Council of the European Union

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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	12 January 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 16 final ANNEX
Subject:	ANNEX to the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the International Civil Aviation Organization as regards Amendment 28 to Annex 9 Section D to the Convention on International Civil Aviation

Delegations will find attached document COM(2021) 16 final ANNEX.

Encl.: COM(2021) 16 final ANNEX

EUROPEAN
COMMISSION

Brussels, 12.1.2021
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ANNEX

ANNEX

to the

Proposal for a Council Decision

on the position to be taken on behalf of the European Union in the International Civil Aviation Organization as regards Amendment 28 to Annex 9 Section D to the Convention on International Civil Aviation

ANNEX

1. POSITION TO BE TAKEN

A) As regards point 6(a) of ICAO State Letter EC 6/3-20/71:

The position to be taken on the Union's behalf in reply to the State Letter issued by the International Civil Aviation Organization on 17 July 2020 is that no disapproval should be registered on Amendment 28 of Annex 9, Chapter 9, Section D to the Chicago Convention.

B) As regards point 6(b) of ICAO State Letter EC 6/3-20/71:

The position to be taken on the Union's behalf in reply to the State Letter issued by the International Civil Aviation Organization on 17 July 2020 is that a difference should be notified in relation to Standard 9.34, Annex 9, Chapter 9, Section D to the Chicago Convention.

2. DETAILED EXPLANATION

The difference to be filed is reflected in the following statement and table:

"The following difference will exist on 28 February 2021 between the regulations and/or practices of [*Member State*] and the provisions of Annex 9, including Amendment 28:"

Provision	Details of the difference	Remarks
Amendment 28 of Annex 9, Section D, Standard 9.34	Category A – 'A Contracting State's requirement is more exacting or exceeds a SARP' Standard 9.34(a) requires Contracting States not to inhibit or prevent the transfer of PNR data to another Contracting State that complies with the SARPs. Standard 9.34(b) takes into account that the Contracting States shall retain the ability to maintain or introduce higher levels of protection in accordance with their domestic legal and administrative framework, and to enter into additional arrangements with other States in order to establish, in particular, more detailed provisions relating to the transfer of PNR data. Under the current European Union legal framework, Member States have to comply with requirements that are in some respects more exacting than those set out in Amendment 28 for the transfers of PNR data originated in the Union to Contracting States that are not Member States of the European Union. In this context, the current language of the Standard 9.34 is, from the perspective of the European Union and its Member States[1], not	[*Member State*] would like to stress the importance of the work made by ICAO and its contracting States in updating the Standards and Recommended Practices on PNR and welcome the adoption of Amendment 28 by the ICAO Council in June 2020. [*Member State*] underlines that the present difference – filed under Category A as per point 2.1 of Attachment E of State Letter 2020 – 71 – is intended to communicate with due transparency to ICAO and its Contracting States how European Union Member States will implement the Standards in accordance with the European Union legal framework. According to the European Union legal framework, the transfer of PNR data originated in the Union from air carriers to the competent authorities of a third country is lawful if certain requirements, which are in some respects more exacting than those set out in Amendment 28, are met. Such requirements stem from the Charter of Fundamental Rights of the European Union, in particular Articles 7, 8 and 52, as interpreted by the Court of Justice of the European Union in Opinion 1/15 on the envisaged PNR agreement with Canada and from Chapter V of

1 Text proposed by Member States of the European Union to the ICAO Council in reply to EC 6/3-20/14, dated 25 February 2020, on the draft amendment:

"9.34: Contracting States shall:
(a) not inhibit or prevent the transfer of PNR data by an aircraft operator or other relevant party, nor sanction, impose penalties or create unreasonable obstacles on aircraft operators or other relevant parties that transfer PNR data to another Contracting State provided that Contracting States' PNR data system is compliant with the Standards contained in Section D, Chapter 9 of Annex 9; ~~and~~ *but*
(b) equally, retain the ability to introduce or maintain higher levels of protection of PNR data, in accordance with their legal and administrative framework, and to enter into additional arrangements with other Contracting States, in particular to: promote collective security; achieve higher levels of protection of PNR data, including on data *transfers* ~~retention~~; or *to* establish more detailed provisions relating to the transfer of PNR data, provided those measures do not *undermine* ~~otherwise conflict with~~ the Standards contained in Section D, Chapter 9 of Annex 9."

	sufficiently clear in legal terms in expressing that the Union Member States are not precluded from imposing those requirements notwithstanding Standard 9.34. For this reason, [*Member State*] considers that the present difference should be notified pursuant to Article 38 of the Chicago Convention in order to allow it to apply legal requirements to PNR data transfers to Contracting States that are not Member States of the European Union, which are in some respects more exacting, without undermining the Standards laid out in Amendment 28. [*Member State*] confirms that in the absence of the possibility of ensuring compliance with such requirements, therefore, transfers by air carriers cannot take place in accordance with Union law.	Regulation (EU) 2016/679.