Abstract: Chinese economic development has been driven, among other factors, by the gradual expansion of the private economy and the establishment of Chinese-based multinational corporations recognized as “champions” of the Chinese economy. At the same time, the Chinese Communist Party strives to maintain proper coordination mechanisms over the Chinese private economy, in order to ensure the harmonization between private and public interests. Does such policy direction, pursued by the Chinese leadership, rely on legal mechanisms? Does the Chinese Communist Party have legal instruments at its disposal in order to carry out coordinative functions concerning the private economy? The issue, although acknowledged by several scholars, has been rarely the object of a comprehensive legal analysis, taking into account the interactions between the different legal formants of the Chinese system.

The purpose of this paper is to sketch an outline of the main legal mechanisms empowering the Chinese Communist Party to supervise and coordinate the activity of private economic operators. Starting from the assessment of some recent developments, embodied in «Opinions on Strengthening the United Front Work in the Private Economy in the New Era» issued in September 2020, the analysis will try to identify some of the most relevant legal provisions aimed at ensuring Party supervision over the private economy, in particular Art. 19 of the Company Law. Such provisions will be analyzed not only within the context of the recent developments of Chinese economic law, but also with regard to its practical applications by courts, in order to define the scope, in concrete, of Party activities in the private economy.

The information gathered and analyzed will then be taken as conceptual basis to draw some conclusions regarding the structural role of the Chinese Communist Party in the development of Chinese commercial and economic law.

1. Introduction

Those who study Chinese law are fascinated by the idea of reconstructing the legal implications stemming from Chinese state capitalism (Liebman and Milhaupt 2015). It is, obviously, no simple task. Among the biggest challenges engaged in by scholars is that of framing, from a legal perspective, the complex, multi-level institutional networks surrounding many fundamental issues of modern Chinese economic law (Castellucci 2019). One of these issues is, beyond doubt, that regarding Chinese Communist Party control over the private economy.

Studies on Chinese political thought and economic policy have highlighted the tight relations existing between the CPC and private entrepreneurs, to the point that party membership of businesspersons operating in the private sector has been regarded as part of a comprehensive strategy meant to provide political power with a strong, albeit non strictly juridical, instrument to ensure coordination between public development policies and private operators’ business strategies (Chen 2015; Yan and Huang 2017).

The very same approach is that pursued by the recent «Opinions on Strengthening the United Front Work in the Private Economy in the New Era» issued by the CPC Central Committee on 15th September 2020. The new document was regarded, especially by the press, as a stronger assertion of party control over Chinese private economic operators. Furthermore, the opinions occur at a time when the confrontation between the Chinese model of economic development and other “liberal-democratic” models is more and more polarized.

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1 关于加强新时代民营经济统战工作意见 (guanyujiaqiangxinshidaiminyingjingjitongzhangongzuoyijian).
2 This stance was confirmed by the welcome reserved to the Opinions in several western newspapers. See, for instance, the news at the weblinks https://www.bloomberg.com/news/articles/2020-09-16/chinese-communist-party-wants-
To legal scholars, the core issue is to interpret the connection, emphasized by the Opinions, between Party control over private economy and the enhancement of the “legalization” of Chinese economy, in line with the pattern of “codification” of Chinese law (Castellucci 2019; Liebman and Milhaupt 2015; Liu 2020).

This paper is aimed at analyzing some implications of this connection and, in particular, the codification, in Chinese commercial law, of the presence of CPC branches in private companies. Such presence is mainly formalized through the provision of Art. 19 of the Company Law, whose legal value, although sometimes evoked even by non-jurists, has rarely been assessed in depth. The analytical effort must of course consider that some peculiarities of the Chinese legal order affect the methodology of the research. Therefore, in the first place, we have to reconstruct a comprehensive framework of legal sources also exploring the functional connection between formal legal sources and party documents or regulations, a connection which, in its judicial dimension, is strengthened by the mixed political-legal committees in courts at all levels (Castellucci 2012; Chen 2008; Kischel 2019; Mazza 2011). In the second place, we must consider the interactions among the different legal formants affecting the concrete scope and extent of CPC influence over the private economy: the legislative one, the one represented by CPC sources, the jurisprudential one and the socio-anthropological one, concerning the complex interpersonal relationships existing between public authorities, economic operators, private entrepreneurs and party cadres.

In order to draw its conclusion from a comprehensive and contextual analysis of the research issue, the paper will be structured into three main parts. The first part will sketch a theoretical framework (both legal and political) describing the main implications of the CPC intervention in private economy regulation. The second part will focus on the theoretical and practical role of Art. 19 of the Company Law, taken as the major example of the legalization of party control over private economy. The third part will put forward some conclusions regarding the scope and intensity of CPC influence over Chinese private enterprises, also framing the issue in the context of the trans-nationalization of Chinese investments.

2. The Communist Party and the Private Economy: setting the scene

From the perspective of the purely “superficial” institutional environment, the «Opinions on Strengthening the United Front Work in the Private Economy in the New Era» (hereinafter «the Opinions») seem to be aimed at promoting an activity which could be easily be called “lobbying”. The main addressee of the Opinions is indeed the United Front Work Department of the CPC Central Committee, in charge of increasing CPC influence among non-Party interest groups, targeting both individuals and collective entities (Suzuki 2019; Wang and Groot 2018). The existence of such department, however, draws its legitimacy from the guiding role of the CPC as enshrined in Chinese constitutional structures. Therefore, the position of the “lobbyist” is in this case both hierarchically preeminent and comprehensive, since it does not focus on a specific interest but encompasses several instances coming from the various social and economic forces of the nation.

