



# US Trade Controls Compliance in Europe

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Harmonizing ITAR and EAR Definitions and Key Concepts  
for a Global Compliance Solution





## Panel

### **Robert King**

Legal, Corporate Affairs & Compliance  
Head of Trade Compliance UK  
robert.king@leonardocompany.com

### **Leonardo MW Ltd**

2 Crewe Road North, Edinburgh, EH5  
2XS, UK  
Tel: +44 (0) 131 343 4953  
Fax: +44 (0) 131 343 4908  
Mobile: +44 (0) 7801 718869  
leonardocompany.com

### **Stephan Müller**

Partner  
Stephan.Mueller@oppenhoff.eu

### **Oppenhoff & Partner**

Telephone: +49 221 2091 448

### **George N. Grammas**

Partner and Chair, International Trade /  
Global Import and Export Compliance  
George.Grammas@squirepb.com

### **Squire Patton Boggs**

squirepattonboggs.com

2550 M Street, NW  
Washington, DC 20037  
United States  
T +1 202 626 6234  
M +1 240 606 7026

7 Devonshire Square  
London. EC2M 4YH  
England  
T +44 20 7655 1301



# Recent changes to ITAR and EAR Definitions and Concepts; Impact on Non-US Companies

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- US Controls over US Content in Non-US Items
- Specially Designed
- Export, Reexport and Retransfer
  - Deemed Export and Deemed Reexport
  - Encryption “Carve Out”
- Military End-use and Military End-user
- Technology / Technical Data; Excluded Information
- Compliance Obligation
  - Share Licensing Information with Foreign Licensees
  - Use the US Destination Control Statement (DCS)

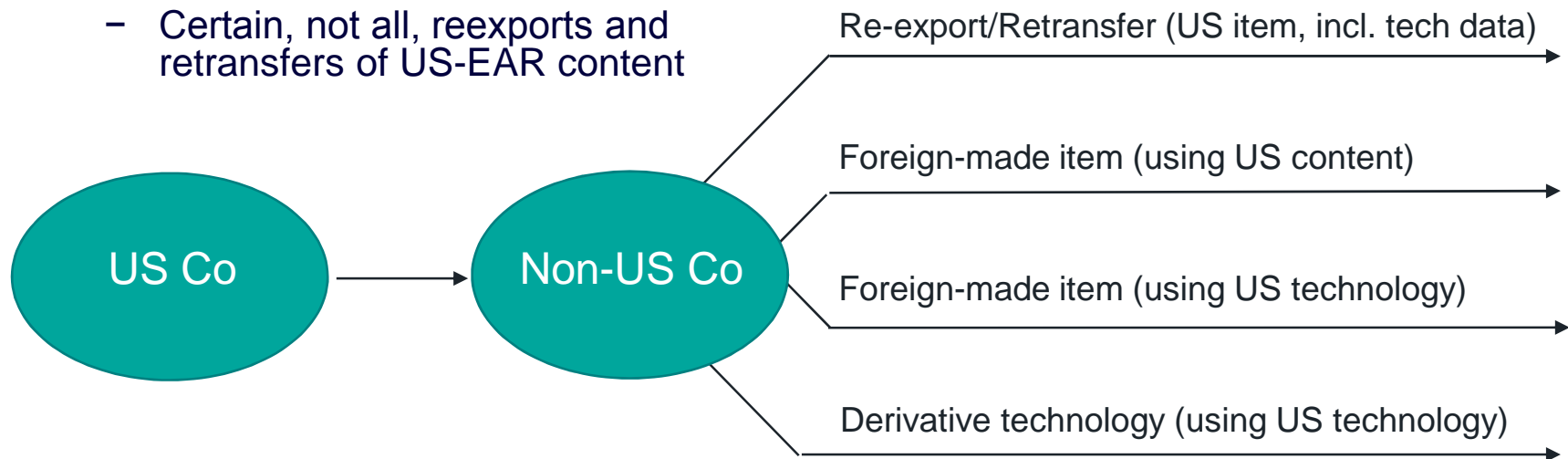
# Scope of US Export Controls / Incorporation

The application of US export controls depends on:

