

# Confidentiality Q&A: Ireland

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Ireland specific information concerning the key legal and commercial considerations in relation to confidentiality

This Q&A provides jurisdiction-specific commentary on *Confidentiality: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

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## Confidentiality

1. How frequently do you find that confidentiality agreements are put in place in your jurisdiction for a general commercial purpose?

Confidentiality agreements (often referred to as non-disclosure agreements) are frequently entered into in Ireland to protect the confidentiality of information disclosed by one party to another in a commercial context. This is the case irrespective of where the parties to the contract are incorporated. The disclosure of confidential information can be mutual (meaning each party to the agreement discloses their confidential information to the other) or there can be disclosure by just one party to the agreement. In a commercial context, examples of common scenarios in which confidentiality agreements are typically entered into include:

- **Mergers and acquisitions.** A potential buyer of a company will typically be required by the seller to execute a confidentiality agreement (for example, a non-disclosure agreement, or to include confidentiality provisions in a heads of terms or an exclusivity agreement) before carrying out due diligence on the company for sale and entering into negotiations with the seller.
- **Evaluation licences.** Where a party wishes to trial technology from a supplier or to otherwise evaluate its intellectual property before entering into a formal agreement (for example, a software agreement or research and development agreement), it will often be required to execute a confidentiality agreement at the outset of the engagement, or confidentiality obligations will be included in heads of terms.
- **Contractor/consultancy services agreement.** Where an organisation engages a contractor to provide services to it, the organisation will usually require the contractor to be bound by confidentiality obligations in respect of any confidential information that is made available to the contractor, or to which it has access in performing the services. The confidentiality obligations will typically be incorporated into a consultancy services agreement or the contractor will be required to execute a separate non-disclosure agreement.

- **Tender process.** Before entering into a tender process, bidders are often required to enter into a non-disclosure agreement.
- **Commercial agreements.** It is common for parties who enter into commercial agreements, including services agreements, franchising agreements, distribution agreements, supply agreements and agency agreements, to be subject to confidentiality obligations.

2. Would contractual obligations set out in a confidentiality agreement which is governed by the law of your jurisdiction be additional to legally-imposed obligations of confidence, or would they replace them?

The contractual confidentiality obligations set out in a confidentiality agreement are additional to confidentiality obligations imposed under Irish law. Irish law imposes a common law duty of confidentiality in certain circumstances (see [Question 3](#)). In addition to the common law duty of confidentiality, Irish statutory law also imposes specific confidentiality obligations and requirements in certain sectors, including under the following legislation:

- Central Bank Act 1942 (as amended).
- Companies Act 2014.
- Credit Reporting Act 2013 (as amended).
- European Union (Markets in Financial Instruments) Regulations 2017.

The confidentiality obligations in [Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 3](#) are typical of what would usually be contained in a confidentiality agreement governed by Irish law.

3. What is the definition of confidential information in your jurisdiction? What types of information (i) cannot, under the law of your jurisdiction, be protected by a confidentiality agreement or (ii) are usually excluded from the definition of Confidential Information contained in a confidentiality agreement governed by the law of your jurisdiction?

## Definition of confidential information

### Common law

The Supreme Court decision of *House of Spring Gardens v Point Blank Limited* [1984] IR 611 provides that a duty of confidence will exist at common law if the following elements are present:

- **Relationship of the parties.** The relationship of the parties is such that it would give rise to an obligation of confidence regarding the information imparted.
- **Nature of the information.** The information disclosed would properly be regarded as confidential information.

In the same case, the Irish Supreme Court approved the following set of criteria to establish whether the information in question is confidential for the purposes of the second prong of the test (nature of the information):

- The information must be information "the release of which the owner believes would be injurious to him or of advantage to his rivals or others".
- The owner must believe the information to be confidential.
- This belief must be reasonable.
- The information must be judged in light of the use and practices of the particular industry or trade concerned.

### **Statute**

Irish statutory law provides for various definitions of confidential information that are relevant to specific contexts. One example of a statutory definition of confidential information can be found in the Credit Reporting Act 2013 (as amended) as "information that is expressed by the Central Bank of Ireland to be confidential, either as regards particular information or as regards information of a particular class".

