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“Pirates, but not of the Caribbean”: The French Private Ship Protection Act

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Abstract

After comparing the legal frameworks related to piracy with those of Europe’s main countries, the French legislator recently released a comprehensive set of rules in order to allow ship-owners to embark protection teams aboard merchant ships in an effort to prevent pirate attacks. As this kind of economic activity implies specific skills and liability linked to the possible use of force, the legislator has carefully crafted the material and geographical boundaries. The ship protection business can only take place on board cargo vessels and only in two specific areas: one off the coast of West Africa and the other in the Indian Ocean and Red Sea region. In order to ensure safety on board such vessels and compliance with all rules applying to maritime transport, the legislator has given state authorities broad power to regulate the firms and employees taking up such activity. Firms and employees must receive special approval from the state authorities monitoring their professional skills prior to undertaking the activity. On board the ship, the protection squad remains under the shipmaster’s direction and is subject to unannounced control checks from French warships or patrolling ships and aircrafts.

Keywords

French ship protection Act, ship protection at sea, defence teams, security at sea, piracy, ship-owners regulations, seamen labour regulations

Even though the notion of piracy remains closely tied to some romantic myth of cordial anarchy, pirates are first and foremost a threat to seafarers, navigation and trade. As the problem of piracy and armed robbery at sea persists,² the United Nations and many states with access to the seas and significant interest in maritime activity have created specific legal frameworks in order to counter the phenomenon of piracy by fighting and repressing these acts, which are perpetrated at sea, particularly in international waters beyond the reach of state sovereignty.

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2 According to the 2014 IMO annual report on piracy, 242 acts of piracy or armed robbery at sea were committed in 2014 as well as 49 attempts (IMO, ‘Report on Acts of Piracy and Armed Robbery against Ships’ (2015)) <www.imo.org/en/Our-Work/Security/PiracyArmedRobbery/Reports/Documents/219_Annual_2014.pdf> accessed 25 February 2016. See also, for an analysis of piracy’s economic costs Alexander Knorr, ‘Economic Factors for Piracy: The Effect of Commodity Price Shocks’ (2015) 38 *Studies in Conflict & Terrorism* 671.



On 15 July 1994, France passed Act n° 94-589 on the fight against piracy and the state’s police powers at sea,³ implementing the relevant clauses of the United Nations Convention on the Law of the Sea (UNCLOS).⁴ It defined the offence of piracy and empowered state authorities, namely the commanders of state ships and aircrafts, to take any coercive measure necessary to fight this scourge.⁵ Nevertheless, in some regions,⁶ merchant ships are under constant threat of pirates using fast boats and firearms, who do not hesitate climbing aboard cargo vessels, often by way of violent and sudden actions. This requires a quick deterrent response, yet pirates often escape even when warships are patrolling the region, due in part to the sheer size of these hazardous areas. In order to cope with this threat, many European countries have gradually come to allow private protection squads on board merchant ships flying their flags, and some countries even permit national and foreign navy vessel protection detachments on board (such as France, Germany, Denmark, Belgium and Italy).⁷

Until 2014, France prohibited ship-owners from embarking private squads aboard their vessels. The 1 July 2014 Act on private ship protection businesses act (the 2014 Act⁸), preceded by a clear

3 *Loi n° 94-589 du 15 juillet 1994 relative à la lutte contre la piraterie et aux modalités de l'exercice par l'Etat de ses pouvoirs de police en mer* [Act on fight against piracy and state police powers at sea] *Journal officiel de la République Française* (Paris, 16 July 1994) 10244 <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000713756&fastPos=2&fastReqId=74943313&categorieLien=cid&oldAction=rechTexte> accessed 1 February 2016.

4 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) arts 100-107 and 110, grants warships a right of visit of any ship even on the high seas if involved in piracy.

5 The 1994 Act (n 3) allows control on board any suspicious boat (s. 2), preventive detention on board for suspects and precautionary seizure of goods or documents linked to the piracy act or attempt (s. 3) and ship’s diversion to any port in order to deepen controls (s. 4).

6 Especially the South China Sea, Straits of Malacca and Singapore and Indian Ocean, see 2014 IMO Report (n 2) annex 2, 1-2.

7 See Anna Petrig, ‘The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates’ (2013) 62 *International and Comparative Law Quarterly* 667. For an example of a similar pattern in Europe after an evolution of the national legal framework, see the Italian legislation as discussed in Eugenio Cusumano and Stefano Ruzza, ‘Contractors as a Second Best Option: The Italian Hybrid Approach to Maritime Security’ (2015) 46 *Ocean Development & International Law* 111. Also see the Dutch legal scheme, practice and theoretical considerations: Bibi Van Ginkel, Frans-Paul Van Der Putten and Willem Molenaar, *State or Private Protection against Maritime Piracy? – A Dutch Perspective* (Netherlands Institute of International Relations, 2013) <www.clingendael.nl/sites/default/files/20130200_state_or_private_protection_web.pdf> accessed 1 February 2016. See also Kiara Neri ‘The Use of Force by Military Vessel Protection Detachments’ (2012) 51 *Military Law and Law of War Review* 73.

