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LEGAL MODELS OF DEVELOPMENT PLANNING

A COMPARATIVE INQUIRY IN DIALOGUE WITH CHINA AND EUROPE

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Acknowledgments

Do not hate lawyers, but be wary of them. They will try to put a logic on display, attached to this or that world occurrence, and call it a research. I want to be a lawyer, so that is what I'll do. However, I know, as everyone knows, that a research is not just logic, is not just reasoning, is not just thought. Every research captures, in its developing, a portion of the researcher's life. It reflects the joys, the sorrows, the expectations, the delusions, the fears, the doubts and the insecurities of those who spend some of their best nights and days upon it. So this is it. This research is filled up with me and is, inevitably, an attempt to prove that my scientific dignity is better than what I think it is. What is the outcome, whether or not I succeeded, is not for me to decide. However, the attempt only is due to the unrelenting support of those who I want to thank now, those who gave credit to me and my research, those who encouraged me to pursue it, those who corrected my mistakes, calmed down my expectations and challenged my discouragement.

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Thanks to Carmelina for everything she has been, for everything she is and for everything she will be. This research I dedicate to her.

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ABSTRACT

Why should a legal scholar be interested in development plans? The present work begins and evolves with such question in mind.

In order to provide an answer, the research focuses on certain major epiphanies of modern development planning and tries to isolate their legal characters. Therefore, the first issue to be addressed is the identification of "legal models" of development planning. The legal nature and legal effects of planning acts is still not clear and moves along fuzzy borders between traditional categories of mid-twentieth century planning (socialist and non-socialist) and modern soft law planning documents and guidelines.

In the first place, the research will try to assess the notion of planning in a legal perspective as well as the legal features of the planning acts/planning norms. The objective of this phase is to decide whether or not, and to which extent, socio-economic development planning may be thought of *legally*. In order to do so, I will carry out an analysis from the perspective of legal anthropology.

In the second place, the research will focus on the definition of the legal features of modern development planning in the People's Republic of China, through the analysis of the relevant legal formants, with the purpose of determining whether or not the identification of a Chinese "development planning law" is logically feasible.

In the third place, I will question and verify the existence of development planning acts and norms in European Law. The purpose of the phase is on one hand to reconstruct and define the legal value of the regulatory framework for the functioning of European development policies. On the other hand, at this stage certain categories and practical solutions verified on the "Chinese front" may be applied to the European context.

In the fourth place, i.e. in the conclusive chapter, I will try to draw some results of the comparative analysis carried out, as well as to trace an evolutionary pattern, determining how legal models of development planning affect, on a global scale, the changes in the role of the state in its relationship with the market.

CHAPTER ONE
INTRODUCTION

1. Basic features of the research

Why should a legal scholar be interested in development plans?

I started researching this topic, in 2016, out of personal curiosity rather than with a clear research question in mind. I had just decided to major in Chinese law and had to pick a topic for my Master's degree's dissertation. From my previous studies of Russian law, I knew about soviet economic planning and also knew that a plan existed in China, but very few legal scholars, all around the world, were interested in it. I blame that on two misunderstandings: the first one is to believe that development planning is, inherently, not law but pure policy. The second one is to believe that development planning, when binding over economic operators, is an exclusive feature of a close soviet-style command economy.

In early 2016 I did not know these two assumptions were indeed misunderstandings, I found it out along the way.

A historical fascination toward the evolution of world socialism led me to deepen my research on Chinese planning, at first studying English sources and then, as my knowledge of Chinese progressed, approaching domestic sources, scientific articles and pieces of legislation.

Having the opportunity to carry out my research in China, at the Zhongnan University of Economics and Law in Wuhan, I took advantage of all the research instruments available. I discussed my research topic with professors and researchers of both law and economics. I visited Chinese libraries to find out that there is a small but quite consistent literature on planning from a legal perspective. Then, together with another Italian law student, Marco Furlanetto, ventured in a small village in the Pingjiang county (Hunan province) to interview the director of a rural cooperative and asked him about how the development policy of the local governments affects his daily activities.

Being in China and being an Italian scholar in China, I inevitably had to face the "issue" of the academic relations between the two countries and I measured first hand the contribution that Italian legal thinking gave to its Chinese counterpart. Although the

debate about its actual influence is and will be ongoing, it is undisputed that the Italian roman law studies shaped the cultural background of many modern Chinese scholars since the 1980s[1]. After studying in Italy or studying Roman law on Italian textbooks, these scholars became esteemed professors of civil law and Roman law in the most prestigious Chinese universities. Broadening the perspective, I believe every Chinese lawyer would confirm the huge influence that western legal thinking had on the evolution of Chinese legal system. Many modern Chinese civil lawyers feel greatly indebted toward German doctrines and use them to explain current Chinese civil law[2].

Is the reverse process possible? May western legal scholars learn something from the theoretical and practical categories of modern Chinese law?

To answer this question, we must firstly select the object of our analysis.

1.1 The obscure nature of development planning

Development planning is a distinctive feature of modern China[3]. Contrary to what the 1990s had led some to believe[4], its significance, though deeply changed, permains.

The European Union, as supranational entity, regularly issues development strategies and implements them, mostly, through several development funds.

Many other countries all over the world issue medium-to-long term development strategies and plans.

The legal implications of such phenomenon are the object of this research.

Planning, as a word, may sound, to our western ears, a little bit "heavy", in terms of ideological implications. Names matter, but, for now, let us forget about them. To call it planning, programming, coordinated resource allocation or development investments does not make such a difference. Assuming that socio-economic development is an issue, how may the governments deal with it?

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[1] Among the senior Chinese scholars interested in Roman law and, later, Italian law are Xu Guodong (徐国栋) and Fei Anling (费安玲), who edited a Chinese translation of the Italian civil code.

[2] See, for instance, ZHU QINGYU (朱庆育), 民法总论 (*The General Theory of Civil Law*), Peking University Press, Beijing, 2nd Edition, 2018; HAN SHIYUAN (韩世远), 合同法总论 (*Introduction to Contract Law*), Law Press China, Beijing, 2018

[3] See G.SABATINO, *Legal Features of Chinese Economic Planning*, in I.CASTELLUCCI (edited by), *Saggi di Diritto Economico e Commerciale Cinese*, Editoriale Scientifica, Napoli, 2019, 33-78

[4] See B.NAUGHTON, *Growing Out of the Plan: Chinese economic reform 1978-1993*, Cambridge University Press, Cambridge, 1995.

To this question, modernization theories, starting from the 1960s[5], tried to answer by upholding the exemplary role of the liberal legalist model[6], connoting the Law and Development cultural movement. At the same time, sociological studies claimed that non-liberal models upholding corporatism and familism represented the structural basis of backwards societies[7].

Scholars eventually came to realize the limits of a western-oriented stance on law and development[8], while the applicability of the category of "rule of law" to Chinese legal development pattern was challenged and charged of being biased[9].

China offers a unique perspective on the issue. The Chinese legal tradition was build up on a chtonic basis[10] by the intertwining forces of Confucianism, Legism and Taoism (and Buddhism), of law and rite[11]. Its focal core, however, remained affected by the circular and all-encompassing inspiration of chthonism[12], so that "*law must speak to individuals in the relationship in which they find themselves, in sufficient detail for them to recognize the information needed for guidance*"[13]. This stance implies that even the formal legal rule (法 – *fa*) lacks the abstract and general dimension and is instead founded on casuistry[14]. When socialist law in mainland China was put at the service of economic development, it reproduced, more or less consciously, the traditional scheme by applying

[5] The connection between socio-economic development and a rational, "non-ritual" complex of laws had been previously emphasized by M.WEBER in *The Protestant Ethic and the Spirit of Capitalism*, Routledge, New York, 1992 (1st ed. 1904-1905). Weber attributed European (*rectius*, northern European) economic development to cultural elements mainly deriving from the Protestant ethic and including an institutional setting ensuring certainty of legal rules. As laid out by R.PEERENBOOM, *China's Long March Toward the Rule of Law*, Cambridge University Press, Cambridge, 2002, 451-452, Weber's theory on modernization deeply affected the evolution of the Law and Development movement.

[6] See W.ROSTOW, *The Stages of Economic Growth: A Non-Communist Manifesto*, Cambridge University Press, Cambridge, 1960

[7] See E.BANFIELD, *Le basi morali di una società arretrata*, il Mulino, Bologna, 2010 (1st ed. 1958, Free Press)

[8] See D.TRUBEK, M.GALANTER, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, Wisc. L. Rev., Vol. 4, 1974, 1062 ff.; B.TAMANAHA, *The Primacy of Society and the Failures of Law and Development*, in Cornell International Law Journal, Vol. 44, 2011, 209-216

[9] See R.PEERENBOOM, *China's Long March*, cit., 126 ff., also for further bibliographical references

[10] See P.GLENN, *Legal Traditions of the World*, Oxford University Press, Oxford, 2004, 303

[11] See R.CAVALIERI, *La Legge e il Rito*, Franco Angeli, Milano, 2009; R.SACCO, A.GAMBARO, *Sistemi Giuridici Comparati*, Utet, Torino, 2008, 381-384; A.CHENG, *Storia del Pensiero Cinese*, Vol. I, Einaudi, Torino, 2000; P.GLENN, *Legal Traditions of the World*, cit., 305 ff; P.DE CRUZ, *Comparative Law in a Changing World*, Routledge, London, 2007, 210; W.MENSKI, *Comparative Law in a Global Context*, Cambridge University Press, Cambridge, 2006, 503 ff.

[12] On the notion of chtonich legal tradition see P.GLENN, *Legal Traditions of the World*, cit., 59 ff.

[13] See *ivi*, cit., 317

[14] *Ibidem*

the general notion of rule by law. The legal rule came to set the guiding principle according to which public authorities were empowered, case by case, to issue relevant decisions. Confucian emphasis on harmony of personal relationships within hierarchical societies became an ally of the new legalization season[15]. In this era of civil codification, the challenge for China is to successfully overcome another integration: that of western models transplanted over the past forty years[16] with the backbone of Chinese socialism[17] and its "core values", heavily drawing from confucian legal discourses.

This integration has already produced some peculiar results, such as the introduction in the 2017 General Provisions of Civil Law (民法总则 – *minfazongze*) of the so-called "green principle" (绿色原则 – *luseyuanze*)[18], imposing that civil relationships must be conductive to saving resources[19].

Modern Chinese law, thus, clarifies the role of both public and private subjects for sustainable development purposes. The role of development planning and its law in this context is, in our western eyes, uncertain.

At the same time, the European Union, upholding a principle of "social market economy"[20], tries to balance the protection of free market with social instances of fair development. The European legal order also deals with the issue and challenge of integration of models[21]. Both civil law and common law shaped, overtime, the fiber of European law, as well as legal solutions developed in single countries[22]. European economic legislation heavily drew from extra-european (i.e. north American) legal models, in particular with regard to antitrust and competition, consumer protection and producer's liability[23]. However, since the Rome Treaty of 1957, European law has also established a peculiar instrument to manage development, i.e. the development fund(s).

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[15] See *ivi*, cit., 330 ff.

[16] See R.SACCO, A.GAMBARO, *Sistemi Giuridici Comparati*, cit., 399-404

[17] See W.MENSKI, *Comparative Law in a Global Context*, cit., 584-593

[18] Art. 9 of the General Provisions

[19] The principle has already been applied in some decisions by Chinese Courts. In the decision n. 473/2018 of September 28th, 2018, the County Cout of Guanyang (Guanxi Province) used Art. 9 of the General Provisions of Civil Law to evaluate the legitimacy of a customary rule concerning the periodical celebration of rites in honor of deceased ancestors and the subsequent division of the expenses among the heirs

[20] See Art. 3 of the TEU

[21] See R.SACCO, A.GAMBARO, *Sistemi Giuridici Comparati*, cit., 303-310

[22] See G.BENACCHIO, *Diritto Privato della Unione Europea*, Cedam, Milano, 2016, 11-33; P.DE CRUZ, *Comparative Law in a Changing World*, cit., 159-164

[23] See G.BENACCHIO, *Diritto Privato della Unione Europea*, cit.; F.CAFAGGI, *La responsabilità dell'impresa per prodotti difettosi*, in N.LIPARI (edited by), *Diritto Privato Europeo*, Cedam, Padova, 1997, Vol. II, 1011 ff.

Once again, the role of such funds and, in particular, their relation with the complex of European economic law is uncertain.

1.2 The research issues and phases

The fragmentary and obscure legal status of development planning in both legal orders may therefore be the ground for a comparative experiment, to be carried out in four fundamental steps.

1) Assessing the notion of planning in a legal perspective as well as the legal features of the planning acts/planning norms. The objective of this phase is to decide whether or not, and to which extent, socio-economic development planning may be thought of *legally*.

2) Defining the role of development planning in the legal system of the People's Republic of China. The objective of this phase is to verify the legal incidence of plans and planning activities on Chinese law. The issue implies the assessment of the legal nature of planning acts, of the sources of planning, of the implementation and enforcement mechanisms.

3) Questioning and verifying the existence of development planning acts and norms in European Law. The purpose of the phase is on one hand to reconstruct and define the legal value of the regulatory framework for the functioning of European development policies. On the other hand, at this stage certain categories and practical solutions verified on the "Chinese front" may be applied to the European context.

4) Drawing the conclusions of the comparative analysis. This section addresses three fundamental issues: i) defining legal models of development planning in the PRC and the EU, in terms of inner coherence and comprehensiveness, influence over other branches of law, practical application by legal operators; ii) assessing the global dimension of such models, in terms of influence over structural dynamics of socio-economic development; iii) verifying the incidence of such models over the economic regulatory functions of law and the state.

1.3 Methodological remarks

The choice of the legal orders compared depends, in essence, on three considerations. In the first place, my personal experience of PhD candidate in comparative private law with focus on China and Europe. In the second place, the interest of Chinese scholars in European economic legislation, its foundations and solutions, to the point that some of the major achievements of modern Chinese economic law such as the Anti-Monopoly Law (2008) are heavily inspired by European counterparts[24].

In the third place, the existence of two, constitutionally sanctioned, economic models advocating for the integration between market and socio-redistributive instances protected and promoted by public institutions. I am referring to the Socialist Market Economy and to the Social Market Economy.

Every comparative law scholar is aware of the wide and deep differences that exist between China and Europe in terms of law; but, at the same time, they are aware of the wide and deep similarities that exist. It is not a crude attempt to overlook significant ideological differences, but the consideration that law, as a social phenomenon, addresses social instances which, more often than not, are similar and that, nowadays, there are almost no radically different systems[25].

Comparative law measures similarities and differences, wide or narrow, without having preferences for the ones or the others[26].

The comparative analysis explains the different objectives laid out and the different incidence of implementation instruments. It also highlights, where present, the basic connection between planning and development's will, which by itself justifies the presence of a body of rules governing process. Lastly, it measures the degree of

[24] See GUANGJIE LI, *Revisiting China's Competition Law and Its Interaction with Intellectual Property Rights*, Nomos Verlagsgesellschaft mbH., 2018, 36-46. Another sector where the interest of Chinese scholars in European models is documented in literature is, for instance, that of Circular Economy. Once again, the issue assessed by Chinese literature is that of adapting European models to the specific features of the Chinese context. See WU DAHUA (吴大华), 西方国家循环经济发展之借鉴 (*Experiences of Circular Economy Development in Western Countries and reference for China*), in 昆明理工大学学报 (*kunmingligongdaxuexuebao*), Vol. 8(7), 2008, 23-28; PENG FENG (彭峰), CHEN SIQI (陈思琦), 欧盟"循环经济"立法：起源、概念与演进 (*EU Legislation on Circular Economy: Origin, Concepts and Evolution*), in 上海政法学院学报 (*shanghaizhengfaxueyuanxuebao*), Vol. 6, 2017, 21-28

[25] See G.CRESPI REGHIZZI, *La comparazione giuridica estrema: l'Est europeo, l'Estremo Oriente, l'Africa e l'India*, in L.ANTONIOLLI, G.BENACCHIO, R.TONIATTI (edited by), *Le Nuove Frontiere della Comparazione*, Quaderni del Dipartimento di Scienze Giuridiche dell'Università degli Studi di Trento, Trento, 2012, 241-257, 243

[26] See R.SACCO, *Introduzione al Diritto Comparato*, Utet, Torino, 1992, 22

detachment between the declamatory, programmatic and ideological dimension of planning and its concrete implementation and enforcement in different contexts.

This is an anthropological research. Anthropology, like comparative law, helps distinguishing the stratification of different ensembles of binding rules over a complex phenomenon [27] such as development planning. Planning, as each aspect of life, is governed by cultural models[28]. Within these models, political, technical and strictly legal rules all affect the structuring of decisions, to the point that the binding force of the rule is determined by several cultural elements. Law is inherently pluralist[29].

The anthropological view sees the universe as a multitude of functions determining beings rather than a pure multitude of beings[30]. Applying to modern planning a similar scheme allows us to define its legal nature and legal features by assessing its concrete function and its effectiveness toward the community it is directed at.

One of the objects of legal anthropology is the study of modern societies[31]. Such point of view recognizes no logical opposition between traditional and non-traditional societies, seeking to isolate and assess the fundamental hierarchies and social relations which connote both of these models[32].

In this research, I will attempt to do so by highlighting, first diachronically and then sinchronically, the relevant concepts which empower development planning in the eyes of the community. In other words, I will try to develop an anthropological "filter" to test the "legality" of planning activities.

1.4 Structure of the research

The general structure of the research roughly reflects the phases I have previously described. In the first part, I will try to assess the theoretical and anthropological foundations of planning, in legal perspective.

[27] See U.MATTEI, P.MONATERI, *Introduzione Breve al Diritto Comparato*, Cedam, Padova, 1997, 124; N.ROULAND, *Anthropologie juridique*, Les Presses universitaires de France, Paris, 1988, 154.
[28] See U.MATTEI, P.MONATERI, *Introduzione Breve,* cit., 124
[29] See W.MENSKI, *Comparative Law in a Global Context,* cit., 26
[30] See N.ROULAND, *Anthropologie juridique,* cit., 345
[31] See U.MATTEI, P.MONATERI, *Introduzione Breve,* cit., 128
[32] See N.ROULAND, *Anthropologie juridique,* cit.

In the second part, I will carry out an assessment of the Chinese planning system, from the legal point of view. I will try to sketch a systemic framework, reconstructing the logic connections within Chinese economic law and inquire the legal nature of modern Chinese development planning, its functioning and relations with other branches of Chinese law.
In the third part, I will concentrate on the study of the European legal mechanisms regarding development planning, in particular development funds, reproducing the logic scheme employed in the Chinese part of the research.
In the fourth part, I will point out the outcomes of the comparative analysis and trace the main features of the two legal models of development planning compared, also looking at the features of their circulation.

CHAPTER TWO
THE ANTHROPOLOGICAL AND THEORETICAL FOUNDATIONS OF SOCIO-ECONOMIC PLANNING FOR DEVELOPMENT

1. Planning and legal culture

An economist told me[33] that any kind of human[34] activity involves some form of planning[35].

Such planning has always an economic nature, since it pertains to organization and usage of resources, be they material or intellectual[36].

Such planning is always dynamic, consisting in a creative intervention justified by a purpose.

Such planning is always rational, meaning that it requires balancing environmental conditions, demands, available resources and subjective instances.

Planning is not, *per se*, a legal concept, but it reflects a logic, general and common notion[37].

An inquiry into the legal implications of planning implies the assessment of planning acts as rules/norms, in relation with those other conduct rules, which form the most relevant

[33] As reported from the interview with Prof. Yan Bo, of the Faculty of Economics of the Zhongnan University of Economics and Law, Wuhan, People's Republic of China: "*everything we do, every activity we intend to carry out requires, to a certain extent, some planning. It is a inherent feature of our life in the society*"

[34] Planning requires a conception of organized division of labour which, although it is not to be excluded that it may pertain to animals as well, has been embodied in the institutional structures created by mankind over its history. A.SMITH, in *The Wealth of Nations* – Chapter II – noted that "*this division of labour(…)is not originally the effect of any human wisdom(…)it is the necessary, though very slow and gradual consequence of a certain propensity in human nature*".

[35] See also S.MAZZAMUTO, *Piano Economico e Pianificazione (diritto civile)*, in Dig. Disc. Priv., 4th Ed., Utet, Torino, 1995, 542-556, 542; WANG SHAOGUANG e YAN YILONG (王绍光，鄢一龙), 中国民主决策模式 – 以五年规划制定为例 (*A democratic way of decision-making: five year plan process in China*), Library of Marxism Studies, Vol. 1, China Renmin University Press

[36] S.NANDA and R.WARMS in *Culture Counts: a concise introduction to cultural anthropology*, Wadsworth, Belmont, 2012, 129 ff., remind how the allocation of resources is a capital part of the organization and anthropological development of human communities and that "*productive resources are the things that members of a society need to participate in the economy, and access to them is basic to every culture. The most obvious productive resources are land, water, labor, and tools. However, knowledge is also an important productive resource*".

[37] See S.MAZZAMUTO, *Piano economico*, cit., 542

part of the law[38]. Planning fits into the connection between means and purposes which inspire the action programmes of individuals and groups[39].

Planning has an inherently social character. Lone hunters do not plan. They may very well define strategies to catch their prey but their decisions do not establish a coordinated pattern of behavior and/or development, simply because it would be useless. Plans does not exist without a society[40].

The traditional idea of social order[41], ensured through legal rules given by an organization, as laid out by Hauriou[42] and Romano[43], offers a perspective on the nature of the planning rules: it is, among the others, through plans that communities organize themselves.

Planning has not been the focus of the studies of legal anthropologists, nor of jurists. Its multi-dimensional nature and its resistance to accurate definitions prevented, to some extent, legal scholars from considering planning a universally valid legal concept, outside the borders of the socialist legal thinking[44].

However, legal anthropology provides us with a notion of law which, rather than focusing on the formal vest of the rule, looks at its effectiveness in compelling the people's behavior[45].

If law is culture[46] and, therefore, is a "*way members of a society adapt to their environment and give meaning to their lives*"[47], then the problem is to verify whether and how planning allows societies to adapt to changing environments in an effective way.

Over the course of human history, planning has been carried out and is being carried out by different social entities (e.g. families, villages, enterprises, states, international

[38] See N.BOBBIO, *Teoria generale del diritto*, Giappichelli, Torino, 1993, 3

[39] *Ivi*, cit., 5-6

[40] The idea of a social order as fundamental element the legal rule is embodied by the old saying "*ubi ius ibi societas, ubi societas ibi ius*"

[41] On the topic see E.EVANS PRITCHARD, *Social Anthropology*, Routledge, Abingdon, 2004 (first published in 1951)

[42] See M.HAURIOU, *Principes de droit public a I'usage des etudiants en license (3'' annee) et en doctoral es-sciences politiques*, Tenin, Paris, 1910; M.HAURIOU, *La cite moderne et les transformations du droit*, Bloud & Gay, Paris, 1925

[43] See S.ROMANO, *L'ordinamento giuridico*, Quodlibet, Macerata, 2018, 1st Ed. 1917, 2nd Ed. 1945

[44] Even the socialist legal science, though shaping the basis for the comprehension and validity of planning, never developed a systemic legal theory of planning, until the recent studies of Chinese economic scholars in the 2000s

[45] See R.SACCO, *Antropologia Giuridica*, il Mulino, Bologna, 2007; R.BANAKAR, *Normativity in Legal Sociology*, Springer, Cham, 2015, 138

[46] See L.ROSEN, *Law as Culture*, Princeton University Press, Princeton, 2006

[47] See S.NANDA, R.WARMS, *Culture Counts, cit.*, 5. See also A.CATEMARIO, *Linee di Antropologia Culturale*, Guida Editori, 1977, 31

organizations), which may give rise to different and sometimes competing rules within the context of a pluralistic legal order[48].

If we think of law as a mean to achieve social control[49], then planning, in bringing together economic, political, religious and ethical instances of different social groups does not contradict a legal dimension. Instead, it reassesses it, establishing a rational order. The concept of order leads us, once again, to Santi Romano's concept of law[50], emphasizing the three fundamental elements of society, order and organization, meant as the instrument to realize the order in the society[51].

Planning is always "social" in its nature. Not only because it concerns dynamic interactions among men, but also because it has an inherent communicative dimension[52]. Planning requires collecting and processing information, to the point that its efficiency on the availability of truthful and complete data.

Another issue is whether or not planning may exist in a society without defined social organizations. Indeed, Bobbio pointed out[53] that Romano's theory did not consider how a society does not necessarily implies law. Romano, in other words, believes that law arises from the organization of an orderly society, i.e. from an institution[54]; however, not every society develops institutions.

Through bargaining relationships and organization of complex activities such as hunting, harvesting or constructing, societies with "diffused power"[55] – thus not employing strictly hierarchical structures – plan their daily activities, but do not make them functional to a future development.

Though it would be the topic of several interest researches, this is clearly not the main object of this research. What I am interested in is the institutionalized planning and, in the context of this book, particularly state planning.

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[48] See J.GRIFFITHS, *What is Legal Pluralism*, in Journal of Legal Pluralism, Vol. 18(24), 1986, 1-55.
[49] See L.ROSEN, *Law as Culture*, cit., 14 ff.
[50] See S.ROMANO, *L'ordinamento Giuridico*, cit.
[51] *Ibidem*, see also N.BOBBIO, *Teoria Generale del Diritto*, cit., 8-9
[52] This dimension is reflected in planning decision-making, which is, more often than not, communicative. See, on the issue, see PENG HE, *Chinese Lawmaking: from non-communicative to communicative*, Springer, Cham, 2014.
[53] See N.BOBBIO, *Teoria generale del diritto,* cit., 9
[54] See S.ROMANO, *L'ordinamento giuridico,* cit.
[55] On the distinction between centralized-power societies and diffused-power societies see M.FORTES, E.EVANS PRITCHARD, *African Political Systems*, Oxford University Press, Oxford, 1940; R.SACCO, *Antropologia Giuridica*, cit.

2. Power centralization and the anthropological institutions of planning law

The institutional theory of law founds its anthropological complement in the consideration of the inherently social mentality of human beings[56]. Such element is reflected in the communitarian conception of the economy's base, i.e. the "*social and material space that a community or association of people make in the world. Comprising shared material interests, it connects members of a group to one another, and is part of all economies*"[57].

Economy contains two fundamental dimensions, that of community and that of market[58]. In planning, the two dimensions intertwine, since planning itself is a mean through which a community, be it a family, an association or a state, tries to harmonize its internal transactions as well as its market relationships with other communities.

Planning within an institutional context requires a centralization of power. Even before resource allocation, the purpose of such centralization lies in the ability to organize labor and extract value from it, i.e. obtaining the resources to be allocated[59]. If the ability to control labor within a productive process is what defines the centralization of power, we may infer that it is not necessary to have a state in order to develop a centralized-power society[60].

The earliest forms of state, in anthropological perspective, have been traced back to the bronze age and have been linked with the centralization of structures required to manage the production of bronze[61].

However, complex forms of labor division had already occurred before, at least since the Neolithic[62].

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[56] See GUDEMAN, *Community and economy: economy's base*, in J.CARRIER (edited by), *A Handbook of Economic Anthropology*, Edward Elgar, Northampton, 2005, 94

[57] *Ibidem*

[58] *Ivi*, cit., 95

[59] This is obviously a view affected by Marxist studies. See DURRENBERGER, *Labour*, in J.CARRIER (edited by), *A Handbook of Economic Anthropology*, cit., 125-126

[60] In *ibidem*, the author notes that the earliest institution in charge of labor organization is indeed kinship.

[61] See R.SACCO, *Antropologia Giuridica*, cit., 104-109

[62] If, as it has been argued, the Neolithic revolution itself is the expression of a social and ideological change provoking a transformation of the relation between man and nature (See J.CAUVIN, *Naissance des divinités, naissance de l'agriculture. La révolution des symboles au néolithique*, C.N.R.S. Editions, Paris, 1994; M.MONTANARI, J.FLANDRIN (edited by), *Storia dell'alimentazione*, Laterza, Roma-Bari, 1997, 22), then such cultural perspective is what justifies our assessment of the anthropological concept of planning.

The idea of planning may derive from a tendency toward "domination" of nature and the economy[63]. It may also stem from the striving toward a comprehensive order between human and nature. In both cases, the human intervention in the economy reflects a supranatural legitimacy[64] which creates a set of ideologies empowering men to creatively interact with nature[65].

Economic historians have pointed out how in pre-capitalist societies, kinship, religion and law all are part of the constitution of the mode of production[66]. Even with the development of capitalist forms of production, that integration partially survives. Not only because, as held by Weber[67], religious and philosophical conceptions directly affect the evolution of economic models, but also because modern economic operators historically arise from social aggregations like families or clans[68].

The economic institution arising from kinship identifies with the household, which, however, also includes, sometimes, non-kin elements[69].

In its archetypical form, the household develops its own economic strategies according to two main purposes[70]: a) the conservation and expansion of property for the future generations; b) the insurance of the groups' welfare[71].

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[63] This idea is reflected, in the view of some authors, for example in the birth and development of breeding. (see J.DIGARD, *L'Homme et les animaux domestiques*, Fayard, Paris, 1990)

[64] On the concept of supernatural legitimacy see R.SACCO, *Antropologia Giuridica, cit.*

[65] If we look at the Chinese context, the dialectical interaction between opposites, such as sky (天 – *tian*) and earth (地 – *di*), never relies on these sole two elements, but includes the force, the element which integrates those two (see A.CHENG, *Storia del Pensiero Cinese,* cit., 23-25). Each activity, in a sense, must therefore reflects such integration and from such integration, at the same time, draws legitimacy.
In the development of the western legal tradition we may find, indeed, some remarkable similarities, concerning the role of folk-law in the administration of local economies, a folk-law justified and enforced through kinship ties and, later, through their attachment to religious cultural structures such as sins and penitence (see H.BERMAN, *Law and Revolution: the Formation of Western Legal Tradition*, Harvard University Press, Harvard, 1983).

[66] See P.ANDERSON, *Lineages of the Asbsolutist State*, Norton & Company, London, 1974

[67] See M.WEBER, *The protestant ethic,* cit.

[68] See, for instance, T.RUSKOLA, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, in Stanford Law Review, Vol. 52(6), 2000, 1599-1729; E.ROTWEIN, *Economic Concentration and Monopoly in Japan*, in Journal of Political Economy, Vol. 72(3), 1964, 262-277

[69] See S.NANDA, R.WORMS, *Culture Counts,* cit., 163

[70] See R.RUDOLPH, *The European family and the economy: central themes and issues*, in Journal of Family History, Vol. 17(2), 119-138

[71] The first purpose is achieved in first place through the definition of inheritance rules (see *ibidem*). Such rules, in modern times, may either take advantage of the discretion provided for the state civil law or simply be recognized and sanctioned by the state. The expansion of household properties and the insurance of daily welfare is achieved instead through the organization of the inner labor (see R.RUDOLPH, *The European Family, cit.*) and the definition of external market relationships.

Each household economy is subdivided into a domestic and a market sector. Studies on the peasant households of the Andean region[72] showed how there are different degree of interactions between households and the market. Outside of the dimension of pure subsistence, any household establishes exchange relations with other households which may resemble market relations[73] but may also follow the schemes of the gift economy[74]. Money or any other currency is usually not needed for the functioning of such exchanges[75].

Households also evolve into corporations. The literature on the topic is quite extensive[76], but what it is worth noting is that the notion of "family enterprise" implies the intertwining of multiple legal orders, one surely being that of the enterprise and another surely being that of the household[77]. The interaction between the different orders is affected by the contemporary presence of several hierarchies and networks of relationships. On a large scale, this phenomenon implicitly favors the coordination of market dynamics toward concentrations and cartels, which are often sponsored by the State.

East Asian economic law tradition developed, in the past centuries, a model of corporate governance based on family or kinship ownership of relevant assets, leading to the formation of concentrations called *zaibatsu* (in Japanese)[78] or *chaebol* (in Korean)[79].

When, instead of on sole kinship relation, an economic institution is based on functional affiliation, the guild arises: in its classic definition of "*society for mutual aid or*

[72] See MAYER, *Households and their markets in the Andes*, in J.CARRIER (edited by), *A Handbook of Economic Anthropology*, cit. 405 ff.

[73] *Ibidem*

[74] On the concept of gift economy see M.MAUSS, *The gift*, Hau Books, Chicago, 2016 (First published in 1954)

[75] It is instead important, in most cases, the existence of a connection, be it a kin connection or another cultural connection, between the households. On the other hand, when a household wants to operate on the external market (i.e. the national market), it organizes its own labour so to gain access to national currency to invest in the purchase of needed resources.

[76] See, for instance, T.RUSKOLA, *Conceptualizing Corporations and Kinship*, cit.; L.SEIBOLD, M.LANTELME, H.KORMANN, *German family enterprises*, Springer, Cham, 2019

[77] See THE FAMILY FIRM INSTITUTE INC., *Family Enterprise*, Wiley, Hoboken, 2014

[78] See H.MORIKAWA, *A History of Top Management in Japan: Managerial Enterprises and Family Enterprises*, Oxford University Press, Oxford, 2001; E.ROTWEIN, *Economic concentration*, cit.

[79] See E.KIM, *The Impact of Family Ownership and Capital Structures on Productivity Performance of Korean Manufacturing Firms: Corporate Governance and the "Chaebol Problem"*, HGCY Working Paper Series No. 05-02, 2005; JEONG-PYO CHOI, *Cowing, Diversification, Concentration and Economic Performance: Korean Business Groups*, in Review of Industrial Organization, Vol. 21(3), 2002, 271-282; CASTELLUCCI, *La Corea*, in M.MAZZA (edited by), *I sistemi del lontano oriente*, in *Trattato di Diritto Pubblico Comparato*, diretto da FERRARI, Cedam, Milano, 2019, 381-388.

prosecution of common object"[80], the guild represents one of the most ancient and widely spread regulatory institutions of economic dynamics[81]. Guilds exercised their regulatory activity with regard to both the production and the distribution of resources, goods and services, thus giving raise to the great distinction between manufacture/service guilds and trade guilds[82]. We are not certain about the birth and early development of such institutions[83]. The specialized literature has tried to isolate the main features of the guild as economic institutions and associate them with certain historical coordinates. In Europe, such coordinates have mostly regarded the period from the 11th to the 18-19th Century A.D[84]. This is roughly the same period that has raised the interests of sinologists and Chinese scholars[85] interested in the study of the *huiguan* (会馆) or the *gongsuo* (公所)[86]. Those who have attempted a categorization[87] have emphasized how part of Chinese economic history is dominated by merchant guilds. Such guilds, moreover, were often composed mostly if not exclusively of "foreign" merchants, i.e. merchants coming from different parts of the empire and later established in relevant trade nodes such as Shanghai,

[80] See The concise Oxford dictionary, 6th ed., 1976

[81] See S.OGILVIE, *The economics of guilds*, in The Journal of Economic Perspectives, Vol. 28(4), 2014, 169-192, 169

[82] *Ibidem*. Ogilvie, however, associaties service guilds and trade guilds, while for the purpose of this research and for the purpose of the comparative analysis with the Chinese guild system, it is more convenient to consider trade guilds as a distinct category, connoted by its mercantile identity.

[83] Although we may suppose their evolution stems from an increasingly complex manufacture and urban economy

[84] See S.OGILVIE, *The economics of guilds*, cit.; R.LARMOUR, *A Merchant Guild of Sixteenth-Century France: The Grocers of Paris*, in The economic history review, Vol. 20(3), 1967, 467-481

[85] See, for instance, KWANG-CHING LIU, *Chinese Merchant Guilds: An Historical Inquiry*, in Pacific Historical Review, Vol. 57(1), 1988, 1-23; WU HUI (吴慧), *Guild Hall, Public offices, Guilds: summary of the evolution of merchant organizations in Qing Dynasty* (会馆、公所、行会: 清代商人组织演变述要), in 中国经济史研究 (*zongguojingjishiyanjiu*), Vol. 3, 1999, 111-130; WANG RIGEN (王日根), *The evolution of the guild hall during the Ming and Qing dynasties* (明清时代会馆的演进), in 历史研究 (*lishiyanjiu*), Vol. 4, 1994, 47-62; CASTELLUCCI, *Homo oeconomicus sinicus*, in I.CASTELLUCCI (edited by), *Saggi di Diritto Economico e Commerciale Cinese*, cit., 5-32

[86] The two terms are employed to indicate the concept of "guild", although their meaning is indeed different. The word *huiguan* (会馆) does not indicate, in its original meaning, the guild as a group, as an institution, but rather refers to the "guild hall". The term *gongsuo* (公所), on the other hand, refers to a more proper organization, where merchants would discuss and define trade strategies.

[87] See C.SHIUE, W.KELLER, *Markets in China and Europe on the Eve of the Industrial Revolution*, in The American Economic Review, Vol. 97(4), 2007, 1189-1216; KWANG-CHING LIU, *Chinese Merchant Guilds*, *cit.* This view is, however, disputed, since we have plenty of sources testifying presence of craft and manufacture guilds in imperial China. See, for instance, J.BURGESS, *The Guilds and Trade Associations of China*, in Annals of the American Academy of Political and Social Sciences, Vol. 152(1), 1930, 72-80

Beijing, etc[88]. Conversely, European experience displays a wide variety of manufacture guilds[89].

Guilds were institutions carrying on market and competition coordination activities[90]. Competition would be regulated by guilds through the setting of quality standards[91] as well as through the control of new commercial points (e.g. setting new stores)[92] and through membership/market access restrictions[93]. Guilds, especially craft ones, essentially detained monopoly over production techniques and skills[94], which were passed on to apprentices according to the internal rules of the organization and following specific training phases. Production strategies could evolve over time; new products or techniques could be allowed or rejected, all within the perspective of a common market organization[95]. In order to deal with market asymmetries, guilds were able to enforce prices as well as guarantee credit to certain members so to sustain their economic activities[96].

Guilds also exercised prerogatives of both social control and social security[97]. Furthermore, guilds interacted with the regime of households through the relationships between masters and apprentices[98]. Guilds effectively created a separate, but integrated

[88] See WU HUI, *Guild Hall, Public offices, Guilds*, cit.
[89] See S.OLGILVIE, *The economics of guilds*, cit.
[90] There have been debates about the impact that such activities had on the development of the European industrial society. S.OLGILVIE, in works such as *The economics of guilds*, cit., holds the view that guilds prevented technological and economic progress to happen, due to their inherent corporatist and conservative approach. The view was openly contested by S.EPSTEIN, in *Craft Guilds, Apprenticeship, and Technological Change in Preindustrial Europe*, in The Journal of Economic History, Vol. 58(3), 1998, 684-713; *Craft Guilds in the Pre-Modern Economy: A Discussion*, in The Economic History Review, Vol. 61(1), 2008, 155-174
[91] See S.EPSTEIN, *Craft Guilds in the Pre-Modern Economy*, *cit.*; WU HUI, *Guild Hall, Public offices, Guilds*, cit.
[92] *Ibidem*
[93] *Ibidem*. See also G.RICHARDSON, *Guilds, Laws, and markets for manufactured merchandise in late-medieval England*, in Explorations in Economic History, Vol. 41, 2004, 1-25
[94] *Ibidem*; S.EPSTEIN, *Craft Guilds, Apprenticeship, and Technological Change*, cit.
[95] See S.EPSTEIN, *Craft Guilds in the Pre-Modern Economy*, cit.; S.OLGILVIE, *The economics of guilds*, cit.
[96] *Ibidem*
[97] In England, for instance, guilds were entrusted by municipal and ecclesiastic authorities to regulate working hours, working days and location of workshops (see G.RICHARDSON, *Guilds, Laws, and Markets*, cit.). It did not amount to a discretionary regulatory powers, it instead built upon existing customs and practices enforced and implemented by and through the guilds (*ibidem*).
[98] See B.DE MUNCK, *From brotherhood community to civil society? Apprentices between guild, household and the freedom of contract in early modern Antwerp*, in Social History, Vol. 35(1), 2010, 1-20

(though to different extents and not without issues) social community which provided financial aid for its members and even their families when needed[99].

Sometimes guilds' monopolistic prerogatives were defined into charters issued by public authorities[100]. In other cases, the integration of guilds into the public powers' structure depended on their embeddedness into a network of sub-contracting[101] which sought to delegate power from the top to the bottom of the administrative pyramid relying not only on bureaucratic organs but also on such intermediate social bodies. This is, for instance, the case of China[102].

In modern times, the enhancement of state powers and the diversification and growth of markets undermines the regulatory capacity of households, associations and of other economic planning institutions such as villages, cities, etc. If we reason in terms of non-state planning institutions, the most advanced expression of such entities is undoubtedly the Multinational Corporation (MNC).

Each MNC has a hierarchical structure, expressed through different schemes. In a so-called "actor-based multinational corporation"[103], whose global structure relies on subsidiaries, affiliates and local branches, the subordination is, in concrete, realized through the ownership of the subsidiaries' capital. Where subsidiaries are owned and operated by an independent dealer, a hierarchy may still be established through the employment of specific contracts such as franchising, enabling the MNC to define some essential elements of the contractual relationship on the basis of its own economic development goals.

Similarly, the contract shapes the hierarchical connections in network-based economic environments[104]. So are defined the circumstances where the leading MNC relies on an extensive network of suppliers which produce and/or assemble parts or components of a

[99] See M.STOLLEIS, *Origins of the German Welfare State*, in German Social Policy, Vol. 2, 2013; WU HUI, *Guild Hall, Public offices, Guilds, cit.*

[100] See S.OLGILVIE, *The Economics of Guilds*, cit.

[101] On the concept of sub-contracting see ZHOU LI-AN, *Incentives and Governance: China's Local Governments*, Gale Asia Cengage Learning, 2010

[102] See WU HUI, *Guild Hall, Public offices, Guilds, cit.*; FAN JINMIN (范金 民), *The functional nature of Jiangnan's guild halls and public offices in the Qing dynasty* (清代江南会馆公所的功能性质), in 清史研究 (*Qingshiyanjiu*), Vol. 2, 1999, 45-53.

[103] See J.RUGGIE, *Multinationals as global institution: Power, authority and relative autonomy*, in Regulation & Governance, John Wiley & Sons Australia, 2017

[104] *Ibidem;* see also F.CAFAGGI, *Regulation through contracts: Supply-chain contracting and sustainability standards*, in *ERCL*, Vol. 12(3), 2016, 218-258

product. Here, the hierarchical nature is embedded in the economic asymmetry connoting the contract[105].

The polycentric nature of the market society implies that MNCs, when acting as global regulators, do interact with several other actors apart from states[106].

MNCs, when carrying out their economic activities, are therefore involved in a network of connections with different institutional actors. In order to sustain the consequent dialectic process they need planning. Through planning they: i) define their inner organization and hierarchical links; ii) set out objectives and development strategies valid not only for the parent company but, obviously, for the subsidiaries as well; iii) define the standards to be incorporated in the supply contracts stipulated with several other economic entities[107].

MNCs planning has both an internal and an external dimension. The internal one concerns the organization of the inner structures as well as the establishment of a responsibility system for the attainment of planned objectives. However, in concrete, MNCs, in order to reach such goals, need to operate on the market with other enterprises. Transnational supply networks rely on chains of contracts between enterprises located in different areas of the globe, operating for the realization of a final product or of a certain activity.

In economical perspective, it may happen that the lead MNC is the most significant, if not the only one, contractual counterpart of the smaller enterprises, in a monopsony situation[108]. A multinational corporation is able to exercise a significant contractual influence towards several small enterprises competing to enter into the supply chain. Such influence might concern the definition of the price of the performances involved[109] or the choice of a certain national jurisdiction to hear disputes. It might also concern the incorporation, in the final contract, of standards of production, work organization and

[105] See T.TAJTI, *Franchise and Contract Asymmetry: A Common Trans-Atlantic Agenda?*, in Loy. L.A. Int'l & Comp. L. Rev., Vol. 37, 2016, 245-273

[106] See L.BACKER, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, in Connecticut Law Review, Vol. 39(4), 2007, 1-46, 13. Backer distinguishes at least four relevant actors: i) civil society; ii) the media; iii) consumers and investors; iv) national and international political communities.

[107] See L.BACKER, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking*, cit.

[108] See M.ANNER, *Multinational Corporations and Economic Inequality in the Global South: Causes, Consequences, and Countermeasures*, Paper Prepared for the 9th Global Labour University Conference "Inequality within and among Nations: Causes, Effects, and Responses" Berlin, 15-17 May 2014

[109] *Ibidem*

ethics[110] determined by the leading corporation through its codes of conducts and plans[111]. The transnational planning of MNCs takes to the global level the basic principle of the essentially geographical dimension of planning, where social entities operate at different degrees of localization, interacting with each other.

The village and the city represent, in the Chinese[112] and the European[113] context, basic units of social aggregation and economic production. The rationalization of their development founds the most immediate (and widely recognized) form of planning, i.e. the urban planning, which is today legally regulated in all the legal systems in the world. On the other hand, the implementation of general planning is carried out through gradual localization of initiative and projects, thus emphasizing its "multilevel governance"[114] dimension.

The most complex and all-encompassing institution of planning law, in anthropological perpective, is however the State. Indeed, planning as a formally legal concept stems from state power. More or less invasive form of state planning have accompanied the evolution of humanity since the neolithic[115]. Other planning institutions have interacted with states as semi-autonomous social fields[116], exerting influence over public powers[117] and being affected by them. Today, states (or supranational entities such as the EU) employ complex legal instruments to carry out and implement their planning strategies and, to different extents, direct, control and coordinate the economic planning carried out by other

[110] See F.CAFAGGI, *Regulation Through Contracts*, cit.

[111] See L.BACKER, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking*, *cit.*, 14-18

[112] See FEI XIAOTONG, *From the Soil.: the Foundations of Chinese Society* (english edition), University of California Press, Berkley, 1992

[113] See, for instance, H.PIRENNE, *Medieval Cities: Their Origin and the Revival of Trade*, Princeton University Press, Princeton, 1946 (1st Edition 1925).

[114] The expression is usually associated with the European model of governance and I used it purposefully. It will recur in the analysis of European development planning.

[115] Agriculture, when employed on a large scale in order to feed entire communities, requires several organizational choices. The power within the communities was then centralized and assigned to one or a few figures in charge of governing the whole range of activities necessary for the development of the community itself.
The example of ancient Mesopotamia perfectly fits into this thesis: there, since the 4th Millenium B.C, "*the great organizations (temples and palaces), which governed the economic life of the cities, tried to enhance the production of cereals in order to maintain masses of subordinate workers, changing the model of food supply and drastically diminishing the range of food types produced*" (see M. MONTANARI, F. SABBAN (edited by), *Storia e Geografia dell'Alimentazione*, Utet, Torino, 2006, 19-20)

[116] On the notion of "semi-autonomous social fields", see S.MOORE, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, in Law & Society Review, Vol. 7(4), 1973, 719-746.

[117] For example, guilds served also as connection between civil society and public powers, through political link which often followed family dynamics

institutions, with different purposes[118]. All these critical points will be in the central part of this research with regard to the two legal systems compared. It is therefore to that part that I refer.

3. Characters of the planning norm. Planning and objective law

Planning implies a social dimension. Such definition founds a legal ground in the theory of objective law laid out by Duguit[119]. Planning rules are objective since they arise from the social interaction between human beings. The very concept of planning derives from the conveying of productive necessities for exchange, conservation, allocation purposes, in a truly Marxist perspective[120]. On the other hand, the institutionalization of organized planning strongly relies on cultural elements founding the legitimacy of the aforementioned institutions. Planning as an activity involves therefore both economic rules and cultural, hence moral rules[121]. Planning, in other words, must be just. Justice concerns the correspondence between a rule and the values which inspire the community creating and practicing it[122]. Reasoning once again from a Marxist point of view, each concept of justice depends on the set of values enforced by the ruling class[123], so that justice comes to be "the utility of the strongest"[124]. Each legal order embraces certain values and directs its normative activity according to them, implicitly excluding other values[125].

Different planning theories may deal differently with this issue. In modern experiences, the justice of planning process relates more and more with inclusive participation. The

[118] Where previously self-planning institutions have been brought under the full sovereignty of national states – e.g. cities or, in general, local entities – one of the purposes is that of coordination.
[119] See L.DUGUIT, *Il diritto sociale, il diritto individuale e la trasformazione dello stato* (trad. it. PARADISI), Sansoni, Firenze, 1950; L.DUGUIT, *Objective Law I*, in Columbia Law Review, Vol. 20(8), 1920, 817-831; L.DUGUIT, *Objective Law II*, in Columbia Law Review, Vol. 21(1), 1921, 17-34
[120] According to the classic Marxist view which considers law as the product of the interaction of productive forces. On the topic see E.PASHUKANIS, *The General Theory of Law and Marxism*, Transaction Publishers, 2nd printing 2003
[121] Moral rules, according to L.DUGUIT (*Objective Law II*, cit., 18) are those "*which apply to every man living in some country at a given period, which impose upon him a certain attitude in his external manifestations, in regard to his clothes, his dwelling, his worldly relations as well as his religious practices*"
[122] See N.BOBBIO, *Teoria Generale del Diritto*, cit., 23-24
[123] See P.DE CRUZ, *Comparative Law in a Changing World*, cit., 185
[124] The expression is reported in the "Republic" of Plato, pronounced by Thrasymachus
[125] See N.BOBBIO, *Teoria Generale del Diritto*, cit., 24; R.SACCO, *Antropologia Giuridica*, cit.

issue, indeed already recognized by Marx himself[126], envisages a concept of democracy which goes beyond the representativeness and calls for the reassessment of the role of those same intermediate social bodies which, historically, always exercised planning activities, e.g. social and trade associations, other civil organizations, etc.

Therefore, planning rules are both economic and moral. The problem, now, is to assess whether and how such rules may become legal in their nature. It is once again Duguit to point how such transformation occurs, indeed, without the State[127]. Planning law, even when enacted by public powers, does not need a formal legal sanction to become legal. In Duguit's words[128] "*an economic or moral rule becomes a juridical norm when (...)has penetrated into the consciousness of the mass of individuals composing a given social group (...)or those in it who constitute the greatest force, can intervene to repress violation of this rule.*"

Duguit's stance is compatible with both Moore's anthropological theory of semi-autonomous fields and the Marxist view of the inherent psychological character of law[129]. Duguit's theory seems to have at least another relevant consequence over planning norms, that is their objective and not subjective character[130]. The rule comes from the social and moral integration, in a community dimension, of objective relations developed between subjects. Its whole nature is purely objective. The collective psychological evaluation of the rule is transposed into a cultural idea and, as such, binds its creators. The very concept of subjective right, in this context, assumes a whole different meaning[131], since each subjective position is deemed "legal" only when reflecting the cultural fiber of the community.

Planning norms do not confer subjective rights related to their content[132], since the subjective positions they define with regard, for instance, to economic operators, are necessarily functional to the pursuit of a certain standard.

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[126] See K.MARX, *On the Jewish Question*, Collected Works, Vol. 3, Lawrence & Wishart, London, 1976, 168

[127] See L.DUGUIT, *Objective Law II*, cit.

[128] See *ivi*, cit., 22

[129] See E.PASHUKANIS, *The General Theory*, cit., 74-75. Similarly, such view, although Duguit was certainly not a socialist, indirectly supports the Marxist view of the "withering away of the state" while preserving the legal value of relevant norms.

[130] See L.DUGUIT, *Il diritto sociale, il diritto individuale*, cit.; L.DUGUIT, *Objective Law I*, cit.

[131] Duguit would exert himself to deny the very existence of the subjective character of law. See *ibidem*

[132] In rule of law environments planning rules may instead confer subjective rights with regard to procedural requirements and phases.

The planning rule reflects the structure of the hypothetic teleological norm[133]. If you want x you must do y[134]. The enforcement of teleological legal rules requires the contemporary presence of two elements. One is undoubtedly a technical-legal framework. The other one is a self-enforcing legal proposition incorporated into the cultural environment called to apply it. In other words, force and faith are both required.

Planning relies on the common belief in its justice, rational feasibility and moral goodness. Such belief is strengthened through the involvement of the community in the definition of plans as well as through incentives or disincentives. This is the basic structure of the promotional rule as normally known in modern legal orders[135]. In socialist legal thinking, the promotional rule conveys the idea that the transition toward communism is gradual and requires the maintenance of certain bourgeois legal structures[136]. In liberal-democratic contexts, states' promotional intervention in the economy may rely on the recognition of the social character of the state organization and the necessity of "unequal" legislation to pursue common development objectives, in contrast with the formal egalitarism of "traditional" liberal law[137].

4. Following: the anthropological filter and the validity of the planning norm

The planning rule is binding when its economic and moral characters are integrated into the culture of the community. The integration requires a material element (force) and an ideological element (faith).

The integration also relies on certain fundamental conceptual structures, which are common in every legal order, although interpreted in different ways. If we look at the Chinese and European experience in comparative perspective, these structures helps us tracing evolutionary patterns emphasizing the main divergences and similarities in the notion(s) of planning, reflected in the specific legal solutions applied. This analysis is

[133] See N.BOBBIO, *Teoria Generale del Diritto*, cit., 154
[134] *Ibidem*
[135] On the notion of promotional law see N.BOBBIO, *Dalla struttura alla funzione: nuovi studi di teoria del diritto*, Edizioni di Comunità, Milano, 1977; F.RIGANO, *Le leggi promozionali nella giurisprudenza costituzionale*, in Giur. It., 1999, 11 ff.; F.ZINI, *La funzione promozionale del diritto nella crisi del normativismo kelseniano*, in Società e Diritti, Vol. 3, 2017, 29-4
[136] See K.MARX, *A contribution to the critique of political economy*, Progress Publishers, Moscow, 1971
[137] See F.RIGANO, *Le leggi promozionali,* cit.

therefore aimed at creating a sort of conceptual filter, in anthropological perspective, to assess the "validity"[138] of the planning norm and its different evolution(s).

Positivists legal theorists[139] emphasized how the legal norm, meant as a conduct rule, may be subjected to three different evaluations based on the criteria of justice[140], validity (i.e. objective existence)[141] and efficacy[142]. However, when we think about the collective nature of the planning[143] norm, those three criteria reflect mechanisms of social control and coordination within the community, that may be identified in the hierarchy (reflecting norm existence), the fidelity (reflecting justice) and the efficacy (in the sense that I will be soon explaining).

Hierarchy: hierarchical structures arise from power centralization. At the same time, the rule which previously regulated man-to-man relationships acquires a public character[144]. Each institution incorporates into its own customs conduct rules governing both production and allocation of resources. These rules are founded over social hierarchies that may be kin-related (i.e. father and son), may depend on the effective control over resources, on social status or on force[145]. When such rule is enacted by state structures and correspond, for example, to orders between the monarch and its officers, we call it administrative law[146]. The logic of the rule, however does not change. It is the institution which, relying on its inner hierarchy, functionalizes the behavior of its component to its purposes. No order is given without hierarchy[147]. No planning rule is given without hierarchy.

The first formulation of the rule of law, its first "codification", is in ritual form[148]. The conduct is aimed, first of all, at ensuring the conservation of the hierarchal institution, its

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[138] I am referring to an anthropological concept of validity, as a source of binding force upon a community. I am not, in this sentence, discussing a properly "legal" notion of validity.

[139] See N.BOBBIO, *Teoria Generale del Diritto*, cit., 23 ff.

[140] I have already referred to the criterion of justice, which concerns the ethical and moral fiber of the conduct rule, in light of a common set of values. See *ivi*, cit., 23-24

[141] The criterion of validity regard the existence of the rule, regardless of its moral evaluation. See *ibidem*

[142] Efficacy is a concept which concerns the degree to which the rule is followed by the legal subjects. See *ivi*, cit., 25

[143] A collective nature which is reflected in its institutional dimension

[144] See R.SACCO, *Antropologia Giuridica*, cit., 238-246

[145] *Ivi*, cit.

[146] Incidentally, it could be noted how administrative law, together with criminal law, is usually associated with the first expression of modern state law and, in Chinese law, is associated with the term *fa* (法), traditionally linked with the concept of positive law.

[147] See N.ROULAND, *Anthropologie Juridique*, cit.

[148] See YU RONGGEN (俞荣根), 儒家法思想通论 (*General Survey on Confucian Legal Thought*), The Commercial Press, Beijing, 2018, 114-115.

survival and prospering. The rite empowers the institution to govern family matters in the broadest perspective[149]. At the same time, it cristallizes the role of the institution within the legal order, thus preserving its autonomy from state powers, once they are formed[150]. The hierarchy ensures the existence of the planning norm as a collective rule of conduct, which would be unthinkable outside an institutional framework. However, hierarchy always implies an element of reciprocity. While the first element (i.e. hierarchy) represents the concrete realization of social order through the institution, the second (i.e. reciprocity) is an ancestral legal principle which governs human relations[151].

Chinese culture, already in the post-Neolithic era, appears to have developed a concept of social hierarchies based on syncretism rather than on a pure top-down social pyramid[152]. The whole universe rests, essentially, on a cosmic order, striking a balance between Heaven (天 – *tian*), Earth (地 – *di*) and Men (人 – *ren*). This assumption was, in the 4th Century B.C., conceptualized in the *Tao-te ching*, the major work of Lao-tzu, regarded as the founder of Taoism[153]. As reported by Menski[154], early Taoist thinking assumed that "*any disturbances in human society, or acts contrary to this natural order, resulted in disruption of the harmony between heaven and earth*". From this perspective, *Dao* (道), which is "*a form of natural order or natural law*[155]", is likely a development, from a philosophical perspective, of the syncretism shaped by the ancient, traditional religions.[156].

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[149] *Ibidem*

[150] Incidentally, this element is underlined by Chinese legal scholars as one of the main differences between the Chinese legal tradition of private law and the western legal tradition – *rectius*, the post-French revolution western legal tradition – which instead conceptually refuses the autonomy of intermediate social bodies. This topic has been thoroughly assessed by SU YIGONG (苏亦工) in its relation at the International Conference titled "*I giuristi e la costruzione del diritto. Dagli Scriptores iuris Romani al diritto contemporaneo*" (法学家与法的生长：从罗马法学家到当代法), held at the University of Macau on the 18th and the 19th of May, 2019. The original title of Prof. Su's presentation is 中国古代何以没有产生西式民法？(*Why didn't ancient China produce a western-style civil law?*)

[151] See R.SACCO, *Antropologia Giuridica*, cit., 310-312

[152] The social hierarchies in ancient China stem from a gradual transformation of concepts embedded in Chinese traditional religious thinking, which as well may be regarded as a syncretic faith, aimed at putting in relation the material world with several "supra-worldly" entities, such as the ancestors and the spirit of natural forces (see A.CHENG, *Storia del Pensiero Cinese, cit.*, 27-36). On the early evolution of Chinese legal culture see R.CAVALIERI, *La legge e il rito*, cit., 23-66

[153] *Ibidem*

[154] See W.MENSKI, *Comparative Law in a global context*, cit., 504

[155] *Ibidem*

[156] It seems to be a recurring pattern of the ancient Asian faiths to emphasize the idea of "cosmic order", corresponding to a human conduct inspired by it. W.MENSKI, in *Comparative Law in a global context*, cit., offers a comprehensive and detailed description of the Indian legal tradition as well (Chapter 4), pointing

Several forefathers of Chinese multi-millenary thinking have developed, over this basis, the logical principles of social living and management[157]. Well-known, among the scholars, is the perspective developed by Confucianism[158]. Confucianism presents itself as an essential conservative thinking: it refers to the traditional idea of natural order and points out that at the very beginning of the "chain" of harmony there must be the virtue and piety of the individual, towards the ancestors, the family, and the ruler. From this perspective the common good can never be achieved without a virtuous individual ethic. That who abides by the teachings of Confucius must, in first place, be a gentleman[159]. The virtuous governance is realized, in first place, with the respect of filial piety[160]: such respect must be mutual and moves both top-down and bottom-up, so that "*family is governed by perfecting the person (…) the State is put in order by governing the family (…) the Empire is pacified by putting the State in order*[161]*"*. In the Confucian idea of natural order there are five notable figures: i) the Heaven (天 – *tian*), the Earth (地 – *di*), the sovereign authority (君 – *jun*), the patriarchal authority (亲 – *qin*), the Master authority (师 – *shi*). The role played by each of these figures intertwines with five fundamental relationships[162]: i) between the king and its ministers; ii) between father and son; iii) between husband and wife; iv) between the older and the younger brother; v) between friends.

These relationships are not mutually exclusive; instead, they are always in place at the same time[163].

Aside from the concept of order, Confucianism highlights the importance of virtue (德 – *de*) too, as *the* mean to achieve and maintain such order. This means that, while the subjects have a duty to obey their ruler, he must treat them virtuously and operate only

out (p. 204) the Vedic concept of *rita* (macrocosmic order) as the "*earliest core concept of Hinduism, and thus of Hindu law*" whereas more recent concept of *dharma* represents "*every individual's duty"* (p. 208) in accordance with the greater order.

[157] See A.CHENG, *Storia del Pensiero Cinese I*, cit.

[158] On the general topic, I refer to YU RONGGEN, *General Survey on Confucian Legal Thought*, cit. For a very brief assessment of the incidence of Confucian thought on the Chinese legal system see also CHEN JIANFU, *Chinese Law: Context and Transformation*, Martinus Nijhoff Publishers, Leiden, 2008, 10-14

[159] See WONG, HUI-CHIEH LOY, *The Confucian gentleman and limits of ethical change*, in Journal of Chinese Philosophy, 28(3), 2001, 209-234.

[160] CONFUCIUS, *Dialogues*, Book n. 4 – Government through filial piety.

[161] *Ibidem*

[162] See CHEN JIANFU, *Chinese Law*, cit., 12

[163] So that a son must observe filial piety toward its father but he owes respect and obedience towards the king as well. On the other hand, the king must observe the filial piety towards the ancestors.

for their well-being and for the common welfare. Peng He[164] points out two fundamental concepts of the Confucian theory of government: benevolence (仁 – *ren*) and love (爱 – *ai)*. The first regulates the top-down relationships, the second the bottom-up ones. The two concepts effectively form the moral character of the rule.

The conceptualization of both the moral dimension and the reciprocity of hierarchical structures is not exclusive to Chinese culture. In Europe, as in China, such principle justified the existence and functioning of multiple legal orders consisting of separate but integrated socio-economic communities[165]. In medieval legal doctrines, such principle derived from the divine nature of sovereignty[166]. Furthermore, as already seen, social institutions such as guilds heavily invested in the welfare dimension of their activity, often performing religious functions[167].

Similarly, reciprocity founds the legitimacy of state power establishing, at the same time, a logical and moral "check" on it. In China, it led to the well-known theory of the Mandate of Heaven (天命 – *tianming*)[168].

The legal pattern which links ruling authority with some form of "bilateral relationship" between the ruler and the subjects, which may therefore "legally" revolt[169] if such "agreement" is broken, is known to Western legal and political thought since Sofocle's *Antigone*[170]. It was later incorporated into a principle of justice, which imposed that the ruler headed a Court of Justice and adjudicated litigations[171]. The activity of government was thus generally associated with the duty to exercise jurisdiction. The same view is shared by other eminent legal historians and helps comprehending that the medieval State revolved around a "rule of justice" rather than a "rule of law"[172]. The *princeps* was

[164] PENG HE, *Chinese Lawmaking: from non-communicative to communicative*, Springer, 2014

[165] See F.CALASSO, *Gli ordinamenti giuridici del rinascimento medievale*, Giuffrè, Milano, 1965; N.ARONEY, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, in Law and Philosophy, Vol. 26, 2007, 161-228; ZHOU LI-AN, *Incentives and Governance, cit.*

[166] See N.ARONEY, *Subsidiarity, Federalism*, cit.

[167] See G.RICHARDSON, *Craft Guilds and Christianity in Late Medieval England*, in Rationality and Society, Vol. 17(2), 2005, 139-189

[168] See A.CHENG, *Storia del Pensiero Cinese,* cit., 36-39.

[169] SHAO HUIFENG (邵慧峰), in 中西法律文化新论 (*New discussion about the Chinese and Western legal cultures*), *Zhishichanquanchubanshe*, Beijing, 2018, 26-31, discusses the relation between the heaven mandate and the "right" to revolution, as connected with the loss of the mandate.

[170] The subject was dealt with by F.HEGEL, in *Phänomenologie des Geistes* (1807), edited by GARELLI, Einaudi, 2008, 284-290.

[171] See H.BERMAN, *Law and Revolution,* cit., 296-297. The same author also highlights that this situation was the result of a conceptual merger between the military, economic and political administration.

[172] See P.GROSSI, *L'Europa del Diritto,* Laterza, Bari, 2007

supposed to displace justice since the proper legislative activity was not within his prerogatives. Instead, he had to abide by the principles of *ius naturae*, *ius gentium* and *ius civile*, only intervening by formulating legal provisions when the latter (i.e. *ius civile*) displayed a lack of discipline[173].

With the secularization of legal structure, the principle of hierarchy and its reciprocity have evolved into different forms depending on the legal systems considered. In the Chinese legal system, through the filter of Marxist legal thinking, it has been transposed into the concept of democratic centralism. In liberal-democratic legal orders, after having been confined within the limits of the representativeness of elected institutions, it has now reemerged in the issues of participatory/deliberative democracy and multilevel governance[174].

Fidelity: a social order founded on virtuous relationships within a hierarchy may function only when the subordination of a figure to another corresponds to an almost ethical duty of fidelity and assistance between each other. The problem of fidelity is central in legal anthropology[175], where it is usually employed to assess the relationship between different legal systems or, borrowing Moore's expression, "*semi-autonomous social fields*[176]" within a legal environment which should be, from a purely positivist point of view, unitary.

In China the problem of fidelity has been *the* issue of governance over the centuries. Ruskola[177], when assessing the concept of "corporation" as intended in Confucian thinking, points out that "*the aspirational norm of Confucianism is unity. All aspects of social life are to be regulated by the fiduciary logic of Confucian kinship relations*". Therefore, the key and basic institution in traditional Chinese legal thinking is family, whereas the governing logic, in economic relationships as well as in political ones, is trust, as embedded in social networks[178]. A corporation[179] is then to be regarded as an

[173] The idea that the princeps was required to respect a series of principles of law restraining his powers and legitimized by their divine origins passed on throughout the centuries and was upheld even by Bodin when assessing the extent of the legal prerogatives of a ruler.
[174] See E.KORKEA-AHO, *Adjudicating New Governance. Deliberative Democracy in the European Union*, Routledge, Oxon, 2015; E.CANNIZZARO, *Il Diritto dell'Integrazione Europea*, Giappichelli, Torino, 2015, 47-50.
[175] See R.SACCO, *Antropologia Giuridica,* cit., 166-172
[176] See S.MOORE, *Law and Social Change,* cit.
[177] See T.RUSKOLA, *What is a corporation?,* cit.
[178] See FEI XIAOTONG, *From the Soil,* cit.
[179] Ruskola (*What is a corporation?,* cit.) employs a very broad concept of corporation: he states that a corporation might be "*a moral person, a person/thing, a production team, a nexus of private agreements,*

association of men related to each other on the basis of fiduciary links and mutual fidelity, aimed at achieving a goal which is not the mere sum of the interests of the individuals, but something more, some kind of common good.

A look over the development of the European legal tradition shows that certain institutions were not an exclusive of imperial China. Instead, the kind of corporations which took form starting from the 11th Century, especially in Italy, can be regarded as a form of legal order addressing the issues of control and coordination over a community of people and employing fiduciary relationships in order to enforce its own rules. The idea itself of corporation as a "*collective entity*[180]" fits difficultly into the classic *free market* framework where "*the paradigmatic subject in the political and economic spheres is the individual*[181]". The corporation (i.e. the medieval corporation or guild as well as the multinational firm) holds in high regard the collective dimension of the rule, as well as the ethical one. Medieval corporations often pursued religious goals, as well as setting up schemes of social assistance[182]. In Europe, the idea of "collectives" as legal entities, empowered the exercise of jurisdiction over a community sharing common values and ethics, underwent the wave of enlightenment and was strongly weakened as the French revolutionaries upheld the vision of the "almighty legislature"[183].

In the Chinese legal environment, the enlightenment did not strike its blow over communitarianism and trust. Instead, China was deeply affected by Leninism, in terms of organization of social structures: as Ruskola highlights "*both Confucianism and socialism regard the collective as ontologically prior to the individual*[184]". This underlining analogy enabled Chinese communism to use Democratic Centralism in order to emphasize, in the processes of decision-making, the fiduciary dimension typical of Confucian corporations. In addition, Confucianism and Socialism share the idea of "*a single logic that ought to organize all spheres of social life*[185]". Thus, the legal and the moral spheres are not divided, and economic relations must closely follow the personal ones. In the Chinese context, especially with regard to economic entities and enterprises, the significance of

a city, a semi-sovereign, a (secular) God" criticizing the approach which identifies corporation with the *firm*.

[180] T.RUSKOLA, *What is a corporation?,* cit., 642

[181] *Ibidem*

[182] See F.CALASSO, *Gli ordinamenti giuridici,* cit., 138

[183] See R.SACCO, *Antropologia giuridica,* cit., 91-96

[184] See T.RUSKOLA, *What is a corporation?,* cit., 645

[185] See *ivi,* cit., 637

trust and fidelity as a source of enforceable provisions has often been associated with *guanxi*[186]. *Guanxi*, a concept that can hardly be defined, given its profound implications with the Chinese culture[187], manifests itself as a net of personal relationships, founded on mutual trust, which are of the utmost importance in the governing bodies of enterprises, or with regard to the dialectic between economic entities and public authorities. The level and depth of connection of managers affect strategic decisions made by entities and authorities[188].

Efficacy: the third and last element of the anthropological filter is efficacy. Efficacy is a pervasive concept: it affects the legitimacy in the sense that a power, in order to be legitimized, from an anthropological point of view, needs to be effective in the eyes of its subjects. In our tripartite scheme of evaluation (comprising hierarchy and fidelity), it represents the logic and rational complement to the moral attachment of the legal rule, thus boosting its self-enforcing capacity.

To assess the role of efficacy within the Chinese legal tradition (in comparison with the European one), the uneludible reference is to the thought and work of François Jullien, who vastly explored the history and development of this concept in China and in the West[189]. According to Jullien, classic Greek philosophy, and especially Aristoteles, contributed to the development of a western idea of efficacy based essentially on two phases. In the first one, the goal of the human will is turned into an abstract model, into a

[186] The literature on the issue is huge and, more often than not, focuses on assessing the impact of personal connections and fiduciary relationships on business. See, for instance, T.GOLD et al., *Social Connections in China: Institutions, Culture and the Changing Nature of Guanxi*, Cambridge University Press, Cambridge, 2002; LUO YADONG et al., *Guanxi and Organisational Performance: A Meta-Analysis*, in Management and Organization Review, Vol. 8(1), 2011, 139-72; U.BRAENDLE et al.., *Corporate Governance in China - Is Economic Growth Potential Hindered by Guanxi?*, April 25, 2005, available at the link http://ssrn.com/abstract=710203. For a more socio-anthropological approach to the issue, see YINA MAO, *Indigenous research on Asia: In search of the emic components of guanxi*, in Asia Pacific Journal Management, Vol. 29, 2012, 1143-1168

[187] The importance of social relations in corporation's management is an issue of study and research not confined to China. As far as Japan is concerned, see, for example, T.SEKIGUCHI, *How organizations promote person-environment fit: Using the case of Japanese firms to illustrate institutional and cultural influences*, in Asia Pacific Journal of Management, Vol. 23(1), 2006, 47–69. With regard to Korea, see instead H.YEUNG, *Change and continuity in Southeast Asia ethnic Chinese business*, in Asia Pacific Journal of Management, Vol. 23(3), 2006, 229–254

[188] Such connection functions on a duel level: on the first one the enterprise (or, for instance, local government) uses its connection in order to obtain favourable treatments, exemptions and other kinds of benefits. On the second level, though, well-connected entities, due to their connection, are required to comply with advises, directives, requests and soft orders coming from each other

[189] See in particular F.JULLIEN, *La propensiom des choses. Pour une histoire de l'efficacitè en Chine*, Seuil, Paris, 1992; F.JULLIEN, *Trattato sull'efficacia*, Einaudi, Torino, 1998; F.JULLIEN, *Pensare l'efficacia in Cina e in occidente*, Laterza, Bari, 2006

"plan" laying out the details of what should be and should not be done in order to reach one's purpose. In the second phase, the plan must be enacted, meaning that human action must follow it, regardless of the changing environment. The apex of this model's success was undoubtedly reached in the 18th Century, when efficacy was, scientifically, identified with strict rational planning. From a legal point of view, such tendency coincided with the triumph of codification. It also meant the exaltation of contract as a mean to regulate relationships without being conditioned by elements pertaining to the moral and ethical sphere as well as, ultimately, to the *status* of the parties[190]. In socialist legal thinking, this western conception of efficacy was practically embodied by tendencies towards scientific planning, i.e. a legal instrument able to (theoretically) manage through an entire country's economy through fixed quota and orders[191].

The western, enlightenment-inspired idea of efficacy disregards the impact of circumstances or (to employ a military concept) "attrition"[192]. Scientific planning of human activities and detailed regulation framework (both private and public) are not sensible to contingencies, so that even is reality should greatly differ from the model, the best strategy is to nevertheless follow the plan[193].

On the banks of the Yellow River, history and philosophy led to the development of a much different idea of efficacy. Given the belief in a cosmic order, comprising both nature and humans within it, creating a model would mean stretching the nature into something inexistent. Instead, an effective action means to be able to act on the basis of the circumstances presenting at the very moment of the action, "*hic et nunc*". Efficacy is related to the capacity of foreseeing what will be the outcome of an occurrence once it happens and change one's own strategy according to this. In legal perspective, this means that law is a dynamic concept. Both the content and enforcement of legal provisions have

[190] The analysis is obviously an oversimplification of the issue, which would require and deserve a thorough explanation. Nevertheless, it could give an idea of what changes occurred in the legal culture between the 18th and the 19th Century, as western societies shifted from *status* to contract, as emphasized by H.SUMNER MAINE in *Ancient Law, Its Connection with the Early History of Society, and Its Relation to Modern Ideas*, John Murray, London, 1861, 170

[191] Indeed, soviet plans' quotas and orders were developed by central authorities on the basis of incomplete and sometimes false data provided by local economic entities, which in turn had developed a net of informal relations through which they procured and exchanged materials and goods. On the issue, see B.GRANCELLI, *Le relazioni industriali di tipo sovietico*, Franco Angeli, Milano, 1986

[192] References to military strategy are particularly useful in order to comprehend how, according to Jullien, efficacy is intended in the West. He specifically refers to Von Clausewitz and its "Vom Kriege" (1832)

[193] This could explain how, in liberal theories of contract, the respect of the contractual will tends to prevail over objective equity.

to change on the basis of the instances brought on by the subjects involved[194]. Therefore, a contractual relationship needs to be able to change its content and terms depending on the circumstances and to take into account not only the interests of the parties involved, but also the necessities of the whole community which the parties live and operate in[195].

5. The application of the filter over economic dynamics

The economic object of the anthropological filter is the issue of allocation. The concept, interpreted in light of the moral character of planning norms, acquires the meaning of resource "sharing" among the different components of society. "Sharing" (分 – *fen*) reflects the idea of resource partition but also of hierarchy[196] and is linked, in the evolution of Chinese legal culture, to the idea of "just interest" (义利 – *yili*) or "just gain" (义胜利 – *yishengli*) as the basic principle of the harmonious path toward the enrichment of the whole country (富国 – *fuguo*)[197].

The archetypical application of such logic addresses the dynamics of land property and production, so that the basic institution involved in the development process is the household as actual controller of land(s)[198]. The aggregation of households allows the evolution of villages governed by lineage dynamics and, when institutionalized, owners of the common land[199].

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[194] In Chinese thinking, "*different flavors no longer stand in opposition to each other but, rather, abide within plenitude*" (see F.JULLIEN, *In Praise of Blandness, Proceeding from Chinese Thought and Aesthetics*, Zone Books, New York, 2004, 24). The same author highlights how the major cultural formants of Chinese history (i.e. Taosim, Confucianism and Buddhism) refused abstraction while upholding a notion of "blandness" which, in its neutral and harmonic nature, "*unfurls and expands this world (the only one): drained of its opacity, returned to its original, virtual state, and opened up — forever — to joy*". (see *ivi*, cit., 25)

[195] The law on contracts, as a consequence, tends to empower authorities to sometimes intervene to regulate the approval (Art. 44) and the prosecution (Art. 127) of contracts. On the influence of Chinese traditional legal culture over the concept of contract see also M.TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Cedam, Padova, 2004.

[196] See A.CHENG, *Storia del Pensiero Cinese I*, cit., 223

[197] This logic is especially reflected in the legal thought of Xunzi (荀子). See YU RONGGEN, *General Survey on Confucian Legal Thought*, *cit.*, 518 ff.

[198] See ZHANG TAISU, *Moral Economies in Early Modern Land Markets*, in Law & Contemporary Prob., Vol. 79, 2017, 107 ff.; ZHANG TAISU, Cultural Paradigms in Property Institutions, in Yale J. Int'l L., Vol. 40, 2016, 347 ff.

[199] The village is, historically, the basic institution of Chinese economic development, as famously upheld by Fei Xiaotong (see FEI XIAOTONG, *From the Soil, cit.*). In Europe, instead, the emancipation of lands from feudal control was one of the reasons behind the evolution of the City as new legal and economic institution (see F.CALASSO, *Gli ordinamenti giuridici*, cit.).

The rural origin of the concept of moral economy partially explains the general hostility that some cultures have reserved to economic activities such as trade[200] and why, in neo-classical perspective, economy should be detached from moral influences[201].

In practice, however, economic institutions carry out regulatory and coordinative functions often within moral schemes of conduct[202]. State law cannot ignore them.

How therefore can it deal with them? One approach is exclusionary and the other one is inclusive. The first one is integrated into the classic conception of the liberal state. Liberal law establishes subjective rights to relinquish its own objective right– as a collective institution – to interact with other entities in the government of the economy or of certain parts of the economy[203].

Another approach is instead inclusive. In this case, State law seeks to exert its influence over the economic development of each structured group.

The inclusion of intermediate social bodies' economic role into the legal framework of state law usually follows the pattern of integration without annihilation[204]. Limiting our analysis to the 20th and 21st Centuries and to Europe and China, we may observe, I would argue, three different institutional logics trying to prove justice and efficiency of state control over the economy.

The first example concerns the evolution of the so-called "corporatist" model of the economy. Such model, in its theoretical expression, aims at establishing "*an order, that is, somehow founded neither on state power nor on individual liberty, but on the*

[200] In the traditional Confucian view, just interest arises from the soil and rural production, as carried out through the enactment of household and villages hierarchies, is the real fiber of moral economy. See, YU RONGGEN, *General Survey on Confucian Legal Thought*, *cit.* 518 ff.; CASTELLUCCI, *Homo oeconomicus sinicus*, in I.CASTELLUCCI (edited by), *Saggi di Diritto Economico e Commerciale Cinese*, cit., 5-19.

[201] On the topic see J.CARRIER, *Moral Economy: What's in a name*, in Anthropological Theory, Vol. 18(1), 2018, 18-35

[202] At least one contemporary example explicitates such connection: Islamic Finance. The legal regime of Islamic finance is aimed at integrating regulation of financial activities with the conduct requirement of Islamic Law. On the topic, see HASSAN, MOLLAH, *Islamic Finance*, Palgrave Macmillan, Cham, 2018.

[203] Under the shield of property rights and contracts, households, corporations and other social groups may continue to carry out their own development strategies and allocate their resources according to their internal hierarchies and rules.

[204] This occurs because the legal dynamics among different institutions may never fully eradicate the influence, the nature and the conceptual independence of lower institutions subordinated to higher ones (e.g. the State). See S.ROMANO, *L'ordinamento giuridico,* cit. A similar principle is to be found in Leninist constitutional thought. On the topic, see P.BEIRNE, A.HUNT, *Law and the Constitution of Soviet Society: The Case of Comrade Lenin*, in Law & Society Review, Vol. 22(3), 1988, 575-614.

autonomy of guild-like intermediary bodies, such as unions and professional associations"[205].

Different from the logic of proper corporatism is that of state capitalism. Here, the state integrates itself in the economy by identifying, at least partially, with the market operators, thus establishing State-Owned Enterprises as well as acquiring stakes in formally private enterprises or engaging into economic transactions with private operators. State capitalism is an economic model which has been associated both with Europe[206] and China[207]. Its underlying logic still plays an important role in the Chinese legal system and therefore deserves further consideration.

One of the most advanced and, I would argue, still modern theorizations of state capitalism is the one laid out by Lenin in its "Tax in Kind"[208], written at the eve of the New Economic Policy (NEP). Lenin does not consider state capitalism to be an exclusive feature of socialism. He traces its first modern example in German war economy[209].

[205] See J.WHITMAN, *Of Corporatism, Fascism, and the First New Deal*, in The American Journal of Comparative Law, Vol. 39(4), 1991, 747-778, 752. In the European experience, corporatism is usually associated with fascist conceptions of state and economy, but this is indeed not true. The fascist legal theories actually used corporatism to build up an economical ideology it did not have (J.WHITMAN, *Of Corporatism*, cit.). Between the 19th and the 20th centuries, the role of concentration and cartels in the European economy (J.WHITMAN, *Of Corporatism,* cit.; C.FREEDEMAN, *Cartels and the Law in France before 1914*, in French Historical Studies, Vol. 15(3), 1988, 462-478) was widespread and incisive, to the point that Marxists scholars have deemed corporatism to be a stage in the decline of bourgeois capitalism (J.WHITMAN, *Of Corporatism,* cit.). The effort of fascist doctrine was indeed aimed at upholding the primary role of the State in coordinating the relation between industrial groups and associations and workers' unions, thus making the labor relation as the core of the corporatist structure (H.STEINER, *The Fascist Conception of Law*, in Columbia Law Review, Vol. 36(8), 1936, 1267-1283; J.ADAMS, *Some Antecedents of the Theory of the Corporative System*, in Journal of the History of Ideas, Vol. 3(2), 1942, 182-189). Fascist corporatism, indeed, seems to focus more on the aspect of fidelity to state economic rule than on its efficacy. This element distinguishes it from the traditional conception of corporatism, which in the coordinative rule of state *and* intermediate social bodies sees the realization of a sort of subsidiarity. This logic was at the basis of the functioning of Chinese merchant guilds, which still at the beginning of 20th Century retained relevant powers of management and even adjudication over their members (R.WAGNER, *Alternatives to Magistrate Justice: Merchant Guild Dispute Resolution and the Foreign Trader Driven Litigation and Arbitration Reforms of Late Imperial and Early Republican China*, in Journal of Comparative Law, Vol. 4(2), 2009, 257-290; T.RUSKOLA, *Legal Orientalism,* Harvard University Press, Harvard, 2013).

[206] See F.GALGANO, *Diritto ed Economia alle Soglie del Nuovo Millennio*, in Contratto e Impr., Vol 1, 2000, 189.

[207] See B.LIEBMAN, C.MILHAUPT (edited by), *Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism*, Oxford University Press, Oxford, 2015

[208] See V.LENIN, *Collected Works*, Vol. 32, Progress Publishers, Moscow, 1965, 329-365

[209] Notwithstanding, employing a Marxist perspective, he argues that State Capitalism advances the interests of the ruling class. A class that in 1914-1918 Germany was the Junkers bourgeois. In Soviet Russia, instead, the proletariat had achieved full political power and, thus, State Capitalism was an ideologically feasible mean to achieve the transition to socialism and communism.

Lenin distinguishes four basic forms of state capitalism, based on four legal and economic relations. In first place, a concessionary relation, founded on the "*contractual relationship between the Soviet state and foreign capitalists who could help run those parts of the Soviet economy that the state was unable to manage*"[210]. In second place, cooperative trade relationships, where the state engages in economic transactions with cooperative societies and household industries. In third place, a commission-agent relationship, where the state "*enlists the capitalist as a merchant and pays him a definite commission on the sale of state goods and on the purchase of the produce of the small producer*"[211]. In fourth place, a lease relationship, similar to the concession, where the State "*leases to the capitalist entrepreneur an industrial establishment, oilfields, forest tracts, land, etc., which belong to the state, the lease being very similar to a concession agreement*"[212].

The legal premise of each one of such relations is state supervision and control[213].

Structurally, the first and the fourth relations connect to the archetype of the public contract or "administrative contract" as expressed in legal types as concessions and franchise agreements, public procurement or public-private partnerships. The third relationship, instead, design a scheme where the state pays a private subject to carry out certain economic activity (i.e. sale of state goods or purchase of products). The same logic, built upon the idea of private economic operators as state economic agents, justifies financial measures such as subsidies, grants, tax benefits and preferential financial measures[214].

In China, Lenin's theories on state capitalism circulated after being filtered and re-interpreted by Stalin, which emphasized the element of state control in supplying economic operators with resources and in selling final products[215]. The main advocate of

[210] See HUA-YU-LI, *Mao and the Economic Stalinization of China*, Rowman & Littlefield, Lanham, 2006, 84

[211] See V.LENIN, *Collected Works*, Vol. 32, *cit.*

[212] *Ibidem*

[213] See HUA-YU-LI, *Mao and the Economic Stalinization of China*, *cit.*, 84

[214] On a broader level, it also founds direct state property of economic operators: in this case, the state creates its own agent, detaching itself from the perspective of legal personality but putting economic entities in charge of pursuing public economic development goals.

[215] See HUA-YU-LI, *Mao and the Economic Stalinization of China*, *cit.*, 85 ff. The impact of Stalin's ideas over the development of Chinese socialist legal culture was and still is significant, in the first place because of the direct influence that Stalin's constitutional thought had on the Constitution structure of modern China; in the second place because of the emphasis on the notion of State interest, which is still a relevant feature of contemporary Chinese law. Further proof of Stalinist influences over Chinese thought is the fact that Chinese Marxism scholars consider Stalinism as a relevant phase of the development of socialist thought, refusing the ideological destruction of Stalinism which in the USSR and the West followed the 20th CPSU

early Chinese state capitalism was Zhang Wentian[216], whose economic policies also inspired the first reorganization of Chinese rural economy after the revolution. Several decades later, Lenin's stance on state capitalism and its theoretical distinction between state capitalism economic and legal relations inspired the opening up and reform process[217].

In the last four decades, liberal democracies in Europe, previously embracing (at least partially) state capitalist theories, started linking their economic function to that of external regulators. The change was affected by solutions experimented in the United States since the 1930s and revolved around a notion of economic as "corrector" of market failures[218]. The regulatory state emphasizes the dimension of efficiency and widely relies on standardizing rules, setting standards of behavior concerning the exercise of economic activities.

The regulatory function, however, has an inherent limit. As it has been noted, it is efficient only as long as there is no need for resource allocation[219]. When legal processes affect such allocation, directly or indirectly (e.g. through competition law evaluations) I do not think it is possible to discuss of regulatory functions anymore.

6. Planning as a formant

Planning rules in a strict sense regard organizational measures on planning procedures, content, direct implementation and enforcement. Planning in broad sense, however, includes all legal rules involving the definition of economic transactions, since these rules and their interpretation may be affected by planning. Such influence is in some cases explicit: the PRC Measures for the Administration of Overseas Investment of Enterprises require the compliance of Foreign Direct Investments (FDIs) of Chinese enterprises with

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Congress in 1956. See SONG BINGWU (宋秉武), ZHAO JING (赵菁) YANG DONG (杨栋), 马克思主义法律思想研究 (*Research on Marxist Legal Theory*), 中国社会科学出版社 (China Social Sciences Press), Beijing, 2017, 189-210.

[216] Zhang Wentian had been a provincial party secretary operating in northeast China in the 1940s, in areas controlled by communists since the end of the second world war. See HUA-YU-LI, *Mao and the Economic Stalinization of China*, *cit.*, 82 ff.

[217] See A.PANTSOV, S.LEVINE, *Deng Xiaoping: a revolutionary life*, Oxford University Press, New York, 2015, 373.

[218] See LAZZARA, *La funzione regolatoria: contenuto, natura e regime giuridico*, in M.CAFAGNO, F.MANGANARO, *L'intervento pubblico nell'economia*, Firenze University Press, Firenze, 2016, 118

[219] *Ibidem*

development plans[220]. Regulation n. 1303/2013 on the European Structural Funds declares their functional affiliation with the Europe 2020 Strategy. In other cases, the connection is implicit and derives from the reference that statutes make to "national interests" and "national development"[221]. Where a national development plan is issued, such plan becomes, as an ideological proposition, the blueprint of national development interests.

Planning rules are therefore a complex and diverse ensemble, affecting different areas of law. This depends, in my opinion, on two fundamental reasons. In the first place, the structure of the planning norm, which is open, dynamic and founded on the link between purpose and mean. Given the purpose, planning, through organizational measures, may either establish a new rule or refer to an existing one in order to reach the goal pursued. In the second place, the state, which aims at coordinating the economy, regards planning as the instrument of coordination and not as the outcome. The ultimate incidence of planning must always concern the socio-economic relations between subjects, both public-private and private-private relations.

Is planning a legal formant?[222]. In a socialist legal system, the scholar would be tempted to consider it an expression of declamatory formant[223], given the heavy ideological implications of plans. Indeed, the same conclusions could be drawn when referring to plans such as the Bolivian one, which explicitly aims at representing the socio-economic dimension of the (non strictly socialist) *buen vivir* ideology[224] as enshrined in the constitution[225].

The pervasive references to planning in legal sources and/or documents justifies, however, an inquiry into the nature of planning as an autonomous formant.

[220] See Art. 26

[221] This is for instance the case with the PRC Anti-Monopoly Law

[222] On the definition of legal formant, see R.SACCO, *Introduzione al Diritto Comparato*, Utet, Torino, 1992.

[223] *Ibidem*

[224] The current Bolivian Five-Year Plan (2016-2020) sets the *buen vivir* as both the horizon and the framework where national development strategies have to operate.

[225] The *buen vivir* expression is alternatively rendered with *suma qamaña* and in this form is mentioned in Art. 8 of the Bolivian Constitution. It represents a life ideology which criticizes the traditional notion of progress and development. On the topic, see C.BARIE, *Nuevas narrativas constitucionales en Bolivia y Ecuador*, in Mexico, Vol. 2, 2014, 9-40; N.POSTERO, *The Indigenous State*, University of California Press, 2017, 91 ff.

Such conclusion is to be tested in two different ways. On one hand, on an anthropological level, we must investigate the effectiveness of the planning rules over subjects' conduct, according to the filter I have previously laid out[226].

On the other hand, the nature of planning as a formant of the legal order may be verified through the levels of integration between planning and other formants. On the basis of integration or dissociation between formants we may measure the incidence as well as the role of development planning. The analysis must therefore clarify the references that legislatures, courts and scholars make to planning and plans as instruments or notions to shape other concepts of economic law.

