

ROMANIA

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>For Romania, the term is used in practice to designate internationally concluded instruments which do not meet the requirements for treaties, as they are described in the definition for the term „treaty” in article 1a) of the Law no. 590/2003 on treaties (the definition is very similar to the one in Convention on the law of treaties, done at Vienna on 23 May 1969)</i></p>
<p>2. If not, what term do you use instead (e.g. arrangements) and how do you define it?</p> <p><i>Aside from the term referred above, there are other terms which can designate specific types of non-legally binding instruments, such as:</i></p> <ul style="list-style-type: none"><i>political agreement – an international instrument which scope is to set political objectives to be attained between states or states and international organisations;</i><i>technical arrangement – an international instrument which sets out specific technical details for the application of a treaty, without creating new obligations for the parties;</i><i>twinning agreement – an international instrument concluded between administrative-territorial units (ATUs) which are usually situated in neighbouring countries.</i>
<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>As stated above, Romania considers to be treaties any instruments that meet the requirements set out in art. 1a) of the Law no. 590/2003 on treaties, regardless of their particular designation.</i></p>
II. Distinction
<p>4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements?</p> <p><i>Domestic legislation provides definitions for both the terms „treaty” and „state contracts”, the principal distinctions being that state contracts are concluded between entities which are not subjects of international law and that these instruments are not subject to international public law. Domestic legislation does not provide a definition of the term „non-legally binding agreements”, however, as stated above, in the practice of Romania these instruments differ from others by the fact that are not intended to create legal obligations.</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 essential element which qualifies an agreement as non-legally binding is the fact that, when concluding said agreement, the parties did not intend to create legal obligations</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>From a legal point of view, there are no differences between the different types of non-legally binding agreements.</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>Domestic legislations does not provide for differences between different types of non-legally binding agreements.</i></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?

Domestic legislations does not provide for differences between non-legally binding agreements concluded between states or between states and international organisations.

III. Competence

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

Usually, non-legally binding agreements are signed by the head of the institution/national entities which is the participant in the agreement. However, according to the domestic legislation, the head of the institution/national entities in question can designate another person to sign on his/her behalf.

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?

Municipalities, cities and counties from Romania can conclude twinning agreements with other similar territorial units from other states.

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-legally binding agreements may be taken into consideration when interpreting a treaty according to the rules provided by article 31 of the Vienna Convention on the law of treaties.

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?

For Romania, the choice of whether to conclude a binding or a non-legally binding agreement is influenced by the nature of the effects that these instruments produce. If the foreign policy's objectives can be reached only through a legally-binding instrument, then Romania shall conclude such an instrument; similarly, non-legally binding agreements may be used in order to reach certain foreign policy objectives.

There have been instances when non-legally binding instruments have been concluded in order to facilitate the conclusion of binding agreements, but there is no established practice to this end.

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

According to the Romanian domestic legislation, only Romania, the Government of Romania, the ministries and other centralised entities which, by law, have the capacity to conclude legally binding instruments (treaties) can conclude such instruments. As such, the choice between a legally binding instrument or a non-legally binding one belongs to the ministry/national entities managing the matter covered by the instrument and, as such, initiates the internal procedure for the conclusion of such instruments.

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

According to domestic legislation, the text of a legally binding agreement (treaty) must be presented to the Government of Romania (if it is concluded at departmental or governmental level) and to the President of Romania (if it is concluded at state level) for approval before the signing can take place. Also, full powers (credentials) are issued only for the signing of 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?

According to domestic legislation, the Ministry of Foreign Affairs of Romania must be informed and must formally assess any non-legally binding agreements which are to be concluded by any national entities which has the capacity to do so. Furthermore, the draft texts of twinning agreements between Romanian and foreign ATUs must be assessed by the MFA and the ministry managing public administration before they are signed.

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

As stated above, the formal assessment is done by the Ministry of Foreign Affairs of Romania and, in the case of twinning agreements, the ministry managing public administration. It is important to note that the latter does not check the formal criteria of a draft agreement to ensure it is clearly identifiable as non-legally binding, but checks if the provisions of the agreement are compliant with domestic legislation regulating the ATUs

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

In the case of twinning agreements, the draft texts are sent to the MFA and the ministry managing public administration for assessment after they are negotiated with the foreign partner, but before they are signed.

