

Policy and Legal Advice Centre (PLAC III)

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

Technical assistance requested:	One Senior Non-Key Expert in the area of Negotiating Ch. 16, Taxation, tax base erosion and tax evasion through misuse of shell companies
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 the Negotiating Team
Target Beneficiaries:	Negotiating Group Ch. 16, Tax Administration
Budget Line / Expert Category:	One Senior Non-Key Expert
Duration of the assignment:	20 working days (WD) from April 2023 until December 2023

1. Relevant background information

Background information in relation to the PLAC III project:

The scope of the 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 the 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 the successful carrying out of accession negotiations

In general, the project aims to foster 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. Upon completion of the screening process in 2015, the Serbian public administration has entered into much more demanding and obliging exercises 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, adequate institutional capacity of public administration with highly competent staff are of crucial importance. In the core period of the negotiations, the PLAC III project shall support domestic line institutions and the negotiating structures both in the performance of quality operational work in relation to the 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 Ch. 16 – Taxation

EU rules on taxation cover value-added tax and excise duties as well as aspects of corporate taxation. They also deal with cooperation between tax administrations, including the exchange of information to prevent tax evasion.

Serbia is moderately prepared in the area of taxation. Good progress was made with the amendment of the law on excise duties removing long-standing discrimination in the taxation of imported alcohol, and with further activities in the implementation of the programme of transformation of the Tax Administration. Last year's recommendations were thus partially implemented (European Commission, Serbia Country Progress Report 2022, SWD(2022) 338 final, p. 103)

In the coming year, Serbia should:

- Continue with the implementation of the Tax Administration Reform Programme in order to streamline the Tax Administration's activities while ensuring sufficient human and IT resources for this purpose, improve tax collection and combat the informal economy;
- Make progress towards legislative alignment in the areas of VAT, excise duties and direct taxation (Ibid.)

EU member states are faced with the appearance of entities that operate as shell entities, therefore, distinguishing between business entities with real commercial operations from legal entities with no minimal substance and economic activity for purposes of fair enforcement of tax law becomes challenging.

“While there can be valid reasons for the use of such entities, there is a need for further action to tackle situations where taxpayers evade their obligations under tax law or act against the actual purpose of tax law by misusing undertakings that do not perform any actual economic activity. The outcome of such situations is to lower the taxpayers' overall tax liability. Such an outcome leads to a shift of the tax burden at the expense of honest taxpayers and distorts business decisions in the internal market” (See Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU).

The European Union (EU) has made several efforts to impose stricter rules on the use of shell companies. In December 2021, the European Commission presented a directive on preventing shell companies from misusing their structure for tax purposes ('Unshell'). The proposal introduces a 'filtering' system for EU company entities, which will have to pass a series of gateways related to income, staff and premises, to ensure there is sufficient 'substance' to the entity. Those entities that are deemed to be lacking in substance are presumed to be 'shell companies' and, if they are unable to rebut this presumption through additional evidence regarding the commercial, non-tax rationale of the entity, they will lose any tax advantages granted through bilateral tax treaties or EU directives, thereby discouraging their use.

Directive 2011/16/EU on administrative cooperation in the field of taxation (as last time amended by Council Directive (EU) 2021/514) governs the exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States including cross-border arrangements and reporting requirements to the tax administration, the tax administration's assessment and timely exchange of the data between tax administrations including on entities that may qualify as shell companies.

Council Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market combats base erosion and profit shifting through anti-abuse rules against tax avoidance, controlled foreign company (CFC) rules, exit taxation rules and interest limitation rules.

In addition, the EU legal framework that can be further tied to shell entities consists of Council Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax, Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures and Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law.

The national legal framework governing tax evasion and tax advantage abuse does not deal with shell companies as a specific subject-matter. Furthermore, the legal framework does not provide specific provisions reflecting the *acquis* on administrative cooperation and mutual assistance. However, the Law on Tax Procedure and Tax Administration governs tax fraud, undermining tax collection and tax audit, while, Criminal Code prescribes tax evasion and avoidance of withholding tax as criminal conduct. In addition, the Republic of Serbia is a party to 63 international agreements on avoiding double taxation related to personal income tax, corporate tax and property tax.

The Government of the Republic of Serbia adopted the Negotiating Position for Chapter 16 - Taxation on May 28, 2021.

The Public Finance Management Reform Program for the period 2021-2025 was adopted by the Government of the Republic of Serbia on June 24, 2021. The Program aims at strengthening the legal, and institutional framework for public finance management in the Republic of Serbia in compliance with the EU, OECD and other international standards.

The Serbian Tax Administration (STA) is the competent authority within the Ministry of Finance (MF) in charge of the assessment, audit and collection of public revenues and suppressing any form of tax evasion. The Tax Police, as a separate sector in the Tax Administration of the Republic of Serbia was established by the Law on Tax Procedure and Tax Administration and started to operate in 2003. In accordance with Article 135 of the Law on Tax Procedure and Tax Administration, the Tax Police is authorised to detect tax crimes and their perpetrators.

The assistance of experts is required to help the STA in assessing legal gaps against the EU rules applicable to fighting tax avoidance by means of shell companies and related cross-border tax administration cooperation, provision of recommendations to improve the legal framework for combating the misuse of shell companies for tax avoidance, abuse of tax benefits, tax base erosion, profit shifting and to establish appropriate criteria and tools for the early detection of shell entities based on best practices of EU Member States.

