

**Baker
McKenzie.**

Annual Corporate Compliance Conference 2020

7 September - 9 October 2020



Export Controls and Trade Sanctions

21 - 25 September 2020



Agenda

Tuesday 22 September
2.00 - 3.00 pm BST

Key EU, UK and US Sanctions Update

Chair: Sunny Mann, Partner, London | Paul Amberg, Partner, Amsterdam | Ben Smith, Partner, London | Meghan Hamilton, Associate, Chicago | Akash Sikka, Associate, London

Wednesday 23 September
2.00 - 3.00 pm BST

Key EU, UK and US Export Controls Update

Chair: Ben Smith, Partner, London | Kerry Contini, Partner, Washington D.C. | Mini vandePol, Partner, Hong Kong | Lise Test, Of Counsel, Washington D.C. | Ross Evans, Associate, London

Thursday 24 September
2.00 - 3.00 pm BST

Trends in Trade Investigations

Chair: Tristan Grimmer, Partner, London | Terry Gilroy, Partner, New York | Alison Stafford Powell, Partner, Palo Alto | Julian Godfray, Associate, London

Thursday 24 September
3.45 - 4.45 pm BST

Increased Focus on Foreign Investment Review

Chair: Sunny Mann, Partner, London | Rod Hunter, Partner, Washington D.C. | Sylwia Lis, Partner, Washington D.C. | Anahita Thoms, Partner, Dusseldorf | Karoline Phillips, Senior Associate, London | Alexander Rickets, Associate, London

Key EU, UK and US Export Controls Update

Wednesday 23 September, 2.00 - 3.00 pm BST



Speakers



Ben Smith

Partner (Chair), London



Kerry Contini

Partner,
Washington D.C.



Mini vandePol

Partner, Hong Kong



Lise Test

Of Counsel,
Washington D.C.



Ross Evans

Associate, London

US Developments



Key ITAR Developments

- December 26, 2019: publication of Interim Final Rule revising a number of definitions in the International Traffic in Arms Regulations ("ITAR")
 - Carve-out of end-to-end encrypted technical data from exports, reexports, retransfers and temporary imports
 - "End-to-end encryption" criteria have been defined to align with the EAR
 - ITAR definitions of "export" and "release" have been updated, and the definition of "access information" has been added
 - Notwithstanding alignment, differences between the ITAR and the EAR remain
- January 6, 2020: DDTC issued FAQs providing clarifications regarding the registration and authorization requirements of the ITAR applicable to the provision of defense services abroad by natural US persons employed by foreign persons
 - No registration with DDTC is required but prior authorization must be obtained
 - Compliance obligations rest with the natural US person, rather than the foreign entity employer

Amended Military End-Use/User (MEU) Rules



Amendment to the MEU Rules in the Export Administration Regulations (“EAR”) Part 744.21 became effective June 29, 2020



Existing rule prohibits exports, reexports, and (in-country) transfers of (i) items subject to the EAR that (ii) are listed in Supplement No. 2 to Part 744 of the EAR for (iii) "military end-uses" in China or for "military end-uses" or "military end-users" in Russia or Venezuela



The new rule broadens the scope of the Military End-Use/User Rule by:

- including exports, reexports, transfer to "military end-users" in China;
- adding items to Supp. No. 2 in the categories of materials processing, electronics, telecommunications, information security, sensors and lasers, and propulsion (including items that are commercially widely available and are not inherently sensitive); and
- expanding the definition of "military end-use" from covering items for the "use," "development," or "production" of military items to also include any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, "development," or "production" of military items.

