

IRELAND

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>Ireland uses the terms ‘non-legally binding instrument’ and ‘non-binding instrument’ in its internal guidance but no formal definition has been adopted as a matter of internal policy. In practice such agreements are not entitled ‘non-legally binding instrument’ but may have a number of different titles. The most common of these are Memorandum of Understanding, Exchange of Notes and Arrangement.</i></p>
<p>2. If not, what term do you use instead (e.g. arrangements) and how do you define it?</p> <p><i>See answer to Q1.</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>Ireland’s practice is to use the term ‘Memorandum of Understanding’ for non-legally binding instruments. However, the title of an instrument is not determinative of its legal nature. The legally binding nature of such an instrument is established by an examination of the text, the intentions of the parties and the circumstances in which it is concluded.</i></p>
II. Distinction
<p>4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?</p> <p><i>Distinguishing between these different instruments is achieved by an examination of the text, the intentions of the parties and the circumstances in which they are concluded.</i></p> <p><i>‘Treaty’ is a generic term embracing all written instruments binding under international law, regardless of their formal designation, concluded between two or more entities that enjoy international legal personality. The application of the term ‘treaty’ signifies that the parties intend to create legal rights and obligations enforceable under international law. Treaties typically adopt terminology which is indicative of an intention to be legally bound, such as ‘agree’, ‘article’, ‘entry into force’, ‘Parties’, ‘shall’, ‘undertake’.</i></p> <p><i>By contrast, international non-legally binding instruments tend to be expressed in informal, indicative or aspirational language rather than in legalistic terms. For example, ‘accept’, ‘approve’ or ‘intend’ (instead of ‘agree’), ‘come into effect’ (instead of ‘entry into force’), ‘paragraph’ (instead of ‘clause’), ‘participants’ (instead of ‘Parties’), ‘will’ (instead of ‘shall’).</i></p> <p><i>The third category - international civil law contracts - are instruments that are governed by private contract law and are not intended to be binding under international law. They may come within the jurisdiction of the Irish courts or those of another state or, alternatively, they may make provision for settlement of disputes by negotiation or international conciliation or arbitration.</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>The intention of the parties is the most essential element in determining whether an instrument is non-legally binding. The intention of the parties in this respect may be expressly stated in the text of the instrument, such as a clause indicating that the instrument is not to be considered binding under international law. Such a clause can take forms including:</i></p>

'this instrument / agreement is not eligible for registration as a treaty under Article 102 of the UN Charter'; 'the measures adopted in this agreement are politically binding'; 'the principles set forth below shall not be legally binding'; 'this instrument / agreement represents a political commitment by the Sides and does not constitute a legally-binding agreement'; 'this Memorandum records the commitments of the Participants; it does not create legally binding obligations'.

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?

Non-binding instruments range in form and substance although Ireland does not distinguish between the different designations of non-binding instruments, all of which have the objective of expressing non-legally binding commitments.

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

See answer to Q. 6.

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?

Generally, such instruments are signed by a Minister, or by a senior official of the Government Department or public agency with responsibility for the policy area which is the subject of the instrument. Depending on the policy content of the instrument, express Government authority to sign may be required. See answer to Q. 14.

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?

Irish practice permits public agencies to conclude non-legally binding instruments with counter parties abroad on matters for which they have competence. In some cases, however (for instance with the national police force or the Irish Aviation Authority), this is regulated by statute and requires the prior express consent of the Government.

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?

Non-binding instruments are not capable of producing direct legal effects, since the intention of the parties is not to create legal obligations. However, it is possible that, in certain circumstances, a non-legally binding instrument could, for example, contribute to the crystallisation of a customary international law rule or constitute either a subsequent agreement between parties to a treaty regarding the interpretation of that treaty or the application of its provisions, or record a

subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation for the purposes of international law of treaties.

Non-binding instruments may also serve a 'pre-law function', i.e. they may record political commitments/understandings that may lead in time to legally binding agreements, allowing political understandings to gain broad acceptance before being converted into legally binding undertakings (as was done at various stages during the Northern Ireland Peace Process for instance). Non-binding instruments may also be given legal effect in international law by reference in a legally binding international agreement.

There is no requirement under Irish domestic law to adopt non-legally binding instruments before the conclusion of legally binding international agreements. Ireland does not consider that such instruments are a prerequisite for the conclusion of legally binding international agreements, although they may of course have political or practical value.

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 often deal with routine administrative or technical matters, considered too minor to warrant a treaty. They are particularly useful for setting out operational arrangements under a framework international agreement and for recording shared political commitments or agreed political objectives.

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

The determination of whether a treaty or a non-legally binding instrument is more appropriate in any given case is typically a matter for the Government Department that has responsibility for the subject matter of the agreement.

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

For treaties: Under the Irish Constitution, express Government authority to sign and ratify legally binding international agreements is required. If the agreement imposes a charge on public funds, and is not of a technical and administrative character, then the Constitution requires that the text of the agreement obtain the prior approval of Dáil Éireann (the lower house of parliament). In any event, once entry into force takes place the agreement must be laid before Dáil Éireann.

For non-binding instruments: Entering into a non-binding instrument with another state involves an exercise of the executive power of the state in or in connection with its external relations. Under the Irish Constitution, all Ministers and Government Departments other than those of the Taoiseach (Prime Minister) and of Foreign Affairs require prior express Government authority to do so.

