

Joint ventures in Belarus: overview

Viktoryia Mikhnevich and Aliaksei Vashkevich
Advocates bureau Sorainen

global.practicallaw.com/w-011-5962

DOMESTIC COMPANY JOINT VENTURES (JVS) *Regulation*

1. Are JVs expressly regulated?

JVs are not expressly regulated in Belarus.

Types

2. Which types of JV are allowed?

The law allows both corporate and contractual JVs to be established.

Corporate JVs

Corporate JVs can be formed by the:

- Establishment of a new entity which has all the JV's partners as shareholders.
- Acquisition of shares in an existing entity by the JV's partners.

The JV's partners can also decide to enter into a shareholders agreement providing regulations additional to the JV's articles of association. The shareholders' agreements are subject to legislative limitations, among others, on the maximum number of participating shareholders and on the scope of the regulated issues. The use of shareholders' agreements is not widespread in Belarus due to inconsistent legal practice and uncertainty of enforceability.

The most common corporate forms of commercial legal entity in Belarus are:

- Joint stock companies.
- Limited liability companies.

The forms differ in the terms of authorised capital requirements, status of shares and their disposal and exit from the JV, among others. Neither form provides any specific JV status.

Contractual JVs

A contractual JV can be based on a joint activity agreement or any other civil co-operation agreement. In practice, the contractual form of JV is rarely used.

3. What are the principal corporate/company laws governing corporate JVs?

The principal corporate/company laws governing corporate JVs are the Civil Code of the Republic of Belarus and the Law on Business Companies. Important provisions regarding

procedures for the JV's establishment and activity are provided by numerous acts of the president and the government.

Formation and registration

4. What are the typical JV founding documents for a corporate JV?

The typical founding documents for a corporate JV will be those required for the The main founding document for a corporate JV is the articles of association. The establishment procedure usually requires several other documents, including minutes of the constituent meeting and the meeting of the founders.

5. Is the use of foreign language in a JV's founding documents (both corporate and contractual) restricted?

For the purposes of state registration, the JV's articles of association must be executed either in Belarusian or Russian. Other documents (both corporate and contractual) can be bilingual (Belarusian/Russian and a foreign language). Most of the contractual documents can be executed in foreign language only, but if one of the JV's partners is a Belarusian entity, these documents must be bilingual (Belarusian/Russian and the foreign language).

6. Are public officers (for example, public notaries) involved in a JV's formation procedure?

The JV formation procedure does not require the direct involvement of public officers, except for state registration of a new company or amendments to the corporate JV's founding documents. For foreign shareholders, the registration procedure may require the participation of notaries and other public officers to confirm validity of provided foreign documents and their translations.

The establishment of contractual JVs does not involve public officers, unless there is a special agreement between the parties.

7. Are JVs registered with any local registries? Are public sector bodies' authorisations required for a JV's establishment?

Local registries

There are no special registries for JVs. All new companies and several important changes to their articles of association (such as changes in shareholders, business name, address,

authorised capital) are registered with the Unified State Register of Legal Entities and Individual Entrepreneurs.

Public sector bodies

In general, corporate JV formation does not require approvals or other involvement of public sector bodies except for:

- Actions and operations involving corporate securities.
- Anti-trust requirements.

Shares of joint-stock companies must be registered in the State Register of Securities. All transactions involving such shares must be either performed on the stock exchange or registered with an authorised broker or depository.

Anti-trust requirements comprise obtaining approval from the anti-monopoly authorities on the establishment, reorganisation of the company and transactions with its shares. The list of activities subject to approval includes:

- Reorganisation of an entity holding a dominant position on the market into an open joint-stock company.
- Reorganisation of a commercial entity in the form of merger or acquisition.
- Establishment of an entity which receives property or shares of other entities which are subject to anti-trust control over share transactions.
- Establishment of holdings, associations, including state associations, and unions.
- Acquisition by an entity holding a dominant position on the market of shares of another entity on the same market.
- Acquisition of at least 25% of shares of an entity holding a dominant position on the market where the acquiring entity or individual receives control over such entity.
- Acquisition of any amount of shares, which grants control over 25% or 50% of the business entity's shares in total to the acquirer, which has not had the specified level of control before the acquisition.
- Obtaining the right to participate in management bodies of entities performing activities on the market of interchangeable (similar) goods, where such right provides a possibility to influence decisions of these entities.

