

## **Explanatory Memorandum**

### **I. GENERAL**

#### **1. Introduction**

This order in council (hereinafter referred to as: 'the Decree') seeks to implement the Merchant Shipping Protection Act. The detailed implementation rules are included in the Merchant Shipping Protection Regulations (*Regeling bescherming koopvaardij*) (TBD). The Decree sets forth rules on the following subjects:

- Designation of the sea area to which the Act applies
- Permission procedure per transport to be protected
- Permitted weapons and further rules governing the use of force
- Certification and licensing of maritime security companies
- Protection of personal data

#### *Manner of adoption, preliminary scrutiny procedure*

The rules contained in this Decree concerning the permission procedure, further rules governing the use of force and the processing of video or audio recordings of incidents in which the armed private security officers have exercised their powers to use force on the ship are subject to a preliminary scrutiny procedure at both Houses of the States General (Sections 4(5), 9(9) and 11(6) of the Act). Hence, after obtaining the advice of the Advisory Division of the Council of State, the draft of the Decree will be sent to both Houses. This involves a minor preliminary scrutiny procedure (the controlled delegation referred to in Instruction 2.36 of the Drafting Instructions for Legislation). This means that both Houses will be given the opportunity to comment on the draft before the Minister of Justice and Security can submit the proposal for the adoption of this Decree to the King.

[TBD: preliminary scrutiny of draft Decree by Parliament in due course at the same time as the draft of the Merchant Shipping Protection Regulations, including the Coastguard Form pursuant to Section 4 of the Act, reporting and notification forms pursuant to Section 12 of the Act and designation of parts of the BPM5]

#### **2. Legislative and international law framework**

##### 2.1 Merchant Shipping Protection Act

The Merchant Shipping Protection Act, based on a private member's bill, hereinafter also referred to as 'the Act' or 'the Dutch Act', allows merchant ships flying the Dutch flag to deploy armed private security guards from a maritime security company that holds a licence granted by the Minister of Justice and Security to protect the ships when sailing through the sea area designated in this Decree. These are sea areas with a risk of piracy and where the government cannot offer protection to merchant ships. For the time being, only the Somali piracy area, around the Horn of Africa, has been designated. This area contains strategic navigation routes for merchant vessels. In 2011, the United Nations report first sounded the alarm about the situation in this area and this led to numerous international initiatives such as the establishment of international military support facilities, for example, the Maritime Security Centre – Horn of Africa (MSCHOA/EU NAFVOR).<sup>1</sup> If there is reason to do so, other risk areas may also be designated.

The Act contains five important elements:

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<sup>1</sup> Report of the UN Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia of 24 January 2011 (S2011/30).

- The *first element* concerns the *monopoly on the use of force* which rests entirely with the government both in case of military and private protection. The conditions under which private security guards are authorised to use actual force in the event of an imminent risk of piracy are partly laid down in the Act and partly in this Decree. Together, these rules constitute the legal rules governing the use of force by private maritime security guards. The rules governing the use of force are specifically tailored to the objective of the armed protection (protection of ship and persons on board), the circumstances under which protection will be offered (high seas, day/night, weather conditions, etc.) and the semi-automatic shoulder firearms and associated ammunition designated in this Decree.

The basic principle of the Dutch Act is that the protection of merchant shipping transports through designated sea areas will be offered as far as possible by military personnel, in accordance with the operational concept of the Commander of the Armed Forces. Government protection is, therefore, the first and preferred option. The question of protection provided by private security guards from a licensed maritime security company for a transport through the designated sea area only arises if the requested protection cannot be provided or cannot be provided within a reasonable period of time.

- The *second element* is the *certification, accreditation and licensing* of maritime security companies. Certification and accreditation are internationally accepted forms of self-regulation for companies that provide armed maritime security services ('soft law'). The organisation of the Dutch licensing system is in line with this self-regulation principle. Pursuant to Section 13(2), of the Act, this Decree establishes a set of international standards (ISO standards) and rules of national law that a maritime security company must comply with in order to obtain the certificate, as referred to in Section 1(d) of the Act, which must be submitted along with the application for a licence as referred to in Section 3 of the Act. A certificate may be obtained from an accredited certification body designated by the Minister of Justice and Security (Section 15 of the Act). The accreditation body must be a recognised body as referred to in Article 14 of Regulation (EC) No. 765/2008 of the European Parliament and of the Council or a competent body of a third country which is party to a treaty binding on the Netherlands and which offers an equivalent level of protection as a recognised body (Sections 1(b) and 15 of the Act). Section 13(2) has been inserted in the private member's bill by a memorandum of amendment. This was done because the licensing process has to guarantee that the licence holder complies with various relevant ISO standards as well as the Dutch rules laid down by and pursuant to the Act.<sup>2</sup> Licences are for the time being granted to a maritime security company by the Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport, ILT*) in mandate on behalf of the Minister of Justice and Security.<sup>3</sup>

However, the Decree also contains a provision ('fallback option') for cases in which the applicant submits certificates that have been issued without due regard for Dutch rules. In such cases, the licensing authority (the ILT) will be responsible for conducting an additional verification based on the Dutch rules. An exploratory investigation reveals that certification bodies are still extremely reluctant to get involved with the regulations of flag states during their certification process. For this reason, it seems appropriate to also take into account a scenario in which certificates have been issued without due regard for Dutch rules and where, prior to that, the Minister of Justice and Security was unable to designate a certification body

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<sup>2</sup> In terms of the content, there was a need to break through the closed system of the bill, so that the licence can also be granted on grounds other than international standards, Parliamentary Papers II 2017/18, 34558, No. 13.

<sup>3</sup> In accordance with Section 10:4 of the General Administrative Law Act (Awb) (mandate to a non-subordinate).

pursuant to Section 15(2) of the Act because the certification body did not possess the required accreditation.<sup>4</sup> A technical adjustment is being prepared with respect to the private member's bill to make the provision for such a scenario legally watertight.

