional amendment and constitutional mutation, respectively.

The political process of disambiguation of rules takes place when political actors 're-write' a rule to clarify its meaning. In the case of constitutional provisions, this takes place via constitutional amendment. For that reason, rather than calling this a 're-determination' of the rule, we should call it a 're-wording': The meaning of the rule becomes less controversial, simply because its very words have changed. Thus, I have

opted to reserve the notion of 're-determination' for the process through which the meaning of a rule is disambiguated without changing its wording, which often occurs via judicial interpretation. Stone Sweet (2002) suggests that judicial activity can be understood as a triadic mode of dispute resolution. In his model, by deciding, the dispute-resolver 'makes rules that are concrete, particular and retrospective', and by justifying her decision, 'she makes rules of an abstract, general and prospective nature' (Stone Sweet, 2002: 64). What I call processes of re-determination of rules refers to the first function, by which a court fixes and determines the meaning of a provision. In fact, the dynamic nature of the meaning of rules, which this article seeks to understand, is acknowledged by judicial actors everywhere. Leading higher courts accept, under different arguments, that old legal concepts must be re-interpreted according to changing social needs and the evolving understandings of such rules, preferred by newer generations. From the perspective of this article, when they do so, they are often simply admitting that a rule has been de-determined, that consensus over its meaning has changed or disappeared and that a judicial fixation of its meaning has become necessary.

Courts thus fulfil a function of re-determination of legal rules. For Bourdieu (1987: 818), jurists compete through their different interpretations of the law; however, they are placed within a body organized in hierarchical levels 'capable of resolving conflicts between interpreters and interpretations' (see also Schepel and Wesseling, 1997: 170). When different actors begin to disagree regarding the meaning of a provision – when the provision has been de-determined – they may have recourse to judiciaries to resolve the dispute. Courts will then give an authoritative interpretation of the rule, which is generally binding upon the parties because it is, as stated by Bourdieu, 'the sovereign

vision of the State' (Bourdieu, 1987: 838). Their interpretations of the law involve, to reference Picciotto (2015: 171), social and political power. While it may be true that certain individuals may continue to disagree with the interpretation provided by the court, the binding nature of judicial decisions imposes a new *de facto* consensus around the meaning of the norm. Such a judicial decision should create systemic coherence, providing actors with clarity and certainty for future cases, qualities traditionally considered necessary for a legal system to be perceived as fair and to function adequately (*inter alia*, Neuhaus, 1963; Erickson *et al.*, 1977). The different actors may not necessarily accept the new meaning of the disputed rule because they find the reasoning of the court convincing but may do so simply because they accept the legitimacy of the court to resolve disputes over the meaning of the rules.

A few words on research design

This article takes an interdisciplinary approach to the study of the evolution of the meaning of Art. 125 TFEU, the 'no bailout clause', which combines legal theory, legal-doctrinal analysis and empirical social sciences research. Regarding the latter, this article aims to document with evidence a change in the hegemonic interpretation of the explored rule because at a certain point, interpretative controversy around the meaning of Art. 125 soared. The article shows that this change is the result of the politicization of the question of the bailouts after the crisis placed it firmly on the political agenda. Because the wording of the provision remained constant, legalistic explanations can be discarded and the focus can be placed on socio-political accounts of the phenomenon.

Legal-doctrinal analysis, however, was also essential to construct the argument of the article because documenting the changes in the interpretations of the 'no bailout' clause required the exhaustive analysis of doctrinal texts. It is in the writings of legal scholars where we find the 'conventional' interpretation of Art. 125 TFEU and where the basic claim that the dominant interpretation of this provision evolved over time can be tested. Legal scholars, thus, will explain what Art. 125 TFEU 'meant' at each moment in time, or, in other terms, what Art. 125 TFEU was thought to mean before and after the upsurge of the Euro-crisis.

