

Comments on the Draft Law on Amendments and Supplements to the Law on Defence and the Draft Law on Amendments and Supplements to the Law on Serbian Armed Forces

Belgrade Centre for Security Policy (BCSP) would like to take this opportunity to provide comments on specific amendments that it finds controversial or unclear. BCSP would also like to offer, together with appropriate explanations, suggestions for changes to individual articles that were not envisaged in the Draft Law on Amendments and Supplements to the Law on Defence and the Draft Law on Amendments and Supplements to the Law on Serbian Armed Forces which BCSP believes are necessary.

Comments on the Draft Law on Amendments and Supplements to the Law on Defence

Article 1 of the Draft Law - Article 4 of the Law on Defence

Amending Article 4, paragraph 1 item 9 updated the definition of defence interests. Given that the process of drafting the new national security strategy and the new defence strategy of the Republic of Serbia is under way, the question arises as to why the amendments are preceding the adoption of the above documents.

Articles 16 to 19: Inspection in the Area of Defence

The fact that it is nowhere defined who appoints and dismisses the Director (Chief Inspector), and for what period of time, represents a significant deficiency in the legislative regulation of the operation of the Defence Inspectorate. In practice, the position of Director of the Inspectorate is a formation post that requires the rank of General; consequently, it is a person that is appointed by the President on the proposal of the Minister of Defence for an unlimited period of time. BCSP is of the opinion that, given the importance of the Defence Inspectorate, which should be in charge of the internal control of the entire defence system, the position of Director should not be a formation post, and that it should instead be specially regulated by law. This is even more important due to the fact that the Defence Inspectorate is a state administration body within the Ministry of Defence and not an internal unit of the Ministry or a unit of the Serbian Armed Forces.

BCSP continues to advocate for the adoption of a legal provision according to which the Director of the Defence Inspectorate would be obliged to submit an annual report to the National Assembly, i.e. to the relevant Committee. Such a solution has already been introduced for the post of Inspector General of Military Services. Direct reporting to the National Assembly would significantly strengthen the democratic control and oversight over the Ministry of Defence and the Serbian Armed Forces by linking internal and external control and oversight bodies.

Suggestion:

The Law should be supplemented by Article 16a, which would require that Director of the Defence Inspectorate is appointed by the Government or the President of the Republic, for a period of five years. It is necessary to explicitly specify the conditions under which the Director of the Defence Inspectorate may be relieved of duty, much like in Article 55, paragraph 3 of the Law on the Military Security Agency and the Military Intelligence Agency, which regulates the requirements for dismissal of the Inspector General of military security services.

Also, Director of the Defence Inspectorate should be obliged to submit a regular annual report to the National Assembly on the work of the Defence Inspectorate and the findings established in the course of the reporting period, as well as on significant violations of independence and unlawful influence on the work of inspectors and other persons authorised to carry out inspection supervision activities.

Article 18 of the Draft Law - Article 62 of the Law on Defence

In the proposed Draft Law, Article 62 was supplemented by adding paragraph 3, which stipulates the obligation of other companies (which are not of importance for the defence), other legal entities and entrepreneurs to provide the Ministry of Defence with data relevant to the defence upon request. BCSP finds it problematic that the Law does not clearly define which data are relevant for the defence. As a consequence, this provision can be understood too broadly, giving the Ministry of Defence the power to collect, without limitation and a clear need, information that represents business secrets or personal data.

Suggestion:

It is necessary to provide a precise definition in the Law as to which data are considered data of importance for the defence, and the conditions under which the MoD is allowed to request them from companies, legal entities and entrepreneurs. It is also necessary to supplement the proposed paragraph 3 of Article 62 with a provision concerning the protection of data obtained from third parties (companies, legal entities and entrepreneurs), i.e. on the prevention of their unauthorised access or disclosure.

Articles 71 and 71a of the Law on Defence

BCSP finds that Articles 71 and 71a of the Law on Defence are obsolete, i.e. that they are not fit for a democratic society. They are also potentially in conflict with Article 73 of the Constitution of the Republic of Serbia which guarantees the freedom of scientific creation, as well as Article 46 (freedom of thought and expression), Article 51 (right to be informed), Article 72 (autonomy of the university), and Articles 83 to 83 (freedom of entrepreneurship and market position).

The main problem is the vague formulation of the scientific-research areas “of importance for the defence, security and general interest of the Republic of Serbia”. In practice, this formulation can be interpreted too widely, as was the case in the Draft Regulation on the fields of scientific and other research relevant to the defence of the country and the procedure

and requirements for granting approval for performing such research jointly with foreign persons, or for the needs of foreign persons (2017), according to which practically any research in the field of natural and social sciences can be proclaimed as being “of importance for the defence”.

