

## BOSNIA AND HERZEGOVINA

<b>A. SUBSTANTIVE ASPECTS</b>
<b>I. Definitions</b>
<p>1. In your practice, do you use the term “non-legally binding agreement”? If so, how do you define it?</p> <p><i>In practice the term “non-legally binding agreements” is common for all non-legally binding agreements that are defined as international agreements in accordance with the Decision on procedure of ministries, government agencies and other institutions with regard to activities and initiation of procedures in the field of international relations which have the aim to establish international cooperation in their relevant field of work (further in the text: Presidency Decision on non-legally binding agreements) and which do not have an international treaty character in accordance with the Law on Conclusion and Implementation Procedure of International Treaties.</i></p>
<p>2. If not, what term do you use instead (e.g. arrangements) and how do you define it?</p> <p><i>The terms “memorandum of understanding”, “protocol on cooperation”, “declaration” etc are also very often used in practice. However, without a clear understanding of their non-legally binding character, that is why we insist to have a more clear term like previously mentioned “non-legally binding agreement”.</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>Memorandum of Understanding can be both, so that due attention should be given to the intention of the parties, as well as other essential elements qualifying an agreement as legally non-binding. See answer to question 5.</i></p>
<b>II. Distinction</b>
<p>4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?</p> <p><i>Treaties are defined in Art. 2(1) lit. a) Vienna Convention on the Law of Treaties (VCLT). The distinction between treaties and non-legally binding agreements relates to the intention expressed in the document, whether it creates legal obligations or the document has merely political character. It is also important to determine the subjects of the treaty or non-legally binding agreement. In practice treaties are usually concluded at government (Council of Ministers) level and non-legally binding agreements at ministries or government agencies level. Accordingly to the abovementioned adequate terminology should be used.</i></p> <p><i>International civil law contracts are contracts between subjects of international law establishing obligations under the domestic civil law of a state (as agreed in the contract), and this differ International civil law contract from treaties, which establish obligations under international law concluded exclusively by subjects of international law. The main distinguishing feature between treaties and international civil law contracts is the legal order in which the agreement is rooted (connected to/applicable).</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>

*In practice, we differentiate between legally binding agreements - treaties and civil law contracts, according to the VCLT and Law on Conclusion and Implementation Procedure of International Treaties, and non-legally binding arrangements based on a comprehensive assessment of the intention, as well as structure and wording of the document.*

*There is not just one element that qualifies an agreement/arrangement as treaty or non-legally binding agreement, the whole document must be assessed entirely with a special focus on the intention, then structure and wording.*

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?

*According to our legal framework there is no difference between the types of non-legally binding agreements, but having in mind the ambiguous nature of MoUs, we assess them with due diligence.*

7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them?

*See answer under 6.*

8. Do you distinguish between the type of non-legally binding agreement concluded with international organizations 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 organization?

*See answer under 6.*

### **III. Competence**

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

*The competence to sign non-legally binding arrangements (as described in answer to question No 1) lies with the Council of Ministers as a whole, as well as with each of the state ministries, government agencies and other institutions of Bosnia and Herzegovina, if they obtain the Bosnia and Herzegovina’s Presidency permission in accordance with the Presidency Decision on non-legally binding agreements.*

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

*No legislative framework is regulating the sub-national territorial units competence in this regard.*

### **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?

*Non-legally binding documents might have indirect legal effects and are usually concluded as previous agreements (such as MOUs on future cooperation) to future international agreements –treaties or interpretative guidance (such as “Working agreements” or “Implementation arrangements”). However, non –legally binding agreements are no legal prerequisite for treaties. Additionally, the intent regarding the interpretative*

*guidance/working agreements etc. must be clear that such document is not - legally binding.*

## **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?

*Law on Conclusion and Implementation Procedure of International Treaties as well as the Presidency Decision on non-legally binding agreements foresee an analysis on the legal basis for conclusion of the document.*

