

Preparing for ‘No Deal’: What measures should educational suppliers take?

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Introduction: The State of Play

In default of a political resolution, the UK will by operation of law cease to be a member of the European Union at 11pm GMT on the 31 October 2019. This will see the UK exit both the EU Single Market and Customs Union as well as arrangements, pacts and treaties whose subject-matter range from the free movement of goods to the import of chemicals and foodstuffs.

Business readiness

If a no-deal Brexit has been described as the largest challenge facing our generation of political and business leaders, it nevertheless offers a paradox. Namely, as reported by the Chartered Institute of Procurement & Supply's (CIPS) August 2019 survey of British businesses, if our key industries recognise Brexit as an era-defining challenge, they nonetheless feel acutely unprepared for it. Eighty-seven percent of UK businesses testify to possessing incomplete information or contingency plans concerning a no-deal Brexit. Four out of ten SMEs report having no contingency plans whatsoever.

Responding to a BESA survey in 2016, over 92% of educational suppliers called on the Government to clearly communicate to business the challenges that lie ahead. These calls have largely gone unheeded. By the end of 2017/18, the six key Brexit departments had only spent £400 million on Brexit preparations. In comparison, by the same date, the Bank of America alone had spent £300 million on its Brexit preparations, Barclays £200 million and companies such as Pfizer and Aston Martin, £80 million and £300 million respectively.

Additional no-deal funding

Prime Minister Boris Johnson has recently committed an extra £2.1 billion to no-deal preparations. With the announcement of these additional funds having come just 93 days before the October 31st deadline, time remains as much of a constraint to effective no deal planning as money. As the Director General of the Confederation of British Industry (CBI), Carolyn Fairbairn, has consequently remarked, the question is no longer whether British businesses can be fully prepared for October 31st. It is whether they can achieve basic preparedness.

There is still much British businesses can do

Fairbairn's warning should not be read fatalistically. According to academics such as David Blake at City University, a 'No Deal' Brexit, even if predicted to present largely negatively outcomes for the economy as a whole, does present opportunities to exporters. There remain a number of immediate measures, from registering for an Economic Operators Registration and Identification Number (EORI) to enshrining currency volatility provisions in export contracts, that educational suppliers can take to protect their position.

This briefing outlines the major economic, regulatory and compliance issues educational suppliers can expect as traders in goods and services as well as controllers and processors of data in the event of a No Deal Brexit. For each of these issues, it suggests a number of measures and resources that educational suppliers can enact and consult respectively.

Free Movement of Goods

A particular difficulty for educational suppliers: What is a ‘good’ and what is a ‘service’?

In the event of a no-deal Brexit, educational suppliers’ trade will no longer be governed by the EU treaties and case law but rather by the World Trade Organisation (WTO’s) General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) respectively. Just as in EU law, the WTO’s regime provides different provisions for the trade of goods and services respectively.

To know what tariff terms your business will face, you first therefore need to work out if your offering is a good or a service. If it is a good, its tariff terms will be governed by GATT. If it is a service, it will be governed by GATS.

For educational suppliers, identifying whether your offering is a good or a service can often be challenging. Sometimes what appears initially as a service - such as delivering lesson content to children in a foreign school - takes the form of a transmission of goods, such as the conveyance of books or software abroad. In this scenario, how would we classify such a transaction? Does it fall under the WTO’s provisions relating to goods or services?

While there are no formal definitions, the WTO has tended to opt for the following distinction. All material products, such as books, furniture or hardware, are goods. On the other hand, where the material product is related to some activity, they are treated as services.

A textbook is therefore a good, but where a supplier’s activity concerns the distribution of textbooks, this is a service. Software is similarly a good, but where your contract is for the licensing of this software, this is a service. In the example above, a contract for textbooks or software would fall under the provision of goods. However, if the contract provided that you also had to distribute the books or licence the software, this would be a service.

Movement of Goods: The Status Quo

Along with the free movement of services, capital and people, the free movement of goods has been one of the axiomatic ‘four freedoms’ of EU law for over forty years. This has been facilitated by the rules and processes of the EU Customs Union and Single Market. Below, I provide a brief explanation of how the Customs Union and Single Market operate and why this is important to educational suppliers. Please advance to the next section if you feel that you are already apprised of this knowledge.

The EU customs union

The customs union is a type of free-trade area devoted specifically to goods (note, it does not include services, capital or data). The UK and 27 other EU member countries have agreed to abolish mutual tariffs on many goods- i.e. neither the UK or France would levy import tariffs on each other’s textbooks or school equipment. The joint tariffs schedule that exists at the moment mean that

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49% of the UK's exports in goods which go to the EU, as well as 53% of its goods imports, do so without the need to pay tariffs.

