The Enabling State and the Market*

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This text seeks to contribute to the understanding of some key-aspects of the Enabling State concept (*Gewährleistungsstaat*(1)), especially its application in Economics. In this context, one assumes a dualist map, which in abstract terms can divide the responsibility from the discipline of economic phenomena between the State and the Market. For now, the aim is to try to understand the responsibilities which States today – from the outset, its dimension of *Regulatory State* – must inevitably

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(1) On the concept of Enabling State in German doctrine (where it comes from), cf. Franz Jürgen SÄCKER, "Das Regulierungsrecht im Spannungsfeld von öffentlichem und privatem Recht", *Archiv des öffentlichen Rechts*, vol. 130, 2005, p. 280 et seq. (187); Karl-Heinz LADEUR, *Der Staat gegen die Gesellschaft*, Tübingen, Mohr Siebeck, 2006, p. 340 et seq.; Claudio FRANZIUS, "Der «Gewährleistungsstaat» – ein neues Leitbild für den sich wandelnden Staat ", *Der Staat*, 2003, p. 493 and seq.; *idem*, "Der Gewährleistungsstaat", *Verwaltungsarchiv*, 2008, 3, p. 351 et seq.; *idem*, *Gewährleistung im Recht* (*Grundlagen eines europäischen Regelungsmodells öffentlicher Verwaltungsrechtsdogmatik im Wande*l, Tübingen, Mohr Siebeck, 2009, p. 77 et seq.; Rainer SCHRÖDER, *Verwaltungsrechtdogmatik im Wandel*, Tübingen, Mohr Siebeck, 2008, p. 160 et seq.; Kay WAECHTER, *Verwaltungsrecht im Gewährleistungsstaat*, Tübingen, Mohr Siebeck, 2008, p. 160 et seq.; Friedrich SCHOCH, "Gewährleistungsverwaltung: Stärkung der Privatrechtsgesellschaft?", *Neue Zeitschrift für Verwaltungsrecht*, 2008, p. 241 et seq.; Andreas VOSSKUHLE, "Cooperation between the public and private sector in the enabling state ", *in* Matthias RUFFERT (ed.), *The public-private law divide: potential for transformation*?, London, British Institute of International and Comparative Law, 2009,p. 205 and seq..

shoulder in the context of its general mandate to ensure efficient market functioning [2] in these areas.

1 – From separation to cooperation between State and Market

In one of its most common and publicized topics, current legal literature sets out the satisfaction of collective interests as a joint and shared enterprise involving interaction and interdependence between public and private actors. This topic goes hand-in-hand with an innovative semantic that includes formulas and concepts such as "shared responsibility"[3], "public-private governance"[4] "collaborative governance"[5] or "interdependence between public and private actors "[6].

The stage we are experiencing at the moment thus implies a break from the dichotomy State/society which, since the Absolute State, has remained during the liberal era. The strict liberal dichotomy based on the logic of confrontation, adversity and reciprocal mistrust involved the monopoly of public space by the State and the consecration of the idea that the sphere of State intervention in the world of political values and authority was always *public action*, which was only set out as *public interest action*. The other term of the dichotomy, the «Civil society ruled by private law»[7], was the *private action* space located in the world of Economic values and related to areas or sectors exclusively identified with *private interest actions*. Citizens with purely selfish and individual interests were barred from any institutional actions, as so to protect the community's general interests. The clear separation between the spheres of *public action* (or *of public interest*) – *reserved to the* State – and *private action* (or *of private*

[2] In the Portuguese case, it is even a *constitutional mandate* – cf. Article 81 (1) f) of Portuguese Constitution (*Constituição da República Portuguesa* – CRP), establishing that is above all a matter for the State, under an economic and social context, "to ensure the efficient functioning of the markets …".

[3] The concept of "shared responsibility", applied in the field of public tasks theory, appeared for the first time on a text by Eberhard SCHMIDT-ASSMANN, 1993 on the reform of administrative law; in this sense, cf. Jan Henrik KLEMENT, *Verantwortung (Funktion und Legitimation eines Begriffs im Öffentlichen Recht*), Tübingen, Mohr Siebeck, 2006, p. 57.

[4] *Cf.* William j. NOVAK, "Public-private governance: a historical introduction", in Jody FREEMAN & Martha MINOW (eds.), *Government by contract*, Cambridge, Harvard University Press, 2009, p. 23 et seq..

[5] *Cf.* Jody FREEMAN, "Collaborative governance in the Administrative State", UCLA *Law Review*, 1997, p. 45 et seq..

[6] *Cf.* Catherine DONNELLY, "The response of english public law to private actors in public governance", in RUFFERT, ob cit., p. 169 et seq. (169).

[7] *Cf.* Karl RIESENHUBER, "Privatrechtsgesellschaft: Wirkkraft im Leistungsfähigkeit und deutschen und europäischen Recht", in Karl RIESENHUBER (ed.), *Privatrechtsgesellschaft*, Tübingen 2009, p. 1 et seq..

interest) – *reserved to citizens* – turned out to be quite sharp, so that any interference between the two spheres was considered suspicious and illegitimate.

With the advent of social and democratic State, boundaries between State and society became blurred and the liberal logic of confrontation, adversity and exclusion was replaced by (or at least supplemented with) an attitude of cooperation and concerted action, which expresses itself through complex and diverse integration, osmosis and interpenetration processes in a new model of symbiotic relationship between State and Society.

This process of intertwining and rapprochement between the two poles early had shown a mainly political and organic institutional dimension. In the late 20th century, it has gained relevance also in the field of Economics, in the context of relations between the State and the Market in particular. Indeed, the *rolling back* and weakening of the Administrative Welfare State – i.e., its transformation into an essentially regulatory and supervising system [(8)] – has contributed decisively to increase the participation of private sector in public interest economic tasks. In addition to some ideological assumptions ("the less state, the better") and the glorification of market values, perception of Civil society's[(9)] endogenous potential emerges as a fundamental explanation for certain aspects or dimensions of (traditionally) public liabilities' privatization process. This State's purposes outsourcing dynamic – which will cause a reordering of the State and society roles – shows rather clear signs of a deliberate "leveraging", "mobilization"[(10)] and activation [(11)] of the individuals' ability to achieve public objectives and purposes[(12)].

2 – Rearrangement of public responsibilities and the Enabling State

The transformation process now described has resulted in the definition of a new relationship paradigm between State and society (State and Market), based on a

[(8)] On the view that privatization increases regulatory, control and monitoring tasks, *cf.* Ricardo RIVERO ORTEGA, *El Estado vigilante*, Madrid, Tecnos, 2000, p. 28 et seq..

[(9)] *Cf.* Andreas VOSSKUHLE, "«Concetti chiave» della riforma del diritto amministrativo nella Republica Federale Tedesca", *Diritto Pubblico*, 2000, p. 699 et seq. (p. 747).

[(10)] *Cf.* Martin BURGI, "Die Funktion des Verfahrenrechts in privatisierten Bereichen", in HOFFMANN-RIEM & SCHMIDT-ASSMANN, *Verwaltungsverfahren und Verwaltungsverfahrensgesetz*, Baden-Baden, Nomos, p. 164

[(11)] On this idea of "private potential activation", see Fritz OSSENBÜHL, "Die Erfüllung von Verwaltungsaufagben durch Private ", *VVDStRL*, 1971, p. 148; VOSSKUHLE, "Concetti", cit., p. 746; Gunnar Folke SCHUPPERT, "Das Konzept der regulierten Selbstregulierung als Bestandteil einer als Regelungswissenschaft Verstandenen Rechtswissenschaft ", p. 248.

[(12)] *Cf.* Jody FREEMAN, "The private role in public governance", *New York University Law Review*, vol. 75, 2000, p. 543 et seq. (p. 549).

concept of "shared responsibility" and "cooperation" or "coordination"[13] for the achievement of collective interests. The State's withdrawal was thus far from embodying the return to a pure liberal model, with the emergence of a new "Civil society ruled by private law"[14]: in fact, the (undisputed) strengthened role of Market and Society did not involve disengagement of the State; it rather confirmed a principle of permanence and continuity of *public responsibilities*[15].

