SUMMARY

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An evaluation of the Dutch Merchant Shipping Protection Act

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Summary

The Merchant Shipping Protection Act (WtBK) allows Dutch merchant ships, subject to strict conditions, to utilise armed private maritime security teams to protect themselves against piracy in high-risk maritime areas, particularly around the Gulf of Aden and the Horn of Africa.

Prior to the introduction of the WtBK, the Netherlands protected its commercial shipping exclusively with military teams, known as *Vessel Protection Detachments* (VPDs). This approach encountered growing problems. For Dutch shipping companies, the use of military teams was often too slow, inflexible and too costly. They indicated that, as a result of this approach, they were missing out on or unable to carry out contracts. To counter these negative effects on Dutch commercial shipping and to protect its competitive position, the WtBK was adopted in 2019 and subsequently came into force on 1 February 2022. The Act has a twofold objective: firstly, to ensure the safety of Dutch commercial shipping within the risk area designated by the WtBK; and secondly, to achieve a level playing field between Dutch commercial shipping and international commercial shipping.

This document reports on the findings of the evaluation of the WtBK, which was carried out on behalf of the *Wetenschappelijk Onderzoek- en Datacentrum* [Scientific Research and Data Centre] (WODC). The evaluation stems from Article 20 of the WtBK, which stipulates that the Minister of Justice and Security must submit a report to Parliament on the effectiveness of the WtBK and its practical effects no later than three years after the WtBK comes into force. The evaluation aims to provide insight into: 1) the legal framework and any potential legal bottlenecks of the WtBK; 2) the application and implementation of the WtBK; 3) any other bottlenecks or success factors; and 4) how those involved assess the effectiveness of the WtBK.

For this evaluation, an extensive literature review of available publications on piracy in the risk area designated by the WtBK, relevant legislation, relevant quantitative data, and documents drawn up by relevant parties such as the Coastguard and the *Inspectie Leefomgeving en Transport* [Human Environment and Transport Inspectorate] (ILT) was carried out. An analysis was then carried out of the key provisions and objectives of the WtBK and underlying legislation. In addition, a functional comparative legal analysis was carried out between the WtBK and comparable international regulations concerning the deployment of private maritime security to protect commercial shipping. Finally, a number of interviews were conducted with parties involved in the implementation and supervision of the WtBK. The findings were then submitted to a group of experts and stakeholders for validation.

The WtBK imposes stringent requirements on the deployment of private maritime security, even by international standards

The legal analysis shows that the WtBK imposes strict requirements on shipping companies and private maritime security firms before the deployment of private maritime security officers is permitted. A key element of the WtBK is the so-called 'VPD-unless' principle, which permits the deployment of private maritime security in Dutch commercial shipping only if military security, by means of a *Vessel Protection Detachment* (VPD), is not possible or would entail disproportionate costs or detours for the shipping company. By applying this condition, the WtBK is also unique from an international perspective. Other flag states that permit the deployment of armed private maritime security teams generally do so provided that the private security team holds the appropriate licence, or do not explicitly regulate such deployment, but do not require that the deployment of armed private maritime security teams be allowed only if the deployment of a VPD is not feasible. The aim of the 'VPD-unless' principle is to preserve the Dutch state's monopoly on the use of force as far as possible. In addition, the WtBK also sets out extensive requirements regarding the certification of private maritime security companies, the management of weapons, the recording of footage by private maritime security teams during any threats, and the provision of timely reports by those involved in the implementation of the WtBK.

The comparative functional legal analysis shows that the requirements imposed by the Netherlands on the parties involved before a private maritime security team may be deployed are also relatively high when compared with countries with similar regulations. These requirements stem from concerns about undermining the Dutch state's monopoly on the use of force, combined with the availability of military capabilities to secure commercial shipping. Other flag states with comparable regulations generally provide little or no military security for commercial shipping, or do not share concerns about undermining the state's monopoly on the use of force to the same extent as the Netherlands.

