

## POLAND

<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>The term “non-legally binding agreement” is gaining ground in the practice of the treaty section of the Polish Ministry of Foreign Affairs.</i></p> <p><i>This term is not defined under Polish law, neither officially, nor unofficially. It would seem that it should denote instruments which are non-legally binding <u>both under international and domestic law.</u></i></p>
<p>2. If not, what term do you use instead (e.g. arrangements) and how do you define it?</p> <p><i>N/a (conf. reply to question 1. above)</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>In line with Article 2.1.a VCLT 1969 the legal nature of a treaty (i.e. a “legally binding instrument”) does not depend on its particular designation.</i></p> <p><i>The abovementioned norm binds Poland both as a party to the VCLT 1969, as well as a norm of customary treaty law in this respect.</i></p> <p><i>As per our practice, most of the documents concluded by Poland and termed “Memorandum of Understanding” are of non-binding nature, however, there are also those that we have treated as legally binding treaties.</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>Treaties are defined in Article 2.1.a of the VCLT 1969, but this definition is not exhaustive. Of paramount importance is the criterion according to which a given agreement is to be regulated by international law. Some indication can be also drawn from the fact whether a given agreement is concluded between a state and an international organization and a treaty concluded otherwise than in written form. They are all “treaties”, subject to the pacta sunt servanda rule.</i></p> <p><i>On the other hand, contracts binding on the domestic level only, are concluded under the (national) legal order chosen by the parties (or otherwise indicated by applicable private international law norms). Then again, there exist other categories of contracts legally binding domestically, other than “civil law contracts” (e.g. administrative contracts).</i></p> <p><i>Non-legally binding agreements (instruments) sensu stricto are not binding on both levels (i.e. neither internationally nor domestically). Yet, as mentioned above, state’s practice does not seem to be entirely consistent with regard to terminological precision and dogmatic consistency on this issue.</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>Yes, it is the intention of parties (or “participants”), clearly expressed in the text of the agreement (instrument). Additional factors may include the specific (non-binding, non-treaty-like) language used in a given document, as well as its content – i.e. whether, by analyzing particular provision of a document, it purports to regulate behavior of states in a</i></p>

<p><i>binding manner or whether, for such a document to be effective, it would have to be of a binding nature.</i></p>
<p>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?</p> <p><i>No, in situation when MoU is qualified as not-legally binding agreement</i></p>
<p>7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them?</p> <p><i>N/a (conf. reply to question 4. in conjunction with the reply to question 6. above).</i></p>
<p>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?</p> <p><i>Such rules do not exist under Polish law or practice.</i></p>
<p><b>III. Competence</b></p>
<p>9. Who, within your State/International Organisation, has the competence to sign a non-legally binding agreement?</p> <p><i>In the case of a non-legally binding agreement (instrument) sensu stricto, there are no competence-related requirements to be met by the person signing it. As per practice, these are usually persons at the ministerial level.</i></p>
<p>10. <u>For States</u>: Are sub-national territorial units like single federal states, provinces, municipalities or public agencies competent to conclude their own non-legally binding agreements?</p> <p><i>In accordance with the Constitution, the Republic of Poland is a unitary State. However, local government participates in the exercise of public power. Also, units of local government have the right to join international associations of local and regional communities as well as cooperate with local and regional communities of other states. To that effect, they are entitled to enter into such specific arrangements, however after obtaining the consent of the Minister of Foreign Affairs.</i></p> <p><u>For International Organisations</u>: 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)?</p>
<p><b>IV. (Indirect) Legal Effects</b></p>
<p>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?</p> <p><i>Yes. Under certain circumstances, non-legally binding agreements (or instruments) can be considered as preparatory documents a future a binding instrument under international law. Two possible examples are, on the one hand, agreements (instruments) concluded in the domain of national security/defense and, on the other hand, large infrastructure investment-related letters of intent etc. They both diminish contractual costs and build confidence of the parties in anticipation for the future legally-binding agreement (instrument).</i></p> <p><i>In some instances, non-legally binding instruments are also concluded in conjunction with the conclusion of a treaty (directly preceding such an act, signed simultaneously with a treaty, or after such conclusion). In particular in such instances, VCLT rules of interpretation come into play (Article 31.2 and 31.3). Finally, a position expressed by states in the soft law instruments</i></p>

can be a proof for existence of an opinio iuris, which, in turn, may contribute to the creation of customary norms.

Overall, non-legally binding instruments might, under certain circumstances, be capable of producing (indirect) legal effects. Nonetheless, even failing the identification of such an effect - they can still autonomously influence the behaviour of states.