While such trade liberalisation measures take place within the customs union, a protectionist stance is taken externally to countries outside of the union. The EU's 28 members therefore apply a "common external tariff" (CET) to all goods originating from outside of the EU. The purpose of this is to protect EU industries from having their prices undercut by foreign competitors, such as the Chinese steel industry, that may be able to exploit cheaper labour or benefit from state subsidies.

Products circulate freely in a customs union with no need for customs checks at borders. This is because, if all countries apply the same tariff, there is no need to check the "country of origin" (i.e. where the product was made) for each good so as to discern whether customs duties should be collected. By contrast, when products enter the EU from a third party country, then there is a need for a customs check. This is to check the "country of origin" of the product, the applicable tariffs and whether all custom regulations have been complied with. Once they enter the customs union, however, these third party products circulate freely as they have already been checked.

The customs union is particularly important for those companies whose products rely on a cross-border supply chain. Many companies' products are made from supplies (whether it be raw materials, chemicals or simply nuts, bolts and screws) that are imported from a number of EU member states. If each of these supplies when crossing a border were subjected to tariffs, this would greatly increase the production cost for companies- forcing them either to find domestic suppliers, reduce margins, or pass the cost on to the consumer.

The EU single market

The single market is a much more ambitious form of a free-trade area, encompassing not only goods but also services, capital and people. The most prominent feature of the single market is that it seeks to harmonise the regulations that apply to products so that businesses compete on a level playing field and consumers' best interests are protected. The EU Commission is particularly alert here to national measures that directly or indirectly discriminate against other EU member states goods'. If, for example, the UK put a tax on foreign textbooks, this would be illegal as it would unfairly advantage UK publishers. Similarly, an EU regulation might indicate that all secondary textbooks have to be made with a certain quality of durable paper- this protects consumers by preventing a regulatory race to the bottom whereby publishers compete to produce the cheapest, yet least durable, product.

Movement of Goods: Implications of No Deal

Customs: overview

In BESA's 2016 survey of 130 educational suppliers on Brexit, 82% of companies reported that they export to the EU. Furthermore, BESA's quarterly 'barometer' reports on the state of the educational suppliers industry have consistently shown that, when faced with a difficult domestic market, suppliers have relied on exports to the EU as a crucial source of growth. There can be no doubt therefore that the EU is an important market for our industry.

In the event of a no-deal Brexit, almost all measures that facilitate the trade and transportation of goods in the EU will fall away, leaving businesses to face burdensome customs procedures, declarations and likely delays at the border. The government has previously estimated that the increased costs of such delays and procedures would range from 4% to 15% of the cost of the goods transported.

UK businesses trading into the EU will also pay tariffs on exports for the first time in 46 years in the event of no deal. These will be applied on 90% of UK exports per value. By contrast, the UK has committed to ensuring that 87% of goods imported into the UK will be tariff-free.

The Government will automatically issue Economic Operator Registration and Identification (EORI) numbers in the coming weeks to all businesses that are VAT registered. EORI identifiers are the crucial identifier by which the EU will allow British businesses to export into the Union after Brexit. Small businesses which fall below the VAT register will need to apply individually for an EORI number.



Recommendation One: **EXPORTS TO EU: ENSURE YOU HAVE AN EORI NUMBER**

As of August 2019, the CBI reported that only 32% of British businesses have obtained an **Economic Operator Registration and Identification (EORI) number**. Without an EORI number, British businesses will not be able to export into the EU after Brexit.

While all British businesses previously had to apply issue for an EORI number, the government announced last week that all VAT registered businesses will now automatically be issued with EORI numbers through the post. **Keep a close eye on this, as the government needs to issue these to over 88,000 businesses in just eight weeks. If you do not receive one, contact the 0300 322 7067 hotline for further assistance.**

If you are one of the UK's 90,000 small businesses that are not VAT registered, you will need to apply for an EORI number yourself. This can be done here: <https://www.gov.uk/eori>

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Furthermore, with British customs authorities set to replace the old IT system (CHIEF) that managed customs declarations at ports with the new Customs Declaration System (CDS), British businesses will have to learn how to navigate new customs declaration forms.



Recommendation Two: IMPORTS FROM EU: REGISTER FOR TRANSITIONAL SIMPLIFIED PROCEDURES (TSP)

An EORI number is key to allowing your business to export to the EU after Brexit. To facilitate your business's imports from the EU into the UK after Brexit, **register for Transitional Simplified Procedures (TSP). This will prevent your imports having to undergo lengthy and costly customs checks at the UK border.**

A TSP reduces the amount of information that importers from the EU need to give on a declaration when goods cross the border. It allows importers from the EU to defer giving a full declaration until after the goods have crossed the border and to pay any duty up to a month after the import. You can register for TSP [here](#).

