

BEREC Opinion on Meta's draft reference offer to facilitate WhatsApp interoperability under Article 7 of the Digital Markets Act



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Contents

1. Introduction	2
2. General remarks.....	3
3. Description of the service and specification of the relevant basic functionalities and their features/facilities.....	4
4. Technical definition and documentation of relevant interfaces and standards to be used .	6
5. Reachability/discoverability and rules concerning opt-in/opt-out	7
6. User location	8
7. Public availability	9
8. Service level agreements and service level objectives	10
9. Key performance indicators (including threshold values)	11
10. Data security and data protection rules	11
11. Security requirements	12
12. Rules on dynamic adjustments.....	13
13. Term, suspension, and termination	13
14. Indemnification	14
15. Rules on dispute resolution between providers	15
16. Contact and technical support	15
17. Updating mechanism for the reference offer	15



1. Introduction

Under Article 7, the Digital Markets Act (DMA) introduces an obligation for gatekeepers on interoperability of number-independent interpersonal communications services (NI-ICS), according to which the designated gatekeepers “*shall make the basic functionalities of its number-independent interpersonal communications services interoperable with the number-independent interpersonal communications services of another provider offering or intending to offer such services in the Union, by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge*” (Article 7(1) DMA).

The gatekeeper should publish “*a reference offer laying down the technical details and general terms and conditions of interoperability with its number-independent interpersonal communications services, including the necessary details on the level of security and end-to-end encryption (...) and update it where necessary*” (Article 7(4) DMA).

The gatekeeper should make *at least* the following basic functionalities interoperable where the gatekeeper provides them to its own end- users: i) end-to-end text messaging and sharing of any attached file (images, videos, voice messages or any other) within six months after the gatekeeper designation for communication between two individual end-users, and ii) within two years for users within groups. Moreover, iii) four years after the gatekeeper designation, voice and video calls should also be made interoperable.

Following the publication of the reference offer, any NI-ICS provider offering or intending to offer such services in the EU may request interoperability with the gatekeeper’s NI-ICS, and the gatekeeper should “*comply with any reasonable request for interoperability within 3 months after receiving that request by rendering the requested basic functionalities operational*” (Article 7(5) DMA).

The end-users of the gatekeeper’s NI-ICS should “*remain free to decide whether to make use of the interoperable basic functionalities that may be provided by the gatekeeper*” (Article 7(7) DMA).

According to Recital 64 of the DMA, the designated gatekeeper should publish “*a reference offer laying down the technical details and general terms and conditions of interoperability*” with its NI-ICS, and the European Commission (EC) can consult BEREC “*in order to determine whether the technical details and the general terms and conditions published in the reference offer that the gatekeeper intends to implement or has implemented ensures compliance with this obligation*”.

On 29 January 2024 the EC formally requested BEREC to produce an opinion on Meta’s draft reference offer for WhatsApp interoperability under Article 7 DMA.

The current BEREC opinion is based on the following elements:



- “DMA Interoperability – WhatsApp Overview” (“restrictive for illustrative purposes only”) – shared by the EC with BEREC on 28 November 2023;
- “DMA Interoperability: Overview of the Technical Framework” (“draft for discussion purposes only”) – shared by the EC with BEREC on 28 November 2023;
- “Interoperability agreement between WhatsApp Ireland Limited and [Partner]” – shared by the EC with BEREC on 16 January 2024;
- The Interoperability Stakeholder Workshop “Meta’s Proposed Compliance solution for Article 7 DMA in relation to WhatsApp”, organised by the EC on 1st February 2024 in Brussels.

For the purpose of this opinion, BEREC is referring to the NI-ICS providers willing to interoperate with WhatsApp as “third-party NI-ICS providers”, “interoperability seekers”, or “potential interoperability seekers”.

2. General remarks

BEREC believes that compliance with the DMA obligations should be determined in light of the general objectives of the DMA. One of the main goals of the DMA – and in particular for the interoperability obligations under Article 7 – is to ensure contestability of the core platform services provided by gatekeepers.

The implementation of the **reference offer should therefore be assessed, among other issues, as regards its potential to reach the objective of reducing barriers to entry for alternative NI-ICS providers and allow for market contestability.** Therefore, special attention should be paid to those technical specificities/features which may lead to service dysfunction or disruption and/or a degraded user experience, as both could compromise the effectiveness of the goals established in this regulation.