- WHERE: Place of export?
  - Every person in United States, including a non-US national or non-US company, is subject to US export controls
  - Every item in the United States, including non-US made item, is subject to US export controls
- WHO: Nationality of the exporter?
  - A US national or a US company is subject to US export controls, even when all export activities occur outside United States
  - May also be subject to the local country's export controls
- WHAT: Origin of the goods and/or technology being exported?
  - US-origin items remain subject to US controls even after they leave the United States and even after incorporation into a non-US product
  - May also be subject to the local country's export controls

# Scope of US Export Controls / Incorporation

- ITAR governs:
  - All exports from the United States
  - Reexports and retransfers of US-ITAR content
- EAR governs:
  - All exports from the United States
  - Certain, not all, reexports and retransfers of US-EAR content

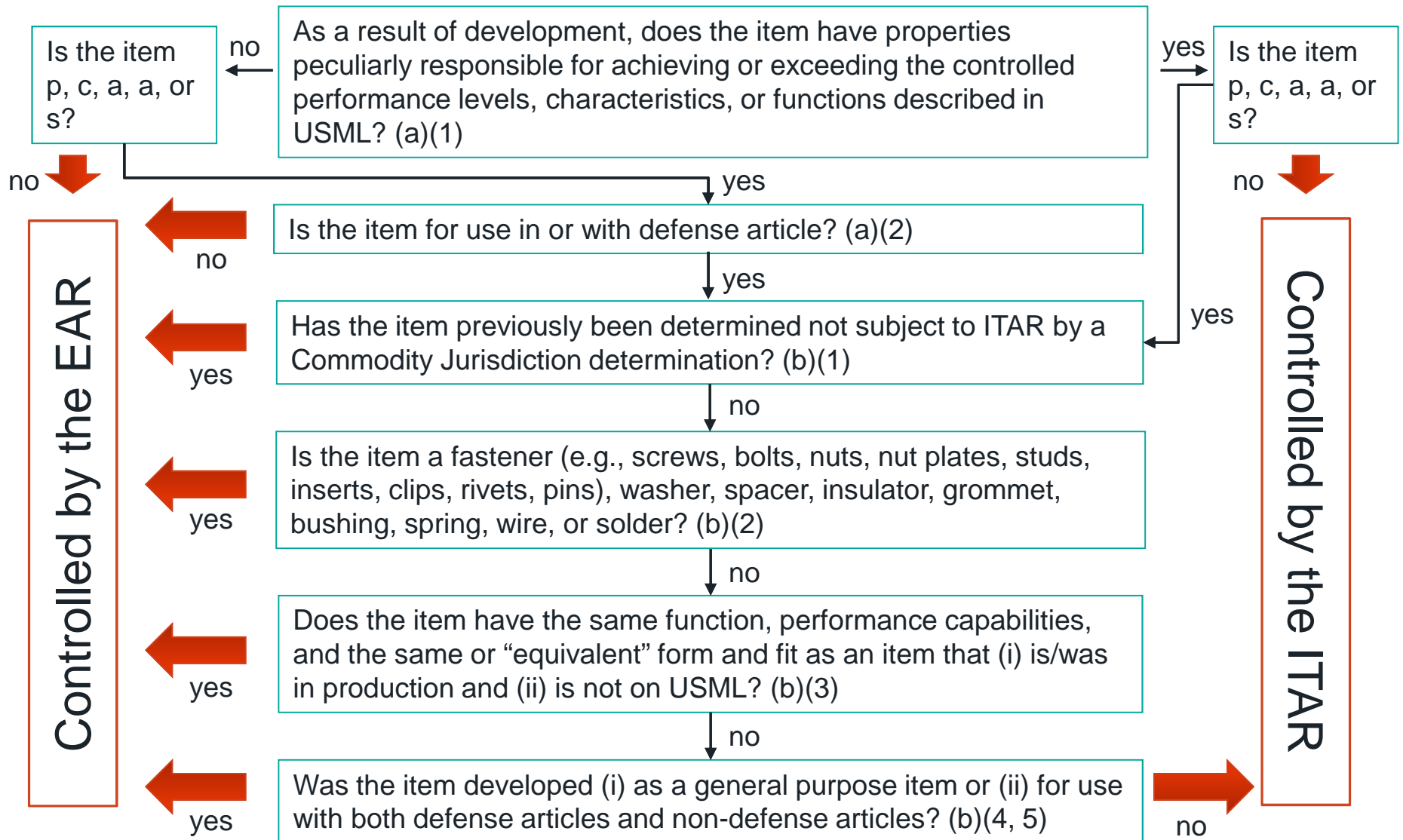


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# Specially Designed Test: Decision Diagram for State (ITAR) vs. Commerce (EAR)

