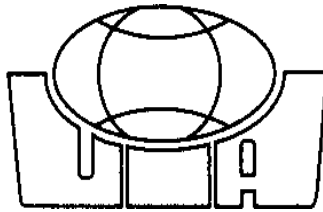


**48ème Congrès de l'UIA- Genève, 1-5 septembre 2004**  
**UIA 48th Congress - Geneva, 1-5 September, 2004**  
**48º Congreso de la UIA - Ginebra, 1-5 de septiembre de 2004**

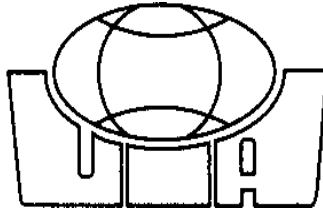


**MERGERS & ACQUISITIONS**

**SALE OF A BUSINESS IN AN  
AUCTION PROCESS**

**Friday, September 3, 2004, 9.00 a.m.-12.30 p.m.**

**48ème Congrès de l'UIA- Genève, 1-5 septembre 2004**  
**UIA 48th Congress - Geneva, 1-5 September, 2004**  
**48º Congreso de la UIA - Ginebra, 1-5 de septiembre de 2004**



# **SALE OF A BUSINESS IN AN AUCTION PROCESS**

by Maria Antónia Cameira

With the assistance of Diogo Rocha Neves

Henriques da Silva, Paes de Almeida, Corrêa de Sampaio & Associados,

PACSA

Lisbon, Portugal

**I. Definition and Structure**

A) Share Deal ..... 5

a) How are auctions used in the context of the sale of shares ..... 6

b) Are auctions statutorily regulated in your home jurisdiction? ..... 7

c) Who is the competent decision maker within a corporation to decide what kind of forum will be used for the planned transaction? .....9

B) Asset Deal

e) Are there any common auction fora? .....10

f) Who is the competent decision maker within a corporation to decide whether an auction will take place and what kind of forum will be used for the planned transaction? ..... 11

**II. Objectives of an Auction**

a) General Analysis of an Auction as a transaction mechanism .....11

b) Does an auction serve solely the purpose of advancing the interests of the shareholders’ interests come into play as well? .....13

c) What are the criteria under which a bid has to be evaluated?.....13

**III. Auction process from the perspective of the seller**

a) What type of auctions is commonly used in a share/asset deal?.....14

b) Is it possible to change the auction rules once an auction as started? .....15

c) Are auctions limited to certain bidders only and if so what are the criteria they have to meet?.....15

d) Should all bidders have equal information in order to provide a fair bidding process? How can information asymmetry be avoided? What if interested parties participate in the auction? .....15

e) How much information should be disclosed? Is there a conflict of interests? .....17

f) When organizing an auction, does EU-Law have to be considered? ..... 18

g) Does public procurement law have an impact on auctions?..... 19

**IV. Auction Process from the perspective of the bidder?**

a) May bidders team up and form-bidding syndicates after the auction has started? May bidders switch a bidding syndicate once the auction has begun? ..... 19

b) Do anti-trust issues arise for bidding syndicates? At what stage of the auction procedure do bidders have to furnish the respective approvals? .....19

c) Are there sanctions (criminal and civil) for bidders who collude in an auction? .....21

**V. Attorney’s obligations in an auction process**

a) Is an attorney free to represent opposing bidders in an auction? .....22

b) What happens if a represented bidder withdraws from the auction? May his attorney now represent another bidder and use the knowledge gained from the previous representation? .....22

**VI. Evaluation of a bid**

a) Who is the competent body to evaluate a bid? .....22

b) Will the seller be bound by the result of an auction?.....23

c) What are the remedies for a spurned bidder? Will there be a court review? .....24

d) Can the spurned bidder have a claim for damages? What about pre-contractual claims? .....24

**Annexes**

Annex 1.....25

Annex 2.....36

Annex 3 .....40

Bibliography ..... 42

# **I. DEFINITION AND STRUCTURE OF AN AUCTION**

## **A) SHARE DEAL**

Does one have to distinguish between a listed corporation and a private corporation?

Yes, one must distinguish between share deals by means of auction in Listed and in Private Corporations.

As “auction” suggests the initiative for sale being taken by the seller, it is rare to see an auction of a listed company as bids for such companies are normally initiated by the purchaser.

Nevertheless, there are three situations that may be configured as an auction in terms of public companies. The first situation arises when a company is subject to a “hostile” bid approach and the Board solicits alternative bids from third parties (“white knights”). The second situation is a public sales offer either from the sale of a controlling shareholder or from IPOs, especially the recent open IPOs. The third situation is when a single shareholder negotiates the sale of his/her shares with more than one potential buyer through a private offer.

In the first and second cases the Portuguese Securities Code lays out a set of rules, namely regarding:

- Transparency of the operations
- Operations should be open to public scrutiny
- Observance of the regulations imposed by CMVM
- Protection of minority shareholders.

The Portuguese Securities Code also sets out communication duties in all cases including deals off-market. Whoever reaches or exceeds a holding of 10%, 20%, one third, one half, two thirds and 90% of the voting rights in the share capital of a public company and whoever reduces a holding to a value smaller than any of those limits, must, within 3 days of the occurrence of the transaction:

- a) Inform CMVM, the company in which the investment has been made and the regulated markets managing entities in which the trading of securities issued by this company is conducted;
- b) Inform the entities referred to in the previous paragraph of those situations that determine the granting to the participant of voting rights inherent to securities belonging to third parties.

Those who reach or exceed holdings of 2% and of 5% of the voting rights corresponding to the capital of a publicly-held company that issues shares or other securities that grant the right to its subscription or acquisition, listed on regulated markets situated or operating in Portugal, and those who reduce their holdings to a value below those limits, are equally subject to the obligations referred to above.

The sale of private companies by auction, is not specifically regulated. Nevertheless, there are general principles laid out in the Portuguese Civil Code, namely regarding pre-contractual duties and the bona fide principle, which are applicable to auctions as well as to contracts in general.

Company law also sets out rules regarding the sale of private companies, namely regarding joint-stock companies. The transfer of shares in these companies cannot be forbidden and can only be restricted by the company's Articles of Association where permitted by law. Thus, these may impose, in regard to the transmission of nominative shares such restrictions as pre-emption rights granted to other shareholders, the need for prior consent from the company or compliance with specific requirements deemed to be in the company's best interest.

As further detailed below, additional rules applicable to auctions have been developed through practice.

#### **a) HOW ARE AUCTIONS USED IN THE CONTEXT OF THE SALE OF SHARES?**

Over the last few years it has been commonplace for any substantial business to be sold by way of auction, since the competitive nature of the sales process gives sellers confidence in the price they receive from the sale and the terms in which the target is sold by stimulating competition between a number of prospective purchasers. In Portugal, however, selling companies through an auction process was never until recently, a common practice. Auctions are, therefore, these days used in several different situations in the context of shares.

As mentioned above, there are three situations that can be configured as "auctions" as regards publicly held companies:

One is when a company is subject to a “hostile” bid approach and the Board solicits alternative bids from third parties with a view to achieving a better price for the shareholders or other improved terms. In this case, the sale is made through the stock exchange and is subject to the rules of the Portuguese Securities Code, namely those referring to Public Offers.

The other is when a significant shareholder negotiates the sale of his shares with more than one potential buyer through a private offer, not subject to the rules of the Portuguese Securities Code regarding Public Offers in general, but still subject to the same communication duties and rules on mandatory bids. In this situation the seller may instruct an intermediary to search for the highest bidder at auction.

The third situation involves public sales offers both from the sale of a controlling shareholder and from IPOs, especially the recent open IPOs. In fact, we have been witnessing the use of auctions in a new area the so-called open IPOs that constitute a major breakthrough with tradition. Normally firms allow their investment bankers both to set the price of IPOs and to determine who should be given the right to buy the shares. In open IPOs, the share price is partly established through an auction rather than relying solely on investment banks to set it.

The momentum for Portuguese open IPOs have increasingly been subject to regulation. Effectively, although CMVM’s regulation n. 21/2000 authorizes the acceptance of orders for transactions involving securities via the Internet, articles from N. 52 onwards of Regulation no. 12/2000 provides that financial intermediaries may not allow investors to have direct access to trading in a regulated market.

