

# **The Legal Effect on the University of Edinburgh of recent changes in U.S. Export Control Rules**

## **Huawei added to Entity List**

On 16 May 2019, the U.S. Department of Commerce's Bureau of Industry and Security (BIS), added Huawei and 68 of its non-U.S. affiliates to the BIS Entity List - a list of foreign entities, including businesses, research institutions, government and private organisations and individuals (Listed Persons), that are subject to specific licence requirements before they can receive exports, re-exports, or in-country transfers of those items which are subject to the U.S. Export Administration Regulations (EAR)<sup>1</sup>.

The EAR covers physical goods, software and technical information that is transferred to a Listed Person and such transfers can occur in the form of an exported product, an in-person transfer that occurs in the U.S. or another country, or even an email exchange or a conversation. See BIS' Guidance on Reexports<sup>2</sup>. The EAR are laws of the U.S. and violations of their terms can be prosecuted either civilly or criminally in the U.S. The penalties include significant fines or prison sentences. These laws do not themselves apply in the UK but failure to comply with their terms can result in entities outwith the US being themselves listed as restricted entities and in this way not able to receive physical goods, software or technical information from the U.S. There can also be follow-on consequences such as inability to use the UK banking system since the major banks do not provide banking services to Listed Entities.

## **Temporary General Licence**

Then on 20 May 2019, the U.S. Government granted a 90-day reprieve from the effects of the entity list designations by issuing a temporary general licence covering certain specified activities. Transfers involving these activities are subject to the same licensing requirements that applied prior to Huawei's inclusion on the entity list, but with some additional certification and recordkeeping requirements. For UoE this means we need to be aware of our current arrangements with Huawei and then comply with the additional requirements. This gives us until 28 August (ie the expiry of the 90 days) to work out what we do after that date.

## **Executive Order 13873**

In parallel, the White House issued Executive Order 13873, not specifically naming Huawei or China, which provides the basis for broader restrictions, potentially including a ban on imports to the U.S. The U.S. Commerce Department is developing new regulations within the next 150 days to implement the Executive Order. 150 days brings us to mid-October.

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<sup>1</sup> The BIS Entity List <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list>

<sup>2</sup> BIS Guidance on re-exports of US origin items: <https://www.bis.doc.gov/index.php/licensing/reexports-and-offshore-transactions>

This note aims to give employees of the University of Edinburgh (UoE) guidance on complying with the EAR. In essence, to what extent can UoE and its employees interact with a Listed Person or an employee of a Listed Person (or other person directly paid or otherwise sponsored by a Listed Person)?

**Guidance.** The EAR prohibits the export, re-export, or transfer of any item that is subject to the EAR where the intended end-user is an individual or entity that is a Listed Person without a US export licence, which will normally be denied. Exports etc are also prohibited if they are going to third parties that supply Listed Persons.

An "item" includes products, equipment, components, materials, software, technology and data. An item is subject to the EAR if it is either:

- a) located in the US;
- b) a US-origin item, wherever it is located. This does not have to be dual-use<sup>3</sup> and includes literally anything that originates in the US;
- c) made outside the US with more than 25% dual-use US content by value;  
or
- d) made outside the US from certain dual-use US technology or software.

1. **Interaction.** Generally, a Listed Person may continue to interact with UoE but UoE may not supply a Listed Person with goods, software or technology covered by the EAR without obtaining a licence from BIS. Organisations and individuals based outwith the U.S. may apply to BIS for licences. Any application for a licence would normally be denied.
2. **Interactions with ARM.** UoE should identify the risks of any transfers of an item subject to the EAR ultimately going to Huawei, including via a collaborator such as ARM. If such a risk is identified, it would be prudent to secure a written assurance from the collaborator that they will not transfer any such items to Huawei. All relevant collaborators will of course be well aware of the US restrictions on transfers to Huawei and will have established measures to ensure full compliance, so providing such an assurance should be straightforward. We should also recognise that UoE collaborators (eg ARM) may seek similar assurances from UoE i.e. that any such item that it transfers to UoE will not be onward transferred to Huawei.
3. **Interactions with US Navy with whom UoE has existing contracts**  
Section 889 of the National Defense Authorisation Act, 2019 imposes restrictions on US government agencies' procurement of telecoms equipment and services from Huawei and some other Chinese companies. This includes at (a)(1)(B) a prohibition on US agencies entering into a contract with any entity that uses any Huawei equipment as a substantial or critical part of any system, with exceptions for services that connect to the facilities of a third party and equipment that cannot redirect or permit visibility into user data traffic. This takes effect 2 years after the NDAA was enacted (13 August

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<sup>3</sup> 'Dual use' means for an intended legitimate use but capable of being used for a banned purpose.

