



Checklist: Confidentiality and Non-Disclosure Agreement (NDA)

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Introduction

This checklist highlights legal issues that need to be taken into account when drafting, reviewing and negotiating a confidentiality and non-disclosure agreement (NDA).

General

- Title of the agreement (the title is only indicative)
- Identification of the parties
 - Name and legal form
 - Address or registered offices
 - Company identification number (0xxx.xxx.xxx) (trade register number or other unique identification number in case of foreign companies, if available)
 - Register of Legal Entities
 - VAT number (BTW BE0xxx.xxx.xxx)
- Identification of the signatory
 - Name
 - Title
 - Verify the authority of the signatory
- Preamble
 - Description of the parties
 - Description of the purposes of the parties to the agreement

- Signature
 - Verify the identity of the signatory, the signature and the date
 - Sign as many original counterparts as there are parties (mention the number of counterparts in the agreement)
 - Check the page numbering (continuous)
 - Initials on every page are not legally required, but they are useful (it confirms that each page was read and accepted and protects against exchanging pages)
- Nature of the NDA
 - Unilateral NDA
 - Reciprocal NDA

☑ Definitions and Interpretation

- Define 'confidential information'
 - Exhaustive definition?
 - Open definition: reasonable presumption of confidentiality
 - Mentions on the information (e.g. "confidential")
 - Nature of the information
 - Circumstances surrounding the disclosure
 - Reference to schedule identifying the exchanged information
 - Combination of the abovementioned options
 - Specific inclusions and/or exclusions?
- Define 'purpose'
 - Limits the context for use of confidential information
 - Link to preamble?
- Interpretation rules
- Hierarchy of the contract documents

☑ Obligations of the Recipient of Confidential Information

- Confidentiality obligation
 - Internal disclosures
 - Employees only
 - External disclosures permitted?
 - Agents, directors and advisors
 - Recipient Affiliates
 - 'Need to know' principle
 - For third parties: obligation to impose confidentiality obligations for onward transfers of confidential information
 - Required level of confidentiality obligations?
 - Requiring identical confidentiality obligations may be difficult to implement ('equivalent' or 'no less protective' is a better alternative)
 - Exceptions?
 - Binding orders or requests?
 - Modalities?
- Purpose limitation in relation to the use of confidential information



- Security obligation
 - Reasonable effort or best effort obligation?
 - Minimum obligation?
- Notification obligation in case of (suspected) breach of confidentiality or security

✓ Liability and Liquidated Damages

- Limitations of liability are unusual in NDAs
- Liquidated damages
 - Preferred for their dissuasive effect
 - Amount may not be unreasonably high
 - Include the right to claim higher, proven damages
- NDAs usually mention that breach may cause grave and irreparable loss
 - Some jurisdictions may require this for injunctive relief
 - Increases security obligation in case of 'reasonable effort' obligation

✓ Intellectual Property Rights in Confidential Information

- Impact of disclosure on intellectual property rights
 - No transfer or assignment
 - Limited license can be envisaged, depending on the circumstances
- Permission/prohibition to use the know-how acquired?
 - Incorporation of and reference to confidential information prohibited?

✓ Duration and Termination

- Duration
 - Determined
 - Specific period of years
 - Linked to a specific event (e.g. no more confidential information)
 - Undetermined
 - Applies if nothing is mentioned
 - Termination is possible at all times subject to reasonable notice: may lead to the opposite of the parties' intentions
 - Termination options?
- Consequences of termination
 - Obligation to return or destroy confidential information
 - At first request of the disclosing party?
 - Choice of the disclosing party?
 - Confirmation?
 - Exceptions?
 - E.g. no application on copies required to comply with archiving obligations?
 - Other obligations?
 - Non-compete under specific circumstances

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Warranties

- Usually provided 'as is' without warranties regarding completeness or accuracy
- Exceptions may apply, depending on the circumstances

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'Boilerplate' Clauses

- Notices
- Export control
- Severability clause
 - Consequences of unenforceable clauses?
 - Negotiation obligation?
 - Replacement obligation?
- Personal nature (intuitu personae)
- Entire agreement clause
- No waiver
- Amendments
- Applicable law and jurisdiction
 - Applicable law
 - Jurisdictions
 - Arbitration as an alternative?

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