

THE IMPORTANCE OF THE REGULATION OF PUBLIC ENTERPRISES

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Abstract

How to cite this paper: Ibraimi, X., Ziberi, B., & Brestovci, A. (2023). The importance of the regulation of public enterprises. *Corporate Law & Governance Review*, 5(1), 122–128. <https://doi.org/10.22495/clgrv5i1p11>

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ISSN Online: 2664-1542

ISSN Print: 2707-1111

Received: 21.03.2022

Accepted: 24.04.2023

JEL Classification: K10, K20, K22

DOI: 10.22495/clgrv5i1p11

The rule of law is a necessary issue for the economic development of a country, while its absence hinders economic development (Krever, 2011). The main aim of this study is to analyze the way of governing and supervising public enterprises in the case of Kosovo. This study shed light on the importance they have in the development and balance of the legal system of a state and a functioning democracy which together enable the preservation, increase of responsibility, and reduction of undue political influence. Good corporate governance following the provisions of domestic law and the lack of political influence of the Government in these bodies is a good signal and indicator for foreign investors and lenders that investing and lending to such companies is safe as the lack of governance enables market disruption while on the other hand deprives citizens of quality public services. Based on ownership, publicly owned enterprises (POEs) are organized into central POEs owned by the Government of Kosovo and local POEs owned by one or more municipalities. The Government and the municipalities exercise their rights in these enterprises through the election of the board of directors (Ministry of Economic Development, 2018). Lack of good governance discourages foreign investors and thus slows down the further evolution of ownership and stagnation in the development of the country's economy.

Keywords: Governance, Oversight, Public Enterprises, Boards of Public Enterprises, Ownership of Public Enterprises

Authors' individual contribution: Conceptualization — X.I., B.Z., and A.B.; Methodology — X.I., B.Z., and A.B.; Data Curation — X.I., B.Z., and A.B.; Writing — Original Draft — X.I., B.Z., and A.B.; Writing — Review & Editing — X.I., B.Z., and A.B.

Declaration of conflicting interests: The Authors declare that there is no conflict of interest.

1. INTRODUCTION

For the economic development of a country to be successful, the institutions must be comprehensive that will characterize and provide secure private property, a system where the law will treat everyone equally, creating conditions for citizens where they will contract and exchange freely as well as provide quality public services (Groenenwegen et al., 2010).

Kosovo, as a new state, is still in the process of building stable and transparent governing structures

and institutions. Corruption continues to be one of the main challenges and a condition for European Union membership or visa liberalization (Ibraimi, 2021a). The Transparency International Corruption Perceptions Index ("Kosovo in CPI", 2020) ranks Kosovo 104th as a result of stagnation in the fight against corruption and the failure of institutions to fight it. These features are also present in public enterprises in Kosovo which operate within the Government of Kosovo or municipalities depending on who is responsible for them.

The services provided by these enterprises affect the interest of society and affect the quality of life of citizens, as these enterprises are established to provide services to citizens to meet their daily needs and requirements starting from the water supply, electricity, public transport, garbage collection, street cleaning, etc.

Public enterprises in Kosovo are regulated by a special law while their ownership is regulated by the Constitution of the Republic of Kosovo¹. According to it, public enterprises in Kosovo are organized as companies based on the law on companies at the head of which are the boards of directors, while depending on the owner they are divided into a local and central level. This law due to the requirements of the time and problems encountered during the management of enterprises was supplemented and amended twice by the Assembly of the Republic of Kosovo on the proposal of the Government in 2012 (Assembly of the Republic of Kosovo, 2012) and in 2015 (Assembly of the Republic of Kosovo, 2015a).

This paper addresses some of the challenges faced by central public enterprises in Kosovo with particular emphasis on how the boards of directors of central publicly owned enterprises (POEs) are selected and operated.

To understand these challenges, the current Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) and administrative instructions deriving from it, government decisions, annual reports of POEs, annual reports of the Policy and Monitoring Unit of Publicly Enterprises (PMUPE), reports published by the fund researchers of the Riinvest Institute (Riinvest, 2012) in comparison with the principles drafted by the Organisation of Economic Co-operation and Development (OECD) (Lewarne & Snelbecker, 2004) were studied. Since the boards of directors of POEs are the bodies that lead the POEs and this is exactly the problem of the study as non-compliance with legal provisions during the selection and appointment of board directors of POEs on a partisan basis, non-declaration of their assets, and lack of transparency in the work of these boards, affects of low-quality services, high prices, poor governance, inefficient and non-transparent.

