

AUSTRIA

A. SUBSTANTIVE ASPECTS
I. Definitions
<p>1. In your practice, do you use the term “non-legally binding agreement”? If so, how do you define it?</p> <p><i>Austria reserves the term “agreement” for legally binding texts and regards the expression “non-legally binding agreement” as contradictio in adiecto. Therefore, we do not use the latter expression and will refer in the following answers to “non-legally binding texts”.</i></p>
<p>2. If not, what term do you use instead (eg arrangements) and how do you define it?</p> <p><i>We use the terms “declaration of intent” (Absichtserklärung) and “arrangement” and also the term “memorandum of understanding”, bearing in mind that memoranda can be both non-legally binding or legally binding and that their non-legal or legal nature depends on the terminology used in the relevant texts.</i></p>
<p>3. Do you consider "Memoranda of Understanding" to be legally binding or non-legally binding instruments? Or can they be both?</p> <p><i>See question 2.</i></p>
II. Distinction
<p>4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?</p> <p><i>The distinction between treaties and non-legally binding texts depends on the terminology used (eg “shall” or “will”, “enters into force” or “takes effect”) and whether or not the text contains clauses relating to the formal treaty conclusion procedure. Private law contracts can be identified by the nature of their content, but also by provisions on the applicability of a particular national law and by liability clauses as well as by provisions on the jurisdiction of particular national courts or by dispute settlement clauses referring to the UNCITRAL arbitration rules.</i></p>
<p>5. In your view, is there one (or multiple) essential element(s) typically qualifying an agreement as non-legally binding? If so, which one(s)?</p> <p><i>See question 4. The use of expressions like “will”, “endeavour to” or “intend to” instead of “shall” and “takes effect” instead of “enters into force” reflects the intention of the partners not to be legally bound and therefore indicates non-legally binding texts.</i></p>
<p>6. Do you distinguish between “MoUs” and other types of non-legally binding agreements, such as “joint declarations of intent” or “arrangements”? If so, how?</p> <p><i>In our understanding, these are just various designations for non-legally binding texts that do not imply any legal or political differentiation (apart from the fact that certain memoranda of understanding may be legally binding, which has to be assessed separately, see question 2).</i></p>
<p>7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them?</p> <p><i>Not applicable.</i></p>

8. Do you distinguish between the type of non-legally binding agreement concluded with international organisations or States? Do you have different rules applying to non-legally binding agreements depending on whether the other side is a State or an international organisation?

No.

III. Competence

9. Who, within your State/International Organisation, has the competence to sign a non-legally binding agreement?

Members of central, regional or local governments, according to their substantive competences, or anybody authorised, if only informally, by them, as well as representatives of other authorities or institutions.

10. For States: Are sub-national territorial units like single federal states, provinces, municipalities or public agencies competent to conclude their own non-legally binding agreements?

Yes, see question 9.

For International Organisations: Are bodies/specialized agencies competent to conclude their own non-legally binding agreements (or can they sign non-legally binding agreements on behalf of the entire organisation)?

IV. (Indirect) Legal Effects

11. Do you consider non-legally binding agreements capable of producing (indirect) legal effects, for example as preparatory acts for/in connection with a legally binding instrument or as interpretative guidance for such binding instruments? Would you consider non-legally binding agreements under certain circumstances as a prerequisite of a binding instrument of international law?

In our view, non-legally binding texts may “provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development”, as the International Law Commission (ILC) opined in relation to resolutions of international organisations in its 2018 “Draft conclusions on identification of customary international law”. Of course, this applies only if the general conditions for the identification of customary international law are fulfilled. Non-legally binding texts may be precursors of binding instruments of international law, but we do not see them as necessary prerequisites.

To the extent that non-legally binding texts are closely connected to the elaboration and application of treaties, they may serve as travaux préparatoires or as subsequent “agreements” for the purposes of the interpretation of the relevant treaty, see Article 31(2)(b) and (3)(a) of the Vienna Convention on the Law of Treaties and the ILC’s 2018 “Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties”.

B. PROCEDURAL ASPECTS

V. Choice of Instrument

12. What factors influence or determine your decision whether to opt for a legally binding or non-binding agreement? For instance, do you sign non-legally binding agreements to facilitate the conclusion of a legally binding agreement in the future or do you conclude non-legally binding agreements in situations in which a legally binding agreement cannot be reached with the involved sides?