7. Planning law and its categorization. Economic Law

In western legal thinking, economic and development planning were not usually associated with specific legal categories. The very concept of "economic law" was not considered an autonomous legal discipline, but a mere group of legal norms holding relevance for the functioning of the economic system[227].

The Chinese legal literature, instead, unanimously includes planning in economic law textbooks and regards it, when studied in legal perspective, as economic law[228].

But what is economic law?

Liberal democracies still clings, at least partly, to the dogma of separation between law and the economy as inherited by the first industrial revolution and the birth of modern capitalism[229].

Thus, the classic liberal approach regulates economic transaction through private law (i.e. civil and commercial law). Economic law, thus, is not a subject in the strict sense and may only be thought of in its objective dimension[230].

[226] This role is particularly evident in legal orders lacking or refusing positive written law. In revolutionary orders such as 1918-1921 Soviet Russia planning might either integrate with customary relationships commonly followed within the order or establish by itself customary law, given that the strength and legitimacy of the planning authority is high enough.

[227] See M.GIANNINI, *Diritto Pubblico dell'Economia*, Cedam, Padova, 1980, 17

[228] See ZHANG SHOUWEN (张守文), 经济法学 (*Economic Law*), Peking University Press, Beijing, 2018

[229] See F.GALGANO, *Diritto ed Economia*, cit.

[230] See G.DI GASPARE, *Diritto dell'Economia e Dinamiche Istituzionali*, Cedam, Milano, 2015, 3-5

The significance of public intervention in the economy in the legal-constitutional traditions of certain western European countries [231], however, justifies a different approach.

Scholars, in particular, emphasized the inherent "institutional" dimension of economic law, revolving around the relations both internal and external, that social bodies shape develop to exercise, in concrete, economically relevant activities[232]. The orientation of such relational activities is determined by the "economic constitution"[233] of a legal order, i.e. those rules, founded over constitutional principles but embedded in living law[234], which inspire economic activities and their degree of regulation.

This theory echoes the institutional theory of law and is able to explain that, in global economies, the institutional relations are the core of economic regulation[235].

In this context, the notions of planning and programming[236], due to their functional connection with such economic constitution, identify public coordination activities holding an imperative, and not merely programmatic, character.

Economic Law as a conceptual category was first theorized by Soviet legal science, during the NEP. Its original purpose was, indeed, the solution of a dilemma, i.e. the reconciliation of a) the rejection of law as a product of the bourgeois capitalism[237] and b) the restoration of law following the legal nihilism which had marked the war communism season[238]. In its embryonal phase, soviet economic law relied on two premises: i) the prevalence of economic dynamics over legal relations[239]; ii) the prevalence of the public element over the private one, so to deny a general freedom of contract[240].

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[231] France and Italy are just two of the main examples and are also the object of a quite comprehensive research about the notion of "programming" in law. See R.CUONZO, *La programmazione negoziata nell'ordinamento giuridico*, Cedam, Padova, 2007

[232] See G.DI GASPARE, *Diritto dell'Economia,* cit., 7-13

[233] See *ivi*, cit.

[234] On the notion of living law, see L.MENGONI, *Diritto vivente*, in Digesto civ., Utet, Torino, 1990.

[235] Incidentally, as I will also note later, the institutional dynamics among economic institutions enhance the role of soft law sources, which are often the product of such interaction.

[236] In Western legal culture, the two terms came to represent the same concept, as reported in R.CUONZO, *La programmazione negoziata*, cit., 7

[237] See H.BERMAN, *The restoration of Law in Soviet Russia*, in The Russian Review, Vol. 6(1), 1946, 3-10, 3-6; G.GOIKHBARG, *Economic Law*, Moscow, 1924, Vol. 2, 8-19

[238] *Ibidem*; see also N.GUBSKY, *Economic Law in Soviet Russia*, in The Economic Journal, Vol. 37(146), 1927, 226-236

[239] See H.BERMAN, *The restoration of Law in Soviet Russia*, cit.; P.BEIRNE, P.SHARLET, *Pashukanis: Selected Writings on Marxism and Law*, Academic Press, London, 1980, 235 ff.

[240] See A.OSTROUKH, *Russian Society and its Civil Codes: A Long Way to Civilian Civil Law*, in Journal of Civil Law Studies, Vol. 6(1), 2013, 373-400

On these basis, Soviet Economic Law concerned the definition of allowed economic relationships between subjects, their structure and their social scope. Special economic laws, together with the Civil Code of 1923 created a legal complex intended to encompass all socio-economic relations and transactions[241]. The fundamental principle enshrined in § 1 of the Civil Code constituted a sort of re-interpretation in socialist perspective of Duguit's ideas[242], stating that "*Civil rights enjoy the protection of the State, except when they are used contrary to their economic and social purpose*"[243].

Economic Law, as intended by several of the most respected soviet legal scholars (among them Pashukanis and Goikhbarg) was, in fact, the only relevant body of law in a socialist socio-political order. It restored certain institutes abrogated after the October Revolution, such as successions and donations[244], according to the pursuit of limited free market advocated by the NEP. On the other hand, it implemented relevant passages of Lenin's theories by defining the regime of lease and concessions of state property to private subjects[245].

At the same time, however, scholars were conscious that economic law was essentially a transitionary legal regime, designed to favor the accumulation of the necessary capital and promote the transition to full communism, thus leading to the gradual "withering away" of both the state and its law[246], to be substituted by social relationships between the subjects of the community.

This conception of Economic Law was overturned by the establishment of Stalinist rule and centralized planning. Rejection of law was limited to bourgeois liberal law, while law issued by the new socialist state was fully legitimized and promoted since it constituted the instrument to achieve the development of socialism and, in a future perspective, the transition to communism[247]. Therefore, economic law, distinguished from civil law,

[241] Significantly, the 1923 Civil Code did not regulate family relations, later object of the 1926 Family Code which relegated marriage and divorce to the sphere of private agreements, displaying the disinterest of the State in conducing such legal provisions under the sphere of general civil law. See H.BERMAN, *The Restoration of Law in Soviet Russia*, cit., 5; A.OSTROUKH, *Russian Society and its Civil Codes*, cit.

[242] See P.BEIRNE, P.SHARLET, *Pashukanis: Selected Writings*, cit., 166 ff.

[243] Furthermore, § 4 stated that "Rights are granted for the purpose of developing the productive forces of the nation", reinforcing the idea of a functionalization of subjective rights. On the topic, see N.GUBSKY, *Economic Law in Soviet Russia*, cit.

[244] See A.OSTROUKH, *Russian Society and its Civil Codes*, cit.

[245] See N.GUBSKY, *Economic Law in Soviet Russia*, cit., 229-230. At the same time, Soviet jurisprudence developed the concept of "economic impossibility", meaning that when agreements leads to gain and/or losses contrary to the economic aims of the State, they are void (*ibidem*).

[246] See H.BERMAN, *The restoration of Law in Soviet Russia*, cit.

[247] *Ibidem*

became the backbone of soviet economic planning. It regulated the legal regime of State enterprises[248] and thus, in a centralized planning, almost the totality of economic entities, from the mid-1930s to the fall of the Soviet Union.

In the late 1970s, Soviet economic law theory entered China, when Chinese socialism was about to implement limited market mechanisms[249]. Chinese legal scholars started discussing an "economic law" (经济法 – *jingjifa*)[250], on the premise of a necessary detachment from the rule of men (人治 – *renzhi*)[251] which had characterized Maoist economy in favor of an economic rule of law (经济法治 – *jingjifazhi*)[252]. At first, the system relied on economic legislation rather than on a theoretical approach to economic law and produced a remarkable number of more or less comprehensive laws and other provisions during the 1970s and the 1980s[253]. Such occurrence, while strengthening the idea of an economic regulatory dimension, led some scholars to perceive the notion of economic law as weak or non-existent[254].

However, when the socialist market economy (社会主义市场经济 – *shehuizhuyishichangjingji*) became the official economic doctrine of the state, economic law found its own basis in the reconciliation of socialism and market. Therefore, economic law covered those fields of law embodying the transition from purely planned economy to market socialism, such as SOEs law, TVEs law, Rural Economic Organization law, etc.[255]. The fundamental premise which inspired the development of Chinese economic law, in the works of eminent scholars such as Shi Jichun, is the inherent

[248] See G.CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, Cedam, Padova, 1969.

[249] See SHI JICHUN (史际春), 在改革开放和经济法治建设中产生展的中国经济法学 (*China's Economic Law in the process of opening up and reform and construction of an economic rule of law*), in 法学家 (*faxuejia*), Vol. Z1, 1999, 199-205, 200-201.

[250] See GUAN BEI (关怀), 经济立法与经济司法 (*Economic legislation and economic judiciary*), Shanghai People's Press, Shanghai, 1981

[251] See SHI JICHUN, *China's Economic Law in the process*, *cit.*, 200

[252] *Ibidem*

[253] Such as the Law on Foreign Investments (1979) and the Law on Economic Contracts (1981). Furthermore, several special regulations and administrative provisions were issued to establish and manage the newly created Special Economic Zones (经济特区). See *ivi*, cit., 201

[254] See SHI JICHUN (史际春), LI QINGSHAN (李青山), 论经济法的理念 (*On the notion of Economic Law*), in 华东政法学院学报 (*huadongzhengfaxueyuanxuebao*), Vol. 27(2), 2003, 42-51, 45

[255] See SHI JICHUN (史际春), 我国基本集体经济立法刍议 (*On the basic collective economic legislation of China*), 中国法学 (*zhongguofaxue*), Vol. 6(2), 1992, 33-41. Later on, newly issued legislation in matters such as competition and consumer protection was associated with economic law.

social character of economic law[256]. Its fundamental scope lies in the harmonization of economy dynamics with collective interests represented by the state[257].

Economic law regards horizontal and vertical legal relations, as well as domestic and international legal relations[258]. This is what distinguishes economic law from both civil and administrative law[259]. Furthermore, economic law is inherently connected with the interests expressed by each state[260], so that it has no pretense of universality. Chinese scholars went so far to reconstruct a logic between the historical dimension of Chinese economic management and modern economic law for the socialist market economy[261]. The ethical identification between home and country which connoted the patriarchal origins of the household economy of the Chinese empire is reflected in the economic law which serves the interest of the nation-state[262]. Shi Jichun and Zhao Zhonglong point out six fundamental elements composing the legal rule[263]: usage (习惯 – *xiguan*), faith (信仰 – *xinyang*), moral and philosophical ideas (道德和哲学观念 – *daodehezhexueguannian*), adjudication (裁判 – *caipan*), scientific discussion (科学讨论 – *kexuetaolun*) and legislation (立法 – *lifa*). The combination of these elements forms the comprehensive system of the rule of law according to Chinese economic law scholars. Economic Law corrects market failures but, at the same time, must promote the fair distribution of resources through professional competence and ethical credibility of the governing bodies[264].

How to translate such principles into a comprehensive legislation? The first attempts at a codification of the general principles of economic law occurred in the mid-1980s[265] but bore no consequences. Therefore, economic legislation has always been quite

[256] See SHI JICHUN, *China's Economic Law in the process*, cit., 199-200
[257] *Ibidem;* SHI JICHUN, LI QINGSHAN, *On the notion of Economic Law*, cit., 45
[258] See SHI JICHUN, LI QINGSHAN, *On the notion of Economic Law,* cit.,; CHENG XINHE (程信和), 经济法通则原论 (*An introduction to the general principles of economic law in China*), in Local Legislation Journal, Vol. 4(1), 2019, 54-72
[259] *Ibidem*
[260] *Ibidem*
[261] See SHI JICHUN (史际春), ZHAO ZHONGLONG (赵忠龙), 中国社会主义经济法治的历史维度 (*The historical dimension of China's socialist economic rule of law*), in 法学家 (*faxuejia*), Vol. 5, 2011, 9-19
[262] *Ibidem*
[263] See *ivi*, cit., 13
[264] See *ivi*, cit., 13-14
[265] An entire generation of older jurists, such as Yang Ziyan (杨紫烜), Liu Wenhua (刘文华), Xu Jie (徐杰), Li Changyu (李昌麒) etc. proposed the establishment of an "Economic Law General Outline" (经济法纲要). See CHENG XINHE, *An introduction to the general principles*, cit., 54

fragmented[266], comprising more or less comprehensive special laws as well as regulations, notices, opinions, etc.

In 2018 a new effort by scholars – mainly Cheng Xinhe (程信和) – produced a proposal for the "General Principles of Economic Law" (经济法通则 – *jingjifatongze*)[267]. The purpose of the Principles would be to legally define the rules which adjust the economic relations generated during the life and operations of the national economy, to pursue the overall economic interests of the society[268]. The scope of such General Principles would be to offer a framework for the exercise of state powers in the field of public economic management, as well as to provide a partition of the specific fields of economic law and existing economic legislation. At the same time, the General Principles would "codify" in legal form rules that, still today, are incorporated in policy documents and other regulatory acts[269].

The second part of the Proposal focuses on the different partitions of Chinese economic law. We distinguish fields concerning economic regulation, economic direction and coordination and supervision. Economic direction and coordination concerns, first and

[266] See *ivi*, cit., 55-56
[267] See *ivi*, cit., 54-55
[268] See *ivi*, cit., 55-56
[269] *Ibidem*. In the first part, the proposal discusses six major topics, each corresponding to a chapter: i) basic provisions (基本规定 – *jibenguiding*); ii) the economic system as a whole and in organizational perspective (经济制度和经济体制 – *jingjizhiduhejingjitizhi*); iii) the subjects of the relations between economy and law (经济法律关系主体 – *jingjifaluguanxizhuti*); iv) the rights of the subjects in economic law (经济法中主体的权利 – *jingjifazhongzhutidequanli*); v) The actions of economic law (经济法律行为 – *jingjifaluxingwei*); vi) the responsibility in the system of economic law (经济法中的责任 – *jingjifazhongdezeren*).
Of particular interest is the fourth chapter, which proposes the establishment of three groups of rights referred to State, Enteprises and Individuals: a) economic development rights (经济发展权 – *jingjifazhanquan*) (Art. 51), concerning the right to participate and engage in "economic construction" (经济建设 – *jingjijianshe*) (Art. 52) as well as to enjoy the benefits of the consequent development; b) economic distribution rights (经济分配权 – *jingjifenpeiquan*), concerning the right to enjoy, in concrete, development benefits and income growth; c) economic security rights (经济安全权 – *jingjianquanquan*) (Art. 53), concerning the right to maintain economic order, control risks, safeguard the safety of both public and private property. These rights, however, have to be balanced with the comprehensive management power of government authorities to regulate, supervise and provide services for national economic activities, as laid out in Art. 61. This last article, integrated with the others, expresses the general part of Chinese economic law theory, which may also be defined as Public Economic Management, regarding the powers and the general instruments at disposal of the government to ensure the balanced development of economic activities according to public purposes. On the concept of Public Economic Management see ZHU SINGWEN, HAN DAYUAN, *Research Report on the Socialist Legal System with Chinese Charateristics*, Vol. 4, Enrich Professional Publishing, Singapore, 2014.

foremost, economic planning and industrial policy law as well as subjects directly related to allocation of public resources such as tax law and investment law.

Planning rules, therefore, find their place within Economic Law. Furthermore, the proposal argues for a legal connotation of planning, for the existence of a "planning law" consisting, eminently, of "economic procedure law" (经济程序法 – *jingjichengxufa*), i.e. procedural rules[270].

The theoretical debate over Chinese economic law reached, so far, conclusions very similar to the ones embraced by some Western scholars. The emphasis on the social fiber of economic law echoes the institutional theory of economic law. Furthermore, subjects usually included in the (few) western economic law handbooks[271], are since long time considered part of economic law by Chinese scholars.

The relational and functional approach is fully embraced in Chinese legal culture and this renders economic law an independent and conceptually detectable field of law. In the west, and especially in civil law European countries, the legacy of the traditional "objective theory" of economic law favors the fragmentation of regulatory provisions among several theoretical branches[272]. It also, indirectly, impairs the logic coherence of planning, which, *per se*, acts as coordinative element among economic conducts and the rules governing them.

[270] SHI JICHUN and SONG BIAO (宋彪) in 规划，监管，与中国经济法 (*Planning, supervision and China's economic law*), in 法学家 (*faxuejia*), Vol. 1, 2007, 67-72, 68, describe how such concept had already been pointed out by Liu Shaoqi, on the basis of the necessity to address and coordinate socio-economic interests.

[271] E.g. public and private financial regulation, price control, industrial policy, etc. See, for instance, M.GIUSTI, *Fondamenti di Diritto dell'Economia*, Cedam, Padova, 2007.

[272] So, for instance, competition law is covered both by administrative law and private law (especially commercial law). Consumer protection law is instead usually a "domain" of private law scholars and especially contract law scholars. This choice has relevant practical consequences, first and foremost the logic hierarchy guiding the research and the application of the relevant provision. Consumer law is therefore often identified with the study of the consumer contracts, while partially neglecting the institutional aspects of consumer protection.

CHAPTER THREE

LEGAL STRUCTURE AND FUNCTIONING OF DEVELOPMENT PLANNING IN THE PEOPLE'S REPUBLIC OF CHINA

1. Introductory remarks

In the second chapter, I tried to define the theoretical foundations of planning in legal perspective. I did it trying to reconstruct (partially) a dialogue between the Chinese and the Western legal culture. Now, it is time to move from those premises and look for legal models of development planning. This chapter starts doing it from the analysis of the Chinese experience. First, I will briefly address the historical dimension of modern planning, taking into account its evolution in the 20th Century, focusing my attention on the Soviet Union and pre-reform China. In the second place, I will lay out the comprehensive analysis of contemporary Chinese planning.

2. Brief history of economic planning

The history of development planning points out, to the lawyer, a fundamental distinction. On a theoretical and broader level there is "planning", i.e. the construction of a network of relations regulated by legal or para-legal sources empowering public authorities to direct, monitor and coordinate one or several sectors of a national economy. From a more concrete and slightly narrower perspective, we may refer to the "plan", that is, in essence, an act which carries out, at the most complex and comprehensive level, all the functions of planning.

To the legal anthropologist, such distinction might hold no significance, since it is rather obvious that planning, as human activity, may not be reduced to the plan, which is instead one of the products of planning[273]. However, in legal perspective, defining the historical

[273] Anthropologists, when discussing and assessing development planning, do not feel the need to refer to a "plan". They do not identify planning with the plans, since planning is an human activity that may function even without any formalized plan. See A.HOBEN, *Social Anthropology and Development Planning – a Case Study in Ethiopian Land Reform Policy*, in *The Journal of Modern African Studies*, 10(4), 1972, 561-582; A.ROBERTSON, *People and the State: an Anthropology of Planned Development*, Cambridge University Press, New York, 1984

boundaries between "planning" and "plan" is essential because it allows us to inquire: i) on one hand the legal value and legal positioning of planning acts; ii) on the other hand, the effectiveness of planning as legal formant.

The birth of the "Plan" as a legal concept can be traced back to the Soviet experience, whereas modern planning[274] (in the broader sense) was probably experienced for the first time for the purpose of organizing war economies during World War One. This paragraph will briefly address the evolution of the aforementioned historical examples, starting with the war planning from 1914 onwards, then examining the different phases of Soviet planning and finally analyzing the development of planning in the People's Republic of China since its founding till the "opening up and reform" of the late 1970s and the subsequent formal abandonment of the planned economy system in 1993.

2.1 Pre-soviet experiences of contemporary planning

The association of World War I with the concept of "collectivism" was firstly upheld, with a strong negative meaning, by Murray N. Rothbard[275], who exerted himself to define WW1 economies as totally planned, managed by big business interests strongly influenced by the state apparatus.

The feasibility of such concept is obviously up to debate, but, for the purpose of this research, it may be noted how, during WW1, the interaction between public authorities and economic operators reached a complexity and an integration never experienced before. It certainly was an integration dictated by necessity, but it nonetheless was able to create, without disrupting the legal texture, a comprehensive set of rules aimed at managing the whole economy.

In legal perspective, the most relevant national experience in terms of planning structures is probably the German one[276].

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[274] The assessment of the concept of modern planning on a theoretical level would obviously deserve an extensive analysis. In part, I tried to sketch some major issues in the previous paragraph. However, for simplicity's sake, it is necessary to decide on a starting point for our historical analysis. Since we chose to focus on State planning law, it is reasonable to concentrate on the experiences which framed scientific and comprehensive planning using legal coordinates

[275] See M.ROTHBARD, *War Collectivism in World War One*, in RADOSH and ROTHBARD, *A New History of Leviathan*, E.P. Dutton & Co. New York, 1972, 66-110

[276] See S.MALLE, *The Economic Organization of War Communism*, Cambridge University Press, Cambridge, 1985, 299, where it is stated that "*Germany had offered to the world an example of central direction of the economy comparable to one single machine working according to a plan*"

The German war laws between 1914 and 1918 gradually deepened the scope of the state's intervention in the economy and society in order to ensure the proper functioning of the war machine. Such intervention was especially directed towards three main issues: production management, distribution management and workforce management. With regard to the third issue, the control was mainly achieved through issuance of state certificates of employment, exemption of skilled workers from military service, adjustments to retirement age and restrictions on the possibility to change jobs[277].

As far as the production and distribution control are concerned, the preferred ways of action comprised price control, import/export control and financial incentives to private companies[278]. The main achievement of German war planning was, however, the establishment of The Raw Materials Section within the War Ministry. The initiative was advocated by Walther Rathenau[279], who was also the chairman of the section. Such department was responsible for the expropriation and distribution of key raw materials and managed up to 300 different kind of raw goods. In order to maximize its efficiency and alleviate the burden of such an enormous task, the department set up a number of *Kriegsgesellschaften* (war corporations). Such corporations were privately owned, often having form of stock corporations, but in practice operated under state supervision, organizing the distribution and consumption of raw materials[280].

From the theoretical point of view, the organization of the department as well as the functioning of the connection between it and private economic entities reflected Rathenau's views on the state management of mass economies and represented a strong source of inspiration for the development of Soviet planning mechanisms[281].

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[277] See M.STOLLEIS, *History of Social Law in Germany*, Springer, Heidelberg, 2014, 83-84

[278] See H.ULLMANN, *Organization of War Economies: Germany*, in International Encyclopedia of the First World War, 2017

[279] See W.HENDERSON, *Walther Rathenau: A Pioneer of the Planned Economy*, in The economic history review, New Series, Vol. 4(1), 1951, 98-108; L.BURCHARDT, *Walther Rathenau und die anfänge der Deutschen rohstoffbewirtschaftung im erstern weltkrieg*, in Tradition: Zeitschrift für Firmengeschichte und Unternehmerbiographie, Vol. 15(4), 1970, 169-196.

[280] See W.MICHALKA, *Kriegsrohstoffbewirtschaftung, Walther Rathenau und die "kommende Wirtschaft"*, in W.MICHALKA (edited by), *Der Erste Weltkrieg. Wirkung, Wahrnehmung, Analyse*, Munich, 1994, 485-505

[281] See WANG SHAOGUANG (王绍光) and YAN YILONG (鄢一龙), *A Democratic Way of Decision-Making: Five Year Plan Process in China* (中国民主决策模式，以五年规划制定为例), Library of Marxism Studies, Vol. 1, 2016, 13-14; E.CARR, *The Bolshevik Revolution 1917-1923*, Vol. 2, Macmillan, New York, 1952, 363

Structurally, the basic functioning of the raw materials department showed that entire networks of contractual relationships could be altered and regulated by administrative acts and policy directives in order to support the war effort[282]. The interference between plans and contracts was the premise of the theoretical construction of scientific Soviet planning.

2.2 The evolution of Soviet Planning

The study of the Soviet planning experience is an essential passage to any analysis concerning macroeconomic coordination, for several reasons. Soviet planning was the first to have formalized a legal notion of plan, connected to a planning process involving different actors with the final purpose – and pretense – of regulating the whole national economy[283]. Notwithstanding, even in the Soviet experience, such development was achieved through a gradual process and what makes it particularly relevant is its evolution from planning for necessity to planning for management and development, following a path of construction of legal relations between public powers and economic operators.

From the breakout of the revolution to the war communism. The most immediate element of connection between the German war planning and the Soviet one is the circumstance that, in both cases, "planning law" was created by necessity. On the other hand, the Bolshevik leadership in October 1917 could not nor would rely on a pre-existing bourgeois legal system[284]. It instead strongly desired to frame its governance model in light of an all-encompassing economic determinism, believing that traditional legal concepts and institutions, together with the state itself, would whiter away[285].

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[282] See M.ROTHBARD, *War Collectvism,* cit. Indeed, it has been noted how even after the end of the second world war, the American economy relied on war economy mechanisms in order to absorb the "impact" of the peace. On the topic, see S.MELMAN, *The permanent war economy : American capitalism in decline*, Simon & Schuster, New York, 1985

[283] Lenin mentioned how Marx had not developed a notion of state capitalism in his works. G.XIAO, in *The Role of Economic Contracts in Communist China*, in *California Law Review*, Vol. 53(4), 1965, 1029-1060, 1043, further points out, drawing from this consideration, that the role of law within the context of a planned economy had to be developed on the basis of the soviet experience, both from the conceptual and the operative point of view

[284] See G.AJANI, *Il modello post-socialista*, Giappichelli, Torino, 2008, 33-37. The author also notes how in socialist eastern Europe the continuity between pre-socialist and socialist law was allowed much more than in Soviet Russia, although the pre-existing law had to be adapted to the new socialist principles (see *ivi*, cit., 37-40)

[285] See H.BERMAN, *Commercial Contracts in Soviet Law*, in *California Law Review*, Vol. 35(2), 1947, 191-234, 191

The main achievements of such phase are the establishment of the Supreme Council of the National Economy and the enactment of the Fundamental Law of Land Socialization of the Russian Federated Soviet Republic, which could be regarded as one the first rudimentary examples of socialist legality. The SCNE was established with the Decree of 1 December, 1917 and put in charge of the "*coordination of economic life, the coordination and unification of the activity of central and local regulating institutions (…) with the functions of coordinating and drafting economic plans*"[286].

In other words, the Council should have functioned as a broad-scope general planner, orienting the activities and the priorities of the enterprises subjected to "worker's control"[287]. On the other hand, the Law of Land Socialization, after having empowered central and local land departments to distribute agricultural land among toilers (Art. 9), it assigned to the same departments several duties, comprising the creation of "conditions favorable to the development of the productive forces", "develop scientific farming ", "develop agricultural enterprises sail" (Art. 11).

This document, which represented an advancement and evolution, from the legal point of view, of the Decree on Land of October 26th 1917, as well as the SCNE, were however soon challenged by the rapid escalation of the civil war[288], whose practical requirements, in terms of army supply, rendered it impossible to establish an incentive-driven and moderately soft planning such as seemingly envisaged by previous attempts at macroeconomic regulation. Therefore, overall nationalization and strict vertical hierarchy in the economic relation management led to the entrenchment of an emergency-driven planning system. In May 1918 the SCNE proposed a plan for the utilization of natural resources and development[289] and in July the first congress of *Sovnarkhozy* of the Northern Region approved, through a resolution, the first comprehensive plan for the organization of the economic activities of the region[290]. Between 1918 and 1920 plans multiplied and in January 1919 the regime of obligatory delivery of foodstuffs

[286] See S.MALLE, *The Economic Organization of War Communism,* cit., 206

[287] The Decree on Workers' control was first published in November 1917 and represented a first (and unfollowed) attempt to estasblish a sort of self-managed enterprise system, based on democratic centralism. See J.BUNYAN, H.FISHER, *The Bolshevik revolution, 1917-1918: Documents and materials*, Stanford University Press, London, 1934.

[288] It was in particular after the Treaty of Brest-Litovsk and the subsequent exit of Soviet Russia from WW1 that the civil war escalated. On the topic, see E.CARR, *A History of Soviet Russia,* cit.

[289] See S.MALLE, *The Economic Organization of War Communism,* cit., 301

[290] See *ivi*, cit., 302

(*prodrazverstka*) was officially introduced[291], formalizing the complete and direct control of the State over food production and distribution. Industrial enterprises were placed under general directorates (*glavki*) which imposed production quotas on each single enterprise[292].

In practice the system displayed a significance of diffuse, and in some cases even "anarchist" management[293] which contravened the theoretical idea at its basis, as also laid out in Chapter 15 of the RFSR Constitution of 1918, which envisaged an emergency financial policy revolving around the supreme authority of the All-Russian Central Executive Committee[294].

Although successful in supplying the red army, war communism proved unable to consolidate the legal relations between the economic entities and the correspondent administrative departments, thus not evolving into a complete and functional state capitalism and leading to severe disruption in the distribution and consumption of goods[295], eventually imposing a policy change.

The New Economic Policy and the State Capitalism (1921-1927). Presented to the hard-liners Bolsheviks as a "strategic retreat"[296] the NEP represents a quite mature – though not fully developed – transposition of the Leninist theories on the economic and legal relations between state and operators[297]. It effectively laid the foundations of Soviet planning, even refusing the idea of a comprehensive and integrated plan, which Lenin himself defined "a bureaucratic utopia"[298]. Actually, one of the most prominent

[291] See *ivi*, cit., 399 ff.

[292] *Glavkism* was the name which defined the economic system of war communism and was based on raw goods exchanges rather than monetary transactions. See G.CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, cit., 19

[293] In *Economic Organization of War Communism,* cit., 223-226, S.MALLE reports that the *glavki* were indeed several autonomous divisions operating in every different sector of production, which never achieved functional coordination between each other

[294] Pursuant to Art. 31 of the Constitution.

[295] War planning, indeed, came to suppress many of the reforms approved right after the revolution regarding the management of factories and agricultural production, fueling rebellious feelings exacerbated by a famine between 1921 and 1923. See E.CARR, *A History of Soviet Russia*, cit.

[296] In V.LENIN, Collected Works, Vol. 33, Progress Publishers, London, 1973, 62, it is stated that "*Partly owing to the war problems that overwhelmed us and partly owing to the desperate position in which the Republic found itself when the Imperialist war ended we made the mistake of deciding to go over directly to communist production and distribution (...) brief experience convinced us that that line was wrong, that it ran counter to what we had previously written about the transition from capitalism to socialism,namely, that it would be impossible to bypass the period of socialist accounting and control in approaching even the lower stage of communism*"

[297] See § 2.4.; see also V.BANDERA, *The New Economic Policy (NEP) as an Economic System*, in Journal of Political Economy, Vol. 71(3), 1963, 265-279

[298] See V.LENIN, Collected Works, Vol. 35, cit., 475

achievements of the post civil-war period was due to the work carried out by the GOELRO[299] – i.e. the plan for the electrification of the RFSR – which Lenin strongly supported but whose evolution into a broader development plan suffered from "*the incapacity of the leadership to define reasonable priorities*"[300]. Faced with the hardships of a staggering food crisis, the soviet leadership chose to create space for market mechanisms to operate. The ending of the *prodrazverstka* allowed farmers to sell their exceeding production on the market and the industrial enterprises experienced forms of contracting out, leasing, as well as being involved in joint-venture projects with foreign investors[301].

Large and strategic enterprises remained state-owned and while a part of them still had to rely on planned supply systems, another part was allowed to autonomously arrange raw goods supply and to sell their products at market prices. Such mechanism reflected the idea brought about by the *Sovnarkom* Decree of 9 August 1921, which introduced the concept of profitability (*hozrasčet*) aimed at alleviating the burden on the state budget by encouraging enterprises to cover the expenses with their revenues. After the initial stage of the NEP, profitability became an essential element of the economic organization of personified public persons[302], naturally leading to another crucial development: the rise of the contract as an economic law instrument[303], also stimulated by the decision of the 12th CPSU congress in 1923 to assign to the *tresty* (institutionalized cartels of state enterprises) the duty to realize a supplementary value for accumulation purposes[304].

The definition of contractual relations between state enterprises implied another significant legal development: the distinction between the right of ownership pertaining

[299] See S.MALLE, *The Economic Organization of War Communism,* cit., 314
[300] *Ibidem*
[301] See V.BANDERA, *The New Economic Policy,* cit.
[302] G.CRESPI REGHIZZI, in *L'impresa nel diritto sovietico,* cit., 23-25, synthetizes the fundamental elements of the *hozrasčet* in the conferral to the enterprises of a complex of goods, the operational authonomy within the boundaries of the plan, the proportioning of profits and losses and the coverage of losses through the gains.
[303] A special category of contracts which received great attention and experienced intermittent fortune during the NEP was that of international trade contracts. Indeed, during the NEP, the USSR established (or re-established) foreign economic relationships with western Europe countries, in particular France and Germany and through trade contracts tried to attract foreign capitals and credit to finance the growth of the still weak soviet economy. On the topic, see M.JABARA CARLEY, R.KENT DEBO, *Always in Need of Credit: The USSR and Franco-German Economic Cooperation, 1926-1929*, in French Historical Studies, Vol. 20(3), 1997, 315-356
[304] See G.CRESPI REGHIZZI, *L'impresa nel diritto sovietico,* cit., 21

to the enterprise and its right of management[305], instead connected with its operative dimension. Such division, which also effectively allows the contracting-out and lease of state enterprises, has since then been at the core of the theory of socialist enterprise and still affects the status of state-owned enterprises and state or collectively-owned land in the People's Republic of China[306].

The relation between planning[307] and contract during the NEP experienced different phases but never formally accepted the full autonomy of the second. Supply and financing mechanisms were always in significant percentage managed by the State through planning orders and, by the second half of the 1920s, it was clear that the contract had to be subordinated to planning[308].

The Stalinization of planning (1927-1953). The second decree on *tresty* (1927) though defining them as "autonomous economic unities" (Art. 1), also ruled that they had to operate on the basis of profitability and in accordance with the obligations laid out by the plan and approved by the competent state organ. The subordination between the economic unit and the plan is so strong that it could be hard to even recognize post-1927 *tresty* as legal persons[309]. The same year, with the Decree of 8 June, the *Gosplan*[310] decisions were made binding for all state planning organs[311].

With the end of the NEP, the *Gosplan* became the core of the planning law system and since 1931 was directly controlled by the *Sovnarkom*. It drew up the Five-Year Plans, as well as annual and quarterly plans for the whole USSR[312]. Its departments introduced production figures and workforce requirements for each enterprise, while direct management was carried out by ministries. The interaction between the *Gosplan* and the

[305] On the distinction see A.VENEDIKTOV, *La proprietà socialista dello Stato*, Einaudi, Torino, 1953

[306] See, for instance, the Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People (中华人民共和国全民所有制工业企业法) of 1988, revised in 2009

[307] Planning was carried out by administrative departments of the State machine through orders which were not integrated in a unitary document and act such as the plan. They were indeed referred to specific initiative such as the GOELRO

[308] The Decree of June 8th, 1927 rendered the Gosplan's orders mandatory for all the state planning organs. On the relations between contract and plan, as well as contract ancillary and functional status in repsect to the plan, see W.FRIEDMANN, *Modern Trends in Soviet Law*, in The University of Toronto Law Journal, Vol. 10(1), 1953, 87-92, 89

[309] G.CRESPI REGHIZZI, in *L'impresa nel diritto sovietico,* cit., 21-22

[310] This committee had been at first set up – in 1921 – with supportive and consultative duties.

[311] See H.BERMAN, *Commercial Contracts in Soviet Law*, cit., 193, footnote 12

[312] *Ibidem*. The USSR was officially founded on the 30th of December, 1922, while, actually some counterrevolutionary forces were still active in the far-east. They, however, were to be quelled in the the next two years.

ministries followed a clear pattern[313]: i) the *Gosplan* issued general control figures and plan directives to the ministries; ii) the ministries disaggregated such figures by connecting them with each enterprise under their direction; iii) disaggregated figures were communicated to the enterprises in order to draft the enterprise plan accordingly with the general directives issue by the *Gosplan*; iv) the enterprise plans were aggregated into sector plans by the ministries and then sent to the *Gosplan* which prepared the general plan; v) lastly, the plan was subjected to the scrutiny of the CPSU Central Committee and the USSR Council of Ministers[314] and then formally ratified by the Supreme Soviet.

Such procedure produced a plan holding formal and substantial legal value, whose violation directly gave rise to sanctions, in first place, from a civil-economic perspective, the nullity of the contract violating the plan.

According to such plan enterprises had to conclude contracts and transactions.

In 1931 a state arbitration system for enterprises (*Gosarbitrazh*) was introduced, in order to adjudicate disputes in pre-contractual and contractual phase[315] and, later, to prevent localism and infra-departmentalism in the execution of plans[316].

The centralization of planning structure[317] and the definition of plan as legal act reflected the idea, upheld by Stalin since the early 1930s, of the hasty strengthening of state power, as logic consequence of the "socialism in one state" stance[318].

Between centralization, decentralization and stagnation (1953-1983). The Stalinist planning model, in its basic mechanisms, was not rejected nor amended until the collapse of the Union.

[313] See L.MIGALE, *L'impresa socialista: tendenze dalle riforme in atto in Urss, Polonia, Ungheria*, Cedam, Padova, 1989, 14-15

[314] Chapter V of the 1936 still retained the old terminology of "Council of People's Commissars" (i.e. the Sovnarkom) which was then replaced by "Council of Ministers"

[315] See H.BERMAN, *Commercial Contracts in Soviet Law*, cit., 204-205; W.FRIEDMANN, *Modern Trends in Soviet Law*, cit., 89-90

[316] Art. 2 of the 1960 Gosarbitrazh Regulation by the Council of Ministers

[317] On the economic notion of centralization in Soviet planning and its balance see M.HARRISON, *The Fundamental Problem of Command: Plan and Compliance in a Partially Centralised Economy*, in *Comparative Economic Studies*, Vol. 47, 2015, 296-314

[318] See M.VISHNIAK, *Sovereignty in Soviet Law*, in *The Russian Review*, Vol. 8(1), 1949, 34-45, 38; H.FREUND, *Soviet Law under "Stalinism"*, in *The Slavonic and East European Review*, Vol. 19(53-54), 1939-1940, 175-187, 181

Nevertheless, the degree of centralization and enterprise autonomy (especially from a contractual point of view) greatly varied overtime[319]. The whole history of soviet planning law followed a back-and-forth approach where multiple attempts at decentralization and greater economic units' autonomy was counteracted by an often silent return to centralized bureaucratic methods. In the post-Stalin era, the first great-scale reform was launched with Law of 10 May, 1957[320], which deeply re-shaped the industry and construction administration system and set up 105 Councils of People's Economy (*sovnarhozy*) – replacing some economic ministries – in charge of coordinating resource use and production within their region and reporting to local authorities on the state of the economy[321]. However, the imperfect definition of the relations between the *sovnarhozy*, local authorities and ministries affected the outcome of the reform which already in 1961 was partly overturned[322]. Successive reform projects focused, rather than on the administrative structure of planning units, on contractual and management autonomy of the state enterprises, so to partially break away from the centralized direction which could not bear the weight of a rapidly developing Soviet economy and society anymore[323].

Indeed, in 1962 a reform allowed buyers – i.e. enterprises – to refuse to purchase a planned contingent, on the basis of several requirements listed by the law[324]. Later on, in 1969, the Statutes of Delivery empowered enterprises to execute planned contracts before the confirmation of the actual plans[325]. In those years, some scholars assumed that contracts had become the basis of the plans instead of their consequence[326].

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[319] As recalls H.BERMAN in *Commercial Contracts Law*, cit., 194-195, since the 1940s, for war reasons too, the soviet authorities conducted decentralization attempts and the role of the economic accounting was strengthened

[320] See G.CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, cit., 83-87, footnote 42; O.IOFFE, M.JANIS (edited by), *Soviet Law and the Economy*, Martinus Nijhoff, Dordrecht, 1987, 6

[321] To each Council was associated a geographic region

[322] In particular, 19 new administrative macro-regions were created and in 1962 a National Council of People's Economy was established. See G.CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, cit.

[323] Between the 1940s and the 1960s Soviet Economy experienced, indeed, a rapid economic growth which also led to a development of the commodity production, thus imposing real burdens on the planned economy designed to push toward the industrialization (thus focusing on raw materials and heavy industry) but not to manage a middle-income

[324] See O.IOFFE, M.JANIS (edited by), *Soviet Law and the Economy*, cit., 15-16

[325] *Ibidem*

[326] *Ibidem*, see also KLEIN, *Zakonadatel'stvo o Planirovanii Proizvodstva Tovarov Narodnogo Potrebleniia*, Iuridicheskaia Literatura, Moscow, 1967, 68

The spirit of the reform season was embodied by the so-called "Kosygin[327] Reform", whose main legislative achievement was the Regulation of Production Socialist State Enterprise (PSGPP) of 4 October, 1965[328]. The reform, in first place advocated by the economists[329], aimed at broadening management autonomy for the state enterprise which, though subjected to plan, was defined as the fundamental link of the Soviet economy. Binding planned indicators were cut back from about 30 to 9, thus empowering enterprises to contractually manage a wider range of relations – both with other enterprises and with consumers – without having to obey the plan.

The practical impact of the Kosygin Reform was less than anticipated, given that almost immediately after its enactment a silent recentralization took place[330]. However, it highlighted the critical issues of the soviet command economy and set a model for future reform schemes.

In the 1970s the increasing inefficiencies in the functioning and results of plans halted the growth of Soviet economy and aggravated corruption and data fiddling[331], thus prompting, in the following decades, the last reform attempts.

Last attempts at reform (1983-1991). With the election of Juri Andropov[332] as General Secretary of the CPSU, the discourse initiated twenty years earlier by the reformists seemed to regain strength. In July 1983 the party Central Committee and the Council of Ministers issued an edict "*On the additional measures about enlargement of the rights of production associations (enterprises) of industry in planning and economic activity and strengthening of their responsibility for the result of their work*"[333]. It was an experiment trying to address a new stage of economic development for the USSR and which aimed at emphasizing the role of production associations (i.e. the enterprises) in elaborating the plans of economic and social development[334].

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[327] Alexei Kosygin was Chairman of the Council of Ministers and therefore Premier of the USSR from 1964 to 1980.

[328] See G.CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, cit.; O.IOFFE (edited by), *Soviet Law and the Economy*, cit., 8-15; G.HALM, *Mises, Lange, Liberman: Allocation and Motivation in the Socialist Economy*, in *Weltwirtschaftliches Archiv.* Bd. 100, 1968, 19-40

[329] See G.HALM, *Mises, Lange, Liberman*, cit., 9 ff.

[330] See O.IOFFE, *Law and the Economy in the USSR*, in *Harvard Law Review*, Vol. 1591(95), 1982, 1621-1623

[331] The second phase of Breznev's General Secretariat (1972-1982 approximatevely) is usually considered to be a "stagnation era" for the Soviet Economy.

[332] Juri Andropov was the CPSU General Secretary from 1982 to 1984

[333] See O.IOFFE (edited by), *Soviet Law and the Economy*, cit., 3-5

[334] See *ivi*, cit., 10-11

In particular, the enterprises had to draft their own yearly plans on the basis of both the five-year plan and the "*contracts executed between deliverers and buyers of a product. In other words, economic contracts are proclaimed as the basis of yearly planning*"[335]. The involvement of single economic units in the formation and implementation of plans was reinforced by the Law on the Socialist Enterprise of June 1987, placed at the core of Gorbachev's *uskoreniye*[336]. In particular, Art. 10 § 3 of the Law replaced most of the mandatory directives with a few and general "control figures", reflecting the social needs connected to the enterprise production but without the power to affect the unit in the drafting process of its own plan.

The full impact of the 1980s reforms could not be thoroughly assessed, since the deteriorating conditions of the Soviet state prevented them from achieving any significant success. The failure of all radical reform schemes seemed to confirm the view upheld by some scholars [337] that the Soviet state machine was inherently inseparable from centralized planning. On the other hand, it could be argued that Soviet plans were never implemented in a sole centralized manner and production often relied on barter relations between enterprises as well as trust networks between them and local administrative departments[338].

By the 1950s, the size of Soviet economy had become too big and complex to function according to top-down management schemes. The reasons why planning in the USSR was ultimately unable to respond to the evolution of its society and economy are up to debate. Harold J. Berman, in 1986[339], believed that "*all the necessary preconditions are present for a substantial reform of the Soviet economic system – except one: courage*".

2.3 Planning in the People's Republic of China (1949-1992)

[335] See *ivi*, cit., 17

[336] *Uskoreniye* (acceleration) defines a complex of economic reforms advocated by Gorbachev and enacted from 1985-1986 onwards. On the topic see L.MIGALE, *L'impresa socialista: tendenze dalle riforme in atto,* cit.

[337] See O.IOFFE, *Soviet Law and the Economy*, cit.

[338] See B.GRANCELLI, *Le relazioni industriali di tipo sovietico,* cit.

[339] See O.IOFFE, *Soviet Law and the Economy*, cit., 37

This part covers the history of Chinese planning from its foundation to when socialist market economy replaced planned economy as its official economic system, in 1992[340]. My intention is to point out some key legal relations which still today constitute the basis for the functioning of modern Chinese planning but originated in the past.

Therefore, I will not follow a strict periodization, instead trying to present the history of Chinese planning as an evolutionary process whose modern rules do not contradict nor challenge the original premises.

For clarity's sake, however, some macro-distinctions should be provided. The planned economy was the official economic system of the PRC from 1952-53 to 1992-93. Indeed, right after the proclamation of the Republic[341] the economic foundations of the newborn State had been based on the "New Democracy" thought, elaborated by Mao Zedong since the early 1940s.

The eight Five-Year Plans (FYP) issued during the fifty years of properly called planned economy reflect the changes experienced by the PRC itself. The first FYP (1953-1957) marked the establishment of the planned economy in China, while the second FYP (1958-1961) corresponds to the so-called "Great Leap Forward". The third and fourth FYPs cover instead an extended period of time, running from 1962 to the ending of the cultural revolution in 1975[342], thus leading, starting with the fifth five-year plan, to the period of opening up and reform[343].

The relation between law and politics. In its first thirty years Chinese economic planning was integrated within the Chinese legal system without enduring a process of proper "juridification".

Such statement does not mean, however, that no planning regulations at all levels of the state administration were ever enacted[344]. It just points out that the whole system

[340] It was the 3rd Plenary Session of the 14th Central Committee of the CPC which abandoned the doctrine of fully planned economy to embrace the doctrine of socialist market economy.

[341] 1st October 1949

[342] In particular, the official launch of the 4th FYP was delayed until about 1968-1969, probably on account of the great upheaval stemming from the beginning of the Great Cultural Revolution (大文化革命 – *dawenhuageming*). For a chronological report of the events concerning the 3rd and 4th FYP see WANG SHAOGUANG and YAN YILONG, *A Democratic Way of Decision-Making*, cit., 223-229

[343] The 5th endured a double drafting process, before and after the end of the Cultural Revolution. See *ivi, cit.*, 229-231

[344] G.XIAO, in *The Role of Economic Contracts*, cit., 1030, mentions that up to 1958 more than 4000 laws and regulation concerning national economy were issued.

struggled to strike a conceptual balance between politics, as embodied by the party, and law, as the instrument to achieve policy goals.

Lenin himself – and later on Stalin – in 1920 put forward the line according to which former colonial or semi-colonial states would have to follow a path to socialism different from the one developed in Russia[345]. The same line was also upheld by Mao Zedong in the early 1940s and is in fact referred to in his "On the New Democracy" (1940). According to Mao, given the semi-colonial and feudal elements still present in the Chinese society, the revolutionary process had, firstly, to establish a market economy environment, so to accelerate the capitalist development and, secondly, evolve into a mature socialist state-run economy[346].

However, Mao's actions and theoretical stances starting from the late 1940s and, in particular, from the early 1950s displayed a decisive will to establish, in the PRC, a constitutional, administrative and economic structure modeled upon the Soviet example. The interaction between these two stances left traces in the 1954 constitution, whose Art. 10, for instance, "*protects the right of capitalists to own means of production and other capital according to law*"[347] and whose institutional framework is strongly affected by the 1936 USSR constitution.

However, with regard to planning, the 1954 constitution already marks the overcoming of the "New Democracy" experiment and recognizes a decisive role for the economic plans as a mean to direct "*the growth and transformation of the national economy*" (Art. 15).

The "economic Stalinization of China", as this period has been defined[348], meant, in essence, the establishment of a bureaucratic planning machine whose main source of legitimization was to be found in the constitution but whose daily functioning was regulated by policy documents. On the other hand, Art. 27 of the 1954 Constitution, by stating that it was for the National People's Congress to decide on national economic plans, reproduced a structure already known in the USSR. The development of the

[345] See R.NORTH, *Il comunismo cinese* (italian ed.), il Saggiatore, Milano, 1966

[346] See MAO ZEDONG (毛泽东), On the new democracy (新民主主义论), 1940; WANG ZHANYANG (王占阳) 从新民主主义 国营经济到社会主义 国营经济 (*From the new democratic state operated economy to socialist state operated economy*), in Collected Papers of History Studies, n. 3, 2004, 53-61, 53-58

[347] G.XIAO, in *The Role of Economic Contracts*, cit., 1040, reminds that in China, as in other socialist countries, property rights are limited not only in the law but also in the national economic plan.

[348] See HUA-YU-LI, *The economic stalinization of China,* cit.

aforementioned bureaucratic structure carried on rapidly and, with the establishment of the Planning Bureau in 1950 and of the State Planning Commission in 1952, it also led to the launch of the First Five-Year Plan in 1953[349]. However, it ultimately failed to build up a balanced relation between the party and the state, so that with the second Five-Year Plan, launched in 1957, the decisional power upon planning was concentrated into the hands of the party organs and local cells, shifting from a primary stage "rule by law"[350] environment to a "rule of men"[351] planning system.

Though not without reform attempts, this pattern carried on until the end of the Cultural Revolution in 1975-1976 and left visible traces in the institutional texture coming out from the 1975 constitutional revision, which omitted any reference to the role of the plan as driving force of the economy[352], a stance partially reversed by the 1978 Constitution which instead declared that the state was to undertake planned development of the economy[353].

With the beginning of the reforms, the issue of the relation between politics and law within the context of economic planning was revitalized and inspired original outcomes and legislative achievements reflecting the structure of an evolving socialist economy.

In 1981 the Economic Contract Law[354] was enacted, functioning as a reference point for all economic contracts[355] between legal entities until its expiration in 1999, on account of the promulgation of the Contract Law. This Law, together with the State Owned Enterprises Law of 1988[356], represents, probably, the highest point of Chinese economic law in the first two decades of reform[357].

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[349] During the period of New Democracy local experiments in central planning were carried out, for instance, in Manchuria. See G.XIAO, *The Role of Economic Contracts*, cit., 1043.

[350] On the assessment of such concepts see R.PEERENBOOM, *China's Long March,* cit.

[351] *Ibidem*

[352] It merely advocated for the promotion of planned and proportionate development (Art. 10).

[353] Art. 11 of 1978 Constitution. Art. 8 of the 1978 Constitution, furthermore, prevents subjects from using any mean to jeopardize State economic plans

[354] 中华人民共和国经济合同法 (*zhonghuarenmingongheguojingjihetongfa*)

[355]Art. 2 defined economic contracts as "*contracts entered into between civil subjects of equal footing, that is, between legal persons or other economic organizations or self-employed industrial and commercial households or leaseholding farm households for the purpose of realizing certain economic goals and defining the rights and obligations of the parties*"

[356] On the legal regime of SOEs and their management authonomy see CHILD, LU, *Industrial Decision-making under China's Reform, 1985-1988*, in Organization Studies, Vol. 11(3), 1990, 321-351

[357] Economic contracts already existed, although there was no comprehensive legislation on the matter, proving once again the complex relation between politics and law in Chinese history. They were, anyway, closely linked to economic plans. See G.XIAO, *The Role of Economic Contracts*, cit., 1044-1060

It made state plans binding upon all economic contracts[358], providing for nullity in case of violations of the plans[359] and specified that contracts had to be concluded according to the planned targets, also stating that where parties could not reach an agreement the issue was to be handled by superior authorities in charge of planning[360]. The detailed provisions of the 1981 Law connected contract law with economic planning to a degree that had never been formalized or refined before[361]. The instruments and conceptual categories of contract law were employed to ensure the enforcement of plans. To this point, the Chinese positive law had created a set of rules to integrate the plan into its domain. This kind of legislation, in part original but also affected by Soviet models, proved to be deeply linked to a transitory phase of socialist market economy, that of its earliest development. It served the purpose to entrench, on the legal front, the new development model advocated by the Communist Party while, at the same time, empowering planning authorities to exercise a strict and deep control over economic activities where it was necessary[362].

As Chinese economy grew more complex, the structure of such legislation displayed the same deficiencies that had burdened Soviet planning. Therefore, its significance decreased overtime while new legal instruments were issued. Even when it has not been formally repealed[363], it has, today, exhausted its primary function in the context of Chinese economic and social development.

The relation between public and private economic initiative and economic entities' autonomy.

Mao Zedong envisioned a "New Democratic" Chinese economy as based on the interaction between i) state-run economy; ii) private capitalist economy; iii) individual economy; iv) cooperative economy[364].

Such theoretical stance was in line with the thought already expressed in "On the New Democracy", according to which big banks and big commercial enterprises were to be

[358] See Art. 4
[359] See Art. 7
[360] See Art. 11
[361] The Law on Economic Contracts could very well be considered as a law on planning. The plan is the main object of the economic contracts regime and it directs and inspires the relevant provisions of the law.
[362] We are indeed discussing a historical period which knew a type of planning very different from the one in force today
[363] The Law on Economic Contracts was abrogated with the enactment of the 1999 Contract, whereas the Law on the SOEs is still in force, although largely disapplied
[364] See WANG ZHANYANG, *From the new democratic state,* cit., 55

managed by the State whereas the rest of the economic entities would be privately or collectively managed, under the principle of "regulation of capital"[365].

After the end of the civil war, strategic industries were nationalized and placed under direct state management while small and medium enterprises remained in private hands. In parallel, Mao strived for the advancement of the public sector and scientific planning of the economy, so that already in 1951 the preparatory work for the first FYP commenced[366].

The position of the cooperative economy was meant to realize, in this phase, the connection between public and private. The Chinese cooperative was not intended as a Soviet-style collective farm, but it was instead based on the individual economy[367]. To transpose this concept into reality, the party relied on Zhang Wentian's theories on supply and production mechanisms within the cooperation between private entities and the State[368]. Therefore, the State was to provide cooperatives with some basic resources and goods as well as purchasing from them, so to control the cooperatives' market sources. As far as the industrial sector was concerned, the advancement of the State-owned sector of Chinese industrial economy convinced Mao, partly against the indications of Stalin himself[369], that it was time to accelerate the transition to socialism.

The first FYP introduced binding indicators and figures but it did not seek, at least theoretically, to eradicate private economic initiative, which was indeed also recognized by the 1954 Constitution (Artt. 8, 9 and 10[370]), Moreover, the Plan called "*for the enforcement of the system of economic accountability*[371]". This compromise lasted until the CPC leadership and Mao Zedong in particular launched the "Great Leap Forward" program in 1957[372], which was therefore to cover the second FYP time period. The medium-size cooperatives were turned into huge communes, often managing also the industrial production with wide discretionary powers[373]. On account of such abrupt

[365] See MAO ZEDONG, *On the New Democracy*, Chapter VI (The Economy of New Democracy)
[366] See WANG SHAOGUANG and YAN YILONG, *A Democratic Way of Decision-Making*, cit., 213-214
[367] WANG ZHANYANG, *From the New Democratic State,* cit., 55
[368] See § 2.5
[369] See Chapter 2 of HUA YU-LI, *The Economic Stalinization of China*, cit.
[370] Art. 10 explicitated the idea of a gradual transition to socialism while maintaining capitalist elements where they could produce benefits and welfare to the population.
[371] See G.XIAO, *The Role of Economic Contracts,* cit., 1043
[372] For a report of the events concerning the drafting process of the 2nd FYP during the "Great Leap Forward" (大跃进) see WANG SHAOGUANG and YAN YILONG, *A Democratic Way of Decision-Making*, *cit.*, 222-223
[373] See G.XIAO, *The Role of Economic Contracts*, cit., 1033 and 1037-1040

decentralization, the planning mechanisms suffered from severe information asymmetry given that local planning organs[374] did not provide central authorities with accurate data and figures.

A partial reform in early 1960s[375] corrected some downsides but did not challenge the balance reached: up to the late 1970s Chinese economy was based on the two poles of state and cooperative, with party organs and cells functioning as links between the two.

When the new reform season started, new experiments based on the interaction between private and public economic initiative were developed. In particular, the distinction between right of ownership and right of management, applied within the context of Chinese collective property[376], empowered authorities to introduce new legal types of economic entities. The Township and Village Enterprise was probably the most relevant[377] and it comprised four different categories: a) township run; b) village run; c) joint household; iv) individual enterprises[378]. In the last two categories, the local authority – i.e. the township or the village – usually had the ownership over the enterprise and leased it to a household or an individual, in exchange of a fixed sum.

The 1970s reform reconsidered, from an all-round perspective, a concept already introduced during the first Five-Year Plan, that of an industrial entity within a rural administrative unit with the purpose of facilitating its development[379]. However, after the "Great Leap Forward" and the Cultural Revolution such village enterprises had not been included in the planning schemes, so that they could not even be provided with the necessary supplies[380].

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[374] Often political cells within the communes

[375] A reform advocated by Deng Xiaoping and Liu Shaoqi reinvigorated the role of the enterprise director. Already since 1959 communes were entrusted of two tasks: an administrative management task and an economic task, for the management and control of certain production chains and supervision of productive brigades. See G.XIAO, *The Role of Economic Contracts*, cit., 1033

[376] Collective property still today represents one of the two property rights over land in the Chinese legal system, the other right being State property. Pursuant to collective property right, the land is owned by collective entities, such as – typically – villages. Such entities then may transfer management rights over the land to other subjects for a fixed period of time which is usually renovated continuously. Management rights may be in turn transferred by their owners in exchange for a price. On the topic see LI JUN (李俊), *L'utilizzo collettivo e la proprietà collettiva terriera nell'esperienza cinese*, in *Bullettino dell'istituto di diritto romano Vittorio Scialoja*, Vol. 6, 2016, 309-330.

[377] See HE KANG (edited by), *China's Township and Village Enterprises*, Foreign Language Press, Beijing, 2006

[378] See ZHOU LI-AN, *Incentives and Governance*, cit.

[379] See HE KANG (edited by), *China's Township and Village Enterprises*, cit. The author reminds how in 1956 were introduced, within rural communes, industrial enterprises to satisfy the needs of the community.

[380] In 1976 a Bureau for the Administration of Enterprises run by the Communes were established, marking the end of the silence regarding the TVEs. See *ibidem*

It was in the 1980s that the "new" TVE became a mass-scale phenomenon[381] and was finally able to connect itself with the plan, as also desumed from the text of the 1981 Law on Economic Contracts. The private economic initiative had found legally sanctioned instruments to interact with the state-run economy[382]. Notwithstanding this, private economy operated within the framework of a planning still heavily based on a vertical management idea, relying on fixed indicators up to the tenth FYP (2001-2006) concerning the output of several strategic goods and entire sectors as well as state expenses and revenues, consumption, etc.[383]. It was therefore through the logic of sub-contracting[384] that the Chinese leadership was able to make private initiatives comply with a still bureaucratic and vertical planning system.

Centralization and Decentralization. The concept of sub-contracting gives the idea of how, with the beginning of the reform, Chinese economy was able to reorganize itself upon a restructuring of the decentralization pattern of its agricultural and industrial machines. Compared to the Soviet Union, where centralization and decentralization were, at times, a policy choice, in China the capital role of the local governments in the implementation of planning was never challenged. Even at its apex, national central planning controlled by setting production quotas no more than 600 items, while Soviet planning came to control more than 5.500 types of items[385].

The decentralization of the planning machine often relied on institutional structures already integrated into Chinese culture or developed from earlier experiences, such as the *danwei* (单位)[386], whose conceptual framework was particularly fit for comprising the communes, which functioned, by all meanings, as governments. Mao Zedong himself was particularly keen on the decentralization of economic governance and, starting in 1956, strongly advocated a delegation mechanisms for administrative and control powers[387].

[381] With the dismantlement of the communes, the enterprises run by communes became TVEs. See *ibidem*
[382] Such instruments were later formalized in the 1996 Law on Township Enterprises (中华人民共和国乡镇企业法). Some of its provisions (see Art. 5, 26 and 28) explicitly refer to planning.
[383] See, for instance, the 7th Five-Year Plan
[384] See § 2.1
[385] See ZHOU LI-AN, *Incentives and Governance,* cit.
[386] *Ibidem*
[387] *Ibidem*

In 1957 the CPC Central Committee indeed delegated several of the central government prerogatives to the productive brigades[388] as well as to local governments[389]. In the 1949-1992 period the evolution of the relations between the center and the local powers may be, for brevity purposes, summarized as follows: i) from 1949 to 1956 a mild centralization occurred, especially with regard to strategic industries, on the basis of the Soviet experience; ii) from 1956 to 1959 a wave of decentralization took place and the vast majority of SOEs were placed under control of local authorities; iii) after the "Great Leap Forward" some of the functions previously delegated to the local brigades were returned to higher administrative levels; iv) starting in 1964 a new decentralization, advocated by Mao, occurred and between 1969 and 1970 local governments were authorized to issue their own economic plans[390]; v) with the beginning of the opening up and reform the whole planning system underwent a decentralization, which was nevertheless different from the previous attempts, from two different perspectives.

On one hand, SOEs were gradually empowered to autonomously plan, among other things, production, product marketing, pricing, surplus investment, material purchasing and inner organization[391], while private entrepreneurs were allowed to play a role in the still heavily planned market. On the other hand, the new approach to decentralization affected the structure of the planning system, for instance by decreasing planned indicators[392] and instead increasing planned directives.

It was the sunset of the vertically planned economy. In its latest phase (1978-1992) it had succeeded in creating a rule by law environment for government authorities to better direct and coordinate overall economic development, but it had become too strict and too rigid for the size and complexity of the post-reform Chinese economy.

3. Planning in the People's Republic of China: current features

Planning and plan are two distinguished concepts. Such statement holds no less truth when dealing with modern Chinese planning.

[388] Productive brigades were at the very bottom of the administrative pyramid
[389] Directive of the Central Committee of the CPC of 14th September, 1957
[390] See ZHOU LI-AN, *Incentives and Governance,* cit.
[391] CHILD, LU, *Industrial Decision Making,* cit., 328.
[392] See *ivi,* cit., 327-328

Nevertheless, one of the reasons why even the common observer knows Chinese economic planning is the existence of a highly publicized act[393], the National Five-Year Plan for the Economic and Social Development (国民经济和社会发展五年规划 – *guominjingjiheshehuifazhanwunianguihua*)[394], also known as Five-Year Plan (五年规划 – *wunianguihua*).

Therefore, I feel it somewhat justified to use the legal assessment of such act as the blueprint for the examination of the whole Chinese planning system.

The analysis will look for the answers to the research questions formulated at its beginning. It will address each of the topics which may ultimately enable the research to serve its aforesaid purpose. Firstly, I will consider the plan as an phenomenon within the context of the evolution of the Chinese legal system. Secondly, I will focus on the legal principles which inspire and justify Chinese planning. In the third place, I will assess the plan's legal nature and, in the fourth place, the main sources of Chinese development planning. Fifthly, I will analyze the planning process and, in the sixth place, the plans' content.

Lastly, I will address the legal instruments and mechanisms employed in order to implement and enforce the plans.

3.1 Development Planning and the Chinese Legal System

Art. 1 of the People's Republic of China's constitution defines it as a "socialist state" and upholds the socialist system as the basis of the nation's social structure[395].

[393] A simple research on the internet, by inserting "China Five-Year Plan" on a research engine, will display how much economists, journalists or even simple blogger or netizens are aware of the presence of such "plan".

[394] The official terminology, indeed, changes: The 2005 Opinions of the State Council on Planning – a relevant source which will be examined – talks of 国民经济和社会发展规划 (*guominjingjiheshehuifazhanguihua* – National Plan for the Social and Economic development), thus not referring to the duration of the plan.

[395] It could be useful to report the whole text (in english and chinese) of Art. 1 of the Constitution: 中华人民共和国是工人阶级领导的、以工农联盟为基础的人民民主专政的社会主义国家。(*The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants*); 社会主义制度是中华人民共和国的根本制度。中国共产党领导是中国特色社会主义最本质的特征。禁止任何组织或者个人破坏社会主义制度。(*The socialist system is the basic system of the People's Republic of China. The socialist system is the fundamental system of the People's Republic of China. Disruption of the socialist system by any organization or individual is prohibited*).

Thus, China is a socialist legal system. Both Chinese and western scholars have emphasized the constitutional dimension of the legal transplant between the USSR and China[396], embodied by the early 1950s constitutional process[397] led in first place by Liu Shaoqi[398].

Other scholars such as Wang Chunmei focused on the soviet influence over Chinese civil law and held that a decisive role in the sovietization of Chinese law was played by the transplant of the planned economy system[399]. The transplant implied the surgence of planned and policy orders in place of legal provisions and the negation of the private character of civil law[400]. An issue of post-reform China is, according to Wang, that of "de-sovietization", i.e. the gradual overcoming of a civil-economic law model seen as hindering economic development[401].

The apparent inconciliability between soviet-styled plans and market economy justified a scarce interest of legal scholars in development planning. A scarceness which turned into absence after the 14th CPC Congress in 1992 abandoned planned economy in favor of socialist market economy.

In the years of Chinese economy's roaring growth, it was common for scholars to state that, as market economy-based innovations advanced, plans were reduced to be pompous containers of empty words[402].

However, in the most recent years, this stance displayed structural weaknesses. Outside China, Oliver Melton explained to the US-China Economic and Security Review

[396] The influence of Soviet constitutional models over Chinese ones regarded in first place the distinction and establishment of two parallel levels, that of the party and that of the state, as well as the constitutionalization of the centralist-democratic people's congresses system, modeled after the soviets' system of the USSR. The topic is assessed by al major comparative lawyers, from David to Sacco to Zweigert and Kotz. For a deeper look at the effect of soviet rule by law models in China see I.CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Quaderni del Dipartimento di Scienze Giuridiche dell'Università di Trento, Trento, 2012

[397] See LIU ZHAOXING (刘兆兴), 比较法学中国五四宪法与苏联1936年宪法 (*Legal comparison between the Chinese 1954 Constitution and the Soviet 1936 Constitution*), in 中国法律年鉴 (*zhongguofalunianjian*), Vol. 1, 2005, 913. The reference model for China was the Soviet Constitution of 1936, the highest example of Stalinist legal re-institutzionalization in response to nihilist tendencies of the 1920s.

[398] See XIA XINHUA (夏新华), DING FENG (丁峰), 刘少奇与苏联宪法的移植 (*Liu Shaoqi and the Transplantation of Soviet Constitution*), in Present Day Law Science, Vol. 12(1), 2014, 24-29.

[399] See WANG CHUNMEI (王 春 梅), 苏联范式植人中国民事主体制度的历史基础审视 (*Scrutinizing the Historical Background of the Soviet Paradigm Implanted in Chinese Civil Subject System*), in Journal of Henan University (Social Sciences), Vol. 55(5), 2015, 22-27, 25.

[400] *Ibidem*

[401] *Ibidem*

[402] See B.NAUGHTON, *Growing Out of the Plan,* cit.

Commission[403] how Chinese planning had evolved after the beginning of the reforms. Soon after, Melton and Sebastian Heilmann wrote about the "reinvention" of development planning and picked as starting point of such process the – symbolic – year 1993[404].

Within China, the debate followed partly similar patterns. At first were the political scientists and the economists[405] to shed light over the "new" economic and development planning[406]. Soon after, legal scholars started showing interest too. The concept of a Chinese development planning law gradually raised the attention of some jurists.

How does development planning fit into the evolving legal system of the PRC?

Chinese development planning has evolved in parallel with an overall restructuring of the Chinese legal system. One of the underlying needs was to adapt the Chinese legal environment with the challenges represented by the socialist market economy[407]. The advancement toward a rule of law system has been however accompanied by alternative solutions to foster economic development[408]. The evolution of a pervasive state capitalism based on State-Controlled Enterprises (SCEs) [409] formally relying on private law schemes[410] proved that rule of law schemes have been integrated in a network where the political bargaining is still the main factor in governing both economic operations and dispute resolution[411]. The adaptability of the Chinese legal system, depending on the

[403] See O.MELTON, *China's Five Year Planning system: Implications for the Reform Agenda*, Testimony for the US-China Economic and Security review Commission, April 22, 2015, available on the link http://www.uscc.gov/sites/default/files/Melton%20-%20Written %20Testimony.pdf

[404] See S.HEILMANN, O.MELTON, *The reinvention of Development planning in China, 1993-2012*, in Modern China, Vol. 39(6), 2013, 580-628. In 1993 the People's Republic of China officially abandoned planned economy as economic doctrine of the State, instead embracing socialist market economy.

[405] Some of them directly involved in the planning process, Hu Angang above all

[406] See HU ANGANG (胡鞍钢), *A Plan is Born, interview with Lan Xinzhen and Yu Shujun*, in Beijing Review, 33, September 16, 2010; HU ANGANG ET AL., 中国."十三五"大战略 (*The great strategy of China's 13th Five-Year Plan*), 浙江人民出版社 (*Zhejiangrenminchubanshe*), Zhejiang, 2015

[407] See R.PEERENBOOM, *China's Long March Toward the Rule of Law,* cit., 450 ff.

[408] See *ivi*, cit., 466 ff. The author cites clientelism, corporatism and state capitalism as alternative methods of fostering economic development.

[409] The SCEs represent a sort of evolution of "old" State-Owned Enterprises (SOEs) which were instead incorporated into the bureaucratic structure of the relevant economic ministries and local governments. The SCEs are instead formally private law entities whose capital is controlled, totally or partially, by public authorities.

[410] In first place the 1993 Company Law

[411] See GALLAGHER, *The Social Relations of Chinese State Capitalism*, in B.LIEBMAN, C.MILHAUPT, *Regulating the Visible Hand?: The Institutional Implications of Chinese State Capitalism*, Oxford Scholarship Online, Oxford, 2015, 1-39; R.PEERENBOOM, *China's Long March*, cit., 466 ff.

socio-economic relations involved in specific issues, was referred to with the term "variable geometries"[412].

Today, such variability deals with the development of a "Socialism with Chinese characteristic for the new era" (新代中国特色社会主义 – *xindaizhongguoteseshehuizhuyi*)[413].

Starting with the Deng Xiaoping Theory[414], Chinese socialism gradually broke away from the paradigm of class struggle to embrace an economic-development centered stance[415]. In doing so, it tried to avoid the dogmatization of Marxism which instead characterized pre-reform China, preventing the development of a functional legal system[416].

Chinese socialism adheres to the principle of "seeking truth from facts" (实事求是 – *shishiqiushi*), thus upholding a pragmatic and nationally centered view on both legal and economic development[417]. Liu Hongyu distinguishes three theories on the modern evolution of Chinese rule of law[418]. According to the "localization" (本土化 – *bentuhua*) theory, rule of law does not necessarily stem from statutes or formal legal rules but also from practices, customs and social habits. Rule of law should therefore foster and include local legal cultures and social norms[419]. Another theory, that of "modernization" (现代化 – *xiandaihua*) calls for a subject centered approach and a generally "westernization" of

[412] See I.CASTELLUCCI, *Rule of Law and Legal Complexity,* cit.,

[413] The doctrine elaborated by current CPC General Secretary and PRC President Xi Jinping and incorporated in March 2018 in the PRC constitution

[414] With the term "Deng Xiaoping Theory" (邓小平理论 - *dengxiaopinglilun*) the Chinese Constitution (in its preamble) refers to the comprehensive thought of Deng Xiaoping. From the economic law perspective, the main achievement of such theory is the theorization of market socialism as a general principle of Chinese economic and legal system

[415] See LIU HONGYU (刘红臻), 中国特色社会主义法学理论体系的形成过程 及其基本标志 (*The Formation Process of the Theoretical System of Socialist Law with Chinese Characteristics and Its Basic Marks*), in 法制与社会发展 (*fazhiyushehuifazhan*), Vol. 110(2), 2013, 13-28, 13-14

[416] This is for instance the stance upheld by JIANG XIAOWEI and LIU XUGUANG (蒋晓伟，刘旭光), in 关于法学领域马克思主义中国化的思考 (*Reflections on the Sinicization of Marxism in Law*), in Politics and Law, Vol. 9, 2011, 58-65

[417] See LIU HONGYU, *The Formation Process*, cit.

[418] See *ivi*, cit., 23

[419] This is, for instance, the thesis upheld by SU LI (苏力), 二十世纪中国的现代化和法治 (*China's Modernization and Rule of Law in the 20th Century*), in 法学研究 (*faxueyanjiu*), Vol. 1, 1998, 3-15; 变法，法治建设及其本土资源 (*Changing Law, Rule of Law construction and indigenous resources*), in 中外法学 (*zhongwaifaxue*), Vol. 41(5), 1995, 1-9

the rule of law[420]. A third theory, mainly upheld by Ji Weidong[421], links the rule of law with the procedimentalization of decision-making and the advancement of negotiation and discussion in decision-making procedures.

Xi Jinping[422] clarified that the advancement of the rule of law in China must rely on some basic principles: a) the leadership of the CPC; b) the principal position of the people; c) the equality before the law; d) the integration between rule of law and rule of virtue; e) the work on the prevailing conditions in China. On these premises, the 19th CPC Congress laid out a conceptualization of the rule-based governance[423] which tries to rebuff the radical oppositions (e.g. localization/modernization of the rule), seeking instead harmonization, another typical feature of Socialism with Chinese characteristics[424]. How to do it? By weakening the purely political feature of traditional socialist rule and injecting the culture-driven and human-centered rites into the legalization standards, as proposed by authors such as Zhang Zhongqiu[425].

The outcome of such integration is the connection between rule of law (法治 – *fazhi*) and rule of virtue (德治 – *dezhi*), frequently reiterated by the Chinese leadership[426]. The same principle was recently also applied by some courts[427] as an ideological proposition in

[420] See also CHEN JIANFU, *Chinese Law*, *cit.* 70-75

[421] See JI WEIDONG (季卫东), 法治中国的可能性 (*The possibility of Chinese rule of law*), in 战略与管理 (*zhanlueyuguanli*), Vol. 5, 2001, 1-15; 法治秩序的建构 (*Construction of the Rule of Law Order*), China University of Political Science Press, Beijing, 1999, 3-86

[422] Speech at the 2nd Plenary Meeting of the 4th Plenary Session of the 18th CPC Central Committee. See XI JINPING, *The governance of China II*,Foreign Language Press, Beijing, 2017, 119-135

[423] See JIANG CHUANGUANG (蒋传光), 十九大报告对中国特色社会主义法治理论的发展与创新 (*The Nineteenth National Congress Report on the Development and Innovation of the Theory of Socialist Rule of Law with Chinese Characteristics*), in 上海政法学院学报 (*shanghaizhengfaxueyuanxuebao*), Vol. 3, 2018, 135-144

[424] See LIU HONGYU, *The Formation Process*, cit. 23-25

[425] See ZHANG ZHONGQIU (张中秋), 从礼法到政法 (*From ritual law to political law*), in 法制与社会发展 (*fazhiyushehuifazhan*), Vol. 142(4), 2018, 155-166. In ritual law, the author sees the triumph of a person-centered approach looking at the evolution and improvement of the moral character of man and the respect for his/her human rights. Therefore, he advocates for an integration of this concept into the political law system of modern China

[426] *Ibidem*; see also JIANG CHUANGUANG, *The Nineteenth National Congress Report*, cit.

[427] So far, the explicit reference to the concept of "rule of virtue" or "rule by virtue" (德治) has been confined to a series of decisions from the Henan province, all employing the expression 以德治国 (*yidezhiguo*), i.e. governing the country by virtue or on the basis of virtue

order to justify the application of procedural rules regarding evidence[428] or to criticize the obstructing behavior of plaintiffs during conciliation attempts by the judge[429].

The modern moral dimension of socialist legality is also reflected in the frequent references that Chinese courts (in the decisions just cited as well)[430] make to socialist core values (社会主义核心价值观 – *shehuizhuyihexinjiazhiguan*), which are gradually becoming the one of the cores of the 21st century Chinese legal culture[431].

The idea that comes out from such premises is that the law-based governance is a dynamic concept, and the same logic is valid for the relation between government and economy. As pointed out by Shi Jichun[432], static legal rules cannot give a proper response to the changes occurring in the economy and society. Legal rules dealing with the management of the economy cannot define in advance the boundaries between the government and the market[433]. Such approach justifies the presence of open clauses in economic legislation

[428] See People's Court of Zhaoling District, Luohe City, Henan Province, Rural Credit Cooperatives Association of Zhaoling District, Luohe City, and Shaohui Li and Li Mingzhou, November 28, 2018, n. 2553/2018

[429] See Intermediate People's Court of Luohe City, Henan Province, Luohe Gansheng Real Estate Co., Ltd. and Wang Xiaodong, July 16, 2018, n. 1449/2018

[430] In both cases, the Courts include such references in their *obiter dicta*, in order to reinforce and, to some extent, legitimize their decision. Both the rule of virtue and the socialist core values are therefore employed as general principles, open clauses to assess the parties' conduct in the specific cases and orient the application of proper legal provisions

[431] Formally laid out by the 18th CPC Congress in 2012 such values reflect the development of a comprehensive doctrine embraced by the Party since its early years. On the topic, see LI ZEQUAN (李泽泉), 社会主义核心价值观融入法规的 基本形式 (*The basic form of the integration of socialist core values into the legal system*), in Zhejiang Academic Journal, Vol. 1, 2018, 38-44, 38-40).

Particular attention deserves the role that socialist core values have in the General Provisions of the Civil Law of the People's Republic of China, meant to be the first book of the future Chinese civil code: Art. 1 of the provisions states that the statute is enacted, among others, "*for the purposes of (...) upholding socialist core values*". LI HONG (李宏), in 社会主义核心价值观融入民法典的理论意蕴 (*The theoretical implications of the integration of socialist core values into the civil code*) in Journal of Henan Normal University (Philosophy and Social Sciences), Vol. 45(3), 2018, 65-70) argues that the provisions reflect the implementation of Marxist philosophy into Chinese civil law, following the people-oriented approach and a materialist approach.

People's Courts at all levels refer to socialist core values in trying civil and administrative cases, emphasizing their pedagogical role. This means that while the values are not employed as grounds of the judgments, they are referred to in the *obiter dicta* by the People's Courts in order to publicize their moral significance and their functional relations with civil norms. For instance, the socialist core value of integrity, connected with the legal clause of good faith, may affect the interpretation of Art. 58 of the Contract Law where it provides for the liability of the parties at fault for the invalidation of the contract. In cases both parties are at fault, the respective liability may be tempered by favoring the party whose conduct has been more ethically worthy. This is the reasoning of the decision of People's Court of Laoshan District, Rizhao City, Shandong Province of 5th May, 2015 (n. 169/2015)

[432] See SHI JICHUN (史际春), 政府与市场关系的法治思考 (*Reflections on the Rule of Law in the relationship between government and market*), in Journal of the Party School of the Central Committee of the CPC, Vol. 18(6), 2014, 10-16, 12

[433] *Ibidem*

as well as of comprehensive documents such as developments plans, which may be referred to by laws.

Xi Jinping clarified that equality before the law extends to party and government officials too[434] and public authorities cannot violate the rights of the private economic operators and try to influence economic mechanisms and relations pertaining to the self-functioning of the market.

The respect of the rule is a priority in first place for public officers and party cadres. It is ensured not only and not always by its clarity in setting boundaries and limits to the intervention of the government into the economy, but by the circumstance that in its formulation the rule itself takes into account and incorporates the instances that the interested parties express[435].

The dynamic nature of the economic rule is further required by the economic conditions of the "primary stage of socialism" (社会主义初级阶段 – *shehuizhuyichujijieduan*) to allow spaces to private economy for the purpose of accumulating capital and fasten development, not too distant from Lenin's conclusions about the NEP. To this purpose, Art. 6 of the Chinese Constitution[436] states that "*diverse forms of ownership develop side by side and keeps to the distribution system in which distribution according to work is dominant and diverse modes of distribution coexist*". These are the basic socio-legal relations of the socialist market economy or "market socialism" (市场社会主义 – *shichangshehuizhuyi*), arisen from the 1970s-1980s reforms championed by Deng Xiaoping[437].

[434] See XI JINPING, *Officials Must Set a Good Example in Observing the Law*, in XI JINPING, *The Governance of China*, Vol. II, cit., 136-139

[435] See SHI JICHUN, *Reflections on the Rule of Law*, cit.

[436] I am referring to the 1982 Constitution.

[437] It has been argued that the theoretical roots of market socialism may be found in Mao Zedong's essay "On Contradiction" (1937) and in the particular in the explanation of the contradiction between the relations of production and the productive forces (See HOU SHUFANG (侯淑芳), 试论邓小平对毛泽东社会主义社会 基本矛盾理论的继承和发展 (*A Probe into the Inheritance and Development of Mao Zedong ' s Theory of Basic Contradictions of Socialist Societies by Deng Xiaoping*), in Journal of Central University for Nationalities (Human and Social Sciences), Vol. 28 (2), 2001, 17-23, 17-18). However, in "*On the correct handling of the contradictions among the people*" the Great Helmsman further pointed out economic planning was the mean to compose such contradictions and reach an equilibrium between production and needs, thus displaying the superiority of planned economy versus market. The theory which was later to become the "market socialism" was indeed born from the evolution of Mao's doctrine about contradictions, particularly thanks to Deng Xiaoping (See HOU SHUFANG, *A probe into the inheritance*, cit.).

Market Socialism is today the official economic system of the People's Republic of China, having replaced planned economy since the 14th Congress of the CPC in 1992. According to Deng's theory, market and planning are not mutually exclusive and do not characterize capitalism and socialism[438]. Both of these elements may be detected in market economies as well as in planned economies. Furthermore, the primary position of public economy is not inextricably related to its size, so that state owned economy may fully play its guidance role even leaving entire sectors of the economy in the hands of private economic operators[439].

The boundaries between government and market stem from the rational integration of instances brought on by the society, which are then incorporated into the *objective* law[440]. Institutionally, the Party absolves a unifying function among such instances[441]. In particular, according to the theory of the Three Represents[442], it embodies the advanced cultural and productive forces as well as the interests of the overwhelming majority of the people. An important consequence of the theory was the gradual integration between the party and the private economic operators. Under Jiang Zemin's leadership, the number of private enterprises establishing inner party cells started rising dramatically[443]. This ensured that a whole class of private enterpreneurs is subjected to the Party responsibility

[438] See DENG XIAOPING (邓小平), 文选 (*Selected Works*), Vol. 3, 人民出版社 (*renminchubanshe*), 1993, 373.

[439] See HOU SHUFANG, *A probe into the inheritance*, cit., 18-19

[440] See § 2.3. Such conceptual view appears to employ the Hegelian *volkgeist* as filtered through historical materialism in Engels' "*The origins of family, private property and the State*" (1884). Engels writes "*The state is therefore by no means a power imposed on society from without (...). Rather, it is a product of society at a particular stage of development (...); it is the admission that this society has involved itself in insoluble self-contradiction and is cleft into irreconcilable antagonisms (...) in order that these antagonisms, classes with conflicting economic interests, shall not consume themselves and society in fruitless struggle, a power, apparently standing above society, has become necessary to moderate the conflict and keep it within the bounds of "order"*. The same concept is recalled by SHI JICHUN, *Reflections on the rule of law, cit.*, 11.

[441] See CHEN JIANFU, *Chinese Law*, cit., 192-195

[442] On the notion and structure of the principle, see JIANG ZEMIN, *Selected Works*, Foreign Language Press, Beijing, 2013, Vol. III, 1-2; DING JUNPING (丁俊萍), "三个代表"思想源流和理论创新 (*The origins and development of the thought of Three Represents*), China Social Sciences Press, June 2012 Edition;
CAI RUIYAN (蔡瑞艳), 论"三个代表"重要思想的理论逻辑与实践框架 (*On the theoretical, logic and practical framework of the important thought of three represents*), in Journal of Yancheng Institute of Technology(Social Science Edition), Vol. 28(2), 2015, 11-14, 11

[443] XIAOJUN YAN, JIE HUANG, in *Navigating Unknown Waters: The Chinese Communist Party's New Presence in the Private Sector*, in China Review, Vol. 17 (2), 37-63, 39, point out, among the enterprises examined in the research, from 1993 to 2002 the percentage of private enterprises establishing CPC cells rose from 4% to 27,4%

and evaluation system [444], whose standards and criteria, embodying the Party's development vision, comprise the strategic priorities laid out by plans.

The transposition to the state administrative and legal dimension of the principle of Three Represents, which focuses on the Party dimension, was carried out by the theory of Scientific Outlook on Development (科学发展观 – *kexuefazhanguan*) developed by Hu Jintao[445]. This theory evolved in close connection with the rethoric of the Harmonious Socialist Society (社会主义和谐社会 – *shehuizhuyihexieshehui*). Such strong reference to the concept of social harmony led some scholars to assume that the theory of the Scientific Outlook on Development represented an overcoming of Marxist categories[446]. Indeed, the concept of harmony is deeply connected with the concept of sustainability[447]: social security, environmental protection, healthcare are issued to be comprehensively and rationally addressed and law becomes the path to follow. The cultivation of rational citizens with legal belief[448] goes through the enhancement of present legal rules and the building of new set of rules aimed at preventing social conflicts and solving the existing ones.

The scientific outlook on development represents the first step toward the aforementioned integration between ritual and political law.

Therefore, its main pillar is a people oriented approach. Economic development must strive toward the double goals of favoring and enhancing people's economic initiative as well as regulating and coordinating it in order to ensure that social harmony is preserved[449]. In legal perspective, such stance implies the strengthening of the legal value of Constitution[450], as the cornerstone of the socialist rule of law. This does not mean the

[444] See U.KISCHEL, *Comparative Law*, Oxford University Press, Oxford, 2019, 705

[445] CPC Secretary from 2002 to 2012

[446] See GUOXIN XING, *Hu Jintao's Political Thinking and Legitimacy Building: A Post-Marxist Perspective*, in Asian Affairs: An American Review, Vol. 36(4), 2009, 213-226

[447] See WU XIAOLI (邬小丽), 科学发展观与经济法中政府的准确定位 (*Scientific Concept of Development and the Exact Positioning of Government Authority in Economic Law*), in Journal of Nanjing University of Aeronautics &Astronautics(Social Sciences), Vol. 7(3), 2005, 35-39, 37.

[448] See ZHANG HONGYING (张红英), 马克思市民社会理论视域下的和谐法治建设 (*The construction of a harmonious rule of law in light of Marx's civil society theory*) in 传承 (*chuancheng*), Vol. 7, 2015, 82-83

[449] Hu Jintao's view is the product of a Chinese society which realize to have reached a consistent level of development and, therefore, perceives the need to deal with social issues typical of a developed society.

[450] See LI JIHUI (李继辉), 胡锦涛和谐法治观探析 (*An Analysis of Hu Jintao's View on Harmonious Rule of Law*), in Theoretic Observation, Vol. 84(6), 2013, 9-11, 9

introduction of mechanisms of constitutional review of laws and statutes[451]. It however promotes the reference to the Constitution to upheld comprehensive interpretations and implementations of legal provisions in line with the strategic priorities set up by the public powers.

The concept of harmonious society is today transposed into one of the socialist core values (harmony), while the dialectic rule of law/rule of virtue implements the ideology of the people oriented approach. The scientific connotation of such approach is instead translated into the operative principle of inclusiveness.

The socialist market economy is not a market economy. It is, however, a law-based economy[452].

The state enhances the complementary function of private economy while exercising supervision and control, pursuant to Art. 11 of the PRC Constitution.

To such purpose, Socialism with Chinese characteristics for the new era condensed and harmonized the general principles developed under previous leaderships[453], by defining and clarifying the connection between morality, technique, politics and law. Furthermore, it implemented the pattern knowledge-action-implementation-supervision[454], employing law as the mean of construction of such pattern[455].

The National Development Plan (i.e. the Five-Year Plan), based on the recommendations (建议 – *jianyi*) of the CPC Central Committee, is "*a guide to action for market entities, an important basis for government in performing its duties, and a common vision to be shared among the people of China*"[456]. In light of the features of modern Chinese law, the

[451] The power to enforce the Constitution is vested in the NPC and its Standing Committee but there are no mechanisms laid out for both supervision and enforcement. Theoretically, the Constitution has supreme authority over the law and its 1982 version is the "strongest", legally speaking, in the legal experience of the PRC. In 2001 the Shandong High Court founded a claim for damages over the right to education laid out in the Constitution, but the decision did not trace a new pattern and was not followed by successive case law. See, on the topic, CHEN JIANFU, *Chinese Law*, cit., 135-143

[452] Market and plan are therefore interpreted functionally. In this perspective, even the rule of law governing certain fields of market economy functions as an instrument, since its existence is due to a precise choice which, theoretically, could always be revoked or amended.

[453] I.e. the Deng Xiaoping Theory, the Thought of Three Represents and the Scientific Outlook on Development.

[454] See XI JINPING, *The Governance of China II,* cit., 241-248

[455] The Supervision Law of 2018 introduced a unitary and hierarchical institutional supervision structure. The incorporation of plans and plans' implementation into the scope of such supervision is up to debate and the practical impact of such law will need a few years to be assessed. However, provisions such as Art. 11(3), laying out a system of government sanctions for public officers who "fail to perform their functions in an effective manner" appears to take the performance-based legitimacy to a new level, by integrating it into positive law

[456] Preamble of the 13th Five-Year Plan

Plan is also a product of the described integration process. According to contemporary Chinese legal scholars, the Plan (and planning) are not simply sets of declamatory and ideological propositions typical of socialist legislation[457]. They instead endure a process of legalization[458].

The change is reflected in the terminology. Up until the early 21st Century, the official definition of "Plan" still embraced the original denomination of "计划" (*jihua*): this word, commonly translated as "plan", comprises two different characters: the last one is 划 (*hua*), meaning "to plan" but also "to divide", "to distinguish", "to make boundaries"[459]; the first character – 计 (*ji*) – is instead used to express, as noun, a plan, an idea or a stratagem and, as a verb, "to count", "to calculate", "to compute"[460].

Nevertheless, over the past fifteen years, the official terminology has abandoned the use of 计划, instead preferring to adopt, in official documents, the term 规划 (*guihua*)[461], translated as plan, but also as program[462] or, in a broader sense, as guidelines. Does that mean that the stricter and more "severe" denomination previously used has been replaced by a wider, more "gentle" expression, reflecting the change in the notion and status of the plan?