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2 The presence of such cells was also at the center of the investigation carried out by U.S. authorities concerning Huawei, about which see § 3.

3 This notion mirrors the well-known (and infamous) concept of guanxi (关系), as driving paradigm of Chinese socio-economic governance at all levels (Gold, Guthrie and Wank 2002; Ko and Liu 2017; Li, Liu 2010; Mao 2012; Wong, Wei, Wang and Tjosvold 2017).

5 中共中央统一战线工作部 (zhongyangzhanxianzuobu)
As a consequence, the Party action, is not one-sided: the effectiveness of CPC influence also depends on the capacity of the very same Party to shape and implement its policies according to the needs and interests of the widest possible array of social bodies and groups. Therefore, the co-optation of representative figures (e.g. intellectuals and businesspersons) into the Party organs and the Party decision-making processes is also meant to strengthen the efficiency of a model of consultative democracy at the basis of Chinese macro-economic regulation, as evident in the evolution of its key concepts, such as development planning (Castellucci 2019; Wang and Groot 2018; Wang and Yan 2016).

However, such peculiar “nature” of the Opinions cannot be understood if not framed within the context of the evolution of Chinese legal thinking on Marxism and socialist market economy. The text of the Opinions seems to emphasize some key concepts meant to strengthen the connection between the ideological guidance of the CPC and the law-bound ordinary activities of the private economy (Chen 2008). In the first place, there is the issue of consensus, for there is need to reinforce the Party’s ability to lead the “trends” of private economy.

The clear, although only implicit in the text, foundation of such idea is the doctrine of the “Three Representatives” (三个代表 – sangedaibiao), elaborated by former Paramount Leader Jiang Zemin and now incorporated in the Preamble of the Chinese constitution (Cai 2015; Ding 2012; Jiang 2013). One of such three “representatives”, according to the doctrine, is indeed CPC’s representation of the advanced productive forces of the nation. If such stance obviously serves the purpose of justifying the guiding role of the Party within the context of a partially privatized economy, its implications are much more widespread and concern Party’s commitment to the creation of a strong backbone of private economic operators linked to guiding state ideologies through individual Party membership and enterprises Party branches (Yan and Huang 2017).

Two are the main legislative provisions implementing such commitment. Art. 19 of the Company Law 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»; on the other hand, Art. 7 of the Law on Individual Proprietorship Enterprises requires for «any Communist Party member in a sole proprietorship enterprise» to «conduct their activities in accordance with the Constitution of the Chinese Communist Party».

However, the strive for consensus, made so explicit by the aforementioned provisions and by the Opinions, must make use of the institutional instruments developed in the last two decades of Chinese socio-economic development and which are today embodied by Xi Jinping’s thought, the sole real ideological reference found in the Opinions (Xi 2017). The idea is, therefore, that to ensure that the path to socialism with Chinese characteristics is followed, political consensus relies: a) on an increasingly inclusive decision-making process; b) on a legally structured system of education and supervision for private entrepreneurs. Both notions are clearly emphasized by the opinions. With regard to the first point, the Opinions (Point 8) adhere to the principle of «Uniting – Criticizing – Uniting» (团结 – 批评 – 团结 – tuanjie – piping – tuanjie), echoing the Party-led coordinative decision-making process already well established in the development plans’ drafting process (Wang 2017).

6 See Points no. 1-2, 5-6 of the Opinions.
7 The translation referred to is the one available on the website of the Peking University Law School (en.pkulaw.cn).
8 The translation provided by the Peking University Law School, indeed, translates the expression «在个人独资企业中的中国共产党党员» with «members of the Chinese Communist Party among the employees of individual proprietorship enterprises». However, the original Chinese text, though not really clear, seems to suggest a broader scope of application, covering all CPC members working in the enterprise. Regardless of the specific meaning of the provision, it is indeed unreasonable that a distinction is made between employers and employees with regard to duties connected to party membership, since all party members are equally subjected to the CPC Constitution and Disciplinary Regulations.
The main institutional channel chosen by the Opinions to implement such policy is that of the Industrial Associations, as embodied by the several references made to the reform of the structure and function of the All-China Federation of Industry and Commerce (in the text of the Opinions referred to as «Federation of Industry and Commerce» –工商联 – gongshanglian). Industrial Associations (行业协会 – hangyexiehui) have for a long time been acting as connections between private economy and state power in China. Formally non-governmental and non-profit associations, their purpose may differ from case to case, but it generally concerns the enhancement of the cooperation and coordination between the member enterprises as well as the management of the relationship between the enterprises and the public authorities. Cooperation may lead to harmonization of industrial policies and strategies but also to price control (Li and Luo 2016; Yao and Che 2011; Xu 2010). The Federation of Industry and Commerce, as the most relevant of such associations, is meant to function as a bulk of ideologically loyal economic operators capable to integrate private profit with public policies. From this perspective, the Opinions advocate for the Federation to act as an intermediate institution between the state and the private economy. They therefore call for the Federation, as well as for the several Chambers of Commerce in China, to cooperate with the authorities to identify and correct cases of infringement of the property rights of private enterprises (Point 18) and to be entrusted of public services through government procurement procedures (Point 24). On the other hand, the Opinions call for Party committees and people’s government to take into account suggestions from representatives of private enterprises, industrial associations and chambers of commerce, to carry out periodical surveys and work conferences concerning the development of private economy, in order to collect complaints, suggestions and recommendations (Point 20).

