

Policy and Legal Advice Centre (PLAC III)

Terms of Reference (ToR) for a Short-Term assignment

Technical assistance requested:	1 (one) Senior Non-Key Expert, Cluster 1, Fundamentals; Personal Data Protection
Project Title:	Policy and Legal Advice Centre (PLAC III), Serbia
Ref:	EuropeAid/139295/DH/SER/RS
Service Contract No.:	(CRIS) 2018/404-529
Main beneficiary:	The Ministry of European Integration of the Republic of Serbia and enhanced negotiating structure in line with the new EU methodology
Target Beneficiaries:	The Ministry of European Integration, the Coordination for Conducting Negotiations on the Republic of Serbia's Accession to the European Union and Team for Support to Negotiations negotiation groups, the Ministry of Justice, the Ministry of Interior and other line ministries as well as state institutions to which the Law on Personal Data Protection applies, the Commissioner for the Access to Information of Public Utility and Personal Data Protection.
Budget Line /Expert Category:	One Senior Non-Key Expert
Duration of the assignment:	25 working days (WD), from December 2021 to May 2022

1. Relevant background information

Background information in relation to PLAC III project:

The scope of PLAC III project is to provide support to relevant national institutions in charge of alignment of national legal acts with the Union *acquis* and to contribute to further building of capacities of relevant national structures for successful carrying out of accession negotiations.

The PLAC III project should achieve two results:

RESULT 1- Enhanced compatibility of national legislation with EU legislation and its effective implementation

RESULT 2 - Enhanced capacities of the relevant national structures for successful carrying out of accession negotiations

In general, the project aims at fostering the process of accession negotiations of the Republic of Serbia by supporting the effective alignment of national legislation with the Union *acquis* and its implementation and by further building the capacities of involved carriers of the EU integration process in the Republic of Serbia. After completion of screening process in 2015, Serbian public

administration has entered into much more demanding and obliging exercise of accession negotiations, whereby each step and every decision should result in approaching actual membership in the EU. For this scenario to happen in accordance with planned dynamics, preparedness, and adequate institutional capacity of public administration with highly competent staff is of crucial importance. In the core period of the negotiations, PLAC III Project shall support domestic line institutions and the negotiating structures both in performance of quality operational work in relation to harmonisation process and in the effective coordination during various stages and phases in the process for different negotiation chapters.

2. Background information in relation to Cluster 1, Fundamentals - Judiciary and fundamental rights

The enabling legal and institutional environment for the protection and enjoyment of basic human rights and freedoms is the cornerstone of the accession requirement with respect to the Chapter 23 of the negotiation process (Cluster 1 under the new methodology of negotiation). The joint position of the European Union (EU) with respect to Chapter 23 notes the need for Serbia to strengthen the regime of basic human rights protection (Joint Position of the EU with respect to Chapter 23, 10074/16 ELARG 78, Brussels, 5 July 2016, p. 25). In this respect, the *National Programme for the Adoption of the Acquis Communautaire* sets out a general framework for the harmonisation and strengthening of the human rights standards in the area of political and civil rights, economic and social rights, as well as cultural rights and minority protection (third revised version of the National Program, 2018, pp. 70-76). The *Action Plan for Chapter 23* underscores that Republic of Serbia (RS) is: "fully committed to the process of European integration and aware that this process requires substantial and fundamental changes in the judiciary, the anti-corruption system and the protection of fundamental rights, both at the normative and the implementation level" (p. 3).

The joint position of the EU with respect to Chapter 23 sets out baseline benchmarks with respect to the **right to privacy/personal data protection**, namely: 1) Government is committed to the enactment of a new Law on Personal Data Protection in compliance with the EU acquis and to monitoring its effective implementation, as well as to taking corrective measures deemed necessary to ensure the compliance with the Law; 2) Government is committed to strengthening the capacity, institutional and financial independence of the Commissioner for the Access to Information of Public Utility and Personal Data Protection (Joint position, p. 18).

Consequently, the Action Plan (AP) for Chapter 23 envisages specific actions to the baseline benchmark regarding the right to privacy/personal data protection as defined under:

- AP Chapter 3.9.1.1. - Capacity building trainings for the implementation of the new Law on Personal Data Protection.
- AP Chapter 3.9.1.5. - Promotional public activities on rights and duties arising from the new Law on Personal Data Protection; and
- AP Chapter 3.9.1.6. - Monitoring the implementation of the new Law on Personal Data Protection.