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[457] See R.SACCO, A.GAMBARO, *Sistemi Giuridici Comparati*, cit., 325-327

[458] See SHI JICHUN (史际春), 论 规 划 的 法 治 化 (*On the legalization of planning*), in Journal of Lanzhou University (Social Sciences), Vol. 34(4), 2006, 1-8. The author points out another relevant consideration: government intervention concerns not only public economy but also privately owned economy, especially in the context of a globalized market, where private economic operators may be supported by governments in their expansion on foreign markets

[459] The character 划, deriving from the traditional Chinese character 劃 (also *hua*), is indeed formed by the two radicals 戈 (*ge*) – meaning spear, lance or halberd – and 刀 (*dao*) – meaning knife

[460] 计 – derived from traditional Chinese 計 (*ji*) – comprises the radical 讠 (*yan*), indicating "speech" or "word", and the character 十 (*shi*), meaning "ten" but also "complete", "full" and "perfect". It appears, therefore, that the concept of planning expressed by the word 计划 refers to a process based on calculating indexes and figures, thus setting numerical objectives, an idea fitting perfectly into the Stalinist planning model, that is a scientific planning in terms of top-down development of the objectives and prevalence of figures over policy directives

[461] The term *guihua* (规划) is now universally recognized as the official terminology and is employed by legislation, by Courts and by legal doctrine. On the topic see YU JIANRONG (于建荣), 从五年计划走向五年规划 (*From the Five-Year Plan to the Five-Year Plan*), in Ascent, Vol. 142 (24), 2005, 23-25. The translation of the title of the article it is not accurate since both 五年计划 and 五年规划 are commonly translated as "plan": the title refers to the evolution from the first to the second denomination. In the english abstract of the articles the author provides, as key-words, "five-year plan" and "five-year project", but, in my opinion, such translation could give the idea of a sort of "demotion" of the plan, which indeed has not happened.

[462] See SHI JICHUN, *On the legalization of planning*, cit., 1.

Such an assumption, though not totally lacking truth, is, in my opinion, quite far from reality, as it can be noted simply looking at the character 规 (*gui*), which replaced 计 (*ji*), 划 (*hua*) remaining unchanged. 规 can indeed have the meaning of "compasses" and "dividers", thus mirroring somewhat the character 划, but it also means "rule" or "regulation"[463], being the first character in other law-related words such as 规定 (*guiding* = rule, regulation, prescription), 规则 (*guize* = rule, regulation, law), 规范 (*guifan* = standard, norm) and 规矩 (*guiju* = rule, intended as norm regulating a community or an organization as well as customary practice).

It seems therefore that the current denomination of the plan, as well as of the planning activity, bears a stronger link with the legal dimension than its predecessor does. 规划 expresses the idea of a plan which sets also a rule, a prescription. Incidentally, the new terminology could also suggest the legal nature of Chinese plans, different from proper statutes, from proper "law" (法律 – *falu*), but "legal" in its regulatory (规制 – *guizhi*) dimension.

3.2 The operative principles of planning. The Principle of Unity

In the previous paragraphs I have described the theoretical principles governing the rule-based economy, including planning. Now, I will assess some operative principles, which guide the plan-making process and justify its scope and content.

In first place, Unity. In socialist law, the political, legal and economic management are both theoretically and institutionally unified under the guidance of a ruling party – or an alliance of several parties – which can legitimately interpret the will of the ruling class. In legal perspective such feature implies the refusal of the principle of separation of powers. This idea was first implemented in Soviet Russia[464] and later transposed into the constitutional structure of the PRC[465].

[463] 规 derives from the traditional Chinese characters 槼 or 規 (both *gui*) and is composed by the radical 见 (*jian*), meaning "to see", "to observe", "to perceive", and by 夫 (*fu*), indicating "man" or "male".

[464] For instance, the Soviet Constitution of 1977 formalized the guiding role of the CPSU (Art. 6).

[465] Art. 3 of the Legislation Law (2000), upholds that statutory law must promote the guiding role of the CPC. On the principle of unity in Chinese constitutional law see also CHEN JIANFU, *Chinese Law,* cit.

The principle of unity is reflected by the existence of a parallel structure between the Party and the State, based on a constant interaction. The unity, however, does not mean that the activity of each state organs – and party organ – is not supervised.

In a socialist legal system the liberal-democratic idea of checks and balances cannot be accepted, since it contravenes the basic principle of the people's rulership, but, indeed, the Chinese legal system, drawing from its legal culture and applying it to current conditions[466], has developed the idea of a fourth general function, that of supervision (监督 – *jiandu*), as independent from the other three, though also following the logic of the ultimate unity of state functions[467].

From the economic point of view, the principle of unity means that the decision of the economic operators should strike a balance between economic, legal, political and social instances, depending on the role, size and strategic importance of said operators. In practice, this balance is often ensured by the work of CPC cells and branches within companies, according to Art. 19 of the Company Law[468].

The principle of unity, furthermore, deeply affects the system of legal sources in the PRC: given the intertwining between the Party and the state structures, it must be borne in minds that decisions of the Plenary Sessions of CPC Central Committee, as well as its notices, as well as the official declarations of Party Leaders, have to be regarded as sources of Chinese law[469].

3.3 Following: The principle of Democratic Centralism

[466] I am referring to the theory of the "five powers" as laid out by Sun Yat-Sen (孙中山), which still today is at the basis of Taiwan's Constitutional Structure. It is debated whether or not such idea inspired the modern concept of supervision as enshrined in the Supervision Law of 2018. On the topic see LIU XIAOMEI (刘小妹), 人大制度下的国家监督体制与监察机制 (*National Supervision System and Supervision Mechanism under the National People's Congress System*), in Tribune of political science and law, Vol. 36(3), 2018, 14-27, 15-16; ZHANG JIE (张杰), 《监察法》适用中的重要问题 (*Important issues in the application of the Supervision Law*), in 法学 (*faxue*), Vol. 6, 2018, 116-124, 118-119.

[467] See Art. 2 and 4 of the 2018 Supervision Law.

[468] English translation: The Chinese Communist Party may, according to the Constitution of the Chinese Communist Party, establish its branches in companies to carry out activities of the Chinese Communist Party. The company shall provide necessary conditions to facilitate the activities of the Party.

[469] The statement is also justified by the Constitutional and Rule-Making Role of the CPC within the Chinese system. On the topic see CHEN JIANFU, *Chinese Law*, cit., in particular Chapters II and III.

Art. 3 of the Chinese Constitution lays out the principle of Democratic Centralism, which is also referred to in many pieces of legislation. Democratic Centralism, as a principle guiding the decision-making process of human organizations – be they parties or state organs – was first developed by Lenin starting in 1905-1906 as an inner decision-making process of the Bolshevik faction[470]. Later on, it became part of the official doctrine of the Bolshevik party, the CPSU and, in 1927, the Communist Party of China[471]. Its basic structure is still the same outlined at the Third International as fundamental requisite of all communist parties around the world and comprises three elements[472]: i) election of all organs and positions within the party; ii) constant reporting of every elected body to its "electorate"; iii) subordination of the lower organs and position to the higher ones. To a deeper look, democratic centralism is more complex than what one could assume. The main idea of the principle was intended by Lenin himself as "freedom of discussion, unity of action"[473]. In other words, the democratic element lies in the freedom of expression within the organization[474]; whereas, when a decision has been approved – usually by majority – every member is expected to support it. Within a complex legal order such as the Chinese one, democratic centralism acquires a full and useful meaning only when put in relation with other constitutional values and principles contained in the fundamental legal texts[475].

According to Crespi Reghizzi[476], the Soviet legal science, through the principle of democratic centralism, "*tried to compose the antinomies between the directive and participatory features of enterprise law, between administrative law and civil law*". The same, in my opinion, could be upheld with regard to modern China, with the important difference that Chinese planning today extends the significance of democratic centralism to its whole system, comprising public authorities, enterprise management, expertise groups and so on.

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[470] See CHENG NAISHENG (程乃胜), 论民主集中制原则在宪法中的地位 (*On the principle of democratic centralism in the Constitution*), in 法制与社会发展 (*fazhiyushehuifazhan*), Vol. 6 (54), 2003, 57-64, 57

[471] On the issue see XING YING, XIA LI, *The Communist Party of China's local leadership, organizational form, and rural society in the 1920s*, illustrated by Zeng Tianyu and the Jiangxi Wan'an rebellions, in Chinese Journal of Sociology Vol. 1(3), 2015 380–418

[472] See CHENG NAISHENG, *On the principle of democratic centralism,* cit., 57-58

[473] See V.LENIN, *Collected Works, Vol. 10*, Progress Publishers, Moscow, 4th edition, 1978, 380

[474] See also the Constitution of the Communist Party of China, General Program, Point 4

[475] See CHENG NAISHENG, *On the principle of democratic centralism,* cit.

[476] See G.CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, cit., 15-17

Democratic centralism in China applies both to the party and to the state institutional structure. As far as the Party is concerned[477], the stance toward democratic centralism is well expressed by Xi Jinping himself[478], which pointed out how, on one hand, the Party welcomes criticism toward itself and the state policies, but, on the other hand, "*innovative analysis must be built upon a firm political stance*". In other words, the hierarchy is not contradicted by the debate as long as such debate serves the purpose of the elaboration, by the highest Party organs, of better policies.

3.4 Following: the principle of inclusiveness as paradigm of modern Chinese economic planning

"*The spirit of deliberation of the New Democratic Revolution is not in the final voting; it is mainly in the deliberation and repeated discussion that happen before a decision is made*"[479]. This statement by Zhou Enlai offers quite a significant view over the issue of deliberative and consultative democracy. The essence of planning can differ widely depending on how the poles of the democratic centralism.

As socialism with Chinese characteristic entered its "new era", the concept of consultative democracy has been regarded as its "*unique form and distinctive strength*"[480]. The same principle founds the recently issued Interim Regulation on Major Administrative Decision-Making Procedures[481], effective from the 1st of September 2019 and whose scope includes, among others, local development plans.

The consultation mechanisms characterizing Chinese socialism operate on two different levels as well in two different moments. On one hand, decision-making processes can aim at involving public opinion into the development of strategic decisions and plans[482]. On

[477] On the topic, see LI SONGSHAN (刘松山), 党内民主集中制在人民民主中的运用 (*The application of Inner Party's democratic centralism in People's Democracy*), in 政治与法律 (*zhengzhiyufalu*), Vol. 5, 2006, 23-35

[478] Part of the speech at the National Conference on Party School on December 11, 2015, in XI JINPING, *The Governance of China II*, cit., 173

[479] See ZHOU ENLAI, *Issues on the CPPCC*, in *Selected Works of Zhou Enlai on the United Front*, People's Publishing House, Beijing, 1984, 134

[480] Xi Jinping, speech at the meeting marking the 65th anniversary of the CPPCC, in XI JINPING, *The Governance of China II*, cit., 318

[481] 重大行政决策程序暂行条例 (*zhongdaxingzhengjuecechengxuzanxingtiaoli*)

[482] See Section 2 of the Interim Regulations on Major Administrative Decision-making Procedures. WANG XUEHUI (王学辉), and WANG YADONG (王亚栋), in 行政法治中实质性公众参与的界定与构建 (*The Definition and Construction of Substantive Public Participation in Administrative Rule of Law*), in 法治研

the other hand, the consultation may happen at an institutional level, involving, in first place, the Chinese People's Political Consultative Conference and, in second place, expertise groups as well social and non-governmental organizations[483]. Moreover, consultative processes can occur both before/during the drafting process and after, thus turning into supervision mechanisms[484]. The extent of the scope of such consultative mechanisms is justified by the very nature of Chinese socialism in the new era, so that "*putting the people's democracy into practice and ensuring the people's position as masters of the country demands that we initiate extensive discussions throughout the whole of society while governing the country*"[485]. The principle of inclusiveness, and its incidence on planning, does not find explicit reference in the Constitution, but is laid out in the 2005 Opinions for strengthening the planning work for the national economic and social development plan (国务院关于加强国民经济和社会发展规划编制工作的若干意见) as well as in the CPC documents and recommendations regarding plans.

The public's involvement in plan drafting process and supervision raises indeed complex issues. It has to deal with several technical difficulties such as information asymmetries among the public opinion, participation costs, awareness of public society and technical management of the consultative procedures[486]. Indeed, some experiments of public involvement in planning procedures have already been carried out[487] and are likely to be repeated in the future. Some authors also advocated the introduction of a responsibility

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究 (*fazhiyanjiu*), Vol. 2, 2019, 50-59, 52, consider Art. 41 of the Constitution to be the legal basis for such kind of deliberative decision-making, where it states that "*Citizens (…)have the right to criticize and make suggestions regarding any state organ or functionary"*

[483] It's a process which starts from the Party and goes on to the State apparatus, as laid out by Xi Jinping in his speech at the CPC central committee's conference on the party's work with social organizations, in XI JINPING, *The Governance of China II*, cit. , 334-338

[484] See Point XXV of the Opinions on Establishing and Improving the Implementation Mechanism of the National 13th Five-Year Plan issued by The General Office of the Central Committee of the Communist Party of China The General Office of the State Council

[485] Xi Jinping, speech at the meeting marking the 65th anniversary of the CPPCC, in XI JINPING, *The Governance of China II*, cit., 319

[486] See LUO MEIYING, ZHAO GAOXU (骆梅英， 赵高旭), 公众参与 在行政决策生成中的角色重考 (*Reassessment of the role of public participation in administrative decision-making*), in 行政法学研究 (*xingzhengfayanjiu*), Vol. 1, 2016, 34-45, 35-37. Providing sufficient and complete information to the public is, indeed, on of the first step toward the construction of an efficient system of public participation in decision-making processes as noted by XIA YU (夏雨), 行政立法中公众参与的难题及其克服 (*The Problem of Public Participation in Administrative Legislation and Its Overcoming*), in 法治研究 (*fazhiyanjiu*), Vol. 2, 2019, 71-78

[487] For instance, the popular Chinese messaging service WeChat (微信 – *weixin*) was involved in consultation procedures among the public for the preparation of the 13th FYP

system for public offices and government not complying with the duty of consulting the public over delicate issues[488].

The promotion of democracy in development planning passes through a process of "drawing on collective wisdom" (集思广益 – *jisiguangyi*)[489], according to a logic which refuses the representative principle[490] and instead relies on the construction of a legal set of planning rules in order to process and interpret social instances and transpose them into rights and duties.

3.5 Legal nature of planning acts

When dealing with the legal nature of plans and, more in general, of planning acts, we should distinguish, for the purpose of the present analysis, three different levels of assessment.

At the primary and basic level, we can discuss the legal value of plans from the point of view of legal anthropology, as already discussed[491].

The second level of the analysis is the socio-political one: within an organized society, plans may be regarded as binding as long as they reflect common shared values or the political will of one or several organizations which are legitimately viewed as detaining powers of rulership at a certain moment[492].

The third level of analysis is the properly legal one, though meant in a narrow sense, as incorporation of the concept of planning in the discourse of legal formants – e.g.

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[488] See LUO MEIYING, ZHAO GAOXU, *Reassessment of the role,* cit., 37 ff. The thesis seems now upheld also by the Interim Regulations on Major Administrative Decision-Making Procedures

[489] Xi Jinping, speech at the meeting marking the 65th anniversary of the CPPCC, in XI JINPING, *The Governance of China II,* cit., 320; WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 38-61

[490] This is not the place to discuss about the Chinese conception of democracy. What I am interested in is how the idea of public participation affects the mechanism of planning, justifying it with the reference to democracy. It has however been argued that not only China, but several part of Asia, due to their specific culture, regard democracy as the "*state's ability to provide collective welfare benefits*". See J.PALEY, *Toward an Anthropology of Democracy*, in Annual Review of Anthropology, Vol. 31, 2002, 469-496, 475

[491] As already noted, a centralization of the power seems to be essential to the establishment of a structured planning. Gluckman highlights how hierarchy enables a mechanism of power delegation (or sub-contracting). Such delegation, I would argue, is the core and the basis of each concept of planning. See J.CARRIER (edited by), *A Handbook of Economic Anthropology,* cit., 112-113 and 115.

[492] On the topic see also J.PALEY, *Toward an Anthropology of Democracy,* cit.; R.SACCO, *Antropologia Giuridica,* cit.

legislation, jurisprudence, legal doctrine. This is, obviously, the interpretative key I am most interested in.

After a decade of silence, a renewed, though lukewarm, interest in legal features of planning took over some Chinese scholars and the topic which channeled such interest was, indeed, the legal nature of planning acts, *rectius* of the National Planning Act, i.e. the National Five-Year Plan for Social and Economic Development.

Starting from the 1980s, the gradual dismantling of certain previously state-owned sectors of the economy in favor of the growth of private sector started eroding traditional planning at the core, while still formally upholding the plan as the primary regulatory source for the management of the economy. It is what Naughton called the "Growing out of the Plan" phase[493], implying an increase of the out-of-plan transactions while shrinking the size of the plan, so that "*given the obvious fact that the economy was growing rapidly, (…) the plan would become proportionately less and less important*"[494].

However, it was in 2002 – a decade before the studies of Melton and Heilmann – that Xiao Xiangrong criticized the lack of legal approach to plans' drafting process and implementation[495]. From then on, with a certain recurrence, economic law scholars inquired the legal implications and legal nature of planning acts, in first place Shi Jichun, who first discussed the idea of a "legalization of planning"[496].

It was in those years (2002-2012, during the leadership of Hu Jintao) that the legal debate around planning gained its actual features. Scholars faced (and face) a phenomenon whose high complexity renders it difficult to define clear answers.

3.5.1 The issue and the different theories proposed

[493] See B.NAUGHTON, *Growing Out of the Plan*, cit.

[494] See *ivi*, cit., 9. Furthermore, the fact that the 14th Congress of the CPC formally abandoned the planned economy seemed to justify a skeptical view toward any theory which upholds the legal significance of Chinese plans.

[495] See XIAO XIANGRONG (肖向荣), 建议制定 《规划法》(*Proposal for the development of a "Planning Law"*), in 宏观经济研究 (*hongguanjingjiyanjiu*), Vol. 41(4), 2002, 63. The author was also one of the first Chinese scholars to openly discuss about a "Planning Law", i.e. a comprehensive statute laying out provisions regarding plans' drafting and implementation.

[496] See SHI JICHUN, *On the Legalization of Planning*, cit.

As reported by Guo Changsheng[497], the nature of plans is quite clear among economists and management scholars. Plans, and in particular the national Plan, are strategic (战略性 – *zhanluexing*), programmatic (纲领性 – *ganglingxing*) and comprehensive (综合性 – *zonghexing*), with the characteristics of time continuity and spatial delimitation[498].

Among lawyers, instead, there is almost no common ground about the legal nature of plans and, according to Hao Tiechuan, the contrast further proves the relevance of the issue, since understanding confusion about such nature may lead to difficulties in their implementation[499].

When approaching the issue, legal scholars tend to note that, pursuant to Art. 62 n. 10 of the Constitution, the Plan for National Economic and Social Development is examined and approved by the National People's Congress (NPC), i.e. the main legislative body. Furthermore, the report of the 14th CPC Congress clearly stated that, in the socialist market economy, plans remain an important mean of macro-economic regulation[500]. These circumstances lead scholars to uphold that plans are, somehow, legally relevant. In particular, the formal approvation by the NPC justifies the legal effectiveness of the master Plan[501].

On these premises, the Chinese doctrines developed different theories which I classify under four main groups.

A) The Plan as a "special legal act" (特殊性法律 – *teshuxingfalu*)

The theory is put forward by Guo Changshen[502] on the basis of the analysis of the Plan's drafting procedure coupled with a Marxist approach. Guo notes that, even if the Plan is approved by the NPC, it does not follow the legislative procedure set by the Legislation

[497] See GUO CHANGSHENG (郭昌盛), 规划纲要的法律性质探析 (*Legal nature of the planning outline*), in 上海政法学院学报 (*shanghaizhengfaxueyuanxuebao*), Vol. 3, 2018, 57-66, 58; the circumstance is also mentioned by XU MENGZHOU (徐孟州), 论经济社会发展规划与规划法制建设 (*On economic and social development planning and the construction of a legal system of planning*), in 法学家 (*faxeujia*), Vol. 2, 2012, 43-55, 45

[498] *Ibidem*

[499] See HAO TIECHUAN (郝铁川), 我国国民经济和社会发展规划具有法律约束力吗？(*Is the national plan for the economic and social development legally binding?*), in Study & Exploration, 169 (2), 2007, 99-102, 99-100

[500] See *ivi*, cit., 101

[501] See YANG WEIMIN (杨伟民), 规划体制改革的主要任务及方向 (*The main tasks and directions of the reform of the planning system*), in 中国经贸导刊 (*zhongguojingmaodaokan*), Vol. 20, 2004, 8-12, 10

[502] The author, before laying out his own theory, analyzes several major theories about the legal nature of the plan, which I will often refer to by directly quoting, among others, the work of Guo

Law[503]. It instead follows a special legislative procedure, which heavily involves the political organs of the CPC. In its formal and ritual procedure of enactement, the Plan resembles a piece of statutory law[504].

Even in its content, Guo points out, the Plan reproduces the logic structure of general norms, following a pattern of assumption (about the issues of development) → behavior (action to be carried out in order to tackle the issue) → consequences (achievement of the goal, i.e. the socio-economic development)[505].

Regardless of its formal attire, the Plan is also legal because it is socially effective bringing to unity the will of the state, the will of the ruling class, society and its material conditions. If its procedure satisfies the formal character of the legal rule, its comprehensive and fact-based content embodies the ruling class' will and its connection with material society[506]. On such premises, Guo believes that the Plan is to be considered binding on the government as well as on every member of the society[507].

The theory, without doubt, shows deference toward a Marxist approach, which fits in the context of market socialism. However, it does not explain why the Plan should be regarded as a "legislative act" (立法行为 – *lifaxingwei*)[508] and not, as the author refuses to do, another type of normative document[509].

Indeed, the greatest merit of this theory is, in my opinion, to derive, through its Marxist approach, an all-encompassing value of the Plan, not limited to the public sector. This consideration implies the assessment of the effectiveness of planning instruments toward both public and private actors and economic operators.

Other approaches, though upholding the legal nature of the plan on the basis of its constitutional status and its drafting, approval and supervision procedures[510], considers it to be binding only upon the government[511]. According to this theory, the legal effect of

[503] Legislation Law (中华人民共和国立法法 – *zhonghuarenmingongheguolifafa*) of 2000 (revised in 2015)
[504] See GUO CHANGSHENG, *Legal nature,* cit., 60
[505] See *ivi,* cit., 62
[506] See *ivi,* cit., 62-63
[507] *Ibidem*
[508] See *ivi,* cit., 64
[509] See *ivi,* cit., 62-63. The same author recognizes a lack of argumentation from those scholars who advocate the completeness of the legal attributes of the plan (see *ivi*, 60), since it mainly draws its binding force from the explanation of its content. However, his formalistic approach does not settle the issue.
[510] See YAN CHENGYI (颜诚毅), 规划与法律如何衔接 (*How to integrate planning and law*), in 人力资源管理 (*renliziyuanguanli*), Vol. 1, 2016, 191-192
[511] The theory is reported in GUO CHANGSHENG, *Legal nature,* cit., 59-60

the Plan should be interpreted narrowly[512]. Hao Tiechuan points out that the notion of legal effect, in general, refers to the reliance on state force to ensure the effectiveness of the rule's application[513]. The Plan's content defines objectives related to government's duties that are integrated into the evaluation of public offices performances. Therefore, they constraint public servants' behavior and are only addressed to them[514].

It is what Guo Changsheng call an "incomplete legal attribute" (不完全法律属性 – *buwanquanfalushuxing*)[515].

B) The Plan as a "regulatory document" (规范性文件 – *guifanxingwenjian*)

This theory relies on a mainly formal reasoning. Since legislative nature is only attributable to acts approved according to the Legislation Law, Plans are by no means statutory or even "legal". Neither are they, however, regulations/measures adopted by the State Council pursuant to Art. 89 of the Constitution. The specialty of their approval procedure would justify their inclusion in the residual and fairly ambiguous category of "regulatory documents". They are, according to Huang Jinrong[516], all documents with legal effect other than laws or other regulations and they are usually general and abstract in their content[517]. Therefore, the notion comprises all the measures, notices, opinions, etc. issued by administrative authorities without following the prescribed drafting procedures provided for statutes and regulations.

The concept displays some similarities with the concept of administrative regulations and measures, issued by governments and other administrative bodies under the government[518]. On this premise, some authors[519] suggest that a "general authorization"

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[512] See HAO TIECHUAN, *Is the National Plan,* cit., 101

[513] *Ibidem*

[514] See *ivi*, cit., 101-102

[515] *Ibidem*. This also seems the approach embraced in DI YI (翟翌), 论"国民经济与社会发展规划 "相关行政诉讼 (*On the administrative litigation related to the national economic and social development plan*), in 政治与法律 (*zhengzhiyufalu*), Vol. 1, 2012, 90-100, 92. Here, the author denies that the Plan has a "normative content" but states that it has "statutory effect" pursuant to Art. 62 of the Constitution as well as the legally regulated system of supervision on local plan by local People's Congresses

[516] See HUANG JINRONG (黄金荣), " 规范性文件 " 的 法律界 定及其效 力 (*Legal definition and validity of "regulatory documents"*), in 法学 (*faxue*), Vol. 7, 2014, 10-20

[517] See *ivi*, cit., 10-11

[518] See *ivi*, cit., 11-12

[519] See ZHOU LEJUN (周乐军), 行政规范性文件的生成形态及其类型化 (*The Formation and Typology of Administrative Normative Documents*), in 法学论坛 (*faxueluntan*), Vol. 3, 2019, 59-68. The author explicitly declares that the analysis carried out is based on a functionalist approach to the concept of rule of law, thus approaching the Kelsenian legal hierarchy notion in a dynamic way, distinguishing between general and special authorizations

may empower public organs to issue valid and legally effective regulatory documents, as long as they do not cover matters that, for their importance and comprehensiveness, must be regulated through statutory law.

This opinion, however, does not clarify the legal value of such documents nor their position in the hierarchy of legal sources.

The issue is partly addressed by the Administrative Procedure Law (行政诉讼法 – *xingshengsusongfa*)[520]. The Law mentions the *guifanxingwenjian* in more than one provision, specifying that defendants in administrative disputes (i.e. public administrations), when providing the legal basis for the action(s) taken and challenged, may also refer to such normative documents[521], which are, on the other hand, reviewable by courts under request of plaintiffs challenging their lawfulness[522].

When the court finds that these documents are unlawful, it cannot consider them in assessing the lawfulness of the action challenged and provides the issuing authority with recommendations[523], thus establishing a dialogue with the administration which is internal to the system, while the document deemed unlawful is "set aside". It appears, therefore, that regulatory documents may be used by the courts to uphold the legitimacy of an administrative action but not to assess its unlawfulness. Furthermore, the administrative judge may not annul such documents and must refer to the issuing authority.

The scheme designed by the Administrative Procedure Law is consistent with the reference that Chinese courts make to general socio-economic development plans, which are often used to uphold administrative decisions. Furthermore, the usually administrative nature of regulatory documents does not exclude that they may also be issued by the NPC and its standing committee, when such organs operate outside the scope of the Legislation Law[524].

The notion of regulatory documents, partly due to its ambiguousness, appears to some extent appropriate to define such peculiar acts as the plans and even justify indirect

[520] The two amendments of the Law, occured in 2014 and 2017, reformulated the original 1989 text and introduced important changes with regard to the legal status of regulatory documents
[521] Art. 34
[522] Art. 53. The provisions regarding regulatory documents was introduced with the 2014 amendment of the Law, as reported in ZHOU LEJUN, *The Formation and Typology,* cit., 59
[523] Art. 64
[524] The point is emphasized in HUANG JINRONG, *Legal Definition,* cit., 13-16

references made by judges. However, I believe, it fails to address a basic point. Some of the main sources regulating modern development planning in China are classifiable as regulatory documents[525]. These sources are regulatory since they, in a general and abstract fashion, define procedures and operational rules for the preparation and implementation of plans. Plans follow a completely different structure: they lay out conduct rules which are aimed at managing and coordinating economic activities rather than at regulating them. Moreover, the Interim Regulation on Major Administrative Decision-Making Procedures [526] include local development plans among the "*major administrative decision-making matters*" (重大行政决策事项 – *zhongdaxingzhengjueceshixiang*)[527], together with several other policy-inspired concrete activities, thus seemingly associating local plans with administrative decisions [528] and actions, rather than with normative documents.

C) The Plan as a mixed-nature act

The functionalist and non-formalistic vision of Xu Mengzhou[529] builds up the idea that the core of the nature of plans is a hybrid one, derived from the coupling of policy and law. The policy element within Chinese plans is acknowledged by almost every scholar. Xu, however, associates this aspect with the peculiar legal notion of plan. In expressing their comprehensive and programmatic nature, plans display a policy content which is detached from the purely political dimension and becomes a blueprint for the development of the whole nation[530]. Furthermore, the national Plan is approved by the NPC, which gives it legal effect. It also clarifies responsibilities for its own implementation and sets objectives functioning as a commitment from the government to the people[531].

[525] In particular the Opinions for strengthening the planning work for the national economic and social development plan (2005)
[526] Effective from September 1, 2019
[527] See Art. 3
[528] The concept is confirmed by Art. 2 of the Regulation, stating that "*This Regulation shall apply to the procedures for making and adjusting major administrative decisions of local people's governments at or above the county level*"
[529] See XU MENGZHOU, *On economic and social development,* cit. This theory is also reported in GUO CHANGSHENG, *Legal nature,* cit., 60
[530] See *ivi*, cit., 45. Xu is perfectly aware that the Plan is formulated in accordance with the recommendations of the CPC Central Committee. However, he argues that the approval of the NPC, as well as the previous deliberation from the State Council, transposes the plan from the political level to the legal plan
[531] *Ibidem*

It is an act aimed at orienting and coordinating the behavior of economic actors within the market and promoting socialism with Chinese characteristics[532]. Its peculiar role imposes, according to Xu, a broad approach. The Plan is therefore both a policy and a legal document[533].

Xu's analysis stops here. His stance, however, deserves a further reflection. The mixed nature of plans and the idea of a legal vest to a policy content defines planning acts in terms of soft law. Soft law rules, due to their broad nature, are particularly fit to define long-term policy objectives and strategies, exactly like development plans[534]. The argument would be further reinforced by the evolution of planning procedures, which now emphasize the inclusive dimension[535] and rely, for the implementation and enforcement of planning strategies, at least to some extent on voluntary compliance by the addressees, due to the common core of the development objectives laid out[536].

In the Chinese context, however, compliance also relies on extensive responsibility systems for public officers as well as on hard law provisions which refer to development plans, indirectly providing another channel to express a legal effect[537]. In other words, the association between plans and soft law is valid as long as we further specivy the degree of integration[538] between plans and those hard law provisions which refer to plans or serve as implementing instruments for plans.

D) The Plan as a social regulatory force

As the new course of Chinese planning had just started, Yang Weiming[539] addressed the issue of the reform of the planning system in a brief article[540] which is stil one of the most

[532] *Ibidem*
[533] See *ivi*, cit., 45-46
[534] On the topic see A.DI ROBILANT, *Genealogies of Soft Law*, in The American Journal of Comparative Law, Vol. 54(3), 2006, 499-554
[535] See § 3.2.4
[536] This legal process connotes the evolution of modern soft law. Soft law drafting procedures tend to involve the subjects regulated, to develop an inclusive dimension. The binding force of soft law provisions relies, at least partially, on the fact that the objectives and purposes set by the act take into account the instances and the interests of the subjects regulated, so to promote a spontaneous compliance. See E.MOSTACCI, *La Soft Law nel Sistema della fonti: uno studio comparato*, Cedam, Padova, 2008, 37-40
[537] Furthermore, the party responsibility system assessed the performances of party cadres also on the basis of compliance with development plans
[538] On the different degrees of integration between soft law and hard law see E.MOSTACCI, *La Soft Law*, cit.
[539] Yang Weiming (1956-) is a former member of the National Development and Reform Commission and a current member of the People's Consultative Conference. He has also been director of the research center for development planning of the Tsinghua University in Beijing
[540] See YANG WEIMING, *The main tasks*, cit.

quoted among Chinese scholars. From the perspective of a non-jurist[541], Yang defined planning as a criterion to regulated social behaviour, second only to law[542]. Guo Changsheng intended this theory as denying legal attributes to planning acts[543]. However, a thorough analysis of Yang's view proves a clear understanding of the legal character of plans, due to the NPC approval[544]. Furthermore, Yang advocates for a comprehensive legalization of the planning system, in particular for documents clarifying the relations among national, local, general and special plans, as well as the drafting process and content of plans[545].

According to Yang, plans are social regulatory forces because they restrain public behaviour and because of their orienting capabilities[546]. Such coordinative nature is transposed into a legal responsibility system where statutory laws or other legal provisions set rules which share a common purpose with development plans[547]. Through its whole system, development planning acquires a legal character. Yang appears to be aware of this and, following this approach, the legal nature of plans is not the key to the functioning of the system. What is important is the incorporation into legal acts of the phases and tasks of the planning process.

I would argue that Yang's theory does not want to deny legal nature to plans. It instead focuses on the relations between plans and the planning system. To formalists, his approach would not be acceptable[548], but in the context of a comparative analysis, it

[541] Yang's studies mostly regarded development planning and industrial policy.
[542] See YANG WEIMING, *The main tasks,* cit., 8
[543] See GUO CHANGSHENG, *Legal nature,* cit., 59
[544] See YANG WEIMING, *The main tasks,* cit., 10
[545] See *ivi*, cit., 12
[546] See *ivi*, cit., 10
[547] Yang is not the only scholar to put forward this proposition. The analysis of legal responsibilities deriving from plans is clarified in the terms mentioned above in YAN YUNQIU (颜运秋), FAN SHUANG (范爽), 法理学视野下的中国经济规划 (*China's economic planning from the perspective of jurisprudence*), in 法治研究 (*fazhiyanjiu*), Vol. 3, 2010, 12-19, 15-17
[548] Guo Changsheng notes (see GUO CHANGSHENG, *Legal nature,* cit., 59) that the idea of plan as a criterion for regulating social behaviour does not clarify its essential meaning. Furthermore, social matters are regulated by extensive sets of norms which are political, legal, ethical, religious, etc. In other words, any rule is meant, to some extent, to regulate a social behavior or an economic relation. On this basis, I would say that for sure the plan is for sure a socio-political instrument to regulate legal subjects' behavior. However, what, in Chinese socialism's new era, renders it particularly significant is its capacity to "upgrade" its socio-political significance to a proper legal one, incorporating its regulating function into legal documents. However, Yang confirms this point too. It is Guo's approach which, in certain points, appears to be too strict and not fit to analyze a complex and dynamic phenomenon such as the plan.

reinforces the idea of planning as a formant[549]. Yang's theory is not developed from a strictly legal point of view. Therefore, he does not address the consequences that could derive from different legal attributes of development plans, in terms of legal responsibility and litigation. Nevertheless, he offers a comprehensive perspective which allows me to test his and the previous theories against the concrete application the Chinese legislature and the Chinese courts have carried out with regard to development plans.

3.5.2 The position of development planning in statutory and case law

References to development planning have become a regular feature of Chinese socio-economic legislation. Each piece of statutory law concerning a matter of socio-economic development contains, usually within the first ten articles, a provision requiring that People's governments at all levels include the matter regulated in their general development plans[550].

The norms only mention local development plans, but obviously the general national plan also refers to these policies. Such statutes, therefore, on one hand uphold plans as integrating factors among economic policy laws[551] and on the other hand reassess the logic hierarchy which binds local plans to the national one. Their function is thus mainly coordinative.

The Chinese legislature, however, also upholds a different, more substantive, function of planning, i.e. it refers to planning as a criterion of legitimacy of certain administrative actions. So, Art. 5 of the Urban and Rural Planning Law[552] states that "*The establishment of the overall planning of a city or town, a township planning or a village planning shall*

[549] Neither Yang nor the others scholars quoted mention the concept of formant. They are not comparative lawyers. However, Yang's approach builds up a basis for a comprehensive approach which is non-formalistic.

[550] See, for instance and just to refer to the most recent legislation, Art. 7 of the Vaccine Administration Law of the People's Republic of China (中华人民共和国疫苗管理法); Art. 5 of the Social Insurance Law of the People's Republic of China (中华人民共和国社会保险法); Art. 8 of the Food Safety Law of the People's Republic of China (中华人民共和国食品安全法); Art. 7 of the Product Quality Law of the People's Republic of China (中华人民共和国产品质量法). Similar provisions are contained in statutes concerning, for instance, electronic commerce and promotion of circular economy.

[551] In YAN YUNQIU, FAN SHUANG, *China's economic planning,* cit., 17, it is mentioned how planning absolves a role of coordination among economic policies and this role is one of the reasons why, according to the authors, the process of planning's legalization should be sped up.

[552] Urban and Rural Planning Law of the People's Republic of China (中华人民共和国城乡规划法), issued in 2007 and revised in 2019.

be based on the national economic and social development planning". The provision is implemented and integrated, in concrete, by Art. 9 of the Regulation on the Expropriation of Buildings on State-Owned Land and Compensation[553], saying that "*all kinds of construction activities requiring expropriation of buildings shall comply with the national economic and social development plan, overall land use plan, urban and rural plan and special purpose plans*".

In other words, the plan ensures that there is a project whose common-interest basis justifies the expropriation. From this perspective, the letter of the law is confirmed by local courts which, in order to evaluate the legitimacy of an expropriation, refer to the local economic and social development plans and the projects such plans lays out[554]. In these decisions, judges verify whether or not the projects justifying expropriations are included in local development plans[555].

As reported by the *He Zhenxue v. Hangzhou Municipal People's Government*, the content of the plans indicates the involvement of a public interest in the contested activity. If a project is included into the plan, then the activity carried out by the administration is legitimate, even if the land expropriated had been previousy designated for other uses[556].

In other cases, the parties themselves include local development plans as evidence to uphold either the legitimacy of an act concluded[557] – i.e. an expropriation or a construction project – or an obligation upon the government.

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[553] 国有土地上房屋征收与补偿条例 (*guoyouyudishangfangwuzhengshouyubuchangtiaoli*)

[554] Among the most recent decisions see *He Zhenxue and other 27 people v. Hangzhou Municipal People's Government*, Hangzhou Intermediate People's Court, Zhejiang Province, March 12th of 2014, n. 44/2014; *Yu Junjie and other 113 people v. Liaoyang Municipal People's Government*, Liaoyang Intermediate People's Court, Liaoning Province, January 30th of 2018; *Ye Ping, Ding Zhuoyuan, etc. v. Yiwu Municipal People's Government*, Jinhua Intermediate People's Court, Zhejiang Province, September 6th of 2018, n. 662/2017; *Wang Zhenyu, Wang Yingchun*, second instance administrative judgment, Hubei Higher People's Court, September 10th of 2018; *Deng Zhiming*, the second instance administrative judgment of the Furong District People's Government of Changsha City, Hunan Higher People's Court, September 10th of 2018, n. 209/2018.

[555] On the topic, see also GENG BAOJIAN (耿宝建), YIN QIN (殷勤), 集体土地征收与补偿过程中可诉行政行为的 判定与审查 (*Judgment and review of actionable administrative actions in the process of collective land acquisition and compensation*), in 法律适用 (*falushiyong*), Vol. 1, 2019, 76-91

[556] For instance, commercial uses, as reported in the examined case. The Court mentions that the land expropriated had been designated for commercial purposes, but since the plan show a clear interest in the construction of the project contested (i.e. a subway line) in that specific area, the previous decision is overridden (see *He Zhenxue and other 27 people v. Hangzhou Municipal People's Government Housing Administrative Collection Case*, section II – 裁判结果 – results of the referral).

[557] See also *Zhu Yafei, Zhang Jianshu, Wang Minglie, Wang Tong, Lu Fuzhong v. Shanghai Jing'an District People's Government*, Shanghai Second Intermediate People's Court, July 21st of 2015, n. 270/2015.

In this regard, the *Ye Ping et al. v. Yiwu Municipal People's Government* decision (September 6th of 2018) issued by the Jinhua Intermediate People's Court, Zhejiang Province, is particularly relevant, on account of the double perspective through which the Court assessed the role of the plans involved in the case, i.e. in particular the economic and social development plan of the Yiwu (义乌) city[558], the urban plan and the compensation plan for the expropriated houses on state-owned land[559]. In first place, the Court refers to the city economic and social development plan looking for the common interest justifying the expropriation itself and rules that "*the renovation project (…) is in line with the outline of the 13th Five-Year Plan for the National Economic and Social Development*". On the basis of this argument, the Court then dismisses the first claim of the plaintiff, according to which the construction works did not respond to any public interest[560].

In second place, the Court proceeds to address the procedure of formulation of the compensation plan (征收补偿方案 – *zhengshoubuchangfangan*[561]), and in particular the solicitation of public opinions in the drafting phase of such plan. The plaintiff argues for the non-legitimacy of the compensation plan due to the lack of public consultation procedures. The Court, in its reasoning, ascertains the occurrence of such procedures and upholds the legitimacy of the compensation plan[562], thus dismissing also the second claim of the plaintiff[563].

The issue is even clearer in the *Xu Bingheng, Chen Miaofeng et al. decision*[564], where the Zhejiang Higher People's Court assessed the legitimacy of a local administrative act –

[558] A county level city in the Zhejiang Province.

[559] According to the land ownership regime in China, land in cities is state-owned and private subjects may acquire the ownership of construction built upon such land.

[560] First page of the judgment. Other cases are available where the parties makes reference to the plan in order to argue for the lack of common interest justifying the expropriation: see, for instance, *Lu Chonghua, Lu Wei and other v. Feidong County People's Government*, Hefei Intermediate People's Court, Anhui Province, September 17th of 2018.

[561] It is not, obviously, a development plan and the English translation could be misleading. The Chinese term is however different and it is therefore clear that such plan is not a *guihua*, but a sort of administrative plan to organize the compensation procedures.

[562] Pages 2 and 3 of the judgment. The same reasoning is carried out in the *Deng Zhiming* case, where the Court verifies that the local governments sought public opinions after the issuance of the compensation plan.

[563] However, what, for the purpose of the analysis, is relevant, is the logic employed by the Court, which, essentially, not only evaluates the legitimacy of the public authorities' decision on the basis of the plan but also investigates the legitimacy of the procedures according to which such plans are drafted.

[564] *Xu Bingheng, Chen Miaofeng v People's Government of Jiangdong District*, Ningbo City, Zhejiang Higher People's Court, August 22nd of 2016, n. 571/2016, p. 2 of the judgment.

concerning the reconstruction of old urban houses – in light of its compliance with the section of the Economic and Social Development Plan regarding urban reconstruction project and housing construction. The Court mentions that, in order to assess the need to carry out the activity reviewed (i.e. reconstruction of houses), the judge must verify the compliance of the project with urban and rural planning law as well as with the general socio-economic development plan.

In concrete, the Courts, when carrying out such verification, often refer to documents issued by the local Development and Reform departments which state such compliance[565], thus showing deference toward the decision of the administration and restrain from a thorough assessment.

In another case[566], although indirectly, the People's Court of Huaiyin District, Jinan City traced a connection between development plans and a general responsibility regarding private subjects. In a contractual dispute regarding a heating service contract, the Court denied the plaintiff the restitution of the whole fee previously paid to the defendant since with his behaviour he had directly caused the event leading to the closure of the heating pipes[567]. Such behaviour was in the first place violating the relevant regulations[568] and, in the second place, contravening the directive laid out in the national development plan, which provided for the establishment of a safe and sound heating management system.

Going back to analyzing legislative provisions, a third group of sources mentions plans as a criterion to orient and justify certain actions of the government. I mainly refer to legal rules regarding investments. So, Art. 26 of the Measures for the Administration of Overseas Investment of Enterprises[569] requires that such investments comply, among other, with "development plans and macro-economic policies". Again, Art. 11 of the Regulation on Government Investment[570] uses national plans, special plans and industrial

[565] See the *Xu Bingheng* case as well as *Zhang Yuanbin v. Xuzhou Yunlong District Agricultural Machinery Management Service Station Enterprise*, Xuzhou City (Jiangsu Province) Intermediate People's Court, May 24, 2019, n. 7855/2018.

[566] *Yu Bin v. Jinan Laoshan Thermal Power Center*, People's Court of Huaiyin District, Jinan City, Shandong Province, July 17, 2018, n. 1262/2018.

[567] In the case, the defendant had cut off the plaintiff's pipes after he had allegedly released through flushing, an excessive amount of water, after carrying out a series of repairing works on the heating system.

[568] In first place the Shangdong Regulation on Heating (山东省供热条例 – *shandongshengongretiaoli*).

[569] 企业境外投资管理办法 (*qiyejingwaitouziguanlibanfa*) issued in 2017.

[570] 政府投资条例 (*zhengfutouzitiaoli*), effective since July 1, 2019.

policies as criteria for the review and approval of government investment projects carried out by the relevant departments.

These two sources uphold the idea of a plan addressed not only to public officers but also to each subject involved in matters covered by it. Since government investment is the main instrument to implement development policies, here the link between the plan and the resources allocated is particularly strong and the funds received by a private subject to implement a planned project enjoy special protection from creditors[571].

The analysis of the relevant legislation and caselaw highlights a core point: the plan expresses public interests and is a key to interpret what public interest is as well as to assess its presence in concrete matters. When such assessment has been carried out, however, Chinese courts have always, so far, used the plan to uphold the legitimacy of the public authorities' actions. On such premises, the group of cases regarding expropriation indicates that local plans are used as a sort of regulatory document, reproducing, although implicitly, the scheme designed by the Administrative Procedure Law.

The Interim Regulation on Major Administrative Decision-Making Procedures, as already noted, is not clear on the point. Assimilating local plans to administrative decision-making matters, i.e. administrative actions, would imply the possibility to judicially review plans, but so far, there are no decisions concerning a plan-related litigation[572]. Furthermore, the plan is never the sole reference of Chinese judges but instead functions as a second-level criterion to reinforce the judge's reasoning or to found a general and all-encompassing responsibility in addition to the responsibility arising from the violation of a specific norm.

The situation is different with investment-related rules. Here the (national) plan is a direct justification for public initiative and functionally binds the funds allocated for its

[571] See the decision *Liu Zhaoquan v. Wuyuan City Nanfang Real Estate Co., Ltd.*, People's Court of Wuyuan City, Hunan Province on March 12, 2018.

[572] The topic of the plan related litigation has been the object of an article by Di Yi (see DI YI, *On the administrative litigation*, cit.). Indeed, the author itself recognizes that lawsuits directly challenging development plans are not accepted by Chinese courts. His reflections are therefore purely hypotethical and mostly focus on administrative acts which implement the plan and fall within the scope of the administrative procedure law for judicial review. The issue is relevant, according to the author, if we think that recent plans incorporate into binding indicators policies regarding social security and social services (see *ivi*, cit., 93), thus raising the issue of those administrative acts which "violate" the plan they should in theory implement.

implementation. It founds the approval and review procedures for Foreign Direct Investments of Chinese enterprises, carried out by the competent ministries[573].

It is reasonable that the legal binding force of development plans is higher when intervening on economic policy laws and regulations[574]. Such force, however, is clearly directed not only at public authorities, but at every economic operator and private subject. This is proved by both the letter of the law and the caselaw.

Such mechanism is reinforced by the presence, within some private companies, of CPC branches[575]. Such presence veiculates and strengthens the party's capability of governing the economy[576]. Therefore, a functional link with plans seems to be logic and the theories which believe plans are legally binding only on the government show a structural weakness.

On the other hand, the evolution toward a people-oriented plan and the enhancement of its social dimension[577] justifies wide references to development plans in order to define public interests and private subjects' responsibilities and duties.

General national plans may absolve such function acting as special soft law sources with orienting capacity, while in concrete local plans are often used in the same fashion of regulatory documents issued by the administration.

3.5.3 Legal nature of planning acts: brief conclusions

Comparative legal science, when assessing Chinese law, discourages formalist approaches and instead strives for the consideration of both superficial and deeper legal structures[578], the latter comprising, among others, political/policy norms (政策 –

[573] See G.SABATINO, *The Legal Issues of "Going Global" and the Trans-Nationalisation of the Chinese Public-Private Partnership Model*, in Transnational Dispute Management, "The changing paradigm of State-controlled entities regulation: laws, contracts and disputes", forthcoming, 2019 (online advance publication, may 2019)

[574] See YAN YUNQIU, FAN SHUANG, *China's economic planning,* cit.

[575] Provided for by Art. 19 of the Company Law, which states that "The Chinese Communist Party may, according to the Constitution of the Chinese Communist Party, establish its branches in companies to carry out activities of the Chinese Communist Party. The company shall provide necessary conditions to facilitate the activities of the Party".

[576] See MA HUAIDE (马怀德), 依法执政 与《公司法》第 19 条的规定 (*Government by Law and the provision of Art. 19 of the Company Law*), in 党建研究 (*dangjianyanjiu*), Vol. 7, 2006, 52-53

[577] See YAN YUNQIU, FAN SHUANG, *China's economic planning,* cit.

[578] See U.KISCHEL, *Comparative Law,* cit., 696-707

zhengce)[579]. Policy *and* law are also the two main directives of socio-economic development[580]. In the plans, they coexist and develop a relation of interdependence[581]. Such mixed nature, which is uncontested by Chinese legal scholars, allows the system of planning to function differently according to the economic fields and administrative levels involved. At the local level, and with special regard to urban planning matters, the scheme of regulatory documents serves, in concrete, the notion of plan as vehicle of public interests. The Interim Regulation on Major Administrative Decision-Making Procedures does not pose obstacles, provided it is interpreted functionally, so that the notion of administrative decisions (laid out in Art. 2) affects local plans with regard to their drafting procedures but does not exhaust their nature.

In addition to their "regulatory" nature, plans (especially general and national ones) exert over both public and private subjects an effect which establishes a general responsibility system. Here the plan functions as a policy act (or a soft law act) which is however recognized and integrated within the legal system through its formal approval procedures[582].

The main purpose of such approval is indeed that of explicitating the presence of the plan in the legal system and of giving effectiveness to the inner hierarchy of development plans[583]. Once the plan is accepted into the legal system, it functions as a distinguished formant. It vehiculates policies in economic legislation and in turn relies on economic legislation for its implementation and enforcement. In concrete cases, it enhances or "softens" its binding effect, acting as the epitome of the "variable geometries" of Chinese law[584].

Plans are not laws. Plans, as policy acts, exist and work before and beyond laws and Yang Weiming is perfectly right in defining plans as social regulation criteria. His view, however, catches the full effectiveness of modern Chinese planning when coupled with non-formalistic comparative approaches to the Chinese legal system. Each of the theories that I described are to some extent proved by concrete applications. The theory of legal

[579] See *ivi*, cit., 704-705
[580] See XU MENGZHOU, *On economic and social*, cit., 48
[581] *Ibidem*
[582] See *ivi*, cit.
[583] I am referring to the hierarchy between general and special plans as well as between higher and lower plans.
[584] The expression is coined in I.CASTELLUCCI, *Rule of Law and Legal Complexity*, cit., 92-102; see also G.SABATINO, *Legal Features of Chinese Economic Planning*, cit., 40-42

formants integrates them into a unitary concept of planning, intended as an interdependent ensemble within the legal order.

To sum up, plans are not laws, neither are regulations. Plans are plans and that, in China, makes sense even from a legal point of view.

3.6 Legal basis of planning: outline of the relevant sources

The integration of plans into Chinese economic law implies a process of legalization of the concept of development planning[585]. However, if the ultimate goal of such legalization is that of employing the law in order to avoid turning plans into empty shells[586], then the first step is to assess what is, nowadays, the framework of legal sources directly concerning plans and planning[587].

The following analysis will employ a conceptual division which only partially reflects the traditional "pyramid of legal sources"[588]. The reason is that the picture of legal sources concerning development planning in China is still quite fragmented and to different "phases" or "functions" of planning correspond different legal sources[589]. I will try to follow the conceptual cycle of development planning, thus firstly mentioning legal sources dealing with general principles and fundaments of planning, then reviewing the sources concerning the planning process and the supervision and finally assessing the "indirect" sources of planning law.

In terms of ideological fundaments, declamatory values and certain *rule by law* structural provisions, the first sources to be considered are undoubtedly the Constitution of the People's Republic of China and the Constitution of the Communist Party of China. These

[585] The point is emphasized by several scholars whose works I have previously quoted. Among them, Yang Weiming, Xu Mengzhou and Shi Jichun.

[586] See SHI JICHUN, *On the legalization of planning,* cit., 1-2

[587] In the previous subparagraph I have instead analyzed some legal sources which help define the positioning of planning within the Chinese system. I am now interested in sources which directly address the process of development planning.

[588] Employing a traditional scheme of legal sources for approaching the Chinese system could prove perilious given its peculiarities. See JIANFU CHEN, *Chinese Law,* cit., 172 ff. In second place, planning law is regulated by fragmentary sources and this elements leads us to build up by ourselves a systemic framework of legal sources, without relying on traditional legal hierarchies. See also U.KISCHEL, *Comparative Law,* cit., 678 ff.

[589] So, for instance, the source regarding some general principles and drafting principles of Chinese planning may be found in regulatory documents and/or notices and opinions whereas the basic supervision system for development plans is laid out by a statute.

two documents both reflect a common vision of China's development, even if, obviously, from different perspectives.

The PRC Constitution[590] mentions the plan for the economic and social development in six articles[591], i.e. Art. 25, 62, 67, 89, 99 and 118. It lays out some general but extremely important provisions about the planning process, ruling that the plan is drafted by the State Council (Art. 89) and formally approved by the National People's Congress (Art. 62), this same pattern being replicated at the lower administrative levels (Art. 99). Furthermore, other articles, by defining the general principles of socialist market economy (Art. 6 to 13) and by upholding the coordinating role of the State in terms of macro-economic management (Art. 14 and 15) also reinforce the significance and the effective role of development planning[592].

The CPC Constitution, even if it does not explicitly mention the Plan, offers a deeper look into Chinese development planning theory. In its general program[593], it upholds the commitment of the CPC to economic development and traces the pattern to follow in order to pursue and finally achieve this fundamental but "never-ending" goal.

In particular, the CPC Constitution outlines five different fundamental approaches to development: i) development of socialist market economy; ii) development of socialist democracy; iii) development of an advanced socialist culture[594]; iv) building a harmonious socialist society[595]; v) building a socialist ecological civilization[596].

Furthermore, Art. 3 (2) of the CPC Constitutions lists, as an obligation of each party member, to "*Implement the Party's basic line, principles, and policies, take the lead in reform, opening up, and socialist modernization, encourage the people to work hard for economic development and social progress, and play an exemplary and vanguard role in production, work, study, and social activities*". Such last provisions essentially

[590] On the general structure of the PRC Constitution see JIANFU CHEN, *Chinese Law*, cit.

[591] In the Chinese text the term "plan" is still rendered with 计划 (*jihua*) and not 规划 (*guihua*). However, I believe that such difference is due to historical reasons, since the Constitution was enacted in 1982 and these articles have not been subjected to changes.

[592] The role is reassessed by the provisions contained in Art. 25 and Art. 118 concerning the compliance of family planning with development planning (Art. 25) and the compliance of Autonomous Regions' development strategies with national development planning (Art. 118).

[593] The general program, although placed at the beginning of CPC Constitution, does not function like a preamble, but rather like a complex of "general provisions" and "general principles".

[594] The provision traces a connection with the principle of the Three Represents.

[595] Here we may trace a link with the principle of Scientific Outlook on Development.

[596] The focus on ecology and environment has become increasingly important in modern Chinese planning and is therefore one of the most interesting channels of expression of modern planning.

synthesizes the cultural, legal and pedagogical[597] elements of modern development planning, focusing both on ensuring the implementation and promoting a "culture" of "working for the development".

Beside the two fundamental "constitutions" which define the very core of the Chinese legal system, we find "constitutional conventions". This concept is well-known among European constitutional lawyers but in China so far there is not a comprehensive study on such topic[598]. Conventions stemming from the history, especially with regard to the relations between the Party organs and the state organs[599], have a significant role[600]. This statement is particularly true in development planning law, whose close relation with policy imposes a constant interaction between the two levels. The role of the technical expertise and the People's Consultative Conference in the planning process, the role of CPC Central Committee in the approval of the final draft of the plan, are defined by rules which, even when nowadays transposed into written sources, stem from conventions[601].

Several other legal sources deal with general principles of planning and development. Such sources are usually opinions, notices or even PRC's leaders' speeches. They define some general concepts to guide the development of the economy, so that they actually set some general principles[602].

[597] The pedagogic element of law is extremely important in China and is also expressed through the compenetration between rule of law and rule of virtue. On the topic, see I.CASTELLUCCI, *Rule of Law and Legal Complexity*, cit.

[598] See HU JINGUANG, *Constitutional Conventions in China*, in China Legal Science, Vol. 2 (96), 2013, 96-107, 96.

[599] The significance of conventions is confirmed by the high degree of interpersonal exchange which characterizes party and state organs, meaning that members of state organs are often also members of party organs. On the topic see KISCHEL, *Comparative Law, cit.*, 703.

[600] See HU JINGUANG, *Constitutional Conventions in China, cit.*, 103-107. The author offers some examples of such conventions.

[601] The extent of the binding force of such conventions is topic for a debate (see HU JINGUANG, *Constitutional Conventions in China, cit.*) but it is undoubtable that so far conventions have played an important role in the development of planning law and have also, to some extent, initiated and "guided" its gradual process of legalization.

[602] For instance, the Circular of the General Office of the State Council on Transmitting Suggestions of the State Planning Commission and the State Science and Technology Commission on Further Promoting the Implementation of the China Agenda for the 21st Century (国务院办公厅转发国家计委国家科委关于进一步推动实施中国２１世纪议程意见的通知), issued in 1996, put forward the concept of "sustainability" of development (Sec. 1), whereas, a decade later, the Several Opinions of the State Council on Speeding up the Development of Circular Economy (国务院关于加强国民经济和社会发展规划编制工作的若干意见) (2005) shaped, in essence, a comprehensive plan for the implementation of the concept of scientific outlook on development.

Speeches and declarations of party and government leaders are relevant since their thought is what, during the history of the PRC, guided the evolution of the legal system[603]. The PRC Constitution also contains some general provisions regulating the planning process. However, in the last twenty years, this process has been regulated by an increasingly complex body of legal sources which, most of the time, are classified as opinions and, thus, may fall within the category of regulatory documents.

These sources may be distinguished according to two different criteria: on one hand, they are often issued with regard to one specific plan either by the National Development and Reform Commission or by the CPC Central Committee[604]. On the other hand, these documents are issued both at the central level and at the local levels, so that each local government issues its own opinions or suggestions. The content of these documents pertains to the different phases of plans' drafting, emphasizing the role of different institutional actors and the principles characterizing the whole process.

In 2005, the State Council issued the Opinions for strengthening the planning work for the national economic and social development plan[605], aiming, for the first time, at defining a general framework of principles and rules guiding the planning processes in the PRC[606]. These opinions represent, still today, the most relevant legal source on the planning process. They lay out a framework of institutional relations serving the purpose of the correct preparation of the national development plan, incorporating several convention evolved over time and transposing them into legal rules. Their content is general and abstract and they fit in the category of regulatory documents, not reviewable

[603] See for instance the Xi Jinping's speech about how to "Guide Development with New Concepts" or that about a "Deeper Understanding of the New Development Concepts", in XI JINPING, *The Governance of China II*, cit., 217-240. Such speeches often deal with general issue and put forward guiding rules and principles in order to tackle these issues, also trying to anticipate some reform patterns and clarifying priorities.

[604] For examples the Several Opinions on drafting and the process of the 10th Five-Year Plan (关于"十五"规划编 制方法和程序若干意见) issued in 1999 by the then National Development Planning Commission. With regard to the last FYP we may refer to the Opinions on the estasblishment of a sound comprehensive implementation mechanism of the Outline of the 13th National FYP (关于建立健全 国家"十三五"规划纲要实施机制的意见) issued by the Central Committee in 2016, or to the Proposal for the draft of the 13th FYP (中共中央关于制定国民经济和社会发展第十三个五年规划的建议), once again issued by the Central Committee in 2015.

[605] 国务院关于加强国民经济和社会发展规划编制工作的若干意见 – *guoweiyuanguanyujiaqiangguominjingjiheshehuifazhanguihuabianzhigongzuoderuoganyijian*

[606] Comprising general plans, special plans, national and local plans.

by judges but fit to serve as an interpretative tool to uphold the righteousness of the administrative action.

Since September 1st, 2019, the new Regulation on Major Administrative Decision-Making Procedures is effective. The Regulation is addressed to local people's governments at or above the county level (Art. 2) and regards, among others, decision-making procedures involving "*major public policies and measures relating to public services, market regulation, social management, environmental protection*" as well as "*important plans for economic and social development*" (Art. 3).

The measures follow the general evolution of Chinese decision-making theory, emphasizing the aspects of public participation and expert demonstration[607], thus codifying, at the local level, the employment of an inclusive method of planning[608].

Another group of sources concerns planning supervision. In the first place, there are party documents concerning cadres' supervision and evaluation. In the second place, the documents regulating the planning process almost always comprise a section dedicated to supervision mechanisms[609]. In the third place, planning supervision is the only feature of modern Chinese planning to be dealt with by statutory law, i.e. the Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels[610], issued in 2006 and effective since 2007. The entire Chapter III of this Law (Art. 15-21) concerns "*Examining and Approving Final Accounts, Hearing and Deliberating the Plans for National Economy and Social Development and the Reports on the Implementation of Budgets, and Hearing and Deliberating Audit Reports*".

The legal provisions here contained regulate the plan supervision and adjustment from two essential perspectives: a) from the perspective of the interaction between the Beijing government and the local governments at all levels with regard to the supervision of the enactment and implementation of development plans; b) from the perspective of interaction between planning and budget law, especially when an adjustment or

[607] Chapter II, Sec. II and III.

[608] The dimension of such inclusiveness is realized, in concrete, through hearings, debate, questionnaires and surveys.

[609] See Sec. 3 and 4 of the 2005 Opinions.

[610] 中华人民共和国各级人民代表大会常务委员会监督法 – *zhonghuarenmingongheguogejirenmindaibiaodahuichangwuweiyuanhuijianchafa*)

amendment of the plan is required and approved by the People's congresses at the various levels[611].

Section I of Chapter III of the Regulation on Major Administrative Decision-Making Procedures introduces a preventive legality examination (合法性审查 – *hefaxingshencha*) carried out by competent departments. The examination concerns (Art. 27): i) the compliance of the decision-making matter with the statutory authority; ii) the compliance of the draft decision with the statutory procedures; iii) the compliance of the content of the draft decision with laws, regulations, rules and national policies.

The last category of sources to be considered is that of "indirect" sources of planning law. With this term, I refer to all the ensembles of legal norms which, though not explicitly regarding planning may:

a) share with planning law the ultimate purpose, that is the regulation of macroeconomic dynamics to achieve proper and orderly economic and social development;

b) regulate sectors of law and instruments which may serve the purpose to implement and enforce planning acts.

Tax and fiscal law, financial law, banking law, competition law all have close relations with planning[612]. In other cases, the relation with planning is even made clear by the law, as happens with the Law on the Supervision of Standing Committees of People's Congresses at Various Levels.

There is, in other words, a common intent which connects each sub-sector of Economic Law, pursuant to Art. 15 of the PRC Constitution[613] where it rules that "*The state strengthens economic legislation and improves macro-regulation and control*".

On a broader perspective even Contract Law bears close links with development planning, especially on account of the organizational nature that several long-term contract

[611] Furthermore, it is important to note that the Law on the Supervision of Standing Committees of People's Congresses at Various Levels dedicates two different chapter to the Supervision mechanisms for the Economic and Social Development plans and to "inspecting the implementation of laws and regulations" (Chapter IV).

[612] This is reflected in the theoretical assessment of Economic Law as well as in the structure of economic law textbooks. See ZHANG SHOUWEN, *Economic Law,* cit., which, under the chapter dedicated to macroeconomic regulation, discusses fiscal law, financial markets law and planning law.

[613] See ZHANG SHOUWEN, *Economic Law,* cit., 93-94

assume[614]. Such contracts reflect, to some extent, the notion of plan, consisting of a long-term project aimed at regulating economic relations[615].

Such general overview reflects an evolutionary pattern toward the "legalization of planning". It is a notion referring to the relation between planning and the concept of 法治 (*fazhi*), which is also commonly translated as "rule of law"[616]. However, such translation might lead to some misunderstandings, especially when one tries to approach the recent developments of planning law regarding them as a march toward a liberal-democratic concept of rule of law. This is why the term "legalization" (法治化 – *fazhihua*) is, in my opinion, more appropriate, since it gives a clearer idea of the transposition of previous planning rules originating from policy into law.

Shi Jichun[617], on the premise of the all-encompassing character of economic planning[618], advocated the legification of the procedures and of the objects of planning, coordinated under the macro-concept of economic law[619]. Such legification is to be realized mostly through organizational rules[620] integrating plans' drafting, supervision and content with law[621].

The Law on the Supervision of Standing Committees of People's Congresses at Various Levels is, in this perspective, a unique example and a strong basis for further developments, since, through statutory law, regulates the supervision and adjustment procedures for planning acts, which also must be regarded as an important step toward a mature legalization[622].

As stated by the State Council Information Office's Document "Construction of the Rule of Law in China" of 2008[623], the establishment of legal mechanisms for macro-economic

[614] See § 3.2.10; see also WANG LIMING (王利明), *On the organizational role of contract law* (论合 同法组织经济 的功能), in Peking University Law Journal, Vol. 29(1), 2017, 104-120.
[615] In *ivi*, cit., 111, the author describes some examples of organizational contracts in Chinese economic and commercial law and refers for instance, to the Sino-Foreign Joint Venture Enterprise Law.
[616] With regard to its place, for instance, among the socialist core values.
[617] See SHI JICHUN, *On the legalization of planning*, cit.
[618] Comprising general, special, national and local planning, as well as industrial policies and other special measures concerning, for instance, price fixing or use of government reserves. See *ivi*, cit., 2-5
[619] See *ivi*, cit., 5
[620] See *ivi, cit.*, 6
[621] In other words, the legalization must focus, firstly, on a) dividing tasks between the various institutional actors involved in the planning process; b) defining the phases of such process.
[622] See XU MENGZHOU, *On the plan for economic*, cit., 46-47. The same path is followed by the upcoming Regulation on Major Administrative Decision-Making Procedures
[623] 中国的法治建设 (*zhongguodefazhijianshe*), in Political Literature Review, March 2007-March 2008; see also ZHANG SHOUWEN, *Economic Law*, cit., 197

regulation has enhanced the coordinative and regulatory action of public authorities[624]. The realization that planning needs to be regulated through legal means, rationally employing each of the legal sources at the legislature's disposal, seems to have been accepted by the Chinese leadership[625]. The general idea would be to include drafting, approval, implementation, evaluation and supervision into a unitary regulatory setting[626], but so far development planning is not covered by a comprehensive law[627].

Regardless of future evolutions, the stance of Chinese legal scholars on the process of planning's legalization and the reinforcement of several pieces of economic legislation touching policy fields covered by plans seems to confirm a function of legal formant carried out by Chinese development planning.

3.7 The planning process and the interaction between law, politics and science

In assessing the process of planning in the People's Republic of China, I think that it is best to commence from the fundamental notion of inclusiveness, since it represents, in my opinion, the guiding principle of the procedimentalization of Chinese planning[628].

As it happened with regard to the nature of the plan, the planning process has also experienced, over the past decades, dramatic changes and an overturn of the very logic of development planning[629]. The planning process as laid out in the relevant sources[630]

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[624] *Ibidem*

[625] The idea of a macro-economic regulation is reassessed by Xi Jinping in its speech at the National Conference on Finance of July 14, 2017, to be found in XI JINPING, *The Governance of China II,* cit., 304-308

[626] See XU MENGZHOU, *On the plan for economic,* cit., 46

[627] Indeed, in its legislative plan for its 12th session, the National People's Congress, in 2015, included a "Development Planning Law" (中国共和国发展规划法), but the proposal was not enacted (see ZHANG SHOUWEN, *Economic Law,* cit., 195-196). Another push toward the definition of planning legal framework would be given by the approval of a set of General Principles of Economic Law (经济法通则) as advocated by several scholars.

[628] Inclusiveness, meaning the conciliation of opinions and instances coming from different groups, is functional to the strengthening of plans' binding force. See LIU GUOHONG (刘国宏), 新时期我国五年规划的逻辑探讨 (*On the logics for Five-Year Planning for China in the New Era*), in China Opening Journal, Vol. 178 (1), 2015, 23-27, 25

[629] O.MELTON and S.HEILMANN, in *Reinvention of Development Planning,* cit., 584, state that "*For understanding the emergence of the new-style development planning system that was established in China since the early mid-1990s and consoli dated in the 2000s, the initial years of introducing a "socialist market econ omy" after 1992 are of particular importance. A radical reorientation and reorganization of the planning system was launched by a Central Committee decision in fall 1993*".

[630] i.e. the Constitution but especially the State Council Opinions of 2005 (hereinafter "the Opinions") and the Regulation on Major Administrative Decision-Making Procedures.

follows a model which, though recognizing the traditional socialist planning as its forefather, places at the core of its system the interaction between different actors whose common effort is to lead the final draft of the plan and which belong to the institutional sphere, to the political sphere, to the social and economic sphere[631].

The inclusiveness among the subjects reflects, in second place, an inclusiveness among different types of knowledge involved in the planning process:

a) there is a political knowledge[632] (政治知识 – *zhengzhizhishi*), based on the study of the developments of socialism with Chinese characteristics in relation with the needs (需求 – *xuqiu*) of the population;

b) there is a purely scientific knowledge[633] (科学知识 – *kexuezhishi*), which elaborates, from the most objective perspective, information and data and, on their basis, classifies the issues arising from the analysis of the socio-economic situation[634];

c) there is a common or public knowledge (公众知识 – *gongzhongzhishi*), expressed by public opinion over the most relevant issues, within a consultative space;

d) there is, then, a knowledge which I would define as "legal" – in the sense of "pertaining to legalization" – (法治知识 – *fazhizhishi*), whose purpose is to define a language and instruments legally fit to enhance plan's implementation, diffusion and enforcement.

On the basis of such model, Chinese planning has abandoned the traditional dialectic, which emphasized the institutional and bureaucratic dimension, based on the relation State Planning Commission[635]→CPC Central Committee→National People's Congress, with the State Planning Commission being the sole body empowered to process and analyze data coming from the different economic operators.

Instead, it has embraced a comprehensive structure which might resemble a bush rather than a simply hierarchical structure[636].

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631 Points 8 and 9 of the Opinions

632 The political aspect may concern the issue the democratization of the planning process. See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making*, cit., 115 ff.

633 See *ivi*, cit., 131 ff.

634 See *ivi*, cit., 132.

635 The State Planning Commission was the precursor of the modern NDRC.

636 The metaphor is borrowed from studies regarding human evolution and, in particular, from the article by C.GROVES and M.LAHR, *A bush not a ladder: Speciation and replacement in human evolution*, in Perspective in Human Biology, Vol. 4, 1994, 1-11. Groves and Lahr argued, in essence, that the pattern of human evolution could not be represented by a ladder, conducing from an older specie to a more recent one. It instead resembled a bush, givn the complexity of variations and speciation over the course of the evolutionary process.

Modern planning comprises both strongly ritualized phases and informal consultative phases where institutional and socio-economic actors are actually able to bring their instances before the planning organs. Wang Shaoguang and Yan Yilong[637] have used the expression "drawing on collective wisdom" (集思广益 – *jisiguangyi*)[638] in order to describe the logic of decision-making process in development planning and have highlighted five different concrete expression of this principle, following the scheme of the planning cycle. I) Divergent Thinking (发散思维 – *fasansiwei*), in the sense of collecting different opinions, of brainstorming ideas[639] and hypothesis about the issues and possible solutions. II) Collective Thinking (集众思 – *jizhongsi*), in the sense of comprehensively processing the information acquired, of comparing (比较 – *bijiao*), of distinguishing and differentiating (鉴别 – *jianbie*) and of developing a clear line of thought from the assessment of all the different opinions submitted. III) Soliciting opinions (征求意见 – *zhengqiuyijian*), thus experiencing at its highest degree the inclusiveness of the planning process, involving both institutional and social actors as well as experts. IV) Reaching a joint resolution (合议决 – *heyijue*), in the sense of defining a set of priorities and common goals with the agreement of all the actors and institutions involved. V) Communicating and implementing (转达贯彻 – *zhuandaguanche* or 告四方 – *gaosifang*[640]), in the sense of adequately promoting and informing about the reached agreement in all its aspects, in order not only to prepare the implementation but also to put the conclusions developed under a new scrutiny.

Collective wisdom is further mentioned in Art. 2 of the Regulations of the CPPCC National Committee on Political Consultation, Democratic Supervision and Participation in and Deliberation of State Affairs[641] (1995), which states that "*The aim of political consultation, democratic supervision and participation in and deliberation of state affairs*

[637] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making*, cit., 51-52

[638] The concept was first introduced by Chinese scholars to define a new method of decision-making. Since the 1980s it was employed with regard to constitutional reforms. See XIAO WEIYUN (肖蔚云), 关于新中国的制宪权 (*On the power of enacting constitution of new China*), in 中国法学, Vol. 6(3), 1984, 41-47, 46

[639] See also HU ANGANG (胡鞍钢), *The Distinctive Transition of China's Five-Year Plans*, in Modern China, Vol. 39 (6), 629-639, 633

[640] The second expression indicates, literally, "to say it in the four directions", "to the four cardinal points".

[641] 政协全国委员会关于政治协商、民主监督、参政议政的规定 (*zhengxiequanguoweiyuanhuiguanyuzhengzhixieshang, minzhujiancha, canzhengyizhengdeguiding*)

is: to promote socialist democracy, reflect opinions and demands from all quarters, lay a broad platform for democratic parties, patriots with no party affiliations, people's organizations, personages of ethnic minorities and patriots from all circles, which and who have joined the CPPCC, to play their role, pool wisdom from various sources, and accelerate the process of putting major state decision-making on a more scientific and democratic basis (…) to harmonize the relations between different social groups, enhance mutual communication and understanding between them (…)".

3.7.1 The National Development and Reform Commission

The National Development and Reform Commission (国家发展和改革委员会 – *guojiafazhangaigeweiyuanhui*) officially commenced its activity in 2003, replacing the State Development Planning Commission which in turn had replaced, in 1998, the State Planning Commission[642].

The National Development and Reform Commission (hereinafter "NDRC") enjoys status of ministry under the State Council and its functions and inner organization are today laid out in the Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the National Development and Reform Commission (2008). The Notice at Section I (b) assigns to such Commission the task of ensuring macro-economic control and, namely, drafting and implementation's tasks, pertaining in first place to medium-to-long term national economic and social development plans[643], as laid out in Section II (1)[644]. The NDRC is also put in charge of the planning of specific key construction projects, as well as "*working out the targets, policies and measures for the control of the total fixed assets investment and the investment structure*"[645]. Though not mentioned in the Notice, the NDRC also participates in the implementation and enforcement of the Anti-Monopoly Law. Another fundamental

[642] The creation of a new institution occurred at a time of great changes, which saw Hu Jintao promoting a gradual re-empowerment of the State over the market and putting forward its Scientific Outlook on Development theory.
[643] There are then plans for the development of logistics or hi-tech industries (Section II-6), plans for coordinated regional development and major functioning zonal plans (Section II-7), plans for the total import and export volume of important agricultural products, industrial products and raw materials as well as national reserve plans (Section II-8), national economic mobilization plans (Section II-13)
[644] Other tasks regard industrial policies, price adjustment policies, fiscal policies, monetary policies and land policies – Section II (1,3 and 5)
[645] Section II(5)

aspect of macro-economic regulation is that of the analysis, research and monitoring, as ruled by Section II (2) of the Notice of the General Office of the State Council[646], which empowers the NDRC to carry out research and studies over macro-economic issues[647].

In the third place, the NDRC is in charge of highly relevant implementation and coordination tasks, pertaining not only to the plans that it drafts, but also to economic and social policies[648].

Both the implementation and coordination may be achieved through policy documents as well as laws and regulations – as ruled by § 12 of Section II – which the NDRC is in charge of drafting[649].

In terms of inner organization, the NDRC comprises twenty-eight internal bodies[650]: the department of development planning is the one that materially draws up planning acts before submitting them to the higher organs[651], i.e. the CPC Central Committee and, later, the National People's Congress.

Other departments, focusing on specific economic sectors, play a central role in the draft, for instance, of special plans.

Over its first fifteen years of activity, the NDRC has played a fundamental role in shaping the main concepts and institutions of Chinese economic law. Some issues concerning coordination between different ministries have arisen, as it occurred in the enforcement of the Anti-Monopoly Law or as it happens between the NDRC and the State-Owned Assets Supervision and Administration Commission[652] (SASAC), whose main task is to manage, on behalf of the State Council, all State assets, therefore directly controlling both

[646] *Monitoring the macroeconomic and social development situations; being responsible for making forecasts, giving early warnings and guiding the release of information; organizing studies on such major issues as macroeconomic operation, aggregate economic balance, national economic security and overall industrial safety, and proposing macro-control policies and suggestions (…)*

[647] The concept is repeated in § 3 and 4 of Section II

[648] In order to carry out, for example, "*the strategy of sustainable development; comprehensively coordinating the energy conservation and pollutant discharge reduction work; making plans, policies and measures for the development of circular economy as well as the conservation and comprehensive utilization of energy resources, and coordinating the implementation thereof (…)*" (Section II § 10).

[649] To sum up, it is the NDRC which, in coordination with other relevant authorities, must "*give play to the guiding role of national development plans and industrial policies in macroeconomic control, and comprehensively apply fiscal, tax and monetary policies to form a more complete macro-control system and improve the level of macro-control*" (Section V(7)).

[650] In addition to such departments, the State grain administration and the State energy administration are under the control of the NDRC.

[651] See Section III(3)

[652] 国有资产监督管理委员会 (*guoyouzichanjianduguanliweiyuanhui*)

the SOEs and the State-Controlled Companies (SCCs)[653]. In 2018, a new wave of significant reforms has occurred in China, which might have a profound impact over the competences and activities of the NDRC. In the first place, the connection between the NDRC and the Auditing Organs has been addressed by the Plan for deepening Party and state institutional reform[654], which advocated for a supervision of the key project carried out by the NDRC[655]. Furthermore, the new Supervision Law creates a centralized and independent State Supervision Commission[656] which will "*conduct supervision of public officials exercising public power (…), investigate duty-related violations and crimes, build integrity and carry out the anti-corruption work, and maintain the dignity of the Constitution and the law*"[657].

On one hand, the supervisory commission will supervise the activity of the NDRC and, in case, conduce investigations over the correct application of relevant laws and regulations. On the other hand, it will also exercise, at least to some extent, supervision over public authorities, SOEs and even private economic operators[658] conducing activities connected to the implementation of the development plans, thus carrying out a task already exercised by the NDRC.

I would argue that the State Supervisory Commission, on account of its constitutional status[659] and position in the institutional hierarchy, overrides the decisions and the supervisory activity carried out by the NDRC and acts as a higher-level comprehensive supervisor.

3.7.2 Phases of the planning cycle. Tackling informational asymmetry

[653] The action of the SASAC might certainly cover some areas which fall within the scope of the NDRC too. So far the issue has not been resolved, so that a future development planning law could also, hopefully, address it and lay out a clearer division of tasks between the two Commissions.

[654] 深化党和国家机构改革方案 (*shenhuadangheguojiajigougaigefang'an*), in 党的生活 (*dangdeshenghuo*), n. 3-4, 2018, 105-114, 110

[655] *Ibidem*, see also JI RUI (冀 睿), 审计权与监察权之关系 (*The relationship between auditing power and supervisory power*), in 法学 (*faxue*), Vol. 7, 2018, 143-153, 151. I would argue (though it is not mentioned by the plan) that the supervision is based on Art. nn. 17-25 of the Audit Law, which empower auditing organs to exercise supervision over several expenditures and revenues of public institutions.

[656] As well as supervisory commissions at each administrative level.

[657] Art. 3 of the Supervision Law

[658] Art. 15 of the Supervision Law defines the subjective scope of the statute

[659] See LIU XIAOMEI, *National Supervision System*, cit.

To a dynamic economy corresponds a circular planning. Conceiving Chinese planning as "circular" is indeed an idea that, though reflecting the actual functioning of plan decision-making, in part disregards and in part reassesses the traditional structures of socialist planning[660]. Be it as it may, modern Chinese planning process "*is a continuous cycle of information gathering, analysis, policy formulation, policy implementation, evaluation, and revision, and is better thought of as a five-year policy cycle, rather than a unitary plan*"[661].

The cyclic feature embraces a twofold approach: temporal and conceptual, to which, I would argue, a third, legal approach may be added. In the first place, planning is a cycle because the "life-span" of each plan is juxtaposed, to some extent, to the life-span of its predecessor and successor. As explained by Melton and Heilmann, "*preparatory work begins as early as two years before the formal five-year plan period starts*"[662].

The conceptual interaction between the different phases of the plan also follows a cyclic approach, that of democracy (民主 – *minzhu*) and concentration (集中 – *jizhong*, also translated as centralization), of participation (参与 – *canyu*) and consensus (共识 – *gongshi*), of discussion (讨论 – *taolun*) and revision (修改 – *xiugai*)[663].

In legal perspective, the cycle reflects a circular relation among the relevant legal instruments employed. So, for instance, the conclusion of a project contract in accordance with the plan pertains both to the enforcement and – through its results – to the developing phase of the next plan, whose priorities and strategies must be laid out starting from a critical assessment of the goals achieved by the previous plan[664].

For explanation purposes, I will try to sketch a general classification, so to distinguish: a) a revision phase; b) a research and study phase; c) a proper drafting phase; d) an approval phase. Regardless of the categorization that one could decide to adopt, it is extremely

[660] It certainly overcomes the "authoritarian decision-making mode" that Hu Angang associates with the late 1950s and the 1960s (See HU ANGANG, *The distinctive transition*, cit. 633) but, on the other hand, it respects, both in principle and in practice, the theory of democratic centralism which strongly emphasizes the collective decision-making process.

[661] See O.MELTON, S.HEILMANN, *The reinvention of development planning,* cit., 601

[662] *Ibidem*

[663] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 92

[664] The circular pattern of modern development planning also fits into the image – previously mentioned – of the "planning bush" as metaphor of the inter-connection and inclusiveness of planning. Given such dynamic nature, it certainly is perilous to propose schematic distinctions about different phases in the Chinese planning process, since, I want to immediately clarify, each one of the tasks associated with such phases may very well occur at the same time, so that talking about phases does not imply a strict chronological succession.

important to point out what is the common logic that moves the planning process in its evolution: contrary to what the common opinion could be, the focus of the process is not solely on the centralization and the definition of powers, but also on information gathering[665].

Information asymmetry means that planning authorities receive and elaborate data and figures which do not correspond to the real data and figures of the national economy, so that their knowledge is incomplete or false[666]. Legalization and inclusiveness are conceived as antidotes to such asymmetry and strive to improve the coordinating mechanism for the preparation of planning acts, adhere to a people-oriented and scientific development concept, in the sense that planning authorities must listen to the opinions of all sectors of society, as laid out in the Opinions of 2005[667].

Structurally, each planning cycle beings and ends with a revision phase. Such phase concerns two plans, the one in preparation and its predecessor. It is aimed at evaluating the results achieved in the middle of the plan's implementation and enforcement[668]. The revision phase mainly revolves around a document defined as "mid-term evaluation" (中期评估 – *zhongqipinggu*), reflecting the achievements as well as the failures or drawbacks of the plan's implementation. Pursuant to the Opinions of 2005, the mid-term evaluation responds to the logic of timely organization of the evaluation system, aimed at clearly assessing the problems and carefully analyze their causes[669]. The mid-term evaluation is also preceded and coordinated by a revision plan (评估工作方案 – *pinggugongzuofang'an*) issued by the NDRC, or by the correspondent development planning commission at each administrative level[670].

Planning authorities carry out both research and studies about data already at their disposal and a broader assessments through questionnaires and reports from social organization and enterprises[671]. The revision may be carried out either by the planning

[665] See WANG SAHOGUANG, YAN YILONG, *A democratic way of decision-making*, cit., 115

[666] Such asymmetry may be due to voluntary conducts, such as data fiddling by enterprises or local authorities. It may also be due to inherent inefficiencies of vertical planning, since authority are not able to manage complex and big economies.

[667] Section II n. 5

[668] See Art. 21 of the Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels

[669] Several Opinions, Sez. V(12)

[670] See *ivi*, Sez.V(13)

[671] See, for instance, the Revision Work Plan for the 13th Five-Year Plan for Economic and Social Development of the Beijing Municipality (北京市国民经济和社会发展 第十三个五年规划中期评估工

department itself or by third parties[672], i.e. the so called third party assessment, often carried out by research institutes or universities or even international organizations[673].

The evaluation phase itself comprises different stages[674]: a) information gathering; b) drafting; c) research deepening on the basis of the draft; d) final approval. Pursuant to Art. 21 of the Law on the Supervision of Standing Committees of People's Congresses at Various Levels, the final document of the mid-term evaluation must be submitted to the Standing Committee of the People's Congress at the relevant level together with an adjustment proposal scheme (if the government wants to suggest any adjustment) for the final approval. Before such submission, the evaluation is approved by the Party Central Committee at the relevant level as well as by the development planning commission[675], which will also present it before the People's Congress, on behalf of the government[676]. In this final phase the evaluation is usually also submitted for a non-official review to the Consultative People's Conference at the relevant level, which will also arrange measures for the proper notification of the evaluation documents once it is approved[677].

In the revision phase, the interaction scheme between the NDRC, the CPC Central Committee and the National People's Congress[678], drawing from the provisions of Art. 21 of the Law on the Supervision of Standing Committees of People's Congresses, replicates the scheme which will regulate the formal drafting and approval of the National Development Plan.

The preparation of the mid-term evaluation may take up to six/seven months[679]. During this long period, planning institutions commence to lay out the foundations for the drafting of the new plan. In particular, the NDRC and the local development and reform commissions carry out studies and researches over the issues and topics highlighted by

作方案), Sez. 3. See also Chapter II Sez. II of the Regulation on Major Administrative Decision-Making Procedures.

[672] *Ibidem*; see also WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 94

[673] 2005 Opinions, Sez. 5(12)

[674] See Revision Work Plan for the 13th Five-Year Plan for Economic and Social Development of the Beijing Municipality, Sez. 3

[675] See *ivi, cit.*, Sez. 3(4)

[676] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 94

[677] Revision Work Plan for the 13th Five-Year Plan for Economic and Social Development of the Beijing Municipality, Sez. 3(4). The necessity of circulation of implementation reports is also upheld by Art. 20 of the Law on supervision of standing committees of people's congresses.

[678] The same scheme is replicated at each administrative level between the Planning Commission, the Party Central Committee and the local People's Congress.

[679] See the Revision Work Plan for the 13th Five-Year Plan for Economic and Social Development of the Beijing Municipality.

the evaluation, which Hu Angang defines as the "brainstorming" nature of Chinese plans[680].

The 2005 Opinions, in § 8 and 9 of Sec. III deal with how to "promote democracy" in the planning process, laying out three levels of inclusiveness:

i) an institutional level which promotes debate between the central and the local governments, as well as between different departments within the government, during the phases of research;

ii) a scientific level, where planning authorities set up committees of experts (专家委员会 – *zhuanjiaweiyuanhui*) and listen to the opinions expressed by experts during the planning process. Experts must come from different fields of expertise and should add up to no less than 1/3 per committee. Expert committees are, furthermore, required to produce a report containing arguments and opinions over the issues debated[681];

iii) a public consultation principle, which requires planning authorities to disclose information about the evolution of the draft process in order to solicit opinions from the public during organized hearing sessions[682].

The first step of the research is the formulation, by the NDRC, of several topics of discussion[683]. Discussion groups and think-tanks are formed and entrusted of developing independent reports over the topics selected[684]. Think-Tanks may refer to administrative departments but also universities. The basic logic is that the more groups are involved in analyzing relevant data and information the more clear and complete such information will be, thus avoiding asymmetries[685]. Different reports are, in a broad sense, in competition[686], so that different approaches may be evaluated in order to lay out the theoretical and policy foundations of the new plan. Already at this stage of the process,

[680] See HU ANGANG, *The distinctive transition,* cit., 633. I would define it as the most thorough and efficient application of the general principle of inclusiveness.
[681] Section III(9)
[682] Section III(8). The Opinions, though, provide only for a broad framework of what the research activities should be. In practice, the whole picture is more complex, since the research itself serves a preliminary purpose of defining priorities, a "creative" purpose of deciding strategies, objectives, projects, etc. and also a refining purpose which, drawing from the opinions collected, constantly adjourns and amends the conclusions reached.
[683] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 95
[684] *Ibidem*
[685] See HU ANGANG ET AL., 国家五年规划决策中的智库角色研究 (*Think Tanks and China's Five － Year Plans*), in Comparative Economic ＆ Social Systems, No. 6, 2016, 62-71, 63-65
[686] WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 95

the NDRC works together with party organs, and especially the Central Financial and Economic Affairs Commission (中央财经委员会 – *zhongyangcaijingweiyuanhui*)[687], which is an inner body of the Central Committee of the CPC[688].

From this moment on, the research phase proceeds together with the drafting phase[689].

A first round of consultations is held after the NDRC issues the draft document concerning the fundamental ideas for the new plan[690]. Conferences and debates are organized all around China. As soon as the CPC Central Committee issues its recommendations for the new plan, the research focus shifts from formulation of the basis to definition of the content of the planning acts. Therefore, the scope of the studies becomes more narrow and detailed. This passage heavily features the work and study of the CPPCC, as well as of international organizations – e.g the World Bank – and experts of renowned fame[691]. The Central Financial and Economic Affairs Commission also puts relevant departments and research institutions in charge of carrying out other studies and research projects. As the conclusions reached are presented to the NPC and to the CPPCC, both institutions launch another "wave" of study and research groups operating over the whole territory of the PRC, in order to carry out even more specific research[692].

Now, I want to focus my attention on two significant aspects of this phase: a) the role of think-tanks; b) the role of the CPPCC. With regard to think-tanks, their function fits into the system defined as "collective learning" (集体学习 – *jitixuexi*)[693].

[687] It was established in 1980 as Central Leading Group for Financial and Economic Affairs (中央财经领导小组) and renamed in 2018 within the context of an inner reorganization of the CPC.

[688] Party organs are also called to formulate opinions and observations on the reports, leading to a new cycle of debates and – as noted – to the organization of expert committees.

[689] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 95 ff.

[690] Not to be confused with the draft of the plan outline.

[691] Mike Spence, recipient of the Nobel Prize for the Economy in 2001, was involved in the research phase for the draft of the 12th FYP.

[692] This occurs within the context of a constant cooperation which involves, apart from the NDRC, local governments and development commissions, local party organs and committees and local Consultative Conferences, over a series of debates at the presence of authorities and aimed at producing reports later submitted to the drafting group of the NDRC.