In principle, there is complete freedom for the sellers to organize the sale of shares by auction of private companies in the manner and on the conditions they deem appropriate. The rules applicable to these share deals are the abovementioned and are further explained below.

#### **b) ARE AUCTIONS STATUTORILY REGULATED IN YOUR HOME JURISDICTION?**

In Portugal there are no specific provisions to regulate the sale of a business by auction. The sale of businesses is generally regulated by the provisions of the Civil Code, the Companies Code and, in the case of publicly held companies, by the Securities Code.

With regard to private companies, the lack of specific regulation does not mean complete deregulation. The Portuguese Civil Code lays out principles applicable to auctions namely regarding pre-contractual duties and the principle of bona fide.

The practice has also given rise to a standard set of rules. In fact, some of the abovementioned auction rules are frequently contained in a “confidentiality letter” (please see annex 1) that comprises deadlines, whether one or two bidding rounds will be made and what answer the seller expects from the potential bidder.

Often, the company will contact an investment bank, which serves as an intermediary and under the terms of the contract signed between them, the bank will usually be obliged to identify potential buyers and handle the negotiations with them. The bank will define a sales strategy, evaluate the company to be sold, collect and prepare the information asked for by the potential buyers, help the shareholders to analyse the bids and even take care of the formal procedures necessary to conclude the contract.

Public procurement rules may also be relevant in some situations, especially when selling government-owned or government controlled companies.

The sale of public companies in Portugal by auction is ruled by the Portuguese Securities Code. The code is designed to ensure fair and equal treatment of all shareholders in relation to takeovers.

- By Public Sales Offer

The Securities Code considers as public offers:

1- Offers of securities addressed, in whole or in part, to unidentified addressees. The uncertainty of the addressee is not prejudiced by the fact that the offer takes place through multiple standard communications, even if addressed to individually identified addressees.

2- The code also considers as a public offer any offer addressed to all the shareholders of a public company, even if the respective company’s share capital is represented by nominative shares. Also, any offer addressed to more than 200 people will be subject to public offer regulations.

The general rules for Public Offers set out by the Portuguese Securities Code are the following:

- equality of treatment: public offers must take place under conditions that ensure equal treatment of the addressees,
- compulsory intermediation: public offers for securities must take place through a financial intermediary,
- registration and publicity: Prior registration and prior publicity,
- public offer's announcement: the public offer's announcement must contain the necessary information for the preparation of the contracts to which it refers,

- prospectus requirement: the carrying out of any public offer relating to securities must be preceded by the provision of a prospectus,
  - mandatory takeovers: duty of launching a take-over and both compulsory acquisition and compulsory sale. In compulsory acquisitions proceedings, equal treatment to holders of shares of the same class must be ensured, in particular with regard to the calculation of the price achieved,
  - communication duties: as already explained above,
  - insider dealing and market abuse.
- Sale by auction by a controlling shareholder through “private agreement”:

Where a controlling shareholder holds an auction for the sale of their shareholding in a public company, the legal requirements applicable to auctions of private companies discussed above will generally apply to the conduction of the auction and the sale of the shares to the successful bidder.

Such sales are also regulated by the Portuguese Securities Code especially regarding the aforementioned communication duties and mandatory bids.

In bankruptcy proceedings, the Portuguese Civil Procedure Code establishes rules regarding both the sale of assets and the sale of shares through an auction determined by a court.

Treasury bills may also be offered, directly or indirectly, at auction or by subscription offer limited to a single or to several financial institutions, or to a consortium thereof.

The sale of treasury bills through auctions is regulated by Decree-Law No. 279/98 of 17 September as amended by Decree-Law n. 91/2003, of 30 April and Instruction n. ° 4/2003 that lays out the provisions for the auction process itself.

**c) WHO IS THE COMPETENT DECISION MAKER WITHIN A CORPORATION TO DECIDE WHAT KIND OF FORUM WILL BE USED FOR THE PLANNED TRANSACTION?**

The competent decision maker within a corporation to decide on what kind of forum will be used for the planned transaction, will depend on whether such a transaction is potentially capable of seriously affecting the interests and financial position of the shareholders or not.

The Portuguese Companies Code attributes to the Board of Directors large and wide-ranging management powers, as follows:

- (i) manage and conduct, in general, the business of the corporation, subject to decisions taken by shareholders at general meetings, or to the intervention of the Board of Auditors, where required by the law or the Articles of Association;
- (ii) elect the Chairman of the Board and co-opt board members;
- (iii) convene general meetings;
- (iv) produce the annual report;
- (v) decide on purchase, sale or encumbrance of immovable assets;
- (vi) grant guarantees on behalf of the company;
- (vii) decide on restructuring the company and/or its activities;
- (viii) relocate the company's registered offices and increase the company's share capital;
- (ix) make, or elaborate on, proposals for the merger, demerger or transformation of the corporation;
- (x) make decisions on any matters as established in the Articles of Association.

Therefore, any decision regarding a transaction that falls within these powers will be the competence of the Board of Directors unless the Articles of Association stipulate differently.

In fact, in the Portuguese Companies Code the attributes of the General Meeting of joint stock companies fall short of a residual competence. The General Meeting is only empowered to:

- (i) Approve the annual report where it is the competent body to do so;
- (ii) To decide on the Board of Directors's proposals, approved by the Board of Auditors, on profit reinvestment;
- (iii) To oversee and nominate or remove the members of the corporate bodies, including the Board of Directors and the Board of Auditors;
- (iv) Decide on increases or decreases in the share capital, merging, demerging, or transforming the company as well as amendments to the Articles of Association;
- (v) Decide on matters specified by the Articles of Association.

In our opinion, despite this residual competence, whenever the planned transaction is potentially capable of seriously affecting the interests and financial position of the shareholders the decision must be passed at the General Meeting.

## **B) ASSET DEAL**

### **e) ARE THERE ANY COMMON AUCTION FORA?**

There are no common auction fora for asset deals and share deals, as they are fundamentally different in their legal effect, even if the commercial effect may prove similar.

Opting for asset deals may be the result of several different situations. Asset sales typically occur as a consequence of divestment (see, for example, Philips, S.A. of Portugal), in an acquisition where for structural or tax planning reasons instead of disposing of the shares the seller disposes of the assets or it also may take place as a collateral deal entered into as a consequence of a privatization process (see, for example, the case of Stagecoach Holdings in Portugal) and in liquidation and bankruptcy processes.

As opposed to share deals, in Portugal, especially in liquidation and bankruptcy proceedings, asset deals are commonly transacted through auctions in specialized auction-houses. In bankruptcy situations the court appoints a judiciary trustee that retains the assets and organizes their sale.

**f) WHO IS THE COMPETENT DECISION MAKER WITHIN A CORPORATION TO DECIDE WHETHER AN AUCTION WILL TAKE PLACE AND WHAT KIND OF FORUM WILL BE USED FOR THE PLANNED TRANSACTION?**

The competent decision maker within a company to decide on what kind of forum will be used for any asset deal is, following the provisions of article 406<sup>o</sup> of the Portuguese Companies Code, the Board of Directors. However, the articles of association may stipulate complementary requirements namely deliberation at a General Meeting.

If the asset deal represents any transaction capable of seriously affecting the interests and financial position of the shareholders, as is the case of demergers, different compulsory legal requirements will need to be complied with. In fact, in these deals, the Board of Directors must prepare a resolution addressing these matters and including the references required by law and outlining the objectives of the deal that then must be submitted for deliberation at a General Meeting.

These legal requirements follow the Holz Müller doctrine according to which the Board of Directors requires the approval of a General Meeting before it can complete any transaction capable of seriously affecting the interests and financial position of the individual shareholders.

**II. OBJECTIVES OF AN AUCTION**

**a) GENERAL ANALYSIS OF AN AUCTION AS A TRANSACTION MECHANISM.**

An auction can be defined as a bidding mechanism formed by centralized proceedings for the exposure of purchase and sale orders to all market participants simultaneously.

Driving reasons of auctions are the speed of sale, the disclosure of information about buyers' valuations and the prevention of dishonest dealing between the seller's agent and the buyer.

In auctions, the seller gains a number of benefits from the auction process, namely to reach more potential buyers, to maximise the price, obtain better sales terms and to control the timetable.

