

Practical Guide to Non-Disclosure Agreements (NDAs)

In the corporate world, signing Non-Disclosure Agreements (NDAs) or confidentiality agreements is standard practice, especially during M&A processes. This document is essential in the sale and purchase of companies, as it provides a security framework that allows sensitive information to be shared with confidence and guarantees the protection of the company against possible damage.

What is an NDA?

An NDA is an agreement through which the signing parties undertake to keep certain information confidential due to the sensitive nature of this type of transaction, as its disclosure could be used fraudulently, as insider information, or by competitors for own their benefit.

There are several types of NDAs, each adapted to the needs of the parties involved:

Unilateral NDA:

Only one party commits to keeping the information confidential. This is common in employment relationships or when a company shares information with a potential investor (whether debt or equity).

Bilateral or Mutual NDA:

Both parties commit to protecting the confidentiality of the shared information. This type of NDA is common in mergers or strategic partnerships, where both parties exchange sensitive information.

Multilateral NDA:

Involves more than two parties. For example, when several companies collaborate on a joint project and all commit to protecting the exchanged information.

Essential Aspects of an NDA

Non-disclosure agreements must be precise and detailed, addressing essential aspects that guarantee the effective protection of information. In addition, it is common for the parties to use these agreements to regulate other issues, such as prohibiting investment by other means, forbidding contact or hiring of employees, clients, and suppliers, or even adding rules that prohibit the investor from obtaining exclusive financing.

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1 Clear definition of the purpose of the NDA and confidential information

It is crucial to explicitly define the "purpose" of the confidentiality agreement and what constitutes "confidential information." A broad and clear definition avoids ambiguities and potential gaps in protection.

The "purpose" is usually defined by reference to the transaction the parties intend to achieve or, in general terms, the reasons why the parties will make certain confidential information available. "Confidential information" typically includes, among others, all information of technical, financial, and commercial nature that is likely to be disclosed in writing, verbally, or by any other means, within the scope of the "purpose."

2 Exceptions to confidentiality

The agreement must provide for situations where disclosure of information is allowed, such as legal requirements or specific regulations.

Common exceptions to confidentiality include:

- Information that was already public before signing the agreement.
- Information which was lawfully known by the receiving party.
- Information made public by other sources not violating the NDA.
- Disclosure by court order or regulation.
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3 Duration of the agreement and destruction of information

The NDA must specify its validity period, i.e., the time during which the information must remain confidential. This period may vary depending on the nature of the information and the specific needs of the transaction.

It is also common for these agreements to include clauses on the return and/or destruction of confidential information.

4 Obligations and definition of the parties

It is essential to clearly define who will be considered the disclosing party and who the receiving party, or whether both parties will share confidential information bilaterally. This distinction is key to precisely establishing the obligations and responsibilities of each party with respect to the shared information.

Additionally, the agreement must clearly set out the parties' obligations, including the handling and protection of information during the negotiation period and once it ends. The agreement should also establish limitations on the use of information, restricting it exclusively to the purpose of the transaction.

It is also very important to expressly define who the representatives of both parties are, and especially the representatives of the receiving party. In this case, the representatives are those persons or entities who, while not the receiving party itself, are part of the group of persons and entities that, acting on its behalf, may also receive confidential information. These may include affiliated entities of the receiving party, managers, directors, employees, professional advisors, and consultants of both the receiving party and its affiliates.

5 Consequences of breach

It is essential to include the consequences that will arise in the event of non-compliance with the obligations established in the NDA. These may include penalty clauses, financial compensation, and corrective mechanisms to ensure compliance with the agreed terms.

6 Other clauses

As already mentioned, confidentiality agreements increasingly cover more than just the protection of confidential information. This is because, when disclosing confidential information, the disclosing party is placed in a vulnerable position before the receiving party, which will know its business model, clients, accounts, etc.