Three methodological clarifications are necessary in this regard. First, the article focuses on the writings of legal scholars as a means to capture the constructions of the meaning of Art. 125 TFEU and the struggles around its interpretation and excludes writings about that topic by academics in other fields. The reason for this focus is that, following the theoretical framework, it is legal scholars who specialize in the construction of meanings and in the competition for the hegemonic interpretation of the law. Pieces produced by other academics, *inter alia* economists and political scientists, are also discussed in other regards but are not considered part of the struggle for the interpretation of law that operates mainly in the legal field, even if the boundaries between disciplines and functions are sometimes fuzzy. Second, the article focuses on English-language doctrinal materials. In addition to the usual practical impossibility of analyzing materials in all other languages, English has been selected as the current *lingua franca* of European legal academia. Third, to reconstruct the interpretative struggles of legal academia, this article focuses essentially on materials published until

the beginning of 2013. The reason for this focus is that on May 2013, the reform of Art. 136 TFEU came into force, and hence, this 'variable' ceased to be constant. One of the consequences of this change is that the article does not cover subsequent important episodes of the legal dynamics of the Euro-crisis, such as the OMT reference of the German Federal Constitutional Court. However, in doing so, the article seeks to maximize reliability and provide a clean and clear research design.

Combining the legal and social science perspectives, this article aims to show the potential of interdisciplinary approaches to understanding episodes such as the interpretative dynamics of Art. 125 TFEU. These dynamics can only be properly accounted for when combining different research methods. Social science cannot understand the evolution of meanings of Art. 125 TFEU through time without the help of legal scholarship and the narratives about the meaning of the rule that it created. At the same time, however, doctrinal analysis cannot understand the causes of this evolution without the aid of social science approaches and their emphasis on power and conflict.

Analysis. The 'no bailout' clause as a case study

In this section, in the light of the theoretical framework set out above, I shall analyze the empirical case of Art. 125 TFEU, the well-known 'no bailout' clause. The section is divided into three parts. In the first subsection, I analyze academic production about this

provision before the outbreak of the crisis in Europe. I will show that the range of legal interpretations of the rule was narrow and that doctrinal controversy about its meaning was mild in this period. In the second subsection, I analyze academic production on the rule once the crisis started, showing the increased attention paid by legal scholars to the rule and the growing controversy about its meaning in a context of political polarization about the bailouts. In this process, the meaning of Art. 125 TFEU became contested. In the third subsection, I illustrate how the legal system intervened to resolve the interpretative dispute, and I describe in detail how in the *Pringle* case the Court of Justice stabilized the controversial meaning of the provision.

A credible commitment? The analyses of the 'no bailout' clause before the outbreak of the crisis in the European Union

As widely known, since at least 2009, the European Union has suffered from a severe economic and financial crisis, which has affected certain Member States more intensely than others. Within the Euro-zone, countries such as Greece, Portugal, Ireland and Cyprus encountered increasing difficulty repaying or refinancing their debt. The Spanish banking system, as well as some EU countries outside the Euro-zone, such as Hungary, Latvia [5] and Romania, faced similar problems. To address this delicate economic situation, a system of 'bailouts' was designed, through which these countries would receive financial assistance in exchange for certain political and economic reforms, usually involving important social cutbacks. However, the treaties of the

[5] Latvia joined the Euro only in 2014.

European Union included a certain regulation of eventual 'bailouts', and soon all actors turned their eyes to these provisions. The main rules affecting the mechanisms of financial assistance were Arts.122, 125 and 126 TFEU. Article 125 TFEU contains the 'no bailout' clause:

> *'1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.*
>
> *2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.'*

From the perspective of static approaches to the determinacy of rules, Art. 125 TFEU should be considered either determinate or indeterminate, or something in between. Scholars could argue that the meaning of the rule was clear and that it either forbade or

authorized the bailouts. They could also consider Art. 125 TFEU indeterminate, at least to some extent, so that courts applying it to a particular dispute would have broad discretion in making their decisions, even leaving room for political preferences and biases. My argument is that in all of these views, something essential would go unnoticed: the dynamic processes through which the meanings of rules are constructed and modified over time. In traditional approaches, rules would be assumed to have a certain, constant level of determinacy, and this level of determinacy would depend on the rule and its wording, instead of the processes of political competition that shape and mutate their meanings over time.