The extensive role of consultative decision-making in private economy matters is embodied, at its highest level, by the CPC’s commitment to recommend outstanding private entrepreneurs as members of both the People’s Congresses at all levels and the People’s Political Consultative Conferences (Point 13). The role of the Political Consultative Conferences, in particular, is strategic for the integration between Party policies and private economy. Such conferences are meant to act as collectors of instances coming from all the relevant sectors of China’s society and economy (Peng and Chen 2015; Wang and Luo 2007; Zhou 1984). Although their role is formally just consultative, the last decades have seen a gradual consolidation of constitutional conventions regarding the involvement of such institutions in decision-making processes, especially when related to broad national-wide economic policy acts, such as, in the first place, the national development plans (Hu 2013; Wang and Yan 2016).

The role played by these organs empowers private economic operators to participate in the preparation and drafting of key national (and local) policies, preventing, as much as possible, divergences in the priorities pursued. The elimination of conflicts of interests is also a premise for the allocation of state subsidies and benefits in those sectors which may, at the same time, represent the vanguard of private investments and the object of public development policies (Castellucci 2019). It is, by all means, a Party-guided consultative process, but it is nonetheless a consultative process which institutionalizes the “ethical” obligation of the public power to rule according to the instances coming from the people. The traditional theory of democratic centralism, still at the basis of CPC and Chinese decision-making process, is expanded and deepened, in pursuit of that integration between rule of

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9 Points 16 and following of the Opinions deal extensively with the tasks and organization of the Federation of Industry and Commerce as well as of the Chambers of Commerce.
law (法治 – *fazhi*) and rule of virtue (德治 – *dezhi*) much emphasized by Chinese Marxist legal theory (Song, Zhao and Yang 2017).

Indeed, the promotion of ethical paradigms in the relation between private economy and Party action is a recurring element in the text of the Opinions, mirroring a general trend affecting the recent development of the Chinese legal system. In practice, such general goal is implemented through the close connection between education and supervision. Education is achieved by publicizing CPC activities and ideology among private businesspersons and by involving those persons in such activities. The final goal is to instill a sense of self-awareness in private economic actors concerning the ethical responsibility to serve the country, to act according to a set of moral standards also reflecting the general interests pursued by the political leadership, to avoid hedonism or other unsuitable conducts.

Ethical responsibility implies, in this context, a political responsibility based on CPC disciplinary regulations but also a legal responsibility, today founded at its highest degree over Section 7 of the Constitution of the PRC (as amended in 2018) and the Supervision Law. The enactment of the Supervision Law raised the attention of several legal scholars and has been mostly linked to the attempt at ensuring stricter control over conducts of public servants, as also emphasized by Xi Jinping’s thought (Xi 2017). However, the legal framework for the exercise of supervisory powers does not limit the subjective scope of supervisory bodies’ activity to public servants; it also includes «Personnel engaged in public affairs at organizations managing public affairs upon authorization by laws or regulations or lawful entrustment by state organs».

What does such expression mean? The notion of «public affairs» is quite vague and seems to concern every activity dealing with interests and instances expressed by public powers. From this perspective, Chinese scholars believe that even a self-employed carpenter hired to repair tools within a public university campus could be carrying out a public-related activity, thus being subjected to the Supervision Law. Apart from this “extreme” example, however, public affairs surely include activities carried out by private economic operators under the background of an administrative contract (行政合同 – *xingzhenghetong*) such as a PPP, according to a public procurement procedure (Sabatino 2020). In other words, those services which the Opinions advocate be entrusted to industrial associations and chambers of commerce according to the law are to be subjected to the Supervision Law. Furthermore, members of the People’s Congresses and of the People’s Political Consultative Conferences at all levels are also subjected to supervision.

The content of such supervision, as laid out in Art. 11 of the Supervision Law, is perfectly in line with the direction embraced by the Opinions and concerns «integrity education» (廉政教育 – *lianzhengjiaoyu*) and «moral integrity» (道德操守 – *daodecaoshou*).

The coherence in contents between the moral standards of the Opinions and the moral standards set by the Supervision Law reflects, indeed, a general coherence between the development of the in-Party

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10 A recent example of such “moral shift” of Chinese law is the legal implementation of the “socialist core values” (社会主义核心价值 – *shehuizhuyihexinjiazhi*) as interpretative cornerstone of rules governing civil relations (Li 2018; Li 2018).
11 See, for instance, Points 6 and 7 of the Opinions.
12 Point 9.
13 This section introduces the Supervisory Commissions as constitutional organs of the Chinese state, at all levels, structured according to a strict hierarchy and creating, in concrete, a fourth “power” or fourth “function” of the State, beside the legislative, the executive and the judicial function (Huang 2019; Zhang 2018).
14 Art. 15(2) of the Supervision Law.
15 This example was discussed by the Author with several scholars and researchers of the Zhongnan University of Economics and Law. Chinese case law suggests, furthermore, that the scope of Supervisory Commissions’ action includes collective economic organizations and cooperatives (Foshan Intermediate People's Court (Guangdong Province), 18th July 2019, Civil Case (Appeal) no. 6956).
16 Art. 15(1) of the Supervision Law.
rule of law and the state rule of law. For private economic operators, this means that CPC policies may become, to an extent, criteria to assess the legitimacy of their business strategies. From an organizational point of view, the functioning of this mechanism is ensured through the creation, classification, registration and supervision of intermediate bodies such as the industrial associations. In other cases, state law provides for criteria to evaluate certain private investments in light of general development policies stemming from the Party’s will, as it happens with the regulation of outward foreign direct investments.

