

Provisional guidelines – use of armed guards on board Norwegian ships

1. Introduction

The shipping industry has been hit hard by the steadily increasing and extremely violent acts of piracy occurring off the coast of Somalia and in the Indian Ocean. These acts are taking place despite the implementation of improved security measures by the industry, including the use of convoys, and the presence of military forces. The pirates are now carrying out attacks across large parts of the Indian Ocean, and the marine forces have a limited ability to protect trade vessels in such a large geographical area. The pirates are better organised, better equipped and more aggressive in their use of firearms than previously.

To help ensure that ships registered in Norway are able to protect themselves as effectively as possible against acts of piracy and pirate attacks, the decision has been made to regulate the use of private armed security guards by means of changes to the Regulations of 22 June 2004 No. 972 concerning security, anti-terrorism and anti-piracy measures and the use of force on board ships and mobile offshore drilling units (the Security Regulations) and the Regulations of 25 June 2009 No. 904 concerning firearms, firearm parts and ammunition, etc. (the Firearms Regulations). The Security Regulations are based on section 40, fourth paragraph, see also section 39, first paragraph, see also section 40, first paragraph, of the Act of 16 February 2007 No. 9 relating to ship safety and security (the Ship Safety and Security Act). In the interests of completeness, it should be noted that it is the company that decides whether to use private armed security guards. The Security Regulations do not encourage the use of such guards, but rather are intended to regulate the selection and use of private armed security guards to ensure that the highest possible professional and ethical standards are followed in connection with the use of such services on vessels registered in Norway.

These guidelines offer explanatory comments on relevant provisions of the Security Regulations and the Firearms Regulations relating to applications for firearms permits, the selection and use of armed guards, and reporting to public authorities on the use of force in connection with pirate attacks.

These guidelines are not exhaustive, and it is recommended that companies and any hired security firms/guards engage professional, qualified advisers to establish the scope of the legal rules to which they are subject under Norwegian law.

2. International rules, industry standards, etc.

At present, there are no binding international rules that govern the use and selection of private armed security guards. However, Den Norske Krigsforsikring for Skib (DNK, in cooperation with the Norwegian Shipowners' Association and the Norwegian Maritime Officers' Association), BIMCO and IMO (the UN maritime organisation), have all developed guidelines for the selection and use of private armed security guards. The IMO guidelines (MSC.1/Circ.1405) are appended to these guidelines in the interests of completeness. In preparing the guidelines, the IMO has relied on, among others, the standards of BIMCO and DNK. However, the IMO has also developed guidelines for flag states (MSC.1/Circ.1406). It is expected that the flag-state guidelines may be expanded to cover all states, including coastal

and port states. The flag-state guidelines will not, however, be discussed in more detail here. The DNK guidelines can be downloaded from www.warrisk.no.

Sector and industry standards are not binding on companies unless this is stated explicitly in the rules. However, such standards may be significant to relations between private parties, for example with regard to insurance cover. Moreover, the industry has worked closely with the military forces operating in the Gulf of Aden to establish Best Management Practices (BMPs). The BMPs describe passive and other unarmed security measures that companies and masters can implement on board to reduce the risk of hijack in high risk areas. The effective implementation of the BMPs current at any given time on board vessels, in addition to other passive and active unarmed measures, has been found to increase the chances of successfully preventing boarding and hijacking in connection with pirate attacks. It is important that the company, in consultation with the master and the Company Security Officer (CSO) or a corresponding person, conducts an active assessment of passive and active unarmed measures before armed guards are brought on board. The use of armed guards must be a supplement to, and not a replacement for, the effective implementation of the BMPs and, if relevant, other passive or active unarmed measures. Further comments in this regard are included below. An updated version of the BMPs can be downloaded from the website of the Norwegian Maritime Directorate: www.sdir.no/no/sikkerhet/ISPS/.

Customary international law, among other legal authorities, provides that the use of force is restricted to cases of necessity or self-defence, i.e. cases in which there is no other way out and in which the requirements of necessity, reasonableness and proportionality are observed in connection with the use of force. Such customary international law is binding on Norway and its inhabitants.

However, there are also international rules that deal with acts of piracy and terrorism. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988 (the SUA Convention 1988) and the Protocol of 2005 to the SUA Convention 1988 (the SUA Convention 2005, not ratified by Norway, however), contain specialised penal provisions targeted at acts of terrorism and hijacking at sea. The UN Convention on the Law of the Sea of 1982 adopted several principles for combating piracy on the open seas in accordance with customary international law. In general, the Convention on the Law of the Sea grants a very wide scope for the use of force against piracy by nation states; see Articles 105 and 110 of the Convention on the Law of the Sea. However, the Convention on the Law of the Sea provides no basis for private law enforcement.