- The *third element* concerns the *permission procedure* to be undergone by the shipowner prior to a transport for which it considers protection necessary. For this, the shipowner submits an application to the designated point of contact in this Decree, i.e. the Coastguard Centre, which takes the decision regarding the application for permission, in mandate on behalf of the Minister of Justice and Security. The permission is granted after it is apparent that military protection cannot be provided or cannot be provided within a reasonable period and if all other conditions have been met. This Decree sets out the permission procedure in greater detail. The permission procedure relates to the protection measures that shipowners and the master are obliged to take, under the Act, before and during a transport through the designated sea area. These measures depend on the type of ship, sailing speed and accommodation plan. The Merchant Shipping Protection Regulations designates parts of the so-called 'BMP5' for this purpose. These Best Management Practices to Deter Piracy and Enhanced Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea have been developed and adopted by the sector specially for the designated sea area and include all the reasonably possible protection measures.<sup>5</sup> With the designation of parts of the BMP5 in the aforementioned Regulations, these become legal rules that can be enforced in the event of non-compliance.<sup>6</sup>
- The *fourth element* concerns *government supervision* of the compliance with Dutch legislation by licensed maritime security companies and of the enforcement of this legislation under administrative and criminal law.  
This supervision is organised at various levels.  
For the purpose of allowing government supervision, a report must be submitted to the Minister of Justice and Security after the completion of each transport on which private maritime security is deployed. This obligation is binding on both the team leader and the master. In the context of criminal accountability for the use of force, the master must immediately report to the Public Prosecutor every use of force and every use of handcuffs. Here, there is also an opportunity to provide further clarification for the video and audio recordings, made on the instructions of the team leader by private maritime security personnel when facing an imminent risk of piracy, which are to be mandatorily submitted. In addition, compliance with the conditions associated with the licence issued for the performance of maritime security activities is supervised. This supervision relates to certification and other requirements for obtaining a licence imposed by or pursuant to the Act.
- The *fifth element* concerns the method of dealing with *foreign licences or decisions* that have been issued by an authority of a third state competent hereto for the performance of private maritime security activities on board merchant ships (Section 3(3) of the Act).<sup>7</sup> In the absence of any harmonisation of regulations either at the European or international level, every flag state is, in principle, authorised to regulate armed maritime security in the interest of safety, with all the differences that this entails. This issue was also faced during the drafting of the

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<sup>4</sup> Pursuant to Section 15(2) of the Act, the Minister of Justice and Security only designates a certification body if it holds an accreditation allowing it to issue certificates in accordance with Section 13(2) of the Act.

<sup>5</sup> The BMP piracy measures have been drawn up by a number of important parties from the maritime industry, such as BIMCO, Intertanko, insurers etc. The BMP measures are recommended to the Member States and the maritime sector via an IMO Circular (MSC1/Circ.1339).

<sup>6</sup> The basis for delegation for the regulation of mandatory self-protection measures is included in Section 1(c) of the Act.

<sup>7</sup> An exemption is made for private security services in Article 2(2)(k) of the Services Directive.

private member's bill. For this reason, i.e. the presence of different legal systems, the Act grants the Minister of Justice and Security the authority to lay down policy rules to clarify the relationship between Dutch and foreign licensing requirements.<sup>8</sup> Based on these policy rules, a maritime security company holding a foreign licence can find out about the Dutch requirements it would have to meet in order to obtain a Dutch licence, after which it can also offer its services to shipowners with merchant ships sailing under the Dutch flag.<sup>9</sup> The Dutch licence aims to provide a high level of guarantees for armed private security operations on board ships registered in the Netherlands (Section 3(3) of the Act).<sup>10</sup>

Finally, it should be noted for the record that the Dutch Act does not comprehensively regulate all matters relating to the armed protection of merchant ships.

- Firstly, the Act does not contain any rules regarding the procedure for obtaining military protection on merchant ships. The Act is aimed at obtaining private maritime security if military protection is not possible. However, in the regulations and in practice, these two aspects cannot be seen separately from each other, given the basic principle of the Act ('VPD, unless'). For example, the Coastguard Centre acts as the designated point of contact for both forms of protection. Section 5 of the Act also contains a provision that grants the Minister of Defence the authority to share, if necessary, the information received when security is requested for a transport with the Minister of Justice and Security.
- Secondly, the Act does not contain any rules regarding the so-called 'Vessel Based Armouries' (VBAs), which private maritime security companies can use for storing the weapons and ammunition to be used by them for the security of merchant ships. Sometimes these armouries serve as 'floating hotels' where private maritime security personnel, who are deployed by various licensed maritime security companies, can stay for shorter or longer periods of time. To make it possible to store firearms and ammunition on a ship, Section 5.10 of this Decree refers to contractual agreements providing for periodic inspections and cooperation with such inspections.
- Nor does the Act regulate what needs to be done with the overpowered pirates who have come on board and have been arrested. Both the master and the private security guards are authorised to make an arrest if they catch offenders red-handed in the commission of a criminal offence (Sections 10(2) and 10(3) of the Act). The Act also states that private maritime security personnel are authorised to handcuff arrested persons, if the arrested persons try to evade their arrest or pose a risk to their own life or safety or to the life or safety of others, and if such evasion or risk cannot be prevented in any other way (Section 10(2) of the Act). In addition, the Act stipulates that they must immediately hand over the arrested persons to the master (Section 10(3) of the Act) and that, subsequently, the provisions of Title VIA of Book 4 of the Dutch Code of Criminal Procedure apply mutatis mutandis (including the presentation of the suspect to the public prosecutor or assistant public prosecutor). Of course, the crew or security guards must also ensure that any injured persons receive the necessary medical care. Since it is fair to assume that the private maritime security personnel will leave the ship at the next seaport, it is up to the master and the

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<sup>8</sup> For example, the United Kingdom does not have a legal provision but it has the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances (2015) issued by the Department for Transport.

<sup>9</sup> See Parliamentary Papers II 34558, No. 6, page 4 with regard to the flagging in and out of ships and the level playing field.

<sup>10</sup> For an explanation, see Parliamentary Papers II 2017/18, 34558, No. 13.

shipowner to find a solution for the arrested persons, in consultation with foreign and/or Dutch authorities.<sup>11</sup> They will also be held responsible for any fatalities.

## 2.2 Other relevant acts

### 2.2.1 GDPR/UAVG

Other European and national laws have also been taken into account when developing the bases of delegation of the Merchant Shipping Protection Act in this Decree and in the ministerial regulation. Hence, in a broader sense, the General Data Protection Regulations (GDPR) and the Dutch General Data Protection Regulations Implementation Act (*Uitvoeringswet Algemene verordening gegevensbescherming, UAVG*) are also of significance. Both these legal regulations are relevant for the processing of personal data by private players (maritime security companies, accredited certification bodies and the accreditation body) as well as the government bodies concerned such as the Coastguard Centre, Ministry of Defence, ILT and Public Prosecution Service.

According to the GDPR, the processing of personal data is only permitted if such processing is lawful: there must be a clearly defined purpose for the processing, a basis as referred to in Article 6 of the GDPR and – in the case of the processing of personal data relating to criminal offences or health – the GDPR or UAVG must provide a basis for exception from the general processing ban with respect to these special categories of personal data. If the processing is lawful, it must meet due care requirements such as the use of appropriate security measures, compliance with the data minimisation requirement and ensuring the transparency and quality of the data.

