

MALTA

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 our practice, we do not use the term “*non-legally binding agreement*”, as it creates ambiguity. Instead, we use the term “non-legally binding instrument.”

A non-legally binding instrument is understood as a written instrument that expresses the intentions or understandings of the participants without creating rights or obligations under international law. It allows the participants to cooperate in a flexible manner without entering into legally binding commitments. The most common forms of such instruments in our practice are Memoranda of Understanding (MOUs). There is no legal definition of “non-legally binding instruments” in the Laws of Malta.

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

Vide answer to Q1

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

In our practice, Memoranda of Understanding are generally treated as non-legally binding instruments. However, the title alone is not determinative, and the instrument may very well be legally binding if it was intended to be so by the two sides, taking into consideration also the instrument’s content and language used.

II. Distinction

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

We define treaties in accordance with the Vienna Convention on the Law of Treaties, namely as “*international agreements concluded between States in written form and governed by international law.*” The drafting of treaties typically reflects the parties’ intention to create legally binding obligations under international law, and this intention is evident in the language used. On the other hand, non-legally binding instruments provide a flexible form of cooperation. They do not create rights or obligations under international law, and they often contain more informal language to reflect their non-binding nature.

To differentiate between these instruments, we examine the intention of the parties/participants, including an assessment of whether the intention is to create legally binding rights and obligations or merely expressions of shared understandings; the content; and the context within which the instrument is drafted and concluded.

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 intention is the most decisive element in determining whether an instrument is legally binding or non-legally binding. This may be expressed explicitly in the text, for example, through a clause stating that the instrument is not intended to create rights or obligations.

In the absence of such wording, the nature of the instrument can be assessed through the context in which it is concluded; its content and the types of commitments described; and the language used. These elements cumulatively help determine whether the instrument is intended to be non-legally binding.
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 principle, we do not draw any significant distinction between the various forms of non-legally binding instruments. The choice of title typically depends on the participants’ preferences and the substance of the cooperation. What matters is not the title of the instrument, but the non-legally binding nature of the arrangements expressed therein. As long as the instrument reflects intentions without creating rights or obligations under international law, it is treated as a non-legally binding instrument regardless of its title.
7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them? Vide answer to Q6
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? Non-legally binding instruments may be signed by Ministers and Members of Cabinet where they relate to matters falling within their areas of direct competence. For instruments of a technical or administrative nature, the Permanent Secretary of the relevant Ministry may also sign, as the administrative Head of the Public Service within that Ministry. Other senior public officials may likewise sign, provided they are duly authorised and have obtained the necessary internal clearances. Depending on the subject matter, additional approvals may be required. All instruments which will be signed by Ministries, Departments, and public entities, including those of a non-legally binding nature, must be cleared by the Ministry responsible for Foreign Affairs prior to their signature, when concluded with foreign counterparts and/or international organisation.
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? Public entities may sign non-legally binding instruments of a technical or administrative nature in areas that fall within their respective mandates, as long as they have the legal capacity and competence to do so. Depending on the subject matter, additional approvals may be required. All instruments, including those of a non-legally binding nature, must be cleared by the Ministry responsible for Foreign Affairs prior to signature, when such instruments are concluded with counterparts from other States and/or with international organisations.

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?**

Although non-legally binding instruments do not themselves create direct legal obligations, they may nonetheless produce indirect legal effects. As non-legally binding instruments reflect the political understanding and arrangements of the participants, they can lay important groundwork and may, in some instances, pave the way for the negotiation of legally binding instruments. Moreover, non-legally binding instruments may also provide interpretative guidance in relation to existing treaties or agreements.

In our system, non-legally binding instruments are not a compulsory prerequisite to the conclusion of a binding agreement under international law.

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?**

The decision on whether to opt for a binding or non-binding instrument is guided primarily by the two sides' intentions and the nature of the subject matter. A non-legally binding instrument cannot be resorted to if its content concerns issues which fall within the scope of the Ratification of Treaties Act of the Laws of Malta, or concerns matters which would require amendments to domestic legislation.

Where the subject matter does not fall within such classification, does not aim to create rights or obligations under international law, and where greater flexibility is preferred, a non-legally binding instrument may be considered. Such instruments also have the advantage of avoiding lengthy parliamentary ratification processes. Non-legally binding instruments may also be used where participants wish to establish cooperation in certain fields before undertaking legally binding commitments.

That said, as mentioned in Q11, there is no requirement for a non-legally binding instrument to precede a legally binding one.

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

The determination of whether to conclude a treaty or a non-legally binding instrument is guided primarily by the subject matter involved. In practice, when the counterpart is another State/international organisation, the decision is reached through a collaborative process between the Ministry for Foreign Affairs and the line Ministry within whose remit the matter falls. Furthermore, all Ministries, Departments, and public entities are to seek guidance and clearance from the Ministry for Foreign Affairs to ensure that the appropriate instrument is chosen and to avoid any potential misunderstandings on the legal status of the particular instrument.