In general use, the concept of *public responsibility* – with an essentially initial descriptive or heuristic value and meaning[16] – has been used by doctrine to indicate the entire spectrum of public tasks, as well as to explain the various forms or degrees of public administrative intervention in social life. In the latter sense, attention has been drawn to the *relational* nature of the concept and to the fact that it connects the poles of State and Society, insofar as it indicates the point of separation or distinction of roles between those poles[17].

As a matter of fact, it already follows from the previous exposition that – in the liberal State of the 19th century – the spectrum of State's public responsibilities was restricted to two extremes: on the one hand, *a basic and general framing responsibility*, exercised at legislative level and implemented in the definition of a regulatory framework (essentially private law) for the consecration of rights and freedoms and for setting their limits; on the other hand, a (very limited) *responsibility for implementation* in the course of which the State is responsible in material terms for the achievement of certain tasks, firstly within police administration and then within infrastructure and public services administration [18]. It is well known that the social State of the 20th century changed this bipolarized structure of public errands, because in practice it has merely widened the sectors of *responsibility for implementation*.

In the period following the adoption of liberalization measures and privatization of the economy – implemented in the last two decades of the 20th century

[13] On the need for a new *coordination* between State and Society in postmodern State, *cf.* Karl-Heinz LADEUR, *Der Staat gegen die Gesellschaft*, Tübingen, Mohr Siebeck, 2006, p. 388 et seq..
[14] *Cf.* FRANZIUS, "Der Gewärleistungsstaat …", cit., p. 355; SCHOCH, ob cit., p. 247.
[15] Despite the continuity, it is indisputable the transcendence of the transformation process that gave rise to the Enabling State; moreover, on the shift from *public responsibility for implementation* to *public guaranteeing responsibility* (along with other factors), mention was made to a development similar to that of a tsunami on public law; Cf. Peter HUBER, "Die Demontage des öffentlichen Rechts", in *Festschrift für Rolf Stober*, Carl Heymanns Verlag, Köln 2008, p. 547.
[16] In this sense, cf. KLEMENT, ob cit., p. 55 et seq..
[17] SCHRÖDER, ob cit., p. 156.
[18] On this (classic) system of dual responsibility, cf. Eberhard SCHMIDT-ASSMANN, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, Berlin, Springer, 1998, p. 154.

(i.e., *after privatization*) –, the allusion to another level or degree of public responsibility, built upon the topic of *guarantee*, has appeared in administrative dogma. It was an *intermediate level* of public responsibility which, moreover, reflects a new arrangement for the articulation and coordination of roles between the State and the Market: as already noted, the Enabling State is not the *Minimalstaat* of the liberal era, nor the *Maximalstaat* of the 20th century[(19)].

As a system or structure that serves the common good, the institutional model of the Enabling State lies halfway between two model poles – *Market model* and *State model* – and the doctrine proposes to designate it as a *regulatory model*[(20)].

Although the literal wording may not fully suggest it, the new model reflects the result of an *interaction* and an *optimal sharing of tasks and responsibilities* between the two polarities, rejecting the totalitarian and excluding trend focused by the two first models. The new grade or level of public guaranteeing responsibility seeks to promote a linkage between the two poles or subsystems which divide a politically organized community – State and Society (Market) –, in order to preserve their inherent rationale and seize their benefits[(21)].

The new public guaranteeing responsibility is not, therefore, confined to the definition of basic and generic legal frameworks on the basis of which a "Civil society ruled by private law" will freely develop[(22)]. Instead, the State intends to lead a more ambitious involvement in social space, taking an institutional obligation to *ensure* or *guarantee* the obtaining of certain results and the achievement of certain public interest goals. The public interest remains, then, as a guiding criterion of *state action*, even when the production of utilities satisfying this interest stays in private hands. In this regard, it is appropriate to recover the "role of guarantor" notion – used in 1971, by Hans-Ulrich Gallwas – to refer to the State's position as a guaranteeing structure for implementation of the common good[(23)].

[(19)] Accordingly, cf. FRANZIUS, "Der Gewärleistungsstaat", cit., p. 355.
[(20)] On these three institutional models of public interest achievement, *cf.* FRANZIUS, Gewährleistung, cit., p. 25 et seq..
[(21)] *Cf.* VOSSKUHLE, "Cooperation …", cit., p. 211.
[(22)] The generic and basic legal frameworks to which we refer in the text are the *classic frames of private law* – through which the State provides to the market and to its agents legal tools enabling them to develop, on equal terms, their freedoms and exercise their rights (legal framework based on citizens equality, property protection, private autonomy and contract freedom).
[(23)] *Cf.* Hans Ulrich GALLWAS, "Erfüllung von Verwaltungsaufgaben durch Private", *VVDSTRL*, 1971, p. 221 et seq. (225 et seq.).

The stress on the idea of *guarantee* also seeks to emphasize the fact that there is an underlying institutional model of public interest achievement which does not assign the State the role of behaving as a provider mechanism, service supplier and producer of goods. On the contrary, to a large extent, the model implies that the tasks and responsibilities of executive and operational nature migrate to the sphere of the market and companies, and the State takes on the role of *ensuring* or *guaranteeing* that market operation and companies' performance develop in accordance with certain previously defined aims and objectives (of public interest). There is here a public mandate reflected in *assuring results* and no longer in the *production of results*.

The Market and the *non-state actors* who act within it have thus extended its spheres of intervention, within a joint understanding between private action and public action: to represent this articulation, the doctrine came to employ the concept of *publicly regulated private self-regulation*[(24)]. This new formula – implying the abovementioned *regulatory model* – illustrates the criteria and logic of separation of roles and responsibilities between State and private actors: the latter develop their autonomy within the Society and the Market, in a legal environment marked by the intersection of a *legal regulation with origin in the market* (*private self-regulation*)[(25)] and a *legal regulation with origin in the State* (*public hetero-regulation*).

In this new framework, the topic of guarantee ultimately refers to a canon of *responsibility for the result*, determining that the State takes on the responsibility to ensure that the functioning of the market produces certain results. This means that the State does not merely play the role of *trigger* or *external supporter* of social forces and private resources[(26)]. Specifically, the guarantee suggests that the State cannot behave as an *impartial, disinterested* and *uninvolved* actor with the results produced in the market. To clarify this point we allude to another level or degree of public responsibility: a *residual, supplementary* or *subsidiary responsibility*[(27)]. Assuming the *back-up role* of the State – which recalls the situation of an alternate player who comes into the game to

[(24)] By all, *cf.* Martin EIFERT, "Regulierungsstrategien", in HOFFMANN-RIEM/SCHMIDTASSMANN/ VOSSKHULE *Grundlagen des Verwaltungsrechts*, , I, Munich, C.H. Beck, 2006, p. 1237 et seq. (p. 1262 et seq.); SCHRÖDER, *ob. cit*., p. 162.

[(25)] Regulation largely based on the contract feature (between private parties); the contract is, by excellence, the regulatory instrument for demeanour and *contacts* made on the Market between businesses or between businesses and customers.

[(26)] *Cf.* SCHOCH, *ob. cit.*, p. 242; on the concept of "aktivierender Staat", cf. Andreas VOSSKUHLE, "Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung ", *VVDStRL*, no. 62, (2003), p. 311 et seq...

