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## Negotiating Non-Disclosure Agreements

Category: News

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[Rz 1] It is mostly in the interest of enterprises to keep their trade secrets confidential and exchange them only with selected business partners. The most common way to protect information is by non-disclosure agreement (NDA)<sup>1</sup>.

[Rz 2] NDAs consist mostly of 2—3 pages legal terms. Even though they are short, one size does *not* fit all. Some questions to be considered when negotiating the next NDA are, e.g.:

1. Who is providing more confidential information? An NDA does not need to be mutual. Maybe you need to protect your trade secrets but wish not to receive any secrets from your partner as they might «contaminate» your business.
2. What information is confidential? Is it financial, technical or operational information? Defining *all* information exchanged during a business collaboration as confidential is seldom necessary.
3. How do you exchange the information? In writing or orally? And how do you recognise the confidential information? Must it be marked as «confidential»? Note that information is either confidential or not — its binary. There is no space for qualifiers such as «strictly».
4. For what purpose may the exchanged trade secrets be used? And exactly who can use the confidential information? Whereas employees are bound by their legal and contractual duty of care and loyalty<sup>2</sup> and therefore do not need to sign individual NDAs, companies within group entities might need to consider group clauses for the exchange and use of trade secrets among each other.
5. During which period are you exchanging confidential information and how long shall the information be kept confidential? These are two different periods: The former is the duration of the NDA itself; the latter is the period during which the information needs to be kept confidential.
6. Do you need exceptions? Permitted disclosures despite confidentiality obligations are, e.g.: information already possessed, independent development or public availability.
7. Typically it is not recommended excluding liability in an NDA. A damage based on a confidentiality breach will most likely be indirect. If you integrate the NDA and its confidentiality terms into another (subsequent) agreement and such agreement disclaims liability for indirect damages, we recommend carving out damages caused by confidentiality breach from such limitation of liability or else the confidentiality obligation will become useless.

[Rz 3] Our law firm has longstanding expertise in protecting IP. We gladly support you in your next negotiation.

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<sup>1</sup> Also referred to as confidentiality agreement (CA), confidential disclosure agreement (CDA) or secrecy agreement (SA).

<sup>2</sup> Art. 321a Swiss Code of Obligations, SR 220.