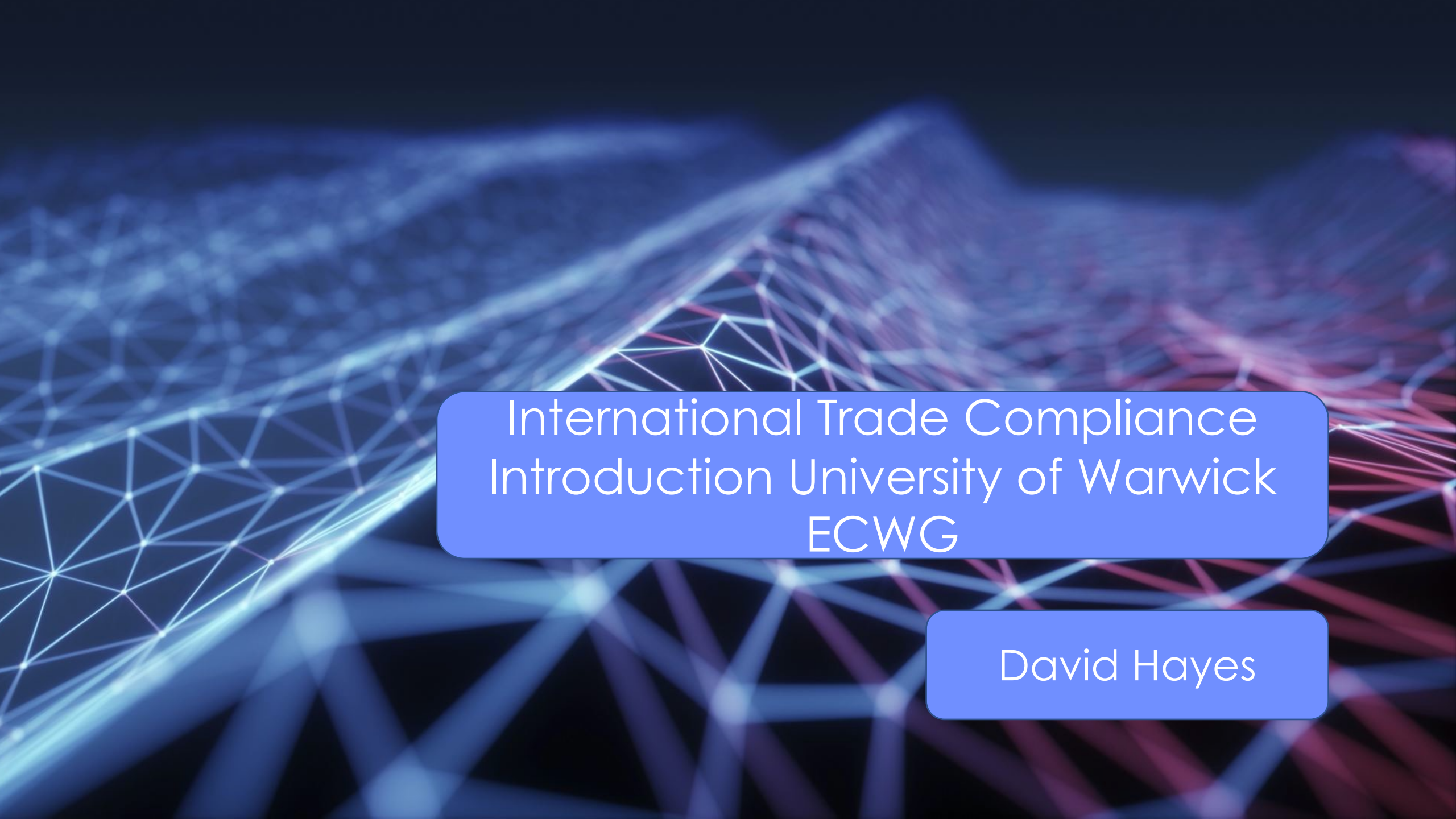


International Trade Compliance Introduction University of Warwick ECWG

David Hayes

Agenda

Current enforcement focus on academia, an international perspective.
The presentation is relevant to all areas, including individual research to overseas partnering