In one specific case, however, the integration between the CPC line and the growing private economy is pursued through a direct intervention on the “body” of Chinese commercial and corporate law. That is the institutionalization of CPC branches in Chinese companies, as laid out by the already mentioned Art. 19 of the Company Law. This provision, though now well known among sinologists, is still, to a great extent, obscure in its meaning, its practical value and implementation. The following paragraph will be therefore focused on the analysis of this provision and on its implications for the future development of the connection between the Communist Party and the Chinese private economy.

3. The rationale and content of Art. 19 of the Company Law

Art. 19 of the Company Law, by its literal meaning, shapes two basic legal relations. The first one concerns the unilateral power of the Communist Party to establish, when deemed fit, branches and cells within a company subjected to the Company Law. The second one creates an obligation for the company to «provide necessary conditions to facilitate the activities of the Party».

The text of the provision does not make distinctions between state-owned and privately-owned enterprises and the Company Law itself applies both to wholly private enterprises and to enterprises in which the state (be it a ministry, a local government or the State Assets Supervision and Administration Commission) holds a stake.

Chinese legal scholars, indeed, have rarely been interested in the legal dimension of Art. 19 and, when they did so, have mostly framed it within the operations of State-Controlled Enterprises (Liu and Xu 2017; Jiang and Li 2017; Wan and Gan 2019; Wang and Wu 2017; Zhang 2019). The presence of CPC cells in strategic enterprises belonging to the government-owned economy may therefore be interpreted as a channel to ensure the management of state-owned assets in compliance with public policies, according to the inclusive and coordinative logic already discussed.

This paper, however, focuses on the private economy. Therefore, the main question is how those two legal relations designed by Art. 19 may be implemented within a private enterprise and with which legal value in concrete. The point is crucial because it touches the same connection upheld by the Opinions, i.e. that between the development of CPC’s coordinative capability and the development of rule of law in the socialist market economy. The influence exercised by the CPC over the private economy through entrepreneurs’ Party membership and targeted support policies in Party’s policy plans (then incorporated in state development plans) is a fact beyond doubt. However, is such influence transposed into a legally enforceable responsibility for private enterprises to follow Party’s indications?

To answer this question, it is necessary to start from the historical rationale of Art. 19. Before the beginning of the reforms and up to the early 1980s, as Chinese enterprises were all state-owned, the

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17 See, in particular, Point 25 of the Opinions.
19 Pursuant to Art. 2, the term «company» in the company law refers to a «limited liability company or a joint stock company limited set up within the territory of the People's Republic of China according to the provisions of this Law». 
presence of CPC enterprise committees completed a model of economic governance derived from the Soviet reforms of the 1930s (Crespi Reghizzi 1969; Jiang and Li 2017). Even after a first “wave” of privatizations – which indeed concerned mostly small-sized enterprises – enterprise Party committees served a centrally planned economy, where their main purpose was to ensure that the spaces of management autonomy granted to SOEs through reforms did not cause interferences with public policies.

Within this context, the CPC Central Committee and the Ministry of Finance issued the Notice on the Issues of Funding of Enterprise Party Organizations’ activities, still today in force20. The notice conceives enterprise Party committees as entities fully integrated within the management structure of the enterprise. Committees’ expenses are regarded as part of the enterprise management expenses21; however, once annual funds is fixed, the management of Party activities – including recruiting, recommendations and cadres’ training operations22 – as well as the management of daily expenses is entrusted to the committee and its secretary, who approves ordinary expenses according to an annual financial plan23.

Although still valid, the practical value of the notice is lost to many Chinese enterprises, now structured according to corporate models vastly different from the ones dominating at the time of its issuance.

The 1990s were indeed a crucial decade for the evolution of modern commercial law (Shi 2018). The CPC intention to reshape government-owned economy around few, strategic enterprises required for the establishment of legal rules fit to govern the privatization and transformation of old SOEs. The Company Law reacted to such needs by introducing the two fundamental models of the Limited Liability Company (有限责任公司 – youxianzerengongsi) and the Joint Stock Limited Company (股份有限公司 – gufenyouxiangongsi) (Ajani, Serafino and Timoteo 2007; Monti 2007; Yu 2019). The «Wholly State-Owned Company» (国有独资公司 – guoyouduzigongsi) is conceived as a special category of Limited Liability Company, mainly characterized by the absence of the shareholders’ assembly, whose functions are exercised by the public authority in charge of the management of the state-owned assets, i.e., in almost every case, the SASAC (Monti 2007; Yu 2019).