2018), so in August 2020. Section (d) provides for waivers if there is compelling justification for additional time to implement the requirements.

4. **U.S. Government Funding e.g. from DARPA.** There is no express prohibition on researchers who work with Huawei on applying for U.S. government funding. The funding conditions would almost certainly prohibit transfers of items to Listed Entities without a licence – which would normally be denied.
5. **Conferences and Meetings.** A Listed Person may attend or speak at conferences that are open to interested members of the public. A Listed Person cannot participate in non-public meetings or communications that involve technical discussions. In broad general terms interactions are usually permitted if they relate to items which were previously publicly available. It is not permitted to put something into the public domain so as to disclose it to a listed Entity.
6. **UoE staff working in the U.S.** While UoE staff are working in the U.S. they are directly subject to U.S. law and liable to prosecution in the US for failure to comply with the EAR – basically transferring items subject to the EAR to a Listed Entity. There are no new visa restrictions on individuals entering the US. But while UoE staff are in the US and when they leave, they need to take care to comply with the US export restrictions. For example, emailing or carrying on a laptop any software or technology to the UK from the US that is intended to be eventually transferred to Huawei would be prohibited. A more fundamental restriction could arise from the US requirement that the transfer of software source code or technology in the US to a Listed Person would require a license which would normally be denied. If UoE staff working on projects with Huawei are considered by our US colleague to be “representing” Huawei, then US organisations may decide not to transfer products, equipment, components, materials, software, technology and data to the UoE employees concerned. We should expect US organisations to be cautious about this. If they consider that there is a risk that any item (e.g. research work) that they collaborate on could be transferred to Huawei, they are likely to decline to work with the UoE staff concerned.
7. **Publications.** A Listed Person may continue to submit articles and other materials for consideration for publication and technical comment in the useful way. A Listed Person may receive or access materials submitted by other persons for publication for peer review purposes. IEEE has issued useful guidance on their approach. A link to the updated guidance dated 2<sup>nd</sup> June 2019 is below<sup>4</sup>.
8. **Use of Email.** As a matter of practicality email can be used to communicate technical information of software covered by the EAR. Thus email communications of such items to a Listed Entity would require a licence

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<sup>4</sup> IEEE Statement on Participation of Members/Volunteers from BIS Entity List Entities  
<http://www.ieee802.org/secmail/pdf/Niv9QEvd.pdf>

which would normally be denied and in the meantime no such email transfers should be made.

9. **Donations.** A Listed Person may make donations to UoE but this cannot be in payment for the transfer of an item covered by the EAR. Such a transfer would require a licence which would normally be denied. Accordingly any donations received from Listed Entities should come with no strings attached.
10. **Private or Personal Discussions.** Any private or personal communications outside the scope of open and public sessions between a Listed Person and any individual (including an employee of UoE) which amounts to the transfer of an item covered by the EAR would require a licence under the EAR which would normally be denied. Employees need to ensure they have no such personal communications.

### **U.K Export Controls**

The U.K.'s own export control regime has been in place for decades. Under U.K. export control rules licences are required for the export of goods, software, technology and know-how which may be used for military purposes, weapons of mass destruction or dual use (meaning not in fact used for these purposes but capable of being so used). In the past UoE has obtained a small number of licences to enable some specific research projects to take place. The University's Research Support Office has assisted with applying for these licences as has the business development team in Informatics. The UK has not added Huawei to any sanction list.

***Important Note.* This guidance has been prepared by UoE's Legal Services team for the initial guidance of employees following on the U.S. government's recent decisions. To enable a full understanding of the whole consequences will need further consideration as well probably as advice from U.S. lawyers.**