

PORTUGAL

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 the Portuguese practice, the term “agreement” is reserved for international legally binding instruments, usually bilateral ones (i.e. an agreement between the Portuguese Republic and another State).

Refer also to Answer to Question 2.

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

Portugal distinguishes between “international legally binding instruments” and “international non-legally binding instruments”.

The first ones mean treaties, as defined in Article 2 of the 1969 of Vienna Convention on the Law of Treaties and in Article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Conversely, “international non-legally binding instruments” can roughly be defined as all other international instruments: they are concluded between entities who are not subjects of international law and they do not create any new international rights nor obligations for the Portuguese State – being merely politically and administratively binding on their signatories.

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

According to Portuguese practice, “memoranda of understanding” are a designation used for international non-legally binding instruments. Nevertheless, as provided for in the Vienna Conventions mentioned above, it is the content of a concrete instrument that determines its international legally binding nature, whatever may be the designation of said instrument.

II. Distinction

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

Refer to the Answers in Subsection I of Section A. In the case of international contracts, they are not subject to the formal assessment explained in Subsection VI.

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 primary elements typically qualifying an international instrument as non-legally binding are its signatories (i.e. entities who are not subjects of international law) and contents – namely a clause noting that the instrument does not constitute a legally binding one and thus does not create new rights nor obligations under international law, and the absence of clauses that are typical of international legally binding instruments (such as provisions on the settlement of disputes and registration with the Secretariat of the United Nations).

Another important element regarding the content of and international non-legally binding instrument is the use of differentiated terminology from that of international legally binding instruments: e.g. “signatories” instead of “parties”, “clause”/“section” instead of “article”, use of verbs such as “will” and “decide” instead of “shall” and “agree”.

Refer also to the Answers in Subsection I of Section A.

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?

Portuguese practice does not distinguish between different types of non-legally binding instruments: only between international legally binding instruments and international non-legally binding instruments.

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

Portuguese practice does not distinguish between different types of non-legally binding instruments: only between international legally binding instruments and international non-legally binding instruments.

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?

The Portuguese Republic as a State (subject of international law) does not conclude international non-legally binding instruments; the Government of the Portuguese Republic, ministries or other subjects of internal Public Law do.

III. Competence

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

Internal law (in the case, Administrative Law) will determine the public legal person with such competence.

Depending on its object, an International non-legally binding instrument may be signed by the Government of the Portuguese Republic (typically when the object concerns more than one governmental area and thus would demand multiple Portuguese signatories), by ministries or other subjects of internal Public Law (for example, public institutes).

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?

Those subnational territorial units may conclude their own international non-legally binding instruments; the Ministry of Foreign Affairs should be aware that such instruments are under negotiation and/or that they have been concluded, although it does not provide political nor legal opinions on them. Those international non-legally binding instruments should take into account international legally binding instruments in force on the same or related objects.

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?

Portugal does not consider that international non-legally binding instruments may produce legal effects, neither that they are prerequisites of an international legally binding instrument.

In the event that an international non-legally binding instrument is concluded before an international legally binding instrument, their content will necessarily differ, as the first cannot create new rights nor obligations 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?

Under the Constitution of the Portuguese Republic, certain matters may not be illegible for an international non-legally binding instrument: for example, agreements on defence cooperation and agreements on friendship.

Without prejudice to the applicable constitutional requirements on international legally binding instruments, a number of factors may influence the decision to opt for such an instrument or an international non-legally binding instrument – but mainly the preference for creating new rights or obligations under international law, or merely designing and implementing international cooperation in a certain area, without it having effects (including legal ones) for other entities besides its signatories.

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

The Ministry of Foreign Affairs does, in accordance with applicable constitutional and legal requirements and on its capacity as the governmental department responsible for conducting the Portuguese external policy and action.

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

Legally binding instruments follow special procedures for signature and approval in accordance with the applicable constitutional and legal provisions. There are no such requirements for non-legally binding instruments.

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. As the Ministry of Foreign Affairs is responsible for conducting the Portuguese external policy and action, the negotiation of all international instruments, both the legally binding and the non-legally binding ones, is followed by that Ministry.