Paradoxically, scholarly production about the meaning of rules is one of the main ways through which meanings are performatively constructed (see Schepel and Wesseling, 1997: 167). The wording of the 'no bailout' provision after the Lisbon Treaty took force had remained essentially the same as in the pre-Lisbon period. What is now Art. 125 TFEU had been Art. 103 EC under the Amsterdam regime and Art. 104b EC under the Maastricht regime. The first paragraph of the current Art. 125 TFEU has remained practically unaltered over this period, and the second paragraph only underwent a small modification of a more procedural than substantive character. For that reason, the doctrinal interpretations of former Art. 103 EC (Amsterdam)/104b EC (Maastricht) should theoretically apply without difficulty to Art. 125 TFEU.

Although the outpouring of literature on the topic of the bailouts began in 2009, it would be incorrect to suggest that there was no academic production on this topic before that year. However, in the pre-crisis period, analyses of the 'no bailout' provision were

generally made incidentally, as a by-product of more general reviews of the European Monetary Union. References before 2009 to former Art. 104b TEC can be found in the work of a few lawyers, some political scientists and a good number of economists. With very few exceptions[6], legal analyses of the provision were generally limited to reiterating the explicit wording of the treaty and indicating that bailouts were forbidden, without further discussion of hypothetical hard cases. In their piece on the topic, Hessel and Mortelmans (1993) simply insisted on the prohibition and recalled that it could also affect national and local authorities. In a similar vein, Verdun (1997: 25; *apud* Snyder, 1999: 439-440) suggested that all the members of Delors Committee, which had a leading role in the creation of the EMU, wanted national governments to remain fully responsible for national macroeconomic and fiscal policies. Some years later, Heipertz and Verdun (2004: 777-778) stated 'the no bail-out clause implies that neither the ECB nor the Community will provide funds to or buy bonds of a national government that becomes insolvent'. The approach taken by Francis Snyder (1999: 450) is also worth noting because although this author focused on overdraft facilities, he rejected the interpretation that they might be granted in emergency situations[7]. Even current literature, when analyzing the EMU retrospectively, suggests that 'at its inception (…) the possibility of a bail-out from the centre was explicitly excluded in the Treaty' (Hinarejos, 2013: 1625.)[8]. The most widespread idea was that bailouts were forbidden

[6] Fratiani *et al*. (1992:39), when discussing the Maastricht regime the no-bailout provision, stated that 'as a matter of principle, the Community shall not be responsible for any financial obligations incurred by member governments (…) [but] Member states in a debt crisis will continue, however, to have the right to be bailed out by the Community or by other members'.

[7] 'EMU also prohibits Member States from making use of overdraft facilities with the European Central Bank (ECB) or national central banks or from offering debt instruments for purchase by the ECB or national central banks. It also confers on the ECB the exclusive right to authorize the issue of banknotes within the community. It limits the access to capital markets of Member States with an excessive budget deficit. At least one author has suggested that technically the European System of Central Banks could come to the rescue of a participating Member State in the event of economic shocks, but such an interpretation of the Treaty may stretch the bounds of political feasibility'.

[8] See p.1628 ff. for a discussion about to what extent, in the opinion of the author, the bailouts in the Euro zone adhered to Art. 125TFEU.

under European law; however, hypothetical 'hard cases' such as those created by the European crisis were generally not analyzed by legal academics. The range of interpretations of the provision provided by legal scholars was narrow at that time, and controversy was notably lesser than in the period following the outbreak of the crisis (see next subsection).