In addition, it is also important to highlight that the dialogue with the potential interoperability seekers on the reference offer is of utmost importance, since they can provide valuable insights on how it should be designed, on the main challenges, and also on the potential red flags. An appropriate timeframe allowing for in-depth discussions with third-party NI-ICS providers should therefore be ensured.

In the next chapters specific comments on Meta reference offer for WhatsApp interoperability are made, following the list of minimum criteria for the reference offer presented in the BEREC report on the interoperability of NI-ICS¹.

¹Chapter 6.3.1 of BoR (23) 92, BEREC report on interoperability of Number Independent Interpersonal Communication Services (NI-ICS), 08.06.2023, see: <https://www.berec.europa.eu/system/files/2023-06/BoR%20%2823%29%2092%20BEREC%20Report%20on%20interoperability%20of%20NI-ICS.pdf>.

3. Description of the service and specification of the relevant basic functionalities and their features/facilities

The description of the service and the specification of the relevant basic functionalities and their features/facilities should be part of the reference offer.

In particular, the definition of “**basic**” functionalities and the scope of “end to end text messages” deserve to be clarified. From a users’ perspective, basic functionalities should be considered as those features that are expected when using a messaging service. Discussions with the potential interoperability seekers showed that some functionalities, such as typing indications, acknowledging of delivery, reactions, stickers and emojis, should be considered as part of the “basic functionality” in order for the alternative NI-ICS providers to effectively compete with the gatekeepers.

In Chapter 1² “Definitions and interpretation”, the term “message” is defined as “an electronic communication in the form of a written or audio message, which may include, without limitation, text, images, videos and other attached files”, which leaves open if it includes, for example:

- profile information like user names or status images;
- presence of information like typing indicators or read receipts³;
- hyperlinks;
- emoji and character encoding (e.g. symbols).

BEREC would like to highlight that “**Interoperable Messaging Services**” is not defined neither in the Chapter 1⁴ “Definitions and interpretation”, nor in Annex 1⁵, paragraph 6, nor in Annex 2⁶ “Technical Specifications”. It would be relevant that the reference offer describes what the “service” technically looks like and how the technical architecture looks like, i.e. what function blocks exist and how they interact with each other (e.g. regarding traffic flows for both, message traffic and “management” traffic like user auth, push). A picture showing the (necessary) building blocks and (expected) traffic flows could be useful.

Additional information on technical features would also be relevant to have in the reference offer, namely:

- What is the “WhatsApp Interop Protocol” and how it looks like and how it is implemented by the interoperability seekers, e.g. if a binary blob for partners to include

² Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 4.

³ Annex 2 6.3.6 states delivery receipt routing, however what is included here remains unclear.

⁴ Interoperability Agreement between WhatsApp Ireland Limited and [Partner]

⁵ Interoperability Agreement between WhatsApp Ireland Limited and [Partner]

⁶ Interoperability Agreement between WhatsApp Ireland Limited and [Partner]

in their apps is foreseen, or a (open or public) specification (with a reference implementation) which the interoperability seekers have to include in their apps, or APIs that will be provided to the interoperability seekers;

- What the points of interconnection are and where they are located; e.g. if they are physical points of connection (i.e. the interoperability seeker and WhatsApp install their respective hardware in some colocation, or at some IXP) or if the interconnection relies on the internet for WAN transport.

Several potential interoperability seekers suggested to include native **multi-device** support as essential. It is very common for NI-ICS providers to provide their users with the possibility to use and synchronise their chats over multiple devices (e.g. smartphone and laptop) and between different operating systems (e.g. iOS, Android, Windows), and this feature seems to be widely adopted. A lack of this function could be a disincentive for users to adopt interoperable options, or at least it could lead to user frustration when they do not get the same experience as they are used to in many other messaging services. The multi-device option that is provided to WhatsApp users limits this to four devices⁷.

There might be technical reasons why multi-device support could be difficult to implement for interoperability. Allowing multiple devices increases the attack surface and by introducing new threat vectors adds complexity to the overall architecture, potentially leading to new security risks. However, there are already technical solutions like MLS⁸ in development addressing those issues. A switch from WhatsApp's current architecture to MLS however entails additional complexity which does not seem compatible with the timeframe given by the DMA.