In addition, trade secrets are a form of confidential information protected in Ireland by the European Union (Protection of Trade Secrets) Regulations 2018. These Regulations transpose the EU Trade Secrets Directive (2016/943/EU) (Trade Secrets Directive) into Irish law. The definition of a "trade secret" is contained in Article 2(1) of the Trade Secrets Directive and requires that the relevant information:

- Is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.
- Has commercial value because it is secret.
- Has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

### **Contract**

In confidentiality agreements, the parties to the agreement are free to determine what information must be protected as confidential. The definition of "Confidential Information" contained in [Standard document, Confidentiality agreement \(commercial\): Cross-border: clause 2](#) is aligned with definitions of "confidential information" that are typically found in standard confidentiality agreements governed by Irish law.

## Information that cannot be protected

It is generally accepted that information in the public domain cannot be protected as confidential by a confidentiality agreement.

### Excluded information from the definition of "confidential information"

The carve-outs included in *Standard document, Confidentiality agreement (commercial): Cross-border: clause 2.2* are typical of the exclusions to the definition of confidential information commonly found in confidentiality agreements governed by Irish law. Another common carve-out is where the information is required to be disclosed by law or a court order.

4. Is information which is held electronically treated differently from information on paper under the law of your jurisdiction?

The common law duty of confidentiality does not distinguish between the protection of confidential information held electronically or in hard copy.

However, it is not unusual for the parties to a confidentiality agreement to agree to certain security protections where information is held electronically. These additional security protections can include the information being subject to password protection and only being accessible to certain individuals within the receiving organisation who require access.

5. Can findings, data or analysis derived from confidential information itself constitute confidential information under the law of your jurisdiction?

Findings, data or analysis derived from confidential information can be considered confidential information under the common law provided that such information is confidential in nature and the relationship between the disclosing party and the receiving party is such that an obligation of confidence arises in the circumstances.

In addition, parties to a confidentiality agreement are free to agree to incorporate "findings, data or analysis derived from confidential information" into the definition of confidential information in order for that information to be subject to the contractual confidentiality obligations agreed by those parties. *Standard document, Confidentiality agreement (commercial): Cross-border: clause 2.1(d)* is aligned with confidentiality agreements governed by Irish law.

6. Is it possible to extend the parties' obligations in the agreement so as to capture information that was disclosed prior to the confidentiality agreement being entered into and signed? Is an undertaking by a recipient not to disclose the fact that a confidentiality agreement has been entered into, or the fact that confidential information has been made available, enforceable in your jurisdiction?

It is possible under Irish law for contractual confidentiality obligations to apply to information disclosed before the effective date of the confidentiality agreement.

An undertaking in an Irish law governed document to keep the existence of a confidentiality agreement confidential, or the fact that confidential information has been disclosed, is generally enforceable under Irish law, subject to certain competing obligations. These include where a party is required by a court order to disclose the existence of the confidentiality agreement, or the fact that confidential information has been disclosed. This is the case irrespective of where the parties to the agreement are incorporated.

It is standard in an Irish law governed confidentiality agreement to include "discussions and negotiations" and "the existence of the terms of the agreement" as forming part of the definition of confidential information in the same way as *Standard document, Confidentiality agreement (commercial): Cross-border: clauses 2.1(a) and 2.1(b)*.

7. Is it necessary for "consideration" (that is, value of some kind) to be given by a discloser for a confidentiality agreement to be binding on a recipient under the law of your jurisdiction? If so, does agreement by the discloser that it will provide confidential information after a confidentiality agreement has been entered into constitute such consideration?

Whether consideration is necessary depends on whether the confidentiality agreement is executed as a deed or a simple contract. For deeds, no consideration is necessary. For simple contracts, consideration must pass from the disclosing party to the recipient in order for the recipient's contractual confidentiality obligations to be enforceable. In Ireland, consideration takes the form of money or money's worth and the act of disclosing the confidential information could be considered sufficient consideration.

With respect to *Standard document, Confidentiality agreement (commercial): Cross-border: clause 3.1*, a confidentiality agreement governed by Irish law and executed as a simple contract will usually refer specifically to the consideration.

8. What are the remedies available in your jurisdiction for a breach, or an anticipated breach, of (i) obligations set out in a confidentiality agreement, or (ii) confidentiality obligations imposed by the general law of your jurisdiction?