The bases for data processing by private players are laid down in Articles 6(1)(a), (b) and (c) of the GDPR. Insofar as health data or criminal offence data are being processed, Articles 9(2)(a) and (b) of the GDPR and, respectively, Sections 30 and 31 to 33 of the UAVG are also important. The bases for the processing of personal data by public authorities can be found in Articles 6(1)(c) and (e) of the GDPR. The aforementioned sections of the UAVG are also important in the context of licensing and supervision. For the Public Prosecution Service and the bodies charged with the administration of criminal justice, the regime outlined in the Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens*) applies.

Section 11 of the Act is an example of a legal obligation applicable to both private players and government bodies for the processing of certain personal data (video and audio recordings of piracy incidents). This obligation serves various purposes. For licensed maritime security companies, this relates to the processing of the recordings in the context of compliance with the Act, the orderliness of business operations (certification) and being able to render account to the supervisory and enforcement authorities. For government bodies, this relates to the exercise of their powers of supervision and enforcement.

### 2.2.2 General Administrative Law Act (*Awb*)

In addition, the General Administrative Law Act (*Algemene wet bestuursrecht, Awb*) is important for the government for the application of the Merchant Shipping Protection Act and the regulations based thereon. The Awb outlines general rules for the government with respect to the careful drafting and adoption of Awb decisions by (or in mandate on behalf of) the Minister of Justice and Security (in this case, relating to permission, licence, designation), the supervision of compliance and the enforcement under administrative law (including sanction decisions). The Awb also regulates the legal protection against government decisions, at the request of interested parties.

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<sup>11</sup> See the Rotterdam Court ruling of 17 June 2010 (ECLI:NL:RBROT:2010:BM8116) for a case in which the arrest of Somali pirates was carried out by Danish government employees and the pirates were transferred to the Netherlands and convicted on the basis of Section 381 of the Dutch Criminal Code.

### *2.2.3 Labour legislation and working conditions legislation*

The licensed maritime security companies are bound by Dutch labour legislation and Dutch working conditions legislation. The Act seems to assume that private maritime security personnel are 'employed' by the licensed maritime security company (see Section 1(m) of the Act). This means that an employment contract has been concluded with the private security guards to be deployed on ships flying the Dutch flag. At the same time, the Act also seems to imply the existence of other, more flexible employment relationships, such as the hiring of self-employed persons (see Section 1(j) of the Act).<sup>12</sup> This latter interpretation offers greater flexibility for the practical implementation. Furthermore, Dutch working conditions legislation (working and rest times of seafarers and private security guards) also applies to merchant vessels flying the Dutch flag.

### *2.4 European Convention on Human Rights (ECHR) and law of the sea conventions*

This Decree as well as the Merchant Shipping Protection Regulations take into account relevant international treaties to which the Netherlands is a party, such as the ECHR and various law of the sea conventions such as the International Convention for the Safety of Life at Sea (SOLAS), the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).

The ECHR is relevant both for the licensed maritime security companies and the private security officers to be deployed by them as well as for the government bodies responsible for licensing, supervision and enforcement. Specifically, compliance with Articles 2 (Right to life), 3 (Prohibition of torture) and 5 (Right to liberty and security), 6 (Right to a fair trial) and 8 (Right to respect for private and family life and the physical integrity of persons) of the ECHR is relevant in this context. The most important thing is that the legal rules governing the use of force must guarantee a proper balance between the use of force – which must always meet the requirements of proportionality and subsidiarity – and respect for fundamental human rights.

#### *Liability of the Dutch State*

Pursuant to the ECHR and the international law of the sea conventions, the Dutch State can be held liable by third States for the activities of armed private security guards on board Dutch ships. This may include incidents on the high seas or in coastal waters involving firearms and the use of force with resulting fatalities.

### *2.5 International standards*

Moreover, international standards are applicable to maritime security companies that submit themselves to self-regulatory systems and ensure that different components of their business operations are certified. In this way, they guarantee proper and orderly business operations and efficient services. These international standards can be characterised as 'soft laws'. Both the Act and this Decree are in line with this system of voluntary certification. In addition to long-standing ISO standards (9000) for quality management systems, there are also standards for transport and logistics chains as well as standards that have been specially developed for maritime security companies that offer and provide armed security services (28007).

For maritime security companies that wish to obtain a Dutch licence to use armed private security guards on board Dutch ships, the certificates of these three sets of ISO standards have been made

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<sup>12</sup> Technical adjustment required of the definition in Section 1(m) of the Act, because the Act only assigns the power to use force to 'maritime security personnel' who are employees with an employment contract.

mandatory in this Decree. The certificates can be obtained from the accredited certification bodies designated by the Minister of Justice and Security. Examples of such bodies are Lloyd's Register Quality Assurance (LRQA) and MSS Global. In the United Kingdom, such bodies are accredited by the national accreditation body (the United Kingdom Accreditation Service, abbreviated as UKAS). With this, the relevant ISO standards become legal requirements, which can also be enforced under public law in the event of non-compliance.

### **3. Supervision and enforcement**

#### *3.1 Supervision, general*

The maritime security of ships implies that such activities will be performed far beyond Dutch borders, at sea and ports. This places exceptional demands with respect to administrative supervision and, if necessary, on-site supervision.

The laws and regulations provide for government supervision to be carried out by officials designated by decision of the Minister and Justice and Security (Section 16(1) of the Act) with respect to the following players:

- Maritime security companies that hold:
  - Certificates issued in accordance with international standards and Dutch regulations (Section 13(2) of the Act and Section 5.1 of this Decree);
  - A licence.
- Accredited certification bodies (Section 15): the Minister of Justice and Security appoints one or more accredited certification bodies for the ISO standards indicated in Section 5.1 of this Decree. The Act obliges the certification body to immediately report to the Minister/ILT any suspension or withdrawal of a certificate issued by it to a maritime security company. The body must also immediately report to the Minister the suspension or withdrawal of an accreditation granted to it.<sup>13</sup>

In both cases, the ILT will have to consider the consequences of these acts for the certification body, which may include a withdrawal or suspension of the licence of the maritime security company (Section 14 of the Act) or, pending a decision in this regard, a refusal to grant permission to the shipping company to engage the relevant company for the protection of a transport (Section 2.2(6) of this Decree).