At present, there are no ongoing 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 assist the STA to conduct the legal gap analysis (LGA) of the legislative framework in force against the EU legislation applicable to preventing fraud and/or misuse of tax advantages through shell companies and related cross-border administrative cooperation of tax authorities with a description of best practices from selected Member States and recommendations for its improvement.

The recommendations provided by the selected expert shall concern, but not limited to, the following issues:

- Setting criteria and procedures for filtering the shell companies from entities with minimum economic substance and discharging the burden of proof (“Unshelling”);
- Setting appropriate indicators and their risk ranking;

- Eliminating gaps/reducing exposure of rules in force to be exploited and/or prescribing new proportional tax consequences available to tax authorities to fight tax avoidance and tax evasion through misuse of shell companies;
- Withdrawal of tax benefits to tax the relevant income against the misuse of shell companies in case of entities covered by benefits of international agreements that provide for the elimination of double taxation;
- Tax treatment of offshore entities for the purposes of early detection of shell companies and application of rules;
- E-invoices and linking of downloaded data in order to identify shell companies (how the download is performed, at what stage, and which data is available to the Tax Administration for the purpose of detecting shell companies);
- Conducting administrative cooperation with the EU tax authorities in relation to shell companies.

On the basis of the LGA's findings, and taking into account the recommendations provided, the selected expert shall assist the STA in drafting the Guidelines on Risk Ranking Indicators to be used by the Tax Police and Tax Audit and Risk Department of the STA.

For the purposes of the assignment the selected expert shall take into account the Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU.

3.2 Requested services

The Senior NKE is expected to provide the following services:

1. Assist the STA in the development of the LGA of the legislative framework in force against the EU legislation applicable to misuse of tax advantages through shell companies and related administrative cooperation of tax authorities with a detailed review of best practices from selected EU Member States (preferably from the OECD members);
2. On the basis of the findings of the LGA and best practices report, provide the beneficiary with recommendations for improving the Serbian legislative framework for combating base erosion and profit shifting (BEPS) and anti-abuse rules to prevent tax avoidance through shell companies and on setting administrative cooperation between the competent tax authorities to combat the misuse of shell entities in compliance with the applicable EU legislation;
3. Assist the STA in drafting Guidelines on Risk Ranking Indicators to be applied by the Tax Police and Tax Audit and Risk Department of the STA for filtering the shell companies from entities with minimum economic substance ("Unshelling");
4. Prepare and hold a workshop/training and present the outputs of the assignment.

3.3 Outputs

The Senior NKE is expected to deliver the following outputs:

1. An LGA report with a detailed review of best practices, drafted;
2. Recommendations for improving the Serbian legislative framework for combating BEPS, through misuse of shell companies, drafted.
3. Guidelines on Risk Ranking Indicators for "Unshelling", drafted.

4. Workshop/training, held.

3.4 Reporting

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

- A Final Mission Report, no later than 1 week after the completion of tasks under this assignment. This report will include a description of all activities and outputs provided by the SNKE in the context of this assignment.
- A brief interim report - only upon a request of the PLAC III team: TL and/or KE 2

Submission of reports:

- A Final Mission Report prepared in the agreed quality shall be submitted to the Team Leader of the Project for review, comments and final approval.
- The 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 a 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, as well as the timing and duration shall be agreed upon with the Beneficiary and the PLAC III team prior to each planned mission.

3.6 Expert's input

3.6.1. Total working days

20 working days (WDs) in total have been planned for Senior Non-Key Expert for this assignment.

3.6.2 Period of the assignment and starting day

It is expected that the work will be performed through several missions during the period from April 2023 until December 2023. However, the starting date will be confirmed at a later stage.

3.6.3 Location/place of assignment

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

3.6.4 Working language

English

4. Expert's Profile - Senior NKE (20 WD):

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, economics or similar, relevant to the assignment;
- Computer literacy;
- Proficiency in report drafting;
- Excellent communication and analytical skills;
- Proficiency in the English language;
- Independence and freedom from conflicts of interest in the undertaken responsibilities

4.2 General professional experience (25 points)

At least 8 (eight) years of general postgraduate professional experience related to the Union acquis, gained in an EU Member State, a candidate or a potential candidate country

4.3 Specific professional experience (50 points)

- Postgraduate professional experience related to implementing the Union acquis on combating tax base erosion and profit shifting (BEPS) activities, harmful tax practices and illicit financial flows.
- Postgraduate professional experience with knowledge of the EU corporate law (e.g. rules governing formation, capital and disclosure requirements and operation of companies).
- Postgraduate professional experience in administrative cooperation in the field of taxation in accordance with the Union acquis 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 akhani@dmiassociates.com no later than 28 April 2023, 17:00 hrs, titled:

“Application for the position - Senior NKE in the area of Ch. 16, Taxation, tax base erosion and tax evasion through misuse of shell companies”

References must be available on request. Only short-listed candidates will be contacted.

Pre-selected experts will be requested to sign a Statement of Availability (SoA) in which they acknowledge and confirm their 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 the Project Manager at DMI Associates Marion Bayard: mbayard@dmiassociates.com or Arianne Khani: akhani@dmiassociates.com.