In this regard, confidentiality agreements increasingly include clauses prohibiting the receiving party from contacting the disclosing party's clients, suppliers, partners, or employees (or those of its group of companies, as the case may be). They also often include clauses prohibiting the receiving party from hiring the disclosing party's employees during the term of the confidentiality agreement, or for a set period afterward, whether shorter or longer.

Furthermore, to increase competition among potential investors in medium- and large-scale M&A or private financing transactions, it is also common to include clauses prohibiting potential investors from exclusively engaging financiers, advisors, or insurance companies. The need for such restrictions depends on the complexity and size of the market in which the parties operate, as well as their bargaining power.

In particular, when the transaction involves listed companies, so-called non-circumvention or standstill clauses are often included, whose main purpose is to prevent a potential investor from seeking alternative mechanisms to invest in the company if its initial intentions are frustrated.

NDA Template

In [Madrid], on [Date]

On the one hand, [*] (hereinafter, the "**Sender**"), with Tax Identification Number [*] and registered office at [*], duly represented for these purposes.

Note: The Sender's identifying details will be disclosed once the final terms of this Confidentiality Agreement have been agreed upon.

On the other hand, [*] (hereinafter, the "**Recipient**"), with Tax Identification Number [*] and registered office at [*], duly represented for these purposes.

Hereinafter, all the parties referred to above, considered jointly, shall be referred to as the "Parties", and each of them individually as the "**Party**".

The Parties mutually recognise each other's legal capacity to enter into this agreement and, to that end,

DECLARE

I.- That, in relation to the interest shown by the Recipient in acquiring shares representing the Sender's share capital or the Sender's assets (hereinafter, the "**Transaction**"), the Recipient may receive certain confidential information from the Sender relating to the Sender and the Transaction.

II.- That the Parties enter into this confidentiality agreement (the "**Agreement**") in order to define, regulate and stipulate their respective rights and obligations in relation to the confidential information that the Sender provides to the Recipient and/or its Representatives in relation to the Transaction, in accordance with the following

CLAUSES

1. For the purposes of this Agreement, the term "**Confidential Information**" includes any information, understood in this sense and including, but not limited to, information of an economic, financial, accounting, technical, commercial, legal, operational or any other nature - even if not expressly marked as confidential - analyses, studies, documents, compilations, images, graphics and any other material, regardless of the medium in which it is found (transmitted either verbally or in writing or by any other means, including visual presentations), obtained by the Recipient and/or its Representatives from the Sender and/or its Representatives (as defined below), either prior to or after the signing of this Agreement, together with any information, analysis, study, document, compilation or other material written or prepared by the Recipient or its Representatives (as defined below), in whatever form, which reflects or incorporates all or part of the Confidential Information, as well as any copies of such Confidential Information. The term "Confidential Information" does not include information that the Recipient can document:

- a) Was in the public domain on the date of disclosure, or subsequently becomes in the public domain for reasons other than a breach by the Recipient or its Representatives of any obligation under or arising from this Agreement; and
- b) Is in the possession of the Recipient or its Representatives on the date it is disclosed, and has not been obtained, directly or indirectly, through another confidentiality agreement.
- c) Must be disclosed by law or by judicial or administrative order. In this case, the Recipient must immediately inform the Sender before such Confidential Information is disclosed, so that the Sender may seek appropriate advice or take any appropriate action to preserve the confidentiality of the Confidential Information.

In the event that such protection is not obtained or no other action can be taken, the Recipient shall provide only that portion of the Confidential Information which, according to a written legal opinion, is legally necessary (such opinion shall be provided to the Sender upon request), and shall use its best efforts to assist the Sender in obtaining such protection or other reliable assurance that the Confidential Information will be treated as confidential.

Likewise, for the purposes of this Agreement, Confidential Information shall also include that which is received directly by the Recipient and/or its Representatives from the Sender, or indirectly through any advisors, shareholders, administrators, directors, employees, agents or representatives of the Sender (collectively referred to as "**Representatives**") or from any companies in the Sender's group (within the meaning of Article 42 of the Commercial Code).