[693] See HU ANGANG ET AL., *Think Tanks and China's Five − Year Plans,* cit., 64. Such process one hand prevent information asymmetries from arising but, on the other hand, gradually improves decision making and implementation ability of both state and party institutions.

The CPPCC fully embodies the concept of "legislative consultation" (立法协商 – *lifaxieshang*) between institutions[694], that is indeed the public consultation and research activity connected to each law-making process.

Since the planning process is itself, for great parts, a public consultation and research process, the significance of the CPPCC in this regard is in its composition. This organ includes[695]representatives of "*the Communist Party of China, the various democratic parties, public personages without party affiliation, people's organizations, ethnic minority groups and people of all walks of life, compatriots of the Hong Kong Special Administrative Region, the Macao Special Administrative Region and Taiwan, returned overseas Chinese and specially invited personalities*". The CPPCC, in other words, provides, within an institutional framework legally recognized and Constitutionally Sanctioned[696], that expertise and knowledge variety which is essential to the functioning of modern planning.

Until the CPC Central Committee recommendations are issued, the consultation rounds mostly involve experts, institutional figures and party organs and both current and former cadres. However, as the NDRC starts to work on the draft of the outline of the plan, the scope of the consultation widens and starts involving the whole society[697], following two perspectives. On one hand, the NDRC carries out consultations with several organizations, active in different fields and providing manifold expertise. On the other hand, the people

[694] See PENG FENGLIAN, CHEN XULING (彭凤莲, 陈旭玲), 论人民政协立法协商 (*On Legislation Consultation of CPPCC*), in 法学杂志 (*faxuezazhi*), Vol. 7(2015), 62-71, 63; on the issue, see also WANG BANGZUO (王邦佐), LUO FENG (罗峰), 人民政协民主监督的理论支撑, 现实意义和制度设计 (*The theoretical support, realistic meaning and institutional design of the democratic supervision of the CPPCC*), in 政治与法律 (*zhengzhiyufalu*), Vol. 5, 2007, 64-68

[695] Art. 20 of the Charter of the Chinese People's Political Consultative Conference (中国人民政治协商会议章程) of 2004 (revised in 2018).

[696] See Preamble of the Constitution where it states "*The Chinese People's Political Consultative Conference (...) will play a still more important role in the country's political and social life, in promoting friendship with other countries, and in the struggle for socialist modernization and for the reunification and unity of the country. The system of multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time*".

[697] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making*, cit., 105 ff.

themselves, through different communication systems[698], can submit proposals and suggestions regarding the plan[699].

Once the plan draft has been issued, the last round of general consultations begins, again involving local governments and institutional authorities, as well as a national committee of experts[700], paving the way for the approval by the CPC Central Committee and the NPC.

The drafting phase of the planning process revolves around two groups mingling with each other. I) the first pertaining to the Central Committee of the CPC or its Financial and Economic Affairs Commission, which prepares and issues the Proposal (建议 – *jianyi*) for the new National Economic and Social Development Plan. II) the second pertaining to the NDRC or its drafting group which instead issue the "Outline" (纲要 – *gangyao*) of the National Plan, that is, in concrete, the planning act which will be submitted to the NPC. Chronologically, the proposal precedes the outline[701] and contains, though at a general level, all the elements that will be incorporated in the planning act[702]. The outline specifies the policy directives laid out in the proposal[703].

The legislation initiative, as far as the plan is concerned, is of the NDRC (on behalf of the State Council, according to Art. 89 of the Constitution)[704]. The Party Central Committee, indeed, does not draft the plan nor commences the revision or research phases, but instead lays out some suggestions, some criteria according to which the NDRC will draft the plan.

The approval phase of each plan also mingle with the research and consultation phase and consists, in essence, of three different "approvals"[705]:

[698] They are, indeed, those cited in Art. 14 § 2 of the upcoming Regulation on Major Administrative Decision-Making Procedures: symposiums, hearings, field visits, written solicitation of opinions from the public, questionnaires, and opinion polls. Such public participation methods may also employ technologies such as instant messaging apps, as happended with in the last planning process.

[699] This last type of consultation obviously requires that both the Central Committee proposals and the conclusions so far reached by the research are properly disclosed to the general public.

[700] They are not the experts composing the aforementioned committee.

[701] Usually in the autumn before the year of the final approval of the new plan (October 2010 for the 12th FYP; October 2015 for the 13th FYP).

[702] See the Proposal for the issuance of the 13th FYP by the CPC Central Committee.

[703] Both the CPC Central Committee and the NDRC may set up inner drafting groups in charge of writing the documents and the drafting groups may carry out their own research as well as organize research groups.

[704] As reminded, the National Plan follows a special "legislative" procedure which is outside the scope of the Legislation Law.

[705] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making*, cit., 112 ff.

i) the State Council in its plenary session discusses the outline and, after having approved it, requests the deliberation of the NPC[706];

ii) the Politburo, chaired by the CPC General Secretary, discusses the Outline as approved by the State Council. This is, in practice, the final review. After the approval by the Politburo the Outline is sent to the National People's Congress[707];

iii) the Outline is first examined by the Finance and Economic Commission of the NPC, then by the general session in March, which approves it according to the Constitution[708]. The discussion taking place within the NPC is not purely formal, as also suggested by the circumstance that, during the sessions, several amendments to the Outline are proposed, discussed and approved[709].

With the formal approval by the NPC, the Plan's implementation stage begins. The planning cycle, however, neither ends nor commences. Revision and research are constant activities during the implementation and enforcement of the plan. Each year, between June and September, the State Council (or, presumably, the NDRC) submits a report to the NPC about the implementation of the Development Plan[710]. Where adjustments to the Plan are required, due to changes in the socio-economic context or to evolution in strategic priorities, Art. 17 of the Law on the Supervision of Standing Committees of People's Congresses at Various Levels provides for a special legislative procedure this time modeled after the scheme of the Legislation Law. The State Council[711] or the local government submits an adjustment scheme to the NPC or to the People's Congress at the correspondent level for examination and approval.

3.7.3 A Confucian-Democratic Centralism for the Chinese planning in the new era

[706] This passage may be preceded by a discussion within the Party Committee of the State Council, which reviews and approves the Outline of the Plan, then submits a report over to the Politburo. The State Council, when discussing the Outline, may decide to send it to the relevant departments, the local governments, the NPC and the CPPCC, soliciting further opinions. This was, for instance, the procedure followed for the approval of the 12th FYP in 2011, as reported in *ibidem*.

[707] Formally, it is the State Council to request the NPC's approval, but the discussion by the Politburo is what sanctions the connection between the Party and the State legal system, also sanctioning the unity of intentions of both levels of governance

[708] As I have already pointed out, Chinese legal scholars believe that this is the passage which gives the Plan a formal legal effect.

[709] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making*, cit., 113

[710] Art. 16 of the Law on the Supervision of Standing Committees of People's Congresses at Various Levels

[711] The NDRC on behalf of the State Council.

The process of development planning in China is not the outcome of a policy choice nor the product of a cycle of deliberation and consultations carried out by the leadership. It is, indeed, the fruit of the reflections of China's legal culture over the relationship between government and knowledge, where the second element (i.e. knowledge) ensures the spontaneous obedience toward the first element (i.e. the government). This, in traditional Chinese culture, is the basic relation connoting the virtue (德 – *de*)[712] which, in Confucian thought, comes in first place from mutual learning[713].

Indeed, policy decision-making is not only a matter of power but also (and mostly) of information[714]. The correct distribution and management of information is reached toward the contribution of every kind of perspective in the definition of planning strategies. Thus, drawing on collective wisdom becomes an expression of democracy[715] or, I would say, of democratic centralism.

The dynamic between the democratic and the centralist elements reflects a scientific conception of governance which blurs the boundaries between "enlightened autocracy" (开明专制 – *kaimingzhuanzhi*)[716] and "deliberative democracy" (协商民主 – *xieshangminzhu*)[717]. The first assumption that justifies the establishment of such planning process is that the couple of equations **[informational asymmetry=incomplete and/or dispersive and fragmented knowledge]** and **[informational symmetry=complete and circular knowledge]** affects both the virtue[718] and efficacy of the plan-making activity. Knowledge, therefore, means in first place to know what is right for the people[719], to realize that people's needs are the driving force of social development[720], to recognize

[712] See A.CHENG, *Storia del Pensiero Cinese I*, cit., 65-66

[713] Learning, in Confucian thought, is the mean to become men, to grow into a human being capable of serving his/her community while staying "moral" with regard to his/her inner character. See *ivi*, cit., 47-52

[714] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making*, cit., 115-116.

[715] *Ibidem*

[716] The concept was first proposed by Liang Qichao during the reform season of 1898, as noted in YU RONGGEN, *Beyond the controversy*, cit., 5

[717] The adjective "deliberative" is translated with 协商 (*xieshang*), a term which may also mean consultative.

[718] The virtuous character of the law is a recurring problem in Chinese legal culture, but, as noted in Chapter 1, is an issue inherent to the study of planning and economic law. Certainly, in China the moral content of the legal rule is experiencing a development season. See DU YALIN, HU XI (杜宴林　胡　烯), 现代法律德性转向及其中国启示 (*The morality shift of modern law and its enlightnment in China*), in 法学 (*faxue*), Vol. 10, 2018, 65-80

[719] CONFUCIUS, *Analects*, 6.22

[720] See GONG TINGTAI (龚廷泰), 人的需要、社会主要矛盾与法治保障 (*Human needs, social contradictions and rule of law guarantee*), in 法学 (*faxue*), Vol. 8, 2018, 124-134, 124-126

that the relevant contradictions among people's needs have been transformed, in the new era, into the contradiction between people's needs and desire for a better life and unbalanced and inadequate development[721].

The result of such reasoning is another important equation, between a balanced development and a circular knowledge. Given these premises, the legitimacy to produce law follows the Confucian conceptualization of five authorities[722] but it emphasizes the connection and interchange between some of these authorities. In particular, it points out the link between the authorities in charge of defining legal and social rules[723] that is expressed by the focus on consultation with experts, old cadres and social organizations during each phase of the planning process[724]. It also seems to embrace a people-centered approach where the democracy is expressed through a relation of obedience/benevolence between the government and the different subjects involved in the process[725]. As in the traditional Confucian institutional structure, the relation between the different actors participating into the planning process is governed in first place by trust[726] and by mutual recognition. The proper functioning of the system ensures that the rule produced – i.e. the planning act – is benevolent on account of its inner knowledge[727] and provided with the features required to properly tackle common development issues.

The relation between traditional Confucian conceptual line of thoughts and development planning process certainly fits into a general reconsideration and reassessment of the Confucian classics in the People's Republic of China[728], but the aspect, in my opinion, must not be exaggerated. Certain conceptual patterns are embedded into the Chinese legal culture and have been incorporated into Chinese socialism through the theories and

[721] See XI JINPING, *Report on the Nineteenth National Congress of the Communist Party of China*, People's Publishing House, 2017, 11; see also GONG TINGTAI, *Human needs*, cit., 129

[722] See PENG HE, *Chinese Lawmaking*, cit., 50. See also § 1.5 and following

[723] i.e. Emperor, Patriarch and Teacher, given that Sky and Land pertain to the definition of "natural rules" (自然规定 – *ziranguiding*). See *ibidem*

[724] The importance of the interaction between the "family" dimension and the "public" dimension may be detected looking at the involvement of elder party cadres in the party decision-making processes.

[725] YU RONGGEN, in *General Survey on Confucian Legal Thought*, cit., 157-158, recalls how the people-centered concept of government (民本 – *minben*) in Confucianism is founded over a notion of "people" which is defined with the term 子民 (*zimin*), literally "the children-people", in connection with the authority of the 君父 (*junfu*) or "the monarch-father".

[726] See T.RUSKOLA, *What Is a Corporation?*, cit., 643-645

[727] The relation between knowledge (知识 – *zhishi*) and benevolence (仁 – *ren*) is expressed in Confucius, Analects, 4.2 and 6.22.

[728] See C.SMITH, JUN DENG, *The rise of New Confucianism and the return of spirituality to politics in mainland China*, in China Information, 00(0), 2018, 1-21

elaborations of the Chinese leaders over the past decades[729]. Today, they connect with modern policy concepts such as deliberative democracy and inclusive decision-making[730], thus seeking global legitimacy[731] and, on the other hand, not emphasizing their conceptual tie with the tradition[732].

The Confucian-Democratic Centralism (儒民主集中制 – *rumingzhujizhongzhi*) which now inspires and guides the development planning process in the People's Republic of China is indeed the peculiar outcome of the evolution of Chinese legal order since the opening up and reform. The definition of the plan decision-making process in the PRC as "democratic"[733] is obviously a statement which calls for debate and discussion, but it nevertheless is a statement justifiable on the basis of the legal provisions and normative practices governing such process.

3.8 The content of the Plan

The concrete outcome of the planning process is the planning act and the concrete object of the planning process is to define the content of the planning act. The specialty of the plan, when compared to other acts, also affects its content that, in terms of technical language employed, of goals' definition and of obligations and duties laid out differs from any other piece of legislation[734].

[729] PENG HE, in *Chinese lawmaking*, cit., 57, discusses a common interpretation of Chinese Marxism, that of its close relation with Chinese traditional culture. For example, the principle of seeking truth from facts is based in the assumption that "facts" correspond to the "historical and traditional roots of Chinese culture as well as the realistic problems of contemporary China".

[730] This is the topic addressed by WANG SHAOGUANG and YAN YILONG in *A democratic way of decision-making*, cit.

[731] I would argue that such legitimacy is also aimed at publicizing and, in the future, exporting certain features of this model.

[732] Neither the legal scholars who addressed the topic nor Wang Shaoguang and Yan Yilong dedicate reflections concerning a conceptual continuity between traditional concepts of governments and social life (Confucian, Taoists, etc.) and modern planning. Rather, they focus on highlighting contemporary foreign experiences of economic legislation which share scope, purpose or object with Chinese development plans.

[733] See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making*, *cit.*, 113 ff.

[734] Each one of the aforementioned elements (language, goals, obligations and duties) endured, overtime, an evolution which Hu Angang defines as the passage from an "Economic Plan" (经济计划), to a "Public Affairs Governance Plan" (公共事务治理规划) (HU ANGANG, *The distinctive transition,* cit., 630. The article is in English, so the differentiation between the terms 计划 and 规划 in the two definitions is mine). Such change, apart from broadening the plan's scope bridges a theoretical gap between traditional socialist planning and development planning as theorized in the second half of the 20th Century outside the socialist countries.

To explain such statement, I will carry out a brief analysis of the main contents of planning acts, taking as example the National Five-Year Development Plan, in particular the 13th FYP. I will focus on a technical assessment, based almost solely on the analysis of the plan's text, highlighting the different legal instrument designed by it to lay out its orders and intentions[735].

According to its text, the 13th Five-Year Plan of the People's Republic of China "*sets forth China's strategic intentions and defines its major objectives, tasks, and measures for economic and social development*"[736]. The key terms of this sentence (strategic intentions, major objectives, tasks, measures) already display how the indications and orders set forth by the plan assume different formal and substantial features. They also reflect the integration of strategy (战略 – *zhanlue*) wisdom (智慧 – *zhihui*), thinking (思路 – *silu*) and public policy (公共政策 – *gonggongzhence*) into the planning act[737].

Each element may correspond to a different instrument and/or technique employed to define a part of the plan's content.

Why does the Plan employ such a wide variety of legal instruments? It is a common knowledge that the Chinese legal system adopts a "variable geometries"[738] stance as far as both the form and the force of each legal provision is concerned, but such concept, when referred to the plan, is taken to a whole new level. The plan is, essentially, a comprehensive vision of an entire society[739] and has since long time renounced to implement such vision through fixed indexes and figures. It instead chose to calibrate, depending on the strategic field involved, the instrument used to carry out its development goals[740]. It is certainly arguable that Chinese development plans changed their focus from

[735] I will not dwell too much on the specific fields covered by the plan which, by the way, are listed, for the main part, in Section 1 (3) of the Opinions of 2005 and comprise: agriculture, water conservation, energy, transports, infrastructure construction, development and protection of important resources, environmental protection, public utilities and public services.

[736] See Preamble

[737] See HU ANGANG ET AL., 国家发展五年规划的 战略分析与实践认识 (*Strategic Analysis and Practice Cognition for Five-year Plan of National Development*), in 清华大学学报 (*tsinghuadaxuexuebao*), Vol. 31 (1), 2016, 27-39, 39

[738] See I.CASTELLUCCI, *Rule of Law and Legal Complexity*, cit., 92-102

[739] This explains why plans often dedicate entire sections to define the development philosophy inspiring them.

[740] As it is easily arguable, a figure is of immediate comprehension to the public officer in charge of enforcing it (as also reported in the interview with Prof. Yan Bo), while a directive better expresses a general policy objective which requires long-term cooperation between market forces and public management, between the "invisible hand" and the "visible hand".

"quantitative change" to "qualitative change"[741]. This is also demonstrated by the variety of instruments employed while traditional socialist plans relied almost solely on figures.

General Outlines on National Development: although a superficial analysis could suggest otherwise, the highly declamatory declarations of intents and outlines concerning the general development of the whole nations – usually laid out in the preamble or in the first chapter of a plan[742] – are the "least socialist" and the "most neutral" among the plan's contents.

Indeed, all around the world and since the 1950s, development plans reserve a specific section to the description of the major policy goals which inspire them and which, more often than not, deal with the construction of a better life for people through a proper coordination of economic development dynamics[743]. Notwithstanding, the use of such declamatory formant in the Chinese plans holds a particular significance, since not only does it put forward the general policy inspiring the plan, but it also defines the relation between the plan and the development philosophy which justifies it. Therefore, the reference in the 13th FYP to "building a moderately prosperous society" (建成小康社会 – *jianchengxiaokangshehui*) and to "*comprehensively advance innovative, coordinated, green, open, and shared development*" is meant to point out that this plan fits into a specific phase of the evolution of Chinese thinking about development. Thus, it transposes into concrete objectives the ideas laid out by those expressions.

Usually, the plan general outline has a twofold structure. In the first part, we found an assessment of the results achieved by the previous plan[744] laying out the positive as well as the negative sides[745]. In the second part, mirroring the initial stage of the research phase in the planning process, the plan set some theoretical and broad rules which are principally directed at public authorities – e.g. *Uphold the principal position of the people; Continue to deepen reform* – but may also hold value for private economic operators and

[741] See HU ANGANG, *The distinctive transition,* cit., 632
[742] In the 13th FYP, the whole first and second chapters contain several of such kind of provisions.
[743] See, for instance, the development plans of Bolivia, Tanzania, Papua New Guinea.
[744] Such analysis may also employ tables in order to display the results achieved.
[745] The 13th FYP states that "*we must be soberly aware that China's development model is inefficient; uneven, uncoordinated, and unsustainable development continues to be a prominent problem; the change of pace in economic growth, structural adjustments, and the transformation of the drivers of growth present interwoven problems; and we face a host of challenges (…)*".

individuals, though formally not aimed at them – e.g. *Keep in mind both the domestic and international situations; Uphold leadership by the CPC*[746].

It is perfectly clear that none of these goals could correspond to an indicator or a directive or a project, but their function is not to be enforced. It is, instead, to render the whole planning act more coherent in its formulation, by justifying, in the introduction, the ultimate purpose of each one of the orders that will be unfolded in the plan.

Plan Indicators: traditional Socialist planning, as applied in the USSR and in the pre-reform China, essentially revolved around plan indicators. From a purely socio-political point of view, the indicator is a goal, developed and set by a leading organ of a State, serving the purpose of fulfilling a medium-to-long term development strategy[747].

In a legal perspective, the indicator is something more: it is a command rule, assisted by sanctions[748] and as such based on legal liability, directed at public authorities and at economic operators. In a Stalinist economy, all economic operators are part of the administrative machine[749] and their integration within the bureaucratic pyramid is what, theoretically, ensures the correct enforcement of the indicators. Such framework only employs binding indicators, whose object generally pertains to production output, supply input, salaries amount, etc.

The transition from a traditionally planned economy to a socialist market economy cannot but deeply affect the structure, the function and the object of the indicators. The binding indicator (约束性指标 – *yueshuxingzhibiao*) changed its scope and is currently aimed at coordinating social development in fields like social policies and environmental policies. The 13th FYP, among the Main Economic and Social Development Indicators[750], sets thirteen binding indicators, three in the "Wellbeing of the people" section[751] and ten in

[746] The 13th FYP, in addition, refers to three very general objective, synthetizing the stances formalized by the CPC Leadership over the past few years: i) To finish building a moderately prosperous society in all respects by the time the CPC celebrates its centenary in 2021; ii) to turn the People's Republic of China into a modern socialist country that is prosperous, strong, democratic, culturally advanced, and harmonious by the time it celebrates its centenary in 2049; iii) the Chinese Dream (中国梦 – *zhongguomeng*) of rejuvenating the nation.

[747] In a socialist context, the relevant organs are those of the leading party. However, the plan was and is always formally sanctioned by the parliament, although it embodied the political will of the party.

[748] Several liabilities may be associated with the plan's norms: disciplinary, administrative, and civil. Today, however, they operate indirectly (except, maybe, for the disciplinary liability).

[749] Or their management is selected and directed by state and/or party organs, as it happened with the cooperatives.

[750] Box 2 of the 13th FYP

[751] Average length of education received by the working-age population; Rural population lifted out of poverty; Rebuilt housing in rundown urban areas.

the "resources and environment" section[752]. The addressees of such binding indicators are, undoubtedly, administrative units and offices as well as local governments. The declared binding force of the indicators enhances their ability to be comprehended and scientifically enforced[753].

The binding indicator is, in other words, a sort of commitment of the public power to people, which clarifies and strengthens the governments' responsibility by setting – through figures – a mandatory objective as well as a mandatory deadline[754] – i.e. five years. In the duty embraced by government concerning the implementation of binding indicastors some Chinese scholars find the basis of the legal effect of such provisions[755]. Even though they pertain to social policies, binding indicators, in the implementation and enforcement phases, may very well imply a certain organization and structuring of economic activities. An indicator regarding the rebuilding of houses in downtown areas[756] is implemented through project contracts which involve economic operators, thus orienting to a wide extent the strategies and behaviors of such operators, both public and private[757].

The shift in the object of binding indicators (i.e. from economic and industrial policies to social and environmental policies) has been occurring since the early 2000s[758] as reflection of the evolution of the CPC long-term development strategy[759]. The scientific outlook on development, while justifying the use of strictest indicators in matters regarding sustainability of economic growth, discourages their use for resource allocation

[752] Arable Land; Increase in land newly designated for construction; Water use reduction per 10,000 yuan of GDP; Energy consumption reduction per unit of GDP; Non-fossil energy; CO2 emissions reduction per unit of GDP; Forest growth; Air Quality; Surface water quality; Aggregate major pollutant emissions reduction.

[753] As reported in the interview with Prof. Yan Bo. We must also remind how binding indicators employ direct implementation instruments.

[754] See HU ANGANG, *Strategic Analysis,* cit., 35

[755] See HAO TIECHUAN, *Is the national plan,* cit., 101. The commitment expressed by binding indicators, however, does not mean that the plan is judicially enforceable since, as already noted, it does not have, as an act, a proper and "pure" legal nature, although having some legal effects.

[756] Indicator n. 14 of Box 2 of the 13th FYP

[757] The same may occur with regard to environmental indicators, which, as it will be noted later, also raise the issue of balancing economic growth and environmental protection (See ZHENG SHIMING (郑 石 明), 政治周期、五年规划与环境污染 (*Political Cycle，Five-Year Plan and Environmental Pollution*), in 政治学研究 (*zhengzhixueyanjiu*), Vol 2, 2016, 80-94).

[758] The 10th FYP (2001-2006) was the last to employ binding indicators concerning production

[759] The 10th FYP was also the first to emphasize a people-oriented approach, focusing on public participation in planning procedures, etc. See on the topic WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit., 127-128

purposes, due to their inefficiency and ineffectiveness within an increasingly market-oriented economy.

Therefore, a second category of indicators was developed, that of anticipatory indicators (预期性指标 – *yuqixingzhibiao*)[760]. Such indicators are, simply put, goals that the country's economy is expected to achieve over the course of five-years[761], not as the mere result of public initiative, but rather as the effect of the interaction of market players[762]. Such interaction is in part voluntary but in part also coordinated by the strategies developed by authorities according to the anticipatory indicators[763]. From this perspective, the anticipatory indicators function as a guidance and addresses not only public authorities but also private economic operators, which may reasonably expect that the government will try to promote certain types of investments or activities[764]. Given their nature, anticipatory indicators are particularly fit to be applied to wide and general macro-economic goals such as national GDP growth rate[765], Per Capita GDP growth rate and employment.

The 13th FYP sets twelve anticipatory indicators, pertaining to Economic Development, Innovation-driven development and Wellbeing of the people's sections[766].

In my opinion, the category of anticipatory indicators also comprises those indicators that are not listed within a dedicated section but are rather incorporated into planned projects or directives[767]. In these cases, the scope of the indicator is more detailed since it pertains to a specific initiative, but its nature and functioning does not differ from other anticipatory indicators.

Plan Directives: be they anticipatory or binding, indicators are only a part of modern Chinese plans. In order to reinforce the promotional and coordinative logic of modern

[760] The term 预期 (*yùqí*) may be also translated with "predictive" or "expected".
[761] See HU ANGANG, *Strategic Analysis,* cit., 35
[762] *Ibidem*
[763] HU ANGANG in *ibidem*, emphasizes the voluntariness of market players' behavior, but in my opinion the function of the plan is also that of directing, to some extent, such behavior.
[764] For example the sectors of high-tech and innovation, heavily emphasized by recent plans.
[765] In the last three FYP it has always been a predictive/anticipatory indicator.
[766] 13th FYP box 2
[767] Such as the goal of "bringing approximately 10.000 high-caliber talented individuals from overseas to make innovations or start businesses", listed under the "talent initiatives" of Section III of Chapter IX (Prioritize Human Resource Development) of the 13th FYP.

plans, the most relevant among their elements is the Directive (指令 – *zhiling*)[768]. The terminology used implies a deep assessment: directive cannot be regarded as an official definition[769]. The reason which drove me to use such term begins and concludes with a comparative remark already formulated, in its general idea, by other scholars, especially with regard to the comparability of the rule by law command with the EU Directives[770]. Overcoming superficial comparisons, I want to point out that, in terms of scope and legislative technique, these directives fit into the rule by law legal norm which has been associated with the concept of EU Directives.

Plan directives, with regard to specific sectors of the national economy, elaborate orders and strategies through brief paragraphs.

These paragraphs define:

a) always the final purpose to be achieved, e.g. "*tighten oversight over state-owned assets, focusing particularly on state capital, increase returns on state capital, and guard against the loss of state-owned assets*"[771] or "*reduce government intervention in pricing, lift all price controls over goods and services in competitive industries, and lift price controls over competitive areas within the power(…)*"[772];

b) general features of the means to be employed to achieve such goals, to be divided into three main categories: i) organizational instrument[773]; ii) financial instruments, meaning investments or other types of financial subsidy for certain purposes[774]; iii) legislative and

[768] The term 指令 (*zhiliing*) is usually employed to define EU Directives (欧盟指令 – *oumengzhiling*) but it is not the only one that expresses the idea of directive. However, compared with other terms such as 指示 (*zhishi*), 指令 contains the ideogram 令 which expresses the idea of an order, a command, thus reinforcing the legal significance of such term.

[769] The term is not found in official documents and in the legal literature, at least not employed as an official definition.

[770] See I.CASTELLUCCI, *Rule of Law and Legal Complexity,* cit. 68-69

[771] Chapter 11 Section 2 of 13th FYP

[772] Chapter 13 Section 2 of the 13th FYP

[773] Meaning the establishment of structures within the public administration with specific characteristics to deal with the issue highlighted in the plan directive. See for instance Chapter 11 Section 2 of the 13th FYP: "*We will establish state capital investment and management companies through reorganization, allocate and utilize state capital more efficiently, and create effective platforms for its flow, reorganization, and structural redistribution*".

[774] See *ivi*, "*We will improve mechanisms for ensuring the rational flow of state capital, make strategic adjustments to its distribution, and encourage more state capital investment in industries and sectors vital to national security and the economy*". Or see also Chapter 8 Section 3: "*To encourage businesses to increase their investment in research and development, we will implement additional tax deductions for their expenditures on research and development*".

regulatory instruments, meaning the announcement or promotion of legislative reforms which regulate, promote and – when necessary – limit certain activities[775].

Plan directives correspond, sometimes perfectly, to each section of a plan. They differ from indicators in more than a feature. Firstly, they fully reflect a promotional logic and, as such, may indirectly bind and involve not only public authorities and public economic operators but also private ones, which may be subjected to preferential measures when complying with directives as well as detrimental measures when not complying. Secondly, they trace a pattern of development without setting binding goals, thus resembling to some extent the anticipatory indicators. However, while the anticipatory indicator on one hand contains a figure[776], on the other hand it lacks some indications and orders concerning means and purposes of the rule which instead are contained in a directive[777].

Furthermore, plan directives intervene in the legal network which connects the central government with the local governments. Each department or local government transposes plan directives into more detailed directives incorporated in the special or local plan[778]. This chain of transpositions eventually leads to the launch of a project or the conclusion of a contract or the issuance of an administrative decision or the grant of a subsidy in accordance with the priority set by the planning acts.

The planned directive (规划指令 – *guihuazhiling*) displays, in its structure, the mixture of law and policy which connotes planning acts. When not implemented through a planned project, it may therefore only found, for the economic operators, a general responsibility for its implementation, but it needs an implementing legal source to enter in a fully legal dimension.

Plan Projects: what, in essence, distinguishes Plan Directives from Plan Projects (规划项目 – *guihuaxiangmu*)[779] is the level of detail displayed by the specific rule. Projects

[775] Chapter 11 Section 2 of the 13th FYP: "*We will establish lists of the regulatory powers and obligations of state-asset investors, make steady progress in bringing state owned productive assets under unified oversight and supervision, and establish a budgetary management system for state capital operations across multiple levels covering all SOEs*." See also Section 1 of Chapter 11 of the 13th FYP, entirely dedicated to SOEs Reform pattern.

[776] Thus being more precise and easily understandable by the addressees and thus more easily implementable, enforceable and accountable.

[777] From this perspective, plan directives are more comprehensive and even more detailed than plan indicators and this explains why many indicators are also conceptually linked to a section of the plan, the environmental indicators being the most evident example.

[778] I cannot help but notice that the same logic pertains, to some extent, to EU directives.

[779] Again, this is not an official term, but one I want to employ in order to clarify my analysis.

identify (as do directives) policy fields to manage, but they also describe the initiative which will have to be carried out such as, for instance, *"extend full 4G coverage to regions where it is needed"*[780]. On account on their inherently detailed nature, projects are particularly abundant with regard to infrastructural development[781].

Where the project to be carried out is of relevance, its inclusion in the plan does not exempt the project from following the legal procedures to be approved[782] (i.e. the approval by the State Council) but instead may be regarded as an instruction to the relevant departments to prepare for the launch of the project and provide the useful instrument and resources.

In some cases, a project may also comprise both a directive and an indicator, such as in Section 1 of Box n. 10 in the 13th FYP, where it lays out a project to increase the length of high-speed rail lines open to traffic to 30.000 kilometers, connecting more than the eighty percent of all large cities.

Plan projects are proof of an evolutionary pattern which draws Chinese planning nearer to European development strategies as designed under the European funds.

Considering them as a distinct category of planning rules highlights how the basics planning instruments may be combined and/or deepened in their grade of detail in order to address specific economic and social development issues[783].

Melton and Heilmann recall[784] that during the 11th FYP period (2006-2010) roughly 160 national-level plans were issued, to which we should add the plans drafted and issued by each local government, from provinces and municipalities downward. These plans covered, in practice, every policy issue that arose in that timeframe.

Chinese planning consists of a staggering number of plans. The focus of my analysis is the planning rather than the mere plans. Therefore, it was spontaneous to assess the National FYP and discuss other plans by reference. Here I just want to offer a very brief

[780] 13th FYP Box 9 (Information Technology Projects), Section I

[781] Here the plan may also specify the regions where a certain project has to be launched or completed such as, for instance, a railway or an airport.

[782] A recent example concerns the construction of the Beijing Daxing International Airport. On the basis of previously put forward sollecitations, the 12th FYP in 2011 called for the construction of a new airport and in January 2013 the State Council formally approved the project. See the link: https://www.flightglobal.com/news/articles/chinese-government-approves-construction-ofsecond-beijing-airport-380974/

[783] Outlining such category and regarding the project as a – at least – semi-autonomous instrument also puts forward a concept which is one of the core points of both the Regional/Macro-Regional Plans and the Special plans.

[784] See O.MELTON, S.HEILMANN, *The reinvention of development planning,* cit., 595

overview of the three major categories of development plans as laid out in the Opinions of 2005 (Section 1(2)):

i) Comprehensive Plans→ these are the plans that directly derive from the National Economic and Social Development Plan. They cover the widest possible range of policy issues and lay out broad directives, indicators and projects. They can be both national and local and they can be issued following a five-year cycle as well as yearly cycle, in order to adjust to the changes in the economic and social environment. In terms of hierarchy, five-year plans are deemed to be binding on yearly plans and this sole hierarchical connection ensures the validity of the latter plans. The principle is also upheld by a recent decision of the Shanghai Intermediate People's Courts[785]. The annual development plan of the Jing'an District (静安区 – *jing'anqu*)[786] implementing a project for the renovation of urban areas had alledgedly not been approved by the local People's Congress and its validity was challenged[787]. The Court, however, verified that the plan was in line with the five-year plan of the same district (approved by the local Congress) in terms of policy directives and declared it to be valid[788];

ii) Special Plans→ these plans are drafted, at every administrative level, by specific departments of the Development and Reform Commissions and concern the development of specific policy field[789] – e.g. agriculture, fishery, industry, communications, education, etc. – over the course of five years or smaller timeframes (e.g. three years or one year). These plans are then usually

[785] *Zhu Yafei, Zhang Jianshu, Wang Minglie, Wang Tong, Lu Fuzhong v. Jing'an District People's Government of Shanghai*, Shanghai Second Intermediate People's Court, July 21, 2015, n. 270/2015.
[786] A district in the Shanghai municipality.
[787] At the basis of the plaintiffs' claim was the decision of the local government to expropriate private property in order to carry out public interest renovation projects. As already seen, this kind of disputes seem to be the most likely to refer to development plans, thus allowing judges to reflect over certain legal features of Chinese planning.
[788] In other words, the Court did not consider the local People's Congress' approval necessary for the legal validity of the annual plan, due to its compliance with the five-year plan. The point, however,implies a reflection since usually annual plans are more specific than five-year plans and, as happened in the case examined, put forward specific projects to be concluded in a short-term. Therefore, the public interests of such projects does not rely on the formal approval by the local People's Congress but instead on the inner hierarchical system of development planning.
[789] See for instance the 13th FYP for the development of the national fisheries' industry issue by the Ministry of Agriculture in 2016 (全国渔业发展第十三个五年规划).

approved by the State Council or by one of its departments[790] – previously authorized – pursuant to Art. 2 of the Notice of National Development and Reform Commission on Issuing the Interim Measures for the Administration of National Special Planning[791]. They derive from Comprehensive Plans, meaning that, for instance, on the basis of a Five-Year Plan for Economic and Social Development, the High-Tech Industry department of the NDRC may draft a High-Tech Industry Development Five-Year Plan, drawing from the directives laid out in the comprehensive plan about High-Tech Industry;

iii) Regional and Macro-Regional Plans→ The regional economy departments of the NDRC[792] regularly draft development plans aimed at coordinating the development of specific regions or macro-regions, i.e. areas comprising several provinces. Today regional planning also functions as basis and guidance for provincial, municipal, district and country comprehensive plans within the region[793]. Pursuant to the Opinions and to the Notice of the National Development and Reform Commission on Issuing the Interim Measures for the Administration of National Regional Planning[794], regional and macro-regional planning [795] may often cover longer timeframes than the comprehensive and special development plans, such as ten or more years[796].

These three types of plans address, in part, different issues and are specifically designed to tackle them. The legal instruments they employ are, however, the same as in the National Development Plan, thus indicators, directives and projects. The extent to which each one of these instruments is used may obviously vary, but the constitutional principles and the legal provisions concerning them are the same, therefore upholding a fundamental principle of unity of development planning law.

[790] If they are local plans they are obviously approved by the government of the corresponding level

[791] 国家发展和改革委员会关于印发《国家级专项规划管理暂行办法》的通知 (*guojiafazhanhegaigeweiyuanhuiguanyuyinfa* 《 *guojiajizhuanxiangguihuaguanlizanxingbanfa* 》 *detongzhi*).

[792] They are: the regional economy department, the northeastern region revitalization department, the western region development department.

[793] 2005 Opinions Section 1 § 2 and Art. 2 of the notice

[794] 国家发展改革委关于印发《国家级区域规划管理暂行办法》的通知 (*guojiafazhangaigeweiguanyuyinfa*《*guojiajiquyuguihuaguanlizanxingbanfa*》*detongzhi*).

[795] E.g. the Plan for the Reform and Development of the Pearl River Delta (2008-2020) (珠江三角洲地区改革发展规划纲要).

[796] The 2005 opinions set the term of five years as a general term, while declaring the its non-binding value.

3.9 The Implementation and the Enforcement of Plans

Implementation (实施 – *shishi*) and enforcement (强制 – *qiangzhi*) represent two additional phases of the planning cycle as well as capital challenges for the legalization of modern developemtn planning[797].

A young economic law scholar noted that, due to its guiding and policy nature, proper planning law is inherently procedural and not substantive[798], like several promotional laws in western countries.

Discussing the legal features of plans' implementation (and enforcement) implies therefore bridging the gap between planning in a narrow sense (i.e. the planning acts) and planning law as "*the system of legal rules that regulate, implement and organize social relations occurring within the processes of socio-economic development planning and all the other types of policy planning*"[799]. In other words, it is here that the two natures of planning acts are, in concrete, integrated with the whole system of development planning. In this paragraph, I will examine how the plans are implemented and enforced, following the macro-categories of direct and indirect implementation and enforcement instruments as well as constraint-driven (约束机制) and incentive-driven (激励机制) mechanisms[800].

3.9.1 The network of development planning: decentralization and differentiation

"*The sky is high and the emperor is far away*" (天高，皇帝远 – *tiangao, huangdiyuan*) tells a famous Chinese saying. Regardless of its historical meaning[801] the issues that it raises are central in the construction of a development planning law. Indeed, the impact that different geographic and climatic conditions may have on the development of legal rules has been more or less constantly noted[802]. In China, the extension and variety of the

[797] See DONG XUEZHI (董 学 智), 论发展规划 法 中 的实施机制 (*On the mechanisms of implementation in development planning law*), in 经济法论丛 (*jingjifaluncong*), Vol. 31(1), 2018, 225-248, 226-227
[798] See *ivi*, cit., 232.
[799] *Ibidem*. The quotation is reported by Dong Xuezhi but is from XU MENGZHOU, *On economic and social*, cit., 46
[800] The distinction is described by DONG XUEZHI in *ivi*, cit., 238
[801] Generally associated with a concept of weak local enforcement of rules issued by central authorities
[802] See MONTESQUIEU, *The Spirit of the Laws*, Books 14-18; R.DAVID, *Traité élémentaire de droit civil comparé: introduction à l'étude des droits étrangers et à la méthode comparative*, R. Pichon, R. Durand-

spaces governed gave rise to the system of "sub-contracting", which enabled central and local authorities to jointly set rules valid for a specific area on the basis of an ongoing bargaining process respectful of both the hierarchy and the autonomy. That system, *mutatis mutandis*, still today inspires the the current implementation structure of development plans.

The 2005 Opinions (Section 1(1)) design a planning system founded on three levels (三级 – *sanji*) and three categories (三类 – *sanlei*). On the basis of the administrative level, we distinguish national (国家 – *guojia*), provincial (省 – *sheng*)[803], city (城市 – *chengshi*)[804] and county (县 – *xian*)[805] planning[806]; on the basis of the function, we distinguish general (总体 – *zongti*), special (专项 – *zhuanxiang*) and regional (区城 – *qucheng*) planning.

According to the administrative structure of the state[807] and on the basis of the National Development Plan[808], each province, municipality and autonomous region prepares its own development plan and each city and county subsequently prepare their own plan on the basis of the general plan of the higher administrative level. The general plans at the various local levels, in terms of process and content, closely resemble the National Development Plan. The variations involve the grade of detail displayed by local plans. As far as the indicators are concerned, local plans are free to both elaborate new ones[809] and

Auzias, Paris, 1950; B.GROSSFELD, *Geography and Law*, in Michigan Law Review, Vol. 82 n. 5-6, 1984, 1510-1519; K.ECONOMIDES, M.BLACKSELL, C.WATKINS, *The Spatial Analysis of Legal Systems: Towards a Geography of Law?*, in Journal of Law and Society, Vol. 13(2), 1986, 161-181

[803] We must also consider the autonomous regions (自治区) and municipalities (直辖市), i.e. Beijing (北京), Tianjin (天津), Shanghai (上海), Chongqing (重庆).

[804] According to the traditional administrative division we should first mention the praefectures (州 – *zhou*) and then the countries. However, today almost all the old praefectures have been turned into cities and, apart from Daxing'anling (大兴安岭), the few praefectures still existing are in the autonomous regions.

[805] We must also consider the autonomous counties (自治县 – *zizhishen*), the municipal districts (直辖区 – *zhixiaqu*), the autonomous praefectures (自治州 – *zizhizhou*).

[806] Moreover, in the townships or villages (乡镇 – *xiangzhen*) the authorities issue local planning documents.

[807] On the general administrative structure of China see L.CARAMANICO, *Livelli di Governo Locale e Sviluppo Economico*, in A.RINELLA, I.PICCININI, *La costituzione economica cinese*, il Mulino, Bologna, 2010, 145 ff.

[808] 2005 Opinions, Section 1(2)

[809] For instance, the latest FYP of the Wuhan City sets new indicators in terms of labor productivity, revenues, registered residents.

set up a different figure than the national plan[810], provided that such figure is higher than the one set up by the central government[811].

The general principle is that the lower the administrative level is the more planning should focus on the most practical and concrete issues[812]. However, the interaction between the center and the local levels bears also the risk of hindering the uniformity of development planning. In particular, the freedom to raise the figures of plan indicators might lead to unwanted (for the central government) consequences when a certain figure represents, in the national plan, a precise policy choice implying an evolution in national priorities. The simplest example is that of Gross Domestic Product: the gradual lowering of the GDP indicator in national plans reflects a view of the Chinese development which aims at emphasizing the social and environmental dimension rather than solely production. Given this premise, a local plan which sets a GDP indicator double in respect of the national one could represent a different range of priorities, especially if we think that on the basis of such indicators the performances of public officers will be assessed and evaluated.

From the "constitutional" point of view, however, Chinese planning follows the model of the so-called "vertical integrated system"[813], based on a quite strict hierarchy which echoes the principle of democratic centralism and the traditional Confucian hierarchy of the family unit[814].

A general and "horizontal" supervisory system is instead designed by the Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels which provides (Art. 16) that each year, from June to September, "*the State Council or the People's Government at or above the county level shall, from June to September each year, report the conditions on implementing the plan*

[810] The Wuhan FYP sets a predictive indicator for growth, so that from a GDP of 10.905,6 billions of yuan in 2015 it should grow to 19.000 billions in 2020, with an annual growth rate of approximatevely 14%, the double of the national indicator.

[811] Such obligation derives from the subordination of local plans to the national plan but also takes into account the specific instances that may be addressed by local plans. The same pattern involves plan directives and project, which are described employing a deeper grade of detail compared with the national plan.

[812] See GUO XIANDENG (郭先登), 新时代大国区域经济发展空间新格局 (*The New Pattern of Big Country's Regional Economic Development Space in the New Era*), in 区域经济研究 (*quchengjingjiyanjiu*), Vol. 1, 2018, 127-140, 133

[813] The expression is from L.CARAMANICO, *Livelli di governo locale,* cit., 146

[814] *Ibidem*

for national economy and social development (...) to the standing committee of the people's congress at the corresponding level".

Due to the geographic, social and economic conditions of the PRC, the concrete core of the planning system lies at the local level, especially at the provincial and county one[815]. Local governments are not only closer to the territory and the real economy but they also manage the great majority of State Owned Enterprises and State Controlled Companies, especially local banks[816].

In terms of development planning, China is therefore a fairly decentralized country, thus diverging, at least in part, from the principle of "vertical integration". Local governments also tend to delegate governance power to other semi-autonomous organizations, shaping what has been defined a "centralized minimalism" or "simplified governance of centralized power" (集 权 的 简 约 治 理 – *jiquandejianyuezhili*)[817]. In this perspective, to decentralize planning while maintaining coordination and control over its implementation and enforcement becomes the perhaps greatest challenge of the central planning authorities.

The decentralization of planning proceeds together with its differentiation. Differentiation refers to a phase which chronologically follows the final approval of the National Development Plan and concerns the elaboration, enactment and implementation of several special and regional plans regulating and coordinating the development of specific policy fields. Special and regional planning, as we have seen, find their original legal basis in the Opinions of 2005 but they are also regulated by two notices of the NDRC on issuing the interim measure for the administration of, respectively, National Special Planning (2007) and National Regional Planning (2015).

Both of these documents are laid out in accordance with the Opinions of 2005 but, at the same time, reflect a partially different logic which also depends on the different historical context which saw their enactment[818].

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[815] See JIANG JIAYING, HU ANGANG, YAN YILONG (姜佳莹，胡鞍钢，鄢一龙), 国家五年规划的实施机制研究： 实施路径、困境及其破解 (*A study of implementation mechanism of the National Five-Year Plan: its implementing paths, its difficulties and its solutions*), in Journal of Northwest Normal University (Social Sciences), Vol. 54 (3), 2017, 24-30, 27; see also L.CARAMANICO, *Livelli di governo locale*, cit.

[816] See L.CARAMANICO, *Livelli di governo locale*, cit., 152-159

[817] JIANG JIAYING ET AL, *A study of implementation mechanism*, cit., 27

[818] The first document was issued right after the 2005 Opinions while the second more recently and under the leadership of Xi Jinping

Special plans are enacted not only on the basis of the national development plan (i.e. a general plan) but also on the basis of the local general development plans and serve the ultimate purpose of reinforcing the general cohesion of the planning system[819]. Where the special plan is enacted by a local administrative department, it is subjected to a double subordination, one to the local general development plan and one to the correspondent special plan of the higher administrative level.

Special plans do not encounter strict limitations concerning their object, but a soft constraint, given that the Notice of the NDRC on National Special Planning[820] outlines the areas where special planning may be, in principle, be employed[821].

The planning process for special planning and for regional planning – closely resembles the one for the general planning, so I just refer to the previous analysis. Nevertheless, it is worth pointing out how Art. 14 of the Notice of the NDRC on Special Planning states that each year "*the preparing department shall, on the basis of the projects whose initiation has been confirmed, propose suggestions on reporting the national special planning of the next year for examination and approval to the development and reform department in October of each year*"[822]. The Development and Reform department shall then report to the State Council before December of each year and, upon State Council's approval, implement it. Such report must be included into an annual evaluation and approval plan of the State Council which lists the special plans and projects for a thorough assessment[823]. According to Art. 16, "*The planning whose basic work is not thorough enough and whose possibility of not completing the procedure for reporting for examination and approval within one year exists may not be listed into the annual plan for examination and approval*". A special plan not included into the annual plan for

[819] See JIANG JIAYING ET AL, *A study of implementation mechanism*, cit., 26

[820] Art. 3

[821] These are: i) important fields concerning the overall development of national economy and society; ii) fields whose projects require the approval from the State Council and where the amount of state investment is relatively large; iii) fields concerning the arrangement of significant industries or the development of important resources; iv) other fields as required by law, administrative regulations or by the State Council. It is easy to note that especially the fourth point leaves a wide open door for the issuance of several different special plans, which may often be connected to the enactment of specific laws. See, for instance, Art. 12 of the Circular Economy Promotion Law.

[822] The provision designs an examination and approval scheme which seems to transpose the solution adopted by Art. 16 of the the Law on the Supervision of Standing Committees of People's Congresses at Various Levels within the vertical relation between the State Council (or the local government) and the department which in concrete drafts the special plan, while at the same time reinforcing the supervision.

[823] See also Section VI of the 2005 Opinions

examination and approval may not be, in principle, accepted[824]. A similar mechanism of supervision is ensured by Art. 27 of the Regulation on Major Administrative Decision-Making Procedures, which established the prior legality examination, employing as one of the criteria the compliance with national policies.

Apart from the monitoring scheme, the provision examined incidentally reveals another important feature of special planning: their main content is represented by projects. If within the general plans projects play a significant but relatively marginal role in terms of both quantity and quality, in the special plans their relevance is much higher. It is through the implementation of key projects in the special fields that the general goals set by the overall planning may be better grasped by the implementing authorities. There is, therefore, a rational interaction between the planning rules and the allocation of resources[825] which, other than representing two major concepts in the implementation of plans, constitute the root of the relation between government and market.

Together with special planning, the pattern of differentiation is also expressed by regional planning, regulated by the NDRC Measures on Regional Planning of 2015. These measures represent a step forward compared with the Measures on Special Planning. Not only because they display a deeper grade of detail in the description of the planning process, but also because they comprise a provision (Art. 11) which lays out a model scheme for each regional plan and requires that such plan indicates (§ 6) the explanation of the guarantee measures for the plan, including "*relevant policies, promotion mechanism, implementation of responsibilities, and supervision of implementation*".

On one hand, regional planning stems from the will of the central government to create plans to address, on a scientific basis, the unreasonable arrangements of interests as well as the differences between the regions' resource availability and carrying capacity[826]. On the other hand, though, it also pursues a centralizing purpose by enacting regional-focused plan directly implemented and supervised by central authorities[827].

[824] It is worth reminding that the refusal of special plan could have disciplinary consequences of the competent officers as well as withdrawal of incentives, prizes, subsidies, etc.

[825] See JIANG JIAYING ET AL, *A study of implementation mechanism,* cit., 25

[826] See TANG YONG (唐 勇), 我 国区域规划实施的法律适用保障研究 (*Study on the safeguard of legal application of Chinese regional planning implementation*), in 西部法学评论 (*xibufaxuepinglun*), Vol. 2, 2009, 140-143, 140

[827] See Artt. 19 and 20 of the NDRC Notice on Regional Planning.

Tang Yong describes two models of legal implementation of regional planning[828]. The first one is a "diffuse management" model, where different government authorities and departments are in charge of the implementation of a regional plan, often in cooperation with local governments involved, as well as of the monitoring and supervision. The second one is a "centralized management" model revolving around the establishment of a special authority with special management powers regarding the implementation of the regional plan[829].

A diffuse management model bears the risk of conflicts between different administrative authorities and, ultimately, the risk of weak implementation and enforcement, especially when local governments may negotiate terms and conditions of particular operations[830]. Such risk, at least theoretically, does not arise in presence of a centralized management system, since potential conflicts between authorities and local governments are managed by central planning organs. Furthermore, a unified authority could carry out monitoring and evaluation procedures more efficiently and comprehensively reporting to the State Council.

The NDRC Notice on Regional Planning seems to alternatively adopt both of these models. Artt. 20 and 21 empower the "*development and reform department of the State Council*"[831] to "*strengthen the supervision and inspection of the implementation of national regional planning, and report their work to the State Council in a timely manner*"[832] as well as to "*conduct post-assessment for national regional planning*"[833]. On the other hand, however, they clarify that the supervision and inspection occurs "*in conjunction with relevant departments and people's governments of the provinces*" and that the post-assessment procedures include consultations with experts from other departments and industries. In practice, none of the regional plans so far enacted relies on a special *ad hoc* unified implementing and enforcement authority.

[828] See TANG YONG, *Study on the safeguard*, cit., 140-141

[829] TANG YONG, in *Study on the safeguard*, cit., discusses the opportunity of establishing a Regional Coordination and Enforcement Committee of the Yangtze River Delta Region (长江三角洲地区区域执法协调委员会), in charge of implementing and enforcing the Outline of the regional planning for the Yangtze Delta Region (长江三角洲地区区域规划纲要).

[830] See TANG YONG, *Study on the safeguard*, cit., 141

[831] The reference could be intended not only for the NDRC but also for the departments of regional economy and other departments which, depending on field involved, could play a role.

[832] Art. 19

[833] Art. 20

Therefore, modern development planning relies on a diffuse implementation system, which ensures its comprehensiveness. Within this context, regional planning may represent the intention of both central and local governments to promote functional and spatial coordination between the city-regions[834]. Furthermore, the establishment of a special implementation and enforcement authority for regional planning implies the solution of several legal issues concerning the extent of the powers of such authority, especially when related with the powers of the local governments as well as of the local courts[835].

Planning is and must be comprehensive and coordinated. This requires that each implementing authority may ultimately refer to the central government which, through the proper application of the principle of inclusiveness, carries out its duties of supervision, implementation and enforcement[836]. To a deeper look, such conclusion upholds the idea of a moderately centralized regional planning enforcement's structure: the challenge, in legal perspective, is that of constructing a set of instruments to avoid, as much as possible, localism and under-enforcement.

Before commencing the detailed analysis of the concrete means of implementation and enforcement of development plans, it may be useful to visually summarize the relevant hierarchical relations between different plans that have been addressed in the previous sub-paragraph[837].

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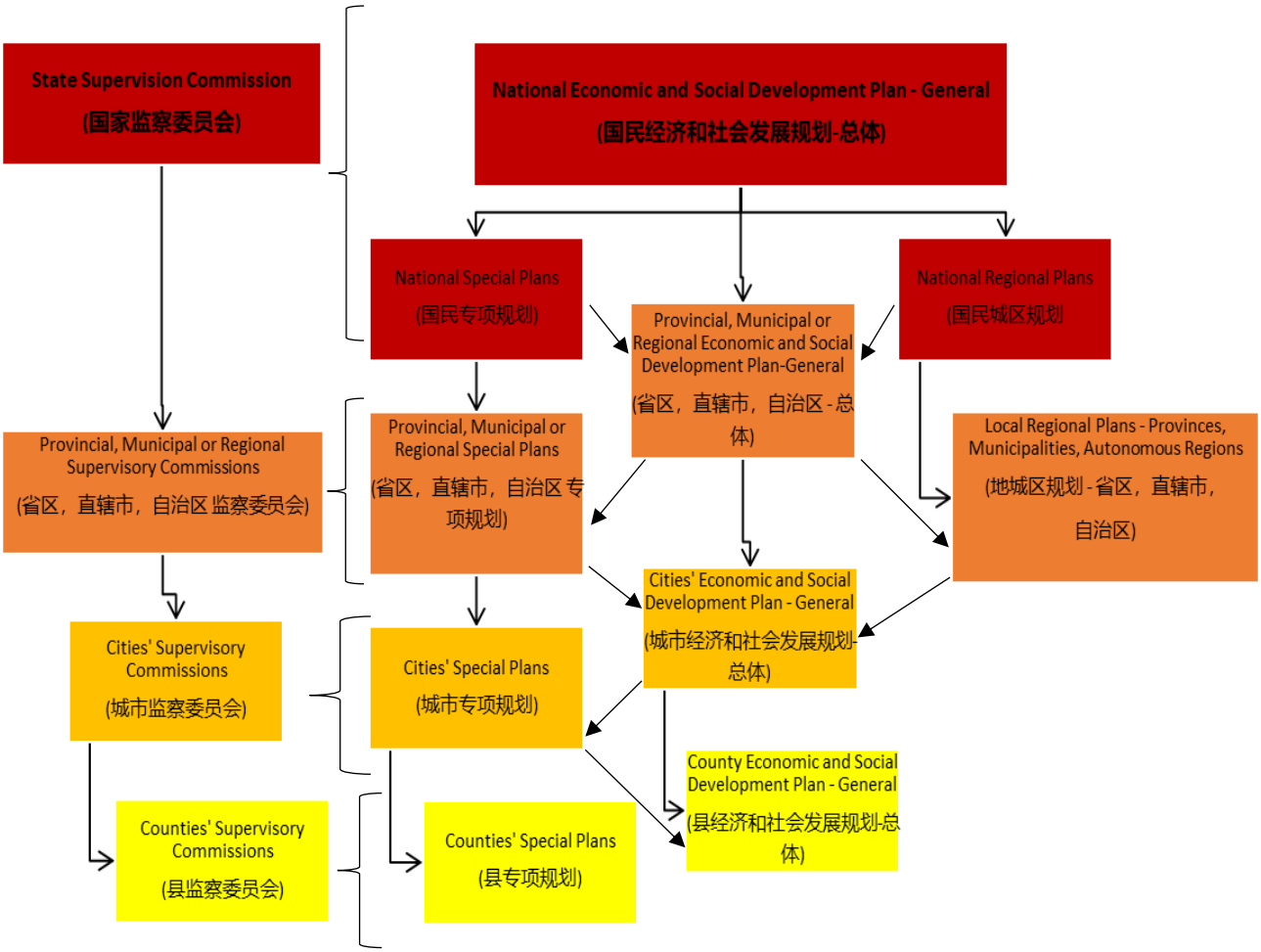
[834] See YI LI, FULONG WU, *The emergence of a centrally-initiated regional plan in China: a case study of Yangtze River Delta Regional Plan*, in Habitat International, Vol. 39, 2017, 137-147, 140

[835] See TANG YONG, *Study on the safeguard,* cit., 142-143. A specialized system of courts hearing cases concerning matters relevant to the strategic priorities laid out in a certain regional plan (*ibidem*) would transform the (regional) development plan into something else, that is a sort of regulation for a Special Economic Zone (经济特区) (on the topic, see A.FENWICK, *Evaluating China's Special Economic Zones*, in International Tax and Business Lawyer, Vol. 2(376), 1984, 376-397, 381). However, the rationale of a Special Economic Zone, intended as a legal institute, is different from the rationale of a Plan. The Special Economic Zone serves the purpose of regulating activities under a legal framework which is different from the one binding the rest of the country in order, for instance, to attract foreign investments (See A.FENWICK, *Evaluating China's Special Economic Zones* cit., 380) or promote specific domestic investments. The Plan has a broader scope, so that a Special Economic Zone may be, if necessary, a consequence of the implementation of a national plan directive.

[836] It is not surprising, then, that the renewed success of regional plans corresponded to the rethinking of development, while instead in the "golden era" of special economic zones (i.e. 1980s and 1990s) regional plans had experienced a steady decline in diffusion and importance. On the issue, see YI LI, FULONG WU, *The emergence,* cit.

[837] The table below displays exactly such relations The arrows represent hierarchical subordination from two different perspective: a) content, meaning the subordinated plan must abide by the relevant objectives, directives and projects laid out in the higher plan; b) supervision, meaning that the planning authority enacting the higher plan has the duty to supervise its implementation, thus verifying whether or not the lower plan complies with the higher one. It is easy to note that each local plan is subjected to that double



The general principle, as expressed in Section VII of the 2005 Opinions, is that plans of lower levels follow plans of higher levels and special and regional plans are also subjected to general plans of the correspondent level and to relevant special plans[838]. According to Section VII each hierarchical relation corresponds, in practice, to a system of reporting according to which the draft plans are sent to higher level's authorities as well as correspondent level's relevant authorities in order to carry out a sort of connection and harmonization process. If authorities at the same level cannot reach an agreement about the coordination of their plans, the conflict may be resolved by a decision of the NDRC (when the conflict is about a regional plan) or by the government of the correspondent level (if the conflict is about two or more special plans of the same level).

subordination to which I already referred before and, in some cases, to a triple subordination – i.e. when the local general development plan is subjected to the higher general development plan, to the higher special plans – obviously just with regard to the specific areas covered by the special plan – and to the higher regional plan.

[838] So, for instance, regional plans must take into account general special plans such as urban plans, land plans. See Sec. VII of the 2005 opinions

When a plan is transmitted from the compiling authority to another authority for observations, the reply must, in principle, be sent within thirty days from the submission date.

In the left part of the table, I added, presented in a synthetic way, the structure of the supervisory commission as designed by the Supervision Law. As already mentioned, these organs may play an important role in planning implementation, through the supervision over the work of all public officers (Art. 3 of the Supervision Law). In first place, the National Supervision Commission[839] has equal status with the State Council and it is therefore hierarchically superior to the National Development and Reform. This means that the National Supervision Commission could exercise supervision over the implementation and enforcement measures of the National Economic and Social Development Plan as well as of the National Special Plans and the National Regional Plans. In the second place, at the local level the role of the correspondent Supervisory Commission would lead to a fourth hierarchical relation[840].

3.9.2 Direct Implementation and Enforcement: the responsibility system

According to Chinese legal scholars[841], the plan's implementation relies on incentive mechanisms and constraint mechanisms. The dichotomy, in diachronic perspective, represents the two "souls" of modern Chinese planning, i.e. the "vertical" and the "horizontal" one, combining with each other. To the notion of "constraint mechanisms", Dong Xuezhi associates a system of legal liabilities connected to plans' implementation[842].

If planning acts may found a general, albeit vague, responsibility upon all civil subjects, a "narrower" legal liability falls upon those civil servants specifically in charge of the

[839] I.e. the highest supervisory organs according to the Supervision Law.

[840] The supervision exercised by the supervisory commission is not limited to the legitimacy or to the merit of the choices of public officers, which already falls within the scope of the supervision carried out by other state organs. It also involves an "ethical dimension" as well, aiming at protecting and promoting moral integrity of the individuals who carry out public functions (see Art. 6 and Art. 11).
From this perspective, the role of the NDRC would not be negatively affected but instead the legal binding force of the plan would be reinforced, introducing a thicker layer of supervision criteria pertaining to the reasonableness and morality of the implementation and enforcement conducts.

[841] See DONG XUEZHI, *On the mechanisms of implementation*, cit., 238

[842] *Ibidem*

implementation procedures[843]. The responsibility of the "leaders" (领导 – *lingdao*) as foundation of the plans' implementation system is confirmed by the Opinions on Establishing and Perfecting the Implementation Mechanism of the National 13th Five-Year Plan Outline issued by the CPC Central Committee[844].

From this perspective, the enforcement of such responsibility mechanism relies on inner administrative liability[845] and concerns ordering corrections and reporting criticism[846].

It is, therefore, a direct mechanism of implementation and enforcement for development plans, in the sense that it addresses the plan itself and not a piece of economic legislation referring to the plan.

The responsibility (责任 – *zeren*) for the correct implementation of the plan comprises two different and intertwined system: the party disciplinary system and the state responsibility system. Both of them assess the legitimacy of acts and conducts in light of the correspondent Constitutions, of the relevant laws, regulations and policies and of moral integrity[847] or "*socialist morality*" (社会主义 道德 – *shehuizhuyidaode*) as laid out by Art. 7 of the CPC Disciplinary Regulations.

Within the legal system of the Communist Party of China the normative foundation of the disciplinary system is in Chapter VII of the Constitution – titled "Party Discipline – as well as in the social foundation of party organizations as hierarchical structures. With regard to the 13th FYP, it is also laid out in Point 27 of the Opinions on Establishing and Perfecting the Implementation Mechanism of the National 13th Five-Year Plan Outline,

[843] See *ivi*, cit., 241-242. The author mentions, in particular, that out of 11 examined national and local documents concerning development planning, 10 mention the establishment of a responsibility system for public figures in charge of implementation.

[844] 中共中央办公厅 国务院办公厅印发《关于建立健全 国家"十三五"规划纲要实施机制的意见》(*zhonggongzhongyangbangongtingguowuyuanbangongtingyinfa《guanyujianlijianquanguojia"shisanwu"guihuagangyaoshishijizhideyijian*》. The document mentions the concept of responsibility several times. In points V and VI it refers to a general concept of responsibility for leaders involved in implementation activities.

[845] On the distinction between broad e narrow administrative liability see XIAO DENGHUI (肖 登 辉), 论我国行政责任的归责原则体系之建构 (*On the construction of the system of criterion of administrative liability in China*), in Wuhan University Journal, Vol. 59(3), 316-320, 316-317

[846] See DONG XUEZHI, *On the mechanisms of implementation*, cit., 241-242. The author points out that, for the most severe cases, administrative sanctions could be imposed and mis-implementation of plans could also amount to a crime, where the conducts carried out are subjected to criminal law. However, he maintains that administrative liability is the most common form of liability connected to plans.

[847] See Art. 11(1) of the Supervision Law but also Art. 12(7-8) of the Civil Servant Law

stating that "*the results of the assessments and evaluations* (on plans) *are an important basis for promotion and punishment of cadres*".

Art. 2 of the CPC Constitution as well as Art. 36(3) enumerate the requirements party officials must fulfill. Here the ethical dimension of the norm[848] uniformly affects not only the party organizations at all levels[849] but also each member of the party in their own individuality, who are asked not only to respect party discipline but also to promote a series of positive conducts connected to a socialist ethic as explained in Art. 8 of the CPC Constitution[850].

In light of such premises, Art. 40 of the CPC Constitution declares that "*Party discipline mainly consists of political and organizational discipline and discipline regarding integrity, the public, work, and life*"[851]. The model also shapes a particular hierarchy of sanctions connected to disciplinary violations, which goes from the simple warning – as a moral reprimand – to the expulsion[852].

The evolution of the disciplinary system of the CPC experienced and experiences a relevant process of legalization[853]. From the enactment of the 2013 Regulations on the Formulation of Inner-Party Rules[854], it led to the issuance of two Five-Year Plans for the elaboration of such rules[855] as well as of the Disciplinary Regulations of the Communist Party of China (中国共产党纪律处分条例 – *zhongguogongchandangjiluchufentiaoli*), issued in 2018 and which ideally represent the correspondent, within the party legal system, of the Supervision Law.

[848] The evolution of modern Chinese law represents the attemp to a harmonization between a traditional "kelsenian" conception (i.e. the law fully separate from the morals) and an integrated notion of law, a new culture of normative relations which combines law and ethics. Here, ethic becomes the foundation of the law. See HUANG, *Morality and Law in China, Past and Present*, in Modern China 2015, Vol. 41(1), 3–39.

[849] i.e. from the highest party institutions to the primary ones within enterprises, schools, social organizations, villages' committees etc.

[850] The integration between rule and ethic is also reflected in the procedure of selection for new CPC members. Such procedure requires in first place the recommendation of two full party members and the assessment of a series of preliminary competences and theoretical knowledge. Then, an "investigative" phase begins comprising further assessment and debates with other members in order to verify the profile of the candidate.

[851] Logically connected to such consideration is the relation laid out in Art. 11 of the Supervision Law between education and discipline. The education is regarded as the logical premise of the discipline.

[852] See Art. 41 of the CPC Constitution.

[853] On the issue, see ZHANG XIAOYAN (张晓燕), 新时代党内法规制度建设的 顶层设计 (*Top-level design of the party's internal legal system in the new era*), in Chinese Cadres Tribune, March 2018, 65-66.

[854] 中国共产党党内法规制定条例 (*zhongguogongchandangdangneifaguizhidingtiaoli*).

[855] It is now in force the 2nd of these plans, covering the period from 2018 to 2022.

The Opinions on Establishing and Perfecting the Implementation Mechanism of the National 13th Five-Year Plan Outline directly link plan's implementation to a responsibility system which concerns, in the first place, party cadres[856]. The same connection, however, derives from several general provisions.

The 2018 Disciplinary Regulations specify several obligations related both to the planning process and to the plans' implementation, thus focusing both on procedural and substantive duties. Art. 70 (2-3) discusses the violation of collective decision-making procedures and Art. 121 punishes negligence in the inspection, supervision and implementation activities.

From the substantive point of view, the CPC Disciplinary Regulations – in Art. 112 – lay out some disciplinarily-unfit conducts, comprising a wrongful management of the expenses which burdens the masses. Arti. 114 punishes the unfair conduct in the areas of social security, policy support, policy alleviation etc.[857] while Art. 116 qualifies as disciplinary violation the untimely and inefficient management of the issues concerning the life and the production activity of the masses.

The sanctions and penalties applied for violations of party disciplinary rules are the issuance of a warning or of a serious warning, with repercussions on the career-advancement of the single party cadre over time[858]. For the most severe cases, removal from the office held within the party, probation or expulsion (this last measure provided for in Art. 112, 114 and 121).

If the general framework of Party disciplinary rules is quite clear, less clear is how to transpose such rules into specific disciplinary provisions connected to a local plan's implementation system[859]. It has been argued that it could be possible to regard inner party laws' hierarchy as state laws' hierarchy, so that the Party Constitution would be the highest legal source and disciplinary regulations as the central level would function as

[856] See, in particular, points 5,6 and 27.

[857] Such policy areas, as already noted, are addressed by each plan and they are usually covered by binding indicators.

[858] Pursuant to Art. 10 of the Disciplinary Regulations within a year or a year and a half from the warning (supposedly depending on its gravity), party members cannot be promoted or recommended to serve positions in organization outside the party.

[859] The issue is connected to the general theme of the integration of party disciplinary rules into the legal system with Chinese characteristics, so to enact a proper legalization process even in this field and uphold the primacy of the rule of law. On the issue, see ZHOU YUELI (周悦丽), 以地方为视角的党内法规体系建设研究 (*A Study on the Construction of the System of Intra-Party Laws and Regulations from a Local Perspective*), in 北京行政学院学报 (*beijingxingzhengxueyuanxuebao*), Vol. 4, 2018, 46-52.

"general laws"[860]. According to such general regulations, several local regulations are indeed drafted by local party organizations[861]. When dealing with plan implementation and enforcement, such local regulations set out, or empower disciplinary organs to periodically set out, performance evaluation criteria based on the indicators, directive and projects laid out in the plan.

On a general level, the party responsibility system exercises its binding force not only over cadres or officers managing party cells and organs but also on each party member, even those who manage, individually or in a corporate structure, a private economic activity[862] or a mixed-ownership activity[863]. The presence of party organs within private enterprises is not only defined by the Company Law[864] but it also related to the cohesion and coherence of economic development strategies and single business entities' positioning in the market environment. It reflects the "*need to establish and consolidate the basic economic system at the primary stage of socialism, guide the healthy development of the private economy, strengthen contacts with workforces in private firms and consolidate the class bases and social bases of our rule under new circumstances*"[865]. In light of this ground rules, private enterprises which organize party branches or individual entrepreneurs obtaining party membership are subjected to the duty to "*implement the Party's basic line, principles, and policies, take the lead in reform, opening up, and socialist modernization, encourage the people to work hard for economic development and social progress, and play an exemplary and vanguard role in production, work, study, and social activities*"[866].

[860] See *ivi*, cit., 48

[861] In *ibidem* it is reported that in 2017, 200 central party regulations were in place but more than 2000 local party regulations also had force.

[862] See CHEN ZONGSHI, *The Revival, Legitimization, and Development of Private Enterprise in China*, Palgrave Macmillan, 2015, (see in particular Chapter 1, 1-29); XIAOJUN YAN, JIE HUANG, *Navigating Unknown Waters*, cit.

[863] On the topic of party presence in mixed owenership enterprises see WU HUI (吴 辉), 探索混合所有制企业党建工作新路径 (*Explore New Paths to Party Building in Mixed Ownership Enterprises*), in Journal of China Executive Leadership Academy Jinggangshan, Vol. 10(6), 2017, 103-107

[864] See Art. 19 of the Company Law

[865] See JIANG ZEMIN, *Collected Works*, Vol. 3, 人民出版社 (*renminchubanshe*), Beijing, 18. See also CHEN ZONGSHI, *The Revival, Legitimization*, cit., 45

[866] *Ibidem*

This means that disregarding plan directives and indicators is a legal ground to levy a disciplinary sanction against a private entrepreneur as well as against a private enterprise party branch[867].

The pattern which transposes the basic responsibility rules into evaluation assessment standards with regard to plan's implementation and enforcement is also at the basis of the State responsibility system which stems from the NDRC [868] and concerns the implementation and enforcement activities of all the local planning authorities.

With the approval of the Supervision Law, however, not only did the supervisory machine of the State endured some changes but also the legal framework for public servant's responsibility grew in complexity and now revolves around two laws:

i) the first one is the Civil Servant Law (中华人民共和国公务员法) of 2005 as revised in 2017, aiming at "*regulating the management of civil servants (...) strengthening the supervision of civil servants, form a high-quality troop of civil servants so as to promote a diligent and honest government and enhance the working efficiency*"[869];

ii) the second one is the Supervision Law, which establishes a centralized system of supervisory organs empowered not only to check civil servants' compliance with law but also to supervise their conduct in terms of ethics and morals.

Here, I am, in particular, interested in pointing out how the Civil Servants' Law designs a pattern of supervision and assessment of civil servant's performances which is effectively harmonized with the party's supervisory system, aiming at a unitary legal effect, as also laid out in Art. 4 of the Civil Servants' Law, according to which "*the guidelines of the Chinese Communist Party (CPC) shall be carried out in the civil servant system*".

From the structural point of view, civil servants' legal obligation to implement and enforce the development plans derives from Art. 12 which requires, among others, that every servant observes the constitution and the law, earnestly performs their functions

[867] Since the role of the party branch is expressed through a close interaction between it and the board of directors of the enterprise (see WU HUI, *Explore New Paths,* cit., 104), this means that the ultimate goal of ensuring corporate harmony and stability (*ibidem*) depends on the respect of rules, respect of proper ethics, moral conduct and determination of strategic priorities in accordance with the policy laid out by the relevant party organizations, such as, in first place, the development plan.

[868] See Chapter V Section 12 of the 2005 Opinions

[869] Art. 1 of the Civil Servants' Law

and enhances the efficiency of their work, safeguards the interests of the state, abide by the orders of the superior organs. According to the Civil Servants' Law[870], the evaluation system revolves around a comprehensive assessment which requires (for non-leader civil servants) an annual examination carried out by the leaders of the correspondent administrative units and, for leader civil servants, an examination carried out by the competent organs[871].

How to transpose the national and general provisions into local rules, which will effectively guide and regulate the functioning of the responsibility system?

Apart from some basic indications – i.e. that the assessment must be periodical and carried out on a hierarchical basis – the Civil Servants Law does not provide enough organizational details[872]. Some useful remarks are provided by management science, according to which "*the assessment is a comprehensive measurement and evaluation of the performance of the government and its public servants, the effectiveness of administrative actions and the administrative capacity of administrative organs*"[873] and such measurement function is carried out through performance indicators[874].

From this point of view, plan indicators represent a fundamental link between plan's elaboration and plan's enactment. They are not, however, a self-sufficient provision, because evaluation indicators necessitate a deeper grade of detail which takes into account the several operations leading to the implementation of a single plan indicator[875]. Therefore, it must be carried out, even in this phase, a decentralizing and differentiating logic.

In order to better comprehend the full meaning of the reasoning carried out, it is useful to elaborate a simple example[876]. Let's suppose that a national development plan lays out an indicator concerning the reduction, over the next five years, of the emissions of a certain pollutant agent. Once the plan is enacted, the NDRC – i.e. the department in charge of the

[870] See Art. 35

[871] E.g, the several departments of the NDRC.

[872] Therefore, evaluation procedures often follow different paths end adopt different forms and schemes, rendering it difficult to sketch a clear picture of the current evaluation instruments in the PRC.

[873] See HU JUN (胡峻), 行政规范性文件绩效评估研究 (*Research on performance evaluation in administrative regulatory documents*), Chinese University of Political Science and Law Press, 2013, 41-42

[874] See LIU FUYAN (刘福元), 城管考核机制中的指标体系研究 (*On the Indicator System of the Performance Evaluation of the City Inspectors*), in Journal of Southwest University of Political Science & Law, Vol. 19(3), 2017, 62-84, 63

[875] See *ivi*, cit.

[876] The example is based on O.MELTON, S.HEILMANN, *Reinvention of development planning*, cit., 596-600

specific sector concerned – will have to carry out periodical assessment of the implementation and enforcement of such provision[877]. In order to define the content of such assessment the NDRC will prepare a series of standards whose content may include:

i) definition of the most strategic enterprise at all administrative levels which will have to reduce the emissions due to their significant impact over the overall rate of emission of that pollutant agent[878]. The NDRC will define on its own the key enterprises at the national level and will require local planning authorities to do the same at each level (provinces, counties, etc.);

ii) definition of the "score" of the evaluation, by assigning different scores to different results, signaling full achievement of the objective, partial achievement or non-achievement[879];

iii) definition of the evaluation schedule: evaluation are usually carried out, within the five-year planning period, on annual basis, thus taking as main criterion the targets laid out in the annual development plans prepared by the NDRC and the local governments on the basis of the national five-year development plan[880];

iv) definition of a double pattern of reward and punishments for the local governments which achieve and do not achieve the plan's goals.

The standard assessment measures of the NDRC will then become the basis for the assessment measures elaborated and issued by local governments and planning authorities as well as special departments at each administrative level, in order to evaluate the implementation and enforcement of general plans, special plans and regional plans. The effectiveness of the evaluation also depends on the nature of the plan's order concerned. A binding indicator will require a more thorough assessment while a purely anticipatory or predictive indicator will correspond to an assessment which emphasizes the

[877] See, for instance, the implementation scheme concerning the assessment of energy consumption of 2007 (单位 GDP 能耗考核体系实施方案).

[878] The economic units involved, at this stage, are State-Owned and State-Controlled Enterprises, and the SASAC will also be responsible for the compilation of further standards of assessment.

[879] The evaluation will concern both the enterprises selected and the administrative units in charge of the implementation, so that the NDRC will incorporate such scores into the standards relevant for the assessment of the public officers managing planning activities.

[880] The NDRC will define how each year local authorities and relevant departments may refer to the higher planning organs or the State Council discussing the state of the implementation of the plan, therefore also contributing to the research for the revision and drafting phase of the next five-year plan.

promotional dimension but not (or at least not with the same degree of severity) the responsibility system[881].

Plan directives will instead be implemented at the lower administrative levels or through special planning by laying out projects whose purpose is in line with the content of the directive. The implementation of the projects will then rely on other performance indicators concerning each phase of the project's realization.

Projects involving strategic areas related to relevant plan indicator may as well be regulated, with regard to their assessment and evaluation, by specific measures, such as the "Measures for the Energy Conservation Examination of Fixed-Asset Investment Projects" of 2017[882].

Rewards for positive evaluations may consist of promotions or of other specific measures as provided by the Civil Servants' Law[883], to which planning authorities at all levels, when elaborating their standards of assessment, can add other types of rewards both for the individuals and for the administrative unit or government evaluated. The same logic inspires the punishment measures[884], which the Civil Servants' Law connects to disciplinary violations, disregard of orders and incompetence. In the first two cases a sanction according to Art. 56 is issued, while in case of incompetence the general sanction is the demotion pursuant to Art. 47.

The whole system of public officers' responsibility is likely to endure profound changes after the enactment of the Supervision Law.

The new "supervisory power" is formally independent from the "administrative function", is placed at the same level with the State Council and exercises supervision over it. It upholds the leadership of the Communist Party[885] and in doing so is likely to carry out a thorough coordination between the disciplinary measures and principles laid out by the Party leadership and the Law of supervision of the PRC.

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[881] Furthermore, as already noted, local governments may decide to hold in different regards specific anticipatory indicators.

[882] See, for instance, Art. 4, describing the powers and tasks of the NDRC in managing the examination procedures.

[883] Pursuant to Art. 48 of the Civil Servants' Law "*Those civil servants or a collective of civil servants who have made outstanding working performances, noticeable achievements and contributions or any other outstanding deeds shall be given rewards, where the principles of combining spiritual rewards and material rewards with the focus on spiritual rewards shall be upheld*", while Art. 49 enumerates some standard circumstances which justify the award of such measures.

[884] See Chapter IX

[885] See Art. 2

The legal revolution represented by the new Supervision Law reflects the strengthening of the ethical dimension of the Chinese legal system, transposed into the relation between the concepts of "rule of law" (法治 – *fazhi*) and rule of virtue (德治 – *dezhi*).

Some scholars point out that the compresence of rule of law and rule of virtue is constant in the development of East Asian legal culture, with the result that the promotion of a liberal-democratic concept of rule of law has encountered more than obstacle[886].

In recent years, the parallel development of the rule of law with chinese characteristics and of an ethics-oriented environment has been at the center of the legal discourse of the Chinese leadership, starting from the enactment of the Outline for the Implementation of the Construction of a Civil Morality of 2001[887] up to the establishment of an independent supervision system in charge of scrutinizing the moral integrity of public officers (i.e. the State Supervison System)[888].

The Rule of Virtue[889] is a legal concept which pertains to the development of Chinese legal tradition and finds its earliest systematization in the development of Confucian legal thinking[890], which also combines law and morality, defining them as equally importance elements for governing a country[891]. In other words, Rule of Law cannot exist without Rule of Virtue as rule's legitimacy also depends on its capacibility to be trusted it on the basis of a set of ethical values[892].

In the first place, the *dezhi* traces a connection between ruling power and education[893]. It is an element which is found in Art. 11 of the Supervision Law and which, with regard to the plan, signifies the need for adequate information and education from the higher planning organs to the lower, concerning the interpretation of plan's objectives and directives.

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[886] See SUN LI (孙　莉), 德治及其传统之于中国法治进境 (*Rule of Virtue and its tradition within Chinese Rule of Law*), in 中国法学 (*faxue*), Vol. 1, 2009, 69-76, 69-70.

[887] 公民道德建设实施纲要

[888] See also § 3.2.1.

[889] As already noted the concept of virtue, in the Chinese legal tradition, connoted the capacity to authoritatively exert persuasion and guidance over subjects, rather than a western-oriented concept of virtue, heavily influenced by religious paradigms.

[890] See DENG CHENXI (邓晨夕), 儒学礼乐教育背景下的法治与德治 (*Rule of Law and Rule of Virtue under the background of Confucian ritual and musical education*), in Journal of Xinxiang University, Vol. 35(4), 2018, 8-11

[891] See *ivi*, cit., 8

[892] See ZHANG QIANFAN (张千帆), 法治，德治与宪政 (*Rule of Law, Rule of Virtue and Constitutionalism*), in 法商研究 (*fashangyanjiu*), Vol. 88(2), 2002, 34-39, 34-36

[893] See *ivi*, cit., 9-10

In the second place, the rule of virtue is flexible and dynamic. It overlaps with the rule of law and supplements the law when the law is too rigid. In particular, the rule of virtue is fit to apply to the implementation and enforcement of a promotional legislation. "Ruling by virtue"[894] means to take decisions which are not only compliant with the laws but also the most fit, according to the circumstances, to pursue the common welfare in harmony with the relevant social and institutional relations. It is a concept which reflects the general principles of communal living according to a common ethic as enshrined in the constitution[895] and incorporated into the legal system.

The Rule of Virtue is fit to guide the evaluation of civil servants and of everyone who, to some extent, carries out activities of public interest[896]. The Rule of Virtue is conceptually connected with the idea of a disciplinary system of rules and constitutes an overall requirement of each implementing and enforcement activity[897]. A positive evaluation under such criteria leads to a reward or, more significantly, to a career advancement. The Rule of Virtue becomes a method to select public affairs' personnel and, in particular, Party cadres[898].

In the Supervision Law, the connection between Rule of Law and Rule of Virtue reaches high levels of integration[899]. The real question is then, once again, how, in the near future, the existence and operativity of the supervision system could affect the monitoring activity of the NDRC and the other relevant departments and how the Rule of Virtue, in

[894] Once again we may discuss about the precise meaning of the term 德治. It could be translated with "rule of virtue" or with "rule by virtue". On the issue see WANG SHUQIN, LIU CHANG (王淑芹, 刘 畅), 德治与法治：何种关系 (*Rule of virtue and Rule of law: what kind of relation?*), in Studies in Ethics, Vol. 73(5), 2014, 64-68

[895] See ZHANG QIANFAN, *Rule of Law,* cit.

[896] For example, a person carrying out repairment works within a public structure such as a university campus is regarded a exercising public interest activities and is, therefore, subjected to rule of virtue and to the Supervision Law.

[897] Beyond the correct implementation and enforcement of plan's indicators and directives, the general conduct of the implementing officer must be aimed at virtuously pursuing public interest, preventing conflicts, give example to people and preserving social harmony.

[898] See YANG DESHAN, ZHAO SHUMEI, *The Communist Party of China and Contemporary China*, China Intercontinental Press, Beijing, 2014, 76-103

[899] We may even talk of a rule of virtue operating under the shield of the rule of law. From this perspective, we would counterbalance the traditional notion which sees the rule of virtue pertaining to the rule of men. Modern rule of virtue emphasizes, instead, the example that public officers must give on the basis of the positive law. See WANG SHUQIN, LIU CHANG, *Rule of virtue and rule of law: what kind of relation?,* cit.

light of the constitutional status of the supervisory system, could play a new and more relevant role in the assessment of the plan's implementation and enforcement[900].

3.9.3 Indirect Implementation and Enforcement of the Development Plans

Economically speaking, the implementation and enforcement of each different kind of development plan relies on an organized allocation of resources, especially financial resource[901]. It is within such conceptual framework that, at the central and at the local level, the incidence of development plans over the macro-economic dynamics is determined.

The plan today does not allocate supplies for each economic unit but, in its implementation phase, manages the allocation of financial resources directed at those economic units. It is therefore necessary to analyze those instruments which empower authorities to regulate and manage the use of such resources. Such regulatory framework does not formally depend on the plan but it is ultimately justified by the logic of development planning. It serves, therefore, the purpose of an "indirect" implementation.

Furthermore, the analysis of the legal instruments regulating the repartition of financial resources leads to the definition of a normative framework[902] which empowers planning organs to manage and coordinate such allocation. On the other hand, it also gives private subjects the opportunity to interact with those organs, to be involved in the decision-making process and to challenge the allegedly illegitimate decisions[903]. The same promotional logic is herein reflected, especially when considering how legal rules on

[900] ZHANG QIANFAN, in *Rule of Law, Rule of Virtue,* cit., 37-38, states his view that the most effective way to build a rule of virtue legal environment is to institute an external mechanism to control government behavior and points out that such mechanism should empower all members of society to protect their legitimate interest through legal means. Sixteen years after such statement, the solution elaborated by the Chinese leadership seems to have taken into account some instances brought on by Zhang, by intstituting a whole system of external supervision. Such system, however, is not direcly aimed at guaranteeing the legitimate interests of the members of society, but at preserving the proper functioning of the legal system according to a top-down dynamic.

[901] See LI ANAN (李安安), 金融资源配置中的地方政府竞争及其法律治理 (*On Local Government Competition and Its Legal Governance in the Process of Financial Resources Allocation*), in 人大法律评论 (*rendafalupinglun*), Vol. 3, 2016, 18-37, 20

[902] See JIANG CHUN, LI ANAN (江春，李安安), 法治、金融发展与企业家精神 (*Rule of Law, Financial Development and Enterpreneurship*, in Wuhan University Journal, Vol. 69 (2), 2016, 90-97

[903] There is, however, an issue regarding in first place the decentralization of the administrative system and, in second place, the existence of ensembles of norms regulating the functioning of social groups, suc has the *guanxi*. On the issue see JIANG CHUN, LI ANAN, *Rule of Law, Financial Development,* cit., 92-94

resource allocation aims at supporting enterprises through funds as well as by aiding them to approach markets otherwise inaccessible[904].

The challenge is therefore in the construction of a legal model of "*flexible supervision and regulation*"[905] which, relying on market rationality and taking as priority the people's interest, enhances its own effectiveness through legal rules concerning negotiation, cooperation, guidance and self-regulation[906].

At the operative level, emphasizing negotiation and cooperation procedures means widely employing contracts and incentives in order to balance the relevant interests at stake. The complexity of the activities carried out justifies, in my opinion, a different definition of the concept, that is, instead of flexible supervision and regulation, "flexible coordination"[907].

We need to further distinguish between indirect implementation with regard to the object and with regard to the subjects. The first concept concerns the implementation and enforcement of development plans through legal provisions and regulatory frameworks not directly pertaining to the plan. The most relevant examples of such indirect implementation concerns budget law, fiscal law and anti-monopoly law.

The concept of indirect implementation with regard to subjects deserves instead an immediate clarification. I refer to the structuring of a network of relations between public institutions and economic operators[908] which enables the institutions to delegate certain implementation activities[909] to the economic operators, thus involving them, be them public or private, into the planning process. An already mentioned example is represented

[904] The State aids enterprises in different ways. As reported during an interview with the director of a rural cooperative in the Pingjiang County, such cooperatives enjoy discounted interest rates when asking for credit to State-Owned Banks, but local governments also promotes the sale of their products through advertisement. On the internazional level, I would think about the involvement of certain enterprises in project to be realized along the Belt & Road.

[905] See JIANG JIANXIANG, LI MO (蒋建湘, 李沫), 治理理念下的柔性监管论 (*On flexible supervision and regulation under the concept of governance*), in 法学 (*faxue*), Vol. 10, 2013, 29-37

[906] *Ibidem*

[907] Under such coordination, the plan intervenes to coordinate and stimulate the implementation and enforcement of different regulatory frameworks and impose sanctions that, although not directly referable to a specific plan's provision are ultimately justified by it.

[908] This network functions differently depending on the quality of the subject involved. In SOEs and SCEs there is inherent link deriving from capital ownership. In Private enterprises the link derives from the presence of party committees or from the individual party membership of the managers. It may also depend on lobbying phenomena. See GUOSHENG DENG, S.KENNEDY, *Big Business and Industry Association Lobbying in China: the Paradox of Contrasting Styles*, in the China Journal, Vol. 63, 2010, 101-125

[909] E.g incorporation of indicators and standards laid out by plans into the specific strategies of the enteprises

by the role of Party Committees within enterprises. Now I would like to further point out that those committees operate transversally, touching either the activity of the Party within the enterprise or the activity of the enterprise as economic entity[910].

The Party committee contributes to the definition of enterprise's strategic plans, industrial priorities and future development and investment projects[911]. Not for the purpose of subjecting the enterprise to purely political and bureaucratic constraints, but in order to favor the coincidence between the strategy of the single economic entity and the strategy laid out in national economic policies[912].

Apart from that shaped by Party committees, other connections between planning organs and economic operators affect the legal assessment of development planning in China.

When the economic operator is state-owned, the connection is both substantial and formal. While the traditional form of the State-Owned Enterprise as dominant up to the late 20th Century has been steadily declining following the transition to socialist market economy, the "modern" SOEs are mostly companies constituted in accordance with the Company Law of 1993 and whose capital is, wholly or partially[913], controlled by the SASAC and subjected to the State-Owned Assets Law of 2008[914].

Since these companies are not formally part of the ministries' organizational structure they may be defined as State-Controlled Companies (SCC)[915].

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910 See WU HUI, *Explore New Paths to Party Building*, cit.

