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Industry position on Fair, Transparent and Non-discriminatory pricing within Ecodesign implementing measure LOT 9



Executive Summary

DIGITALEUROPE has previously issued this interpretation in the build-up to the Regulation 2019/424/EU (LOT 9) and had proposed this interpretation as part of a guidance document that was intended to accompany the Regulation.

Under the EU Ecodesign framework (EU 2009/125), implementing measures (Regulations) are legislated in general for vertical product categories. These Regulations set product design requirements. Under the auspices of the Circular Economy Action Plan, product requirements under Eco-design have expanded beyond the energy efficiency requirements, adding a new type of requirement referred to as material efficiency. Within this new category, making firmware upgrade (where applicable) available for free or at a ‘fair, transparent and non-discriminatory price’, is a requirement that now appears in some of the recent electronic related implementing measures.

The approach to ‘fair, transparent and non-discriminatory’ is not defined in these Regulations, nor in the accompanying FAQs that support these Regulations. For Regulation 2019/424/EU (LOT 9), which applies to server and data storage products, DIGITALEUROPE takes the position of interpreting ‘fair, transparent and non-discriminatory’ cost of making available the latest available version of firmware as follows:

Pricing will be regarded as “fair” if it is commercially reasonable and is otherwise consistent with EU competition law. In assessing whether prices are fair, market surveillance authorities should apply a test that is consistent with other EU policies such as competition law. Firmware updates are valuable intellectual property, which

are developed with considerable investments by server and data storage suppliers. To set a “fair” price under the Regulation, server and storage product suppliers will apply their own prices and pricing methodologies for firmware updates, taking into account relevant facts including competition and the requirement to provide free security updates. These prices and pricing methodologies should not be determined in advance by the market surveillance authority. Likewise, suppliers are free to adapt their pricing from time to time as determined by their own commercial policies.

Suppliers may meet the requirement of “transparent” pricing by publishing how price estimates necessary for firmware updates can be obtained. The requirement for transparency does not require the publication of standardised price lists but may be met by the option for customers to request personalised price estimates, which are sufficiently clear and unambiguous as to the updates covered and price to be paid.

“Non-discriminatory” pricing for accessing firmware should be determined as consistent with how prices are developed for other customers specifically seeking updates. This may result in differentiated pricing according to the customer’s specific situation and requirements. It should be considered a subordinate requirement to the “fairness” criteria.

FOR MORE INFORMATION, PLEASE CONTACT:



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Denmark: DI Digital, IT BRANCHEN, Dansk Erhverv

Estonia: ITL

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France: AFNUM, SECIMAVI, Syntec Numérique, Tech in France

Germany: BITKOM, ZVEI

Greece: SEPE

Hungary: IVSZ

Ireland: Technology Ireland

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Lithuania: INFOBALT

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Netherlands: NLdigital, FIAR

Norway: Abelia

Poland: KIGEIT, PIIT, ZIPSEE

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Romania: ANIS, APDETIC

Slovakia: ITAS

Slovenia: ICT Association of Slovenia at CCIS

Spain: AMETIC

Sweden: Teknikföretagen, IT&Telekomföretagen

Switzerland: SWICO

Turkey: Digital Turkey Platform, ECID

Ukraine: IT UKRAINE

United Kingdom: techUK