Western influences are evident in the content of the Company Law. The intention of the legislature is to distance the new models of Chinese corporate governance from the traditional bureaucratic paradigm of the socialist command economy, thus emphasizing the organizational independence of corporate structure and the notion of limited liability.

In such context, the provision of Art. 19 seems out of place. The emphasis posed by Chinese scholars on its connection with governance of state-owned assets might suggest that it is one of the transitional provisions of Chinese law, meant to acknowledge, from a legal perspective, the persistence of “old” institutes of the planned economy in enterprises destined to gradually shift towards more “neutral” forms of corporate governance. In any case, it would seem that Art. 19 might concern only state-invested enterprises.

This view, however, though not untrue, is in fact an oversimplification. Enterprises’ CPC committees survived the transition to the socialist market economy and, as already noted, the 1990s saw a steady

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20 中共中央组织部 财政部关于企业党组织活动经费问题的通知 (zhonggongzhongyangzuzhibu, caizhengbuguanyuqiyedangzuzhihuodongjing/ewentidetongzhi).
21 Point 2 of the Notice.
22 Point 1 of the Notice.
23 Point 2 of the Notice. The management of the enterprise is involved, pursuant to Point 3, only when approval for additional expenses is required. In particular, it is the industrial plant director (厂长 – changzhang) who decides on extraordinary expenses.
increase in the number of these committees within privately-owned economic entities (Yan and Huang 2017).

Today, as the share of state-owned economy continues to slowly decrease, Party branches in private enterprises grow in number, strength and complexity. Several “champions” of China’s private economy, such as Huawei and Tencent, have internal CPC committees with CPC membership rate among employees above twenty percent. In the case of Huawei, the role and function of the Party committee were addressed by an investigative report commissioned by the U.S. House of Representatives in 2012. Huawei, while confirming that the presence of CPC committee was required by law, upheld that the enterprise did not have relationships with the CPC «in its business activities». At the same time, the enterprise did not clearly describe which activities were carried out by the committee, which decisions of the company were reviewed by the committee and how committee’s members were selected.

The stance taken by the enterprise, however, proves at least one point, i.e. that the setting up of a CPC committee where required is perceived as a legal obligation by the private economic operators. It is therefore necessary to further assess the legal implications stemming from Art. 19. In order to so, I have focused on the research of case law mentioning and applying the provision.

### 3.1 Judicial applications of Art. 19

Such research, indeed, encountered an unexpected issue related to the proper identification of relevant cases. Out of seventeen collected judicial decisions mentioning Art. 19 of the Company Law either as legal basis of the decision or in the legal reasoning carried out, fourteen appear to wrongly refer to the article, associating it to a different content. In some cases, the courts quoted Art. 19 of the Company Law but then reported the content of Art. 19 of the Supreme People’s Court Interpretation on the Company Law (no. 3). In other cases the courts, although referring to the content of Art. 19 as it was a quote (also making use of quotation marks), instead reported a text not consistent with the one of that provision. In one appeal case, the court acknowledges that the first instance decision applied Art. 19 (this time referring to its correct content) but dismisses the lower judge’s reasoning without offering further elements to comprehend how and why Art. 19 was used in the first place.

There are therefore two decisions left mentioning Art. 19 and actually discussing its content in their reasoning. The first one is a decision of the Shenze People’s Court adjudicating a dispute regarding the lawfulness of the convocation of a shareholders’ meeting in a private enterprise owned by three shareholders (natural persons). Art. 19 is not among the legal grounds of the decision, but is taken

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26 Sec. III (iii) of the report. The italics is in the original text. The very same concept is also expressed in a general statement published on the website of Huawei and available at the link: [https://www.huawei.com/en/facts/question-answer/does-huawei-have-ties-to-the-cpc](https://www.huawei.com/en/facts/question-answer/does-huawei-have-ties-to-the-cpc).

27 Ibid.

28 Intermediate People’s Court of Panzhihua City (Sichuan Province), 16th May 2019, Civil Case (Appeal) no. 385.

29 Shenze County’s People Court (Hebei Province), 11th September 2017, Civil Case (First Instance) no. 783. The two main parties of the dispute are two of the three shareholders of the enterprise who are respectively manager (the plaintiff) and legal representative (the defendant). After the defendant allegedly misused both the company’s official seal and his personal seal, the plaintiff (together with the third shareholder) called for an extraordinary shareholders’ meeting whose outcome was a deliberation asking for the return and invalidation of the allegedly misused seals. The defendant failed to comply with the meeting’s resolution, thus leading the plaintiff to ask the court to uphold the legitimacy of such resolution
into account by the court since the plaintiff (i.e. the shareholder upholding the lawfulness of the meeting) presents, as evidence, an opinion issued by the Party branch of the enterprise and supposedly regarding entrepreneurial activities, organization and events\(^{30}\). The court quotes the whole text of Art. 19 but later dismisses the opinion, ruling that it may not have any value as proof of the company’s business activities\(^{31}\).

The court’s reasoning is quite cryptic and leaves much to be hypothesized\(^{32}\). However, the decision puts on displays at least two relevant elements: in the first place, from the factual circumstances described it is clear that CPC branches are common and involved in ordinary business activities even in medium-sized enterprises with few shareholders. That of issuing opinions regarding organizational matters seems to be a common occurrence too. In the second place, the consultative tasks carried out by the Party committees, although justified by the obligation upon the enterprise laid out in Art. 19, does not hold a proper legal value and cannot invoked before a judge. In other words, a Party committee’s opinion upholding the legitimacy of a certain activity (be it organizational or strictly business-related) does not constitute a valid criterion for the judge to develop its interpretation and application of the statutory law.

