



Issues Relating To Organizational Forms And Taxation

TURKEY Pekin&Pekin

CONTACT INFORMATION

Okan Or, Duygu Oner

Pekin&Pekin

Lamartine Caddesi No.10 Taksim, Istanbul

0090 212 313 3500

okano@pekin-pekin.com; charlotte@pekin-pekin.com

www.pekin-pekin.com

1. Identify the forms of organization available in your jurisdiction and discuss the advantages and disadvantages of each (eg., corporation, limited liability company, partnership, limited partnership, co-operative, etc.), describing which type of legal entity is mostly used or is of special interest, namely by foreign investors.

The most common forms of organization in Turkey are Limited (Liability) Company (the "LLC") and Joint Stock Company (the "JSC"). The other two forms of organization are Commandite and Collective Companies both of which are rarely incorporated in practice, especially by foreign investors.

Below is a comparison between a JSC and a LLC;

- a) The minimum number of shareholders required for a JSC is five and two for a LLC. A LLC may not have more than fifty shareholders; however there is no maximum shareholder number applicable to a JSC. Neither a JSC nor a LLC require any Turkish shareholders (i.e., they may be 100% foreign owned);
- b) The minimum capital required for a LLC is TL 5,000 and TL 50,000 for a JSC;
- c) A JSC is managed by its Board of Directors and a LLC does not have a Board of Directors but is managed by its General Manager(s) and its shareholders. All authorities of the shareholders relating to the management of a LLC may be granted to a Director(s) or one of the existing shareholders;

- d) In some cases, such as amendment of the Articles of Association, the Turkish Commercial Code provides LLC minority shareholders more protection than JSC minority shareholders. However, similar protection may also be provided for in the Articles of Association of a JSC;
- e) A LLC with less than twenty shareholders does not need to comply with various procedural requirements applicable to a JSC for meetings of its shareholders;
- f) A LLC with less than twenty shareholders does not need to have statutory, i.e. internal, auditors, unlike a JSC. Instead the shareholders are empowered to review and approve the accounts of the company;
- g) LLC shareholders, unlike JSC shareholders, may be liable for amounts owed by the LLC to government authorities for taxes, duties, levies and charges without any limitation in proportion to their capital contribution if the company is unable to make the required payments. In other words, their liability is not limited to their own capital contribution;

Consequently, the JSC is specifically preferred where shareholders with potentially conflicting interests come together, such as in a joint venture. In addition, a JSC is the only possible option where a public offering of securities is anticipated. Furthermore, there are number of public procurement/concession tender specifications whereby the bidders are requested to be in the legal form of JSCs. Moreover, JSC offers far better protection in relation to tax and similar fiscal liabilities in which JSC shareholders enjoy limited liability for tax obligations. The LLC is a rather simpler structure and may in the long run be easier to administer. While the JSC is by far the more common choice the LLC may be preferable when the primary objective is to establish a fully-owned subsidiary with minimum capital and administrative requirements.

2. Are there attributes of the form that you consider unique to your jurisdiction?

Incorporation of business entities in some specific sectors is subject to additional approvals by supervisory authorities such as the Banking Regulatory Supervisory Authority. Main regulated sectors are: Banking, Private Finance Institutions, Insurance, Financial Leasing, Factoring, Holdings, Foreign Currency Exchange Offices, Public Warehousing, founders and operators of Free Trade Zones and companies subject to the Capital Markets Law.

3. Describe the management and governance structure for each organizational form.

A joint stock company is composed of three statutory organs:

- a) General Assembly

The General Assembly, is authorized and empowered to pass certain material decisions related to the company its meetings.

The authorizations and duties of the General Assembly with respect to, among others, amending the articles of association, appointment and release of members of the Board of Directors and Statutory Auditors, distribution of profit, ratification of the balance sheet and



profit and loss account, liquidation, issue of securities, public offerings cannot be assigned to another organ or individual.

General Assembly meetings shall convene by the invitation of the Board of Directors or in case of mandatory and pressing grounds by the invitation of the auditors.

b) Board of Directors

The Board of Directors consists of at least three members elected by the General Assembly for a period of minimum one and maximum three years. All such members can be foreign nationals.

The Board of Directors is authorized and empowered to manage and represent the company. By virtue of Article 323 of the Turkish Commercial Code, the Board of Directors may assign its duties and authorization to one or several directors, managers and/or officers of the company and authorize them to represent and sign on behalf of the company.

c) Statutory Auditor(s)

A minimum of one Statutory (internal) Auditor is required to be elected by the General Assembly to serve for a period of one to two years. Please be informed that the Statutory Auditor is authorized and empowered to audit the books and accounts of the company. Additionally, the majority of the Statutory Auditors are required to be Turkish nationals.

