

## Turkey: Company Formation In Turkey

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### INTRODUCTION

This article aims to provide general information on most commonly preferred types of limited liability corporations in Turkey.

There are two such types of limited liability corporations in Turkey: "Turkish Joint Stock Companies" ("*anonim şirket*" in Turkish, abbreviated as "A.Ş.") and "Turkish Limited Liability Companies" ("*limited şirket*" in Turkish, abbreviated as "Ltd."). Both types are governed by the Turkish Commercial Code ("TCC"). As the Foreign Direct Investments Law No: 4875 dated June 5, 2003, Article 3 clearly provides that foreign investors are to be treated the same as the local investors (unless an international treaty exists to the contrary), foreign investors are free to choose any of these two types for their operations in Turkey.

### EXPLANATIONS

#### 1. GENERAL INFORMATION ON JOINT STOCK COMPANIES

##### 1.1 Shareholders and Capital

A minimum of one shareholder is required for formation and continuing existence of a joint stock company. All shareholders may be foreign real persons and/or foreign entities. A minimum initial capital of TL 50,000 (approximately USD 23,000 / EUR 17,000) is required at all times.

It is possible for the foreign shareholders' capital contribution to be kept in a foreign currency deposit account in the name of the company without being converted into Turkish currency. However, the shareholders' account with the Turkish currency equivalent paid to the company is calculated on the basis of the purchase rate of the Central Bank of Turkey for such foreign currency on the date of such payment. Any subsequent loss or gain resulting from fluctuations in the foreign currency is for the account of the company.

##### 1.2 Corporate Documents

A joint stock company may be incorporated for an indefinite period. The articles of association are the only corporate document required for incorporation of a joint stock company. Issues that are not addressed in the articles of association are governed by the provisions of the TCC. The shareholders may establish various classes of shares and allocate specific voting, dividend and liquidation privileges to such classes. The articles of association of a joint stock company are registered with the commercial registry and therefore are deemed to be a public record.

##### 1.3 Shareholder Control and Quorum and Voting Requirements

A simple majority shareholding (> 50%) is sufficient to control a joint stock company for most purposes. The TCC contains a very limited number of supermajority requirements for shareholders meetings and decisions. It is possible for the shareholders to add items into the list of matters requiring supermajority decisions or to provide for higher -but not lower- quorum and voting requirements than those provided for in the TCC.

Under the TCC, quorum and voting requirements are divided into four categories, as follows:

- a. The first category relates only to amendments to the articles of association concerning (i) impose obligations for covering the balance sheet loss or (ii) removal of the registered office. These two matters, which arguably are quite remote possibilities, require the unanimous vote of all the shareholders and if this quorum cannot be constituted in the first attempt, same quorum is required for the next meeting.
- b. The second category relates only to amendments to the articles of association concerning (i) constitution of privileged shares or (ii) limitations regarding the assignment of nominative shares. Such changes must be approved by the affirmative votes of shareholders or proxies representing three fourths of the capital of the company. If this quorum cannot be constituted in the first attempt, same quorum is required for the next meeting.
- c. All other amendments to the articles of association must be approved at a meeting where shareholders or proxies representing one-half of the capital of the company are present. If a second attempt to reach a quorum becomes necessary, second meeting must be conducted in one month and the quorum drops to shareholders or proxies representing one-third of the capital. In either case, the vote required for approval is a simple majority of the shares held by shareholders or proxies present.
- d. Any shareholder decision which does not require an amendment to the articles of association, including matters to be decided at the annual shareholders meeting as per the requirements of the law, such as approval of the annual report, financial statements and the dividend distribution plan, can be decided at a meeting where shareholders or proxies representing one-quarter of the capital of the company are present. If the first attempt to reach a quorum fails, then a quorum requirement does not apply to the second meeting. In either case, the vote required for a resolution is simple majority of the shares held by shareholders or proxies present.

