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US EXPORT ADMINISTRATION REGULATIONS (EAR)¹ **USING US-DERIVED RESEARCH EQUIPMENT IN THE UK**

WHEN IS USE CONTROLLED?

Key Take-Aways

1. The EAR controls exports and 're-exports' of all items, which are subject² to the EAR. Re-export extend to transfers within the importing country³. 'Deemed' re-export refers to restrictions on non-US nationals.
2. Two strands control (restrict) use of equipment imported into the UK from the US:
 - a) **End use and end user restrictions arising from the General Prohibitions⁴, namely if an equipment user** (collaborator, researcher or student)
 - is from North Korea (see para 15a below)⁵;
 - is a *prohibited end user* <https://www.trade.gov/data-visualization/csl-search> (see para 15b below);
 - will be doing military intelligence research (see para 15ci below); or
 - will be doing missiles or chemical or bio weapons research (see para 15cii below). Research in relation to *nuclear fuel cycle activities* is controlled under the EAR but the controls *do not apply to activity* in the UK (see para 15ciii below).
 - b) **Any specific ECCN requirements which apply to the equipment.**
3. Where restrictions apply they have to be observed unless BIS grant a licence. In some cases (prohibited end users) there is a presumption of denial, so the licence is very likely to be refused.

¹See BIS guidance at <https://www.bis.doc.gov/index.php/policy-guidance>. BIS also provides seminars. The unofficial electronic EAR files created by BIS <https://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear> is a further useful resource for the footnote references below.

² See further para 12

³ See further para 14

⁴ The Ten General Prohibitions are implemented by part 744

⁵ Unless they have obtained US 'protected person' status e.g political refugees and political asylum holders.

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Introduction and summary

1. This note addresses
 - use of US-imported equipment on University premises,
 - use that might constitute controlled or prohibited use or re-export contrary to the EAR which, unless a licence is sought from BIS, require specific governance controls on the use of the equipment.

Using equipment for academic research is not *normally* controlled. This note explores the boundaries. Generally mere operation of research equipment does not amount to re-export; but this is not always so - action may be required as discussed below
2. The EAR is administered and enforced by the US government Bureau of Industry and Security (BIS). Equipment imported from the US may be specifically controlled by an Export Control Classification Number ("ECCN"). An ECCN is an alphanumeric designation (e.g., 1A984 or 4A001) used in the Commerce Control List (CCL) to identify items for export control purposes. Items that do not have an ECCN are generally controlled as a commercial item, under the classification "EAR99".
3. EAR99⁶ as well as ECCN designated items are subject to the *10 General Prohibitions* e.g. the end-use and end-user controls⁷, and re-export restrictions⁸.
4. EAR99 and ECCN classified items remain subject to the EAR unless the equipment is itself incorporated into a foreign (non-US) made item that does not exceed the applicable *de minimis* thresholds⁹. Note that EAR99 and No License Required (NLR) are not synonymous terms: NLR means that a licence was not required for export from the US. EAR 99 is the classification for the technology; a licence to export from the US may not have been needed; however, as indicated above and further described below, a licence may be required for some specific EAR99 situations¹⁰.
5. A key ECCN concept is "use". Use comprises 6 aspects. Where "use" (as a whole) is controlled, for there to be a breach of the EAR all 6 aspects must be available to the user to activate the controls. The user must be able to 1) operate 2) install (including on-site installation) 3) maintain (checking) 4) repair 5) overhaul AND 6) refurbish the item. If the user can only do up to five of the six aspects of use, this is not controlled.

⁶ <https://www.bis.doc.gov/index.php/licensing/commerce-control-list-classification/export-control-classification-number-eccn>

⁷ Under part 744 – see para 16

⁸ Under part 746 – see para 16

⁹ See part 734.4 and Supplement No. 2 to part 734 of the EAR – see the summary note at

<https://www.bis.doc.gov/index.php/documents/pdfs/1382-de-minimis-guidance/file>

¹⁰ See para 16

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6. Mere operation, including training to use equipment does not amount to “use”. Academics typically operate, and perhaps also maintain and maybe repair – they rarely ‘use’ equipment in all the 6 aspects of how ‘use’ is defined¹¹. Note however that an ECCN may specifically control one of the 6 aspects of use. This is usually in the case of 500- (space) and 600- (munitions) series ECCNs.
7. It is not just the use of equipment that may be controlled. Another key concept is whether there is ‘release’¹² of technology or software source code. Release of EAR-controlled technology or software source code to students, researchers or visitors who are not UK nationals (“deemed”¹³ re-export”) is also controlled. However the mere operation of a piece of equipment does not normally qualify as “release” of “technology” as defined in the EAR. Technology does not refer to the physical manifestation which users operate. The definition of technology is: information required for the "development," "production," "use" operation, installation, maintenance, repair, overhaul, or refurbishing¹⁴.
8. ECCN restrictions may apply to the equipment *and* to the underlying technology. Therefore it is important to check the Commerce Control List (CCL) ECCNs separately for the equipment, and also for the technology and software.
9. Technology will usually be controlled at the same level as the related hardware under the CCL, but that is not always the case. Equipment designated overall as EAR99 may include parts or components or software that are controlled under ECCNs¹⁵.