Limited Liability Companies, on the other hand, do not have a board of directors; instead they are managed by their director(s). Principally, all shareholders of a LLC are also its directors and they are collectively entitled and obligated to manage company affairs and the company. However, the management and representation of the company can be assigned to one or more of the shareholders through articles of association or a resolution of the Shareholders Committee.

Shareholders Committee of a LLC, similar to the General Assembly of a JSC, is authorized and empowered to pass decisions on material issues such as amending the Articles of Association, appoint, dismiss and discharge the Directors and the Statutory Auditors (if any), approve the balance sheet and the loss and profit account and determine the allocation of the profits and increase the share capital.

Shareholders Committee shall convene ordinarily once a year and extra ordinarily when deemed necessary by the Director(s). Shareholder(s) holding 10% or more of the capital may request from the Director(s) to convene the Shareholders Committee.

LLCs with more than twenty shareholders should also appoint at least one Statutory Auditor.

4. Is there a residency requirement for management or owners? In particular, are there restrictions or prohibitions on foreign investors to perform, or have interests in, specific activities?

Neither managers nor shareholders of a Turkish joint stock (or limited liability) company are required to be Turkish citizens or residents of Türkiye. In general, foreign investors are free

to perform or have interests in business activities. However, in certain sectors the regulations limit the maximum foreign shareholding; such as broadcasting companies (up to 25% foreign participation is permitted) and maritime companies (up to 49% foreign participation is permitted).

In addition, according to Title Deed Law, Companies incorporated in Turkey by foreign investors (or companies with foreign shareholders) can only acquire and use real properties in order to conduct the activities stated in their articles of association. These real properties cannot be in military or private security zones. Moreover, foreign companies can only acquire real property in limited circumstances, under certain laws such as the Petroleum Law, Encouragement of Tourism Law, Banking Law and the Industrial Zones Law.

5. Describe the extent to which management and owners are exposed to liability.

Liability of a JSC's shareholder is only against the company and limited with his/its capital contribution. However, LLC shareholders, unlike JSC shareholders, may be liable for amounts owed by the LLC to government authorities for taxes, duties, levies and charges without any limitation in proportion to their capital contribution if the company is unable to make the required payments.

However, "legal representatives" (please see our explanation under question 3 regarding the representation of JSCs and LLCs) of legal entities are personally liable for any unpaid tax and other fiscal liability that cannot be collected from the entity. In fact, following a recent change of Law on Collection Procedure of Public Assets not only the legal representatives who are in office at the time a public receivable is due but also those who were in the office at the time of the occurrence of the fiscal obligation (e.g. underlying taxable event) would be jointly and severally liable.

6. Ownership interest: (i) how is it represented? (ii) is it transferable?; and (iii) is there a minimum number of owners?

The capital of a JSC is divided into shares of equal value which are treated as a negotiable instrument. The shares could be represented via share certificates or temporary share certificates; which could either be in the form of bearer share certificate or registered share certificate. In any case, the shares of a JSC are transferable unless otherwise is explicitly provided in the articles of association.

On the other hand, shares of a LLC, unlike those of a JSC, cannot be represented by negotiable share certificates and any transfer of shares in a LLC must be approved by $\frac{3}{4}$ of the shareholders and those shareholders representing at least $\frac{3}{4}$ of the capital of the company.

The minimum number of shareholders for a LLC is 2 and 5 for a JSC. Also a LLC cannot have more than 50 shareholders whereas there is no limit to the number of a JSC's shareholders.

7. Is there a minimum capitalization?

The minimum capital required for a LLC is TL 5,000 and TL 50,000 for a JSC.

8. Is there a security that can be issued to the public?



In compliance with the requirements of Turkish Capital Market Law and respective legislation, JSCs may issue various types of securities (equity or debts).

LLCs may not issue securities to the public, therefore LLC shareholders have to convert their entity to a JSC in order to issue securities.

9. Can the form incur debt, or grant security for debt?

Both JSCs and LLCs can incur debt. In Turkey, security mechanisms which are commonly used by entities are;

- a) Mortgage on Real Property;
- b) Commercial Enterprise Pledge;
- c) Pledge on Movables;
- d) Share Pledge;
- e) Pledge on Receivables;
- f) Bank Account Pledge;
- g) Assignment of Receivables;
- h) Guarantee Agreement;
- i) Suretyship.

10. What is the duration of the form? Can it be renewed?

A JSC may be established for an indefinite period of time, yet the term of an LLC is required to be defined in its Articles of Association. Shareholders of a LLC could always extend the duration of the form by amending its Articles of Association accordingly.

11. Describe the process, customary time period and approximate cost of establishing the form.

Registration and establishment of a company in Türkiye can be completed in a few days time after the required documentation is duly prepared. Investors who envisage to incorporate a JSC (or LLC) shall submit 3 copies of signed and notarized Articles of Association together with the below listed documents to the Trade Registry located at the province where the entity will be established.