Since declaring independence, Kosovo continued the process of building functional and democratic state institutions although new post-war institutions in Kosovo were established and led by the United Nations Mission in Kosovo (UNMIK) international community (United Nations, 1999), where UNMIK's main goal was rule of law and the establishment and development of legal institutions and frameworks (World Bank Group, 2017).

In many OECD countries, public enterprises play a crucial role in production and employment. Based on the OECD Guidelines, the notion of "public enterprise" refers to enterprises where the state has decisive control, through full ownership. In most developing countries, these enterprises are essential in raising the level of economic development of the country (Daniels & Trebilcock, 2004).

Corporate governance of public enterprises in Kosovo is regulated by Law No. 03/L-087 on public enterprises (Assembly of the Republic of

Kosovo, 2008a). According to this law, POEs are joint stock companies and operate under Law No. 02/L-123 on commercial companies (Assembly of the Republic of Kosovo, 2008b).

The main aim of this paper is to analyze the procedures and the regulation of public enterprises in the case of Kosovo.

The rest of the paper is structured as follows. Section 2 reviews the relevant literature. Section 3 analyzes the methodology that has been used to conduct the research. Section 4 presents the results. Section 5 provides the conclusions.

2. LITERATURE REVIEW

In general, public enterprises that are operated profitably, efficiently, and in conformity with commonly accepted commercial principles would not constitute a drain on financial resources or lead to monetary expansion (Floyd, n.d.).

The legal and regulatory framework for public companies should ensure a level playing field in the markets where public sector companies and private sector companies compete to avoid market distortions (Oneto et al., 2021).

Public enterprises have two defining characteristics: they are government-owned and controlled, and they are engaged in business activities. Ideally, when making statistical comparisons, these characteristics should be given a precise and consistent meaning, but, in practice, this is difficult to do (Gray et al., 1984).

Public enterprises in most countries of the world but also Kosovo play a dominant and important role in the lives of citizens.

Another difference between central and local public enterprises other than ownership is that central public enterprises provide services to all citizens of Kosovo, while local public enterprises provide services only to residents of the municipality or municipalities they own. The composition of the boards is the other difference that distinguishes them. While the boards of directors of central public enterprises consist of 5 or 7 members, the boards of public enterprises consist of 5 members. The common denominator of these boards lies in their mandate, which lasts 3 years.

There are 17 central public enterprises and we will present some of them: Kosovo Electricity Corporation SH.A. (KEK), Transmission System and Market Operator (KOSTT), Kosovo Post and Telecommunications (PTK), Kosovo Railways and Kosovo International Airport. There are 43 local public enterprises, of which 23 are bus stations², 8 companies operate in the field of waste collection, and 3 companies are water and waste companies (Regional Waste Company, Çabrati JSC-Gjakova, Waste Company, JKP Standard-Mitrovica, Regional Waste Company, Ambienti JSC-Peja)³, 2 heating plants (Termokos Sh.A-Prishtinë Heating Plant, Heating Plant in Gjakova city), 3 residential enterprises and one enterprise on the field of green, market, recreation, urban traffic⁴.

² Although Law No. 04/L-111 on amending and supplementing Law No. 03/L-087 for public enterprises represents 44 local enterprises, Regional Waste Company Higjiëna-Gjilan since 2013.

³ The lists of central and local public enterprises are defined by Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a).

⁴ Law No. 04/L-111 on amending and supplementing Law No. 03/L-087 for public enterprises (Assembly of the Republic of Kosovo, 2012).