¹¹ Example: The use of the equipment designated as EAR99 in the classroom or lab environment in the UK by a third country foreign national would not be a controlled event under the EAR. However, if technology or software source code that was subject to the EAR, including EAR99 technology or software source code was released as part of that activity, then an authorization may be required. For example, the use of the equipment designated as EAR99 may require you to release certain operation information that may not be classified in an ECCN, but would still be subject to the EAR, designated as EAR99, and would require an EAR authorization if released to a North Korean national. However, if published in an online manual then the information may not be subject to the EAR based on the criteria in section 734.7, but you would still need to conduct the analysis under the EAR to make those type of determinations when those potential scenarios arise.

¹² ‘Release’ is defined in Part 734.15 – providing visual or other inspection of items or oral or written exchanges that reveal “technology” or source code, including release of access information (ie provision of software keys)

¹³ The term “deemed re-export” is used to indicate the transfer of controlled U.S. technology to a third-country national overseas. See https://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-exports-faqs/search#faq_15 and part 734.14 paras (a)(2) and (b)

¹⁴ See full definition of Technology at <https://www.bis.doc.gov/index.php/documents/regulations-docs/2258-part-772-definitions-of-terms-1>.

¹⁵ For example, release to a foreign national of technology needed to use ECCN controlled items in the equipment would be controlled and any restrictions would need to be observed - if for example the ECCN listed technology controls on repair and there was a need to explain to such person how repair equipment which was classified as EAR99 overall.

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10. Re-export controls apply to the operation, even of EAR99 microprocessors, of items by suppliers to the military where used for military intelligence purposes (see para 13c). Also controlled is where it is known¹⁶ that bio or chemicals weapon research is highly probable.

11. In summary to comply with US export and re-export controls of research equipment it is important:

- a) **to know if an equipment user** (collaborator, researcher or student) in which case a licence is needed if they are to use the equipment
 - is from *N. Korea*(see para 15a below);
 - is a *prohibited end user* <https://www.trade.gov/data-visualization/csl-search> (see para 15b below);
 - will be doing *military intelligence research* (see para 15ci below); or
 - will be doing *missiles or chemical or bio weapons* research (see para 15cii below). Research in relation to *nuclear fuel cycle activities* is controlled under the EAR but the controls *do not apply to activity* in the UK (see para 15ciii below); and
- b) to understand and **observe any ECCN requirements**;

If none of the restrictions in a) or b) apply, there is no need to apply to BIS for a licence for mere operation of equipment. Where a licence is needed, in some cases (prohibited end users) there is a presumption of denial, and the licence is very likely to be refused.

In more detail

12. Some Items are not subject to the EAR¹⁷

- a) Information or software that is published¹⁸.
- b) Technology which arises from fundamental research¹⁹ (fundamental or applied scientific research which is intended for publication).
- c) It is released in a course or lab instruction of an academic institution.
- d) It appears in a patent/application (unless covered by an invention secrecy order).
- e) It is a proprietary published description.
- f) It is telemetry data as defined.
- g) Where the US content is less than the *de minimis* threshold.

¹⁶ Note that the definition is not the same as under UK legislation: Part 772 of the EAR defines “knowledge”. Knowledge of a circumstance (the term may be a variant, such as “know,” “reason to know,” or “reason to believe”) includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also **an awareness of a high probability of its existence or future occurrence**. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts. “

¹⁷ Part 734.3(b)(3)

¹⁸ See part 734.7 EAR at <https://www.bis.doc.gov/index.php/documents/regulations-docs/2382-part-734-scope-of-the-export-administration-regulations-1/file>

¹⁹ Part 734.8

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13. WMD and the Ten General Prohibitions

WMD generally

The US controls WMD risk by publishing an Entity list in supplement no. 4 to part 744. This sets out those entities who present significant risks of diversion to weapons of mass destruction (WMD) programs, terrorism, or other activities that are contrary to U.S. national security or foreign policy interests. Licences for most entities on the Entity List would be denied. There are also generally no licence *exceptions* available for entities on the Entity List. (see para 16b). WMD risk is also controlled under Sections 744.2, 744.3 or 744.4 (nuclear, missile and chemical or bioweapons), as well as CCL-based controls for nuclear proliferation, missile technology, and chemical and biological reasons.