The remedies available for breach of obligations in a confidentiality agreement are the usual remedies for breach of contract (see *Country Q&A, Services Agreement: Ireland* for further details). The main remedies for breach of a confidentiality agreement are to sue for damages or to seek injunctive relief.

Under common law, the main remedies for a threatened or actual breach of confidence are the typical equitable remedies, including:

- An injunction.
- Damages.
- An account of profits.
- An order for delivery up and destruction of the confidential information.

As confidential information typically loses its value once disclosed, claimants often try to maintain confidence by applying to the courts to obtain an injunction to prevent an anticipated breach of confidence or a breach of the terms of the confidentiality agreement. Therefore in Ireland, many confidentiality agreements will include a provision that damages will not be an adequate remedy for any breach (or anticipated breach) of confidentiality obligations and that the non-breaching party will be entitled to injunctive relief or other equitable remedies, even though it is ultimately a matter for a court to determine the appropriate remedy (if any). *Standard document, Confidentiality agreement (commercial): Cross-border: clause 8.2* is often included in confidentiality agreements governed by Irish law.

Trade secrets have been given statutory protection in Ireland by the European Union (Protection of Trade Secrets) Regulations 2018 (Trade Secret Regulations). If a court finds that there has been any unlawful acquisition, use or disclosure of a trade secret, which includes breaching the terms of a confidentiality agreement or any other duty not to disclose the trade secret (see *Regulation 5(2)*), the court has the power under Regulation 14 to order various corrective measures. These measures include injunctive relief prohibiting the use or disclosure of the trade secret or the destruction of anything containing or embodying the trade secret.

Under the Trade Secret Regulations, a person who fails to comply with any measure ordered by the court commits an offence and can be liable on summary conviction to a Class A fine (up to EUR5,000) and/or imprisonment for up to six months. On conviction on indictment, a fine of up to EUR50,000 and/or imprisonment for up to three years may be imposed. Where a person fails to comply with the corrective measures ordered and they continue to commit an offence, they will commit a further offence on each day that it continues and be liable to additional penalties. Such additional penalties include a Class D fine (up to EUR1,000) on summary conviction. On conviction on indictment, an additional fine of up to EUR5,000 may be imposed. Officers of a corporate body could face personal liability where offences are committed with their consent, connivance, approval or attributable to their wilful neglect.

9. Is it common in your jurisdiction for an indemnity to be requested by the disclosing party from the recipient for any loss or damage arising from the misuse or unauthorised disclosure of the confidential information disclosed?

Indemnities tend to be reserved for agreements under which particularly sensitive or commercially valuable information is disclosed and the misuse or unauthorised disclosure of such information would result in loss or damage for the disclosing party. It is not common to include an indemnity in all confidentiality agreements.

10. Does the law of your jurisdiction impose a limit on the time during which the obligations set out in a confidentiality agreement may continue to apply?

The general position under Irish law is that contractual confidentiality obligations are not subject to any maximum duration. Therefore, the parties can, in principle, agree that the confidentiality obligations will last indefinitely and *Standard document, Confidentiality agreement (commercial): Cross-border: clause 10.2* can be amended accordingly. Typically, this will be subject to the caveat that the confidentiality obligations will cease to apply once the information enters the public domain other than through the fault of the receiving party.

While confidentiality obligations can, in principle, last indefinitely, not all clauses like this will be enforceable. The enforceability of express contractual clauses that purport to restrain the use of confidential information indefinitely will be dependent on fact. For example, these clauses are likely to be viewed restrictively by the courts in an employment context, where courts are careful not to prevent an ex-employee from exercising their right to earn a living.

11. Is a clause requiring the return or destruction of the confidential information, on the request of the disclosing party, permitted in your jurisdiction?

A clause requiring the return or destruction of confidential information on request from the disclosing party is permitted in an Irish law-governed confidentiality agreement. This is similar to *Standard document, Confidentiality agreement (commercial): Cross Border: clause 6*. Many agreements often provide that this obligation takes effect when notice of termination is served under the agreement.

12. In your jurisdiction, who would be the typical list of permitted representatives of the recipient in a confidentiality agreement who could receive the confidential information?

The parties to the confidentiality agreement are free to determine to whom the recipient can disclose the confidential information. The typical permitted disclosees include the recipient's officers, employees, contractors, sub-contractors and professional advisors who need access to the confidential information to assist the recipient with the exercise of its rights or the performance of its obligations under the agreement.

