

**BEREC Opinion on Meta's reference offer
published in March 2024 to facilitate WhatsApp
interoperability under Article 7 of the Digital
Markets Act**



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1. Introduction

Under Article 7, the Digital Markets Act (DMA) introduces an obligation for designated gatekeepers to “*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 provider of number-independent interpersonal communications services (NI-ICS), 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 deliver an opinion on Meta's draft reference offer for WhatsApp interoperability under Article 7 DMA. This opinion was provided to the EC on 15 February 2024 and made public on 19 March 2024¹.

Gatekeepers were required to comply with the DMA obligations on 7 March 2024. On that date, Meta published the reference offer to allow for WhatsApp interoperability².

The current BEREC opinion is based on the following elements:

- WhatsApp Reference Offer³;
- WhatsApp Developer Documentation Overview⁴;
- 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;
- The Meta DMA compliance workshop, organised by the EC on 19 March 2024⁵.

Moreover, BEREC could consult the documentation that Meta shares with the third-parties who request interoperability following the signature of a non-disclosure agreement (NDA).

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", "third-parties", "interoperability seekers", "potential interoperability seekers" or "partners".

2. General remarks

The reference offer should contain all information necessary for any (potential) interoperability seeker to assess general, technical and commercial conditions provided. BEREC welcomes the public availability of this document⁶ as this enhances transparency, 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.

BEREC believes that compliance with the DMA obligations should be assessed by the EC in light of the general objectives of the DMA. One of the main goals of the DMA – and in particular

¹ BoR (24) 19, BEREC Opinion on Meta's draft reference offer to facilitate WhatsApp interoperability under Article 7 of the Digital Markets Act, 15.02.2024, see: <https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-opinion-on-metas-draft-reference-offer-to-facilitate-whatsapp-interoperability-under-article-7-of-the-digital-markets-act>

² See: <https://developers.facebook.com/m/messaging-interoperability/>

³ Consulted in March 2024, see: <https://developers.facebook.com/m/messaging-interoperability/>

⁴ DMA Interoperability Developer Documentation: Overview of the Technical Framework (consulted in March 2024), see: <https://developers.facebook.com/m/messaging-interoperability/>

⁵ See: https://digital-markets-act.ec.europa.eu/events-poolpage/meta-dma-compliance-workshop-2024-03-19_en

⁶ See: <https://developers.facebook.com/m/messaging-interoperability/>

for the interoperability obligation 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 and expansion 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 of 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.

Finally, BEREC believes that it would be useful to implement a structured monitoring exercise taking stock of the interoperability refusals or (temporary) malfunctions that the gatekeeper would have to formally declare to the EC. Such a tool could facilitate the effective enforcement of the interoperability obligation, and also allow for the adaptation of the reference offer if relevant. Such a monitoring exercise could be implemented in different ways: such information could be gathered in a database or a tracker, to be regularly updated by the gatekeeper(s) and which would be accessible at least by the EC, the interested parties (third-party NI-ICS providers who already interoperate or are willing to do so), as well as BEREC.

In the next chapters, specific comments on Meta's reference offer for WhatsApp interoperability are made, following the list of minimum criteria for the reference offer presented in BEREC report on the interoperability of NI-ICS⁷.

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

According to the reference offer, the description of the service and the specification of the relevant basic functionalities include:

- Receiving text
- Receiving media
- Sending text
- Sending media (optional)

⁷Chapter 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>.

- Delivery receipts (but not typing indicators)
- Push notification

This means that profile information (status text, status image), typing indications or reactions are not included and thus not supported in the interoperable environment. Especially with regard to emojis, at least a recommendation on a character encoding (e.g. UNICODE, UTF-8) could help providing interoperability for this common and widely adopted function.

The technical documentation includes the (necessary) building blocks and (expected) traffic flows, thus the service is described at a minimum level to support interoperability. The used protocols and specifications are also mentioned and explained in appropriate detail. Third-parties have the possibility to select between two architectures: with or without a separate proxy service. The “Interoperable Messaging Services” are listed in Annex I Chapter 6.3 of the reference offer.