General Prohibitions²⁰

The 10 prohibitions apply to all²¹ items imported into the UK from the US (e.g. equipment) which are subject to the EAR, some of which are relevant to use of imported equipment. **These prohibitions apply whether or not the item is specifically controlled by an ECCN; they apply even if the item has the designation EAR99.** Therefore certain checks must always be made. Generally items designated as EAR99 are not subject to extensive licence requirements, although the items are still subject to the EAR. U.S. export controls follow U.S.-origin items that are controlled under an ECCN (controls vary by destination). It is therefore important to know the specific equipment designation (EAR99 or ECCN) to determine what controls would apply once equipment is imported for use by the University.

²⁰ Part 736, and 744(2) and (17)

²¹ A *foreign-made item* that was exported to the U.S. and then re-exported to the UK would be subject to EAR (and remember that additionally the initial export from the UK might be export controlled under UK export control rules) unless the de minimis rule applied (the US content was below the relevant threshold) or the foreign produced direct product rule applied. The initial export from the US would need to be done in accordance with the EAR. But subsequent reexports or transfers from or within the UK would not be subject to the EAR.

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14. What does re-export mean²²?

Re-export includes the following

- a. Actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country, including the sending or taking of an item to or from such countries in any manner²³.
- b. “Releasing”²⁴ or otherwise transferring “technology” or source code subject to the EAR to a foreign national (a deemed re-export)²⁵. In other words releasing the technology or source code to an equipment user. Release includes making available for download.

The EAR uses the most recent citizenship or permanent residency of a foreign national. For example, if a Cuban national refugee came to the UK three years ago and has subsequently obtained UK permanent residency or citizenship, for purposes of the EAR, that foreign national would be treated as a UK national for determining destination-based controls/licence requirements²⁶.

15. The general prohibitions²⁷ against re-export/transfer of equipment, including EAR99 equipment, are as follows:

The University may not re-export/transfer in country (that is within²⁸ the UK, including inside the University) US-origin equipment, including EAR99 designated equipment, in the following circumstances:

- a. **To an embargoed or sanctioned country in breach of the specific restrictions for that country.**²⁹ These are often listed on end user declarations as Cuba, Iran, North Korea, and Syria, and the Crimea region of Ukraine. However, the EAR destination-based licence requirements for deemed re-exports of EAR99 equipment subject to

²² Part 734.14

²³ Part 734.14 (a)(1)

²⁴ See para 7 above, footnote 5

²⁵ Part 734.14 (a)(2) and (3)(b)

²⁶ Part 734.14(b)

²⁷ The 10 General Prohibitions are set out in the Export Control Reform Act (ECRA) and are implemented by the EAR part 744.

²⁸ Transfers in country are not caught provided there isn't a transfer to a prohibited end user. 734.16 and .18.

²⁹ Russian sanctions: Items classified in any ECCN on the CCL. In addition to license requirements specified on the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR and in other provisions of the EAR, including part 744 and § 746.5, a license is required, excluding deemed exports and deemed reexports, to export, reexport, or transfer (in-country) to or within Russia or Belarus any item subject to the EAR and specified in any Export Control Classification Number (ECCN) on the CCL

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the part 744³⁰ end use and end-user checks, including the Entity List³¹ screening checks, do not extend to **releases of technology or source code** (see para 14 b above) to Iranian, Cuban, and Syrian³² nationals. However, the embargo controls and so licence requirements remain in place for **releases of technology or source code to nationals from North Korea**³³ but not Crimea, which is counted as part of the Ukraine³⁴. For the Crimea region of Ukraine, BIS uses Ukraine as the country for determining these deemed export requirements. Therefore in practice the controls only apply to North Korea.

- b. **To a prohibited end-user**- therefore do a restricted party screening for anyone to whom we give access to (release) the technology, using the Consolidated Screening Tool (<https://www.trade.gov/data-visualization/csl-search>).
- c. **For a prohibited end-use** that is any of the following:
 - i. Use of a microprocessor for direct military use or by a military end user³⁵
This includes any person or entity whose actions or functions are intended to support ‘military end uses’³⁶; the restriction does not apply where use is for or on behalf of the official use by agencies of a cooperating government (ie a Wassenaar participating authority such as the UK).
Part 744 does impose licence requirements and other restrictions for certain specified military end uses and/or military end users³⁷, but these do not include EAR99 designated items except for certain military-intelligence end uses or end users³⁸.
Allowing a UK defence contractor to use an EAR99 designated piece of equipment would be unlikely to trigger any part 744 end use or end user controls. Due diligence is needed but 744 controls are unlikely to apply.