The strongly international character of the merchant shipping market makes certain legal requirements difficult to implement

The legal analysis and interviews brought to light a number of legal issues. Firstly, there are some ambiguities within the WtBK, which are largely due to the highly international nature of the market for private maritime security. For example, the WtBK sets out various requirements regarding *Verklaringen Omtrent Gedrag* [Certificates of Good Conduct] (VOG) for private maritime security companies which are difficult to implement in practice, as standards for such certificates vary greatly from country to country. In addition, the English translation of the *Regeling Bescherming Koopvardij* [Decree Protection Merchant Shipping] (RtBK) is unclear on certain points and appears to contain translation errors.

The current interpretation of the 'VPD-unless' principle prevents the use of private security when the Ministry of Defence does not deploy VPDs

Another legal issue concerns the interpretation of the 'VPD-unless' principle. In practice, this principle is interpreted to mean that if the Ministry of Defence does not deploy any VPDs at all – as has been the case in the WtBK high-risk area since the war in Gaza in 2023 – then no authorisation is granted for the deployment of private maritime security either. This interpretation appears to stem from the assumption that if the risks are too great for the deployment of VPDs, the deployment of private maritime security is also neither desirable nor effective. It is unclear to what extent this interpretation of the 'VPD-unless'

principle is in line with the legislator's intention: on the basis of the 'VPD-unless' principle alone, it is not clear why, in cases where VPDs are not deployed at all, the deployment of private maritime security is therefore also not possible.

The central role of floating armouries largely falls outside Dutch oversight

A final legal sticking point concerns the use of so-called *floating* or *vessel-based armouries* (VBAs) by private maritime security companies. VBAs are vessels in international waters in which weapons are stored and which provide logistical support to private maritime security teams. Interviews have revealed that VBAs play a significant role in the practice of private maritime security: for instance, VBAs not only provide storage facilities for weapons, but also supply personnel to private maritime security teams via a subcontracting arrangement, offer training to private maritime security guards, maintain weapons, and serve as embarkation and disembarkation points for private maritime security teams. Despite their significant role, the use of VBAs is not regulated under the WtBK. As VBAs do not sail under the Dutch flag, the scope for supervision is very limited. This poses risks to the management of weapons and the ability to verify whether members of private maritime security teams have actually completed the appropriate training in accordance with the requirements set out in the WtBK.

Supervision is carefully organised, but can sometimes be difficult to carry out remotely

Supervision under the WtBK takes place in two ways. Firstly, a private maritime security company must obtain a licence to be permitted to provide security for Dutch ships. This licence is granted by the ILT. The licensing process involves a number of steps, during which the private maritime security company is required to submit documentation which the ILT checks to ensure compliance with the requirements set out in the WtBK. The ILT also checks whether the private security company operates in accordance with the operational requirements of the WtBK before granting a licence valid for three years. Secondly, shipping companies, the captains concerned and team leaders of private security teams must complete forms at various stages of the authorisation process and following the deployment of private maritime security, and share these with the Coastguard, the ILT and (in the event of an incident) the *Openbaar Ministerie* [Public Prosecution Service]. This is the case, for example, when private maritime security teams first come aboard and leave a Dutch merchant vessel, and in the event of threats and incidents of piracy.

The use of VBAs limit the possibility for monitoring weapons management and training

Supervision under the WtBK is inherently difficult, as the law is applied remotely, namely within the risk area defined by the WtBK around the east coast of Africa. Furthermore, the use of VBAs by private maritime security companies creates an additional difficulty in carrying out supervision, as VBAs do not fly the Dutch flag. It is therefore not possible for the relevant government organisations in the Netherlands to verify whether weapons are being properly managed and maintained, or whether the training provided by the VBA to private maritime security personnel meets the requirements of the WtBK.

Parts of the WtBK related to incidents of piracy have not yet been tested in practice

Finally, certain elements of the WtBK's supervisory process have not yet been implemented because no incidents of violence related to piracy have yet occurred involving Dutch-flagged merchant ships in the

high-risk area. It therefore cannot be ruled out that other bottlenecks exist within the part of the supervisory process relating to incidents of piracy.

