

## EUROPEAN UNION

<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>No, the European Union does not use the term ‘non-legally binding agreement’.</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 Union uses the term ‘non-binding instrument’, which covers a signed document or a document adopted at a ceremony, that records an understanding or an arrangement between two or more sides including: on the one hand, the European Union, and on the other, one or more third countries or international organisations, without giving rise to rights or binding obligations under international or domestic law or having any financial implications on either side.</i></p> <p><i>The European Union also uses the term ‘administrative arrangement’ to refer to arrangements which deal with matters that fall within the European Union institutions’, bodies’ or agencies’ coordinating, executive and management functions under their administrative autonomy. They are signed or adopted at the relevant administrative level.</i></p> <p><i>Administrative arrangements express an envisaged course of action or a desire to collaborate, without giving rise to obligations that are legally binding.</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>For non-binding instruments, titles such as ‘Memorandum of Understanding’, ‘Joint Statement’, or ‘Action Plan’ are common.</i></p> <p><i>However, the title is not decisive for establishing whether an instrument is binding under international law. As the ECJ has held, the reference to an ‘agreement’ in Article 218 TFEU is to be understood “in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation”<sup>1</sup>. Calling a document ‘Memorandum of Understanding’, for instance, does not ensure that that document will be considered non-binding, for example if it contains obligations that bind the parties under international law.</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>The definition of ‘treaty’ under international law coincides with the definition of ‘international agreement’ by the Court of Justice of the European Union. Consequently, an ‘international agreement’ refers to an agreement in written form with one or more third countries or international organisations, that creates rights and obligations under public international law. Therefore, as opposed to non-legally binding instruments/arrangements, international agreements/treaties have a binding effect.</i></p> <p><i>Whether an instrument is binding under international law depends on the intentions of the parties, which must be determined ‘by reference to the instrument’s actual terms and the particular circumstances of its adoption’ (Award on Jurisdiction and Admissibility of 29 October 2015 in PCA Case N° 2013-19, Republic of the Philippines v the People’s Republic of China,</i></p>

<sup>1</sup> Opinion 1/75 of the Court of 11 November 1975, ECLI:EU:C:1975:145, pp. 1359-1360; Opinion 2/92 of 28 March 1995, ECLI:EU:C:1995:83, para 8.

paragraph 213; Judgment of the International Court of Justice of 19 December 1978 in the Aegean Sea Continental Shelf Case, Greece v Turkey, paragraphs 95 and 96. See also Case C-327/91, France v Commission, ECLI:EU:C:1994:305, paragraph 15 regarding the 'instrument's actual terms', and Case C-233/02 France v Commission, ECLI:EU:C:2004:173, paragraphs 43-44 regarding the 'particular circumstances of its adoption').

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 most important element from this regard is the will of the Parties. In order to express the will of the Parties to come to a non-legally binding agreement, elements relative to language and form have to be followed.*

*Numerous non-binding instruments entered into by the European Union or its institutions contain a clause specifying that the instrument at hand is "not intended to create any legal rights or obligations under domestic or public international law".*

*More specifically, a number of formal, stylistic, and linguistic features tend to be associated with agreements that are binding under international law. Such features must be avoided or kept to a minimum in non-binding instruments. For example:*

- *A preamble that sets out the aims of and the justification for the agreement (e.g. the preamble to the Charter of the United Nations);*
- *Titles (e.g. 'Title I – General Provisions');*
- *Articles (e.g. 'Article 1 – Scope', 'Article 2 – Definitions', and so forth);*
- *Terms such as 'the Parties' or 'the Signatories';*
- *Words such as 'shall', 'agree', 'undertake', 'oblige', 'decide', 'consent' or 'commit';*
- *Provisions on entry into force, duration, termination or suspension of the agreement;*
- *Dispute settlement or voting mechanisms.*

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?