[(27)] *Cf.* SCHOCH, *ob cit*., p. 244; FRANZIUS, "Der Gewährleistungsstaat …", cit., p. 378.

replace another that is not playing well[28] –, this level of responsibility calls for a public action, whenever the market fails and does not provide the desired answer to the objectives set[29]. It is, therefore, a public responsibility for implementation, "in the latent state", that can be achieved through some "rescue" or "reversal option" of the task involved[30], or in a measure of different nature that has the same effect of pushing the State to a position of *player* in the market, and removing its status of mere regulator or supervisor[31]. In both Europe and the United States of America, the most recent financial crisis (2008) illustrates the episodic but decisive changeover from a logic of public guaranteeing responsibility (as Regulator State) to direct action of the State on the market, by means of a phenomenon that some doctrine has referred to as "regulation through business" (purchase of companies and banks, bailout in economies, etc.)[32]. An example of a necessary kind of *step in* by the State can be seen in the power sector, in what concerns electricity production: despite liberalization of production, whenever a need for new capacity installation is identified, the State is responsible, by law, as "*last resort*", for ordering the construction of new production centres[33].

3 – Purposes of the Enabling State

We are now in a position to approach a more concrete knowledge of the purposes of the Enabling State in Economics and the Market[34]; we attempt to know

[28] *Cf.* G.F. SCHUPPERT, "Die öffentliche Verwaltung, im Kooperationsspektrum staatlicher und privater Aufgabenerfüllung: zum Denken in Verwantwortungsstufen ", *Die Verwaltung*, 1998, p. 426.
[29] *Cf.* VOSSKUHLE, "Cooperation …", *cit.*, p. 220.
[30] *See* our *Entidades privadas com Poderes Públicos*, Coimbra, Almedina, 2005, p. 170.
[31] With a critical view on the conception of this level of responsibility, *see* FRANZIUS, "Der Gewährleistungsstaat …", *cit.*, p. 378. In our interpretation, and contrary to what is sometimes said, residual liability does not *disqualify* the position of State, referring to it as a *player, who* plays the game, rather than a *coach*, who defines the game strategy. Now, what happens is that in the new model of public responsibilities, the State, sometimes, cannot be only a coach (*responsibility of guarantee*), as it would seem desirable; it must be prepared for, when it becomes necessary, come in to the game (residual liability) – *hoc sensu*, being a player is thus an additional quality to that of being a coacher.
[32] *Cf.* Steven DAVIDOFF & David ZARING "Regulation by deal: the government's response to the financial crisis ", *Administrative Law Review*, vol. 61, no. 3, 2009, p. 463 et seq.
[33] See, on this subject, our text about "Organização e regulação do sector eléctrico", in *Regulação, Electricidade e Telecomunicações* (*Estudos de Direito Administrativo da Regulação*), Coimbra, Coimbra Editora, 2008, pp. 96 and 147.
[34] The Market concept does not include only those services traditionally qualified as economic, provided in a context of private economic initiative; this concept has been covering services and activities which, in Europe, until recently, were of public ownership and operated without a market logic; when providing them, it was considered that the State was not acting as an entrepreneur, but as responsible for social provision. This framework has changed and, therefore, the health services, for instance, are considered as services of general *economic interest*; *cf.* on this, Stefano Civitarese MATTEUCCI, "Servizi sanitari, mercato e «modello sociale europeo»", *Mercato, concorrenza, regole*, 2009, p. 179 et seq..

and analyse the factors that are implementing, consolidating, or contributing to the achievement of *public guaranteeing responsibility*.

Admitting the incompleteness of the present framework, we note, however, the most striking or typical purposes of the Enabling State's physiognomy: to guarantee the provision of essential services; to guarantee and protect the rights of those who use these services; to guarantee, protect and promote competition; to guarantee other legal assets.

3.1 – Ensuring the provision of essential services

In the dogma of State tasks, the idea of guarantee is associated with the "step back" or "withdrawal" of the State. In other words, *guarantee* alludes to a *minus* related to the model, in the second half of the 20th century, that did not have the mission of *guaranteeing*, because it was in charge of *supply*, *production* and *provision*. In this context, one can see the connection between the public guaranteeing responsibility and the privatization processes of public tasks, particularly in the economic field. However, these processes did not, of course, imply the loss of social importance of the activities involved. On the other hand, it should be recalled that material privatization of tasks was not extended to all public services: some remained as services within State (or municipal) ownership. Within this framework – in legally neutral terms which surpass the public or private quality of activities involved –, and to represent the *social importance* of those activities, we use (based on Community law normative data) the concept of *services of general economic interest*[(35)].

As a matter of fact, one of the main purposes of the Enabling State is to guarantee the existence and supply – in an adequate extent and throughout the territory – of those services of general economic interest. As European Commission documents show, economic activities and services – such as energy production and distribution, telecommunications, transport, broadcasting and postal services, water supply and waste management – are "essential for the day-to-day of citizens and businesses and mirror the European model of society "[(36)]; in a word, these are *essential services* which the State should therefore ensure, even if it does not takes the responsibility of supplying them. In

[(35)] On the concept of services of general economic interest, cf. John Nuno Calvão da SILVA, *Mercado e and Estado – Serviços de interesse económico geral* , Coimbra, Almedina, 2008, p. 215 et seq..
[(36)] *Cf.* European Commission's Communication on *Services of general interest, including social services of general interest: a new European commitment* [COM (2007) 725 final], and with the *White Paper on services of general interest* [COM (2004) 374 final].

this same vein, article 14 of the *Treaty on the Functioning of the European Union* states that "*given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions*". The *Treaty* reiterates, therefore, the view that the provision of services of general economic interest, according to certain principles and conditions, constitutes a common value of Member States – the *Protocol (No. 26) on Services of General Interest* (annexed to the *Treaty*) consolidates this very idea[(37)].

The provision then states that European legislative authorities are responsible for establishing these principles and conditions, "*do not affect in any way the competence of Member States to provide, commission and organise non-economic services services of general interest*". As it is also clear from the *Protocol*, the *Treaty* keeps thus under Member States' sovereignty the delimitation of the range of services of general economic interest, as well as the definition of responsibility for their holding[(38)]. This means that, despite their essential nature, services of general economic interest can be provided by the State or by Market, as a result of a sovereign choice of each Member State. In Portugal, as in many other Member States, some of the listed services have been, in whole or in part, returned to the market (telecommunications, energy production, air transport) but others remain within the State or public sphere (water supply, power transport, rail transport).

When services remain within the sphere of the State, it does not seem appropriate to invoke the idea of Enabling State, since the State takes *responsibility for providing* such services – rather than just guaranteeing their supply. But, as we shall see

[(37)] Article 1 of the *Protocol* provides that the shared values of the Union, in respect of services of general economic interest, include in particular: – the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of users; – the diversity between various services of general economic interest and the differences in the needs and preferences of the users that may result from different geographical, social or cultural situations; – a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of users rights.

[(38)] The same guideline can be seen in paragraph 3, article 1 of Directive 2006/123/EC of the European Parliament and of the Council of December 12, 2006, on services in the internal market ("services directive"), which establishes as follows: "this Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to".

closer, contact with the Market can occur, namely following the decision to entrust the private entities with responsibility for operating the activity[(39)]. Also in this case, the State is to be held responsible for the provision or guarantee of provision of services of general economic interest.

To reference the legal framework emerging in this context – following various provisions of European law, including the aforementioned *Protocol on Services of General Interest* – we allude to the concept of *universal service* (telecommunications, postal services and energy sectors), expression that encompasses the substantive or material dimension of the traditional concept of public economic service[(40)]. Therefore, this is a case of considering that certain activities and services must be provided, whoever provides them, in compliance with a legal regime ensuring that all citizens have access to certain services, in terms of predefined requirements of quality and quantity and on equal terms.

In this context, the State has the inescapable duty of identifying the services covered by *public guarantee* before submitting the respective sectors to a special scheme.

3.2 – Ensuring and protecting rights of the users of essential services

The guarantee for the provision of essential services, referred to in the previous paragraph, is already a dimension of the guarantee and protection of the rights of users. Despite that, it is justified to stand out this specific aspect of the Enabling State.