8 *Loi n° 2014-742 du 1er juillet 2014 relative aux activités privées de protection des navires* [Act on ship protection private business] *Journal officiel de la République Française* (Paris, 2 July 2014) 10890 <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029175262&fastPos=3&fastReqId=654263424&categorieLien=cid&oldAction=rechTexte> accessed 1 January 2016.



introductory text,⁹ aims at modifying the Transport Code¹⁰ and the Homeland Security Code,¹¹ in order to allow the ship-owners to embark such squads,¹² and set up the legal framework of this new business sector. This text was accompanied by five implementation decrees,¹³ which specify the material and geographical scope and requirements of the ship protection activity. This activity consists of ensuring the safety of crewmembers and any passengers travelling on board the ship, as well as the cargo, against external threats¹⁴ through the use of a protection team. This term external threats seems rather inaccurate, as it could also lead to authorising such squads to defend merchant ships against terrorist assaults, and although the 2014 Act’s introductory text does not raise this issue, it is unknown whether the legislator shared such a broad view.

This article outlines the legal framework set by the 2014 Act and the five decrees, by introducing (1) its scope, (2) the requirements set by the regulations for firms and employees and its control by state authorities, and (3) the practical and legal constraints related to the ship protection mission. It must be noted that, as most of the 2014 Act’s provisions have been codified in the French Transport Code and Homeland Security Code, the author makes direct reference to these Codes’ article numbers, as modified or created by the 2014 Act.

1. A strictly limited scope of application

According to French law, granting a weapon-equipped protection team embarked on a merchant ship the right to use force in order to protect the hull, cargo and crew is quite similar to a state

9 *ie* the government statement explaining the act’s goals and general architecture. See *Projet de loi relatif aux activités privées de protection des navires*, n° 1674, déposé le 3 janvier 2014 [Bill on private ship protection business] <www.assemblee-nationale.fr/14/projets/pl1674.asp> accessed 1 February 2016.

10 Transport Code, *Journal officiel de la République française* (Paris, 3 November 2010) 19645 <www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000023086525&dateTexte=20160120> accessed 1 February 2016.

11 Homeland Security Code, *Journal officiel de la République française* (Paris, 13 March 2012) 4533 <www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000025503132&dateTexte=20160120> accessed 1 February 2016.

12 The *Loi* n° 94-589 du 15 juillet 1994 relative à la lutte contre la piraterie et aux modalités de l’exercice par l’Etat de ses pouvoirs de police en mer [Act on fight against piracy and state police powers at sea] on fight against piracy and state police powers at sea did not authorize the ship owners to protect their ships from piracy by such means (n 3).

13 *Décret* n° 2014-1415 relatif aux conditions d’exercice de l’activité privée de protection des navires [Decree on conditions for ruling ship protection private business]; *Décret* n° 2014-1416 du 28 novembre 2014 relatif aux modalités d’exercice de l’activité privée de protection des navires [decree on means and procedures for carrying ship protection business]; *décret* n° 2014-1417 du 28 novembre 2014 relatif aux normes et référentiels admis en application de l’article L. 616-1 du code de la sécurité intérieure [decree on standards admitted under s. L. 616-1 of Homeland Security Code]; *décret* n° 2014-1418 du 28 novembre 2014 pris pour l’application de l’article L. 5442-1 du code des transports [decree implementing s. L. 5442-1 of Transport Code]; *Décret* n° 2014-1419 du 28 novembre 2014 pris pour l’application des dispositions du titre IV du livre IV de la cinquième partie du code des transports et relatif aux modalités d’exercice de l’activité privée de protection des navires [Decree implementing the provisions of title IV from book IV of fifth part of Transport Code and on means and procedures for carrying ship protection business] *Journal officiel de la République Française* (Paris, 30 November 2014) 19999-20008 <www.legifrance.gouv.fr/affichJO.do?idJO=JORFCONT000029813001> accessed 1 February 2016.

14 Homeland Security Code, s. L. 5441-1.



prerogative, traditionally used and controlled by public authorities, making it a radical notion for private businesses.¹⁵ Consequently, such a right to self-defence implying the right to use weapons to protect private activities and workers cannot be granted widely. Even if the freedom of navigation in secure conditions is at stake due to the threat of piracy, French law remains firmly attached to the principle that private individuals should not own and carry lethal weapons, except for purposes of self-defence in very specific, narrowly defined situations that pose a real threat to the owner.¹⁶ As a result of this rule, and prior to the 2014 Act, only state warships and patrol ships could be armed, and they still monopolise all tasks involving law enforcement, safety and security at sea. Thus, the scope of the 2014 Act is carefully delimited.

1.1 The 2014 Act’s scope: French ships protected by private entities on the high seas

First of all, the Transport Code (s. L. 5441-1) draws the *rationae materiae* scope of the Code as follows: the ship protection business consists of protecting, on request and on behalf of the ship-owner, ships sailing under the French flag from outside threats. This definition thus dismisses a number of patterns which may have existed in historical periods,¹⁷ in both France and abroad, such as convoys under warship escort and the protection granted to all ships in an area regardless of their flag.¹⁸ The same section *in principio* excludes from the 2014 Act’s scope a scenario directly involving public authorities in such activity: when the ship protection is carried out by state employees or employees acting on behalf of the state, the 2014 Act’s provisions are no longer relevant and the traditional administrative liability system should take over from the *specialia* provided by the 2014 Act.