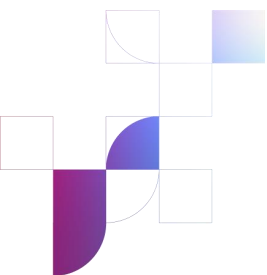
The previous design of WhatsApp used the primary device model in which the mobile device is seen as the "single source of truth"⁹. This has only recently been extended to cover up to 4 devices. Those design decisions taken by WhatsApp lead to its own limitation in providing the multi-device support to their own users, but this would also affect users of third-party NI-ICS providers in the case of interoperability. This limitation could explain the – rather arbitrary – definition in Annex I "1.3¹⁰, where "Client" means an Android or iOS device running a native app that is connecting to the WhatsApp network". Moreover, BEREC notes that there seems

⁷ <https://blog.whatsapp.com/one-whatsapp-account-now-across-multiple-phones>.

⁸ Messaging Layer Security, IETF RFC 9420.

⁹ A "Single Source of Truth" or "Single Point of Truth" is a concept/practice in which a data element is managed and mastered in only one place. Any use of this data element elsewhere is only a reference to the master element, and every edit/update or change only happens to the master element. With regard to messaging services, the single source of truth may be the phone number and the data stored in the device connected to this phone number. Every use of this data on another device is then only a reference to the data stored on the device with the phone number. Opposing to this concept, in a fully decentralized architecture the data may be copied to every device used (i.e. "synchronized"). To enable this, a user has to login (e.g. via username and password) on every new device (and eventually securing this step with another factor besides username and password) to synchronize all data among all devices.

¹⁰ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 20.



to be no technical reason to exclude Microsoft Windows, Linux or macOS as an operating system – especially since Meta itself is offering WhatsApp clients for these operating systems.

Moreover, it is not clear if some functionalities will also be available in a multi-device environment, e.g. the treatment of third-party chats within WhatsApp (separate inbox vs shared inbox) on WhatsApp Desktop and WhatsApp Web.

From end-users' expectations, and to foster implementation of interoperability, BEREC believes that multi-device support is a very desirable feature for market contestability. When the gatekeeper itself does not provide a certain feature in the way third-party NI-ICS providers do, the DMA does not require the gatekeeper to change its own service and align it with the services of the interoperability seekers. However, BEREC would like to stress that this feature *is* available for WhatsApp users and could therefore also be implemented in an interoperable environment.

4. Technical definition and documentation of relevant interfaces and standards to be used

Meta's draft reference offer **lacks technical definition and documentation of the relevant interfaces and standards to be used** (e.g. communications protocols, API description), including any technical usage restrictions. It only refers to documentation under a certain URL, however this URL should be provided in the reference offer. Moreover, it is important that the documentation which will be made publicly available includes a version history, recording all previous changes and the current versions of the documentation.

Furthermore, regarding the provision of "**software rights**", it should be clarified what happens with clean-room re-implementations that are already provided by third-party apps, and whether already-drafted software parts would suddenly fall under a non-disclosure agreement (NDA).

With regard to the use of the **double-ratchet Signal protocol**, the mentioned reference implementation is published under a strong copyleft license (AGPL3, <https://github.com/signalapp/libsignal/>). The reference offer should mention that Meta will grant third-party apps a permission to use Libsignal from the right holder (Signal Foundation), as highlighted by Meta in the workshop organised by the EC on 1st February. In addition, it should also be clarified what happens after the termination of the licence and if the sublicense includes the publication of code (i.e. open source third-party apps may be unable to have integrations if they are prohibited from publishing code).

Moreover, it should be clarified if clean-room re-implementation of the Signal Protocol is exempt from claims by the Signal Foundation (as there could be claims that the wire protocol itself is IP by the Signal Foundation) and if such claims would be covered by the "third party IP claim" clause.



Regarding **interoperability testing**, BEREC notes that Chapter 5 of “Annex 1 - Interoperable messaging services”¹¹ of the Meta’s draft reference offer lacks clarification. There is no indication regarding the duration of the interoperability testing. Furthermore, it stipulates that if WhatsApp identifies issues, WhatsApp may, in its sole discretion, restrict the interoperability seeker activation status. At least, it should clarify that WhatsApp may restrict interoperability only to preserve the *integrity, security and privacy* of Meta’ services. The only timeframe provided in Meta’s draft reference offer is the Long-Stop Date which leads to termination if the interoperability seekers do not manage to make interoperability work within twelve (12) months, which leaves too much room for Meta to terminate the interoperability agreement.