It is worth noting, however, that in the work of a number of authors, usually economists, something more substantial can be found: a deep distrust in the effectiveness of the provision in the event of an actual crisis. As early as 1997, Alexander and Anker (p.346) wrote that 'despite the fact that the Maastricht Treaty contains a no bailout clause, serious doubts arise about its credibility'. Discussing the Delors Report and the amendments of the treaties, Artis (1992: 306) suggested that 'The argument implicit in their position must be that the externality of a fiscal crisis in one country cannot be shrugged off; in reality there would be political pressure to bail out the country concerned and the bail-out operation would imply an over-expansionary monetary policy'. Holzmann *et al.* (1996: 35) even went a step further: 'Art. 104b clearly states that neither the EU nor individual member states are liable for the obligations of a defaulting country. Once faced with default, however, it is clear that the governments will not stick to the treaty if they judge the costs of treaty conformity higher than of deviation'. For Arnold and Lemmen (2001: 109), 'Article 104B of the Maastricht Treaty forbids the ECB or EU to bail out troubled governments, but it remains to be seen whether this principle will be upheld in times of crisis'. Herdegen (1998: 26) also acknowledged the prohibition of bailouts in the treaty but added that this 'does not rule out the possibility that the Community and national authorities will yield to pressure to rescue a Member States'.

Note that, unlike the legal scholars mentioned earlier, the latter authors were not contesting the meaning of the provision. They were not conducting a doctrinal analysis of how to interpret the rule, nor were they suggesting that the provision allows for bailouts in certain exceptions. In fact, in their writings, there seems to be an implicit agreement with the hegemonic interpretation of the provision: the general prohibition of bailouts. Rather than questioning its meaning, these authors were suggesting that in the event of an actual crisis, the prohibition would be simply ignored. Their analysis is not legal but rather purely political. In an intuitive fashion, these writings acknowledged the political pressures that the rule would suffer in the event of an actual crisis and advanced the process of politicization of the rule that we examine in this article. Indeed, their predictions seem to find a certain echo in post-bailouts legal literature about the Euro-crisis. Using Heller's concept of 'authoritarian liberalism' as a starting point for his analysis, Wilkinson (2015: 330) recently observed that 'if not a blatant violation of the rule of law, at least a willingness to play fast and loose with it, notably with regard to the so-called "no bailout provision" of Article 125TFEU'. In the same vein, Menéndez (2015:289) underlined 'the "innovative" interpretation of treaty provisions, such as the no-bailout clause'.

The situation of scarce doctrinal reflection about Art. 125 TFEU in the pre-crisis period described earlier, however, changed radically after 2009. With the start of the crisis, a great deal of academic debate emerged, reaching its peak in approximately 2014. In parallel, the meaning of the 'no bailout' rule became increasingly contested in light of the situation faced by countries such as Greece. As shown in the next subsection, the

crisis was the catalyst for a process of de-determination of the provision, having a double impact on it. On one hand, it provided for a 'hard case' around which academic debate could be created. On the other hand, it politicized Art. 125 so that stances regarding its interpretation had enormous political implications. The range and depth of interpretations of the provision widened, and its meaning became controversial. The fact that the wording of this provision had not changed in the context of the crisis is helpful in terms of research design because one essential 'variable' remained constant. Thus, if the meaning of Art. 125 TFEU changed and became controversial during the last few years, then such change must be due to factors other than purely legalistic ones. Furthermore, the wording of Arts.122 and 126 had not changed either. The only notable change in the treaty frame was the introduction of Art. 136 (3) TFEU; however, its entry into force took place after the ratification of the ESM, which is subsequent to the time period covered by this article. When the CJEU ruled on the *Pringle* case, the treaty frame was the same as it had been before the crisis.

The academic polarization around the 'no bailout' clause and its contested meaning

The advent of the crisis created a continental debate on the question of the 'bailouts'. Political parties at the State level became increasingly divided on the question. While major parties of EU Member States generally supported the bailouts, parties as diverse as the British UKIP, the German *Die Linke* and the Greek *Syriza* opposed them, although for radically different reasons. In many countries, the question of the bailouts became one of the centres of gravity of political and social debate. Dyson (2013: 219)

documents the tension created in creditor States, and particularly Germany, where the Bundesbank, Federal Chancellor Merkel and the parties in the coalition Government CSU/CDU and FPD were initially highly reluctant to take a more flexible approach to the Maastricht provisions on EMU. When the crisis worsened and more decisive action had to be taken, creditor States shaped the negotiations with reference to Art. 125 TFEU (Dyson, 2010: 605). In parallel, as shown by Closa and Maastch (2014: 838), the 'no bailout' rule was mobilized in certain countries by Eurosceptic right-wing parties in their rhetoric. All these episodes show the increasing politicization of Art. 125 TFEU.

