



# MOJ's Announcement on Amendment of the Korean Commercial Code Including Introduction of Electronic General Meeting of Shareholders

## I. MOJ Announces an Amendment to the Korean Commercial Code

On January 26, 2023, the Ministry of Justice (“MOJ”) announced through its 2023 business report amendments to the Korean Commercial Code (“KCC”) as part of the key driving task of “Establishing Legal Infrastructure Leading to Future Prosperity.” As a measure to improve the corporate environment and enhance shareholder protection, the MOJ announced the following tasks: (i) introduction of an electronic general meeting of shareholders (“e-GMS”), (ii) strengthening of shareholder protection in corporate restructuring, (iii) relaxation of regulations on small companies to promote establishment of startups and facilitate their operation, and (iv) improvement of dividend

procedures and methods to promote in-kind and stock dividends. The amendment of the KCC is intended to bring about a significant change in corporate governance and shareholder-related affairs, and the MOJ is planning to amend the KCC by the end of 2023. Therefore, it is recommended to continue monitoring the proposed amendments to the KCC and the related legislative progress.

## II. Key Amendments to the KCC

### 1. Introduction of e-GMS

#### (1) Background

The KCC requires that fundamental matters

of a company be resolved by the general meeting of shareholders, such as matters that result in a fundamental change of the company (e.g. merger, split or transfer of material business), matters that directly affect the economic interests of shareholders (e.g. dividends), and matters concerning the company's organization (e.g. appointment and dismissal of directors or determination of remuneration).

However, despite the importance of the general meeting of shareholders as the highest body of a company, it is often difficult for most minority shareholders to attend the shareholders' meeting and exercise their shareholder rights due to time and space constraints. In this regard, it has been pointed out that, if minority shareholders do not actively participate in the shareholders' meeting, it becomes easier for the controlling shareholders to pursue their private interests against the interests of the company or ordinary shareholders, so it is necessary to promote shareholders' participation in the shareholders' meeting.

As part of the efforts to promote participation in the general meeting of shareholders, the KCC introduced the written voting system (Article 368-3) and the electronic voting system (Article 368-4). However, according to the press releases dated April 12, 2022 and April 13, 2021 from the Korea Securities Depository Corporation, the utilization of these systems has been low, with only 4.95% of shares being e-voted in 2020, 4.67% in 2021 and 9.75% in 2022.

Against this backdrop, if e-GMS is introduced, it is expected that virtual meetings will increase the attendance rate of shareholders, thereby facilitating general meeting of shareholders.

## (2) Introducing e-GMS

The MOJ described the introduction of e-GMS as “the overall digitalization of notices, voting and meetings” and announced that the e-GMS system would be implemented in the first half of 2023. Until now, there has been no clear legal basis for holding and operating e-GMS under the KCC, but the spread of COVID-19 has increased the need for legislation of e-GMS.

There are three ways of operating e-GMS: (i) “e-GMS-only” (only e-GMS is held without physical shareholders' meeting), (ii) “hybrid GMS with hybrid voting” (both physical and electronic shareholders' meetings are held and real-time exercise of electronic voting is allowed), and (iii) “hybrid GMS with physical voting” only (a physical shareholders' meeting is held with online real-time streaming, but e-voting is not allowed). Of these, “hybrid GMS with physical voting” has been interpreted as permissible under the current KCC, and accordingly some companies have held physical shareholders' meetings with online real-time streaming during COVID-19 pandemic. In the forthcoming legislative process, there may be discussions on whether to allow “e-GMS-only” or to allow “hybrid GMS with hybrid voting.” Regarding the said methods, there are opinions that “e-GMS-only” should be allowed in consideration of the operational costs of shareholders' meetings and the risk of invalidation of votes due to duplicate voting on one hand, and that “hybrid GMS with hybrid voting” is preferable in terms of protecting the rights and interests of shareholders who are not familiar with online environment, such as elderly shareholders, and ensuring overall shareholder communication on the other hand.

## 2. Strengthening of Shareholder Protection in Corporate Restructuring

### (1) Background

A spin-off creates a wholly-owned subsidiary of a company. As spin-off does not result in any change in the shareholder value, the current KCC does not give shareholders who object to a spin-off an appraisal right. However, some publicly-traded companies have spun off high-growth business units and taken them public, which has raised questions about the harm resulting therefrom to ordinary shareholders. Accordingly, on December 27, 2022, the Enforcement Decree of the Financial Investment Services and Capital Markets Act (“FSCMA”) was amended to grant an appraisal right to the shareholders who

object to a spin-off in the case of listed companies (Article 165-5 of the FSCMA and Article 176-7 of the Enforcement Decree thereunder), and there has been a strong argument for applying this to unlisted companies as well.