2. The Recipient hereby declares, undertakes and agrees that all Confidential Information, the Transaction, the proposed terms of the Transaction, the fact that negotiations are taking place in relation to the Transaction and the fact that the Recipient has requested or been provided with Confidential Information, as well as its Representatives, shall be kept strictly confidential by the Recipient, its affiliates, directors, officers, employees, representatives, agents and advisers and those of its affiliates (collectively, "**Representatives**") and not be disclosed, by any means, in whole or in part, to any third party by the Recipient and/or its Representatives, without the prior written consent of the Sender. This obligation not to disclose Confidential Information extends to any third party, including those who have signed a confidentiality agreement regarding the Confidential Information and the Transaction or those with whom the Recipient intends or plans to form a joint venture.

The Recipient and its Representatives shall not use the Confidential Information for purposes and/or objectives other than the Transaction. The Recipient and its Representatives undertake and agree not to copy, reproduce or record in any physical or electronic/computer medium any

part of the Confidential Information, nor to use it for commercial or business purposes, nor to use it for their own benefit and/or interests except in relation to the Transaction. In the event of any copying or reproduction of the Confidential Information, which must have been previously authorised in writing by the Sender, such copies shall belong to the Sender, and this Agreement shall apply in its entirety to the Recipient and the Representatives.

The Recipient agrees to disclose the Confidential Information solely and exclusively to those Representatives for whom knowledge of the Confidential Information is essential in relation to the Transaction, who, upon receiving the Confidential Information, shall be informed of the execution of this Agreement and shall be subject to the confidentiality obligations to the Sender under the same terms contained in this Agreement, as if they were the Recipient.

The Recipient shall be responsible for informing the Representatives of this fact. Likewise, the Recipient shall be liable for any breach of this Agreement by its Representatives, as well as by any person to whom the Recipient has improperly disclosed the Confidential Information, and shall be responsible for any costs and damages that may arise therefrom.

The Recipient and its Representatives shall use the same level of diligence as they would use for their own confidential information, taking whatever measures are necessary for this purpose. In this regard, they undertake and agree to adopt and implement whatever protection and security measures are advisable, appropriate or necessary (including so-called "information barriers" or similar instruments) in order to maintain the confidential, private and restricted nature of the Confidential Information and to prevent the Confidential Information from being known, used, viewed or disclosed to any director, employee or advisor of the Recipient or its subsidiaries for purposes other than analysing the Recipient's potential participation in the Transaction. The Recipient undertakes and agrees to inform the Sender as soon as it becomes aware or suspects that the Confidential Information has been or may be disseminated or disclosed to unauthorised third parties within the framework of this Agreement, and to cooperate diligently with the Sender to restore and recover the confidential, restricted and restricted nature of the Confidential Information and to prevent any future unauthorised use of the Confidential Information.

The Recipient undertakes and agrees to hold the Sender and/or its Representatives harmless from any loss, cost, damage and/or harm that may be caused to them as a result of the unauthorised use, dissemination and/or disclosure of the Confidential Information.

3. The Sender may, at any time, terminate the Recipient's and/or its Representatives' access to the Confidential Information. If requested by the Sender to that effect, all Confidential Information shall, at the Sender's discretion, be immediately returned to the Sender or destroyed (in which case the Recipient shall provide the Sender with written evidence of the destruction, certified by a legal representative with sufficient powers, within five (5) business days from the date of the request issued by the Sender).

The part of the Confidential Information consisting of, or to which have been incorporated (in whole or in part) analyses, studies, documents, compilations or any other material prepared by the Recipient or its Representatives shall be destroyed, except for those documents prepared by the Recipient and its Representatives that must be retained to comply with legal or regulatory requirements, and therefore must be returned or destroyed (at the Sender's discretion) once the legal obligation to retain the aforementioned copy has ended.

While such documents must be retained by the Recipient, the Recipient and its Representatives shall keep these documents confidential and shall use them solely for this purpose. The Recipient shall provide written evidence of destruction if requested in writing by the Sender. The termination of access to Confidential Information shall not affect the obligations incurred by the Recipient or its Representatives, which shall remain in force.