Amended Military End-Use/User Rules cont'd



Definition of "military end-user" has not changed but remains very broad to include any person or entity whose actions or functions are intended to support "military end uses"

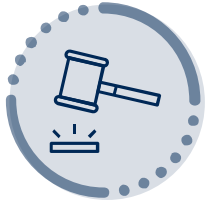


License policy of presumption of denial



BIS Guidance issued on June 26, 2020 confirming broad scope of MEU restrictions

Hong Kong Developments



July 14, 2020: Executive Order 13936 "The President's Executive Order on Hong Kong Normalization"

- Suspension or elimination of special and preferential treatment for Hong Kong
- Authorization for several categories of persons to be designated as Specially Designated Nationals (SDNs)



July 15, 2020: DDTC guidance confirming that Hong Kong is now considered to be included in the entry for China under ITAR section 126.1(d)(1)

- Policy of denial for transfers of ITAR items to Hong Kong



July 31, 2020: EAR amendment suspending the availability of all license exceptions for Hong Kong that provide differential treatment relative to mainland China

(listing available on our blog at <https://sanctionsnews.bakermckenzie.com/department-of-commerce-suspends-license-exceptions-for-hong-kong-that-provide-differential-treatment-relative-to-china/>)

Supply Chain Developments

The "Supply Chain" or "ICTS" Executive Order 13873 - Securing the Information and Communications Technology and Services Supply Chain

- Prohibition on acquisition, import, transfer, installation, dealing in, or use:
 - of ICT/S designed, developed, manufactured or supplied by persons owned/controlled by or subject to jurisdiction or direction of a **foreign adversary**
 - where transaction poses undue risk of sabotage to or subversion of ICT/S in US; undue risk of catastrophic effects on security/resiliency of US critical infrastructure or digital economy; or otherwise unacceptable risk to US national security or security and safety of US persons.
- WeChat and TikTok bans
- Clean Network Initiative

Federal Procurement Ban - NDAA 889

- **(a)(1)(A) Direct Ban:** Ban on federal agencies procuring, obtaining, extending or renewing contracts to procure or obtain, any equipment, system or service that **"uses"** "covered telecommunications equipment and services and certain video surveillance equipment" as a **substantial or essential component or as a critical technology part of system** (effective Aug 13, 2019)
- **(a)(1)(B) Indirect Ban:** Ban on federal contracting with any entity that **"uses"** any equipment, system or service that **"uses"** covered equipment and services (effective Aug 13, 2020)

Huawei Export Control Developments

Authorizations

- Authorization re standard-setting organizations (June 15)
- Temporary General License (TGL) extended but then eventually removed (August 17)
- Preserved the TGL's cybersecurity research and vulnerability disclosure authorization via new footnote 2 to the Entity List