The use of force by private security guards must therefore be based on the general, internationally accepted principles of self-defence. Moreover, the Convention on the Law of the Sea requires assistance to be provided to injured and shipwrecked persons on the open seas, provided that this can be done without serious risk to the ship or the crew; see Article 98 of the Convention on the Law of the Sea.

3. National rules

a. The Ship Safety and Security Act

The Act of 16 February 2007 No. 9 relating to ship safety and security (the Ship Safety and Security Act) applies to all Norwegian ships regardless of where they are located. It does not apply to leisure boats.

Chapter 6 of the Ship Safety and Security Act lays down rules regarding on-board security measures, and consists of two provisions: sections 39 and 40. Section 40, first paragraph, states that measures must be implemented to prevent and protect against illegal actions against the ship. These measures are preventive, and it is the company that is obliged to implement them.

The list in section 39, third paragraph, sets out the measures whose implementation is particularly relevant, which are based on key elements of the ISPS Code. Even though the measures mentioned in sub-paragraphs a) to h) are primarily intended to prevent acts of terrorism, the preparatory works to the Act state that they, “may also have a preventive effect in relation to other unlawful actions against the ship,” typically acts of piracy.

Section 40 of the Ship Safety and Security Act gives the master special authority to implement measures and use force to protect the ship against unlawful actions as mentioned in section 39 of the Act, and to maintain calm and order on board. The wording of the first and third paragraphs is as follows:

“When necessary in order to prevent or protect against actions as mentioned in section 39, first paragraph, the ship may implement measures and use force.

[...]

The right to implement measures and to use force shall lie with the master. All persons on board shall be obliged to give assistance and to respect the measures that are taken.”

The power to use force pursuant to section 40 therefore lies with the master, but there is no doubt that other persons (typically private guards), who use force in accordance with the master’s authorisation must also be subject to the limits on the use of force which are set out in section 40 or which are introduced pursuant to section 40. Section 40, third paragraph, second sentence, of the Ship Safety and Security Act states that *all persons* located on board, including hired private guards, are obliged to respect the measures implemented by the master. This is one of few provisions in the Act which imposes a duty on parties other than the company, the master or the crew. In the interests of completeness, the limits on the use of force will be discussed in more detail in section 10 below.

Section 40, fourth paragraph, of the Ship Safety and Security Act authorises the adoption of regulations that supplement the provision; an example is the Security Regulations.

b. The Firearms Act

The Act of 9 June 1961 No. 1 relating to firearms and ammunition, etc. regulates all trade and acquisition of civilian firearms. Sections 7 and 8 of the Act establish that any person intending to acquire, own or hold firearms requires a permit from the chief of police (a firearm licence), while section 10 governs the withdrawal of firearm licences. The Act is primarily formulated to regulate firearms on Norwegian soil, and is little suited to the special conditions which apply in the present case. On the other hand, the presence of firearms on board Norwegian ships has not been particularly relevant since the passing of the Act, until now.

c. The Security Guard Services Act

The Act of 5 January 2001 No. 1 relating to security guard services (the Security Guard Services Act), regulates the use of commercial security guard services and private security guard schemes. The Act is intended to help to ensure that guard services are of a high quality,

and to protect the legal rights of persons who are the subject of actions by guards and of the users of such services. Guards are not permitted to use force in excess of the general right granted by the self-defence provision in section 48 of the General Civil Penal Code of 1902, nor are they permitted to use firearms.

Pursuant to a statutory amendment which entered into force on 1 April 2011, the Act no longer applies to security guard activities on board ships in foreign waters (referred to as ISPS ships). This is also one of the reasons why the Security Regulations had to be amended to impose requirements on companies that use security firms.

d. The rules in the Norwegian Maritime Code regarding the provision of assistance to persons in distress at sea, etc.

Depending on the circumstances, if a ship repels a hijack attempt by pirates through the use of firearms, the pirates may be put in an emergency situation due to personal injury or damage, fire, etc. Section 135, third paragraph, of the Norwegian Maritime Code (Act of 24 June 1994 No. 39), imposes a duty on a master to assist persons who are in distress at sea or who are threatened by a danger at sea provided that this can be done without serious risk to the ship or those on board. The master is thus required to undertake a concrete assessment in each individual situation as to whether help can be provided without serious risk to the ship or its crew.

As a general rule, the threshold for concluding that pirates present a potential risk to the ship or its crew is low, even if they are in an emergency situation. Even if the conditions for having to provide assistance are met, it does not mean that the pirates have to be taken on board the ship. If the circumstances permit it, it may be sufficient to deploy a life raft or to contact the military authorities. If the circumstances nevertheless require one or several of the pirates to be taken on board, the master should be aware that the pirates may use the emergency situation to take control of the ship.

It is also important to highlight the provision in section 135, fourth paragraph, which provides that, “[n]o one... must in any way, wholly or partially, interfere with the master in making decisions or effectuate efforts that in the master’s professional judgement are necessary for the safety of human lives at sea, or for the protection of the marine environment.” This provision, which is also included in the IMO maritime safety convention (SOLAS), reflects the fact that the master is in command on board, and that he has the final word in decisions relating to the security of the ship.