From the outset, drawing attention to the fact that the State must not only guarantee the existence of certain services; it must also guarantee citizens' *universal* access to these services. While not committing to the exhaustive inclusion of a fundamental right to services of general economic interest, it is worth mentioning the *Charter of Fundamental Rights of the European Union* which, in its article 36 – with the epigraph "access to services of general economic interest"–, prescribes the following: "the Union recognises and respects access to services of general economic interest as provided for in nationals laws and practices, in accordance with the Treaties,

(39) Accordingly, relative to the contact with "market forces", cf. GÓMEZ-IBÁÑEZ, *ob. cit.*, p. 30.

(40) On the survival of a renewed concept of public service in the new context of regulated economy, cf. Carlo IANNELLO, *Poteri pubblici e servizi privatizzati – l ' «idea» di servizio pubblico nella nuova disciplina interna e comunitaria*, Giappichelli, Turin, 2005, *passim*; Giulio NAPOLITANO, *Regole e mercato nei servizi pubblici*, Bologna, Il Mulino, 2005, pp. 17 et seq.; Elisa SCOTTI, *Il pubblico servizio – tra tradizione nazionale e prospettive europee*, Milan, Giuffrè, 2003, in particular, p. 49 et seq..

in order to promote the social and territorial cohesion of the Union" (wording after 2007 changes[41])[42]. As it has been said, despite not recognising a fundamental right in this area, the *Charter* lays down that the Member States recognise, respect and promote citizen access to services of general economic interest[43].

Also in this context, one should bear in mind that public guarantee of user rights allows to understand the meaning of a significant change to the classic framework of understanding: instead of *holding* rights to certain provisions under a *bipolar* or *dual relationship* with the citizen (via the Public Administration with supply or provision of services to *users*), the State takes an institutional obligation of *protecting* the rights of access to essential services, in the context of a *triangular* relationship. In this regard, in addition to the State (with its role in regulation, control, guarantee and protection), private entities and citizens who hold fundamental rights come into play: such as customers or users of services, on the one hand, and private entities who are also holders of fundamental rights, such as service suppliers and providers, on the other [44].

It may thus be said that the transition to the Enabling State has the effect of increasing the requirements of *state protection of individuals' rights.* As a matter of fact, in a context where the fulfilment of the essential needs of individuals is entrusted to the market, the State takes that special duty of protection – incidentally, recall that the *Protocol on Services of General Interest*, along with the *Treaty on the Functioning of the European Union* lays down as a "shared value" – inherent to the regime of these

[41] The European Union Charter of fundamental rights was proclaimed on December 7 2000 (JOCE C 364/1, 12/18/2000) and amended on December 12, 2007 (JOCE 303/1, 14/12/2007).

[42] In its article 6, the *European Union Treaty* (after the *Treaty of Lisbon*) assigns to the Charter " the same legal value as the Treaties. "

[43] On the *Charter of Fundamental Rights of the European Union* and, in particular, with regard to citizens ' right of access to services of general interest, cf. a. l. YOUNG, "The Charter, Constitution and human rights: is this the beginning or the end for human rights protections by community law?", *European Public Law*, 2005, p. 219 et seq.; M. MARESCA, "L'accesso ai servizi di interesse generale, deregolazione e ri-regolazione del mercato e ruolo degli Users ' Rights ", *Il diritto dell'unione Europea*, 2005, no. 3, p. 441 et seq.; L. DANIELE "Carta dei diritti fondamentali dell'unione Europea e Trattato di Lisbona ", *Il diritto dell'unione Europea*, 2008, no. 4 pp. 655 et seq..

[44] In Portuguese law, there is a legislative procedure (Act No. 23/96, of July 26, as amended by Act No. 12/February 26, 2008) hosting some mechanisms intended to protect the user of essential *public* services – a reference to the *public* nature of the services should not be considered decisive for the purpose of signaling it is as public services settled by the State; this may not be the case, and it is not, for instance, regarding electronic communications services. Thus, the following services are covered by that procedure: i) water supply; ii) power supply; iii) supply of natural gas and liquefied piped petroleum gas; iv) communications networks; v) postal services; vi) waste waster collection and treatment; vii) waste management). Mechanisms for safeguarding the rights of users include, moreover, assigning them rights of participation, information and obtainment of itemized bills, setting special conditions governing suspension of services provision or prohibiting minimum consumptions.

services – the guarantee of "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and rights of users* ".

The definition of quality and safety *standards* of services provided in the context of the market – as well as the guarantee of equal treatment and accessibility to services (values which shall be linked to the classic "public service laws: *equality*, *continuity* and *adaptation*) – arise, thus, as essential elements of the Enabling State's physiognomy[(45)]. In particular, regarding citizens' access to certain essential services, it is important to draw attention to the intervention of Public Powers on pricing (e.g., minimum prices)[(46)] or the prohibition to charge amounts not matched by any compensatory measures (e.g., minimum consumption constraints).

Although obvious, it should be noted that the guarantee and protection of users rights are not just powers of the State, which the latter may or may not exercise. Rather, it shall be understood that, in a balanced and credible system of protection of the fundamental rights of citizens by the State, the former arise as holders of the *right to protection by the State*. Perhaps it may even make sense to think of the delineation of a *subjective right to public regulation* – such a subjective right makes sense as a legal position of governed companies (in a given regulatory system) paying taxes and contributions, which, in certain terms, may be conceived as regulatory compensation measures[(47)]; but, in addition, the subjective right to State regulation must still be acknowledged to citizens in general and to the users of a particular regulatory system in particular: thus, apart from being able to claim the regulatory action, users should also be able to impute possible pathological functioning of a regulated economy, not only to the direct producers of the damage (regulated businesses), but also to the regulatory State, for "regulatory failure" (*gaps in regulation*)[(48)]-[(49)]. In some sectors, the protection

[(45)] Another relevant aspect in this point lies in the users participation in regulatory procedures; on this, cf. Giovanna IACOVONE, *Regolazione, diritti e interessi nei pubblici servizi*, Bari, Cacucci Editore, 2004, in particular, pp. 153 et seq..

[(46)] On the public binding pricing, cf. Anna ARGENTATI, *Il principio di concorrenza e la regolazione amministrativa dei mercati*, Torino, Giappichelli, 2008, p. 391, and seq..

[(47)] On the para-commutative character of economic regulation rates "that embody an exchange ratio between the administration and certain groups of individuals", cf. Sérgio VASQUES, "As taxas de regulação económica em Portugal: uma introdução ", in Sérgio VASQUES (coord.), *As taxas de regulação económica em Portugal*, Coimbra, Almedina, 2008, p. 15 et seq. (32); Suzana Tavares da SILVA, As Taxas e a Coerência do Sistema Tributário, CEJUR, 2008, p. 48 et seq. (on *special financial contributions*).

[(48)] On the *government or regulatory failures*, cf. Joseph Stiglitz, "Regulation and failure", *in* David MOSS & John CISTERNINO, *New perspectives on regulation*, Cambridge, The Tobin Project, 2009, p. 13 et seq..

of the rights of service users emerges as a cardinal element of the very concept of balanced functioning of the market. This is what happens, for example, in financial markets, where system credibility and the confidence that citizens place in it are crucial factors for the market's *normal* functioning. Indeed, this environment of trust and credibility arises *because* of the public guarantee resulting from regulatory action by the State and, in particular, by the fact that this action aims at blurring the information asymmetry existing between market operators and citizens investors(50). In fact, it can be said that the very existence of financial markets *regulated* by the State, with available and accessible information, establishes an environment of *trust* and balance that it is essential in this economy sector. The State has, therefore, in this case as in others, a specific duty to develop a regulatory activity (with the regulated entities), so that it not only prevents eventual crises and adverse effects for user rights and heritage, as it also enables the rational balanced functioning of the market; after all, this is about understanding the Enabling State's public regulation as an element of crisis prevention(51).