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?

There is no mandatory centralised formal assessment of non-legally binding instruments. However, the Government Department (except for the Department of Foreign Affairs) responsible for negotiating and concluding a non-binding instrument should liaise with the Office of the Attorney General or the Legal Division of the Department of Foreign Affairs, as appropriate, to ensure that the proposed non-binding instrument is not an international agreement under Irish domestic law or international law for which it would be necessary to seek express Government approval.

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

See answer to Q. 15.

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

There are no formal guidelines with regards to timelines for assessment of non-legally binding instruments, but if there is a question over the legal nature of the instrument during the process of negotiations advice from the Office of the Attorney General should be sought.

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?

There is no general formal assessment applicable for non-legally binding instruments except where a formal assessment is required by statute. See also answer to Q. 10.

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 Department of Foreign Affairs has issued a Practical Guide designed to assist Government Departments with the conclusion of international agreements. A section of this Guide is also dedicated to the drafting of non-binding instruments, which includes a glossary of recommended terms. The Department has also issued guidance on agreements/instruments (binding and non-binding) governing the transfer and use of Irish Aid funds concluded with other States, international organisations and civil society representatives.

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

While there is no centralised formal assessment requirement as such, the Department of Foreign Affairs' Practical Guide (referenced above) ensures that all Government Departments contemplating instruments carry out the necessary assessment. The Guide is updated regularly and sent to Departments annually..

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

As indicated above, there is no formal mechanism or requirement to ensure that all non-binding instruments are submitted for assessment.

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.

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)?

Yes, as noted above, a Practical Guide is updated regularly and issued to all Departments. In addition to consulting the Office of the Attorney General, Government Departments are also encouraged to liaise with the Legal Division of the Department of Foreign Affairs to assist in ensuring that the intended legal status of the instrument is achieved.

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.

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?

No, there is no requirement to notify or consult the legislature. Such a requirement only exists for international agreements which are binding under international law and are not of a technical and administrative character. Notwithstanding the absence of any such formal requirement, some non-binding instruments will be published for the information of parliament and the public.

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

N/A

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

There is no requirement to inform parliament of the conclusion non-legally binding instruments but members of parliament are entitled to ask parliamentary questions of the relevant Minister on any matter.

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?

Legislative participation is not provided for. See answer to Q. 24.

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?

VIII. Signature and Format

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

No, although in certain circumstances (see answer to Q. 9 and 14) Government authority will be required before signing a non-legally binding instrument and, if the instrument governs the transfer and use of public funds, Department of Finance rules determine the minimum grade of an official authorised to sign it.

<p>30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document?</p> <p>No.</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>In principle, Ireland allows for the electronic signature and transmission of non-binding instruments, particularly as one of the main benefits of using non-binding instruments is that they offer increased flexibility, speed and efficiency. However, there is no formal procedure for the signature of a non-binding instrument. The overriding concern in the case of electronic signature is that the parties agree as to the commitments expressed in the non-binding instrument and that means of electronic signature is also agreed. Whether a physical signature is considered necessary for a non-binding instrument may also depend on the nature and form of the agreement</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>There are no set guidelines. In practice, Ireland's non-binding instruments are expressed in English.</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? (e.g. using a special kind of paper only for non-legally binding agreements)</p> <p>No</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>No.</p>
<p>35. If so, what entity keeps the non-legally binding agreement after signature?</p> <p>N/A</p>
<p>36. Do you publish your non-legally binding agreements and are they openly accessible?</p> <p><i>Non-binding agreements are not usually published, although in the past some have featured in Ireland's published annual Treaty Series in the interest of transparency (Irish Treaty Series (gov.ie)). Information pertaining to non-binding instruments may also be requested pursuant to Ireland's Freedom of Information Act 2014 (Freedom of Information Act 2014 (irishstatutebook.ie)). However, under that statute there are certain exceptions which allow for the withholding of information (see next question).</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>The reasons justifying the withholding of information relating to non-binding instruments can be found in Part 4 of the Freedom of Information Act 2014. In particular, under Section 33(1), a</i></p>

freedom of information request may be refused if access to the record concerned could reasonably be expected to affect adversely the security, defence or international relations of the State.

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 Department of Foreign Affairs has produced a Practical Guide for Departments on entering into international agreements, which also contains a section on the drafting of non-binding instruments and a definition of MoUs. To assist with the interpretation of non-binding instruments, the Practical Guide includes a glossary of recommended language, which compares and contrasts the terms used in binding international agreements and non-binding instruments.

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?

In Ireland's view, the flexibility offered by non-binding instruments is the main benefit. As they are less formal in nature, they can be drafted and brought into operation more quickly. They facilitate smooth cooperation on practical, technical and operational matters and are particularly useful where consensus on an underlying substantive issue may be difficult to achieve. They can be used to mobilise political will by setting out or recording shared objectives, desiderata or commitments, they may provide the basis for work towards future international agreements and they can also record agreement on interpretation and / or implementation of existing legal obligations.

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?

Ireland does not maintain a central database of non-legally binding instruments, but we are not aware of any notable increased or decreased use of non-binding instruments.

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?