

Why the acceptance of the EU Digital Identity Wallet for SCA will be mandatory under eIDAS2

Comments from a legal perspective

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Context

[1] In this paper, we address the question of what obligation the upcoming eIDAS2 contains for European payment service providers to accept the EU Digital Identity Wallet (hereinafter: "EUDIW"). Many consider this to be unclear (see 7 ff.) Without clarification (see 39) investment decisions by the European banking industry would have to be made under uncertainty.

[2] On November 8th 2023, the European Parliament and the Council concluded the trilogue negotiations on the eIDAS2 Regulation.² Various socially relevant aspects remain controversial.³ Irrespective of this, the Federal Ministry of the Interior announced the German version of the EUDIW for the first quarter of 2027 at the Smart Country Convention on the same day.

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² https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5651.

³ *Heeger*, Tagesspiegel Background to eIDAS Trilogue, 7 November 2023; on the abolished Unique Identifiers see: *Schroers*: A Unique Identification Number for Every European Citizen: The Proposal for a European Digital Identity Regulation and What it Entails, *VerfBlog*, 2023/2/24, <https://verfassungsblog.de/digital-id-eu/>, DOI: 10.17176/20230224-185228-0; also: *Breyer*, European Digital Identity: Permanent personal identification number is off the table!, 30 June 2023; <https://www.patrick-breyer.de/en/european-digital-identity-permanent-personal-identification-number-is-off-the-table/>; on QWACS and others, see: Joint statement of scientists and NGOs on the EU's proposed eIDAS reform as amended on 2 November 2023, available at: <https://nce.mpi-sp.org/index.php/s/cG88cptFdaDNyRr>.

The EU Commission's Q&A on eIDAS2 states:

"What can users do with the new EU Digital Identity Wallet?"

"Users will be able to use it to authenticate digitally when logging into both public and private online services across the EU, or authorise online transactions, in particular where strong user authentication is required. Examples of these could be accessing a bank account, initiating a payment (...)"⁴

The EU Commission also states in its press release that "(...) the Wallet will allow users to open bank accounts, make payments (...)".⁵

[3] For parts of the European banking industry, however, this is not so clear. They argue that the text of the regulation is unclear, making investment decisions considerably more difficult. One day before the end of the negotiations, the European banking associations contacted the Parliament and the Commission - *without success* - in order to obtain clarification in the text of the regulation.⁶

[4] The banking associations argued that it is not clear from the text of the eIDAS2 regulation whether payment service providers are obliged to accept the EUDIW for the purpose of strong customer authentication (hereinafter: "SCA") for payments and other SCA-relevant cases.

[5] This uncertainty could become a problem for the legislator's plans. This is because its goal, the comprehensive market penetration of the EUDIW in Europe, is much more difficult to achieve without banks according to experience already gained in Scandinavia with digital identities.⁷

Summary

[6] In its current version, the text of the regulation contains many indications that payment service providers should be obliged to accept the EUDIW for the purpose of SCA for payments and Online-Banking Logins. However, this results not only from the eIDAS2, but also from the PSR draft and the draft regulation on the digital euro. A clarification of eIDAS2 would eliminate uncertainty. Depending on

⁴ https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_2664.

⁵ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5651.

⁶ <https://www.ebf.eu/ebf-media-centre/ecsas-call-for-clarity-on-the-application-of-sca-obligations-to-payments-under-eidas-2-0/>.

⁷ Lage der Nation podcast, episode 355 from 2 November 2023, from minute 39.

what the legislator is aiming for, the deletion of two words is sufficient (see 40 and 41 below).

Unclear: What is "strong user authentication for online identification"?

[7] The final version of the eIDAS2 regulation text has not yet been published. The current version of the text on which the Provisional Agreement of November 8th 2023 (hereinafter: "eIDAS2-PA") is based, states under the heading "Cross-border reliance on European Digital Identity Wallets"⁸ in Art. 6 db eIDAS2-PA:

"2. where private relying parties providing services, with the exception of microenterprises and small enterprises as defined in Commission Recommendation 2003/361/EC, are required by national or Union law to use strong user authentication for online identification or where strong user authentication for online identification is required by contractual obligation, including in the areas of transport, energy, banking, financial services, social security, health, drinking water, postal services, digital infrastructure, education or telecommunications, private relying parties shall, no later than 36 months after the entry into force of the implementing acts referred to in [Article 6a] paragraph 11 and Article 6c(4)] and strictly upon voluntary request of the user, also accept the use of European Digital Identity Wallets provided in accordance with this Regulation." (underlines added)

[8] Firstly, the location of the regulation in the section "Cross-border reliance on European Digital Identity Wallets" does not restrict the obligation to accept the EUDIW to cross-border transactions. The text of the regulation does not contain any elements that would support this. It would - in practice - also be the same wallet that people would use to carry out transactions within and between Member States.