Business functions and trade compliance linkage/relevance

UK Export control responsibilities, limitations on controls & the academia myth.
UK controls outline: Military and Dual-Use

"Technology" controls and the extent of decontrols
Impact of US controls on foreign (non-US activities) and persons

Focus on Weapons of Mass Destruction (WMD) end-use controls – key enforcement risk

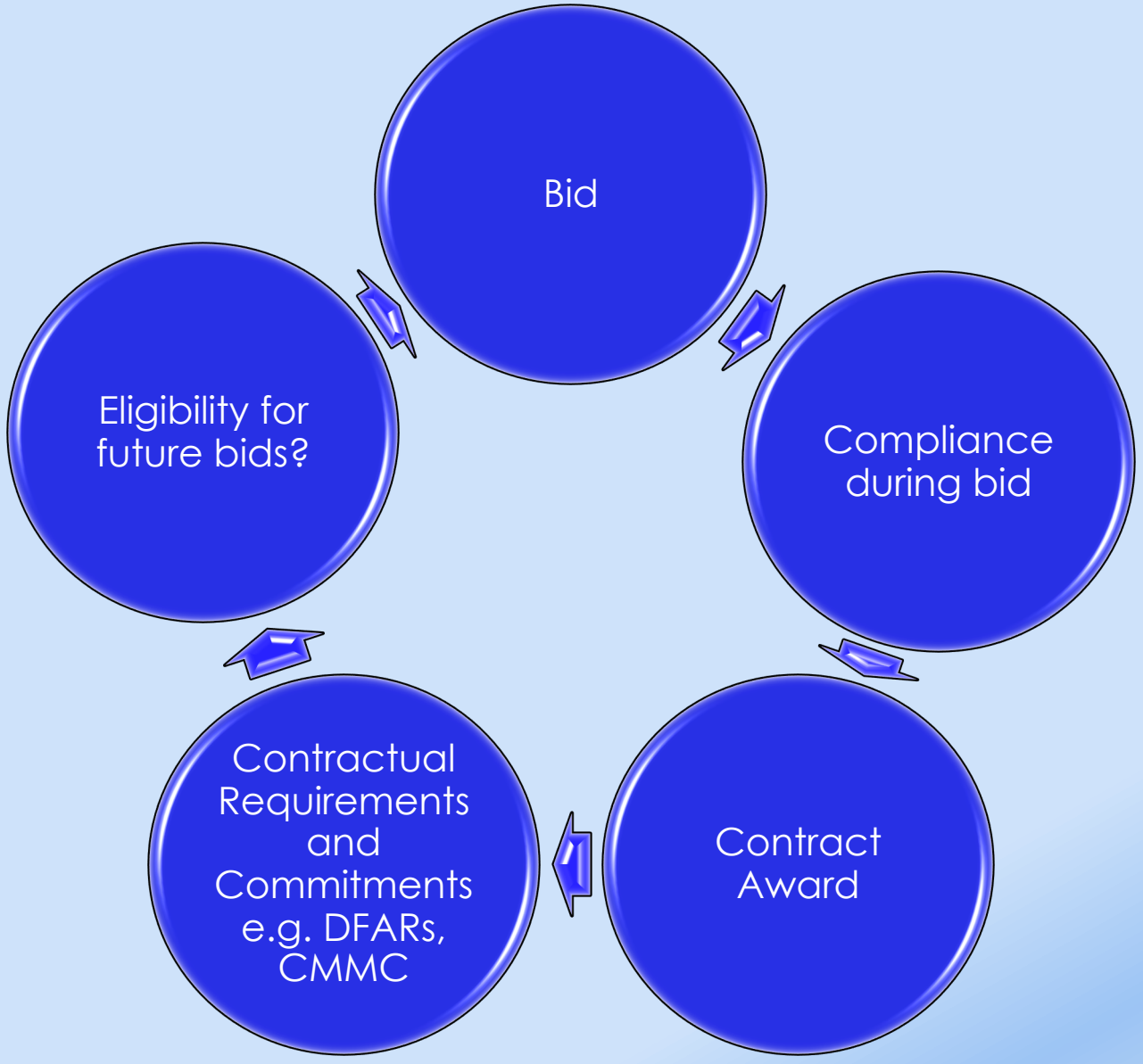
Compliance policies and procedures – risk management