5. Reachability/discoverability and rules concerning opt-in/opt-out

In Meta’s draft reference offer, no provisions regarding the onboarding or verification by the third-party are set. Third-parties therefore must take the responsibility to ensure **authentication and authorization** of their users. By selecting this architecture, the third-party has also the freedom to use any identification of the users, not limiting the user identifier to a phone number but enable other IDs like email addresses or others. BEREC welcomes the decision to allow for other user IDs. However, more technical details are necessary to allow third-parties integration in their processes.

Indeed, such choice requires a separate enlistment procedure, allowing to exchange between WhatsApp and the third-party both user IDs (including cryptographic keys) and information about users’ consent. Meta’s draft reference offer foresees an enlistment procedure, however the technical details including the exchanged information are not yet available.

BEREC notes that with the current provisions of Meta’s draft reference offer, it is unclear how the discoverability and reachability of users is ensured, from WhatsApp to third-parties and vice versa. For instance, Meta’s draft reference offer does not explain how users can find each other (based on which identifiers), how a chat can be initiated (from both sites, by a WhatsApp user to a third-party user or by a third-party user to a WhatsApp user) on a technical and on the user interface level and how the user IDs are exchanged between WhatsApp and third-parties (only certain IDs of users which opted in, or the whole user base, or the complete address book of the users).

BEREC would like to point out that user discoverability in practice is closely linked with the **consent of users to be discoverable** for other users in both ways (from users from WhatsApp and third-party NI-ICS providers). Generally speaking, the process of user discovery would be easier if it were done automatically in the background, i.e. when all users would be discoverable by default. However, user discoverability may also affect user privacy,

¹¹ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 22.



which is why further legal requirements in the DMA must be taken into account. In particular, Article 7(7) of the DMA requires that users “*shall remain free to decide whether to make use of the interoperable basic functionalities*”. Furthermore, Article 7(8) of the DMA states that collection and exchange of personal data of end-users that is necessary to provide interoperability should fully comply with the GDPR and ePrivacy Directive. These requirements suggest that an explicit opt-in by the user to use interoperable functions and to be discoverable to users of other NI-ICS providers is likely to be necessary.¹²

In terms of discoverability, **BEREC recommends that user consent to be discoverable should be explicitly given (opt-in)**. Consent to discoverability could be obtained – and modified at any time – in different ways: i) upfront opt-in request for being discoverable when the application is downloaded or updated. The reply to this request could be made mandatory; ii) opt-in request on a case-by-case basis when a user is being contacted (no personal data would be transmitted before that); iii) opt-in request on a case-by-case basis only when a user is being contacted by someone outside his/her phone contact book.

6. User location

According to Annex 1, Point 7.5.1¹³ of the reference offer, users of potential interoperability seekers must be located in the European Economic Area (EEA). These NI-ICS providers willing to interconnect are responsible to verify that their users are located in the EEA, if they want to make use of interoperable communications (i.e. a user must be present within the EEA within any consecutive sixty (60) calendar day period). If WhatsApp detects or otherwise has reasonable grounds to suspect a user enlisted is not located in the EEA, WhatsApp reserves the right to immediately suspend such user(s) from accessing the Interoperable Messaging Services. Furthermore, if multiple violations are detected, WhatsApp can request the third-party NI-ICS provider to remedy its location validation procedure.

BEREC would like to highlight some issues concerning the limitation of interoperability to users located in the EEA.

First of all, it is not clear how the **distinction between EEA-users and non-EEA-users** should be made. BEREC notes that in principle many different technical methods are possible, for example: based on country codes of phone numbers used as identifiers for account registration (e.g. +49xx for Germany), IP-addresses, self-disclosed data from users (e.g. device GPS-data, selection of the region and country in the operating system). BEREC points out that each of these methods can have advantages and disadvantages, for example in terms

¹² In detail: Wiewiorra, L., Steffen, N., Thoste, P., Fourberg, N., Tas, S., Kroon, P., Busch, C., Krämer, J. (2022). Interoperability Regulations for Digital Services. WIK Consult Report. Study for the German Federal Network Agency, p.115, see: https://www.bundesnetzagentur.de/DE/Fachthemen/Digitalisierung/Technologien/Onlinekomm/study_interoperabilityregulationsdigiservices.pdf?__blob=publicationFile&v=1.

¹³ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 24.



of accuracy of the user location. For example, the number identifiers may not be up-to-date in case of users moving within the EU, while GPS-data may significantly impact privacy and decreases battery life.

