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Background

The then Economic Planning Unit ("**EPU**") under the purview of the Prime Minister's Department[1] has updated and issued the Guideline on the Acquisition of Properties ("**EPU Guideline**") which eventually came into effect on 1 March 2014.

As provided in paragraph 2.1 of the EPU Guideline, the following acquisitions of property except for residential units require prior written approval of the EPU: –

(i) direct acquisition of property valued at RM20 million and above, resulting in the dilution in the ownership of property held by Bumiputera interest and/or government agency; and

(ii) indirect acquisition of property by other than Bumiputera interest through acquisition of shares, resulting in a change of control of the company owned by Bumiputera interest and/or government agency, having property more than 50 percent of its total assets, and the said property is valued more than RM20 million.

Equity Condition under the EPU Guideline

Notwithstanding the above, property acquisitions that are captured by paragraph 2.1 are also subject to the equity condition stated in paragraph 3.1, Part III of the EPU Guideline, which is reproduced as follows: –

Paragraph 3.1:
Companies to have at least 30% Bumiputera interest shareholding.

The compliance period is further provided in paragraph 5 and 6 of the EPU Guideline as follows:

Paragraph 5:
For direct acquisition of property, the equity and paid-up capital conditions imposed

<u>by the Economic Planning Unit, Prime Minister's Department must be complied with before the transfer of the property's ownership."</u>

Paragraph 6:
<u>For indirect acquisition of property, the equity and paid-up capital conditions imposed by the Economic Planning Unit, Prime Minister's Department must be complied with within one (1) year after the issuance of written approval.</u>

Nonetheless, in the event that an applicant is dissatisfied with the decision rendered by EPU, the applicant has the option, as stipulated under Part IX of the EPU Guideline, to submit an appeal to EPU, seeking waiver/exemption of the equity condition as outlined in paragraph 3.1. However, it is crucial to note that such appeals will be thoroughly evaluated on a case-by-case basis, with consideration given to the merit of each case.

<u>The Industry Practice</u>

In a typical outright land sale, most of the non-Bumiputera purchasers aspire to secure full exemption from EPU for the transfer of properties exceeding RM20 million or more and where there is a dilution of Bumiputera ownership post completion of the transfer.

Having said so, the following clause in relation to the approval of EPU is commonly found in the Sale and Purchase Agreement ("**SPA**"): -

*"the approval of the Economic Planning Unit ("**EPU Approval**") and **<u>with exemption or waiver of any equity condition imposed</u>** pursuant to the Guideline on the Acquisition of Properties (effective 1 March, 2014) ("**EPU Guideline**" which shall include such other guideline as may be issued from time to time in replacement, substitution or amendment of the same) issued by the Economic Planning Unit of the Prime Minister's Department of Malaysia or any relevant department as the case may be ("**EPU**")".*

It is the norm under the SPA where the contracting parties would include the approval from EPU as one of the conditions precedent to be fulfilled prior to the completion period of the sale. Usually, such approval will be applied and obtained by the purchaser at the purchaser's own costs and expenses which include the cost of the valuation report. The said valuation report is normally prepared and provided by the Valuation and Property Services Department which is also known as the Jabatan Penilaian dan Perkhidmatan Harta ("**JPPH**").

This entails that the purchaser shall be responsible for applying approval from EPU and, if necessary, lodging an appeal to request for an exemption of any equity conditions that may be imposed by EPU. In the event that such exemption is not granted by EPU, the purchaser may want the right to terminate the SPA with a full refund of all monies remitted to the vendor or the stakeholder named in the SPA.

This implies that the prospect of securing an equity waiver or unconditional EPU approval is somewhat uncertain and unclear, creating unfavourable risks that leans heavily towards the vendor as this situation could potentially become a deal breaker, leading the purchaser to opt for a full exit without any compensatory arrangements.

Probability of Success for Appeals on Equity Condition

Generally, obtaining approval for an exemption on equity condition has been very rare and uncommon since the EPU Guideline was made effective in 2014. Lately, there is information indicating that most appeals are being consistently rejected, even in cases where the applicants are significantly larger and well-established foreign investors.

In addition, EPU may be reluctant in granting a waiver for such equity condition, primarily due to the following factors: -

(i) Ownership of the Land
EPU may not be inclined to grant a waiver for such equity condition if the subject land is a freehold land.

(ii) Location
In the event that the subject land is situated within Kuala Lumpur's Golden Triangle, gazetted areas, areas that will be developed by the government in the future (for public purpose e.g., the construction of MRT, LRT, HSR and ECRL) or areas of similar significance, EPU tends to not grant waiver for such condition.

(iii) Identity of the Disposer
The likelihood of approval for waiving the equity condition is remote when the disposer is a government institution/agency, body corporate or public trustee. The reason behind this is that the government may take a conservative view that the vendor i.e. government institutions/agencies do not face a pressing need to dispose the property to a 100% foreign owned entity or to non-Bumiputera purchaser(s).

(iv) Tangible/Intangible Benefit
The appeal seeking exemption from the equity condition is prone to failure if it lacks any additional quantifiable tangible or intangible benefit that could justify the government's approval for granting such exemption.

(v) Track Record
The appeal for an exemption from the equity condition is likely to fail if there is no supporting track record to substantiate the appeal. In other words, the acquirer/purchaser has no prior experience or history of engaging with the EPU during previous property acquisitions in Malaysia.

Based on this analysis, it is reasonable to infer that the purchaser's appeal for exemption on equity condition is unlikely to succeed unless the proposed acquisition/development demonstrates substantial merit and aligns with the intention of contributing to the economic growth of the country, as evaluated by EPU.

Moreover, it is essential to recognise that a rejection by the EPU or an unsuccessful appeal will establish a significant precedent for any prospective land sale that necessitates approval from EPU. This means that not only does the unsuccessful appeal affect the immediate transaction at hand, but it can also set a precedent that may impact future land sales subject to approval from EPU.

Conclusion

Having that being said, if the purchaser's appeal for exemption on equity condition is rejected by EPU, the purchaser will have the right to exit i.e. to terminate/rescind the SPA and get a full refund whereas the vendor would have lost time and cost incurred, yet still unable to complete the SPA due to EPU's rejection of the equity condition waiver appeal.

Another potential risk in terms of financial implication that the vendor may face is that the purchaser may request the vendor to renew the existing tenancies or expired licences (if the property is tenanted), which might incur substantial cost and effort to the vendor. Moreover, should the appeal for waiver of equity condition faces rejection, the purchaser has immediate right to not proceed with the SPA, ultimately resulting the termination of the deal.

In closing, in all the diverse scenarios in which we have advised various clients in different sale structures, it all depends on leveraging and the respective parties' bargaining power in negotiating the deal until it is sealed. It is neither worthwhile nor prudent to enter into a SPA with a high likelihood of not being able to reach completion due to the inability to obtain exemption on equity condition. Instead, parties should strive for a mutually beneficial outcome and place particular importance on post-administration of the SPA. This includes active stakeholder engagement with EPU and all pertinent parties in order to ensure a seamless and successful completion of the sale.

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1. The roles and responsibilities of the Economic Planning Unit has been taken over by the Ministry of Economy following the change of government after Malaysia's 15th general election.

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