UK Licensing overview

Offences and penalties

The Business Cycle – a Compliance View

Compliance is key enabler for future collaboration – not an impediment!



The University Structure – a Compliance View

Compliance is key enabler for future business – not an impediment!

Function	Relevance Example
Vice-Chancellor/ Executive Board	Set the tone – sine qua non
International Partnerships	Technology – in and out
HR	Vetting technology access
Finance	Financial sanctions compliance
Research	You have to ask!
IT	Guardians of the data
Academic staff	Teaching, especially within an international context
Compliance	Support the above

What Are Strategic Export Controls?

The legal means by which governments, acting alone or through international organisations, control the export of strategic goods in order to meet foreign policy and defence objectives.

- To prevent the "wrong things" falling into the hands of the "wrong people"
- The "things" is a technical question
- The "people" is a political question

Strategic goods are those with a link to weapons related uses

Military controls are a "legal competence" of the UK and of each EU Member State

"Dual-Use" controls are based on retained EU dual-use list

The Times, 8 February 2021

HM Revenue and Customs is preparing to investigate 200 British academics for sharing information that could help China develop weapons of mass destruction
MARK SCHIEFELBEIN/AP

HMRC accuses British universities of inadvertently aiding Chinese military

Matt Dathan, Homes Affairs Editor | Billy Kenber

Monday February 08 2021, 12.01am, The Times

More than a dozen universities may be inadvertently assisting the Chinese military by sharing research in sensitive areas ranging from hypersonic technology to graphene, a think tank claims.

Civitas alleges that 20 British universities have dealings with 29 Chinese universities and nine companies that have military links, including with Chinese weapons conglomerates.

US Department of Commerce

FOR IMMEDIATE RELEASE
February 2, 2021
www.bis.doc.gov

BUREAU OF INDUSTRY AND SECURITY
Office of Congressional and Public Affairs
(202) 482-1069

PRINCETON UNIVERSITY RESOLVES ALLEGATIONS OF EXPORT LAW VIOLATIONS WITH ADMINISTRATIVE SETTLEMENT

Today, Kevin J. Kurland, performing the non-exclusive functions and duties of the Assistant Secretary for Export Enforcement, Bureau of Industry and Security (BIS) of the U.S. Department of Commerce, announced an administrative settlement of $54,000 with Princeton University, located in Princeton, NJ. Princeton University voluntarily self-disclosed potential violations of the Export Administration Regulations (EAR) to BIS, and cooperated with the investigation that was conducted by the New York Field Office of BIS's Office of Export Enforcement (OEE). Princeton University also agreed to complete one external audit and one internal audit of its export compliance program.

"The Bureau of Industry and Security strongly encourages research institutions to maintain robust export compliance programs to prevent violations of the EAR," said Mr. Kurland. "If violations do occur, voluntarily self-disclosing the violations to BIS will help mitigate penalties imposed to protect U.S. national security."

This settlement resolves BIS's allegations that on 37 occasions between November of 2013 and March of 2018, Princeton University engaged in conduct prohibited by the EAR when it exported various strains and recombinants of animal pathogens from the United States to various overseas research institutions without the required export licenses. The items were controlled for Chemical and Biological Weapons reasons, and valued in total at approximately $27,000.