In any case, the obligations and commitments assumed by the Recipient and its Representatives with respect to the Confidential Information in this Agreement shall remain in force for a period of three (3) years from the date hereof.

4. Neither the Recipient nor its Representatives shall contact the Sender's employees or any third party connected with the Sender in relation to the Transaction, in particular, shareholders, advisers or representatives, directors, officers or employees, without the prior written consent of the Sender.

5. The Recipient represents and acknowledges that the Sender and/or its Representatives are not responsible or liable for the accuracy, integrity or completeness of the Confidential Information. The Sender and/or its Representatives shall not be liable to the Recipient, its Representatives or any third party as a result of their use of the Confidential Information. The Recipient and its Representatives waive any right to make any claim or initiate any administrative, judicial or arbitration proceedings against the Sender and/or its Representatives in relation to the Confidential Information provided to them under this Agreement.

6. The Sender shall retain all ownership rights to the documents constituting the Confidential Information. The fact that the Sender has provided the Confidential Information shall not be deemed to grant any rights or licence over it.

7. Insofar as this Agreement imposes obligations on the Recipient's Representatives, it is understood that such obligations include the Recipient's obligation to ensure that such persons comply with the aforementioned obligations.

8. It is understood and agreed that any breach of these commitments may cause irreparable damage to the Sender and/or its Representatives, and that compensation for damages may not be an adequate remedy for such breach. In the event of a breach or risk of breach of the provisions of this Agreement, the Sender shall be authorised and entitled to take legal action before any competent administrative, judicial or arbitral body to demand the adoption of precautionary measures to prevent the Recipient from breaching the terms of the Agreement or disclosing any part of the Confidential Information to any third party. The foregoing is without prejudice to any other administrative, judicial or arbitral action that may assist the Sender and/or its Representatives in their rights against the Recipient and/or its Representatives.

9. Any communication or notification between the Parties in relation to this Agreement shall be made in writing and sent by letter delivered in person or by registered mail with acknowledgement of receipt, burofax or email and addressed to the addresses indicated below. Any change in the address of one Party shall be communicated to the other Party:

The Sender:

For the attention of: _____

Address: _____

Email: _____

The Recipient:

For the attention of: _____

Address: _____

Email: _____

10. In the event that any or all of the clauses stipulated in this Agreement are declared null and void, illegal, or ineffective, the Agreement shall remain in force in all other respects. Any clause in this Agreement that may be declared null and void, illegal, or ineffective may be replaced by a clause that is valid, legal, and effective, and whose effect is as similar as possible to that of the clause it replaces.

11. This Agreement shall not be construed as a legally binding offer, commitment or obligation between the Parties to carry out the Transaction, nor as a promise or obligation to enter into contracts or grant rights by the Sender in relation to the Transaction or any other transaction.

12. The provisions and stipulations contained in this Agreement shall be for the benefit of the Sender in relation to the Transaction.

13. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof, and no representations have been made by either Party except as specifically included herein.

14. The Recipient acknowledges, represents and agrees that the Confidential Information has been or may be disclosed by the Sender to any other third parties who have also shown an interest in the Transaction.

15. This Agreement and the rights and obligations arising therefrom may not be assigned by the Recipient without the prior written consent of the Sender.

16. This Agreement is governed by Spanish law. The courts of the city of Madrid shall have jurisdiction over any contractual or non-contractual dispute arising from the performance or interpretation of this Agreement. The parties waive any jurisdiction that may correspond to them.

In witness whereof, the Parties sign this Agreement in duplicate for a single purpose at the place and on the date indicated in the heading.

The Sender:

Name: [*]

Position: [*]

Date: [*]

Signature: [*]

The Recipient

Name: [*]

Position: [*]

Date: [*]

Signature: [*]



This brochure is of an advertising and informative nature. For the provision of professional legal advice you should contact the firm directly through the specialized contacts.

Seegman refers to the company Seegman Servicios Jurídicos, S.L.P., with tax identification number B88144852.

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