However, the downside of auctions appears whenever:

- In sellers cases:
  - The business is not suitable for sale by auction, for instance, when there are only one or two potential buyers.
  - The structure of the business is particularly complicated or there are significant external factors affecting the transaction.
  - The costs rocket.
  - It inevitably interrupts the normal operation of the business and may lead to the permanent loss of customers and key staff. Moreover if the sale is not completed, the company's name may be damaged.
  - Bidders are not serious in their intentions and are only interested in triggering the unveiling of data about a competitor.
  
- In bidders cases:
  - They are forced to pay a higher price for the target.
  - They are unsuccessful.
  - They have no contractual protection.
  - They incur greater risks through the acquisition of the target triggered by scarcity of information.

The timing and order of the different auction stages differ from transaction to transaction but they almost invariably include the following:

- The distribution of an information memorandum to prospective bidders.
- A first round of "indicative" bidding.
- A due diligence investigation and review of draft sale documentation by bidders.
- A second round of bidding from a limited number of bidders.

- Negotiations with one or more bidders, leading to the conclusion of the sale.

The information memorandum (please see annex 2) is one of the key elements of the auction process. In essence the information memorandum is a document of sale so it needs to comprise all the information required about the target in order to elicit meaningful bids.

**b) DOES AN AUCTION SERVE SOLELY THE PURPOSE OF ADVANCING THE INTERESTS OF THE SHAREHOLDERS OR DO STAKEHOLDERS' INTERESTS COME INTO PLAY AS WELL?**

In an auction as in any other kind of deal, shareholders' interests and the interests of stakeholders usually coincide. "What is good for stakeholders is usually also good for shareholders"<sup>1</sup>.

When selling a company at auction, stakeholders' interests also come into play since they can benefit as well as lose with the sale of the company. In fact, when a company is sold, the company remains largely unaffected by the acquisition; its underlying assets and liabilities will continue to belong to the company. All the rights and obligations of the company being acquired will continue to be enforceable.

However, decisions taken on the follow up of the auction sale may affect existing stakeholders. Termination decisions, after the auction, may sometimes adversely affect the interests of stakeholders. Employees may be laid off, creditors' debt may become riskier, suppliers may be denied a valuable business partner, communities may lose corporate headquarters or corporate operations, and so forth.

In addition, some scaling-down decisions may require management to liquidate operating assets through auction and thereby cause partial termination with possibly adverse effects on stakeholders.

**c) WHAT ARE THE CRITERIA UNDER WHICH A BID HAS TO BE EVALUATED?**

Auction analysis and decision-making tools help buyers evaluate competing bids based on weighted criteria that include both "hard" (price) and "soft" (quality) attributes to discern the most value-maximizing offer.

In the majority of cases, when organizing an auction, a seller usually wishes to achieve the best price possible for its company. Therefore when defining the criteria under which a bid has to be evaluated, the price will have the most significance.

Nevertheless, other matters may be of similar significance, namely the so-called “soft factors” such as relationship factors, culture, strategy and management change. The soft factors are of utmost importance in complex and potentially costly acquisitions. Although soft factors are relatively intangible, they can have a great impact on the hard structures, strategies and systems of the organization.

Soft issues in M&A deals are now often subject to regular and formal assessment proceedings. Surveys of staff opinion, customer attitudes and investor sentiment play a similarly important role, in the decision-making process of the deal.

### **III) AUCTION PROCESS FROM THE PERSPECTIVE OF THE SELLER**

#### **a) WHAT TYPE OF AUCTION IS COMMONLY USED IN A SHARE/ASSET DEAL?**

In Portugal, the most commonly used types of auctions both for share deals and asset deals are the controlled auctions, which are composed of the following steps:

- The preparation of an information memorandum on the company set for sale;
- the lining up of potential purchasers by financial advisers who will be asked to make an indicative offer on the basis of that information memorandum;
- the selection of bidders in the higher range who will be authorized to proceed to limited due diligence in a data room where they will be asked to confirm their bids and submit their proposed amendments to the sale documentation prepared by the sellers staff;
- the selection of the preferred purchaser on the basis of price offered (usually a sealed-bid) and the proposed contract amendments; and
- finally the carrying out of detailed negotiations with the preferred purchaser or purchasers until completion.

It is not uncommon to have further rounds if there is enough interest.

Nevertheless, in liquidation and bankruptcy proceedings the commonly used auctions are both the traditional “English Auction” and the “First- Price Sealed-Bid Auction”.

#### **b) IS IT POSSIBLE TO CHANGE THE AUCTION RULES ONCE AN AUCTION HAS STARTED?**

As there are no specific provisions for auctions in Portugal, there are no restrictions for a seller to change the auction rules after the process has started. However, if both the seller and the potential buyers have agreed on some restrictions when defining the rules of that auction process, they are of course applicable.

In general, sellers are always advised to reserve expressly the right to change the rules after the auction started. However many potential buyers will refuse to participate in an auction with such rules unless the seller underwrites their costs.

**c) ARE AUCTIONS LIMITED TO CERTAIN BIDDERS ALONE AND IF SO WHAT ARE THE CRITERIA THEY HAVE TO MEET?**

It is very common in Portugal, especially in privatisations, to limit auctions to certain bidders.

The process must ensure that only strong, committed bidders are allowed to bid in the auction - bidders that are capable with a high degree of certainty, of closing the transaction and of satisfying its terms. The qualification process should exclude obviously non-serious bidders, particularly those without the financial resources to acquire the target, in order to discourage bids that are merely speculative. However, at the same time, it is important that the qualification process avoids excluding desirable bidders. In any case, the criteria for qualifying bidders must be clearly spelt out and applied consistently across all potential bidders. All potential bidders must have an equal opportunity to demonstrate their capabilities for executing and performing under the terms of the auction process.

Financial, economic and technical criteria are used to limit the bidders. These criteria are determined on a case-by-case basis. Nevertheless, some patterns may be singled out. The private sector usually opts for economic and financial criteria, while the public sector opts for technical and political criteria.

**d) SHOULD ALL BIDDERS HAVE EQUAL INFORMATION IN ORDER TO PROVIDE A FAIR BIDDING PROCESS? HOW CAN INFORMATION ASYMMETRY BE AVOIDED? WHAT IF INTERESTED PARTIES PARTICIPATE IN THE AUCTION?**

A properly conducted auction can be classified as being non-discriminatory and objective, if the results of the auction are determined by the bids of the participants and all participants are subject to the same rules.

An auction would be a relatively transparent mechanism if proper publication of the relevant rules took place and the participants were always entirely familiar with the game.

Ideally a well-designed auction will provide equal information to all the bidders and provide for symmetric distribution of the same in order to achieve a fair bidding process. However, for example, simultaneous multiple-round auctions may allow the internalisation of information asymmetries among participants of the auction and/or auctions with combinatorial bids.

In practice, bidders' knowledge about their rivals is unlikely to be symmetric. Bidders tend to know more about some rival bidders than others. For instance, in a procurement auction contested by domestic firms and foreign firms, domestic firms are likely to know more about the technical capabilities of their domestic rivals than those of foreign rivals.

In auctions for government assets, bidders often consist of incumbent firms with a long history of operation in the industry and relative newcomers in the area. It is then presumably easier for a bidder to estimate the preferences and technological abilities of the old firms than those of the new ones.

How can information asymmetry be avoided?

Auctions are inherently a situation with asymmetric information, therefore avoiding information asymmetry is no easy undertaking. The risk of trading against a privately informed investor depends on two factors: (1) how frequently such investors obtain private information and (2) how intensely they trade on their private information relative to the level of uninformed trading. Therefore, an increase in disclosure frequency reduces the level of information asymmetry either by leading to a reduction in the frequency with which investors obtain private information ("private information events") or decreasing the relative amount of informed trading, or both.

Disclosure directly pre-empts some future private information events by releasing the information publicly before it can be discovered privately. More frequent disclosures allow investors to rationally anticipate that the firm is following an *ex ante* policy of frequently disseminating. Such a disclosure policy reduces the expected benefits of private information search activities.

What if interested parties participate in the auction?

The participation of interested parties generates conflicts of interests. One way to avoid a conflict of interests – if the distribution company or an affiliate elects to participate in the auction – is to delegate

the actual running of the auction to a third party. The third party implements and enforces the rules of the auction, and makes all decisions in cases where the rules allow discretion.