Implementation is largely proceeding smoothly, but cooperation and transparency could be improved

As was the case with the supervision process relating to the WtBK, a distinction can be made between two elements of the WtBK's implementation: the process of granting authorisation for the deployment of private maritime security and the actual deployment of private security personnel.

The process of granting authorisation for the deployment of private maritime security begins when a shipping company submits an application to the Coastguard. As part of this application, the shipping company – often with the support of a private maritime security firm – submits a concise risk analysis of a passage through the WtBK risk area, using a form provided by the Coastguard. The shipping company also submits a list of security measures taken on board the vessel and a quotation from a private maritime security company, so that it can be determined whether the costs of a VPD, in light of the WtBK regulations, are disproportionate compared with the costs of security provided by a private maritime security company. If this application has been completed correctly and in full, the Coastguard will forward it to the Ministry of Defence. The Ministry of Defence will then assess whether the deployment of a VPD is feasible or whether it would result in disproportionate costs or a disproportionate diversion for the shipping company. If the diversion or costs for the shipping company are disproportionate, or if it is not possible to deploy a VPD in good time, the Coastguard will authorise the use of private maritime security.

The procedure for deploying the private maritime security team stipulates that both the ship's master and the team leader of the security team must adhere to strict rules regarding the management and use of weapons. They are also obliged to complete forms at specific points during any deployment – such as whilst the private maritime security team is boarding the vessel and upon completion of the passage through the high-risk area – and to submit these to the ILT. The captain and team leader of the private security team independently describe the passage through the high-risk area in these forms and identify any threats encountered by the vessel.

Following a few teething problems during the start-up phase, the Act has been implemented without any major issues

Interviews with the parties involved highlighted a number of initial difficulties in implementing the WtBK during the period in which the Act first had to be put into practice. These mainly concerned the development of practical regulations for private maritime security teams by the ILT, such as rules setting out how equipment belonging to private maritime security teams should be brought on board, and determining what information shipping companies were required to share with the Coastguard and the Ministry of Defence. Following this initial period, the implementation of the WtBK appears to have proceeded without any major issues, although it should be noted that certain elements of the WtBK have not yet been implemented because no incidents of violence related to piracy have yet occurred on Dutch ships within the risk area.

Stakeholders are calling for greater transparency in decision making and better coordination between organisations

Despite the absence of major bottlenecks, cooperation between the parties involved under the WtBK sometimes appears to encounter difficulties. For instance, some of the parties involved state that they find the decision-making process of the Coastguard and the Ministry of Defence to be opaque. It also emerged that cooperation between government organisations regarding the amendment of practical regulations has at times been difficult. For example, the ILT sent a letter to the *Ministerie van Justitie en Veiligheid* [Ministry of Justice and Security] highlighting a number of shortcomings in the WtBK, which, as far as the research team was able to establish, did not receive a response.

The 'VPD-unless' principle provides limited added value in day-to-day practice

In practice, the added value of the 'VPD-unless' principle also appears to be minimal. Stakeholders indicated that the costs of VPDs are so high that, compared with the costs of deploying private maritime security, they are generally disproportionate given the provisions of the WtBK. As a result, authorisation for the deployment of private maritime security teams is, in practice, rarely, if ever, refused. The need for security provided by VPDs appears to exist only in the case of very costly and vulnerable shipments, such as those involving the transport of offshore installations. In such cases, the relatively high costs of VPDs are offset by the costs of potentially losing (part of) the shipment.

The effectiveness of the WtBK is assessed positively by involved parties, but is difficult to ascertain in practice

It is difficult to determine whether the WtBK has had an impact on the safety of Dutch commercial shipping within the risk area covered by the Act. The threat of piracy within the risk area has declined significantly since 2012 due to a combination of military intervention, development aid, and the deployment of private maritime security on non-Dutch commercial vessels. These factors may have contributed to the reduction in the threat of piracy in and around the Gulf of Aden by the time the WtBK came into force.