14. What are the main differences in your internal procedure when concluding a non-legally binding agreement or a binding treaty? When concluding a legally binding instrument on a matter falling within the scope of the Ratification of Treaties Act of the Laws of Malta, the procedures established in that Act must be followed. Where a legally-binding instrument does not fall within the scope of the said Act, Cabinet approval suffices. However, information on non-legally binding instruments should be submitted to the Foreign and European Affairs Committee (FEAC) of the House of Representatives for information and transparency purposes. As mentioned in Q13, all Ministries, Departments, and public entities are to seek clearance from the Ministry for Foreign Affairs to ensure that the appropriate instrument is opted for, and to avoid any potential misunderstandings on the legal status of the particular instrument.
VI. Formal Assessment¹ of Non-legally Binding Agreements
<u>For States:</u>
15. In your State, is there a mandatory centralised formal assessment of non-legally binding agreements concluded by any government ministry? In practice, the draft instrument is to be reviewed and cleared by the Ministry for Foreign Affairs.
16. If so, what Ministry/body performs this formal assessment? Vide Q15.
17. At what time in the process of concluding a non-legally binding agreement is the formal assessment carried out? The formal assessment begins at the outset of the process, before any negotiations commence, and continues throughout the drafting stage. The Ministry for Foreign Affairs must first give its assent to the commencement of negotiations, and both the initial and final drafts of any proposed instrument must be cleared by the Ministry.
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? Vide Q15.
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 Ministry for Foreign Affairs is currently finalising comprehensive internal guidelines. Once approved, the said guidelines will be circulated across all Ministries, Departments and public entities to ensure that drafters of non-legally binding instruments are guided on the procedures to be followed, both in terms of drafting and conclusion. This initiative is intended to promote consistency and uniformity across the board.
20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?

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.

Awareness of the requirement for centralised formal assessment is ensured through the circulation of written guidance to all relevant actors. A government-wide memorandum has also been circulated to all Ministries, Departments and public entities to clarify the applicable process. Comprehensive internal guidelines are also being finalised and, once approved, will be circulated with a view to further consolidating awareness of the applicable procedures and ensuring consistency.
21. How do you ensure that non-legally binding agreements are, in fact, submitted for the centralised formal assessment procedure? Vide Q15.
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)? Vide Q19.
<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 (e.g. only for politically significant agreements)? Who determines whether such requirements are fulfilled? While non-legally binding instruments are not regulated by law, information about the conclusion of a non-legally binding instrument should be submitted to the Foreign and European Affairs Committee (FEAC) of the House of Representatives for information and transparency purposes.
25. If so, at what stage of the process is the legislature usually involved? Vide Q24.
26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements? Non-legally binding instruments are generally published on the Ministry for Foreign Affairs' Treaties website, although this is at the discretion of the relevant line Ministry, depending also on the subject matter. As mentioned in Q24, it is recommended that the conclusion of non-legally binding instruments is brought to the attention of the Foreign and European Affairs Committee (FEAC) of the House of Representatives for information and transparency purposes. Members of Parliament can request further information through Parliamentary Questions.
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? Not applicable.

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? The Ministry for Foreign Affairs needs to provide its clearance and assent to the signature of the non-legally binding instrument with foreign counterparts or international organisations.
30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document? Normally yes, signatures would need to be on the same document. However, there may be instances when there are separate documents as in the case of Exchange of Notes or 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 there are no formal procedures governing the signing and transmission of MoUs, and bearing in mind their flexible nature, electronic signatures and electronic transmission have, in some instances, been accepted for non-legally binding instruments. However, this is not common practice, and the preference remains for wet signatures and the exchange of physical copies.
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)? Although there are no fixed rules, in practice, instruments are almost invariably drafted in English and are never drafted exclusively in the partner's language. Where a non-binding instrument is drafted in both English and the partner's official language, the understanding is that the English version prevails in the event of any linguistic divergence. <u>International Organisations:</u> 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) No.
IX. Registration and Publication
34. Do you have a (digital) register/archive/database for all non-legally binding agreements signed by your country?

Non-legally binding instruments are to be filed in the Registry of the Ministry for Foreign Affairs. Lead Departments/Ministries are also responsible for maintaining records of all non-legally binding instruments falling within their respective remits. Non-legally binding instruments that are kept in the Open Registry, and which are therefore not of a confidential nature, may also be published on the website of the Treaties Series of the Ministry for Foreign Affairs.
35. If so, what entity keeps the non-legally binding agreement after signature? The Ministry for Foreign Affairs is the depository of any originally signed instrument. Depending on the subject-matter, these instruments are kept either in the Open or the Confidential Registry. Other Ministries, departments or public entities which enter into non-legally binding instruments with foreign counterparts or international organisations are to be forwarded a copy of the original instrument by the Ministry for Foreign Affairs for records purposes.
36. Do you publish your non-legally binding agreements and are they openly accessible? Non-legally binding instruments that are kept in the Open Registry, and which are of a non-confidential nature, may be published on the website of the Treaties Series of the Ministry for Foreign Affairs.
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? A non-legally binding instrument may be withheld from publication if it contains sensitive or confidential information, if they concern national security, defence or sensitive aspects of international relations.
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 Ministry for Foreign Affairs is currently in the process of finalising comprehensive internal guidelines. Upon finalisation, these guidelines will be systematically distributed to ensure that all drafters of non-legally binding instruments are thoroughly guided on the proper procedures of drafting such instruments. This initiative aims to standardise practices. Training sessions may also be provided to further support and guide drafters.
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? When possible, non-legally binding instruments offer the advantage of flexibility, and the absence of the often-lengthy formalities associated with treaties. However, this flexibility can also be a disadvantage, as ambiguous or carelessly drafted non-legally binding instruments may give rise to diverging interpretations and cast doubt on the instrument's legal nature.

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?

While we do not keep statistical records, we have observed an increase in the conclusion of non-legally binding instruments in recent years. This trend may be attributed both to enhanced cooperation between States and to the inherent flexibility that such instruments offer. Their adaptability allows for more fluid and responsive interaction between participants, facilitating collaboration without the constraints and bureaucratic procedures usually associated with legally binding agreements.

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?