The Portuguese Securities Code also establishes, for publicly held companies, a set of rules concerning insider trading. These rules establish that whoever holds privileged information due to their capacity as a member of a managing or supervisory body of a company or as a shareholder, and transmits this information to someone outside the regular scope of their functions or, based on this information, negotiates or advises someone to trade securities or other financial instruments shall be punished by imprisonment for a maximum of 3 (three) years or a fine.

#### **e) HOW MUCH INFORMATION SHOULD BE DISCLOSED? IS THERE A CONFLICT OF INTERESTS?**

The objective of the company in releasing information on the auction is to provide for maximum transparency, within the restrictions necessary to the auction design. The need to preserve confidentiality means that some information cannot be released until after the auction, or the relevant phase, is concluded. However, a full account of the auction will be made available at the earliest possible stage.

The goal is to provide maximum transparency without weakening the anti-collusive effects of the “confidentiality” requirement. Only a transparent and balanced auction will maximize the sale price without incurring in the "Seller's Curse" effect.

Generally, a company that puts itself “in play” will have prepared an offering memorandum (OM) or similar briefing book describing its operations, capabilities, assets, future plans and financial performance. The information in the OM will usually be supplemented and expanded upon in management briefings provided to serious potential buyers.

The due diligence process is most often viewed as an exercise undertaken by the buyer. However, the seller can benefit from understanding the goals of a buyer’s due diligence and anticipating the documentation a prudent buyer will want to see.

In many cases, an efficient way for the seller to assemble and present such documentation for review by the buyer is by setting up a Data Room at the seller facility.

The Data Room should contain documentation relating to key programmes, assets, plans and risks identified in the seller's OM and Management Briefings. Another key set of documentation would show items the seller would expect to "schedule" as part of the transaction agreement.

The ultimate scope of documentation made available for review in the Data Room will also depend on the nature of the proceedings. For example, fewer documents may be made available to first round participants in an "auction" situation. In setting up the Data Room, restrictions on the disclosure of information subject to Non-Disclosure Agreements and other customer-sensitive documents need to be considered along with the information that the seller believes competition-sensitive. Seller's information such as audit reports, for example, might be segregated in a separate "Room" which would be subject to additional restrictions.

Is there a conflict of interests?

Selling a company in an auction process may pose some conflicts of interests. Therefore, an obligation of secrecy is usually imposed on all the participants, through confidentiality letters.

Not only is the potential buyer, but also the intermediary, asked to agree to confidentiality.

In fact, in the contracts entered into with the bank, it is common practice to include confidentiality clauses.

Also, when referring to public companies, inside trading rules may be applicable.

#### **f) WHEN ORGANIZING AN AUCTION, DOES EU-LAW HAVE TO BE CONSIDERED?**

Competition and anti-trust provisions must be taken in consideration at two different steps of the auction process.

First of all, when agreeing the auction rules. At this stage the rules defining the auction process must not counteract provisions ensuring the effective right of equality in competing for the acquisition of the target.

In a later stage, when selecting the bidders in a higher range, fundamentally in the case of privatization auctions, equal rights to foreign bidders must be ensured, therefore avoiding protectionist measures that will favour national bidders to the detriment of foreign acquirers.

**g) DOES PUBLIC PROCUREMENT LAW HAVE AN IMPACT ON AUCTIONS?**

Yes, public procurement rules are of relevance in auction processes, especially when selling government-owned or government-controlled companies. In fact, regulations on public procurement contain basic principles on fair and equal treatment of bidders that may be applicable to auctions where there are no pre-agreed rules.

**IV. AUCTION PROCESS FROM THE PERSPECTIVE OF THE BIDDER**

**a) MAY BIDDERS TEAM UP AND FORM BIDDING SYNDICATES AFTER THE AUCTION HAS STARTED? MAY BIDDERS SWITCH A BIDDING SYNDICATE ONCE THE AUCTION HAS BEGUN?**

There are no specific restrictions on bidding syndicates. The rules of the auction may allow for the formation of bidding alliances for joint bidding. When small firms are given the opportunity to cooperate, they may be able to realise economies of scale they would not have realised when bidding alone. Also, co-operating firms will be able to exchange information about the target and thereby reducing the risk of winner's curse.

Nevertheless allowing bidders to form bidding syndicates after the auction has started may pose some collusion issues. Bidding syndicates that are arranged very close to the auction date or after the auctions have started should be particularly discouraged since they give no time for entrants to emerge and threaten the new coalition. Auction participants shall generally be restricted to entities that exist when the auction is first announced, although exceptions are clearly necessary. The seller may impose limitations preventing bidders from colluding with one another as a way of keeping down the price.

As further explained below, both EU and national anti-trust provisions may prevent or sanction collusion situations.

**b) Do anti-trust issues arise for bidding syndicates? At what stage of the auction procedure do bidders have to furnish the respective approvals?**

Quite obviously, if the bid made for the sale by auction of a company is being conducted by two or more companies acting together, such a bid may entail anti-trust issues, which will have to be closely looked at.

Portuguese Competition and Anti-trust issues are regulated mainly by Law n. 18/2003, of 11<sup>th</sup> July.

Bidders in auctions tend to be quite imaginative in finding ways to reduce the bidding competition among themselves, to keep auction prices low. There are three main keys to limiting collusion. The first is to encourage wide participation in the auction and to prevent bidders from forming bidding consortia except with strong economic justification. The second key element is the auction rules themselves. Various auction rules affect the ability of bidders to communicate and to “retaliate” against bidders who are bidding aggressively. The rules should prevent communication that does not contribute to the effectiveness of the auction. There should also be a clear reminder that all bidders are prohibited from cooperating, collaborating, discussing, or disclosing in any manner their bidding strategies or the substance of their bids, including the price, terms or conditions of their bids, or discussing or negotiating agreements with other participants in the auction until the auction has officially concluded. The third key element is antitrust provisions. They provide that interfering with or conspiring to affect prices in an auction is subject to penalties.

The Portuguese legal provisions on Competition and Anti-trust issues concerning prohibited practices and concentrations of companies, are applicable to auctions as follows:

As to prohibited practices: Agreements between companies, decisions by associations of companies and concerted practices between undertakings, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market, are prohibited, in particular those which:

- a) Directly or indirectly fix purchase or selling prices or interfere with their establishment by free market forces, thus causing them either to rise or fall artificially;
- b) Directly or indirectly fix other transaction conditions effected at the same stage or different stages of the economic process;

As to concentration of Companies: certain merger and acquisition activities may be deemed anticompetitive as they lead to greater concentration of market share, which may offset market balance to the detriment of smaller companies. This is apparent for any transaction, which creates or reinforces a share exceeding 30% of the national market for a particular good or service or for a substantial part of it. The same applies when the companies involved have obtained in Portugal a turnover exceeding EUR 150 million, net of taxes, provided that the individual turnover in Portugal of at least two of these companies exceeds two million euros.

However, the provisions on concentrations of companies do not apply in the following situations:

- The acquisition of shareholdings or assets within company recovery or bankruptcy proceedings;
- The acquisition of a shareholding merely as a guarantee;
- The acquisition by credit institutions of shareholdings in non-financial companies, if the Credit Institutions does not hold, directly or indirectly, for more than three years a stake in a company outside the financial sector, representing more than 25% of the voting rights.

Infringements to competition law are punished through administrative fines imposed by the Competition Authority, notwithstanding the criminal liability eventually incurred by the offender.

Bidders are not bound by statutory provisions as to the stage of the auction proceedings when they are obliged to furnish the respective approvals. The definition of this stage will therefore be left to the specific auction rules. Nevertheless, public procurement rules set out provisions regarding bidding syndicates that may be applicable especially when selling government-owned or government controlled companies.

**c) ARE THERE SANCTIONS (CRIMINAL AND CIVIL) FOR BIDDERS WHO COLLUDE IN AN AUCTION?**

Again there are no specific provisions for auctions on this matter; nevertheless, competition and anti-trust rules may be applicable.

Law No. 18/2003 sets out provisions regarding proceedings and sanctions for prohibited practices hampering free market competition. Article 43° of the aforementioned law establishes fines for prohibited practices that may not exceed 10% of the previous year's turnover for each of the companies participating in the infringement.