Section L. 5441-1 of the Transport Code § 2 defines the protection team competencies and underlines that this activity can only be carried out on board the ship it aims to protect. This rules out two types of protection, which fall within the competence of other French authorities and legal frameworks:

- When the ship is moored in a French harbour, the protection of the ship from the dock is entrusted to the state services in charge of port security (which is the *Gendarmerie Maritime* or, in some circumstances, the French Navy) or to land-based private security firms,

15 In order to understand the various frameworks available to states, see Natalino Ronzitti, ‘The Use of Private Contractors in the Fight against Piracy: Policy Options’ in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP 2011) 37.

16 Stemming from a 1939 decree which established as a principle the prohibition of weapon detention, now consolidated in Homeland Security Code, s. L. 311-1 *et seq.*

17 Especially World War II and the first Gulf War.

18 See, eg, the procedure called ‘naval control’, Defence Code, s. R. 1335-1: in the framework of existing law and when needed by the circumstances, the prime minister can impose a naval control on French maritime navigation, regardless of whether commercial, fisheries or pleasure navigation, in order to ensure the safest transit conditions. This control can be limited to determined geographic areas and apply only to certain ship categories.



which are governed by another Act.¹⁹

- The protection tasks only take place on board the ship: the 2014 Act prevents the ship-owner and the security firm from using means that are detachable from the protected ship, such as speed crafts and helicopters, to prevent piracy suspects from approaching their target. As a consequence, such action is reserved to state warships patrolling in the vicinity.²⁰

1.2 The 2014 Act only applies to cargo vessels and empty passenger ships

The 2014 Act applies to ships sailing under the French flag (s. L. 5441-1). Indeed, the French legislation only applies to such vessels and extending its territorial jurisdiction to other ships employing on board security firms is out of the question.²¹

According to the 2014 Act, all ship-owners can require a private protection team, but the n° 2014-1418 decree exempts a number of French-flagged ships from the benefit of these regulations: pleasure crafts – even commercial ones – and passenger ships, except for those that come within one of these two categories and have a hull exceeding 24 metres and carrying only their crew (composed of professional seamen in the case of pleasure crafts). The restrictions that apply by virtue of this decree may be explained by what would be the protection team’s operational constraints if it had to defend a ship carrying passengers. Indeed, beyond the great number and expanse of compartments in a passenger vessel, the sole fact that passengers are exposed to the action would be an insurmountable challenge for the protection team. This task is far from the mere protection against piracy. In addition, the state is, in principle, in charge of fighting terrorism and has issued specific regulations and operational plans – such as ‘Pirate Mer’ plan. It trains and dedicates special units for this kind of mission, referred to as counter-terrorism and hostage rescue teams, integrated into French Navy commandos.

19 *Loi n° 83-629 du 12 juillet 1983 réglementant les activités privées de surveillance, de gardiennage et de transport de fonds* [Act on private security activities] *Journal officiel de la République française* (Paris, 13 July 1983) 2155, now at Homeland Security Code, s. L. 611-1 *et seq.*

20 See, eg, the *Atalanta* operation led by the EU naval force (EUNAVFOR), designed to protect merchant vessels from piracy off the coast of Somalia. It is a joint action decided by the EU council on 10 November 2008 (Decision 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33) and modified by decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2012] OJ L89/69). Joint Actions 2008/749/CFSP and 2008/851/CFSP were amended through Council Joint Actions 2009/907/CFSP ([2009] OJ L322/27), 2010/437/CFSP ([2010] OJ L210/33), 2010/766/CFSP ([2010] OJ L327/49) and 2012/174/CFSP ([2012] OJ 89/69). The *Atalanta* military operation fits in the legal framework set by the UN Security Council resolutions allowing the Member States to use any means in Somali national waters in order to fight piracy (UNSC Res 1846 (19 December 2008) UN Doc S/RES/1846/2008 [8] and UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020/2011 [10]). Since the beginning of *Atalanta*, the French navy has brought to this operation an Atlantique 2 patrol aircraft and a warship – or at least a frigate; in spring 2015, the offshore patrol vessel *L’Adroit* was added.

21 See arts 92-93 UNCLOS.



Nevertheless, the special dispensation granted to passenger ships carrying only their crew allows ship-owners to protect ships transiting through dangerous areas and avoids assaults like that suffered in 2008 by the French-flagged *Le Ponant* sailing cruise ship, which was attacked by Somali pirates in the Gulf of Aden while performing (without passengers) a connection navigation between Seychelles and the Mediterranean Sea.²² Moreover, section L. 5441-1 clearly states that the squad's activity aims at ensuring the safety of all persons embarked on board the vessel, crew and passengers and the goods transported. Thus, all cargo vessels transporting passengers – as is frequently the case – can host a defence team.

Having reduced the material scope of the Code, the French legislator also intended to limit its geographical area of application.