[9] Payment service providers that are "private relying parties" shall accept the EUDIW if they are obliged to provide "*strong user authentication for online identification*" in accordance with European or national regulations.

⁸ Provisional Agreement of November 8th 2023: <https://www.europarl.europa.eu/committees/en/european-digital-identity-provisional-ag/product-details/20231116CAN72103>.

[10] Payment service providers are *private relying parties* because they trust the identity-related information. - But are they also obliged to provide "*strong user authentication for online identification*"?

"Strong user authentication" corresponds to "strong customer authentication"

[11] From the perspective of payment service providers, it is therefore initially necessary to clarify what is meant by "strong user authentication". According to Art. 97 (1) PSD2, payment service providers are not obliged to provide strong *user authentication*, but rather strong *customer authentication*. This will also be the case in the future PSR (Art. 85 para. 1 PSR draft).

[12] However, the definition of "strong user authentication" in the eIDAS2-PA essentially corresponds to the definition of "strong customer authentication" in the PSD2 or, in future, the PSR (Art. 3 lit. i (50) eIDAS2-PA; Art. 4 (30) PSD2 or, in future, Art. 3 No. 35 PSR draft). Both definitions are based on the fact that at least two elements or factors out of the categories knowledge, possession and inherence are used in such a way that the breach of one does not compromise the reliability of the others. It can therefore be assumed that the eIDAS2 legislator meant comparable processes.

[13] This is also supported by the fact that the term *user* does not require a contractual relationship and is therefore broader than the term *customer*, i.e. the latter is also meant.

[14] The expansion of the scope from customer to user is also necessary because eIDAS2 is also intended to support the digitalisation of the administration, in which there are usually no contractual relationships between citizens and the state.

Does "for online identification" have a specific meaning?

[15] However, what is to be understood by the term "for online identification", which the legislator adds ("*strong user authentication for online identification*"), is open to interpretation. Three possibilities are recognizable:

- [16] Narrow understanding: By "strong user authentication for online identification", the legislator could mean that payment service providers should only be obliged to use the EUDIW if they use an SCA merely to identify the person.

Consequence: The obligation to accept the EUDIW would then be limited to SCA transactions that serve the purpose of identification - e.g. identification in accordance with money laundering regulations. The obligation to accept the EUDIW would thus be limited to a core function of the EUDIW. According to this understanding, there would be no obligation to accept the EUDIW for the use of SCA for payments or online banking logins.

- [17] Hybrid understanding: By "strong user authentication for online identification", the legislator could also mean that payment service providers should be obliged to accept the EUDIW in cases where they are obliged to use SCA and could want to limit the obligation to the part of the SCA that concerns the identification of the person.

Consequence: The EUDIW would then have to be accepted for the identification component of an SCA when authorizing a payment or logging into online banking and yet another instrument would have to be used for the other components.

- [18] Broad understanding: By "strong user authentication for online identification", the legislator could mean that payment service providers should be obliged to accept the EUDIW in cases in which they are obliged to accept SCA - without wanting to limit the obligation to accept the EUDIW to a certain part of the SCA (for the technical feasibility of the entire SCA with the EUDIW, see below 42).

Consequence: The EUDIW would then have to be accepted for the full SCA when initiating a payment or logging in into online banking.

Narrow understanding is hardly an option

[19] The fact that there is no isolated "strong user authentication for online identification" argues against a narrow understanding. The reasons for which SCA must be carried out are specified by the legislator in Art. 97 (1) PSD2 (or Art. 85 (1) PSR). Mere identification is not one of them. If the legislator only wanted to include payment service providers that use SCA for identification, nobody would be obliged as a result. It is true that authentication is always an identifying element of SCA.⁹ However, identification is not an end in itself, but is required in connection with a further process, such as consent to a payment (authorisation) or login.¹⁰ The "pure" identification, e.g. for reasons of anti money laundering law (AML), is not based on the requirements for an SCA, but on those of AML laws for

⁹ In detail: Casper/Terlau/Zahrte, 3rd ed. 2023, ZAG § 55 marginal no. 2, 3.