In light of the above, the general rule is that a shareholder holding shares representing more than 50% of the company's capital will have control over all decisions in all the categories described above except the first two categories, provided that such a shareholder attends all shareholders meetings.

Notwithstanding the foregoing, where there are different classes of shares, any decision which adversely affects the rights of shareholders holding a specific class of shares will also need to be approved by a special assembly of such shareholders. The quorum and voting requirements for meetings of these privileged shareholders are the same as those required for the third category of decisions discussed above.

##### 1.4 Corporate Governance

A joint stock company is managed by its "board of directors" appointed by the general assembly of

shareholders, and for daily affairs, by the managers appointed by the board of directors. A director (a member of the board) can be natural/legal entity shareholder or natural/legal entity who is not a shareholder. Neither the directors nor the managers are required to be Turkish citizens or residents of Turkey but the local presence of at least one manager certainly is an advantage for purposes of facilitating the day-to-day representation and administration of the company.

The board is composed of a minimum of one director. The directors are officially appointed by the shareholders. Directors may also be of foreign nationality. The very first board of directors of a company can be appointed by a provision in the articles of association or a general assembly resolution. The meeting quorum for the board of directors is constituted with the presence of one member plus ½ of the number of directors. However, in the event that such number is not a whole number (i.e. in case of a board with odd number of directors), the meeting quorum is reached by rounding such number upwards. For instance, also as per the understanding of the Turkish Court of Appeals, the meeting quorum for a board of three shall be three [1 + (3 x ½)]. The board resolves with the affirmative votes of the simple majority of its members present at a duly convened meeting. The TCC does not provide for the frequency of board meetings. In addition to periodic meetings, the articles of association may also provide for meetings as and when required by the chairman but each director may at any time request that a meeting be convened.

The board has the authority to resolve on all matters relating to the company except for those reserved for the (general assembly of) shareholders either by law or the articles of association. Specific quorum and majority requirements for the board (higher but not lower than the provided ones) may be provided for in the articles of association. Proxies are not allowed but it is possible to pass a resolution in writing and waive the requirement for a formal meeting.

### 1.5 Shareholders' Rights

The TCC provides all shareholders of a joint stock company with the following rights (which may be exercised also by proxy):

- a. to participate in shareholders meetings
- b. to cast one vote per share (additional voting rights may be provided for in the articles of association, but non-voting shares are possible only for public companies)
- c. to review the annual report and financial statements (to be made available by management at least 15 days before each annual shareholders meeting)
- d. to require from the company's auditors clarification of the accounts of the company or of transactions entered into by the company
- e. to bring legal action against (general assembly of) shareholders' decisions where such decisions violate the law, the articles of association or the shareholders' duty of good faith (which is generally interpreted as a duty not to infringe on the interests of minority shareholders without legal justifications)
- f. to participate, pro rata to such shareholders' existing shareholding, in each increase in the company's capital, (except as may be restricted by the articles of association or a shareholders' resolution)
- g. to receive a pro rata share of dividends (except as may be restricted by the articles of association)
- h. to receive a pro rata share of any proceeds resulting from liquidation of the company (except as may be restricted by the articles of association)
- i. to ask for a special audit (if it is essential for the exercise of a shareholding right and if right to demand information and examination has been exercised before)
- j. preferential right regarding new shares which occurred from the increase of capital

In addition, the TCC provides holders of shares representing 10% or more of the capital of a joint stock company with the following rights, which cannot, through the articles of association or otherwise, be limited:

- a. to be represented in board of directors on conditions that is provided in the articles of association
- b. to demand a special auditor from the court for the company (if general assembly rejected the request for a special audit)
- c. to demand the rightful termination of the company
- d. to demand the publish of the nominative share certificates in non-public companies
- e. to call an extraordinary general assembly of shareholders or require the inclusion of additional matters in the agenda of scheduled general assembly of shareholders
- f. to bring legal action regarding the auditor's removal and appoint a new auditor

### 1.6 Shareholders' Obligations

The primary obligation of a shareholder is to pay the outstanding portion of its capital subscription as and when called by the board of directors (or by the shareholders). In the event that a shareholder defaults in the payment of his/her capital commitment, the board of directors of the company can revoke all rights of such shareholder with respect to the shares of such shareholder that are not subscribed for, and deprive such shareholder from the said shares.