*The draft analysis –basis for conclusion of the **Treaties** contains: constitutional basis, reasons for conclusion of a treaty, draft treaty, opinion of the Ministry of Foreign Affairs on the evaluation of foreign policy reasons for conclusion and harmonization with the treaty law, opinions of other relevant institutions (depending of the field the treaty is covering), financial framework (if applicable), legal framework change (if applicable), need for negotiation and delegation, proposal for temporary application of the treaty (or its part), as well as proposal for the signatory of the treaty.*

*The draft analysis – basis for the conclusion of non-legally binding agreements contains: text of the non-legally binding agreement, reasons for conclusion, explanation why the agreement is not a treaty, financial framework, legal framework change (if applicable), as well as the evaluation –exclusion of the possibility that such agreement would create any legal, financial or other obligation.*

*For both, treaty and non-legally binding agreement, the Ministry of Foreign Affairs is giving its opinion whether the draft documents are in accordance with the treaty law and if they do meet the aim of the foreign policy of Bosnia and Herzegovina.*

*The practice on conclusion of treaties or non-legally binding agreements is different and there is no established trend, but since non-legally binding arrangements are more flexible in their conclusion and handling, more institutions decide to opt for it.*

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

*The responsible ministry or government agency decides on the draft proposal, the government –Council of Ministers confirms the proposal, but in the end the decision is made by the Presidency. However, in practice none of the draft proposals have been changed or rejected by the Council of Ministers or the Presidency, consequently the responsible ministry make the decision.*

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

*The procedure for non-legally binding agreements is shorter and simpler.*

*The main difference is that the Presidency is solely deciding on the non-legally binding agreements without the involvement of the Council of Ministers, nor is parliamentary approval required.*

## VI. Formal Assessment<sup>1</sup> of Non-legally Binding Agreements

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

*Yes, according to Law, the Ministry of Foreign Affairs assesses all international agreements to determine/establish if the international agreement is an international treaty or a non –legally binding agreement.*

*If determined as a non –legally binding agreement the MFA makes sure that there are no legal obligations accidentally entered into it, meaning that the non-legally binding agreement meets its intention and is prepared in accordance with international practice in this field.*

*The Ministry is also assessing the foreign policy reasons.*

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

*Ministry of Foreign Affairs –Department for International Legal Affairs*

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

*The formal assessment of a non-legally binding agreement is carried out at the beginning of the procedure, so that the text or the draft analysis –basis can be adjusted before sending it to the Presidency for approval and permission.*

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?

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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?

*Except the already mentioned legislation (Law on Conclusion and Implementation Procedure of International Treaties as well as the Presidency Decision on International (non-legally binding) agreements), there is no other legislative framework.*

20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?

*The Presidency Decision on non-legally binding agreements is a public document. However, additional awareness activities towards institutions should be undertaken to avoid conclusion of non-legally binding agreements outside of the relevant legal framework.*

21. How do you ensure that non-legally binding agreements are, in fact, submitted for the centralised formal assessment procedure?

*There is no guarantee that all the institutions will apply the Decision.*

*However, the requirement of a formal assessment through the Ministry of Foreign Affairs is also built on cooperation and trust that other ministries and institutions will submit their draft agreements.*

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

23. Does the responsible ministry/body provide guidance to other (government) departments and agencies on best practices with respect to non-legally binding agreements (e.g. workshops, information materials on how to properly draft and conclude non-legally binding agreements)?

*The Ministry of Foreign Affairs is providing guidance, advice and recommendation. Workshops and seminars on treaty law and non –legally binding agreements were organized by the Civil Service Agency and the Ministry of Foreign Affairs staff participated as lecturers. Additionally, a draft guidance is currently in preparation, and a plan of education might be proposed.*

## **VII. Democratic Review/Parliamentary Participation**

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?

*The conclusion of non-legally binding arrangements does not require parliamentary notification, consultation, or approval.*

25. If so, at what stage of the process is the legislature usually involved?

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26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements?

*The Parliamentary Assembly has the right to review/monitor the implementation of the non-legally binding agreements within its competence to review/monitor the work of the government –Council of Ministers and other institutions. Members of the Parliamentary Assembly have the right to put forward questions to the Council of Ministers/competent ministries or institutions, including questions on planned or concluded non-legally binding agreements. However, since there is no legal procedure for non-legally binding agreements towards the Parliamentary Assembly, the topics and scope of parliamentary information lies in the government’s discretion.*

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?