¹⁰ On the future legal situation: Art. 3 No. 34 PSR draft. Identical to Art. 4 (29) PSD2

the identification of a person, so that no practical application would be conceivable with a narrow understanding.

Hybrid understanding would have been made clearer

[20] The grammar of the phrase "strong user authentication for online identification" argues against a hybrid understanding. According to the pure understanding of the text, the sentence refers to an SCA for identification. However, there is no identification that has an SCA component (see above). Rather, there are only SCA processes that have an identification component. It can be assumed that the legislator would have made it clearer if he had only meant the identifying component of the SCA.

Recital 31 supports a broad understanding

[21] The recitals speak in favour of a broad understanding.¹¹ Recital 31 of the Provisional Agreement of November 8th 2023 states:

"Secure electronic identification and the provision of attestation of attributes should offer additional flexibility and solutions for the financial services sector to allow identification of customers and the exchange of specific attributes necessary to comply with, for example, customer due diligence requirements under the Anti Money Laundering Regulation, [reference to be added after the adoption of the proposal], with suitability requirements stemming from investor protection legislation, or to support the fulfilment of strong customer authentication requirements for online identification for the purpose of account login and initiation of transactions in the field of payment services." Underlines added.

[22] Recital 31 supports a broad understanding of the obligation to accept the EUDIW for both identification and the SCA purposes login and transaction release.

[23] This is because the legislator fleshes out the criterion "for online identification" by citing the examples of "account login" and "transactions" as the purpose of the transactions.

[24] In addition, he lists "customer due diligence" and "the fulfilment of strong customer authentication requirements for online identification for the purpose of account login and initiation of transactions" in equal order. This would not be conclusive if it were based on the understanding that SCA "for online identification" only refers to identification processes. This is because "customer

¹¹ Provisional Agreement of November 8th 2023:
<https://www.europarl.europa.eu/committees/en/european-digital-identity-provisional-ag/product-details/20231116CAN72103>.

due diligence" refers to identification under money laundering law, meaning that the legislator would have listed the same thing twice.

Recital 28 supports a broad understanding

[25] EC 28 of eIDAS-PA essentially repeats the wording of Art. 6 db para. 2 , but places it in a concrete context in advance:

"The wide availability and usability of EDIWs should rely on their acceptance and trust by both private individuals and private service providers. Therefore, private relying parties providing services such as in the areas of transport, energy, banking and financial services, social security, health, drinking water, postal services, digital infrastructure, telecommunications or education should accept the use of EDIWs for the provision of services where strong user authentication for online identification is required by Union or national law or by contractual obligation." (underlines added)

[26] It would be absurd if the processing of payments, by far the most frequently used service in the financial sector, were not included. Payments have a particular potential to make the EUDIW part of the daily lives of European citizens.

Broad understanding fulfils the methodological requirements of the ECJ to consult the recitals

[27] A broad understanding of the obligation to accept the EUDIW based on the recitals must fulfil the methodological requirements of the ECJ for the use of recitals for interpretation.

[28] Recitals have no legally binding effect. The ECJ stated¹² that it

"...should be borne in mind that the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording" (underlines added).

[29] Nevertheless, the recitals can be used to identify the actual provisions of a legal act.¹³

[30] It must therefore be asked whether a broad understanding of the term "online identification" on the basis of the recital represents a (still permissible)

¹² ECJ, judgement of 19 June 2014, case C 345/13, ECLI:EU:C:2014:2013 - Karen Millen Fashions, para. 31; also: ECJ, judgement of 13 September 2018, case C-287/17, ECLI:EU:2018:707 (Ceska pojistovna a.s./WCZ, spol. S r. o., para. 33.

¹³ Wegener, in: Calliess/Ruffert, TFEU/EUV, 4th ed. 2011, Art. 19 TEU, para. 15.

determination of the actual provision of Article 6db, or whether such an understanding already constitutes an (impermissible) derogation or even an obvious contradiction ("clearly contrary").

[31] An obvious contradiction can be denied, because Art. 6 db eIDAS-PA does not exclude an obligation to accept the wallet for purposes beyond identification, but merely formulates it ambiguously.