§ 120.41





# Definitions of Part, Component, Accessory, Attachment, or Software

- Part -- § 120.45(d)
  - Any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of designed use. (Examples: rivets, wire, bolts, etc.)
- Component -- § 120.45(b)
  - An item that is useful only when used in conjunction with an end-item. A major component includes any assembled element that forms a portion of an end-item without which the end-item is inoperable. (Examples: airframes, tail sections, transmissions, tank treads, hulls, etc.) A minor component includes any assembled element of a major component.
- Accessories and attachments -- § 120.45(c)
  - Associated articles for any component, equipment, system or end-item, and which are not necessary for its operation, but which enhance its usefulness or effectiveness. (Examples: military riflescopes, special paints, etc.)
- Software -- § 120.45(f)
  - Includes but is not limited to the system functional design, logic flow, algorithms, application programs, operating systems and support software for design, implementation, test, operation, diagnosis and repair.

## (b)(3) - Same Function, Performance Capabilities, and the Same or “Equivalent” Form and Fit

- The comparison item must be in “production” not in “development”
- “Equivalent” form means that the item being classified has been modified solely for fit purposes.
  - Form = its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it
  - Fit = its ability to physically interface or connect with or become an integral part of another commodity
  - Function = the action or actions it is designed to perform.
  - Performance = the measure of a commodity's effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency)

## (b)(4, 5) - Developed as Dual-purpose or as General Purpose Item

- Must establish that:
  - (4) Was or is being developed with knowledge that it is or would be for use in or with both defense articles on the USML and also commodities not on the USML;
  - (5) Was or is being developed as a general purpose commodity or software, i.e., with no knowledge for use in or with a particular commodity (e.g., a F/A-18 or HMMWV) or type of commodity ( e.g., an aircraft or machine tool)
- This must be established by documents contemporaneous with the development.
  - For example, concept design information, marketing plans, declarations in patent applications, or contracts
  - Absent such documents, the commodity may not be excluded from being specially designed by either paragraph (b)(4) or (5)
- “Knowledge” includes not only the positive knowledge a 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

# Why is ITAR/EAR Jurisdiction Important?

## Impact on non-US Company

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- In addition to the export controls in the home country of the non-US company,
  - An item could be controlled under the ITAR
  - But, its specially designed parts and components could be controlled under the EAR
- Depending on the ITAR/EAR jurisdiction:
  - Different US reexport and retransfer rules apply
  - Different rules apply to releasability and control of the technology
  - Different rules apply to the obligation to include a DCS and flow down other compliance obligations
- Again, these US rules overlay the potentially different rules that may apply in the home country of the non-US company

# Specially Designed - Comparison

- Wassenaar - Use of “Specially Designed” throughout
- US ITAR (22CFR120.41) - definition includes “catch & release” consideration
- UK, German and other EU Member States
  - UK Control Lists’ definitions
    - “specially designed for military use ” or “specially designed or modified for military use”
    - No consideration relating to the technical capability of the item
    - Thus a minor modification to a civil product could bring it under UKML category
  - From BAFA perspective
  - Thus, very minor changes to the standard version of an item can make it “specially designed” and thus fall under the rules and regulations for military items.
    - Example: a company produces sealings for aircraft windows and doors. The material and the profile is always the same, however, the length of the sealing band differs depending on the size and shape of the window. If a special length was required for a military aircraft, the sealing material is considered by BAFA to be military, since it is “specially designed” for a military aircraft.
    - Differing terms: exclusively designed, specially designed, designed, suitable for