UK Government – Export Licensing

UK ECJU Updated Guidance – 31 March 2021

Transnational Education (TNE)

Both export control restrictions and exemptions apply when a UK institution offers STEM-based courses:

-**through an overseas campus**

-**to overseas-based students by electronic means**

When providing these STEM-based courses you must ensure any training, advanced study, continued professional development, or individual research projects:

-comply with export controls

-are not undertaken in support of a WMD programme

Care must also be taken if research is:

-undertaken as part of an **applied** or work based programme, such as an engineering doctorate

-through a **split-site programme of study** involving a non-UK based component

UK ECJU Updated Guidance – 31 March 2021

Limits of academic exemption

Any academic exemption is unlikely to apply to all aspects of research focused advanced postgraduate degrees such as MPhil or PhD looking at areas of controlled technology. Especially as such research programmes will typically be applied research. By their very nature, they will include technology not covered by the 'public domain'.

What is an Export?

The physical taking or sending of a controlled items outside of the UK

The electronic transmission of controlled items outside of the UK

The UK has a very limited concept, approximating US “deemed export” controls, only when such an activity is linked to a WMD end-use.

UK Bases for Control

The item (goods, software or technology) being exported is on a control list

End-Use Controls – The item being exported is not on a control list but the perceived end-use renders the export licensable

"Technical assistance" controls – under export control or sanctions regulations

What is Military?

Usually the basis of control is "specially designed or modified for military use"

Design intent is what matters

- NOT the intended end-use
- NOT whether the **customer** is military – classify the **item** not the recipient

Very "broad brush" test for control

Lacks the objective measures usually found in the dual-use list

NOT just weapons – virtually all specially designed or modified military goods:

- **Down to component level !!**
- **Includes "technology"**

What is Dual-Use?

Dual-use goods are those items which, although not designed for military use, may have a military application

In essence, that which is not military is dual-use **BUT** not all dual use items are controlled

Controlled dual-use goods are those defined in the dual-use control list (Retained Annex I to EC Reg 428/2009)

Uncontrolled dual-use goods may still require a licence

Dual-use controls are mostly based on performance parameters - NOT design intent and are difficult to interpret correctly - they catch many types of goods from electronic components to raw materials BEWARE!

Dual-Use

Categories

- 0 Nuclear materials, facilities & equipment
- 1 Special Materials & Related Equipment
- 2 Materials Processing
- 3 Electronics
- 4 Computers
- 5 Telecommunications and Information Security
- 6 Sensors & Lasers
- 7 Navigation & Avionics
- 8 Marine
- 9 Space & Propulsion

Sub Categories

- A Systems, Equipment & Components
- B Test, Inspection and Production Equipment
- C Materials
- D Software
- E **Technology**

Followed by three digits denoting the international regime or arrangement from which the control entry originates, e.g. 2B007

What is “Technology”

Specific (technical) information, in virtually any form, necessary for the "development", "production" or "use" of "goods“.

Examples: CAD/CAM models; drawings; blueprints; technical specifications

Usually, but not always, where the product to which the “technology” relates is itself controlled

2E001 "Technology" according to the General Technology Note for the "development" of equipment or "software" specified in 2A, **2B** or 2D.

2E002 "Technology" according to the General Technology Note for the "production" of equipment specified in 2A or **2B**.

2E201 "Technology" according to the General Technology Note for the "use" of equipment or "software" specified in …., **2B007.b., 2B007.c**., ….

What is “Technology” (2)

Note broad language – technology controls are usually **but not always** expressed in the context of controlled goods

2E003.b. "Technology" for metal-working manufacturing processes, as follows:

1. "Technology" for the design of tools, dies or fixtures specially designed for any of the following processes:

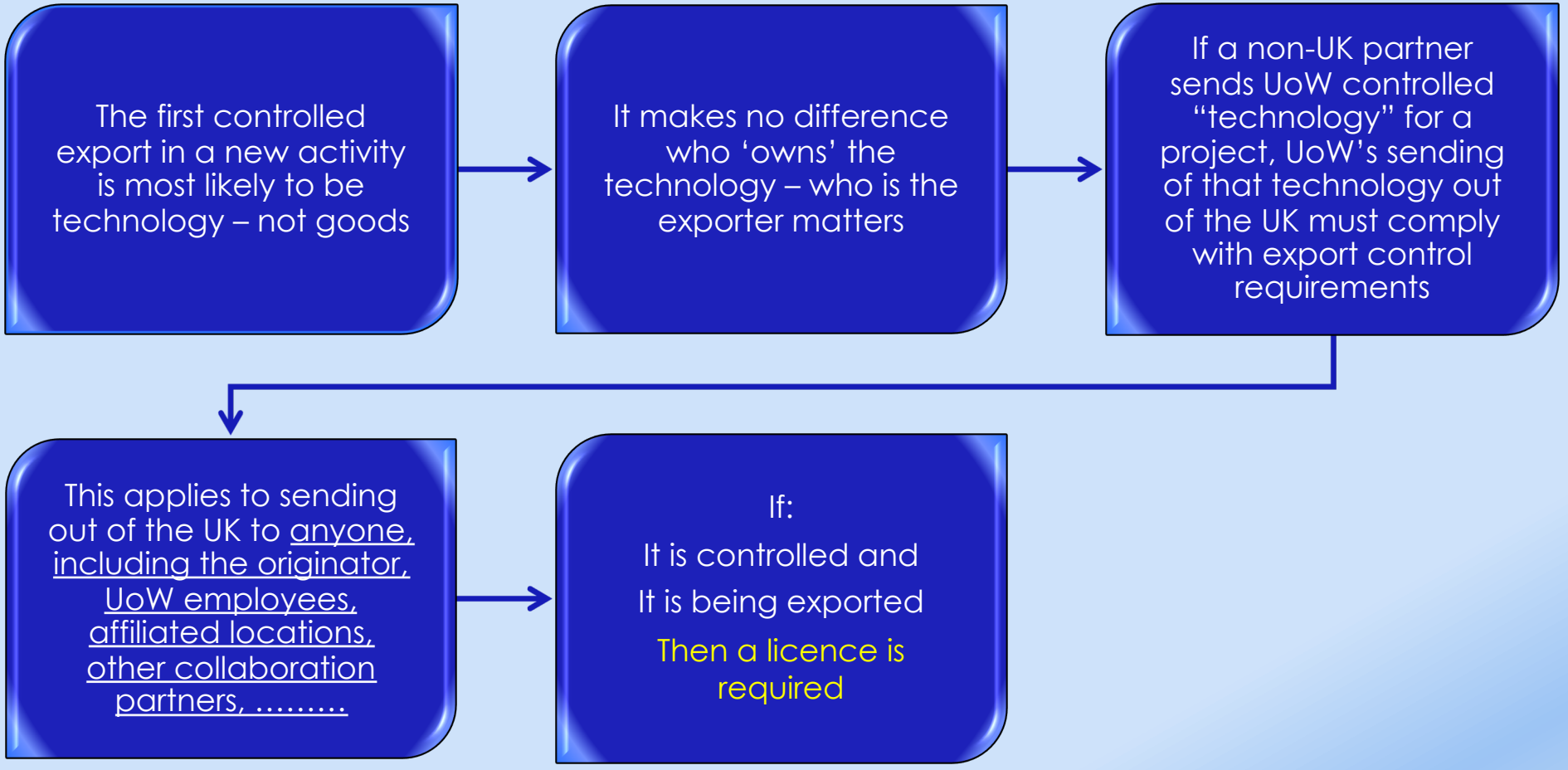
a. "Superplastic forming";

b. **"Diffusion bonding"; or**

c. 'Direct-acting hydraulic pressing';

2E003.e "Technology" for the "development" of integration "software" for incorporation of expert systems for advanced decision support of shop floor operations into "numerical control" units;

Technology Transfers – Real World



Some Areas of Risk

Media driven focus on WMD End-Use – actually not the greatest risk and easily mitigated

Activities of UoW involving the export of controlled technology from the UK – higher probability and higher penalties

Extraterritorial (XT) application of laws, particularly the US but more recently China

Material subject to XT laws are still subject, even if received indirectly, e.g. from another UK party.