3.3 – Ensuring, protecting and promoting competition

Another important and even nuclear dimension of the Enabling State's purposes is the protection and promotion of the market and competition. One may refer**,** incidentally, to an "enrichment of public interest", a phenomenon that results from the

(49) On the admissibility of a right to police action [on this, cf. Miguel NOGUEIRA DE BRITO, "Direito Administrativo de Polícia", in Paul OTERO & Pedro GONÇALVES (coords.), Tratado de Direito Administrativo, I, Coimbra, Almedina, 2009, p. 298 et seq.] and perhaps more clear-cut than this, the *right of citizens to public regulation* emerges as a the natural corollary of the logic of the very regulatory activity: to induce confidence in the proper functioning of regulated systems. The systematically improper operation of a regulated system can't help but blame the regulator. The same applies where it is clearly asserted that the absences of the regulated entity are so obvious that they couldn't be overlooked by a mildly diligent regulator. The solution that we do not propose – take responsibility away from the regulatory public structures by "regulatory failure" – would have the damaging effect of discrediting the system and not stimulating prevention of these same faults. It must be said, finally, that the defence of the thesis of the State's responsibility, in the case of bad functioning of the regulated system, does not mean to propose that the State should respond by the action of individuals, in the private space of Society and Market. In our view, what is implied is that the State should respond for damages caused by (active and omissive) behaviours that it adopts in carrying out its regulatory responsibilities.

(50) Highlighting this aspect, on the guarantee of financial public order, cf. Juliette MÉADEL, *Les marchés financiers et l'Ordre public*, Paris, LGDJ, 2007, p. 349 et seq.. In financial markets, contrary to what is happening in the markets for infrastructure, public guarantee of the market balanced functioning is not obtained by ensuring equal opportunities for operators (for example, through asymmetric regulations of positive discrimination to the new entrants), but fundamentally by ensuring the balance between market operators and "consumers." Therefore, the defence of their interests plays here an even greater role.

(51) On regulation as crisis prevention, cf. Jacques ZILLER, "La régulation comme prévention des crises ", in Marie-Anne FRISON-ROCHE (ed.), *Les risques de régulation*, vol. 3, Paris, Dalloz, 2005, p. 51 ff.

fact that the defence of market economy has come to include the catalogue of State purposes[52] and, therefore, competition within the market has become a public interest value. Here, too, the difference between the classic model of *separation* of State and Market and the new model based on *cooperation* between these two poles seems to be especially clear.

But, it must be said, rather than a natural interaction process between the two poles, we see, to a large extent, the *Market conformation* by the State itself. That is to say, the Market that the State has the responsibility to protect and promote is not, of course, either the market in its spontaneous configuration or submitted to the minimum regulator of a classic private law, but, rather, the market built and configured according to publicly imposed requirements and *standards*.

One of the expressions of such Market's *public conformation* – in some cases, one even alludes to a *market building* by the State or to the making of competition as an administrative task[53] – can be seen, for example, in phenomena of *asymmetric regulation* (positive discrimination rules which encourage *new entrants* or smaller operators) and regulation of the access by third parties to networks and critical infrastructures. In the case of network industries, the "access by third-party companies to the network" actually takes on a decisive character – let us quote here Ariño Ortiz, 1991, on the liberalization of network industries, which reads as follows: "the key to the vault, the cross of the system is and will be the right of access by third parties to the network. If this is refused or it vanishes, market and competition disappear"[54].

Written nearly two decades ago, this statement is still fully up to date in relation to the network industries, in which the infrastructural element is *essential* to support liberalized activities. The regulation of *third parties access* arises thus as a fundamental dimension in the framework of the public guaranteeing responsibility. In the absence of a careful and firm regulation on this point, the liberalization process of a network industry will inevitably founder. Guaranteeing a *non-discriminatory access* by third parties is therefore an inescapable aspect of the *regulation for competition*, imposing itself as a natural and decisive instrument for ensuring economic public order and the proper functioning of the market.

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[52] *Cf.* Guylain CLAMOUR, *Intérêt général et concurrence* (*essai sur la perennité du droit public en économie de marché*), Paris, Dalloz, 2006, *passim*.
[53] *Cf.* Christian KOENIG, "Herstellung von Wettbewerb als Verwaltungsaufgabe", *Deutsches Verwaltungsblatt*, 2009, p. 1082 et seq..
[54] *Apud* F.J. VILLAR ROJAS, *Las instalaciones esenciales para la competencia*, Granada, Comares, 2004, p. 205.

As we shall see further, another vector of competition promotion arises from the effect of the *contract-awarding law*. This system**,** which regulates – according to a principle of "appeal to the market" – the procedures of public contract-awarding and granting of scarce resources, acts as a key-instrument in creating a "competition *for* the market."

3.4 – Ensuring an efficient and fair balance between public interest and private interests

We have already alluded to the fact that the concept of the public guaranteeing responsibility is associated with the aim of combining and preserving the advantages and strengths of rationales coming from the public sector (State) and private sector (Civil Society or market). Now, it should be noted – as a central purpose of the Enabling State – the definition of a coherent, efficient and synergetic articulation between the two sectors, to avoid any kind of totalitarian development, either in the sense of a pan-publicization of civil life, or in the opposite direction, of the capture or colonization of the State and the public sector by private interests(55).

To avoid these risks, it is essential that the *structure of guarantee* that the State deploys is sufficiently sound to assert its authority and enforce the law. But this same structure should not aim to annihilate the fundamental bases of a Market organized in accordance with the principles of a free economy, based on contractual freedom, freedom of enterprise and protection of private property.

The careful and aware pursuit of this purpose is essential in economic areas subject to *strong regulation*, as well as in a variety of *public-private collaboration* schemes. In both scenarios, further harmonization and the effective contact between public subjects and private entities enhances the risk of deviations and adoption of unbalanced and disproportionate solutions. Therefore, especially in these cases, it must prevail an additional commitment in achieving an efficient and fair balance between public interest and private interests.

In view of the achievement of this objective, it is necessary – at the time of the adoption of solutions for regulatory or public-private collaboration– to be aware that it is not reasonable or sensible to expect a disinterested action from individuals; or a kind of private action naturally suited for the achievement of public interest. Without calling

(55) VOSSKUHLE, "Cooperation …", cit., p. 211.

into question the possibility and the actual occurrence of this phenomenon, it is *normal* that individuals are guided by self-interested and selfish criteria. As we wrote elsewhere, Public Administration only, and not private individuals, is institutionally bound to pursuit the public interest. Having this in mind, it is very helpful to realize that (the above mentioned) mobilization of individuals for the achievement of public purposes does not mean nor requires that those move away from the purpose of achieving their own legitimate interests. As a matter of fact, this is the context of the State's objective of ensuring a *fair* and *efficient* articulation between the public interest and the private interests.

3.5 – Ensuring and crediting "market solutions" promoted by the State

The process of reconfiguration of State's functions – which led to his rolling back and to greater responsibility of the market and private persons – was, to a large extent, the result of a movement induced and encouraged by the State, in the sense of the adoption of a "market solution" in place of public provisions[(56)]. This was the case, for instance, with the emergence of private *certification* services in such varied fields as organic food production, technical safety of machinery and industrial products, and environmental or quality protection. In many hypotheses, these new private services of certification replace former systems of public inspection and surveillance. In this context, the doctrine has called the attention to the changeover of the State to a position of *second line control agent* or *control of control*[(57)]. The (also) new public functions of *accreditation* and *official recognition* of these private certification systems play an essential function in the context of the Enabling State.

Thus, following the *State's waiver* to the development of public activities of direct provision to citizens in areas as sensitive and relevant such as technical safety or public health protection, it had to be considered a commitment by the State on the accreditation of the "market solutions" it has promoted and determined. This can only be achieved when the State is able to offer a public guarantee for the proper functioning of the new private services.

[(56)] On the phenomenon of private self-regulation developed by State's thrust, it can be seen, in depth, our *Entidades Privadas*, cit., p. 176 et seq..
[(57)] *Ibid*, p. 186.