Finally, section 164, first sentence, of the Norwegian Maritime Code requires all masters involved in a collision between ships to provide assistance to the other ship and those on board, provided that this can be done without exposing one’s own ship to serious risk.

e. Regulations of 22 June 2004 No. 972 concerning security, anti-terrorism and anti-piracy measures and the use of force on board ships and mobile offshore drilling units

The Norwegian Maritime Directorate has issued the Regulations of 22 June 2004 No. 972 concerning security, anti-terrorism and anti-piracy measures and the use of force on board ships and mobile offshore drilling units. The regulations implement the ISPS Code and EU regulation 725/2004/EC. Internationally, there are differing views on the ISPS Code, which was adopted as a counter-measure following the terrorist attacks on the United States on 11 September 2001 and which also includes measures to combat piracy and armed robbery. The

regulations were adopted pursuant to section 39 of the Ship Safety and Security Act, which also covers other illegal acts than acts of terrorism but contains no direct references to piracy. However, it must be assumed that it also covers anti-piracy measures. Provisions concerning the use of force are included in chapter 4 of the regulations, while the use and storage of firearms and armed guards are covered in chapter 5. Chapters 4 and 5 of the regulations are discussed in more detail below.

f. Regulations concerning serious crimes

Pursuant to the Seamen's Act, the Norwegian Maritime Directorate has introduced the Regulations of 1 March 2005 No. 235 concerning the obligations of the master and company in the event that a criminal offence of a serious nature is committed on board ship, and concerning notification of missing persons. The regulations apply when there is a suspicion that a criminal offence of a serious nature has been committed on board a Norwegian ship, when a person accompanying the ship is missing in circumstances that give reason to believe that the person has drowned, and when a person has committed suicide on board. Among other things, the regulations impose certain duties on the captain to take investigative steps. Section 1 states that the regulations will not apply in connection with the investigation of matters related to the operation of the ship, including navigation. Criminal offences, such as a pirate attack, must be regarded as connected to the operation of the ship. The regulations will therefore not apply to such actions, and the master is not obliged to take investigative steps.

g. Penalties

i. The General Civil Penal Code 1902

If a ship is subjected to a pirate attack, and the ship employs force to prevent the ship from being hijacked, etc., the pirates or other persons may suffer personal injury or death. Such an act of self-defence will only be immune from prosecution and lawful if the use of force satisfies the conditions set out in section 48 of the General Civil Penal Code 1902 (section 18 of the 2005 General Civil Penal Code), on self-defence.

Section 12 of the General Civil Penal Code governs scope, and states that the code applies to the crew of a vessel registered in Norway or, "any other person travelling on the vessel," regardless of where they are located. A foreign security guard who commits a criminal offence on a vessel registered in Norway is thus covered by the General Civil Penal Code.

Section 48 of the General Civil Penal Code deals with self-defence. The provision states that self-defence applies when one has to take action which is otherwise unlawful in order to protect oneself against an unlawful attack by another person. Even actions which cause injury or death may, depending on the circumstances, be taken in self-defence. Such actions are not only immune from prosecution, but also lawful, and do not normally trigger liability in damages. However, the preventive action must be proportionate, and must therefore correspond to the seriousness of the situation with which one is faced. Section 40 of the Ship Safety and Security Act and section 48 of the General Civil Penal Code are alternative, and not mutually exclusive, grounds for immunity from prosecution and lawfulness. Once an act of self-defence is completed, the person attacked may have a certain duty to assist the attacker, see section 3 d above.

Section 314, first paragraph, of the General Civil Penal Code sets out penalties for a master or officer of the watch who in connection with a collision or manoeuvre causes

a dangerous situation and subsequently fails to provide assistance. Accordingly, the penal provision is only triggered by a failure to provide help when the emergency at sea has occurred as a result of a collision or manoeuvre (see section 164 of the Norwegian Maritime Code), and does not penalise breaches of the general duty to assist contained in section 135. See also section 3 d above.

ii. Penal provisions in the Ship Safety and Security Act

Chapter 10 of the Ship Safety and Security Act sets out penalties for breaches of the Act. However, breaches of sections 39 and 40 are not penalised. The security firm, the guards or the master may nevertheless be prosecuted by the Norwegian prosecuting authority if the limits on the use of force are breached. In special cases, the company may also be subjected to criminal prosecution pursuant to sections 48a and 48b of the General Civil Penal Code (criminal liability of enterprises). Breaches or defects caused by the security firm may also have severe financial consequences for the company with regard to the ship's insurers or the owner of the cargo.

iii. Penal provisions in the Firearms Act

Section 33 of the Firearms Act states that any person who intentionally or with gross negligence breaches provisions laid down in or pursuant to the Act shall be liable to fines or imprisonment for a term not exceeding three months, unless the offence is subject to a stricter penalty. Unlawful importation, transfer, acquisition or possession may be punished by imprisonment for a term not exceeding two years or, in the case of gross offences, a term not exceeding four years.