Movement of goods: overview of import tariffs relevant to educational suppliers

In March 2019, HM Treasury published the tariff rates it will apply to different categories of good imported into the UK after Brexit. The Government has also recently launched an [online Trade Tariff Search Tool](#) where you can consult the relevant tariff rates for different categories of good. For your convenience, I have provided a sample of tariff rates relevant to the educational supplier industry. Please take the time to double check these, as the tariff rates for particular items under each of these categories (i.e. particular form of wood) can vary largely.

Category of Good	Range of Tariffs
Computer hardware	0%
Household items, including furniture and furniture components	TBD
Paper	0%
Polyethylene Plastics	6.5%
Stationery	2.7%
Textiles, including clothing	3.5-12%
Woods	0% for most categories

Movement of goods: overview of export Tariffs relevant to educational suppliers

Educational suppliers will be subject to the integrated Tariff of the European Union (TARIC) applied by the EU to all third party countries. **The average tariff on UK goods exported into the EU will be 4.3%.** You can check the export tariffs your goods will be subject to by checking the European Union's [TARIC database here](#).

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Below is a sample of export tariffs that will be relevant to educational suppliers. Again, please take the time to double check these as the tariffs applied to particular items under each of these categories of good can vary largely.


Category of Good	Range of Tariffs
Computer hardware	1.5+%
Household items, including furniture and furniture components	Typically 2.7%
Paper	Up to 6.5%
Polyethene Plastics	6.5%
Stationery	3.7%
Textiles, including clothing	6.5%-12%
Woods	0% for most categories

Customs: cross-border supply c

Cost increases for companies that rely on cross-border supply chains risk being substantially higher. As opposed to exporters whose products are sourced purely from domestic materials, exporters who rely on cross-border supply chains will have to bear the cost of customs checks on each of the materials they import from EU member states.

According to the CBI, a multiplicative factor of up to three could apply to the costs that companies with cross-border supply chains face compared to exporters who source from domestic materials. The Chartered Institute of Procurement & Supply (CIPS) reported in August 2019 that 32% of British businesses who use EU suppliers are consequently looking for British replacements.

A significant risk here is posed by currency volatility. In light of a weakening pound, 60% of UK businesses with EU suppliers report that supply chains have become more expensive. 31% of British businesses have taken hedging measures against these fluctuations, such as converting pounds into more stable currencies.

 **Recommendation Three: CONTRACT IN STERLING AND CONSIDER BRINGING SUPPLY CHAINS WITHIN UK**

Businesses can safeguard themselves against the further loss in the value of the pound **by contracting in sterling, rather than Euros, when purchasing goods.** This has two benefits. First, it immunises you against the risk of an unexpected price rise between agreeing a contract and the delivery of the goods caused by a further loss of value in the pound.

Second, **contracting in sterling avoids the risk of increased costs and slower processing times for euro transactions after Brexit,** especially, as if expected, the UK no longer participates in the Single Euro Payments Area (SEPA) after October 31.

With 57% of UK businesses reporting that they are considering measures to adapt their supply chains, **it is worth considering whether your business’s supply chain can equally be brought within the UK.**

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Customs: delays

Delays are expected to have a huge impact on the UK border in the event of a no-deal. Research by Imperial College London has found that two minutes spent by every vehicle at a customs port could more than triple queues on adjacent motorways for up to 29 miles. The Chartered Institute of Procurement & Supply has reported that 38% of UK businesses' European customers have already switched to a EU supplier. A further 60% of European businesses have indicated that they plan to abandon UK suppliers if delays at the border extend to 2-3 weeks.



Recommendation Four: CONSIDER ENGAGING SERVICES OF CUSTOMS BROKER, FREIGHT FORWARDER OR LOGISTICS PROVIDER

According to the CBI, 45% of British businesses plan to, or have engaged, the services of a customs broker, freight forwarder or logistics planner so as to mitigate the risk of their goods being unduly held up at the border. This could be a viable option for your business too.

Movement of Goods: UK exports of goods to the rest of the world after Brexit

As a member of the EU, UK exporters of goods benefit from free trade agreements (FTAs) that the EU has with around 70 partners ranging from large economies, such as Japan and South Korea, to smaller economies, such as Dominica and St. Vincent. According to a briefing by the House of Commons Library, these trade agreements account for around 14-15% of UK trade in goods.

The UK will no longer be party to these agreements after the 31 of October. That said, the UK has signed a number of 'roll on' agreements with third-party countries whereby the terms of the EU agreements have been replicated in separate agreements with the UK. Notably for education suppliers, 'roll on' agreements have been concluded with South Korea, Israel and Switzerland.

Except where such 'roll on' agreements exist, it is widely expected that the UK will trade according to the WTO's terms on trade in goods . These terms would be governed by the WTO's General Agreement on Trade and Tariffs (GATT), and, crucially, the latter's 'Most Favoured Nation' (MFN) principle whereby if a country gives a preferable tariff rate to one country, it is legally bound to extend it to all.

You can consult the WTO tariff rates on various categories of good by accessing its 'Tariffs Analysis Online' facility [here](#). Please note that you will have to complete a registration to access this portal.