- The Coastguard Centre that is mandated to implement the permission procedure for each transport (Section 2.2 of this Decree): the nature of the supervision will be determined in consultation with the Minister of Defence, in the context of the mutual cooperation between the ministers (Section 5 of the Act).
- Other parties (government authorities or individuals) with whom agreements have been made regarding the storage of weapons and ammunition on land in coastal states bordering on the designated sea area or storage on a ship in the vicinity of this area (Section 5.10 of this Decree).<sup>14</sup>

#### *3.2 ILT's supervisory powers*

ILT officials (inspectors) designated by the Minister of Justice and Security have access to all the powers directly assigned in Title 5.2 of the Awb (e.g. entering premises, demanding information, proof of identity, business data and documents, investigation of cases and investigation of means of transport). Everyone is obliged to cooperate fully with a supervisor within the reasonable period set by the supervisor, insofar as this can reasonably be required (Section 5:20 of the Awb).

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<sup>13</sup> This obligation is included in the designation order of the Minister of Justice and Security pursuant to Section 15(2) of the Act.

<sup>14</sup> See Parliamentary Papers I 2018/19, No. D

Section 16(1) of the Act also stipulates that the Minister of Justice and Security may issue general and special instructions to ILT officials. This provision, which also appears elsewhere in the legislation, has been laid down to ensure that the minister responsible for policy content can, in a similar way as the Minister of Infrastructure and Water Management, issue instructions to the appointed officials regarding the supervision to be carried out by these officials. In principle, the ILT does not fall under the authority of the Minister of Justice and Security. However, this authority to issue instructions to the ILT does not change the responsibilities of the ILT. The ILT remains responsible for how the supervisory responsibilities are implemented.<sup>15</sup>

### *3.3 Administrative enforcement, general*

In case of violation of the certification conditions or licensing requirements, the first thing at stake for maritime security companies is the certificate or licence in question. In addition, this places new protection contracts for shipowners at risk. After all, if a certificate is suspended or withdrawn, the Minister of Justice and Safety will, either temporarily or permanently, deny permission to shipowners to award a contract to the maritime security company in question.

In addition, licensed and certified maritime security companies may also be faced with a temporary or permanent tightening of the conditions or intensity of supervision, if an inspection by a certification body or the ILT shows that the business operations are not in order or if other irregularities were found.

Moreover, the maritime security companies risk an administrative fine of up to 20,750 euros (the fourth category of Section 23(4) of the Dutch Criminal Code) in the event of violation or insufficient compliance with the legal requirements (e.g. the reporting obligation under Section 12 of the Act) or the rejection of an application for the renewal of the licence or for a new licence.

The team leader and the master risk an administrative fine of 20,750 euros if they fail to meet the requirement of sending a report or notification to the Minister of Justice and Security and the Public Prosecution Service.

## **4. Justification for exercising the power to use force**

As discussed earlier in Subsection 2, the master must report immediately to the Public Prosecution Service if the private maritime security personnel have exercised their power to use force or handcuff persons. The master is required to attach video and audio recordings relating to the use of these powers to the report. The Act requires private maritime security personnel to make video and audio recordings, at the instruction of the team leader, in the event of an imminent risk of piracy (Sections 11 and 12 of the Act).

Following on the master's report to the Public Prosecution Service, the public prosecutor has the opportunity to consider whether it is appropriate to investigate the private security guards' exercise of their legal power to use force and, depending on the outcome, take a decision regarding possible criminal prosecution. The emphasis will lie on an assessment based on the legally defined rules governing the use of force (Section 9 of the Act and Section 3.4 of the Decree). The video and audio recordings will be included in the assessment of this use of force. When sending the video and audio recordings (as part of the reports and notification) to the Minister or the Public Prosecutor, the team leader and the master may provide a more detailed explanation of the incident. This information provides insight into the circumstances of the case and the course of events which prompted the security guards to use force (threat of piracy, team leader's discussion with the master, actions of the maritime security personnel and effects thereof on the ship from which the threat of piracy originates,

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<sup>15</sup> Cf. the instructions concerning the government inspections, Government Gazette 2015, 33574. This authority will only be used as an ultimate remedy. Moreover, the authority will not be mandated. In addition, before issuing an instruction which has substantial consequences for the implementation of the work programme or an important impact on the ILT's capacity, this will be discussed and agreed on with the Minister of Infrastructure and Water Management. Additional procedural rules apply for special instructions.

etc.). The communication with the MSCHOA and other ships in the area may also be important for the subsequent justification.

#### **5. Privacy impact assessment**

TBA

#### **6. Regulatory burden**

TBA

#### **7. Workload impact and financial consequences**

TBA

#### **8. Internet consultation**

TBA

### II. BY SECTION

#### **Chapter 1. General provisions**

##### **Section 1.1 (Definitions)**

These five definitions are supplementary to the twenty definitions already included in Section 1 of the Act. This includes definitions of the following: storage location, private security guard, private security team, permission, licence and the Act. The most relevant definitions in the Act are: use of force, accreditation body, protection measures, certificate, accredited certification body, force, weapons, piracy, ship, shipowner, private maritime security personnel, maritime security company, master, team leader, territorial sea, transport and seafarer.

##### **Section 1.2 (Designation of risk area)**

Section 2 of the Act lays down the obligation, by order in council, to designate the sea areas to which the Act applies and where armed private security is permitted for protecting ships flying the Dutch flag against piracy. In Section 1(n), 'piracy' is defined as: any unlawful act of violence or detention, as well as any act of looting committed by the crew or passengers of a private ship for personal purposes against another ship outside the territorial sea of a state, or an attempt thereto. Given the situation in recent years, a section of the Indian Ocean, Gulf of Aden and Red Sea is a designated area. This area has long been designated as a High Risk Area in an international context, in view of the piracy incidents in recent years and the need to protect merchant vessels sailing in or through the area. Previously, when the laws and regulations on private maritime security were not yet in force, only military protection was possible on ships flying the Dutch flag in the area. The supporting organisation for this area is the Maritime Security Centre – Horn of Africa (MSCHOA). The designation of the sea area in this Section is based on the most recent Industry Releasable Threat Bulletin (No. O12, issued on 15 March 2019) prepared by the EU NAFVOR and the Combined Maritime Forces. Previously, this area was somewhat larger in size.<sup>16</sup>

If, in future, other High Risk Areas are designated in an international context, these may be added to this Section, so that private security for merchant ships flying the Dutch flag will also be possible for these areas under the 'VPD, unless' condition.

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<sup>16</sup> The above-mentioned Bulletin is distributed confidentially by the Maritime Security Centre – Horn of Africa (MSCHOA), which is headquartered in Brest (France). The new boundaries became applicable from 1 May 2019. The penultimate modification dates from 1 December 2015.