Furthermore, political debate on the rule was soon converted into legal debate. This conversion operated through two connected processes. First, lawyers intervened in the political debate about the convenience of the bailouts with doctrinal arguments about their legality, which will be analyzed in this subsection. Second, in a subsequent stage, the Court of Justice intervened to end the doctrinal debate, thus re-determining the meaning of Art. 125 TFEU, which will be analyzed in the next subsection.

In Picciotto's (2015: 171) reading of Bourdieu, coherence emerges in the legal field in part through its social organization, which produces mutual understanding based on 'habitus'. The concept of habitus can be defined as 'the shared set of dispositions that orient the agents in a particular field and in regard to other fields' (Madsen, 2011: 265). Previous socio-legal research on European integration has suggested that the habitus of the European legal community is one that depoliticizes European integration in the frame of a cohesive field (Schepel and Wesseling, 1997; Jettinghoff, 2004: 5). In the case at stake, the emergence of interpretative controversy around Art. 125 TFEU can be

deemed a disruption of such habitus, created by the political salience of the bailouts and their regulation. As noted above, at a certain point, legal academics began to focus on Art. 125 TFEU as much as political actors were, and the provision became 'the subject of intense controversies among legal scholars' (Herman, 2013: 410). According to Wendel (2014: 268), 'the discussion already started with bilateral financial aids and the EFSF'. The mechanisms of financial assistance became Hart's 'toy motor-car': the case that had not been originally envisaged by the rule and that, therefore, questioned its meaning and its definiteness. Some authors acknowledged the lack of consensus on the meaning of Art. 125 (Parmstorfer, 2012: 772) and indicated the existence of two groups: those supporting the legality of bailouts such as those contained in the EFSF and those considering them forbidden under the provision (Closa and Maatsch, 2014: 828 ff.). This polarization is the clearest proof that the 'no bailout' rule *had become* an under-determinate legal provision, whose once uncontroversial meaning was now contested. De Witte and Beukers (2013:809-810) illustrated well these emerging debates:

> *"…it was not entirely certain whether the creation of the EFSF complied with the primary norm laid down in Article 125 TFEU that prohibits EU States from being liable for or assuming commitments of other EU States (the so-called "no-bailout" rule). The governments considered that the EFSF mechanism of lending money subject to severe conditionality was not caught by the Treaty prohibition on giving (direct) financial support, but this interpretation was controversial".*

The legal academia had rapidly perceived the importance that Art. 125 TFEU was to have in the context of the crisis. Academics polarized around the interpretation of the rule. For some academics, the bailouts were legal from the perspective of EU law. As noted above, this position coincided with that of the main parties in the Union and with that of national governments such as the German one[9] (see Wendel, 2013: 26). With an ironic comment, Joerges (2014: 294) explained his view of this relation between political preferences and doctrinal positions: 'Lawyers, practitioners and academics alike, have all traditionally sought to remain on good terms with political power. When it comes to Articles 122-126 TFEU, our discipline can apparently not resist helping political and institutional actors by taking the letter of the law so lightly as to run afoul of it'

One guest editorial by Jean-Victor Louis (2010) at *Common Market Law Review* was devoted to defending the legality of the bailouts. In the view of the author, Art. 122(2) could be used to grant financial assistance to Member States in severe difficulty in 'exceptional circumstances', and the on-going crisis would fit in that category (Louis, 2010: 984). Even if Arts. 125 and 126 had to be taken into account when granting financial assistance, the situation had degenerated 'into an asymmetric shock or a suck common to a number of Member States, in a period of serious crisis' (Louis, 2010:984), and this meant that Art. 122 could be used subject to conditionality and on a temporary basis (Louis, 2010:985). Furthermore, the author asserts that although Art. 122(2) TFEU provides for action by the EU, loans by Member States are not prohibited by the 'no

[9] See for instance its position during the assessment of the ESM and the Fiscal Treaty by the German Federal Constitutional Court (Wendel, 2013: 26).

bailout' clause (Louis, 2010:985). The author concludes his article by referring to the possibility of a permanent mechanism: 'the creation of such a Fund would most probably need a revision of the Treaty' (Louis, 2010:986).

