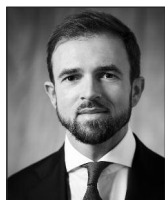


Netherlands introduces updated guidance on cloud exports



Sebastiaan Bennink reviews the content of an updated version of the Netherlands' authorities' guidance note on the export of controlled technology via a cloud service.

On 23 October 2018, the Dutch Ministry of Foreign Affairs released an updated version of the guidance note on export of controlled technology via a cloud service (the 'Guidance Note'). The Guidance Note is an annex to the factsheet on export controls of strategic goods, released by the same ministry.

Cloud export

As a starting point, the Guidance Note describes that a cloud export occurs when controlled technology is uploaded to the cloud and subsequently is made available to individuals physically located outside the Netherlands. An export licence is then required, if a general export licence is not applicable. According to the Guidance Note, a cloud export of controlled technology occurs:

- at the moment of uploading of controlled technology to a cloud to which individuals physically located outside of the Netherlands have access;
- at the moment when access to the controlled technology is granted to individuals located physically outside the Netherlands. This occurs, when the files have already been uploaded to the cloud and access to individuals located outside the Netherlands is granted at a later moment. The individual who grants access to the controlled technology is then considered the exporter; and
- when employees of a company have access to the controlled technology when they are abroad.

The Guidance Note adds that all individuals or entities who have access to the controlled technology are formally considered to be the consignee(s) of the controlled technology and therefore should be included as such on the export licence. This also includes system administrators, server-

or cloud owners, if they are able to read the data (which is not often the case, according to the Guidance Note).

Cloud security

Publication of controlled technology without a licence is prohibited. According to the Guidance Note, this means that uploading controlled technology to a public website or unsecured cloud without an export licence is de facto prohibited. This also means that uploading controlled technology to an insufficiently secured



cloud is considered making controlled technology publicly available, which in fact, without the necessary licence, is also prohibited.

According to the Guidance Note, the server and the data transactions that include controlled technology should be sufficiently secured by means of an encryption standard that is appropriate for the sector the transactions relate to. Furthermore, the risks should be demonstrably known and controlled, and supervision may not be impeded by outsourcing. This means that companies who use the cloud should at all times (i) have knowledge of who has access to what information in the cloud and (ii) be able to provide this information to the competent supervisory authorities.

The Guidance Note adds that all cloud exports of controlled technology should be carried out via a private cloud,

which is at least secured with some form of end-to-end encryption. Furthermore, the information on the server itself should also be encrypted minimally in accordance with industry standards, thereby applying the level of security appropriate to the risks associated with the specific technology. Exchanging the encryption keys that provide access to the exported data should be done via safe channels, outside of the cloud.

Server location

According to the Guidance Note, in principle, it does not matter in which country the server is located if (i) it is secured in accordance with industry standards, (ii) a private cloud is used and (iii) the transactions are secured with a minimum of end-to-end encryption.

Nationality

The Guidance note also describes that export does not occur unless the information is made available to an individual outside the Netherlands. When that information is exchanged within the borders of the Netherlands, the exchange is not considered to be 'exported', irrespective of that individual's nationality. This means that, in principle, no licence is required if controlled technology is made available to individuals who are physically located in the Netherlands. Moreover, the Guidance Note adds that often a general licence will apply for the export of controlled technology and that for the export to other EU member states it is unnecessary to apply for a separate license with the Dutch authorities. Nationality does play a role if the receiving individual is considered a sanctioned party, according to the Guidance note. If the individual to whom the controlled technology has been made available in his turn wants to export the controlled technology, this individual needs an export licence to do so.

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