1.3 The 2014 Act only applies in predetermined dangerous areas

Given that the 2014 Act affords ship-owners options far beyond those authorised to other private persons by common law, the legislator has compelled the government to establish strict and appropriate geographic limits on this activity. First of all, the Transport Code (s. L. 5442-1) states that the 2014 Act's regulation only applies beyond the limits of the states' territorial sea and empowers the Prime Minister to set by ministerial order the boundaries of the areas under the regulation, according to the criterion of threats encountered, after having consulted an inter-ministerial committee including ship-owners' representatives. The committee can also suggest, if needed, modifications to the shape and extent of the relevant areas. It thus ensures that the geographical scope of the 2014 Act meets this naturally shifting threat.

The geographical scope of the 2014 Act is currently determined by a ministerial order of 28 November 2014,²³ which identifies two areas where merchant ships are authorised to embark a defence team:

- The first, 'West Africa', stretches from the 16th parallel north (i.e. roughly the Cape Verde Archipelago) to the 17th parallel south (approximately the continuation of the line separating Angola from Namibia). Its eastern border is the boundary of the territorial sea of the

²² See a parliamentary report depicting the assault: Christian Ménard, *Rapport fait au nom de la commission de la défense nationale et des forces armées sur le projet de loi (n° 2502), modifié par le Sénat, relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police de l'État en mer* [Report on the bill on fight against piracy and state's police powers at sea] (Assemblée Nationale, 9 November 2010) <www.assemblee-nationale.fr/13/rapports/r2937.asp> accessed 1 February 2016. For the criminal proceedings that followed, see Cass Crim 16 September 2009, no 09-82.077 <www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021053597&fastReqId=1657137381&fastPos=22> accessed 1 February 2016. For the pirate's complaint before the ECtHR, see *Ali Samatar and others v France* App nos 17110/10 and 17301/10 (ECtHR, 4 December 2014).

²³ *Arrêté* du 28 novembre 2014 fixant les zones dans lesquelles les entreprises privées de protection des navires peuvent exercer leur activité [ministerial order setting the areas where private ship protection firms can operate] *Journal officiel de la République française* (Paris, 30 November 2014) 19999 <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029813006&dateTexte=20160120> accessed 1 February 2016.



neighbouring states (from Senegal to Angola), that is 12 nm (22 km) from their shores.²⁴ Its western limit has been drawn along the 19th degree longitude west, departing roughly from a point 110 nm (200 km) off Dakar and stretching approximately to the area halfway between Ascension Island and Saint Helena. It is about 6 million km² large (1.7 million nm²).

- The second, ‘Indian Ocean and Red Sea’, covers between 10 and 12 million km². It ranges from the Gulf of Aden (16° north) and the Iranian and Pakistani maritime approaches (26° north) to 10° south (roughly the longitude of northern Madagascar). It ends with the 78° east, i.e. a line corresponding to the longitude of the southernmost point of India. Here again, the area is closed by the territorial sea of the neighbouring states (from Pakistan to Mozambique and Angola). This area is more or less equivalent to the EUNAVFOR’s *Atalanta* operation framework.²⁵

These areas cover most of the regions exposed to the threat of piracy and allow ship-owners to safeguard a significant amount of the worldwide seaborne traffic, yet disregard three blind spots – which may be for diplomatic reasons that have proved to be inescapable.

The first stems from the fact that the relevant areas end with the border of the territorial sea of the neighbouring states, betting that each of them is able to ensure the safety of its coasts and maritime approaches. However, neither failing states nor weak ones have sufficient means at their disposal to carry out coastal patrols in order to eradicate piracy. Nevertheless, on this point, the French legislator had no choice but to abide by international law, which inevitably led to this solution²⁶ (except when the neighbouring state or the UN Security Council allows it). Nonetheless, it does not appear to be a real constraint, at least not for the vessels passing through the territorial seas of these states without stopping at their harbours. Indeed, such ships can avoid coastal waters with a higher risk of attack and remain far from the hazardous areas.

The two other blind spots are well-known for being the theatre of piracy and terrorist threats respectively. The first is the area composed of the Strait of Malacca and the South China Sea, which is seriously affected by piracy on account of its position as a key vector for global maritime traffic.²⁷ However, the bordering states have increased their patrols in the area, and piracy has decreased markedly over the last ten years. One must add that, in this sector, the outer limits of the territorial

24 Art 3 UNCLOS.

25 Decision 2008/851/PESC (n 20) s 1.2. See EUNAVFOR, ‘Mission’ <eunavfor.eu/mission> accessed 1 February 2016. To understand the situation and the legal framework that governs the fight against piracy in this area, see Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011).

26 UNCLOS grants to each ship a right of innocent passage in territorial waters, even to armed ships flying the flag of another state (arts 17 to 32). This right excludes any exercise, manoeuvre or training implying the use of weapons (art 19(b)). Only the sovereign state in the area can regulate the activities in its own territorial waters (art 21) not the flag state.