There are, however, doubts among many legal experts that the UK could simply move to WTO terms in the event of No Deal with the EU. There are two apparently insurmountable hurdles to the UK trading on current WTO terms in the short term.

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First, the UK must produce its own schedule covering each of the 5,000-plus product lines covered in the WTO agreement and have this schedule agreed by all 163 WTO states in the 18 parliamentary sitting days before Brexit.

The second hurdle is the sheer volume of domestic legislation that would need to be passed before the UK could trade under WTO rules: there are nine statutes and 600 statutory instruments that would need to be adopted.

BESA will monitor developments on this issue and update members once clarity on this issue emerges.

The Free Movement of Services

Movement of services: The status quo

The UK services sector is often described as a great British success story, accounting for nearly 80% of the UK's GDP. With the value of British exports of education products and services having reached £1.9 billion in 2019, and growth in the education services sector now outstripping that seen in other major industries including insurance, the education market will play a vital role in the success of the post-Brexit economy.

According to the formal definition provided in international law, educational services includes all trade where educational and training services are provided across borders on a contract or for a fee. To break this rather bland definition down into concrete examples, this category includes, for example, online assessment and e-learning platforms, school information management systems and continued professional training (CPD) services provided by UK educational suppliers abroad.

Furthermore, educational services relate to any training services that an educational supplier provides as part of the delivery, maintenance or installation of a good or service.

Under EU law, the freedom to provide services includes the right of free travel to provide and receive services, as well as the right to provide services across borders digitally. At the outset of the EU, it was initially thought that education, just like health and social security, might not fall under the remit of free movement laws. Many governments argued that these domains should be subject to national policy exemptions, whereby governments could restrict market access to foreign education, health and social security retailers and providers.

However, the European Court of Justice has long since clarified that education services now fall within the free movement of services. Education suppliers are thus currently free to provide their services across the EU member states without impediment.

Benefits of free movement of services for UK services firms

To facilitate free movement of services, EU law provides that UK services firms - educational suppliers included - benefit from preferential access rights and protections in other EU member states. This makes it easier for businesses to establish themselves abroad and to provide cross-border services on either a temporary or permanent basis. This saves UK firms from having to adopt the costly measure of either creating a subsidiary registered in the national law of a target EU market, or working with a European agent, in order to sell their services abroad.

In participating in the free movement of services, UK firms are also protected by the rules of the single market, competition law and state aid.

Single market measures prevent governments from adopting measures, such as taxes, levies or import quotas, whose effects would be to directly or indirectly discriminate against UK education suppliers. For its part, competition law acts on

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the level of business to business engagements, its object being to prevent cartels or groups of foreign education suppliers clubbing together to block market access to UK competitors. Lastly, state aid prevents governments from granting an unfair advantage to their country's national suppliers over foreign competitors, by, for example, granting the former tax breaks, subsidies or grants.

EU agreements on trade in services with the rest of the world

It must be remembered that it is not only access to the EU market that is on the line for UK service businesses in the event of No Deal. There are other markets that are currently relatively open to UK service providers due to free trade agreements concluded by the EU with over 70 other nations. **These are less relevant to educational suppliers, however**, as while these agreements liberalise access to many sectors, such as telecom, transportation and legal services, **they very rarely apply to education.**

In contrast to countries such as Australia, which has been very successful in negotiating market access for education suppliers in its Free Trade Agreements (FTAs) with other countries, the EU has generally agreed to exempt education from trade liberalisation measures in its agreements with third-party countries.

Thus if in 'KAFTA', Australia' FTA with South Korea, Australia has achieved preferential trade access for educational suppliers to the Korean market, the EU's FTA agreement with Korea does not provide comparable trade liberalisation measures. More notably, the EU-Canada Agreement (CETA), described as the most comprehensive trade agreement the EU has ever concluded, exempts education from trade liberalisation measures.



Recommendation Five: ENGAGE WITH BESA'S CONSULTATION ON PREFERENTIAL TRADE TERMS IN FUTURE UK FTAs

The Department for Education (DfE) and Department for International Trade (DIT) are conducting a joint initiative to consider preferential trade terms for education suppliers, and in particular EdTech companies, that the UK will seek to negotiate in FTAs with third countries.

As part of this initiative, the DfE and DIT have asked for the input of BESA members as to the preferential trade terms they wish to see included. In the next few weeks, BESA will be distributing a briefing on the preferential terms that countries such as Australia have managed to secure for their educational suppliers in FTAs. This will provide BESA members with a template of the type of terms that might be relevant, and enable them to judge whether there are certain terms they feel are inappropriate to UK suppliers or whose scope it would be beneficial to extend further.

BESA will then conduct a survey of member's views on this issue, with a view to influence the DfE and DIT's consultation.

