

Strelia M&A Series

February 2022

NDA's - Needless, Necessary, Sufficient?

Negotiating a non-disclosure agreement or NDA is one of the first steps in the M&A process. It is tempting to assume that all NDAs are boilerplate, but making any mistake at the stages of negotiating and signing an NDA can negatively impact the M&A process, especially when the deal involves competitors. NDAs have not only a protective but also a strategic purpose: a properly drafted NDA sets expectations with buyers. In nearly every M&A transaction, parties sign an NDA, but this is only one of the tools to protect confidentiality of sensitive information during and after the sale process. Thus, NDAs are far from needless—they are necessary. They are not sufficient on its own and should therefore be combined with other strategies. In this Series, we discuss some of the pitfalls relating to NDAs and how to avoid them.

Common Issues in Defining Confidential Information

Sellers want to define the scope of the confidential information as broad as possible, but buyers will want the opposite: to have a narrow scope. Common issues concern derived information, labeling requirement, oral information, obligation to provide information, residual clauses, sharing access credentials, and the disclosure period. Sellers should, for example, include language that covers information disclosed prior to the signing of the NDA to ensure that all information is protected. If a Seller is sharing customer information, employee records or other personal data, it should consider the lawful basis for making such disclosures and include appropriate GDPR clauses in the NDA. In the early stages of the negotiations, it may be more appropriate to redact information so that it no longer constitutes personal data. When the other party is a competitor, parties should be cautious about sharing commercially sensitive information that can reduce strategic uncertainty in the market (such as prices, quantities, information about costs) because they could result in an infringement of Article 101 of the TFEU. Finally, parties should carefully draft exclusion scenarios that address situations in which it would be too burdensome for a buyer to keep the information confidential or when confidentiality is simply inappropriate.

How Long Should it Last?

If no term is stipulated, a buyer can terminate an NDA by giving the seller a reasonable notice period. But a seller would want to avoid this from happening. NDAs typically have terms of two years. The term can vary depending on the strategic value of the information to the seller and how quickly the information can become obsolete. Buyers would demand termination of the NDA to avoid ongoing administrative obligations of ensuring compliance and monitoring. Sellers would not want the general term to prejudice the protection of confidential information under intellectual property rights or trade secrets. In such scenario, separate term lengths can be allocated to address specific categories of information. Other provisions can be given a different term as well, such as a non-solicitation clause. If all information is not disclosed simultaneously, the NDA should provide that each element of confidential information is protected for a specified term from the time of its disclosure.

No Guarantee

Although an NDA is a necessary tool to protect confidential and sensitive information, it does not guarantee that the buyer will comply with its undertakings. The most common legal remedy for breach of an NDA is to sue for damages. Because of the challenge in establishing the occurrence and the value of the harm or loss, a seller will be seeking to include a liquidated damages clause. The value of the liquidated damages must not exceed the value of the actual harm or loss that was potentially foreseeable at the time when the parties signed the NDA. Depending on the nature of the confidential information, court-ordered injunctions that bar the buyer from using or disclosing the confidential information are also available to a seller. Rather than having to rely on these remedies, parties can prevent misuse of confidential information in the first place by disclosing only what is necessary and providing disclosures at stages to avoid divulging everything upfront.



Gisèle Rosselle
Partner

gisele.rosselle@strelia.com



Cédéric Devroey
Associate

cederic.devroey@strelia.com



Marie-Elisabeth Dubois
Associate

marie-elisabeth.dubois@strelia.com