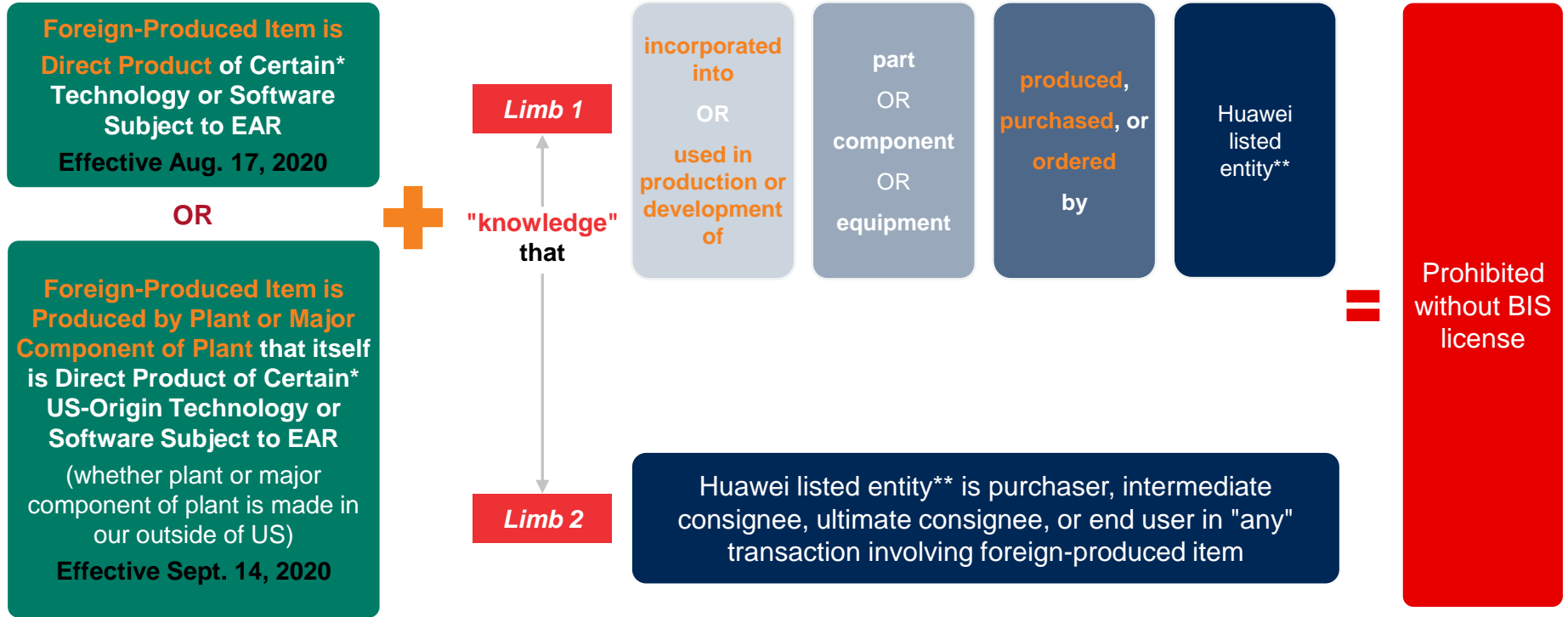
Additions to the Entity List

- On August 17, 38 more entities added to the Entity List for a total of more than 150 entities

Expanded Jurisdiction (Foreign-Produced Direct Product Rule)

- First expanded in May 2020, expanded on August 17
- Broader universe of "foreign-produced items"
- Broader circumstances subject to "knowledge" requirement

Updated Huawei Foreign Direct Product Rule



*3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991

**As of August 17, 2020, 153 Huawei entities listed on Entity List

Other Entity List Developments



Parties to the transaction:

Clarification of BIS licensing requirements where any party on the Entity List acts as a purchaser, intermediate consignee, ultimate consignee, or end user in a transaction involving items subject to the EAR (August 17)



More Entity list additions

- Human rights / Xinjiang
- South China Sea
- Pakistan

Foundational Technologies

Advance Notice of Proposed Rulemaking

1

Section 1758 of the Export Control Reform Act of 2018 ("ECRA")

3

Includes not only "technology" but also "commodities" and "software"

5

BIS seeks public comments until Oct. 26, 2020

2

BIS proposed a similar rulemaking process for "emerging technologies" in 2018

4

Could include:

- Items currently subject to military end-use/end-user controls under Supp. No. 2 to Part 77, such as semiconductor manufacturing equipment and associate software tools, lasers, sensors, underwater systems
- Items currently classified under AT controls or as EAR99 but are being utilized or required for innovation in developing conventional weapons, enabling foreign intelligence collection activities, or weapons of mass destruction applications.

Other US Developments



Russia and Yemen

- Part of a larger effort within BIS that involves a "comprehensive review" of all country groups to ensure they appropriately reflect current US national security and foreign policy.
- Russia: Moved from Country Group A:2 and A:4 to Country Group D:2 and D:4
- Yemen: Moved from Country Group B to Country Group D:1



Antiboycott

- UAE-Israel peace deal
- With new decree, UAE abolishes Israel Boycott Law
- However, no change (yet) to US antiboycott laws – treat boycott requests from the UAE as you did before

China and Hong Kong



Hong Kong Developments – National Security Law

Secession

Defined as (i) separating Hong Kong or any other part of the PRC from the PRC; (ii) altering by unlawful means the legal status of Hong Kong or any other part of the PRC; (iii) surrendering Hong Kong or any other part of the PRC to a foreign country.

Subversion

Defined as (i) overthrowing or undermining the basic system of the PRC; (ii) overthrowing the body of central power of Hong Kong or PRC; (iii) seriously interfering in, disrupting or undermining the performance of duties and functions by the body of central power of Hong Kong or PRC; (iv) attacking or damaging the premises and facilities used by the body of power of Hong Kong or PRC making it incapable of performing its duties / functions.