The anti-monopoly authorisation is mandatory if at least one of the conditions specified above is present and the reorganised entity (the founder of the new entity or the entity, which shares are disposed) satisfies one of the following:

- Book value of assets at the latest reporting date exceeds EUR1 million).
- Amount of its proceeds from sales for the previous financial year exceeds EUR2 million).

8. What other formal requirements must be complied with to validly constitute a JV?

In addition to the requirements specified in *Questions 4, 6 and 7*, the following formalities must be complied with:

- The authorised capital of a corporate JV must be formed within 12 months of state registration.
- Compliance with respective share transaction procedures where the JV's transaction involves this kind of transfer (pre-emptive rights in limited liability companies).

- Obtaining special permits (licences) for certain types of activities (telecommunication, pharmaceuticals, gambling).

A contractual JV in the form of simple partnership with the purpose of performing entrepreneurial activities can only consist of individual entrepreneurs or commercial entities. For other contractual JVs, no formal requirements are established.

Permitted markets

9. Can the JV structure be used in every industry sector? Are there any restrictions to be considered and carefully assessed before investing in a JV?

The JV structure can be used in every industry sector provided the requirements specified in *Question 8*, including licensing, are complied with.

Purpose

10. Can a JV be established with any purpose?

Both contractual JVs and corporate JVs can be established with any purpose provided that they do not contradict general provisions of law, for example, activities performed only by the state (production of highly dangerous toxins, import of alcoholic products and so on) or prohibited activities (for example, terrorism).

Share capital and participation

11. What possible forms of participation are there in a JV's share capital? How can a JV member contribute and are there statutory limits on the possibility to make contributions in kind?

Forms of participation

JV partners participate in the corporate JV through their shareholding in the authorised capital of the legal entity.

Contributions

Corporate JV's partners must make contributions into the authorised capital. The contributions can be made in the following forms:

- Monetary funds.
- Any property, including real estate.
- Securities.
- Property rights, including disposable intellectual property rights.
- Any other disposable rights which have a cost assessment.

All non-monetary contributions must be evaluated. The law also establishes limits on contributions of property rights, which cannot be more than 50% of the authorised capital.

Specific limits are as follows:

- Limited liability company: no legal limitations on the minimum amount of the authorised capital
- Joint-stock companies:
 - closed joint-stock company: 100 basic units (about EUR1,000);
 - open joint-stock company: 400 basic units (about EUR4,000).

Certain special limitations are provided for the banks, insurance companies, and some others.

Contractual JV regulations do not provide any requirements as to contributions to the JV.

12. Can a corporate JV's share capital be denominated in a foreign currency?

The authorised capital of corporate JVs must be specified in Belarusian roubles. A denomination in a foreign currency is not possible. However, it is possible to additionally determine an equivalent of the specified amount in foreign currency and pay the contribution in foreign currency.

Duration and limits on membership

13. Are there statutory limits on a JV's duration?

There are no statutory limits on a JV's duration (for both corporate JVs and contractual JVs).

14. Are there statutory limits on the number of members participating in a JV?

Under the applicable law(s) (see *Question 3*), several corporate forms such as limited liability company, additional liability company and closed joint-stock company have limits of no more than 50 shareholders.

There are no limits on the number of contractual JV members.

Public sector bodies

15. Can a public sector body enter into a JV agreement? Subject to what conditions? In particular, do public private partnerships (PPP) laws and regulations apply?

Public sector bodies can establish JVs and enter in JV agreements on the same terms as private partners. Special provisions and incentives, including PPP, investment and concession agreements may apply.

Public and private partners can conclude a PPP agreement in accordance with the requirements of the Law on Public Private Partnerships 2015. The PPP project can be implemented in relation to infrastructure facilities in the following areas, among others:

- Road and transport activities.
- Communal services and utilities.
- Healthcare.
- Social services.
- Education and culture.
- Physical culture, sports and tourism.
- Telecommunications.
- Power engineering.
- Processing, transportation, storage, supply of oil.
- Transportation, storage, gas supply.
- Agriculture.

