The Netherlands

By Jikke Biermasz, Kneppelhout & Korthals

The Netherlands is a trading nation. The port of Rotterdam is by far the largest port in Europe and is one of the five largest ports in the world. Amsterdam airport is an important logistics centre for Europe. Although the Netherlands is a small country, it leaves its mark on European export control policy and the majority of Dutch export control policy is coordinated internationally. In this chapter, we will discuss in a nutshell the most important aspects of the control of exports, transfer, brokering and transit of dual-use items in the Netherlands and review the key legislation, principal players, the procedures and the enforcement of export legislation.

**Key legislation**
The Netherlands is party to the relevant international export control conventions and is associated to all export control regimes. Regulatory controls on strategic goods in the Netherlands are mainly based on the following European regulations, national acts, orders and measures:

- **Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items**
  We assume this regulation, which introduces a community system for the export of dual-use goods, to be well known.

- **General Customs Act (Algemene Douanewet)**
  Since coming into force in August 2008, the General Customs Act has, *inter alia*, replaced the former Dutch Customs Act and the Import and Export Act as part of an integral revision of Dutch customs legislation. The General Customs Act forms the legal basis for virtually all orders and measures with respect to strategic goods. The remit and powers of control of Dutch customs have been further extended.

- **Strategic Goods Order (Besluit Strategische Goederen)**
  The Strategic Goods Order states the rules for the import, export and transit of strategic goods.

- **Strategic Goods Implementing Order (Uitvoeringsregeling Strategische Goederen)**
  The Strategic Goods Implementing Order goes deeper into the licence application procedure.

- **Economic Offences Act (Wet op de Economische Delicten)**
  The Economic Offences Act describes the powers of the customs authority and the fiscal information and investigation department with regard to investigations and details the sentences applicable in cases of criminal breach of export legislation.

- **Other legislation and regulations**
  Other relevant legal instruments are, *inter alia*, the Financial Involvement Strategic Goods Order, the CWC Implementing Act, the CWC Implementing Order, the Arms and Munitions Act and Sanctions Act.

**Authorities**
The main authorities in Dutch export control policy are:

- **The Ministry of Economic Affairs, Agriculture and Innovation (MEA)**
  The MEA is charged with the control of export and transit of strategic goods. The MEA holds the primary political and legal responsibility for implementing the export and transit controls and deciding on licence applications.

- **Tax and Customs Service, Central Licensing Office Service (CDUI)**
  Companies wanting to conduct a transaction subject to a licence requirement need to apply for an export licence at the Central Licensing Office Service. The CDUI processes the lion's share of the applications; in particular, applications for the export and transit of strategic goods to less sensitive countries. A minor part of the licence application is forwarded to the MEA for further assessment. The CDUI is part of the Tax and Customs Service Department of the Ministry of Finance and has a mandate from the MEA to process and grant licences.

- **Tax and Customs Service, team POSS**
  The team POSS supervises companies in the field of precursors, documents of origin, strategic goods and sanctions legislation. It supports the customs risk control organization by carrying out customs controls, inspections, examinations of books and records and supplying risk analysis.

- **The Financial Information and Investigation Service (FIOD)**
  The investigation of criminal offences against export legislation is one of the duties of the FIOD. In exercising their tasks and powers, the FIOD and the team POSS coordinate their actions and liaise with each other.

- **Ministry of Foreign Affairs (MFA)**
  The MFA deals with the international aspects of arms controls and international security policy. MFA is
consulted by MEA in licence applications for the export or transit of military goods to certain destinations. The MFA is then charged with the assessment of that application against, *inter alia*, the criteria of the EU Council Common Position. The MEA has the primary responsibility but the advice of the MFA plays a crucial role in decisions on sensitive transactions.

**General Intelligence and Security Service (AIVD)**
The AIVD has investigation and security powers and can provide MEA with information for export controls.

Other authorities which can play a role are the Military Intelligence and Security Service (‘MIVD’) and the Agency for Business and Co-operation (‘EVD’).

**Rules and procedures**
On 27 August 2009, the new Dual-use regulation (the ‘Regulation’) came into force. Dual-use goods controlled by the Regulation are included in the annexes. Export controls on dual-use goods aim to prevent certain goods normally used for civil purposes from being used in the development and manufacture of weapons of mass destruction and missiles capable of delivering these weapons to their targets.

**Export of dual-use goods**
Under the Regulation, export is understood as export of Community goods, re-export of non-Community goods, and transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means to a destination outside the European Community.

There is no licence requirement in case of intra-Community trade in those dual-use goods listed in Annex 1 to the Regulation which are not also mentioned in Annex 4. There are, however, requirements regarding commercial documents, which have to mention clearly that the goods will be subject to control upon export.

The most sensitive goods, which are not only listed in Annex 1 but which are also included in Annex 4, do not qualify for free circulation.

Transfer within Europe of these goods is subject to a licence requirement.

The export outside Europe of dual-use goods listed in Annex 1 is subject to a licence requirement.

**Transit of dual-use goods**
The term ‘transit’ means the transport of non-Community dual-use items entering and passing through the customs territory of Europe with a destination outside the Community.

Dual-use goods which transit though the European Community only are not subject to a licence requirement.

Where dual-use goods appearing in Annex 1 enter the customs territory of the Netherlands in transit through the EU, the MEA may however declare the transit subject to a licence requirement and if necessary prohibit it. This may be the case where the products are or may be (partially) intended for use in connection with weapons of mass destruction or missiles capable of delivering such weapons.