3.6 – Guarantee and protection of other legal assets

In addition to those values set out above, it is still up to the State to guarantee and protect more general values, such as *safety* (e.g., technical safety), *health and work*[(58)] – this is all about extending the State's protection duty to areas that go beyond the rights of specific users of each service or activity.

In this context, guaranteeing the general protection of the rights of citizens as consumers occupies a central place in the list of the Enabling State's responsibilities. This is not only about the development of a direct supervisory and protection policy of consumers – within the framework of guaranteeing the access to goods and services – but also about the implementation of an authoritarian logic of intervention, in which the State is called to "regulate" the consumption and choice process of consumers (taking even a function that some consider "parental"). These include measures of varied nature, legitimized by a "reflective administration" acting to prevent risks, in a context of uncertainty management[(59)]; such measures may involve the ban on the consumption of a product suspected of being dangerous or the imposition upon the producer of comprehensive information disclosure on products manufactured by him (*mandatory information disclosure*), including *soft law* measures, such as warnings and recommendations, which, without prohibiting or imposing, seek to influence consumer choices[(60)].

On the other hand, in the case of the so-called *network industries* (energy, transport and telecommunications), the requirement of environment protection, urbanism and land use planning assumes a special significance. It is up to the State to prevent that these values are called into question through any less responsible attitude by the market and its forces.

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(58) *Cf.* John Nuno Calvão da SILVA, *Ob. cit*., p. 101 ff.

(59) *Cf.* Antonio BARONE, *Il diritto del rischio*, Milan, Giuffrè, 2006, specia., p. 155 et seq.; on public regulation as risk management tool, *cf.* Tom Baker & David Moss, «Government as risk manager », *in* David MOSS & John CISTERNINO, *New perspectives on regulation*, Cambridge, The Tobin Project, 2009, p. 89 et seq..

(60) *Cf.* Filippo PIZZOLATO, *Autorità e consumo* (*diritti dei consumatori e regolazione del consumo*), Milan, Giuffrè, 2009, pp. 1 et seq., and 77 et seq. on the typology of interventions within public regulation of consumption; the Author resumes the role of the State in the area of consumption to a *authoritarian regulation* function (which, depending on the degree of impact on the freedom of consumers, may be *neutral*, *promotional* or *defining*) and not just to a function of recognition and supervision of consumer rights.

On warnings and recommendations as administrative procedures actions, cf. Eduardo Rocha DIAS, *Direito à Saúde e Informação Administrativa* (*o caso das advertências relativas a produtos perigosos*), Belo Horizonte, Editora Fórum, 2008, as well as of our own authorship, "Advertências da Administração Pública ", *Estudos em Homenagem ao Prof Doutor. Rogério Soares*, Coimbra, Coimbra Editora, 2001, p. 723 et seq..

Finally, there is another dimension of the purposes of the State that has to be underlined here: we refer to the need to consider some "*future-looking aspects of the public interest* "; here is what follows from the fundamental duty of the State to protect the interests of future generations, not allowing that future welfare is put at risk by short-term expediency[(61)]. This common-sense orientation – which applies to the State's own actions – may have implications, for instance, within investments in infrastructure (e.g., in networks update) or imposition of storage requirements (e.g., energy resources).

4 – Legal instruments for implementing the Enabling State

In the context of the delineation of a legal dogma – thought in the light of the features and purposes of the Enabling State – the doctrine has drawn attention to the requirement to build and develop a *public guaranteeing law*[(62)] or an *administrative guaranteeing law*[(63)]. The goal now is to know the topics that allow for understanding this renewed sense of administrative law, purpose that leads us to the analysis of legal instruments ensuring the achievement of the Enabling State. In our interpretation, and without the pretence of presenting a comprehensive list, these instruments are essentially *regulatory law*, *contract awarding law* and *public-private collaboration law*.

4.1 – Regulatory law

As Friedrich Schoch notes, administrative guarantee law is first and foremost, a *Regulierungsrecht*, a regulatory law[(64)]. In fact, bearing in mind the various dimensions and purposes of the Enabling State, there is a linear path leading to the conclusion that regulation – understood as a system of guidance, monitoring and control of economic and social processes – is a central concept and true key element in this area[(65)]. In an especially emphatic formulation, it seems right to conclude that "without regulation, the Enabling State does not exist "[(66)]. In line with an highlight by Rivero Ortega, it can be said that, in the new paradigm of interaction between State and Market – which, recall,

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(61) Accordingly, cf. Carol w. LEWIS, "In pursuit of the public interest", *Public Administration Review*, vol. 66, no. 5 (2006), p. 694 et seq.; this text resumes the definition of public interest (attributed to Walter Lippmann) in the following terms: "*the public interest may be presumed to be what … (people) would choose if they saw clearly, thought rationally, disinterestedly and benevolently* ".

(62) *Cf.* FRANZIUS, *Gewährleistung*, *cit*., pp. 549 ff.

(63) VOSSKUHLE, "Cooperation …", *cit*., p. 209 et seq.; on the new administrative law centred on the topic of guarantee, see also our *Entidades Privadas*, cit., p. 1101 et seq..

(64) SCHOCH, *ob cit*., p. 245.

(65) *Idem*, *ibidem*.

(66) In this regard, cf. Matthias RUFFERT, "Begriff", in Michael FEHLING & Matthias RUFFERT, *Regulierungsrecht*, Tübingen, Mohr Siebeck, 2010, p. 349.

is based on a *model of regulation* –, State public regulation was converted into a political-legal requirement (constitutional) [(67)]. Regulation and regulation law arise, therefore, as compensation schemes for the State rolling back, following the privatization process and the abandonment of the direct supply of public services[(68)].

As we all know, the regulation comes out in various forms and relies on multiple instruments, covering, *inter alia*, the establishment of general and abstract rules (legislative acts and regulations of the Public Regulatory Administration) as well as administrative actions: administrative decisions, contracts, material operations (e.g., supervision and surveillance), informal actions (as warnings and recommendations)[(69)].

In this issue, we aim to know – albeit through an overview – regulation or mechanism forms used by the State to comply with its functions and carry out its purposes in *public guaranteeing responsibility*. As a matter of fact, with the exception of the aforementioned measures adopted within the framework of *public subsidiary responsibility* and direct State intervention in the Market, all other measures adopted by the State tend to follow on from the concept of public regulation.

In carrying out its regulation task, a fundamental instrument of the Enabling State is the issuance of rules that will shape or limit the actuation of the agents on the market. In this context, we can distinguish two categories of rules: on the one hand, *basic or cross-cutting rules*, which apply without distinction to all economy sectors and, therefore, to the whole market; and, on the other hand, r*ules of sectorial nature*, designed to deal with matters faced by a given economic sector.

i) **Definition of a regulatory or cross-cutting framework**

An essential task of the *Regulatory State* – above all others and, in a way, foundational – is the establishment of *general rules* on the functioning of the activities that take place in the market.

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(67) *Cf.* Ricardo RIVERO ORTEGA, *Derecho administrativo económico*, Madrid, Marcial Pons, 2007, p. 23.

(68) In this sense and alluding to regulation administrative law as a "consistent privatization law", cf. Matthias KNAUFF, "Regulierungsverwaltungsrechtlicher Rechtsschutz" *VerwArch*, 2007, p. 382 et seq. (383).

(69) For a categorization of regulatory instruments (instruments of feasibility and guarantee of competition, instruments for guaranteeing the supply and multifunction instruments), *cf.* Michael FEHLING, "Instrumente und Verfahren", in Michael FEHLING & Matthias RUFFERT, ob cit., p. 1087 et seq..

From the outset, here arise legislative rules[(70)]: with an economic projection (*economic regulation*), these rules aim at ensuring and promoting a balanced and efficient functioning of the market, guaranteeing the "public order of the market"[(71)]; with a social function (of *social regulation*) they seek to protect and implement other values (protection of the rights of consumers and workers, protection of the environment and quality of life, etc.).