911 *Ibidem*

912 The role of party committee within private enterprises still raises perplexity in the West. It is uncertain the role of these organs. In the United States there is an ongoing debate (started more than seven years ago) about the role of CPC Commitee within Huawei. See the *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE*, U.S House of Representatives, 112th Congress, October 8, 2012. The report (p. 40), highlights the uncertainty about the role of the party committee, but it seems to assume that such role is in first place a coordinative one and is founded on a technical cooperation. It is, therefore, a harmonizing role, which also reflects the "representation of the advanced social and productive forces" carried out by the Party according to the thought of the Three Represents.

913 Art. 5 of the SOA Law defines "State-Invested Enterprise" (国家出资企业) as "*a wholly state-owned enterprise or company with the state being the sole investor, or a company in which the state has a stake, whether controlling or non-controlling*".

914 中华人民共和国企业国有资产法 (*zhonghuarenmingongheguoqiyeguoyouzichanfa*)

915 As highlighted in GUO RUI, *The Creation of Modern State Ownership：Legal Transplantation and the Rise of Modern State-owned Big Businesses in China*, in Peking University Journal of Legal Studies, Vol. 1, 2013, 69 ff., the process of corporatization derived from the legal transplant operated with the 1993 company law (which introduced mostly American corporate models) in concrete served the purpose of a reorganization of old State-Owned Companies more of a promotion of emerging private companies. Through the new structures set up by the Company Law, old SOEs were able to empower technically legitimated management while freeing themselves from the control of party bureaucracy. On the other hand, the State was able to enforce a strict control over its proprerty rights, benefitting from the rapid expansion of strategic SCCs.

The control by the public authorities is carried out through the exercise of the contributor's prerogatives[916], managing SOAs to "*promote the centralization of state-owned capital to the important industries and key fields that have bearings on the national economic lifeline and state security*"[917]. State Controlled Enterprises are thus directly subjected to plan indicators, directives and project[918]. Furthermore, the eagerness of such enterprises to comply with planned orders affects their access to credit as well as the amount of subsidies and tax reduction they enjoy[919]. In the last place, local State Controlled Enterprises are often "protected" by policy and even judiciary localism, so that such enterprises, as recipients and implementing organs of the local plans, are to some extent guaranteed against disturbing external factors – i.e. a competitor, a particular economic and financial conjuncture[920].

The connection between planning organs and economic operators involves not only the relations between the state and the state-owned economic operators, but even the private economic operators. The legal significance of the relations between private operators and the state develops according to different levels. The first one is the level of *guanxi* (关系), a concept symbolizing an interpersonal connection between several persons based on trust, ultimately leading to the formation of a network of relationships where decisions are shared, favors are exchanged[921] and knowledge is transferred[922]. The legal value of *guanxi* is justified by its reliance on the "rite" (礼 – *li*) as applied within a hierarchical context where public authorities, big corporations and small and medium enterprises interact with each other. The fundamental issue of *guanxi* is that it contravenes the basic

[916] See Chapter II of the SOA Law
[917] See Art. 7 of the SOA Law.
[918] SOE managers and directors are also included in list laid out in Art. 15 of the Supervision Law and are therefore subjected to the Supervision system and liability system related to plans' implementation.
[919] The State Controlled Enterprises are indeed still today the major recipients of tax benefits and subsidies, on account of several reasons but especially of the strategic positions they occupy, especially at the local level where local governments tend to favor their "own" enterprises by awarding subsidies and granting loans through state-controlled banks, incidentally adding up to their own debt.
[920] See G.SABATINO, *Legal Features of Chinese Economic Planning*, cit., 65-66
[921] See XINCHUN LI, LI LIU, *Embedded Guanxi Networks, Market Guanxi Networks and Entrepreneurial Growth in the Chinese Context*, in Front. Bus. Res. China, Vol. 4(3), 2010, 341-359; WAI WAI KO, GORDON LIU, *A Typology of Guanxi-Based Governance Mechanisms for Knowledge Transfer in Business Networks of Chinese Small and Medium-Sized Enterprises*, in Group & Organization Management, Vol. 42(4), 2017, 548-590; WONG, LU WEI, XINYAN WANG, DEAN TJOSVOLD, *Guanxi's Contribution to Commitment and Productive Conflict Between Banks and Small and Medium Enterprises in China*, in Group & Organization Management, Vol. 42(6), 2017, 819-845
[922] See WAI WAI KO, GORDON LIU, *A typology of Guanxi-Based Governance*, cit., 559 ff.

logic of the Rule of Law with Chinese Characteristics and, especially at the local level, may easily hinder the effective binding capability of state legal norms.

On a more complex level of integration there is the relations founded on Party's membership, which I already discussed.

The third and more structured form of relation between planning organs and private economic operators relies on the establishment of Industrial Associations (行业协会 – *hangyexiehui*), formally non-governmental and non-profit[923] associations comprising enterprises operating in a certain sector of the economy[924]. The operative purpose of such associations may differ from case to case, but it generally concerns the enhancement of the cooperation and coordination between the enterprises on the basis of an agreement reached by the members as well as the management of the relationship between the enterprises and the public authorities[925]. Cooperation may lead to harmonization of industrial policies and strategies but also to price control[926].

The autonomy of the industrial associations must therefore be balanced with the inevitable intervention of the government, which serves the purpose of ensuring the respect of competition law[927] and, in general, the proper consideration of public interest.

It was noted[928] how such industrial organizations have not reached a full organizational autonomy and they are essentially at the service of governments. Their concrete functions vary from information and service providing to participation in politics. Through such activities, they are able to coordinate the directions of industrial production and strategies, functioning as a powerful tool of industrial public policy.

The process, however, is at least partially reciprocal, meaning that while the state exercises its influence over the industrial associations, those associations exercise a

[923] See YAO XU, CHE LIUCHANG (姚旭， 车流畅), 论行业协会组织的法律性质 (*On the Legal nature of Industrial Associations*), in 法学杂志 (*faxuezazhi*), Vol. 5, 2011, 34-37, 34-35

[924] On the topic see YAO XU, CHE LIUCHANG, *On the legal nature of industrial associations,* cit.

[925] LI BOQIAO (李伯桥), LUO YANHUI (罗艳辉), 论行业协会自治权与国家干预的冲突与协调 (*On the Conflict and Coordination between the Autonomy of Industry Associations and State Intervention*), in 经济法研究 (*jingjifayanjiu*), Vol. 16(1), 2016, 73-81, 79 ff.

[926] See *ivi*, cit., 73-75

[927] Price regulation may, obviously, affect competition. See LI BOQIAO, LUO YANHUI, *On the conflict and coordination* cit., 74-75. We must remind that the management and regulatory powers of the industrial associations have a double source. The first is the agreement or the contract which establishes the association and the second are government authorization which, from time to time, may empower the association to exercise different functions.

[928] See XU JIANMING (徐建明), 浅谈行业协会的组织职能规划 (*Discussing the organizational planning function of industrial associations*), in China New Technologies and Products, Vol. 22, 2010, 218.

certain influence over public authorities in order to affect the elaboration of national economic strategies[929].

Government intervention and influence over industrial associations has been, among Chinese scholars, the object of debate and criticism[930] and there have been proposals for the establishment of a clear legal framework regulating the autonomy of industrial associations[931].

To this research, they are an example of how Chinese planning authorities entrust social organizations with broad planning functions. In reassessing the principle of inclusiveness, they uphold the all-encompassing effectiveness of planning not only toward public but also toward private economic operators.

3.9.4 Following: Planning Law and Budget Law

The connection between planning law and budget law is both formal and substantial. Formally, the budget is a legal document drafted by the government and approved by the National People's Congress or by the Local People's Congresses following a special procedure laid out by the Budget Law and the implementation sources[932].

Plans on national economy and social development, middle and long-term financial plans and relevant fiscal and economic policies are the basis for the making of annual draft budgets by the governments, pursuant to Art. 16 of the Regulations for the Implementation of the Budget Law[933]. This means, on one hand, that the content of the

[929] See GUOSHENG DENG, S.KENNEDY, *Big Business and Industry Association Lobbying,* cit.

[930] In particular, it has been pointed out how industrial associations often act as branches of administrative departments and ministries and protect the interests of the State-Owned Enterprises more than of other entities (see LI BOQIAO, LUO YANHUI, *On the conflict and coordination,* cit., 75-76). Moreover, the weak autonomy of industrial associations could hinder the efficiency of support provided by such associations to its members unless there is a correspondent will by the government (see ZHANG DEFENG (张德峰), 论我国合作金融行业组织体系的 法律重构 (*On the Legal Rebuilding of Cooperative Finance' s Industry Organization System in China*), in Modern Law Science, Vol. 36(5), 2014, 70-81, 72).

[931] See WANG LI, XIE LULU (汪莉，解露露), 行业协会 自治权之程序规制 (*Procedural Regulation of Trade Association Autonomy*), in 行政法学研究 (*xingzhengfaxueyanjiu*), Vol. 2, 2013, 9-14

[932] 中华人民共和国预算法 (*zhonghuarenmingongheguoyusuanfa*), of 1995, amended in 2014. The People's Congresses also exercise supervision over the implementation of the annual budget according to the Law on the Supervision of Standing Committees of People's Congresses at Various Levels. The speciality of their approval procedures and the supervision system they are subjected to connotes both the budget and the plan. However, the legal nature of the budget of easily justified by the provisions of the Budget Law as well as by its technical "neutrality", since every entity, within each system, usually drafts and approves a budget document.

[933] 中华人民共和国预算法实施条例 (*zhonghuarenmingongheguoyusuanfashishitiaoli*) of 1995.

annual budget is defined also in accordance with the priorities laid out in the plan; on the other hand, it means that the allocation of resources for plan's implementation are managed through budget law, thus following its provisions.

Budget management may reflect plan's orders in different ways. As far as the projects are concerned, the budget may set aside specific funds. Other funds may be destined to subsidies or tax reductions. Financial aid may be addressed to economic operators but also, and maybe more significantly, to local governments[934].

3.9.5 Following: preferential financial measures

The allocation of financial resources through preferential measures is a method of plan's implementation which recurred over the whole history of Chinese planning after the reforms. It is a concept which pertains to incentives and is enacted through the repartition of resources in a way that favors one or several economic operators over the others. This statement implies a series of legal consequences[935]. In first place, systemic consequences, connected to the peculiar elements of the Chinese financial system; in second place an assessment of the purpose of such selective allocation of resources. Each one of these two points will be separately analyzed, but it is now necessary to preliminarly define the different forms which such preferential measures may assume. All these forms have a common scope, but are managed through different legal instruments and are founded over different legal basis. I tried to group them into four main ensmebles: i) fiscal benefits; ii) subsidies; iii) preferential access to credit; iv) price control.

Fiscal Benefits: plans' implementation through fiscal benefits is achieved as fiscal laws empower public authorities (central or local)[936] to reduce tax rate or exempt from taxes

[934] Art. 18 of the Regulations on the Implementation of Budget Law state that the central budget's content comprises "Expenditures for refunding or subsidizing the local governments". In this way, Therefore, local governments would enjoy more funds than the ones they are entitled to according to the tax-sharing system.

[935] The problem is the balance between a centralized and a decentralized system of resource allocation, the first one being associated with a command economy and the secondo ne to a market economy. See PISTOR, GUO LI, ZHOU CHUN, *The hybridization of China's Financial System*, in B.LIEBMAN, C.MILHAUPT (edited by), *Regulating the Visible Hand: Institutional Implications of China's State Capitalism*, Oxford Scholarship Online, 2015

[936] Under the 1994 reform, the "shared tax revenues", to be divided among central and local governments are managed and redistributed at the central level, thus increasing the fiscal dependence of provinces from the central government. The 1994 reform if on one hand sought to rationalize a system which too often relied on informal bargaining activities, on the other hand certainly aimed at emphasizing the role of the central government. Today, such solution does not come without problems. Chinese scholars (Li Jianghong and Shen Bin) criticized local governments' high reliance on non-fiscal methods of financial income, such

those economic operators which conduct activities, use technologies and carry out investment in compliance with plans' orders and directives. The Law on Enterprise Income Tax, as amended in 2017, dedicates a whole section to preferential fiscal treatments[937]. Art. 25 states that "*Preferential treatments in enterprise income tax are granted to the important industries and projects whose development is supported and encouraged by the state*". Furthermore, Art. 27 enumerates some forms of incomes which may be exempted from enterprise income tax or whose tax rate may be reduced. These incomes pertain to those sectors whose development is regulated by development plans[938]. Preferential treatments are formulated by the State Council[939] and are usually disciplined by regulatory documents[940]. Some economic sectors are covered by specific normative frameworks regulating the application of preferential tax measures[941].

The State Administration of Taxation is in charge of monitoring the correct application of the preferential treatments[942]. Each enterprise may calculate in advance whether or not it has the requirements to enjoy a preferential tax rate and apply it on its own motion[943].

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as debt financing. On the specific topic of local tax legislation see LI JIANGHONG (黎江虹), SHEN BIN (沈斌), 地方税收立法权的价值功能转向 (*Steering the value function of local tax legislative power*), in 法学 (*faxue*), Vol. 7, 2019, 67-82. On the evolution of Chinese fiscal system and the effects of 1994 reform see L.CARAMANICO, *Livelli di governo locale*, cit., 159-165; JIN, QIAN, WEINGAST, *Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style*, in Journal of Public Economics, Vol. 89 (9-10), 2005, 1719-1742; ZHENG, *De Facto Federalism and Dynamics of Central-local Relations in China*, World Scientific Publishing, Singapore, 2007

[937] Chapter IV, titled "Preferential Tax Treatments"

[938] They comprise agriculture, breeding, fishing, etc. See also, for more information, Art. 33 and 34 of the Enterprise Income Tax Law.

[939] See Art. 35 of the Enterprise Income Tax Law. More specifically, it is the Minister of Finance to coordinate fiscal policies and its relation with expenditures for economic development purposes. See L.RICCARDI, *Introduction to Chinese Fiscal System*, Springer, Singapore, 2018, 14-16

[940] Still in contemporary times, the Chinese fiscal system relies on informal practices and non-legislative documents which today may be grouped under the notion of regulatory documents. See WEI CUI, *What is the "Law" in Chinese Tax Administration*, in Asia Pacific Law Review, Vol. 19 (1), 2011, 73-92

[941] See, for instance, the Notice of the Ministry of Finance, the State Administration of Taxation, the Ministry of Commerce and Other Departments on Promoting Nationwide the Enterprise Income Tax Policies for Advanced Technology Service Enterprises, the Notice of the Ministry of Finance, the State Administration of Taxation, the National Development and Reform Commission and the Ministry of Industry and Information Technology on Issues concerning Enterprise Income Tax Policies for Integrated Circuit Production Enterprises. Special tax regimes are, furthermore, in place for Special Economic Zones or Free Trade Zones.

[942] Since the 1994 reform, the State Administration of Taxation coordinates and supervises the work of local tax offices, thus ensuring the central government's control over shared revenues' distribution. See L.RICCARDI, *Introduction to Chinese Fiscal System*, cit., 16-18

[943] Art. 4 of the Announcement of the State Administration of Taxation on Issuing the Revised Measures for the Handling of Matters concerning Preferential Enterprise Income Tax Policies (国家税务总局关于发布修订后的《企业所得税优惠政策事项办理办法》的公告).

If, after the monitoring procedure, the State Administration of Taxation finds that such requirements are indeed not fulfilled, the necessary adjustments are made[944].

Subsidies: as that of "preferential financial measures", the concept of subsidies (资助 – *zizhu* or 补贴 – *butie*) is wide and comprises a series of different concrete expressions sharing a common purpose. Generally, a subsidy could be defined as the "*expenditure of special funds allocated by a government according to the political and economic situation and policies for a certain period of time to achieve specific purposes. In essence, it is a kind of transfer expenditure of the government, a unilateral and uncorresponded payment by the government*"[945].

On the basis of such definition, three elements should be pointed out: i) subsidies have a public nature, meaning that they are determined, in most cases, by a decision of a public administration (at the central or local level); ii) subsidies are functional to the implementation of policy directives; iii) subsidies are unilateral, meaning that they do not require a counter performance, as also stated by Art. 3 § 3 of the Measures for the Administration of Central Budgetary Investment Subsidy and Interest Discount Projects[946], which rules that "*both investment subsidies and interest discounts are gratuitously granted*".

In a wholly planned economy subsidies may be granted by the government in order to maintain and freeze prices or to cover losses of state-owned enterprises[947]. This kind of subsidies is still today granted, to some extent, to certain SOEs[948].

Subsidies, however, have another important function, that of coordinating or directing certain market dynamics. In other words, subsidies tend to provide certain economic operators with competitive advantages[949].

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[944] See Art. 13 and 14 of the Announcement of the State Administration of Taxation on Issuing the Revised Measures for the Handling of Matters concerning Preferential Enterprise Income Tax Policies.

[945] See ZHANG CHENGSONG (张成松), 财政补贴的税法评价：基于 税法文本与法理的分析 (*Evaluation of financial subsidies from the perspective of tax law*), in 经济法论丛 (*jingjifaluncong*), Vol. 29 (1), 2017, 277-298, 278-279.

[946] 中央预算内投资补助和贴息项目管理办法 (*zhongyangyusuanneitouzibuzhuhetiexixiangmuguanlibanfa*)

[947] See LU QINGZHENG, GUO ZHIYUAN (吕清正 郭志远), 我国政府补贴的法律治理 (*Legal governance of China's governments subsidies*), in 江淮论坛 (*jiangzhunluntan*), Vol. 3, 2017, 95-100, 95

[948] *Ibidem*. The author refers to the examples of Sinopec, a relevant SOE operating in the crude oil sector, which over 2006 received a series of relevant government subsidies.

[949] See LU QINGZHENG, GUO ZHIYUAN, *Legal governance*, cit., 95

Award and management of state subsidies are largely based, still today, on regulatory documents[950] or even on customary rules and functions according to the relevant networks of relations between economic operators and public authorities[951]. This statement is particularly true at the local level, where most of the subsidies are allocated[952]. The national legislature's interventions have been limited to specific sectors regarded as particularly important, such as the renewable energies and the hi-tech industry[953].

In this context, often not very clear, the function of subsidies in plan's implementation assumes different forms. The most immediate is the direct grant of the subsidy to the economic operators defined as strategic on the basis of development plans[954]. Such case comprises two different circumstances: i) the economic operator is already relevant and plays a strategic role for the further development of an economic sector (such as big SOEs); ii) the government wants to promote the development of an economic activity or a specific area by supporting determined economic operators[955].

In other cases, subsidies are granted for specific and mandatory purposes, such as the purchase of machinery or the production of a specific good[956]. Furthermore, the subsidy

[950] Such as the Notice on the description of the use of special subsidy funds for Shimashan Logistic Park in the transport sector in 2017 (关于石马山物流园 2017 年交通运输领域专项补助资金使用情况说明) issued by the Luyuan City Road & Transport Administration (涟源市道路运输管理) or the interim measures for the administration of special funds for the development of transportation in the Hunan Province (湖南省交通运输事业发展专项资金管理暂行办法).

[951] See on the issue YAO HAIFANG (姚海放), 论政府补贴法治: 产业政策法、财政法和竞争法的协同治理 (*On the rule of law of government subsidies: coordinating the management of financial law and competition law*), in 政治与法律 (*zhengzhiyufalu*), Vol. 12, 2017, 12-21, 16

[952] LU QINGZHENG, GUO ZHIYUAN, *Legal governance*, cit., 95

[953] Some of the relevant sources providing for subsidies' grant are: the Notice of the Ministry of Finance on Issuing the Interim Measures for the Administration of Subsidy Funds for Energy Conservation and Emission Reduction of 2015 and the Notice of the General Office of the Ministry of Finance, the General Office of the Ministry of Industry and Information Technology and the General Office of the China Insurance Regulatory Commission on Issues concerning the Application for Subsidy Funds for Insurance Premium for the First Piece (Set) of Crucial High-Tech Equipment.

[954] See, for instance, the Joint Notice of the Ministry of Finance and the National Energy Administration on the Financial Subsidy Policy for the Development and Utilization of Shale Gas (财政部、国家能源局关于页岩气开发利用财政补贴政策的通知) (n. 112/2015) which, for the 13th FYP period, grants a general subsidy to all shale gas mining enterprises amounting to 0.3 Yuan/Cubic Meter in 2016,2017 and 2018, and to 0.2 Yuan/Cubic Meter in 2019 and 2020.

[955] As reported in an interview with a director of a rural cooperative in the Pingjiang county (Hunan), the local governments are often keen on promoting the development of rural cooperatives.

[956] In *ibidem*, it has also been reported that the financial measures issued to support an economic entity such as a rural cooperative are linked to certain requirements. With regard to the rural cooperative directed by the person interviewed, the local government had decided, together with the cooperative, that only certain products would be produced and placed on the markets, such as tea. On the other hand, in the portion of collective land managed by the members of the cooperative for their personal purposes, the main colture was rice.

could also serve the purpose of promoting the sale of a certain good produced by a certain economic operator, so that the government supports the advertising and promotion activities[957].

In all these cases, the relevant connection is essentially the same: linking the grant of subsidies to the exercise of economic activities which correspond to plans' indicators and directives. This link functions for both public and private economic operators and empowers planning authorities to direct economic activities employing a strong incentive instrument[958].

Once awarded, subsidies are granted through specific funds usually deposited on a bank account owned by the recipient[959], thus being transferred into its ownership. On such funds, however, insists a precise vinculum, connected to their scope and their relation with development plans. This means that such funds may not be the object of an execution procedure inititated by a creditor. The view was upheld by two decisions issued within the context of the same dispute, concerning an execution procedure against an enterprise which had received subsidies for a transportation project[960]. In one decision, the Loudi Intermediate People's Court noted that "*the State establishes special funds for the construction of key projects, in order to serve special projects as detailed in the National Socio-Economic Development Plan*"[961]. Such funds are "*marked for a special purpose and no unit or individual may intercept or misappropriate them*"[962]. The functional link between the plans and the subsidies is also determined by the indication of specific

[957] As reported in *ibidem*

[958] Scholars have analyzed, for the most part, the subsidies granted to major SOEs, carrying out strategic operations. On the topic see CHU YEONG LIM ET. AL., *China's "mercantilist" government subsidies, the cost of debt and firm performance*, in Journal of Banking and Finance, Vol. 86, 2018, 37-52; R.ECKAUS, *China's exports, subsidies to State-Owned enterprises and the WTO*, in China Economic Review, Vol. 17, 2006, 1-13. However, most of the subsidies are actually indeed granted to small enterprises, both SOEs and Cooperatives or even private enterprises in the rural areas or less developed zones.

[959] The circumstance is reported, for instance, in the case *Liu Zhaoquan v. Wuyuan City Nanfang Real Estate Co., Ltd.*, decided by the People's Court of Wuyuan City, Hunan Province on March 12, 2018.

[960] See *ivi*, cit.; see also, between the same parties, the decision of the Intermediate People's Court of Loudi (Hunan Province) of January 10, 2019, n. 20/2018.

[961] Hereinafter the Chinese text：国家设立重点项目建设财政专项资金，是为国民经济和社会发展规划特定. The decision further mentions that such funds, due to their link with the plan, are subjected to special accounting and may not be used for operations ouside the scope of the planned project.

[962] Hereinafter the Chinese text: 该资金应专款专用，任何单位和个人不得截留、挪用.

expenses to be covered by subsidies (e.g. wages) under the coordination and supervision of the government[963].

The actual impact or effectiveness of the government subsidies is the topic of many debates among Chinese scholars, with different opinions competing[964]. However, the current normative framework regarding subsidies displays several critical issues. From the quantitative point of view, it has been argued that the amount of subsidies granted makes economic operators count on them to cover losses caused by inefficient management[965]. From the qualitative point of view, the priority given to certain economic fields, especially at the local level, could lead to uncoordinated development. On the top of that, subsidies undoubtedly raise an issue about their compatibility with competition law[966].

Development plans are today a criterion to assess the legitimacy as well as the proportionality of the subsidies granted[967].

Some recent documents hint to a favor of the Chinese legislature toward project-based, conditional subsidies. The Measures for the Administration of Central Budgetary Investment Subsidy and Interest Discount Projects of 2016 introduce a new logic in the subsidy policy, revolving around projects and shaping a bottom up approach "economic

[963] See the decision of the Wuyuan City People's Court, which also specifies that, in the case examined, the subsidies were intended to cover the expenses for the wages of the migrant workers participating in the construction works.

[964] See for example HUATAO PENG, YANG LIU, *How government subsidies promote the growth of entrepreneurial companies in clean energy industry: an empirical study in China*, in Journal of cleaner production, Vol. 188, 2018, 508-520

[965] See YAO HAIFANG, *On the rule of law of government subsidies,* cit., 12-13

[966] *Ibidem*

[967] Indeed, pursuant to Art. 12 of the Budget Law, "*Budgets at all levels shall adhere to the principle of "overall and comprehensive arrangements, thrift and economy, consistence with capabilities, emphasis on performance, and balance between revenues and expenditure*". The establishment of a procedure of appraisal and evaluation of performances of enterprises enjoying government subsidies could then represent a major step toward the proper legalization of this incentive measure (see YAO HAIFANG, *On the rule of law of government subsidies,* cit., 18). The same procedure should aim at directing subsidies toward innovative economic field as well as at promoting R&D related subsidies and discourage direct subsidies to enterprises (*ibidem*). In the first place, subsidies should be subjected to an "internal" review mechanism carried out by government departments. For instance, LU QINGZHENG and GUO ZHIYUAN, in *Legal governance,* cit., 99, suggest that a specialized department should be estasblished, in order to check the correctness of financial relations. Today, a general monitoring of subsidies is already exercised by the NDRC and the local development and reform commissions when supervising the implementation of development plans. Furthermore, Art. 3 of the Regulation on Major Administrative Decision-Making Procedures subjects to control the decisions involving "major public construction projects" and "major matters that have a significant impact on economic and social development, involve material public interest, or the vital interests of the public". These decisions obviously involve subsidies and, therefore, this is another legal framework to consider.

operator→project→administration". The Measures regulate the "*investment subsidy granted by the National Development and Reform Commission ("NDRC") to eligible projects invested by local governments and those invested by enterprises*" (Art. 2). The sectors covered by such projects coincide with the sectors managed by the plan, i.e. "*the economic and social fields where resources cannot be allocated effectively through market and government support is required*"[968]. Entities entitled to apply for subsidies and interest discount include local development and reforms commission, central enterprises and enterprise groups[969], but it cannot be excluded that both public and private enterprises could file fund applications[970]. The NDRC is responsible for the examination and approval of fund applications[971]. It also supervises the implementation phase and may conduct mid-work evaluations of the project and adjust the work plans and relevant policies[972]. These measures clearly aim at regulating the discretional activities of governments and administrative departments in the grant of financial subsidies. The core concept is undoubtedly that of "project" which is expected to gain more significance in development planning activities too. This circumstance represent an important analogy with a legal dynamics experienced in the EU context and leaves ground for debating whether or not the Chinese model of planning could be shifting toward a project-centered approach.

Access to credit: the topic of access to credit represents, essentially, a specification of that of subsidies. Preferential access to credit means, indeed, to grant, through credit institutes controlled by the government, loans to economic operators applying preferential measures (e.g. discount interest rates). In some cases, the loan is granted in the form of a non-performing loan, so that the credit institute will not require credit restitution from the debtor. Preferential access to credit means, under these terms, indirect subsidies.

[968] Art. 4 of the Measures also specifies some of the sectors involved, such as "*(1) social public welfare services and public infrastructures; (2) agriculture and rural areas; (3) ecological environment protection and restoration; (4) major scientific and technological progress; (5) social management and national security*".
[969] See Art. 10 § 2
[970] The Measures do not set a binding list of sectors involved.
[971] See Chapter III of the Measures
[972] Art. 20 of the Measures

The analysis commences from a structural consideration on the PRC financial system. In this system, the great majority of commercial banks[973] – at both the central and the local level – is still publicly owned. This, however, does not imply a "*monolithic control*" or a "*necessarily centralized resource allocation*"[974]. The ownership itself of commercial banks is shared by several public entities, such as ministries, SOEs, equity funds, etc. To such fragmented ownership situation corresponds a management of human resources which places at its core the Party Committees. Such committees play a fundamental role in the selection and evaluation of personnel[975]. This also implies a frequent exchange of management personnel[976] between the commercial banks, the public entities which own them and the regulatory authorities, i.e. the People's Bank of China (中国人民银行 – *zhongguorenminyinhang*) and the China Banking Regulatory Commission (中国银行业监督管理委员会 – *zhongguoyinhangyejianchaguanliweiyuanhui*), which in 2018 merged with the China Insurance Regulatory Commission to form the China Banking and Insurance Regulatory Commission (中国银行保险监督管理委员会 – *zhongguoyinhangbaoxianjianchaguanliweiyuanhui*). Furthermore, the selection of personnel as well as the internal management may not depend on market-driven criteria[977]. Some scholars emphasize a connection between commercial banks and great SOEs, meaning that SOEs would be granted easy loans by commercial banks, thus operating under soft budget constraints[978]. Chinese State-Owned Commercial banks operate under state control, implementing financial conditions and interest rates (e.g. on deposits) not on the basis of market dynamics but policy directions[979] in first place determined by the People's Bank of China. The general subjection of the commercial banking system to

[973] The four biggest commercial banks in China are the Bank of China, the Industrial and Commercial Bank of China, the Agricultural Bank of China and the China Construction Bank. These banks are all state-controlled.
[974] See PISTOR, GUO LI, ZHOU CHUN, *The hybridization of China's Financial System,* cit., 8 ff.
[975] *Ibidem*
[976] *Ibidem*
[977] See YANG YOUZHEN (杨有振), 论国有商业银行 公司治理制度的完善 (*On the improvement of corporate governance systems of State-Owned Commercial Banks*), in 经济问题 (*jingjiwenti*), Vol. 2, 2006, 48-50
[978] See SHANG JINWEI, TAO WANG, *The Siamese Twins: Do State-Owned Banks Favor State-Owned Enterprises in China?*, in China Economic Review, Vol. 8 (1), 1997, 19-29; PISTOR, GUO LI, ZHOU CHUN, *The hybridization of China's Financial System,* cit., 11
[979] See NING LIZHI (宁立志), WU YUHONG (吴雨虹), 银行业市场结构的竞争法思考 (*Thinking on the Structure of Banking Market in Competition Law*), in Journal of Hubei University of Police, Vol. 185(2), 2018, 114-121, 117

state economic policies is determined by Art. 31 of the Commercial Banks Law (about limits on deposit interest rates)[980] and, especially, Art. 34, ruling that "*Commercial banks shall carry out their loan business upon the needs of national economy and the social development and under the guidance of the state industrial policies*".

As it happens with subsidies, preferential access to credit is an incentive measure to stimulate activities promoted and regulated by development plans. This dynamic is particularly important at the local level, where banks lay out agevolated financial plans favorable interest rates to support growth in under-developed areas[981].

An objective issue of excessive recourse to preferential access to credit, however, exists. The situation was and is particularly delicate for local governments, whose debt, also fueled by non-performing loans gravating on government-owned local banks, reached high levels[982]. To tackle this issue, state-owned banks have been progressively relieved from their burden of NPLs, which have been transferred to Asset Management Companies since 1999[983]. In 2007, the Notice of China Banking Regulatory Commission on Strengthening the Supervision of Large Non-performing Loans introduced a system based on inner restructuring, constant monitoring and CBRC supervision. At the same time, since the end of the 1990s State-Owned banks progressively withdrew from the local markets[984], especially townships and villages' ones. Their role has been gradually filled by village banks, often in form of cooperatives, which still now enjoy preferential

[980] Art. 31 states that "*A commercial bank shall determine its own interest rates in accordance with the upper and lower limits for deposit interests set by the People's Bank of China and make announcement*". YAN YUNQIU and FAN SHUANG in *China's economic planning,* cit., 14, note that this article, coupled with Art. 32 on deposit reserve, introduce an indirect mechanism of control by the People's Bank over commercial banks. In other words, the authors note, the law allows commercial banks to determine their own interest rates on the basis of market dynamics, but requires them to comply with requests and indications from the People's Bank when they are issued.

[981] See *ivi*, cit. Furthermore, during an interview with the director of a rural cooperative in the Pingjiang County, it has been stated how the local government-owned banks defined a policy addressed to rural cooperative, providing for loans without interests for the first three years of the repayment plan.

[982] This issue was tackled, for instance, through the employment of PPP contracts. On the topic see G.SABATINO, *Linee Evolutive del Partenariato Pubblico-Privato (PPP) nell'Ordinamento Giuridico della Repubblica Popolare Cinese*, in Rivista Trimestrale degli Appalti, Vol. 4/2018, 2019, 1309-1336

[983] See PISTOR, GUO LI, ZHOU CHUN, *The hybridization of China's Financial System,* cit., 13 ff.; LI JIANGFENG, *Non-Performing Loans and Asset Management Companies in China： Legal and Regulatory Challenges for Achieving Effective Debt Resolution and Recovery*, in Peking University Transnational Law Review, Vol. 1, 2013, 85 ff.

[984] See GUAN BIN (管斌), 论我国村镇银行公司治理的 制度变革 (*On the institutional reform of corporate governance of chinese village banks*), in 经济法论丛 (*jingjifaluncong*), Vol. 29(1), 2017, 299-322, 300

treatments in terms of taxes and budget constraints[985]. Their structure and operativity has so far enjoyed a relatively vague and under-developed normative framework, which allowed local governments to support such institutions in order to coordinate the development of certain areas.

Price control: Art. 18 of the Price Law[986] empowers the government to set the prices of certain products, for instance those which are "*of great importance to development of the national economy and the people's livelihood*". The same principle is upheld by the Opinions of the National Development and Reform Commission on Comprehensively Deepening the Reform of the Price Mechanism. These Opinions, furthermore, lay out directives to coordinate the price control in sectors such as monopolized industries (e.g. energy, etc.) as well as regarding strategic goods such as water for agricultural consumption and agricultural products[987].

In an indirect way, prices may also be set by industrial associations, even concerning goods not comprised in Art. 18 of the Price Law.

Price control management is carried out by the NDRC, thus providing an institutional connection with the implementation of development plans.

3.9.6 Following: selective implementation and enforcement of the anti-monopoly law

The PRC is the "*most recent major country to join the (…) competition law club*"[988]. Its 2008 Anti-Monopoly Law[989], for many aspects a transplant of foreign solutions[990], seeks to adapt traditional competition law categories to a complex state capitalist socialist market economy[991]. The logic supporting such attempt requires national competition authorities to take into account state industrial policies and guidance when implementing

[985] See *ivi*, cit., 303-304
[986] 中华人民共和国价格法 (*zhonghuarenmingongheguojiagefa*), of 1998
[987] See sections III, IV, V and VI
[988] See WENTONG ZHENG, *State Capitalism and the regulation of competition in China*, in M.DOWDLE, J.GILLESPIE, I.MAHER (edited by) *Asian Capitalism and the Regulation of Competition*, Cambridge University Press, Cambridge, 2013, 144
[989] The Anti-Monopoly Law (中华人民共和国反垄断法) is the brainchild of a political context which emphasized the gradual retreat of the private sector of the economy and the advance of the public sector (国进民退 – *guojinmintui*) (see G.SABATINO, *Legal Features of Chinese Economic Planning*, cit., 73-74).
[990] See WENTON ZHENG, *State Capitalism*, cit., 144-145
[991] See *ivi*, cit.

and enforcing competition rules[992]. In other words, the scope of competition law cannot be just to protect competition. It must instead concern the coordination of market dynamics for socio-economic development purposes[993], striking a balance between market and non-market interests among economic operators, public authorities and consumers.

Therefore, Chinese competition law comprises both instruments to promote competition and instruments to limit competition, provided that they are justified by a national interest[994]. It is, in the words of Shi Jichun and Luo Weiheng, "not neutral"[995], meaning that big, small, national, foreign, state-owned and private enterprises may be treated differently according to the industrial policies to pursue and the necessities to adjust market relations for socio-economic purposes.

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[992] See D.HEALEY, Z.CHENYING, *Bank mergers in China: what role for competition?*, in Asian Journal of Comparative Law, Vol. 2, 2017, 1-34, 12

[993] Even the authors which advocate a narrow interpretation of anti-monopoly may not deny the deep connection between it and the industrial development, consumers' behavior and, in general, economic development. See on the issue LIU NAILIANG (刘乃梁), 反垄断规制功能的行业限定 (*Industry-Limited Anti-Monopoly Regulation Function*), in 法制与社会发展 (*fazhiyushehuifazhan*), Vol. 136(4), 2017, 152-166; LIU YING (刘颖), 反垄断法适用除外制度初探 (*A preliminary study on the exemption system of Anti-Monopoly Law*), in 生产力研究 (*shengchanliyanjiu*), Vol. 6, 2009, 69; LAN LEI (兰磊), 论我国垄断协议规制的双层平衡模式 (*On the Double-layered Balance Model of China's Monopoly Agreement Regulation*), in Tsinghua University Law Journal, Vol. 11(5), 2017, 164-189, 176-177. The issue led Chinese doctrine to gain awareness of its profound implications, even in comparative perspective with other experiences, such as the European one. The topic of competition with regard to book prices, as assessed by the Court of Justice of the European Union, has been discussed by Chinese scholars. See on the issue JIAO HAITAO (焦海涛), 文化多样性保护与反垄断法文化豁免制度 (*On cultural diversity protection and the system of cultural exemption in anti-monopoly law*), in 法学 (*faxue*), Vol. 12, 2017, 76-91. Connecting competition protection to social development purposes means detecting an ethical nature of competition law. As a consequence social, moral and ethical considerations may guide the implementation of Anti-Monopoly Law. In the Chinese context such approach is also justified by the Confucian heritage of the present Chinese legal system. On the issue see T.HORTON, *Confucianism and Antitrust: China's Emerging Evolutionary Approach to Anti-Monopoly Law*, in The International Lawyer, Vol. 47 (2), 2013, 193-228, 196 ff.

[994] This definition applies, for example, to the notion of administrative monopoly, where the restrictions to competitions are justified by the promotion of economic development. The definition is however up to criticism, since public interest may always conceal a private interest of the single economic operator. See on the issue XU SHIYING (徐士英), 竞争政策视野下行政性垄断行为规制路径新探 (*A New Probe into the Path of Regulation of Administrative Monopoly Behavior from the Perspective of Competition Policy*), in 华东政法大学学报 (*huadongzhengfadaxeuxuebao*), Vol. 4, 2015, 27-39, 28-29

[995] See SHI JICHUN (史际春), LUO WEIHENG (罗伟恒), 论"竞争中立" (*On "competition neutrality"*), in 经贸法律评论 (*jingmaofalupinglun*), Vol. 3, 2019, 101-119. The authors assess the concept of "competition neutrality" as embedded into a liberal notion of competition regulation and uphold the idea that Chinese socialist market economy is incompatible with such concept, due to the coordinating and regulating role that the State must assume in order to promote a healthy development of the market. In upholding such thesis, the authors also express doubts about some views put forward by leading Chinese state officers, about a gradual implementation, in the future, of the concept of competition neutrality (see *ivi*, cit., 101-102).

The AML is a regulatory framework which still leaves many empty spaces and open issues. These are partly due to a choice of the Chinese legislature, such as the absence of a discipline of state aids, but partly depend on the variability of market and competition dynamics. Therefore, the implementation of the AML becomes a constant interaction of variables between public authorities and economic operators[996]. How may this "game" be functional to the implementation of development plans?

The first connection between competition law and development planning relies on a normative discipline which emphasizes, when regulating competition, public interests and national development. Art. 15 exempts from the provisions of the Law those monopoly agreements which are functional i) to the improvement of new technologies, development of new products and research, ii) to "*upgrading product quality, reducing costs, improving efficiency, unifying product specifications or standards, or carrying out professional labor division*", (…) iv) to "*the purpose of realizing public interests*". The State Council can further exempt, on a case by case basis, certain agreements from the provisions of the AML[997].

The same reasons justify the protection guaranteed to certain conducts normally expression of an abuse of dominant position. Such conducts are now defined by the Provisions on Prohibiting Abuse of Dominant Market Positions [998]. In particular, Art. 20 defines the criteria to assess the notions of "unfair" and "unjustified" conducts and mentions, among others[999], the "*impact of acts on social and public interest*", the impact "*on economic operational efficiency and economic development*" and "*on operators' business development, future investment and innovation*"[1000].

With regard to concentrations, Art. 27 of the Anti-Monopoly rules that "*the impact of the concentration of business operators on the market access and technological advancements*" as well as "*the impact of the concentration of business operators on the*

[996] See LIU NAILIANG, *Industry-Limited Anti-Monopoly,* cit., 154-155
[997] See Art. 15 (7)
[998] The provisions replace the previous provisions issued by the Industry and Commerce Administration, following the structural reform of China Anti-monopoly system in 2018.
[999] See, in particular, nn. 2,3 and 5.
[1000] The article reproduces and developes the criteria of Art. 8 of the "old" provisions, which required the authorities to consider "whether the conduct has impact on the economic efficiency, public interests and economic development". The rule, however, was rarely applied by Chinese courts. I have been able to find just one decision of the Industry and Commerce Administration of the Inner Mongolia Autonomous Region (n. 4/2016 of 16th august, 2016) which carried out a test based on the provisions of Art. 8, but concluded that the enterprise's conduct did not fall within the cases designed by the rule.

national economic development" are factors to be taken into account when assessing the legitimacy of a concentration[1001].

The importance that Chinese authorities reserve to public policy considerations in enforcing the AML is a well-established fact among scholars, confirmed by caselaw. In the first place, the MOFCOM adopted a quite strict geographic approach in the definition of relevant markets and tended to focus on nation-scale mergers rather than local patterns of economic behaviour[1002]. In sectors characterized by high stratification and complexity, such as banking[1003], this approach would, in concrete, allow provincial entities to freely merge.

When assessing cases, especially those concerning foreign operators, the MOFCOM often based its final decision upon policy reason[1004]. In the famous Coca Cola-Huiyin case[1005], the Minister of Commerce prohibited a concentration stating that it would adversely affect the healthy[1006] development of the national fruit juice industry, as well as impair the development of the Chinese SMEs operating in the sector[1007].

In other cases, the MOFCOM widely used behavioural remedies[1008], subordinating the approval of the concentration to several conditionalitites affecting long-term strategic industrial choices of the merging parties, e.g. patent licensing[1009], investments[1010], etc.

Pursuant to the Interim Provisions on Assessing the Impact of Concentration of Business Operators on Competition[1011], it is also the public authority that must, in the examination

[1001] The burden of proof is on the shoulders of the business operators, but if they can prove that "the favorable impact of the concentration on competition obviously exceeds the adverse impact, or that the concentration meets the public interests" then the competent authority may decide not to prohibit the concentration (Art. 28).

[1002] See D.HEALEY, Z.CHENYING, *Bank mergers in China,* cit., 22

[1003] See *ivi*, cit.

[1004] See YO SOP CHOI, SAN YOUN YOUN, *The Enforcement of Merger Control in China: A Critical Analysis of Current Decisions by MOFCOM*, in IIC, Vol. 44, 2013, 948-972.

[1005] Minister of Commerce Decision n. 22 of the 3rd of March, 2009.

[1006] The use of the term "healthy" (健康 – *jiankang*) is significant since reflects a vision which is not purely focused on efficiency of the market and reminds the general concept of efficacy as developed by Chinese thinking, concerning the harmony of industrial relations.

[1007] See YO SOP CHOI, SAN YOUN YOUN, *The Enforcement of Merger Control in China*, cit., 958-960

[1008] See *ivi*, cit., 960-963

[1009] As happened with the Google/Motorola case, decided by the MOFCOM 19 May, 2012. See *ibidem*.

[1010] See CLARKE, *Current Issues in Merger Law*, in J.DUNS, A.DUKE, B.SWEENEY (edited by), *Comparative Competition Law*, Edward Elgar, Northampton, 2015, 205

[1011] 商务部关于评估经营者集中竞争影响的暂行规定 (*shangwubuguanyupinggujingyingzhejizhongjingzhengyingxiangdezhanhangguiding*)

of concentrations, take into consideration the impact of such concentration on the technological progress and the national economic development[1012].

Identical purposes of fostering national development are at the basis of the special regime reserved to State-Controlled Enterprises in the AML. Art. 7 of the AML introduces a general exemption for those industries controlled by the State-Owned Economy and concerning the lifeline of national economy and national security. Indeed, the same article also exempts from the application of Anti-Monopoly Law those industries which lawfully enjoy exclusive production and sales.

The activities of such enterprises are not only exempted from the application of anti-monopoly legislation, but also protected and supervised by the state. The fundamental reason for this choice lies in the public interest function carried out by state enterprises[1013]. This function may pertain to the exercise of public interest activities toward the people, but in first place concern the maintainance and consolidation of state power over the economy[1014].

The words of the law, moreover, leave wide spaces for interpretation, so that the sectors covered by such universal exemption may be determined on a case to case basis by the competent authorities[1015].

The issue becomes then to avoid abuse of administrative powers in managing these special competition regimes. The AML dedicates a whole Chapter[1016] to the "Abuse of Administrative Power to Eliminate or Restrict Competition": it provides for a set of prohibitions, preventing admimistrative organs to alter competition by abusing their powers. In other words, administrative organs should not favor, unjustifiably, State-Controlled Enterprises[1017]. This is what has been defined an "indirect" or "implicit" subjection of SCEs to the AML[1018].

[1012] See Art. 3 of the Interim Provisions

[1013] See LI GUOHAI (李国海), 论反垄断法对国有企业的豁免 (*On the exemption of State-Owned Enteprises from the Anti-Monopoly Law*), in 法学评论 (*faxuepinglun*), Vol. 204 (4), 2017, 115-123, 116; see also SHI JICHUN, LUO WEIHENG, *On "competition neutrality",* cit.

[1014] *Ibidem*

[1015] See LI GUOHAI, *On the exemption of State-Owned Enterprises*, cit., 121 ff.

[1016] See Chapter V

[1017] See, for instance, Art. 32 of the Anti-Monopoly Law.

[1018] See LI GUOHAI (李过海), 反垄断法适用于国有企业的基本理据与立法模式选择 (*Theoretical basis and legislative model of applying anti-monopoly law to state-owned enterprises*), in J. Cent. South Univ. (Social Science), Vol. 23(4), 2017, 37-43

The mis-management of special competition regimes is particularly problematic at the local level, where phenomena of economic protectionism are still widespread[1019].

In order to tackle this issue the current chain of enforcement provides for an authorization model, where central organs empower, often on a case by case basis, local organs to carry out investigations or formulate decisions over AML related cases[1020]. The system is based on Art. 10 of the Anti-Monopoly Law.

The implementation and enforcement system of Anti-Monopoly Law has recently undergone a major restructuring. In 2018, a new State Administration for Market Regulation was established and put in charge of implementing and enforcing both the AML and the Ant-unfair competition law[1021]. At the same time, new provisions regulating the different hypothesis of illicit market behaviour have been issued. The aim of the reform seems to be that of tackling the fragmented regime of enforcement, which was moving toward a decentralization[1022], and instead reassessing the role of the central government in market regulation[1023].

Chinese competition law does not display a directly traceable connection with development planning. In its (legal and political) function of representing the modern socialist market economy[1024], it relies on its own comprehensive system of concepts, measures and remedies. The influence of development planning over competition law is therefore embedded in the theoretical and practical role played by public/national interest

[1019] If with regard to foreign acquisitions the protection of national economy may require preventing mergers, with regard to infra-provincial or infra-county markets, excessive protectionist conducts could hinder the development of a healthy national-wide industry and contravene development plans.

[1020] See LIU NINGYUAN (刘宁元), 关于中国地方反垄断行政执法体制的思考 (*Reflections on China's Local Anti-Monopoly Admininistrative Law Enforcement System*), in 政治与法律 (*zhengzhiyufalu*), Vol. 8, 2015, 11-19, 15-17

[1021] See YONG REN, FENGYI ZHANG, JIE LIU, *Insights of China's Competition Law and its Enforcement: the Structural Reform of Anti-Monopoly Authority and the Amended Anti-Unfair Competition Law*, in Journal of European Competition Law & Practice, Vol. 10(1), 2019, 36-45. The reform replaced a previous system which relied on three different organs (see LIU NINGYUAN, *Reflections on China's Local Anti-Monopoly*, cit., 11-13): i) the Ministry of Commerce (MOFCOM), in charge of enforcing the merger control's provisions; ii) the NDRC, in charge of supervising prices; iii) the State Administration for Industry and Commerce, in charge of supervising over monopolistic agreements and abuses of dominant positions. Each one of these organs had its own local correspondents and elaborated a specific authorization model to interact with them (*ibidem*). On the organization of Chinese competition authorities prior to the reform see also A.RUVOLETTO, *Competition Law in the People's Republic of China. Leniency Policy in China's Fight against Cartels*, in I.CASTELLUCCI (edited by), *Saggi di Diritto Economico e Commerciale Cinese*, cit., 123-164

[1022] See LIU NINGYUAN, *Reflections on China's Local Anti-Monopoly*, cit., 17-19

[1023] This process seems to be in line with the recent evolutions of modern planning, striving toward a horizontal but centrally-managed coordination.

[1024] See WENTON ZHENG, *State Capitalism*, cit.

considerations in the implementation and enforcement of competition rules. Development plans, embodying such considerations, act as a cryptotype[1025] of Chinese competition law, silently determining the influence of different economic policies in the definition of relevant markets and anti-competitive effects.

3.10 The Plan and the Contract: relevant features of a complex legal relation

The connection between plan and contract was the fundamental legal relation of economic law in the USSR as well as in pre-reform China[1026].

The Law on the Economic Contracts of 1981 represented, up to 1999, the principal reference point for the definition of plan's legal binding force. Today, this piece of legislation does not exist anymore[1027]. Tracing a legal connection between plan and contract is therefore less obvious than it was just a few decades ago. To define such connection means to support a comprehensive reassessment of the role of civil law within the context of the socialist market economy[1028].

The evolution of post-reform civil law and contract law focused on applying to the Chinese context some cornerstones of liberal civil law as defined in continental Europe between the 18th and the 19th Century[1029], thus emphasizing the separation between law and politics, common interest and private autonomy. Several legal scholars have therefore paid less attention to the relevant issues which, in the transition period (1970s to 1990s), concerned the link between the state and the market[1030]. If law is an instrument of social

[1025] On the notion of "cryptotype" in comparative law see R.SACCO, *Introduzione al Diritto Comparato*, cit., 125-128.

[1026] This is valid even if we consider the strong ideological connotation of Maoist planning, which could nevertheless erase the contract in favor of the political embodied by planned orders. On the topic, see M.TIMOTEO, *Il contratto in Cina e Giappone*, cit., 253-265. The author also points out how in the maoist era the term used to define the notion of contract gradually changed in China. The traditional term 契约 (*qiyue*) was slowly replaced by 合同 (*hetong*), whose characters emphasize a dimension of communality.

[1027] Moreover, modern plans, at least formally, do not concern the allocation of products and raw materials.

[1028] The role of civil law in the modern socialist market economy is assessed in XUE JUN (薛军), 两种市场观念与两种民法模式 (*Two Types of notions on market and two models of civil law*), in 法制与社会发展 (*fazhiyushehuifazhan*), Vol. 83(5), 2008, 94-108, 95

[1029] European Codes arrived in China through Japan and the German-Japanese model was at the basis of the first codification project of 20th Century China, in 1911 (大清民律草案). See H.PAZZAGLINI, *La recezione del diritto civile nella Cina del nostro secolo*, in Mondo Cinese, Vol. 76, 1991, 49-66; XUE JUN, *Two types of notions*, cit., 99

[1030] See XUE JUN, *Two types of notions*, cit., 99-100

governance, which social coordination goals civil law wants to achieve? These goals inspire the logic itself of civil law[1031].

Contract law is an epiphany of the (attempted) integration between liberal structures and socialist principles. Prior to the 1999 Contract Law this integration had led to a somewhat fragmented legal framework comprising the Economic Contract Law, some special contract laws[1032], the general principles of Civil Law and several regulations and other national and local sources[1033].

Today, after 20 years of life, the Contract Law managed to unify, at least formally, the legal regimes for contracts and represents the main, if not the sole, legal basis used by judges in contract-related disputes[1034]. The "*communitarian or social function of contract*"[1035], heritage of both the traditional and socialist Chinese legal cultures[1036], is mainly expressed through references, in the general principles, to the socio-economic order[1037], social ethics and public interest, as well as through the emphasis on the general clauses of honesty and good faith[1038].

On top of all, Art. 52 provides for nullity where the contract damages national interests (n. 1) and public interests (n. 4).

Beyond the formality of the law, furthermore, relational schemes for dispute resolutions[1039], emphasizing criteria based on objective equity rather than on the respect of the original will of the parties[1040].

The general character of Chinese contract law fits into a system functional to the realization of social justice[1041], thus aimed at protecting disadvantaged social groups,

[1031] *Ibidem*

[1032] In particular the law on international contracts (1985) and the law on technology transfer contracts (1987).

[1033] See M.TIMOTEO, *Il contratto in Cina e Giappone,* cit., 271-311

[1034] See I.CASTELLUCCI, in *Rule of Law and Legal Complexity,* cit., 122, defined such law as expression of a "neo-authoritarian" or "communitarian" model rather than of a purely statist-socialist one.

[1035] See *ivi*, cit., 125.

[1036] On the historical evolution of the notion of contract in the Chinese legal culture, see M.TIMOTEO, *Il contratto in Cina e Giappone,* cit.

[1037] The maintainance of socio-economic order is on one hand a general purpose of the Contract Law (Art. 1). On the other hand, parties, in concluding and performing a contract, must not disrupt such order, as well as respect social ethics and not impair public interests (Art. 7).

[1038] See Art. 6. See also I.CASTELLUCCI, *Rule of Law and Legal Complexity,* cit., 123-124

[1039] See M.TIMOTEO, *Il contratto in Cina e Giappone,* cit., 307-311

[1040] See I.CASTELLUCCI, *Rule of Law and Legal Complexity,* cit., 125-126

[1041] See XUE JUN, *Two types of notions,* cit., 106-107

protecting the environment and promoting solidarity between citizens according to the socialist core values.

The contract, as instrument of organization of economic activities, combines rules shaped by the will of the parties and mandatory rules imposed by the law[1042]. However, in a socialist market economy, the contract is also an instrument to promote and maintain cooperative relations between economic agents[1043].

When such cooperation is directed, through the application of specific legal norms[1044], at realizing both private and public/national interest[1045], one could argue that, as it happens with competition law, development plans and planning function as cryptotypes of contract law too. The following analysis is meant to verify the terms and limits of such statement. Given the ongoing civil codification process, in the near future the Contract Law of 1999 will be incorporated in a specific book of the future Civil Code. This analysis is necessarily based on the existing legal framework and does not take into account possible future scenarios. It is, however, aimed at reconstructing the logic of the relation between planning and contract, rather than at the sole study of the norms.

The Chinese contract reflects, in principle, the preminence of national interest over private ones[1046]. Contractual relationships are not simply regulated, but instead are "coordinated", according to a legal framework which accompanies the parties over the entire course of their relation. The national interest (国家利益 – *guojialiyi*)[1047], through its counterpart of "public interest" (公共利益 – *gongongliyi*)[1048] imposes on the parties a

[1042] See DAI LEI (戴 雷), 分析合同法组织经济的功能 (*Analysis of the function of the contract in organizing the economy*), in Legality Vision, Vol. 12 (下), 2017, 169-170, 169

[1043] *Ibidem*

[1044] Other than the general principles of the Contract Law, see Art. 52 which enumerates, among the causes for the nullity of the contract, the damage to "national" and "public" interests; see also Art. 127 which states that "*(…)the administrative department of industry and commerce and other relevant departments shall (…)be responsible for monitoring and dealing with any illegal acts which, by taking advantage of contracts, harm the interests of the State or the interests of thepublic and society*".

[1045] On the difference between the two concepts see *infra*.

[1046] See GONG LIXIA (巩丽霞), 刍议合同法中的 "国家利益"(*Discussion on "National interests" in the Contract Law*), in 商业时代 (*shangyeshidai*), Vol. 23, 2006, 57-58

[1047] The term "national interest" appears in the Contract Law only in Artt. 52 and 127, which are, however, two key norms of the contractual system. Moreover, the reference to socio-economic orders in the general principles of contract law is to be interpreted as "national interests". This view is also supported by HAN SHIYUAN in *Contract Law*, cit., 216-217, who defines national interest in light of the notion of public economic order.

[1048] See GONG LIXIA, *Discussion on "National interests",* cit., 57-58. The author states that national interest comprises social interests, public interests and collective interests. The view is adversed by RAN KEPING (冉克平), 论"公共利益"的概念及其民法上的价值 (*Concept of"Public Interests" & Its Civil Law Value*),

conduct standard, a transactional ethic (交易道德 – *jiaoyidaode*)[1049] which "upgrades" their private interests to the public dimension[1050]. Furthermore, the concept of national interests expresses a different meaning from the "simple" public interest. To some authors, it refers to the economic, social, security, strategic and political interests of the State as laid out by its leadership[1051]. However, other authors[1052] believe that national interests do not coincide with the interest of the government or the leadership and instead refer to a) the protection of public security and territorial integrity; b) promotion of people's happiness and welfare; c) protection of the government autonomy and self-determination. This second approach explains how not only does the Contract Law provides for nullity in cases of contrast between the contract and the national interests (Art. 52), but it also puts administrative departments in charge of monitoring and dealing with acts which "*by taking advantage of contracts, harm the interests of the State or the interests of the public and society*" (Art. 127). Incidentally, this approach also enhances the influence of development plans, which are, as noted, acts of the state and not of the Party, and share the same purpose of the theoretical concept of national interests[1053].

3.10.1 Planned contract (计划合同) and administrative contract (行政合同)

When the 1981 Economic Contract law was in force, Chinese doctrine distinguished the "planned contract" (计划合同 – *jihuahetong*) from the "unplanned contract" (非计划合同 – *feijihuahetong*)[1054]. Planned contracts were those subjected to national (and local)

in Wuhan University Journal, Vol. 62(3), 2009, 334-338, who considers national interest to be subordinated to public interests, which express a broader idea. However, when applying his theory to Art. 52 of the Contract Law the same author suggests that the meaning of national interest and social interest should be intended as "public interest", thus unifying the notions.

[1049] See ZHONG RUIDONG (钟瑞栋), 论我国民法上的公共利益 (*On public interests in Chinese civil law*), in Journal of Jiangsu Administration Institute, Vol. 49(1), 2010, 126-130

[1050] *Ibidem*

[1051] See GONG LIXIA, *Discussion on "National interests",* cit.

[1052] See RAN KEPING, *Concept of "Public Interests",* cit.

[1053] Furthermore, I would argue that there is no real contrast between the two approaches, since: i) such concepts must interpreted and they are, in concrete, interpreted in first place by the leadership; ii) the same author (Ran Keping) admits that such three points reflect the major objectives of internal and foreign policy, partly contradicting himself.

[1054] See ZHAO LIWEI, JIANG DEYUAN (赵立伟, 姜德源), 试论完善计划合同立法 (*On perfecting the planned contract legislation*), in 当代法学 (*dangdaifaxue*), Vol. 3, 1989, 30-33; ZHANG LIANZHEN, HE XIAONAN (张联珍，何晓南), 科技计划合同的法律性质及责任 (*Legal nature and responsibility in technology planned contracts*), in 法律学习与研究 (*faluxuexiyuyanjiu*), Vol. 3, 1990, 74-75; JIANG

plans[1055]. Such contracts were connoted by wide restrictions to parties' contractual will and determination. The contractual performance was determined by plans in all its relevant elements (e.g., object, price, etc.). Depending on the changes in the relevant plans, contracts were adjusted by decisions of planning authorities. Planned contracts violating plans were deemed to be invalid[1056].

The 1999 contract law does not contain a general principle about the relation between plans and contract, nor the notion of planned contract is assessed by contemporary scholars. Some specific legal provisions, nevertheless, address such relation[1057].

The most significant legal provision which logically connects with the "old" institute of planned contract is Art. 38 of the Contract Law, whose title is "*Contracts Concluded in Accordance with National Plan*" (依国家计划订立合同 – *yiguojiajihuadinglihetong*). The use of *jihua* instead of *guihua* is obviously due to the time when the Contract Law was enacted[1058].

Pursuant to such article "*Where the State has issued a mandatory assignment or a State purchasing order based on necessity, the relevant legal persons and the other organizations shall conclude a contract between them in accordance with the rights and obligations as stipulated by the relevant laws and administrative regulations*". In the body of the article the words "计划" or "规划" – meaning "plan" – do not appear. Although some English versions translate the word "任务" (*renhe*) with "plan"[1059], in my opinion it is more appropriate to use the word "assignment" or "task"[1060]. Conversely, the word 计划 (*jihua*) appears in the title of the article. My interpretation is that the absence of the term "plan" from the body of the article is due to the absence of a general and overall binding force of the plans over contracts[1061]. On the other hand, specific provisions

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DEYUAN (姜德源), 关于计划合同责任中的国家责任问题探讨 (*Discussion on the issue of State Responsibility in civil liability in planned contracts*), in 吉林大学社会科学学报 (*jilindaxueshehuikexuexuebao*), Vol. 6, 1990, 27-30

[1055] See JIANG DEYUAN, *Discussion on the issue of State Responsibility,* cit., 27. See also § 3.1.3.

[1056] See *ivi,* cit.; see also ZHAO LIWEI, JIANG DEYUAN, *On perfecting the planned contract,* cit.

[1057] On the issue, see MO ZHANG, *Chinese Contract Law*, Martinus Nijhoff Publishers, Leiden, 2006, 47 ff.

[1058] Indeed, the change in terminology between *jihua* and *jihua* occurs starting from the mid-2000s.

[1059] Such as the translation of the Peking University Law School, available on the website pkulaw.cn

[1060] Literally, 任务 (*renhe*) may assume the meaning of "assignment", "mission", "task", "duty".

[1061] The thesis of a system of "compulsory contracts" was discussed in a recent decision of the Jinan (Shandong) Intermediate People's Court of August 25th, 2017 n. 5123/2017, but only in the appellant's arguments, which claimed the existence of such system pursuant to Art. 38 of the Contract Law. The Court, in its reasoning did not address the topic.

laid out by the plans, such as mandatory tasks – i.e. mandatory indicators – and purchasing orders may be binding.

Art. 38, therefore, refers to contracts that are, at least partially, planned. The planning may concern "mandatory tasks" or "state purchasing orders". Both of these planning orders are directed to "*relevant legal persons and the other organizations*". As a consequence, contracts between individuals are not touched by this provision[1062].

With regard to "state purchasing orders", the addressees of Art. 38 are easily detectable: the relevant legal persons and other organizations are State-Controlled economic operators[1063]. Plans may directly control the supply contracts between such entities by placing a mandatory provision regarding purchasing of goods. Arguably, these plans will not be the general development plans, but rather the special plans adopted by competent administrative departments or the special plans enacted by the economic operators themselves[1064].

Art. 38 of the Contract Law is referred to by the Chinese Courts as well, not as the main ground of the judgment[1065], but in order to clarify the obligations of the parties. In a circumstance covered by Art. 38, even if the parties cannot reach an agreement over some contractual clauses (e.g. about prices, etc.) and the contract is not actually concluded, the contractual performance is carried out anyway[1066]. For instance, a load of supply may still be sold to the purchasing party, which in turn will pay a price determined according to consultation procedures (Art. 61 of the Contract Law) managed by public authorities[1067]. Furthermore, local competent authorities may decide to carry out negotiation procedures in order to reach an agreement over the critical issues, all while the performance is in place. In this case, the planned order replaces the contract, at least with regard to the essential elements of the performance required.

[1062] See MO ZHANG, *Chinese Contract Law*, cit., 49

[1063] The concept of "relevant legal persons" and "organizations" may be potentially widened through interpretation. It is not excluded that economic contracts between private economic operators will have to respect at least the general policy strategy under the indicator, especially when the management of such private entity is subjected to the Party's responsibility system thanks individual memberships or to the presence of a CPC Committee pursuant to Art. 19 of the Company Law.

[1064] The plan hierarchy requires that general directives are replicated in the special plans, but the plan which, in concrete, imposes the purchasing order is always the special one, closer to the economic operator.

[1065] An exception is represented by a decision of the People's Court of Linyi District, Weinan District, Shaanxi Province of the 6th of December of 2017, n. 5464. In this case the Court applies Art. 38 to a service contract stipulated by a local association of artists.

[1066] See Guizhou Higher People's Court, decision of 15th of May, 2015, n. 51

[1067] *Ibidem*

What happens if a contract subjected to Art. 38 does not respect the plans' orders? In the first place, it must be pointed out that such occurrence is, at least partially, prevented from happening by Art. 44 of the Contract Law, which states (§ 2) that "*with regard to contracts that are subject to approval or registration as stipulated by relevant laws or administrative regulations, the provisions thereof shall be followed*"[1068]. The logic consequence is that contracts subjected to approval do not become effective until the approval is obtained[1069]. Contracts subjected to approval are most likely contracts which have to receive state's consent after their definition[1070]. Without such consent, they are invalid.

The second paragraph of Art. 44 should prevent most planned contracts from violating plans. Notwithstanding, not every planned contract is subjected to prior approval. The plan could simply lay out an order and the relevant economic entities are required to comply with it without submitting the final contract to a higher authority[1071].

In case that such circumstance occurs, legal provisions about contract nullity apply. In particular, Art. 52 of the Contract Law states that a contract is null and void when, among others, "*is concluded through the use of fraud or coercion by one party to damage the interests of the State*", "*malicious collusion is conducted to damage the interests of the State, a collective or a third party*", as well as in case of "*damaging the public interests*". Some esteemed authors affirm that Art. 52 is meant to protect state-owned assets in contractual transactions and identify the "interests of the State" with provisions of statutes, mandatory regulations and customs designed to protect the economic public order[1072]. Therefore, if according to Art. 38 plans directly bind contracts, Art. 52 refers to plans only indirectly, through the filter of the public economic order[1073].

[1068] The paragraphs lays out a specific provisions different from the general rule according to which "the contract established according to law becomes effective upon its establishment".

[1069] See Supreme People's Court "*Answers to Several Questions Concerning Application of Foreign Economic Contract Law*" of 1987; see also MO ZHANG, *Chinese Contract Law,* cit., 65

[1070] A classic example is that of contracts concerning projects laid out in the plan, which need approval from the authorities to be inititated.

[1071] A procedure of prior approval is indeed unconvenient and unefficient, so that it is reasonable to think of it as an instrument to be used just when necessary and not usually.

[1072] See HAN SHIYUAN, *Contract Law,* cit*.*, 216-217

[1073] In other words, if the plan actually defines what the public interests are with regard to the policy areas it covers and allocates state-owned assets in the legitimate way, it should therefore be concluded that contracts violating the plan are null and void. On the other hand, some authors (see M.TIMOTEO, *Il contratto in Cina e Giappone,* cit. 334-335) highlight that provisions on contract's validity in the new contract law mark the freedom of contractual activity from the boundaries of planned economy.

Another issue concerns the subjective scope of this provision. Art. 52 applies to all contracts, not only those subjected to Art. 38. When an economic contract between public economic entities violates the plan, it also violates, *per se*, public interest, thus falling under the scope of Art. 52. Does the same principle apply to contracts between private subject (entities and/or individuals)?

The general answer should be, in my opinion, negative. A systemic interpretation of Art. 38, Art. 44 and Art. 52 would suggest that are subjected to plans: i) economic contracts between public economic entities; ii) economic contracts between a public administration and a private economic entity[1074].

The content of Art. 38 and its (scarce) concrete applications refer to a quite traditional notion of planned contract. It is, however, limited to certain contracts stipulated by state-controlled entities[1075] and its significance is decreasing in the system of contract law.

Art. 38 of the Contract Law lays out a model of planned contract which is traditional in its structure. The rapid development of Chinese economy required for market socialism to provide new contractual frameworks in order to promote and regulate economic activities[1076]. In particular, the gradual privatization of part of the SOEs and the "corporatization" of another part of them led to the establishment of economic contractual relationships between public authorities and economic entities subjected to private law.

Since the late 1980s, some scholars tried to isolate a category of contracts on the basis of the subjective character of one party, i.e. the administration[1077]. Therefore, the concept of "administrative contract" (行政合同 – *xingzhenghetong*) gradually came to define those

[1074] This second category, as I am about to explain, often falls within the notion of "administrative contracts", thus moving away from the paradigm of the "traditional" planned contract.

[1075] The objective scope of the provisions is further limited by the rareness, in modern plans, of orders regarding allocation of resources. It is certainly possible that purchasing orders and other mandatory orders are issued outside of the plan, but one of the general principles of socialist market economy recognizes the decisive role of the market in the allocation of resources, thus greatly dimishing the importance of Art. 38. Up to the early 1990s, instead, planned contracts regulated a wide array of economic goods and products: agriculture, fishery and husbandry products, energy, transports, investment in fixed-assets, key projects, etc. (see ZHAO LIWEI, JIANG DEYUAN, *On perfecting the planned contract*, cit., 31-32).

[1076] Therefore, the Contract Law introduced several specific contracts designed to be applied to complex contractual relationships, such as Contracts for Construction Projects (Chapter 16) and Technology Contracts (Chapter 18). Indeed, no reference to plans is made in the articles concerning such contracts, save for Art. 273, titled "Conclusion of major construction project contracts" (重大建设工程合同的订立).

[1077] See WEN FUZE (温福泽), 行政合同的概念及特点(*The concept and characteristics of administrative contracts*), in 云南大学学报法学版 (*yunnandaxuexuebaofaxueban*), Vol. 4, 1989, 51-53; ZHOU WEI (周伟), 论行政合同 (*On the administrative contract*), in 法学杂志 (*faxuezazhi*), Vol. 3, 1989, 16-17

contracts stipulated between a public party and a private party aimed at fulfilling a purpose laid out by the administration[1078].

On the basis of such wide criteria, several contracts concerning transfer of public resources (e.g. public procurement, franchising, public projects, Public-Private Partnerships, land transfer, etc.) fall within this category[1079], whose general scope, as noted by Chen Guodong, is (still) that of allocating resources[1080].

While the legislature is silent on the matter, scholars have been debating about the private or public nature of such contracts. Famous names such as Cui Jianyuan held that the public nature of duties incorporated into the contract pertains to its object and does not affect the rights and obligations of the parties, which remain governed by civil law[1081]. Furthermore, Chinese scholars favor and advocate administrative contracts by putting emphasis on the value of equality, freedom and negotiation[1082].

Entering into such debates is way beyond the scope of the present research. What I am interested in is verifying whether and how development plans affect the evolution of the administrative contract scheme.

In the administrative contract, autonomy of the contractual parties is limited in two different ways. In the first place, the public party must follow certain procedures to select the counterparty, as for instance public bidding or other tendering procedures, ensuring a competitive procedure[1083]. In the second place, the content of the contract concluded must take into account the public interest which justifies the activity to be carried out. This second element is reflected in the general powers of supervision retained by the public party of the contract, but, in concrete, is expressed through faculties of unilateral amendment and termination of the contract, also a prerogative of the public party[1084].

[1078] See WEN FUZE, *The concept and characteristics, cit.*, 51; WANG ZHONGLIANG (汪中良), 行政合同无效认定的法律适用 (*Legal application of invalidity in administrative contracts*), in 上海政法学院学报 (*shanghaizhengfaxueyuanxuebao*), Vol. 2, 2017, 109-116

[1079] See CHEN GUODONG (陈国栋), 作为公共资源配置方式的行政合同 (*Administrative Contract as a mean of public resources allocation*), in Peking University Law Journal, Vol. 30(3), 2018, 821-839, 821-822

[1080] See *ivi*, cit.

[1081] See CUI JIANYUAN (崔建远), 行政合同之我见 (*Comments on administrative contract*), in 河南省政法管理干部学院学报 (*henanshengzhengfaguanliganbuxuebao*), Vol. 82(1), 2004, 99-102

[1082] See CHEN GUODONG, *Administrative Contract*, cit., 826

[1083] See *ivi*, cit., 836. On the different tendering procedures defined by Chinese Law, see SABATINO, *Linee Evolutive*, cit.

[1084] See WEN WEI (温薇), 论行政合同的单方面变更与解除 (*On the unilateral amendment and termination in administrative contracts*), in 南海法学 (*nanhaifaxue*), Vol. 13(1), 2019, 38-52, 39

In order to define which public interests may justify unilateral interventions on the contract, Wen Wei explicitly refers to the "*implementation of new public policies (...) general regional planning*"[1085]. In doing so, the author seems to implicitly agree with the old doctrine which not only derived, from changes in plans and policies, amendments to planned contracts, but also negated that the local implementing authorities could bear liabilities[1086]. Within the context of the new contractual system, compensation, as well as proportionality in the unilateral interventions, are, according to Wen, fundamental elements of administrative contracts' legal regime[1087]. Notwithstanding this, the intervention itself may be justified by development plans. Wen's argument is supported both by legislation and caselaw. In the first place, existing sources defining public interests often refer to development plans, such as the normative sources about compensation for expropriated land[1088].

Furthermore, Wen refers to a judgment of the Hainan Provincial High Court which[1089] upheld plans as criteria to define public interests in a dispute related to unilateral termination of an administrative contract regarding the implementation of tourism-related project in the Changjiang autonomous county[1090]. The judge assessed the legitimacy of the unilateral termination in light of the purpose of development and protection of public interest, focusing on the general plans of the district involved[1091]. The logical premise of such reasoning is in the idea that in the administrative contract, parties are not equal. There is a principle of superiority of the public administration, which empowers it to carry out directive and supervision tasks[1092]. Similar reasoning, as reported by other authors, were carried out by several courts in the past decade[1093].

[1085] See *ivi*, cit., 42

[1086] See JIANG DEYUAN, *Discussion on the issue of State Responsibility*, cit.

[1087] See WEN WEI, *On the unilateral amedments*, cit., 42

[1088] See *ivi*, cit., 43. The author does not explicitly mentions plans in this passage, but I have previously assessed that the regulatory framework here considered directly refers to development plans.

[1089] I have been unable to find the text of the case, so for its content I refer to *ivi*, cit. It is, anyway a decision of 2013 by the Hainan Provincial High Court.

[1090] According to the information reported in *ibidem*, it seems that the contract disputed was a concession/franchising contract, where the private party acquired rights to use state-owned land in order to realize the project. The parties had also agreed that the private partner would manage the infrastructural/touristic complex once realized and could profit from such management, according to one of the typical schemes of franchise contract.

[1091] See *ivi*, cit., 48

[1092] *Ibidem*

[1093] See SHEN GUANGMING (沈广明), 行政协议单方变更或解除权行使 条件的司法认定 (*Judicial Confirmation of the Conditions for the Unilateral Change or cancellation of the Administrative Agreement*), in 行政法学研究 (*xingzhengfaxueyanjiu*), Vol. 3, 2018, 121-132

In 2015, the Supreme People's Court issued the Interpretation of Several Issues Concerning the Application of the Administrative Procedure Law of the People's Republic of China[1094]. The Supreme People's Court, according to Shen Guangming[1095], established a double standard for allowing unilateral interventions on administrative contracts, revolving around i) a public interest and ii) a legal basis[1096]. In doing so, it partially confirmed the previous caselaw but emphasized the necessity of a legal basis to uphold the existence of a public interest, leading courts to avoid vague and creative references to public interest[1097]. Local plans, together with regulations, have constantly been referred to by courts in order to assess, case-by-case, contents and limits of the notion of public interest, almost in the vest of regulatory documents. The Supreme Court's intervention seems to be in line with this framework. It, however, reinforces the opinion which emphasizes the administrative dimension as the core of the administrative contract, highlighting how the validity of the administrative contract is essentially assessed through public interest considerations, interpreted in light of administrative provisions[1098]. This view is also consistent with the general provision set by Art. 52, providing for nullity where contracts violate both national and public interests.

In this system, I would conclude, plans are certainly not cryptotypes. The legislature, the courts and the legal scholars are all well aware of the role played by development planning in the definition of public interests and refer to such role in different contexts, making full use of the "variable nature" of planning rules. In the administrative contract, plans not only affect, on the policy level, the definition of the contractual content, but also determine the conditions for unilateral interventions justified by public interests[1099]. Proportionality and compensation rights design spaces for the rule of law to ensure a

[1094] 《最高 人民法院关于适用 < 中华人民共和国行政诉讼法 > 若干问题的解释》

[1095] See SHEN GUANGMING, *Judicial Confirmation,* cit.

[1096] Even before the reform of the Administrative Procedure Law and the subsequent intervention by the Supreme People's Court, some scholar had proposed the establishment of such standard. In particular, Wang Zhaihua (王寨华) had proposed to use the notion of "national interests", while Xu Yalong (徐亚龙) had upheld the necessity to found unilateral interventions upon clear legal basis. See *ivi*, cit., 121-122, where the author refers to the relevant bibliography.

[1097] See *ivi,* cit.

[1098] See WANG ZHONGLIANG, *Legal application,* cit.

[1099] Plans may empower public authorities to adopt special procedures when concluding administrative contracts, in order to reach the implementation goals in a more efficient way. This is the case for instance, of Art. 11 of the Bidding Law which allows contracts for national and local projects approved by the NDRC to be concluded through bid by request procedures, instead of public bidding.

"balanced inequality" among the parties. The inherent logic of the "old" planned contract, however, has been limited and refined, but not overturned.

3.10.2 Following: an example of plan-contract interaction

A project may become the instrument to transpose the plan into the contract. The plan, when it lays out specific projects, necessarily functions as the prior requirement for the negotiation and conclusion of project-related contracts, in first place the general framework contract.

In the recent years, this kind of scheme has been increasingly applied to regulate and coordinate the functioning of Public-Private Partnerships contracts (PPP). PPPs, born as project contracts [1100], are extensively employed in practice as instruments of implementation of development plans. The statement is confirmed by the General Contract Guidelines for Government and Social Capital Cooperation Projects[1101], which state that cooperative projects are incorporated into local development plans[1102].

The PPP contract is comprised within the theoretical category of the government and social capital cooperation projects (政府和社会资本合作项目合同 – *zhengfuheshehuizibenhezuoxiangmuhetong*). It concerns, in China as in the rest of the world, a partnership agreement between a public partner – i.e. a public administration or a government – and a private partner, i.e. a private economic operator[1103]. The two parties negotiate a long-term cooperation relationship aimed at carrying out a certain operation (e.g. an infrastructure) or activity (e.g. management of a public transport service).

In spite of an increasing success, the PPP contract is not covered by a comprehensive legal framework yet. As a consequence, scholars and researchers have focused on the two main forms that this cooperation model assumes in the practice: i) the concession or

[1100] See BEIJING MINGSHU DATA TECHNOLOGY CO., LTD. SOUTHEAST UNIVERSITY PPP INTERNATIONAL RESEARCH CENTER, *Policy Analysis of PPP development in China (1984-2017)*, August 2017; LIU, YAMAMOTO, *Public-Private Partnerships (PPPs) in China: Present Conditions, Trends, and Future Challenges*, in Interdisciplinary Information Sciences Vol. 15, No. 2 (2009), 223–230

[1101] 政府和社会资本合作项目通用合同指南 (*zhengfuheshehuizibenhezuoxiangmutongyonghetongzhinan*).

[1102] Section 3, 7 of the Contract Guidelines

[1103] It is a general concept which does not exclude different interpretations, as highlighted by JIANG GUOHUA (江国华), 政府和社会资本合作项目合同性质及争端解决机制 (*Contract nature and dispute settlement mechanism in government and social capital cooperation projects*), in 法商研究 (*fashangyanjiu*), Vol. 184(2), 2018, 3-14, 3

franchise agreement[1104]; ii) the constitution of a Special Purpose Vehicle, in a corporate form, participated in capital by both the public and the private partner[1105].

There have been some developments in terms of regulation, through the promulgation of two set of guidelines: the General Contract Guidelines for Government and Social Capital Cooperation Projects[1106] and the PPP Project Contract Guide[1107]. These two documents display a quite close relationship between PPP projects and development plans. In particular, Section 3 of the General Contract Guidelines states that cooperation projects have to be included in the local development plans.

PPP contracts formalize medium-to-long term partnership relationships aimed at carrying out medium-to-long term projects. They represent a sort of natural outcome for the realization of planned projects. The connection between the plan and the contract is, in this case, similar to the one laid out in Art. 273 of the Contract Law, pertaining to construction projects[1108].

Moreover, the connection between PPPs and plans may be defined also with regard to the means of financing the projects. Provisions regarding financing means are an essential element of the PPP contract as ruled by the General Contract Guidelines for Government and Social Capital Cooperation Projects[1109]. In particular, Art. 14 states that the project contract needs to clarify the source of funding and the plan for the total investment in the project. Art. 15, furthermore, mentions that financing options may include both subsidies and loans for the cooperative projects granted by the public partner, i.e the local government. In other words, the aforementioned methods of indirect implementation of the plan, such as subsidies and access to credit, are employed within the partnership contractual relation. Why does this happen?

[1104] The franchising contract has been compared with the public procurement contract, highlighting the possible interactions between the two instruments. On the issue see WEI YAN (魏 艳), 特许经营抑或政府采购：破解 PPP 模式的 立法困局 (*Franchising or Goverment Procurement: cracking the legislative predicament of the PPP model*), in 东方法学 (*dongfangfaxue*), Vol. 2, 2018, 139-150

[1105] See CHEN XUEHUI (陈学辉), 政府参股 PPP 项目公司法律地位：理论反思与标准建构 (*The Public Share-holding PPP Project Company's Legal Status: Theory Rethink and Criterion Construct*), in 行政法学研究, Vol. 5, 2017, 134-143

[1106] 政府和社会资本合作项目通用合同指南, issued by the NDRC in 2014

[1107] PPP 项目合同指南, issued by MOFCOM in 2014

[1108] As a consequence, it is arguable that the sanction for a PPP contract violating the plan would be contractual nullity.

[1109] Chapter IV of the Guidelines

In my opinion, the explanation is quite linear: through the contractual instrument, the project as well as its financing sources are channeled into more manageable legal structure, that is the contract. Moreover, the contract is also more easily questionable before a judicial authority. The PPP is, indeed, an instrument employed, among others, to tackle the issue of the increasing debt of local governments[1110]. The current regulatory framework allows preferential financial measures to support the partnership, but it also aims at properly sharing the risk[1111], which, when pertaining to the management of the realized project, should be borne by the private partner. In second place, it shapes a set of contractual rules revolving around the project, which becomes the core element of the development strategy[1112].

However, this logic not always works perfectly. Indeed, the monitoring of the use of government funds, even when supporting PPPs, is certainly a problem to be addressed[1113]. In order to tackle, new ways of financing have been regulated, such as the PPP projects bonds issued by PPP Project Company or Private Investors to finance the project or to exstinguish previous debts[1114].

PPP contracts still struggle to find a proper place within the Chinese legal taxonomy[1115]. In light of the ongoing debate, they fit within the category of administrative contracts, but this does not provide a special legal regime, so that the Contract Law remains the only clear reference.

[1110] See ZHENG YAFANG (郑雅方), 论我国 PPP 协议中 公私法律关系的界分 (*The Distinguishment of Public-Private Legal Relations in PPP Agreements*), in 行政法学研究 (*xingzhengfaxueyanjiu*), Vol. 6, 2017, 35-43, 35; SABATINO, *Linee evolutive*, cit.

[1111] See HU GAIRONG (胡 改 蓉), P P P 模 式 中 公私利 益 的 冲 突 与协调 (*Conflict and coordination of public and private benefits in the PPP model*), in 法学 (*faxue*), Vol. 11, 2015, 30-40, 31; YIN SHAOCHENG (尹少成), PPP 模式下公用事业政府监管的挑战及应对 (*The challenge faced by government supervision over public welfare industry under PPP pattern and its countermeasures*), in 行 政 法 学 研 究 (*xingzhengfaxueyanjiu*), Vol. 6, 2017

[1112] In this feature, the Chinese model is evolving closer to the European solutions, which, as I will assess, puts the project at the core of the development strategy.

[1113] See, for instance, YU AN (于安), 我国 PPP 合同的几个主要问题 (*Several relevant problems of China's PPP*), in 中国法律评论 (*zhongguofalupinglun*), Vol. 13(1), 2017, 42-46, 46

[1114] See the Notice of the General Office of the National Development and Reform Commission on Printing and Distribution of the "Guideline for Issuance of the Special Bonds of Public-Private Partnership (PPP) Projects" (国家发展改革委办公厅关于印发《政府和社会资本合作(PPP)项目专项债券发行指引》的通知).

[1115] See WEI YAN, *Franchising or Government Procurement,* cit.

Actually, the Project Contract Guide, in its Preliminary Instructions[1116], while partly associating the PPP with the public procurement system, regards the PPP Project Contract (PPP 项目合同 – *PPP xiangmuhetong*) as the core of a contractual system, a legal framework around which several contracts are established, in order to regulate the specific features and issues of a long-term relationship. Such project contract has to determine the principles regulating the sharing of the risk connected to the project and the general duties and rights of the private and public parties[1117]. In case of constitution of a Special Purpose Vehicle, the Project Contract will have to define the structure as well as the functioning of such company.

The Project Contract functions, to some extent, as a plan itself, a sort of second-grade special plan, this time with the formal qualification of contract, thus subjected to contract law[1118].

Indeed, contracts functional to the implementation of the plan often have a scope not pertaining to a mere exchange, as the traditional contract would require. They instead build medium-to-long term cooperative relationships between public authorities and economic operators. They define the respective roles of the contractual parties, empowering the public party to carry out coordinating, monitoring and supervising taks over the activity of the counterparty. In some cases, they also regulate the constitution of institutional structures empowered to carry out specific tasks, such as in the PPP Project Company Contract. They may therefore be defined as "organizational contracts", rather that mere "administrative contracts"[1119].

[1116] Project Contract Guide, 1.

[1117] *Ibidem*

[1118] The reference to public or national interest, therefore, justifies the application of Art. 52 of the Contract Law. However, the Chinese legal doctrine has not yet reached a conclusive stance on the definition of administrative contract. See on the topic CUI JIANYUAN (崔建远), 行政合同族的边界及其确定根据 (*The boundary and determination of the administrative contract category*), in 环球法律评论 (*huanqiufalupinglun*), Vol. 4, 2017, 21-32

[1119] The notion of organizational contract (组织合同 – *zuzhihetong*) was transposed into China from the European Union, where it was assessed and studied most thoroughly (See S.GRUNDMANN, F.CAFAGGI, G.VETTORI, *The organizational contract from exchange to long-term network cooperation in European contract law*, Ashgate, Burlington, 2013). Chinese legal scholars have, nevertheless, well comprehended the value of the organizational contract in the coordination of market relationships. From the structural point of view, the organizational contract is characterized by its medium-to-long term horizon and its plurality of parties (See WANG LIMING, *On the organizational role*, cit., 110-111). From the functional point of view, it is characterized by its organizational scope and places emphasis on the synergy of behavior between the contractual parties (*ibidem*).

Regardless of nametags, public-private cooperation contracts would benefit from a proper legalization of their regime, a legalization which would find its place in the future civil codification. Chinese contract law, in its formal structure, clearly favors the integration of civil law categories, but in its guiding principle and, most of all, in its practical application, it embraces interpretative solutions which support a directive and coordinative role of public authorities.

4. Conclusive remarks. Planning as a formant of the Chinese legal system

Over the past fifteen years, Chinese Development Planning has endured several dramatic changes, accompanying the evolution of both the Chinese society and the Chinese legal system. In the last six years, its flexible, dynamic and inclusive nature has served the purpose of achieving the ultimate goal of the great rejuvenation of the Chinese nation[1120]. Chinese leaders, in first place the current general secretary Xi Jinping, have emphasized the absolute necessity of a comprehensive and gradual renewal of Chinese social and economic structures. The discourse over the "Chinese Dream" (中国梦 – *zhongguomeng*) combined the individual aspiration to personal realization through work and the collective strive for harmonious social and economic relationships[1121].

Development plans and development planning define the connection between the invisible hand of the market, whose role in the allocation of the resources is "decisive"[1122], and the visible hand of "*government scientific macro-control and efficient governance*"[1123]. In doing so, it influences and affects the evolution and functioning of almost all the relevant legal structures and institutes of Chinese economic law.

Furthermore, development plans expanded their transnational dimension, by assuming a central role in the promotion and support of the international cooperation project of the "Belt & Road" (一带一路)[1124]. The 13th Five-Year Plan dedicates its 51st and 52nd Chapter

[1120] See XI JINPING speech at the exhibition "The Road to Rejuvenation" in November 29, 2012, in XI JINPING, *The Governance of China I*, Foreign Language Press, Beijing, 2014, 37-39

[1121] See *ivi*, cit., 47-51

[1122] Before the 18th CPC Congress the role of the market was defined as "basic"

[1123] See XI JINPING, *The Governance of China I*, cit., 128-130

[1124] The first reference to the ancient Silk Road (丝绸之路 - *sichouzhilu*) to promote an interntional cooperation project involving China as the leading partner occurred in September, 2013, when Xi Jinping used such term to define a future cooperation network between China and Central Asian countries, during a speech at the Nazarbayev University in Kazakhstan. From the on, the consensus on such initiative has

to, respectively, "*Move with the Belt and Road Initiative*" and "*Participate in Global Economic Governance*". With particular regard to the Belt & Road initiative, the 13th Five-Year Plan lays out and promotes strategic projects[1125] to be realized in cooperation with foreign governments. In practice, the model that has been often employed and will be employed for such projects is that of the PPP between a Chinese enterprise and the foreign government[1126]. Therefore, to some extent the 13th Five-Year Plan reproduces the domestic implementation dynamic of the plan to the transnational level, to the point that it is arguable whether or not Chinese development plans may today be among the major sources of an embryonal "Belt & Road legal system"[1127].

Chinese scholas agree over the general legal significance of planning, but disagree over the specific legal form(s) and nature(s) assumed by planning acts. In this chapter, I have tried to shed some light on the issue through some instruments of the comparative lawyer. Now I have to (at least try to) provide an answer.

Development planning is a legal formant of the contemporary Chinese legal system. Its epiphanies, in the first place planning acts, assume different legal values in the concrete applications by courts and economic operators. The underlying logic is however the same and relies on the basic conjunction between planning and public interests. The final purpose is to design a uniform set of socio-economic priorities, allowing the state to coordinate socio-economic relations among operators. In doing so, planning also

increased as the operative initiatives taken by Chinese government. In November 2013 the 3rd Plenary session of the 18th Central Committee of the CPC officially expressed the necessity to reinforce the ties with the neighboruing countries and on march 28, 2015 the NDRC, the Ministry of Foreign Affairs and the MOFCOM issued a joint action plan on the guiding principles and cooperation strategies for the 一带一路 (*yidaiyilu* – One Belt, One Road). The initial translation One Belt, One Road (OBOR), was then changed in the official documents, replaced by Belt & Road Initiative (BRI), maybe due to the fact that the reference to "one belt " and "one road" could evoke, among foreign partners, the idea of a supremacy will exerted by China. The nature of the initiative, however, has not changed. The "belt" represents, in concrete, a strategy of cooperation following the ancient silk road, while the "road" should represent the maritime counterpart, referred to the ancient maritime silk road.