The security situation in the Red Sea has effectively brought the application of the WtBK to a standstill after 2023

Following the Act's entry into force, Dutch shipowners were ultimately only able to obtain authorisation to deploy private maritime security teams for just over a year. Due to the deteriorating security situation in the Red Sea, the Ministry of Defence has not issued any further VPDs in the WtBK's risk area since the end of 2023. Consequently – due to the interpretation of the 'VPD-unless' principle discussed above – the deployment of private maritime security has also not been permitted since late 2023.

Those involved regard private security as a more flexible option, particularly for smaller vessels

The WtBK is, however, regarded by the majority of stakeholders as effective in ensuring the safety of Dutch commercial shipping within the risk area defined by the Act. Stakeholders regard the flexibility of private maritime security teams as an important positive aspect of the WtBK: a VPD consists of 11 military personnel, and smaller vessels are generally unable to accommodate a VPD, which makes security provided by a VPD impossible for smaller vessels within Dutch commercial shipping. As a result of the WtBK coming into force, it became possible to protect these smaller vessels against the threat of piracy.

According to those involved, lower costs and improved insurability strengthen the competitive position

Stakeholders were also generally positive about the impact of the WtBK in creating a level playing field for the Dutch commercial shipping sector. Stakeholders regard the lower costs associated with the deployment of private maritime security teams as a significant positive effect of the WtBK. These stakeholders also felt that the WtBK has made it easier for the Dutch commercial shipping sector to obtain the necessary insurance for transit through the WtBK's risk area. Although the 'VPD-unless' principle is unique, and one might therefore expect this to have a negative impact on the intended level playing field, this was not identified as a problem by the stakeholders interviewed. It should be noted, however, that due to limited input from the merchant shipping sector itself in this evaluation, it is difficult to determine to what extent shipping companies assess whether a level playing field has actually been achieved.

The high entry requirements support high-quality private maritime security companies but keep the market small

Private maritime security companies were also generally positive about the WtBK and believed that the WtBK's high requirements keep security companies with less robust business practices out of the Dutch market. One of the companies interviewed also stated that the strict requirements for licence holders under the WtBK make a licence under the WtBK valuable internationally as well, as the licence acts as a mark of quality due to these high standards. It should be borne in mind, however, that the Dutch market for private maritime security is small and specialised, and that only two private security companies held a licence under the WtBK at the time of this evaluation.

Based on these findings, we make a number of recommendations

Based on the findings of the evaluation and the expert meeting, the research team has drawn up a number of recommendations to reduce bottlenecks within the WtBK and to enhance cooperation between the different private parties involved and government bodies.

Test the entire WtBK process through a scenario-based exercise to identify bottlenecks and enhance cooperation between stakeholders

As no incidents of piracy have yet occurred involving Dutch commercial shipping within the WtBK's risk area, certain parts of the WtBK process have not yet been implemented or tested in practice. It has also become apparent that cooperation between the parties involved has at times been difficult. To identify bottlenecks in advance and enhance cooperation between the parties involved, we therefore recommend testing the entire WtBK process through scenario-based exercises involving the relevant parties.

Amend the requirements within the WtBK so that they are more readily applicable in an international context

The evaluation shows that the WtBK sets unclear requirements in certain respects, given the highly international character of the market for private maritime security. For example, the RtBK requires the management of a private maritime security company to submit a certificate of good conduct as part of the application for a licence under the WtBK, but do not specify what information a foreign equivalent of such a certificate must contain. Furthermore, the RtBK requires, for example, that the team medic of a private maritime security team must have undergone training that is only available in the United Kingdom. Furthermore, the English-language version of the RtBK contains a number of formatting errors and

translation errors. These shortcomings make it difficult to carry out supervision under the WtBK, as employees of private maritime security companies often come from various countries outside the Netherlands.