BEREC believes that it would be relevant to include in the reference offer additional information on technical features, namely:

- What is the “WhatsApp Interop Protocol”, how it looks like and how it is implemented by the interoperability seekers, e.g. if a binary blob for partners to include 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 IXP⁸) or if the interconnection relies on the internet for WAN transport.

Several potential interoperability seekers suggested to include native **multi-device** support as an essential feature. It is very common for NI-ICS providers to offer their users 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 devices⁹.

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

⁸ Internet Exchange Point.

⁹ See: <https://blog.whatsapp.com/one-whatsapp-account-now-across-multiple-phones>



risks. However, there are already technical solutions like MLS¹⁰ in development addressing those issues. However, a switch from WhatsApp's current architecture to MLS would entail additional complexity which does not seem compatible with the initial 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"¹¹. This has 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 Point 1.3¹², where "Client means an Android or iOS device running a native app that is connecting to the WhatsApp infrastructure". Moreover, BEREC notes that there seems to be no technical reason to exclude Microsoft Windows, Linux or macOS as operating systems – especially since Meta itself is offering WhatsApp clients for these operating systems.

From end-users' expectations, and in order to foster the take-up of interoperability, BEREC believes that a 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

The WhatsApp Developer Documentation Overview included in the reference offer provides an implementation scheme and explains the basic protocols for the exchange of messages and the necessary functions (e.g. verification, user enlistment and authentication processes). Additional detailed technical documentation is to be sent separately under NDA to qualified

¹⁰ Messaging Layer Security, IETF RFC 9420.

¹¹ 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.

¹² Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 23.



parties. The set of documents which are made publicly available should include a side reference to a version history, which should be made easily accessible in a list column.

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 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>), but there is no information about the conditions under which the sublicense is granted. It should be clarified in the reference offer that the sub-license is provided free of charge. Additionally, 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 welcomes Meta’s provisions in Chapter 5 of “Annex 1 - Interoperable messaging services”¹³ of the reference offer to support the partner in implementing and activating the interoperable messaging service. There is no indication regarding the duration of the interoperability testing. However, “WhatsApp may (in its discretion) continue to extend the testing period until the partner has resolved the issue and is able to demonstrate a working test model, provided that the partner is able to demonstrate continued progress towards resolution of the issue during that extension period”. WhatsApp should give clear reasons for restricting the partner activation *status* as well as for any failure of the interoperability test, should this occur.

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

According to the reference offer, no provisions regarding the **onboarding or verification of users** by the third-party are directly set as the technical process of discoverability and reachability of users is not further specified.

However, further technical information on “Identities - Verification, User Enlistment and Authentication” can be found in the WhatsApp Developer Documentation Overview (page 7). From BEREC’s point of view, Meta should provide a valid reasoning concerning the potential risks of integrity or security to justify that some information qualifies for the NDA classification.

Details are provided on the different identifications used. In particular, WhatsApp’s technical solution uses two main identifiers: a user-visible identifier and a uniquely generated identifier that is used at the infrastructure level (for protocols, data storage, etc.), referred to as an

¹³ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 22.



“internal identifier”. The process of verifying identifiers and enlistment of partner clients (technical description of enlistment requests) are also described in the document.

Third parties must take the responsibility to ensure authentication and authorization of their users. By selecting this architecture, the third parties are largely free 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, as also described under Point 1.6 in the Annex 1 of the reference offer. BEREC welcomes the decision to allow for other user IDs. BEREC would like to point out that it may be useful to also provide a process for changing user names, especially the identifiers visible to other users. If such a function did not exist, this could restrict users who have changed their name, for example. They would probably have to create a new account if they want to change their identifier.

The reference offer does not provide any further details regarding general **discoverability** and **reachability of users**, from WhatsApp to third parties and vice versa. For instance, the 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) both on a technical and on the user interface levels, 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).

