

# UK higher education providers – advice on consumer protection law

Helping you comply with your obligations

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This publication is also available from the CMA's webpages at [www.gov.uk/cma](http://www.gov.uk/cma).

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## 1. Executive summary

- 1.1 The Competition and Markets Authority (CMA) has produced this compliance advice following the findings of the Office of Fair Trading's (OFT's) Call for Information (CfI) on the higher education (HE) undergraduate sector in England<sup>1</sup> and further work it has undertaken into potential consumer protection issues in the UK HE sector.<sup>2</sup>
- 1.2 Following constructive engagement with a range of stakeholders, we have consulted on and published this advice to help HE providers across the UK understand their responsibilities under consumer protection law in their dealings with undergraduate students.
- 1.3 HE providers play a crucial role in the UK economy. They contribute directly to economic growth, employment and local economic activity, delivering skilled workers into the wider economy, and contributing to export earnings. Compliance with consumer protection law is important not only in protecting students but also in maintaining student confidence and the reputation of the HE sector and in supporting competition.
- 1.4 Consumer protection law will generally apply to the relationship between HE providers and prospective and current undergraduate students. It sets out minimum standards that apply to various aspects of an HE provider's dealings with students, for example in relation to information provision and complaint handling, and the requirement of fairness for terms and conditions. It sits alongside sector-specific regulatory obligations that are relevant to many HE providers.
- 1.5 The advice is particularly important at a time when a greater share of HE providers' funding is coming directly from students, which has highlighted particular expectations of providers when it comes to, for example, information they provide about degrees and courses available, the choices on offer, students' rights as consumers, and how complaints by students will be handled. Consumer protection law is therefore an important aspect of an HE provider's relationship with students, together with the existence of a supportive learning and pastoral environment within an academic community.
- 1.6 The issues addressed in this advice are also important for students, given that for most students deciding what and where to study will be a 'one-off' decision involving the investment of a significant amount of time and money. That decision needs to be properly informed and right for them. Once students

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<sup>1</sup> [Call for information on the higher education sector \(undergraduate\) in England.](#)

<sup>2</sup> See [Consumer protection review of higher education in England.](#)

have enrolled, if they are dissatisfied with their experience, it is likely to be difficult for them to switch HE providers or courses.

- 1.7 HE providers should read and consider the advice and ensure that they are complying with the law. If necessary they should make changes to their practices, policies, rules and regulations as soon as possible. Non-compliance with consumer protection law could result in enforcement action by the CMA, local authority Trading Standards services or the Department of Enterprise, Trade and Investment (DETI) in Northern Ireland.
- 1.8 We have specifically considered the law as it applies to HE providers of undergraduate courses but this advice may also be relevant to HE providers of other types of courses and to other students where consumer protection legislation applies. The advice may also be of interest to consumer and student advisers, and to enforcers.
- 1.9 This advice sets out the minimum requirements for compliance with consumer protection law. The advice is not a substitute for the law itself, nor does it replace the role of a court, which provides a definitive interpretation of the law. The advice sets out the views of the CMA, and HE providers may wish to seek their own legal advice on the law.
- 1.10 Information on background to this work, the purpose and scope of this advice and what you need to do is summarised in Chapter 2. Chapter 3 provides an overview of the consumer protection law covered in this advice. The subsequent chapters of the advice broadly follow the 'student's journey' and focus on the issues of information provision, terms and conditions and complaint handling processes and practices. The examples used in the advice are based on issues which we believe are likely to be relevant to students.
- 1.11 Chapter 4 explains what information HE providers need to give to students, and when it should be provided, in order to comply with their obligations under consumer protection law – in particular the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs) – and to enable students to make informed decisions about what and where to study.
- 1.12 Chapter 5 sets out advice about ensuring that HE providers' terms and conditions are fair and comply with unfair terms legislation.
- 1.13 Chapter 6 addresses issues around HE providers' complaint handling processes and practices under the CPRs and unfair terms legislation, which should be transparent, clear, easily accessible and fair.

## Summary of requirements for HE providers

### *Information provision: ensuring that students are given up front, clear, timely, accurate and comprehensive information*

#### 1.14 Student research and application stage:

- (a) To comply with the CPRs you must provide prospective students with material information – including about the courses you offer, the structure of courses, and the fees/costs. This should be given **before** they make a decision about which courses and HE providers to apply to. This includes information given in writing, visually and verbally. You should make sure this information is accurate and you should not omit important information that could affect students' decisions.
- (b) The information should be accurate, clear, unambiguous and timely, and should be given up front.
- (c) You should ensure that information is easily accessible – for example, via your website, prospectuses, course and departmental handbooks and at open days.
- (d) You should ensure that you draw prospective students' attention to important and surprising rules and regulations, and make them accessible.