Article 44° of Law No. 18/2003 sets out the criteria for determining the amount of the fine. The applicable fine will vary depending on the gravity of the infringement affecting the maintenance of effective competition in the Portuguese market, the advantages that the offending firms have enjoyed as a result of the infringement, the repeated or occasional nature of the infringement, the extent of participation in the infringement, co-operation with the Competition Authority, until the close of the administrative proceedings and the offender's behaviour in eliminating the prohibited practices and repairing the damage caused to the competition.

Competition provisions also lay out additional penalties should the gravity of the infringement so justify. For these offences both individuals and legal entities may be held responsible.

## **V. ATTORNEY'S OBLIGATIONS IN AN AUCTION PROCESS**

### **a) IS AN ATTORNEY FREE TO REPRESENT OPPOSING BIDDERS IN AN AUCTION?**

According to both the CCBE code of conduct and the Portuguese Ethics Code an attorney is not free to represent opposing bidders in an auction since a lawyer may not advise, represent or act on behalf of two or more clients on the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

A lawyer must also cease to act for both clients when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.

### **b) WHAT HAPPENS IF A REPRESENTED BIDDER WITHDRAWS FROM THE AUCTION?**

### **MAY HIS ATTORNEY NOW REPRESENT ANOTHER BIDDER AND USE THE KNOWLEDGE GAINED FROM THE PREVIOUS REPRESENTATION?**

Again, according to both the CCBE code of conduct and the Portuguese Ethics Code a lawyer must respect the confidentiality of all information made known to him in the course of his professional activity, therefore a lawyer must refrain from acting for a new client if there is a risk of a breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

## **VI. EVALUATION OF A BID**

### **a) WHO IS THE COMPETENT BODY TO EVALUATE A BID?**

In a share deal, the competent body to evaluate the bid is the General Meeting, although the Board of Directors will inevitably send a recommendation to the shareholders with its assessment of the offer.

In asset deals that do not represent a transaction capable of seriously affecting the interests and financial position of the individual shareholders, i.e., day-to-day management decisions, the competent body to evaluate the bid is the Board of Directors. By contrast, if, in fact, the asset deal is considered to be a major disposal of the company's assets and thereby considerably affects shareholder interests, the competent body to evaluate the bid will be the General Meeting.

In privatisation processes in Portugal, a sales jury is usually created and will be the competent body to evaluate the different bids. The recommendation of this sales jury is non-binding, however its opinion is usually followed by the Government.

#### **b) WILL THE SELLER BE BOUND BY THE RESULT OF AN AUCTION?**

Usually the seller tends to protect himself against any claim from bidders, by inserting a clause in the auction rules (exemption clause) excluding any liability and determining that he has no obligation to either sell to the highest bidder, to the bidder offering best overall terms, or indeed, may withdraw from the process altogether.

The bidders, in most cases will refuse to act in such circumstances unless the seller underwrites their costs.

Nevertheless, if it becomes apparent from the interpretation of the auction rules, that the seller was bound to accept the highest bid or the one offering the best overall conditions, the seller will be bound by the result of the auction.

The most common exemption clauses are the following:

- Making the liability or its enforcement subject to restrictive or onerous conditions;
- Excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of the pursue of any such right or remedy;
- Excluding or restricting rules of evidence or procedure.

The Portuguese Civil Code rules out certain unfair contract terms and therefore the use of such clauses is limited. Effectively, the anticipated waiving of the right to file a claim for damages as well as the waiving of the right to remedies in respect of any liability, is void.

#### **c) WHAT ARE THE REMEDIES FOR A SPURNED BIDDER?**

##### **WILL THERE BE A COURT REVIEW?**

When considering the available remedies for the spurned bidder, the starting point is whether or not the rules of the auction contain any specific provision to protect their interests. If so, the agreement executed between the parties will be upheld by the courts as a primary consideration.

In Portugal, as mentioned above, there is no specific legislation concerning auctions. Nevertheless, the infringement of the mentioned rules of the Portuguese Civil Code, namely the good faith principle, or other legislation, such as for instance, competition law, may result in a court review that may lead to the annulment of the sale or give right to an indemnity.

In all these situations, proof that the spurned bidder has suffered a loss and that this loss can be ascribed to the seller's non fulfilment of his obligations in accordance with the auction's rules of procedure, applicable law or generally accepted standards, is required.

**d) CAN THE SPURNED BIDDER HAVE A CLAIM FOR DAMAGES?  
WHAT ABOUT PRE-CONTRACTUAL CLAIMS?**

A spurned bidder may be entitled to a claim for damages under the culpa in contrahendo principles, for breach of pre-contractual duties or for breach of the bona fide principle. The sales memorandum may further provide for specific remedies concerning spurned bidders.

The application of statutory provisions or the rules of the auction may allow compensation and/or trigger an injunction. These damages will include direct damages and loss of profit.

As mentioned earlier, in most cases the seller tends to protect himself against any action by spurned bidders by including a clause in the auction rules to exclude any liability or to determine that he has no obligation to sell to the highest bidder or to the bidder offering best overall terms.

## ANNEX 1

### CONFIDENTIALITY AGREEMENT

This contract is dated \_\_\_\_\_

#### Parties

(1) [COMPANY NAME], incorporated and registered in England with company number [\_\_\_\_\_] whose registered office is at [\_\_\_\_\_] (**Seller**).

(2) [COMPANY NAME], incorporated and registered in England with company number [\_\_\_\_\_] whose registered office is at [\_\_\_\_\_] (**Buyer**).

#### Background

The Buyer is negotiating with the Seller for the purchase of the Business.

The Seller and its Group wish to ensure that Confidential Information revealed to the Buyer in the course of the negotiations remains confidential and is not used by the Buyer for any purpose other than the proposed purchase of the Business.

#### Agreed terms

##### 1. INTERPRETATION

1.1 The definitions and rules of interpretation in this clause apply in this agreement.

**Business:** [DESCRIPTION OF BUSINESS PROPOSED TO BE SOLD].

**Confidential Information:** has the meaning given in clause 2.2.

**Copies:** copies of Confidential Information including any document, electronic file, note, extract, analysis, study, plan, compilation or any other way of representing or recording and recalling information which contains, reflects or is derived or generated from Confidential Information.

**Group:** in relation to a company, that company and any company of which it is a Subsidiary (its holding company) and any other Subsidiaries of any such holding company.

Unless the context otherwise requires, the application of the definition of Group to any company at any time shall apply to the company as it is at that time.

**Permitted Purpose:** considering, evaluating and negotiating the proposed purchase of the Business.

**Subsidiary:** in relation to a company (the holding company), any other company in which the holding company [(or persons acting on its or their behalf)] directly or indirectly holds or controls either:

- A majority of the voting rights exercisable at general meetings of that company; or
- The right to appoint or remove directors having a majority of the voting rights exercisable at meetings of the board of directors of that company, and any company which is a Subsidiary of another company shall also be a Subsidiary of that company's holding undertaking.

1.2 Clause and schedule headings do not affect the interpretation of this agreement.

1.3 A **person** includes a corporate or unincorporated body.

1.4 A reference to a law is a reference to it as it is in force for the time being, taking account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force made under it.

1.5 **Writing** or **written** includes faxes but not e-mail.

1.6 Words in the singular include the plural and in the plural include the singular.

## **2. BUYER'S OBLIGATIONS**

2.1 In return for the Seller making Confidential Information available to the Buyer], the Buyer shall:

- Keep the Confidential Information secret;
- Use the Confidential Information only for the Permitted Purpose;
- Not directly or indirectly disclose the Confidential Information (or allow it to be disclosed), in whole or in part, to any person or make Copies unless permitted by this agreement;
- Use its best endeavours to ensure that no person gets access to Confidential Information from the Buyer, its officers, employees or agents unless authorised; and
- Inform the Seller immediately upon becoming aware, or suspecting, that an unauthorised person has become aware of Confidential Information.

2.2 Confidential Information means:

- The fact that the Seller is considering selling the Business and the existence and contents of this agreement; and
- All information in whatever form (including, without limitation, in written, oral, visual or electronic form, or on tape or disk) relating to the Business, or any company that is (or was at the date of this agreement) in the Seller's Group, that is directly or indirectly disclosed, [whether before or after the date of this agreement], to the Buyer or any of its representatives by any agent or employee of the Seller's Group, or which comes to the Buyer's attention in connection with the Permitted Purpose, but excludes the information in clause 2.3.