[1125] E.g. "international container shipping services and postal train routes", "China-Kazakhstan logistics cooperation center", "develop the Maritime Silk Road Index into an influential international shipping indicator".

[1126] See G.SABATINO, *The Legal Issues of "Going Global, cit.*; See also XI JINPING, *The Governance of China II*, cit., 547-548

[1127] See, on the topic, LIU JINGDONG (刘敬东), "一带一路"法治化体系构建研究 (*Research on Construction of the Rule of Law System of "One Belt One Road"*), in Tribune of Political Science and Law, Vol. 5, 2017, 125-135; see also G.SABATINO, *Linee Evolutive*, cit.

vehiculates, especially in its inclusive dimension, some ethical features of the Chinese legal tradition which, indeed, some comparative lawyers deem to have been eradicated[1128]. Borrowing Naughton's famous expression, I would conclude that it is planning that, in modern China, has grown out of the plan. It has made plans just one (though the main) instrument to reach its ultimate goals. It has favored the embeddedness, in statutes, courts' decisions and scholars' analysis, of references to public economic policies and national interests.

For the comparative lawyer, I believe, planning is today also an interpretative key, the epitome of the anthropological filter to approach the Chinese legal order and its ongoing reforms.

[1128] See U.KISCHEL, *Comparative Law,* cit., 713-716. Other comparative lawyers, however, adopt different stances. For instance, M.TIMOTEO (*Il contratto in Cina e Giappone,* cit.) points out the "resistance" of communitarian schemes as well as a general reluctance to judicial dispute resolution. Obviously, none of the possible approaches must be exaggerated. The integration of modern Chinese law with its legal tradition is a topic too big to be assessed here. Anyhow, it is my opinion that the recent evolutions in both legislation and caselaw display a gradual rediscovering of traditional ethics, filtered through modern socialist thinking. Indeed, even Kischel (*Comparative Law,* cit., 707-708), while denying the role of traditional legal culture, highlights the inherent socialist character of Chinese Law. It is therefore in the evolution of socialist theory that, I believe, one should look to find traces of traditional legal cultures.

CHAPTER FOUR
THE LEGAL FRAMEWORK OF DEVELOPMENT PLANNING IN THE EUROPEAN UNION

1. The problem of the comparison

The legal discourse on development planning in the European Union stems from the incorporation in the Treaties of several provisions regarding development policies[1129]. In literature, policy analysis outweighs legal analysis[1130].

European development policies vary in their purpose, scope and method. However, I am interested in planning and European institutions do not issue formal development plans like their Chinese counterparts. The object of the comparative research must therefore be looked for beyond formal categories.

When I approached the issue, I tried to isolate the elements which connoted the Chinese part of the research. I knew that I needed to search for a set of legal rules concerning the substantive and procedural setting for resource-allocation instruments justified by common development purposes.

The choice fell on the structural and development funds. Such funds do not exhaust the legal dimension of EU development policies[1131]. However, their positioning within the EU legal order justifies an assumption about the functional equivalence of their legal rules with Chinese planning provisions. An assumption which has to be tested and assessed through the following comparative research.

Again, legal literature rarely dwelled on the topic. It was mostly interested in defining the relation and compatibility of development funds with State aids provisions[1132]. On the

[1129] See R.JONES, *The Politics and Economics of the European Union*, Edward Elgar, Northampton, 2001, 207

[1130] The amount of literature on European development policy is indeed quite impressive and touches several issues concerning decision-making procedures and policy content as well as the macro-concept of multilevel governance. For a general and quite comprehensive overview of the topic see H.WALLACE, W.WALLACE, M.POLLACK (edited by), *Policy-Making in the European Union*, Oxford University Press, Oxford, 2005

[1131] For instance, the whole sector of trade policy, which is experiencing a fast development in terms of legal framework, is generally not touched by development funds.

[1132] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law of the European Union*, Oxford University Press, Oxford, 2016; L.DANIELE, S.AMADEO, C.SCHEPISI (edited by), *Aiuti pubblici alle imprese e competenze regionali*, Giuffrè, Milano, 2003

other hand, there is an abundance of legislative sources, both primary and secondary, both hard and soft.

The comparative attempt occurs at a time when the legal dimension of China-EU economic relations is gaining strength. The interexchange between the two systems is justified by several issues that historical evolution shaped in a similar way. This statement could appear at first glance preposterous. It is indeed based on a group of common issues defined by quite similar notions. The issue of multilevel governance, of integration between market and social instances, of development of inclusive decision-making techniques, etc. With regard to each one of those elements, the dynamic of the interrelation between EU institutions and member states is reflected, *mutatis mutandis*, in the Chinese context[1133].

Comparing these two legal experiences means to reconstruct, on a global scale, the evolution of the concept of public economic management, pointing out issues, tendencies and future perspectives.

2. The European stance on long-term development planning. The principle of cohesion

"Plan" and "Planning are not usually referred to European development funds, which are instead justified "in terms of economic and social cohesion, by which was meant the removal of various disparities within the Union[1134].

The The term "plan", intended as laid out in the previous paragraphs, (still) does not belong to the European Union legal system. The association of cohesion policy and

[1133] Therefore, in both legal systems, the answer of public powers to the aforementioned issues came with the development of legal mechanisms to coordinate the market, comprising, among the most relevant, long-term investment programming. Moreover, solutions recently taking foothold in China in order to implement development plans, such as the Public-Private Partnerships, are indeed well-known and regulated, to different extents, among European countries. This justifies the attention of the Chinese legal science. See, for instance, ZHAO HONG (赵宏), 德国公私合作的制度发展 与经验启示 (*Development And Experience of The Public-Private Partnership System in Germany*), in 行政法学研究 (*xingzhengfaxueyanjiu*), Vol. 6, 2017, 13-22; LUO GUANNAN (罗冠男), 意大利 PPP 法律制度研究 (*The Public-private Partnership Legal System in Italy*), in 行政法学研究 (*xingzhengfaxueyanjiu*), Vol. 6, 2017; ZHENG CHUANJUN (郑传军), 特许经营与 PPP 的比较：国际经验和中国实践研究 (*Comparison of Franchising and PPP: International Experience and Chinese Practice*), in 国际经济合作 (*guojijingjihezuo*), Vol. 1, 2017, 82-90.

[1134] See H.WALLACE, W.WALLACE, M.POLLACK (edited by), *Policy-Making in the European Union, cit.*, 214; C.RUMFORD, *European Cohesion? Contradictions in EU Integration*, Macmillan Press, London, 2000; see also, mainly in historical perspective, SAPIENZA, *Considerazioni sulle azioni di riequilibrio territoriale nell'Unione Europea*, in SVIMES, *Il riequilibrio territoriale nell'Unione Europea*, il Mulino, Bologna, 1995, 9-20.

development planning is however detected in concrete. The integration of structural funds into the European budget following a wave of reforms in 1988[1135] introduced based the erogation of funds over pluri-annual strategic development plans[1136] to be agreed upon by the Commission and the Member States. Around the same time, European institutions under the influence of the Brundtland Report (1987) started shaping a Sustainable Development Strategy[1137]. Funds became "structural" in the sense that they should be used in a "*coordinated fashion under the key principle of concentration and programming*"[1138] in order to address the basic disparities in European development. With that reform, the then European Economic Community wanted to overcome some deficiencies of the previous regulatory framework.

The idea of a common investment policy justified by development purposes was already enshrined in the Rome Treaty, which established the European Investment Bank and the European Social Fund[1139]. In 1975, Reg. 724/1975 inaugurated the European Regional Development Fund, the oldest of the "structural funds" and the first one to explicitly address development issues[1140]. Its structure was based on fixed national quotas, thus allowing member states to "*determine which projects would be financed from the fund*" [1141] . This feature, toghether with its small size, contributed to impair its effectiveness[1142]. Its early experience, however, highlighted some basic characteristics of the European "law of development" which are at the same time partially unresolved issues.

[1135] See, in particular, Reg. 2052/1988.
[1136] See N.BERNARD, *Multilevel Governance in the European Union*, Kluwer Law International, The Hague, 2002, 102-103
[1137] See E.KORKEA-AHO, *Adjudicating New Governance*, cit., 80-84. The Brundtland Report defined sustainable development as "a process of change in which the exploitation of resources, the direction of investment, the orientation of technological development and institutional change are made consistent with future as well as present needs". In recent times, this concept of sustainability has been replaced by a tripartite notion which involves three distinct pillars: society, economy and environment.
[1138] See N.BERNARD, *Multilevel Governance*, cit., 102
[1139] The European Social Fund, regulated by Art. 3 and then Title III Chapter 2 of the Rome Treaty, had indeed a goal which was more limited ratione materiae, i.e. the promotion of employment.
[1140] See N.BERNARD, *Multilevel Governance*, cit., 101. As reported by C.RUMFORD, *European Cohesion?*, cit., 29, the creation of the ERDF originally occurred in order to counterbalance the UK's expected contributions to the EC budget. However, with the creation of the ERDF, "*the role of the European Community shifted from vetting aid packages and competitive subsidization (…) to initiating regional poliy and introducting coherent development policies*" (*ibidem*). An example of the organization of this original model of structural funds with regard to a member state (Italy) is provided in G.VEDOVATO, W.CORDEN, *Fondi Comunitari e Italia nel 1976*, in Rivista di Studi Politici Internazionali, Vol. 44(1), 1977, 115-129
[1141] See N.BERNARD, *Multilevel Governance*, cit., 101
[1142] *Ibidem*

In the first place, the geographical dimension of the European Economic Governance. The focus on the less-developed geographical areas was already addressed by Recitals n. 1 and 2 of Reg. 724/75. Nowadays, the ERDF supports both cross-border cooperation projects and cooperation over larger transnational territories[1143]. The geographical areas addressed by cooperation funds are determined by the Commission through implementing decisions[1144]. The provisions reflect a policy approach which favors the definition of macro-regional strategies addressing areas which experience common issues[1145]. The areas targeted by such strategies as well as by Funds do not have autonomous financial, administrative and political functions. They are instead defined by their functionality, they exist to reach the goals set by the subjects which are part of them[1146]. The underlying principle which justifies the current geographical approach is Art. 174 of the TFEU which introduced, in addition to the social and economic cohesion, the territorial cohesion as a way to pursue an "*overall harmonious development*"[1147]. The relevance of the principle is all-encompassing and is not limited to the instruments of cohesion policies in a narrow sense. The Regional Aid Guidelines transpose the notion of territorial cohesion into State Aid Law. Consequently, the main problem is that of coordination among the different regional classifications. A problem which, as we will see, is not fully resolved.

In the second place, the European approach to cohesion is collocated by scholars under the operational concept of shared management[1148], touching upon the notion of multilevel

[1143] See Art. 2 of Reg. 1299/2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal.

[1144] See Art. 3 § 1 of Reg. 1299/2013

[1145] See L.D'ETTORRE, *Le strategie macroregionali dell'Unione Europea: tra cooperazione territoriale europea e multi-level governance*, in Federalismi.it, Vol. 20, 2018, 9-10. This is the basic definition of a macro-region, whose scope is undoubtedly wider than that of the ERDF. The Funds, however, in their implementation process, target objectives set within the framework of the correspondent macro-regional strategies. See *ivi*, cit., 12-13

[1146] *Ibidem*

[1147] The strategies reflect a fundamental problem of the European Union as a legal order, that is the construction and legitimization of a legal system balancing national sovereignties and its own sovereignty as laid out in Art. 4 § 2 of the TEU (see R.ARNOLD (edited by), *Limitations of National Sovereignty through European Integration*, Springer, 2016, 53). More in particular, the concept itself of national identity as upheld by the treaties seems to be intended for the purposes of pursued common development goals. Therefore, it is limited by the European legal order where it contravenes the fundamental values of the Union (see *ivi*, cit., 55).

[1148] See CRAIG, *Shared Administration, disbursement of community funds and the regulatory state*, in H.HOFMANN, A.TÜRK, *Legal Challenges in EU Administrative Law*, Edward Elgar, Northampton, 2009, 34-62, 36-38

governance[1149]. Right after the establishment of the ERDF[1150], the European legislature sought to gradually expand the flexibility of the Commission in the management of the fund while driving member states to enter into bargaining with the Commission itself for the definition of the funded projects[1151]. The tension between the Union and the Member States, on account of partially different interests, is still today one of the sore points of cohesion policies[1152]. The issue also arises from the application of the two fundamental principles of the Member States' national identity (Art. 4 § 2 TEU) and of subsidiarity (Art. 5 TEU)[1153], which inspired and inspires the drafting process of structural funds' and budget regulations for each policy cycle[1154].

Today, the structural funds functions according to operative programmes developed by member states and addressing the instances of local territories and communities. Local entities such as Regions have to be involved in the bargaining process. They also usually act as managing authorities for single programmes.

The concept of multilevel governance was developed, in the late 1980s and early 1990s, on the basis of studies upon European cohesion policies. Its most fitting definition is probably that given by Gary Marks, who defines multilevel governance as "*a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional, and local – as the result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralized functions of the state up to the supranational level and some down to the local/regional level*"[1155]. The spatial dimension of European governance is reaffirmed on

[1149] The concept is really wide and the literature abundant. For immediate references, see N.BERNARD, *Multilevel Governance,* cit.,; A.SIMONATO, *Integrazione europea e autonomia regionale: profili giuridici della governance multilivello e politiche di coesione 2021/2027*, Vol. 21, 2017; G.MARKS, *Structural Policy in the European Community*, in A.SBRAGIA (edited by), *Euro-Politics: Institutions and Policymaking in the "New" European Community*, Brookings Institution Press, Washington D.C, 1992, 191-224; G.MARKS, *Structural Policy and Multilevel Governance in the EC*, in A.CAFRUNY, G.ROSENTHAL (edited by), *The State of the European Community*, Lynne Rienner, New York, 1993, 391-410; N.BEHNKE, J.BROSCHEK, J.SONNICKSEN (edited by), *Configurations, Dynamics and Mechanisms of Multilevel Governance*, Palgrave Macmillan, Cham, 2019

[1150] In particular with Reg. 214/79 and Reg. 1787/1984.

[1151] See N.BERNARD, *Multilevel Governance,* cit., 101-102

[1152] See CRAIG, *Shared Administration,* cit., 36-37

[1153] The principle of subsidiarity from the perspective we are interested in, deals with the organization of the chain of development planning acts, from the all-encompassing strategies to the partnership agreements. In the vision of the founding fathers of the European Union, the principle of subsidiarity should imply that of solidarity (see KRIJTENBURG, *Schuman in Times of Upheaval*, in J.DE ZWAAN ET AL., *Governance and Security Issues of the European Union*, Springer, 2016, 33-50).

[1154] See A.SIMONATO, *Integrazione europea e autonomia regionale,* cit., 6

[1155] See G.MARKS, *Structural Policy*, cit., 392

the basis of three levels: the local one, the national one and the supranational one. The effectiveness of the decisions of economic coordination is legitimized, through the cooperation between the different levels, as confirmed by the White Paper on Multilevel Governance of 2009[1156]. From the perspective of legal acts of coordination, the implementation mechanism of investment funds is based on partnership agreements between the Union and the Member States and between States and Local entities[1157].

In multilevel governance decision-making, bargaining involves European institutions, national governments and local governments, as well as relevant social bodies[1158]. The plurality of instances does not necessarily imply more efficiency. Indeed, it may gradually impair decision-making processes by multiplying the pages of the agreements and observations and hindering the implementing action of the local administrations[1159]. In other words, planning is jeopardized by its own complexity.

Integration requires a harmonization of policy objectives between the different layers of governance. Such occurrence does not always happen[1160]. As a consequence, financial resources allocated for development purposes often do not ensure that, at the lowest implementation level, the projects financed actually reflect the goals set by the Union's strategies. Furthermore, the Charter for Multilevel Governance has been criticized for its inability to define multilevel governance as a comprehensive principle[1161].

That of multilevel governance is a undoubtedly a general principle. Such principle, in legal perspective, is, however, still not employed as a criterion to assess the compatibility of provisions and acts of the institutions with the European legal system[1162].

Multilevel governance is legally characterized through reference to other general principles[1163], in a similar fashion to what happens with Chinese plans.

Today, after the 1988 reforms, the structural funds are fully integrated in the multiannual financial framework pursuant to Art. 312 of TFEU. This implies that each budget cycle corresponds to a planning cycle. In laying down the legislative procedure for the financial framework, Art. 312 deviates from the majority principle and requires that the Council

[1156] See White Paper of Committee of Regions on Multilevel Governance, 2009, 8
[1157] See Art. 5 of Reg. 1303/2013.
[1158] See L.D'ETTORRE, *Le Strategie Macro-regionali*, cit.
[1159] See A.SIMONATO, *Integrazione europea*, cit., 20-23
[1160] See *ivi*, cit., 24
[1161] See *ivi*, cit., 17
[1162] See *ivi*, cit., 19
[1163] *Ibidem*

acts unanimously when adopting the correspondent regulation[1164]. The rule may be derogated only by a unanimous decision of the European Council (§ 2)[1165].

3. The Social Market Economy

The principle of cohesion is the structural and practical foundation of EU development planning, but it does not amount to a doctrine of development[1166]. In order to detect a set of principles governing the hierarchies among EU economic rules, we must look elsewhere.

Art. 3 § 3 of the Treaty on the European Union (TEU) introduces three important references: i) to the concept of sustainable development; ii) to the concept of balanced growth; iii) to the concept of social market economy[1167].

Among these principles, that of social market economy bears a significant ideological baggage. The expression has been introduced with the Lisbon Treaty in 2007, but, in a diachronic perspective, it embodies the evolution of a European common tradition.

The notion of social market economy is the doctrine of development[1168] we are looking for.

Ideologically, the social market economy represents "*an attempt to harmonize our desire for freedom and social justice with insights into the working of the market machinery*"[1169]. It presupposes the market, but it does not coincide with it[1170]. It goes beyond.

[1164] The Council acts after obtaining the consent of the Parliament, given by majority (§ 2).

[1165] In other words, the TFEU requires a clear and undisputed political consent which the majority rule cannot guarantee.

[1166] The reconstruction of a common European economic model implies, anyhow, several and complex issues. Partly due to the heterogeneity of the Member States' legal systems and traditions, leading to a heterogeneity in the power. Partly due to the difficulty to depict an organic platform of values concerning a whole development model.

The clear reference to the freedom of the market and in the market, indeed, does not suffice to describe the legal foundations of a European economic model.

[1167] Such references also represent a common heritage linked to strategic objectives already laid out in the 1957 Rome Treaty. Art. 2 of the Rome Treaty mentioned, among the purposes of the EEC "*the establishment of a common market, the approximation of MS economic policies, the promotion of a harmonious development of economic activities*".

[1168] See BOSCOLO, *L'unificazione attraverso la garanzia delle prestazioni di pubblico servizio*, in M.CAFAGNO, F.MANGANARO (edited by), *L'intervento pubblico nell'economia*, cit., 329

[1169] See A.MÜLLER-ARMACK, *The Social Market Economy as an Economic and Social Order*, in Review of Social Economy, Vol. 36(3), 1978, 330

[1170] *Ibidem*

The social market economy is both antithetic and specular to the socialist market economy. The two notions adopt different points of view and draw justification from different premises, but embrace a development goal that is, to some extent, the same.

Historically, the notion of Social Market Economy has its origins in the post-WW2 reconstruction of West Germany[1171]. The expression, commonly attributed to Alfred Müller-Armack[1172], drew inspiration from a general reconsideration of the *laissez-faire* economic paradigm in the Weimar Era. Furthermore, a relevant influence over the critics of purely capitalist economic solutions was exerted by that same Walter Rathenau[1173] who was so important in the development of the modern notion of planning. The social market economy finds its theoretical justifications in first place in the integration, on the policy level, of an economic order and a social order[1174].

In second place, it embraces the assumption that economic and social policy are complementary but may also jeopardize each other[1175].

The social market economy does not share the same ideological basis as the welfare state theory[1176]. In the social market economy, the "unequal law"[1177] is functional to the coordinated socio-economic development. Furthermore, it follows the fundamental logic of subsidiarity: the individual and the market function and operate autonomously as long as they manage to do it efficiently. When this is not possible, the State intervenes[1178].

In post-war Germany the social market economy meant refusing centralized planning, not much the soviet and socialist one, but the national-socialist one, as it was established, gradually, between 1933 and 1945[1179].

[1171] See J.VAN HOOK, *Rebuilding Germany: the creation of the Social Market Economy*, Cambridge University Press, Cambridge, 2004; S.MUREŞAN, *Social Market Economy*, Springer, Cham, 2014, 9-120 and 233-241

[1172] See C.WATRIN, *The Principles of the Social Market Economy — its Origins and Early History*, in Journal of Institutional and Theoretical Economics, Vol. 135(3), 1979, 405; RÖSNER, *The Institutional Framework of a Social Market Economy*, in H.SAUTTER, R.SCHINKE (edited by), *Social Justice in a Market Economy*, Peter Lang AG, 2001, 59

[1173] See C.WATRIN, *The Principles of the Social Market Economy*, cit., 406

[1174] See A.MÜLLER-ARMACK, *The Social Market Economy*, cit.

[1175] See H.ZACHER, *Social Market Economy, Social Policy, and the Law*, in Journal of Institutional and Theoretical Economics, 138(3), 1982, 369

[1176] See RÖSNER, *The Institutional Framework*, cit., 64

[1177] Intended as a set of "special" and "derogatory" rules designed to protect the interests of specific social groups

[1178] See RÖSNER, *The Institutional Framework*, cit., 65

[1179] See H.ZACHER, *Social Market Economy, Social Policy, and the Law*, cit., 371-372

The choice, however, was not obvious. Up to 1948, the reconstruction necessities were deal with through rationing and centralized resource allocation[1180], while in the soviet-occupied zone (later East Germany or German Democratic Republic) a soviet-inspired planning model was established. Moreover, there were no certainties about the repositioning of Federal Germany into the international community and the Atlantic sphere. So, to promote the integration of West Germany in the western bloc, the choice of the market economy was judged as the best one, together with the dismantlement and refusal of the corporatist concentrations, which had characterized the whole history of united Germany[1181].

This new model derived its legitimacy from the social ethics of Christianity as well as from the ordo-liberal economic school but it did not exhaust itself in them[1182]. The social market economy is defined as a socio-economic model more than a political one. It linked its own success to the definition of a set of efficient rules regarding the relations between economic operators. In particular, the principle of subsidiarity requires not only the economic intervention of the state within the limit of what is necessary, but also the establishment of rules aimed at ensuring the effective functioning of the market.

The protection of competition becomes, in a social market economy, the main policy tool for the public powers[1183]. The measure and incidence of such protection operates on several levels. In the first place, it ensures the survival of a competitive market environment fighting the tendency of capitalist economies towards concentrations. At the same time, it defines special protection rules for dependency situations connected to the functioning of a free market, such as the subordinate work[1184].

In second place, a social market economy may reserve to state control specific sectors of the national economy and exempt them from rules regarding competition. The legal rule,

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[1180] See S.MUREȘAN, *Social Market Economy,* cit., 236-237; J.VAN HOOK, *Rebuilding Germany,* cit.

[1181] See RÖSNER, *The Institutional Framework,* cit., 60; C.WATRIN, *The Principles of the Social Market Economy,* cit., 412. On the corporatist structure of imperial Germany economy see also H.NEUBERGER, H.STOKES, *German Banks and German Growth, 1883-1913: An Empirical View*, in The Journal of Economic History, Vol. 34(3), 1974, 710-731

[1182] See S.MUREȘAN, *Social Market Economy,* cit., 9-120; R.EDERER, *Capitalism, Socialism and the Social Market Economy*, in Review of Social Economy, Vol. 27(1), 1969, 23-36, 28; RÖSNER, *The Institutional Framework*, cit. 60-62

[1183] See H.ZACHER, *Social Market Economy, Social Policy, and the Law,* cit., 373-374; M.MONTI, *Competition in a social market economy*, Speech by Commissioner Monti at the Conference of the European Parliament and the European Commission on 'Reform of European Competition law' in Freiburg on 9/10 November 2000.

[1184] *Ibidem*

in this perspective, must firstly define the boundary between the domain of private initiative and the public domain. Secondly, it must define the modality of the intervention of the state in the economy, according to the principle of subsidiarity, in order to avoid, as much as possible, distortions in price mechanisms and competition[1185].

It has been highlighted how the social market economy is founded over three pillars[1186]:

i) The Market Economy→ it is a fundamental assumption that the allocation of resources must be managed by the market, or "planned" by the market and by the relevant social bodies[1187] operating within a market. Therefore, the social market economy refuses a centralized and bureaucratic planning system;

ii) The Social Order→ for the purposes of the integration between social and economic policy, the community must enjoy a minimum level of socialization guaranteed and managed by the State. In other words, the State transfers resources from the market to the social order according to social justice and common good purposes[1188];

iii) The Ecology→ the emphasis on the ecology of the market represents a recent development in the social market economy debate[1189]. It constitutes an integrated dimension, between the social and the economic orders. Ecology becomes an attribute of the economy, which at the same time aims at developing a certain vision of the common welfare[1190].

The reference, in the Lisbon Treaty, to a highly competitive social market economy constitutes the outcome of a compromise already arisen during the drafting procedure of

[1185] From such premises, it could be argued that the social market economy model essentially corresponds to the regulatory State paradigm as it has evolved in Europe over the last decades, which sees public authorities as impartial monitors and arbitrators of the market.

[1186] See S.MUREȘAN, *Social Market Economy, cit.*, 150 ff. Other authors (see V.ŠMEJKAL, S.ŠAROCH, *EU As a Highly Competitive Social Market Economy – Goal, Options, and Reality*, in Review of Economic Perspectives, Vol. 14(4), 2014, 393-410, 397-398) point out instead six fundamental principles of the social market economy, which may however operate at the service of the three main pillars: i) dominance of monetary policy guaranteeing price stability; ii) free markets without entry restrictions; iii) private property within the limits of the protection of a competitive market environment; iv) freedom of contract, also subject to the protection of the competitive market environment. ; v) responsibility for liabilities from transactions of market participants; vi) stability of economic policy, meaning enactment of rules to reduce the level of uncertainty.

[1187] i.e. families, corporations, economic operators, public authorities

[1188] The fundamental issue here is essentially to balance such purposes with the interests and right deriving from the functioning of the market economy

[1189] See S.MUREȘAN, *Social Market Economy,* cit., 166

[1190] See, on the topic, also the 2019 reflection paper "*Towards a Sustainable Europe by 2030*", available at the link https://ec.europa.eu/commission/publications/reflection-paper-towards-sustainable-europe-2030_en

the Constitutional Treaty, later aborted[1191]. On one hand, some opinions advocated the reference to a European social model; on other hand, there were those who defended the primacy of the free market as the founding value of the Union itself[1192]. As a consequence, the concept of social market economy is somewhat underdeveloped in the European legal system. To the enunciation of the principles does not correspond an enhancement of the Union's competences and powers in the social field. Furthermore, the case law of the Court of Justice of the European Union (CJEU) traditionally follows a stance according to which economic freedoms prevail, in the balance of interests, over social rights and instances[1193].

In the absence of a strong role for the Union in the social matters, the principle of the social market economy is in danger of becoming a purely declamatory legal formant, completely dissociated from the effective and living law[1194]. European legal scholars highlighted the risk of regarding social market economic as a programmatic criterion to strive toward a balance between social and economic instances[1195]. Even the principle laid out in Art. 9 of the TFEU[1196], which was indeed tentatively interpreted as binding EU institutions to a comprehensive assessment of social and economic interests and rights[1197], was not actively employed by the CJEU[1198].

The traditional concept of social market economy did not found successful legal transplants. Though being sometimes regarded as a model for developing countries[1199], it

[1191] See V.ŠMEJKAL, S.ŠAROCH, *EU As a Highly Competitive,* cit., 399

[1192] *Ibidem*

[1193] See K.POLOMARKAKIS, *A tale of two approaches to Social Europe: The CJEU and the Advocate General drifting apart in Case C-201/15 AGET Iraklis*, in Maastricht Journal of European and Comparative Law, Vol. 24(3), 2017, 424-437; see also the famous decisions *Viking* (C-438/05) and *Laval* C-341/05).

[1194] There is an ongoing debate in Europe related to the evolution of the paradigm of efficiency in public administration's action, especially after the emphasis that recent developments such as the Fiscal Compact put on the purely economic aspect of the efficiency. In other words, the public action should be aimed at employing the least possible amount of public resources and on the notion of efficiency should be shaped on this criterion. In this context, the qualitative aspect of the action (intended as relation between input and output) is a recessive character and the notion itself of socio-economic policy is bound by a "static" approach to economic efficiency. On the topic, see URSI, *Il paradigma europeo dell'efficienza delle pubbliche amministrazioni*, in Istituzioni del Federalismo, Vol. 3-4, 2018, 839-856.

[1195] See V.ŠMEJKAL, S.ŠAROCH, *EU As a Highly Competitive,* cit., 403-404

[1196] The article states that "*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health*."

[1197] See the opinion of the Advocate General in the Case C-515/08 – Santos Palhota

[1198] See V.ŠMEJKAL, S.ŠAROCH, *EU As a Highly Competitive,* cit., 405

[1199] See K.FASBENDER, M.HOLTHUS, *The Social Market Economy: An Export for the Third World?*, in Intereconomics, November/December 1990; D.RADKE, *The German Social Market Economy: An option for the Transforming and Developing Countries*, GDI Book Series n. 4, Frank Cass, London, 1995

was for the most part confined within its historical and geographical boundaries, i.e. the post WW2 Federal Germany.

The temptation of putting in dialogue the two notions of "social market economy" and "socialist market economy" is perilous but irresistible[1200]. Planning offers a privileged perspective since it allows comprehending the methods, results and contradictions of such process[1201].

The first and most significant comparative remark is a structural one. The Social Market Economy, in its theory and its practical application in West Germany, regards competition law as the main (if not the sole) legally sustainable instrument for market regulation and coordination. Today, the idea of Antitrust as "coordinative law" is based on structural features, such as the peculiar and discretional role of the EU Commission[1202] when investigating conducts and imposing sanctions, also driven by policy reasons[1203]. Pursuant to the principle of subsidiarity, the state direct intervention, in a social market economy, is limited to the services of public interest. Such services are subjected,

[1200] Furthermore, the construction of dialogue between these two legal cultures is one the purposes of this work. Therefore, without again assessing the unquestioned divergence in the ideological premises, it is worth noting how both these cultures face, today, the issue of the legalization of the concept of "sustainability".

[1201] This is a useful choice but not required, since other perspectives could be validly used. One in particular is that of the circular economy, which in Europe as in China has declined in the production of significant legislative documents. On the issue see QI JIANGUO et al., *Development of Circular Economy in China*, Springer, Cham, 2016. The integration between economic and social development is the flag of the Chinese socialist modernization (see ZHANG ZHEN (张　震), 社会主义现代化：社会主义初级阶段发展战略的目标导向 (*Socialist Modernization: the Goal Orientation of Development Strategy in the Primary Stage of Socialism*), in Journal of Heihe University, Vol. 9, 2018, 27-29). It is also the underlying purpose of the Europe 2020 strategy and now of the 2030 strategy for a sustainable Europe. In order to reach their goal, both the systems have learned to reconsider the geometry of their legislation and produced a relevant body of promotional rules so to strengthen the coordinative function of their public authorities. On the other hand, a persistent, though somewhat diminishing, difference in the approach of legal institutions and scholars to economic law and development legislation marks the boundary between the two.

[1202] See G.BENACCHIO, *Diritto Privato dell'Unione Europea,* cit., 359-362

[1203] In second place, on the use of "open clauses" in the legislative provisions, such as the ones which provide for the exemption from the prohibition of state aids certain conducts for purposes of public interest and development (See Art. 107 § 3 of the TFEU). The criteria for the interpretation, implementation and enforcement of competition rules touch upon planning where they do or do not functionalize market behaviors to specific development goals. For instance, a comparative analysis of antitrust laws will show that in the European context the implementing institutions – i.e. in first place the EU Commission – have so far upheld a general prohibition of mergers empowering so-called "champions", i.e. privileged economic operators holding a strategic and state-sanctioned dominant position in a certain market(decision of the Commission of February 6, 2019, about the Alstom-Siemens merger). Such stance purposely disregard, or at least holds in minor regard, the "protectionist" interests concerned with the protection of the internal market from outside economic operators. In literature, some authors also linked such model of non-protectionist antitrust to purposes of promoting an protecting democracy (see N.PETERSEN, *Antitrust Law and the Promotion of Democracy and Economic Growth*, Preprints of the Max Planck Institute for Research on Collective Goods Bonn 2011/3, 2011).

furthermore, to a regulatory framework which exempts them from the application, under certain conditions, of the provisions concerning state aids[1204], as already laid out by the CJEU in the *Altmark* case[1205].

A legal regime for cohesion, therefore, does not pertain to the traditional idea of social market economy. It finds some organizational antecedents in budget planning rules[1206], but overall it is a distinctive and concrete evolution of EU law, not directly associated with any development doctrine.

The implementation of the cohesion principle is mostly carried out through development funds, i.e. the main object of this chapter. The coordination with the budget policy of the Union is in the first place ensured by the simultaneous programming period set out in the Financial Multiannual Framework[1207].

This choice represents, rather than a specification of the principle of social market economy, the European interpretation of those national and regional planning policies part of the legal traditions of the Member States since before the war.

4. Development planning in the constitutional traditions of the Member States

The establishment of the European Economic Community occured, historically, in a moment of great expansion of public intervention in the national economies of the founding Member States[1208]. With the birth of the French Commissariat General au Plan (1946) under impulse from Jean Monnet[1209], post-war Europe entered into the golden age

[1204] Reg. 994/98 provides that the Commission may substract certain categories of aids to the obligation of prior notification. See G.BENACCHIO, *Diritto Privato della Unione Europea*, *cit.*, 380-381. See also Commission Regulation n. 360/2012

[1205] Case C-280/00 of July 24, 2003

[1206] Legal instruments of economic planning and legal instruments of budget planning reciprocally imply and integrate. In the European context, a valid example of a refined and complex legal framework is represented by Germany (See *Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft* (Act to Promote Economic Stability and Growth) of 8 June 1967). At the European level, the coordination of budget policies and provisions is also aimed at development purposes. Member States issue to the Commission a draft budget program for every year, containing specific information to be assessed (see Art. 6 of Reg. 473/2013)

[1207] See Reg. 1311/2013 for the period 2014-2020

[1208] See B.EICHENGREEN, *The European Economy since 1945*, Princeton University Press, Princeton, 2007; J.HAYWARD, O.NARKIEWICZ (edited by), *Planning in Europe*, Croom Helm, London, 1978

[1209] See J.HAYWARD, O.NARKIEWICZ (edited by), *Planning in Europe*, *cit.*, 27. Incidentally, I cannot help but notice, as also reported in *ibidem*, that Jean Monnet was one of the founding fathers of modern Europe and avocated for the implementation of the Schuman plan which later was to lead to the foundation of the ECSC.

of planning[1210]. In the following two decades, most western European countries adopted forms of development planning, following two main directives. On one hand, a development planning strongly integrated with a centralized industrial policy, favoring the constant concertation between public authorities and private economic operators and directing state resources to boost the growth of specific industrial sectors[1211]. On the other hand, a regional planning approach, focused on funds' disbursement over less-developed regions[1212].

The first constitutional recognition of economic planning, though not mentioning it, was contained in Art. 156 of the Weimar Constitution[1213]. After the war, the French Constitution of 1946 contemplated the possibility to issue a "*national economic plan for full employment and the rational utilization of material resources*" and the 1958 Constitution states (Art. 34) that "*Programming Acts shall determine the objectives of the action of the State*". The Italian Constitution of 1948[1214] empowered the State to determine, through law, programmes and controls over the economy, in Art. 41 § 3. Spain followed in 1978 (Art. 40 § 1 of the Constitution). The underlying idea motivating such "constitutionalization" of planning was the (at least partial) functionalization of private

[1210] With the term "golden age of planning" I refer to that period, running from 1945 to 1975 approximatevely, which saw several countries of different political and legal systems experiencing enthusiasm for development planning. On the topic see A.ROBERTSON, *People and the State,* cit.; see also R.CUONZO, *La programmazione negoziata,* cit., 99 (footnote n. 223).

[1211] This was the stance adopted particularly in France, whose industrial policy and planning policy is extensively dealt with in J.HAYWARD, O.NARKIEWICZ (edited by), *Planning in Europe,* cit. On the topic see also R.DU BOFF, *The Decline of Economic Planning in France*, in The Western Political Quarterly, Vol. 21(1), 1968, 98-109; S.ALI, *Economic Planning in France 1945-1965: A brief review*, in The Punjab University Economist, Vol. 7(1), 1969, 51-69

[1212] In countries where regional disparities in socio-economic development were wider (e.g. Spain, Italy), this was the most favored approach, so that even national planning was in concrete to be implemented mostly through differentiated regional plans, otherwise resulting quite ineffective. See R.HUDSON, J.LEWIS, *Regional Planning in Europe*, Pion Limited, London, 1982

[1213] Art. 156 stated that "*The Reich may transfer economic enterprises suited for nationalization into common property (…) It may join in the administration of economic enterprises or syndicates or may order the states or communities to do so, or may otherwise assure decisive influence.*
In case of urgent demand the Reich furthermore may enforce the merger of economic enterprises and syndicates for the benefit of public welfare with the aim to assure the cooperation of all producing sections of the people, in order to participate employers and employees in the administration, in order to regulate production, distribution, usage, pricing, im- and export of wares according to principles of the social economy".

[1214] Prior to the Constitution, Italy had a quite long tradition of public intervention in the economy and since the 1920s a theoretical debate about the functions of planning had been going on. Once again, it was the first world war to determine an acceleration in the promotion of planning mechanisms. See PICOZZA, *Vicende e procedura della programmazione economica*, in F.GALGANO (edited by), *La Costituzione Economica*, Trattato di Diritto Civile e Commerciale, Vol. 1, Cedam, Padova, 1977, 264

economy to social purposes, to be achieved through adequate policy frameworks and programmes[1215].

In principle, this approach was justified by a general acceptance of the social function of property, incorporated in the constitutional traditions of western European countries[1216] and recognized by the Court of Justice of the then ECC as a founding principle of the European integration[1217].

The traditional vision of public intervention in the economy followed two fundamental forms of intervention: i) the direct exercise of an economic activity by the State; ii) public control over private economic activities[1218].

With a notable exception (France), national economic planning in western Europe came to be strongly associated with state control of industrial capital. In Italy, a short-lived attempt at coordinated planning produced just one planning act[1219]. On the other hand, the public intervention in the economy was widespread and diversified at least in the first fifty years of Italian republican history[1220]. It relied on industrial subsidies, price control and production regulation, coupled with detention of relevant capital in formally private enterprises[1221].

Italian planning was never imperative and displayed a chronic inability to address the structural shortcomings of the industrial system[1222]. Similar doubts were raised toward

[1215] See S.MAZZAMUTO, *Piano Economico e Pianificazione,* cit., 544-545. In Italy, planning found a statutory expression with Law n. 685/1967 which introduced a national economic programme for the period 1966-1970. On the Italian economic planning see also M.CARABBA, *Un ventennio di programmazione : 1954-1974*, Laterza, Roma-Bari, 1977; M.GIUSTI, *Fondamenti di Diritto dell'Economia,* cit., 111-141

[1216] In addition to the Italian and Spanish constitutions see also § 14 and 15 of the German 1949 Constitution.

[1217] See, for instance, the landmark decision of the Court of Justice in the *Hauer* case (C-44/79) of 13 December 1979, see in particular § 20.

[1218] *Ibidem*; see also M.GIUSTI, *Fondamenti di Diritto dell'Economia,* cit.,

[1219] It was the Five-Year Programme 1966-1970, approved with Law n. 685/1967. The failed experience of national general planning led however to the enactment of several special and regionals programmes in the successive years. See R.CUONZO, *La programmazione negoziata,* cit., 100-132

[1220] See M.GIUSTI, *Fondamenti di Diritto dell'Economia,* cit.

[1221] See *ivi,* cit., 197-209. See also J.HAYWARD, O.NARKIEWICZ (edited by), *Planning in Europe,* cit., 20. In Italy, the model of economic development embraced relied on State capitalism structures, such as the Institute for Industrial Reconstruction (*Istituto per la Ricostruzione Industriale* or IRI) which, in its historical experiences, came to resemble a management institution for State-Owned assets, not much different from the Chinese SASAC. Moreover, between 1956 and 1993 a Ministry for State-Owned Assets (Ministero delle Partecipazioni Statali) operated.

[1222] See R.CUONZO, *La programmazione negoziata,* cit., 128-132

national planning in France[1223], whose experience, for historical reasons and regulatory complexity[1224], is among the most significant in western Europe[1225].

Development planning in several countries of western Europe (Italy, France, Spain) echoed the dimension of social and territorial cohesion more than the doctrine of Social Market Economy. The EU experience is thus in partial continuity with such national legal traditions. On the other hand, it has been noted that the creation of the EEC led to a drastic reduction in the frequency and intensity of States' intervention in the economy[1226].

This is due to the emergence of a regulatory approach[1227] which is not fully integrated with the policy implications of the principle of cohesion.

5. The institutions of European Development Planning

The institutional framework of European economic governance, though mirroring in part the Union's institutional structure as described in the books, differs from it with regard to both the particular role of certain organs and the distribution of powers and competences. As far as investment funds are concerned, it is the Commission to exercise the most significant powers in terms of coordination and management of such funds, together with national authorities[1228].

The activity of development planning requires a necessary "confusion" or intertwining of purely legal mechanisms and other acts and procedures which would be otherwise defined as political. The employment of inter-institutional negotiation[1229] to define strategies

[1223] See *ivi*, cit., 137-139

[1224] The idea of the economic intervention of the State was part of the French legal traditions since the absolute monarchy. Furthermore, when after the war the idea of economic planning was transposed into planning acts, the rules about their drafting procedures grew increasingly complex. On the French experience in economic planning see *ivi*, cit. 133-170.

[1225] French legal doctrine even discussed the issue of the legal nature of economic plans. While early opinions denied the legal nature of plans on the basis of a theoretical opposition between law and economic planning in a liberal economy. In the Conseill Constitutionelle in 1982 seemed to embrace a different stance and declared that programming was an activity reserved to law. French legal scholars, however, never abandoned a somewhat skeptic view over the legal force of economic planning. On the issue see *ivi*, cit., 162-170

[1226] See CORSO, *Splendori e Miserie dell'Intervento Pubblico nell'Economia Italiana*, in M.CAFAGNO, F.MANGANARO (edited by), *L'intervento pubblico nell'economia,* cit., 593

[1227] See G.DI GASPARE, *Diritto dell'economia,* cit.

[1228] This is an institutional element which draws these fields of European Law near to other important sector of economic legislation, such as Antitrust and Competition Law. See G.BENACCHIO, *Diritto Privato della Unione Europea*, cit., 351 ff.

[1229] Inter-institutional and inter-governmental negotiation have been referred to by some authors as the new core of the European institutional system, while, at the same time, the role of the Commission as "engine"

constitutes a legal basis for the elaboration and implementation of subsequent provisions, as reminded by Recital n. 3 of Reg. n. 1303/2013 and by Art. 5 of the same Regulation[1230]. The synthesis and intertwining between law and politics is expressed to its greatest degree in the activity of the **European Council**[1231]. Pursuant to Art. 15 § 1 of the TEU the European Council "*shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions*". From the perspective of development planning strategies, however, the *dictum* of Art. 15 appears to be reductive where narrowly interpreted[1232]. The exercise of impulse functions, indeed, is transposed, in concrete, in the approval of policy strategies which determine some numerical goals valid for each planning cycle[1233]. This has been the case, for instance, with Europe 2020, a strategy elaborated by the Commission but formally issued and approved by the European Council with the Conclusions of the 17th of June 2010.

Obviously, due to its composition[1234] and role, the European Council is the organ in charge of politically sanctioning a certain strategy, of defining the common priorities of the MSs[1235]. On the other hand, the decision-making procedure by consensus (Art. 15 § 4 TEU) introduces an element of deliberative democracy which recurs over the whole cycle of funds' implementation[1236] .

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of European integration has been greatly reduced in the recent years. See G.DI GASPARE, *Diritto dell'Economia,* cit., 265-267

[1230] Only by taking into account this aspect it is possible to comprehend and analyze the different roles played by the institutions. As I will highlight in the conclusions as well, such consideration leads me to point out another observation, that concerns the inherent similarity in the structural foundations of planning law in every legal system. Planning law as such relies on an alteration of the traditional legal syllogism, employs communicative decision-making procedures and does not recognize a clear division between law and politics.

What is instead different is in first place the distribution of powers, the direction in the exercise of such powers – i.e. top-down or bottom-up – as well as the concept of efficiency of the legal rule, derived from a difference in the philosophical theorization of efficacy.

[1231] See DE SCHOUTHEETE, *The European Council*, in J.PETERSON, M.SHACKLETON (edited by), *The Institutions of the European Union*, Oxford University Press, Oxford, 2006, 45-48

[1232] In particular, as I am about to point, with particular reference to the concept of legislative functions

[1233] There is, then, the issue of coordination of these planning cycles, since Europe 2020 represents the general strategy but the time cycles set by each fund may differ. They last, usually, for five years

[1234] According to Art. 15 § 2 "The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work".

[1235] See DE SCHOUTHEETE, *The European Council,* cit., 48-49; E.CANNIZZARO, *Il Diritto dell'Integrazione Europea*, cit., 25-29

[1236] In comparative perspective, it may be argued that the European Council carries out, at least to some extent, functions which, in the Chinese context, are partly a prerogative of the National People's Congress and partly a prerogative of the Central Committee of the Communist Party. In particular, while the formal

The "democratic"[1237] deficit of this governance model is essentially due to the inter-governmental dimension in the negotiation of development straregies, which is balanced in two ways: i) the bottom-up approach in the functioning of the funds[1238]; ii) the inclusion of social bodies in the negotiation procedures for partnership agreements.

A strong emphasis on the inter-governmental dimension relegates both the **Council** and the **Parliament** to a secondary role. The functions of the two institutions may be grouped under three fundamental ensembles. On one hand there is a general legislative power, derive from the role provided for in the Treaties. The relevant Regulations we are discussing and will be discussing are approved with the ordinary legislative procedure, thus with full intervention by both the Council and the Parliament[1239].

In the second place, the two institutions intervene in the planning process not only through the issuance of regulations and other primary sources, but also through other decisions affecting the implementation of plans and programs[1240].

In third place, both the Council and the Parliament retain a general and quite "soft" supervisory function. Such supervision is, for the most part, exercised through the obligation, placed on the Commission, to periodically report to the Parliament and the Council about the state of implementation of cohesion policies[1241]. With special regard to the Council, supervision also channels the political interaction between Member States

sanction to the Plan is given by the National People's Congress, it is the Central Committee which, through its recommendations (建议 – *jianyi*) lays out the blueprint of the planning process. These conclusion are reinforced by some specific characteristics of the European Council, as laid out by DE SCHOUTHEETE in *The European Council*, cit., 45-47. These features are: authority, informality, flexibility, unequal relationships, seniority and ambivalence. In the European Council, representatives of bigger and richer member states exert more power their other representatives. At the same time, long-serving heads of state and government, even if coming from smaller countries, may be able, after a few years, to exercise a considerable political power.

We cannot, however, indulge into easy comparisons: in the European legal system the political role of the European Council is democratically legitimized by the mandate of its components – i.e. chiefs of State and chiefs of governments – so that the principle of representative democracy is not harmed. In China, as already seen, the system employs different solutions and the democratic legitimacy of the Communist Party comes through different theoretical channels.

[1237] Talking about democratic deficit could appear improper. To clarify, I am referring to a representative and liberal notion of democracy and not to a Chinese notion of democracy.

[1238] The concept is reaffirmed by the white paper on multilevel governance which explicitly links this concept to that of participatory democracy

[1239] With regard to the Regional Development Fund, Art. 178 of the TFEU empowers the Parliament and the Council to adopt, through ordinary legislative procedure, also the implementing regulations.

[1240] For instance, Art. 23 § 9 of Reg. 1303/2013 empowers the Council, under initiative from the Commission, to decide over the suspension of funds with regard to a member State when the mentioned conditions are fulfilled.

[1241] See Art. 23 (§ 15-16-17) and Art. 53 of Reg. 1303/2013

and the Commission[1242]. Moreover, the Parliament, pursuant to Art. 225 of the TFEU, holds the power to demand from the Commission a proposal over measures to adopt with regard to certain issues. Furthermore, the Council, acting on a proposal from the Commission, decides over the existence of a member State's excessive deficit (Art. 126 § 6-7-8 of the TFEU). Such decision constitutes, pursuant to Art. 23 of Reg. 1303/2013, a possible justification for the suspension of funds toward a member State.

A "softer" and mostly consultative position is occupied by the **Social Economic Committee** and the **Committee of Regions.** Their consultative role is defined in the treaties and reaffirmed in several sections of the regulations about investment funds and policies[1243]. Secondly, the two committees may exert influence and stimulate debate over specific issues[1244].

However, their role in the negotiation procedures for partnership agreements is not a primary nor a particularly significant one since the procedures are managed and coordinated by the Commission (Art. 14 Reg. 1303/2013).

A point that is worth raising concerns the potential importance of these two committees having regard to their composition. The Social Economic Committee represents those intermediate social bodies which are an integral part of the multilevel governance paradigm[1245]. The Committee of Regions instead represents the local entities[1246]. Their fundamental rationale is to "*mobilize additional input (…) for the European decision-making*".

The role played by the two committees is torn between a concrete influence over other institutions' deliberations (on account of the technical legitimacy they bear) and a soft

[1242] See HAYES-RENSHAW, *The Council of Ministers*, in J.PETERSON, M.SHACKLETON, *The Institutions*, cit., 75-77.

[1243] See, for instance, Art. 16 and Art. 53 of Reg. 1303/2013. On the general consultative role of the two committees see R.ADAM, A.TIZZANO, *Lineamenti di Diritto dell'Unione Europea*, Giappichelli, Torino, 2010, 101-107

[1244] As we have seen, the Committee of Regions has been particularly active in the definition of a concept of multilevel governance and has issued the 2009 White Paper on Multilevel Governance, later on transposed into a proper Charter of Multilevel Governance.

[1245] Pursuant to Art. 300 § 2 of the TFEU "*The Economic and Social Committee shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio- economic, civic, professional and cultural areas*".

[1246] Art. 300 § 3 TFEU: *The Committee of the Regions shall consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly*

consultative position destined to be often ignored[1247]. So far, the bottom-up approach upheld by the Commission in managing the development funds has tried to enhance the inclusiveness principle especially at the local level, delegating the realization of the "dialogue" between social bodies to national and local governments, pursuant to the principle of subsidiarity. As a consequence, the two committees have not embodied, at least legally speaking, the dimension of inclusiveness pursued by European legislation on investment funds and investment planning.

Within the institutiona framework of European economic governance, the most significant position is occupied by the **Commission**[1248]. Such position is defined in the first place by the treaties. Art. 175 § 2 of the TFEU provides for the Commission to "*submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years on the progress made towards achieving economic, social and territorial cohesion (…) this report shall, if necessary, be accompanied by appropriate proposals*". The TFEU underlines the coordinating role of the Commission as far as cohesion policy is concerned[1249]. Such role is better specified in the several tasks mentioned by Reg. 1303/2013, first and foremost the approval of partnership agreements (Art. 16) and of their admendments.

The European Commission directs the negotiation process with member states and assesses the compliance of the agreements reached with the relevant legal sources, the EU policies and their goals. From an organizational perspective, the Commission relies on a series of inner departments[1250] whose competence reflects the wide variety of subjects and fields touched by EU policies and, as far as our topic is concerned, by partnership agreements. In particular, several Directorates General (DGs) are in charge of elaborating the specific recommendations to member states' regarding the implementation of the Europe 2020 strategy[1251].

[1247] See JEFFERY, *Social and Regional Interest*, in J.PETERSON, M.SHACKLETON, *The Institutions*, cit., 321-329

[1248] See A.DRUMAUX, P.JOYCE, *Strategic Management for Public Governance in Europe*, IIAS Series: Governance and Public Management, Palgrave Macmillian, London, 2018, 81-122

[1249] This role is in line with the provisions of Art. 17 § 1 TEU, according to which the Commission promotes the interests of the Union and adopts, to such purpose, the relevant initiatives. The Commission exercises, therefore, its coordinating role due to its independent nature, serving only the interests of the Union. On the topic see E.CANNIZZARO, *Il Diritto dell'Integrazione Europea,* cit., 33-34

[1250] See A.DRUMAUX, P.JOYCE, *Strategic Management*, cit., 81-122

[1251] See *ivi*, cit., 211-214

The coordinative role of the Commission is also expressed through the concrete management of investment funds, where a management structure is provided for by the legal sources. Reg. 1017/2015 on the European Fund for Strategic Investments states (Art. 4) that the Commission concludes an agreement with the European Investment Bank for the management of the fund. The Commission also nominates three of the four members of the fund's steering board (Art. 7 § 3).

Beside a general coordinative role and complementarily to it, the Commission plays a significant supervisory role. According to Reg. 1303/2013, member states forward to the Commission an annual report about the implementation of investment programmes (Art. 50). In the second place, the regulation provides for the organization of annual meetings between members of the Commission and representatives of the member states (Art. 51). In the third and last place, the Commission exercises a relevant secondary rule-making power, concerning amendments and implementation acts of the relevant regulations[1252], as provided for by the regulation themselves. Such power derives, legally, from Art. 290 of the TFEU.

Beside the Commission, significant operative functions are carried out by the **European Investment Bank** (EIB) which represents, together with the European Social Fund, one of the two development planning institutions established by Art. 3 of the 1957 Rome Treaty, respectively with letters i) (the ESF) and j) (the EIB). In that context, the two institutions had to serve the purpose of harmonious development of internal market (Art. 2 of the Rome Treaty). Nowadays, although that purpose still holds value[1253], the concept of development has been incorporated into specific strategies functioning as an additional justification and basis for the activity of the EIB as well as the investment funds.

Such process was driven by the gradual expansion of the role of investment funds in the Union's cohesion policy[1254]. The EIB represents a fundamental joining link between two functions of the investment funds: the technical-financial one and the political-administrative one.

[1252] Apart from Reg. 1303/2013 and Reg. 1017/2015, we may refer, for instance, to Reg. 1300/2013 on the Cohesion Fund, Reg. 1301/2013 on the European Regional Development Fund as well as other regulations laying out provisions for each specific active fund.

[1253] See R.ADAM, A.TIZZANO, *Lineamenti di Diritto,* cit., 100-101

[1254] See Research for Regi-Committee – Review of the Role of the EIB Group in European Cohesion Policy, 2016, 37

Internally, the EIB is organized as a peculiar financial institution. It has legal personality (Art. 308 TFEU) and a board of governors designed by the shareholders, i.e. the member states[1255] (Art. 6 of the EIB Statute). The board of governors designes the management committee (Art. 11 of the EIB Statute) as well as the board of auditors holding supervisory and control tasks (Art. 12 of the EIB Statute).

The main purpose of the EIB is defined by Art. 16 of its Statute which, in turn, refers to Art. 309 of the TFEU. If, on a theoretical level, the EIB's mission is to contribute to the development of internal market, in concrete such its action is carried out through a diversified range of financial instruments, mainly loans and guarantees[1256] over activities of European economic operators, both public and private[1257].

The destination of EIB activities and investments is specified in Art. 309 of the TFEU and reflects the objectives of general development policies[1258].

The EIB comes to play an essential role in the implementation of structural funds' initiatives. Reg. 1303/2013 confirms such perspective. Art. 31 (§ 1) specifies that "*The EIB may, at the request of Member States, participate in the preparation of the Partnership Agreement, as well as in activities relating to the preparation of operations, in particular major projects, financial instruments and PPPs*". The same article provides for the EIB to carry out, when requested by the Commission, consultation tasks (§ 2), technical analysis of major projects (§ 3) as well as being the recipient of grants and service contracts (§ 4). Art. 38, furthermore, states that managing authorities of member states may entrust project implementation tasks to the EIB (§ 4 a)[1259].

[1255] Art. 4 of the EIB Statute defines the shares of each member state

[1256] There can be, however, other instruments, as described in the Research for Regi-Commitee – Review of the Role of the EIB Group, cit., 42

[1257] See Art. 16 of the EIB Statute

[1258] It comprises "*(a) projects for developing less-developed regions; (b) projects for modernising or converting undertakings or for developing fresh activities called for by the establishment or functioning of the internal market, where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States; (c) projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States*".

Art. 18 of the EIB Statute reflects the logic of Art. 309 of the TFEU and further specifies that the EIB may issue loans and guarantees only when "*(a) where, in the case of investments by undertakings in the production sector, interest and amortisation payments are covered out of operating profits or, in the case of other investments, either by a commitment entered into by the State in which the investment is made or by some other means; and (b) where the execution of the investment contributes to an increase in economic productivity in general and promotes the attainment of the internal market*".

[1259] Managing authorities may also conclude contracts with the EIB for implementation purposes without activating tendering procedures or competitive procurement procedures (see Research for Regi-Commitee – Review of the Role of the EIB Group, cit., 36).

The EIB, though acting on impulse from other institutional actors, may carry out management functions for financial resources destined to investment funds. Reg. 1017/2015 on the European Fund for Strategic Investments (EFSI) regards the EIB as a co-direction organ of the fund together with the Commission, empowering it to nominate one of the steering committee members[1260].

The EIB carries out, in addition, two other significant tasks: the first one is a monitoring function deriving from its active role in the management of the operations. The second one is a consultative function, with regard to technical assistance as laid out in Art. 58 of Reg. 1303/2013 (§ 2 lett. a, e, j).

In the last place, an assessment of the *multilevel* system of EU economic governance requires the consideration of the function of **national and local governments**.

National and local governments are an integral part of the multilevel governance system. National governments are in charge of designating a managing authority for the partnership agreement as well as a monitoring committee (Art. 47 Reg. 1303/2013). Managing authorities are usually locally-based entities such as local governments. The interaction between national and local governments is the core of the whole system of structural funds, according to a bottom-up approach to funds' management[1261].

National governments also have to designate committees in charge of the local-led development programs pursuant to Art. 34 of Reg. 1303/2013.

In institutional perspective, national governments are able to exert their influence over Council decision-making through the activities of the Coreper II[1262] and the Coreper I[1263]. The activity of these Committees, i.e. the preparation of the Council's works and reunions, aims at integrating interests as well as promoting, through political bargaining, different instances coming from different national contexts, leading to a *de facto* decision-making activity[1264].

[1260] The EIB is part of the fund management agreement. In a similar fashion, the European Union's financial guarantee over EIB and EFSI projects initiated pursuant to the regulation derives from an agreement between the EIB and the Commission.

[1261] On the topic, see L.DANIELE, S.AMADEO, C.SCHEPISI (edited by), *Aiuti pubblic alle imprese,* cit., 233-252.

[1262] In charge, among other functions, of assisting the Council in the preparation of works regarding structural and cohesion funds.

[1263] In charge, among the others, of preparing works about fishery and agricultural policies, as well as R&D and social policies.

[1264] See LEWIS, *National Interests,* in J.PETERSON, M.SHACKLETON, *The Institutions,* cit., 281-288. From this perspective, the national governments have a legal-political role to be exercised – at least theoretically – in the ex ante definition of those strategies which inspire the partnership agreements. There is, in other

6. The Legal sources of European development planning

From the principle of cohesion derives a coordination of investments on the basis of projects, following a decentralized approach and referring to funds covering specific policy areas. It is, in other words, a system which seeks to "plan without plans"[1265]. The legal framework which derives from such premises is, to some extent, an attempt to reach an institutionalization and legalization of the example represented by the Marshall Plan, which functioned as a driving force for the early European integration[1266].

To do so, even in the absence of a unifying act such as the plan, the European legislature shaped a system of legal sources fit to reflect the dynamics of such "negotiated planning"[1267].

These sources have different nature but their formal legal effect does not always reflect the importance they hold during the course of the planning process. Their content reflects the general operative principles which govern the whole system of EU development funds, i.e., in the first place, the principle of subsidiarity, the principle of inclusiveness (also called "of participation") and a broad principle of deliberative democracy founded over consensus[1268].

6.1 The Treaties

words, a double negotiation: one occurs at the moment of the definition of strategies; the other one occurs with the partnership agreement.

[1265] Planning without plans actually refers to a policy that has already been tested in history, as planning and plan, as we all know, are two different things. The capital letter referring to plans obviously indicates the rejection of plans in the proper sense, as formal documents endowed with a certain peculiar juridical nature and connected to an idea of economy and country-system, as happens in China.

[1266] See LAK, *The Early Years of the European Integration*, in J.DE ZWAAN ET AL., *Governance and Security Issues*, cit., 21. Even the promotion of harmonization of the market as well as in the market through competition enhancement was regarded as political solution to facilitate post-war reconstruction while avoiding the formation of industrial cartels which in the past, especially in Germany, had favored the rise to power of nationalist forces (see *ivi, cit.*, 21-22, see also N.PETERSEN, *Antitrust Law and the Promotion of Democracy*, cit.)

[1267] On the notion, see R.CUONZO, *La programmazione negoziata*, cit.

[1268] These are the general principles which in western experiences govern the model of the "negotiated programming". For a thorough explanation of such principles, focused on Italy but valid for the EU as well, see *ivi*, cit., 178 ff. It could be useful to spend just a few words on the principle of consensus, which represents, in the perspective of modern EU deliberative democracy, the critique of the traditional principle of authority of the public powers and the preference for the stipulation of agreements among the subjects involved in the planning process (see *ibidem*).

In the Treaties the issue of development planning's strategies is addressed and assessed with regard to the cohesion and solidarity policies, as laid out in Art. 3 § 3 of the TEU. On the basis of socio-economic and cultural asimmetries in the then ECC, since the 1980s European institutions commenced a comprehensive reflection about territorial cohesion policies[1269].

It was the European Single Act to introduce a specific action of the then EEC for the purpose of economic cohesion[1270], realizing, at least in part, that paradigm of harmonious development laid out in the Rome Treaty of 1957[1271]. From then on, at least on a constitutional level, the principle of cohesion became a theoretical pillar of the European legal order, also inspiring amendments in the fundamental laws of member states[1272].

Cohesion, therefore, becomes the guiding principle for territorial cooperation[1273]. Furthermore, especially after the Lisbon Treaty and the Economic Crisis of the 2000s, the concept of cohesion has been increasingly associated with that of redistribution, emphasizing the solidarity aspect[1274]. European development planning law acquires a stronger social dimension complementary to the territorial dimension[1275].

Apart from Art. 3 of the TEU, the entire Title XVIII of the TFEU deals with Economic, Social and Territorial Cohesion Policies. This title is part of a group also including Titles XIX and XX, concerning, respectively, research and technological development, and environment. What pulls together the three sections of the TFEU is the underlying logic which supports the provisions they lay out. This logic empowers the European Institutions

[1269] See MCMASTER, VAN DER ZWET, *Macro-regions and the European Union: The Role of Cohesion Policy*, in S.GÄNZLE ET AL. (edited by), *A 'Macro-regional' Europe in the Making*, Palgrave Macmilla, Cham, 2016, 47-71, 49. In hindsight, the problem of territorial asymmetry had already been posed with the creation of the regional development fund: operational solutions therefore already existed, what has been started since the years has been more the theoretical reflection on the subject than by to incorporate these principles fully into the fundamental legal texts of the union

[1270] See C.NOTARMUZI, *Le politiche di coesione e la gestione dei fondi strutturali europei nella programmazione 2014-2020*, in Giornale Dir. Amm., Vol. 6, 2014, 563

[1271] See *ivi*, cit., endnote no. 4

[1272] For instance, the Constitutional Law n. 3/2001 of the Italian Republic reformulated the text of Art. 119 of the Constitution, introducing (§ 5) a reference to the promotion of cohesion and solidarity.

[1273] See MCMASTER, VAN DER ZWET, *Macro-regions and the European Union,* cit., 50

[1274] See BRANCASI, MARZUOLI, *The Function of Redistribution Between Crisis and Inclusion*, in F.MERLONI, A.PIOGGIA (edited by), *European Democratic Institutions and Administrations*, Springer, Cham, 2018, 140

[1275] See Art. 174 TFEU. From this perspective, cohesion policy is different from both budget policies (See BRANCASI, MARZUOLI, *The Function of redistribution,* cit., 140) and sovereign debt restructuring measures such as the quantitative easing (see *ivi,* cit., 139).

to exert actions and strategies concurrent with the Member States' competence, in a more incisive way compared to nearby Titles of the TFEU[1276].

The technique employed is based on the definition of several organizational rules in the Treaties. Such element, in Title XVIII – and even more in Title XIX – is particularly evident. If Art. 174 lays out long-term goals for investment policies[1277], Art. 175 of the TFEU explicitly mentions the structural funds as a practical instrument to implement investment planning strategies. Art. 175 only mentions three funds – i.e. the European Agricultural Guidance and Guarantee Fund; the European Social Fund; the European Regional Development Fund – but the notion of funds is not restricted to them. Therefore, at least the Cohesion Fund mentioned in Art. 177 and the Fund for Strategic Investment instituted with Reg. 1017/2015 must be regarded as fundamental instruments of European development planning law. Art. 175 § 1 ends with an open clause, mentioning "other financial instrument" that may be employed in order to reach the objectives of cohesion policies. Such expression once again stresses the financial nature of European planning instruments, intended as means to allocate financial resources.

Art. 175 § 3 also lays out the specific EU actions for cohesion, stating that "*If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions*".

Funds, therefore, are not an exclusive feature of the investment planning system since they are just a part of a broader scope of action from the European institutions. Nevertheless, they today represent the most relevant legal instrument of such system[1278].

[1276] For instance Title IX (employment), Title X (Social policy) Title XIII (Culture), Title XIV (Public health), Title XVII (Industry).

[1277] *"In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.*
In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.
Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross- border and mountain regions".

[1278] Art. 175 also mentions the EIB, whose activity has indeed developed, in the last decade, in close relation with development funds. See Research for Regi-Commitee – *Review of the Role of the EIB Group*, cit.

Art. 177, acting from a constitutional perspective, requires that "*the tasks, priority objectives and the organization of the Structural Funds*" are defined by "*regulations in accordance with the ordinary legislative procedure*"[1279].

The Treaties, when defining the legal techniques and mechanisms for the enactment of cohesion policies, require the mandatory consultation of both the Economic and Social Committee and the Committee of Regions, thus "reinforcing" the ordinary legislative procedure[1280].

If Title XVIII recognizes the funds and their scope, leaving the definition of detailed rules concerning their management to specific Regulations, Title XIX takes a further step. Such Title, regarding "Research and Technological Development and Space" provides for the issuance of a multiannual framework program adopted through ordinary legislative procedure with prior consultation of the Economic and Social Committee (Art. 182 TFEU). In other words, the TFEU introduces a legal act issued by European Institutions which represent a functional equivalent of a development plan. The reasons for this statement are clarified by the Treaty itself.

The framework programme, on the basis of policy goals and priorities laid out in Art. 179 and 180: i) defines objectives; ii) defines, in their general features, the activity to be carried out in order to reach those objectives; iii) "*fix the maximum overall amount and the detailed rules for Union financial participation in the framework programme and the respective shares in each of the activities provided for*"[1281].

The programme is flexible and may be amended depending on the evolution of strategic priorities (Art. 182 § 2). It is implemented through more specific programmes adopted by the Parliament and the Council. Pursuant to Art. 183, such specific programmes must "*determine the rules for the participation of undertakings, research centres and universities*", reflecting an inclusive logic[1282].

[1279] The article adds that "*The general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing Financial Instruments shall also be defined by the same procedure*". Furthermore, § 2 provides for the establishment of a cohesion fund in order to financially support "*projects in the fields of environment and trans-European networks in the area of transport infrastructure*".

[1280] The same occurs with regard to environment, as laid out in Art. 192. See also C.PANARA, *The Subnational Dimension of the EU,* Springer, Cham, 2015, 67. The same logic is also followed by Art. 178 which reserves to the Parliament and the Council a competence in the enactment of implementing regulation, again with the prior consultation of the two committees.

[1281] Art. 182 § 1 of the TFEU

[1282] In the second place, the cooperation may lead to the participation of the Union to research and development programmes initiated by Member States (Art. 185) or by third countries or international

The Commission must periodically report about the research and development activities' implementation state (Art. 190).

The programme now in force under the framework of Title XIX of the TFEU is Horizon 2020 (established by Reg. 1291/2013), which, together with Europe 2020, will be analyzed as a separate category of legal sources of European development planning.

Partially different is, instead, the legal regime laid out in Title XX, concerning environment.

Art. 192 provides for the Council – through a special legislative procedure[1283] – to adopt, where necessary, measures for the achievement of objectives laid out in Art. 191. Such measures comprise fiscal measures, urban planning measures and waste management measures.

Where the measures requested by the European institutions should be too expensive to enact for the member states' authorities, § 5 of Art. 192 authorizes exceptional terms or financial support from the Cohesion Fund established by Art. 177.

6.2 Plans and Strategies

That of strategies and investment plans represent a macro-category which cuts through the traditional hierarchy of legal sources[1284]. Beside general documents quoted in regulations[1285], we find strategies that the same regulations lay out and define[1286]. In this section I will try to sketch a sort of logic hierarchy and scheme of the subdivision of such strategies. A hierarchy which, it is worth pointing out, does not correspond to the proper legal hierarchy. Therefore, the justifications which supports the hierarchy I will describe pertain to the inner logic of planning.

If the research question is whether or not exists a plan – or some plans – in the European legal order, we must break up the traditional scheme of legal sources in order to find those

organizations (Art. 186). In the third place, the Union may set up "joint undertakings" or "any other structure necessary for the efficient execution of Union research, technological development and demonstration programmes".

[1283] See E.CANNIZZARO, *Il Diritto dell'Integrazione Europea,* cit., 66-67.

[1284] On the hierarchy of legal sources in EU law see *ivi,* cit.; G.BENACCHIO, *Diritto Privato della Unione Europea,* cit.

[1285] Such as Europe 2020

[1286] As in Horizon 2020, disciplined by Reg. 1290 and 1291 of 2013

policy lines and directives which reflect the fundamental institutes and concepts of planning.

The employment of policy strategies based on indicators, implementation and monitoring mechanisms is common knowledge among European governance scholars [1287]. Furthermore, the relevant primary sources often refer to those strategies, regarding them as guiding criteria for development and implementation of legal provisions[1288].

However, if our first question is whether such strategies, in comparative perspective, may be regarded as proper Plans, the answer cannot help but be negative. Today, there is not, in the European legal order, an act which may be defined as a Plan according to the criteria assessed in the Chinese part of this research.

While investment funds reflect a structural planning logic[1289], the same does not always occur for major comprehensive strategies, which may also be a consequence of contingent occurrences, as happened with the Juncker Plan, regarded as a response to an economic depression phase. In other cases, long-term development strategies follow a more or less regular pattern[1290] which is, however, not always in line with the timeframe of both budget and funds' policy cycles.

European planning strategies are somewhat fragmentary. An element of coherence is indeed provided by the alignment of European strategies with global sustainable development strategies, for instance with embracement of the UN 2030 Agenda for Sustainable Development [1291] by the EU [1292]. The 2030 Agenda lays out seventeen development goals [1293] which overlap with European strategies, so that the role of

[1287] See E.HARTMANN, P.KJAER (edited by), *The evolution of intermediary institutions in Europe*, Palgrave Macmillan, 2015, 101-103

[1288] See, for instance, Art. 4 of Reg. 1303/2013; Whereas n. 2 of Reg. 1305/2013, Whereas n. 4 and Artt. 3 and 5 of Reg. 1302/2013

[1289] See N.BERNARD, *Multilevel Governance*, cit., 102

[1290] While R&D programmes such as Horizon 2020 find their legal basis in the Treaties, the Europe 2020 strategy had indeed followed the so-called Lisbon Strategy, which ran from 2000 to 2010 with modest results.

[1291] Resolution adopted by the General Assembly on 25 September 2015, 70/1, "Transforming our world: the 2030 Agenda for Sustainable Development".

[1292] See the Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on *The new European consensus on development "Our World, our Dignity, our Future"* (2017/C 210/01), June 30th 2017.

[1293] See, for more detailed information, the official UN website at the page https://www.un.org/sustainabledevelopment/development-agenda/

development funds becomes capital in ensuring the implementation of such goals[1294]. On an even broader level are the European agendas defined for each legislative cycle by the European Council[1295], which however are not strictly focused on development and display a purely political nature.

Looking for a formal Plan – with the capital "P" – in the European legal order would be an useless effort. We may, however, look for some functional equivalents, at least with regard to specific policy fields[1296].

Furthermore, we may look for institutional dynamics, incorporated into such strategies and which represent typical legal features of development planning. I am referring to the considerations laid out in the Commission's Communication on Europe 2020[1297]: i) impulse role of the European Council, as the main legal-political institution, empowered to adopt the planning strategies; ii) operative, coordinating and monitoring role of the Commission; iii) inclusion of intermediate social bodies and the civil society in the elaboration, implementation and enforcement of strategies.

Longterm strategies, with the exception of those covered by Title XIX of the TFEU, are structurally similar to the Actions Plans/Programmes included in the soft-law sources of the EU[1298]. Their function is therefore either essentially preparatory or, especially in setting objectives, aimed at implementing Union's policies[1299]. They enucleate and communicate the objectives to be pursued and the policies to be implemented for such purpose, thus favoring inter-institutional and intra-societal dialogue and interaction[1300]. Furthermore, the strategies are in first place always defined and approved by the Commission, even if they are later sanctioned by other EU institutions[1301]. Notwithstanding this, such strategies differ from the traditional notion of action

[1294] The role of funding is confirmed by the Joint statement of June 30th 2017, while a specific role for the European Fund for Strategic Investments is laid out in the Reflection Paper Toward a Sustainable Europe by 2030.

[1295] The most recent one covers the 2019-2024 period.

[1296] Horizon 2020 is probably the most relevant example, concerning the R&D policy field.

[1297] Commission Communication of March 3, 2010, 28-30

[1298] See L.SENDEN, *Soft Law in European Community Law*, Hart Publishing, Portland, 2004, 128-132; E.MOSTACCI, *La Soft Law,* cit., 85-90. For a further assessment of the legal value of soft law instruments in EU Law see *infra* § 4.5.4.

[1299] According to such considerations, even the conclusions of the European Council may be included among soft law source sas atypical acts. See E.MOSTACCI, *La Soft Law,* cit., 90-92

[1300] See *ivi,* cit., 85-90

[1301] The form adopted by the Commission is usually that of Communications, thus reproducing the scheme which connotes almost every action plan (see E.MOSTACCI, *La Soft Law,* cit., 86). For instance, see the Communication of November 26, 2014 regarding the Investment Plan for Europe (COM-2014-903).

programme since they tend to enucleate groups of very general policies in a longterm perspective and are thus relatively scarce in number compared to action programmes[1302]. Such aspect on one hand enhances the coordinating potential of the strategies but, on the other hand, reduces the legal binding value they exert on the EU institutions themselves[1303], which is instead transposed on the implementing acts, both of soft law and hard law.

These general remarks are reflected in the structure of the three major strategies currently in place: Europe 2020, the "Juncker Plan" and Horizon 2020. The first and the third strategy are expression of recurring patterns of policies. The second one identifies with its implementation instrument.

Europe 2020[1304] is part of the long-term (usually issued every decade) development macro-strategies of the EU[1305]. They rely, usually, on two documents. In the first place, a Communication of the Commission which lays out the economic and social reasons for the adoption of the strategy[1306]. Following the Commission's initiative, the European Council approves the Commission's communication[1307]. In launching Europe 2020, it also approved five "headline targets" as proposed by the Commission[1308]. The content of such documents is extremely synthetic and almost seems to correspond to the introductory sections of Chinese development plans.

The targets set by macro-strategies are not directly enforceable. In the first place because they are too general. In the second place because the decentralized multilevel governance

[1302] Actions Programmes setting the agenda for a certain policy area are quite frequently issued by EU institutions since the 1980s. See L.SENDEN, *Soft Law in European Community Law,* cit., 128-129

[1303] The binding value of actions programmes and other soft law instruments enucleating EU policies is connected to their laying out the initiatives the EU institutions want to adopt, thus ingenerating expectations in third parties while ensuring the certainty and transparency of the Commission's actions. See E.MOSTACCI, *La Soft Law,* cit., 89. See also CJEU C-70/06, *Commission v. Portuguese Republic*; C-177/04, *Commission v. French Republic*. However, with regard to these general development strategies, the highly general outlines they lay out to some extent renders it difficult to define which actions the EU institutions are bound to enact and implement, thus leaving it to the subsequent acts (such as recommendations to member states adopted in accordance with the relevant Regulations) to exert a binding legal effect on the EU institutions.

[1304] See, on the general topic, A.DRUMAUX, P.JOYCE, *Strategic management,* cit., 81-166

[1305] Europe 2020 was preceded by the so-called Lisbon Strategy which covered (with scarce results) the period 2000-2010. The next policy cycle will instead be covered by the 2030 strategy which, as already noted, seeks a deep integration with the SDGs.

[1306] See, for instance, the Communication of the Commission of March 3rd 2010. For the explanation of the socio-economic justifications of Europe 2020 see pages from 7 to 27.

[1307] See the conclusions of the European Council of June 17th 2010.

[1308] I would define such targets as predictive or "soft" indicators. They concern: i) employment rate; ii) R&D investments; iii) reduction of gas emissions; iv) improving education levels; v) improving social inclusion rates. Further "flagships initiatives", similar to planned projects, were laid out in the Commission' Communication.

would require the national authorities to implement the objectives which, over time and on the basis of the Commission's guidelines, are defined not only pursuant to the strategy but also on the legal provisions governing investment funds[1309]. There is no legal instrument that the Commission may act on to ensure the responsibility of member states for the implementation of Europe 2020 targets. The activation of the infringement procedure[1310] is unfeasible, given the non-legislative nature of such strategies[1311].

They are therefore enforceable only on the basis of mechanisms of open coordination[1312] between European institutions and member states, according to reciprocal dialectic and monitoring. Evidently, this cannot be enough and this is why European law widely employs more complex instruments such as the funds and budget plans[1313].

References to macro-strategies are however made by European legislation, usually in recitals, in order to justify the orientation of the provisions adopted[1314] or to define the meaning of some terms employed[1315].

In the last place, macro-strategies may also represent the inspiration for the definition of the Union's budget in the corresponding period[1316].

[1309] See L.D'ETTORRE, *Le strategie macroregionali,* cit.

[1310] On the infringement procedure see E.CANNIZZARO, *Il Diritto dell'Integrazione Europea,* cit., 177-183

[1311] The infringement procedures regards the obligations deriving from the Treaties, thus not covering, at least at a first glance, plans and development strategies. Indeed, R.ADAM and A.TIZZANO in *Lineamenti di Diritto,* cit., 279, argue that it cannot be excluded that a conduct from a member state, although not violating any formal legal provisions, jeopardizes the achievments of Union's goals and thus collide with the principle of sincere cooperation pursuant to Art. 4 § 3 TEU.

[1312] The preference for the Open Method of Coordination in implementing cohesion policies and actions is emphasized by H.WALLACE, W.WALLACE, W.POLLACK, *Policy-Making,* cit. 239. On the concept of Open Method of Coordination (OMC) see D.TRUBECK, L.TRUBECK, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, in European Law Journal, Vol. 11(3), 2005, 343-364; G.DALLA CANANEA, C.FRANCHINI, *I principi dell'amministrazione europea*, Giappichelli, Torino, 2013

[1313] See M.VAROTTO, *Le nuove risorse e i nuovi programmi dell'Unione Europea dal 2014 al 2020*, in Azienditalia, 2011, 11 ff.

[1314] Such as in provisions regarding public procurement (see Recitals nn. 2-47-95-96-123 of Directive n. 2014/24).

[1315] (see Art. 2 n. 22 of Directive n. 2014/24).

[1316] For instance, the 2014-2020 period, inspired by Europe 2020, as laid out in Reg. 1311/2013. See M.VAROTTO, *Le nuove risorse e i nuovi programmi,* cit.

A peculiar position among EU strategies is occupied by the Juncker Plan[1317] or the "Investment Plan for Europe" which, however, followed the same "launching procedure" of Europe 2020[1318].

The Juncker Plan focuses solely on investment development and displays an eminent financial nature, not only due to capital injections but also to the establishment of a EU's guarantee on selected projects[1319]. It is, indeed, jointly promoted by the Commission and by the European Investment Bank[1320].

As far as its content is concerned, the Juncker Plan seems to aim at ensuring coordination between new and already existing financial instruments, i.e. the structural funds[1321].

In essence, its function coincides with the legal regime of the European Fund for Strategic Investments (EFSI) and, in the first place, the Reg. 1017/2015[1322].

Research Framework programmes such as Horizon 2020 deserve, instead, further consideration. In legal perspective, such programmes are what most closely resemble a development plan. Multiannual Framework Programmes for Research and Development (MFPRD) find their legal basis in Art. 182 of the TFEU and are established and regulated *in* a primary source, e.g. the two Regulations n. 1290 and 1291 of 2013 concerning Horizon 2020. The programmes themselves enjoy therefore a precise legal nature, that of regulations. These regulations, in establishing them, also point out certain recurring features which are worth highlighting.

I) Duration. MFPRDs are established for a timeframe defined by the law and corresponding to the six-year financial planning cycle (e.g. 2014-2020)[1323].

[1317] It is a plan strongly advocated by the then President of the European Commission Jean-Claude Juncker, a salso desumed from the introduction to the Commission's communication. In spite of its name, it is, actually, not a plan. It functions as a series of recommendations, a theoretical and ideological introduction to the establishment of the European Fund for Strategic Investments.

[1318] The Juncker Plan was announced in the Commission's Communication of November 26th, 2014 and was later confirmed by the conclusions of the European Council of 23-24 October 2014. Its structure revolves around "three mutually reinforcing strands" (see Commission's communication, 4): i) mobilization of financial resources; ii) targeted initiatives concerning real economy; iii) greater regulatory predictability.

[1319] Pursuant to Reg. 1017/2015 it is the EFSI to acta s guarantee.

[1320] See Commission's Communication, 4

[1321] The plan also promotes a jointly managed "Investment Task Force" in order to select and evaluate economically viable projects. The initiative was later transposed into the European Investment Advisory Hub, regulated in Chapter IV of Reg. 1017/2015.

[1322] Although the Commission's Communication does not mention Europe 2020 explicitly, Reg. 760/2015 on European long-term investment funds mentions it in its first Recitals, thus drawing a connection between the two strategies and reassessing the logic priority of Europe 2020 among development strategies.

[1323] See Art. 3 Reg. 1291/2013. Art. 182 TFEU, indeed, talks about a "multiannual framework". Therefore, there is a constitutional foundation about the duration of the plan referred to by the regulation.

II) Definition of objectives and diversification of planning instruments. MFPRDs employ numerical indicators and planned directives which closely resemble the ones laid out in Chinese development plans. For instance, Art. 5 of Reg. 1291/2013 introduces a basic numerical indicator (3% of the GDP) to be invested in R&D within 2020. Then, it lays out thematic priorities[1324] and issues policy directives. Their structure is similar to the ones employed in Chinese plans. Starting from the description of the issue and of factual situations, the directives of the annex follow a triadic scheme. In the first part they set out a general policy objectives, pointing out the critical issues of the field concerned; in the second part they assess the role of such field within the context of the Union's economy; in the third part they lay out the features of the implementing activities to be carried out, i.e. the research activities supported by the plan[1325].

Such mechanisms aim at defining criteria to assign funds to certain projects and not to others on the basis of the scope and purpose of the MFPRD[1326].

III) Resource Allocation. Art. 6 of Reg. 1291/2013 determines, for each strategic priority, the financial resource allocated by the EU, also specifying which kinds of organizational activities[1327] may be supported. Art. 4 of Decision n. 743/2013 sets further conditions, for instance limiting to 5% of allocated resources the maximum cap for expenses related to administrative activities of the Commission. In MFPRDs the principle of decentralization is therefore counterbalanced, to some extent, by a centralized management of the resources allocated, where the Commission is in direct dialogue with the subjects applying for grants, not operating the "filter" represented by national governments and managing authorities.

MFPRDs regulations, obviously, also define the implementation and monitoring phases, emphasizing the central role of the Commission[1328]. More interestingly, regulations may

[1324] Art. 5 § 2 states that "*2. The general objective set out in paragraph 1 shall be pursued through three mutually reinforcing priorities dedicated to:*
(a) Excellent science;
(b) Industrial leadership;
(c) Societal challenges.
The specific objectives corresponding to each of those three priorities are set out in Parts I to III of Annex I, together with the broad lines of activities".

[1325] See for instance, point 1.2 of the annex about nanotechnologies.

[1326] The same structure, but more detailed, is displayed also by Council Decision n. 743/2013, implementing Reg. 1291/2013 and referred to by the same Art. 8 of Reg. 1291. In the Council Decision, the strategic priorities are determined according to six sectors, each of them containing specific goals described, through guidelines for activities, in the annex. Such guidelines are usually detailed directives.

[1327] For instance, preparatory activities, monitoring and audit activities, etc.

[1328] See Art. 9 of Reg. 1291/2013

also mention some of the implementing instruments, such as the public-private partnership[1329].

Each of the elements described is common to all the other regulation establishing investment funds. Notwithstanding, MFRDs regulations hold a particular significance since they build close legal relations between the resources allocated and the development programme/plan established. The definition of criteria and limits for resource utilization and, furthermore, the definition of procedures to be granted such resources (in Reg. 1290/2013) render the MFRD a particularly "strong" plan from a legal perspective. It is, in other words, a synthesis between a promotion logic and a rule-of-law logic, so that the planning activities of European institutions may be scrutinized: i) by member states, according to the general rules which bind European institutions to respect of European Law; ii) by subjects who feel they have been harmed by an erroneous application of substantive and procedural rules regarding projects' grants.

The General Court already pronounced some relevant decisions[1330] which, in practice, always confirmed the choices of the Commission, showing a particular respect toward its discretional powers in the management of resources[1331].

MFRDs are logically dependent on macro-strategies such as Europe 2020, on the basis of their narrower scope[1332]. Their legal regime, however, displays peculiar features which suffice to consider them separate, albeit integrated, plans of EU development governance. MFRDs find their own legitimacy in Art. 182 TFEU, so that a general principle of responsibility toward their implementation may be derived from the treaties and the relevant regulations. Such responsibility is judicially accountable and violations of the plan may be challenged by subjects taking part in it[1333].

[1329] We may therefore argue that in Europe, as in China, the PPP is gradually becoming one of the preferred instrument to implement development planning policies.

[1330] See General Court decision of 18 January 2018, Case T-76/15 (*Kenup*); decision of 5 february 2018, Case T-208/16 (*Ranocchia*); decision of 3 may 2018, Case T-48/16 (*Sigma Orionis*)

[1331] Such judicial interpretations reinforce the idea of an allocation which is more centralized compared to other funds formally independent from development strategies.

[1332] Regulations n. 1290 and 1291 of 2013 explicitly refer to Europe 2020, recognized as guiding light of European development policies. Such dependency is, however, closely related to the circumstances. Since three strategies are in place at the same time, a logic hierarchy develops between them.

[1333] There is, in other words, a mechanism of direct implementation and enforcement that may regard the respect of procedural rules as well as control over discretional powers of implementing authorities, i.e. the Commission. As noted, case law suggests that such scrutiny is particularly hard to carry out, but its legal possibility is significant. Indeed, it allows the addressee of the planning activity to challenge it on the basis of an alleged deviation from its purposes. This mechanism, in the other investment funds, is realized only

6.3 The Legislative Sources

Generally speaking, I would argue that the primary sources of European development planning law may be divided into two main sections. On one hand, there are the regulations directly related to structural and development funds. They lay out and define the theoretical and operative foundations of the planning instruments. In particular, they regulate the functioning of the Funds, empowering them as financial instruments within the context of the common investment policies[1334]. In other cases, they directly lay out plans – such as MFPRDs[1335] – and set up the Multiannual Financial Framework[1336] according to the budget rules of the Union.

Furthermore, the timing of the regulations is properly coordinated in order to reflect a common development strategy[1337]. So far, the European legislature has adopted a timeframe of six years as the "ordinary planning cycle" of the Union's budget and investment policies. Therefore, the present 2014-2020 cycle will be followed by the 2021-2027 cycle[1338]. The Commission has already issued its proposals for the regulations concerning financial instrument to back and implement the new planning cycle[1339]. Each

indirectly and not at the European level, given the presence of partnership agreements. In Horizon 2020, on the other hand, is directly based on primary sources establishing the plan.

[1334] See, for instance, Reg. 1299/2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal; Reg. 1300/2013 on the Cohesion Fund and repealing Council Regulation (EC) No 1084/2006; Reg. 1301/2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006; Reg. 1302/2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings; Reg. 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

[1335] See Reg. 1290/2013 laying down the rules for participation and dissemination in "Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)" and repealing Regulation (EC) No 1906/2006; Reg. 1291/2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC

[1336] See Reg. 1311/2013 laying down the multiannual financial framework for the years 2014-2020

[1337] So, for instance, the Multiannual Financial Framework 2014-2020 corresponds to Horizon 2020 as well as to the validity timeframe of the other investment fund regulation, which, indeed, are amended or wholly replaced periodically to match the beginning of a new financial and planning framework.

[1338] See A.SIMONATO, *Integrazione Europea ed autonomia regionale,* cit.

[1339] See, for instance, the proposal of the Commission 2018/0132 for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027. Following such proposal, the commission issued other proposals related to the legal regime of the investment funds for the new planning cycle 2021-

new planning cycle may obviously bear some structural changes to the instruments of European planning. For instance, the Proposal 2018/0196 of the Commission has a broader scope than Reg. 1303/2013, since it includes in the framework of European planning policy other relevant financial instruments such as the Asylum and Migration Fund and the Internal Security Fund.

On the other hand, European planning refers to other primary sources concerning specific issues of economic development. The relation between the planned strategies and these sources is in some cases direct, as it happens with Directive 2014/24 on public procurement[1340], functional to the implementation of Europe 2020[1341]. In some other cases is indirect, meaning that European legislation, though not referring to a specific strategy, sets goals and imposes on MSs the obligation of implementing them through plans. This happens, for instance, with Directive 2008/98 on waste and, in general, with other relevant documents in the field of circular economy development[1342].

The common ground between these different types of sources is to be found in the Cohesion policy actions laid out in the treaties, also comprising the "environmental action" of Art. 192 of the TFEU, indeed referred to by Directive 2008/98 as the empowering legal basis for the intervention.