The new Law on Personal Data Protection (Official Gazette of the RS, No. 87/2018) was enacted on November 9, 2018 and came into force on August 22, 2019. In the assessment of the European Commission, the new Law is "mostly aligned" with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation - GDPR) (European Commission: *Serbia 2020 Report*, Brussels, 6.10.2020 SWD(2020) 352 final p. 32) and with Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal

offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

However, the implementation of the Law thus far has revealed certain shortcomings which might call for an additional legislative attention. This particularly pertains to the rules governing personal data protection which is acquired through the system of video surveillance cameras - CCTV. As noted in the Opinion of the Commissioner:the Law on Personal Data Protection does not contain specific provisions on the conditions for processing personal data using video surveillance." (Opinion of the Commissioner: 073-12-1447 / 2019-02 dated 1 November 2019). The issue of acquiring personal data through CCTV has gained additional attention with the emergence of the CCTV system having an option of facial recognition as well as legislative initiative seeking to establish the legal basis for the instalment of such video cameras in public areas. Consistent with the overall commitment of the Government to the regime of human rights and fundamental freedoms arising from Chapter 23, careful consideration in the balancing of public interest and personal data protection is thus required, before final deliberation as to the feasibility as well as the extent of the use of CCTV with facial recognition is made. On October 6, 2021, the European Parliament called for a ban on police use of facial recognition technology in public places, and on the so called "predictive policing" i.e., using Artificial Intelligence (AI) tools in efforts of profiling potential criminals before a crime is committed (Resolution 2020/2016(INI)). Therefore, the analysis of the Law is deemed necessary, in order to determine whether a legal intervention may be appropriate and necessary to address the issue of personal data protection with respect to the use of CCTV, including the one with the facial recognition option.

In addition, the analysis of the Law on Personal Data Protection shall determine whether the Commissioner's authority needs to be further strengthened, in particular with respect to the use of CCTV surveillance and the power of the Commissioner to instigate legislative changes deemed necessary to further strengthen personal data protection. Currently, the Commissioner lacks such a power and formally is not considered a stakeholder in the so-called horizontal consultation (consultation among line ministries and other state institutions) in the process of preparing draft laws (Art. 44, Law).

The analysis will take into consideration the role of the Ombudsman/Protector of Citizens in this respect as well as the Guidelines issued by the Commissioner in 2019¹, concerning video surveillance, processing of sensitive data and other specific matters regulated in the Law.

The analysis shall be prepared also against the background of relevant international documents addressing the issue of personal data gathering, processing and storing by the use of CCTV, including the recent Council of Europe *Guidelines on Facial Recognition* (Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Convention 108+; T-PD(2020)03rev4, 28 January 2021), legislation and documents of the EU as well as legislation and practices of the EU and other European countries.

At present, there is no on-going or planned assistance projects for the activities covered by this ToR.

3. Description of the assignment:

3.1 Specific objectives

The specific objective of this assignment is to provide the expert assistance to the targeted beneficiaries in order to increase their overall capacity to ensure the enhanced compatibility of

¹ <https://www.poverenik.rs/images/stories/dokumentacija-nova/Publikacije/Publikacija4ZZPL/4PublikacijaZZPL.pdf>.

the national legal system with EU legislation and its effective implementation as well as for the successful carrying out of accession negotiations and fulfilling the benchmarks set by the EC.

In the scope of this objective, these activities are foreseen:

- Conduct an analysis of the Law on Personal Data Protection against the background of the international standards, regional and European best practices and provide recommendations with a view to:
 - strengthening the legal and institutional framework governing the protection of personal data acquired through CCTV;
 - determining the feasibility of introducing CCTV with facial recognition in the Law by considering the balancing of public interest and personal data protection as well as the extent of the use of CCTV with facial recognition
 - determining if there is a case for the authority of the Commissioner in the overall regime of personal data protection to be further strengthened, in particularly with respect to the use of CCTV, including the one with facial recognition.
- Propose amendments to the Law by drafting law provisions incorporating the above recommendations
- Holding a workshop for the targeted beneficiaries to present the results of the analysis and present the best practices related to the data protection regime of the selected EU and other relevant European countries.