With a similar argument, Athanassiou (2011: 558) found Art. 125 TFEU 'compatible with the extension of Union or Member State temporary financial assistance to Euro area Member States in difficulty' (Athanassiou, 2011: 561). In his view, a literal interpretation of the clause indicates a prohibition of the assumption of the liabilities of any of the entities listed in Art. 125 but not a prohibition of a guarantee of Member State's obligations (Athanassiou, 2011: 561). A teleological interpretation, he continues, confirms that the prohibition is unlikely to have been a blanket one because its indiscriminate invocation would be tantamount to disregarding the common interest in price stability, risking Union-wide financial and economic stability, and ignoring the principle of solidarity (Athanassiou, 2011: 561). Finally, in his view, a contextual interpretation suggests the need to make a balanced reading of the interplay between Art. 125 and Art. 122: 'the idea that the no-bailout clause must always prevail over art. 122(2) TFEU should be dismissed' (Athanassiou, 2011: 563-564).

However, not everyone seemed to agree that the bailout mechanisms where compatible with the treaties. On the other side of the interpretative battlefield, not only certain politicians but also a number of academics insisted on the illegality of the bailouts. In 2012, Palmstorfer offered a very critical perspective. In his view, Art. 125 had to be seen as a ban on the Council or Member States granting financial assistance, the provision being a disciplinary tool intended to make clear that governments must

autonomously keep national finances in order (Palmstorfer, 2012: 775-776.). He warned against 'reinterpretations' of the provision: 'this does not mean that Art. 125(1) TFEU has to be reinterpreted. Quite the opposite is the case: as this disciplinary effect cannot be relied on, the provision all the more has to be interpreted as a prohibition' (Palmstorfer, 2012: 777). Moreover, he rejected the idea that Art. 122(2) could act as an exception to the application of the 'no bailout' clause. In his view, Art. 122(2) 'has to be construed as not covering situations in which Member States – without involving the Union (i.e., the Council) – come to the rescue of other Member States' (Palmstorfer, 2012: 779), so that the Greek loan facility, the EFSF and the ESM would not be covered by such provision. Furthermore, in addition to the lack of a Commission proposal for these instruments, he questioned whether the exceptional circumstances 'beyond control' of the Member State concurred in the financial assistance (Palmstorfer, 2012: 781), at least in the cases of some debtor countries.

In the same vein, for Lupo Pasini (2013: 220), the exception in Art. 122 'should be limited to unexpected emergencies and not used to bypass the principles of nonintervention of Articles 125 and 123' as 'a broad interpretation of Article 122(2) TFEU would essentially render meaningless the principle of nonintervention'. From a political science perspective, Closa and Maatsch (2014: 826-827) illustrated the tension between legal mandates and political preferences because in their view Art. 125(1) TFEU prohibited assistance to Member States so that 'eurozone members faced a dilemma. On the one hand, they could choose to stick to the provisions of the Treaty and refuse to provide assistance (…) Alternatively, eurozone states could choose to provide a bail-out. While this option would diminish the risk of contagion, it would also require bypassing EU law, either by means of a treaty reform and/or through alternative

legal instruments'. Furthermore, this position is found not only among English-language scholars. According to Wendel (2013: 27), a good number of German academics were of the view that 'already the EFSF and the bilateral aids to Greece did not comply with Article 125TFEU'.

The debates between those defending the legality of the bailouts and those defending their unlawfulness show that the meaning of Art. 125 TFEU had become a contested issue. The rule was now the object of competing scholarly interpretations whose implications were functional to some of the main political narratives about the crisis in the EU and its management.