Moreover, **the cases of roaming** should be taken into account. Indeed, it remains unclear what (automatically?) happens when a user enters or leaves the EEA within the given consecutive sixty (60) calendar day period. If automatic measures are taken, BEREC notes that this period may be too short under certain circumstances and may lead to unjustified blocking of users. If it is considered that a period limitation must be set, a good reference can be prevalence of location of users in the EEA in the last four (4) months, in line with the fair use policy set for international roaming.¹⁴

The application of the rule to WhatsApp users should also be clarified. Indeed, it is not clear from Meta's draft reference offer if also WhatsApp users need to be located in the EEA in order to make use of the interoperable communication options, i.e. if WhatsApp users outside the EEA are not reachable via other (European) NI-ICS and cannot send messages to other NI-ICS.

Finally, with regard to the geographical limitation of the area of application, BEREC points out that further transparency for users is important during implementation. If the requirements for communication are not met, messages should not simply be not be delivered. Users should be actively informed if they cannot reach certain contacts due to the EEA-restrictions made.

7. Public availability

The reference offer should contain all information necessary for any interoperability seeker to assess general, technical and commercial conditions provided. As Article 7 DMA requires publishing the reference offer, **BEREC strongly encourages to make the complete reference offer publicly available and easy-to-be-found on the gatekeeper's website** and, if applicable, on the EC's website dedicated to the DMA implementation. The publication facilitates non-discrimination principles and lowers barriers for potential interoperability seekers who may need the reference offer to decide whether the proposed technical solution would be feasible.

The gatekeeper should provide reasonable exceptions (to be recognised by the EC), for any restrictions to the publication of the full documentation (e.g. by means of NDA).

¹⁴ Commission implementing regulation (EU) 2016/2286 of 15 December 2016 laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2286>.

The reference offer should also include at least a minimum set of technical details and specifications which allow for NI-ICS willing to interconnect to make a qualified decision to submit an application in advance (c.f. Chapter 2, Paragraph 1¹⁵).

8. Service level agreements and service level objectives

Meta's draft reference offer includes a section on service levels. However, this section only sets broad objectives based on the general interoperability obligations: there are some specified response times or limitations, but nothing about availabilities, traffic limitations, minimum response times, dispute resolution times or any other key performance indicators.

BEREC would like to highlight that **Meta's draft reference offer will not ensure that end-users of third-party NI-ICS providers are entitled to the same quality of service as WhatsApp's users**. However, quality of service is key to meet the underlying objectives of Article 7 of the DMA and degraded quality would result in an effective disadvantage for interoperability seekers.

BEREC deems that Meta's draft reference offer should set accurate Service Level Agreements (SLAs) based on the internal Service Level Objectives (SLOs). They would include, e.g.:

- SLAs for ordering, delivery, service (availability) and maintenance (repair) including specific time scales for the acceptance or the refusal of a request, for testing or delivery of services and facilities and for provision of support services;
- Procedures in the event of proposed amendments which may include a requirement for notification to the EU competent authority for such amendments, for example, launch of new features, upgrades, changes to existing services (see Chapter 12 below);
- Set of actions (e.g. remedies) when SLA terms are breached.

BEREC believes that SLOs with specific internal targets as regards e.g. obligations tied to specific response times are likely to be set within Meta. Such SLOs should be included in the reference offer to provide more transparency to the interoperability seekers.

9. Key performance indicators (including threshold values)

Well defined **Key Performance Indicators (KPIs)** would set a quantifiable and transparent measure of performance for specific objectives. They **should be included in the reference**

¹⁵ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 7.

offer, as well as in the compliance report that the gatekeeper has to provide. This will enable the Commission and interoperability seekers to monitor whether Meta is offering interoperability at non-discriminatory conditions. This is typically the case for reference offers in electronic communications markets.

KPIs should reflect what end-users expect when using NI-ICS. While stakeholders should be consulted to establish the most relevant KPIs, BEREC deems that they should at least reflect:

- Technical aspects of interoperability:
 - Service descriptions linked to binding times for providing the service availability; including KPIs related to communications failure. These KPIs could be a means to compare the QoS granted by Meta to its WhatsApp's users and the QoS granted by Meta to users of alternative NI-ICS providers;
 - Traffic limitations (like expected amounts of messages within a certain timeframe), including KPIs related to latency. These KPIs could be a means to compare the QoS granted by Meta to its WhatsApp's users and the QoS granted by Meta to users of alternative NI-ICS providers;
 - Guaranteed time to repair:
 - Initial reaction to newly created tickets, differentiated by severity;
 - Time to effective reparation.
- Commercial relationship between Meta and interoperability seekers:
 - Timespan from initial contact to granting access to the testing system;
 - Dispute resolution times.