## (2) Key Features of Strengthening Shareholder Protection in Corporate Restructuring

The MOJ states in its business report that strengthening shareholder protection in corporate restructuring (recognition of appraisal rights, etc.) is one of its main areas of focus. Further, on December 5, 2022, at the appointment ceremony of the KCC Special Committee, which is an advisory body for the amendment of the KCC, a measure to recognize appraisal rights was mentioned as a means to protect shareholders in the event of a spin-off. As such, it is expected that the main focus of the proposed amendment to the KCC will be to recognize appraisal rights of shareholders in the event of a spin-off of unlisted companies.

The MOJ will promote measures to strengthen shareholder protection in the event of corporate restructuring in the first half of 2023. If passed, the amendment would provide protection for minority shareholders by ensuring that they have a chance to recoup their investment, but it may also increase the cost of corporate reorganizations for companies. In addition, it is possible that appraisal rights are granted to shareholders in cases where a subsidiary is established in a similar manner, such as through an in-kind contribution. Therefore, it is advisable to closely monitor the details and relevant developments of the proposed amendment to the KCC and review the likely impact of such amendment.

## 3. Relaxation of Regulations on Small Companies for Promoting Startup Creation and Operation

### (1) Regulation of Small Companies under the KCC

The current KCC provides for a number of special

exceptions for companies with capital of less than KRW 1 billion. They include: (i) exceptions in incorporation (e.g., exemption from notarization of the articles of incorporation at the time of incorporation (Article 292) and acceptance of a certificate of balance in lieu of a certificate of receipt of share subscription price (Article 318(3)), (ii) exceptions in appointment of officers (e.g., a fewer number of directors required (Article 383(1) and exemption from the duty to appoint a statutory auditor (Article 409(4)), (iii) exceptions in convocation procedures of general meetings of shareholders and meetings of bondholders (Articles 363(3) and (4) and Article 491-2, respectively) and (iv) exception in decision-making bodies (Article 383(6)).

### (2) Relaxation of Regulations on Small Companies

In its business report, the MOJ states that it will further ease regulations on small companies to help them start, operate, and succeed in their businesses. Specifically, the MOJ has announced that it will stipulate a longer term of office for directors than 3 years, which is the maximum period under the current KCC (Article 383(2)), and will also overhaul the provisions on administrative fines for minor violations of the registration rules, such as an incorrect address of the representative director in registration (Articles 635(1)1, 317(2)8, 317(4), and 183). These are expected to be implemented in the second half of 2023.

## 4. Improvement of Dividend Procedures and Methods to Promote In-kind and Stock Dividends

### (1) Background of the Reorganization of Dividend Procedures

Currently, most companies pay dividends by setting the year-end (i.e., the end of the fiscal year) as the dividend record date and determining the shareholders entitled to receive the dividends first, and then determining the amount of dividends at the general meeting of shareholders held in the spring of the following year (that is, “the record

date first, followed by amount determination”). It has been pointed out that, under the current system, investors are discouraged from investing in high dividend stocks because they have to invest in advance without knowing the dividend amount and accept the dividend amount as decided months later.

## (2) Promoting Dividend Payouts

In its business report, the MOJ states that it will revise the dividend procedures and methods to promote in-kind and stock dividends in the second half of 2023. Before announcing the business report, on January 31, 2023, the MOJ, jointly with the Financial Services Commission (“FSC”), issued a press release titled “Plans to Improve Dividend Procedures in Conformity with the Global Standard,” in which the MOJ rendered a new authoritative ruling. The ruling provides that the current KCC is interpreted to permit separating the record date to determine who are the shareholders eligible to vote at the general meeting of shareholders and the record date to determine who are the shareholders entitled to receive dividends resolved upon at that meeting and setting the dividend record date to be after the meeting date (MOJ’s authoritative ruling on Article 354). As a result, “amount determination first, followed by the record date” is now possible for annual dividends.

In February 2023, the Korea Listed Companies’ Council and the KOSDAQ Council amended and announced the standard articles of incorporation to improve the dividend payout process. As a result, some companies made amendments to their articles of incorporation to adopt the method of “amount determination first, followed by the record date” at their 2023 general shareholders’ meetings.

Further, the FSC is expected to amend the FSCMA in the first half of 2023 to stipulate that, even in the case of quarterly dividends, the dividend amount can be determined first and then the record date is set afterwards. In other words, Article 165-12 of the FSCMA, which prescribes that the shareholders as of the last day of March, June and

September are entitled to receive quarterly dividends, may be amended to permit for the quarterly dividend record date to be after the date the board of directors resolves on the quarterly dividends. In such event, as the company may not have a sufficient preparation time for dividend payouts, the payment period may be extended from 20 days to 30 days.

If the regulations on dividend procedures are amended as above, it is expected that there will be a significant change in the operation of the general meeting of shareholders and the practice of dividend payouts of listed companies. In particular, it will be recommended to take such changes into account in preparing an agenda for the ordinary general meeting of shareholders regarding dividends and amendments to the articles of incorporation (e.g., amendment of the dividend record date).

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*\* The opinions expressed in this article are the author’s own and do not reflect the views of KOTRA.*