27 According to the 2014 IMO annual report on piracy (n 2), among the 242 piracy or armed robbery at sea acts committed in 2014, 82 took place in the South China Sea and 77 in the Strait of Malacca.



seas are so closely related that the area where ship-owners could implement the French 2014 Act would be too narrow to justify activating a protection team. Another area forgotten by (or rather excluded from) the 2014 Act's geographical scope is the Persian Gulf, which is also affected by a permanent threat of terrorist activity. It is necessary to emphasise that the bill that paved the way for the 2014 Act only addressed the problem of piracy. Thus, the government, when preparing the decrees and statutory orders intended to enforce the law and define the relevant areas, left out or overlooked the question of piracy-related terrorism in this region. Moreover, the outer limits of the territorial seas are again very close to those of the neighbouring states. It is also likely that given the nature of the risk, its intricacy and its links with the geopolitical context, the most relevant response is that provided by a few neighbouring states and the repositioned Western forces.²⁸

It is evident that the legislator's intent was to carefully determine the situations in which the ship-owner is granted the right to hire a protection team insofar as the particular situation justifies such measures. This mirrors the cautious approach of public authorities in this respect, due to the nature of the activity and its means, which in a certain way breaks with some established usages among the maritime world. In addition, the 2014 Act provides for a strict legal framework because uncontrolled development of this sector can lead to various forms of mercenary crews on board French vessels.

2. Authorisation, certification and control are the keys to the system

With the aim of avoiding the surge of uncontrolled ship protection businesses, the 2014 Act and the decrees n° 2014-1415 and n° 2014-1417 create a twin control mechanism based on an administrative authorisation necessary for the firms wishing to involve themselves in this trade and an individual approval scheme for each employee of maritime security firms. This legal framework is directly inspired and almost identical to the system created 30 years ago for ground-based private security guards by the Act of 12 July 1983. The regulatory provisions specifying the conditions laid down by the 2014 Act have also been introduced in the Homeland Security Code, in parallel with 'classical' (i.e. ground-based) private security regulations, and use part of their legislative environment. The foundations of this system are as follows.

2.1 The private security firm must be certified, receive authorisation and its managers must be granted approval

First of all, the private ship protection business is reserved to the firms that are able to demonstrate that their organisation and internal procedures can cope with the kind of missions given by ship-owners. Each firm willing to enter the market has to be certified by an independent certifying

²⁸ The Fifth Fleet of the US Navy, which is headquartered in Manama (Bahrain) with at least one aircraft carrier and its group. For example, the French navy deployed the group on the *Charles de Gaulle* aircraft carrier six times between 2001 and 2015.



entity, according to the Homeland Security Code (s. L. 616-1), which only allows the firms having received this *ad hoc* certification to run such a business. This certification ensures that the private security firms putting protection teams at the disposal of ship-owners comply with the regulations connected with all on board security matters. These include the ability to communicate directly with the vessel's crew and management rules within the protection team, rules regarding the use of force and the reporting of incidents, etc. (Homeland Security Code, s. R. 616-2). It is issued by the national commission for private security activities, which is a Home Office entity.

The procedure leading to the firm's authorisation is the same as that applied to all private security firms fulfilling this activity on the ground (Homeland Security Code, s. R. 612-1 *et seq.*). But given the specific requirements of the maritime environment, the nature of the tasks and the scope of rights given to the defence teams, special sections of the Code (s. R. 616-1 *et seq.*) strengthen the standards imposed on the applicants. Moreover and as a consequence of the regulatory demands imposed on the firm, each manager must request and receive individual administrative approval, which is a mandatory prerequisite to starting the business. It is delivered by a special administrative commission bringing together Home Office representatives, such as prefects, judiciary authorities and private security firms' representatives. This committee is the competent licensing authority for all private security firms and is known as the regional private security approval and control commission (Homeland Security Code, ss. R. 633-1 and R. 635-1). Given that ship protection is carried out beyond the limits of the territorial seas and not in a specific continental region of France, the Paris regional commission delivers the approvals enabling the ship protection firms (Homeland Security Code, s. R. 633-1) after checking the nationality of the future bearer, his professional skills and compatibility with such activity as well as a criminal record check.

It must be noted that the approval is not intended as a mere formality. Indeed, a comprehensive body of skills is expected from the private ship protection firm's manager (Homeland Security Code, s. R. 616-11): knowledge of the French legislation governing the activity, of possible criminal liability (especially as it relates to the protection of physical integrity), the duty to provide assistance and the obligation to prevent criminal offences. They are also supposed to master French legislation on firearms, the International Ship and Port Facility Security Code (ISPS code), the International Safety Management Code (ISM code) and the UNCLOS provisions regulating the right of innocent passage. Looking ahead in an effort to predict how these requirements will be interpreted by the public authorities handling the ship-owners' applications is no easy feat. Nevertheless, such conditions necessarily imply that only persons duly skilled and well-versed in issues related to the maritime field, especially naval safety, will be able to create and run private ship protection firms. It is thus probable that these conditions guarantee a suitable professional level in the sector.

In addition to these requirements, it must be noted that the first authorisation delivered to a firm can only be provisional (Homeland Security Code, ss. L. 616-1 and R. 616-1) and is limited to six months validity. The request lodged by the firm must include its procedure manual, approved by the Minister of Transport (Homeland Security Code, s. R. 616-3) and the contract with the certifying organisation controlling its procedures. After receiving this temporary authorisation, the firm must



obtain its certification within six months as this document is the *sine qua non* condition to receiving final approval (Homeland Security Code, s. R. 616-5).