In the case of any other non-legally binding agreements, the draft texts are sent to the MFA for assessment before they are signed

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?

As stated above, twinning agreements are subject to formal assessment by the MFA and the ministry managing public administration.

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?

Currently, there are no internal guidelines for formally assessing non-legally binding instruments.

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.

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 obligation to submit non-legally binding agreements to assessment is contained in laws, which are published in the Official Journal of Romania as such being readily accessible to any interested person or national entities.

Furthermore, when a ATU decides to conclude a twinning agreement, it must communicate its decision to the MFA and the ministry managing public administration before starting the negotiations with the foreign partner. The purpose of this requirement is to assess the political opportunity of the action. If the MFA approves the decision to conclude the twinning agreement, in its reply it also reminds the ATU that it must send the draft text to the MFA and to the ministry managing public administration for assessment.

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

The internal procedure regulated by domestic legislation provides that all instruments which have an international impact for Romania have to be endorsed by the MFA. The formal assessment is done during the endorsement procedure. If the decision to conclude the instrument and the text of the instrument have not been endorsed by the MFA, the Government, being the last endorser, can preclude the conclusion of the instrument

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)?

At the moment, the MFA does not provide workshops or information materials on how to properly draft and conclude non-legally binding agreements. Assistance to other national entities is given on a case-by-case basis, with further reference to materials available publicly (UN Treaty Handbook, manuals, etc).

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?

According to domestic legislation, the Parliament of Romania does not have powers regarding the conclusion of non-legally binding agreements.

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

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

According to domestic legislation, the Parliament of Romania does not have powers regarding the monitoring and/or reviewing of 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?

For International Organisations:

<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>VIII. Signature and Format</p>
<p>29. Is there a formal procedure to authorise the signature of a non-legally binding agreement?</p> <p><i>Domestic legislation provides a specific procedure only in the case of technical arrangements for cooperation with foreign armed forces.</i></p> <p><i>For other types of non-legally binding agreements there is a more general procedure for endorsing and approving external actions promoted by internal actors.</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>Domestic legislation does not provide for this specific requirement. Since for Romania, the practice employed for signing non-legally binding agreements had been adapted over from the practice of signing treaties, a non-legally binding agreement can be composed of one or more instruments, in the latter case each bearing the signature of the participant who produced it.</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>Domestic legislation does not allow for electronic signatures on any international instrument, be it legally binding or non-legally binding.</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>The practice of concluding non-legally binding agreements in Romania reveals that, usually, these types of international instruments are set in an international („neutral”) language such as English or French. In case the foreign partner also uses the Romanian language (such is the case of the Republic of Moldova), the instrument can be set only in Romanian.</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>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><i>ATUs, ministries and other national entities keep they own registers of the non-legally binding agreements they have concluded.</i></p>
<p>35. If so, what entity keeps the non-legally binding agreement after signature?</p> <p><i>The entity, be it national or local, on behalf of which the non-legally binding agreement was signed also keeps the original texts.</i></p>
<p>36. Do you publish your non-legally binding agreements and are they openly accessible?</p>

Domestic legislation provides only for the publishing of treaties and there is no such requirement for non-legally binding agreements. However, since these instruments are often signed during a ceremony which involves the press, they are accessible to the public through the media.

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?

While there are some cases where confidentiality and/or security required that the texts of some non-legally binding agreements were not made public, in most cases there are no specific reasons why non-legally binding agreements are withheld from publication.

Since, in the case of twinning agreements, they are applied locally, and in the case of other types of non-legally binding instruments, they are relevant only for the entity that concluded the instrument, central registration and publication would cause unnecessary complications.

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?

At the moment, the MFA does not provide workshops or information materials on how to properly draft and conclude non-legally binding agreements. Assistance to other national entities is given on a case-by-case basis, with further reference to materials available publicly (UN Treaty Handbook, doctrine, etc).

In the case of twinning agreements, the MFA does provide a model of „Cooperation Agreement“ for ATUs.

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?

The main benefit of concluding non-legally binding agreements, especially at central level, is using them as interpretative guidance for legally binding instruments. Furthermore, non-legally binding agreements can represent important political steps towards enhancing relations with other international actors and may lead to the conclusion of binding instruments.

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?

Since there is no centralised registration of non-legally binding instruments concluded in Romania, it is impossible to discern if there was an increase in the number of such instruments being concluded in recent years.

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?