¹ See Article 160 of the Constitution of the Republic of Kosovo, https://mapl.rks-gov.net/wp-content/uploads/2017/10/1.CONSTITUTION_OF_THE_REPUBLIC_OF_KOSOVO.pdf

The Government of Kosovo as the main owner of central public enterprises supports the position of introducing the private sector in public enterprises (through concessions or privatizations of various segments within these enterprises), as an attempt to replace the hierarchical decisions of the command economy with the sole purpose of owners to increase their profit (Harvylyshyn & McGettigan, 1999). Although the Government supports the privatization of public property, privatization for other entities represents the transfer of public property to workers to use and manage it forever (Ibraimi, 2021b).

POEs are the main provider of public services to citizens, which during the administration of UNMIK were administered by the Kosovo Trust Agency (KTA)⁵ (Assembly of the Republic of Kosovo, 2011) where in 2004 it implemented a process of restructuring and reform in POEs causing their vertical disintegration and organizing them as separate ethnicities (Assembly of the Republic of Kosovo, 2011) until the declaration of independence of Kosovo in 2008 and the adoption of Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) and the transfer of ownership of central public enterprises to the ownership of the Government of Kosovo.

The Government of Kosovo was obliged to oversee the governance of these enterprises and report to the Assembly on an annual basis. Although the Government of Kosovo has been the owner of the central POEs since 2008, it has an obligation to efficiently exercise its property right. The law stipulates that POEs without exception be treated and have the same legal framework as private enterprises. Regarding the selection of board members of public enterprises, the law mandates the one-level board model but also the Anglo-American model, where all members must have professional training and be politically independent. The same law, i.e., Law No. 03/L-087 on public enterprises, was amended in 2012 (Law No. 04/L-111) to adapt to the situation created after the restructuring of government departments and after the conclusion of supervised independence. This law regulates issues related to limitations of board powers, avoids conflicts with the law on local government and the same law provides for reductions in bonuses that may be paid to board members. This amended law enables and allows the Government, the Assembly, and the National Audit Office of the Republic of Kosovo (<https://zkar-rks.org/en/per-ne/>) to conduct at any time and any type of audit they deem necessary.

Board members of public enterprises are elected through selection and appointment. The procedure for selecting members begins with the opening of a public competition and the determination of the necessary criteria to qualify for the required position. Among the persons who have applied for the vacant position, the person who is considered to meet the conditions set out in the competition is selected. While in the appointment process, no competition is opened, but the shareholder identifies the most suitable candidate for the vacancy, and then his/her job is offered. This selection procedure is regulated by Law

No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a), where according to this law all directors are selected by the Government of Kosovo, a procedure which is the object of criticism for lack of transparency and avoidance of public competition practice (Rinvest, 2012).

For the procedure to be in line with legal provisions, the Government must follow these steps:

- The Secretary General of the Government through a decision appoints a recommendation commission which has the task to recommend to the government potential candidates for the position of director in the board of POEs. The secretary in this commission must appoint 7 members to identify suitable candidates for the board. According to the law, members of the Recommendation Commission can be appointed only senior civil servants or external experts, provided that they are qualified and experienced in the respective industry.

- The Government opens a public competition for positions on the boards of public enterprises, where the necessary conditions for the required positions must be clearly defined.

- After the expiration of the deadline for receipt of documentation and application, the Recommendation Commission convenes, which has the obligation to verify whether the applications have met the required criteria. After listing the persons who have passed the first stage, the Recommendation Commission conducts the interviewing and evaluation of the candidates.

- The Commission after interviews and evaluations prepares a list of candidates who receive a positive evaluation, which list is sent to the Government.

- The Government, after receiving the list of candidates from the Recommendation Commission, selects the members of the board. So the whole procedure of selecting board members begins and ends within the Government.

This way of selecting the members of the boards creates space for abuses and space for the selections by the Recommendation Commission to be politically influenced and to favor the ruling parties. The law stipulates that the members of the Recommendation Commission should be only senior civil servants or external experts with high qualifications and experience from the respective industry.

Representation of women in the management of central POEs continues to remain low, despite the obligations arising from the Law No. 05/L-020 on gender equality (Assembly of the Republic of Kosovo, 2015b).

According to this law, state bodies and public institutions are obliged to fair gender representation which is achieved when we have a minimum representation of 50% for each gender, amended to Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a).

It obliges that women be appointed in the composition of the boards of public enterprises, according to the legal requirements of the Law No. 05/L-020 on gender equality (Assembly of the Republic of Kosovo, 2015b).