*No legislative participation is provided. See answer under question No 24.*

## **VIII. Signature and Format**

29. Is there a formal procedure to authorise the signature of a non-legally binding agreement? It is necessary that the division inside the Federal Foreign Office responsible for the subject matter issues its specific authorisation of signature. This authorisation does not require specific formalities (particularly no full powers).

*The Presidency Decision on non-legally binding agreements provides the formal procedure necessary for the signature of a non –legally binding agreement. The Presidency of Bosnia and Herzegovina issues the permission of signature of the non –legally binding agreement. Aside from the preparation of the proposed analysis –basis and opinions of the Ministry of Foreign Affairs (and/or other institutions) no specific formalities are required.*

30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document?

*There is no legal framework when it comes to the signatures. Usually, in practice both sides sign one set of the non –legally binding agreement in the original and it becomes effective from the date of signature or last signature (unless a later date is expressly agreed). Subsequently, the originals are each sent to the other side to obtain the missing signatures.*

*Non-legally binding arrangements can also be concluded through exchange of instruments (notes verbales, letters), e.g. arrangements of mutual support.*

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?

*The possibility for electronic signature of non-legally binding arrangements is not regulated and there have not been any precedents for the use of electronic signature for non-legally binding arrangements in practice yet.*

32. 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)?

*Non-legally binding agreements may be signed in any language the sides agree on. If the non-legally binding agreement is signed in English, a translation might be made in one of the official languages –Bosnian, Croatian and Serbian. However, if the other side insists on their own language version, Bosnia and Herzegovina also requires its own copy in the official languages of Bosnia and Herzegovina –Bosnian, Croatian and Serbian. In this case, it is up to the sides whether they choose to also add a third language (most frequently English) as a tool for interpretation.*

33. Do you have any formal requirements exclusively for concluding non-legally binding agreements? (e.g. using a special kind of paper only for non-legally binding agreements)

*No formal requirements.*

## **IX. Registration and Publication**

34. Do you have a (digital) register/archive/database for all non-legally binding agreements signed by your country?

*The Presidency Decision on non-legally binding agreements provides that original signed non-legally binding agreement should be sent to the Ministry of Foreign Affairs for registration and storage.*

35. If so, what entity keeps the non-legally binding agreement after signature?

*Department for International Legal Affairs –Ministry of Foreign Affairs*

36. Do you publish your non-legally binding agreements and are they openly accessible?

*There is no legal framework regulating the publication of the non-legally binding agreements, so it depends on the initiating institution whether to publish or not. In practice, most of the non-legally binding agreements are published at official web-sites of the initiating institution.*

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?

*There is no legal framework addressing the question, but as mentioned in the previous answer the signatories may decide not to publish the non-legally binding agreement due to reasons of confidentiality, security etc.*

#### **X. Education/Training**

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?

*As mentioned in answer to question 23: Workshops and seminars on treaty law and non – legally binding agreements were organized by the Civil Service Agency and the Ministry of Foreign Affairs staff participated as lecturers. The education plan should be revised.*

*Internal guidelines together with a Model Non-binding agreement as well as glossary would be a great tool to avoid misunderstandings and would create more clarity.*

#### **C. GENERAL OBSERVATIONS ON STATE PRACTICE (AND WAY FORWARD)**

39. What, in your view, is the main benefit of using non-legally binding agreements? What is your main concern?

*The main advantage seems to be less formality during drafting and conclusion of non – legally binding agreements, which is easily following the speed of everyday politics.*

*The main concern is that the increased usage of non –legally binding agreement will replace the international treaties and lead towards informality in international relations which can cause legal uncertainty.*

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?

*In recent years, Bosnia and Herzegovina has concluded way more non-legally binding agreements than international treaties. The main reasons for that are that the procedure for non-legally binding agreements is less formal and there is a need for fast reaction to align country politics with EU and other international politics. Unfortunately, the number of registered non-legally binding agreements and registration rules have to be updated/revised.*