COUNCIL OF EUROPE

A. SUBSTANTIVE ASPECTS

I. Definitions

1. In your practice, do you use the term "non-legally binding agreement"? If so, how do you define it?

In its practice the Council of Europe does not use this term to designate a certain category of agreements.

2. If not, what term do you use instead (e.g. arrangements) and how do you define it?

Terms that are used include memoranda of understanding, letters of Intent, co-operation agreements, memoranda of co-operation, exchanges of letters or declarations of intent. These are generic terms which are used for agreements which do not fall into existing categories of agreements.

3. Do you consider "Memoranda of Understanding" to be legally binding or non-legally binding instruments? Or can they be both?

Memoranda of understanding may be legally binding depending on their content (e.g., agreements which extend the jurisdiction of the Administrative Tribunal of the Council of Europe to disputes between other international intergovernmental organisations and their agents, MoUs concluded with states for the purposes of establishing 'Information Offices of the Council of Europe' (IOCEs) or MoUs employed by the Council in the framework of the execution of judgments of the European Court of Human Rights (ECtHR), in particular in those instances where the Council acts as an intermediary for the payment of the sums awarded by the Court as just satisfaction). Others such as letters of intent or declarations of intent are legally non-binding. The distinction between legally binding and non-binding is drawn based on the instruments' content.

II. Distinction

4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?

Treaties are instruments defined as such by the Vienna Convention on the Law of Treaties (Art.2.a). We understand the term "international civil law contract" as referring to a commercial contract with a trans-frontier element. The Council of Europe concludes contracts with private-sector economic operators in France and abroad which are, however, in principle not subject to any national civil law. Both treaties and the afore-mentioned contracts are legally binding as opposed to non-legally binding agreements.

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)?

The absence of any legal obligation would seem to be the only essential feature to qualify an agreement as legally non-binding. This is frequently made explicitly clear in the text of the agreement by a provision excluding any legally binding obligations arising from the agreement. In addition, the language used throughout the agreement (e.g., 'should', 'will' or 'agree to' instead of 'shall'). Furthermore, a provision on dispute resolution is usually added by which the Parties undertake to solve any dispute which may arise due to the interpretation or application of the terms of the agreement amicably.

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?

Please see reply to questions 1-3.

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

The only rule would seem to be Rule 1318 of 20 October 2010 on Guidelines for concluding agreements between the Council of Europe and other international intergovernmental organisations or public international entities that applies to both legally binding and non-binding instruments.

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?

Rule 1318 which was previously mentioned covers both international intergovernmental organisations and public international entities and applies for the conclusion of legally binding or non-binding agreements.

III. Competence

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

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?

    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)?

In the Council of Europe the Secretary General has the competence to conclude non-legally binding agreements on behalf of the organisation, or anyone who has a written delegation by the Secretary General (e.g., Deputy Secretary General, Director Generals, Heads of other Major Administrative Entities). However, as an exception the Council of Europe Development Bank can be pointed out, which is a separate legal entity with its own legal personality. It can follow a different procedure to conclude any kind of agreements.

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 experience we have not seen such examples so far, but we cannot exclude the possibility.

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?

This would largely depend on the other party involved and on the content of the agreement (e.g., when no financial obligations for the Council of Europe are at stake). Sometimes a declaration of intent could be followed by a legally binding agreement. Also, there is a possibility that for some reasons a legally binding agreement cannot be reached, so a legally non-binding Memorandum of Understanding might be concluded instead.

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

- The initiative to draft a Treaty can come from the Committee of Ministers (representing the member States), the Parliamentary Assembly, the Congress of Local and Regional Authorities, a Conference of specialised ministers or a Steering or monitoring Committee. The Committee of Ministers has to approve the elaboration of a treaty and give a mandate to a drafting committee.

- Agreements concluded pursuant to Rule 1318 are initiated by the Secretary General or the other party to the agreement. The Committee of Ministers then decides, save exceptions (see below under 14.) if such an agreement shall be concluded.