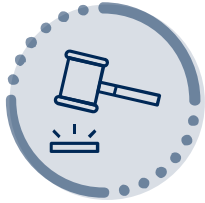
Terrorist Activities

Various prohibitions, including: organizing, planning, committing, participating in or threatening to commit a number of terrorist activities causing or intending to cause grave harm to society with a view to coercing the PRC or Hong Kong governments, an international organization or the public in order to pursue a political agenda.

Collusion with a Foreign Country or External Elements to Endanger National Security

Various prohibitions, including: (i) imposing sanctions or blockade or engaging in other hostile activities against the HKSAR or the PRC; and (ii) provoking by unlawful means hatred among Hong Kong residents towards the PRC or Hong Kong governments, which is likely to cause serious consequences.

US Responses to Hong Kong Developments



July 14, 2020: Executive Order 13936 "The President's Executive Order on Hong Kong Normalization"

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China Response to US Sanctions and Executive Orders

- In response to the sanctions the US announced against 11 individuals related to the NSL and four individuals and one entity in relation to Xinjiang, China announced sanctions in relation to the same number of persons
- China does not have an established “sanctions” program; however, it has issued new regulations with regard to its Unreliable Entity List, which it originally announced last May 2019

China - Unreliable Entity List

What does it mean if your company / customer falls within the list?

Background

- Announced by MOFCOM on 31 May 2019
- *Regulations on Unreliable Entity List* issued 19 September 2020
- Applies to foreign persons – entities, organizations or individuals

Procedure and standard

- “Working Mechanism” (UEL Office) composed of relevant central departments to organize and implement UEL system
- The UEL Office will announce the entities to be listed
- Entity may submit a defense if there is an investigation
- Possible grace period for rectification measures that can lead to removal of entity's listing



Blacklisting considerations

- Endangering China's national sovereignty, security or development
- Damaging the legitimate rights and interests of Chinese enterprises, organizations and individuals
- Applying discriminatory measures

Potential consequences

- Restrictions on China-related import or export activities
- Restrictions on investment in China
- Restrictions on relevant personnel or transport vehicles from entering China
- Restrictions or revocation of the relevant personnel's work permit, qualification for stay or residence in China;
- Fine corresponding to severity of circumstances
- Other necessary measures

Can a person be subject to conflicting obligations under the US / China laws?

EU and UK



UK Export Control Developments

Review of export licences to Hong Kong and China

- Open General Export Licence (Dual-Use Items: Hong Kong Special Administrative Region) – amended in September 2019 and January 2020, revoked in August 2020
- Trade licences (category C goods, HK-specific category C goods)
- In July 2020, UK extended China arms embargo to Hong Kong:
 - weapons, components and ammunition; military vehicles;
 - crowd control equipment (already banned since 2019);
 - equipment which might be used for internal repression (firearms, shackles, smoke grenades, intercept equipment).

UK Export Control Developments

Review of OGELs and OGTCLs

- 20 June 2019 – Following the UK Court of Appeal Judgement concerning licences issued for export to Saudi Arabia, the UK Government gave an undertaking not to grant new licences for export of items for possible use in Yemen conflict.
- December 2019 – No longer possible to register for certain OGELs and OGTCLs to Saudi Arabia, Bahrain, Egypt, Jordan, Kuwait, Sudan, and UAE. New registrations will be for licences that exclude these countries. Existing registrations not immediately impacted but would be reviewed.
- December 2019 – Removal of Turkey from new registrations for same licences, with regard to situation in Syria; OGEL (Turkey) revoked in January 2020.
- February 2020 – Ongoing review: removal of countries from certain dual-use OGELs (Yemen, Turkey, Lebanon).
- 7 July 2020 – Completed review of Saudi Arabia export licences; No longer bound by commitment not to grant new licences, but significant backlog of applications to be cleared.