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

The International Law Department of the Department of Legal Affairs assesses the draft instruments and identifies whether the legal nature and contents of each instrument is in accordance with international law, internal law, and national practice.

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

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.

Non applicable.

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?

Non-legally binding instruments concluded by subnational entities are not subject to the formal assessment explained above.

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?

Over the years, the Legal Department of the Ministry of Foreign Affairs has issued manuals containing written guidance on international instruments, including non-legally binding ones, for the services of the Ministry and other governmental departments

The manuals take into account, and explain, the main differences between international legally binding instruments and international non-legally binding instruments, including from the point of view of recommended language and on constitutional and legal requirements for signing and approving legally binding instruments – in contrast with the lack thereof in the case of non-legally binding instruments. Recommended models of final provisions are provided as annexes to those manuals.

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

Such requirement is brought to the attention of relevant actors by the Ministry of Foreign Affairs, in everyday business and in external policy coordination meetings (especially preparatory meetings for visits of high-level officials). The manuals referred to in Answers to Questions 19 and 38 are another important tool for that awareness and are circulated as appropriate.

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

There are no special monitoring channels for ensuring that international non-legally binding instruments concluded by them are submitted for the centralised formal assessment procedure. It is for the competent services within the Ministry of Foreign Affairs and other governmental departments to ensure that such assessment of these instruments does take place prior to their signature.

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)?

Refer to Answers to Questions 19 and 38.

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. Such requirements are exclusive of legally binding instruments.

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

Non applicable.

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

Non applicable.

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?

Non 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?

No. Such requirements are exclusive of international legally binding instruments.

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

Although there are no legal requirements to do so, our national practice is that of having both international non-legally binding instruments and international legally binding instruments signed by hand and at the same date by a representative of each signatory.

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?

Although there are no legal requirements to do so, our national practice is that of having both international non-legally binding instruments and international legally binding instruments signed by hand and at the same date by a representative of each signatory.

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)?

As result of the State's constitutional obligation to protect and promote the Portuguese language, bilateral non-legally binding instruments or legally binding instruments are signed in Portuguese as a matter of principle.

Very exceptionally, non-legally binding agreements may be signed only in a foreign language, provided it is not an official language of the State of the other signatory.

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)

Such requirements are exclusive of legally binding instruments.

IX. Registration and Publication

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

Only physical copies of non-legally binding instruments signed by Portuguese entities are kept by the Division of Archives and Library of the Diplomatic Institute of the Ministry of Foreign Affairs.

At the moment, there is no digital register/archive/database for non-legally binding instruments signed by Portuguese entities.

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

The Division of Archives and Library of the Diplomatic Institute of the Ministry of Foreign Affairs is provided a copy of non-legally binding agreements; the originals will usually be kept by the Portuguese signatory itself (which may or may not be the Ministry of Foreign Affairs).

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

No. Legally binding instruments concluded by the Portuguese Republic are published in the official gazette, in accordance with the Constitution of the Portuguese Republic. As no such constitutional nor legal requirement exists in the case of non-legally binding instruments, it is for the Portuguese signatory to decide whether to publish it (for example, in its official webpage).

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?

This will greatly depend on the object of the non-legally binding instrument, as well as on the practice and will of the Portuguese signatory.

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 Department of the Ministry of Foreign Affairs disseminates periodic manuals for the services of the Ministry, as well as to other governmental departments.

Those manuals take into account, and explain, the main differences between legally binding instruments and non-legally binding instruments, including from the point of view of recommended language and on constitutional and legal requirements for signing and approving legally binding instruments – in contrast with the lack thereof in the case of non-legally binding instruments. Recommended models of final provisions are provided as annexes to those manuals.

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 play a crucial role in developing international cooperation (bilateral or multilateral), including within the framework of previous legally binding instruments in force (as secondary instruments that further elaborate on said cooperation matters).

Because they do not require special formalities for signature nor approval under Portuguese and international law, they allow for more expedite negotiations and start of implementation, as well as easier changes, if need be.

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?

Portugal does not have a notion that this is the case in our national practice. Even if this was the case, under the Constitution of the Portuguese Republic there are matters of international cooperation that would always have to be concluded under a legally binding instruments (e.g. agreements on cooperation in the field of defence).

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?