Movement of Services: The Implications of a No Deal Brexit

With regard to the free movement of goods, we saw that, while leaving the tariff-free free trade area provided by the EU Customs Union would be damaging to UK educational suppliers' future European business, the increase in tariffs that would have to be paid under WTO rules would not necessarily be severe. Namely, we saw that the EU's average Most-Favoured Nation tariff on goods under the WTO's GATT rules is on average 5.3%, with most goods relevant to education suppliers facing tariffs of between 2-3%.

In the case of trade in services, the hurdles facing UK educational suppliers' future international trade is more pronounced. Under the WTO's General Agreement on Trade in Services (GATS), the set of international rules that govern trade in services, average tariffs on services are 40%.

Before we look at how education fits within this discussion, we first need to consider the structure of GATS and the components which govern its operation.

The structure of GATS

Within the WTO framework, GATS consists of three components:

- (a) A framework of rules that lays out the general obligations governing trade in services. These are general principles that apply to all sectors;
- (b) Annexes on specific service sectors; and
- (c) Schedules detailing the liberalisation commitments of each WTO member.

As you can see from this three-fold structure, GATS is a combination of top-down and bottom-up approaches. There are a number of top-down general principles that apply to all sectors, but as point (c) above shows, beyond this individual countries are each free to choose the degree to which they commit to liberalise access to industries such as the education sector as well as the tariffs they set.

In short, looking at the general body of text of the GATS agreement is less useful to us than examining each of the individual liberalisation commitments that countries have pledged to make.

An important piece of terminology we need to consider before looking at each of these individual liberalisation schedules is "mode" of trade. Four modes of trade are identified by GATS, the first of which is most relevant to educational suppliers:

- 1) Mode 1: cross border supply - for instance, services through international mail, internet and e-learning, as well as teleconference facilities;
- 2) Mode 2: consumption abroad - for instance, students studying abroad;
- 3) Mode 3: commercial presence - for instance, FDI in the form of setting up branches in the territory of another Member State.
- 4) Mode 4: presence of natural persons - 'temporary' (with temporary yet to be defined) entry of workers in the territory of another Member State.

Knowledge of these 'modes' will help you understand the different tariff regimes that are included in each country's schedules of trade liberalisation. For example,

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a country might apply tariffs only on Mode 2 types of education services entering its country.

GATS and education

Under Chapter 5 of GATS, there are five categories of education service that can be subject to trade liberalisation measures. Three of these are of relevance to BESA members. These include a) primary education; b) secondary education and c) adult education.

Extent of country commitments

Unfortunately for education suppliers, relatively few WTO members have made trade liberalisation commitments in the education sector. Of the 144 WTO members, only 44 have made commitments to liberalise market access for education services. **This makes it crucial that educational suppliers work with government to ensure that preferential trade terms for the sector are included in FTAs.**

You can check each country’s education commitments under WTO rules [here](#).

- (i) Primary education commitments

Of the 44 countries that have made a commitment in educational services, 30 have made commitments in primary education services. Of these 30 commitments, 50% provide tariff-free access for Mode 1 forms of trade in services, such as services provided through e-learning, through telecommunication or in the mail. BESA provides a summary in the table below of some of the key commitments made by primary education markets relevant to educational suppliers.

Countries	Commitments
EU (negotiates as a single bloc), Mexico, New Zealand, and Switzerland	Market access to privately funded primary educational services. In the majority of cases, there are zero tariffs applied.
China	China allows market access for private international schools and private schools. It bars market access to state delivered compulsory education (grades 1-9 of the state system).
Japan	Japan only allows market access to ‘formal education institutions’ These are not-for-profit institutions that include kindergartens, elementary schools, and lower secondary schools.
Norway	Allows for market access, but only to those primary schools which do not lead to the conferral of state recognised exams.
Thailand	Full market access both to national and international primary schools.

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(ii) Secondary education

There are 35 country commitments in secondary education. Importantly for educational suppliers, over 60% of these commitments provide tariff-free market access for Mode 1 cross-border trade in supply of services, such as e-learning and education training provided through telecommunications. As in primary education, most of these commitments are restricted to allowing market access to private secondary schools.

Countries	Commitments
Australia, Austria, New Zealand and EU	Market access to educational suppliers but only to privately funded secondary educational services. In the majority of cases, there are zero tariffs applied.
China	Market access restricted to private international schools, schools for children of foreign workers and private schools. Importantly, China excludes access to so called 'special education services' including military, police, political and party school education.
Japan	Market access restricted to not-for-profit upper secondary schools and technological colleges.
Thailand	Full market access to both national and international schools.
Vietnam	Market access to secondary schools, but only where the services are to assist learning in the following subject areas: technical, natural sciences and technology; business administration as well as business studies; economics, accounting, international law and language training.

(iii) Adult Education

There are 32 country commitments in adult education. There are fewer commitments that distinguish between public and private in adult education, though six countries still limit the application of their liberalisation commitments to privately funded adult education.