Consider options for tightening supervision of the management of weapons and floating armouries

The use of VBAs by private maritime security companies complicates supervision under the WtBK and entails risks relating to the management of weapons and the training of members of private maritime security teams.

We see two ways in which this supervision can be improved. Firstly, members of private maritime security teams could be required to have completed training courses recognised by the ILT. The ILT already maintains a list of recognised training courses, and by requiring members of private maritime security teams to have completed these courses, it is possible to exercise better supervision over VBAs. Secondly, shipping companies and private maritime security firms could be more closely involved in supervision through the sharing of information: shipping companies usually carry out risk assessments themselves, sometimes in collaboration with private maritime security firms. If parts of these risk assessments relate to the use of VBAs, it is possible to gain a clearer picture of the use of VBAs and the associated risks.

Another option requires an amendment to the *Wet Wapens en Munitie* [Weapons and Ammunition Act] (Wwm), by including private maritime security officers and their armaments in the exemption clause. This would enable private maritime security guards to bring their weapons to the Netherlands for maintenance and management. This would reduce dependence on VBAs, as such an amendment to the Wwm would allow private maritime security companies to store and maintain the weapons they use to secure merchant ships on Dutch soil.

Finally, consideration could be given to encouraging the use of *land-based armouries*, which would enhance the scope for oversight of weapons management. In this regard, it will likely be necessary to assign a greater role to the Ministry of Foreign Affairs within the Wwm, as *land-based armouries* are located on the territory of third countries.

Reconsider the prevailing interpretation of the 'VPD-unless' principle

The 'VPD-unless' principle, as currently interpreted, raises questions. The 'VPD-unless' principle fails to clarify why, in areas where the Ministry of Defence does not deploy VPDs at all – as is currently the case in the risk area under the WtBK – the use of private maritime security should also not be permitted. Although the parties involved point to reasons for adopting this interpretation – such as in cases where the deployment of VPDs is too dangerous and private maritime security companies must therefore be excluded – it is unclear whether this interpretation is in line with the legislator's intention.

Make the decision-making process regarding whether or not to deploy VPDs in the risk area more transparent

One shipping company and one private maritime security firm interviewed indicated that they found the decision-making process regarding the deployment of VPDs and the authorisation of private maritime security teams to be opaque. This mainly concerned the decision making surrounding the non-deployment of VPDs, due to significant security risks in the WtBK risk area. Furthermore, under the current

interpretation of the 'VPD-unless' principle, such a decision also means that authorisation is not granted for the deployment of private maritime security teams.

Shipping companies and private maritime security firms often have to decide at short notice whether they can accept contracts and how to organise a transit. Greater insight into how the Coastguard and the Ministry of Defence decide on whether or not to deploy VPDs would therefore better enable them to anticipate expected developments. This would, for example, allow them to adjust shipping routes in good time or to decide whether or not to accept certain assignments.

To improve cooperation and predictability in the face of changing security situations, consideration could be given to making decision making regarding the deployment of VPDs more transparent. This could be achieved, for example, by sharing the assessment framework or the criteria used in the risk analyses – insofar as this is possible without disclosing operationally sensitive information. An ongoing dialogue between the Coastguard, the Ministry of Defence and the relevant shipping companies and private security firms could also contribute to a better understanding of the decision-making process and, consequently, to the functioning of the WtBK.

Consider measures to keep the Dutch market attractive to private maritime security companies

The Dutch market for private maritime security is small and specialised. At the time of this evaluation, there were only two security companies holding a licence under the WtBK. At the same time, since the end of 2023, as a result of the prevailing interpretation of the 'VPD-unless' principle, licence holders have, in practice, been unable to use their licences for operations in the WtBK risk area. Consequently, they bear the costs of licence granting, renewal and readiness, but are unable to make use of the licences in practice.

This situation may discourage existing and potential providers – after all, one licence holder has already recently withdrawn – and thereby increase the risk of further market concentration. It is therefore advisable for the relevant government bodies to work with private security firms to explore how the market can remain attractive and accessible even during such periods, without compromising the quality of service provision.