[32] However, it is difficult to answer whether a broad understanding of the obligation to accept the EUDIW constitutes an impermissible derogation from Art. 6 db eIDAS-PA in the sense of ECJ case law, because Art. 6 db PA is not unambiguous and identification is an essential aspect of the SCA. However, the broad understanding is also supported by two systematic arguments, so that the broad understanding should not constitute a deviation from Art. 6 db eIDAS-PA.

Recital 111 of the draft PSR supports a broad understanding

[33] To date, the European legislator has not specified the concrete means by which the SCA should be carried out. Instead, the PSD2 (Art. 97 (1)) and, in future, the PSR (Art. 85 (1)) only specify the cases in which an SCA must be carried out. Which requirements an SCA must fulfil and when it can be dispensed with: this is where legislators and supervisors work together. Naming specific means that can be used for SCA would be new.

[34] However, the draft PSR provides arguments in favour of the legislator now wanting to go this far.¹⁴ Recital 111 of the draft PSR specifically states that the EUDIWs enable cross-border identification and authentication:

"European Digital Identity Wallets implemented under Regulation (EU) No 910/201452 of the European Parliament and of the Council, as amended by Regulation [XXX], are electronic identification means that offer identification and authentication tools for accessing financial services across borders, including payment services. The introduction of the European Digital Identity Wallet would further facilitate crossborder digital identification and authentication for secure digital payments and facilitate the development of a pan-European digital payments landscape." (underlines added)

¹⁴ Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010, COM(2023) 367 final.

Clear positioning of the EU Commission in favour of a broad understanding in the digital euro proposal

[35] In the Explanatory Memorandum¹⁵ on its regulatory proposal for the establishment of a digital euro, the EU Commission also clearly states that it has a broad understanding of the obligation to accept the EUDIW. There¹⁶ it states,

"The EU-wide interoperable European Digital Identity Wallet allows users, on a voluntary basis, to on-board and perform strong customer authentication when making payments, as required by Article 97 of the PSD2. The same functionalities should be offered to digital euro users."

[36] According to Art. 97 Para. 1 PSD2, it is precisely the payment authorisation and login that depend on an SCA. In the memorandum, the EU Commission also only refers to the *user*, who should have the option of selecting the EUDIW. It thus presupposes the possibility of selection and with it the technical provision by the payment service provider.

[37] According to the draft regulation, payments with the digital euro should also be authorised via the EUDIW¹⁷ :

"Payment service providers should also accept the use of European Digital Identity Wallets if the payer wishes to use the wallet for payment authorisation of digital euro payment transactions."

Result

[38] In its current version, the text of the regulation contains many indications that payment service providers should be obliged to accept the EUDIW for the purpose of SCA for payments. This results not only from the eIDAS2-PA, but also from the PSR draft and the draft regulation on the digital euro. A clarification of eIDAS2 would eliminate uncertainty. Depending on what the legislator is aiming for, the deletion of two words is sufficient (see 39 below).

Possible Clarification

¹⁵ Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, COM(2023) 369 final.

¹⁶ Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, COM(2023) 369 final, p.5.

¹⁷ We have not investigated in detail whether the legislator means by "authorised" the authorisation in the sense of the consent of the paying person to execute the payment transaction or the authentication. Both are relevant for the payment and can coincide. For the distinction: Casper/Terlau/Zahrte, 3rd ed. 2023, ZAG Section 55 marginal no. 2, 3.

[39] Although there are good reasons to understand that the legislative drafts contain or are based on a broad obligation to accept the EUDIW, there is a need for clarification - both if the legislator actually wanted to regulate a broad obligation to accept the EUDIW and if it actually had the opposite in mind.

- [40] Legislator wanted to regulate a broad obligation to accept the EUDIW: In this case, it would be the obvious choice to delete the narrowing addition "for online identification".
- [41] Legislator did not want to regulate a broad obligation to accept the EUDIW: In this case, it would make sense to include a definition in the text of the regulation that would indicate what is meant by "strong user authentication for online identification".

Technical aspects

[42] The possible obligation of payment service providers to accept the EUDIW for SCA in accordance with Art. 6 db eIDAS2-PA coincides with the EU Commission's considerations to tighten liability for authorised fraudulent payment transactions (Art. 59 para. 1 PSR draft). If the EU Commission uses the IT architecture of the EUDIW to ensure that SCA increases security with the EUDIW, this may trigger a de facto incentive for payment service providers to accept the EUDIW. From a technical point of view, it would certainly be possible to handle the entire SCA with the EUDIW. This has already been demonstrated by Digitallabor technicians with prototypes.

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