Revision of the Korean Commercial Code concerning the Usurpation of Corporate Opportunity

Due to recent gift tax controversies on the business given exclusively to the conglomerates' subsidiaries, the prohibition of the misuse of the newly formed companies' business opportunities pursuant to the Revised Korean Commercial Code ("Revised KCC") is once again gaining public attention. Article 397-2-1 of the Revised KCC prescribes that "a director shall not use a business opportunity that may benefit the company now or in the future for his personal gain or to benefit a third party without the approval of the Board of Directors."

The prohibition of the usurpation of corporate opportunity (the "Prohibition") has been introduced for the purpose of enhancing corporate management transparency (i) by preventing the damage that is likely to occur in case a director uses a company's information or the corporate opportunities related to business operations to promote his personal gain or a third party's interests, which would lead to the usurpation of the profit that the company may obtain in the future, and (ii) by regulating the conflicts of interests between directors and the company through the board's approval.

However, the implementation of the Prohibition is likely to result in controversies and questions are likely to arise concerning the scope of the Prohibition.

Among other things, it is difficult to determine which cases specifically correspond to corporate opportunities because the Revised KCC uses vague concepts such as "learned in the course of performing his duties or corporate opportunities obtained with the company's information" and "a corporate opportunity that the company is currently exploiting or an opportunity that the company will be exploiting with an affiliated company."

For example, it is generally assumed that it is preferable for a company to consign to a third party the logistics of the products that the company manufactures rather than operate a logistics business itself. Under these assumptions, whether giving work (e.g., logistics) exclusively to the company's subsidiaries under the same conditions as the market conditions should be considered as an usurpation of a corporate opportunity may become an issue. This is because the logistics business may not be viewed as a corporate business if the company's choice to consign the logistics to a third party is deemed as a reasonable management judgment. Moreover, pursuant to the prohibition of usurpation of corporate opportunity under the Delaware General Corporation Law, which inspired the Revised KCC, the scope of the usurpation of corporate opportunities is being interpreted more broadly, which will leave room for debate in the future on what constitutes a corporate opportunity.

In addition, it appears that various interpretations are likely to arise in determining whether a director used a company's corporate opportunity "for his personal gain or for a third party's benefit."

However, even if a specific corporate opportunity is prima facie subject to Article 372-2-1 of the Revised KCC, a director may use such business opportunity for himself or for a third party in cases where (i) the board of directors approves by a two-thirds majority the use by a director of the business opportunity or (ii) the company waives a business opportunity because it cannot financially afford to undertake it. Nonetheless, because the meaning of the term ("company's business opportunity") itself is ambiguous, controversies are likely to arise in determining whether a prior board approval is required after having presented the relevant business opportunity to the company.

To prepare for any legal issues that may arise regarding this Prohibition, the company must perform a full review to determine whether the business opportunity will be exploited internally, or the company will authorize a company's subsidiary or affiliate to exploit the opportunity, or the company will lead a third party to exploit the opportunity.

Finally, Article 392-2 paragraph 2 provides that "in violation of paragraph 1, the director and the director who gave his consent and who caused a damage to the company shall be responsible to compensate for the damage, and the profits earned by the director or a third party shall be calculated as damages." In this regard, since litigation concerning the liability of directors is likely to arise, before the scope of the application of the Prohibition is definitely established, the aforementioned cases must be taken into consideration. In such cases, the company should seek proper legal advice.

If there is any question regarding the above, please contact us as set out below.

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