Central public enterprises are run by men. In most boards, we have only one or two women in the positions of board directors, while very often there have been cases where the Government has not appointed any women to the boards. This male

⁵ The KTA was established to privatize socially-owned enterprises and restructure public enterprises. It was established by UNMIK Regulation 2002/12.

dominance and the Government's failure to achieve equal gender representation in leadership undermine fundamental democratic values of equality and justice.

Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) enables the establishment of temporary boards of directors of POEs and for this, the law authorizes the Government of Kosovo which serves as the board of directors until the election of the permanent board. Although the two boards exercise the function of leading the POEs, there are some differences between them. The permanent board is elected by the Government of Kosovo in a procedure defined by Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) with a term of 3 years and consisting of 5 or 7 members, while the temporary board is appointed by the Government with a term of 6 months consisting of 5 members. Democratic Institute of Kosovo (KDI, <https://kdi-kosova.org>) during the research has found omissions in the implementation and observance of legal provisions provided for the appointment of a professional and functional board, a violation of the nature of gender and political affiliation.

3. RESEARCH METHODOLOGY

The research methodology used in this study begins with a review of the literature on concept recognition and then continues with the bibliographic research of various authors on the regulation of public enterprises in general and in particular on the role of Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a). The research is of descriptive and comparative nature where the quantitative method is followed by the presentation of tabular and graphic data using secondary data. Secondary data are second-hand data collected by various institutions, and agencies, reports of the Government of Kosovo, applicable laws, etc.

4. RESULTS

Research conducted by KDI has analyzed the boards of central public enterprises, which were appointed or elected in the second half of 2020 by the Hoti Government. KDI has found cases of politicization of boards, lack of conflict of interest, and other irregularities in the appointment and selection of directors of permanent and temporary boards.

The general competencies of the directors of the boards are defined in Article 12 of Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) and they are as follows:

- exercising the activity to increase the long-term value of the enterprise and its shareholders;
- exercising duties following the business and financial strategies supported in the approved Business Plan of the Enterprise;
- treat shareholders equally;
- exercising their duties as directors.

At the municipal level, the shareholder right of the POE is exercised by the Municipal Commission of Shareholders, which selects the members of the board of local POEs and reports to the Municipal Assembly on an annual basis. If one or more municipalities are shareholders in a local enterprise,

then each Municipal Shareholder Committee has the right to select one director (Government of the Republic of Kosovo, 2009).

At the central level, the Government of Kosovo has the exclusive right to exercise shareholder rights in central POEs, while decisions are implemented by the Minister of Economic Development which reports to the Assembly of Kosovo on an annual basis.

The last link in the enterprise management chain is the company officials who are responsible for managing and achieving the annual targets set by the officials themselves and approved by the board of directors.

The board, as the main body of POEs, has a number of competencies towards POE officials, including starting with their recruitment, salary setting, and up to dismissal. The most problematic issue regarding the powers of the board over POE officials is considered in Article 21.1 Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) which allows the board to dismiss officials by majority vote with or without a statement of reasons (except for the Internal Audit Officer). Article 21.1 makes management highly dependent on the board and at the same time makes it extremely difficult for management to reject board decisions that may be contrary to the interests of the company. Such a provision is contrary to the labor law, as according to the labor law the employer is obliged to hold a meeting with the employee in order to explain the termination of the employment contract. Public enterprises operate based on the business plan which plan is approved by the board and monitors the performance of the enterprise in order not to deviate from the objectives of the enterprise set out in this plan. If the board finds that the performance of the enterprise has deviated from the goals set out in the business plan, then it shall hold the executive director of the enterprise accountable for the causes of the deviation.

Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) does not provide for the participation of employees in the boards of public enterprises because the boards make confidential decisions and employees cannot discuss strategic issues of the enterprise. Participation is considered problematic especially when the board could make decisions against the interests of the employees. In the example of Kosovo where boards are politicized to ensure the independence of the employee representative on the board, the law could apply the German model where the employee representative is directly elected by the company employees. Employee representation on the board can also be used as an opportunity to gain employee support in the process of restructuring or privatizing POEs.

