

# **Amendments to the Korean Commercial Code permit new M&A structures beginning February 2016**

## **1. Overview**

On November 12, 2015, the National Assembly of the Republic of Korea passed a bill to amend the Korean Commercial Code (the “KCC”), permitting certain M&A structures that were previously not allowed in Korea. The amendments to the KCC (the “Amendments”) will be promulgated within 15 days of the passing of the bill and will take effect 3 months after such promulgation. The 2012 amendments to the KCC made possible the use of the forward triangular merger structure. The Amendments will additionally permit (i) the use of the reverse triangular merger structure and (ii) the use of the triangular merger structure for the acquisition of a spun-off business, in each case using as consideration the shares of the ultimate acquiring company to purchase the shares or certain businesses of the target company. The Amendments also include other measures intended to facilitate corporate restructuring and investment activities.

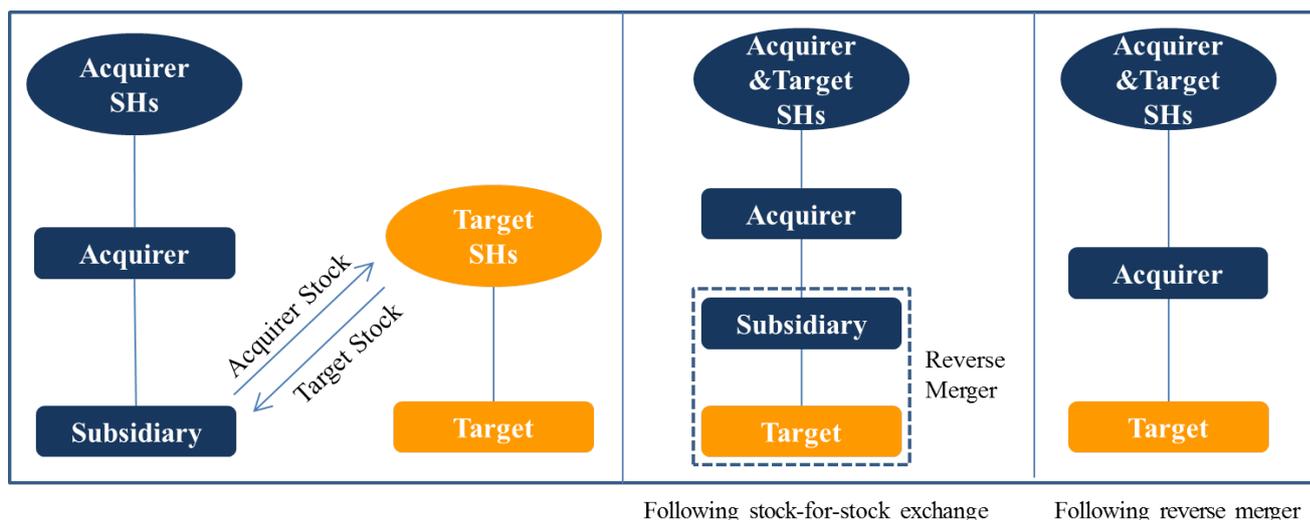
## **2. Description of the Amendments**

### **A. Use of the Reverse Triangular Merger Structure**

The Amendments permit a company acquiring a 100% ownership interest in another company to use forms of consideration other than its own shares (Articles 360-3(3) and (4) of the KCC), including any shares of the acquiring company’s parent company acquired for such purpose (Article 360-3(6) of the KCC). As a result, it is now legally permissible for a company to effectuate a reverse triangular merger by forming a subsidiary that then uses the shares of its parent company to acquire a 100% ownership interest in a target company. The use of the reverse triangular merger structure is expected to be particularly useful in cases where the target company has contracts or other assets that cannot be easily transferred or assigned.

#### **In this structure:**

- 1) The acquiring company creates a merger subsidiary to acquire the target company;
- 2) The target company’s shareholders exchange their target company shares with the merger subsidiary for the shares of the acquiring company;
- 3) The merger subsidiary merges into the target company;
- 4) The merger subsidiary ceases to exist as a separate entity; and
- 5) The target company survives the merger and becomes the acquiring company’s subsidiary.