4. Geographical scope

Time-limited firearm permits issued pursuant to section 23 a of the Firearms Regulations and the Security Regulations apply to ships in foreign waters which are sailing in, to or from an area subject to alert level 2 or 3, but only when they are sailing south of 30 degrees north latitude. The phrase "(...) only when they are sailing south of 30 degrees north latitude" will guide the interpretation of "sailing in, to or from an area subject to alert level 2 or 3". The conditions of the time-limited firearm permit will not be breached if ships sailing to an area subject to alert level 2 or 3 bring on board armed guards and equipment, for example because of the planned sailing route, market conditions or legal conditions, provided that this is done south of 30 degrees north latitude.

5. Requirement for a firearm permit pursuant to section 23 a of the Firearms Regulations

A company which is considering bringing armed guards on board its ships must first apply for a firearm permit pursuant to section 23 a of the Firearms Regulations. The company may apply for a permit even if no decision has been made to conclude a contract with a specific security firm for the purchase of armed guard services. The application must be made to the chief of police in the police district in which the company or the operating company has its head office, or the police district in which the local representative of the owner has its registered address. Companies may only be granted a permit for a limited time period of up to six months. At the end of this period, companies may apply for a new permit. Permits granted pursuant to section 23 a of the Firearms Regulations are deemed to be firearm licences.

Section 23 a of the Firearms Regulations permits companies to be granted a general, time-limited permit for holding of firearms by hired security firms on board ISPS ships registered in Norway. Granted permits will only apply in cases in which firearms are brought on board

for protection against acts of terrorism and piracy as described in chapter 6 of the Ship Safety and Security Act. Companies may be granted a general permit to hold firearms. Granted permits will therefore not be linked to individual firearms. The reason why permits are not linked to individual firearms is that the permit and application systems of the Firearms Act appear to be largely impractical and unsuitable with regard to the matters that fall under the Ship Safety and Security Act, which regulates the use of armed guards on board ships registered in Norway. In addition, the time aspect will complicate making an individual application every time. Moreover, granted permits will not apply to a specific assignment or a specific security firm. Accordingly, when an application for a permit is made, no information needs to be included in this regard. In addition, the permit will not apply to security firms that are banned pursuant to section 20, fourth paragraph, of the Security Regulations; see section 6.

As stated, a granted permit will not be linked to each individual firearm. However, companies must apply for an exemption in order to be permitted to hold prohibited firearms. A chief of police may grant exemptions in respect of the following prohibited firearms:

- fully automatic firearms with a calibre such that the diameter of the bullet does not exceed 7.62 mm;
- fully automatic firearms that use rounds with a size of 9x19 mm; or
- single-shot, repeating or semi-automatic firearms with a calibre such that the diameter of the bullet does not exceed 12.7 mm.

An application for a permit made to a chief of police must include the following information:

- the name and address of the company, along with the full name and address of the person authorised to submit the application; see section 26, second paragraph, of the Firearms Regulations;
- the purpose of the application; see section 23 a, first paragraph, of the Firearms Regulations;
- any application for an exemption in respect of prohibited firearms; see section 23 a, second paragraph, of the Firearms Regulations;
- any previous firearm licence held by the applicant and, if relevant, who issued it; and
- a declaration that the ships have FG-approved security cabinets or, if relevant, that the necessary FG-approved security cabinets will be acquired by the time the guards come on board.

The application must be dated and signed by the applicant.

6. Criteria for the selection of security firms, etc.

Today, numerous security firms offer on-board guard services in high risk areas. There is reason to believe that not all of the security firms have the necessary expertise and credibility required to perform the demanding task of providing armed guard services in high risk areas. Companies are required to carry out a detailed assessment of the suitability of the security firm and the guards for each assignment. Section 20 of the Security Regulations imposes requirements on companies in connection with such selection, while the IMO guidelines contain more detailed provisions on how selection should occur. Section 20, third paragraph, of the regulations specifies that companies must take the IMO guidelines into account when selecting and using private armed security guards. This also means that the IMO guidelines should be followed wherever possible. However, it is not certain that all of the documentation

recommended by the guidelines can be submitted. At the same time, there may be information which a company deems necessary but which is not mentioned in the guidelines.