Moreover, it would be relevant to provide WhatsApp users with the possibility to add users from interoperable NI-ICS providers in bulk, rather than to add each individual user on a case-by-case basis. For third-party NI-ICS providers that use email addresses or phone numbers as identifiers it would be appropriate to expect that a user’s phone book can be used as a basis for establishing connectivity to third-party NI-ICS users in bulk and keep them updated – which is the same way used by WhatsApp to establish connectivity between its own users. BEREC notes that this automation of discoverability would provide attractive interoperable communication options from a user’s point of view.

The reference offer does not seem to provide much information on **the consent of users for interoperability and on how to be discoverable** for other users in both ways (from users from WhatsApp and third-party NI-ICS providers). BEREC notes that information on this point in the reference offer can be found in Annex 1 in Point 7.4 Identity (p. 27):

“Partner must not enlist a Partner User to the WhatsApp Infrastructure without that Partner User voluntarily opting in to receive the Interoperable Messaging Services according to applicable Laws.”

This seems to mean that opt-in has to be interpreted as an “informed consent” (also in compliance with the General Data Protection Regulation, GDPR). Furthermore, under Point 8.2 in Annex 1 (p. 29) of the reference offer it is clarified that:

“Nothing in this Agreement shall limit or otherwise affect the discretion of WhatsApp Users or Partners Users to decide whether to opt in to Interoperability and/or whether



to use Interoperable Messaging Functionality (in whole or in part), in accordance with Article 7 (7) DMA”

BEREC understands this to mean that **active opt-in consent must be given** by the user. However, it remains unclear for BEREC in what way such an opt-in could be given and how this should be implemented at a technical level. BEREC has highlighted before¹⁴ that different approaches are possible when a user would be prompted to make a certain choice, e.g.:

- 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;
- iv) opt-in request whenever a new third-party NI-ICS provider becomes interoperable with WhatsApp.

BEREC notes that the consent mechanism may also have an impact on future functions, especially group functionalities¹⁵ which have to be provided interoperable at later stage. The consent mechanism should therefore be designed in such a way that it does not make the use of these group functionalities excessively difficult or not usable at all.

6. User Experience and Design

As highlighted under Chapter 2, the implementation of the reference offer should be assessed, among other issues, as regards its potential to reach the objectives of reducing barriers to entry and expansion for third-party NI-ICS providers and allow for market contestability.

Therefore, BEREC is of the opinion that special attention should also be paid to the user experience and design with regard to the implementation of interoperability. In this respect, BEREC would like to point out that reaching the objectives mentioned above also depends decisively on how chats and notifications from third-party NI-ICS providers are displayed to WhatsApp users and on whether additional hurdles (in any) may have to be taken by third-party users compared to first-party users.

¹⁴ BoR (24) 19, BEREC Opinion on Meta's draft reference offer to facilitate WhatsApp interoperability under Article 7 of the Digital Markets Act, 15.02.2024, see: <https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-opinion-on-metas-draft-reference-offer-to-facilitate-whatsapp-interoperability-under-article-7-of-the-digital-markets-act>

¹⁵ E.g., group chats with different users from different NI-ICS if not all have given consent for all NI-ICS.



BEREC has noted that Meta is currently planning to display chats from users of third-party NI-ICS in a separate inbox for its WhatsApp users (“*In order to manage user expectations, and keep chats with similar levels of encryption, security and functionality together, third-party messages are displayed in a separate but readily accessible inbox tab.*”¹⁶). BEREC notes that this design choice may make it more difficult for WhatsApp users to find messages from users of third-party NI-ICS providers and might reduce the use of the function. BEREC notes that, in general, interoperable communication services such as telephony services, SMS messaging or e-mail services do not differentiate received messages by provider, but provide a unified inbox to users. In contrast, chats in the proposed separate inbox for third-party NI-ICS providers might be overlooked especially by unexperienced WhatsApp users. BEREC notes that there does not seem to exist a technical reason for not using a unified inbox and that it appears to be a pure design choice. This could lead to a negative assessment of interoperability by end-users if interoperable communication is perceived as more difficult for them to use, as two separate inboxes (WhatsApp/third-party NI-ICS providers) must be checked for new chats.

