EDPS Formal comments on the draft Commission Implementing Regulation (EU) laying down rules for the application of Regulation (EU) No 910/2014 of the European Parliament and of the Council as regards protocols and interfaces to be supported by the European Digital Identity Wallets

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('EUDPR')[1], and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 13 August 2024, the European Commission consulted the EDPS on the draft Commission Implementing Regulation (EU) laying down rules for the application of Regulation (EU) No 910/2014 of the European Parliament and of the Council as regards protocols and interfaces to be supported by the European Digital Identity Wallets ('the draft Implementing Regulation').

2. The draft Implementing Regulation is accompanied by an annex[2].

3. The objective of the draft Implementing Regulation is to lay down rules on the interfaces and protocols of the wallet solutions[3].

4. The draft Implementing Regulation is adopted pursuant to Article 5a(23) of Regulation (EU) No 910/2014[4], as amended by Regulation (EU) 2024/1183 amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework ('the EDIW Regulation')[5].

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[1] OJ L 295, 21.11.2018, p. 39.
[2] The draft Implementing Regulation is accompanied by an annex specifying the standard referred to in Article 5(1) and (2).
[3] Article 1 of the draft Implementing Regulation.
[4] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, 28.8.2014, p. 73–114.
[5] Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework, OJ L, 2024/1183, 30.4.2024.

5. The EDPS previously issued formal comments on the proposal for the EDIW Regulation[6]. As stated in the EDPS formal comments[7], the envisaged technical implementation will ultimately determine whether all necessary data protection safeguards have been integrated in the EDIW Regulation or not. Indeed, the EDPS highlights that the technical architecture of the European Digital Identity Wallet cannot be fully assessed until all the relevant Implementing acts aiming at laying down technical specifications and reference standards are finalised.

6. The EDPS further highlights that different aspects covered by the Implementing Regulations interact with and influence each other. For instance, aspects related to the core functionalities are related to the aspects concerning the interfaces of the European Digital Identity Wallet. The EDPS is concerned that the complexity of the overall architecture, combined with a multiplicity of Implementing acts, make it impossible to fully assess the impact at this stage.

7. These formal comments therefore do not preclude any additional comments by the EDPS in the future, in particular if further issues are identified or new information becomes available, for example as a result of the adoption of other related Implementing or delegated acts[8].

8. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR.

9. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR and are limited to the provisions of the draft Implementing Regulation that are relevant from a data protection perspective.

2. Comments

2.1. General comments

10. Recital (1) of the draft Implementing Regulation recalls that the European Digital Identity Wallets ('wallets') aim at facilitating access to services across Member States, for natural and legal persons, while ensuring the protection of personal data and privacy. For the sake of completeness, the EDPS recommends adding a recital

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[6] EDPS Formal comments on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, issued on 28 July 2021.
[7] EDPS Formal comments on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, page 2.
[8] In case of other Implementing or delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

explicitly recalling the applicability of the EU data protection legal framework when processing personal data within the scope of the draft Implementing Regulation[9].

11. The EDPS notes the absence of a reference to this consultation in a recital of the draft Implementing Regulation. Therefore, the EDPS recommends inserting such a reference in a recital of the draft Implementing Regulation.

2.1.1. The EDIW Regulation and data protection by design and by default

12. The EDPS welcomes that the EDIW Regulation contains provisions[10] enabling the implementation of the wallet in accordance with the principle of data protection by design and by default[11]. The draft Implementing Regulation, in turn, should also foster the implementation of this principle, taking into account in particular the state of the art of technology.

13. In the following paragraphs, the EDPS recalls provisions of the EDIW Regulation that are important under a privacy and data protection viewpoint, having regard in particular to the principle of data protection by design and by default.

14. Article 5 of the EDIW Regulation provides that "*[w]ithout prejudice to specific rules of Union or national law requiring users to identify themselves or to the legal effect given to pseudonyms under national law, the use of pseudonyms that are chosen by the user shall not be prohibited*"[12]. Article 5a(4)(b) of the EDIW Regulation further specifies that wallets must enable the users to generate pseudonyms and store them encrypted and locally within the wallet, in a manner that is user-friendly, transparent, and traceable by the user. This means that users should be able to use the wallet in such a way that a relying party can, when this is necessary, have visibility on multiple transactions carried out by a specific user without having access to the legal identity of the user.

15. Article 5a(4)(a) of the EDIW Regulation provides that the wallet must ensure that selective disclosure of data to relying parties is possible.

16. Article 5a(4) and (5) of the EDIW Regulation establish in particular the requirements for the security and integrity of the wallet. The latter needs to be uniquely and securely linked to a user, whose personal identification data and attributes must not be at risk of being transferred to a wallet belonging to another user.

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[9] The EDPS notes that the accompanying Annex outlines the technical specifications for person identification data to be issued by providers of person identification data[9]. This person identification data must include certain mandatory attributes which constitute personal data: family name; given name; birth date; family name at birth; given name at birth; birth place; sex; nationality; issuance date of person identification data. Additionally, the person identification data may include optional attributes, which also constitute personal data, among which: age in years; birth country; resident address; personal administrative number; portrait (facial image of the wallet user) (Annex of the draft Implementing Regulation, Tables 1 and 2).

[10] Notably, under Article 5; Article 5a(4), letter (a); Article 5a(14); Article 5a(16), letter (a) and (b) of the EDIW Regulation.

[11] Article 25 of Regulation (EU) 2016/679 ('the GDPR').