A too-wide definition of scientific and research fields that are important for the defence is not practical in terms of use of the capacities of the Ministry of Defence, and it does not facilitate the development of scientific research activity in the Republic of Serbia. Namely, consistent application of Articles 71 and 71a would mean that:

- 1) Research institutes, faculties and organisations will be obliged to submit potentially all their data to the Ministry of Defence, which would impose a disproportionate burden on them, especially as it is unclear what the MoD would be allowed to do with the obtained data. This would also impose a heavy burden on the organisational unit of the Ministry that would be responsible for receiving, processing and analysing all the submitted data.
- 2) Given the limited domestic funding assigned for research, and the orientation of domestic research centres toward foreign sources of financing (e.g. European Union programmes), most research carried out in the Republic of Serbia would have to wait for the approval of the Ministry of Defence (in accordance with Article 71a, paragraph 2). In this case, too, it is unclear whether the Ministry has the capacity to issue research approvals, and whether it would be expedient to build such capacities in the Ministry.

BCSP understands that the Ministry of Defence has a legitimate interest in encouraging research that would improve the defence policy, material and technical capacities of the defence system, operational capabilities of the Serbian Armed Forces, etc. However, this interest can be achieved in less intrusive ways, such as calls for applications to assign funds for research on issues of importance for the Ministry of Defence and the Serbian Armed Forces, or the organisation of public discussions on specific topics with representatives of the research community.

BCSP agrees that security and counter-intelligence protection of the Ministry of Defence and the Serbian Armed Forces, as well as the critical infrastructure of the Republic of Serbia as a whole, is necessary. This, however, needs to be regulated in a way that is different from the current solution contained in Article 71a of the Law on Defence. The protection of classified information is already envisaged in the Data Secrecy Law and Article 102 of the Law on Defence. **This means that neither domestic nor foreign legal and physical persons can access these data while engaged in scientific and other research.**

Finally, BCSP is advocating the adoption of the critical infrastructure protection law, which would define which facilities and systems are important for the security of the country and how they should be protected.

Suggestion:

Paragraphs 1 to 4 in Article 71 should be deleted.

Article 71a should also be deleted.

Article 20 of the Draft Law - Article 76 of the Law on Defence

The amendment of this Article will allow the associations operating in areas that are of importance for the defence to acquire the status of associations that are of special importance for the defence. It is unclear, however, what the status of an association that is of particular importance to the defence would mean. Will these associations take precedence when allocating funds for projects, in relation to other associations whose activities are also important for the defence? It is also unclear why paragraph 3 was deleted, that is, how the decision on the allocation of funds for the financing of associations' projects and activities will be made.

Suggestion:

BCSP opposes the deletion of paragraph 3 of Article 76. Criteria and procedure for the allocation of funds for the financing of projects and activities of associations that are important for the defence should continue to be prescribed by the Government, at the proposal of the Ministry of Defence.

It is necessary to define, in the law or a by-law, what the status of an association of special importance for defence means, as well as the obligations of the Ministry of Defence towards such associations. At the same time, other associations, whose activity is also important for the defence, should not be excluded from the process of allocating funds that serve to finance projects and activities.

Article 22 of the Draft Law - Article 102 of the Law on Defence

Amendments to the Law provide much more detail in the provision on classified information relating to the defence system. BCSP considers this to be unnecessary, as the Data Secrecy Law already regulates which information can be classified as secret, as well as the procedure for determining the level of secrecy. In this regard, the precise definition of Article 102 can lead to certain types of data being considered secret by default in the application of the law. This is unacceptable, because the procedure for the determination of secrecy refers to specific data, whose disclosure to an unauthorised person would damage the interests of the Republic of Serbia ("if the need to protect the interests of the Republic of Serbia takes precedence over the interest of free access to information of public importance", Data Secrecy Law, Article 8 paragraph 1).

BCSP also points to a potentially problematic solution contained in paragraph 2 of the amended Article, according to which classified information relating to the defence system are to be protected in accordance with the law governing the secrecy of data and "cannot be made available to the public". The above provision can be interpreted to mean that the mark of secrecy can in no way be revoked or that the status of secrecy cannot cease even after the expiry of the legal deadline (contrary to Article 16 of the Data Secrecy Law). The Data Secrecy Law already comprehensively regulates this matter, and it is therefore sufficient to just state that classified information relating to the defence system shall be protected in accordance with the law regulating the protection of data secrecy.

Suggestion:

Added provisions should be deleted and Article 102 should be left in the form that is present in the current version of the Law.

Articles 25 and 28 of the Draft Law - Articles 107a and 107dj of the Law on Defence

The Law currently prescribes that the Military Attorney's Office is a special organisational unit of the Ministry of Defence, whose organisation of work is regulated by the Minister of Defence with the consent of the Government. The envisaged amendment to this Article deletes the word “special” – as explained, in order to create conditions for the Military Attorney's Office to be part of the Secretariat of the MoD. Consequently, the Minister of Defence is given the authority to regulate the organisation of work of the Military Attorney's Office without the consent of the Government. The Ministry of Defence did not clearly explain why it believes that this amendment will enable “better organisation, functioning and more efficient operation” of the Military Attorney's Office. BCSP expresses concern that in this way the independence of the Military Attorney's Office will be reduced, and that it will depend on the Minister of Defence and his level of integrity.