- Defence and law enforcement activities.
- Science.

A JV can also be established within the requirements of an investment agreement with the Republic of Belarus which provides, among others, additional guarantees and incentives to the investor, as well as multiple tax exemptions. According to recent changes, investment agreements can only be concluded for realising projects in priority economic sectors or types of activities, which in practice cover most of the areas which are attractive to investors.

An investment agreement is used, for example, for:

- Acquiring a state-owned enterprise or establishing a joint venture with a state-controlled company to secure a stable legal framework for a project.
- Greenfield investment projects requiring arrangements for supplies of power and raw materials, prices for goods produced by the new enterprise (especially in the energy sector).
- Large-scale development and construction projects.

Concession agreements allow to perform activities, which otherwise are exclusive for the state, or use objects and property, which may belong only or exclusively to the state. In practice, concession agreements are not spread in Belarus.

Non-competition and anti-trust clauses

16. Are there statutory constraints on the use of non-competition or anti-trust clauses in a JV agreement?

Non-competition clauses in JV agreements are generally not enforceable under the law.

De facto company/partnership

17. Must the contractual JV satisfy any conditions to avoid falling within the definition of de facto company/partnership?

The formation of a new legal entity is subject to statutory requirements, including mandatory state registration. Because of this, a contractual JV cannot be determined as a *de facto* company.

Limiting member liability

18. Can a JV agreement provide that a JV member can participate without incurring any risk, loss or reward?

Generally, partners of a corporate JV established as a limited liability company or a joint-stock company are not responsible for its obligations and bear the risk of loss only within the limits of their participation interests. However, in certain cases, the shareholders are subject to subsidiary liability for:

- Insolvency or bankruptcy which was caused by the shareholders.
- Failure to submit a mandatory application for economic insolvency or bankruptcy due to the fault of the shareholders.
- Violation of the order for the company's liquidation, which results in liquidation without mandatory bankruptcy procedures.

Certain forms of corporate JV, namely a limited liability company and additional liability company, allow substantial adjustment the terms of participation in the JV, including for partners' rewards. However, full deprivation of profits and other basic rights related to participation and management of the JV is generally not possible

Anti-trust

19. Do any anti-trust rules, guidelines or policies apply to a JV agreement?

There are no specific requirements to JV agreements in the sphere. In general, the law prohibits agreements, joint activities and decisions, which result in one of the following:

- Division of market by territory, volume of sales, assortment of goods/services, scope of sellers and buyers.
- Excluding or restricting access of other business entities to the commodity market.
- Determining, increasing, reducing or maintaining prices during auctions for the same goods or during auctions.
- Economic or technical untenable decrease and/or termination of goods production.
- Economic or technical untenable refusal to enter into contracts with certain sellers or buyers.

Governance and limits on directors

20. Can the parties to a JV freely regulate the JV or are they subject to certain restrictions?

A corporate JV can be freely regulated provided that mandatory statutory rules are not changed. The principal provisions, which are not subject to the JV partners' discretion or provide only limited possibilities for amendments, are the following:

- Appointment and competences of the JV's management bodies.
- Decision-making procedures, including order for convoking and conducting the general meeting of shareholders, quorums for adopting decisions on the most important issues of the JV's activity.
- Disposal of shares, for example, pre-emptive right in limited liability, additional liability and closed joint-stock companies.
- Approval of large transactions and transactions with affiliated persons.
- Exit from the JV.

Though the amount of restrictions is significant, it is usually possible to establish the desired corporate governance structure and other regulations relating to the JV's activity and management. However, certain legal instruments are still ineffective and are not enforced by public authorities and courts, including:

- Voting obligations and veto.
- Put and call options.
- Drag-along and tag-along rights.
- Indemnification provisions.

Currently several amendments to the legislation are in development, which can fully or partially allow some of the above options.