*Given their non-legally-binding character, the EU approaches these instruments in the same way in terms of its internal procedure for their signature or endorsement or adoption.*

*The EU distinguishes between MoUs, including Joint Declarations of intent, and Administrative Arrangements. While the former are signed or endorsed or adopted on behalf of the EU, the latter deal with matters that fall within the European Union institutions' coordinating, executive and management functions under their administrative autonomy and often express an envisaged course of action or a desire to collaborate.<sup>2</sup>*

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

*The 'non-binding instruments' are signed or adopted on behalf of the EU, so a decision by the Commission needs to be preceded by an endorsement by the Council, while 'administrative arrangements' are signed or adopted at the relevant administrative level.*

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-

<sup>2</sup> See the Administrative Arrangement between the Directorate-General for Humanitarian Aid and Civil Protection of the European Commission and the Civil Protection and Emergency Situations Service of the Ministry of Internal Affairs of the Republic of Moldova on cooperation in the field of Civil Protection, [https://civil-protection-humanitarian-aid.ec.europa.eu/system/files/2016-06/administrative\\_arrangement\\_moldova.pdf](https://civil-protection-humanitarian-aid.ec.europa.eu/system/files/2016-06/administrative_arrangement_moldova.pdf); Administrative arrangement to exchange non-public information on medicinal products between DG Sante/EMA and FDHA/Swissmedic, [https://www.ema.europa.eu/en/documents/other/administrative-arrangements-exchange-non-public-information-medicinal-products-between-dg-sante\\_en.pdf](https://www.ema.europa.eu/en/documents/other/administrative-arrangements-exchange-non-public-information-medicinal-products-between-dg-sante_en.pdf).

legally binding agreements depending on whether the other side is a State or an international organisation?

*No, the European Union does not differentiate.*

*It is to be noted that the European Union through the Commission and the High Representative can establish and maintain relations with international organisations by virtue of Article 220 TFEU. Unlike the rules on non-binding instruments or the provisions of Article 218 TFEU, under which the EU can conclude non-binding instruments or international agreements both with third States and international organisations, this avenue is specific to cooperation with international organisations.*

### **III. Competence**

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

*In accordance with Article 17(1) TEU, the Commission has the exclusive power to represent the Union externally except in the area of the common foreign and security policy (CFSP). In that area, it is the High Representative of the Union for Foreign Affairs and Security Policy that represents it externally at his level (Article 27(2) TEU). At the level of Heads of State and Government, it is the President of the European Council who represents the European Union in the area of the CFSP (Article 15(6) TEU).*

*Thus, when non-legally binding documents are to be signed or endorsed or adopted on behalf of the Union, the Commission engages in this action except for those that fall under the CFSP, in which case the High Representative acts on the international plane.*

*In cases where administrative arrangements are signed or endorsed or adopted on behalf of the Commission or one of its Services or on behalf of the European External Action Service (EEAS), it is one Commissioner or a high-ranking official of the Service or the EEAS respectively that acts externally by signing or endorsing or adopting the administrative arrangement.*

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)?

*No, non-binding instruments are signed/adopted on behalf of the Union and this requires the endorsement from the Council and the decision of the Commission (or the High Representative) which shall sign or adopt the instrument.*

*Union bodies and specialized agencies can conclude administrative arrangements provided these fall within their mandate.*

### **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-binding instruments are used to set down in writing an understanding or arrangement without creating obligations that are legally binding under international or domestic law. NBIs are*

*thus normally not used for this purpose. Normally, if there is a need to have such kind of legal interpretation the practice of the EU is to do so through joint declarations of the parties.*<sup>3</sup>

## **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?

*Non-binding instruments may carry considerable political weight and constitute 'measures by which the Union's policy is made and its external action planned'.<sup>4</sup>*

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

*- For non-binding instruments: the Commission or the High Representative for the CFSP, have the power to initiate policy including the signature of non-legally binding instruments. The policy-making power to decide on its signature or endorsement or adoption lies with the Council.*

*- For treaties binding under international law: for 'international agreements', Article 218 TFEU provides for the single treaty-making procedure of the EU reflecting the balance of powers of the institutions. Under Article 218(3) and (4) TFEU, it is the Council that decides on the opening of negotiations on an international agreement on the basis of a recommendation by the Commission or, in matters of the CFSP, the High Representative; the Council adopts negotiating directives and nominates the Union negotiator. Once the negotiations are over, it is the Council that decides on the authorisation of signature (Article 218(5) TFEU) and conclusion (Article 218(6) TFEU) of an international agreement on the basis of proposals by the Commission or the High Representative in the area of CFSP. Additionally, as mentioned in Article 218 (6) TFEU, the Council shall adopt a decision only after obtaining the consent of or after consulting the European Parliament.*