Compliance with XT laws can conflict with Equality Act 2010

Non-compliance with XT laws can incur significant costs and criminal penalties

UK End-Use Controls – Summary

Provision	Activity	Excludes	Cognizance	Final destination
Art 4 Retained EC Reg 428/2009	Physical or electronic transfer from UK		Know/Informed WMD End-Use	Outside UK
Art 6 ECO 2008	Physical or electronic transfer from UK		Suspect WMD End-Use	Outside UK
Art 10 ECO 2008	**Transfer by any method in the UK**	**Public Domain – per Art 18(2) Basic Scientific Research (BSR) NOT EXCLUDED**	**Know/Informed WMD End-Use**	**Outside UK**
Art 11 ECO 2008	Transfer by any method by UK person outside UK	Public Domain – per Art 18(2) (BSR) NOT EXCLUDED	Know/Informed WMD End-Use	Of the actual transfer – can include to the UK WMD End-Use must be outside the UK
Art 12 ECO 2008	Transfer by non-electronic means	Public Domain – per Art 18(2) (BSR) NOT EXCLUDED	Know/Informed WMD End-Use	Immediate or final destination outside UK
Art 19 ECO 2008	Provision directly or indirectly of "technical assistance" from anywhere		Know/Informed WMD End-Use	Outside UK (directly or indirectly)

UK Technology Export Controls & Related Sanctions

Penalties Relating to "WMD End-Use"?

Export Control Order 2008 Art 34(3)

A person who contravenes a prohibition in Part 2 or 3 of this Order that is engaged because the person—

(a) has been informed;

(b) is aware; **or**

(c)has grounds for suspecting that goods, software or technology are or may be intended, in their entirety or in part, for WMD purposes commits an offence and may be arrested.

(4) A person guilty of an offence under paragraph (3) shall be liable—

(a)on summary conviction—

(i)in England and Wales or Scotland, to a fine not exceeding the statutory maximum or to imprisonment for a term not exceeding twelve months, or to both;

(ii)in Northern Ireland, to a fine not exceeding the statutory maximum or to imprisonment for a term not exceeding six months, or to both; **or**

(b)on conviction on indictment to a fine or to imprisonment for a term not exceeding two years, or to both.

ITAR/EAR
US Jurisdiction in a Foreign Organisation

David Hayes

US Export Control Laws and Regulations

	Dept of State (DDTC)	Dept of Commerce (BIS)
Enabling Statute (Legal Basis)	Arms Export Control Act (AECA) 22 U.S.C. 2751 - 2796	Export Control Reform Act 2018
Regulations	International Traffic in Arms Regulations (ITAR) 22 C.F.R. 120 - 130	Export Administration Regulations (EAR) 15 C.F.R. 768 - 799
Administrator	U.S Department of State Political-Military Affairs Directorate of Defense Trade Control (DDTC)	U.S. Department of Commerce Bureau of Industry & Security (BIS)
Control List	United States Munitions List (USML) 22 C.F.R. Part 121	Commerce Control List (CCL) 15 C.F.R. Part 774

What is Extraterritoriality?

Applying the law of a country outside that country

Both ITAR and EAR are extraterritorial

The US control "attaches" to the US export and remains with the US export unless US law removes the control – even after incorporation

How this works in practice is different for ITAR and for EAR

ITAR/EAR Comparison

ITAR is Absolute/EAR is conditional

For ITAR, reexport control can arise from US controlled hardware, software, technology, or from services provided by "US Persons"