The practical implications of the second part of Art. 19 («The company shall provide necessary conditions to facilitate the activities of the Party») are to be scrutinized more deeply than those of the first part, since the power of the CPC to establish committees in enterprises cannot be disputed. The issue emerges clearly in the second one of the decisions examined, concerning a labour dispute between a private enterprise (appellant) and a former employee (appellee) who, during his work tenure (2006-2015), also served as member of the enterprise’s board of directors (2015) and as Secretary of the enterprise’s Party committee (2012-2015)\(^{33}\). The main object of the dispute is the payment of arrears for the year 2015. The legal circumstances examined by the court are fairly complex, because the labour contracts stipulated between the parties did not specify, nor gave clear indications about the amount of the wage\(^{34}\). Both the first instance court and the appeal court therefore refer to Art. 18 of the Labour Contract Law, which lays out the criterion of "equal pay for equal work" in order to resolve disputes in absence of clear determination of the wage as well as of applicable collective contracts\(^{35}\).

The position of the appellee as enterprise Party secretary is referred to from multiple perspective. In the first place, the appellant claims that such position does not represent a proper labour relation and is therefore excluded from the scope of labour law\(^{36}\). The court rapidly dismisses the argument, pointing out that the position of Party secretary rests upon a previous position as employee of the enterprise\(^{37}\). Members of CPC committees, indeed, are chosen among the personnel of the enterprises and forcing the defendant to comply. The enterprise involved in the dispute is a medium-sized enterprise in terms of registered capital (36.300.000 RMB) operating in the fields of housing construction and engineering construction.

\(^{30}\) Page 4 of the judgment.

\(^{31}\) Ibid.

\(^{32}\) In particular, the dismissal of the CPC branch opinion as evidence is derived by the court directly on the text of Art. 19, but without further reasoning. Indeed, as already noted, Art. 19 just establishes a right (for the CPC) to establish committees and an obligation (for the enterprise) to ensure the necessary conditions for the committees’ activities. There are not clear elements concerning the nature and value of the documents issued by such committees.

\(^{33}\) Yichang City Intermediate People’s Court (Hubei Province), 9\(^{th}\) January 2018, Civil Case (Appeal) no. 138. The private enterprise acting as appellant mainly operates in the packaging industry and had, in 2010, a registered capital of 30.000.000 RMB. It is therefore another medium-sized enterprise.

\(^{34}\) In particular, the two parties stipulated three consecutive labour contracts.

\(^{35}\) As also emphasized by the decision, the principle “equal pay for equal work” in practice is implemented through a comparison of the work conditions of different employees, so that the employee whose contract does not specify his/her wage should be given the same treatment reserved to employees working in similar positions or entrusted with similar tasks.

\(^{36}\) Page 1 of the judgment.

\(^{37}\) Pages 2-3 of the judgment.
employees and shareholders) and are therefore linked to the economic unit by a legal relationship autonomous from their Party membership.

Therefore, the Court deems it fit to apply labour law to the examined dispute.

In the second place, the Court refers to Art. 19 to justify the enterprise’s obligation to pay arrears to the appellee and to determine their amount. According to the Court, as the labour contract does not specify the remuneration, there are two legislative criteria to follow: one is that of Art. 18 of the Labour Contract Law, i.e. the “equal pay for equal work” principle. The other principle is that of Art. 19 of the Company Law, according to which – as the court notes – members of the CPC committees must enjoy working conditions enabling them to properly carry out Party activities. The court believes that such condition include remuneration. In the case examined, as the defendant was appointed as director the salary he received (though not mentioned in the contract) was calculated pursuant to the job position he previously held and was therefore inferior to the pay of his fellow directors. The enterprise refused to pay the appellee the arrears amounting to the difference between the salary he perceived and that perceived by other directors.

The issue, indeed, could have been resolved through a plain application of the “equal pay for equal work” principle. However, the court highlights that the discriminatory treatment reserved to the appellee is a violation of the enterprise’s obligation to ensure optimal working conditions for CPC committees. The conduct of the enterprise is therefore not only a violation of labour law, but also a violation of the rules on business activities as laid out in the Company Law.

The idea that the obligation contained in Art. 19 also regards a proper economic treatment of the members of the CPC committees is quite significant. Although the court does not shed much light on this matter, it appears that its concern is to ensure that Party committees’ members are not ill-treated not only on the basis of a general principle of non-discrimination in labour law but also in order to ensure that the work of the committees (and their personnel) is not subjected to economic constraints depending on the enterprise’s will. There seems to be, in other words, and underlying notion of “independence” of the CPC committees which would be hindered by discriminatory treatments.

From this perspective, the approach taken by the aforementioned decision is in line with the stance set by the Supreme People’s Court in an important notice of 2005 concerning the status of the funds allocated for the activities of enterprises’ party committees.