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## EAR §734.13

- An actual shipment or transmission out of the United States, including the sending or taking of an item out of the United States, in any manner;
- Releasing or otherwise transferring “technology” or source code (but not object code) to a foreign person in the United States (a “deemed export”);
- Transferring by a person in the United States of registration, control, or ownership of certain spacecraft

## ▪ ITAR §120.17

- An actual shipment or transmission out of the United States, including the sending or taking of a defense article out of the United States in any manner;
- Releasing or otherwise transferring technical data to a foreign person in the United States (a “deemed export”)
- Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to the ITAR by a U.S. person to a foreign person
- Releasing or otherwise transferring a defense article to an embassy or to any of its agencies or subdivisions, such as a diplomatic mission or consulate, in the United States;
- (5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad; or

## EAR §734.14

- An 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 manner;
- Releasing or otherwise transferring “technology” or source code subject to the EAR to a foreign person of a country other than the foreign country where the release or transfer takes place (a deemed reexport);
- Transferring by a person outside the United States of registration, control, or ownership of certain spacecraft:

## ITAR §120.19

- An actual shipment or transmission of a defense article from one foreign country to another foreign country, including the sending or taking of a defense article to or from such countries in any manner;
- Releasing or otherwise transferring technical data to a foreign person who is a citizen or permanent resident of a country other than the foreign country where the release or transfer takes place (a “deemed reexport”); or
- Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to the ITAR between foreign persons.



# Export / Reexport Home Country

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## EAR

- foreign person's most recent country of citizenship or permanent residency, except as described in §734.20.

## ITAR

- all countries in which the foreign person has held or holds citizenship or holds permanent residency.

# Transfer and Retransfer

## EAR §734.16 Transfer (in-country).

- Transfer (in-country) is a change in end use or end user of an item within the same foreign country. Transfer (in-country) is synonymous with In-country transfer.

## ITAR §120.51 Retransfer.

- A change in end use or end user, or a temporary transfer to a third party, of a defense article within the same foreign country; or
- A release of technical data to a foreign person who is a citizen or permanent resident of the country where the release or transfer takes place.

# Allowing Employees of Non-US Parties to Access US Technology / Technical Data: EAR

- Permitted deemed reexports: 750.7
  - A BIS license authorizing release of “technology” to foreign recipient also authorizes the release of the same “technology” to the foreign recipient’s foreign employees who are permanent and regular employees (and who are not proscribed persons) of the foreign recipient’s facility or facilities authorized on the license
- NOT deemed reexport: 734.20
  - The foreign recipient is authorized to receive the “technology” or source code at issue, whether by a license, license exception, or situation where no license is required under the EAR; AND
  - Case 1. Authorized Release of “technology” or source code
    - The foreign recipient has “knowledge” that the employee’s most recent country of citizenship or permanent residency
    - is that of a country to which export from the United States of the “technology” or source code at issue would be authorized by the EAR
    - under a license exception or NLR

# Allowing Employees of Non-US Parties to Access US Technology / Technical Data: EAR (cont.)

- NOT deemed reexports (cont.)
  - Case 2. *Release to Country Group A:5 nationals.*
    - The employee is a *bona fide* permanent and regular employee of the foreign recipient and is not a proscribed person (not proscribed on a list);
    - Such employee is a national exclusively of a country in Country Group A:5; and
    - The release of “technology” or source code takes place entirely within the physical territory of any such country, or within the United States.
- Compare to ITAR 126.18(d)
  - No approval is needed for reexport of unclassified data to dual national or third-country national employees of licensee (including approved sub-licensees), consignee or end-user, employees are:
    - Regular employees;
    - Nationals exclusively of NATO countries, EU, Australia, Japan, New Zealand, or Switzerland;
    - Within the physical territories of the such countries or the US;
    - Signatory to employee NDA, unless their employer is agreement licensee or sublicensee; and
    - Not the recipient of any permanent transfer of hardware.