As regards documentation which companies are required to submit to the Norwegian Maritime Directorate for briefing purposes, section 20, second paragraph, of the regulations requires:

- a) A statement of reasons stating why the industry's guideline preventive measures are deemed insufficient and that there is a need for armed guards.
- b) An assessment of the suitability of the security firm and the guards, including the security firm's own documentary evidence:
 1. of satisfactory procedures for the recruitment and training of personnel;
 2. of satisfactory procedures for the procurement, use, maintenance, storage and transportation of equipment, including firearms and ammunition, relevant to the assignment in question;
 3. that the guards hold the necessary qualifications and have completed necessary training, including firearms training, for the assignment in question; and
 4. that the guards are at least 18 years of age, can identify themselves and can submit a recently issued certificate of good conduct. If a certificate of good conduct cannot be obtained, an alternate, similar confirmation or reference should be procured.

The requirement for companies to send the aforementioned documentation to the Norwegian Maritime Directorate is based on the principle that the Norwegian prosecuting authority should have access to a certain minimum amount of information for the purposes of any future investigation, for example if the unlawful use of force is suspected. The requirement is also intended to ensure that companies undertake a quality assessment in connection with the selection of their security firm.

Section 20, second paragraph, sub-paragraph a), of the regulations specifies that a decision to use armed guards may only be taken once a risk assessment has been completed that shows that measures in accordance with the BMPs will not ensure satisfactory security. This requirement affirms the duty of companies to carry out a risk assessment before private armed guards are brought on board; ref. "(...) there is a need for armed guards". Moreover, it also affirms the fundamental condition that private armed security guards must be a supplement to, and not a replacement for, passive security measures recommended by the industry. The aim of the provision is to help ensure that companies assess, specifically and in each individual case, the need for private armed security guards, and that private armed security guards are not used unnecessarily on board ships registered in Norway. Section 1.2 of the IMO guidelines (Risk Assessment) contains supplementary provisions concerning the risk assessment.

Section 20, second paragraph, sub-paragraph b), of the regulations requires companies to assess the suitability of the security firm and the guards for the intended assignment. An assignment on board a ship requires other qualities than an assignment on land. Companies will also be required to take the IMO guidelines into account in this context, see section 20, third paragraph. In the assessment of the suitability of the security firm and the guards, the security firm's own documentation relating to the matters specified in items 1) to 4) will be relevant minimum factors. It should also be noted that section 2.1 of the IMO guidelines (General (PMSC Selection Criteria)) contains a list of matters which should be considered with regard to the security firm, including its ownership, financial position, insurance

coverage, any accreditations, etc. See also section 2.2 of the guidelines (PMSC Background Information), which recommends that companies investigate the experience of the firm, including whether it has references from other clients and whether it has a sufficient understanding of the situation in the high risk areas, including of the military operations being conducted in these areas.

Item 1) requires the assessment and submission to the Norwegian Maritime Directorate for briefing purposes of the security firm's own documentation relating to, "satisfactory procedures for the recruitment and training of personnel". "Satisfactory" must be interpreted to mean, first, that the security firm has drawn up procedures and, second, that the procedures meet, objectively, a certain minimum standard measured by reference to the guidelines for the use and selection of security firms contained in the IMO guidelines. With regard to this requirement, it will be important, among other things, to give consideration to section 2 of the IMO guidelines (PMSC Selection Criteria). It will be natural to evaluate the experience and expertise of key company personnel, staff recruitment sources, who is recruited (whether background checks are performed, whether maritime experience is required), etc. As regards the satisfactory training requirement, this must be deemed also to include training of the crew on board to minimise the risk of injury to crew members in connection with the repelling of a pirate attack as much as possible.

Item 2) requires the company to assess and submit to the Norwegian Maritime Directorate for briefing purposes documentation concerning, "satisfactory procedures for the procurement, use, maintenance, storage and transportation of equipment, including firearms and ammunition, relevant to the assignment in question". As in the case of item 1), this requires, firstly, that the security firm has procedures in place and, secondly, that consideration is given to the IMO guidelines when evaluating the quality of the procedures. The transportation of firearms to the port at which the guards are to embark may be relevant, and it is important in this regard that the company checks that the security firm has procedures in place for obtaining the necessary permits (for example export permits or permits from the port state). The same applies to the security firm's procedures for the procurement of firearm types permitted by the firearm permit. The requirement that the security firm must have in place proper procedures for the use of firearms is, of course, also a key element. In this context, companies should give particular emphasis to checking whether the procedures of the security firm also cover any specialised types of firearm in respect of which the companies have applied for an exemption. Companies should also be aware of section 3.4 of the IMO guidelines (Management of Firearms and Ammunition from Embarkation to Disembarkation), which contains supplementary provisions regarding the factors to which the company should pay attention. In addition, the company should also be aware of sections 3.5 to 3.6 (Rules for the Use of Force and Reporting and Recordkeeping).