We see non-legally binding texts as tools that are normally totally independent from the possible future conclusion of binding instruments. They are signed if the substance of the arrangement does not call for a legally binding instrument or if such an instrument would not be convenient for certain signatories, as treaty conclusion procedures may be too time-consuming or too burdensome and inflexible. Thus, non-legally binding texts often ensure a broader participation. Non-legally binding texts may also be preferred if treaties are considered unusual for certain topics or for conclusion by certain organisations.

13. Who, within your State/international organisation, ultimately decides whether to conclude a treaty or a non-legally binding agreement?

Treaties (including other legally binding agreements under international law) may only be concluded by the Republic of Austria or its formally authorised organs as well as by its regions. Treaties and agreements concluded by the Republic or the government in most cases require some initial initiative of the minister for foreign affairs. Non-legally binding texts may be concluded by all the authorities referred to in the answer to question 9.

14. What are the main differences in your internal procedure when concluding a non-legally binding agreement or a binding treaty?

Non-legally binding texts require only a political decision of any of the authorities referred to in the answer to question 9. Often, however, such texts are submitted for a formal assessment, on a voluntary basis, to the international law department of the foreign ministry. Treaties and agreements, on the other hand, require the strict application of the constitutional provisions relating to their conclusion that, unless the conclusion has been delegated to the government or to individual ministers, include the need for parliamentary approval and for ratification by the Federal President. All treaties and agreements are to be published in the Federal Law Gazette, which is not the case for non-legally binding texts.

VI. Formal Assessment¹ of Non-legally Binding Agreements

For States:

15. In your State, is there a mandatory centralised formal assessment of non-legally binding agreements concluded by any government ministry?

No.

16. If so, what Ministry/body performs this formal assessment?

Not applicable.

17. At what time in the process of concluding a non-legally binding agreement is the formal assessment carried out?

The voluntary formal assessment by the legal department of the foreign ministry, see question 14, is usually made well before the intended date of signature but sometimes also at very short notice.

18. If sub-national territorial units/bodies or specialized agencies are competent to conclude non-legally binding agreements (cf. question 9), are such agreements subject to the same formal assessment applicable for agreements of the (federal) government/international organisation?

Such authorities may conclude non-legally binding texts, see question 9, but there is no mandatory formal assessment, see question 15.

¹ In this section, “formal assessment“ refers to the internal procedure for checking the formal criteria of a draft agreement to ensure it is clearly identifiable as non-legally binding.

<p>19. Do you have an internal standard/written guidance for formally assessing non-legally binding agreements, i.e. a law, a directive or internal guidelines?</p> <p><i>There is an informal collection of the most relevant terminology in the international law department of the foreign ministry for use during any voluntary formal assessment.</i></p>
<p>20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?</p> <p><i>Not applicable.</i></p>
<p>21. How do you ensure that non-legally binding agreements are, in fact, submitted for the centralised formal assessment procedure?</p> <p><i>Not applicable.</i></p>
<p>22. Does the responsible ministry/body provide guidance to other (government) departments and agencies on best practices with respect to non-legally binding agreements (eg workshops, information materials on how to properly draft and conclude non-legally binding agreements)?</p> <p><i>The international law department of the foreign ministry suggests drafting improvements and provides informal guidance to all authorities submitting their draft non-legally binding texts to a voluntary formal assessment.</i></p> <p><i>Once a year, a representative of the international law department of the foreign ministry offers a (voluntary) one day seminar on the difference between legally binding and non-legally binding international instruments, including on the different terminology to be used, at the Austrian Federal Academy of Public Administration ("Verwaltungsakademie des Bundes"). On this occasion, information materials, such as a glossary and a list of model standard provisions for use in non-legally binding texts, are shared. The target audience are officials of federal authorities who are tasked with the drafting of such texts.</i></p>
<p><u>For International Organisations:</u></p>
<p>23. If such a process exists, please describe the regular process of formal assessment of non-legally binding agreements within your organisation.</p>
<p>VII. Democratic Review/Parliamentary Participation</p>
<p><u>For States:</u></p>
<p>24. Is your legislature notified or consulted about the conclusion of non-legally binding agreements? If so, does parliament need to be involved for any non-legally binding agreement or are there limitations (eg only for politically significant agreements)? Who determines whether such requirements are fulfilled?</p> <p><i>There is no obligation to notify or consult parliament about the conclusion of non-legally binding texts, but of course the entire activity of the government, including the conclusion of such texts, is subject to parliamentary control (interpellation etc).</i></p>
<p>25. If so, at what stage of the process is the legislature usually involved?</p> <p><i>Not applicable.</i></p>
<p>26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements?</p> <p><i>Yes, although not specifically, but within the general system of parliamentary control, see question 24.</i></p>

