



Consultation on proposals to (i) introduce a statutory scheme of arrangement and compulsory acquisition mechanism for real estate investment trusts and (ii) enhance the SFO market conduct regime for listed collective investment schemes

The Law Society's Submissions

The Securities and Futures Commission issued the consultation paper on 28 March 2024 on proposals to (i) introduce a statutory scheme of arrangement and compulsory acquisition mechanism for real estate investment trusts and (ii) enhance the SFO market conduct regime for listed collective investment schemes (“Consultation Paper”).

In response, the Law Society provides the following submissions. Unless otherwise defined, the same abbreviations and definitions appearing in the Consultation Paper are used in this paper.

Consultation Questions

Question 1. *Do you agree with the proposal to introduce a statutory arrangement or compromise mechanism similar to that under the CO¹ with the proposed features and modifications for REITs²? Please explain your view.*

Law Society's response:

Yes, we agree with the proposal except that we have a few questions as set out below.

We agree with the proposal because it will provide a structured restructuring or exit mechanism for REITs (which is currently not available) and will therefore narrow the gap in this respect between HKEX-listed companies and REITs with safeguards to unitholders' interests similar to those available to shareholders of a company. This will also be consistent with the SFC's approach to the regulation of REITs with reference to the requirements applicable to HKEX-listed companies.

¹ Companies Ordinance (Cap. 622 of the Laws of Hong Kong)

² real estate investment trusts

We also consider the proposed modifications to be necessary to reflect the differences between a REIT and a company. It is probably worth ironing out some of the proposed modifications in the legislation itself. Examples of such proposed modifications are as follows:

- (i) Who will be liable for a contravention of the relevant requirements? S.671(5) of the CO sets out the persons who will be liable for committing an offence if the requisite explanatory statement is not duly provided. Such persons include **all of** the heads of (a), (b) and (c) below.
 - (a) ***“the company”***. The Consultation Paper (paragraph 36(b)) proposes that the obligations imposed on a REIT will be deemed to be imposed on *“the trustee or management company (as appropriate)”*. It is not clear whether the management company or the trustee (or both) will be liable in the same way as “the company” will be liable under ss.671(5) and (6) of the CO;
 - (b) ***“every responsible person³ of the company”***. The Consultation Paper (paragraph 36(f)) proposes that the concept of *“responsible person”* under the CO will be extended to cover ***“officers”*** of the management company of a REIT. We consider this to be a reasonable approach though will the definition of “officer” under Schedule 1 of the SFO⁴ or that under s.2 of the CO be adopted for such purpose? The definition under the SFO is potentially wider than the CO definition in that the SFO definition includes *“any other person involved in the management of”* the corporation; and
 - (c) ***“a trustee of a deed for securing the issue of the company’s debentures” (“Debenture Trustee”)***. The CO requires the Debenture Trustee to disclose its material interests (where applicable) and the Debenture Trustee *“who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention”* commits an offence (along with the other persons listed thereunder) under s.671(5) of the CO. The Consultation Paper (paragraph 28(b)) proposes that **both** the trustee of REIT and the directors of the trustee will be required to disclose their material interests in the explanatory statement. We query if the position under the CO should instead be followed such that the directors of the trustee are not required to declare their interests in the explanatory statement. Presumably, a defence equivalent to that available to a Debenture Trustee under the CO should be available to the trustee of a REIT under the new provisions of the SFO.

³ Under s.3 of the CO, a ***“responsible person”*** includes a person who is an ***officer*** or shadow director of the company and authorizes or permits, or participates in, the contravention or failure. An ***“officer”*** is defined under s.2 of the CO to include a director, manager or company secretary of a body corporate.

⁴ Under Schedule 1 of the SFO, an ***“officer”*** includes, in relation to a corporation, *“a director, manager or secretary of, or any other person involved in the management of, the corporation”*.

The same question also applies to the proposed offences equivalent to those under ss.673(8) and 677(2) of the CO, both of which hold “the company” and “every responsible person of the company” liable for the relevant offences.