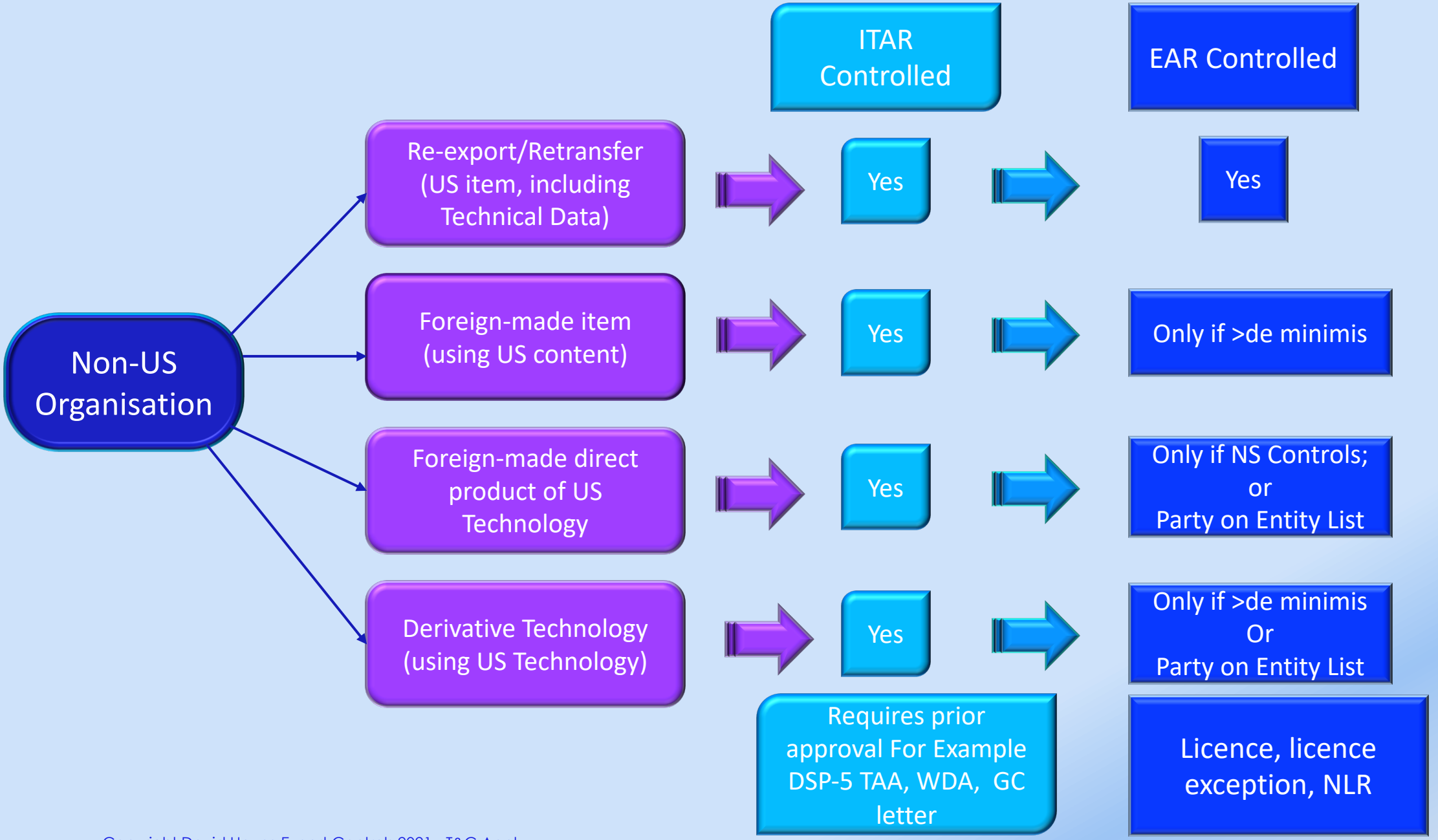
For EAR, reexport control can arise from US controlled hardware, software, technology

Re-export of technology may be by mere disclosure – show/tell it to a national of country X, it has been re-exported to Country X