*Standard document, Confidentiality agreement (commercial): Cross Border: clause 4* sets out the terms on which a recipient is permitted to disclose confidential information to certain parties and is aligned with what can be expected from a confidentiality agreement governed by Irish law. Therefore, there are no necessary suggested amendments.

13. Where the information is particularly sensitive, would it be possible in your jurisdiction for the disclosing party to require that the recipient enters into a separate undertaking with each of its representatives?

It is possible under Irish law for a confidentiality agreement to provide that the recipient must enter into a confidentiality agreement with each representative. The confidentiality agreement often makes the disclosure subject to the condition that the representative must agree to adhere to confidentiality obligations which are equivalent to or no less protective than the confidentiality obligations that the recipient owes to the disclosing party.

14. What would be the typical list of situations under the law of your jurisdiction in which a party might be compelled to disclose confidential information supplied by the other party (and which should therefore form express exceptions to an undertaking to keep them confidential)?

The typical situations in which a recipient can be compelled to disclose confidential information, which would otherwise be subject to confidentiality restrictions, include:

- **A court order.** The recipient may be required by a court order to disclose confidential information.
- **A legal obligation.** The recipient may be required by a legal obligation to disclose certain confidential information. For example, under section 22 of the Central Bank (Supervision and Enforcement) Act 2013, the Central Bank of Ireland can, where necessary for the purposes of performing its functions under financial services legislation relating to the proper and effective regulation of financial service providers, require any person to provide it with any information that it specifies in its notice.

The procedure set out in *Standard document, Confidentiality agreement (commercial): Cross-border: clause 5.2* is standard from an Irish law perspective. *Clause 5.2* requires the party who is subject to a compulsion obligation, to the extent permitted by applicable law, to use reasonable endeavours to notify the owner of the confidential information of the requirement and to take into account any reasonable requests of the owner of the confidential information in relation to the content of the disclosure.

15. Might any additional undertakings be considered in certain scenarios, for example, undertakings not to entice away officers or employees or not to solicit customers of the disclosing party?

In Ireland, it is not uncommon for confidentiality agreements to include a non-solicitation restrictive covenant to prevent the recipient from soliciting or enticing away employees who may have had access to confidential information within the disclosing party's business. This type of non-solicitation clause is frequently included in the employment contracts of senior employees. A non-dealing clause in respect of customers and suppliers is also common and often included in a senior employee's employment contract.

Restrictive covenants must be constructed carefully to ensure that they are not held to be unenforceable on the basis that they are a restraint of trade. In general, the courts will only enforce a restrictive covenant if it is necessary and reasonable to protect legitimate business interests and is drafted as narrowly as possible, particularly with respect to the duration and geographical scope. The Irish courts have traditionally been reluctant to enforce a non-solicitation clause that lasts longer than six months after termination of the contract. The enforceability of restrictive covenants very much depends on the facts.

16. Could a third party, for example, members of a party's group enforce a confidentiality agreement, without being a party to the agreement?

No. Under Irish law, the privity of contract rule applies, meaning that only a party to an Irish law governed agreement can enforce the terms of that agreement (unless there is an agency agreement in place). This is the case irrespective of where the parties to the agreement are incorporated.

17. Could a party to the confidentiality agreement enforce any of its provisions against a third party under the laws of your jurisdiction. For example, against a permitted representative of the recipient, without that representative being a party to the agreement?

No. The terms of a confidentiality agreement can only be enforced against the parties to that agreement. Unless the permitted representative is a party to the agreement, the terms of the confidentiality agreement are not enforceable against it.

However, the Irish courts may recognise that a permitted representative is under a common law duty to keep information confidential, if it can be shown from the relationship of the parties that an obligation of confidence arises and the information that has been disclosed to the permitted representative is confidential in nature. In this situation, the party may have an action for breach of confidence against the permitted representative.

18. What are the formal requirements for executing a valid confidentiality agreement in your jurisdiction?

A confidentiality agreement is often entered into in the form of a deed or as a simple contract. The execution formalities vary depending on whether the agreement is entered into as a deed or a simple contract.