The choice of the specific instruments employed reflect the different aim of the legal source. The management of investment funds as well as the establishment of Union level's plans and frameworks is to be established through regulations. This choice ensures the direct effect of the provisions laid out in all Union. The principle of subsidiarity as well as the shared competence's criterion are not violated because such regulations display an eminently organizational nature and refer to financial instrument established by the Union at the Union's level. When, instead, the cohesion goal is directed towards specific economic sectors, then subsidiarity and competence principles require the use of European Directives[1343]. Incidentally, the legal nature of directives might lead, as

2027, such as the Proposal 2018/0196 on a Regulation laying down common provisions on EU structural funds.

[1340] To be considered together with Directives n. 2014/23 and 2014/25, forming an ensemble of legal provisions for Public Procurement.

[1341] See Recital n. 2 of Directive n. 2014/24.

[1342] For instance, see Directive 2009/125 on Eco-design

[1343] The directives bind the member state with regard to the objectives to be achieved but not with regard to instruments and means to employ, as laid out in Art. 288 of the TFEU. See also E.CANNIZZARO, *Il Diritto dell'Integrazione Europea,* cit., 111 ff.

sometimes happens, to another result: a competition between different models of implementation developed by different member states[1344].

6.4 Following: the non-legislative sources

The delegated and implementing sources. I have already mentioned the role of the delegated and implementing regulations enacted by the Council or by the Commission as empowered by the primary sources to do so[1345]. Their role is particularly relevant since they intervene not only in specifying the significance of certain primary provisions but they also lay out rules to facilitate the implementation of the investment policies. For instance, Delegated Regulation 1516/2015 provides for a flat co-financing rate for operations funded by the European Structural and Investment Funds in the Research, Development and Innovation sector, while Delegated Regulation 240/2014 issues a Code of Conduct on partnerships in the framework of the European Structural and Investment Funds[1346].

The soft law sources. The extent of the issuance of soft law in the field of development planning justifies their assessment[1347]. Soft law is defined, in the capital work by Senden[1348], "*Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects*".

Formally, Art. 288 of the TFEU mentions only recommendations and opinions as legal acts of the Union having no binding force. This is the so-called "official soft law"[1349].

[1344] The logic of open coordination is therefore reassessed and confirmed. See also G.BENACCHIO, *Diritto Privato della Unione Europea,* cit., 147-150. According to a coordination logic, a comparative analysis between the models established in different national legal system could not only provide grounds for mutual learning but also inspire the European legislature in a future and stronger harmonization effort which could go beyond the minimum degree of harmonization so far pursued.

[1345] In particular, the general provisions contained in Art. 290 and 291 of the TFEU concerning, respectively, delegated acts and implementing acts. See E.CANNIZZARO, *Il Diritto dell'Integrazione Europea,* cit., 138-142; R.ADAM, A.TIZZANO, *Lineamenti di Diritto,* cit., 202-209

[1346] Such delegated and implementing acts intervene in all the relevant phases of the implementing process: the destination of resources to different sectors (see Implementing Decision of 3 April, 2014); the management of the implementing instruments such as Public-Private Partnerships (see Delegated Regulation 1076/2015); the monitoring and supervision procedures (see Delegated Regulation 1970/2015).

[1347] As already mentioned even plans and strategies such as Europe 2020 may be considered soft law and thus fall within the scope of this brief assessment.

[1348] See L.SENDEN, *Soft Law in the European Community,* cit., 112

[1349] See A.KOVACKS, T.TOTH, A.FORGACS, *The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts,* in Elte Law Journal, Vol. 2, 2016, 53-70

However, for the purpose of this analysis, particular significance is held by the "unofficial soft law"[1350], i.e. the several white papers, guidelines, reports and policy documents issued by European Institutions concerning the implementation of investment planning strategies.

In functional perspective[1351], they can be classified as follows:

a) Preparatory and Informative Instruments: the Papers of the European Union may be classified as preparatory soft law sources. Their scope is really broad and they provide substantial information for the definition of future development strategies[1352].

   More detailed are the studies concerning general topics about the function and the implementation of planning strategies. For instance, the Study on the coordination and harmonisation of ESI Funds and other EU instruments[1353] is the result of a three-years long research process which, drawing on available data as well as interview and on-field research, points out the achievements and drawbacks of the investment policy[1354]. However, these kind of reports mainly focus on the organizational issues of the "planning machine"[1355], thus not intervening on the assessment of economic development goals. Beside the preparatory instruments are the informative instruments, usually Communications from the Commission, which may nevertheless also carry out relevant decisional and interpretative

[1350] *Ibidem*

[1351] The criteria and categories used for this classification are those laid out in L.SENDEN, *Soft Law in the European Community Law*, cit.

[1352] The structure of the White Paper on the Future of Europe (Of March 1st, 2017) reflects this function: it explains a series of general scenarios regarding the European stance on its own future, assessing their justification, their future perspective and their pros and cons. The Green Paper on Long-term financing of the European Economy (Of March 25th 2013), instead, revolves around a series of research questions answered through descriptive reasoning.

[1353] Study on the coordination and harmonisation of ESI Funds and other EU instruments, Contract No 2015CE16BAT064

[1354] These studies occur during the planning cycle and constitute the functional equivalent of the research phase we have seen occurring in the Chinese context. Indeed, information and data are collected through direct dialogue with the coordinating and managing authority at the national and local level so to tackle possible informational asymmetries. The information collected should subsequently be processed and analyzed by the relevant European institutions – i.e. the Commission – in order to perfect the next management cycle of structural funds.

[1355] For instance, "Smart Demarcation of ESI Funds" – point 2.3.3 of the Study on the coordination and harmonisation of ESI Funds and other EU instruments; Complexities and difficulties arising from differences in the regulatory frameworks of the funds – point 4.2.1 of the previously mentioned study

functions[1356]. This is the case when communications lay out development strategies;

b) Interpretative and Decisional Instruments: communications, notices and guidelines may pursue explanatory purposes, i.e. clarifying the meaning and the scope of certain legal provisions. They also set "*general rules regarding the way in which implementing powers will be exercised*"[1357]. Economic policies widely rely on this kind of sources: both competition policies and development policies are disciplined by guidelines and notices laying out complex regulatory frameworks[1358], such as the Regional Aid Guidelines or the Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds ('ESI Funds')[1359]. Other examples of this category are the Operational Guidelines and Explanatory Notes. These are documents prepared by the Commission and directed towards MSs in order to clarify some issues deriving from the application of certain provisions concerning structural funds. Their purpose is therefore operational[1360]. Indeed, the Guidelines always refer to a legal basis, a set of legislative provisions regarding the issue they intend to clarify. As a consequence, their primary function comes to be that of interpretative criteria for member states but also, I would argue, for the courts. Due to its influence over European institutions – i.e., in this case, Commission Directorates – soft law may play a significant role in the harmonization of European Law in social and cohesion fields[1361];

[1356] See L.SENDEN, *Soft Law in the European Community Law,* cit., 132-138. In particular, the inter-institutional communications which the Commission addresses to the Council and the Parliament (on the topic see A.MATTERA, *Le marché unique européen. Ses régles, son fonctionnement*, Jupiter, Paris, 1988) are particularly relevant and often fulfil a *pre-law* function, i.e. preparation of the subsequent phases of a policy cycle (see *ibidem*). Therefore, they appear to be more similar to preparatory acts.
[1357] See LSENDEN, *Soft Law in the European Community Law, cit.*, 148
[1358] See *ivi,* cit., 148-155
[1359] Commission Notice (2016/C 269/01).
[1360] For instance, during the present planning cycle the Commission issued guidance for member states with regard to management cost and fees eligible for support by the European Structural Funds (pursuant to Art. 42 of Reg. 1303/2013); to Integrated Sustainable Urban Development (pursuant to Art. 7 of Reg. 1301/2013); to calculation of total eligible costs to apply for major projects in 2014-2020 (pursuant to Art. 61 and 100 of Reg. 1303/2013).
[1361] See D.TRUBECK, L.TRUBECK, *Hard and Soft Law,* cit.; E.BROOKS, *Europeanisation through soft law: the future of EU health policy?*, in Political Perspectives, Vol. 6(1), 2012, 86-104

c) Steering Instruments: Senden defines steering instruments as those instruments having the objective of "*steer(ing) or guid(ing) action in some way or another*"[1362]. Within this category fall the only soft law sources having a legal basis, i.e. recommendations and opinions, but also a wide array of other instruments as conclusions of both European and National institution meetings[1363]. Furthermore, following the functional approach embraced by Selden, I would classify as steering instruments the specific recommendations that the Commission addresses to Member State during the process of implementation of Structural Funds' policies, first of all the recommendations/opinions issued during the formation of the partnership agreement. These are the acts which express the logic of multilevel governance but also define the inner hierarchy of planning, since they tend to shape partnership agreements in accordance with common objectives.

The legal value of Soft Law sources in European Law has relied, thanks to the CJEU caselaw, on substantive rather than on formal requirements[1364]. Therefore, provided that soft law may not derogate from hard law[1365], the CJEU developed, although in a quite theoretical fashion[1366], a sort of test in order to verify the binding legal force of a soft law act[1367]. It looked in the first place at the intention laid out in the acts, desumed from its wording[1368], historical context and terms[1369]. In the second place, it required that the act produces new legal effects and not legal effects underlined in already existing legislative acts[1370]. In the third place, it verified whether or not soft law acts have a legal basis[1371], such as, most generically, Art. 17 TFEU[1372]. Selden further proposed that the binding

[1362] See L.SELDEN, *Soft Law in the European Community Law,* cit., 156
[1363] See *ivi,* cit., 189 ff.
[1364] See CJEU C-1/57 and 14/57, *Usines a Tubes de la Sarre vs. High Authority,* § 114; C-22/70, *ERTA.* See also L.SENDEN, *Soft Law in the European Community Law,* cit., 248-251
[1365] See *ivi,* cit., 243-246
[1366] See *ivi,* cit., 282
[1367] See *ivi,* cit., 248-267
[1368] The content of the act must be framed as an imperative order and should not employ terms or verbs indicating hypothetical situations or pure opinions. See CJEU C-301/03, *Italy vs. Commission,* § 20-24; C-57/95, *France vs. Commission,* § 14-18; 325/91, *France vs. Commission,* § 14. See also E.KORKEA-AHO, *Adjucating New Governance,* cit., 93; L.SELDEN, *Soft Law in the European Community Law,* cit., 251-254
[1369] So, for instance, a communication may be legally binding since it "*contains measures which constituted subject matter of the proposal for a directive which the Commission withdrew because of a deadlock in the negotiations with Member States in the Council*" (see *ivi,* cit., 254) as held by C-57/95, *France vs. Commission,* § 21.
[1370] See C-303/90, *France vs. Commission,* § 24; C-366/88, *France vs. Commission*. See also *ivi,* cit., 258-259
[1371] See *ivi,* cit., 259-261
[1372] See E.KORKEA-AHO, *Adjudicating New Governance,* cit., 89

legal value of a soft law act depends on its respect for prescribed decision-making procedures, its notification/publication and on it clarifying its reasons and justifications[1373].

Given these premises, it has been noted that judicial disputes upon such acts are not a common occurrence[1374].

Furthermore, Art. 263 of the TFEU specifies that judicial review concerns those acts intended to produce legal effects *vis-à-vis* third parties. The aforementioned test is therefore meant to verify whether or not such effects exist.

Even if Art. 17 TEU may represent an "umbrella legal basis" and the other conditions are all fulfilled, I would argue that the implementation and enforcement of such measures mostly occurs in an intra-governmental dimension, where institutional politics countrerbalance the lack of a judicial approach.

This is the case with the country specific-recommendations and opinions issued during the drafting of partnership agreements. Provided that such acts define the way the Commission wants some issues to be defined and employ a quite imperative language[1375], the sanction for the "violation" of such opinions is inherent in the non-conclusion of the partnership agreement which in turn constitutes violation of primary EU Law[1376]. The soft law source is in this case "reabsorbed" in the primary legislation. Conversely, the binding force of the soft law act is ensured through the involvement of all the institutional actors involved on the basis of common interests[1377]. The same logic applies for the Code of Conduct on Partnership Agreements.

The assessment of the legal binding value of soft law, however, is relevant in at least two other cases: a) acts laying out criteria according to which the Commission will exercise its powers (e.g. Regional Aid Guidelines); b) acts addressing implementing procedures to be carried out at the national level (e.g. the notice on the respect of CFREU in the implementation of ESI Funds). In the first case, soft law acts are binding upon the

[1373] See L.SENDEN, *Soft Law in the European Community Law,* cit., 261-266

[1374] See *ivi,* cit., 282 ff.

[1375] See, for instance, the comments of the Commission to the Partnership agreement with Italy for the period 2014-2020 which, over the course of more than seventy pages (in the Italian version) contest in detail the ambiguousness and confusion of certain points of the draft agreement prepared by Italian authorities.

[1376] For the sake of legal certainty, a judicial contestation of such documents would be likely in case they provide for instructions which contravene a legal rule of higher rank. In this case, it would be the State to challenge the soft law act. See C-301/03, *Italy vs. Commission*, Opinion of the A.G.

[1377] On this definition of soft law see E.MOSTACCI, *La Soft Law,* cit., 1-5

Commission which cannot depart from them without providing reasons[1378]. In the second case, the acts may be binding upon member states[1379], thus justifying an action from the Commission against a MS in terms of infringement procedure. These considerations, put forward by some authors with regard to the OMC procedure, are applicable, logically, to the soft law sources concerning development funds, in particular structural funds, but with an important difference. In the context of development planning, the fund as instrument of resource allocation is disciplined through legislative sources (regulations) and operates in a sector where the Union has a specific competence, i.e. that of cohesion. Therefore, the legal value of soft law acts and the feasibility of their judicial review, in this context, stresses the hierarchical, though multilevel, implementing structure for development strategies and, at the same time, confirms the central role of the Commission in coordinating the legal instruments for common development, according to a rule of law logic.

7. The principle of inclusiveness in European Development Planning

Two are the possible notions of inclusiveness desumed from existing European development law. The first one refers to the concept of "inclusive growth" as mentioned in the Europe 2020 strategy[1380]. Such inclusiveness is related to the sharing of economic growth benefits among all the different social groups[1381]. It may therefore been associated with social instances of development[1382] but ultimately its proper definition remains obscure[1383].

[1378] See T-374/04, *Germany vs. Commission*
[1379] See E.KORKEA-AHO, *Adjudicating New Governance*, cit., 95-100
[1380] The official denomination of Europe 2020 is ""Europe 2020:A strategy for smart, sustainable and inclusive growth".
[1381] See, for instance, E.IANCHOVICHINA, S.LUNDSTROM, *What is Inclusive Growth?*, note prepared for the Diagnostic Facility for Shared Growth, 2009, available at the link: http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1218567884549/WhatIsInclusiveGrowth20081230.pdf
[1382] See G.SCHMID, *Inclusive Growth: What Future for the European Social Model?*, Paper of the Observatoire Social Europeen, No. 15, May 2013
[1383] Some authors, when assessing the definition of the Europe 2020, do not mention inclusiveness and just refer to smartness and sustainability. See, for instance, R.BERMEJO, *Handbook for a Sustainable Economy*, Springer, Cham, 2014, 120

The second concept of inclusiveness is procedural and concerns the involvement of a wide range of institutional actors and social bodies during the process of development planning. This is indeed the notion I am interested in.

Once again, we may start by looking at Reg. 1303/2013. Its Recitals nn. 11 and Art. 5, on the basis of the principle of multilevel governance[1384], call for the adoption of an inclusive approach in the preparation of partnership agreements by member states. In particular, partnership agreements and relevant programmes should include: i) competent regional and local authorities; ii) competent urban and other public authorities; iii) economic and social partners; iv) relevant bodies representing civil society, including environmental partners, non-governmental organisations, and bodies responsible for promoting social inclusion, gender equality and non-discrimination[1385].

The relevance of the partners is due to their capability of "*of influencing the preparation*" of programmes or to the circumstance that they "*could be affected by the preparation and implementation of the programmes*"[1386].

With the Delegated Regulation n. 240/2014 the Commission, acting pursuant to Art. 5 of Reg. 1303/2013, issued a Code of Conduct on partnership in the framework of the European Structural and Investment Funds. Its main purpose is "*to provide for a European code of conduct in order to support and facilitate Member States in the organisation of partnerships for Partnership Agreements and programmes*"[1387].

The Code of Conduct requires (Art. 3) that Member States identify the partners of their partnership agreements and programmes among three different categories: a) competent regional, local, urban and other public authorities; b) economic and social partners; c) bodies representing civil society. The categories are very wide in scope, so that public authorities also comprise "*higher educational institutions, educational and training*

[1384] Recital n. 11, in particular, mentions that "*The purpose of such a partnership is to ensure respect for the principles of multi-level governance, and also of subsidiarity and proportionality and the specificities of the Member States' different institutional and legal frameworks as well as to ensure the ownership of planned interventions by stakeholders and build on the experience and the know-how of relevant actors*".

[1385] The partners mentioned are to be involved in the establishment, implementation and monitoring of the partnership agreements, for instance through their inclusion in the programme monitoring committee (Art. 48 § 1 Reg. 1303/2013).

[1386] See Recital n. 11 of Reg. 1303/2013. It is therefore a concrete interest the criterion that justifies their inclusion. Indeed, the very concept of partnership "*implies close cooperation between public authorities, economic and social partners and bodies representing civil society at national, regional and local levels throughout the whole programme cycle consisting of preparation, implementation, monitoring and evaluation*" (Whereas 2 of the Delegate Regulation 240/2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds).

[1387] Recital n. 1 of Delegated Regulation 240/2014

providers and research centres". Furthermore, both b) and c) display a preference for associations representing the interests of economic operators[1388], social groups[1389] and civil society[1390].

The inclusiveness principle is enforced through the obligation of consulting the aforementioned partners in the preparation of partnership agreements and programmes[1391]. In the second place, partners are also involved in the implementation phase, for example in the preparation of the calls for proposal[1392]. In the last place, partners have to be involved in the supervision and monitoring process[1393].

Beside the provisions concerning investment funds, the Commission may launch public consultations about certain issues, addressed to stakeholders and relevant authorities[1394].

8. The European Structural and Investment Funds

The investment fund is the most relevant legal instrument of the European development planning system[1395]. Consequently, it also serves as a reference for our comparative analysis.

The investment fund is not a legal act[1396], nor a legal subject. It does not have legal personality. It is an organizational instrument managed by European institutions and by the Commission in the first place[1397], in charge of implementing development strategies.

[1388] Such as business associations or chambers of commerce

[1389] Such as "social partners' organisations, in particular general cross-industry organisations and sectoral organisations"

[1390] Pursuant to Art. 3 § 2, "*Where public authorities, economic and social partners, and bodies representing civil society have established an organisation regrouping their interests to facilitate their involvement in the partnership (umbrella organisation), they may nominate a single representative to present the views of the umbrella organisation in the partnership*".

[1391] Art. 6 and 8 of the Delegated Reg. 240/2014

[1392] As provided, for instance, by Art. 13 Delegated Reg. 240/2014. Significantly, the same article mentions the avoidance of conflicts of interests. This represents a wide divergence with the Chinese planning systems, where the favor of local governments for specific enterprises is still a widely spread phenomenon.

[1393] Not only through their membership in monitoring committees (Art. 10 of the Delegated Reg. 240/2014) but also through their participation in the preparation of reports (Art. 15) and evaluations (Art. 16).

[1394] As it happened with the public consultation on the energy strategy for Europe 2011-2020

[1395] See L.DELLMUTH, M.STOFFEL, *Distributive politics and intergovernmental transfers: The local allocation of European Union structural funds*, in European Union Politics, Vol. 13(3), 2012, 413-433, 413-415; HARMSTRONG, B.GIORDANO, C.MACLEOD, *The durability of European Regional Development Fund partnership and governance structures: a case study of the Scottish Highlands and Islands*, in Environment and Planning, Vol. 33, 2015, 1566-1584, 1566; H.WALLACE, W.WALLACE, M.POLLACK, *Policy-Making*, cit., 213 ff.

[1396] Legal acts are, instead, the strategies and regulations which define the functions and organization of the funds.

[1397] In the case of the EFSI (European Fund for Strategic Investments) the EIB plays a central role as well.

Functionally, the fund is, instead, an instrument to correct market failures[1398], not by a regulatory perspective, but by an interventionist approach. The fund acts as a dispenser of public capital aids. On account of this, the coordination between investment funds and state aid law is particularly important and delicate[1399].

Investment funds, furthermore, represent a constant element in European planning, whereas strategies and policy frameworks, even if often only formally, change with each cycle[1400].

Classifying such funds raises issues, because it implies, necessarily, the choice of categorizing criteria, which the legislation does not provide explicitly. The expression "European Structural Funds" would comprise, strictly speaking, just the five funds which are regulated and coordinated the "Common Provisions Regulation" (CPR), which, in the current policy cycle, is Reg. 1303/2013. These are the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.

To these we may add the European Fund for Strategic Investments, which follows its own regulatory framework (Reg. 1017/2015) and is enacted within the context of the Juncker plan. Different policy programmes sharing the ultimate goals of promoting development of the EU space must function according to a common logic[1401].

The coordination effort is "inspired" by the guidelines laid out in the CPR but, in concrete, is left to the member states, which may develop national strategies as well as incorporate coordination instruments into the partnership agreements concluded pursuant to the same CPR. The logic should be one of complementarity[1402]. For trans-border projects in the fields of transport, telecommunications and energy the coordination is also supported,

[1398] It is the same role, to some extent, of a promotional financial institution, as laid out in the Communication from the Commission to the European Parliament and the Council of 22 July 2015, 3-4.

[1399] See Art. 37 Reg. 1303/2017; Commission Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Artt. 107 and 108 of the Treaty; Communication from the Commission of 22 July 2015, *cit.*; H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 187 ff.

[1400] See European Commission, Directorate-General for Regional and Urban Policy, Blue Guide on Investment Funds – i.e. European Structural and Investment Funds 2014-2020: Official Texts and Commentaries, 2015, Sec. 1, Policy Goals and Intervention Principles. The document highlights, for instance, certain differences in the approach to funds between the 2007-2013 and the 2014-2020 cycles.

[1401] In concrete, as also pointed out by the Commission (See Blue Guide on Investment Funds, 19-20) and by the Common Strategic Framework (CSF) annexed to Reg. 1303/2013 (Point 4), the structural funds must necessarily be coordinated with all the other investment programmes in force and regulated by European Union Law. In the first place, the MFPRD but also, for example, the Erasmus + programme (see Blue Guide on Investment Funds, cit., 20).

[1402] CSF 4.4, 4.5, 4.6

through financial assistance, by a Connecting Europe Facility (regulated by Reg. 1316/2013), which, essentially, functions as a fund.

There are some structural analogies between different funds which are to be highlighted:

i) An equal time-frame of validity of each fund or programme set on the basis of the multiannual budget framework;

ii) An explicit or implicit reference to one or more development strategies;

iii) The employment of the financial instruments defined by Reg. 1046/2018 on the financial rules applicable to the general budget of the Union, replacing, among other, Reg. 966/2012 mentioned by Regulations concerning funds[1403].

The aforementioned instruments are: procurements and concessions[1404]; co-financing project grants[1405]; prizes[1406]; guarantees[1407]; loans[1408]; other financial instruments[1409]. These categories cover, virtually, the entire range of cohesion and development actions of the European Union. Project grants, within the context of European structural funds, may also be intended as a) direct financing; b) reimbursement of eligible costs; c) unit costs; d) lump sums; e) flat-rate financing[1410]. The financial instruments provided for aim at balancing two fundamental dimensions of project-driven development planning: on one hand transparent and competitive evaluation procedures; on the other hand direct support to tackle market failures[1411], according to schemes similar to the one of traditional financial and banking activities.

This justifies a central role for the EIB in the management of instrument as the EU guarantee fund[1412]; it also justifies the opportunity, for member states, to support and finance credit institutions in order to promote development initiatives[1413]. These are the so-called National Promotional Banks[1414]. Indeed, the intersection between credit system, public control and development strategies traces an evolutionary path of the post-crisis

[1403] In particular by Reg. 1290/2013 and Reg. 1017/2015
[1404] See Title VII of Reg. 1046/2018
[1405] See Title VIII of Reg. 1046/2018
[1406] See Title IX of Reg. 1046/2018
[1407] See Title X of Reg. 1046/2018
[1408] *Ibidem*
[1409] *Ibidem*. Such instruments may comprise, for instance, equity or quasi-equity participations in other funds or programmes launched at the national or European level. On the issue, see Art. 10 Reg. 1017/2015
[1410] See also Art. 46 of the Proposal for the new CPR
[1411] See Art. 209 § 2(a) of Reg. 1046/2018
[1412] Regulated by Reg. 1017/2015
[1413] See Art. 2(3) Reg. 1017/2015; Communication from the Commission of 22 July 2015, cit.
[1414] *Ibidem*. Up to July 2015, eight countries (Bulgaria, Slovakia, Poland, Luxembourg, France, Italy, Spain, Germany) had announced their participation in the EFSI project via their NPBs

European economic law[1415]. The instrument of public guarantee, for instance, has been employed to tackle the issue of Non-Performing Loans (NPLs)[1416]. Other solutions, on a wider level, have been carried out through the establishment of funds financed by credit institutes serving the purpose of favoring the recapitalization of failing banks and the purchase of NPLs[1417].

Within the context of planning, the role of credit institutes such as the National Promotional Banks (NPBs) displays an evident public nature. This is probably the reason why, so far, the NPBs designated by member states are government-controlled institutes[1418].

Obviously, the two logics I have recalled may very well integrate and intertwine in the concrete cases. Indeed, this is what often happens. Let us take the European Regional Development Fund[1419] as an example. One of its purposes is to favor investments into underdevelopment regions, thus to correct an inhomogeneous market growth. However, it functions according to the partnership agreement pursuant to Reg. 1303/2013. The EFSI and the EU Guarantee Fund as well function according to project selection procedures, although carried out in a different way from the other funds.

The financial instruments, moreover, follow a general co-financing principle, according to the logic of subsidiarity. With regard to loans and guarantees co-financing is, somewhat, implied in their very structure[1420]. With regard to funds covered by the CPR, instead, there are co-financing rates determined by the Commission but whose maximum caps are set by the Law[1421].

[1415] See F.CAPRIGLIONE, *La nuova finanza: operatività, supervisione, tutela giurisdizionale. Il caso "Italia". Considerazioni introduttive (la finanza post-crisi: forme operative e meccanismi di controllo)*, in Contratto e Impr., 2017, 1, 75 ff.

[1416] See P.MESSINA, G.GIANNESI, *Garanzia sulla cartolarizzazione delle sofferenze (GACS)*, in dirittobancario.it. See also Italian Legislative Decree n. 18/2016 and Law Decree n. 237/2016, which introduced a State guarantee for NPLs.

[1417] See F.CAPRIGLIONE, *La nuova finanza*, cit.

[1418] In Italy this institution is the *Cassa Depositi e Prestiti*, which is controlled, for the 80% of the capital, by the Ministry of Economy and Finance. See Communication from the Commission of 22 July 2015, cit., 8

[1419] See Reg. 1299/2013

[1420] Reg. 1017/2015, however, specifies that, where appropriate, the aim of the guarantee is to obtain capital relief. Reg. 1046/2018 as well specifies that guarantees and loans are aimed at producing an advantage which is higher that the invested capital. Therefore, the basic idea is to reintegrate the guarantee and recuperate the loans, rendering it a performing loan.

[1421] See Art. 120 Reg. 1303/2013

We must distinguish between funds covered by the CPR and funds/programmes not covered by the CPR. Functionally, the first category comprises funds which are to be managed through a partnership agreement with the member states[1422]. The CPR lays out a Common Strategic Framework, which guides the preparation of national partnership agreements. Such agreements, once approved, found and direct the preparation of specific programmes and projects supported by the funds.

A second category comprises, instead, those funds and programmes lacking the "intermediate" filter represent by partnership agreements. In the MFPRD and pursuant to the EFSI regulation, proposals and projects are presented to the Commission – i.e. its competent Directorate – and evaluated by it[1423].

It is clear that to a diversity of instruments corresponds, necessarily, a diversity of results and consequences, positive externalities and drawbacks. In general, on the premise that the fund is the core promotional mechanism for development, two approaches are carried out: a more centralized one and a strongly decentralized one. With regard to the first approach, the experience of Horizon 2020 (the MFPRD), for instance, made someone suggest that a step forward had been taken in terms of efficiency of the European bureaucratic machine[1424] as well as in terms of goals' definition. In particular, it has been argued that the Horizon 2020 objectives are more comprehensive and better focus on the main issues of R&D in the EU[1425].

On the other hand, the experience of structural funds has been subjected to both praise and criticism, on the basis of empirical studies. In particular, it has been pointed out how, especially in the underdeveloped regions, the mechanisms of structural funds favored the development and growth of Small and Medium Enterprises (SMEs)[1426]. However, scholars have also highlighted how the concrete allocation, at the local level, of funds'

[1422] These are the properly called Structural Funds, which I already mentioned.

[1423] The EFSI, as regulated by Reg. 1017/2015, justifies a further distinction with the MFPRD since it is jointly managed by the Commission and by the EIB according to models which resemble the functioning of a Development Bank.

[1424] See M.GALSWORTHY, M.MCKEE, *Europe's 'Horizon 2020' science funding programme: how is it shaping up?*, in Journal of Health Services Research & Policy, Vol. 18(3), 2013, 182-185

[1425] See CASSINGENA HARPER, *Exploring the Potential for Foresight and Forward-Looking Activity* in Horizon 2020, in L.GOKHBERG ET AL. (edited by), *Deploying Foresight for Policy and Strategy Makers*, Springer, Cham, 2016, 183-195; A.SCHINDLER-DANIELS, *Shaping the Horizon: social sciences and humanities in the EU framework programme "Horizon 2020"*, in Z Erziehungswiss, Vol. 17, 2014, 179-194

[1426] See A.LEWANDOWSKA, M.STOPA, G.HUMENNY, *The European Union Structural Funds and Regional Development. The Perspective of Small and Medium Enterprises in Eastern Poland*, in European Planning Studies, Vol. 23(4), 2015, 785-797

resources for specific initiatives covered by programmes and partnership agreements may be motivated by political and electoral reasons, thus deviating from the natural purpose of the funds[1427].

In general, the decentralized and multilevel logic which moves the structural funds raises an issue concerning the "quality" [1428] of local governments in charge of the implementation[1429].

Where local politics are affected by corruption and "non-state *guanxi*", the allocation of resources inevitably is in danger of being exposed to inefficiencies. In the European context, the solution to this problem must take into account the necessary multilevel dimension of economic governance. A centralized supervisory system such as the one modern Chinese law is shaping does not appear feasible.

8.1 The functioning of the European Structural Funds: The Partnership Agreements

The CPRs lay out some provisions which are common for all the structural investment funds. The European legislature builds a system which aims at striking a difficult balance between the protection of market functioning and the correction of its own failures[1430].

The funds should address market failures[1431] as long as such failures and their negative effects exist. This is an application of the economic subsidiarity in a Social Market Economy. In concrete, it justifies provisions providing for the reduction of the eligible expenditure to be co-financed by structural funds when the operation has the potential to generate net revenues.

[1427] See L.DELLMUTH, M.STOFFEL, *Distributive politics and intergovernmental transfers,* cit.

[1428] The notion of quality is to be intended as efficiency and transparency and absence of corruption, in the first place.

[1429] See A.RODRÍGUEZ-POSE, E.GARCILAZO, *Quality of Government and the Returns of Investment: Examining the Impact of Cohesion Expenditure in European Regions*, in Regional Studies, Vol. 49(8), 2015, 1274-1290. We may note, in comparative perspective, that also in China planning may suffer from political malfeasance and interferences, especially at the local level. Instead, there cannot be electoral reasons interfering with plans' implementation, for systemic reasons linked to the guiding role of the Communist Party. This does not mean, however, that the public opinion does not affect the planning process, as we have seen.

The real problem, in the Chinese context, concerns the respect of the political and legal hierarchy within the planning system, between the center and the local governments. This means, furthermore, tackling the guanxi networks where they deviate from the development logic pursued by the Party. This problem, to some extent, is also a European one.

[1430] See BOTTINO, *Il finanziamento pubblico dell'economia: possibilità, condizioni e limiti*, in M.CAFAGNO, F.MANGANARO (edited by), *L'intervento pubblico nell'economia,* cit., 223-225

[1431] See Recitals nn. 35 and 36 of Reg. 1303/2013

The CPRs also point out another operative principle deriving from the doctrine of social market economy: the specific legal regime of structural funds does not apply when State Aid Law applies[1432]. Therefore, it is for the Commission, when applying the two sets of rule, to decide whether or not an aid co-financed by a structural fund complies with Art. 107 and 108 of the TFEU[1433].

An eternal contradiction seems to reappear: development planning is, on one hand, regarded as a support system and not as a comprehensive public economic management instrument; however, on the other hand, structural funds are a temporally stable feature of European economic law[1434].

The implementation of development policies follows a "cascade" dynamic tending to reproduce the content of higher acts[1435] in lower ones, i.e., in particular, the partnership agreement and the specific programmes[1436]. Both of these acts are prepared by member states and approved by the Commission.

The partnership agreement is drafted by the government of each member state, usually by an economic ministry or a specific department[1437]. Depending on the inner organization of each MS' executive, various committees may be responsible for issuing guidelines or instructions to be incorporated into the partnership agreement. For instance, while the Italy-EU partnership agreement for 2014-2020 was formally issued by the Cohesion Department of the Presidency of the Council of Ministries[1438], Art. 2 § 1 lett. c) of Law n. 183/1987 provides for the Inter-ministerial for economic programming[1439] to lay out general directives concerning the utilization of financial fluxes both national and European[1440]. In other words, the distribution of European funds between the several thematic areas is decided by the competent authority pursuant to such directives[1441].

[1432] See, for instance, Art. 61 § 8 and Art. 65 § 8 of Reg. 1303/2013

[1433] See Case C-349/17 *Eesti Pagar AS*; See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law of the European Union,* cit., 187 ff.

[1434] See BOTTINO, *Il finanziamento pubblico dell'economia,* cit., 223-225

[1435] I.e. comprehensive strategies or the CSF laid out in Reg. 1303/2013.

[1436] See BOTTINO, *Il finanziamento pubblico dell'economia,* cit., 223-225

[1437] For the Italian Republic, it is the Cohesion Department within the Presidency of the Council of Ministries, for the Czech Republic it is the Ministry of Regional Development, for the Republic of Malta it is the Ministry of European Affairs, for the Federal Republic of Germany is the Ministry for Economy and Energy (Bundesministerium für Wirtschaft und Energie)

[1438] See Art. 24-bis of the Decree of the Presidency of the Council of Ministries of 1 October 2012

[1439] Also called CIPE

[1440] See also BOTTINO, *Il finanziamento pubblico dell'economia,* cit., 223-225

[1441] Moreover, the department of European Affairs within the Presidency of the Council of Ministries is in charge of coordinating the policies for the realization of the Europe 2020 strategy (Art. 18 of the Decree of

Partnership agreements all share a common structure, but may differ in their organization. Some partnership agreements, indeed, closely resemble development plans, at least in their descriptive sections[1442]. After outlining the main challenges related to national development, they set numerical indicators representing goals to be achieved. Other structural features of the agreements are required by the provision of the CPR. For instance, the implementation of horizontal principles and multilevel governance principles. The agreements describe in detail their prior research and consultation phases, highlighting the involvement of NGOs and civil society in the process, through public meeting and questionnaires[1443]. In some cases, for each thematic objective, the member state may point out which meetings have been organized and which partners attended[1444]. The CPR also defines the notion of "partners"[1445]. A further requirement of the CPR is the detailed description of several measures taken to ensure the effective implementation of the structural funds. These measures may be financial, such as the establishment of a performance reserve[1446]. More interestingly, such measures may imply a self-assessment from MSs aimed at ensuring a proper harmonization of rules in close relation with the grants from structural funds. This is the purpose of the so-called *ex ante* conditionalities[1447] or "enabling conditions" as they will be called in the next planning cycle.

1 October 2012). Another department, for economic programming and coordination of economic policies, functions as a secretariat for the CIPE (Art. 20 of the aforementioned Decree).

[1442] Partnership agreements are indeed way longer than traditional development plans, such as the Chinese ones, since they almost always exceed the three-hundred pages. Most of their length, however, is due to the detailed description of the conditionalities and the instruments to ensure the effectiveness of the implementation.

[1443] See, in particular, the Paragraphs 1.5 of the Partnership Agreements, dedicated to the application of horizontal principles.

[1444] Quite detailed are, for instance, the Table 1,2 and 3 of § 1.5 of the Italy-EU partnership agreement

[1445] See Art. 5 of Reg. 1303/2013.

[1446] See Art. 20 § 1 of Reg. 1303/2013.

[1447] See also Blue Guide on Investment Funds, Chapter 3 "Improving Effectiveness". As explained by Art. 19 of the Reg. 1303/2013, "*Member States shall assess in accordance with their institutional and legal framework and in the context of the preparation of the programmes and, where appropriate, the Partnership Agreement, whether the ex ante conditionalities laid down in the respective Fund-specific rules and the general ex ante conditionalities set out in Part II of Annex XI are applicable to the specific objectives pursued within the priorities of their programmes and whether the applicable ex ante conditionalities are fulfilled*".

Such conditionalities are, in other words, requirements that the CPR deems essential to properly carry out planned programmes. The CPR usually lays out a series of *ex ante* conditionalities that the economists classify into three ensembles[1448].

A) strategic conditionalities, pertaining to the existence of a clear policy or strategy, at the national level, to sustain and support the potentially funded programmes. For instance, let us consider the thematic objective n. 6 of Annex XI of Reg. 1303/2013 – i.e. Preserving and protecting the environment and promoting resource efficiency – whose conditionality n. 6.1 lett. a) requires the existence of "*a water pricing policy which provides adequate incentives for users to use water resources efficiently*"[1449].

B) Regulatory conditionalities, pertaining to the existence of legal provisions to ensure the correct, efficient and transparent implementation of programmes[1450]. Partnership agreements carry out a deeper assessment of regulatory conditionalities. In particular, they measure the fulfillment of thematic conditionalities using regulatory provisions as the main criterion. Thus, for instance, the Italy-EU agreement specifies that conditionality 3.1 of Annex XI – i.e. Specific actions have been carried out to underpin the promotion of entrepreneurship taking into account the Small Business Act – is, at least partially, fulfilled by a series of legislative innovations introducing simplifications and favorable measure for SMEs[1451].

C) Administrative capacity conditionalities, pertaining to the "*capacity of the administrations in the beneficiary countries to devise strategies, build up project pipelines, manage projects, organise proper tender procedures and run efficient internal controls*"[1452].

[1448] See W.DEFFAA, *The New Generation of Structural and Investment Funds – More Than Financial Transfers?*, in Intereconomics, Vol. 3, 2016, 155-163

[1449] Another example regards thematic objective n. 7 – i.e. Promoting sustainable transport and removing bottlenecks in key network infrastructures – whose conditionality 7.1 requires the issuance of "*comprehensive plan or plans or framework or frameworks for transport investment in accordance with the Member States' institutional set-up*".

[1450] Conditionality 6.2 concerning thematic objective n. 6 requires, for example, that member states fully implement Directive 2008/98 where it asks member states to develop waste management plans.

[1451] Partnership agreements are sometimes very detailed in specifying which norms of the national legal systems are appliable to concrete cases concerning strategic priorities and thematic objectives.

[1452] See W.DEFFAA, *The New Generation of Structural and Investment Funds,* cit.; A.RODRÍGUEZ-POSE, E.GARCILAZO, *Quality of Government and the Returns of Investment*, cit. Therefore, conditionality 8.3. requires that "*Labour market institutions are modernised and strengthened in the light of the Employment Guidelines*". N. 1 of the general ex ante conditionalities – i.e. anti-discrimination – asks instead for "*the existence of administrative capacity for the implementation and application of Union anti-discrimination law and policy in the field of ESI Funds*". In this case, too, partnership agreements, with regard to each conditionality, specify which capacity the national administrative bodies have to ensure their fulfilment.

The CPR (usually in the annexed Common Strategic Framework or CSF) provides, indeed, for another distinction between thematic conditionalities and general conditionalities. The first category comprises conditionalities related to the thematic objectives laid out in the CPR. The second category refers to a series of general and fundamental issues for the correct functioning of the European investment programmes: anti-discrimination; gender; disability; public procurement; state aid; environmental assessments; statistical systems and results indicators. For each of these issues MSs must guarantee that their administration is capable of i) implementing and enforcing relevant European laws and ii) allowing an efficient management of the planned programmes.

Such brief assessment of conditionalities on one hand suggests how far-reaching is European development planning law, trying to uphold a strategy of economic development compliant with promotion of non-discrimination measures. On the other hand, it indicates the economic fields whose legal framework is fit to be interpreted in accordance with the development priorities laid out in the CPR. Public Procurement is a perfect example. In particular, the transposition of European public procurement directives (2014/23, 2014/24 and 2014/25) led to the introduction, into MS' legal systems, of public contract law provisions ensuring and/or promoting the respect of environmental standards linked to indicators, thus reflecting the same logic of the CPR and of Europe 2020[1453].

The very concept of *ex ante* conditionality seems to connect with the soft law approach which inspires the Open Method of Coordination. The core of the legal mechanism laid out is the constant dialogue between the member state and the Commission, which reviews the partnership agreements and presents its observations. Such observations take into serious account the analysis of all the *ex ante* conditionalities, also issuing, when

[1453] A particularly interesting example is offered by the introduction, in the Italian public procurement law, of the concept of "Minimum Environmental Criteria" (Criteri Ambientali Minimi – CAM) which *may* be incorporated, by contracting authorities, into bidding documents. On the topic see S.COLOMBARI, *Le considerazioni ambientali nell'aggiudicazione delle concessioni e degli appalti pubblici*, in Urbanistica e appalti, Vol. 1, 2019, 5 ff. On environmental considerations in Italian public procurement see also C.LACAVA, *Il nuovo codice dei contratti pubblici – I criteri di aggiudicazione*, in Giornale Dir. Amm., 2016, 4, 436 ff. On the spanish experience, modeled after the two European directives (nn. 23 and 24 of 2014) see M.GALLEGO CORCOLES, *La integración de cláusulas sociales, ambientales y de innovación en la contratación pública*, in Revista Documentación Administrativa. Nueva Época, Vol. 4, 2017, 93-96; B.GOMEZ FARINAS, *La dimension ambiental en la seleccion del contratista: especial referencia a las medidas de gestion ambiental*, speech at the Seminario Formigal, 2018, available on the online observatory for public procurement of the University of Trento, at the link http://www.osservatorioappalti.unitn.it/content.jsp?id=32&page=1#2017

necessary, negative opinions about the fulfilment of the conditionalities[1454]. The MS may therefore either point out arguments supporting its position or elaborate counterstrategies to ensure the fulfillment of conditionalities. However, in line with the soft law logic, un-fulfillment does not necessarily hinder the concession of funds. In case of a disagreement between a member state and the Commission upon the fulfilment of conditionalities, the CPR even lays out a presumption in in favor of the member state, stating that the non-fulfillment must be proven by the Commission (Art. 19 § 4 Reg. 1303/2013). As a last resort the CPR empowers the Commission to justify a suspension (partial or total) of interim payments over grounds of non-fulfilment of *ex ante* conditionalities[1455]. The suspension, however, does not apply when the Member State reaches an agreements with the Commission on the non-applicability of a conditionality or on the fact that it has been fulfilled.

The proposal for a Regulation covering the next planning period (2021-2027) aims at replacing *ex ante* conditionalities with "enabling conditions", fewer in number but holding a stronger legal significance[1456]. Indeed, according to the proposal, the non-fulfilment of an enabling condition impedes payment related to the objective concerning the unfulfilled condition[1457]. As far as their content is concerned, such new enabling conditions do not differ from the *ex ante* conditionalities, apart from a closer connection between structural funds' implementation and effective application of the Charter of Fundamental Rights of the European Union.

The evolution pattern from *ex ante* conditionalities to enabling conditions, indeed, also proves the increasing favor of the European legislature toward a centralized *ex ante* assessment. The assessment is focused on the three cornerstones of fundamental rights, market and competition regulation and organizational efficiency[1458]. At the moment of the definition of the partnership agreement and, subsequently, the specific programmes, the Commission evaluates the capacity of national laws to effectively and efficiently implement the planned projects. It is an effort for the harmonization and it is (still) a mixture of soft and hard law.

[1454] See, for instance, section 2.3 of the Observations to the Italy-EU partnership agreement
[1455] See Art. 19 § 5 of Reg. 1303/2013.
[1456] See Point 5 Title II of the Proposal, also see Whereas 17 of the Proposal
[1457] See Art. 11 of the Proposal
[1458] See Annex IV to the Proposal for the new CPR

8.2 Following: the Operational Programmes and projects

Operational Programmes and projects constitute the lower part of the European planning hierarchy and also ensure the realization of the principles of multilevel and decentralized governance[1459]. National authorities – both central and local, depending on programmes – are in charge of selecting priorities, using resources allocated and reporting the implementation status to the Commission[1460]. On the basis of the allocation laid out in the partnership agreements, each programme elaborates a further and more detailed allocation, quantifying the amount of resources requested for its own implementation. Both Reg. 1303/2013 and the Proposal for the 2012-2027 CPR point out three main parts of each operational programme. In the first place, each programme should lay out a thematic plan, concerning priorities and result indicators[1461]. In the second place, a financial planning is required: in other words, programmes should define financial allocations from each of the structural funds, since a programme may be supported by more than one fund. Furthermore, programmes must define member states' co-financing rates[1462]. In the third place, programmes should lay out operational planning, i.e. actions, strategies and coordination mechanisms to ensure an efficient implementation and a reduction of the administrative burden on the beneficiaries[1463]. Furthermore, "*where Member States and regions participate in macro- regional strategies or sea basin strategies, the relevant programme, in accordance with the needs of the programme area as identified by the Member State, shall set out the contribution of the planned interventions to those strategies*"[1464].

Programmes are elaborated and defined by MSs' governments or by other relevant authorities, mostly local entities[1465]. Each programme must indicate a managing authority,

[1459] According to Art. 26 § 1 of Reg. 1303/2013 "*The ESI Funds shall be implemented through programmes in accordance with the Partnership Agreement*"
[1460] See BOTTINO, *Il finanziamento pubblico dell'economia,* cit., 223-225
[1461] See Art. 27 of the CPR and Art. 17 of the Proposal for the 2021-2027 CPR
[1462] *Ibidem*
[1463] *Ibidem*
[1464] See Art. 27 § 3 of Reg. 1303/2013. Macro-regional strategies, when integrated with planning instruments, may realize at its best the principle of multilevel governance, which, as we already noted, has a significant geographical character. On the issue, see L.D'ETTORRE, *Le strategie macroregionali dell'Unione Europea,* cit.
[1465] See Art. 26 § 2 of the CPR

in charge of the implementation and the supervision[1466]. The geographical coverage of the programme usually determines the choice of the managing authority[1467]. The managing authority, however, does not always correspond to the beneficiary of the programme or the project. So, for instance, a programme managed by a national ministry could very well have a region as a beneficiary.

Programmes, as the partnership agreements, are approved by the Commission following a procedure of assessment and evaluation[1468]. The Commission may issue observations related, in particular, to the compliance of programmes with development strategies, fund regulations and partnership agreements[1469]. Each programme must be approved no later than six months from its submission[1470]. Programmes may also be amended at request of member states, following another assessment procedure[1471].

Once programmes have been approved, the managing authority further deals with specific projects implemented thanks to funds received[1472] and defines the amount of resources to be transferred to each project. Such projects should also be respectful of the horizontal principles and employ multilevel governance and inclusive methods in their preparation and implementation. The resources coming from the structural funds are transferred to the competent authorities and become part of their budget, although functionally linked to the implementation of the programme approved[1473].

A sort of double scheme is currently in force[1474]: financial instruments may be set up at the Union level and managed by the Commission, directly or indirectly. Alternatively, they may be set up at the local level and managed by managing authorities which can

[1466] See for example the programme titled "ROP Toscana" aimed at fostering the development of the Tuscany Region, Italy, and managed by a general directorate of Tuscany's government.

[1467] See, for instance, the Innovation fund promotes Hamburg's start-up scene managed by the local ministry of Economy, Transport and Innovation

[1468] See Art. 29 of the CPR as well as Art. 18 of the Proposal for the new CPR

[1469] Pursuant to § 3 of Art. 29 the Commission may issue observations within three months from the submission of the programme.

[1470] See § 4 of Art. 29 CPR and § 4 of Art. 18 of the Proposal

[1471] See Art. 30 of the CPR and Art. 19 of the Proposal

[1472] See, for instance, the project regarding "Zero-emission heating provided by geothermal energy in Montieri, Italy", to be carried out in the municipality of Montieri and falling within the scope of the "ROP Toscana" operational programme

[1473] See BOTTINO, *Il finanziamento pubblico dell'economia,* cit., endnote n. 25. The Proposal for the new CPR further specifies that "*Member States shall use the contribution from the Funds to provide support to beneficiaries in the form of grants, financial instruments or prizes or a combination thereof*" (Art. 47).

[1474] See Art. 38 of Reg. 1303/2013. The Proposal does not seems to alter such structure, which therefore will be in place even in the new planning cycle.

decide either to create new financial instruments (e.g. grant new prizes or lump sums) or inject new capital into existing instruments (e.g. already existing support schemes).

As in China, the concrete realization of planning occurs at the local level. For certain major projects, as already noted, member states as well as the Commission may decide to request assistance from the EIB[1475]. The EIB may also be awarded grants or service contracts for the implementation of certain programmes and projects[1476]. However, such occurrence does not concern the majority of small and medium-scale projects, which are carried out almost entirely at the local level. The project is therefore, at the same time, a planning act and an implementation act. It implements the operational programmes, the partnership agreements and, ultimately, the Union's strategies, but it also lays out, in concrete, the operations to be carried out and defines the available financial resources[1477].

Operational programmes and projects also found a responsibility of national authorities toward their proper implementation. Such responsibility is based on different grounds. In the first place, on the provisions of the CPR[1478], which introduces two reasons for financial corrections to Union's contribution to a programme[1479]: i) a breach of law which affected the selection of an operation to be supported; ii) a breach of law which affected the amount declared eligible for reimbursement. If the actual impact of the breach cannot be assessed, financial corrections may nevertheless be carried out where a "substantiated risk" of a negative effect occurs[1480]. The Commission, when detecting a potential infringement of the relevant laws, in first place asks the member state to submit observations[1481]. If the member state does not agree with the provisional conclusions laid out by the Commission, a hearing is held "*to ensure that all relevant information and observations are available as a basis for conclusions by the Commission on the application of the financial correction*"[1482]. The final decision must be taken within six months from the date of the hearing. Such time limit is applicable even to programmes

[1475] See Art. 31 of the CPR. The same provisions, however, is not contained in the Proposal for the new CPR
[1476] *Ibidem*
[1477] Once again we are dealing with a typical instrument of planning law as pointed out by Chinese plans and highlighted, for instance, by S.HEILMANN and O.MELTON, *Reinvention of Development Planning,* cit.
[1478] See, for instance, Naples (Italy) Court of Appeal, Decision of 1st July, 2016
[1479] See Art. 85 CPR
[1480] According to § 3 of Art. 85 the Commission must however respect the principle of proportionality when applying its corrections
[1481] See Art. 145 of Reg. 1303/2013
[1482] *Ibidem*

falling under earlier CPRs not mentioning any time limit, as clarified by the Court of Justice[1483].

In the second place, MSs are responsible for the correct implementation of programmes and projects on the basis of national provisions. Indeed, given the framework established by European structural funds, national provisions concerning subsidies and grants to enterprises for development purposes are to be interpreted in light of the principle laid out in the European relevant laws[1484]. Furthermore, the managing authority must verify that the financial instruments established to pursue development goals are used in accordance with the relevant provisions and, for example, with the relevant purpose. Therefore, national courts have stated that a grant to realize interventions regarding energy efficiency cannot justify the launch of a procurement procedure for an operation which only partially refers to the aforementioned development goals[1485].

8.3 Following: the supervision and report system

The supervision and report system for structural funds distinguishes between two supervisory activities: i) supervision of the implementation process with regard to its efficiency, for purposes of improving planning mechanisms and tackle arisen issues; ii) supervision of the implementation process with regard to compliance with law and other relevant provisions. The supervision and monitoring tasks are, in principle, shared between the Commission and the member states[1486]. I have already mentioned the system of periodic reports. Here it is worth pointing out how member states are also required to set up a monitoring committee[1487]. On the other hand, the Commission may not only receive and process all the relevant information collected by monitoring organs, but also "*carry out on-the-spot audits or checks subject*"[1488], in accordance with the principle of proportionality, in order to "*avoid unjustified duplication of audits or checks carried out by Member States, the level of risk to the budget of the Union and the need to minimise*

[1483] See Case C-197/13
[1484] See Italian Council of the State, Decision n. 3784 of 1st September 2016
[1485] See Italian Council of State, Decision n. 4638 of 5th October 2015.
[1486] See Art. 73 of Reg. 1303/2013
[1487] See Art. 47 to 51 of Reg. 1303/2013
[1488] See Art. 75 § 2 of Reg. 1303/2013

the administrative burden on beneficiaries in accordance with the Fund- specific rules"[1489].

Evaluations are carried out both *ex ante* and *ex post*[1490].

Since 2015, European funds have also co-financed the functioning of the so-called "integrity pacts", i.e. contracts stipulated between contracting authorities and economic operators participating in a bidding procedure. Such pacts are essentially aimed at preventing corruption and monitoring the smooth implementation of projects. They also provide for external organizations (i.e. civil society organizations) to carry out monitoring and assessment functions[1491].

The main supervisory instrument at the disposal of the Commission is, however, the account and balance periodical check. For each operational programme, the Commission receives yearly accounts[1492] which, after evaluation, determine the chargeable amount for the accounting year[1493]. At the closure of the operational programme, member states submit a final balance and a final implementation report, also subjected to evaluation, which, if accepted, leads to the final payment from the structural funds[1494].

8.4 The PPP as an implementing instrument

Art. 62 of Reg. 1303/2013 states that "*The ESI Funds may be used to support PPP operations. Such PPP operations shall comply with applicable law, in particular concerning State aid and public procurement*". The PPP is the only implementing instrument which is explicitly mentioned by the CPR. This is particularly relevant because it establishes the PPP as the operational mean to realize the projects covered by the funds. In particular, financial resources may be granted, within the context of a PPP,

[1489] *Ibidem*

[1490] Prior to programmes' implementation, the managing authority shall assess the coherence and consistency of programmes with regard to thematic objectives, financial resources and organizational aspects. After the implementation the Commission, or the member state in close cooperation with the Commission, will assess the results achieved and their contribution to the realization of the development strategy.

[1491] So far, nine integrity pacts have been signed. See https://ec.europa.eu/regional_policy/en/newsroom/news/2017/01/16-01-2017-integrity-pacts-better-safeguarding-and-use-of-eu-funds

[1492] See Art. 137 of Reg. 1303/2013

[1493] See Art. 139 § 8 of Reg. 1303/2013

[1494] See Art. 141 of Reg. 1303/2013

both to the public party and to the private party[1495], which by the way may also change during the course of the project realization if the PPP agreement so provides[1496]. For the following analysis, I will mostly refer to the Italian model of PPPs as a paradigm of a national model evolving under the influence of European Law.

In Europe, as in China, the relevance of PPPs for development planning depends on both economic and structural reasons.

Economists have pointed out[1497] that outsourcing may generate benefits in terms of economies of scale[1498] and reduction of costs,[1499] as well as economies of scope (i.e. generate synergies when several activities require similar, complementary expertise and thus enable the operator mastering them to reduce its costs). Furthermore, outsourcing allegedly allows public authorities to benefit from the effects of competition creating market incentives for private operators interested in entering a PPP agreement[1500]. By relinquishing its directing role, the administration avoids complex decision-making procedures (and political interferences[1501]) and instead focuses on purely regulatory[1502] and supervisory functions. However, the reality shows that "regulation" and "supervision" of economic activities often implies a planning dimension[1503]. Planning and regulation find their common ground in the economic policy[1504] which drives the outsourcing

[1495] This article partially derogates to Art. 2 (10) of Reg. 1303/2013 which defines "beneficiary" as "*a public or private body and, for the purposes of the EAFRD Regulation and of the EMFF Regulation only, a natural person, responsible for initiating or both initiating and implementing operations; and in the context of State aid schemes, as defined in point 13 of this Article, the body which receives the aid; and in the context of financial instruments under Title IV of Part Two of this Regulation, it means the body that implements the financial instrument or the fund of funds as appropriate*".

[1496] See Art. 63 § 3 of Reg. 1303/2013

[1497] See S.SAUSSIER, J.DE BRUX (edited by), *The Economics of Public-Private Partnerships*, Springer, Cham, 2015, 19-26

[1498] *Ibidem*

[1499] See R.MCQUAID, W.SCHERRER, *Public Private Partnership in the European Union: Experiences in the UK, Germany and Austria*, in Uprava, letnik VI, 2/2008, 7-34

[1500] O.WILLIAMSON, in *The economic institutions of capitalism*, The Free Press, New York, 1985, suggested that subordination relations within organizations do not encourage efficiency. Therefore, SSAUSSIER and J.DE BRUX (edited by), in *The Economics of Public-Private Partnerships*, cit., state that "*in the case of outsourcing, the relationship is based on a contract that can include strong incentives by describing the expected service (that is, a higher degree of precision as to the service to be provided) and by introducing a range of incentive clauses (bonuses and penalties) allowing the operator to keep all the additional revenue it is able to generate by being efficient*".

[1501] See S.SAUSSIER, J.DE BRUX (edited by), *The Economics of Public-Private Partnerships*, cit., 25-26

[1502] See G.CARTEI, *Le varie forme di partenariato pubblico privato. Il quadro generale*, in Urbanistica e Appalti, 8, 2011, 888 ff.

[1503] See S.AMOROSINO, *Regolazione e Programmazione delle Infrastrutture*, in Urbanistica e Appalti, 1, 2019, 46 ff.

[1504] *Ibidem*

process according to specific development goals. Administrations act according to plans: they select the operations to outsource, the timing and the conditions of such work on the basis of medium to long-term programming[1505]. After such decisions are taken, the regulatory legal framework plays its role, governing partners' selection procedures and supervision mechanisms. Once again, the logic of planning diverges, to some extent, from the formal legal logic. The planning act precedes and justifies the application of regulatory frameworks.

Within the European context, the economics of public-private partnership necessarily involve the need for integration of the internal market, which was also the driving force behind the development of European public procurement law in the 1970s and the 1980s [1506] . Incidentally, the enhancement of the efficiency of procurement and outsourcing systems was justified by a general call to hasten the competitiveness of European economy in face of both the U.S and other industrialized countries[1507].

Now, some authors have indeed argued that, with regard to the connection between regulation and planning, European legislation emphasizes market competition and efficiency at the expense of cohesion[1508]. While such statement, in my opinion, holds truth[1509], I believe it should be also pointed out that, with regard to public procurement and PPPs, the recent developments of European law try to shape a pattern of cohesion, of balance between market efficiency and other instances brought up by development strategies such as innovation, energy efficiency, environmental protection, etc[1510]. The definition of the PPP as an implementation instrument for structural funds further proves that contracts involving public parties and public interests may (and sometimes must) take into account certain common development goals[1511]. Such logic connection may be

[1505] See F.DI CRISTINA, *Il nuovo codice dei contratti pubblici – Il partenariato pubblico privato quale "Archetipo Generale"*, in Giornale Dir. Amm., 4, 2016, 436 ff.

[1506] See N.PHILIPSEN, S.WEISHAAR, G.XU, *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, Springer, Heidelberg, 2016, 99

[1507] See *ivi*, cit., 99-101

[1508] See S.AMOROSINO, *Regolazione e Programmazione*, cit.

[1509] The point is further proven by the European Commission Green Paper on PPPs (2004), whose point 1.2 is significantly titled "*The challenge for the Internal Market: to facilitate the development of PPPs under conditions of effective competition and legal clarity*".

[1510] See N.PHILIPSEN, S.WEISHAAR, G.XU, *Market Integration: The EU Experience and Implications*, cit., 103

[1511] See S.PAGLIANTINI, *Sul c.d. contratto ecologico*, in Nuova Giur. Civ, 2, 2016, 20337; A.CASTELLI, *Il contratto di EPC come veicolo di efficientamento energetico*, in Ambiente e Sviluppo, Vol. 1, 2019, 35 ff.; F.FRACCHIA, *Sulla configurazione giuridica unitaria dell'ambiente: art. 2 Cost. e doveri di solidarietà*

pursued through different means: the European legislation is particularly advanced in the field of public procurement, where, for instance, it lays out specific provisions to consider environmental care as evaluation criteria in tendering procedures[1512].

Even from a purely economic point of view, however, the complexity of the operations involved as well as of the interests and goals pursue renders it necessary to employ wider and more comprehensive cooperation schemes between public and private parties, which go beyond procurement. It is, in other words, necessary to consider all the relevant phases of a project, from its conception to the choice of partners to its implementation and execution. This stance supports the choice of the PPP as a feasible instrument to pursue development goals. On one hand, it involves a private operator which "*finances, builds, and operates a public service, an infrastructure, or a public facility through a global contract (i.e., involving several stages of service provision, such as the design and construction of an infrastructure and its management)(…) by offering a comprehensive "package deal" to a single operator, the public authority encourages the latter to internalize cost reductions at the level of service operation, which can be realized by an appropriate investment in the design of the support infrastructure*"[1513]. On such grounds, economic literature regards PPP as a "global contract"[1514]. Moreover, the partnership contracts allow public authorities to involve private economic operators in the realization of projects developed on the basis of coordinated planning documents. Therefore, the operation comes to be subjected to a sort of double framework: on one side there is the coordination and supervision system laid out by the CPR, Partnership agreements and operational programmes; on the other side there is the regulatory and supervisory system established by relevant laws concerning PPPs as well as specific fields such as public procurement[1515]. At least theoretically, the dialectic between efficiency and cohesion,

ambientale, in Dir. ec., 2002, 215 ff.; P.DELL'ANNO, *La tutela dell'ambiente come "materia" e come valore costituzionale di solidarietà e di elevata protezione*, in Ambiente e Sviluppo, Vol. 7, 2009, 585 ff.

[1512] See S.COLOMBARI, *Le considerazioni ambientali*, cit.; L.ANDRIOLA, M.DI SAVERIO, P.MANZIONE, M.PEZONE, *Verso una scelta di prodotti e servizi "sostenibili per l'ambiente"*, in Ambiente e Sviluppo, Vol. 3(2003), 293 ff.

[1513] See S.SAUSSIER, J.DE BRUX (edited by), *The Economics of Public-Private Partnerships*, cit., 27; D.MARTIMORT, J.POUYET, *Build it or not: Normative and positive theories of public private partnerships*, in International Journal of Industrial Economics, Vol. 26(2), 2008, 393–411; O.HART, *Incomplete contracts and public ownership: Remarks, and an application to public private partnerships*, in Economic Journal, Vol. 113(485), 2003, C69–C76; J.BENNETT, E.IOSSA, *Delegation of contracting in the private provision of public services*, in Review of Industrial Organization, Vol. 29(1), 2006, 75–92

[1514] See S.SAUSSIER, J.DE BRUX (edited by), *The Economics of Public-Private Partnerships*, cit.

[1515] These national sources are, furthermore, often directly influenced by European Law or constitute the transposition of European directives. With regard to the Spanish context, J.GIMENO FELIU ET AL. in *La*

regulation and planning is resolved and incorporated into one single contractual instrument. In order to achieve such integration, however, the contractual instrument must have specific features which, indeed, characterize the PPP from the structural point of view. To this regard, both official documents, such as the 2004 European Commission Green Paper on PPPs[1516], and scholars agree on three main characteristics of PPP agreements, reflected also in national legislations[1517]. In the first place, a long-term dimension of the cooperative relationship between a public authority and a private partner (or several private partners)[1518]. In the second place, a programming (or, *rectius*, planning) activity which is the core of the relationship[1519]. Such planning dimension operates in two directions: on one hand, it concerns the dialectic between the parties during the definition of the project. The administration, on the basis of its own plans as well as on the relevant operational programmes, defines the content and the scope of the project, while the private party is responsible for its realization[1520]. However, since the PPP contract provides for the allocation of both the construction and the management risk on the private party's shoulders[1521], the enactment of the project also depends on a payment from

gobernanza de los contratos publicos en la colaboracion publico-privada, Cambra de Comerç de Barcelona, Barcelona, 2018 (available on the website of the Observatory on Public Procurement of the University of Trento), mention (p. 16-17) that public-private cooperation contract have become a mean to orient the behavior of economic operators.

[1516] The Green Paper represents the first comprehensive document of the European institutions on the topic of PPPs. See, on the issue, G.CARTEI, *Le varie forme di partenariato pubblico privato,* cit.

[1517] PPPs are not directly regulated by European sources. As a consequence, each member state decided to adopt different forms of regulation. In general, we may distinguish between two approaches. The first one is the choice of a more or less comprehensive statutory act concerning PPPs, as it happens in Greece with Law n. 3389/2005 and in Germany with the Law of September 1st 2005. The second one is to regulate PPPs either in more than one source or in a comprehensive source regarding a more general matter. For instance, the Belgian Law of June 17, 2016 regards concession contracts and represents the most relevant point of reference for the regulation of PPPs in Belgium. In France, PPPs are regulated by Law No. 93-122 of 29 January 1993 on Concession Agreements and by Order No. 2004-559 of 17 June 2004 on partnership contracts. In Italy, the Legislative Decree n. 50/2016 introduced a "Public Contract Code", whose Artt. 179 to 191 regard PPPs. Incidentally, we may note how the choice of connecting the discipline of PPPs with other relevant discipline such as concessions or public contracts, reflects an ongoing debate about the nature of PPPs, often associated with concession contracts but indeed, as it will be pointed out, different from them.

[1518] See European Commission Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions; S.AMOROSINO, *Il partenariato pubblico-privato dalle teorie giuridiche alla realtà del codice dei contratti pubblici (e del decreto correttivo n. 56/2017)*, in Urbanistica e Appalti, 5, 2017, 616 ff.

[1519] *Ibidem*; see also LUNARDELLI, *Trasparenza e partenariato pubblico privato: aspetti teorici*, in A.FIORITTO (edited by), *Nuove forme e nuove discipline del partenariato pubblico e privato*, Giappichelli, Torino, 2017, 456

[1520] *Ibidem*; see also European Commission Green Paper on PPPs, cit.

[1521] Indeed, the Commission Green Paper specifies that "*a PPP does not necessarily mean that the private partner assumes all the risks, or even the major share of the risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned*

the public to the private partner. Such payment may occur in the form of a periodical canon as well as of other instruments, such as for instance the direct profits generated from the management of the project[1522]. This leads me to consider the second aspect of the PPP planning activity: its entrepreneurial nature, embodied by the economic plan ensuring the balance between economic feasibility and financial sustainability[1523]. This plan, therefore, should specify the public or private nature of the resources allocated for the project as well as its phases[1524]. When the partnership is, instead, based on project finance mechanisms[1525], the connection between PPPs and development policies is even clearer. In the Italian legal system, for instance, the public partner elaborates a feasibility project and on such basis assesses the proposals received[1526], evaluating them on the basis of the general criteria laid out in Art. 95 of the Public Contracts Code, which may include environmental impact criteria and circular economy criteria, e.g. containment of energy consumption and of resource utilization, but also innovative features, seemingly referring to a R&D dimension of the partnership. In addition, pursuant to Art. 183 of the Public Contracts Code, the public partner evaluates the quality of the project proposed and the economic and financial value of the relative plan.

In third place, the PPP relation revolves around a proper sharing of the risks arising from the activities decided on[1527]. The main operational risks are borne by the private partner, who also bears the political risks related to strategies and "quality" of the public

to assess, control and cope with this risk". However, national legislation often adopts more decisive approaches: Art. 180 § 3 of the Italian Public Contracts Code states that the allocation of the risk on the private party implies construction as well as entrepreneurial risk associated with the management of the projects. The PPP contract, moreover, regulates the risk not depending on the economic operators, such as systemic or external risks. A similar approach is taken in France: on the issue, see VAISSIER, SISTERON, SENIUTA, Chapter "*France*", in B.WERNECK, M.SAADI (edited by), *The Public-Private Partnership Law Review*, March 2015, 74-90.

[1522] See Art. 180 of the Italian Public Contracts Code

[1523] See S.AMOROSINO, *Il partenariato pubblico-privato dalle teorie giuridiche alla realtà del codice dei contratti*, cit.; For the definition of economic and financial balance see Art. 3 § 1 lett. fff) of the Italian Public Contracts Code

[1524] See S.AMOROSINO, *Il partenariato pubblico-privato dalle teorie giuridiche alla realtà del codice dei contratti*, cit.

[1525] On the notion of project finance, see JAE MYONG KOH, *Green Infrastructure Financing*, Palgrave Macmillan, Cham, 2018; R.MORRISON (edited by), *The Principles of Project Finance*, Gower, Burlington, 2012; G.CARTEI, M.RICCHI (edited by), *Finanza di Progetto e Partenariato Pubblico-Privato* 2015, Editoriale Scientifica, Napoli, 2015; G.CARTEI, M.RICCHI (edited by), *Finanza di Progetto*, Editoriale Scientifica, Napoli 2010.

[1526] See Art. 183 of the Public Contracts Code

[1527] See S.AMOROSINO, *Il partenariato pubblico-privato dalle teorie giuridiche alla realtà del codice dei contratti*, cit.

partner[1528]. However, political risks as well as external risks and risks independent from the activity to be carried out may be regulated through the PPP contract[1529].

Among European legal scholars the legal nature of the PPP is still debated: while French law seems to have embraced the scheme of the administrative contract, thus emphasizing the public-interest orientation of the PPP[1530], in other contexts lawyers challenge the traditional view of the PPP as a contract. The Commission 2004 Green Paper also distinguishes between a purely contractual PPP based on the traditional concession agreement and a PPP which provides for the establishment of a new, jointly managed legal subject in charge of carrying out the project[1531]. The divergence of opinions is also reflected in the statutory collocations of different PPPs[1532]: in Italy, for instance, while "contractual" PPPs are regulated in the Public Contracts Code, "institutional PPPs" are regulated by Art. 17 of Legislative Decree n. 175/2016[1533]. In the Italian context, indeed, the notion of PPP seems to assume an archetypical function[1534]. The PPP functions therefore as a framework contract, an organizational contract which may be implemented through several instruments: concessions, jointly managed or third entities[1535], the so-called "administrative barter"[1536], the sale of immovable goods as the price for works to be realized[1537].

[1528] This is, as already noted, a problem also addressed by the Chinese legislature with regard to PPP regulation.
[1529] See S.AMOROSINO *Il partenariato pubblico-privato dalle teorie giuridiche alla realtà del codice dei contratti,* cit.; see also Art. 182 of the Italian Public Contracts Code
[1530] See VAISSIER, SISTERON, SENIUTA, Chapter "*France*", cit.
[1531] The Green Paper defines them as "institutional" PPP, thus "*involving cooperation between the public and the private sector within a distinct entity*"
[1532] See S.AMOROSINO, *Il partenariato pubblico-privato dalle teorie giuridiche alla realtà del codice dei contratti,* cit.
[1533] See RUGGERI, *Art. 17: le società a partecipazione mista (cd partenariato pubblico privato),* in V.ITALIA, M.BASSANI, G.BOTTINO, G.RUGGERI, *Le società partecipate dopo "la riforma Madia"*, Giuffrè, Milano, 2017, 35-38
[1534] See F.DI CRISTINA, *Il nuovo codice dei contratti pubblici,* cit.
[1535] Art. 184 of the Italian Public Contracts Code allows the private partner, once selected, to establish a limited liability project company
[1536] The notion of administrative barter refers to the establishment of a social partnership relation between public authorities and individuals or citizens' association within a specific territorial area. The partnership contracts concluded, pursuant to Art. 190 of the Italian Public Contracts Code, concern public utility services such as cleaning or decorating green areas, streets and squares. On the topic, see S.ZEBRI, *Il contratto di partenariato sociale ed il nuovo "baratto amministrativo"*, in Azienditalia – Fin. E Trib., Vol. 6, 2016, 538 ff.; M.BALDI, *Locazione Finanziaria, Contratto di Disponibilità e Baratto Amministrativo nel D.lgs n. 50/2016*, in Urbanistica e Appalti, Vol. 8-9, 2016, 959 ff.;
[1537] See Art. 191 of the Italian Public Contracts Code

Furthermore, Art. 189 of the Public Contracts Code introduces several measures defined as of "horizontal subsidiarity" and involving citizens as private parties in PPP relations[1538]. Horizontal subsidiarity activities, furthermore, enjoy preferential fiscal treatments[1539], whose limits have been defined by courts[1540].

Through the provisions of the CPR, therefore, all these forms of PPP may enjoy support from structural funds. Obviously, the policy mechanism always functions according to a bottom-up scheme, so that local authorities collect and evaluate proposals from citizens, in order to elaborate projects eligible for European support. The "old" issue of the quality of the government is once again the most relevant point to be addressed. In the Italian context, the legislature tried to tackle it by empowering an independent authority, the National Anti-Corruption Authority (ANAC)[1541], to issue guidelines and other acts concerning partner selection procedures as well as the correct distribution of risks during the partnership[1542]. The ultimate purpose is to ensure the transparency and efficiency of the public contract system with specific regard to financial and economic balance[1543], so to avoid unjustified expenses. The nature of the acts issued by such authority is debated among scholars[1544]. Some regard guidelines issued by the ANAC as having the same

[1538] Citizens may not only create consortia and be awarded the management rights of public green areas and rural immovable, but may also, through organized groups, propose projects for the realization of public interest works in the local community. Such initiatives, as the aforementioned "administrative barter" are aimed at realizing, for purposes of common welfare, an inclusive dimension for citizens to be actively involved in socio-economic development activities (See M.BOMBARDELLI, *La cura dei beni comuni: esperienze e prospettive*, in Giornale Dir. Amm., Vol. 5, 2018, 559 ff.; L.GILI, *Il codice del terzo settore ed i rapporti collaborativi con la P.a*, in Urbanistica e Appalti, Vol. 1, 2018, 15 ff.). The idea, in the Italian context, also finds a constitutional basis in Art. 118 § 4 of the Constitution and may also be enacted through non-authoritative acts, called collaborative pacts, where a Municipality and groups of active citizens define the priorities to be addressed for the care and management of urban common welfare goods, such as green areas, streets, parks and other facilities (see M.BOMBARDELLI, *La cura dei beni comuni*, cit.).

[1539] See Art. 189 § 5 and Art. 190 of the Italian Public Contracts Code

[1540] The Lombardy Court of Audit, in particular, stated (Decision of June 24th 2016) that, for instance, "administrative barter" tax benefits cannot be compensated with previous debts owed by the citizen involved in the barter partnership

[1541] The role and tasks of the ANAC (Autorità Nazionale Anticorruzione) are mostly described in Art. 213 of the Public Contracts Code

[1542] See S.AMOROSINO, *Il partenariato pubblico-privato dalle teorie giuridiche alla realtà del codice dei contratti*, cit.; V.NERI, *Disapplicazione delle linee guida ANAC e rilevanza penale della loro violazione*, in Urbanistica e Appalti, Vol. 2, 2018, 145 ff.; S.AMOROSINO, *Regolazione e Programmazione delle Infrastrutture*, cit.; P.PANTALONE, *Autorità Indipendenti e Matrici della Legalità*, Editoriale Scientifica, Napoli, 2018, 221-258

[1543] See § 3 of Art. 213 of the Public Contracts Code

[1544] See E.CHITI, *Il nuovo codice dei contratti pubblici - Il sistema delle fonti nella nuova disciplina dei contratti pubblici*, in Giorn. dir. amm., Vol. 4, 2016, 436 ff.; M.DELLE FOGLIE, *Verso un "nuovo" sistema delle fonti? Il caso delle linee guida ANAC in materia di contratti pubblici*, in www.giustamm.it, 5 luglio 2017; G.MORBIDELLI, *Linee guida dell'Anac: comandi o consigli?*, in Diritto amministrativo, Vol. 3, 2016, 273 ff.

nature of government regulations[1545], in particular when such guidelines necessarily assume a mandatory value, since they concern fields which cannot be regulated without mandatory provisions[1546].

The idea of an independent body – be it an administrative authority or, for instance, a court of audit[1547] – empowered to issue regulatory or para-regulatory acts governing the whole procurement and/or partnership process is upheld by several legislatures, such as the German one[1548]. In some cases, as it happens in Italy, such supervisory body has also relevant investigative powers[1549], to the extent that some of its tasks resemble the ones carried out by the recently established China National Supervision Commission[1550].

Some scholars, however, have argued that the presence of a third authority in charge of supervisory functions may indeed lead to interferences between the programming, the regulatory and the supervisory activities[1551].

With regard to development funds, the harmonization should instead be carried out by managing authorities, which, being already subjected to all the relevant provisions about development planning, incorporate into their projects the guidelines issued by authorities such as the ANAC[1552].

9. The framework programmes for research and technology pursuant to Art. 182 TFEU

The legal basis represented by Art. 182 of the TFEU empowers the Commission to define a different approach to planning in the areas of research and technology. European

[1545] See V.NERI, *Disapplicazione delle linee guida ANAC,* cit.; G.MORBIDELLI, *Linee guida dell'Anac,* cit.
[1546] *Ibidem*
[1547] In Germany, for instance, the courts of audit system is particularly developed and is divided into a State Court of Auditors and different Federal Court of Auditors.
[1548] See I.GEORGIEVA, *Using Transparency Against Corruption in Public Procurement*, Springer, Cham, 2017, 194-210
[1549] See, in particular, § 5 to 17 of Art. 213 of the Italian Public Contracts Code
[1550] See Chapter IV of the Supervision Law. See also WANG XIUMEI (王秀梅), HUANG LINGLIN (黄玲林), 监察法与刑事诉讼法衔接若干问题研究 (*The Research on the Issues of the Connection between Supervision Law and Criminal Procedure Law*) in 法学论坛 (*faxueluntan*), Vol. 2, 2019, 135-144. Organs such as the ANAC obviously do not have the ethical and moral connotation which is instead clear in the Chinese legal system, but their far-reaching monitoring competence, their formal independence from the government and their capacity to intervene in the development of cooperation partnership contracts between public and private subjects justifies the comparison.
[1551] See S.AMOROSINO, *Regolazione e Programmazione delle Infrastrutture,* cit.
[1552] See, for instance, the Guidelines of the Italian Ministry of Education of July 25th, 2017, issued as managing authority of the national operational programme "Per la scuola, competenze e ambienti per l'apprendimento".

institutions are indeed directly in charge of adopting relevant financial instruments according to budget regulations[1553] to support project proposals coming from different legal entities[1554], be they private (e.g. enterprises) or public (e.g. research centers and institutions). This does not mean that the Commission itself manages all the relevant programmes. It instead may designate specific bodies at the Union's level to manage certain programmes created under the framework of the development strategy. Therefore, for instance, the "Excellent Science" programme under Horizon 2020 is managed by the European Research Council[1555]. The Commission, however, in issuing the work programmes, defines the "*objectives pursued, the expected results, the method of implementation and their total amount*"[1556].

The functioning of the current MFPRD is disciplined by Regulations n. 1290 and 1291 of 2013 as well as by the Decision n. 743/2013 which lays out the specific programme implementing Horizon 2020 and the two aforementioned regulations, distinguishing between six thematic areas[1557] as well as establishing the European Research Council. For the next planning cycle (2021-2027) the Commission has already issued its proposals concerning the new strategy called Horizon Europe[1558], which reflect most of the mechanisms already in force but introduce some innovations.

Structurally, MFPRD regulations (such as Reg. 1290/2013) are similar to the CPRs. They include, usually in an annex, "Broad lines of the specific objectives and activities", a group of plan directives which, on the basis of the indicators of the relevant macro-

[1553] Art. 6 of Reg. 1290/2013 states that "*In accordance with Art. 10 of Regulation (EU) No 1291/2013, funding may take one or several of the forms provided for by Regulation (EU, Euratom) No 966/2012, in particular grants, prizes, procurement or financial instruments*". There is, therefore, substantial similarity with the instruments provided for in Reg. 1303/2013. Art. 6 of the Proposal for a new regulation concerning Horizon Europe does not differ, in content, from the now in force Art. 6.

[1554] Art. 7 of Reg. 1290/2013 states that "*Any legal entity, regardless of its place of establishment, or international organisation may participate in an action provided that the conditions laid down in this Regulation have been met*". The reference to the concept of legal entity justifies the widest subjective scope possible, since Art. 2 § 13 of the same Reg. defines legal entity as "*any natural person, or any legal person created and recognised as such under national law, Union law or international law, which has legal personality and which may, acting in its own name, exercise rights and be subject to obligation*".

[1555] See Art. 6 of Decision n. 743/2013

[1556] See Art. 5 § 6 of Decision n. 743/2013

[1557] They are: Excellent Science; Industrial Leadership; Societal Challenges; Spreading excellence and widening participation; Science with and for society; Non-nuclear direct actions of the Joint Research Centre (JRC)

[1558] These include a Proposal for a Regulation establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination - 2018/0224 (COD); a Proposal for a Decision on establishing the specific programme implementing Horizon Europe – the Framework Programme for Research and Innovation - 2018/0225 (COD)

strategy of development (e.g. Europe 2020)[1559], examine specific issues of the thematic areas.

A distinct regulation (e.g. Reg. 1290/2013) concerns the rules for participation in the MFPRD and does not find a direct correspondent in the legal sources for structural funds. The reason lies in the absence, in the framework programmes for research and technology, of the member-states driven partnership agreements/operational programmes process. The multilevel governance principle is not denied, nor is the bottom-up approach, but while the second element is reflected in the dynamic of project proposal, presented to the Commission or to the relevant authority from the legal entities interested in financial support, the first one – i.e. the multilevel governance – is less emphasized than in the CPR. Member States participate in the preparation of "model grant agreements"[1560] but are not part of the actual agreement. Obviously, many participants in funded projects are national authorities, such as universities or research center, but they act as legal entities separate from the national governments[1561].

Governments may, however, request relevant information concerning projects[1562].

The inclusive dimension of the MFPRD is much more focused on involving expertise. The Commission or the relevant managing authority are empowered to appoint experts to assist and/or advise in the following activities[1563]: a) evaluation of proposals; b) monitoring of the implementation of actions carried out under the MFPRD Regulation as well as of previous Research and/or Innovation Programmes; c) implementation of Union research and innovation policy or programmes ; d) evaluation of Research and Innovation

[1559] See the Introduction of the Annex

[1560] See Art. 18 of Reg. 1290/2013

[1561] The Proposal for a Regulation on Horizon Europe introduces the European Partnerships as a mean to implement part of the framework programme (Art. 8). Such partnerships resemble, in the structure, the partnership agreements laid out in the CPR but do not involve the Commission and the member states. Instead, they should be concluded between the Commission and the entities described in Art. 2 § 3 of the same Proposal, i.e. any legal entity entitled to participate in the work programmes. Partnership may also take the form of co-funded programmes or of participation into member states programmes as well as joint undertakings set up by the Union for the execution of its research and technology programmes, as laid out in Art. 187 TFEU.

[1562] Art. 4 of Reg. 1290/2013 states that "*Without prejudice to Article 3, the Commission shall, upon request, make available to the Union institutions, bodies, offices or agencies, any Member State or associated country, any useful information in its possession concerning results generated by a participant in an action that has received Union funding, provided that both the following conditions are met:*
(a) the information concerned is relevant to public policy;
(b) the participants have not provided sound and sufficient reasons for withholding the information concerned".

[1563] See Art. 40 § 1 of Reg. 1290/2013

Programmes; e) design of the Union research and innovation policy, including the preparation of future programmes. The experts are identified and selected "*on the basis of calls for applications from individuals and calls addressed to relevant organisations such as research agencies, research institutions, universities, standardisation organisations, civil society organisations or enterprises*"[1564].

A similar mechanism regulates the composition of the European Research Council, whose Scientific Council is formed by "*scientists, engineers and scholars of the highest repute and appropriate expertise, of both women and men in different age groups, ensuring a diversity of research areas and acting in their personal capacity, independent of extraneous interests*"[1565]. The members of the scientific council are appointed by the Commission following a consultation of the scientific community and a report to the European Parliament and the Council[1566]. Since the scientific council is in charge of defining the overall strategy of the European Research Council, the work programmes and the methods of evaluation for proposal[1567], we may infer that, in this regard, European law ensures a highly technical legitimacy to the Scientific Council and to the system of external experts' appointment.

In the Proposal for the Decision on Horizon Europe, indeed, the inclusive dimension is particularly emphasized. Within the framework of newly-introduced thematic "missions"[1568] to serve the policy sector – also called "pillar" – "Global Challenges and Industrial Competitiveness"[1569], the Proposal empowers the Commission to appoint a "mission board", composed by "*high-level individuals*" including "*end-users' representatives*". Such board should have consultative functions concerning the content of programmes, implementation and selection of experts.

Within the context of work programmes, the Commission or the entrusted authority issue calls for proposals. In order for the award procedure to commence, at least three entities

[1564] See Art. 40 § 2 of Reg. 1290/2013
[1565] See Art. 7 of Decision n. 743/2013
[1566] *Ibidem*
[1567] *Ibidem*
[1568] Art. 2 § 5 of the Proposal for the Regulation on Horizon Europe, "*mission' means a portfolio of actions intended to achieve a measurable goal within a set timeframe, and impact for science and technology and/or society and citizens that could not be achieved through individual actions*".
[1569] Art. 4 § 2 of the Proposal for the Regulation on Horizon Europe describes the objectives of such "pillar", which include "health", "inclusive and secure society", "digital and industry", "climate, energy and mobility", "food and natural resources", "non-nuclear direct actions".

established in different member states[1570] must participate in an action[1571] and refer to a common proposal. Once proposals have been collected, a preliminary evaluation is carried out on the basis of ethical criteria. Art. 13 § 3 of Reg. 1290/2013 states that proposals contravening "ethical principles" may be excluded at any time from the selection procedure[1572].

A slightly different ethical dimension inspires the Commission's review over proposals raising ethical issues[1573]. Such review is necessarily linked to the relevant legislation and principles at the European level, i.e. the legislation concerning fundamental rights, which represent the core of the ethic fiber of the whole Union. The clear reference is to the European Charter of Fundamental Rights and the European Convention on Human Rights[1574].

The review, in this case, concerns the content of the project proposed and is therefore deeper than the preliminary evaluation based on ethical criteria. It pertains to matters such

[1570] F 3,4 and 5 of Art. 9 of Reg. 1290/13 provide for some exceptions to this principle and state that : "*3. By way of derogation from paragraph 1, the minimum condition shall be the participation of one legal entity established in a Member State or associated country, in the case of:*
(a) European Research Council (ERC) frontier research actions;
(b) the SME instrument, where the action has a clear European added value;
(c) programme co-fund actions; and
(d) justified cases provided for in the work programme or work plan.
4. By way of derogation from paragraph 1, in the case of coordination and support actions and training and mobility actions, the minimum condition shall be the participation of one legal entity.
5. Where appropriate and duly justified, work programmes or work plans may provide for additional conditions according to specific policy requirements or to the nature and objectives of the action, including inter alia conditions regarding the number of participants, the type of participant and the place of establishment". Art. 18 of the Proposal on Horizon Europe reproduces this logic and provides for a minimum number of three participants, apart from cases where i) the work programme established otherwise; ii) projects are related to European Research Council (ERC) frontier research actions, European Innovation Council (EIC) actions, training and mobility actions or programme co-fund actions; iii) actions to be carried out are of coordination and support.

[1571] See Art. 9 of Reg. 1290/2013. The entities must also be independent from each other. Pursuant to Art. 8 of Reg. 1290/2013 "*Two legal entities shall be regarded as independent of each other where neither is under the direct or indirect control of the other or under the same direct or indirect control as the other*".

[1572] The interpretation of the concept of "ethical principles" raises some issues. Since we are talking about a general and broad evaluation, not pertaining to the content of the proposal (as it happens instead in Art. 14 of Reg. 1290/2013), it seems reasonable to link such "ethical principles" to the general notions of diligence and good faith related to the specific conduct required to the subject issuing the proposal. As a consequence, scientific misconduct such as appropriation of others' researches would qualify as a violation of ethical principles. In practice, at least it would be taken into account by the experts' recommendation over the proposal. On the issue, see Case T-208/16 *Ranocchia*, decided by the General Court on February 5th 2018.

[1573] See Art. 14 of Reg. 1290/2013 and Art. 15 of the Proposal for the Regulation on Horizon Europe.

[1574] See Art. 15 of the Proposal.

as protection of personal data, physical and mental integrity of the person, health protection and non-discrimination[1575].

The technical evaluation of proposal is based on three main criteria[1576]: a) excellence; b) impact; c) quality and efficiency of the implementation. Work programmes further specify such criteria. Evaluation is carried out by independent experts, but the Proposal for a Regulation on Horizon Europe aims at introducing a partially different discipline, with the establishment of an evaluation committee which may partially or fully be composed by external independent experts but may also include representative of European institutions[1577]. The goal pursued seems to be a better coordination between the evaluation criteria for research and technology proposals and the Unions' development strategies and budget policies.

The criteria laid out for the evaluation of proposals clearly reserve a wide discretionary space for the evaluation body. On the other hand, they raise the issue of assessing possible misuse of such discretionary powers. European case law[1578] established that "*a measure is vitiated by a misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case*". Moreover, in case of complex assessment, the legitimacy of the evaluation is upheld on the basis of the legitimacy of the procedure without assessing the merit of the evaluation itself, apart from cases of "*manifest error of assessment or misuse of powers*"[1579]. In other words, the discretion of the evaluation authority – legitimized, we must recall, by its own technical competence – is, to some extent, protected from complaints.

What is instead subjected to judicial control is the procedure followed. The evaluation review system must focus on the procedural aspects of the proposal evaluation phase and not on the merits[1580]. The Commission must ensure that such review system is transparent.