How this works in practice is different for ITAR and for EAR

Compliance requirements are therefore also different

Summary - Impact of US Content or Derivation on Foreign Made Products



Compliance System – Considerations 1

Essential Elements	UoW Approach	Comments
Management Commitment	Establishment of Export Control: Policy & Training Working Group (ECPTWG)	Resourcing/developing/oversight of compliance activity
Risk Assessment	Currently developing better understanding of risk Controlled and WMD End-Use	Requires periodic reassessment and modification, in light of changes to risk profile
Internal Controls	Controls in place and promulgated via UoW website Clearly defined responsibilities in R&IS	Management of licences/audits to be discussed
Testing/Auditing	To be defined by ECPTWG	Use of UK open licensing incurs periodic government audits. Emphasises rather than removes internal audit need
Training	Both awareness level and R&IS training in train	Consider use of government resources for student body wide awareness, e.g. ECJU/You Tube video (c. 8 mins)

Compliance System – Considerations 2

Aspect	Description	Comments
The 4 "**W**"s of exporting	**W**hat; **W**here; **W**ho; **W**hy?	Classification; Destination; End-User; End-Use
Classification	**What:** Crucial dependency	The context in which the system operates. Possible to have two applicable systems, e.g. UK and US
Destination	**Where:** Can include face-to-face teaching in UK **in limited circumstances**	**NOT** based on nationality. Based on WMD end-use outside UK
End-User	**Who:** End-User due diligence ("Red Flags")	Proactive protection, often contractual
End-Use	**Why:** End-Use due diligence, particularly WMD end-use ("Red Flags")	Proactive protection, often contractual

UK Licensing

Individual licences, SIEL and OIEL, require an application

OGELs and (EU)GEAs require one-off registration per licence, per location and can then be used repeatedly

Open licences, OIEL and OGEL/(EU)GEA, trigger audits by Compliance Inspectors from DIT

There are over 40 OGELs and 6 (EU)GEAs

EUGEAs are retained in UK law and called "GEAs"

OGELs can cover military, dual-use or both

(EU)GEAs cover only dual-use

UK Licence Conditions –All Licence Types

*Ensure
the items to be exported are covered by the licence

*Ensure
the destination is covered by the licence

Ensure
the licence reference is quoted on the shipping paperwork

Provide
written instructions to the forwarder (even if customer nominated) that the export is subject to licensing and the details of the licence to be used in the customs declaration

Obtain
a copy of the customs declaration from the forwarder (can be difficult with nominated forwarders)

*Retain
All licence conditions met and records kept for four years to demonstrate compliance

Penalties and Problems?

Penalties for breaching export controls range from loss of open licence privileges through fines to imprisonment.

DIT is the licensing authority but HM Revenue & Customs (HMRC) are responsible for enforcement

If you have any concerns regarding a possible breach of controls you must contact your compliance staff

UK Penalties

Criminal Violation – Intentional (Section 68(2) Customs & Excise Management Act (CEMA) 1979)

10 years imprisonment and unlimited fine

Criminal Violation – Strict Liability (Section 68(1) CEMA)

The greater of 3x the value of the goods or £1000, plus forfeiture of the goods

Other sanctions:

Compound penalty (CEMA) - (£575k technology to US)	Removal of the authority to use open licences	Company director disqualification (CDDA 1986)

UK Enforcement/Compliance

In 2018 there were 3 prosecutions under the Export Control Order 2008,

All were successful.

HMRC evidence to Parliament that prosecution figures can vary, depending on the maturity of investigations:

A similar uplift is evident in compound penalty figures.

2017 – 1 compound penalty totalling £5,360.00

2018 – 3 compound penalties totalling £111,312.50

2019 – 6 compound penalties totalling £146,786.59

2020 – (Mar-Sep) - 19 compound penalties totalling £700,368.01

UK HELP

- SPIRE www.spire.trade.gov.uk

- Checker tools https://www.ecochecker.trade.gov.uk/spirefox5live/fox/spire/OGEL_GOODS_CHECKER_LANDING PAGE/new

- ECJU on gov.uk: https://www.gov.uk/government/organisations/export-control-organisation

- Tariff Correlation 2019:
- trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=192

Contact Information