Item 3) requires the company to assess and submit to the Norwegian Maritime Directorate for briefing purposes documentation concerning the requirement, "that the guards hold the necessary qualifications and have completed necessary training, including firearms training, for the assignment in question". This provision relates directly to the requirement regarding the suitability of the guards, particularly with respect to the handling of the firearms permitted by the temporary firearm permit. The provision also relates indirectly to the suitability of the security firm, since suitable security firms are assumed only to recruit suitable personnel. The required experience may typically be from the military or specialist police forces. Not all security firms that offer services necessarily have experience of maritime guard duties, and it is important to be aware that guarding a ship presents different challenges from guard duties

on land. Section 2.4 of the IMO guidelines (Training of PCASP) contains supplementary recommendations regarding what documentary evidence the company should demand from the security firm, for example satisfactory, detailed specifications of completed training, including in the use of firearms.

Item 4) requires the company to verify that the guards are at least 18 years of age and that this can be documented. If a certificate of good conduct or similar document can be submitted, it must be sent to the Norwegian Maritime Directorate. However, the ability to obtain a certificate of good conduct will vary from state to state. Section 2.3 of the IMO guidelines (Selection and Vetting of PMSC) contains supplementary recommendations regarding what documentary evidence the company should demand.

Further, the company must consult the master before deciding to use armed guards; see section 20, first paragraph, of the regulations. The IMO guidelines also recommend consulting the master; see section 1 (Introduction), final paragraph. The reasons for this are that the master is in command on board, that the appropriateness of armed guards is an issue on which opinions may differ, and that the master will often have experience of sailing through high risk areas. It is assumed that the consultation with the master will be real, and that significant weight will be attached to his views. However, the decision to use armed guards lies with the company, as such use must be regarded as a preventive measure pursuant to section 39 of the Ship Safety and Security Act, under which the company is subject to the duty set out there. Nevertheless, the decision to use force to repel a pirate attack is the master's alone; see sections 17, first paragraph, and 24, first paragraph, of the regulations.

Section 20, fourth paragraph, of the regulations contains a safety valve that authorises the Norwegian Maritime Directorate to decide that companies may not use a particular security firm if the Directorate *receives specific, credible information* indicating that the firm in question is clearly unsuitable. In other words, the Directorate has no duty to undertake a quality check of security firms used on Norwegian ships. This check must be undertaken by the company; see section 20, second and third paragraphs, of the regulations. The safety valve is reserved for use in cases in which the Directorate receives specific, credible information through the media or other information channels about circumstances indicating that the security firm is unsuitable for assignments on board ships. It is clear that a high threshold must be exceeded before the Directorate makes this kind of decision, and such decisions will probably be limited to cases in which, for example, other authorities have charged the firm or its guards in connection with the commission of serious criminal offences. The decision of the Directorate may take the form of an individual decision, but it will most likely be sensible for it to be made in the form of a regulation.

7. Duty to notify insurers

Section 21 of the Security Regulations lays down a duty to notify the company's insurer(s). The provision requires a company, before using armed guards, to give reasonable notice to the insurers covering its liability, losses, expenses or expenditure resulting from piracy, and to provide any information required by an individual insurer in order to clarify matters relating to its insurance policy. Note should also be taken of section 3 of the IMO guidelines (Service Provision Considerations), which specifies, among other things, that the company should investigate whether the security firm itself is insured, and what this insurance policy should cover. The guidelines do not specify any sum which the security firm's insurance should cover. The company should consult its insurer in this regard.

8. Procedures for the use of armed guards, firearms, etc.

Section 22 of the Security Regulations establishes a requirement that a company must have in place procedures for the use of armed guards, firearms, etc. In addition, security firms must have in place their own procedures for the use of firearms (Rules of Force); see section 20, second paragraph, sub-paragraph b), item 2), of the regulations. Section 3.5 of the IMO guidelines (Rules for the Use of Force) also contains supplementary rules regarding the required content of the procedures, and states, among other things, that the company and the security firm should agree these. The master should also be consulted about the framing of the procedures. It is crucial that such procedures are in place, so that no doubt can arise about the circumstances under which force may be employed, not least in view of potential subsequent investigations of incidents during which force has been used. Procedures for the use of armed guards and firearms must be used and implemented by the master. The company must, in consultation with the security firm and, if necessary, external advisers, establish operational procedures which satisfy the requirements of the regulations as described in, among others, section 10 below, and which otherwise comply with Norwegian law.

9. Storage of firearms

Firearms must be stored properly, in accordance with the Firearms Regulations; see section 23 of the Security Regulations. This implies that firearms and ammunition must be stored in such a manner that unauthorised persons do not gain access to them; see section 78 of the Firearms Regulations. This means that all firearms that have to be registered, or a vital component of such firearms, must be stored in FG-approved security cabinets (the Norwegian Insurance Approval Board (FG)), or in cabinets with a higher security rating; see section 79, first paragraph, of the Firearms Regulations. The terms “FG-approved security cabinets” and “cabinets with a higher security rating” mean cabinets approved under Norwegian Standard NS 5089, INSTA 610 or NS-EN 1143-1; see section 79, second paragraph, of the Firearms Regulations. The rules for the storage of ammunition follow from section 80 of the Firearms Regulations. FG-approved security cabinets, or cabinets with a higher security rating, may contain, in addition to firearms, the number of rounds approved by the manufacturer of the cabinet. If the cabinet is not separately approved for the storage of ammunition, no more than 2,000 rounds may be stored in the cabinet.