In particular, *competition law* stands out in this framework, not yet aiming to *shape* the market, but rather to set *limitations* and *prohibitions*, as well as to allow the *repression* of abuses (*market abuses*) by *players*. By its very nature, this is a *crosscutting* legislation applicable to all economy and all economic activities. It is based on an *ex post* philosophy of intervention – with a public repressive function – and is largely based on the *assumption* according to which the market, through *private law legal frameworks*, is likely to achieve a balanced and efficient operation. This explains why public intervention occurs *ex post*. The general prohibition on deviations and abuse and the application of punishment have, on the other hand, the effect of inducing that balanced functioning.

In addition to legislative rules, administrative regulations are also of particular relevance, such as *normative instruments*, i.e. the legal standards from administrative bodies which, as the laws, are intended to guide the behaviour of actors in the Market.

ii) Definition of a sectorial regulatory framework

In addition to the definition of cross-cutting rules, applicable to all activities that take place and develop in the market, the State (legislature) is responsible for identifying, within the market, the economic activities which justify a supplementary adjustment and, therefore, a specific regime. In this area, it is necessary the task of carefully detecting which specific activities claim a special attention and, in particular, require the setting of rules operating in a prophylactic manner, avoiding or preventing *distortions* and *failures* in the Market functioning – this includes activities corresponding to *network industries*, raising specific difficulties on the establishment of

[(70)] Unlike many doctrinal guidelines – see, for all, Silvia a. Frego LUPPI, *L'amministrazione regolatrice*, Torino, Giappichelli, 1999, p. 135 et seq. – we have include in the concept of regulation legislative rules designed to regulate the economy. In the same sense, cf. Vital MOREIRA, *Auto-Regulação Profissional e Administração Pública*, Coimbra, Almedina, 1997, p. 34 and seq..

[(71)] In this sense, cf. Domenico SICLARI, "Tutela dell'ordine pubblico del mercato affidata ai privati e sussidiareità orizontale *ex lege* ", *Diritto e società*, 2005, p. 253 et seq. (264).

"network competition" and, therefore, access by third parties[72], as well all activities regarded as *services of general economic interest*.

After defining the perimeter of economic activities to be subjected to a *sectorial regulation*, it follows the taking of legislative-political decisions on the *regulatory strategy* or, in other words, on the institutional structure of regulation. In this regard, the first option consists in deciding whether to adopt a model of "regulation by agency ", a model of "regulation by contract " or even a" hybrid model": in the first case, the State chooses to set up an administrative structure (or assign an existing structure) into the tasks of administrative regulation; in the second case, the option is to conclude contracts with market players and to define in these contracts (service and public works concession or, in general, contractual or institutional public-private partnerships) a specific regulation with which they must comply; in the third case, there is a conjunction between regulation by agency and regulation by contract (as it is the case in Portugal, in water and sanitation sector)[73].

After that decision has been made, when it is embodied on the creation of a regulatory agency, it is necessary to choose the agency model: fundamentally, it is about the requirement to choose an independent and non-governmental body or an entity integrated in the administrative hierarchy or only subject to government supervision and guidance. That is to say, the legislature has the task of choosing between the introductions of a non-governmental structure (immune to Government pressures) or, on the contrary, a structure under government influence. In this respect, and despite not being clear-cut, European Union law reveals a clear inclination towards [74] independent regulatory authorities: as we have already had occasion to state in other occasion, this option is understandable, consistent with the encouragement of an a*dministrative federalism* within the European Union, which is the result of the assignment to the European Commission (or, in the future, executive agencies) of a *functional supremacy* over[75] national administrative authorities; in fact, this supremacy affirmation goes

[72] In this context, on the particularities of an infrastructure law within a liberalized scope, cf. Veith *Privatisierung des Rechtsstaats MEHDE, – Staatliche Infrastruktur*, Baden-Baden, 2009, in particular, pp. 17 et seq..

[73] On the *public regulation by contract*, as an alternative among other regulatory strategies, cf. José a. GÓMEZ-IBÁÑEZ, *Regulating infrastructure: monopoly, contracts and discretion*, Cambridge, Harvard University Press, 2006, pp. 18 et seq.; we have already dealt with the subject, in a text on "Regulação Administrativa e contrato", *in* Estudos em Homenagem ao Senhor Professor Doutor Sérvulo Correia, Coimbra, Coimbra Editora, 2010, pp. 987 et seq..

[74] With special sharpness at this point, see, e.g., the solutions of Directive 2009/72/EC, relating to the common market for the internal market in electricity.

[75] *Cf.* our "Direito Administrativo da Regulação", *Regulação*, *cit.*, p. 32.

especially well with an independent or non-governmental national administrative authority.

Following the layout choice, it is incumbent upon the legislature to define institutional sectorial rules, in order to meet the specific requirements of each regulated sector. Thus, for example, in the financial sector, confidence and system credibility are crucial – the guarantee of these values relies on the subjection of legal acts and private business to several forms of public control. In contrast, in network industries sector, it is essential to establish rights of access by third parties and rules on agreements between operators (e.g., in the field of networks interconnection). In these sectors, one must introduce, or allow to be introduced, specific obligations on some or all operators: *universal service* and *public service obligations*, which require the adoption of certain demeanours and may have an organizational relevance (e.g., accountancy unbundling obligations or adoption of certain forms of internal control) or a projection on external action (e.g., the obligation to provide information).

In fact, what is at stake here is the requirement of the legislation to set up, with a significant margin of discretion, the exercise of *economic initiative freedom*, combining it with the public interest and the rights of citizens on access to essential services. In this regard – in which the setting of legal rules may already qualify as regulation – the legislation should take social concerns (guarantee of universality) within the framework of a *social regulation*.

iii) Monitoring and supervision of regulated entities; punishment of offenders

On the implementation of the Enabling State's purposes, monitoring and, above all, supervision of regulated activities come as a fundamental dimension, as well as the warning and punishment of offenders[(76)]. After defining the regulatory strategy and the setting of the regulatory structure (contract or agency), it is incumbent upon the State to assemble and operate this structure. The *day-to-day* of regulation will be entrusted to the body with regulatory functions (it can be the public contracting party or a regulatory agency).

[(76)] Accordingly, cf. WAECHTER, *ob. cit.*, p. 273 et seq.. An important objective in this area is orientating the behaviour of the regulated entities in order to prevent infringements and abuses; on the role of public measures of warning and subpoena, cf. Karine NYBORG/Kjetil TELLE, "The role of warnings in regulation: keeping control with less punishment", *Journal of Public Economics*, 2004, p. 2801 et seq..

4.2 – Contract-awarding law

We have already alluded before to contract-awarding law as a key instrument in creating a "competition *for the* market". In this respect, the doctrine proposes the correspondence between: on the one hand, *regulatory law and competition* in *the market*; and, on the other hand, between *contract-awarding law* and *competition* for *the market*[(77)].

Contract-awarding law is, in fact, a legal structure essential for the upturn of an interaction process between the State and the Market, inspired by the logic of development of competition and market solutions. In this context, one speaks about a transition from a *Providing Administration* to a *Contract-Awarding Administration*, which, in this, case means the transition from a direct public management model to another, of privatization and *contracting out* within the implementation of public tasks, in which occurs a surrender of public functions or the obtaining of the collaboration of individuals chosen through public and transparent selection procedures[(78)].

