

The regulatory principle of technological neutrality; what does it entail?

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Proposed title of the presentation/paper:

The regulatory principle of technological neutrality; what does it entail?

Rationale behind the paper

To thoroughly analyse the newly emerging principle of technological neutrality, so as to lead to a better understanding and application of the principle in the future.

Methodology

Aside from using the traditional legal sources ((legislative process of the) law, case-law and literature), the paper will also benefit from interdisciplinary research methods. Both communications science and economics will be explored so as to find arguments that can help to justify and clarify the principle.

Research questions:

The main research question will be: What does the principle of technological neutrality entail? This question will further be subdivided in the following sub questions: (1) What caused the emergence of the principle of technological neutrality? (2) Can economics and communications science deliver arguments in favour of the legal principle of technological neutrality? (3) What are the different possible rationales behind the regulatory principle of technological neutrality, and how do these affect the interpretation and implication(s) of the principle?

Deliverable:

The aim will be to deliver a paper in between 20-25 pages.

Background and structure of the paper:

The principle of technological neutrality was officially coined by the European Commission as a regulatory principle in its 1999 Communications Review.¹ This 1999 Communications Review Communication presented the results of a thorough review of EC telecommunications regulation, initiated in 1997 by the Convergence Green Paper.² Technological neutrality was presented as one of five principles³ that would underpin the

EC regulatory framework on Electronic Communications,⁴ that has been in place since 2002 and is currently under review.⁵ According to the text of the 1999 Communications Review, technological neutrality means that “legislation should define the objectives to be achieved, and *should neither impose, nor discriminate in favour of, the use of a particular type of technology* to achieve those objectives”.⁶ This basic explanation however leaves quite some room for interpretation, which is illustrated by the fact that market parties, policymakers and legislators seem to adhere to different meanings of the principle, as they see fit. This situation is further complicated by the fact the principle is not solely used in its originating context of network regulation, but is also put forward as one of the main drivers behind the revision of EC content regulation, i.e. the Television Without Frontiers Directive. The current situation can lead to unwanted consequences: the ongoing vagueness creates uncertainty in both theory and practice, with the risk that technological neutrality will not be taken seriously as a regulatory principle.

As mentioned, technological neutrality is a fairly new principle. This brings up the question “why it was not there before”, i.e. what caused its emergence. The paper will therefore start by explaining the emergence of the principle by shortly setting out how technological developments have fundamentally changed the communications landscape over the last decades, and how these affected the way in which different sectors (telecommunications, media and information technology) had to be regulated.

Consequently, the principle of technological neutrality in its current form will carefully be analysed. Firstly, the paper will go into the norm that is incorporated in the principle. The principle implies that that the State should try to remain neutral towards technology in regulation; a norm that can have far-reaching consequences. It therefore deserves to be investigated whether this norm can properly be justified. The paper will see what arguments can be taken from economic theory; can technology-neutral regulation be supported from an economic point of view? This part of the paper will not only make out whether technology-neutral regulation will be more efficient than technology-specific regulation, but also whether there might be specific economic reasons to occasionally deviate from the principle. In a similar fashion, the paper will proceed to investigate whether communications science supports technology-neutral regulation.

The last part of the paper will approach technological neutrality from the legal perspective. Given the insights from the two other disciplines, it is interesting to see how the principle has been implemented in the law. A perusal of the application of the principle of technological neutrality in various areas of EU law (State Aid, Network Regulation, Content Regulation) demonstrates that the principle cannot always fully be captured by the rough definition of “the State should try to remain neutral towards technology in regulation”. In fact, four different rationales can be identified for applying technological neutrality in law, which lead to different interpretations and implications of the principle. This section of the paper will show what these four different rationales are, and how these affect the interpretation and the implications of technological neutrality for European regulation.

The paper will end with a conclusion.

¹ “Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review”, COM(1999)539.

² “Green Paper on the convergence of the telecommunications, media and information sectors, and the implications for regulation. Towards an information society approach, COM(97)623 (December 3, 1997),

³ The principles hold that future regulation should (i) be based on clearly defined policy objectives; (ii) be the minimum necessary to meet those objectives; (iii) further enhance legal certainty in a dynamic market; (iv) be enforced as closely as practicable to the activities being regulated; (v) aim to be technologically neutral.

⁴ The 2002 Electronic Communications Framework is comprised of six Directives:

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive') [2002] OJ L108/33; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and associated services ('Authorisation Directive') [2002] OJ L108/21; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('Access Directive') [2002] OJ L108/7; Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services [2002] OJL249/21; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and associated services ('Universal Service Directive') [2002] OJ L108/51; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ('Directive on privacy and electronic communications') [2002] OJ L201/37.

⁵ See “Communication on the Review of the EU Regulatory Framework for electronic communications networks and services”, COM(2006)334.

⁶ “Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review, COM(1999)539.

Literature:

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