In BEREC’s opinion, the process for obtaining user consent to interoperability from WhatsApp users also plays a decisive role. In particular, the “choice architecture”, which describes the way in which information and choices are presented to end-users, can steer user decision-making, in a subtle but powerful way¹⁷. BEREC is of the opinion that information on the use of interoperable communication options should be presented in a neutral, simple and factual way. Sensible default settings should be used. Inappropriate use of alerts or security warnings in the process of obtaining user consent could be frightening to users and discourage them from interoperable communications. As only third-party NI-ICS providers that meet WhatsApp end-to-end encryption standards can become interoperable according to Article 7(3) DMA, specific security alerts regarding end-to-end encryption or other communication aspects seem to be unnecessary.

BEREC believes that careful design of these interfaces will be necessary for interoperability to be effective. BEREC welcomes the fact that the DMA already provides for regulations in this regard under Article 13 DMA, which prohibits gatekeepers from implementing circumvention measures. More specifically, Article 13(4) DMA provides that gatekeepers “*shall not engage in any behaviour that undermines effective compliance with the obligations of [Article 7] regardless of whether that behaviour [...] consists in the use of behavioural techniques or interface design*”. In combination with Article 8 DMA, the EC has the opportunity to intervene if certain implemented interface design choices might undermine the effective application of the provisions in Article 7 DMA.

¹⁶ Meta’s DMA compliance report, p. 50, see: <https://transparency.meta.com/reports/regulatory-transparency-reports/>

¹⁷ CERRE (2024): Implementing the DMA: substantive and procedural principles, see: <https://cerre.eu/publications/implementing-the-dma-substantive-and-procedural-principles/>



7. User location

According to Annex 1, Point 7.5.1¹⁸ of the reference offer, users of potential interoperability seekers must be located in the European Economic Area (EEA). The provisions in this aspect are the following:

- Any Partner users that Partner enlists or provides access to the interoperable messaging services must be located and remain in the EEA.
- 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).
- Also WhatsApp users need to be located in the EEA¹⁹ in order to make use of the interoperable communication options, i.e. WhatsApp users outside the EEA are not reachable via other third-party NI-ICS and cannot send messages to another NI-ICS.
- 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.

BEREC believes that some elements should be clarified. For instance, it appears of utmost importance to clarify how the distinction between EEA-users and non-EEA users will be made, as well as how the EEA users can make use of the interoperable messaging services when they are temporarily roaming in another country outside the EEA.

Moreover, BEREC would like to highlight that the following specific issues concerning the limitation of interoperability to users located in the EEA are not clear in the reference offer nor in the WhatsApp Developer Documentation Overview:

- **Technical distinction between EEA-users and non-EEA-users:** BEREC notes that in principle many different technical methods are possible with different advantages and disadvantages (see BEREC opinion on the draft WhatsApp reference offer²⁰).

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

¹⁹ See: Definition of WhatsApp Users in the RO under Definition 1.1 (p. 9): "*WhatsApp User*" means an End User of the WhatsApp Application categorised by WhatsApp as an EEA user"

²⁰ BoR (24) 19, BEREC Opinion on Meta's draft reference offer to facilitate WhatsApp interoperability under Article 7 of the Digital Markets Act, 15.02.2024, see: <https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-opinion-on-metas-draft-reference-offer-to-facilitate-whatsapp-interoperability-under-article-7-of-the-digital-markets-act>



- **Handling of cases of roaming.** It is 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 an unjustified service disruption. If it is considered that a period limitation must be set, it should be noted that in the fair use policy set for international telecommunication roaming the prevalence of location of users in the EEA refers to the last four (4) months.²¹ In BEREC's opinion there is not technical nor economic reason to provide a shorter timeframe in the case of NI-ICS.
- **Application also to WhatsApp users:** As also WhatsApp users need to be located in the EEA in order to make use of the interoperable communication options and to be reachable by third-party NI-ICS, this can increase the technical complexity, especially with regard to the realization of group functionalities in the future as there will be two different groups of WhatsApp users (EEA/Non-EEA WhatsApp Users).

