

Setting up a company in Turkey

In accordance with the principle of *equal treatment* specified in the Foreign Direct Investment Law No. 4875 of 2003, foreign investors may freely set up companies in Turkey¹. Apart from ordinary incorporation documents (e.g. Articles of Association, signature declarations) which are also requested from Turkish persons/entities, there is no additional approval, licensing or permission requirement for foreign investors while establishing a company in Turkey, except for the mere notification obligation to the Foreign Direct Investment Department of the Undersecretariat of Treasury for statistical purposes.

Under Turkish corporate practice, joint stock corporations² (**JSC**) (*anonim sirket*) and limited liability partnerships (**LLP**) (*limited sirket*) are the most common types of capital companies foreign investors choose to establish in Turkey. Due to the hybrid characteristic of LLPs³, JSCs are more flexible and easy to administer and thus, more suitable for large scale transactions⁴. Below you may find a brief description of both company types.

I. Main Characteristics

1.1 Corporate Governance

(i) Articles of Association

The Articles of Association (the **Articles**) (*ana sozlesme* or *esas sozlesme*) of a JSC and/or an LLP is the main document governing the relationship between the shareholders/partners of such legal entity, its scope of activity and relevant corporate matters. The Articles of a company must include, among others, names and addresses of the incorporators; and the trade name, headquarter address, scope and objective, and the share capital of the company.

Turkish law is not explicit on shareholders' agreements, which have not yet been tested before Turkish courts. It is a possibility for the shareholders of a JSC or the partners of an LLP to execute a shareholders' agreement whose provisions cannot override those of the Articles of a JSC or an LLP. In other words, in the event of an eventual conflict between the Articles and the shareholders' agreement, the former would prevail.

(ii) Corporate Bodies

- Day-to-day management

In JSCs, the Board of Directors (the **Board**) (*yonetim kurulu*), composed of at least three (3) natural persons elected and appointed by the General Assembly (*genel kurul*), has the power to conduct the business of and represent the JSC. In order to be a Board member, one must be a shareholder of the company irrespective of the number of shares he/she holds. Representation of Board members *via* proxy in Board meetings is prohibited.

LLPs do not have a Board similar to that of JSCs but managers (*mudur*) with the right to manage, represent and bind the company before third parties. Unless otherwise stipulated under the Articles, the partners of an LLP are automatically considered as managers.

¹ There may be sector-specific cases and legislation where foreign persons/entities are not equally treated with their Turkish counterparts. For instance, a non-Turkish person/entity is legally banned from holding more than 25% of the share capital of a radio/television company in Turkey.

² In Denmark *aktiselskabet*; in France and in Luxembourg *la société anonyme*; in Germany *die Aktiengesellschaft*; in Ireland *the public company limited by shares*; in Italy *la società per azioni*; in the Netherlands *de naamloze vennootschap (N.V.)*; and in the United Kingdom *the public company limited by shares*.

³ In LLPs, a number of resolutions can only be made by an overwhelming majority or unanimity of the partners. Therefore, although LLPs are called capital companies, personal relationships of their partners are also key to their due management.

⁴ Certain businesses including but not limited to banking, insurance and asset management can only be conducted through JSCs.

- **Material Resolutions**

In a JSC, material resolutions, such as amendment of the Articles, Board member appointments and company dissolution, can only be made by the General Assembly, which may hold ordinary or extraordinary meetings where the attendance of a Ministry of Industry and Trade representative, *the commissar*, is mandatory. In an LLP, such powers are vested in the Board of Partners, and the attendance of a commissar is not required.

The resolutions of General Assembly/Board of Partners meetings are binding upon all shareholders/partners. Unless otherwise provided under the Articles, applicable meeting and decision quorums are the ones set forth under the Turkish Commercial Code No. 6762 (the **TCC**).

- **Internal Audit**

Under Turkish law, “statutory auditor” (*murakip* or *denetçi*) is referred to as one of the mandatory bodies of all JSCs and LLPs having twenty (20) or more partners. Statutory auditors should be natural persons and thus legal entities cannot assume such role.

The General Assembly/Board of Partners appoint statutory auditors. In JSCs, a minimum of one (1) and a maximum of five (5) statutory auditors may be appointed. In case of the former, the auditor must be a Turkish citizen. If there are more than one (1) statutory auditor, half plus one of them must have Turkish nationality.

1.2 Shareholding and Share Capital

Number of shareholders/partners. A JSC can be established by a minimum of five (5) shareholders, whereas at least two (2) partners are required to incorporate an LLP. The shareholders or partners may either be natural person(s) or legal entity(ies). Nevertheless, an LLP cannot have more than fifty (50) partners.