EU and Liechtenstein	Full market access for adult education services in private education. No market access to public education.
Austria	Access to both public and private education, but radio and television broadcasting prohibited.

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Japan	Prohibition on foreign language tuition services except for there they are supplied in partnership with a formal education institution established in Japan,
China	Full market access except for special education (e.g. military, police, political and party school education).
Thailand	Full market access to professional and/or short course education services.
Viet Nam	Full market access but the education content must be approved by Vietnam's Minister of Education and Training.



Recommendation Six: CONSIDER PRIORITISING EUROPEAN AND SOUTH-EAST ASIAN MARKETS IN SHORT-TERM AFTERMATH OF BREXIT

The majority of countries that have committed to trade liberalisation of education services are either European or South-East Asian. Given that major markets such as the UAE and the US have not liberalised trade in education services, it might be worth considering a short-term pivot to Asian and European markets.

BESA provides members with a wide-ranging programme of events throughout the year, covering both the UK and overseas. With Southeast Asian markets likely to offer the most liberalised market access terms to the UK's education suppliers after Brexit, your business may wish to attend a number of trade exhibitions BESA is organising in the region. These include:

[L&T Hong Kong 11-13 December 2019](#)

[Bett Asia 4-5 March 2020](#)

[BESS Vietnam 27-28 March 2020](#)

For more information as to any of these events, please contact BESA's Deputy Head of Events, Yasmin Barnett, at yasmin@besa.org.uk

Free Movement of Data: The Status Quo

The Fifth Freedom?

‘Personal data is the new oil of the internet and the new currency of the digital world.’ These words, uttered by the former European Commissioner for Consumer Protection, Meglena Kuneva, reflect a heightened awareness among EU officials of the centrality of data in an information age, and that, like oil, from its extraction to its disposal, the treatment of personal data must be planned carefully and executed by trained experts.

Europe has long recognised privacy as a human right. However, unlike other legal cultures such as in the United States, Europe’s commitment to privacy extends beyond a mere recognition of the sanctity of home life to encompass the fields of communications, reputation and data processing. It is for this reason that Stefano Rodatà, one of the drafters of the Charter of Fundamental Rights of the European Union, has argued that personal data protection is now considered a new fundamental right among Europeans.

More broadly, if the European Union is often reputed to be based on ‘The Four Freedoms’ - the freedom of movement of capital, people, services and goods - it is now common to talk of the free movement of data as the ‘fifth freedom.’

This ‘fifth freedom’ nevertheless requires protections. In 2018, the European Union’s General Data Protection Regulation (GDPR) came into force. GDPR presumes that personal data is important, so much so that every aspect of interacting with data requires careful planning. **Although GDPR is a European provision, it is directly effective in UK law.** This is legal jargon for saying that, as UK businesses currently operating in a EU member state, education suppliers are currently required to comply with its provisions when processing data.

Free Movement of Data: Implications of a no-deal Brexit

International transfers of data: key for educational suppliers

Educational suppliers, particularly EdTech companies, those with e-learning products or school information management systems, often handle a large amount of personal data across a number of countries. A no-deal Brexit risks being significant here, as educational suppliers will have to adapt to new compliance measures required for the international transfer of data.

Importing personal data from the EEA/EU into the UK

The GDPR restricts the transfer of personal data to countries outside the European Economic Area¹, where the receiver of this data is a separate organisation or individual. In the event of No Deal, the UK will no longer be a member of the EEA. As a result, the transfer of personal data from organisations within the EU to other organisations in the UK faces being restricted unless the EU is satisfied that the UK has implemented adequate data protection legislation.

¹ The EEA states consist of the 28 EU members states plus Iceland, Norway and Liechtenstein.

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Separate organisations

To reiterate, once the UK has left the EEA/EU after 31 October, GDPR would only restrict the transfer of personal data from the EEA to the UK where the receiver of this data is a separate organisation or individual. If your business has two offices, one in the EU and the other in the UK, transferring personal data from the former to the latter will not be subject to restrictions as the transfer would take place *within* the same organisation.

By contrast, transfers to another company within the same corporate group will be restricted. Therefore, if your EU parent or subsidiary transferred personal data to your UK company, this would be a restricted transfer.

Transfer or transit of data?

Restrictions on the movement of data from the EEA to the UK after 31 October will only apply where this is intended as a transfer of data. A transfer of data is one where there is an intention that the personal data will be accessed or manipulated in the non-EU country. By contrast, let's say you are an educational supplier whose main office is in London, but which also has offices in Brussels and Paris.

Perhaps it is the case that if your Brussels office wants to send data to your Paris office, the latter will nevertheless be routed through your company's server in London. This scenario, so long as there was no intention to access or manipulate the personal data as it passed through your London server, would not qualify as a restricted transfer. GDPR rules would consider it a direct transfer between Brussels and Paris.