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

*The conclusion of non-binding instruments, as previously stated, involves the Commission or the High Representative, as the case may be, to sign/adopt the instrument, after having obtained the endorsement from the Council exercising its political assessment. The European Parliament is not involved in the procedure.*

*For binding treaties ('international agreements'), the envisaged procedure is encompassed in Article 218 TFEU, as explained in the reply to Question 13 above.*

### **VI. Formal Assessment<sup>5</sup> of Non-legally Binding Agreements**

For States:

<sup>3</sup> See Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States of 27 October 2016, <https://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> and statement no 38 to the Council's minutes on the occasion of the signature of CETA by the Council Legal Service on the Legal Nature of the Joint Interpretative Instrument, <https://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>.

<sup>4</sup> Case C-660/13, Council v Commission (Swiss MoU), ECLI:EU:C:2016:106, para 40.

<sup>5</sup> 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.

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)?
<u>For International Organisations:</u>
23. If such a process exists, please describe the regular process of formal assessment of non-legally binding agreements within your organisation.  <i>The procedure of assessment of non-legally binding instruments involves several services inside the Commission before and after an endorsement is sought from the Council.</i>
<b>VII. Democratic Review/Parliamentary Participation</b>
<u>For States:</u>
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?
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?
<u>For International Organisations:</u>
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?  <i>The European Union operates in accordance with the EU Treaties and only within the boundaries set by them. This applies to the powers of all EU institutions. Thus, there is no scope for more formal guidelines determining the role of each institution, since these can only be determined by the EU Treaties and not the will of the EU institutions or the EU Member States. The Court of</i>

*Justice of the EU is the only competent institution to interpret the EU Treaties. However, following the judgment of the European Court of Justice on the MoU with Switzerland (C-600/13), with a view to ensuring a smooth process between the Council, the Commission, and the EEAS, the institutions have agreed on working Arrangements for Non-Binding Instruments.<sup>6</sup>*

### **VIII. Signature and Format**

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

*Please refer to the previous answer where we addressed the procedure. (Question 13)*

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

*Parties to non-binding instruments can either countersign the respective agreements or there can be an exchange of signed non-binding instruments.*

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?

*Following the Covid-19 pandemic, electronic signature has been practiced/envisioned by the European Union. Nevertheless, the EU does not yet have procedures as regards electronic signature of non-binding instruments.*

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?

*A non-binding instrument or administrative arrangement signed or endorsed or adopted by the European Union must be drawn up in an official language of the Union. The language most frequently used is English.*

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, there are no such 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 signed or adopted original of the document is stored with the relevant lead Service of the Commission or with the European External Action Service depending on its subject-matter. The lead Service also uploads a scanned copy of the signed or adopted document on the internal registration system.*

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

<sup>6</sup> J Wouters, F Hoffmeister, G De Baere and T Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International and Legal Actor* (3<sup>rd</sup> ed), OUP, 2021, at 98-99; Council Document ST 15367 2017 INT of 4 December 2017, <https://data.consilium.europa.eu/doc/document/ST-15367-2017-INIT/en/pdf>.

Please see question above.

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

*Non-binding instruments and administrative arrangements are documents within the meaning of Article 3(a) of [Regulation 1049/2001](#) regarding public access to European Parliament, Council and Commission documents.<sup>7</sup> They are therefore registered and filed in a manner that makes them easily retrievable.*

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?

*In principle, no.*

## **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?

*The Commission has an internal Vademecum on external action, which includes guidance on legally-non binding instruments. The Vademecum is updated regularly.*

## **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 benefit lies with the formal expression of the commonality of political intents of international partners. The main concern is the proliferation on non-binding instruments that do not serve specific tangible external action goals.*

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?

*The European Union does not keep such statistics.*

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?

*Resolutions and declarations adopted by international organisations are unilateral acts. Their legal nature depends on the internal rules of the international organisation in question.*

*Non-legally binding agreements concluded by IOs are bilateral or multilateral instruments where the intention of the sides is not to make them legally binding.*

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?

*Non-binding instruments do not give rise to obligations that are legally binding. Nevertheless they may carry considerable political weight and constitute 'measures by which the Union's policy is made and its external action planned'.*

<sup>7</sup> OJ 2001 L 145, p. 43.