Duration. A JSC may be established for an indefinite period of time, yet the term of an LLP is limited to a maximum of 99 years.

Share capital. The minimum share capital of a JSC is TL 50,000 (approximately EUR 25,000) and that of an LLP is TL 5,000 (approximately EUR 2,500). Issuing privileged shares granting additional rights to their owners, such as distribution of dividends or nomination of a Board member or statutory auditor, is allowed in JSCs provided that the Articles includes such privileges. Since an LLP is not entitled to issue share certificates (representing its share capital), privileged shares are not feasible in an LLP.

Minority shareholders. Shareholder(s) of a JSC holding shares representing 10% or more of the share capital (5% for publicly owned JSCs) enjoy minority shareholders’ rights granted under the TCC. Some of these rights are as follows: (i) request for appointment by the General Assembly of a special auditor (*ozel denetçi*) with regard to specific corporate matters; (ii) filing lawsuits against directors and/or statutory auditors for their misconduct; (iii) calling for extraordinary General Assembly meeting; etc.

Share certificates. All JSCs have shares (*hisse* or *pay*), but only a portion of them have share certificates (*hisse senedi*). Share certificates are particularly issued when a share transfer is contemplated because they provide a significant tax (*i.e.* VAT) advantage⁵. In JSCs with issued share certificates, the said certificates (*i.e.* the shares that they represent) can be transferred through endorsement and/or delivery, depending on the certificate type (*i.e.*, bearer share certificates or registered share certificates). However, in an LLP, shares may only be transferred by a written agreement executed before a notary public.

Going public. Finally, pursuant to the Turkish capital markets legislation, only JSCs can go public.

⁵ A more resorted option is issuing temporary share certificates (*gecici ilmuhaber*), which provide for the same function and tax advantage in share transfers.

II. Liability of shareholder(s)/partner(s)

JSCs and LLPs are capital companies leading to the liability of their shareholders/partners to be limited to their shareholding/partnership stake.

In both JSCs and LLPs, each shareholder/partner is liable towards such JSC/LLP for the capital contribution that he/she promised to make when incorporating the company. Default in such payment may lead to the dismissal of the relevant shareholder/partner from the company.

In a JSC, shareholders cannot be held personally liable for JSC's public debts. However, in an LLP, a partner is liable up to the percentage of his/her partnership ratio in the total capital of such LLP for public debts including but not limited to corporate tax, social security premiums, etc.

III. Registration of companies with the Trade Registry and the Tax Authority

Once the necessary documents are duly submitted to the Trade Registry, the registration process will take approximately one (1) week, the delivery of the required documents to the relevant trade registry being the first day. The documents prepared (and signed if necessary) abroad, before being sent to Turkey, must be notarized and apostilled in accordance with the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (*Hague Apostille Convention*) or, alternatively, certified by a Turkish Consulate in the country of origin. These formalities may prolong the process.

The incorporation of JSCs and LLPs are completed upon registry with the respective trade registries. Although such registration is proof for the valid existence of a corporation, in order to engage in tax generating transactions (e.g. opening of bank accounts), such corporation must obtain a tax registration number before the relevant tax authority. The company may be fined in case of failure to obtain a tax registration number within a month from incorporation. The whole incorporation process may be followed through a power of attorney issued by each of the incorporators.

IV. The Draft Turkish Commercial Code

The Draft Turkish Commercial Code (the **Draft Code**), which has been under discussion in the Turkish Parliament for four years, introduces significant changes in corporate structures of JSCs and LLPs. The Draft Code specifies new rules for both JSCs and LLPs in line with corporate governance principles. Below are some of the important provisions that will be applicable once the Draft Turkish Commercial Code is enacted:

- JSCs and LLPs may be incorporated by one shareholder/partner.
- The minimum capital requirement for LLPs is increased to TL 25,000 (approximately EUR 12,500).
- The Articles of the JSCs and LLPs will be standardized for all companies and the shareholders' agreement will become the main document governing the relationship among shareholders and partners.
- JSCs will be obliged to have a web site whose mandatory content is set under the Draft Code.
- The Board of JSCs may be composed of one (1) director that is not required to be a shareholder. Thus, legal entity shareholders may straight away be a director, as opposed to the current representation *via* a natural person. At least one (1) of the directors with representation authority should be a Turkish citizen domiciled in Turkey.
- The concept of a "stakeholder" is introduced.
- Mergers and spin-offs are re-defined and the relationship among group companies is thoroughly regulated.

- General Assembly meeting quorums for both JSCs and LLPs are revised. Online General Assembly meetings are made possible provided that appropriate information technology systems are put in place by the relevant JSCs.