#### 2.3 Information is not Confidential Information if:

- The information is, or subsequently becomes, public knowledge other than as a direct or indirect result of the information being disclosed in breach of this agreement; or
- The Buyer can establish, to the reasonable satisfaction of the Seller, that it found out the information was gained from a source not connected with the Seller or its Group and that the source is not under any obligation of confidence in respect of the information; or
- The Buyer can establish, to the reasonable satisfaction of the Seller, that the information was known to the Buyer before the date of this agreement and that there was no obligation of confidence in respect of the information; or
- The parties agree in writing that it is not confidential.

#### 2.4 The Buyer may disclose Confidential Information only:

- To such officers and employees of their Group as are strictly necessary for the Permitted Purpose;
- To professional advisers or consultants engaged to advise the Buyer in connection with the Permitted Purpose;
- To bankers and potential investors and their professional advisers or consultants for the purpose of securing financing in relation to the Permitted Purpose;
- To people whom the Seller agrees in writing may receive the information; and
- To the extent permitted by clause 4

#### 2.5 The Buyer shall:

- Inform any person to whom they disclose the Confidential Information that the information is confidential; and
- Ensure that any person to whom they disclose the information (other than disclosures under clause 4 complies with this agreement) as if they were the Buyer and, if the Seller so requests,

that they enter into a confidentiality agreement with the Seller on terms equivalent to those contained in this agreement.

2.6 The Buyer may make only such Copies as are strictly necessary for the Permitted Purpose and shall:

- Clearly mark all Copies as confidential;
- Ensure that all Copies supplied or made by can be separately identified from their own information; and
- Endeavour to ensure that all Copies under their control are protected against theft or unauthorised access and that no person discovers Confidential Information from the Buyer unless authorised.

2.7 The Buyer shall, immediately upon the Seller's written request, supply the Seller with a list showing to the extent reasonably practical:

- Where all Copies supplied to the Buyer by the Seller are held;
- All Copies that have been made by the Buyer or the persons to whom they have disclosed the Confidential Information (except where the Copies contain insignificant extracts from or references to Confidential Information) and where they are held; and
- The names and addresses of every person to whom Confidential Information has been disclosed and a copy of the confidentiality agreements signed by them complying with clause 2.5.

2.8 If discussions in relation to the proposed purchase of the Business cease, or the Seller so requests in writing at any time, a senior officer of the Buyer shall immediately:

- Return to the Seller all the Confidential Information received by the Buyer; and
- Destroy or permanently erase all Copies supplied or made by the Buyer, or by the persons who have received Confidential Information, [other than Copies that contain insignificant extracts from, or references to, Confidential Information, Copies which are such only because they refer to the proposed purchase of the Business, or that contain no Confidential Information other than information disclosed under clause 4

2.9 Nothing in clause 2.8. shall require the Buyer to return or destroy Confidential Information or Copies that the Buyer, or the persons to whom the Confidential Information or Copies have been disclosed, are required to retain by applicable law or to satisfy the rules or regulations of a regulatory body or securities exchange to which such a person is subject.

2.10 The Buyer will, immediately upon the request of the Seller, confirm in writing (such confirmation to be signed [under oath] by a director of the Buyer) that they have complied with the obligations under clause 2.8.

### **3. AUTHORISED CONTACT**

3.1 All communications with the Seller about the Permitted Purpose should be addressed to \_\_\_\_\_.

3.2 The Buyer shall not contact or communicate with any officers, employees, consultants, advisers, landlords, bankers, customers or suppliers of the Business or the Seller's Group in connection with the Permitted Purpose other than the person named in clause 3.1. without the Seller's written consent.

### **4. FORCED DISCLOSURE**

4.1 Subject to clause 4.2, the Buyer may disclose Confidential Information to the minimum extent required by:

- Any order of any court of competent jurisdiction or any competent judicial, governmental or regulatory body; or
- The rules of any listing authority or stock exchange on which the shares of any company in the Buyer's Group are listed or traded; or
- The laws or regulations of any country with jurisdiction over the affairs of any company within the Buyer's Group.

4.2 Before the Buyer discloses any information under this clause 4, the Buyer shall (to the extent permitted by law) use their best endeavours to:

- Inform the Seller of the full circumstances of the disclosure and the information that will be disclosed, and take all such steps as may be reasonable and practicable in the circumstances to agree the contents of such disclosure with the Seller before making the disclosure;
- Give the Seller a copy of a legal opinion indicating that disclosure is necessary;
- Consult with the Seller as to possible steps to avoid or limit disclosure and take those steps where they would not result in significant adverse consequences to the Buyer;
- Gain assurances as to confidentiality from the body to whom the information is to be disclosed; and
- Where the disclosure is by way of public announcement, agree the wording with the Seller in advance.

4.3 The Buyer shall co-operate with the Seller if the Seller decides to bring in any legal or other proceedings to challenge the validity of the requirement to disclose Confidential Information (at the Seller's cost and expense).

4.4 If the Buyer is unable to inform the Seller before Confidential Information is disclosed, the Buyer shall (to the extent permitted by law) inform the Seller immediately after the disclosure of the full circumstances of the disclosure and the information that has been disclosed.

**5. SELLER'S OBLIGATIONS**

5.1 The Seller shall keep secret the Buyer's interest in purchasing the Business and take all reasonable precautions to ensure that this information stays secret.

5.2 The Seller shall disclose the Buyer's interest in purchasing the Business only:

- To such officers and employees of any company in the Seller's Group as are strictly necessary for the Permitted Purpose;
- To professional advisers or consultants engaged to advise the Seller in connection with the Permitted Purpose; and
- To the extent required by any order of any court of competent jurisdiction or any competent judicial, governmental or regulatory body, by the rules of any stock exchange or listing authority or by the laws or regulations of any country with jurisdiction over the affairs of any company in the Seller's Group.

5.3 The Seller shall ensure that any person to whom it has disclosed this information keeps it secret, unless it was a forced disclosure under clause 5.2. (c)

**6. TIME**

6.1 The obligations contained in this agreement (with the exception of the obligations contained in clause 7) shall end on completion of the purchase of the Business by the Buyer.

6.2 If the Buyer does not acquire the Business, the obligations contained in this agreement shall last\_\_\_\_\_.

**7. RESTRICTIONS ON BUYER**

7.1 The Buyer shall not, and shall ensure that no company in the Buyer's Group shall, for a period of \_\_\_\_\_ months after the date of this agreement, without the prior written agreement of the Seller,

directly or indirectly, engage in or have contact of any kind with any of the officers or employees of the Seller, or any company in the Seller's Group, except to the extent that negotiations in respect of the proposed purchase of the Business continue or otherwise in the ordinary course of business between the parties.

7.2 The Buyer shall not, and shall procure that no company in the Buyer's Group shall, for a period of \_\_\_\_\_ months after the date of this agreement, without the prior written agreement of the Seller:

- Employ or offer to employ, or enter into a contract for the services of, any individual who was, at any time during the negotiations relating to the proposed purchase of the Business, an employee holding an executive or managerial position with, or an officer of, any company in the Seller's Group (Key Seller Employee) or entice, solicit or procure any such person to leave the employment of the Seller or company in the Seller's Group (or attempt to do so) whether or not that person would commit any breach of contract in leaving such employment; or
- Procure or facilitate the making of any such offer or attempt by any other person.

7.3 The placing of an advertisement of a post available to a member of the public generally and the recruitment of a person through an employment agency shall not constitute a breach of clause 7.2. provided that no company in the Buyer's Group, or any of their respective officers and employees, encourages or advises such an agency to approach any key Seller Employee.

7.4 The Buyer shall not, for a period of \_\_\_\_\_ months after the discussions over the purchase of the Business have ended, deal with or seek the custom of any person who is or was a client or customer of the Business, if the type of goods or services in respect of which the client or customer is solicited were supplied to the client or customer by the Business in the \_\_\_\_\_ months before the date of this agreement or during discussions over the acquisition of the Business.

7.5 The undertakings in this clause 7 apply to actions carried out by the Buyer in any capacity and whether directly or indirectly, on its own behalf, on behalf of any other person or jointly with any other person.