<p>27. If legislative participation is provided for, does the legislature have a (legal) remedy if it perceives a violation of its right to be consulted/to participate?</p> <p><i>Not applicable.</i></p>
<p>For <u>International Organisations</u>:</p>
<p>28. In case you have an internal directive/guideline on how to conclude non-legally binding agreements, has this document been approved by the member States/a statutory organ of the organisation?</p>
<p>VIII. Signature and Format</p>
<p>29. Is there a formal procedure to authorise the signature of a non-legally binding agreement?</p> <p><i>No.</i></p>
<p>30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document?</p> <p><i>It is common practice that the signature is on the same document.</i></p>
<p>31. Do you allow for electronic signature of your non-legally binding agreements? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of non-binding agreements instead of the exchange of physical copies?</p> <p><i>Although an electronic signature would be possible, it is never used in practice for non-legally binding texts.</i></p>
<p>32. <u>For States</u>:</p> <p>Do you always require non-legally binding agreements to be set in your own language or do you also accept them exclusively in the partner's language / in English (or any other "neutral" language)?</p> <p><i>Non-legally binding texts may be drafted in any neutral language (preferably in English, if English is not the official language of the other partner). Drafting such texts exclusively in the partner's language would not be acceptable. The same applies to legally binding treaties and agreements.</i></p> <p><u>For International Organisations</u>:</p> <p>What language do you usually require for the text of your non-legally binding agreements?</p>
<p>33. Do you have any formal requirements exclusively for concluding non-legally binding agreements? (eg using a special kind of paper only for non-legally binding agreements)</p> <p><i>No.</i></p>
<p>IX. Registration and Publication</p>
<p>34. Do you have a (digital) register/archive/database for all non-legally binding agreements signed by your country?</p> <p><i>No.</i></p>
<p>35. If so, what entity keeps the non-legally binding agreement after signature?</p> <p><i>The concluding authority, see question 9, and in some cases the Austrian State Archives.</i></p>

<p>36. Do you publish your non-legally binding agreements and are they openly accessible?</p> <p><i>Non-legally binding texts are usually not published or made openly accessible as there is no obligation to do so. However, it is up to the concluding authority/institution whether to make a non-legally binding text openly accessible, e.g. by publishing the text on their homepage.</i></p>
<p>37. Are there certain reasons (confidentiality, security, etc.) why non-legally binding agreements can be withheld from central registration/storage or (if applicable) publication? If so, which ones?</p> <p><i>Not applicable.</i></p>
<p>X. Education/Training</p>
<p>38. How do you disseminate information internally regarding the differences between binding and non-legally binding agreements? For example, are there regular workshops or training sessions with the units drafting non-legally binding agreements? Are there certain standard forms (“Model MoU”), which units can use as a drafting aid?</p> <p><i>See question 22.</i></p>
<p>C. GENERAL OBSERVATIONS ON STATE PRACTICE (AND WAY FORWARD)</p>
<p>39. What, in your view, is the main benefit of using non-legally binding agreements? What is your main concern?</p> <p><i>See question 12.</i></p>
<p>40. In recent years, have you been concluding an increased number of non-binding international agreements? If so, why do you think this is the case?</p> <p><i>No.</i></p>
<p>For International Organisations:</p>
<p>41. How would you describe the main differences between resolutions/declarations adopted by IOs and non-legally binding agreements concluded by IOs from a legal and practical perspective?</p>
<p>42. Do you attribute any law-making effect to non-legally binding agreements? Or do you see them as mere status and administrative arrangements for the purposes of international organisations?</p>