Services related to strategic goods
The term ‘brokering services’ means the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to a third country or selling or buying dual-use items located in third countries for their transfer to another third country. The sole provision of ancillary services, such as transportation, financial or insurance services is excluded from the definition.

Subject to certain conditions, there is a mandatory licence requirement with respect to dual-use items. Authorization is required for the brokering of dual-use items listed in Annex 1 if the broker has been informed by the MEA that the items in question are or may be (partially) intended for the use in weapons of mass destruction or missiles capable of bringing these weapons to their targets. In such cases, the broker has to notify the MEA who will decide whether a licence is required.

**Notifications, soundings and licence applications**
An export licence is granted by the competent authority in the country where the exporter is established. For the Netherlands this is the CDIU. Licences are issued on behalf of the MEA. There are three types of licence; the type required depends on the nature of the product and the purpose for which the licence is requested.

**Individual licence**
An individual licence can be requested for military and dual-use goods, and is intended for a specific exporter, a specific good, export of Community goods and re-export of non-Community goods to specific destinations and for a specific transaction. Individual licences are normally valid for one year, but for dual-use goods a three-year licence can be issued.

**Global licence**
A global licence can be requested for military and dual-use goods for a specific exporter, a type or category/categories of goods, export to one or more destinations and multiple transactions. In principle, a global licence is valid for one year, but – again – for dual-use items, the licence can be issued for three years.
For certain sensitive goods and/or destinations, global licences will not be issued. In such cases, the applicant must rely on an individual licence.

Community and National General Export Authorizations
There are two types of general licence: the Community General Export Authorization ('CGEA', or 'CAV' in Dutch) and the National General Export Authorization ('NGEA', or 'NAV' in Dutch). Both offer the option of a simplified procedure. The CGEA and NGEA are valid for certain goods and for export to certain third countries.

The exporter must make a non-recurrent registration with the CDUI and must comply with the registration and notification requirements. Both the CGEA and the NGEA are valid for an indefinite period (subject to interim changes).

Who is authorized to request a licence?
Licence applications for dual-use items should be made by the exporter. This is any natural or legal person or partnership on whose behalf an export declaration is made. Reference is made to article 2.3 of the Regulation.

Exporters established in the Netherlands need to submit licence applications in writing to the CDUI, even if the goods are located outside the Netherlands.

How is the licence application assessed?
The export control system is based on an in-advance risk analysis. The objective of the analysis is to reduce the risks of undesired use and diversion. In deciding whether to issue a dual-use export licence, Member States, including the Netherlands, take into account, inter alia, the commitments and obligations to which Member States have agreed, the commitments to sanction measures, considerations of national foreign and security policy, including criteria of the EU Council common position, considerations regarding the intended end use and the risk of diversion.

The CDUI will give an indication of whether, under present circumstances, the authorities would respond favourably or unfavourably to an application for a licence.

In their assessment, the authorities consider information on the country of final destination, technical specifications of the goods, information on the end-user, information on acquisition attempts from the country of final destination, information on the nature of the transaction (such as the mode of transportation, countries of transhipment, the mode of payment, the broker involved) and information from foreign authorities including licence denials.

Classification and declaration of licence-exemption
It is possible to ascertain whether a transaction is subject to a licence requirement by checking the list of strategic goods. Additionally, the CDUI can give a definitive answer on the classification and will, on request, issue a certified statement (in Dutch or in English) to the effect that goods are not subject to a licence requirement. Such a statement may also be helpful if a bank asks for it.

Sondage
It can be helpful to have an indication as to whether a licence will probably be granted before entering into contract negotiations or closing a commercial deal. In the Netherlands, it is possible to submit an informal and preliminary application (a so-called ‘sondage’). Although the circumstances at the time of the ultimate application remain decisive, the CDUI will give an indication of whether, under present circumstances, the authorities would respond favourably or unfavourably to an application for a licence. The sondage can be requested using an official form. Information on the destination, the end-user as well as an accurate description of the goods must be provided.

Penalties and enforcement
On the basis of the General Customs Act, the Strategic Goods Order prohibits acts in breach of the Dual-use Regulation. Violation of provisions under or pursuant to the General Customs Act with respect to strategic goods is punishable under the Economic Offences Act. Deliberate violation qualifies as a serious offence and unintentional infringement as a minor offence. The (maximum) penalties carried by the offences vary from a six-year prison sentence and a fine of the fifth category (€76,000 and upward for a serious offence) and one year’s detention and a fine of the fourth category (€19,000) for the lesser offence. In the case of legal entities, the fine can be increased with one category. The sixth category is €76,000 and upward. The same is the case when the value of the goods with respect to which the offence has been committed gives rise to an increase.

In conclusion
We hope this brief overview of the ins and outs of Dutch export control policy has been useful. We do advise businesses to contact the CDUI or to call in an adviser specialized in export control legislation when questions arise. The sondage procedure is a useful instrument to ensure that a refusal of a licence does not result in a commercial debacle.

Links and footnotes
2 Australia Group, Missile Technology Control Regime, Nuclear Supplies Group, Wassenaar Arrangement, Zangger Committee.
3 The form can be downloaded from www.rijksoverheid.nl/exportcontrole under ‘Vergunnings en sondages aanvragen’.