2.2 The professional card bearing the ‘ship protection at sea’ label is the prior authorisation granting access to the profession

As the managers of the ship protection firms, and just like every security guard in France, each member of a protection team embarked on board a merchant ship has to carry a professional card that confirms the administrative authorisation allowing him to embark and fulfil the corresponding tasks (Homeland Security Code, ss. L. 616-2 and R. 616-6). Although issued by the employer, this card bears the personal registration number allotted by the public authorities. It must be shown whenever requested by police officers or other types of controlling agents.

As far as the basic principles of good moral character and integrity are concerned, there are few differences between the requirements that a ‘classical’ security guard must meet and those for ship protection agents. According to the Homeland Security Code (s. L. 612-20), the authorisation can only be issued if the potential employee produces a judicial record untainted by a felony or serious misdemeanour. An administrative inquiry also searches for possible evidence that the applicant has infringed rules of moral integrity or has been a threat to public order or state security. In such cases, the administration can refuse to grant the applicant approval. Foreign applicants subject to an expulsion order or judicially banned from French territory can also be denied approval. Last but not least, the applicant must also submit the documents establishing his skills.

There are two major differences between land-based security guards and those carrying out ship protection missions. First, in terms of professional skills, the Homeland Security Code (ss. R. 616-11 et R. 616-12) is much more demanding from ship-based security agents than their colleagues employed (on ground) under the Act of 12 July 1983: the members of protection squads have to master the knowledge expected from the managers (listed above), but they must also have received the basic training of seamen and be proficient in risk management procedures. In addition, they shall be acquainted with their own firms’ procedures for the use of force and reporting of incidents, with the maritime work environment, the vessels’ operating constraints and the chain of command on board. The regulations also insist that the agents possess theoretical and practical knowledge about firearms and on board security devices and have basic medical training. At the very least, medical fitness for sea service must be established as well as a medical statement proving their physical and psychological ability to carry a weapon.

Second, another distinction is made between the two categories of security guards: while the land-based guards receive firm authorisation if they fulfil the legal conditions, the ship protection agents can only be given a provisional approval when they first apply (Homeland Security Code, s. L. 616-2). The first professional card issued is only valid for one year and cannot be delivered if the applicant does not show a hiring letter from an authorised ship protection firm. This first issuance is a trial and qualifying period, which unknown to classical (ground-based) security guards, during which the



employee must be on board the vessel for at least 30 days and receive a favourable report from the firm. From this moment, he can submit a new application before the Paris regional commission in order to obtain a five year professional card (Homeland Security Code, s. R. 612-13), which is valid for four years after the probationary year. The commission can also deny the card (ss. L. 616-2 and R. 616-9).

Even access to training as a ship protection agent is submitted for authorisation (Homeland Security Code, s. L. 612-22). This rule is common for both these agents and ‘classical’ security guards but, unlike the latter, the ship protection agents cannot be provisionally employed during their training period (ss. R. 616-1 and R. 616-2). Finally, it must be noted that all the authorisations and approvals issued under the 2014 Act, whether that of the firm, the managers or employees, can be withdrawn if they cease to fulfil the legal conditions or challenge public order (Homeland Security Code, ss. L. 612-8, L. 612-9, L. 612-20).

2.3 The ship protection firms under state control

The Homeland Security Code (ss. L. 616-4 and L. 616-5) allows for the possibility of unannounced checks and for the state to investigate any incident involving the embarked defence squads and to punish any offences committed. A wide variety of state officials are empowered to carry out a control check at any moment: police commissioners and officers, *Gendarmerie* officers and non-commissioned officers, maritime affairs service officers and civil servants, commanders and second-in-command of navy warships, state ships and aircrafts devoted to maritime patrol, and customs officers.

The control check can take place on board the protected vessel and includes the right of all state ships commanders to order the diversion of a merchant ship so as to carry out the control check. The commissioned officials listed above can ask for the professional card of each member of the protection team, check the identity of all persons found on board the vessel and open all on board documents, especially the protection squad record held by its chief, which is designed to chart and track its activities (Transport Code, s. L. 5542-10). When controlling the ship, the authorised officers are granted the right to visit the whole vessel, especially the compartments designed to store weapons and ammunition. At the end of the inspection, an official written record must be drawn up. Each investigating police officer and a number of state commissioned agents (navy officers, navy ship pursers, etc.) are empowered to find and record the infringements of legislation related to ship protection activity. When appropriate, and after having received special authorisation from the public prosecutor, they can seize the weapons and ammunition and any document that could help prove the infringement.



3. The protection mission, its legal framework and operational constraints

3.1 The protection squad is under the shipmaster's oversight

Compared to traditional security missions taking place in office or commercial buildings, protecting a merchant ship en route entails technical requirements and restrictions, linked with the environment – i.e. the size of the ship and number of angles of attack,²⁹ compatibility of protection actions with the vessel's navigation, especially in circumstances such as heavy traffic, natural obstacles, hazardous cargo implying restrictions on firearm use, etc. Moreover, neither the shipmaster nor the squad have immediate access to public authorities and services, which are a natural extension of ground-based security guards, such as police and emergency services. However, it should be borne in mind that the threat requires the use of more powerful weapons or defence tactics than those granted to traditional security guards (who cannot carry firearms in France) and increases pressure on the ship protection team members, who will inescapably have to tackle war-like situations.