Constitutional amendment v. constitutional mutation: the process of 're-determination' of the 'no bailout' clause

According to the theory set out above, once a rule has undergone a process of de-determination, it may become necessary to turn to legal or political mechanisms to fix its meaning again. The case of Art. 125 TFEU is especially useful to illustrate this because it provides an example of each of the procedures of disambiguation of rules that was described in the theory section of this article: a constitutional amendment and a judicial 're-determination' of rules.

The constitutional amendment was not carried out through the direct reform of Art. 125 TFEU but rather indirectly through the amendment of Art. 136. A systemic interpretation of the interplay between the two provisions was expected to disambiguate the relation between the ESM and the 'no bailout' clause of the Treaty. Apparently, however, the reason why political actors decided to formally amend the treaty was precisely the threat posed by a judicial institution: the German Federal Constitutional Court. According to De Witte and Beukers (2013: 810 ff.), in the view of the former decisions of Karlsruhe on European matters, the German government urged its European counterparts to amend the TFEU to provide a solid legal basis for the ESM that would neutralize any eventual impediment deriving from a restrictive interpretation of Art. 125. The treaty amendment was intended to remove ambiguities regarding the legality of the bailouts but did so through a formal mechanism in which the very wording of the law – the signifiers – and not merely its interpretation was modified. This amendment, however, took place after the *Pringle* ruling of the ECJ and when the entire process of political de-determination and judicial re-determination of Art. 125 had already concluded.

The process of disambiguation through judicial re-determination of the 'no bailout' provision was unleashed by the Irish Supreme Court, which raised the question whether the ESM was compatible with Art. 125 TFEU. The case had been brought before the Irish judiciary by the MP Mr. Thomas Pringle and was referred to the Court of Justice by the Irish Supreme Court through the preliminary reference mechanism. The episode confirmed Bourdieu's (1987: 831) observation that the juridical field converts direct conflict into regulated legal debate: A political battle about the bailouts was finally going to be settled by a court of justice following the rules of the juridical field. As

stated above, at this point, the amendment of Art. 136 TFEU still had not entered into force. For Borger (2013: 23), this put the Court of Justice in a difficult situation because 'it could not simply state that Article 136(3) TFEU clears the way for assistance operations that would otherwise be prohibited by the no-bailout clause'.

In its decision, however, the Court of Justice still found the ESM and the 'no bailout' clause compatible because the former was considered not to diminish the incentive for financial probity (Craig, 2013: 280), which was deemed the main rationale of the rule. The ruling of the Court of Justice attacked the process of de-determination of Art. 125 at its roots: The rule had become controversial when facing what Dworkin (1975: 1057) would call a 'hard case' in which 'the result is not clearly dictated by statute or precedent'. This difficult case gave rise to contradictory interpretations of the provision. *Pringle* gave Luxembourg the chance to address the controversy by interpreting the meaning of Art. 125 and how it applied to the difficult case of the ESM. Although not everyone agreed with the interpretation of the Court of Justice (see Craig, 2013: 280-281; Joerges, 2014:306 ff.; Wilkinson, 2015: 330), this interpretation provided a now-uncontroversial guide to action by which all actors could safely abide. The result was that the ratification of the ESM was given a green light.

In this regard, the legal system was ultimately capable of providing what it is expected to offer political actors and citizens: legal certainty, systemic coherence, and relatively uncontroversial guides for action. It was judicial operators who guaranteed that the situation of ambiguity of Art. 125 was reversed through a process of re-determination of the rule. In this sense, the mechanism of preliminary reference created by the European

legal system turned out to successfully fulfil its mission, with national higher courts and the Court of Justice smoothly cooperating in solving the interpretative problems deriving from the socially and doctrinally contested meaning of the 'no bailout' clause. However, it is worth noting that the ECJ only ruled on the question posed by the Irish Supreme Court, as required by the very nature of Art. 267 TFEU; therefore, it is possible to imagine situations not clarified by this decision and in which new processes of disambiguation were potentially necessary.

