

These guidance notes do not constitute legal advice. They do not form part of the exclusivity agreement and are not an aid to interpretation of the exclusivity agreement.

Updated: 15 March 2017

GUIDANCE NOTES – IPF EXCLUSIVITY AGREEMENT¹

Heads of terms will sometimes provide a period during which the seller will give the buyer a fixed period of time to carry out its due diligence. This does not guarantee that either side will enter into a sale contract, but it does give the buyer certainty that the seller will not negotiate with other parties during that period. Whilst heads of terms illustrate serious intent to enter into a transaction, they are not generally legally binding. Certain provisions (including exclusivity) may be legally binding but this will depend on the circumstances. Best practice is therefore to enter into a standalone Exclusivity Agreement.

We know from our members that negotiations around the terms of an Exclusivity Agreement can distract the parties from proceeding with the transaction itself. Also, with the level of investment by overseas buyers (many of whom are not familiar with the UK market), it was felt that an industry template might give some comfort to those investors new to the UK market. With that in mind, the IPF set up a working party² from the real estate sector (covering property companies, funds, agents, lawyers and accountants) with a view to creating a standard form Exclusivity Agreement adoptable with minimal amendment.

The template has been created to represent what the IPF believes is a fair and reasonable position for both parties and reflecting general market standards at the current time. Whilst we recognise that some organisations will have their own policy in relation to some of the points below, we hope that the industry will embrace the use of this Exclusivity Agreement in keeping with our mission to enhance the efficiency and liquidity of real estate as an investment asset class.

Following finalisation of the English law document, a Scottish version has been prepared which can be used in relation to properties located in Scotland.

1. TRANSACTION TYPE

The Exclusivity Agreement has been produced for use on direct real estate transactions.

2. EXCLUSIVITY PERIOD

- 2.1 The period of the exclusivity (or lock out) will depend on the specific transaction but should have a definitive start and end date. Some agreements may seek to link the exclusivity period to the provision of the sales pack (see paragraph 3 below). However, if dates are not pre-determined, there is scope for uncertainty and dispute.

¹ The definitions used throughout the Exclusivity Agreement are also used in these guidance notes.

² Ciaran Carvalho – Nabarro (chair), Dan Buckle – Aberdeen Asset Management, Steven Cowins – Greenberg Traurig, Sue Forster – IPF, Siobhan Godley – Deloitte, Neil McGibbon – Starwood Capital Europe Advisers, Philip Nell – Hermes Real Estate, Alex Peeke – Land Securities Group, Clare Thomas – Nabarro, Geraint Thomas – JLL

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- 2.2 Timing is important in any transaction and the Exclusivity Agreement provides that the parties are to act promptly and in accordance with any timetable set out in the heads of terms or as otherwise agreed between the parties. It was not considered to be market practice to make time of the essence and the Exclusivity Agreement is therefore silent on this point. Whether in fact time would be deemed to be of the essence, would depend on the particular circumstances of the transaction.

3. SELLER'S OBLIGATIONS

The Exclusivity Agreement envisages that there is a full sales package available to the Buyer. This can be a contentious issue and what is best practice will depend on each particular transaction. It is recommended that prior to entering into any Exclusivity Agreement, the parties are clear on what information will be made available. The IPF have produced a helpful 'Readiness for Sale' guide aimed at streamlining commercial property transactions. Appendix 2 sets out best practice as to what should be included in a sales package and Appendix 3 is a readiness for sale checklist which is available to download in spreadsheet format from the IPF website.³

4. BUYER'S OBLIGATIONS

The Exclusivity Agreement requires the Buyer to act promptly in its obligations and it is recognised that a specific timetable may be set out in the heads of terms.

5. EXECUTION

- 5.1 It is recommended (and good practice) that the actual parties (and not their representatives or agents) sign the Exclusivity Agreement.
- 5.2 The use of electronic signatures is still rare in the UK and so the Exclusivity Agreement assumes that a handwritten signature will be used in the normal way (this will be revisited should market practice change). It is however common for the parties to complete on the basis of pdf signed documents rather than the originals. In Scotland, it is proposed that the authorised signatory's signature is witnessed ensuring it is "self-proving" and valid.
- 5.3 Where a non-UK entity is a party, it is not usual market practice to request a legal opinion letter for the Exclusivity Agreement.

6. MISCELLANEOUS

- 6.1 The Exclusivity Agreement is personal to the parties and is non-assignable. There may be circumstances where the Buyer may wish to assign its interest in the agreement and this should be specifically raised with the Seller.

³ <http://www.ipf.org.uk/industry-involvement/publications/readiness-for-sale.html>

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6.2 While the Exclusivity Agreement is drafted to be governed by the law and courts of England, it is appreciated that the parties may choose to use a different jurisdiction depending on the location of the property. The Scottish version has been adapted to use Scottish law and jurisdiction.

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