## B. Use of the Triangular Merger Structure for Acquisition of Spun-off Businesses

The Amendments permit a company acquiring a spun-off business to use forms of consideration other than its own shares for full payment of consideration (Article 530-6(1)(iv) of the KCC), including any shares of the acquiring company’s parent company acquired for such purpose (Article 530-6(4) of the KCC). As a result, it is now legally permissible for a company to effectuate a triangular merger for the acquisition of a spun-off business. The use of the triangular merger structure for the acquisition of spun-off businesses is expected to be particularly useful in cases where a desired business unit co-exists with less desired business units within the same company.

### In this structure:

- 1) The acquiring company creates a merger subsidiary to acquire any business division of a target company;
- 2) The target company spins off the business division and such business division merges into the merger subsidiary;
- 3) The merger subsidiary provides the acquiring company’s shares to the target company’s shareholders in consideration for such business division merging into the merger subsidiary; and
- 4) The merger subsidiary continues to be the acquiring company’s subsidiary after the merger.

## C. Amendments to Other M&A Provisions

- Expansion of the “small-scale stock swap” exception: Previously, if the total number of new shares issued by a company for a stock swap did not exceed 5% of its total issued shares and the total amount of consideration to be paid to shareholders of a target company, which is to become a wholly owned subsidiary through such stock swap, did not exceed 2% of the issuing company’s net assets, the stock swap was allowed to proceed based on a resolution by the issuing company’s board of directors instead of the normally-required special resolution by its general meeting of shareholders. The current Amendments increase these thresholds to 10% of the total issued shares and 10% of the net assets, which are in line with the small-scale merger thresholds adopted in 2012 (Article 360-10(1) of the KCC). Such increase of thresholds is expected to stimulate the use of the small-scale stock swap system

On the other hand, in determining whether the shares paid as consideration for a merger or stock swap exceed the requisite thresholds in a small-scale merger or small-scale stock swap, the previous system counted only the newly issued shares and not any treasury shares paid as consideration (Supreme Court Decision rendered on Dec. 9, 2004, Case No. 2003Da69355), but the Amendments explicitly provide that treasury shares are to be counted, which results in a de facto tightening of the thresholds. Previously, companies sometimes utilized the small-scale merger system by paying the consideration with their treasury shares, but this will no longer be allowed due to the Amendments.

- Introduction of “simplified business transfer” system: The Amendments introduce the “simplified business transfer” system, which allows a transferring company to proceed with a business transfer based on a resolution of its board of directors instead of its general meeting of shareholders if all shareholders consent or 90% or more of the transferring company’s shares are owned by the acquiring company (Article 374-3 of the KCC). The “simplified business transfer” system will reduce the time and costs relating to a general meeting of shareholders in a business transfer, which is expected to provide substantial benefit especially for listed companies.
- Dissenting shareholders’ appraisal rights: The Amendments also improve the dissenting shareholders’ rights in M&A transactions by clarifying their rights exercisable against the company. Specifically, shareholders with non-voting shares are allowed to exercise their rights as dissenting shareholders (Article 360-5(1) of the KCC), which is expected to grant more stability and help protect dissenting shareholders in M&A transactions, and companies acquiring shares will be required to pay consideration within 2 months after the expiration of the dissenting shareholders’ appraisal rights period (Article 374-2(2) of the KCC), which would make the companies’ administration of payment procedures more convenient.
- Obligation to dispose the parent company’s shares: The Amendments adopt new provisions requiring any company that acquired shares in its parent company for a triangular merger or reverse triangular merger to dispose any remaining shares within 6 months after payment of consideration (Articles 360-3(7), 523-2(2), 530-5(5) of the KCC). Any violation of such requirement will entail a criminal penalty (fine of KRW 20 million or less).

### **3. Major Implications**

The new acquisition structures made possible by the Amendments will allow the use of new acquisition and restructuring strategies that were previously impossible or noncompliant in Korea. The other measures included in the Amendments to facilitate corporate restructuring and investment activities will likely have a stimulating effect on the Korean M&A market.

It must be noted, however, that the actual use of the newly permitted acquisition structures may need to wait until the tax code is amended to accord such structures suitable tax treatment. We will continue to monitor such further developments and provide you with follow-up news alerts.