10. Use of force, including the use of firearms

Authority to use force to prevent or protect a ship against acts of terrorism or piracy is found in section 40, first paragraph, see also section 39, first paragraph, of the Ship Safety and Security Act. The preparatory works to the Ship Safety and Security Act state that this provision largely mirrors section 6, fourth paragraph, of the Police Act, which grants the police a positive right to use force without linking this to the provisions of the General Civil Penal Code relating to self-defence and the principle of necessity. The use of force includes the use of firearms; see Proposition to the Odelsting No. 87 (2005–2006), page 125.

Pursuant to section 40, first paragraph, of the Ship Safety and Security Act, force may be used when “necessary” to prevent or protect against a pirate attack. The preparatory works to the Ship Safety and Security Act expand on this, stating that the use of force must be limited to cases in which it is, “necessary, justifiable and proportionate, but [that] the relatively strict requirements regarding the protection of the attacker’s interests which are laid down in the self-defence provision do not necessarily have to be satisfied”; see Proposition to the Odelsting No. 87 (2005–2006), page 125. Moreover, the statement that the use of force must be “necessary, justifiable and proportionate” corresponds with the basic requirements and conditions that have to be met in order for use of force which would otherwise be unlawful to

be deemed immune from prosecution. Use of force which would otherwise represent, for example, unlawful assault, will be lawful if the conditions specified in the self-defence provision in the current section 48 of the General Civil Penal Code (section 18 of the 2005 General Civil Penal Code) are met. The conditions for the lawful use of force are specified in more detail in section 17 of the Security Regulations. Pursuant to section 17, second paragraph, of the Security Regulations, force, including the use of firearms, may only be employed against a threat which is direct, immediate, significant and otherwise unavoidable. Further, it is stated that the use of force must be avoided wherever possible, and when it is necessary, it must be proportionate in view of the scope of the threat and the conditions otherwise. This must be understood to mean that other, less radical measures must be attempted before force may be employed. This underlines the importance of the principle that private armed security guards are to function as a supplement to other, passive security measures, and not as a replacement for them.

In order for a master to be permitted to implement measures, including the use of force, to prevent or protect against a pirate attack, the use must be lawful. Unlawful use of force may trigger criminal liability under the General Civil Penal Code. However, from the preparatory works to the Ship Safety and Security Act, it is clear that the master may exercise significant discretion when faced with an unclear and apparently precarious situation. An imminent pirate attack will therefore satisfy the necessity requirement as described in more detail in section 17 of the regulations, even if the pirate vessels and pirates are located up to 2,000 metres from the ship. This interpretation is also consistent with the statement in the preparatory works that, “the relatively strict requirements regarding the protection of the attacker’s interests which are laid down in the self-defence provision do not necessarily have to be satisfied”. However, the use of measures and force must be balanced against the seriousness of the situation one faces; see Proposition to the Odelsting No. 87 (2005–2006), page 125.

For the purposes of the discussion below, it has been assumed that the conditions for the use of force laid down in section 17 of the Security Regulations are met. Section 24 of the Security Regulations governs the use of firearms. The section states that:

Arming and the implementation of procedures for the use of firearms shall be approved by the master in each individual case. Individuals shall always be responsible for ensuring that their use of firearms complies with sections 17 and 22.

This provision must be read with section 40, third paragraph, of the Ship Safety and Security Act. The section clearly states that the right to implement measures and to use force to prevent or protect the ship against piracy lies with the master. It is therefore natural to conclude that guards are also under the master’s command. See also section 22, second paragraph, of the Security Regulations.

“[I]n each individual case” cannot be interpreted to mean that the master must be informed in all cases and that the use of firearms to discourage a pirate attack must be approved. The master may issue standing orders regarding the use of firearms in accordance with the company’s established procedures in this regard, for example in connection with the night watch. However, beyond this, the general rule must be that the master must be informed about and implement the procedure for the use of firearms in accordance with established procedures.

The sentence stating that individuals are responsible for ensuring that their use of firearms complies with sections 17 and 22 of the regulations is intended to make all persons on board aware that their actions will be assessed independently, regardless of the master's command. In other words, marksmen have an independent responsibility to assess whether their use of a firearm will be lawful in the specific case, regardless of what the master or the company's instructions state. The master and the company's instructions will therefore not exempt the marksman from criminal prosecution, even if the master has the ultimate command and has acted in accordance with the company's procedures. The company, the master and the marksman may in such cases be prosecuted in Norway. However, if the marksman has acted contrary to the master's instructions, it is assumed that, normally, only the marksman will be the subject of any criminal prosecution.