In addition, shareholders have the obligation to maintain the confidentiality of commercial secrets of the company. Shareholders, who violate this obligation, shall compensate the damages suffered by the company.

## 2. GENERAL INFORMATION ON LIMITED LIABILITY COMPANIES

A limited liability company is founded by at least one individual or entity. The upper limit has been determined as 50. There is no nationality requirement for the shareholders.

Compared to a joint stock company, a limited liability company has a certain "personal" character. For instance, unlike the joint stock companies, transfer of shares requires (if a contrary provision does not exist in the articles of association) the consent of the general assembly.

In limited liability companies - as the sole exception to the limited liability principle - shareholders are responsible for public debts of the company towards the state (together with the managers of the company), with proportion to their shares in the capital of the company (it is noteworthy that the same rule applies for members of the board of directors in joint stock companies, who are responsible for the company's public debts).

The minimum capital requirement is TL 10,000 (approximately USD 4,500 / EUR 3,500).

In limited liability companies, the authorized body is the "board of shareholders". Normally, all shareholders

have both the right and obligation to take part in the management – each shareholder automatically qualifies as a “manager” unless the articles of association (or the board of shareholders) regulates to the contrary. Persons other than the shareholders may also be appointed by the board of shareholders as managers. The daily activities and transactions of a limited liability company are carried out by the managers. There is no upper limit regarding the number of managers. Managers can be both of foreign or Turkish nationality.

The affairs of the company can be delegated to a certain manager (or a board of managers) appointed by the board of shareholders.

The board of shareholders meets at least once a year. In limited liability companies all the authorizations regarding the affairs of the company with the exemption of amendments to the articles of association, capital increase and the appointment of the company manager, may be assigned to the managers by the board of shareholders.

### **3. BASIC DISTINCTIONS BETWEEN A JOINT STOCK COMPANY AND A LIMITED LIABILITY COMPANY**

The following are the major distinctions between joint stock companies and limited liability companies:

- a. The minimum number of shareholders required is one for a joint stock company and also for a limited liability company. A limited liability company may not have more than 50 shareholders, but no such maximum applies to joint stock companies.
- b. The minimum capital required for a limited liability company is TL 10,000 as opposed to TL 50,000 required for a joint stock company.
- c. A joint stock company is managed by its board of directors. A limited liability company does not have a board of directors but is managed instead by its general manager and its shareholders. All authorities of the shareholders relating to the management of a limited liability company may be granted to a general manager or one of the shareholders.
- d. In some circumstances, (such as the rightful termination of the company), the TCC offers to the minority shareholders in joint stock companies a stronger protection than it offers to those of a limited liability company. However, similar extra protection may also be provided for in the articles of association of a limited liability company.
- e. A limited liability company's shareholders, unlike a joint stock company's shareholders, may be liable for amounts owed by the limited liability company to government authorities for taxes, duties and charges if the company cannot make the required payments. In both company types, the representatives i.e. the manager in the limited liability company and the board of directors in joint stock companies have the same personal liability.
- f. Any transfer of shares in a limited liability company must be approved by the general assembly. A share transfer in a joint stock company does not need to comply with such requirement. Shares may be transferred in private and such transfer may be subsequently approved by the board of directors if the share certificates are registered; if the share certificates are bearer; not even such a board resolution is required.
- g. Under the TCC, provisions relating to limited liability company governance are less developed and less clear than those relating to joint stock company governance.
- h. Limited liability companies may engage in almost all activities that joint stock companies are eligible for. The major exceptions to this end are the banking and insurance activities that may only be engaged in by a joint stock company.
- i. Only joint stock companies may be listed with stock exchanges.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*