- (ii) Whom should the directors of the manager and the trustee notify of their material interests? S.672 of the CO requires such notification of interests be given to “the company”. We suggest that such notification requirement under the new legislation be treated as having been complied with when the notice is sent to the board of directors of the management company of the REIT (on behalf of the REIT), which is equivalent to the board of directors of a listed company.
- (iii) What should be the role of the trustee of the REIT during the process? The proposal (paragraph 28(a)) suggests that the application to the court may be made by, among others, the management company or the trustee of the REIT. We assume that this means either the manager or the trustee may make such application for and on behalf of the REIT. In the light of Rule 4.1A of the REIT Code, pursuant to which the trustee has a fiduciary duty to oversee the activities of the management company for compliance with the regulatory requirements applicable to the REIT, it is reasonable to require the trustee to perform other compliance functions or duties for the purpose of safeguarding unitholders’ interests during the process of the scheme of arrangements for the REIT. This will, for example, cover the duties (a) to ensure that the explanatory statement complies with the requirements under the law; and (b) to ensure that the trust deed will be properly amended in accordance with any court order requiring the same in connection with the sanction of the scheme.

Question 2. *Do you agree with the proposal to introduce a statutory compulsory acquisition mechanism similar to that under the CO with the proposed features and modifications for REITs? Please explain your view.*

Law Society's response:

We agree with the proposal to introduce a statutory compulsory acquisition mechanism similar to that under the CO for the same reasons given in the response to Question 1 above.

We note that the proposal has largely followed the requirements, and offers the same protection to minority shareholders, under the CO and consider the modifications bespoke for a REIT to be reasonable. In the light of the requirement under the CO for any notice in this context be delivered, or sent by registered post, to a Hong Kong address, or as directed by the Registrar of Companies (upon application by the offeror or (as the case may be) the repurchasing company), the proposed power to be given to the SFC to give directions in the case of absence of a unitholder’s address in Hong

Kong (see paragraph 3 of the Appendix to the consultation) would be important if the REIT is dual-listed on another stock exchange with overseas unitholders on its overseas branch register without any Hong Kong addresses. Please also consider whether a default manner of notification to unitholders registered in the overseas branch register (if any) (e.g. by way of email to the registered email address of each such overseas unitholder) will be appropriate.

We note generally that the position of minority shareholders who remain following a privatisation should as far as possible be the same as those of any minority shareholders of a company who remain after a privatisation (e.g., to the extent the company remains a public company with Hong Kong shareholders, they would continue to have the protection of the Takeovers Code).

Question 3. *Do you have any comments on the proposed interpretations and definitions to be used in the new Part of the SFO which are modified from the CO to cater for the nature and features of a REIT?*

Law Society's response:

The definition of “*associate*” in the context of a REIT acting as the “repurchasing REIT” in a general offer will need to be considered in the light of the following:

- CO: The definition of “associate” for a “repurchasing company” under s.667(2) of the CO would not cover the management company (or its directors) or the trustee of the REIT.
- Consultation Paper: The Consultation Paper proposes to deem any voting rights of the trustee or the management company (and/or its directors) to be those of the REIT.
- Takeovers Code: An “associate” of an offeror⁵ under Schedule IX of the Takeovers Code will cover, among others, any REIT trustee of the offeror (including in the case of a repurchasing REIT in a unit buy-back), as well as any management company (together with persons controlling, controlled by or under the same control as the management company) of the offeror.

The definition of “associates” under the Takeovers Code is consistent with the principle stated in the Consultation Paper and appears to be suitable for the new legislation.

Question 4. *Do you have any comments on the proposed deeming provisions to be introduced in the new Part of the SFO having regard to the REIT structure?*

⁵ Under the Takeovers Code, in relation to share buy-backs, an “offeror” means a company engaged in, or considering engaging in, a share buy-back in respect of its own shares.

Law Society's response:

We do not have further comments apart from our response to Question 3 above.

Question 5. *Do you have any comments on the proposed amendments?*

Law Society's response:

No comment.

Question 6. *Do you have any comments on the proposed implementation timelines?*

Law Society's response:

No comment.

**The Law Society of Hong Kong
28 May 2024**