The principle of minimal use of force must be followed, including in cases in which the ship is under attack by pirates. As stated, the company must establish detailed procedures for the use of firearms; see section 22 of the regulations. These procedures must, as a minimum, provide that, if the circumstances permit, the attackers must be warned by means of light and sound signals and the firing of warning shots; see section 24, third paragraph, of the regulations. The procedure for the use of firearms must therefore reflect the principle that the use of force must be gradual, reflecting the seriousness of the situation.

Further, section 24, fourth paragraph, of the regulations states that the firing of aimed shots with the objective of rendering a person harmless may only occur as a last resort and after other, gentler means have been tried unsuccessfully, or in situations in which alternative means clearly have no chance of success.

11. Reporting of incidents to the Norwegian Maritime Directorate and the Norwegian National Criminal Investigation Service (Kripos)

The duty of companies to make reports to the Norwegian Maritime Directorate and the Norwegian National Criminal Investigation Service (Kripos) is set out in sections 18 and 23, second paragraph, of the Security Regulations. Pursuant to section 18 of the Security Regulations, companies are required to report to the Norwegian Maritime Directorate within 72 hours incidents during which a ship has employed force to repel an "attack" on the ship by pirates or terrorists; see the first paragraph, first sentence. "Force" must of course be interpreted to mean the use of firearms. The use of passive security measures to prevent a pirate attack as recommended in the current version of the BMPs will not trigger a company's duty to make a report to the Norwegian Maritime Directorate.

The report must specify the persons involved and the use of force, including the use of firearms; see the first paragraph, second sentence. The report has two aims: one is to provide the Norwegian authorities with information about the use of firearms on board ships registered in Norway; the other is to support any subsequent investigation. As regards the latter factor, it should also be noted that the situation which triggers the reporting duty should, insofar as the circumstances permit it, be documented by means of sound and video recordings; see the first paragraph, final sentence. In the interests of completeness, it should be noted that the company is not obliged to document the incident by means of sound and video recordings; ref. the word "should" in the provision.

If there is reason to believe that the use of force has resulted in personal injury or death, this must be reported immediately to the Norwegian National Criminal Investigation Service (Kripos); see section 18, second paragraph, of the Security Regulations.

Section 18 of the Security Regulations does not state explicitly who is subject to the reporting duty. However, it is clear that it is the master who is the primary target of the provision. Nevertheless, the company bears ultimate responsibility for ensuring that the operation of the ship complies with the rules laid down in or pursuant to the Ship Safety and Security Act; see section 6 of the Ship Safety and Security Act.

Section 23, second paragraph, of the Security Regulations also establishes a duty for the company or the master to ensure that a register is kept of all firearms and ammunition brought onto and taken off the ship. Each firearm must be identified by type, manufacturer's mark or model description, calibre and firearm number. The quantity of ammunition must also be specified. Any deviations must be accounted for. This information must be reported to the Norwegian Maritime Directorate immediately, i.e. both when the firearm and ammunition are brought on board and when they are taken off the ship. This provision must be read with section 18 of the Security Regulations. In addition to serving purely investigative purposes, the reporting duty also enables the authorities to check what firearms are brought on board ships registered in Norway. Here too, it is clear that it is the master who is the primary target of the provision.

Reports pursuant to sections 18, first paragraph, and 23, second paragraph, of the Security Regulations may be sent electronically to postmottak@sjofartsdir.no.

12. Relationship with the Freedom of Information Act

Section 19 of the Security Regulations provides that, “[i]nformation which is sent to the Norwegian Maritime Directorate or the Norwegian National Criminal Investigation Service (Kripes) pursuant to sections 18, 20, second paragraph, or 23, second paragraph, may be covered by the exemption from access set out in section 24, third paragraph, of the Freedom of Information Act”. The assessment regarding whether information is to be exempted must be made by the body which receives the request for access; see section 29 of the Freedom of Information Act. Section 24, third paragraph, of the Freedom of Information Act must be considered in light of the fact that the regulations oblige the company or the master to submit various pieces of information which may be covered by the exemption pursuant to section 24, third paragraph, of the Freedom of Information Act. Information may be exempted from access, firstly, when an exemption is “required because access would facilitate the commission of criminal acts”. The exemption rule covers, among other things, information about specific security measures (active and passive security measures), guard routines, information about sailing routes, etc. which could be used for criminal purposes. The assessment should also take account of the fact that this information can be used to survey companies and their security measures in order to attack companies which do not have armed guards on board. Public authorities should not help to expose companies which choose not to bring armed guards on board to targeted attacks when their ships sail in or through high risk areas. Secondly, information may be exempted from access when an exemption is “required because access would jeopardise individuals”. The exemption rule covers cases in which a person may be exposed to reprisals by criminals if information about the person is made public. This exemption rule is not limited to cases in which the person in question is resident in or comes from Norway.