The company can start to operate its business activity after the approval and registration of Trade Registry by receiving registration number which is unique for every established company. Company registrations and participations are announced to the third person or related parties by the publication of Turkish Trade Registry Gazette.

Documents for the Company Establishment

1. Company Establishment Petition and Notification Form, duly filled in and signed by persons authorized to represent the company;
2. Notarized signatures of persons authorized to represent the company together with the company trade name;

3. Bank receipt of the deposit to Turkish Competition Authority's account, amounting to 0.04% of the registered capital;

4.1 Certified copies of the ID certificates of the real person founders and their residence certificates (if they have Turkish citizenship);

4.2 In case there are any real persons of foreign citizenship among the founders of the company, the copy of his/her passport to be presented together with the passport itself or its notarized copy;

4.3 In case the foreign shareholder(s) is a legal entity; the original copy of the Certificate of Activity issued by the competent authorities and approved by the relevant Turkish Consulate or apostilled and its notarized translation;

7. In case there are any rights and movable and immovable assets to be put in as capital for a company to be established; expert report of the assessment made to ascertain the value of these and the related court decision for the expert assignment.

In addition to the above described procedure, Joint Stock Companies of which the Foundation and Amendments to the Articles of Association are Subject to the Prior Permit of the Ministry of Industry and Commerce. According to Article 273 of the TCC, the foundation and amendments to the Articles of Association of banks, special financial institutions, insurance companies, financial leasing companies, factoring companies, holding companies, foreign exchange dealers, public bonded warehouse operators, public companies subject to the Capital Market Law and free trade zone founders and operators are subject to the prior permission of the Ministry of Industry and Commerce.

12. Are there requirements for the government (central or local) to be part of a project or investment vehicle or receive part of the profits arising therefrom (apart from taxes)?

In general there are no requirements for the government to participate in investment vehicles or receive part of the profits arising there from. However, although very limited, there are exceptions to the above principle. Namely, in few special sectors such as mining and energy, specific laws and regulations require that entities active in such business to pay a portion of their profits to the government as "State's Right".

13. For what taxes is the form liable?

The Turkish tax system comprises direct and indirect taxes. Direct taxes include individual income tax and corporate income tax. Indirect taxes include value added tax (VAT), excise taxes which are charged on the sale and importation of certain goods, raw materials, energy, natural gas, oil, etc. and transaction taxes, such as stamp tax, banking and insurance transaction tax, real estate sale and purchase tax, etc.

As corporate entities, the net incomes of JSCs and LLCs are subject to corporation tax. Besides they can be subject to value added tax, excise and transaction taxes, depending on the scope of the company.

Corporate Income Tax:

Pursuant to Article 1 of the Corporation Tax Law, the net income of corporations generated from their commercial and agricultural activities in Turkey is subject to corporate income tax at a rate of 20%.

Value Added Tax:

The transfer of all goods and the rendering of all services including importation the same into Turkey are, in general, subject to VAT at a rate of 18%. There are, however, reduced or increased rates depending on the subject matter of taxation. For instance, the rate of VAT on lease payments of financial lease arrangements in relation to investment (non-consumer) goods (including those provided by non-resident financial lessors via cross-border financial leasing) is 1% whereas increased rates of VAT are charged on the sale of some luxury goods and cars.

Excise Tax:

The sale of certain goods such as cars, cigarettes, oil, energy and natural gas is also subject to additional excise and special consumption taxes that could be as high as 50+% for certain cars for example.

Banking and Insurance Transaction Tax:

All revenues of resident banks, finance and insurance companies, such as interest, commission, premiums and other fees and charges, are subject to banking and insurance transaction tax ("BITT") at a general rate of 5%.

Real Estate Sale and Purchase Tax:

The sale and purchase of real estate is levied at a rate of 3.3% over the sale and purchase price, half of which is payable by the seller and the other half by the purchaser. It is possible, however, to cap the sale and purchase price at the amount of minimum real estate values declared periodically by the municipalities.

Stamp Tax:

All documents that contain a monetary amount of undertaking are subject to stamp tax at a general rate of 0.825% over the amount of monetary undertaking. However, exemptions are available in relation to certain transactions, such as cross border financing, issuance and transfer of securities, exportation, etc., provided that such exemptions are explicitly granted by law.

14. What is the tax treatment of payments to foreign owners?

Any distribution of dividend would be subject, in addition to the 20% corporate income tax, to a 15% withholding tax according to Turkish (domestic) tax law. Tax treaties often provide discounted rates of withholding for shareholders who are residents of treaty countries.

15. Is there a tax treatment which would impact foreign owners differently than owners resident in the jurisdiction?

Turkey follows a non-discrimination and equal treatment policy towards foreign (non-resident) investors. The foreign investment legislation is based on the principle of equal treatment for the domestic (resident) and foreign investors. Accordingly, foreign (non-resident) investors have the same privileges and obligations as the Turkish (resident) investors.