The status of employees in POEs is regulated by Law 03/L-212 on work (Assembly of the Republic of Kosovo, 2010), while the recruitment, salary level, or promotion of employees is done by the officials of the enterprises based on the internal regulations of the respective enterprises.

According to Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a), POEs are any enterprise whose ownership is estimated to be more than 50% owned by the Republic of Kosovo or one or more public authorities of

the Republic of Kosovo. However, the same law allows the sale of government shares in case the government decision is approved by a simple majority of votes by the Assembly of the Republic of Kosovo. If the Government of Kosovo decides to sell more than 50% of the shares of a public enterprise, it can no longer be treated as a public enterprise and the remaining shares must be governed by Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a)⁶. Central POEs in Kosovo are monitored by the PMUPE which operates as a department in the Ministry of Economic Development, while POEs are monitored separately by each municipality. The PMUPE supports the Minister of Economic Development in the exercise of duties and responsibilities to POEs and in the capacity of the observer has the right to participate in board meetings. Since the work of the PMUPE has been well evaluated by the officials of the central POEs, the Government with decision No. 02/26 of 2008 allowed the Minister of Economic Development to increase the number of employees.

In addition to monitoring, PMUPE and POEs have legal obligations for transparency to the public. According to Article 14.3 of Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) it is required each public enterprise after the approval of the annual financial statements to publish on the Internet a statement that represents the realization of the objectives of the POE in comparison with the defined goals and bylaws in force. Article 31.3 defines the board of the enterprise as responsible for publishing the annual report on the website. Except for the enterprises which are responsible for publishing the reports, Articles 31.3 and 32 make the PMUPE responsible for the publication of these reports as well as the publication of a financial statement for all central public enterprises.

According to OECD principles and Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a), all POEs are required to adopt and implement a Code of Ethics and Corporate Governance. The Code of Ethics is of great importance as it not only provides guidance on standards of conduct but must also contain a program that protects persons within the company who report cases of abuse of company assets. Based on interviews with officials, two of the 22 POEs did not have a Code of Ethics while 5 of these companies notified them orally. Whereas, 3 of the interviewed enterprises do not have a Corporate Governance Code. Article 29 of Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) provides that each POE test and carry out a report that measures customer satisfaction on an annual basis.

5. CONCLUSION

The government has no obligation to finance public enterprises unless authorized to do so by law approved by the Assembly of the Republic of Kosovo, and the government should not transfer the profits of one public enterprise to another. Since the Government of Kosovo has publicly supported the introduction of the private sector in

these industries, a concrete case of such a process will be the privatization of PTK, which created two companies, Telecom and Post of Kosovo. Post of Kosovo was established as a new public enterprise in 2011 with government decision No. 16/53 continued to remain in public ownership, while Telecom of Kosovo is awaiting a privatization process.

The manner of governing and organizing POEs in Kosovo based on the analysis of the data of this study does not represent a good model based on the strong political influence in the appointment of board members and officials of public enterprises in Kosovo who then, on the party and political grounds, they increase the number of employees in the same bodies, which causes damage to the functioning of enterprises.

Therefore, it is necessary for the Government of Kosovo to reform the manner of the selection of boards and increase transparency in the selection process in order to reduce the political influence, publish the biographies of board members, organize more advanced training for the governance of public enterprises, to promote the inclusion of members of the opposite sex on the boards of public enterprises, to ensure that the panel for the selection of directors is independent in the composition of which will have a representative of civil society, the Government to draft an urgent plan for the gradual reduction of the number of employees in public enterprises as in case of their privatization the gradual reduction of the number of employees would avoid mass layoffs and consequently the increase of the number of social cases in Kosovo.

Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a) specifies the deadlines for the publication of documents which include: the organizational structure of the POE, the review of the business and financial performance, court proceedings, and the transactions mentioned in Articles 31 and 32 of Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a).

The Assembly of the Republic of Kosovo should exercise more massive control and oversight over the Government and POEs both in the way they are managed and in the integration of government strategies.

The Assembly of the Republic of Kosovo should initiate legal changes to clarify the political independence of board members for central POEs.