The Belarusian laws provide for the concept of shareholders' agreements under the latest amendments to the Law on Business Companies which entered into force on 26 January 2016. The authors of this article are not aware of any Belarusian court decisions related to shareholders' agreements, including on issues of their validity and enforcement. There may, however, be scope for different interpretations of the legal nature and binding effect of the shareholders' agreement and its provisions, which may create risks for the enforceability of such agreements.

Currently, contractual JVs are subject to certain restrictions and limitations under the Civil Code including:

- Any subjective condition in the JV agreement (for example, in the form of a condition precedent or as an element of a put or call option) will be void as the Civil Code provides that such conditions are outside the influence of any of the parties.
- A waiver of rights is generally considered invalid.
- Donations between commercial organisations are generally prohibited.
- The concepts of indemnification or representations and warranties granted for the benefit of one of the parties are not recognised by the Civil Code and other laws.

Contractual JVs in the form of a simple partnership are subject to only a few rules, mainly providing for default provisions on management and partners' participation

21. Are there limits or restrictions on the eligibility of an individual as a member of the board of directors/statutory auditor?

The law does not contain any specific restrictions on the eligibility (including nationality restrictions) of an individual to act as one of the following:

- Sole executive body (CEO).
- Member of the collective executive body (management board).
- Member of the board of directors (supervisory board) of a legal entity.

However, foreign nationals performing the functions of the CEO or acting as members of the management board must obtain a work permit before starting their employment.

The JV in the form of limited liability company or joint stock company must have an internal inspector (auditor) or inspection commission, which a controlling body of the company with the main function of conducting internal audit of the JV. The director, the members of the managing board, and the members of the supervisory board cannot be elected as the inspector or members of the inspection commission.

An annual external audit is not mandatory for legal entities, except for:

- Insurance companies.
- Companies with the status of resident of the Hi-Tech Park (a special legal, economic and tax regime aimed at IT companies).
- Any company whose annual gross sales exceed EUR5 million.

The statutory audit of a legal entity must be performed by an auditor licensed in Belarus.

Termination

22. What legal regime applies to a JV's termination? Can a JV be terminated for just cause on request of one party?

A corporate JV can be terminated voluntarily or by a decision of a court or registering authority.

Voluntary liquidation is initiated only by a vote of at least three quarters of the shareholders in case of joint stock company or the unanimous decision of all shareholders in case of limited liability company. One party cannot freely terminate the JV.

However, there are general options for exit from a corporate JV which do not result in liquidation of the legal entity, but may cause factual termination of the JV's activities. These are mainly related to disposal of the shares/participation interest by the shareholder and are regulated strictly within the framework of corporate law.

In addition, a shareholder of a limited liability company can exit the company at its discretion at any time or can be judicially excluded at the request of other shareholder(s).

According to Belarusian law, there are some cases when a JV is liquidated by a decision of court, including for:

- A decrease of the value of net assets below minimum statutory amounts of the authorised capital or, in practice, below zero.
- Economic insolvency (bankruptcy).
- Carrying out activities without special permits or carrying out activities prohibited by law or in serious violation of the law.
- Failure to perform mandatory liquidation of the company after a decision of the shareholders (for example, expiry of the terms of activity).

Additional reasons for the liquidation of a commercial company's by a decision of the registering authority are:

- Inactivity for 24 months continuously.
- Proposal of the tax authority to liquidate the company due to bad debts before the state budget and to write off those debts.

Contractual JVs can be terminated under the terms of the agreement between the parties and the general provisions of contract law. Special rules for termination exist in regard to agreements of simple partnership, including the following additional grounds:

- Death/liquidation of any partner.
- Insolvency or bankruptcy of any partner.
- Acknowledgement of any partner as missing or fully or partially disabled.
- Refusal of any partner from the agreement on simple partnership.
- Termination of the agreement upon initiative of any partner where the agreement was concluded under a negative condition.
- Expiry of the agreement's validity term.
- Allotment of the partner's share on demand by the creditor.

None of the named rules except for expiry of the validity term apply where the JV partners directly agree on the continuation of the JV after any of these events takes place.

23. Is the termination of a JV agreement subject to any public sector body's approval?

Termination of JV agreements is generally not subject to the approval of any public sector body, unless the chosen way for termination is subject to anti-monopoly approval (see Question 7).