## **Chapter 2. Permission for the deployment of private maritime security personnel**

### **Section 2.1 (Basic principle of the Dutch law)**

This Section once again explicitly states that the basic principle of the Dutch Act is that the protection of merchant ships flying the Dutch flag against piracy is a task of the government, unless the government is unable to offer this protection (see Section 4(2), preamble, (a) and (b) of the Act). This principle has been emphasised several times by the government during the parliamentary debate on the private member's bill. It implies that the protection of merchant shipping transports through internationally 'recognised' high-risk areas will be provided as far as possible by military personnel, in accordance with the operational concept of the Commander of the Armed Forces. Government protection is, therefore, the first and preferred option. The question of protection provided by private security guards for transit through the designated sea area will only arise if such protection cannot be provided or cannot be provided within a reasonable period of time or if the lack of government protection for the shipowner leads to the frequent rejection of contracts (due to the high costs of military protection). It is also important to state this principle more explicitly in connection with the interpretation of the Dutch Public Enterprises (Market Activities) Act (*Wet markt en overheid*) and the resulting rules of conduct. Although private maritime security is not typically a government task but a market activity, the government is fully responsible for the quality of services provided by private companies (licensing) and for the compliance by these companies with the specified requirements (supervision and enforcement). These are definitely considered as government tasks.

By way of explanation, it should also be mentioned that the entry into force of the Dutch Merchant Shipping Protection Act is accompanied by a simultaneous amendment to the Weapons and Ammunition Act (hereinafter referred to, in Dutch, *Wwm*). This amendment means that a fifth paragraph will be added to Section 3a of the *Wwm*, stipulating that Sections 26(1) and 27(1) of the *Wwm* do not apply to private maritime security personnel acting pursuant to the provisions of the *WtBK*. The aforementioned articles of the *Wwm* prohibit the possession and carrying of, among other things, weapons that are permitted for private maritime security personnel under Section 3.1. Since maritime security companies use warehouses on ships or on land near a risk area (Article 5.10 of this Decree), the implementation of the *WtBK* does not involve transporting, importing or exporting weapons on Dutch territory. An exception in the *Wwm* for these acts has therefore not been deemed necessary by the legislator.<sup>17</sup>

### **Sections 2.2 and 2.3 (Permission, 'government, unless' criteria)**

These Sections further elaborate the key principle of the Act. They also describe the cooperation between the Minister of Defence (responsible for military protection) and the Minister of Justice and Security (responsible for private armed protection) (also see Section 5 of the Act). The procedure is closely related to the previously existing application and permission procedure that only involved military protection.

Section 4 of the Act stipulates that shipowners may obtain permission for the deployment of armed private security guards for a transport that is probably eligible for military protection but where such protection cannot be provided or cannot be provided within a reasonable period of time or if, in the opinion of the Minister of Justice and Security, the acceptance of military protection would imply the following:

- a. The need for a modification of the intended sailing route by more than a certain number of nautical miles to be determined by an order in council; or

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<sup>17</sup> Parliamentary Papers II 2016/17, No. 6.

- b. A certain percentage of additional costs to be determined by an order in council, compared to the costs for private maritime security personnel.

Section 2.3 determines the number of nautical miles to be sailed as 100 (Subsection 1) and the percentage of additional costs as 40 percent (Subsection 2). These criteria do justice to the principle of military protection, but offer also sufficient scope for the possibility of private security. When considering the above interpretation, it was taken into account that military protection is preferable whenever possible. Military protection is provided according to the VPD concept of the Commander of the Armed Forces as it has developed over the course of time. Private security is based on a concept that has developed – in parallel with the above concept – within an international context. The most striking aspect is the difference in the number of security guards (11 military personnel versus at least 3 private security guards). Military protection and protection by private security guards are therefore not entirely interchangeable. The deployment of private security personnel is expected to primarily meet the demand for the protection of smaller merchant ships that serve the so-called 'spot market'. A lower percentage of additional costs would – partly in view of the size of a military protection team and the associated costs compared to the size and costs of a team of private maritime security guards – make the threshold for private security too low and thereby seriously detract from the 'VPD, unless' principle. Hence, permission can be granted for the provision of private armed maritime security if military protection would result in 40% additional costs compared to the costs of private maritime security personnel.

Section 2.2 stipulates that, just as before, the shipowner must request permission from the Coastguard Centre per transport (see Section 4:1 of the Awb). A transport is defined as the movement of a ship between two or more seaports (Section 1(s) of the Act). The Coastguard Centre will first assess whether the transport in question is eligible for protection, for which it is important to consider whether the transport will sail through the sea area designated in Section 1.2 and whether the shipowner and the master have taken all the reasonably possible protection measures. If this is not the case, neither military nor private security personnel will be involved. It must also be clear whether it is possible to accommodate military personnel on the ship, in view of the facilities available for this on board the ship. After the Minister of Defence has determined that military protection is not possible, the option of private security will be discussed and the Minister of Justice and Security (Coast Guard Centre) will take a decision regarding the application, in accordance with the criteria outlined in Section 2.3 of this Decree. For this purpose, the shipowner encloses an estimate of the costs for the private maritime security company, which also indicates the size of the security team, staff composition of the team, nationality of the team members and the brand, type and registration number of the firearms and associated ammunition to be brought on board (Section 2.2(4)).

Pursuant to Section 2.2(6), the Minister of Justice and Security may refuse permission for armed private security personnel if a suspension or withdrawal of the licence based on one of the grounds referred to in Section 14(a) to (f) of the Act is under consideration and, pending a carefully considered decision in this regard, an immediate refusal of permission is advised (emergency measure). It may be, for example, that the Minister has seen indications that the maritime security company is not complying with the rules laid down by or pursuant to the Act or otherwise acting contrary to what may be expected from a proper maritime security company according to generally accepted standards.

The so-called 'Coastguard Form' (part of the Merchant Shipping Protection Regulations) facilitates the application and permission process (Section 2.2(7)). In view of the rapid developments in the spot market and the importance of shipowners being able to quickly find out the status of their application, the deadline for deciding on the application has been set at 48 hours (see Sections 4:13 and 4:14 of the Awb).<sup>18</sup> The permission procedure does not entail any costs for the shipowner because the

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<sup>18</sup> Parliamentary Papers II 2017/18, No. 9.

protection of merchant ships flying the Dutch flag is essentially a government task, which means that the costs of obtaining this protection do not need to be borne by the shipowner.

### **Chapter 3. Weapons and further rules governing the use of force**

#### **Section 3.1 (Firearms and ammunition)**

This Section specifies the type of firearms and ammunition that private security guards may deploy when using force, where these firearms are also permitted for use within Europe for the protection of merchant shipping.<sup>19</sup> This includes a semi-automatic shoulder firearm which can fire bullets that are suitable for penetrating through metal. Determining a maximum calibre is the most efficient approach, with the maximum of .50 (12.7 mm) being determined as the most appropriate calibre. In an extreme case, private security guards will attempt to disable the pirate ship's engine. Above the stated maximum, there is no longer a question of 'small calibre'.