## **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?

*Indeed, in particular the factors described in the question influence the decision of Poland whether to enter into a treaty or a non-legally binding instrument. Clearly, the decision may be also the result of the wish of the other party.*

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

*The responsible entity (usually: ministry), which consults other appropriate state organs.*

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

*The procedure of concluding international agreements is regulated by the Act of April 14, 2000 on International Agreements (Ustawa o umowach międzynarodowych). On the other hand, concluding of non-legally binding agreements requires only a political decision, and the procedure is not regulated in Polish law. However, there is an established practise of consulting these instruments with the treaty section of the Legal and Treaty Department of the Polish Ministry of Foreign Affairs before signing them. The above-mentioned practise was to some extent codified in the 'Treaty Guidelines' that were prepared and issued by the said Department. Despite their name, they also contain directives how to proceed with and prepare non-legally binding instruments.*

### **VI. Formal Assessment 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?

*No, however, there is an established practise of consulting these instruments with the treaty section of the Legal and Treaty Department of the Polish Ministry of Foreign Affairs before signing them.*

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

*N/a (conf. replies to questions 14 and 15 above).*

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

*The assessment by the treaty section of the Legal and Treaty Department of the Polish Ministry of Foreign Affairs is usually made once the text is drafted.*

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

<p>to the same formal assessment applicable for agreements of the (federal) government/international organisation?</p> <p><i>There is no exhaustive catalogue of entities competent to conclude non-legally binding agreements (all governmental bodies, state agencies, state bureaus etc.). In practice, at least some to some extent, the formal assessment is the same. Conf. reply to question 17 above.</i></p>
<p>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?</p> <p><i>Poland has The Treaty Guidelines issued by the treaty section of the Legal and Treaty Department of the Polish Ministry of Foreign Affairs. Their Chapter II.7 is devoted to the non-legally binding agreements (what is a non-legally binding agreement, how to draft and conclude it etc.). The Treaty Guidelines are published and available online (<a href="https://www.gov.pl/web/dyplomacja/wytyczne-traktatowe-ministerstwa-spraw-zagranicznych">https://www.gov.pl/web/dyplomacja/wytyczne-traktatowe-ministerstwa-spraw-zagranicznych</a>).</i></p>
<p>20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?</p> <p><i>N/a (conf. reply to question 15. above). However, The Treaty Guidelines, mentioned in the answer to question 19, have been circulated to all entities concluding non-legally binding agreements.</i></p>
<p>21. How do you ensure that non-legally binding agreements are, in fact, submitted for the centralised formal assessment procedure?</p> <p><i>N/a (conf. replies to questions 15, 19 and 20 above).</i></p>
<p>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)?</p> <p><i>The Treaty Guidelines, mentioned in the answer to question 19, have been circulated to entities concluding non-legally binding agreements and are also available online for all interested entities.</i></p>
<p><u>For International Organisations:</u></p>
<p>23. If such a process exists, please describe the regular process of formal assessment of non-legally binding agreements within your organisation.</p>
<p><b>VII. Democratic Review/Parliamentary Participation</b></p>
<p><u>For States:</u></p>
<p>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?</p> <p><i>There is no obligation to notify or consult parliament about the conclusion of legally non-binding agreements.</i></p>
<p>25. If so, at what stage of the process is the legislature usually involved?</p> <p><i>Not applicable.</i></p>
<p>26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements?</p> <p><i>Yes, although not specifically, but within the general system of parliamentary control (interpellation etc).</i></p>

<p>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?</p> <p><i>Not applicable.</i></p>
<p>For <u>International Organisations</u>:</p>
<p>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?</p>
<p><b>VIII. Signature and Format</b></p>
<p>29. Is there a formal procedure to authorise the signature of a non-legally binding agreement?</p> <p><i>No.</i></p>
<p>30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document?</p> <p><i>Yes, it is common practice that the signature is on the same document.</i></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>There is no specific regulation regarding such an electronic signature and the common practice is they are signing in originals in hard copies.</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>While we strive to have non-legally binding agreements to be set also in the Polish language, they can, if agreed between the parties, can be drafted in one other foreign language – usually in English. In such a case, e.g. English should not be a national language of the other party.</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><i>Yes, we have a special kind of paper only for MoU.</i></p>
<p><b>IX. Registration and Publication</b></p>
<p>34. Do you have a (digital) register/archive/database for all non-legally binding agreements signed by your country?</p> <p><i>Not yet. They are kept in a Treaty Archives of the MFA with all the other legally binding agreements but only when the concluding authority sent the original hard copy of MoU (or its digital version) to the MFA (a practice which the MFA encourages) or MFA is the concluding authority.</i></p>
<p>35. If so, what entity keeps the non-legally binding agreement after signature?</p>

*The concluding authority, or MFA in a State Archives.*

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

*No.*

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?

*Not applicable.*

#### **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 Legal and Treaty Department of the Ministry of Foreign Affairs consults and corrects draft legally non-binding agreements and provides guidelines for all bodies submitting draft legally non-binding texts to a voluntary formal assessment. The generally available publication of the Treaty Guidelines of the Ministry of Foreign Affairs includes an extensive chapter on legally non-binding agreements, their form, the differences between a legally binding and a legally non-binding international instrument, including the different terminology to be used, as well as models of such agreements.*

#### **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?

*Legally non-binding instruments are a flexible way to arrange cooperation in situations where there is no need to create legally binding rights and obligations. They are not subject to the national treaty procedure provided for international agreements; therefore their conclusion is simpler and less time-consuming.*

*Simultaneously, they are also not subject to the pacta sunt servanda principle and are based only on the principle of good faith and political willingness to implement them, which entails less legal certainty for participants.*

*They are not regulated by international law and failure to comply with them does not result in international responsibility, although it may be associated with accountability of a different nature, e.g. political.*

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?

*Yes. Probably mostly due to perceived advantages of such agreements, as enumerated in an answer to question no 39.*

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?