Finally, with regard to the geographical limitation of the area of application, BEREC wants to point out that further transparency for users is important during implementation. Users should be actively informed if their location classification (EEA and non-EEA) changes or if they cannot reach certain contacts due to the EEA-restrictions made.

8. Service level agreements and service level objectives

Meta's reference offer includes a section on service levels agreements under Annex 1 – Appendix A. This Annex stipulates that: *“WhatsApp will use commercially reasonable endeavours to provide availability of WhatsApp application for interoperability that is materially the same as the general availability of the WhatsApp application, including in terms of WhatsApp Application uptime and Message latency”*.

The binding nature of these terms is questionable. First, the fact that WhatsApp shall only adopt *“commercially reasonable endeavours”* to provide availability does not seem to be as binding as an obligation of best effort. Second, concerning the quality itself, BEREC acknowledges the reference to the *“general availability”* of the application, notably in terms of uptime and latency and believes that this should be interpreted as a real equivalence of output, meaning that end-users from WhatsApp and the interoperable NI-ICS providers should benefit from the same quality of service.

²¹ 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>.



Indeed, quality of service is key to meet the underlying objectives of Article 7 of the DMA. Degraded quality would result in an effective disadvantage for the interoperability seekers.

BEREC deems that Meta's 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 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. Meta's reference offer does not include any element related to KPIs. While the absence of KPIs in Meta's first compliance report is justified by the timing²², it is important that the next report integrates such metrics. Once defined, they should be included in the reference offer as well.

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:

²² Meta's compliance report was submitted on 6 March, before the entry into application of Article 7, see: https://scontent-mrs2-2.xx.fbcdn.net/v/t39.8562-6/431009250_1846639239090452_3219463139934460359_n.pdf?_nc_cat=107&ccb=1-7&_nc_sid=b8d81d&_nc_ohc=dRHS0paZJNYAb5XHVoZ&_nc_ht=scontent-mrs2-2.xx&oh=00_AfBoKq2GgT2MOZP7eKxdMnNDi2lfo-crobLdm2-oBKDHBg&oe=6626F653

- 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

Although a specific chapter (Chapter 10) in Meta's reference offer and several annexes (annexes 3, 4 and 5) specify the conditions on data security and data protection rules, BEREC considers that some key aspects could be further detailed and clarified.

For instance, it is unclear what role Meta, third parties and end-users play under GDPR, e.g. with regard to contracted data processing (c.f. Art. 28 GDPR and Commission Implementing Decision EU 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework (notified under document C(2023)4745)) or with view to the DMA as the legal basis for data processing. There is only a few references in that regard, namely in Point 2.2.1 of Annex 4, which states that "*each Party shall be individually responsible for ensuring that its Processing of the Personal Data is lawful, fair and transparent in accordance with applicable Data Protection Requirements, including where applicable on the basis that the Data Subject has unambiguously given his or her consent, or on the basis of some other valid ground provided for in applicable Data Protection Legislation*". On that basis, one might infer that the consent of users of NI-ICS willing to interconnect is required by WhatsApp, and also WhatsApp users have to declare their consent.



BEREC also 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 required. 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, as it is referred, in Point 7.4.2. of Annex 1, that “(...) *Partner must not Enlist a Partner User to the WhatsApp Infrastructure without that Partner User voluntarily opting in to receive the Interoperable Messaging Services according to Applicable Laws.*”.