Additionally, the 'no bailout' clause episode clearly illustrates the risks posed by the possibility of an open judicial conflict in Europe. As is widely known, some national higher courts and the Court of Justice have had important disagreements regarding who has the final word on the interpretation of EU law, with the former insisting that in cases of conflict with core constitutional elements they could declare EU law non-applicable in their countries[10]. The German Federal Constitutional Court has been particularly relevant in this regard, with Lindseth (2012: 470) calling it 'the most difficult interlocutor' of the European Court of Justice. The risk is obvious from the perspective of the theory upheld by this article. The capacity of legal systems to re-determine their legal rules through judicial actors is essential for them to fulfil their basic functions. However, processes of judicial re-determination have as a premise that there is one single actor whose say is final and formally accepted as binding by all other actors, even if some could substantially disagree with its interpretation of the controversial rule. In other terms, even if there is no agreement on the 'meaning' of a rule, there should be agreement that the interpretation of a rule made by a certain judicial authority should be

[10] See *inter alia* MacCormick, 1995; Kumm and Ferreres, 2005; Kumm, 2005; Lock, 2009; Komarek and editors, 2009; Baquero, 2008; Wendel, 2011; Davies, 2012.

accepted as binding by all because coherence through re-determination is a precondition for the correct functioning of the entire legal system. This shows the existence of a tension between legal certainty and constitutional pluralism that, in my view, pluralist authors have not yet been able to resolve[11]. The process of re-determination may be aborted if two powerful judicial actors have competing claims about ultimate interpretative authority, which can lead to conflicting interpretations of a rule.

Conclusions

The crisis that has afflicted the European Union since at least 2009 has changed the political and social landscape of the continent. The mechanisms of assistance created to address the financial difficulties in certain countries, as well as the austerity measures that were linked to such mechanisms, have polarized political debate in many Member States. This article has analyzed the political dynamics underlying the interpretation and application of a legal provision that turned out to play an essential role in the management of the crisis: Art. 125 TFEU, the so-called 'no bailout' clause. This provision, whose meaning was once relatively uncontroversial, suddenly became the object of furious political and academic interpretative debate. While before 2009, academic literature on Art. 125 TFEU had been scarce, after that year, the number of contributions on it increased dramatically. Legal scholars, in particular, began to exhibit dramatically diverging interpretations about its meaning, so that the clause seemed at a

[11] There is a certain acknowledgment of this in the work of some pluralists. See for instance Barber, 2006: 306.

certain point to have become a paradigmatic example of an indeterminate legal provision. Only the intervention of the Court of Justice could provide certainty. The decision of the Court of Justice took place in a context of dense politicization, and the hypothesis that this could have constrained its behaviour deserves careful consideration. In any case, however, this decision was able to fix the meaning of Art. 125 TFEU, thus providing the main actors with clear rules for action.

Using the example of the 'no bailout' provision, this article has sought a way to overcome the dichotomy determinate/indeterminate in the conceptualization of legal rules. This dichotomy, which underlies the traditional debates between the hegemonic schools of legal theory, hides under static depictions of rules the complex, dynamic processes through which the meanings of such rules are socially constructed and modified over time. Indeed, these processes are political ones. This is the case first because they are structured around power relations: certain actors with more juridical capital are considered to have a higher authority to make legitimate interpretations of the rules (Bourdieu, 1987: 842). Second, these processes are the result of a struggle for power: the power to make a certain interpretation of a rule prevail over other rival interpretations (Bourdieu, 1987). Finally, the catalysts of the processes of 'de-determination' of rules are often, as in the case covered by this article, political events, which contest the former understanding of a certain provision and foster academic production of scholarly interpretations on its meaning. To understand these processes, it is essential to combine the classic contributions of legal theory with the most recent developments in linguistics and with social science theories and methods.

Precisely because the episode of the 'Euro-bailouts' is just one more instance of the complex interactions between law and social forces, some of the core patterns found in the case of Art. 125 TFEU are expected to be generalizable to similar scenarios of contested interpretation of rules. As shown in this article, the meanings of the legal provisions are a political question. They are mutable and dynamic, simultaneously the site and the object of political competition. Ultimately, we have one more example that politics govern law as much as law governs politics.

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