

# RECENT LEGISLATIVE AND JUDICIAL DEVELOPMENTS IN CONTINENTAL EUROPE

AFFECTING THE CASUALTY  
INSURANCE INDUSTRY

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Most companies trading in military goods and products that can be used for both civil and military purposes (so-called dual-use items) are familiar with the laws and regulations that control the physical export of such goods. What is less known is that there are also provisions at the international and national levels that govern the performance of services connected to such goods. Since there is no physical crossing of borders when providing these services, it is not immediately obvious that strategic services may also be subject to a disclosure and/or licensing requirement.

A new Strategic Services Act (Wet Strategische Diensten) that covers these services took effect in the Netherlands on January 1, 2012. This act has a much broader scope than the European Union (EU) Dual-use Regulation<sup>16</sup> and requires the reporting of brokering services with respect to dual-use items to the competent Dutch authorities. This chapter provides highlights of the new Strategic Services Act.

## THREE TYPES OF STRATEGIC SERVICES

The new Dutch Strategic Services Act applies to services with respect to both military and dual-use items, and it deals with three types of service provision:

- Non-physical transmission of software and technology
- Technical assistance
- Brokering services

In practice, the non-physical transmission of software and technology is considered equal to the physical transmission of the same software and technology. Therefore, it makes no difference whether there is a physical export transaction or if the dual-use software or technology is provided by e-mail, telephone or uploaded via the Internet or an intranet. If the export of a physical item would normally require a license, then the non-physical transmission by electronic means – also defined as an export – would require a license as well. The exporter is the party that decides to transmit or make available the software or technology by electronic means.

The second type of service provision noted, technical assistance, includes all kinds of technical support, in particular, support provided in connection with the development, production, testing, maintenance and repair of the strategic goods. Technical assistance can also be given in the form of transfer of knowledge and advice.

## STRATEGIC BROKERING SERVICES

Without elements that limit geographical scope, the EU Dual-use Regulation defines brokering services as:

- The negotiation and the arrangement of transactions for the purchase, sale or supply of dual-use items; and
- The selling or buying of dual-use items for the interest of one or more parties.

<sup>16</sup> Council Regulation (EC) No 428/2009 of May 5, 2009, setting up a community regime for the control of exports, transfer, brokering and transit of dual-use items.



This is a rather broad concept and also comprises the actual sale/purchase transaction, which may not be immediately recognized as a service. However, the provision of sole ancillary services is excluded. These services, which include transportation, financial services, (re)insurance and general advertising or promotion, fall beyond the scope of brokering services. Delineating clearly between brokering services and sole ancillary services may not always be simple, and several questions emerge. What is meant by 'sole,' especially when many logistics services providers offer broad packages of services? Is the list of ancillary services limited? And how is "general advertising and promotion" identified? These questions should be addressed when considering the regulation of brokering services.

Currently, the EU Dual-use Regulation only deals with brokering services with respect to the flow of goods located outside Europe between two third countries and services rendered by a broker residing or established in an EU member state from the territory of the EU into the territory of a third country.

Parties that provide brokering services associated with dual-use items should be aware that the Dutch Strategic Services Act has a much wider scope in many respects. It applies to brokering services with respect to dual-use items that are located in the EU and that are designated for export to a third country. Moreover, the act is not limited to brokering services provided from the territory of the EU. Dutch nationals or foreign nationals with permanent residence in the European section of the Netherlands who provide brokering services in another country are subject to the act's requirements as well as the applicable Dutch criminal statutes if the law is violated.

## AUTHORIZATION REQUIREMENT

Providing brokering services with respect to dual-use items can be subject to a notification and a subsequent authorization requirement. This is the case when brokering services are rendered with respect to dual-use items listed in Annex I of the EU Dual-use Regulation if the broker has been informed by the authorities that such authorization is needed. In addition, the Netherlands has expanded the application of the rules to non-listed dual-use items designated for certain specific purposes and dual-use items for military end use. In addition to a possible authorization requirement, brokers have a registration obligation and an obligation to keep and save records.

## DUTY TO REPORT

In order to make sure that the Dutch authorities have sufficient information to impose an authorization requirement when necessary, brokers now have a duty to report their services effective January 1, 2012. There are two options:

- One-time notification requirement: With this non-recurring notification, the broker reports the dual-use items for which services are usually provided as well as the usual destinations. Changes in products or destinations must be reported as well. The one-time notification must have been made by June 30, 2012, at the latest.
- Duty to report on a transaction basis: This applies to services associated with more sensitive goods and destinations.

Brokers who did not make the notification in time are in breach of the law and in principle, risk a fine. In these cases, it is advisable to make the notification as soon as possible.

## CRIME AND REPUTATION

Violation of the relevant provisions of the Strategic Services Act constitutes an economic offense. Apart from the fact that the penalties for the offenses are significant, publication of the criminal judgment can be ordered, particularly when the violation is intentional or in cases where the fine category for legal entities would be increased. The ordered publication of the judgment would damage the reputation of a broker.

## EXAMPLES OF THE ACT'S IMPACT

Two examples illustrate the impact of the new legislation. The first involves a group of companies operating in the telecommunications equipment and information security business, including a U.S. parent company and Dutch and German affiliates. The Dutch company arranges the commercial transaction with respect to equipment listed in Annex I of the EU Dual-use Regulation between the German entity and a buyer in a third country. The export declaration is made in the name of the German company, which applies for an export license. The fact that the brokering services are provided within the group is not relevant. The Dutch company has an independent duty to report its services to the Dutch authorities.

Another example involves a Dutch employee of a French company active in the composite industry who renders brokering services with respect to exports of this French company from France to a party in a third country such as the United States, Brazil or Israel. Again, there is a notification obligation because the Strategic Services Act has extraterritorial effect and applies to all Dutch nationals and foreign nationals with a permanent address in the Netherlands, regardless of the place where the services are provided.

## CONCLUSION AND RECOMMENDATION

The Dutch legislation with respect to strategic services is far-reaching in nature. Companies and persons who are in a broad sense involved in commercial transactions with respect to dual-use items and have some link to the Netherlands are advised to make a detailed analysis of their responsibilities. Inter-company transactions and transactions within groups must be acknowledged as well. Which types of goods are involved? What are the destinations? Does involvement in a commercial transaction constitute the concept of brokering services? If so, who is considered the broker? Because strategic brokering services are invisible, the legal definition used to capture those services is necessarily abstract as well. However, in terms of export control policy, non-physical services are as real as the dual-use items to which they are connected.