Subsection 2 stipulates that each team member may have a maximum of two firearms with the associated ammunition. This requirement, which is derived from French legislation, limits not only the size of the security team but also the total number of firearms and associated ammunition that may be present on board the ship.

#### **Sections 3.2 and 3.3 (Weapons safe, responsibility of the team leader and master)**

These Sections deal with the safe storage and management of firearms and the associated ammunition on board the ship. The management of firearms also includes the necessary maintenance. The Merchant Shipping Protection Regulations outline a number of detailed rules concerning the weapons safe in connection with the safety of persons on board as well as other persons and the inherent risks associated with the handling of firearms and ammunition.

#### **Section 3.4 (Further rules governing the use of force)**

The most important rules governing the use of force are included in Section 9 of the Act.<sup>20</sup> In addition to and with due observance of these rules, further rules are defined in Section 3.4. Together they form the legal rules governing the use of force by private maritime security personnel.

It should be noted that the rules in Section 9 of the Act are of a higher order than the rules in the Decree. This means that the rules in Section 3.4 must be read and applied in addition to and with due observance of the rules of Section 9 of the Act. For example, Section 3.4(1), which stipulates the firing of a warning shot in the air before a security guard is authorised to aim and shoot, is influenced by Sections 9(5) and 9(6) which state that a prior warning, such as the firing of a warning shot, may be omitted if the circumstances of the case do not allow for such a warning. This might be the case if events follow each other in such rapid succession that firing one or more warning shots is no longer an option. Prior to the firing of a warning shot, the act of drawing or threateningly displaying the firearms must be preceded by an order from the team leader, unless such an order cannot reasonably be expected (Section 9(6) of the Act). The firing of a warning shot also requires an order from the team leader, unless this cannot reasonably be expected (Section 9(6) of the Act). The order issued by the team leader must be preceded by a discussion between the team leader and the master, unless such a discussion or the outcome thereof cannot reasonably be expected (Section 9(7) of the Act).

For a good understanding of the above, all the rules governing the use of force are outlined below:

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<sup>19</sup> Cf. Article 6(2) of Council Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons, as amended by Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 and the listing of weapons and ammunition in Annex II under A.

<sup>20</sup> **Force:** any more-than-minor compulsive force exercised on persons or property (Section 1(f) of the Act).  
**Use of force:** the use of force and the threat of force, including the drawing of a firearm (Section 1(a) of the Act).

Section 9 of the Act

1. In case of an imminent risk of piracy, private maritime security personnel are authorised to draw, deploy or threateningly display the firearms referred to in Section 3.1 of this Decree.
2. Private maritime security personnel are authorised to use force and thereby make use of the firearms referred to in Section 3.1 of this Decree to the extent that this is necessary to avert the imminent risk of piracy and insofar as this purpose cannot be achieved in any other way.
3. Private maritime security personnel must abstain from the use of force aimed at inflicting fatal injuries.
4. The use of force must be reasonable and moderate in proportion to the intended purpose.
5. The use of force must be preceded by a warning, unless the circumstances do not allow for a warning.
6. Private maritime security personnel must not use any force until after they have been ordered to do so by the team leader, unless this order cannot reasonably be expected.<sup>21</sup>
7. The team leader must not issue an order for the use of force until after he has determined, in consultation with the master, that the protection measures have not resulted in averting the risk of piracy, unless this consultation or the result thereof cannot reasonably be expected.

Section 3.4 of this Decree

1. In addition to and with due regard for Section 9 of the Act, a private maritime security guard must first fire one or more warning shots into the air to avert the imminent risk of piracy, before aiming and shooting.
2. If the risk is not averted through the above action, the private maritime security guard may fire at the bow of the ship from which the threat of piracy originates and thereafter, if the danger has not yet been avoided or averted, at the engine of the ship with the aim of preventing the ship from sailing.
3. If, in the most extreme case, the danger cannot be avoided or averted and there is an immediate threat to the life or safety of the persons on board of the ship to be protected, the private maritime security guard is authorised to fire at the non-vital parts of the body of persons on the ship from which the threat of piracy originates.
4. Subsection 3 also applies if the persons on the ship, from which threat of piracy emanates, attempt to gain or have gained access to the ship to be protected.

With respect to the relationship between the legal rules governing the use of force and the doctrine of self-defence, I note the following. One of the reasons for drafting a separate Act, which allows for the protection of merchant ships flying the Dutch flag through the deployment of private maritime security personnel, is based on the monopoly on the use of force which is always held by the government. This means that the legislator lays down the rules that give substance to the use of force, in relation to the purpose of the actions of private security guards (protection of the ship, cargo and persons on board) and the circumstances under which they may be compelled to exercise the powers assigned to them for using force to avert the threat of piracy by drawing, deploying or otherwise threateningly

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<sup>21</sup> The team leader is the private maritime security officer who has been designated by the maritime security company as the supervisor for the other private maritime security personnel and who is operationally in charge during the transport (Section a(q) of the Act).

displaying and using these weapons, if necessary. The abovementioned circumstances may vary greatly (high seas, day/night, weather conditions, sailing speed, etc.).

With a view to the use of force for averting an imminent risk of piracy, the permitted firearms and the ammunition to be used as well as the criteria for their use are specified in Section 9 of the Act and Section 3.4 of this Decree. These legal rules serve to protect legal interests. If force needs to be used, private security guards and their team leader as well as the master may rely on these rules. In the context of the criminal accountability for the use of force, the doctrine of self-defence or excessive force in self-defence is expected to play only a residual role, since the public prosecutor and the criminal court will primarily assess and verify the use of force based on the rules governing the use of force. This assessment is no different from that with respect to *government officials* who are entitled to use force and for whom – with a view to specifying the weapons they can use – specific rules governing the use of force have been established. Under exceptional circumstances, a *private security guard* may also rely on the doctrine of self-defence or excessive force in self-defence, in the same way as a government official. In this case, the guard's defensive actions will also be assessed based on the above criminal law doctrines.

## **Chapter 4. Licence**

### **Section 4.1 (Scope)**

This Section explains the scope of the Dutch licence.

### **Section 4.2 (Term/conditions per licence)**

This Section stipulates that the period of validity of the licence will be a maximum term of three years. After the initial term, it may be renewed for up to three years each time. Fees will be charged to cover the costs of processing the application (initial granting of the licence or renewal). The rates for this are included in the Merchant Shipping Protection Regulations. Subsection 3 stipulates that certain conditions may be attached to the licence, for example, with regard to the government supervision and cooperation with other states in the context of maritime security legislation. With due regard for the general rules and principles for the modification of decisions, these conditions may be changed or adjusted during the term of the licence, if circumstances so require. Under the Belgian Maritime Security Act, licences are valid for a maximum period of three years, to be determined at the time of granting the licence. The German law stipulates a fixed term of validity of two years for the licence.