It should be noted that this list is not exhaustive and should be considered as dynamic. It will probably be necessary to adapt KPIs over time to make them correspond to the objectives of the DMA and to what is expected by end-users.

10. Data security and data protection rules

From Meta's draft reference offer, it's unclear what role Meta, third parties and end-users play under GDPR, e.g. with regard to contracted data processing (c.f. GDPR according to Art. 28 GDPR) or with view to the DMA as the legal basis for data processing. The consent of users of NI-ICS willing to interconnect is required by WhatsApp, and also WhatsApp users have to declare their consent. However, it is not clear how the data handling will be reflected in each data protection declaration. For example, if all users have to fully agree with each other's data protection declaration or if adaptations are desired or possible.



BEREC notes that details on the **interplay of data processing** – by both parties WhatsApp and NI-ICS willing to interconnect – **could be more comprehensive**, especially with regard to the application of the GDPR and the consideration of each other's data protection declarations.

With regard to data such as messaging contents, user information, metadata, etc., a network security program that includes encryption in storage and transit is demanded. BEREC notes that it is unclear how the data handling will be reflected in each other's data protection declarations.

On the implementation of users' consent, BEREC notes that WhatsApp states that the third-party providers' users' consent must be collected, however no more details are specified.

11. Security requirements

WhatsApp allows two options with regard to the use of encryption software: i) using the "encryption software" made available by WhatsApp or ii) using an alternative encryption protocol "that has been approved in writing by WhatsApp (at its absolute discretion) and subject to any validation requirements, policies and conditions of such approval specified by WhatsApp, and provided such alternative provides materially the same level of encryption as the Encryption Software".¹⁶

BEREC welcomes Meta's proposal to provide licenses for the encryption software. However, the use of one obligatory encryption protocol might be seen as restrictive especially with regard to future developments of NI-ICS, both with regard to encryption protocols but also in view of the future phases of the DMA interoperability provisions.

Additionally, notifications on security incidents seems to only be an obligation by the interoperability seeker to inform WhatsApp, not vice versa. BEREC would like to highlight that Article 40 of the European Electronic Communications Code requires that ECN/S providers notify competent authorities of any security incidents, which have had a significant impact on the operation of networks or services. The reported information on the incident (e.g. affected number of users, duration, geographical spread of the area) could in general also be helpful for interoperability partners to assess incidents.

12. Rules on dynamic adjustments

With regard to adjustments and changes of the interoperability conditions, BEREC considers that there should be **a sufficient notice period**. Any of such changes should also be announced in advance and actively so that interoperability seekers do not have to regularly

¹⁶ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 28.



search for changes in order not to miss important adjustments and to be able to implement them in good time. **Thus, partners should be actively notified by WhatsApp about upcoming changes** (e.g. not only posting them on the official website, but via a dedicated email). This would be a better procedure also in e.g. urgent cases (e.g. security issues). Clarifications at which conditions WhatsApp may bring modifications to its services which impact interoperability could help making updates manageable for any involved party.

In Meta's draft reference offer, technical details are missing in Annex 2:¹⁷

- In No. 2¹⁸ it is stated that the developer documentation (which is not accessible because the URL is missing) will be “updated from time to time”, but neither how often it will happen nor the process of updating itself are specified. Third-party NI-ICS providers willing to interoperate will nevertheless have a three (3) months deadline to adopt the latest supported version.
- WhatsApp will provide notices about standard, urgent and legal changes “from time to time” via a website, however no forecasts regarding timing or necessary actions are specified. It would be better when WhatsApp actively notifies the interoperability seekers instead of letting them check the website daily.

BEREC notes that WhatsApp may unilaterally update the Developers Documentation, and the third-party NI-ICS providers must adopt the latest supported version as specified in the above-mentioned documentation within three (3) months. In case of failure of adopting the latest supported version, WhatsApp reserves the right to suspend Interoperability. Any future change should be discussed with the NI-ICS providers, who are interconnected or willing to interoperate with WhatsApp. Also, the EC should be informed especially if changes relate to technical specifications and protocols.