UK Compliance and Enforcement

- ECJU announced 9 enforcement cases against UK exporters between May and October 2019, relating to unlicensed exports of dual use goods, military goods, and related activity. All of these resulted in compound penalties (between £5,000 and £90,000).
- Important changes to ECJU Inspection Procedures:
 - Exporters informed of exact date of inspection (no longer possible to move/agree a date to suit exporter's availability)
 - Since April 2020, inspections to take place remotely as a coronavirus precaution – ECJU has published [additional guidance](#).

Updates to EU Dual-Use Control List



Updated EU Dual-Use List (Annex I to Regulation (EC) 428/2009 came into effect on 31 December 2019



The changes reflect updates to the international non-proliferation agreements during 2018



Amendments from **Wassenaar Arrangement** include, for example:

- 2B003 overhauled to remove certain manually controlled machine tools
- 5A002 (and related Cat.5 controls) – new post-quantum cryptography / security algorithms
- New decontrol note for "Information security" items specially designed for a 'connected civil industry application' (e.g. Internet of Things) (5A002)
- Amendment to control entry for cryptographic activation token, including a Technical Note for the local definition of 'cryptographic activation token' (5A002)
- Category 6 controls for lasers – parameters updated for technical progress



The UK published an updated version of the **consolidated UK Strategic Export Control Lists** on 8 January 2020, setting out all items (goods, software and technology) that the UK considers controlled for export

Proposals for 'Recast' EU Dual-Use Regulation

- Commission proposals for amendment on 28 September 2016; aimed to modernise controls, increase harmonisation & transparency, and reduce burden on businesses
- European Parliament agreed amendments on 17 January 2018; included broad human rights end-use control, new unilateral Category 10 control list
- European Council agreed a mandate for negotiations with European Parliament in June 2019; rejected proposals around human rights end-use and Category 10
- Leaked Commission compromise text in May 2020 – middle ground approach
- European Parliament and Council need to agree before legislation gets adopted; unclear when and in what form this may occur

Key Proposals

Recast dual-use regulation

- Potential new Category 10, broad EU-wide human rights end-use control (may be agreed in limited form), new circumvention control
- Broad controls on "technical assistance" and "brokering" (including to impact subsidiaries/JVs of EU companies) through broadening of definitions
- New definitions of "export" and "exporter", designed to facilitate cloud computing and to align with Union Customs Code

Broadening available licences:

- GEA for low value shipments (€5k or less)
- GEA for intra-group transmission of software and technology
- GEA for encryption
- Availability of large project authorisations (generally up to 4 years)
- Individual licenses and global export authorisations up to 2 years
- Removal of encryption control lists entirely (Cat 5 Part 2)
- Focus on Internal Compliance Programmes and due diligence – particularly for new intra-group global export authorisation

Brexit – Status of EU Law



- European Union (Withdrawal) Act to repeal the European Communities Act 1972
- Will also end the jurisdiction of the European Court of Justice in UK
- All existing EU legislation (including the EU Dual-Use Regulation) was **copied across** into domestic UK law to “ensure a smooth transition”
- The UK left the EU on 31 January 2020 and a transition period will run until 31 December 2020.
 - **No change to current export controls framework until the transition period ends**

Impact of Hard Brexit

Dual use export controls



- **EU Dual-Use Regulation to be transposed to UK law** on date of Brexit
 - BUT... UK will no longer have role in updating the EU Dual-Use List
 - Potential for divergence between UK and EU Dual-Use Lists over time
- **No automatic exchange of information** on dual-use exports between EU and UK authorities (e.g., information on licence denials)
- UK will **no longer benefit from EU General Export Authorisations** (GEAs) which authorise export of dual-use items to specific non-EU destinations (e.g., Australia, Canada) and for certain reasons (e.g., temporary export for exhibition)
 - UK has provided for “retained GEAs” to ensure continued coverage
- UK will **likely be included in list of EU GEA countries** – to cover exports of dual-use goods from EU to UK
- **UK has published an OGEL regime** to reflect fact that UK is not part of EU (including to cover exports from UK to EU-27)
- UK licences **no longer valid** for exports from the EU-27, and EU-27 granted licences **no longer valid** for exports from UK

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