### **Section 4.3 (Decision-making period)**

The decision-making period for the licence application, as laid down in this Decree, is eight weeks and this may be extended once by twelve weeks if further investigation or advice from a third party is required (see Sections 4:13 and 4:14 of the Awb).

### **Section 4.4 (Transfer of the licence to a third party)**

The licence to offer or provide armed maritime security services is not transferable (Section 13(3) of the Act). This means that the licence cannot be sold to a third party. Nevertheless, there is need for an option allowing for the transfer of the licence to another company in the event of a merger or division. For such a transfer, Section 4.4 requires the prior permission of the Minister of Justice and Security. By declaring Section 14 of the Act to be applicable *mutatis mutandis*, it is clarified that the application for the licence to be transferred to another legal entity will be assessed based on the grounds for withdrawal provided in Section 14 of the Act.

### **Section 4.5 (Suspension of the licence)**

Section 14 of the Act regulates the grounds for revoking or suspending the licence. In addition to this, this Section contains some of the procedural requirements necessary for a suspension (duration, end

and extension). Subsection 4 regulates that the suspension of the licence will have no consequences for transports for which permission has been granted and which are already present in the sea area designated in Section 2.1 or where this can no longer be avoided.

## **Chapter 5. Legal requirements for the granting of certificates and licences**

### ***Part 5.1 Set of standards and rules***

Section 13(2) of the Act contains the key provision of the Dutch licensing system which is based, to a large extent, on the principle of self-regulation (accreditation, certification) to which maritime security companies voluntarily submit themselves. It stipulates, firstly, that a set of standards and rules will be laid down by an order in council, which the applicant must comply with in order to obtain a certificate. Secondly, Section 13(2) stipulates that this set of standards and rules will, in all cases, include the standards incorporated in the most recent version of the standards documents for maritime security companies as defined by the International Organization for Standardization. Sections 5.1 and 5.2 elaborate this system in further detail.<sup>22</sup>

#### **Section 5.1 (Granting of certificates)**

This Section stipulates that, at the request of a maritime security company, an accredited certification body will grant, pursuant to Section 13(2) of the Act, a certificate if the maritime security company complies with the standards documents 28000:2007, 28007:2015 or 9001:2012 of the International Organization for Standardization (ISO) as well as with the rules laid down by and pursuant to the sections in Part 5.2. Section 5.1 designates three relevant ISO standards documents for which a certificate must be submitted. For each of these certificates, a link can be made to the legal requirements imposed on maritime security companies in Part 5.2 of this Decree.

Each accredited certification body, which has been designated by the Minister of Justice and Security as a certification body for one or more of the aforementioned ISO standards and the granting of the associated certificate, will be requested to declare conformity with the Dutch rules via a separate statement (certificate plus additional statement).

- 28000: quality requirements for companies in logistics and transport chains
- 28007: quality requirements for companies in the armed maritime security sector
- 9001: quality requirements for business management systems

#### **Section 5.2 (Granting of a licence)**

This Section contains a provision ('fallback option') in the event that one or more of the certificates referred to in Section 5.2 have not been issued in compliance with the rules applicable to maritime security companies as laid down by and pursuant to the sections in Part 5.2. In this case, these certificates are not considered to be valid certificates as referred to in Section 1(d) of the Act. The Section stipulates that, in this case, the Minister (read: the ILT) will assess whether the maritime security company has complied with these rules in the context of the application for the licence.

### ***Part 5.2 Requirements for the maritime security company***

#### *§ 5.2.1. General requirements*

#### **Sections 5.3 to 5.7 (Requirements for the maritime security company)**

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<sup>22</sup> See the government's position on certification and accreditation in the context of government policy, Parliamentary Papers II 2015/16, 29304, No. 6.

These Sections set out a number of corporate law requirements applicable to maritime security companies that wish to obtain and maintain a Dutch licence. The company must be transparent and reliable, the continuity of the company must be guaranteed, the company organisation must be responsible, reliable and verifiable, and there must be an internal supervision system in place. Maritime security companies that are not headquartered in the EU/EEA are required to organise all or part of their maritime security activities from a branch office in the Netherlands that is registered in the Trade Register.

*§.5.2.2 Requirements for armed security activities*

**Section 5.8 (Requirements for the private maritime security team)**

This Section sets out requirements applicable to the members of the private maritime security team to be deployed on a transport. Every member of the team must be reliable and medically fit, professionally competent and skilled and familiar with Dutch legislation and the policy followed by the licensed maritime security company. They must be capable of properly and fully implementing all the legal regulations, the policy and all ensuing instructions of the licence holder. The security guards must be at least 18 years old at the time of actual deployment (Subsection 1). The private security team must consist of at least three security guards, as announced in the letter from the government when the bill was being discussed in the Senate (Subsection 2).<sup>23</sup> Although the Guardcon model contract used by shipowners and security companies is based on a team size of at least four people, the government considers it justified to allow a team of three private security officers in certain, exceptional circumstances: e.g. if the ship is very small, fast and manoeuvrable and the crew members participate in keeping watch when sailing in high-risk areas.

The reliability of a private security guard can be assessed by the maritime security company based on a recently issued certificate of good conduct or a foreign equivalent thereof. The Minister of Justice and Security also has access to the judicial documentation in the context of the granting or withdrawal of the licence. The medical fitness for carrying out armed private security operations on a ship can be assessed based on a recent medical certificate issued by a doctor or medical specialist.

**Section 5.9 (Safe storage of firearms and ammunition)**

This Section regulates the responsibility of the maritime security company with respect to the safe handling of firearms and ammunition during storage at a storage location around the sea area designated in Section 2.1 that is used by the company, on board the ship to be protected and during transport between the storage location and the ship to be protected. Section 1 of this Decree defines a storage location as: a location on land or on a ship that serves as a storage location for firearms and ammunition.

Pursuant to Section 5.9(2), the maritime security company must make its policy and instructions for the safe storage of firearms and ammunition in these situations sufficiently known to the private maritime security team to be deployed on a transport. Further rules may possibly be included in the Merchant Shipping Protection Regulations (on the basis of Section 8 of the Act and Subsection 3).

**Section 5.10 (Use of storage locations)**

In order to guarantee the safety of the stored firearms and ammunition, Section 5.10 stipulates that the maritime security company must only use storage locations with which contractual agreements exist and which have indicated their willingness to be inspected periodically by the relevant coastal state, flag state, officials charged with supervision and, if necessary, a third party to be designated by the minister.