Suggestion:

BCSP invites the Ministry of Defence to either clearly explain to the public the reasons for the above mentioned legislative changes or abandon them.

Comments on the Draft Law on Amendments and Supplements to the Law on Serbian Armed Forces**Article 2 of the Draft Law - Article 18 of the Law on Serbian Armed Forces**

Article 18a introduces item 8a which specifies the authority of the Minister of Defence to adopt a plan for the research and development of NGO funds and regulate the method and procedure of researching the development of production, traffic and procurement of weapons and military equipment for the needs of the Serbian Armed Forces. Unlike in the case of the equipping plan, the Minister is not to adopt the research and development plan on the proposal of the Chief of Staff. Considering the fact that certain scientific and research institutions that operate within the defence system are part of the General Staff (the Military Geographical Institute, the Technical Test Centre), and that the Serbian Armed Forces are the ultimate beneficiary of research and development, with an interest in communicating its needs to the Ministry, the following question arises: why is the General Staff not participating in the drafting of the research and development plan?

Article 9 of the Draft Law - Article 53 of the Law on Serbian Armed Forces

In paragraph 1, which specifies the tasks of the Military Police, it was added that “by decision of the Minister of Defence, the tasks involving anti-terrorist protection and protection of certain persons shall also be performed outside the Ministry of Defence and the Serbian Armed Forces”. The Ministry explained the amendments to Article 53 by the need to align

this Law with the provisions of the new Law on Police. However, what remains unclear is the scope of the Minister of Defence's powers in this regard, i.e.:

- Whether the Minister will determine which persons will be protected outside the Ministry of Defence and the Serbian Armed Forces (or this should be regulated by an appropriate by-law), and
- On what basis the Minister of Defence will independently be making decisions relating to the premises outside the facilities of the Ministry of Defence and the Serbian Armed Forces, where civilian authorities (primarily the Ministry of Internal Affairs) should be in charge of security .

Also, BCSP notes with concern that the Draft Law no longer contains the paragraph 9 of Article 53, which obliges the Military Police to immediately inform the nearest police unit in the case they have to exercise powers over civilians (pursuant to paragraph 7, items 1 and 2 of this Article) or to detain them, and to hand the civilians over to the police for further processing.

Suggestion:

The draft provision stipulating that “by decision of the Minister of Defence, the tasks involving protection from terrorism and protection of certain persons shall also be performed outside the Ministry of Defence and the Serbian Armed Forces” should be deleted. The deletion of paragraph 9 of Article 53 should be revoked.

Article 33 of the Draft Law - Articles 120 and 120a of the Law on Serbian Armed Forces

The Draft Law introduces a new Article, 120a, which regulates the records of persons interested in employment in the Ministry of Defence and the Serbian Armed Forces, for the purpose of admitting civilian personnel to the SAF without a public competition. Although the requirements for employment without a public competition, defined in the Law on the Serbian Armed Forces and the corresponding Regulation, are relatively restrictive when it comes to this type of employment in the MoD and the SAF, BCSP reminds that employment without a public competition involves a high risk of corruption and believes that it is necessary to give priority to public or internal employment competitions, even in the case of employment of unassigned military officers, admission of students on scholarship or employment for a fixed period of time.

Article 149 of the Law on Serbian Armed Forces

Amendments and supplements to the Law on Serbian Armed Forces of 2015 (“Official Gazette of the Republic of Serbia” no. 88/2015) eliminated items 21 to 23, which specified the following as disciplinary offences:

- Taking over the duties of Director or Deputy or Assistant Director in a legal entity without the approval of the competent state authority, or violation of the restriction of membership in the bodies of a legal entity by a professional member of the Serbian Armed Forces;
- Establishment of a company or a public service, and engagement in entrepreneurship by a professional member of the Serbian Armed Forces; and

- Failure to transfer controlling rights in a business entity to another person; failure to submit information to the superior officer about the person to whom the controlling rights have been transferred, or failure to provide the superior officer with evidence of transfer of controlling rights by a professional member of the Serbian Armed Forces.

Regulation of disciplinary liability for the above activities diminishes the risk of conflicts of interest, and it is therefore unclear why those items were deleted. The Law on Serbian Armed Forces stipulates that the regulations governing civil servants shall apply to the rights and obligations of professional military personnel and persons employed by the military, and the Law on Civil Servants provides for disciplinary liability regarding all three offences that have been deleted from the Law on Serbian Armed Forces of 2015. Article 149 of the Law on Serbian Armed Forces should, instead, clearly list all the disciplinary offenses, so that anyone who is applying the Law could more easily recognise a specific activity as an offence.

At the same time, BCSP points out that incompatible activities and the prevention of conflicts of interest in the Ministry of Defence and the Serbian Armed Forces have not yet been adequately regulated.

Suggestion:

BCSP recommends that deleted items 21 to 23 from paragraph 1 of Article 149 be reinstated.

Also, it is necessary as soon as possible to adopt the appropriate by-law which would more precisely define and regulate the conflict of interest of professional members of the Serbian Armed Forces, as well as employees of the Ministry of Defence.