

Non-disclosure agreement

(NDA)



Important issues

Parties	Names, legal form, registered office, address and authorized representatives (including their position)
Position of Party A	Under the considerations, briefly indicate what Party A is doing/contributing and, if necessary, what it hopes to find
Position of Party B	Under the considerations, briefly indicate what Party B is doing/contributing and, if necessary, what it hopes to find
One-sided / two-sided Non-disclosure Agreement	Does the confidentiality apply to one or both parties? In the case of a two-way NDA, it is important to clearly distinguish between the (defined) Providing Party and the Receiving Party.
Definition of affiliates	Define what falls under affiliated companies or, if necessary, specify a number of Affiliates that must also be covered by the NDA. Be very cautious; secrets are best kept if they are not shared much.
Definition of the Project	Briefly describe the Project. This definition determines what the information may be used for (within the Project) and has to be customized for the project. In some cases, use within the project is further restricted by adding an extra definition for the "Purpose".
Starting date	dd/mm/yyyy or the day the last party signed the NDA. Be aware if any Confidential Information that should be covered by the NDA has already been shared prior to the starting date, and ensure it is also covered.
Expiration date	dd/mm/yyyy or for example the End date of the Project.

Definition of Confidential Information

This definition is usually broad and comprehensive, but not too broad as it must be clear what is Confidential Information and what is not. In addition, it is always important to check whether your own key assets are covered.

Confidentiality formalities

For example, *“Identified and explicitly marked as confidential and appropriately labeled as “confidential”* possibly also with an addition to confirm any verbal information in writing afterwards. When including a marking provision, make sure that it is adhered to and is feasible.

Exception to Confidentiality

Consider the – often adopted as standard – exceptions to the confidentiality obligation, such as, for example, *“The Receiving Party is not bound by confidentiality with regard to those parts of the Confidential Information of the Providing Party, if these were already public or were already in its possession before it received this Confidential Information from the Providing Party. Or if it came into its possession through a third party that is not bound by confidentiality”* etc. If you, as a Party, wish to obtain (usage or property) rights to the Results, for example, an exception such as “confidentiality does not apply to information found by the Receiving Party itself” may have some unpleasant consequences.

Division of the burden of proof

For example: *“The burden of proof rests with the Receiving Party and the Receiving Party will promptly notify the Providing Party in writing if it believes any of these exceptions occur.”*

Definition of Background Information

Certainly when Results are expected when executing the Project, it may be important to clearly delineate what a Party already has (before the Starting Date) and perhaps also what it subsequently finds outside the actual Project so that it is not shared under the Results agreement.

Definition of Results (Foreground) and transfer

If Results from the Project are expected, it is important to make agreements about the ownership and use (also afterward). For example (very far-reaching): *“If the Receiving Party’s use of the Confidential Information leads to intellectual property rights or similar claims, the Receiving Party will transfer these rights and/or claims to the Providing Party free of charge.”* If this option is chosen, a transfer provision can be added if necessary.

No right to apply for IP rights

For example: *“The Receiving Party will not apply for, or otherwise claim protection for, any Intellectual Property Rights, anywhere in the world in regards to the Confidential Information provided, nor will the Receiving Party permit or assist anyone else to do so.”*

No use outside the Project / Purpose

For example *“The Parties undertake to use the Confidential Information only for the implementation of the Project/Purpose”*. Determine whether certain actions should be explicitly excluded.

Other obligations

In addition to the restriction of use by the Project/Purpose definition, nondisclosure agreements often have clauses specifically forbidding certain actions. Think of a covenant to copy and dissect Confidential Information. etc.

Disclosure to Employees

Carefully consider who should have access to the Confidential Information and limit this group (the best way to keep a secret is by not sharing it)

Disclosure to Third Parties	Once again; consider who should have access to Confidential Information and keep this group as small as possible
Publication regulation	Especially when collaborating with knowledge institutions, it is important to include a regulation about publication, with agreements about, among other things, advance review and postponement of publication (in the case of patenting).
Obligation to provide Confidential Information or the option not to do so	Do you want to be sure that certain information will be shared or do you want to explicitly state that you have the option to not share Confidential Information?
Obligation to return Confidential Information during the agreement	Is it important to be able to reclaim Confidential Information even though the Project has not yet been completed?
Possibility of ceasing the use of Confidential Information during the agreement	For example, if the Project involves testing, you may want to consider building in the ability to cease the use of Confidential Information during the term of the agreement.
Obligations afterwards	This is important to ensure that the confidentiality requirement is maintained after termination of the agreement. Also check carefully whether other obligations must continue (for example, the obligation to not apply for IP protection). In addition, a clause to return or destroy or (in the case of electronically transferred material) restrict access is also important. In addition - especially in testing/reporting situations - you may want to ensure that such information is provided to you no later than the Expiration Date.
Sanctions for non-compliance	Failure to observe the nondisclosure agreement may make it impossible to apply for a patent as the novelty has been compromised. For this reason (and because calculating the damage can be difficult) you should consider including a penalty in case of non-compliance.
Premature termination	Sometimes it's a good idea to exclude the possibility of premature termination of a non-disclosure agreement, but in other cases it may be important to make agreements about premature termination or dissolution in the event of non-compliance. Carefully consider the obligations in case of termination due to the passage of time or by mutual consent, and those in case of non-compliance, as these may differ.
Transferring rights	Can your other party transfer its rights and obligations under the non-disclosure agreement? In most cases, this will be blocked because otherwise you may not have enough "control" over who your Confidential Information is shared with.
Merger or acquisition	Perhaps you want to enable the transfer of rights and obligations in the event of a merger or takeover? Keep in mind that your other party may also be taken over by your largest competitor. Most nondisclosure agreements allow intra-group transfers (to Affiliates).

Salvatorian clause

This is a “safety valve”; It is agreed that - if a provision in the non-disclosure agreement cannot be enforced or is null and void - the rest of the agreement will remain in effect and the parties undertake to replace the relevant clause with something that is permitted/or that works.

General obligation regarding assistance

Depending on the Project/Goal, it may be useful to include a general (effort) obligation to provide assistance.

Non-attack provision

While the restrictions imposed by competition law must be respected, consideration may be given to including a non-aggression clause (with regard to the IP) or, for example, including a “cooling-off period” after termination of the agreement.

Jurisdiction

Know which law applies to the agreement (Dutch/Belgium/German, etc.) and make an agreement about this in principle. Make sure the attorney drafting or reviewing your non-disclosure agreement is very familiar with that country’s legal system.

Choice of Forum

Decide which judge or arbitrator will handle any dispute and make sure it is in accordance with your choice of law (i.e. don’t use Dutch law in a Swiss court).

Alternative Dispute Resolution

Sometimes disputes can be resolved better (about certain articles of the agreement) by means of alternative dispute resolution (such as escalation to management level, the insertion of a cooling-off period, etc.).

If you have any questions or would like Intellectual Property advice?

Please contact V.O. Patents & Trademarks

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