3.2 Requested services

Senior NKE in the area of human rights approach in legislative development shall

1. Prepare a legal and institutional analysis of personal data protection framework in RS especially in regard to the Law on Personal Data Protection (the Law).
2. Provide recommendations for the improvement of the Law and the recommendations on whether the role of the Commissioner could be strengthened through the Law.
3. Propose the amendments to the Law by drafting the relevant provisions in light to the above recommendations.
4. Prepare a workshop for the targeted beneficiaries to present the results of the analysis and the corresponding recommendations including the practices of the selected EU and other relevant European countries in the field.

3.3 Outputs

Senior NKE is expected to deliver the following outputs:

1. A legal and institutional analysis of Personal Data Protection framework drafted
2. Recommendations for the improvement of the Law and the recommendations on the role of the Commissioner drafted
3. Amendments to the Law drafted
4. Workshop held.

3.4 Reporting

The SNKE shall provide the following reports by using the templates of the Project:

- Final Mission Report, not later than one week after the completion of tasks under this assignment. This report will include the description of all activities and outputs provided by the SNKE in the context of this assignment.
- A brief interim report - only upon request of the PLAC III team: the TL and/or KE2

Submission of reports:

- A draft final mission report shall be submitted to the Team Leader of the Project for review and comments by the end of the mission.
- The final version of the final mission report, prepared in the agreed quality, shall be submitted to the Team Leader of the Project for review, comments and final approval.
- All reports shall be signed by the SNKE and the Team Leader, responsible for endorsing the reports.
- The reports and all prepared documents shall be submitted in hard copy and electronic version to the Team Leader of the project.

3.5 Specifics

The SNKE shall work under the guidance and follow the instructions of the Team Leader. The SNKE shall collaborate with the project team, other experts involved and representatives of the relevant beneficiary institutions.

Each of the short-term missions, the timing and duration shall be agreed with the Beneficiary and the PLAC team prior to each planned mission.

3.6 Expert input

3.6.1 Total working days

25 working days (WDs) in total have been planned for this assignment.

3.6.2 Period of the assignment and starting day

It is expected that the work will be performed in the period from December 2021 until May 2022. The precise starting date will be confirmed at the later stage.

3.6.3 Location/Place of assignment

The SNKE has to deliver 100% of the input in Serbia, unless otherwise agreed due to extraordinary circumstances (i.e. COVID-19). Home-based days are subject to a prior approval by the EU Delegation Project Manager responsible for the PLAC III project.

3.6.4 Working language

English

4. Experts' Profile – Senior NKE (25 working days):

4.1 Qualifications and skills (25 points)

- A level of education, which corresponds to completed university studies of at least 3 years attested by a diploma such as law, political science, international relations, relevant to the assignment

- Computer literacy
- Be proficient in report drafting
- Excellent communication and analytical skills
- Proficiency in English language
- Be independent and free from conflicts of interest in the responsibilities they take on

4.2 General professional experience (25 points)

- At least 8 (eight) years of general postgraduate professional experience related to the EU acquis gained in an EU member state, a candidate or potential candidate state.

4.3 Specific professional experience (50 points)

- At least 3 (three) preferably 5 (five) years of postgraduate professional experience in supporting legislative reforms by drafting policy documents and/ or legislation related to human right and/or personal data protection gained in an EU member state, candidate or potential candidate country
- Postgraduate professional experience related to governing personal data protection issues will be an asset.
- Knowledge of Serbian legal system will be an advantage

5. Applications

Applications (EU format CV and application letter in English) need to be submitted by e-mail to mbayard@dmiassociates.com and mail to akhani@dmiassociates.com no later than November 18, 2021, 17:00 hrs, titled:

“Application for the position – Senior Non-Key Expert on Personal Data Protection”

References must be available on request. Only short-listed candidates will be contacted. Pre-selected experts will be requested to sign Statement of Availability (SoA) in which they acknowledge and confirm the availability to accomplish this assignment within the indicated period, at the indicated starting date and within the number of working days requested.

The Project is an equal opportunity employer. All applications will be considered strictly confidential.

Advertised posts are not available to civil servants or other officials of the public administration in the beneficiary country, Serbia.

For more information, please contact Project Manager at DMI Associates Marion Bayard: mail to mbayard@dmiassociates.com or Arianne Khani mail to akhani@dmiassociates.com