7.6 Each of the covenants in this clause 7 are considered fair and reasonable by the parties.

## **8. INDEMNITY**

The Buyer will (in addition to, and without affecting, any other rights or remedies the Seller may have whether under statute, common law or otherwise) indemnify, and keep indemnified, the Seller, each company in the Seller's Group, and their respective officers, employees, advisers or agents (each an Indemnified Person) from and against all actions, claims, demands, liabilities, damages, losses, costs, charges and expenses (including without limitation consequential losses, loss of profit and loss of reputation and all interest, penalties and legal and other professional costs and expenses) that an Indemnified Person may suffer or incur in connection with, or arising (directly or indirectly) from, any breach or non-performance by the Buyer, or any person to whom it has disclosed or given access to any part of the Confidential Information or any Copies, of any of the provisions of this agreement.

## **9. WHOLE AGREEMENT AND CONDUCT OF NEGOTIATIONS**

9.1 This agreement is the whole agreement between the parties and supersedes any arrangements, understanding or previous agreement between them relating to the subject matter covered by the agreement.

9.2 This agreement and the supply of Confidential Information does not constitute an offer by the Seller to sell the Business and does not impose an obligation on either party to continue discussions or negotiations in connection with the proposed purchase of the Business.

9.3 The Confidential Information may not be accurate or complete and the Seller makes no representation or warranty as to the accuracy, completeness or reasonableness of the Confidential Information and no such representation or warranty shall be implied. The Seller is not liable to the Buyer or to any person to whom the Buyer discloses the Confidential Information if it is relied upon.

9.4 If the purchase proceeds, the Buyer will be required to enter into a purchase agreement in which the Buyer will be required to acknowledge that the Buyer has not been induced to enter into the agreement by any representation other than as set out in the purchase agreement.

9.5 Nothing in this clause 9 operates to limit or exclude any liability for fraud.

## **10. COSTS**

Unless otherwise specified, all costs in connection with the negotiation, preparation, execution and performance of this agreement (and any documents referred to in it) and the consideration or evaluation of the Confidential Information shall be borne by the party that incurred the costs.

## **11. ASSIGNMENT**

11.1 Except as provided otherwise in clause 11.2, no person may assign any of their rights under this agreement or any document referred to in it.

11.2 The Seller may assign their rights to any company in their Group or to a successful purchaser of the Business and those persons shall be entitled to enforce this agreement as if they were the Seller.

## **12. ACTING AS PRINCIPAL**

12.1 The Buyer is acting as principal and not as a broker or agent.

12.2 As far as the Buyer knows, no other person has an interest in the Business (whether all or part) that the Buyer has not disclosed to the Seller.

## **13. THIRD PARTY RIGHTS AND INTELLECTUAL PROPERTY**

13.1 Except as provided in this clause 13, this agreement is made for the benefit of the parties to it and their successors and permitted assigns and is not intended to benefit, or be enforceable by, anyone else.

13.2 This agreement is made for the benefit of the owners of the Business from time to time and all current companies in the Seller's Group, and they may enforce this agreement as if they were the Seller and a party to this agreement.

13.3 The parties may terminate, rescind or vary this agreement without the consent of any person who is not a party to this agreement.

13.4 None of the Confidential Information is the property of the Buyer. The disclosure to the Buyer of any Confidential Information shall not give the Buyer any licence or other rights whatsoever in respect of any part of such Confidential Information beyond those rights contained in this agreement.

## **14. SEVERANCE**

14.1 If any court or administrative body of competent jurisdiction finds any provision of this agreement to be invalid, unenforceable or illegal, the other provisions of this agreement shall remain in force.

14.2 If any invalid, unenforceable or illegal provision were valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to make it valid, enforceable and legal.

## **15. VARIATION AND WAIVER**

15.1 A variation of this agreement shall be in writing and signed by or on behalf of all parties.

15.2 A waiver of any right under this agreement is only effective if it is in writing and it applies only to the person to whom the waiver is addressed and under the circumstances for which it is given.

15.3 A person that waives a right in relation to one person, or who takes or fails to take any action against that person, does not affect their rights against any other person.

15.4 No failure to exercise or delay in exercising any right or remedy provided under this agreement or by law constitutes a waiver of such right or remedy or will prevent any future exercise in whole or in part thereof.

15.5 No single or partial exercise of any right or remedy under this agreement shall preclude or restrict the further exercise of any such right or remedy.

15.6 Rights arising under this agreement are cumulative and do not exclude rights provided by law.

## **16. LANGUAGE**

16.1 If this agreement is translated, the English language text shall prevail.

16.2 Any other document provided in connection with this agreement shall be in English or there shall be a properly prepared translation into English and the English translation will prevail in the case of any conflict between them.

## **17. GOVERNING LAW AND JURISDICTION**

17.1 This agreement and any disputes or claims arising out of, or in connection with, its subject matter are to be governed by and construed in accordance with the law of England.

17.2 The parties irrevocably agree that the courts of England have [non-] exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement.

This contract has been entered into on the date stated at the beginning of it.

Signed by \_\_\_\_\_ for and on behalf of

## ANNEX 2

### **SPECIMEN TIMETABLE**

The timetable varies from auction to auction. This is a realistic rather than aggressive timetable, though it assumes that the seller will have ready access to due diligence information and material from which to compile a useful information memorandum.

#### **Timing Action**

- Appointment of an advisory team by the seller, including financial advisers, solicitors and accountants.
- Assessment of likely interest.
- Identification and researching of potential bidders.
- Identification of potential timing and commercial issues.

**By despatch date** Alerting the management of the target, if appropriate, on a need-to-know basis.

- Performance of seller's due diligence.
- Preparation of information memorandum.
- Verification of information memorandum if desired or required.
- Preparation of data room.
- Preparation of draft sale documentation.
- Securing of confidentiality undertakings from all potential bidders.

**Despatch date** Distribution of information memorandum and process letter.

- Submission by bidders of indicative bids, requirements for due diligence and notification of any fundamental competition, regulatory or other conditions.
- Despatch of draft sale documentation by seller.
- Opening of data room to bidders.
- Arrangement of management and site visits.
- Deadline for firm bids and submission of marked-up sale documentation.
- Selection of preferred bidder.
- Signature of sale documentation.

#### **Information in the data room**

The information in the data room should contain all the information which will form the basis of exclusions from the warranties as having been disclosed and will cover at least the following:

*Financial*

- Historical accounting information.
- Capital expenditure since the last accounts.
- Share capital and borrowings, distinguishing between intra-group debt and bank borrowings.
- Copies of underlying loan and security documents and guarantees.
- Business plan or projections for the current year.

#### *Taxation*

- Status of tax returns and details of tax position including losses (if applicable).

#### *Constitution*

- The memorandum and articles of association (or equivalent documents for overseas companies) of group members.
- Details of directors and other officers.

#### *Assets*

- Details of principal assets.

#### *Contracts*

- Details of major suppliers and customers and copies of relevant contracts (although because of commercial sensitivity, some of these may be held back until the preferred buyer has been selected).
- Contracts with principal agents and distributors.
- Joint venture agreements, licences and other material contracts.

#### *Licences*

- Details of licences and permits required for the target's business.

#### *Employment*

- Service contracts with directors and key employees.
- Standard terms and conditions of employment for other categories of staff.
- Details of pension schemes and other employee benefits such as profit-sharing schemes.
- Analysis of workforce, by age and length of service.

#### *Property*

- Details of major factories and offices.
- Title deeds to properties owned or leased by the target.

#### *Intellectual property*

- Details of patents, trademarks, copyright and other intellectual property used by the target.
- Licences of intellectual property rights.
- Details of computer systems and software used.

#### *Insurance*

- Copies of insurance policies and information on claims.

#### *Disputes*

- Details of liabilities, including litigation or arbitration proceedings and other disputes or investigations (including environmental disputes and investigations) affecting the target.