As we all know, there are economy sectors where liberalization – an opening of the market to free private initiative – is not possible. That happens in natural monopoly sectors, based on essential infrastructures and networks (e.g., water distribution, energy transportation). Indeed, the fact that *competition in the market* is not viable, with several companies competing with each other for the provision of goods and services, does not exclude another way to induce competition and adopting strategies of "appeal to the market ": this is what happens with the promotion of competitive solutions within "public markets", established by the State via call for tenders to the award of contracts[(79)]. In this case, competition occurs before market access, and it reflects among

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[(77)] On the difference between these concepts, cf. FRANZIUS, *Gewährleistung …*, *cit*., p. 413 ff. (*"Wettbewerb im Markt"*) and p. 493 et seq. (*"Wettbewerb um den Markt"*). *Competition in the market* is brought through a model of market opening to the more or less free entry of companies that will compete with each other; in the scenario of *competition for the market*, the competition occurs towards the entry on the market, which cannot function as an open market. In the first case, regulation law is determinant; in the second, the decisive character lies with the procurement contract law. In this sense, *cf.* Also Johannes MASING, "Regulierungsverantwortung und Erfüllungsverantwortung", *Verwaltungsarchiv*, 2004, p. 151 et seq. (p. 156 et seq.). Still on this nomenclature, cf. FEHLING, *ob cit*., p. 1102 et seq.; Fabio GIGLIONI, *L ' accesso al mercato nei servizi di interesse generale*, Milan, Giuffrè, 2008, pp. 225 and seq. and 235 et seq.; Luca De LUCIA, *La regolazione amministrativa dei servizi di pubblica utilità*, Turin Giappichelli, 2002, p. 275 et seq..

[(78)] On this topic, see Martin Burgi, "Die Ausschreibungsverwaltung", *Deutsches Verwaltungsblatt*, 2003, p. 949 et seq..

[(79)] *Cf.* MASING, *ibidem*, noting that in the water sector the fact that the full liberalization is out of discussion does not rule out the possibility to adopt remedies of liberalizing nature, or at least, to encourage competition and the market.

companies in dispute over market access. As part of this strategy of *competition for the market*, promoted by the State and associated with the convening of private individuals for public tasks (public-private collaboration schemes: *cf. infra*), contract-awarding law has a key role in the definition of fair criteria of choice and contractors selection. As an instrument of the (Enabling) State in a process of interaction with the market, contract-awarding law complies with central objectives (although sometimes in conflict with one another), either in defence of market values (competition advocacy, equality of *chances*), either in the tutelage of public interest and transparency and impartiality values [(80)].

Contract-awarding Law not only fulfils an essential function in contracts for public purchases; it has a role of identical nature where it is involved the special assignment of exclusive rights or rights over scarce resources, particularly on *quota* situations imposed by scarcity of resources to be explored or for technical nature reasons (e.g., assigning rights over radio frequency or mineral resources management; limited number of available authorizations[(81)])[(82)].

In all its applications within public procurement or outside it, the contract-awarding law – with its postulates and requirements concerning the appeal to the market and respect for the principle of equal opportunities – arises as a key dimension or completion of administrative guaranteeing law[(83)].

4.3 – Public-private cooperation

Possibly even more than as an instrument at the service of the achievement of the Enabling State's purposes, public-private collaboration may be seen as a way to configure and implement the very idea of the Enabling State. This is, in fact, an

[(80)] For a comprehensive vision on the objectives of public procurement contract law, cf. Steven L. Schooner, "Objectives for the system of government contract law", *Public Procurement Law Review*, 2002, p. 103 et seq.; in particular, on the dilemma and confrontational tension between the various objectives of the procurement contract law, cf. Omer DECKEL, "The legal theory of competitive bidding for government contracts ", *Public Contract Law Journal*, vol. 37, 2008, no. 2, pp. 237 et seq.; on this same issue, Marco D'ALBERTI, "Interesse pubblico e concorrenza nel codice dei contratti pubblici", *Diritto Amministrativo*, 2008, no. 2, p. 297 et seq..

[(81)] See, for example, article 12 of Directive 2006/123/EC on services in the internal market: providing for the assumption of a (legitimate) limitation of the number of available authorizations for a supply service activity, the standard requires the adoption of a *selection procedure* among the potential candidates, which provides full guarantees of impartiality and transparency.

[(82)] On the interaction between State and Market when the management of scarce resources is at stake, cf. Mario MARTINI, *Der Markt als Instrument hoheitlicher Verteilungslenkung*, Tübingen, Mohr Siebeck, 2008.

[(83)] *Cf.* FRANZIUS, *Gewährleistung*, *cit*., p. 503 et seq..

instrument which develops the logic of the guaranteeing responsibility regarding activities and services which shall remain in the sphere of State.

Indeed, through certain forms of public-private collaboration, it may occur the reduction or conversion of an original public implementing responsibility into a public responsibility of intermediate grade, focusing on guarantees rather than on direct provision; this happens when, concerning activities (e.g., corresponding to nat*ural monopolies*) legally classed as *public service* or public infrastructure and taken through State ownership, the State comes to assign leases to private entities. In this hypothetical set up, the concession contract (or *public-private partnership* contract) transforms former Executive public responsibility (based on ownership and managing responsibility of a public service activity) into a responsibility to guarantee or ensure that the private concession holder explores such activity, according to certain rules (laid out in the law and in the contract). The collaboration leads, therefore, to a phenomenon of shared responsibilities, assigning the performance to the private partner and keeping on the public partner the oversight and guaranteed operation of the model(84).

By virtue of the concession, the State exonerates itself from direct service supply and takes on a more recessed institutional role: a "position of guarantor".

The model of public-private collaboration, through the various modes of partnership (e.g., contractual or institutionalized), sets in motion a synergistic process, which carries out the function of seizing and, more than that, channelling resources and private capacities for carrying out public tasks. In areas to which it has been more widely applied – such as the infrastructure building – public-private collaboration serves the fundamental objective of mobilizing private investment, whether or not articulated with public investment(85)-(86); but one cannot forget that public-private collaboration also serves the concern with the activation of potential managerial efficiency and innovation the private sector can bring to the infrastructure and public service management(87).

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(84) Accordingly, cf. Jan ZIEKOW, "Public-Private Partnership als zukünftige Form der Finanzierung und Erfüllung öffentlicher Aufgaben? ", in Hermann HILL (ed.), *Die Zukunft des öffentlichen Sektors*, Baden-Baden, Nomos, 2006, p. 49 et seq. (p. 52).

(85) See, by the way, the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled *Mobilising private and public investment for recovery and long-term structural change: developing Public-Private partnerships* – Brussels, 19/11/2009, COM (2009) 615 final.

(86) *Cf.* Georg HERMES & Jens MICHEL, "Die Nutzung privaten Innovationspotentials bei privatfinazierten öffentlichen Projeckten ", *Die Verwaltung*, 2005, no. 2, p. 177 et seq..

(87) Furthermore, the doctrine distinguishes two types of approach in the implementation of public-private partnerships: a *finance-based approach* and a *service-based approach* – the first gives prominence to the

The development of public-private collaboration expedients is associated, to a large extent, with the growing importance of the contract in administrative life and with the phenomenon that has been designated as *public administration by contract*[(88)]. As a matter of fact, public administrative contract – as a regulatory process for collaborative relationships between Government and private entities – also arises as an instrument of great significance and relevance in the construction of the Enabling State and, in particular, in the propping up of a Guaranteeing Administration – in this case, an Administration whose responsibility is, on the one hand, to ensure the conclusion of contracts, safeguarding and meeting the requirements of public interest, and, on the other hand, to *regulate* the performance of the co-contractor, ensuring that it punctually complies with its obligations.

mobilization of private capital to finance the construction of public infrastructure and ensures the return on investment through the prices that the private partner is authorised to collect the users; the second highlights the mobilization of innovation, management capacity and, in general, the *skills* of the private partner and ensures the return on investment that the last supports through payments to be carried out by the public partner; in this sense, cf. David W. GAFFEY, "Outsourcing infrastructure: expanding the use of public-private partnerships in the United States ", *Public Contract Law Journal*, vol. 39, no. 2, 2010, p. 353.

(88) On this topic, see FREEMAN & MINOW, *ob. cit*., *passim*; Phillip J. COOPER, *Governing by contract*, Washington, D.C., CQ Press, 2003; Jean-Pierre GAUDIN, *Gouverner par contrat*, Paris, Presses de Sciences Po, 2007.