

BESTPRAC Joint Meeting of WG3

Task 2a – Analysis of examples of basic model NDAs used by the institutions

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Why do we need NDAs? *

- Confidentiality is an important issue for participants in R&D projects
 - From the setting-up to the implementation and exploitation phases
- Exchanging valuable information with other partners is generally a necessity that regularly occurs in collaborative initiatives or undertakings
- Confidentiality issues should be taken into consideration in order to safely exchange information, facilitating the project development and ensuring the non-disclosure of sensitive technology, business or commercial confidential information

* European IPR Helpdesk

Why do we need NDAs? *

- Deciding to become involved in a project, business or commercial relationship requires discussions and the exchange of information between people from different organizations, companies or institutions with different background knowledge and interests
- NDAs provide protection and security to an organization that is about to share or make available information to another organization
- Confidential information or specific documentation should be only revealed under confidentiality commitments settled in advance
- Otherwise it might be used for the benefit of others, excluding and harming the interest of the owner of the confidential information

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Best practices in respect of the model NDAs used by different institutions

- Multilateral NDA or unilateral NDA
 - Multilateral if both/all parties are sharing information
- Separate NDA or NDA as a part of MoU/Lol
 - A part of MoU/Lol if there is a need for clauses related to grant preparation
- Personal NDAs or NDAs between organisation
 - Usually NDAs only between organisations
 - Researcher is not authorized to make commitments on behalf of university

The most important and tricky NDA clauses – Check and remember these!

- Identifying role of the parties (university and company / industry)
 - Disclosing party: party disclosing the information
 - Receiving party: party receiving the Confidential Information
- Identifying the subject matter – Purpose – that parties may disclose Confidential Information
 - Be careful when defining the Purpose: It sets out the limits of forbidden and permissible
 - Not too wide – not too restricted
 - E.g. grant preparation / submitting a Horizon2020 proposal, examining the possibility of a future research collaboration

The most important and tricky NDA clauses – Check and remember these!

- Definition of “Confidential Information” with marking requirement
 - “Any information, including but not limited to any kind of research, financial, business, commercial or technical information and data as well as any apparatus, modules, samples, prototypes or parts thereof disclosed by one of the parties”
 - When disclosed in tangible form: clearly marked as “Confidential”
 - When disclosed orally or visually: identified as confidential prior to disclosure and confirmed in written summary marked “Confidential” within deadline specified in NDA (e.g. 7/15 days)
- Do researchers follow the marking requirement? Who monitors it?
- Option: All information is confidential
- Information that by its nature is unmistakably understood confidential

The most important and tricky NDA clauses – Check and remember these!

- The list of exceptions to Confidential Information
- The confidentiality obligation shall not apply to information which:
 - at the time of the disclosure is in the public domain;
 - after disclosure, becomes part of the public domain by publication or otherwise than by breach of NDA;
 - has already been in the possession of the receiving party prior to the disclosure hereunder;
 - the receiving party receives from a third party without confidentiality obligation;
 - is released for disclosure by prior written consent of the disclosing party;
 - has been independently conceived or developed by the receiving party without exploiting the other party's Confidential Information;
 - is required to be disclosed under law or by order of a court
- Receiving party has the burden of proof

The most important and tricky NDA clauses – Check and remember these!

- Obligation keep the Confidential Information confidential
- Confidential Information is provided only for the Purpose and use of it is strictly limited to the Purpose
 - Any other use is subject to a separate written agreement
 - NDA means no commitment to enter into nor creates further cooperation or commercial relationship
- Obligation to return / destroy the Confidential Information (on request)

The most important and tricky NDA clauses – Check and remember these!

- Disclosing Confidential Information permitted only to the minimum number of party's employees, officers, contractors, students, and to the extent it is necessary in order to carry out the Purpose (need to know basis)
 - Employees must be bound by the confidential obligations no less stringent than set out in NDA
 - No disclosure to any third party without the prior written consent of the disclosing party
 - No copies / duplicates unless it is necessary for the Purpose and permitted by the disclosing party
 - Require NDAs from external advisors / experts
 - If possible, list of persons to who Confidential Information is made available

The most important and tricky NDA clauses – Check and remember these!

- Obligation to use at least the same level of care to prevent any unauthorised use or disclosure of the Confidential Information as party exercises in protecting its own information of similar nature
 - At least reasonable degree of care
- Confidential Information furnished “as is” –basis
 - No warranties
 - Use of Confidential Information takes place at the user’s risk: Disclosing party accepts no responsibility or liability for any expenses, losses (direct/indirect) or actions incurred by the receiving party as a result of its use of Confidential Information

The most important and tricky NDA clauses – Check and remember these!

- Term of NDA – Define the period that NDA obligations remain in effect
 - Becomes effective on the date it has been signed by both parties
 - Remains in effect for X year(s) from the signature date
 - Deadline of the call
 - The obligations set forth in NDA in respect of each disclosure of Confidential Information shall survive any expiry of this Agreement for X years from the date of the disclosure (varies with the field of research)

The most important and tricky NDA clauses – Check and remember these!

- Limitation of financial liability
 - The parties' liability shall not in any event exceed X euros
 - Option (if applicable): The parties' liability shall be restricted to the amount of future share of the project budget
 - Does not apply to damages based on gross negligence or wilful act
- Are you allowed to have several grant proposals to same call / activity?
 - Do not limit your rights unnecessarily
 - Restrictions only to PI / researcher group –levels – not university level

The most important and tricky NDA clauses – Check and remember these!

- Terms of governing law
 - Laws of your own country
 - Country that other party comes from
 - Impartial country (e.g. Belgium law)
 - Country of a party who is sued
- Terms of dispute resolution
 - Arbitration: the rules (e.g. ICC), the place and the language
 - Public / national courts

The most important and tricky NDA clauses – Check and remember these!

- Signing the NDA means no obligation to disclose (/receive) information
- Disclosure of Confidential Information is not considered a “publication”
 - For patent purposes – does not prevent filing a patent
- Confidential Information remains property of the disclosing party
 - No licence is either granted or implied
- No assignment or transfer without prior written consent of the other party
- Amendments only if signed by duly authorised representatives of parties

Or do we need NDAs?

- Are you exchanging information that needs to be kept confidential?
- Do not receive / disclose information that is confidential unless it is necessary for the Purpose
- Consider carefully the necessity of the Confidential Information
 - Risk of collaboration becoming too inflexible and formal