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<sup>23</sup> Parliamentary Papers I 2018/19, No. F. Only one country, i.e. Italy, has legally stipulated that the team must have at least four security officers, but it is considering reducing this number to three.

It seems logical that private maritime security companies should be able to use the storage locations that are also used for military protection. The Ministry of Defence uses weapon depots on the mainland that are managed by or on behalf of the government of the countries where the depots are located. The Ministry of Defence has entered into agreements with the governments of other countries for this.

If the storage location is on a ship, it is important that there are proper contractual agreements with the companies that offer these services. Moreover, it is also important that the flag state supervises the safety of the storage facilities. There are currently four companies that offer floating armoury services at different locations around the Gulf of Aden. Two of these companies are ISO 28007 certified.

#### **Section 5.11 (Handcuffs)**

This Section instructs the maritime security companies and the team leader to make sure that a sufficient number of handcuffs are available when they carry out their activities. The use of handcuffs is prescribed for the sake of safety. It should be noted, however, that the deployment of private maritime security officers will be aimed at preventing pirates from coming on board a merchant ship. This is a point of difference compared to international anti-piracy missions. If this does occur despite the measures taken, the crew and private maritime security officers will usually retreat to the so-called 'citadel' of the ship. However, situations may arise where pirates have to be brought on board for humanitarian reasons or because they are overpowered. In such cases, there will be a need to handcuff the persons concerned.

#### **Section 5.12 (Cameras and microphones)**

This Section elaborates in greater detail Section 11 of the Act which requires maritime security personnel to use cameras and microphones when carrying out maritime security activities. The Act stipulates that video and audio recordings must be made from the time the imminent risk of piracy arises until the threat has been avoided or averted. The recordings must be stored in files. The team leader determines when the cameras or microphones will be switched on (Section 11(3) of the Act). He may decide that this will be done from the time the private maritime security personnel are authorised, pursuant to Section 9(1) of the Act, to draw, deploy or otherwise threateningly display the firearms designated in Section 3.1.

Section 5.12 stipulates that the maritime security company must ensure that an adequate number of reliable cameras and microphones are available when carrying out maritime security activities. For this, the maritime security company may allow itself to be guided by international norms and standards laid down for justifying the use of force.

Detailed rules regarding three of the subjects referred to in this Section are included in the Merchant Shipping Protection Regulations. These concern the following:

- a. Type of cameras and microphones and who is responsible for their functioning;
- b. Functional or technical requirements for the video and audio recordings;
- c. Time limits for the retention and erasure of the video and audio recordings.

The optional basis for delegation referred to in Section 11(5) of the Act is currently not being implemented. This offers the possibility of making it obligatory for maritime security personnel to switch on cameras and microphones during transport through the sea area designated in Section 1.2. Imposing such obligations at this stage would be going too far because this may involve many days during which no incidents occur. The legal authority of the private maritime security personnel to make video or audio recordings during the performance of the security activities, on the instruction of the team leader, is considered sufficient in this context. This may also include – if force is used – making video or audio recordings starting from the time it is necessary to handcuff the arrested persons and continuing the recordings during the subsequent transport of these persons to a seaport.

The team leader's authority to provide the master with the video or audio recordings that have been made, to facilitate the master's reporting and notification obligations under Section 12 of the Act, is outlined in Section 11(4) of the Act.

The video and audio recordings are related to the reporting and notification obligation referred to in Section 12 of the Act. For the purpose of allowing government supervision, the team leader as well as the master must submit a report, each from their own perspective, to the Minister of Justice and Security after the completion of each transport on which private maritime security is deployed. Furthermore, in the context of criminal accountability for the use of force, the master must report immediately to the public prosecutor every use of force and every use of handcuffs. The forms to be used for these reports and notifications are part of the Merchant Shipping Protection Regulations.

#### **Section 5.13 (Policy and instructions for maritime security personnel)**

This Section instructs the maritime security company to maintain and continually update its policy on the performance of the armed maritime security activities and the instructions for the private maritime security team based on this policy. It also instructs the maritime security company to make sure that it can at all times provide the necessary insight into its current policy and associated instructions to the officials charged with supervision.

#### *§.5.2.2 Retention obligation and protection of personal data*

#### **Section 5.14 (Data retention obligation)**

This Section instructs the maritime security company to organise its business operations in such a way that a record is kept of all data demonstrating faithful compliance with the Act. This includes all current company data, with the exception of the reports sent to the Minister and the underlying data that are subject to a retention period of three years. It also instructs the maritime security company to make sure that it can at all times provide access to its updated and complete data records to the officials charged with supervision.

#### **Section 5.15 (Security, privacy policy)**

This Section sets out the core elements of the requirements for a careful and proper processing of personal data. It instructs the maritime security company to take the appropriate technical and organisational measures to protect the personal data against loss or unlawful processing. It also instructs the maritime security company to establish a privacy policy and act in accordance with this.

### **Chapter 6. Amendment of other decrees**

#### **Section 6.1 (Amendment of the Judicial Data and Criminal Records Decree (*Besluit justitiële en strafvorderlijke gegevens, Bjsjg*))**

These amendments will – successively – make it possible to directly provide judicial data and criminal records for the enforcement, under criminal law, of the Merchant Shipping Protection Act against persons (repeated offences) and for the granting and withdrawal of the licence to a maritime security company by the Minister of Justice and Security and the accredited certification bodies as part of a reliability assessment to be carried out for granting the certificate, as referred to in Article 5.1 of the Decree.

### **Chapter 7. Final provisions**

#### **Section 7.1 (Entry into force)**

This provision stipulates that this Decree will enter into force at the same time as the Act. Pursuant to Section 22 of the Act, the Act will enter into force at a time to be determined by Royal Decree, where the various sections or parts of the Act may enter into force at different times. In any case, all the implementation regulations (decree, ministerial regulation and policy rules on the equivalence of foreign licences) must be ready before the Act enters into force, so that the implementing organisations have sufficient time to prepare for the new tasks. The target date for entry into force is 1/1/2021.

**Section 7.2 (Short title)**

The manner of citing differs slightly from the short title of the Act (Merchant Shipping Protection Act). The reason for this is that the short title of the Act, being a private member's bill, is not entirely in line with the Drafting Instructions for Legislation. The capital letters refer to the original initiators of the bill.<sup>24</sup>

The Minister of Justice and Security,

Ferd Grapperhaus

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<sup>24</sup> The then Members of Parliament Ten Broeke and Knops. The Members of Parliament Koopmans and Van Helvert later took over the defence of the bill (Parliamentary Papers I 2018/19, 34558, C and Parliamentary Papers II 2017/18, 34558, No. 8, respectively)