In addition, it is worth highlighting that the reference offer provides information related to the standard contractual clauses for the transfer of personal data to third countries, as presented in the Appendix to Annex 5 of the reference offer. In this regard, one might note that it is referred that the transfers involve sensitive data, however the restrictions and safeguards that should be considered in the context of that sensitive data transferred are presented by reference to Annex 3 (security requirements), which does not add much information on that matter. Without prejudice to the aforementioned, some safeguards are referred in Point 2.7 of Annex 5 of the reference offer, although not specific to the handling of transferred sensitive data. Even so, BEREC notes that further details of the transfers could be provided in line with the Commission Implementing Decision (EU) 2021/914 of 4 June 2021.

11. Security requirements

WhatsApp allows two options with regard to the use of encryption software: i) using the “Sublicensed 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 Sublicensed Encryption Software”.²³

BEREC welcomes Meta's implementation of providing sublicenses 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.

²³ WhatsApp Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 33.



Furthermore, BEREC welcomes the explicit references to the EEECC, NIS 2, e-Privacy directive and GDPR when defining a “Data / Security Incident”. However, notifications on incidents seem to only be an obligation by the interoperability seeker to inform WhatsApp, not vice versa. 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 seekers to assess incidents and manage service continuity.

12. Rules on dynamic adjustments

With regard to adjustments and changes of the interoperability conditions (amendments of the WhatsApp Developer Documentation Overview), BEREC considers that there should be a **sufficient notice period, Partners should be notified by Meta with reasonable advance notice and by one-to-one communication about upcoming changes** (e.g. not only posting them on the official website/standard developers’ channels, but also via a dedicated email). This would be an advisable procedure also in urgent cases (e.g. when security and integrity issues arise). Clarifications at which conditions WhatsApp may bring modifications to its services, which impact interoperability could help making updates manageable for any involved party.

The above suggestion is not considered in Meta’s reference offer, Annex 2.2, according to which the following provision applies²⁴: WhatsApp can amend the WhatsApp Developer Documentation²⁵ at any time through WhatsApp’s standard developer channels”. Interoperability Partners have a three (3) months deadline to adopt the latest supported version; in case of failure by Partners to adopt the new version, WhatsApp reserves the right to suspend interoperability until adoption.

Annex 2.3 adds the option to connect via proxy servers and provides scope for discussion on the technical “*additional steps*” (if any) to implement such a solution. Apart from reference to Point 7.6 of Annex 1, further details on the way to face critical issues, which may arise alongside the implementation of proxies are not addressed. Likewise, no details are spelt out about the way in which proxies may affect the transfer and processing of end-users’ personal data, although some impact about such data is factored in.

Overall, BEREC notes that, concerning updates to the WhatsApp Developer Documentation Overview and discussions for proxies’ operational roll out, WhatsApp does not specify which guarantees, apart from ex post call for dispute resolution, interoperability seekers may enjoy in case of disagreement on one side and which support in case of technical difficulties on the other.

²⁴ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 32.

²⁵ See: <https://developers.facebook.com/m/messaging-interoperability/>



Furthermore, BEREC recommends that either concerning unilateral changes to the WhatsApp Developer Documentation Overview or with regard to issues related to the set up and operation of proxies, given their systemic impact on interoperability, the EC, BEREC and the interoperability beneficiaries should be informed in advance, especially if changes relate to technical specifications and protocols.

13. Suspension and termination

The possibility for the gatekeeper to **suspend interoperability should be exclusively limited to statutory exceptions allowed for in Article 7 DMA.**

The cases upon which Meta has the right to suspend interoperability, enlisted in Point 5 of the reference offer²⁶, seem too broad and may allow an unbounded discretionary power, especially in points 5(1)(c) suspension for “*operational reasons*”, (e) suspension for “*a material adverse effect on the Services*” and (f) arising from Annex 1 Point 7.5 and 8.3, Annex 2 Point 2, Annex 3 Point 4.8, Annex 4 Point 2.2.3²⁷.