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

- *The member States of the Council of Europe can initiate the drafting of a treaty. A drafting committee might be set up. The text of a treaty, when finalised is adopted by the Committee of Ministers. After adoption by the Committee of Ministers the treaty is opened for signatures and ratification by the Council of Europe member States and in some cases non-member States.*
- *When it comes to concluding agreements that fall under Rule 1318, the Committee of Ministers must approve the conclusion of the agreement. The procedure to obtain the Committee of Minister's approval is as follows:*
    1. *The Major Administrative Entity responsible for the field of activity of which the agreement refers prepares the proposal to conclude an agreement.*
    2. *The Secretary General informs the permanent Representations to the Council of Europe of the proposal.*
    3. *The SG contacts the organisation in question to work on a joint proposal.*
    4. *A joint proposal is presented for approval of the Committee of Ministers through its Rapporteur group GR-EXT.*
- *There are, however, exceptions to the requirement of approval by the Committee of Ministers. Agreements which implement or follow up to an existing agreement with an organisation, which are of an otherwise subsidiary nature to an existing agreement or which deal with purely administrative matters within the Secretary General's authority to regulate administrative matters may be concluded by the Secretary General without the ex ante/express approval of the Committee of Ministers, as long as such agreements do not have budgetary implications and do not create legal obligations for the Council of Europe which go further than the*

existing agreements. The Committee of Ministers shall, however, be informed of the conclusion of such agreements.

- *There is no established practice of internal procedures when concluding agreements that fall outside of Rule 1318. The guidelines do not, for instance, apply to agreements concluded by the Partial Agreements or with non-governmental organisations or other similar entities.*

VI. Formal Assessment[1] 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?

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

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

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?

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?

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

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

22. 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)?

For International Organisations:

23. If such a process exists, please describe the regular process of formal assessment of non-legally binding agreements within your organisation.

A formal process is not in place, however, according to established practice the Directorate for Legal Advice and Public International Law and the Directorate for External Relations shall be consulted.

VII. Democratic Review/Parliamentary Participation

For States:

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?

[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.

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

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

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?

For International Organisations:

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?

Rule No. 1318 of 20 October 2010 on Guidelines for concluding agreements between the Council of Europe and other international intergovernmental organisations or public international entities is an internal rule of the Council of Europe. It is signed by the Secretary General but has not been approved by the Committee of Ministers.

VIII. Signature and Format

29. Is there a formal procedure to authorise the signature of a non-legally binding agreement?

There is no formal procedure. If it is not the Secretary General that signs the agreement, it could be the DSG, and in some cases, another member of the Secretariat by delegated authority to sign an agreement.

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

Normally this would be the preferred way. However, there are exceptions, for example, when using an exchange of letters.

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?

While the standard practice would be the exchange of physical copies and wet-ink signatures, the use of electronic signatures has increased.

32. For States:

    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)?

    For International Organisations:

    What language do you usually require for the text of your non-legally binding agreements?

Agreements that require CM approval would be normally drafted in both official languages, English and French, although other texts could be written in either language. Occasionally, agreements are also drawn in other languages if so required by the other party (e.g., the Organisation of American States).

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).

Not systematically

IX. Registration and Publication

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

The Treaty Office of the Council of Europe entertains lists of non-legally binding agreements between the Council of Europe and other international intergovernmental organisations or public international institutions of which the Treaty Office has knowledge. The lists are publicly available on the website of the Treaty Office:

https://www.coe.int/en/web/conventions/bi-or-multilateral-agreements.

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

The Treaty Office will preserve original copies of signed agreements concluded in accordance with Rule 1318 and publish them (unless there are confidentiality concerns) on their webpage (openly accessible here Bi- or Multilateral Agreements - Treaty Office (coe.int))

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

As indicated previously, the Treaty Office acts as depository for agreements concluded under Rule 1318 and publish documents on the corresponding page. MoUs concerning the establishment of external offices in non-member States are not available to the general public but are uploaded on the website of the Protocol (consult Procedures for external offices - Council of Europe (coe.int))

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 are no predefined circumstances that would trigger such measures. Furthermore, the need to apply such measures never occurred in the past.

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?

There are no trainings/workshops on such topics.

The only template available is for a Memorandum of Understanding for the establishment of an external office in a non-member State.

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?

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?

For International Organisations:

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?

Non-legally binding agreements represent agreements concluded by the CoE with (at least) one other party (public or private).

Resolutions and Declarations are instead among the types of documents that the Organisation's bodies can adopt and that are used for fulfilling the Organisation's mandate. More in particular, Resolutions adopted by the CoE Committee of Ministers are administrative decisions that bind the Organisation. Declarations are statements of political nature concerning subjects of interest for the Organisation.

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?

Particularly non-legally binding agreements may certainly have implications in this connection (see, for example, the MoUs concluded for facilitating the execution of ECtHR judgments e.g., for the payment of just satisfaction, in a number of interstate cases).

In other cases, such effects would not, however, appear to be present.

The content, once more, is decisive in determining the nature and scope of the agreement.