Would the import of data from the EU into the UK be covered by an adequacy decision?

The import of personal data from the EU into the UK will therefore be subjected to restricted transfer rules. The latter require that one of four conditions be satisfied in order for the transfer to go ahead. The most straightforward of these, and the one that UK educational suppliers will be hoping for, is where the EU Commission has granted an official *adequacy decision* whereby a non-EEA country's data protection laws have been deemed sufficient so as to allow for the unrestricted flow of data to it.

As the UK is still a member of the EEA, it as of yet not one of the 13 countries that have been granted an adequacy decision.

Will the UK automatically be awarded adequacy status upon leaving the EU?

Unless a Brexit deal is reached between the UK & EU which covers data protection and data transfer arrangements, the answer is no. The Commission would need to go through an assessment process before adequacy is granted. Despite pleas from the UK Government for this process to start, the Commission's current position is that it will not commence this process until the UK has left the EU to become a third country.

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Is the UK likely to be awarded adequacy status?

It is uncertain. The UK's Data Protection Act 2018 incorporates the GDPR into UK law, meaning that even after Brexit, British law will continue to enforce the GDPR's central provisions. It has been widely hoped that this will go a long way to persuading the Commission to grant the UK adequacy. However, there are concerns that the Commission will look less favourably on the UK's controversial Investigatory Powers Act 2016, the latter having been criticised by the European Court of Justice for infringing individuals' privacy.

What if there is no adequacy decision?

In the short-term, it is likely that there will be no adequacy decision concerning the UK. In this scenario, **educational suppliers will need to alter their business practices in line with Article 46-49 GDPR**, the text of which you can consult [here](#).

These Articles outline the alternative methods whereby restricted transfers from the EU into the UK can take place. The burden for compliance with Articles 46-49 of GDPR falls on organisations sending personal data to the UK. Nevertheless, educational suppliers should be proactive in managing their relationships with their EU counterparts to ensure these measures are enforced.

Option 1: Standard Data Protection Clauses



Recommendation Seven: INSERT STANDARD DATA PROTECTION CLAUSES IN CONTRACTS

The easiest means for UK businesses to continue to import personal data from the EU into the UK will be to enter into a contract incorporating one of a set of two standard data protection clauses that have been approved by the European Commission. These can be accessed on the European Commission website [here](#).

The Commission plans to update these existing standard clauses in the next twelve months so as bring their wording closer to that of the GDPR. Until then, you can still enter into contracts which include the currently advertised clauses.

Existing contracts incorporating standard contractual clauses can continue to be used for restricted transfers (even once the Commission has adopted updated standard contractual clauses).

As a word of caution, if you are entering into a new contract, **you must use the standard data protection clauses in their entirety and without amendment.**

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Option 2: Adopt Binding Corporate Rules across your Multinational



Recommendation Eight: **MULTATIONALS SHOULD CONSIDER ADOPTING BINDING CORPORATE RULES**

If you are a multinational, you can also make a restricted transfer if both you and the receiver have signed up to a group document called *Binding Corporate Rules (BCR)*.

BCRs are internal codes of conduct operating within a multinational group, which applies to restricted transfers of personal data from the group's EEA to non-EEA entities.

This may be a corporate group or a group of undertakings or a group of undertakings or enterprises engaged in a joint economic activity, such as franchises or joint ventures.

You must submit BCRs for approval to an EEA supervisory authority in an EEA country where one of the companies is based. The European Data Protection Board (EDPB), the official regulator of the GDPR, has produced a number of in-depth guides to BCRs.

For BCR principles applying to contracts with data controllers, please press [here](#).

For BCR principles applying to contracts with data processors, please press [here](#).

For the Co-Operation Procedure required for approval of BCR, press [here](#).

Option 3: A legally binding and enforceable instrument between public authorities and bodies

Admittedly an option that is less applicable to educational suppliers, a final means through which to enforce a restricted transfer of data from the EU into the UK comes where the exchange occurs between two public authorities. So long as the contract entered into is legally binding, enforceable and contains rights or remedies for individuals whose personal data is transferred, it will be deemed acceptable.

Can I make a restricted transfer without satisfying one of these conditions?

Yes, but only in a number of exceptional circumstances outlined in Article 49 GDPR. The most relevant one for educational suppliers would be where you have received the fully informed consent of the data-subject to the specific transfer in question and the risks involved. This would be a time-consuming and impractical procedure when dealing with large volumes of data however.

Export of Personal Data from the UK into the EEA/EU

The transfer of personal data from the UK to EU member states is an area that is regulated by the UK Government. On 6 February 2019, the Government published official guidance in which it announced that UK businesses can continue to export data to the EEA/EU and the 13 countries subject to adequacy

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decisions by the European Commission without the need to take any further preparatory measure.

UK business controlling/processing data in EEA or about individuals in the EEA.