The main effect of these constraints was a conscious choice of the legislator: given the peculiarity of its environment, the ship protection squad is placed under the shipmaster's responsibility (Transport Code, s. L. 5542-9), who is traditionally and legally designated by the law as the guardian of public order and authority on board and in charge of the ship's safety (UNCLOS, arts. 27 and 94; Transport Code, s. L. 5535-1). The shipmaster's task regarding the protection team is all the more relevant because he is also in charge, on behalf of the ship-owner, of taking every decision or measure needed to safeguard the vessel and ensure its effective operation (Transport Code, ss. L. 5412-2 to L. 5412-4). Besides, this role implies that he is liable under civil and criminal law for any event related with the ship's navigation (s. L. 5542-4).

As a consequence, before departure, the ship-owner has to provide the shipmaster with a copy of an appendix to the contract signed between the shipping company and the ship protection firm. This annex lists the legal elements depicting the squad's composition and approvals, such as data on the firm's authorisation and employees' professional cards, brand, model and serial number of each weapon, name of the squad's captain (Transport Code, ss. L. 5442-7 and L. 5442-8). This document must also certify and provide evidence that the squad's captain is able to communicate with the shipmaster using the working language used on board, chosen by the ship-owner according to the Transport Code (s. L. 5513-1).

The shipmaster is to record in the ship's logbook any event questioning the role of the protection team or involving the weapons or ammunition on board. In the same logbook is the registration of all the boarding and landing movements of squad members, every storage and removal movement of arms or ammunition and the circumstances in which these are used (Transport Code, s. L. 5442-

29 200-300 metres (600-900 ft long) and 30 m (100 ft) wide ships are not uncommon.



11). In the event of an incident involving a member of the protection team, he must write an official report and send it to the national council for private security activities.

When the protection squad boards the ship, the shipmaster has to check the identity of each member and the weapons' serial numbers. He must then inform the state authorities – the prefect in mainland France or the commander-in-chief of the maritime area overseas – that the squad has embarked or disembarked (Transport Code, s. L. 5442-8). Furthermore, the shipmaster or a crew-member has to follow the protection agent in charge of carrying the weapons, in order to escort him between the vessel and the boundary of the port authority, upon both departure and arrival (Transport Code, s. R. 5442-5).

Lastly, the shipmaster is responsible for the defence strategy and its compliance with the vessels' requirements: he provides the protection team with any necessary information about the constraints linked with the safety and operation requirements of the ship, and he decides where and how the weapons must be stored (Transport Code, s. R. 5542-6).

3.2 The protection squad: composition, distinguishing marks and equipment

What can and must be the standard protection squad for a merchant ship is set by the Transport Code (ss. L. 5442-2 to L. 5442-6). The squad's composition is decided by both the ship-owner and the security firm. For this purpose, they must, according to the Code, analyse the potential hazards affecting the boat, taking into account its passive protection systems. According to the 2014 Act, the squad must consist of at least three members. Every agent wears a specific uniform allowing him to be identified on board, to avoid any confusion with police or military officers, and must be provided with a bulletproof vest.

Only the following weapon classes can be purchased, embarked and used:

- Semi-automatic shoulder firearms with calibre ranges from 5.56 mm (.22 inches) to 12.7 mm (.50 inches);
- Pump-action smooth-bore firearms;
- Handguns, no greater than 9 mm (.357 inches) calibre;
- Electromagnetic pulse (EMP) weapons;
- Tear gas or incapacitating spray bombs.

The squad may embark two weapons for each member and four additional weapons as a reserve (Transport Code, s. D. 5442-1-2). The ammunition needed, including incendiary ammunition, can also be embarked and stored on board. It must be noted that, even if the 2014 Act and subsequent regulations remain silent on this issue, they can be interpreted as forbidding the installation and use of firearms mounted on a fixed station aboard the ship. The authorised equipment may seem rather lightweight if one recalls that the protection team has to defend the ship even in grey zones where



piracy frequently profits from weapon smuggling, local conflicts and terrorism.³⁰

In some cases, the ship protection requirements have led some countries or operators to install fixed defence means on cargo vessels, such as small calibre guns on pivot mounts. The British firm Pacific Nuclear Transport Limited, for instance, which is in charge of transporting radioactive fuel for the British nuclear industry, operates three ships carrying a special police unit and fixed naval guns.³¹ Moreover, in France, a 1990 bill proposed to gather, if necessary when a crisis occurs, a ‘maritime complementary force’ consisting of militarised cargo ships, which might imply additional features such as machine gun mountings and light anti-aerial missile systems.³² Perhaps the same could happen when a merchant ship is requisitioned according to the Defence Code (s. R. 2213-21). These examples, however, reveal that this kind of protection pattern is usually reserved by both regulations and state practices for strategic cargo and acute crisis situations. Therefore, we can hardly imagine hundreds of merchant ships navigating around the globe with such defence means, which are disproportionate to the threat and creating other issues in terms of navigation safety, public order and international relations, by blurring the limits between a warship and a merchant ship.³³

It can therefore be assumed that the private ship protection mission was intended by the legislator to be a primary defence level, which was only designed to have a sufficiently strong preventative effect intended to deter pirates or at least to make them hesitate. It seems that the legislator regards the warships patrolling the zones as the true and final means of defence against piracy, and the level of naval control run in these areas is a meaningful clue in this sense.³⁴