# Allowing Employees of Non-US Parties to Access US Technology / Technical Data: EAR (cont.)

- NOT deemed reexports (cont.)
  - Case 3. *Release to other than Country Group A:5 nationals*
    - Employee is a *bona fide* 'permanent and regular employee' and is not a proscribed person;
    - Release takes place entirely within the physical territory of the country where the foreign recipient is located, conducts official business, or operates, or within US;
    - Foreign recipient has effective procedures to prevent diversion to destinations, entities, end users, and end uses contrary to EAR; and
    - Any one of the following situations is applicable:
      - Security clearance
      - Screening procedure for substantive contacts
      - Special rules for UK, Canada, Australia, Netherlands
- Compare to ITAR 126.18(a-c)
  - Unclassified reexports to the licensee's (including approved sub-licensees), consignee's or end-user's dual national or third-country national employees who are bona fide regular employees, directly employed by the licensee, consignee or end-user
  - Transfers must occur completely within the physical territory of the country where the licensee, consignee or end-user is located or operates
  - Must have effective procedures to prevent diversion to destinations, entities, or for purposes other than those authorized
  - One of following
    - Security clearance
    - Screen employees and employee NDA
    - Screening procedure for substantive contacts

# Encrypted Exports are Not Exports Under the EAR (but are Exports under the ITAR)

- Export, reexport or retransfer of encrypted technology – not an export, reexport or retransfer under the EAR
  - Sending, taking, or storing “technology” or “software” that is:
    - Unclassified;
    - Secured using ‘end-to-end encryption;’
    - Secured using cryptographic modules (hardware or “software”) compliant with Federal Information Processing Standards Publication 140–2 (FIPS 140–2) or its successors, supplemented by “software” implementation, cryptographic key management and other procedures and controls that are in accordance with guidance provided in current U.S. National Institute for Standards and Technology publications, or other equally or more effective cryptographic means; and
    - Not intentionally stored in a country listed in Country Group D:5 (see Supplement No. 1 to part 740 of the EAR) or in the Russian Federation.
  - The ability to access “technology” or “software” in encrypted form that satisfies the criteria set forth in paragraph above does not constitute the release or export of such “technology” or “software.”
  - Approval is required to transfer decryption keys, network access codes and passwords if done with knowledge that will result in release of the technology or software without required authorization

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# Compliance for EAR Military Items in Europe – Military End Use/Military End User

- **EAR §744.21(f) *Military end use.***
  - Incorporation into a military item described on the U.S. Munitions List (USML);
  - Incorporation into a military item described on the Wassenaar Arrangement Munitions List (<http://www.wassenaar.org>);
  - Incorporation into items classified under ECCNs ending in “A018” or under “600 series” ECCNs;
  - For “use,” “development,” or “production” of military items described on the USML or the Wassenaar Arrangement Munitions List, or items classified under ECCNs ending in “A018” or under “600 series” ECCNs.
  - Deployment of items classified under ECCN 9A991 as set forth in supplement no. 2 to part 744.
- **EAR §744.21(g) “*Military end user*”**
  - national armed services (army, navy, marine, air force, or coast guard), **as well as** the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support 'military end uses'



# Compliance for EAR Military Items in Europe – Military End Use/Military End User

- 81 FR 70340, effective 31 December 2016
- Introduces concept of Military End User to the ITAR – aligns with EAR
  - Note to Category XII:
    - For purposes of paragraphs (b)(6), (c)(1)(iii), (c)(3), (c)(4)(ii), (c)(5), (c)(6)(viii)(b), and (c)(7)(ii) of this category, a “military end user” means the national armed services (army, navy, marine, air force, or coast guard), national guard, national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support military end uses. **A system or end item is not specially designed for a military end user if the item was developed with knowledge that it is or would be for use by both military end users and non-military end users, or if the item was or is being developed with no knowledge of use by a particular end user. For the purpose of conducting a self-determination of jurisdiction, documents contemporaneous with the development must establish such knowledge.** For the purpose of a Commodity Jurisdiction determination, the government may base a determination on post-development information that evidences such knowledge or is otherwise consistent with § 120.4 of this subchapter.
- NB: DDTC has requested public comments (82 FR 4226) in respect of this change

# Compliance for EAR Military Items in Europe – Military End Use/Military End User

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- Europe:
  - “Military end user”? – focus is on Armed Forces, may not include “Coast Guard” or the other definitions stipulated in US regulations.

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# Definition of Technology / Technical Data

## EAR

- *Technology* means: Information necessary for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of an item.