### **Sample process letter**

#### **(“the target”)**

I enclose numbered copy 1 of the Information Memorandum relating to the target. This is supplied to you in confidence and is to be held on the terms of the confidentiality undertaking signed by you yesterday. We ask you to let us have your written proposal for the acquisition of the target at these offices by \_\_pm on \_\_\_\_\_, \_\_\_\_\_. Your proposal should cover the following points:

1. The price stated in EUROS, that you are prepared, subject to contract, to offer for 100%of the issued shares of the target, on the basis that all the target’s bank and intercompany borrowings have been discharged.
2. Details of your ultimate ownership and copies of your Annual Reports for \_\_\_ and \_\_\_.
3. Confirmation that your offer is made as principal for your own account.
4. Confirmation that you have the necessary finance to complete the transaction (including a letter from your financial adviser or bank to that effect) and details of the way in which it is to be financed.
5. Due diligence issues, which you require to be resolved prior to signing the sale documentation.
6. Details of any regulatory or other consent required prior to the completion of the transaction.
7. Details of any merger or anti-trust clearances or notifications required, and, if none, the reasons for your conclusion that none are required.
8. Your estimate of your share of the widgets market in the Territory.
9. Details and timing implications of any internal approval process required prior to the execution of binding sale documentation.
10. Your intentions as to redundancies or reorganisations of the work force following the sale.
11. Confirmation that there are no other conditions attached to your offer.

Following receipt of indicative offers, the seller intends to select a small number of bidders to proceed to the final stage of the process. This will involve for successful bidders:

- a meeting with the target’s management
- a visit to the target’s premises
- access to the data room maintained at our offices
- copies of due diligence reports prepared by the seller’s advisers all of which will be arranged through us. No contact should be made with any of the target’s staff.

Successful bidders will receive drafts of the sale documentation and will be asked to submit their final offer for the target together with a copy of the documentation with any suggested amendments. Following receipt of such further offers, the seller intends to select a preferred buyer with whom it will proceed to conclude a sale of the target. However, the seller reserves the right to proceed to sell the target to any person at any time or to vary or discontinue the auction process at any time without notice. The seller is under no obligation to accept the highest bid offered or any bid at all.

Yours sincerely,

For and on behalf of \_\_\_\_\_.

### ANNEX 3

#### **REQUIRED INFORMATION OF THE COMPANY INTERESTED IN BIDDING**

##### Information of general nature

- Name and legal form;
- Registered office, main place of business;
- Law on the basis of which the business operates and competent courts in the case of controversy;
- Details of registration on the register of companies and other registers under the law;
- Company objects.

(N.B. if the business represents a group of companies interested in the acquisition this information must be provided in respect of each company)

##### Information about share capital

- Paid up share capital;
- Authorized but unissued share capital;
- Changes in share capital in the last three years;
- Details of capital commitments or of directors' powers to decide on capital increases;
- Total of convertible debenture loans;
- Details regarding the ten biggest shareholders and their percentage holdings of the share capital;
- Identification of any person or legal entity that directly or indirectly, singularly or jointly, exercise or may exercise control over the company-

##### Information on the company's corporate governance

- Board of Directors;
- Board of Auditors;
- Names of limited responsibility shareholders.

##### External accounting checks

- Auditors;
- Indication of any certification of accounts relating to the last three tax years exists, specifying the auditing firm that gave such certification and its registered office;
- If the company has consolidated accounts the information must be given also for that consolidated accounts;

#### Information regarding business activity

- Description of main sectors and markets of the company's activity;
- Description of the company's main assets;
- Description of the net profit over the last three years, if possible by categories of business;
- Staff;
- Investments;

#### Information on property financial situation and economic results

- Accounts reclassified according to criteria of financial analysis of the last three years presented in the form of comparative table;
- Financial reports of the last three years presented in the form of comparative table;
- Forecasts of variations in the types of net property of the last three years;
- If the company is a holding company and prepares consolidated accounts, all of the abovementioned information must be provided regarding the whole group;
- If the company is a holding company and prepares consolidated accounts, all of the abovementioned information must be provided for each of the group's companies;

#### Information regarding reasons for bidding and financial support

#### Annexes:

1. Articles of Association;
2. Accounts (single or consolidated) of the last three years and reports of directors and auditors;
3. Declaration of the managers signatories of this prospectus that as far as they are aware they assume the responsibility that the information contained reflects reality and that there are no omissions that will affect the same.

## **Bibliography**

- ARIKAN, Ilgaz, *How should and Entrepreneurial Firm be Sold? Auctions versus Negotiations*, 2003, [www.stern.nyu.edu/ei/bces/research/evi/papers/arikan.pdf](http://www.stern.nyu.edu/ei/bces/research/evi/papers/arikan.pdf)
- BULLOW, Jeremy and Klemperer, Paul, *Auctions Versus Negotiations*, <https://faculty-gsb.stanford.edu/bulow/articles/Auctions%20Versus%20Negotiations.pdf>
- CAMERON, Lisa J., Crampton, Peter and Wilson, Robert, *Using Auctions to Divest Generation Assets*, 1997, <http://www.cramton.umd.edu/papers1995-1999/97elec-using-auctions-to-divest-generation-assets.pdf>
- DURIE, Robyn, *Spectrum Auctions – Is the Position of the European Commission Sustainable?* International Bar Association, 1996
- Economics 235-01: Strategic Analysis: Chapter 15: Auctions,
- Egan, Byron F., Harper, Robert T., Hirschhoff, Ramelli, Rudolph R., Tafe III, H. Lawrence
- *Euronext Cash Market Trading Manual*, [www.euronext.com](http://www.euronext.com)
- *Euronext Rules – Book I*, [www.euronext.com](http://www.euronext.com)
- FÉVRIER, Philippe and Préget, Raphaële, *Econometrics of Share Auctions*, <http://home.uchicago.edu/fevrier/chapitre4.pdf>
- G. Heidle, Hans and D. Huang, Roger, *Information-Based Trading in Dealer and Auction Markets: An Analysis of Exchange Listings*, 1999, [mba.vanderbilt.edu/fmrc/papers/wp9903.htm](http://mba.vanderbilt.edu/fmrc/papers/wp9903.htm)
- KAGEL, John H. and Levin, Dan, *Common Value Auctions and the Winner's Curse*, 2001, <http://www.econ.ohio-state.edu/kagel/WEBPROMO.PDF>
- KLEIN, Michael, *Infrastructure Concessions – To Auction or not to Auction?*, 1998, <http://rru.worldbank.org/Documents/PublicPolicyJournal/159klein.pdf>
- KLEIN, Stefan, *Introduction to Electronic Auctions*, 1997, <http://www.cs.mu.oz.au/eas/subjects/654/klein-em.pdf>
- KLEMPERER, Paul, *Auctions: Theory and Practice*, 2003, <http://www.nuff.ox.ac.uk/users/klemperer/VirtualBook/VirtualBookCoverSheet.asp>
- LILLIS, Kevin, *Electricity Reform Abroad and U.S. Investment – The auction of U.K. electricity*, 1997, <http://www.eia.doe.gov/emeu/pgem/electric/ch214.html>
- MCCONNELL, Steven C., *Quantifying Soft Factors*, 2002, <http://www.stevemcconnell.com/SoftFactors.pdf>
- Pezanis-Christou, Paul and Sadrieh, Abdolkarim, *Elicited bid functions in (a)symmetric first-price auctions*, 2003, <http://ideas.repec.org/p/aub/autbar/578.03.html>
- SARDESAI, Mahesh P., *Collusion within NASDAQ: Motives, Practices and Consequences*, Michigan Journal of Economics
- SHERMAN, Ann E., *Global Trends in IPO Methods: Book Building vs. Auctions*, 2002, <http://www.gsb.stanford.edu/CEBC/pdfs/Global2.pdf>

- *The Euronext List: a common four-faceted approach applicable to all listed companies*, [www.euronext.com](http://www.euronext.com)
- VETTER, Michael and Pitsch, Stefan, *Towards a Flexible Trading Process over the Internet*, <http://www.ipsi.fraunhofer.de/mahleko/seminars/part%202-architectures/Vetter/Towards%20a%20Flexible%20Trading%20Process.pdf>
- WINE, Humphrey- 3rd., *Buying and selling private companies and businesses*, Butterworths, 2001.
- WOLFSTETTER, Elmar, *Auctions – An Introduction*, 1994, [http://www.wiwi.hu-berlin.de/wt1/papers/1994/auctions\\_introduction.pdf](http://www.wiwi.hu-berlin.de/wt1/papers/1994/auctions_introduction.pdf)
- WURMAN, Peter. R., Wellman, Michael P., Walsh, William E., *Specifying Rules for Electronic Auctions*, 2002, <http://www.csc.ncsu.edu/faculty/wurman/Papers/AI-Mag-WWW.pdf>

---