Such notice, although not strictly a decision, was however issued in response to several cases where local courts, during execution procedures upon companies, froze CPC committees’ funds and CPC committees’ dues account, judging them to be part of the enterprises’ financial resources. The Supreme People’s Court pointed out that such decisions hindered the organizational capability of Party branches, violating Art. 19 of the Company Law. The notice highlighted that Party committees’ funds come from the membership fees paid by employees who are CPC members in proportion to their monthly wages. Such funds are managed exclusively by the Party committee and are stored in a special account. They are, therefore, not under the responsibility or management of the

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38 Page 3 of the judgment.
39 Ibid.
40 Ibid.
41 最高人民法院关于强制执行中不应将企业党组织的党费作为企业财产予以冻结或划拨的通知 (zuigaorenminfayuanguiyuiqiyedangfeizuoweiqiyedangfeizuoweiqiyedangfeizuoweiqyecatchanyuyidongjiehu

42 The notice has therefore the function of instructing lower courts on the assessment of these specific cases.
43 Art. 19 is not openly referred to by the Supreme People’s Court, but the notice mentions that freezing the CPC committees’ account affects the «normal work of the Party’s organization» ( 党组织的正常工作 –
dangzushidezhengchanggongzuo). It is the very same concept laid out in the second part of Art. 19, thus the connection is quite clear.
enterprise. As a consequence, Chinese courts cannot freeze CPC funds during execution procedures, unless it is proved that there are also company’s resources deposited on the CPC special account\(^{44}\).

### 3.2 The legal value and the implementation of Art. 19

Does the knowledge offered by the aforementioned judicial interventions by Chinese courts allow us to draw a clear picture of the legal enforcement of Art. 19 of the Company Law? Indeed, the first significant element displayed in the analysis lies in the existence of relevant decisions considering or applying Art. 19, something which is not to be taken for granted given the highly political and less technical nature of such provision in an otherwise quite “neutral” legal environment, i.e. that of the Company Law. This means that Art. 19 is regarded, both by economic operators and by courts, not as a purely programmatic and ideological statement, but as the basis of legal obligations which may very well be assessed or enforced before courts.

In the second place, the examined decisions, by focusing on the implementation of Art. 19 § 2, shed light over the organizational dimension of enterprises’ Party committees. In particular, it seems clear that such committees are to be perceived, at least theoretically, as separate from the business organization of the economic operators\(^{45}\). Their financial independence, as stressed by the Supreme People’s Court, is counteracted by the formally non-binding nature of their statements and decision\(^{46}\).

On the other hand, however, the professional status and even the economic treatment of their members is protected, in the sense that each decision from the enterprise which directly concerns a member of the committee must be considered as a decision addressing and affecting the committee as a whole, so to verify whether or not its functioning might be hindered by certain choices of the enterprise itself\(^{47}\).

Chinese doctrine, when assessing the legal implications of Art. 19 for State Controlled Enterprises (SCEs), often emphasizes a function of legitimacy (合法性 – hefaxing) (Wang and Wu 2017). It means the legitimacy of the CPC as guiding force of the Chinese society and economy, already laid out in the PRC Constitution, is transposed into a more concrete and structural dimension by specific sectoral laws, including the Company Law (Wang and Wu 2017). At the same time, the Party’s activities, in both private and public enterprises are subjected to organizational rules which are meant to strengthen the legalization (法治化 – fazhihua) and fairness of the CPC’s action (Zhang 2018). It has been argued that the ultimate purpose of such process, with reference to Art. 19, is that of strengthening the Party’s capability of governing the economy (Ma 2006). The core issue is then assessing how is this possible in concrete.

Whereas in SCEs it is quite easy to think of Party branches as direct vehicles of national interests and public interests, as interpreted by the CPC in its guiding role, for private enterprises such logic raises more doubts (Liu and Xu 2017). It has been pointed out that, after legitimacy, one of the principles which should guide the legal structuring of enterprises’ Party branches is the scientific nature (科学性 – kexuexing) of their work (Wang and Wu 2017). It is a common approach shared by several

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\(^{44}\) Pursuant to the notice, the person applying for the execution must offer evidence of the fact that among party funds there are other resources of the enterprise deposited on the special account. If the court accepts the evidence, it may freeze, as a pre-emptive measure, the Party committee’s account. However, the person subjected to the execution (i.e. the enterprise) may then offer proof that the resources deposited on the special account are solely for the Party committee’s use.

\(^{45}\) As confirmed by both the Notice of the Supreme Court no. 209/2005 and the decision of the Shenze County’s People Court (Hebei Province), 11th September 2017.

\(^{46}\) Such non-binding nature is confirmed by the unfitness of such acts to serve as evidence of the enterprise’s nature and business operations.

\(^{47}\) As laid out in the decision of the Yichang City Intermediate People’s Court (Hubei Province), 9th January 2018.
concepts of modern Chinese economic law: the political dimension of the rule is harmonized with a strengthened rule of law thanks to the enhanced technical quality of the CPC coordination activity (Wang and Yan 2016; Hu 2013). As ideal collector of the Chinese society’s instances, the Party is then able to coordinate them with the interests of the private economy, provide business managers with correct information and suggestions (Wang and Yan 2016).