For a deed, the following execution formalities must be adhered to:

- **Description of the document.** The document must be clear on the face of it that it is intended to be entered into by the parties as a deed. Often it will begin with the words "THIS DEED".
- **Signature.** Where an individual is entering into a deed, they must sign the document in the presence of a witness who attests their signature. Where a company registered in Ireland enters into a deed, the company's registered seal must be affixed to the deed and it must be countersigned by two company officers (two directors or one director and one company secretary), unless the company's constitution provides otherwise. The company's constitution may also require that additional formalities be complied with.
- **Delivery.** A deed must be delivered in order to be effective. A deed is delivered where a party expresses an intention to be bound by it. Most deeds will contain a clause providing that the deed is delivered on the date stated on the first page of the deed.

In the case of a simple contract, the general position under Irish law is that there is no need for "simple contracts" to be written, to take any particular form, or to be executed in any particular way. They can be entered into orally,

in writing or electronically provided that the requirements for entering into a valid contract exist (that is, capacity, offer and acceptance, consideration and intention to create legal relations). However, the parties must ensure that execution is in accordance with the requirements of each company's constitutional documentation. A written contract will typically be signed by the parties to the agreement. Where this is an individual, they will usually sign the agreement. For a company, a person with authority to enter into the contract will usually enter into it on the company's behalf.

Most confidentiality agreements (whether a deed or a written contract) will include a counterparts clause, which enables the parties to execute separate copies of the agreement which together constitute the agreement. *Standard document, Confidentiality agreement (commercial): Cross-border: clause 12.8* sets out a market standard counterparts clause.

There is no requirement that a confidentiality agreement be:

- Notarised or apostilled.
- Written in local language.
- Lodged or filed with any government agency.

19. Does the law of your jurisdiction dictate which governing law and jurisdiction will apply to this agreement?

In a commercial context, the parties are free to decide on the governing law and jurisdiction applicable to the confidentiality agreement.

20. Under the law of your jurisdiction, can the law chosen as the governing law of a confidentiality agreement restrict the parties' choice of law in respect of any subsequent transaction documents?

The choice of Irish law as the governing law in a confidentiality agreement will not restrict the parties' choice of law in any subsequent transaction documents. However, if subsequent transaction documents were entered into and did not have a governing law clause, it is possible that a court would look at the confidentiality agreement's governing law clause as persuasive as to what the parties intended the governing law of the subsequent transaction documents to be.

21. Are there any clauses in the confidentiality agreement that would not be legally enforceable or not standard practice in your jurisdiction?

The provisions contained in the *Standard document, Confidentiality agreement (commercial): Cross-border* are aligned with what is typically found in a confidentiality agreement governed by Irish law and do not raise any enforceability issues.

22. Are there any other clauses that it would be usual to see in a confidentiality agreement and / or that are standard practice in your jurisdiction?

In an employment context, it is relatively common to see non-solicitation and non-dealing clauses (see [Question 15](#)).

23. Does the United Kingdom's departure from the European Union (Brexit) raise any issues that should be considered by the parties or affect the drafting of *Standard document, Confidentiality agreement (commercial): Cross-border* in your jurisdiction, especially for transactions or matters that present a connection to the UK (for example, because one of the parties is a UK-incorporated entity or has assets or carries on business in the UK)?

Brexit has implications for the transfer of personal data contained within confidential information from an Irish entity to a UK based entity.

During the transition period which runs until 31 December 2020, there is no issue regarding transferring personal data to a UK based entity. From 11pm on 31 December 2020, the UK will be considered a third country (that is, a country outside of the EEA) for the purposes of the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR). The GDPR restricts the transfer of personal data to a third country or an international organisation unless:

- The European Commission has decided that the country or international organisation in question ensures an adequate level of protection.
- Appropriate safeguards are put in place.

The authors understand that the UK intends to negotiate an adequacy decision with the European Commission during the transition period. If the European Commission determines that the UK offers an adequate level of data protection, then personal data can flow from the Irish entity to the UK entity without any further safeguards being necessary. However, if the UK is not determined to offer an adequate level of data protection, appropriate safeguards will need to be put in place to facilitate the transfer. One of the more common safeguards is the use of "standard contractual clauses" which are a model form agreement approved by the European Commission for facilitating transfers outside the EEA and these could be appended to the confidentiality agreement and entered into by the parties.

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