So far we have looked at two rather clean-cut scenarios. Namely, either where EU organisations operating on the continent export data to the UK, or where UK businesses operating in Britain export data into the EU.

There are, however, three other scenarios we can imagine.



Scenario 1: UK business uses European-based server or third-party data storage provider based in Europe. UK business intends to transfer this data to non-EEA country.

Many UK EdTech providers will likely face this scenario. Particularly where it comes to cloud storage solutions, many providers are based in an EEA. After Brexit, this creates the complicated scenario where, a UK supplier may seek to transfer pupils' data to another non-EEA country, but face the legal question of whether they need to comply with GDPR because the data is stored in Europe.

The answer is yes, they do. Even if the data is only stored in Europe, and does not even concern EEA citizens, it will still come under the terms of the GDPR and be classified as a restricted transfer.

This is because Article 3 of the GDPR applies in all circumstances where personal data is being processed in the EEA. Even storage is considered a form of processing data. That it is not your business that is storing the personal data, but rather a third-party data storage service doing so on your behalf, makes no difference. Under GDPR, your business is liable for the compliance with GDPR of any third-party supplier you contract.

Therefore, to effect this restricted transfer, your business would need to satisfy one of the conditions provided in Article 46-49 GDPR.



Scenario 2: UK business stores data in non-EEA based server. UK business intends to transfer personal data to non-EEA country. However, personal data concerns data-subjects resident in an EEA country.

Scenario 2 differs from Scenario 1 in two respects. First, the location of the data processing is no longer an EEA State. Second, the data subject is now an individual resident in the Union.

In short, we have replaced the question of location of the data-processing to location of the data-subject. Does GDPR apply where the data-subject is resident in the Union?

An example of this scenario for educational suppliers would be if they were transferring data a) processed in a non-EEA state b) about schoolchildren resident in an EEA state to c) a non-EEA state.

The answer again is yes. Under Article 3(2) GDPR, “the Regulation applies to the processing of personal data of data subjects who are in the Union by a controller not established in the Union.”

Therefore, to effect this restricted transfer, your business would need to satisfy one of the conditions provided in Article 46-49 GDPR.



Scenario 3: UK business stores data in EEA-based server. UK business intends to transfer personal data to non-EEA country. However, personal data concerns EEA citizens (schoolchildren) resident in a non-EEA state.

Scenario 3 is identical to number 2 in two respects. First, the location where the data is being processed remains outside the EEA. Second, the identity of the data-subject remains that of an EEA citizen.

It differs, however, in stipulating that the EEA data-subject is not resident in the EEA. The question here is whether the place of residence of the data-subject is key?

An example of this scenario for educational suppliers would be if they were transferring data a) processed in a non-EEA b) about European schoolchildren c) resident in a non-EEA state d) to another non-EEA state.

From the wording of Article 3(2) GDPR, it would seem that the GDPR does not cover this transaction. It would therefore not be a restricted transfer. This is because, as we have seen, under Article 3(2) the Regulation applies to data subjects who are “in the Union.”

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Further Sources of Advice

Legal advice

Businesses, schools and other education institutions seeking formal legal advice as to Brexit might find the services of the following legal providers useful:

- [Ward Hadaway](#): This law firm offers specialist education advice and continues to provide legal services to BESA on a number of items.
- [Education Legals](#): Founded by the former teacher turned lawyer, Frank Suttie, Education Legals offers policy updates and legal advice on Brexit's impact on the education sector.

A number of government departments have produced official legal guidance on Brexit that you may find relevant. These include:

- [How to prepare if the UK leaves the EU with no deal](#)
- [Get your business ready to export from the UK to the EU after Brexit](#)
- [Get your business ready to import from the EU to the UK after Brexit](#)
- [Data Protection and Brexit: Is your organisation prepared?](#)

Business advice

Below is a list of externally-produced private sector resources that offer practical advice on the challenges that businesses will face after Brexit:

- [British Chamber of Commerce's Brexit Hub](#)
- [Federation of Small Businesses' Brexit Pack](#)
- [Institute of Export & International Trade's Brexit Checklist](#)

Exhibiting in international markets

BESA provides members with a wide-ranging programme of events throughout the year, covering both the UK and overseas. With Southeast Asian markets likely to offer the most liberalised market access terms to the UK's education suppliers after Brexit, your business may wish to attend a number of trade exhibitions BESA is organising in the region. These include:

- [L&T Hong Kong 11-13 December 2019](#)
- [Bett Asia 4-5 March 2020](#)
- [BESS Vietnam 27-28 March 2020](#)

For more information as to any of these events, please contact BESA's Deputy Head of Events, Yasmin Barnett, at yasmin@besa.org.uk

Any Further Questions?

This brings an end to BESA's briefing. If you have any feedback, or follow-up questions, please contact BESA's Policy Analyst, Alexander Shea, at alex@besa.org.uk