13. Term, suspension and termination

According to Meta's draft reference offer, the cases upon which Meta has the right to suspend interoperability seem too broad (especially in points 4(2)(c), (e) and (f)¹⁹). The possibility for the gatekeeper to **suspend interoperability should be exclusively limited to legal or technical reasons** or else specific cases/exceptions foreseen in the DMA. It should be noted though that integrity, security and privacy of Meta services should not represent the reasons to indirectly limit or undermine the operational part of the service and suspend the core interoperability conditionally. The reference offer should add strict exceptions, limit the above reasons and offer at the same time the alternative proposed solution to ensure compliance with Article 7.

¹⁷ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 27.

¹⁸ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 27.

¹⁹ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 7-8.



The same reasoning should apply to the section of the “Termination of the agreement”²⁰, where BEREC notes that the discretionary power of Meta to terminate the agreement and thus the provided services is too broad.

Moreover, a clear and transparent notice period should also be included, in order to allow other parties to react.

In addition, BEREC highlights, that – like any contract – the **clauses of renegotiation and the reasons of termination should also be detailed**, transparent, non-discriminatory and take under consideration the rights of both participating parties. In Meta’s draft reference offer, Meta seems to only safeguard its own rights and reserves various reasons for contract termination in interoperability access, which practically also undermine the service itself.

14. Indemnification

One of the minimum requirements that a reference offer should include is related to relevant charges (penalties), terms of payment and billing procedures. Although Article 7(1) of the DMA clearly states that interoperability should be free of charge, BEREC notes that Meta’s draft reference offer does not present any details on payments, penalties or else, namely related to infringements to the agreement from both parties. There is only the general disclaimer that the interoperability seeker is obliged to prevent any harm, problems or penalties from WhatsApp.

In Chapter 17 “Compliance”²¹, however, Meta, in addition to conveying a right to monitor, also established an excessive right for auditing the access seeker. This might pose a problem from a competition standpoint, as such audit rights give Meta the possibility to closely monitor potential competitors.

In addition, in case of “a breach”, Meta conveys the audit cost on to the interoperability seeker. As “breach” is not defined nor any definition on the qualification of the breach is presented, nor a cost ceiling is specified, this poses a risk to interoperability seekers that might be difficult to overcome.

15. Rules on dispute resolution between providers

BEREC notes that there is a dispute resolution procedure defined in Meta’s draft reference offer. This implies a relatively short span, using 10 days steps and giving the opportunity to the involved parties to solve the issue through meetings and discussions escalated till directors’ level. However, BEREC highlights that no reference is made to the situation where

²⁰ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 8.

²¹ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 15.



a solution between the parties cannot be found. In this case the only solution will then be given through injunction and courts.

Dispute resolution mechanisms are commonly used in electronic communications markets. **While the DMA does not include a similar mechanism, it should still be possible to build on this sectoral experience.** For instance, **the reference offer should include a timeframe under which Meta engages to find a solution** with the third-party NI-ICS providers to restore/ensure effective interoperability. **Once the solution has been found bilaterally, this should be applied to all other market players with the appropriate notice period** (see Rules on dynamic adjustments, Chapter12). In case the adjustment concerns (a) specific access seeker(s) and may not be of interest for all the other parties, Meta should still inform all partners and let them the choice to benefit, if they wish, from the same solution found in the bilateral dispute.

16. Contact and technical support

Meta's draft reference offer sets contact points at both sides, WhatsApp and interoperability seekers. However, with regard to technical support (e.g. for testing of the implemented interoperability interfaces), BEREC believes that more details could be added to ensure an easy implementation of interoperability for both sides. This could include (but should not be limited to) initial testing procedures and timeframes, dedicated contact points for resolving upcoming technical issues and coordination of future roll-out of adaptations.

17. Updating mechanism for the reference offer

Article 7(4) DMA states that the gatekeeper should update the reference offer "*where necessary*". For such updates, similar terms as for updates of technical documentation or the general provisions of the implementation of interoperability could apply. The overall provisions with regard to audits however may be adapted as they currently are one-sided and hold accountable only the alternative NI-ICS provider with regard to costs and efforts while WhatsApp can dictate the conditions and compliance.

In BEREC's opinion, updating mechanism for the reference offer could be introduced and aligned with other updates e.g. with regard to technical documentation or the general provision of the implementation of interoperability.