³⁰ Part 744 implements General Prohibitions 5 and 7

³¹ The Entity List includes various entities added because of WMD reasons. But there are even more entities on the list for other reasons that are of concern for other U.S. national security and foreign policy concerns, such as being involved in IED networks that have killed or injured U.S. and allied soldiers.

³² Cuba - Part 746.2(2), Iraq – Part 746.3(a) and Syria – Part 746.9(a)

³³ Part 746.4(a)

³⁴ Part 746.6(a)

³⁵ These are controlled if the equipment or technology includes a microprocessors (“microprocessor microcircuits,” “microcomputer microcircuits,” and microcontroller microcircuits having a processing speed of 5 GFLOPS or more and an arithmetic logic unit with an access width of 32 bit or more; the assumption is that this catches all modern microprocessors

³⁶ <https://www.bis.doc.gov/index.php/documents/regulation-docs/452-supplement-no-1-to-part-740-country-groups/file>. Note that apart from the General Prohibitions, the jurisdiction of the EAR (and ability to grant licences) includes “600 series” military items. Therefore military end users and military end uses can occur under the EAR.

³⁷ See for example those specified in section 744.21 and the Military-End User List under supplement no. 7 to part 744 and section 744.17. Section 744.21 and 744.17 do not include EAR99 designated items.

³⁸ This is a new section 744.22

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- ii. When you know³⁹ that the item (ie the equipment) will be used for
 - chemical or bio weapons⁴⁰ or
 - missile projects.⁴¹

*Rules must be set to require that no such research (para i or ii) is to be done using the equipment unless a BIS licence is sought. **Note:** Make this clear to students, researchers and visitors using the equipment and ask any collaborator to let you know if it will use the equipment for military uses, and if so, obtain a licence. If not to be so used, ask the collaborator to sign an end use certificate to that effect.*

- iii. Direct or indirect nuclear fuel cycle activities⁴² is also a prohibited end use. However Supplement No. 3 to part 744 provides that this section (744.2(a)) does not apply to exports, re-exports, or transfers (in-country) to or within Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy (includes San Marino and Holy See), Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Turkey, **and the United Kingdom⁴³**. *Therefore the United Kingdom is exempt and not subject to this end use control.*

16. ECCNs: Specific controls on use of EAR controlled items (equipment, software and technology)

ECCN basics:

- a) Specific controls are set out in Export Control Classification Numbers (ECCNs).
- b) An ECCN is a designation that an item is controlled because of its specific performance characteristics, qualities, or designed-end use. The item can be a tangible or intangible (i.e., software or technology).
- c) ECCNs are very precisely defined and are focused on commodity, software and technology product groupings. ECCNs are included on the Commerce Control List. If an item is not specifically listed (enumerated or otherwise described) on the Commerce Control List, then it is designated as EAR99, i.e., no licence is required unless to an embargoed or sanctioned destination or to a prohibited end use or end user where the controls apply to EAR99 designated items. The EAR99 designation is a broad basket category that captures most items in daily use.

³⁹ For the definition of 'knowledge' see para 10 above and footnote 15

⁴⁰ Part 744.4

⁴¹ Part 744.3

⁴² Part 744.2a

⁴³ If the activity falls outside Supplement 3, you may apply for a license from BIS to overcome a license requirement under section 744.2. The license review standards are specified in section 744.2(d). However, you would need to obtain the license prior to engaging in the prohibited export, re-export, or transfer (in-country).

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- d) An ECCN is a five-digit alphanumeric designation that categorizes items based on the nature of the product, i.e. type of commodity, software, or technology and its respective technical parameters. An example of an ECCN is 0A979, which corresponds to police helmets and shields.
- e) Each ECCN lists important information that includes a general description of the controlled item(s), the reason(s) for control, available licence exceptions, and, when necessary, additional details on related controls, and more specific item definitions.

17. Sometimes an ECCN will specifically control an aspect of “use”. For example a licence would be required **IF** the technology for the equipment specifically listed “repair” or “operation” as controlled and e.g.

- a) a visual transfer occurred - allowing someone to watch a repair of equipment
- b) someone was instructed on how to operate the equipment.

What if “development” or “production” is listed as controlled under an ECCN? If the ECCN controls production and as part of using the equipment production technology is released to a third country foreign national, then an authorization may be required.

