

HUNGARY

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?

At the Ministry of Foreign Affairs and Trade of Hungary (MFAT) we only use this term in contrast to an international (legally binding) agreements, when assessing a text and/or document. In accordance with our internal regulation we use the following definition for MoUs: An agreement between ministries or government bodies is an international document that is not an international treaty.

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

The usage of terms depends on the specific context, but the most common usage includes “Arrangement” and “Memorandum of Understanding”. Our standard approach is the negative definition: a non-legally binding agreement could be defined as something that is not a treaty under the definition of paragraph a) of Article 2 of the Act L of 2005 on the procedure regarding the conclusion of treaties.

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

We strictly consider them as non-legally binding instruments.

II. Distinction

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

We examine several criteria. First and foremost, the content of the text (e.g: whether it establishes international rights and obligations), then it is possible to examine other factors like the language of the text and sometimes even the title and name (and official capacity) of the signatories. Furthermore treaties can only be concluded between countries or governments, while MoUs are concluded between the ministries of the two countries.

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 could be the content of the text. If it does not create any rights or obligations under international law and the parties do not have the capacity to conclude a legally-binding treaty then it is a non-legally binding agreement. Usually, these agreements include a paragraph which explicitly states that the document shall be considered a non-legally binding agreement, and is not intended to create any rights or obligations under international law nor to conflict with any national law or international treaty. Additionally, the non-legally binding agreements do not need to be registered in the United Nations treaty database, their entry into force does not require any additional state acts, and they can impose obligations solely on the parties involved.

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?

In our legal system there is no further distinction amongst non-legally binding agreements.

As these documents are usually political in their character (and content), in our view further distinction based on their title/type is not needed (in a legal sense).

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

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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?

We do not have different rules for international organisations.

III. Competence

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

We have internal legal regulations, such as the 182/2022. (V. 24.) Government decree on the duties and powers of the members of the Government. We do not have a specific law or set of laws that authorizes certain actors to sign non-legally binding agreements. According to the regulation mentioned above, a member of the government can only sign a non-legally binding agreement concerning its own competence. The competent member of government can delegate the task of signing the document on his/her behalf, but there is no need for full powers.

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?

As already mentioned we do not have specific regulations concerning the conclusion of non-legally binding agreements. In practice these kind of actors and authorities are competent to conclude their own non-legally binding agreements which impose obligations solely on the parties involved.

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 certain cases non-legally binding agreements can have indirect legal effects. It is common in our practice to conclude a non-legally binding agreement for interpretative purposes or set out the details of the implementation of a certain legally binding agreement. This way non-legally binding agreements can be valuable tools in complementing and developing legally binding agreements.

Non-legally binding agreements can also set out the terms and contain mutually accepted elements of a future treaty. However, we are not considering them as prerequisite of a binding instrument of international law, since these are instruments of political nature. Acknowledging them as mere declarations of intent for negotiating a later binding instrument does not generate any commitments.

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?

Normally a non-binding agreement is concluded if the subject matter does not reach the level appropriate for a binding agreement, a subject covers only technical issues or when cooperation only concerns the responsibilities of a single actor/authority and does not have broader impact. Non-legally binding agreements could be useful if the cooperation needs be accelerated with a certain actor in a more flexible manner. In our understanding it is quite rare to conclude a non-legally binding agreement to substitute a legally binding one, because of the lack of interest.

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

The minister responsible for the subject of the non-legally binding agreement may decide alone on the signing of such an agreement. The conclusion of legally binding agreements must be approved by the prime minister after the proposal of the minister responsible for the subject as well as the Minister for Foreign Affairs and Trade.

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

The draft and the definitive text of the non-legally binding agreements shall be communicated to the Minister responsible for foreign affairs prior to the beginning of its negotiation and its signature.

If the draft of the agreement has been identified as a legally binding treaty by the Minister responsible for foreign affairs, it shall follow the procedure for treaties. The procedure for concluding a treaty is much more complex and time-consuming (eg.: requiring ratification). The Prime Minister shall authorize the drawing up of the treaty upon the joint submission of the minister responsible for the subject of the agreement and the Minister responsible for foreign affairs and appoint the person mandated to negotiate. The Government, on the basis of a proposal from the Minister, in agreement with the Minister for Foreign Affairs and the Minister for Justice, and in exceptional and justified cases, between two meetings of the Government, the Prime Minister, having knowledge of the text of the international treaty established or of the detailed content of the treaty, shall authorize the finalization of the text of the international treaty and the designation of the person to act in this connection, and shall decide on the tasks necessary to ensure the consistency of the treaty with domestic law. The binding force of an international treaty can be recognised if, in the light of the text of the treaty (if the international treaty falling within the competence of Parliament) the Parliament or if an international treaty not falling within the competence of the parliament, the Government authorizes so. The minister responsible for foreign affairs shall submit a proposal to the President of the Republic without delay after the adoption of the promulgating act, if the Parliament has given a mandate for the recognition of binding force (or if the Head of State is required by the treaty to recognise that the treaty has binding force on Hungary). The President of the Republic shall, within five days of receipt of the submission or, if the international treaty is promulgated by law, at the time of its signature, issue an instrument of ratification, to be exchanged or deposited through the minister responsible for foreign affairs. As for the promulgation, an international treaty falling within the functions and powers of Parliament shall be promulgated by law. In other cases, the international treaty shall be promulgated by government decree.