To such an extent, it should be noted that Article 7(9) DMA allows the notified gatekeeper (in this case Meta), to request interoperability seekers for measures to preserve the integrity, security and privacy of its own services, only when such measures are duly justified and strictly necessary. Hence, the DMA provides for given circumstantial exemptions, which should not accrue to an extensive and general safe harbour. This implies that a thorough set of reasons strictly aimed at guaranteeing integrity, security and privacy should be spelt out by the gatekeeper on a case-by-case basis, including reasons for terminating and suspending the interoperability service, when this can occur.

The same reasoning should apply to the section of the “Effect of termination”²⁸, where BEREC notes that the discretionary power of Meta to terminate the agreement and thus the provided services is too discretionary.

In addition, BEREC highlights, that the **clauses of renegotiation and the reasons of termination should also be detailed, transparent, non-discriminatory** and take into consideration the rights of both participating parties. In Meta’s reference offer, Meta seems not to provide sound safeguards and prerogatives to the interoperable NI-ICS providers in case of termination; in addition, Meta reserves various reasons for contract termination in interoperability access without alternatives, which risk to undermine the service itself.

²⁶ Interoperability Agreement between WhatsApp Ireland Limited and Partner, p. 9.

²⁷ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 10-8.

²⁸ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 11 and 12.



Furthermore, there is no reference to the way or the time to communicate to end-users of both parties the wind down of the final service to them (retail level), should the termination be accomplished.

14. Compliance monitoring

Section 18 of the reference offer (“Compliance”²⁹) presents the powers and functions of WhatsApp with regard to monitoring the third-party compliance as well as the security, privacy and integrity of WhatsApp Confidential Information. With due regard to Meta’s entitlement to regular monitoring, it appears that the scope of the right of auditing the access seeker has a very broad remit. More in detail, Meta’s prerogative to “*inspect Partner and Partners’ Parties records, resources, facilities, equipment, electronic data, documents, technical processes, operations and systems*” (referred to as “Relevant Materials”) allows Meta to access a full basket of private assets of Partners who are also its competitors.

Thus, such audit rights may give Meta the possibility to closely monitor potential competitors, which raises issues from a competition standpoint (see analogous case in point under Article 6(2) DMA), although Meta labels data and information collected during such audits as Partner’s confidential information. In addition, the broad scope of the so-called “Relevant Materials” and the pervasiveness of inspecting powers may clash with the system of fundamental rights of the EU legal system, where inspection of private assets is usually only allowed for public bodies. Therefore, such a power of inspection should abide to an evidence-based proportionality test, to prove that it is balanced to and aimed at the effective need to protect serious harms to the security, privacy and integrity of WhatsApp Confidential Information.

15. Rules on dispute resolution between providers

In Meta’s reference offer, at section 20.2, a specific procedure for the cases of technical disputes is set and, for this purpose, a relevant definition of “technical dispute” is introduced at section 20.1. Then the procedure foresees that if the involved parties, after following the steps for resolving this technical dispute do not reach a settlement, they can follow the steps of section 20.3 related to a general dispute. The two parties can also decide that even if a dispute meets the definition of and is characterised as “technical”, the steps detailed under section 20.3 can be directly followed (section 20.2).

In addition, although the escalation and dispute resolution procedure seems adequate in terms of the proposed timeframes, under which Meta engages to find a solution with the third-party NI-ICS providers to restore/ensure effective interoperability, BEREC highlights that no further

²⁹ Interoperability Agreement between WhatsApp Ireland Limited and [Partner], p. 17.



solution is provided for in case an agreement between the parties cannot be found. In this case, a referral to an independent body for dispute settlement could be foreseen as a last resort before the judicial review.

As regards the transparency of the procedure, BEREC notes that although in the case of reaching a settlement, a provision for writing down a binding agreement is foreseen, it should be clearly stated how this is applied and communicated **to all other market players with the appropriate notice period** (see Rules on dynamic adjustments, Chapter 12). 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 supports

Part 6 of WhatsApp Developer Documentation Overview clarifies that partners will have access to contact points for ongoing communication and support post-rollout between 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*”. 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.