[12] Article 5b(9) of the EDIW Regulation further provides that relying parties shall not refuse the use of pseudonyms, where the identification of the user is not required by Union or national law.

17. The EDIW Regulation provides in Article 5a(14) that the users shall have full control of the use and of the data in their wallet.

18. Article 5a(14) of the EDIW Regulation provides that the provider of the wallet must neither collect information about the use of the wallet which is not necessary for the provision of wallet services, nor combine person identification data or any other personal data stored or relating to the use of the wallet with personal data from any other services offered by that provider or from third-party services which are not necessary for the provision of wallet services, unless the user has expressly requested otherwise.

19. Article 5a(16)(a) of the EDIW Regulation provides that the technical framework of the European Digital Identity Wallet must not allow "*providers of electronic attestations of attributes or any other party, after the issuance of the attestation of attributes, to obtain data that allows transactions or user behaviour to be tracked, linked or correlated, or knowledge of transactions or user behaviour to be otherwise obtained, unless explicitly authorised by the user*". Although the EDIW Regulation does not expressly mention identity providers, the EDPS considers that the same limitation would also extend to identity providers (as "any other party").

20. Article 5a(16)(b) of the EDIW Regulation requires that the technical framework of the European Digital Identity Wallet "*enable[s] privacy preserving techniques which ensure unlinkability, where the attestation of attributes does not require the identification of the user.*" This unlinkability should prevent the identification of a user when the user needs to present some of their attributes to relying parties in the context of a transaction and identification is not necessary (e.g. to be authorised to the purchase of a product or service for adults only). The EDPS notes that the unlinkability should also apply:

    - among different transactions of the same user against the same relying party (when this is not necessary for the use-case);

    - between data held by the provider of personal identification data and attestation of attributes, on the one hand, and data held by the parties relying on those attributes, on the other hand.

21. Article 5b(3) of the EDIW Regulation provides that relying parties must not request users to provide any data other than indicated in Article 5b(2)(c) (i.e. the indication of the data to be requested by the relying party from users included in the registration of the relying party with the Member State where it is established).

2.1.2. The draft Implementing Regulation and data protection by design and by default

22. The EDPS considers that, in order to implement data protection by design and by default, the technical framework of the European Digital Identity Wallet should make reference to available 'state of the art' privacy-enhancing techniques (PETs) as

mandatory measures. The EDPS recommends that the draft Implementing Regulation refers to the use of PETs and include specifications on when (for which specific aspects) and how these PETs must be implemented.

2.2. Specific comments

23. The draft Implementing Regulation provides that wallet providers[13] must ensure that wallet units support protocols and interfaces that enable the communication of data erasure requests pursuant to Article 17 GDPR to wallet relying parties in accordance with Article 6[14]. This is an important and welcome specification.

24. The EDPS welcomes that, among the required functionalities, wallet providers must ensure the reporting [by users] of wallet relying parties to data protection authorities in accordance with Article 7 of the draft Implementing Regulation. Wallet providers should ensure that wallet solutions provide mechanisms for the easy reporting by users of a relying party to the competent national data protection authority, where an allegedly unlawful or suspicious request for data is made. It should be possible in particular for the user to check if the relying party requests the user to provide any data other that indicated pursuant to Article 5b(2)(c) of the EDIW Regulation, thus in breach of Article 5b(3) of the EDIW Regulation.

25. The draft Implementing Regulation provides a tool for users to report abuses by relying parties[15]. This reporting functionality needs to be developed by wallet providers. For the implementation of this functionality, there is a need for a user interface mechanism, which would allow the user to submit the reporting (notification) of wallet relying parties to the competent national data protection authority. The wallet should also log all these actions.

26. Having regard to the possibility to submit reports and claims in a machine-readable format[16], the EDPS recommends that the draft Implementing act provides for the development of a standard form, to be defined in close cooperation with the European Data Protection Board. Such standard form should include claims related to excessive data requests by a relying party (e.g., a relying party requesting data not in line with the registered intended use of the wallet by the relying party or a relying party requesting an excessive amount of data in relation to the purposes pursued).

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[13] According to Article 2(4) of the draft Implementing Regulation, 'wallet provider' means a natural or legal person who provides wallet solutions.

[14] Article 3(1)(c) and Article 6 of the draft Implementing Regulation.

[15] Article 3(1)(d) of the draft Implementing Regulation. As noted in the EDPS Formal comments on the draft Commission Implementing Regulation (EU) laying down rules for the application of Regulation (EU) No 910/2014 of the European Parliament and of the Council, as regards the integrity and core functionalities of European Digital Identity Wallets, the EDPS also recommends to consider the addition of a functionality that would ensure automated detection and blocking of excessive access requests in the future.

[16] Article 7(3) of the draft Implementing Regulation.

27. The EDPS recommends that the draft Implementing Regulation provides that wallet units should support standardised protocols enabling users to receive from relying parties the information to which they are entitled (as data subjects) under Article 12, 13 and 14 GDPR when relying parties request access to personal identification data or attributes.

28. The EDPS welcomes Article 6 of the draft Implementing Regulation, which provides for wallet functionalities to manage the communication of requests of erasure of personal data to relying parties. However, the EDPS recommends integrating this functionality with:
    ◦ a functionality to record the result of the erasure request; and
    ◦ a functionality to request erasure of the personal data provided through the wallet units to multiple relying parties at the same time.

Brussels,