This study is of great importance for future research as consider the public enterprises as part of the experienced staff in POEs is expected to retire and due to lack of staff, to draft a long-term plan regarding the employment, preparation, and training of new staff in vocational training centers, the University of Prishtina and other private universities. Recruiting new staff is to be done anonymously to avoid political influences and not only through interviews but also through various forms of testing.

Finding a way for employees to be rewarded with bonuses that influence them to increase enterprise efficiency.

Adopting a special law that will oblige all public enterprises to publish on their official websites all information, such as the annual report, financial report, auditorium report, etc.

⁶ See Article 40 of Law No. 03/L-087 on public enterprises (Assembly of the Republic of Kosovo, 2008a).

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APPENDIX

Table A.1. Central public enterprises

Central public enterprise	Board members with political connections	Political connection	Declaration of assets of the directors of the board	No. of women
Electric power corporation	Musa Misini	Musa Misini was a candidate for MP of the Democratic League of Kosovo (LDK) in the early elections of 2014 and a former mayor of Viti. According to the media, at the time of voting, that board member was retired, having reached the age of 67.	The directors of the Board of KEK, except Fatime Grajcevi, have not yet declared their assets. Petrit Ibraj was appointed by the decision of the Government on August 3, 2020, and four months after his appointment he has not fulfilled this obligation legally yet.	1/4
Kosovo Post	Fadil Aliu	Fadil Aliu was a candidate for deputy from the ranks of the LDK in the early elections for the Assembly of Kosovo in 2017.	None of the directors of the Board have declared their assets, even though 30 days had passed since the day of their appointment.	1/4
Trainkos	Elda Maloku	Elda Maloku is an activist of the Social Democratic League.	N/A	N/A
	Leonard Shabanaj	Leonard Shabanaj, who has been appointed as the Chairman of the Board, was an official in the directorate of education in the municipality of Peja at the time when this municipality was governed by the Alliance for the Future of Kosovo (AAK) and was part of this party.	N/A	N/A
	Ujkan Kameraj	Ujkan Kameraj comes from the Egyptian Liberal Party-PLE, a party that is part of the ruling coalition. Kameraj was also a candidate for MP in the elections of the 2014 central snap by the same party.	N/A	N/A
Infrakos	Brahim Selimaj	Brahim Selimaj, who has been appointed Chairman of the Board, was a candidate for a deputy from the ranks of LDK, in the elections premature of the year 2017 and 2019.	N/A	N/A
	Ramiz Rrustaj	Ramiz Rrustaj was a candidate for member of the Municipal Assembly of Klina in the local elections of 2017 from the ranks of the Democratic Party of Kosovo (DPK). The same according to social networks had joined the ranks of AAK in 2018.	N/A	N/A
Trepca	Esat Peci	Esat Peci was a candidate for Mayor of Mitrovica from the AAK. He was elected as a member of the Municipal Assembly of Mitrovica in the 2017 local elections. Esat Peci was initially appointed director of the Board of Supervisors of Trepça by the Government Haradinaj in 2018. Upon arrival in power of the Kurti Government, in February of by 2020 this board was fired. A few months after his dismissal, Esat Peci was appointed again director of the Supervisory Board with the decision of the Hoti Government.	Only one director, Safet Sadiku, has not declared the assets of his.	1/4
NPH Ibër-Lepenc	Afërdita Llumina	KDI found that Afërdita Llumina was a member of the LDK. According to the social networks of the political entity LDK, Afërdita Llumina except that she was an LDK activist, 2019 was elected chair of the presidency of Sub-Branch VII of Branch I of LDK in Kodra e Trimave.	Only one director, Berat Lushtaku, has declared her property.	N/A
Management Company	Selatin Retkoceri	Selatin Retkoceri was a candidate for deputy from Movement Vetëvendosje in the early elections Parliamentary Assembly of 2017. Retkoceri was also a candidate for mayor of Lipjan/Lipljan municipality in the local elections In the year 2017 the political entity Vetëvendosje. The same in 2019, as it was appointed The same in 2019, as it was appointed director board, had joined the DPK.	Three board directors have not declared assets (Selatin Retkoceri, Gazmend Bytyqi, and Bashkim Krasniqi).	N/A

Source: Berisha (2021, p. 18).