[1575] Furthermore, the Proposal also requires an ethical self-assessment carried out by the participating entities. The Proposal, indeed, clarifies certain aspects of the legal provisions which, however, may be already derived hermeneutically.
[1576] See Art. 15 of Reg. 1290/2013 and Art. 25 of the Proposal for a Regulation on Horizon Europe
[1577] See Art. 26 of the Proposal
[1578] See Case T-208/16 *Ranocchia*, § 69; Case C-342/03 *Spain v. Council*, § 64
[1579] See Case T-208/16 *Ranocchia*, § 70; Case C-399/08 *Commission v. Deutsche Post*, § 97; Case C-61/15 *Heli-Flight v. EASA*, § 101
[1580] See Art. 16 § 3 of Reg. 1290/2013 and Art. 27 § 2 of the Proposal

Once this review phase is exhausted, participants may file complaints before European judicial organs – i.e. the General Court in the first place – pursuant to Art. 263 § 4 of the TFEU which states that "*Any natural or legal person may (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*"[1581]. The wording of such article, however, raises some issues. Indeed, the article would allow subjects to challenge only acts directly addressed to them or having individual concern to them. A narrow interpretation would thus exclude, for example, the possibility to challenge a call for proposal, being it a general act not targeted to any individual subject. This view, though argued for, in the case law, by European institutions, has not been accepted by the General Court. Instead, the Court stated that participants in a project might challenge the final decision regarding their specific proposal on grounds of irregularity in the formulation of the call for proposal since such decisions are "*the first measures which the applicants could challenge and thus the first measures entitling them to dispute, indirectly, the lawfulness of (...) selection procedure*"[1582].

As it happens with the structural funds, the research and technology framework programme may be implemented through PPPs, either setting up a joint undertaking with financial contributions from the EU or defining contractual agreements between the partners which specify the objective of the partnership, the respective commitments, the key performance indicators and outputs to be delivered[1583].

Contractual implementation of MFPRD is particularly relevant, since it designs a contractual scheme incorporating planned directive and planned indicators directly derived from the framework programme and its major objectives, thus implementing a logic of "negotiated planning/programming"[1584].

10. The European Fund for Strategic Investments

[1581] See Case T-208/16 *Ranocchia*; Case T-76/15 *Kenup*
[1582] See Case T-76/15 *Kenup* § 66; Case T-461/08 *Evropaïki Dynamiki v. EIB*, § 73-74
[1583] See, for instance, Art. 25 of Reg. 1290/2013.
[1584] See R.CUONZO, *La programmazione negoziata*, cit.

The European Fund for Strategic Investments is a complementary instrument which intertwines with other planning frameworks such as the Structural Funds or the MFPRD. Its role stems from an agreement between the Commission and the European Investment Bank[1585]. Such agreement provides for the establishment of a specific account managed by the EIB as a reference for EFSI supported operations[1586].

The EFSI is managed through a steering board, but the evaluation of projects eligible for support is carried out by an Investment Committee, appointed by the steering board for three years[1587]. Once again, the technical legitimacy of its members is emphasized, since they are independent experts having "*a high level of relevant market experience in project structuring and project financing, as well as micro and macro-economic expertise*"[1588].

Projects approved and supported by the EFSI fall under the procedure of the EIB, but with the support of an explicit Union's guarantee laid out by Art. 8 of Reg. 1017/2015[1589]. Structurally, therefore, the EFSI does not differ much from other development funds[1590]. However, it combines a public-driven allocation with the internal dynamics of a public development banks such as the EIB[1591]. Through the employment of financial instruments such as financial guarantees, the EFSI also aims at mobilizing private capital toward selected policy fields and economic sectors[1592]. This scheme is reproducible at the national level, through the activity of national promotional banks[1593].

[1585] See Art. 4 of Reg. 1017/2015

[1586] Art. 4 § 2 (a)(i) of Reg. 1017/2015 specifies that the EFSI is a separate facility within the EIB

[1587] Art. 7 § 7-8 of Reg. 1017/2015

[1588] *Ibidem*. Furthermore, the steering board must ensure that the expertise of the investment committee's members is diversified "*to ensure that it has a wide knowledge of the sectors referred to (...) and of the geographic markets in the Union*".

[1589] For operations carried out within the Union or involving "*entities located or established in one or more Member States and extend to one or more third countries falling within the scope of the European Neighbourhood Policy, including the Strategic Partnership, the enlargement policy, the European Economic Area or the European Free Trade Association, or to an overseas country or territories*".

[1590] Reg. 1017/2015, after the usual general outlines, defines the EFSI and regulates the EFSI agreement between the Commission and the EIB (Art. 4), then laying out the eligibility criteria for the use of the EU guarantee (Art. 6) and the governance structure of the EFSI (Art. 7). In Chapter III the Regulation addresses the EU guarantee and guarantee fund, further specifying operational rules for its use. Chapter IV concerns instead the Investment Advisory Hub while Chapter VI focuses on reporting, accountability and evaluation.

[1591] On the issue, see D.MERTENS, M.THIEMANN, *Market-based but state-led: The role of public development banks in shaping market-based finance in the European Union*, in Competition & Change, Vol. 22(2), 2018, 184-204.

[1592] It does not come as a surprise, therefore, the fact that, once again, Public-Private Partnerships have been the object of the attention of national development banks and, within the context of the EFSI, appear to be a preferential legal framework to carry out development initiative. See *ibidem*

[1593] See EIB Operational Plan 2017-2019, 27. The EFSI actually reshapes the role of development banks such as the EIB, leading them "beyond their market-correcting countercyclical efforts" (see D.MERTENS, M.THIEMANN, *Market-based but State-led,* cit., 188).

11. Investment planning and State-aid rules in the European legal system

To define the legal positioning of EU development planning, the last, relevant step is to assess the functioning of that field of EU economic law which functions as a logic and hierarchical premise of the funds' system: state aid law.

State aid law represents, to some extent, a peculiarity of European economic law. Already regulated in the ECSC Treaty[1594], state aids have been subsequently disciplined in Artt. 92 and 93 of the Rome Treaty, now Artt. 107 and 108 of the TFEU. The possible negative externalities of state aids and subsidies over the efficient development of market economies have been, indeed, incorporated into liberal-democratic legal systems to various extents[1595]. None of these legal sources, however, denies aids as a whole[1596]. The very notion of "aid" is embedded in the wide pursue of harmonized development[1597] justified, to some extent by a dynamic interpretation of the competition policy, to which state aids are a corollary and not an enemy[1598].

From an economic point of view, antitrust regulation, in general, is exposed to objective efficiency defenses, claiming that potentially anti-competitive conducts may produce efficiency externalities[1599].

On such premises, it is almost obvious that in the European legal systems there is a general clause of non-incompatibility of state aids and subsidies[1600], which are, first and foremost, incompatible with the common market only when they "*distort or threaten to distort*

[1594] See W.SAUTER, *Coherence in EU Competition Law*, Oxford University Press, Oxford, 2016, 206

[1595] In the United States, for instance, the Sherman Act (1890) does not regulate state aids. However, the Commerce clause contained in Sec. VIII (3) of the Constitution empowers the Congress to regulate commerce among the states and therefore regulate federal schemes of aids and support to industry. Negative externalities of public support to private economic activities also justify the existence of international legal frameworks such as the WTO Agreement on Subsidies and Countervailing Measures (see H.HOFMANN, C.MICHAEU (edited by), *State Aid Law of the European Union, cit.*, 1 ff.). In the WTO system the control over subsidies is "horizontal", meaning that it is left to bilateral relations and agreements between States.

[1596] C.RUMFORD, in *European Cohesion?*, cit., 153 ff., notes how state aids had been widely employed by European countries in the 1960s and 1970s in order to protect and promote the development of "national champions", i.e. to support their national industrial policies. The view that confines state aids to the idea of "necessary evils" is a fruit of the neo-liberalist economic thought of the 1980s.

[1597] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law of the European Union,* cit., 1 ff.

[1598] See C.RUMFORD, *European Cohesion?, cit.*, 155.

[1599] See K.MATHIS (edited by), *Law and Economics in Europe*, Springer, 2013, 372

[1600] See BOTTINO, *Il finanziamento pubblico dell'economia,* cit., 226; G.BENACCHIO, *Diritto Privato della Unione Europea,* cit., 377-378

competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States" (Art. 107 § 1 TFEU).

From this perspective, the European legal frameworks is in line with the provisions of the WTO agreement on Subsidies and Countervailing Measures[1601], whose Art. 3 § 1 prohibits subsidies contingent upon export performance and use of domestic goods over imported ones, thus intervening over the international market distortion. This approach to the relation between legitimacy and non-legitimacy of the aid justifies, furthermore, the inclusion of state aid law within the domain of competition law[1602].

State aids, however, necessarily bear a significant relation with planning too, since they represent, indeed, a way to allocate resources and are a fundamental instrument for pursuing general interests[1603]. The fact that the European law stance is that they are the "*second best option to achieve optimal allocation*"[1604] behind the market, does not contravene the idea that they are, in fact, a way to achieve such *optimus*.

The TFEU, as known[1605], distinguishes between aids which are always compatible with the internal market (Art. 107 § 2) and aids which may be deemed compatible (Art. 107 § 3). The second group incorporates common instance of planned development mentioning aids to low-development areas, aids for the execution of project of EU interest, aids for the eradication of disturbances in national economies, aids to support development of certain economic activities or certain areas. Art. 107 § 3(e), instead, lays out an "open clause provision", empowering the Council, on a proposal from the Commission, to enact decisions declaring other categories of aids as compatible.

On the basis of such premises, it has been argued that between European funds and state aid law there is a relation which is both conflictual and complementary[1606]. Indeed, "*an inevitable distortion of competition ensues through EU cohesion-based structural interventions*"[1607]. On the other hand, however, the system of development funds and state aid law constitute the two fields of European economic law where the integration between

[1601] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law,* cit., 6
[1602] *Ibidem*
[1603] See G.FERRARI (edited by), *Diritto Pubblico dell'Economia*, Egea, Milano, 2013, 146
[1604] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law,* cit., 7; See also Communication from the Commission (2005) 107 final, 'State Aid Action Plan: Less and better targeted State aid: A roadmap for State aid reform 2005– 2009'
[1605] See G.BENACCHIO, *Diritto Privato della Unione Europea,* cit., 377-381
[1606] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law,* cit., 187-188
[1607] See *ivi*, cit., 191

the concept of cohesion and the concept of efficiency is most refined[1608]. This integration is further reassessed in the Commission Regulation n. 651/2014 (the so-called "block exemption regulation") declaring certain categories of aids compatible with the internal market in application of Artt. 107 and 108 of the Treaty. Recitals n. 55, 58, 59, 75 of the Regulation all refer to the Europe 2020 strategy in order to define thematic areas where the use of state aids is justified for development purposes.

Apart from the common reference to development strategies, state aid law and development funds law display, at least, one conceptual analogy and one structural analogy. In the first place, they both employ a wide notion of "state intervention" in the economy[1609]. The TFEU addresses aids granted "*by a Member State or through State resources*". These comprise each intervention which leads to a diminution of state revenues while alleviating the economic and financial burden of an undertaking[1610]. These may include "*direct grants, capital investments, loans, guarantees, and benefits in kind*"[1611]. Tax benefits are to be regarded as aids too[1612]. Moreover, both funds and state aids law design mechanisms of *ex ante*[1613]and *ex post* assessment. The system of *ex ante* evaluations finds a common ground in the idea *ex ante* conditionalities[1614]. In state aid law, the *ex ante* monitoring procedure is founded over Art. 108 § 3 of the TFEU, stating "*The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (…) The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision*"[1615]. Reg. 1589/2015 – laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union – structures a system of prior notification to

[1608] See *ivi*, cit., 191-194
[1609] See W.SAUTER, *Coherence in EU Competition Law*, cit., 207-209
[1610] See G.BENACCHIO, *Diritto Privato della Unione Europea*, cit., 377
[1611] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 68
[1612] See Case C-30/59; see also I.RICHELLE ET. AL, *State Aid Law and Business Taxation*, Springer, Berlin, 2016; C.MICHEAU, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, Wolters Kluwer, New York, 2014
[1613] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 198-201
[1614] *Ibidem*
[1615] The last sentence of § 3 refers to the so-called "standstill clause" which imposes on member states the obligation not to put the aid into effect before the decision of the Commission. The clause is reassessed in Art. 3 of Reg. 1589/2015 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union (codification). On the issue, see V.TOMLJENOVIĆ ET AL. (edited by), *EU Competition and State Aid Rules*, Springer, Berlin, 2017, 223-227

the Commission of a decision to grant aids[1616]. Therefore, the Commission may decide to open a formal investigation procedure where the Member State as well as interested parties are called and may ask to be involved through their specific observations[1617]. So far, to the *ex ante* evaluation system has not corresponded a comprehensive *ex post* evaluation system, which is instead established with regard to the development funds through the expenses report system and the use of repayment of costs as an implementing financial instrument.

Indeed, in the Communication of May 8th 2012 on the EU State Modernisation (SAM), the European Commission put forward the idea of an *ex post* assessment of state aids[1618], to verify their impact on competition as well as the balance between the public goal of the aid and such impact[1619].

Art. 12 of Reg. 1589/2015 empowers the Commission to "*examine information regarding alleged unlawful aid from whatever source*". The following investigation procedure may lead to an order of suspension as well as recover of unlawful aids[1620]. The recovery procedure, indeed, may in the first place encounter some resistance on the political level from the state and, in the second place, lead to severe consequences for the undertakings receiving the aid[1621]. From this perspective, instead, the *ex ante* judgment of financial and economic viability of fund-supported projects in development fund, as well as the already mentioned instrument of cost repayment, serves also the purpose of avoiding undesired negative economic consequences in the implementation procedure.

From the analysis it may be noted how, both conceptually and structurally, the system of development funds and state aid law bear some similarities. Therefore, the main operative

[1616] Indeed, in Joined Cases C- 399/ 10 P and 401/ 10 *P Bouygues and Bouygues Telecom v Commission and Others* the CJEU found that even the announcement of the promise of a loan may be regarded as state aid. Therefore, it could be argued that the obligation of prior notification must be interpreted carefully, considering that even a public announcement should be somewhat authorized by the Commission when it may affect competition in the market.

[1617] See Art. 6,7 and 24 of Reg. 1589/2015

[1618] See Communication, 3

[1619] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 201. I would argue that the practical obstacles to the implementation of a system of ex post assessment of state is related to the high degree of difficulty of an eventual recovery of the already granted aid.

[1620] Art. 13 of Reg. 1589/2015

[1621] See G.BENACCHIO, *Diritto Privato della Unione Europea*, cit., 378-379, footnote n. 50. The footnote refers to the famous case of the milk quotas regarding Italian milk producers at risk of going bankrupt for the recovery of illicitly granted aid.

problem does not concern compatibility between the two systems, but rather their potential juxtaposition[1622].

The issue calls for some preliminary clarifications. At first glance, the very applicability of state aid law to development funds could be prevented from the European and non-national nature of the resources granted by funds[1623]. The European Commission itself, when assessing co-financed projects, has often regarded as state resources only the ones coming from member states[1624]. This argument is counteracted formally by the mechanism of resources' transfer, going from the funds to the national-level relevant authorities' budgets. Moreover, managing authorities have a certain degree of discretion in laying out specific projects and initiatives under operational programmes[1625], thus falling within the scope of State Aid Law[1626]. Therefore, when Art. 37 § 1 of the CPR provides for the managing authorities to comply with state aid law, it is referring, essentially, to the exercise of that discretion. This is confirmed by the evolution of the CJEU case law, which found that where the aid constitutes implementation of a European measure for which the MS has no discretional power then the resources transferred are not considered state aid[1627]. The degree of discretion that MSs and managing authorities exercise with regard to operational programmes and projects is to be assessed case by case[1628]. For instance, in the State aid case N 764/2007[1629], the Commission found that since the relevant resources were transferred from the ERDF directly to the "*contractor selected by it in accordance with the procurement rules upon presentation of invoices*"[1630],

[1622] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 187 ff.
[1623] See *ivi*, cit., 203
[1624] See Commission Decision State aid N 57/2005 – United Kingdom Regional Innovative Broadband Support in Wales, § 22. However, State Aid SA.46228 (2016/N), for instance, assesses a project entirely financed through European resources.
[1625] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 204-209
[1626] In *ivi*, cit., 203, it is mentioned that "*the Commission started reviewing what was effectively funding it had approved itself under the State aid rules. This 'expansion' has caused significant problems both at a practical level, namely how ESI Funds are to be calculated in the aid intensities and aid ceilings, and at a conceptual level, namely how funds disbursed by the EU budget can be considered as State aids and how the Commission can control itself*".
[1627] See Joined Cases C- 213– 15/ 81 *Norddeutsches Vieh und Fleischkontor*. § 22; C- 460/ 07 *Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz* § 70; T- 351/ 02 *Deutsche Bahn AG v Commission* § 102.
[1628] In Case C- 482/ 99 *France v Commission*, the CJEU held that "*the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken*".
[1629] Construction of a 400 MW Combined Cycle Gas Turbine Plant at AB Lietuvos Elektrinė
[1630] Decision N 764/2007, § 15

neither the Lithuanian State nor the state-owned company operating the project had direct control and influence over such resources[1631].

From the perspective of the aid recipient, moreover, the application of state aid law is excluded where such recipient does not fall within the notion of "undertaking" pursuant to Art. 107 TFEU[1632]. Therefore, as upheld by the CJEU since the *Höfner* case[1633], the aid must be addressed to an entity engaging in an economic activity, to be carried out, at least potentially, in competition. Consequently, for instance, public universities receiving support from European funds are excluded from the application of state aid law, since their activities serve social, cultural and educational purposes[1634].

In principle, the independence of development funds law and state aid law imposes on member states the obligation to notify aids granted using resources coming from European funds for the implementation of the relevant projects.

Regardless of the nature and structure of the managing authority[1635], where the state may exercise a decisive influence in the allocation of resources[1636], state aid law applies. The discretion exercised by managing authority justifies, at least in principle, the distinction between the legal frameworks of development funds and state aids. However, the same concept may be interpreted in another way: state aid law comes to function as a sort of set of supplementary provisions to evaluate, in advance, the merits of a EU-supported project as implemented at the national and local level[1637]. This mechanism, however, raises a fundamental issue, that of consistency of state aid assessment criteria with the development criteria used to assess funded project at the European level.

European funds are subjected to the Commission Regulation n. 1407/2013 on the application of Artt. 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. Pursuant to Art. 3 of the Regulation, aids to a single undertaking per

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[1631] *Ibidem*

[1632] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law, cit.*

[1633] See Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*.

[1634] See Case C- 318/ 05 Commission v Germany, § 68. By contrast, the CJEU held, in the same case, that "*courses provided by establishments financed essentially by private funds, particularly by pupils and their parents, constitute services within the meaning of Article 50 EC, the aim of such establishments being to offer a service for remuneration*". Therefore, private educational institutes and universities, where enjoying support from European funds, are subjected to state aid law.

[1635] It may be a public authority or a State-Owned enterprise or even a private enterprise. See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 207

[1636] See Case C- 305/ 89 *Italy v Commission* § 13; Case T- 37/ 97 *Forges de Clabecq v Commission* § 68 ff. ; Case C- 206/ 06 Essent Netwerk Noord and Others § 65 ff.

[1637] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law*, cit., 207-209

member state not exceeding 200.000 Euros over any period of three fiscal years (§ 2)[1638] are exempted from the obligation to notify the aid to the Commission (§ 1).

If the project funded does not comply with such ceiling, qualitative criteria must apply, on the basis of § 2 and 3 of Art. 107 of the TFEU. The most relevant legal source for the "qualitative" assessment of aids is the Commission Regulation n. 651/2014 declaring certain categories of aid compatible with the internal market in application of Artt. 107 and 108 of the Treaty, hereinafter also called the "Block-exemption Regulation". In addition, the Commission issues specific guidelines for certain types of aids, for instance the Guidelines on Regional State aid [1639] or the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest [1640]. The first coordination effort with the development funds provisions is carried out by these legal acts, not only through general references to Europe 2020 [1641] or other development strategies [1642], but also through specific assessment criteria. Point 3.2.1 of the Regional Aid Guidelines (RAG) specifies that "*Regional aid schemes should form an integral part of a regional development strategy with clearly defined objectives and should be consistent with and contribute towards these objectives*". In order to assess such consistency, § 32 introduces some criteria, mentioning the "*measures implemented in accordance with regional development strategies defined in the context of the European Regional Development Fund (ERDF), the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development or the European Maritime and Fisheries Fund with a view to contributing towards the objectives of the Europe 2020 strategy*". Pursuant to such paragraph, the Commission, in assessing individual cases of notified state aids, must take into account that a project is, for instance, carried out within the context of an operational programme approved by the Commission itself pursuing common development objectives[1643]. In the second place, § 20 of the Communication on projects of common interests states that the Commission "*will take a more favourable approach*" in assessing

[1638] Art. 3 § 3 lowers this ceiling to 100.000 over three fiscal years for "*a single undertaking performing road freight transport for hire or reward*"
[1639] 2013/C 209/01
[1640] 2014/C 188/02
[1641] See Point 1.4 of the Communication 2014/C 188/02; § 30 of the Regional Aid Guidelines
[1642] § 15 of Communication 2014/C 188/02
[1643] See State Aid SA.46228 (2016/N) – Latvia Development of separate waste collection systems, § 51

the compliance with state aid law when "*(f) the project involves co-financing by a Union fund*". In practice, when evaluating projects, the Commission considers the involvement of a European fund to judge over the contribution of the aid to the relevant development objective as well as its necessity[1644]. According to case law[1645], the Commission also assesses the appropriateness and proportionality[1646] of the state intervention, as also laid out in the sectoral guidelines such as the RAG [1647]. From this perspective, the appropriateness evaluation may for instance consider the connection between the specific project and the operational programme laying out the development goals and indicators[1648].

The evaluation is easier if we look at the policy topics of the Block exemption regulation, which almost entirely correspond to the priorities pursued by the development funds[1649].

The coordination between state aid law and development funds functions in two directions. On one hand it provides for another layer of supervisory power over the implementation of funded projects; on the other hand, more significantly, promotes *ex ante* coordination of investment initiatives.

The logic (and legal) hierarchy shaped by the legislation is quite clear. Development funds must comply with state aid provisions. State aid law, in principle, is superior. But, in its implementing instruments, takes into account the instances brought up by cohesion policies.

Aids connected to European funds bear, therefore, a much lesser risk to be deemed incompatible with the common market[1650]. This information, however, must be balanced

[1644] See State aid SA. 49406 (2017/N) - Spain - Subsidies for the production of solid biomass fuel in Extremadura, Spain; State Aid SA.46228 (2016/N) – Latvia Development of separate waste collection systems;

[1645] Commission Decision of 15 December 2009 in State Aid case no. N 385/2009 – Public financing of port infrastructure in Ventspils Port, OJ C 72 of 20.03.2010; Commission Decision of 2 July 2013 in State Aid case no. SA.35418 (2012/N) – Greece – Extension of Piraeus Port, OJ C 256 of 5.09.2013, p. 2; Commission Decision of 18 September 2013 in State Aid case no. SA.36953 (2013/N) – Spain – Port Authority of Bahía de Cádiz, OJ C 335 of 16.11.2013, p. 1; Commission Decision of 27 March 2014 in State aid case no. SA.38302 – Italy – Port of Salerno, OJ C 156 of 23.05.2014, p.1.

[1646] As mentioned by § 77 of the RAG, "*In principle, the amount of the regional aid must be limited to the minimum needed to induce additional investment or activity in the area concerned*"

[1647] See Sec. 3.6 of the RAG

[1648] See State Aid SA.46228 (2016/N) – Latvia Development of separate waste collection systems, § 53

[1649] See Art. 1 of the Regulation. Policy fields, such as agriculture, not covered by the regulation are instead covered by specific legislation (For instance Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products).

[1650] Recent caselaw, as already seen, indicates that the Commission pays great attention to the link between aids and funds. Moreover, some data may sustain such thesis. The 2012 Financial Year Budget Report of

with data regarding the objective fulfilment rate of funded projects and the usage rate of available funds[1651]. Indeed, some have argued that, due to the highly complex network of conditions to be respected by projects with regard to state aids, in addition to other conditions, only a percentage of the available funds are actually transposed into viable projects[1652].

Other issues have been highlighted with regard to the criteria for the definition of regions eligible for aids and funds' support[1653]. For less-developed regions, the CPR (Art. 90) defines them as regions whose GDP per capita is less than 75 % of the average GDP of the EU-27. The RAG adopt[1654], indeed, the same criterion, empowering member states to define "a" areas[1655] the regions whose GDP per capita in purchasing power standards (PPS) is below or equal to 75 % of the EU-27 average, as well as the outermost regions. However, in practice, some discrepancies have been highlighted in the exact definition of such areas according to the CPR and according to the RAG[1656]. This problem may be due to informational asymmetry in the elaboration of relevant data[1657]. It may also arise from another structural difference. The RAG allow member states to designate "c" areas, falling within the scope of Art. 107 § 3(c)[1658] distinguishing between pre-defined "c" areas and "non pre-defined" areas. The former are defined on the basis of population criteria[1659]. The latter may be defined according to population, GDP and unemployment rate[1660]. In comparison, the classification of the CPR is based on a tripartite structure based on GDP and much more rigid and centralized, in this regard.

The practical consequence of this difference is that the geographical coverage of lawful state aids designs a different map from the coverage of structural funds. Perhaps such

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the Court of Auditors indicates that only 3 out of 180 aids linked to funds, among those assessed by the Commission, were deemed to be unlawful.

[1651] See for example the Court of Auditors report for 2012, point 6.91, where the Court highlights that most member states were unable to fully use the available funds.

[1652] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law,* cit., 202

[1653] See *ivi*, cit., 195-197

[1654] RAG § 150-151

[1655] "A" areas are the ones enjoying aids pursuant to the clause of Art. 107 § 3(a) of the TFEU, so "*areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349*"

[1656] See H.HOFMANN, C.MICHAEU (edited by), *State Aid Law,* cit., 195-197

[1657] *Ibidem*

[1658] The provision refers to the "*development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*"

[1659] RAG § 158

[1660] RAG § 168

discrepancy is not entirely unreasonable, especially given the specific objectives of laid out in § 3 of Art. 107 TFEU[1661]. However, the different degree of discretion left to member states in defining development areas is inconsistent with the circumstance that, in both cases – i.e. development funds and state aid – the institution in charge of supervising the resource allocation choices is the same one, i.e. the Commission.

Even if from the formal point of view both state aids and development fund have a legal basis in the treaties and are disciplined through regulations as well as implementing Commission regulations, the functioning of the system proves that state aid law is superior to development fund law. Apart from the literal reference to state aids in the CPR and the other relevant sources, the system of prior notification obliges managing authorities and member states to submit to the Commission those very same projects developed in accordance with Commission-approved operational programmes. The efficient coordination of the system depends on the criteria embraced in the relevant state aid provisions. As long as the presence of a funded project constitutes an indicator of compliance with the internal market in state aid law, European funds enjoy a partial "immunity" as structural development forces of the European economy. After all, if we interpret state aid law from a "positive" point of view, that is the determination of those aids in harmony with the common market, then we may argue that this is the primary planning dimension of European Law[1662], together with the cohesion principle and under the ideology of the social market economy.

12. Conclusions. The position of development planning in EU Law

[1661] See SEABRIGHT, *'Panel discussion'*, in C.DIETER EHLERMANN, M.EVERSON (edited by), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids*, Hart Publishing, Oxford, Portland Oregon, 2001, 23. The authors put forward the idea that distinct origin of the funds and the related intra-state and inter- state funds' transfers constitute enough circumstances to justify a distinct regulatory approach. So for example, as reported in H.HOFMANN, C.MICHAEU (edited by), *State Aid Law,* cit., 197, "*a richer Member State should in principle be able to resort to its own resources, under the terms of the State aids legislation, to support less developed regions within its surface/ geographical scope, even if that decision runs counter to EU cohesion objectives*". On the issue, see also T.BESLEY, B.SEABRIGHT, *The effects and policy implications of state aids to industry: An economic analysis*, in Economic Policy, Vol. 14(28), 1999, 37

[1662] See BOTTINO, *Il finanziamento pubblico dell'economia,* cit., 225. The author reminds that state aid law constitutes the most unifying factor with regard to conditions and limits of public financing of the economy.

If the principle that large-scale economics are logically subjected to a centrally-managed redistribution effort still stands[1663], therefore it could be argued that the EFSI, in connecting the logic of the fund and the logic of the development bank, pursues an activity of market-shaping or market-creating[1664]. In other words, it "*address(es) societal challenges by building a functional ecosystem that channels financial flows*"[1665].

The constitution, through legal frameworks, of markets, acquires a political character[1666], that is the (still incomplete) consolidation of a post-regulatory public power, where planning and regulation justify and found a centrally-managed allocation of resources stimulating and supporting market activities of private economic operators[1667]. This happens when regulation incorporates political economy, macroeconomic and even ethical considerations, which, according to the traditional theory of the regulatory state, should be excluded from its scope[1668]. On the other hand, planning does not find its limit in the free market or in the general structure of an economy[1669]; instead it aims at influencing the market, at shaping the market.

The dialogue between planning and market as emerging from European legislation and institutional interaction proves the theory of Deng Xiaoping about the interaction between the two elements as true, even in the European context.

Some have argued that a conceptualization of the public coordinative role in modern capitalism is embodied by the advancement of the so-called "European Consolidation State"[1670], revolving around the "*institutionalization of fiscal austerity*" and being a sort of evolution of both Schumpeter's "tax state" and the post WW2's "debt state"[1671].

I have already pointed out how strong is the relation between investment policies and budget policies in European Law. Such connection is, however, somewhat perilous. Investment plans and funds, being financed through the Union's budget, draw resources

[1663] See K.POLANYI, *The Great Transformation*, Farrar & Rinehart, New York, 1944, 43-55
[1664] See D.MERTENS, M.THIEMANN, *Market-based but state-led*, cit., 188
[1665] *Ibidem*
[1666] See K.POLANYI, *The Great Transformation*, cit.
[1667] See S.AMOROSINO, *Regolazione e Programmazione delle Infrastrutture*; LAZZARA, *La funzione regolatoria: contenuto, natura e regime giuridico*, in M.CAFAGNO, F.MANGANARO (edited by), *L'intervento pubblico nell'economia,* cit., 117-128
[1668] *Ibidem*
[1669] *Ibidem*
[1670] See in particular W.STREECK, *The Politics of Public Debt Neoliberalism, Capitalist Development, and the Restructuring of the State*, MPIfG Discussion Paper 13/7, 2013; W.STREECK, *The Rise of the European Consolidation State*, MPIfG Discussion Paper 15/1, 2015
[1671] See W.STREECK, *The Politics of Public Debt,* cit., 16

from member states, which, however, may be unwilling or incapacitated to provide them due to the budget constraints imposed by austerity policies[1672].

From this perspective, European planning is in danger of falling into another contradiction. Through its development funds, the EU has established the relevant law to serve the purpose of a coordinated public economic management. However, the incomplete interdependence between different sectors of European economic law (and, thus, the relative independence of such sectors) prevents a proper integration of planning and regulation. Similarly, there is a conceptual distinction between purely economic regulation – i.e. aimed at tackling informational asymmetries and balancing the market – and social regulation – i.e. aimed at preserving certain common interests from market failures[1673]. Given that, in practice, both of these regulatory functions employ the same instruments and operate through the same legal schemes[1674], i.e. market corrections, the distinction does not seem to rely on legal arguments. It instead draws legitimacy from a dichotomy between an "objective" assessment of the market based on efficiency and a "subjective" assessment based on shared fundamental values within a specific human community[1675].

Today, the system of funds, although with different degrees of intensity, covers socio-economic issues as well as ethical issues on both a thematic and a geographical dimension over the whole Union. Their efficiency, however, varies from case to case. As showed by the reports of the European Court of Auditors, the majority of the funded projects only partially achieve the goals and the set indicators[1676].

The real issue, in the European context, seems to be the geographical fragmentation of policy implementation schemes.

The comparative outlook upon European development planning shows a highly complex and, I would argue, efficient regulation of the instruments of planning. On the other hand, the legal force of theoretical frameworks for development policies is very feeble.

[1672] See D.MERTENS, M.THIEMANN, *Market-based but state-led*, cit., 188

[1673] See LAZZARA, *La funzione regolatoria*, cit., 123

[1674] *Ibidem*

[1675] See *ivi*, cit., 122-123

[1676] See Annual Report for the financial year 2017, points 6.87 and 6.88. The Court of Auditors highlight that "*for the 74 projects where both result and output indicators had been set, we found that these had been fully achieved in 26 cases (35 %), partially achieved in 43 cases (58 %), could not be assessed in two cases (3 %) and were not achieved in three cases (4 %)*". Moreover "*Of the 34 cases where output indicators had been set (but not result indicators), we found that these had been fully achieved in 23 cases (68 %) and partially achieved in 11 cases (32 %)*".

Strategies are simply too vague and lack a hierarchical system capable of deriving, from the general acts, both local and special acts directly applicable by courts or local authorities. The project-based approach favors intergovernmental negotiation in place of uniform application of policy strategies. Primary legal sources refer to development strategies only in a very declamatory way and do not link them to a concept of public interest which is differently rooted in the constitutional traditions of member states.

To put it simply, the mechanisms of development planning, even when they reach high levels of efficiency and legal enforceability, do not shape a formant for the system. The statement is confirmed by the content of the relevant legislation, by the few decisions of European courts, by the words of the scholars.

The reasons for such orientation may be several. I will point out the one that I believe is more significant: public economic management, in contemporary European law, is carried out mostly through competition law. The statement is further confirmed by the clear hierarchy shaped by legislation, which requires development funds' law to comply with state aids law. Moreover, this structural choice of the EU legislature is consistent with the original notion of social market economy.

CHAPTER FIVE
RESULTS OF THE COMPARATIVE ANALYSIS

1. Looking for legal models of development planning

It should be obvious that this research has been driven by a functionalist approach. In doing so, it respects one of the pillars of comparative legal theory[1677]. I have, in essence, looked for the legal instruments which, in China and Europe, serve the purpose of development planning. The logic process I followed, however, did not commence from the positive norms, but rather from the assessment of the notion(s) of development and planning in the legal orders examined. Understanding how institutional, judicial and academic actors interpret the logic and necessities of development planning allowed me to trace connections between the positive norms. At the same time, it helped me trying to escape that argument seeing functional comparison as negligent toward the cultural context of legal rules[1678].

To some extent, the functional comparison mirrors the functionalist approach to legal reforms in the sphere of economic development, which have been experiencing substantial popularity among governments and international institutions for more than twenty years[1679]. However, planning cannot sustain extreme functionalism, which renders law itself "development", an end and not a mean[1680].

As the debate about the legalization of Chinese planning proves, the integration between planning and law serves the purpose of a higher integration, that between law and economic policy, between technique and politics, between society and institutions.

The ultimate question is therefore how such mechanism affects the evolution of the role of the State in the economy. However, before formulating a tentative answer, it is necessary to derive, from the comparative analysis, the legal models (if existing) of development planning as functioning in the two systems taken into account.

[1677] See U.KISCHEL, *Comparative Law*, cit., 88-90; see also K.ZWEIGERT, H.KÖTZ, *Introduzione al Diritto Comparato*, cit.
[1678] See U.KISCHEL, *Comparative Law*, cit., 92
[1679] See G.AJANI, *Legal change and economic performance: an assessment*, in A.ENGELBREKT, J.NERGELIUS, *New Directions in Comparative Law*, Edward Elgar, Cheltenham, 2009, 3-16
[1680] See *ivi*, cit., 6

1.1 Tracing a Chinese model

In the "Chinese section" of the research I have, essentially, distinguished three conceptual groups, which I then tried to apply to the analysis of the European context. These groups are: i) ideological and theoretical foundations of state development planning; ii) planning law in a "strict" and "procedural" sense, i.e. the legal or para-legal rules affecting the planning procedures; iii) planning law in a "broad" and "substantive" sense, i.e. the legal or para-legal rules which, directly or indirectly, serve the purpose of implementing and enforcing planning strategies.

In China, the sum of these three groups shapes the "planning formant". Its underlying force, however, lies in the widespread acknowledgment (by legislatures, judges and scholars) of development plans and strategies as conceptual collectors of public and national interests. The ongoing legalization process enhances such acknowledgment, both on the procedural and the substantive level. To give examples, on one hand, the Regulation on Major Administrative Decision-Making frames local development plans within a detailed dimension of inclusiveness and "Chinese-style participatory democracy"[1681]. On the other hand, the Foreign Investment Law[1682] provides (Art. 14) for the state to "*encourage and direct foreign investors to invest in particular industries, fields, and regions*" on the basis of the needs of "*national economic and social development*"[1683]. If, to western eyes, encouraging and directing could appear legally "weak" verbs, the previous analysis should have proved how things in China work[1684].

I have purposely referred to two legal sources issued in 2019, as concrete proof of the increasing space that Chinese legislation gives to development planning. If we further consider the words of scholars and the (small but significant) amount of judicial decisions referring to plans, we discover the critical connections giving effectiveness to Chinese planning. They rest in its meta-legal, all-encompassing and inclusive aspiration,

[1681] In the sense acquired within the context of the Chinese socialist legal system and not within a liberal-democratic legal system. See WANG SHAOGUANG, YAN YILONG, *A democratic way of decision-making,* cit.
[1682] Effective since January 1st, 2020.
[1683] The provision mirrors the rule already laid out in the Measures for the Overseas Investment of Chinese Enterprises, which indeed explicitly mention development plans as a criterion to assess the legitimacy of investments. On the topic see G.SABATINO, *Legal Issues of Going Global,* cit.
[1684] A contemporary sinologist, probably, would not use the term "weak" but rather the term "thin", since such terminology, often present in Chinese economic legislation, serves the purpose of enforcing the "thin rule of law" discussed by Pereenboom. On the topic see R.PEREENBOOM, *China's Long March,* cit.; I.CASTELLUCCI, *Rule of Law and Legal Complexity,* cit.

sanctioned by the Party as a fundamental part of its doctrine and ideology. Therefore, the "legislative poetry"[1685], often displayed by Chinese economic legislation through emphasis on ethical virtues of state-centric communitarianism, reflects the deep legal structures[1686] of the Chinese order and its underlying legal hierarchies. One of them, the most relevant for this research, renders development planning one of the functional cores of the economic law system, prevailing over more specific policy sectors such as competition, finance, etc. Laws on economic policies become the way to transpose objectives and tasks of planning into law[1687]. The social regulatory force of planning[1688], external but integrated with law, emphasizes, through its independent and effective schemes, the legal fiber of Chinese state capitalism, of its own development model.

The future will (arguably) show how this order will evolve. Will planning be comprehensively regulated through statutory laws? Will plans become laws or be given a formal legal nature?

At least with regard to the first point, Chinese scholars strongly advocate the approval of a Development Planning Law, which would, however, mainly regulate planning processes and content, with little influence over the substantive dimension of development planning.

At the end of the analysis and conscious of the oversimplifying nature of each schematic classification, I try to summarize the main legal features of the Chinese development model as viewed in light of development planning.

I) A set of constitutional and para-constitutional principles advocating the functionalization of market dynamics to national socio-economic development as embodied in state policies.

II) A "non-neutral" stance of the state when intervening in the economy justified by the absence of clear boundaries between state, society and market[1689], requiring the state to support, through industrial policies, oligopolies functional to the promotion of quality and industrial development[1690]. Indeed,

[1685] The expression is used by U.KISCHEL in *Comparative Law,* cit., 598-600, to describe a feature of Latin American constitutionalism and in particular the tendency to fill constitutions with idyllic statements regarding protection of social and economic rights of the people.
[1686] See U.KISCHEL, *Comparative Law*, cit., 700 ff.
[1687] See YAN YUNQIU, FAN SHUANG, *China's economic planning,* cit., 14
[1688] According to the definition given in YANG WEIMIN, *The main tasks and directions,* cit.
[1689] See SHI JICHUN, LUO WEIHENG, *On "competition neutrality",* cit., 110
[1690] See *ivi,* cit., 111-113

as stated by Shi Jichun, the natural tendency to monopoly and unfair competition of free markets impairs the qualitative evolution of industrial systems[1691].

III) A system of procedural rules (state rules, party rules and conventions) defining the phases of the planning processes as well as their inner hierarchy. On one hand, such rules display a strong organizational character. On the other hand, they strongly emphasize the dimension of inclusiveness as a general principle of modern planning, providing for wide and extensive research and consultation phases in the decision-making process.

IV) A series of substantive rules incorporated into different pieces of legislation which, directly and indirectly, found a general legal responsibility for plans' implementation and enforcement and support, in concrete, implementation and enforcement efforts.

V) A notion of "plan" as the highest expression of public/national interests. This role, apart from being acknowledged in certain pieces of legislation, is widely accepted by scholars and referred to by courts.

VI) A significant and extensive role played by regulatory documents and party legal sources. However, modern planning sees a gradual increase of state legal sources (primary and secondary) directly addressing and referring to development plans. These sources regulate planning but also use planning as an economic regulation criterion (e.g. in investment regulation). This further proves the ongoing process of legalization of Chinese planning.

These are the main features which, in legal perspective, connote Chinese development planning. These are, therefore, the conceptual points that may guide comparative analysis.

1.2 Following: tracing an European model

The discourse on European development planning is dominated by the "overextension" of the legislative formant. Primary sources regulate, in detail, the functioning of all the

[1691] *Ibidem*. Interestingly, the authors support their arguments through the comparison and state that no system reached high levels of incomes through free competition, since industrial policies have always been a fundamental tool for the State to coordinate national economic development. In the Chinese context, this argument supports, according to the authors, the choice of preserving a strong State-Owned economy.

instruments of resource allocation for development purposes, i.e., in the first place, the development funds. In its narrow sense, we may therefore argue for the existence of a "European planning law", provided that we identify the main body of European planning with development funds, as I have done in this research. These judicially enforceable rules are mostly procedural and organizational. Their orientation differs. Structural funds revolve around a decentralized implementation mechanism whose procedures seem to apply an inter-institutional bargaining logic (among the Commission, the national and the local governments). Research and technology framework programmes, on the other hand, employ a quite centralized approach.

This main distinction affects the operative sources of European planning. While research programmes are almost entirely managed through the relevant regulations and decisions, structural funds rely on partnership agreements and a whole series of soft law sources such as, for instance, recommendations, observations, etc., as well as on a wide array of implementing regulations and delegated acts. Even the supervisory phase of the implementation is sometimes managed through integrity pacts, functioning as agreements operating among the institutions involved in the implementation of a specific programme. The amount of legal sources and the degree of detail they display renders the legal regime of EU funds the most widely and precisely regulated, not only compared to China, but in the whole world.

To such rich legal framework pertaining to funds' functioning correspond a relatively weak theoretical framework, which is reflected in the non-centrality of development strategies.

The constitutional basis of planning policies in the EU is the notion of cohesion but neither European institutions nor scholars have traced a clear connection between cohesion and planning. The planning nature of development funds derives from empirical observations of their functioning and not from a structural feature of the system[1692].

[1692] See ALLEN, *Cohesion and the Structural Funds,* cit. In this regard, the evolution of EU law did not take into full account the legal traditions of member states, which instead recognized and developed a notion of planning or programming for development purposes. This, indeed, may be due to the fact that in Europe never emerged a strong and leading model in development planning, as instead happened with competition law (Germany).

The recent incorporation of global development strategies (e.g. the 2030 Agenda) in European ones is an example of policy import[1693] which further proves the absence of a legally positioned notion of "plan" and "planning strategy" in the EU legal system.

The connection between "planning law" and other relevant pieces of economic legislation follows instead a logic which is contrary to the one displayed by Chinese sources. The public economic management in the European context is strongly focused on competition policy. Cohesion policies and state funds must comply with EU competition law and especially with state aids provisions. As a result, among the most relevant sources of European "planning law" are the regulations and guidelines on the application of state aid law.

The primacy of competition law, indeed, is in line with the traditional notion of social market economy as embraced in Art. 3 of the TEU.

The overabundance of organizational law coupled with the absence of a theoretical framework on the function and scope of development planning impedes a clear assessment of its overall legal value. If Chinese economic law, as showed by this research, can sustain planning law as one of its component, in the EU "planning law" remains a notion confined to the procedural and organizational aspect of the funds' functioning. We may therefore say, for sure, that certain implementation instruments are legally disciplined and legally legitimized, as long as they comply with competition policies and laws.

Excluding the peculiar case of the technology and research framework programmes[1694], EU development planning policies seem to draw their legitimacy from the inter-governmental dimension of the institutional system[1695], weakening the role of the supranational dimension.

In light of the previous considerations, I would outline the main feature of EU development planning according to the following points.

I) A single clear constitutional foundation in the notion of cohesion.

II) A relatively weak legal significance of development strategies. From the current evolutionary pattern, it seems that in the future EU strategies will be

[1693] On the concept of policy import and export see G.FALKNER, F.MÜLLER, *EU Policies in a Global Perspective*, Routledge, New York, 2014, 1-15

[1694] These programmes, as already noted, are much more similar to "plans", even if they strongly emphasize the project-logic and do not embrace a directive logic such as traditional "socialist" plans.

[1695] See E.CANNIZZARO, *Il diritto dell'integrazione Europea*, cit., 22

more closely anchored to global strategies on sustainable development, thus refusing a geographically limited role in order to coincide with global trends.

III) The logic and legal subordination of development planning rules to competition law. On this premise, the orientation of EU competition law becomes essential to understand the evolutions of EU planning. Up to now, EU state aid law has displayed a certain consideration of development policies. Other sectors of competition law, however, do not seek interdependence with cohesion policies and are still, for the most part, "neutral"[1696]. However, given the project-driven dynamic which governs development funds, state aid law remains the most relevant joining link to look at, while also greatly limiting the scope of development planning.

IV) A strong emphasis on organizational and procedural rules, laid out mostly in primary sources (i.e. regulations) and fully binding on the subjects involved in implementation procedures.

V) A strong focus on the notion of project as the main vehicle to implement development policies. Resources are dispatched on the basis of project proposals and their use is monitored on the basis of the project's different phases. Even in centralized regulatory frameworks (e.g. research programmes) the dispatch of funds necessarily starts from the bottom, i.e. from the local governments or the single entities putting forward the proposals.

VI) An increasingly significant role played by soft law sources in the implementation and enforcement procedures. These sources on one hand reinforce the inclusive dimension of development planning and, on the other hand, shape a system based on open coordination between EU institutions and national governments (central and local). Furthermore, soft law sources are the ones through which the EU development strategies connect with global

[1696] As known, the Treaties (see, in particular, Art. 101 of the TFEU) provide for exemptions in the application of competition rules, even with regard to "technical or economic progress". These provisions, however, do not find clear connections in other pieces of legislation and are therefore assessed by the Commission on a case-by-case basis. Where legislative provisions discuss criteria of interpretation of competition rules (such as the Guidelines on the assessment of horizontal mergers of 2004) do not seem to take in great account socio-economic development, *rectius*, they seem to regard the efficiency of the market as *the* main requirement for a sound socio-economic development.

strategies. These sources, in the last place, inevitably reinforce the inter-governmental dimension of policy planning.

With the (tentative) definition of some features of the two models of development planning I set the foundations for the final comparative effort, that is verifying where these two models intertwine, where they differ in structure and content and which evolutionary path they are walking on.

However, since the ultimate question I will answer to regards the impact of planning on the orientation of states' tasks in the contemporary era, I feel that it is necessary to spend a few words about the global impact of the planning models described, so to assess once again, but from a broader comparative perspective, their boundaries and their institutional capacity.

2. Legal models of economic development in global perspective

Comparative lawyers, when discussing the circulation of models, usually take into account structured ensembles of norms categorized within more or less traditional categories[1697]. More importantly, circulation has mostly concerned formalized and "superficial"[1698] legal institutes and concepts. This is the process which made it possible to trace the pattern of diffusion of western European civil codes in Latina America[1699] or in post-soviet European states[1700]. Again, this is the criteria to look for legal transplants, which Kischel defines as "*when the use of comparative preparatory materials leads legislatures to adopt specific legal norms or institutions from foreign law into their own*"[1701].

Applying this logic to the topic of the research would, however, be misleading. Development planning and economic law display an inherent fluidity which renders it difficult to isolate specific models and make them circulate.

[1697] See R.SACCO, *Introduzione al Diritto Comparato*, cit., 132 ff.

[1698] I am using the term "superficial" as Kischel would use when talking about the Chinese system, i.e. those institutes and concepts which form the external and most visible structure of a legal order, such as, in the first place, institutional rules and legal ensembles of norms.

[1699] On the topic, see R.SACCO, A.GAMBARO, *Sistemi Giuridici Comparati*, cit., 301-303; U.KISCHEL, *Comparative Law*, cit., 585-591; I.CASTELLUCCI, *Sistema Juridico Latinoamericano*, Giappichelli, Torino, 2011, 43-75

[1700] See G.AJANI, *Il modello post-socialista,* cit.

[1701] See U.KISCHEL, *Comparative Law*, cit., 59

The perspective changes as we realize how our research object differs from the traditional "models". The fluidity of planning law reflects the plurality and fluidity of the global context[1702]. In the second place, we cannot forget that economic law, and especially development planning law, is "institutional" in its nature and content[1703], so that models of development may very well be transposed from one order to another one via inter-institutional relations, i.e. affecting the way planning institutions intend and use their powers of macro-economic regulation. Development planning law, in other words, circulates (when it circulates) mainly at the level of deeper legal structures[1704].

The purpose of this section is then to verify whether a certain legal order (e.g. China and/or Europe) was able to export not a specific legal institute (e.g. the Supervisory Power of the 2018 Supervision Law; the structural funds) but rather the strategic orientation of a legal regime in its concrete applications.

The topic would deserve much more space than the following few pages. My intention is, however, to test the functional role of planning models in light of a comparative logic and according to their global dimension. A further research, instead, would give more insight about the topic of circulation of EU and Chinese legal models.

2.1 The Chinese legal model and its "transfusion"

Comparative law discourses, for the most part, see modern China as a receptor of foreign legal models[1705]. The import of foreign solutions into China began at the end of the 19th Century, hastened by the success of the Japanese example[1706], and continued under alternate fortunes in the post-imperial and Republican era (1911-1949)[1707]. Communist China shaped its constitutional and economic law upon soviet models and today opens its socialist market economy to legal innovations coming from Europe and the United States.

[1702] See W.MENSKI, *Comparative Law,* cit., 46-50
[1703] See G.DI GASPARE, *Diritto dell'Economia,* cit., 7-13
[1704] I once again take the words of Kischel as example.
[1705] See W.MENSKI, *Comparative Law,* cit., 560-565; R.SACCO, A.GAMBARO, *Sistemi Giuridici Comparati,* cit., 394-397; M.TIMOTEO, *Il contratto in Cina e Giappone,* cit.; U.KISCHEL, *Comparative Law,* cit., 688-691
[1706] See M.TIMOTEO, *Il contratto in Cina e Giappone,* cit.; H.PAZZAGLINI, *La recezione del diritto civile,* cit.
[1707] On this specific period, see M.NG, *Legal Transplantation in Early Twentieth-Century China*, Routledge, New York, 2014

The comparative legal science, however, acknowledges that the Chinese legal culture, over its long history, was also exported in the areas which, at different times and to different degrees, were under the influence of Imperial China and of Confucianism. In at least three major areas (Korea[1708], Japan[1709] and Indochina[1710]) the Chinese element directly and deeply shaped socio-economic structures.

The long lasting influence of the Chinese legal culture is to be found in some underlying principles of social life, classified by Pham Duy Nghia[1711] with regard to the Vietnamese context but, I believe, fit to describe the whole experience of circulation of Chinese legal culture. Among them are collectivism, harmony and consensus, primacy of relational networks and benevolence in hierarchical relations such as within the family and among different social entities.

Without concessions to tempting oversimplifications, we may assume that the Chinese influence shaped the development of East-Asian legal cultures by upholding a necessarily inter-relational approach to life and government, a synergy through rulership and ethics, a tendency toward the preservation of cooperative socio-economic relationships which, in modern times, found a channel of expression in the principle of good faith[1712].

The chthonic-confucian layer of Asian law was, starting in the 19th Century, subjected to the legal changes brought by colonialism and foreign imperialism, especially in Vietnam and Laos, fallen under the French rule[1713], and later Korea, subjugated by Japan.

In the second half of the 20th Century, as socialism took over China, North Korea, Vietnam and Laos, Confucian legal culture was at the center of a paradox: on one hand it was obviously fought by the new dominant ideology on account of deep political differences[1714]. On the other hand, its emphasis on collectivism[1715] (and its refusal for democracy, at least in the western sense) favored, to some extent, the entrenchment of

[1708] See I.CASTELLUCCI, *La Corea*, cit., 297-407; LI JU (李 炬), 汉文化对朝鲜司法文化的影响 (*The influence of Han Culture over Korean judicial culture*), in Journal of Yanbian University, Vol. 3, 1996, 29-32.
[1709] See M.TIMOTEO, *Il contratto in Cina e Giappone*, cit.
[1710] See BUI NGOC SON, *The Law of China and Vietnam in Comparative Law*, in Fordham International Law Journal, Vol. 41(1), 2017, 135-206
[1711] See PHAM DUY NGHIA, *Confucianism and the conception of the law in Vietnam*, in J.GILLESPIE, P.NICHOLSON (edited by), *Asian Socialism and Legal Change*, ANU Press, 2005, 76-90, 80-81
[1712] See M.TIMOTEO, *Il contratto in Cina e Giappone*, cit.
[1713] See BUI NGOC SON, *The Law of China and Vietnam*, cit., 151-152
[1714] See PHAM DUY NGHIA, *Confucianism*, cit.; U.KISCHEL, *Comparative Law*, cit., 713-715
[1715] See T.RUSKOLA, *What is a Corporation*, cit., 645-647

socialist legal structure[1716], which were, all along communist Asia, imported from the Soviet Union[1717].

The circumstances changed again in the 1980s. While the Soviet economic model was gradually displaying severe deficiencies, socialist law was being re-interpreted by the Chinese reformers with considerable success. It was not an entirely original experiment. It was, indeed, a socialist adaption of some structural features of Singapore's development model, i.e. of a state capitalist model[1718]. From the perspective of socialist states it was, however, a peculiar combination of planned and market economy. The Chinese model and its logic was therefore at the basis of the Vietnamese *doi moi* ("renovation") and the Laotian "New Economic Mechanism".

The *doi moi* was launched by the 6th Congress of the Vietnamese Communist Party in 1986 and, as it happened in China[1719], stimulated a reconsideration of the role of law for the development of a "socialist-oriented market economy" [1720] (Art. 51 of the Constitution[1721]). The Chinese mark is thus evident in the definition of the economic doctrine, as well as in the upholding of a "socialist rule of law State" (Art. 1 of the Constitution). Behind the official formulas, the Vietnamese reform movement was also driven, in the first place, by a desire to enhance the technical preparation and legitimacy of party cadres and economic units' managers[1722]. This deeply affected the changes in Vietnamese development planning, which also went from directive to coordinative. As in China, Vietnamese planning has a clear constitutional foundation embodied in the formal role of the national parliament[1723] and in the inclusive role of regional planning[1724]. Even in their content, Vietnamese plans assumed the discursive and broad style of their Chinese

[1716] See PHAM DUY NGHIA, *Confucianism,* cit., 84

[1717] With regard to Vietnam see *ivi, cit.*; with regard to North Korea see I.CASTELLUCCI, *La Corea,* cit. In the third chapter I have already dealt with the influence of soviet law over China, so I refer to that part for bibliography.

[1718] See J.KURLANTZICK, *State Capitalism: How the Return of Statism is Transforming the World*, Oxford University Press, Oxford, 2016

[1719] See BUI NGOC SON, *The Law of China and Vietnam, cit.*, 155

[1720] See L.CHOUKROUNE, *Droit et Economie dans le Vietnam du "Doi Moi": l'Insertion a la Globalisation per "L'Etat de Droit"*, in Revue internationale de droit compare, Vol. 56(4), 2004, 891-916

[1721] The current version of the Vietnamese Constitution is the result of the 2013 reform which, in essence, shaped a new constitution which replaced the 1992 version. See BUI NGOC SON, *The Law of China and Vietnam,* cit., 156

[1722] See M.SALOMON, *Les arcanes de la « démocratie socialiste » vietnamienne*, in Les Etudes du CERI, Vol. 104, 2004, 10-11

[1723] See Art. 70 of the Constitution. In concrete, the latest Vietnamese FYP has been adopted through a resolution of the National Assembly (n. 142/2016/QH13).

[1724] Art. 75 § 2 of the Constitution

counterpart[1725]. The differentiation in planning is ensured by the presence of special and regional plans[1726]. The "performance-based legitimacy"[1727] is also reflected in the extensive relational networks among party cadres, public economic operators and private economic operators[1728].

The Vietnamese legal system shaped some of its functional links upon Chinese models, following the ideology of market socialism. However, it did not derive its whole system from the Chinese one.

For instance, the new code of 2015, indeed, seems to integrate a French approach, especially in the structure of the code, with a para-traditional and communitarian dimension as clearly expressed by Art. 7, regarding the purposes of civil relationships, and by certain institutes such as the "multiple ownership" of communities and households[1729]. Such peculiarities of Vietnamese civil law connect with its Confucian and traditional substrate embedded in agricultural societies[1730] and are still, to some extent, consistent with the moral dimension of Chinese market socialism, as also expressed by the reference to "social ethics" as limit to civil rights[1731]. Here, however, the influence of Chinese models is neither direct nor clear and the orientation of the system is mostly driven by a reconsideration of the national legal culture coupled with the maintenance of a soviet-fashioned party state[1732].

The basic scheme of Chinese influence over Vietnamese law also stands for Laos. Starting in the late 1980s, the Lao People's Democratic Republic started implementing a "New Economic Mechanism" following the steps and the solutions already experimented in China[1733]. Compared to Vietnam, Laotian constitutional, civil and economic law heavily

[1725] The analysis is mostly based on the latest FYP valid for the period 2016-2020. Significantly, Vietnamese plans do not employ the distinction between binding and predictive indicators.
[1726] The regional plans, as just said, are also mentioned by the Constitution, at least with regard to the regions inhabited by ethnic minorities.
[1727] On this notion, see LE HONG HIEP, *Performance-based Legitimacy: The Case of the Communist Party of Vietnam and "Doi Moi"*, in Contemporary Southeast Asia, Vol. 34(2), 2012, 145-172
[1728] See J.GILLESPIE, *Is Vietnam Transitioning Out of Socialism or Transforming Socialism?*, in FU HUALING, J.GILLESPIE, P.NICHOLSON, W.PARTLETT (edited by), *Socialist law in Socialist Asia*, Cambridge University Press, Cambridge, 2018, 319-350; J.GILLESPIE, *Localizing Global Competition Law in Vietnam: a Bottom-up Perspective*, in International and Comparative Law Quarterly, Vol. 64, 2015, 935-963
[1729] See Art. 211 and Art. 212
[1730] See PHAM DUY NGHIA, *Confucianism*, cit.
[1731] See Art. 2 of the 2015 Civil Code.
[1732] This is also proved by Art. 4 of the Constitution which upholds the guiding role of the Communist Party. The provision mirrors the one already contained in the Soviet Constitution of 1977.
[1733] See R.ST. JOHN, *New Economic Order in Indochina*, in Asian Affairs: an American Review, Vol. 21(4), 1995, 227-240

drew from Chinese models[1734], to the point that one could even discuss about a legal transplant. The 2003 Constitution is modeled after the Chinese Constitution of 1982 and, with regard to development planning, closely replicates the two main provisions regarding approval from the National Assembly (Art. 53) and drafting by the government (Art. 70). The central role of the plan in Laotian economic law is confirmed by the provisions on the State budget[1735], whose first aim is "*to implement national socio-economic development plans and policies*". The budget law also design a basic adjustment scheme[1736] taking place in July of each year and coordinate by the ministry of Finance which, to ensure "*the targets under the national socio-economic plan and the objectives of macro-economic balance*", periodically readjusts the budget. As a logic connection between planning and contract law, Art. 14 § 2 of the Contract Law provides for nullity where the contract conflicts with State or public interests.

A peculiar case is represented by North Korea, whose socialism is indeed based on the doctrine of *Juche* (now replaced by Kimilsungism-Kimjongilism), displaying autonomous features from the traditional Asian Marxism-Leninism[1737].

According to its Constitution (Art. 34), North Korea employs a planned economy system. Since the 1980s and in particular during the 1990s, North Korea also experienced a season of "legal enthusiasm", which produced a set of statutory laws heavily inspired by Chinese models[1738]. However, the rhythm of economic legislation reform has been very different from that of China, Vietnam or Laos. The core of the domestic economy is still regulated by the 1993 Commercial Law (revised in 2012)[1739] which designed a centrally-planned mechanism of supply and resource allocation[1740]. This circumstance justifies a clear distinction between the commercial activities and the civil relations' sphere[1741]. The role

[1734] The proximity between Chinese and Laotian law could also be due to the closeness of their diplomatic and economic ties. See, on the topic, S.KU, *Laos in 2014: Deepening Chinese Influence*, in Asian Survey, Vol. 55(1), 2015, 214-219

[1735] Contained in the 1994 Budget Law

[1736] Art. 27 of the Budget Law

[1737] See I.CASTELLUCCI, *La Corea,* cit., 328-368

[1738] *Ibidem*

[1739] I based such English translation upon a previous Chinese one which employed the term "商业法" (*shangyefa*).

[1740] See Art. 11. According to this article, the relevant planning authorities elaborate commodity orders on the basis of a research upon the needs of community. Then the planning department of the government drafts the plan according to such commodity orders.

[1741] This is the opinion of LIU YU (刘宇), 朝鲜民主主义人民共和国法律现状评述 (*Comment on the Laws of the Democratic People's Republic of Korea*), in Hebei Law Science, Vol. 27(12), 2009, 32-36

of the contract is fully subordinated to the determinations of planning acts[1742], according to a logic which is comparable to that of the 1981 Economic Contract Law of China. The North Korean model, however, further emphasizes the centrality of the plan by setting up a wide system of liabilities for plans' violations or under-achievements. While the general regime revolves around the administrative liability, in the most severe cases violations of the plan may found criminal liability[1743].

Chinese influences over the general orientation of the system are confirmed, but there is (still) a relevant core of economic legislation which upholds the centrality of plans as fully binding laws, governing the general system of production and supply on the basis of vertical orders.

Assessing the impact of Chinese legal models over Asian socialist countries follows the macro-categorizations of comparative law. However, looking at the deeper legal structures of development planning pushes us away from the socialist countries and makes us wonder whether or not Chinese economic law gained recognition beyond the borders of socialism.

The question is in the first place justified by China's position within the contemporary global order. The rise of the so-called "Beijing Consensus"[1744] as a set of criteria to measure success of developing countries growth strategies posed a challenge to the liberal-democratic order [1745]. Since Xi Jinping's rise to the leadership, China's interventionism gained strength and exertion of soft power upon trade and commercial partners intensified with the launch of the Belt & Road Initiative. Talking about China as a model for development is not a taboo anymore[1746]. In a lucid analysis of 21th century state capitalism, Kurlantzick highlighted that the Chinese one is without doubts the most

[1742] *Ibidem*
[1743] *Ibidem*
[1744] See S.KENNEDY, *The Myth of the Beijing Consensus*, in Journal of Contemporary China, Vol. 65(19), 2010, 461-477. The Beijing consensus ideally challenged the Washington Consensus formed at the end of the cold war and revolving around liberal-democratic models of economic development. The term "Beijing Consensu" was coined by Joshua Cooper Ramo in 2004, who also laid out some of its major features: innovation-based development; economic success measured by levels of sustainability; self-determination, i.e. fall of the ideological prejudice regarding non-liberal countries.
[1745] On the topic see A.FIORI, M.DIAN (edited by), *The Chinese Challenge to the Western Order*, FBK Press, Trento, 2014; for a journalistic perspective on the phenomenon, I recommend J.CARDENAL, H.ARAUJO, *Come la Cina sta conquistando l'occidente*, Feltrinelli, Milano, 2016.
[1746] See A.FIORI, M.DIAN, *The Chinese Challenge*, cit., 47-49

publicized and the most appreciated state-capitalist development model on a global scale[1747].

In order to ascertain legal-comparative implications of such statement, the most immediate way is to follow the patterns of Chinese international cooperation[1748]. Chinese development assistance to foreign countries "*takes place within the broader intersection of foreign aid, commercial enterprise, and international politics*"[1749]. Key projects in the agricultural and industrial sector are financed by Chinese big SOEs (and, to a lesser extent, by Chinese private enterprises) and often directly managed by them[1750]. Foreign governments enjoy low-rate or zero-rate credit from Chinese banks and receive a logistic and organizational support unavailable within western-driven aid schemes, which tend to focus on social infrastructures such as schools, hospitals, etc.[1751] Chinese FDIs, therefore, fit into a model of investment policy which, in developing countries, is often closely tied with the promotion of domestic industrial capacity, as also proved by legal regimes for foreign investments[1752].

In a typical situation[1753], a Chinese enterprises would carry out a project within the scheme of a concession or a franchise contract or a PPP contract, employing in part Chinese workers and in part local workers. The foreign government, formal titular of coordinating and supervisory powers, would be in concrete required to purchase the necessary goods and services from Chinese companies, which would, however, subcontract certain productive activities to local companies[1754], also providing technical

[1747] See J.KURLANTZICK, *State Capitalism*, cit., 183

[1748] The literature on the topic is huge. Among the most recent analysis, see CHING KWAN LEE, *The Specter of Global China*, The University of Chicago Press, Chicago, 2017; O.HODZI, *The End of China's Non-Intervention Policy in Africa*, Palgrave Macmillan, Cham, 2019

[1749] See S.SEPPÄNEN, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, in Vanderbilt Journal of Transnational Law, Vol. 51, 2018, 101-158, 113

[1750] See *ivi*, cit.; for a brilliant case-study on economic relations between China and Ethiopia and the influence of Chinese investments in Ethiopian institutional structures see E.ZISO, *A Post State-Centric Analysis of China-Africa Relations*, Palgrave Macmillan, Cham, 2018

[1751] See SEPPÄNEN, *Chinese Legal Development Assistance*, cit., 113-118.

[1752] This is for instance the legal framework for foreign investment in the Republic of Mozambique, one of the African states where Chinese investments are more significant. See, on the topic, CESAR DIMANDE, *O Investimento Estrangeiro em Moçambique: o Caso da China*, in WEI DAN, O.MASSARONGO JONA (edited by), *Questões Juridicas Contemporaneas Relativas ao Comercio e Investimento China-Africa*, Almedina, Coimbra, 2014, 7-19

[1753] See S.SEPPÄNEN, *Chinese Legal Development Assistance*, cit.; E.ZISO, *A Post State-Centric*, cit.

[1754] This does not always happen. In some cases, the Chinese companies' tendency to stick to Chinese suppliers and avoid involving local enterprises. See A.BOLESTA, *Myanmar-China peculiar relationship: Trade, investment and the model of development*, in Journal of International Studies, Vol. 11(2), 2018, 23-36, 26-27

and managerial assistance. Once the project is realized, the infrastructure would be handed over to the foreign government.

Chinese development aid, therefore, fuels a chain of productive relations strongly connected to the political cooperation between the Chinese government and the foreign one(s). It offers a model of "weakened capitalism" dependent on public investment[1755].

The most relevant outcome of such cooperation is, however, the increasing eagerness of China to promote its development model and divulgate information about it. If in the 1980s Deng Xiaoping discouraged Africans from following the Chinese model[1756], since 1998 the Academy for International Business Officials of the MOFCOM "*gave 933 seminars and workshops to more than twenty thousand foreign officials from 155 countries*"[1757]. In the Guangxi Province operates (since 2006 with status of University) the Baise Cadre Academy (白色干部学院 – *baiseganbuxueyuan*)[1758] trains Chinese and foreign officials [1759] holding lectures about several topics including Chinese law. Similarly, several training programmes or informal networks have been established between China and its international partners[1760]. In a few but relevant cases China also offered specific legal counseling on reforms[1761].

Chinese foreign development programmes are mostly directed at state-capitalist developing countries. Several of them also experienced, in the past, a socialist phase[1762]. As a consequence, their legal systems are somewhat familiar with typical socialist structures and they generally issue development plans. In some cases, such plans became a distinctive feature of their development pattern. Emblematic is the case of Ethiopia, whose ruling party (EPRDF) holds close ties with the CPC since the 1990s[1763]. Ethiopian Growth and Transformation Plans are, among development plans around the world, some of the most similar to Chinese plans, especially with regard to the degree of detail in their

[1755] See E.ZISO, *A Post State-Centric*, cit., 140
[1756] See J.KURLANTZICK, *State Capitalism*, cit., 109
[1757] See S.SEPPÄNEN, *Chinese Legal Development Assistance*, cit., 133
[1758] The official website (only in Chinese) of the Academy is http://www.bsela.org.cn/. See also https://www.scmp.com/news/china/economy/article/2155203/remote-corner-china-beijing-trying-export-its-model-training (latest access August, 19, 2019).
[1759] Currently, the Academy has about 150 international students, coming from countries such as Somalia, Zambia, Pakistan, Thailand, Laos, Cambodia and Vietnam. See http://sis.vnu.edu.vn/visit-and-work-with-baise-academy-china/?lang=en (latest access August, 19, 2019).
[1760] See J.KURLANTZICK, *State Capitalism*, cit., 109-114
[1761] See S.SEPPÄNEN, *Chinese Legal Development Assistance*, cit., 127-129
[1762] Among them, Ethiopia, Mozambique, Angola, Cambodia.
[1763] See *ivi*, cit., 103 ff.

directives and the abundance of specific planned projects[1764]. Plans' objectives are implemented and enforced through preferential credit schemes and selective industrial policies[1765]. Some specific features of competition law[1766] support such implementation process. However, one of the key points of the Ethiopian development scheme is the deep integration between state structures, ruling party structures, SOEs and private economic operators. Ziso sketches a clear picture of the influence that the Chinese presence in Ethiopia had on shaping such integration[1767]. This author states that "*As economic and political relations with China grew, Ethiopia abandoned its initial* "*revolutionary democracy model for a developmental state model*"[1768]. As a consequence, Ethiopia appeared more and more reluctant to give up state control of the economy[1769]. Whereas the state controls, through monopoly or SOEs dominance, strategic sectors of the economy[1770], private enterprises' landscape is dominated by party-affiliated companies and politically connected enterprises[1771]. The EPRDF used its own financial strength to attract private operators within its own system of responsibility and control[1772]. At the same time, governmental institutions are set up to regulate and coordinate investment as well as supervising privatizations[1773]. The will to protect and foster Chinese investments led such institutions to favor Ethiopian SOEs in tendering processes, since these are the enterprises which deal more easily with Chinese counterparts[1774]. They are also, however, the enterprises most subjected to development plans. What Ziso calls Ethiopian "party-capitalism"[1775] also favored the reinforcement of informal governance institutions, i.e. relational networks, ethnicity-based groups and other associations which often follow customary rules and cultural norms[1776]. Such groups are often the most qualified to

[1764] I am in particular referring to the content of the current Plan, the Growth and Transformation Plan II (GTP II) (2015/16-2019/20).
[1765] See UNCTAD, A Review of Competition Policy in Ethiopia, United Nations, 2018.
[1766] See K.MOGES BELETE, *The State of Competition and the Competition Regime of Ethiopia: Potential Gaps and Enforcement Challenges*, Organization for Social Science Research in Eastern and Southern Africa, Addis Ababa, 2015
[1767] See E.ZISO, *A Post State-Centric,* cit., 137 ff.
[1768] See *ivi,* cit., 139
[1769] *Ibidem*
[1770] Such as, for example, telecommunications, power, banking, insurance, air transport, shipping and sugar.
[1771] See E.ZISO, *A Post State-Centric,* cit., 137 ff.
[1772] *Ibidem*
[1773] Among them, the Ethiopian Investment Commission and the Privatization and Public Enterprises Supervising Agency.
[1774] See E.ZISO, *A Post State-Centric,* cit., 142
[1775] See *ivi,* cit., 171 ff.
[1776] See *ivi,* cit., 181-189

interact with Chinese operators, given the importance Chinese businesspersons give to mutual trust and inter-personal harmony[1777].

The case of Ethiopia highlights influence dynamics which have acted similarly in other countries. In Myanmar, for instance, the China model and, later, Chinese investments fostered important economic laws[1778]. They also fostered a renewed importance for socio-economic plans which, in a Chinese-fashioned structure, have played a decisive role in the nation's recent development[1779], all within the context of a market economy heavily influenced by the State sector[1780], not only through large SOEs but also through local government-controlled enterprises resembling the "old" Chinese TVEs[1781].

In other cases, Chinese investments urged national governments to define legal regimes to regulate and control development strategies. The PPPs are a classic example, which in Mozambique[1782], for instance, are quickly becoming a preferred instrument to implement planned infrastructure development[1783] and to "govern" economic relations with Chinese operators. China has not defined a legal regime for PPP, therefore Mozambique did not model its law upon a Chinese model. However, its connection to development planning echoes Chinese mechanisms and the exercise of soft power within commercial relations with China gradually shapes the orientation of the practical application of the law. It models the way of thinking of African and Asian legal operators.

There is a legal institute which, even in its formal vest, traveled from China to other countries and it is worth mentioning: it is that of Special Economic Zones. In the countries targeted by Chinese FDIs (especially in Africa) the SEZs are often established at the urge of Chinese enterprises, in order to ensure smooth business operations[1784]. Foreign

[1777] *Ibidem*
[1778] For instance, the 1988 Foreign Investment Law, the 1989 SOEs Law; the 1990 Private Industrial Enterprises Law.
[1779] See A.BOLESTA, *Myanmar-China peculiar relationship,* cit.
[1780] *Ibidem*
[1781] See *ivi,* cit., 31
[1782] See ABDALA, *O Regime Juridicodas Parcerias Publico-Privadas em Moçambique*, in WEI DAN, O.MASSARONGO JONA, *Questões Juridicas,* cit., 29-40
[1783] See the Programa Quinquenal do Governo para 2015 – 2019, i.e. the Mozambique FYP, approved by the Assembleia da Republica with the Resolution n. 12/2015.
[1784] See S.SEPPÄNEN, *Chinese Legal Development Assistance,* cit., 130-131; A.BOLESTA, *Myanmar-China peculiar relationship,* cit. (this work is obviously focused on the Myanmar experience); see also E.ZISO, *A Post State-Centric,* cit., which describes how in Ethiopia certain SEZs have been established by the government but, in concrete, entirely managed by Chinese enterprises investing in them.

countries often model the legal regime of their SEZs upon the Chinese one[1785]. The success of Chinese SEZs has been so great that some countries[1786], even major powers such a Russia, established SEZs as a legally-regulated phenomenon within their national legal orders[1787]. The topic is fascinating and extremely useful to comprehend the legal dynamics of modern international economic cooperation and the influence of Chinese models, but the limited space at my disposal prevents me from thoroughly assessing it. A further comparative research would shed more light upon this common but still partly obscure phenomenon.

Chinese legal models circulate according to "soft" dynamics. They are rarely the object of a formal "import". Chinese models tend to shape institutional relations at the core of economic law. They also promote a coordinative role for development planning, which, in the legal systems influenced, becomes a reference point for the application and the implementation of several economic laws.

Chinese models exert their influence over legal environments structurally fit to absorb them, i.e. state-capitalist countries. The vehicle for the diffusion of Chinese models is in the first place the presence of trade and economic cooperation initiatives. To a lesser extent, China is trying to promote its models abroad through, to put it simply, teaching, thus exploiting the appeal and prestige accumulated in foreign partners[1788].

There are no transplants. There is, instead, a gradual transfusion of Chinese models in the deep legal-institutional structures of certain foreign partners. This concept (i.e. "transfusion") was not developed by sinologist nor by comparative lawyers with regard to China[1789], but, in my opinion, it perfectly fits the existing circumstances and provides

[1785] See D.BRÄUTIGAM, TANG XIAOYANG, *African Shenzhen: China's special economic zones in Africa*, in Journal of Modern African Studies, Vol. 49(1), 2011, 27-54

[1786] Among the first to "import" the Chinese SEZs model there were, obviously, socialist countries. I.CASTELLUCCI in *La Corea*, cit., thoroughly describes the experience of certain SEZs in North Korea.

[1787] The reference is to the Federal Law n. 116/2005 of the Russian Federation.

[1788] The reactions to Chinese engagements abroad are obviously not uniform, but among governments and even among populations Chinese interventionism in Africa, for instance, is met with more admiration than fear or discouragement. On the topic, see L.HANAUER, L.MORRIS, *Chinese Engagement in Africa*, Rand Corporation, 2014. See, in particular, pages from 55 to 71.

[1789] The term was coined by Augustin Diaz Bialet with reference to the reception of Roman Law in Argentina (see A.DIAZ BIALET, *La Recepcion del Derecho Romano en la Argentina*, Imprenta de la Universidad de Cordoba, Cordoba, 1951). The term was later employed by Castellucci in order to assess, in comparative perspective, the place of Roman law in latino-american legal cultures. Castellucci also traces a distinction among Transfusion, Reception and Transplant. See I.CASTELLUCCI, *Sistema Juridico Latinoamericano,* cit., 91-99

a clear and logic comparative instrument to measure why and how the Chinese model of development and of development planning is widely circulating on the global landscape.

2.2 Circulation of superficial EU legal structures

EU Law, speaking in comparative perspective, endures an academic treatment opposite to that reserved to Chinese Law. The potential of the EU legal models in terms of circulation and transplant is common knowledge[1790]. However, thorough assessment are really scarce. This cannot be the place to fill this void, but, similarly to the previous sub-paragraph, I will try to outline some comparative remarks about the EU development model.

When scholars explicitly touched the issue, they verified the capacity of EU economic policies to be exported[1791]. In a recent analysis, the result of the verification was, indeed, not too surprising: the export of EU economic policies (among the, competition policies) mostly occurs with regard to national legal systems which are about to join the EU. The circulation of legal models becomes therefore a way to build up the necessary *acquis* before joining the EU[1792].

Circulation of EU policies and models is often incorporated into the agreements that the EU concludes with foreign entities[1793], which comprise clauses about protection of fair competition and limitation upon state subsidies[1794]. When addressing other policy fields, agreements even refer to EU legal provisions, such as those regarding public procurement and tendering procedures[1795].

EU influence on foreign economic policies diminishes as the distance between the EU and the foreign countries widens[1796]. The intentional or cooperation-driven export of EU models is, however, not the sole channel of their circulation. If the "globalization" of Chinese models has, so far, mostly followed the routes of Chinese investments, EU law, due to its specific institutional features, "*has served as the unrivaled model for (...)*

[1790] See U.KISCHEL, *Comparative Law*, cit., 892.
[1791] See G.FALKNER, F.MÜLLER, *EU Policies in a Global Perspective*, cit.
[1792] *Ibidem*
[1793] *Ibidem*
[1794] See, for instance, Points 10 and 11 of the EU-Mercosur trade agreement of July 1st, 2019.
[1795] See Point 9 of the EU-Mercosur trade agreement.
[1796] See G.FALKNER, F.MÜLLER, *EU Policies in a Global Perspective*, cit.

regional integration efforts in the entire world"[1797]. EU's specific character of supranational economic integration institution paved the way for the gradual development of several similar experiments. None of them has so far reached the legal complexity of the EU, but, in terms of development planning, some of them imported EU solutions.

The legal experience of MERCOSUR[1798] raised, over the last decade, the attention of several jurists[1799]. The comparative research confirmed the role played by the EU model in the definition of MERCOSUR institutional structure and legal system, but also emphasized some basic differences which today still connote MERCOSUR as an inter-governmental (or even inter-presidential) organization, rather than a supra-national one like the EU[1800]. In particular, not all MERCOSUR member states have developed (so far) a doctrine of primacy of MERCOSUR law over national laws[1801]. The weak role played by the MERCOSUR Parliament and the strong inter-governmental character of both the Council for the Common Market[1802] and the Common Market Group[1803] (the two most relevant institutions) hinder the technical legitimacy of MERCOSUR economic policies while making them, in concrete, almost purely political declarations of common intents[1804].

It was, indeed, the problem of balance between the political power of the four members to justify, in the 2000s, a debate about the issue of cohesion and of redistribution of economic benefits within the common market[1805]. It was at this point that the European structural funds offered the model for the establishment of a Fund for Structural

[1797] See U.KISCHEL, *Comparative Law,* cit., 892

[1798] The MERCOSUR (Mercado Comun del Sur) was established with the Treaty of Asuncion in 1991 among Brazil, Argentina, Paraguay and Uruguay.

[1799] So far the most comprehensive assessment of the legal features of MERCOSUR is certainly that contained in M.TOSCANO ET AL., *The Law of Mercosur,* Hart Publishing, Portland, 2010; see also M.FERRETTI, *Focem: una accion concreta para el avance hacia la reducion de las asimetria estructurales en el Mercosur,* in Revista de Derecho de la Universidad de Montevideo, Vol. 23, 2013, 135-210

[1800] See M.TOSCANO ET AL., *The Law of Mercosur,* cit., in particular pages from 7 to 27

[1801] See *ivi,* cit., 65-68

[1802] The CCM is formed by the ministries of foreign affairs and of the economy of member states and has functions of political conduct and decision-making. See *ivi,* cit., 40-43

[1803] The CMG is "*coordinated by the Ministries of External Relations of the Member States and integrated with members of the Ministries of Economy and Central Banks*". It is the main executive body of the MERCOSUR. See *ivi,* cit., 43-45

[1804] This statement is further reinforced by the weakness of the MERCOSUR competition law system, also relying heavily on inter-governmental procedures. See *ivi,* cit., 291 ff.

[1805] See *ivi,* cit., 396-399. On the issue of asymmetry in the MERCOSUR see also L.HERNÁNDEZ, *El Mercosur y sus asimetrías: análisis de la bilateralidad y sus condicionamientos politicos*, in El Colegio de Jalisco, Vol. 6, 2013, 1-29

Convergence (FOCEM)[1806], whose aim is "*to promote the competitiveness and the social cohesion of the Member States, to reduce the asymmetries – in particular in the countries and regions less developed* –"[1807]. The FOCEM functions according to thematic areas[1808], operational programmes and projects according to a bottom-up mechanism which sees proponents submit their proposals to national authorities in the first place[1809]. Over the last few years, the size of the Fund grew considerably. Its function also partially changed. Its nature is still today mainly redistributive of economic benefits on geographical basis, thus favoring projects concerning less developed areas. However, this pattern is slowly evolving into a broader approach, closer to the comprehensive development guiding, at least in principle, the EU structural funds[1810].

A similar approach characterizes the functioning of the Development Fund of the Association of Southeast Asian Nations (ASEAN), as described in its Terms of Reference annexed to the Agreement on the Establishment of the Fund[1811]. The Agreement explicitly connects[1812] the establishment of the fund to the pursuit of a long-term development strategy, i.e. ASEAN 2020. Within the context of the ASEAN, however, the supra-national coordination of development policies interacts with state capitalist national contexts[1813], often even influenced by Chinese models (among them, Vietnam, Laos and Myanmar). Development planning, in these countries, strongly relies on competition law, which explicitly protects the competitiveness and the growth of domestic enterprises[1814].

[1806] See *ivi*, cit., 396 ff.; see also B.BORDAZAR, L.LUCIA, *Los proyectos de infraestructura y los Fondos de Convergencia Estructural del MERCOSUR: el caso de interconexión eléctrica entre Uruguay y Brasil*, in Boletín Informativo del CENSUD, Vol. 20, 2010

[1807] See the Recital of the Decision n. 45/04 of the CMC establishing the Fund; see also M.FERRETTI, *Focem*, cit., 154-157

[1808] See *ivi*, cit., 163-164

[1809] See TOSCANO ET AL., *The Law of Mercosur*, cit., 399-403. Member states also have to finance a part of the project. The fund, therefore, functions according to the principle of co-financing. On the functioning of the Fund see also M.FERRETTI, *Focem*, cit., 167-176.

[1810] See *ivi, cit.* 396 ff.; see also B.BORDAZAR, L.LUCIA, *Los proyectos*, cit.

[1811] Signed on July, 26th, 2005.

[1812] In its preamble.

[1813] On the interaction between the ASEAN and the national legal orders which form it, see RÜLAND, *The limits of democratizing interest representation: ASEAN's regional corporatism and normative challenges*, in The European Journal of International Relations, Vol. 20(1), 2014, 237-261.

[1814] For a general overview see the ASEAN Handbook on Competition Policy and Law in ASEAN for Business 2017.

A more extensive penetration of EU models concerned the East African Community, as also noted by legal scholars[1815]. In particular, the economic model of the EAC revolves around a particularly significant role for the protection of competition[1816], through the provisions of the EAC Competition Act of 2006, heavily inspired by the EU legal regime. The EAC development strategy for the period 2011-2016 called for the establishment of a series of development funds. There were talks about the creation of a centralized EAC development fund, but the process seems to be still ongoing.

Due to the economic and political structures of its member states, EAC competition law partially deviates from the EU paradigm. Section 14 of the Competition Act allows member states to grant subsidies to any undertaking if they deem the aid is justified by public interests[1817]. Section 16 lays out a prohibition for those subsidies which may alter the competition in the internal market. However, Section 17 exempts from the prohibition an extensive groups of subsidies which serve a wide array of development goals.

The centrality of the EU-inspired competition law is therefore balanced by a loose control over state subsidies, creating a common framework of competition policy which is eager to take into account considerations of national industrial policy, even at the expense of the common market. In this aspect also emerges a substantial "*state monopoly over decision-making processes and institutions*"[1818] which connotes the EAC as an inter-governmental entity, like the MERCOSUR.

Regional or macro-regional integration experiences all look at the EU as an almost "necessary" model. The complexity and relative success of EU legal structures for market integration had a huge impact over other supra-national entities, even the ones that I did not address such as the Eurasian Economic Union.

However, the point to emphasize is that the circulation of EU models of economic law seems to follow the opposite direction compared to Chinese models, but not in the sense meant by studies on EU policy export[1819]. EU economic law and development funds law

[1815] See E.UGIRASHEBUJA ET AL., *East African Community Law*, Brill Nijhoff, Leiden, 2017. The book adopts, in essence, a comparative approach between the EAC and the EU, verifying similarities and differences between the two legal orders.

[1816] See KARANJA-NG'ANG'A, *EAC Competition Law*, in E.UGIRASHEBUJA ET AL., *East African Community Law*, cit., 433-453

[1817] On the analysis of the mentioned rules, see also *ivi*, cit., 451-453

[1818] See E.UGIRASHEBUJA ET AL., *East African Community Law,* cit., 19-20

[1819] See G.FALKNER, F.MÜLLER, *EU Policies in a Global Perspective, cit.*, as also quoted at the beginning of the sub-paragraph.

circulates widely among supra-national organizations, but mostly in its superficial legal structures. To legal frameworks designed upon EU models correspond different theories and orientations of regional integration. We may even assert the existence of formal "transplants" of EU models, which are however not accompanied by the "transfusion" of the logic principles which inspire the activity of EU institutions. A partial counterbalance to such dissociation is represented by the effect of trade agreements between the EU and other supra-national entities. The inclusion of EU standards or the reference to EU policies within the agreements may gradually favor the incorporation, in foreign legal orders, of the deep structures of European economic law.

Is this mechanism valid also for the EU-China relations? So far, EU has not signed a trade agreement with China as that with MERCOSUR. Thus, we are not able to give judgments on the point. However, the integration of EU models in Chinese economic law does not seem to stray from the pattern I just described. Superficial legal structure were exported from the EU to Chinese competition law or to Chinese consumer protection law. Deep mechanisms of Chinese state capitalism, however, survived quite easily. Among scholars, some voices explicitly clarify certain structural differences between the two systems, so that the EU legal solutions concerning, for instance, state aids, while useful to China, may not be the object of a direct transplant[1820].

3. Development planning and the coordinative state

The polycentric nature of the global institutional landscape cuts through the function of the regulatory state. Standards and conduct rules are increasingly externalized to both public and private international operators[1821]. Economic regulatory regimes are torn between a Reaganian tendency to de-regulation and and an over-legification and iper-regulation of the economy. The consequence is a destructuring of the state, *rectius* – of the public powers[1822].

[1820] I am referring to N.PHILIPSEN, *Subsidies as a Means to Solve Market Failure: Lessons for China from EU State Aid Policy*, which I read in the Chinese translation in 财经法学 (*caijingfaxue*), Vol. 4, 2018, 137-151

[1821] See G.DI GASPARE, *Diritto dell'Economia,* cit., 345-348

[1822] See *ivi*, cit., 257-419. The author offers a (indeed quite pessimistic) thorough analysis of the different epiphanies of such deconstruction.

The anthropological institutions of development planning challenge the state's monopoly in the economic regulation. Social organizations, industrial associations, MNCs, indigenous communities, cities, villages, regions and macro-regions all feel empowered to carry out development planning functions. Sometimes they seek recognition from States [1823]. Sometimes they set up transnational networks cutting through national sovereignities, transfusing ethical principles, standards and rules[1824].

The new forms of development planning as evolved in China and in the EU represent a reaction of sovereign public powers to the weaknesses of their traditional functions, i.e. directive functions in China; regulatory functions in the EU. It is a planning which tries to integrate the programmatic aspiration of the international soft law[1825] with sovereign powers over resource allocation. It is, in other terms, a coordinative planning, upholding a notion of "coordinative state".

The concept of coordination recurred in the whole course of this research. Therefore, transposing it into the definition of a "new" role for public powers is, somehow, the logic consequence of the analysis so far carried out. It is, in its syntethic form, the ultimate outcome of the comparison.

Coordinative power is the meeting point of two experiences drawing from different legal traditions and functioning according to different legal principles and structures. Coordinative power is the instrument that these experiences use to compose the (apparent) antinomy between market economy and social ethics.

The implications on the traditional legal structures and hierarchies display analogies and differences in the two systems, as I have pointed out. Their respective models circulate globally and locally, inevitably interacting with other planning institutions such as corporations and local entities. Further researches could dedicate to the issues arising from such interaction the space they deserve.

Here, at the end of this "global" journey, we may only conclude that the comparative analysis showed that the legal mechanisms of development planning are producing, in essence, a result which is both practical and theoretical. The regulatory function is slowly renouncing to the utopia of "external control" while public powers are increasingly aware

[1823] It is, obviously, the case of local entities. But it is also the case, for instance, of the indigenous communities in Latin American legal orders that fought for the recognition of their identity as well as of their laws. See U.KISCHEL, *Comparative Law*, cit., 605-619

[1824] See E.MOSTACCI, *La soft law*, cit., 100-112

[1825] See *ivi*, cit.; see also B.CONFORTI, *Diritto Internazionale*, Editoriale Scientifica, Napoli, 2014, 160 ff.

of the variety of complex instruments at their disposal to coordinate and guide resource allocation. Call it state capitalism, call it cohesion-driven market economy, the underlying logic does not change. The public intervention in the economy constantly finds new (and often more subtle) ways to alter market dynamics for development purposes. Today, this circumstance is in line with a global trend, sanctioned by the soft circulation of development planning models as well as by international development strategies.

Within this common pattern, different models coexist, uphold sometimes colliding principles, favor different solutions, often challenge each other. My attempt was to describe their nature, their functioning, some of their achievments, some of their shortcomings. It is now for further researches (and for politicians) to judge which one is better.

It is instead for the readers to decide if they should care about plans after all.

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