Choice of law and jurisdiction

24. Are there constraints on the choice of the law and the jurisdiction applicable to a JV?

Corporate JVs are subject exclusively to the jurisdiction of Belarus.

Parties of contractual JVs are generally free to choose the governing law. If the parties have not specified the applicable law in the JV agreement, the law of the place where the joint activity is mainly performed must apply.

JVS WITH FOREIGN MEMBERS

Validity and authorisation

25. What are the rules relating to validity and authorisation of JVs with foreign parties?

Validity

JVs with foreign parties are allowed under Belarusian law.

Limits

There are no requirements relating to number of or correlation between local and foreign partners.

Authorisation

Authorisation relating to foreigners is governed by the same rules as those for domestic entities and individuals, except for powers of attorney issued abroad, which are regulated by the law of the place of issue. However, it is advisable to take into account local requirements to prevent disputes.

In general, all documents issued abroad must be legalised/apostilled and translated into Russian or Belarusian. The same relates to the authorising documents and other documents related to establishment of corporate JVs, including resolutions on establishment and respective power of on behalf of the JV's founder.

The described rules mainly apply to communications with state authorities, administrative procedures or litigation, while in relations with private persons there are usually no strict requirements.

Effect of foreign membership

26. Are any of the rules relating to domestic company JVs (see Questions 1 to 24) different for JVs with members incorporated under, or governed by, the laws of a foreign country?

There is no difference between any of the rules relating to domestic company JV and for JVs with members incorporated under, or governed by, the laws of a foreign country.

Economic or financial incentives

27. Are there economic or financial incentives for foreign direct investments in a JV?

All investors are granted at least the following basic rights and guarantees under Belarusian law:

- Right to private property and its protection without discrimination.
- Protection against unlawful acts by government authorities that violate investors' rights or cause losses, or both.
- Equality of rights for national and foreign investors.
- Free repatriation of profits.
- Protection of investments from nationalisation and requisitioning.

Although there are no any specific incentives for JVs involving foreign direct investments, any investor can benefit from the following preferential regimes:

- China-Belarus Industrial Park ("Great Stone") with one of the most advantageous set of benefits for investments into electronics, biotechnologies, fine chemistry, machine engineering, logistics and new materials.

- High Technology Park establishing attractive conditions for IT companies (see also *Question 21*).
- Six free economic zones (FEZ) providing significant tax benefits for activities in a wide range of industries until the end of 2049.
- Tax exemptions for conducting business in rural areas and 22 towns.

Minimum investments/contributions

28. Are there mandatory minimum equity investments or contributions in kind thresholds for a foreign JV member?

Generally, there are no requirements on minimum investment or contribution threshold for foreign investments into JVs, except for special provisions applicable to FEZ and Great Stone Industrial park residents (see *Question 27*) as follows:

For FEZ residents the minimum amount of investments is the equivalent of EUR1 million or EUR500,000 with an undertaking to make investments over three years.

Minimum investments for the residents of the Great Stone Industrial Park are US\$5 million or US\$500,000 for a R&D project or where there is an undertaking to make investments over the course of three years.

THE REGULATORY AUTHORITIES

Ministry of antimonopoly regulation and trade of the Republic of Belarus

Main activities. Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus applies public policies in the field of counteracting monopolistic activity and development of competition, exercises control over compliance with law and investigates violations.

W www.mintorg.gov.by/index.php?lang=en

ONLINE RESOURCES

Legislation

W <http://law.by/>

Description. State information resource for legal information. The website contains scientific, practical, educational and other information related to law, as well as unofficial translations of principal legal acts.

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Viktoryia Mikhnevich, Senior Associate

Sorainen
T +375 17 306 2102
F +375 17 306 2079
E viktoryia.mikhnevich@sorainen.com
W www.sorainen.com



Aliaksei Vashkevich, Legal Assistant

Sorainen
T +375 17 306 2102
F +375 17 306 2079
E aliaksei.vashkevich@sorainen.com
W www.sorainen.com

Professional qualifications. Belarus, Lawyer

Areas of practice. . Corporate, mergers and acquisitions, private equity, privatisation, investment incentives, competition.

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