When concluding a non-legally binding agreement there are no such requirements.

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?

Yes. According to Paragraph (2) Article 4 of the Act L of 2005 on the procedure regarding the conclusion of treaties, the ministers and the central government agencies shall send the Minister responsible for foreign policy a draft of any agreement concluded by the Minister and the central government agency with a foreign government agency or international organisation which does not constitute an international treaty within the meaning of Section (a) Article 2 of the Act L of 2005 before the negotiation and signing of the agreement. If, on the basis of the draft agreement, the Minister responsible for foreign policy determines that the agreement constitutes an international treaty, the procedure relating to international treaties shall be followed.

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

The assessment is performed by the Department of International Law of the Ministry of Foreign Affairs and Trade.

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

It is a legal duty of the negotiator to ask for the formal assessment prior to signature. It is useful if the Department of International Law of the Ministry of Foreign Affairs and Trade is involved at an early stage of the negotiations in order to help the negotiators avoiding any inappropriate text during the drafting process.

18. If sub-national territorial units/bodies or specialized agencies are competent to conclude non-legally binding agreements (cf. question 10), are such agreements subject to the same formal assessment applicable for agreements of the (federal) government/international organisation?

Bodies or specialized agencies usually fall under the supervision or control of a central government body. As such they are competent to conclude non-legally binding agreements but only within their own competence.

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?

The MFAT has an internal regulation and the Department of International Law has also an internal guideline concerning the practice and procedures supplemented by a guideline on the usage of MoU/treaty language.

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 legal departments of the relevant actors are usually familiar with the internal legal framework applicable, as all relevant actors are required by law to communicate the documents for assessment.

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

It is required by law, binding all government actors.

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.

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.

workshops, information materials on how to properly draft and conclude non-legally binding agreements)? <i>There have been examples of such practice (circulating information materials and relevant information to a wide range of actors and authorities), but not on a regular basis.</i>
<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.
VII. Democratic Review/Parliamentary Participation
<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? <i>The legislature does not need to be notified according to the law.</i>
25. If so, at what stage of the process is the legislature usually involved?
26. Does your parliament or other legislative body 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?
VIII. Signature and Format
29. Is there a formal procedure to authorise the signature of a non-legally binding agreement? <i>There is no formal procedure to authorise the signature, however if a member of the government is substituted by another member of government at the signature, according to the practice, there should be a written letter of request coming from the member of government whose tasks and responsibilities are concerned.</i>
30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document? <i>Yes, they have to be on the same document.</i>
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? <i>Hungary neither allows for electronic signature nor accepts electronic transmission instead of physical copies.</i>

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)?

Agreements are signed either exclusively in a neutral language, or in both the partner's language and our own, often accompanied by a third version in a neutral language.

For International Organisations:

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

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)

We have similar requirements for the Hungarian copy as for treaties, although they are less strict, for example there is no need for seal or stamp and we also use a different kind of folder. We use a special paper with a frame with the colours of the Hungarian flag.

IX. Registration and Publication

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

We have the same archive for non-legally binding agreements and legally-binding ones, although each ministry acts according to its own practice..

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

The depositary and register of treaties of the Department of International Law of the MFAT.

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

We do not publish non-legally binding agreements but they are accessible upon request.

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?

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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 regular workshops or training sessions regarding the above mentioned topic, nevertheless the learning material for the mandatory diplomatic exam at the MFAT contains the fundamental information on the differences between binding and non-binding agreements. There are also guidelines that are available internally and containing the necessary information.

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?

Non-legally binding agreements can be useful tools to deal with technical or administrative issues or set out the details of a legally-binding treaty. They can particularly be useful when dealing with military matters (eg. military exercises and other forms of cooperation), as these kind of agreements usually already have a detailed international legal background, therefore it is easier (i.e. less formalities) and quicker to negotiate and sign them. Non-legally binding agreements are

helpful assets in enhancing cooperation of the signatories, as they usually indicate the political will to work together in a specific area.

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?

We saw a rise in the number of non-legally binding agreements in the recent years.

The main cause of this is that they are fast, flexible and easy to negotiate, they are not legally binding, but at the same time the importance of the (usually high-level) meeting could be emphasized and the close cooperation and agreement be visualized.

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?

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?