## ITAR

- *Technical data* means: Information, other than software as defined in §120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.

Information that is not within the scope of the definition of “technology” or “technical data” is not subject to the EAR or ITAR, respectively

# Information Not Subject to the EAR or ITAR

## EAR 734.3; 734.7

- Information and “software” that are published are not subject to the EAR
  - Published means: unclassified “technology” or “software” is “published,” and is thus not “technology” or “software” subject to the EAR, when it has been made available to the public without restrictions upon its further dissemination such as through public dissemination (i.e., unlimited distribution) in any form (e.g., not necessarily in published form), including posting on the Internet on sites available to the public
- Non-proprietary system descriptions are not subject to the EAR

## ITAR 120.10; 120.11

- Information in the Public Domain which is published and which is generally accessible or available to the public:
  - Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States
  - Through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency (see also §125.4(b)(13) of this subchapter)
- Basic marketing information on function or purpose or general system descriptions

# Further clarification of technology found in the EAR (but not in the ITAR)

- Technology (controlled vs. not controlled)
  - "Technology" "required" for the "development", "production", or "use" of a controlled product remains controlled even when applicable to a product controlled at a lower level.
  - *Required* refers to only that portion of "technology" or "software" which is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions.
  - Such "required" "technology" or "software" may be shared by different products.
    - For example, assume product "X" is controlled on the CCL if it operates at or above 400 MHz and is not controlled if it operates below 400 MHz. If production technologies "A," "B," and "C" allow production at no more than 399 MHz, then technologies "A," "B," and "C" are not "required" to produce the controlled product "X". If technologies "A," "B," "C," "D," and "E" are used together, a manufacturer can produce product "X" that operates at or above 400 MHz. In this example, technologies "D" and "E" are peculiarly responsible for making the controlled product and are thus "required" technology.

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# Recent Changes Concerning Licenses

## EAR 750.7

- The export, reexport, or transfer (in-country) authorized by a license is for the item(s), end-use(s), and parties described in the license application and any letters of explanation, unless limited by a condition set out in a license
- The applicant must inform the other parties identified on the license, such as the ultimate consignees and end users, of the license's scope and of the specific conditions applicable to them.

## ITAR 123.28, 124.1, 125.1(f)

- Unless limited by a condition set out in a license or agreement, the export, reexport, retransfer, or temporary import authorized by a license or agreement is for the item(s), end-use(s), and parties described in the license application (and any letters of explanation) or agreement. DDTC grants licenses approves agreements in reliance on representations the applicant made in or submitted in connection with the license application or proposed agreement.



# Export Classification Information

## EAR

- In addition, the commercial invoice must contain the ECCN(s) for any 9x515 or “600 series” “items” being shipped (*i.e.*, exported in tangible form)

## ITAR

- When exporting items subject to the EAR (see §§ 120.5, 120.42 and 123.1(b) of this subchapter) pursuant to a Department of State license or other approval, the U.S. exporter must also provide the end-user and consignees with the appropriate EAR classification information for each item. This includes the Export Control Classification Number (ECCN) or EAR99 designation.

## EAR 758.6

- The exporter must incorporate the DCS as an integral part of the commercial invoice whenever items on the Commerce Control List are shipped (*i.e.*, exported in tangible form).
  - License exceptions BAG and GFT excepted
  - Does not apply to EAR99 items

## ITAR 123.9

- The exporter must incorporate the following information as an integral part of the commercial invoice, whenever defense articles are to be shipped (exported in tangible form), retransferred (in tangible form), or reexported (in tangible form) pursuant to a license or other approval under this subchapter:
  - The country of ultimate destination;
  - The end-user;
  - The license or other approval number or exemption citation; and
  - The following statement

“These items are controlled by the U.S. Government and authorized for export only to the country of ultimate destination for use by the ultimate consignee or end-user(s) herein identified. They may not be resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized ultimate consignee or end-user(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations.”

# Tools to Strengthen Compliance

- The Trade Practitioner
  - ITAR Practitioner's Handbook
  - Updates on US and EU Export Controls and Sanctions
  - European Regulation
  - Trade Policy
  - CFIUS Actions

[www.TradePractitioner.com](http://www.TradePractitioner.com)