18. Further guidance is contained in the **BIS FAQs**⁴⁴ in particular:

- a) A deemed export licence is not needed if a foreign national is using controlled equipment in a laboratory provided that the individual was not overhauling or refurbishing equipment – they were only operating the equipment. This does not meet the definition of “use” unless the ECCN specifically prohibits operation as an aspect of use or if release to the foreign national requires a licence for EAR99 designated operation “technology”⁴⁵.
- b) A foreign national just stepping foot into a facility does not trigger a deemed export license requirement, unless a release of “technology” or software source code occurs.
- c) Unless controlled by an ECCN, a deemed export licence is not required if a foreign national is getting trained on how to use / operate the equipment. Being taught how to operate a purchased piece of equipment is not considered ‘use’ of technology⁴⁶.

⁴⁴<https://www.bis.doc.gov/index.php/documents/compliance-training/export-administration-regulations-training/1554-ear-definitions-faq/file>

⁴⁵Operation technology that is not controlled in an ECCN would be designated as EAR99; licence requirements could still come into play as described in para 16.

⁴⁶If the training involved all six elements of “use” and the ECCN controlled “use” that would be controlled. TSU has an authorization under 740.13(a) for operation technology and software, which can be helpful in certain cases when an authorization would otherwise be required. In certain case, the training information may

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19. Where controls apply

- a) Where equipment is controlled by an ECCN or as EAR99 a plan must be put in place to ensure either compliance with the EAR (for EAR99 equipment) and the specific requirements of a relevant ECCN - or a licence sought.⁴⁷
- b) Where controls cannot be complied with and no licence exception applies, a licence must be sought from BIS to authorize activities that are not allowed unless specifically licensed⁴⁸.

20. End user declarations (EUDs)

When buying equipment universities should require that US suppliers give notice if they will be sharing any EAR-controlled equipment and provide the specific ECCN for the equipment⁴⁹ or confirm it is EAR99.

Suppliers may require signature of EUDs for their own compliance/risk management purposes. These are often in a standard form and prescribe restrictions that don't apply.

Check the requirements of any EUD against the guidance in this note and the related notes referred to, and question the supplier if the EUD goes beyond the applicable restrictions. A sufficient general purpose EUD could be limited to the following (text suggested by BIS):

"We agree to comply with the provisions of the U.S. Export Administration Regulations (15 CFR 700-799). "We agree to obtain authorization from the Bureau of Industry and Security prior to any end uses/users that require a licence pursuant to the U.S. Export Administration Regulations (15 CFR 700-799)"

also not be subject to the EAR because it is published. For example, if a company "published" an online manual that explains how to use an item, provided it met the criteria in section 734.7 that published information would not be subject to the EAR.

⁴⁷ In most cases under the EAR, the EAR doesn't specify that a company is required to have a compliance program. For certain licences they may require having a Technology Control Plan (TCP) as one of the conditions of the licence, but otherwise companies are generally able to decide on the extent of a compliance program they want to put in place. Everyone that participates in transactions subject to the EAR are responsible for complying with the EAR, but how they go about doing that companies have flexibility in developing a compliance program.

⁴⁸ Some activities of concern (missile, chemical or bio research for example) may be subject to a presumption of denial or the even more restrictive policy of denial license review policies, but one could still apply for a licence.

⁴⁹ There is no EAR regulatory requirement on a supplier to give this information, except for License Exception STA. As a good compliance practice ask potential suppliers to provide this information.

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21. Conclusion:

In general, for EAR99 equipment re-export controls will be minimal, so in most cases it won't impact what a university needs to do, but because the items in question are still subject to the EAR, the obligations to comply with the EAR still go along with that. If companies request end-user statements or other types of affirmations which seem to go too far, then you can try to talk to the other parties. If what is being requested is not required by the regulator, you may be able to negotiate with the other company about what additional documents will be provided. Usually those types of conversations go best if the university explains that it understands the EAR requirements and that it too is committed to complying with the EAR. Talking to the supplier can sometimes help to resolve those issues. Explaining how you use the EAR99 equipment and that you don't have intention of re-exporting it to a sanctioned destination or to a prohibited end use or end user may be helpful.⁵⁰

Acknowledgement: the first author of this note is Rosemary Boyle, University of Cambridge.

⁵⁰ It may be helpful to include a reference in bid documentation to the Destination Control Statement (DCS) that companies in the UK should receive on commercial invoices for shipments received from the U.S. for any item in an ECCN that is not being exported under License Exceptions GFT (gift or donation) or BAG (baggage – temporary export). This is in Part 758.6. There is a specific requirement for the DCS to set out the ECCN(s) for any 9x515 or “600 series” “items” being shipped (space and munitions).