3.3 The defence mission: how it is carried out

According to the Transport Code (s. L. 5442-7), the ship-owner must inform the state authorities that he intends to embark a protection squad on one of his vessels at least 72 hours before its boarding. At that time, he checks the professional cards of the agents and informs the captain of these elements. The declaration sent to state authorities must mention the ship’s scheduled itinerary and the protection squad’s boarding and landing programme. At the same time, 72 hours before

30 According to press reports, Somali pirates often use weapons, such as automatic assault rifles or rocket launchers (eg when attacking the French cruise ship *Le Ponant* in 2008 or the Liberian-flagged tanker *Sirius Star*). Moreover, in 2000 and 2002, speedboats apparently driven by suicide bombers/terrorists collided with the US Navy frigate *USS Cole* in Aden harbour and the French supertanker *Limbourg* close to the Yemeni shore.

31 These ships are M/V *Pacific Grebe*, *Pacific Heron* and *Pacific Egret*.

32 *Projet de loi relatif à la force maritime de complément*, n° 1190, déposé le 2 avril 1990 [Bill on the maritime complementary force] <www.assemblee-nationale.fr/14/projets/pl1674.asp> accessed 1 February 2016. The bill was sent to the Assemblée nationale but apparently never brought to debate.

33 Even if this was a common case until the beginning of the 18th century.

34 The French navy offers a voluntary naval control service, led by the Indian Ocean maritime area command. For the principles and rules of such control, see *instruction interministérielle* n° 1094/SGDN/PSE/PPS/CIPRS du 27 juin 2001 relative au contrôle naval volontaire [Interdepartmental instruction on voluntary naval control] *Bulletin officiel du ministère chargé de l'équipement* (Paris, 10 September 2001) 1112 <www.bulletin-officiel.developpement-durable.gouv.fr/fiches/BO200116/A0160050.htm> accessed 1 February 2016.



this transfer, the firm in charge of conveying arms and ammunition to the ready-to-sail ship must declare the transfer.

Once the ship is at sea, the shipmaster and the protection team's captain consider together the measures and countermeasures to be laid down in order to defend the vessel before it reaches the hazardous areas. There, the squad, if duly authorised by the captain, can begin its training. Indeed, the weapons can be removed from their storage compartments only when the boat sails into one of the two geographic areas discussed above and only the shipmaster can make such a decision and order the squad to put itself in readiness mode and defence condition (Transport Code, s. R. 5442-6).

The forms of action offered to the protection squad are defined by the Transport Code (ss. L. 5442-4 and L. 5442-6). In particular, the squad's members are the only persons on board who are legally entitled to handle the weapons and resort to force in order to ensure the vessel's protection.³⁵ If one of the aggressors turns out to be a prisoner or is picked up aboard the merchant ship after a failed assault, he must be placed under 'consignation' by the shipmaster,³⁶ who must inform the French embassy in the country where the next stop is scheduled.³⁷

3.4 After the mission: follow-up and feedback

Seeking to set strict norms for this new activity, the French legislator has built a comprehensive feedback system designed to gather and transmit to state authorities any useful information after the protection team has been activated. The shipmaster and the squad's captain are both required to write a separate report describing any incident that led the squad to resort to force (Transport Code s. L. 5442-12). The protection squad leader's report is attached to the shipmaster's report and sent to the maritime prefect as soon as is possible. If it carefully draws the conclusions of the event, this report can become the starting point of a true operational debriefing gathering the ship-owner, the ship protection firm and state authorities and allowing better knowledge of the threat to be gathered. Indeed, the legislator demands it to mention the attack's circumstances, nature, the means used by the pirates, especially their arms and assault methods, the number of pirates, description and language. Moreover, it collects the defence team's composition, written testimonies of its members, lists the arms and ammunition that were used, the wounds suffered and any damage to the ship or the cargo. The report must also analyse the event, the lessons learned from it, the procedures recommended to avoid new assaults and any breach of discipline rules assignable to the protection team.

35 According to s. L. 5442-4, the squad mission is carried out in the framework laid down by Title II of Book I of the Penal Code, which suggests that only an appropriate and legitimate need for self-defence can justify forceful action.

36 The aim of this coercive measure is to maintain public order on board by isolating any person who could endanger the vessel, the crew, the cargo or the passengers (Transport Code, s. L. 5531-19). It cannot be applied without the public prosecutor's agreement, but in cases of emergency, the shipmaster can decide to do so immediately if the prosecutor is duly informed.

37 For the links between the protection squad issue and human rights, see Jessica NM Schechinger, 'Responsibility for Human Rights Violations Arising from the Use of Privately Contracted Armed Security Personnel Against Piracy. Re-Emphasizing the Primary Role and Obligations of Flag States' (2014) in Erik Jaap Molenaar, Sarah Nouwen and Cedric Ryngaert (eds), *What is Wrong with International Law? Liber Amicorum A.H.A. Soons* (Brill 2015).



There is no doubt that, provided these reports are thoroughly read and analysed by public authorities and the data collected to strengthen the response to piracy, they will be the most efficient state control tool for the sector. This is all the more necessary now that such missions will not tolerate any lack of professionalism, consciousness and sense of duty.