It is easy now to see how the logic of our discourse has come back to the principles emphasized by the recent Opinions on the Strengthening the United Front Work in the Private Economy. A renewed attention to legalization, an emphasis on the coordination of interests, a stress on the moral and ethical nature of the guidance offered by the Party, are all elements shaping the content of CPC operations within private enterprises. This also explains the interest of the law in defining the structural independence of Party committees and, at the same time, the functional interdependence with the management of the enterprise. In other words, the law (and the judges) ensures that private enterprise, when hosting CPC committees, give them operative freedom while enabling Party-members’ employees to work for the committees without fears of negative repercussions on their status and salary. Furthermore, Party committees (and their accounts) must not bear responsibilities for business failures and debts of the hosting enterprise.

The fuzzy separation between the Party and the economic operators is bridged by the consultative and advisory role played by the committees. These functions, when disregarded, are not enforceable by “formal law”. They will be instead enforced, when deemed necessary, at the level of the CPC disciplinary rules for members, or through more or less indirect means of financial support (subsidies, cheap credit from state-controlled banks, etc.).

4. Conclusions

Political control over China’s private economy has been the object of great attention in the past years, as well as of several misunderstandings, which have somewhat polarized the debate between those who tend to exaggerate the constraints posed by the CPC to private enterprises and those who instead tend to paint Chinese business law as rationally structured upon European or Anglo-American models, void of considerable political influences (Shi 2018).

Such polarization, hastened by the trade conflicts erupting between China and the United States, does not take into account the evolution of the Chinese legal system and, in particular, its preference for the integration between legal, political, technical and moral legitimacy. The CPC stance toward the private economy, legally ensured by clauses such as Art. 19 of the Company Law, is one of the several legal formants of Chinese commercial and economic law48. As such, it cannot be ignored, nor must it be regarded as the sole force behind business strategies of China’s private economy. As decisive as they may appear, even the recently issued Central Committee’s Opinions do not uproot any previously existing business environment; they rather logically organize – and publicize – operative mechanisms which have been since long in place, though concealed behind the complexity of cryptic statutory clauses and fragmented regulatory sources.

As such, their significance is, first and foremost, symbolic: the Opinions mark the ultimate legitimization of the process of “State advancement and private retreat” (国进民退 – guojinmintuitui) commenced two decades ago, right after the constitutionalization of that theory of the “Three Represents” which ideologically founds CPC widespread influence over the private economy (Castellucci 2019).

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48 Since it deals with the relation between the Party legal order and the State legal order, the connection between CPC policy and private business strategies, as ensured by Art. 19, might also be regarded as one of the “deeper structures” of Chinese law (Kischel 2019).
However, what for the Chinese system is a (partly) harmonious development of some of its contradictions – above all, that between the market and state control – for other countries could be an operative problem. Dealing with Chinese investment means being aware of the possible relations between economic operators and political power, as well as of the true extent and limits of Party’s influence over private economy.

Commercial law, as developed within the western legal tradition, is still partially unable to address the operative complexity of what it perceives as a direct limitation of individuals and enterprises’ economic freedoms, as it is a provision such as Art. 19 of the Company Law or a document such as the Opinions. As a consequence, the most reasonable way to treat the phenomenon seems to many that of focusing not on the ideological and organizational dimension of public control over China’s economy, but rather on the concrete instruments of financial support which may be enjoyed by politically-backed enterprises. This is the approach embraced by the EU Commission’s White Paper on levelling the playing field as regards foreign subsidies issued on 17th June, 2020. The white paper advocates for the adjustment of EU state aid rules in order to detect foreign enterprises whose business activities are supported through public resources coming from foreign governments. The China Chamber of Commerce to the EU (欧盟中国商会 – oumengzhongguoshanghui) has adopted an official position during the consultation procedure concerning the white paper; it has expressed deep concerns regarding the potential impact of new state aid rules over the economic freedoms laid out in the EU treaties and the international economic agreements including the European Union, implicitly confirming our previous statement on the EU business law’s unfitness to address the complex phenomenon of CPC control over Chinese enterprises.

The CCCEU document clearly displays concern regarding the treatment of Chinese investments in the EU, should the white paper be transposed into legislation, and resorts to invoke the application of the “grandfather clause” in order to protect already established Chinese investment in the European economy.

The difficult interaction between the hybrid nature of Chinese business rules and the renewed awareness of EU institutions toward politically-backed foreign investments touches, among other issues, upon government aids to private enterprises. Such phenomenon, if technically detectable and measurable to some extent, for the comparative legal scholar represents the consequence of a more general trend, i.e. the evolution of both western and Chinese business rules along two different paths, characterized by different degrees of integration between policy, legal technique and ethics. Indeed, provisions like Art. 19 of the Company Law, or documents such as the Opinions examined in this paper, are not even directly related to aids or subsidies, which may of course be an outcome of the coordination between private business strategies and public policies but are not a requirement for the existence of such coordination. The legal mechanisms empowering the CPC to work on such coordination are instead firmly entrenched in the logic of Chinese business and economic law in the new era and regard institutional interactions, rather than solely financial resources’ allocation.

The acknowledgment of the peculiar features of modern socialist market economy also brings the realization of the uniqueness of the Chinese system as a separate, if ever developing model of economic law.

49 COM(2020) 253 final. The white paper, indeed, moves along the line already traced by the previous interventions of the EU legislature such as, above all, the Regulation no. 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union.

50 China Chamber of Commerce to the EU – Position document attached to the Consultation questionnaire, available online.

51 See, in particular, pp. 1-2.
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