#### 1.15 Offer stage:

- (a) The CPRs and the CCRs both apply at the offer stage. When an offer is accepted, the HE provider and prospective student enter into a contract. To comply with both pieces of legislation you should ensure that:
  - (i) you continue to provide important information to prospective students to inform their decisions about which offer(s) to accept (this obligation continues throughout your dealings with students);
  - (ii) you draw prospective students' attention to your full terms and conditions, that these are easily accessible, and that you highlight particularly surprising or important terms;
  - (iii) you provide prospective students with the necessary pre-contract information under the CCRs at the latest before they accept an offer of a place on a course;
  - (iv) where any pre-contract information (as defined in the CCRs) that you have already provided changes, you have obtained the student's

express agreement to the change before or at the time of making the offer;

(v) where you anticipate that some things might change after the offer is accepted, you make clear in the pre-contract information what could change, when, and how, so that the student can agree to this; and

(vi) any terms in the contract that purport to allow changes to the pre-contract information are fair under unfair terms legislation.

(b) At the stage of offer and acceptance of a place on a course, a contract is concluded between HE provider and student. For distance contracts (for example, offers and acceptances made via the Universities and Colleges Admissions Service (UCAS)), you should:

(i) provide confirmation of the contract on a durable medium, for example as attachments to an email. The confirmation must include all pre-contract information, unless it has already been provided on a durable medium; and

(ii) remember to give prospective students notice of their 14-day right to cancel, where the application and offer are carried out at a distance.

#### 1.16 Student enrolment stage:

(a) In principle, the pre-contract information you gave to students at the offer stage should still be accurate on enrolment. In any event, if it has been necessary to make any changes that affect material information (as defined in the CPRs), you should ensure that you tell students about these at the earliest opportunity – failure to do this may be a misleading omission under the CPRs.

(b) Where a separate contract for educational services is entered into between you and prospective students on enrolment, and enrolment takes place on campus, you should ensure that you comply with the CCRs requirements for on-premises contracts – certain information must be provided if it is not already apparent in the context. If enrolment takes place at a distance, comply with the CCRs requirements for distance contracts (see above).

(c) You should ensure that you draw students' attention to your terms and conditions, and any other rules and regulations, and make them accessible. You should highlight important and surprising terms and provisions to students.

## ***Ensuring that terms and conditions between HE providers and students are fair***

1.17 You should ensure that:

- (a) your terms (which are likely to include your rules and regulations and other applicable documentation that contains rules that apply to students) can be easily located and accessed (for example, on your website) and are available to students;
- (b) students are aware of your terms and that you give them the opportunity to review them before they accept an offer;
- (c) you highlight any important or surprising terms and draw them to students' attention before they accept an offer, so that their significance is not missed;
- (d) your terms are written in plain and intelligible language so that students understand them and understand how they affect their rights and obligations and how the terms could impact them; and
- (e) your terms are not drafted in such a way that their effect could be unfair. They should strike a fair balance between your rights and obligations and those of students. For example, the following types of blanket term may be open to challenge:
  - (i) terms allowing an HE provider an unreasonably wide discretion to vary course content and structure or increase fees during the duration of the course;
  - (ii) terms seeking to limit an HE provider's liability for non-performance or sub-standard performance of the educational service;
  - (iii) terms giving HE providers a blanket assignment, or a blanket right to receive an assignment, of intellectual property rights (IPRs) from students to the HE provider; and
  - (iv) terms allowing an HE provider to impose academic sanctions against students for non-payment of non-tuition fee debts.

## ***Ensuring that HE providers' complaint handling processes and practices are accessible, clear and fair to students***

1.18 You should ensure that:

- (a) your complaints procedure is easily located and accessible to students, for example on your website and intranet;
- (b) you provide prospective students with information about your complaints process before they accept an offer of a course. This includes procedures relating to applicants and current students if they are separate;
- (c) you provide students with clear and accurate information about your complaint handling procedures in writing and (where applicable) verbally, for example:
  - (i) where you offer a course in partnership with, or sponsored or awarded by, another HE provider it should be clear where responsibility for complaint handling lies;
  - (ii) you should provide accurate details of any external complaint or redress scheme that students can access; and
  - (iii) where students raise concerns at an informal level, you should inform them that they can make a complaint under your formal complaints process if the matter is not satisfactorily resolved;
- (d) your complaints handling processes are fair, which is more likely to be achieved where you:
  - (i) set out clear and reasonable timescales in which students can expect to hear back about their complaint at each stage of the process, as applicable;
  - (ii) set out clear and reasonable timescales relating to how long students will be given to respond to any requests for further information that you may make;
  - (iii) do not create unreasonable barriers for students pursuing a complaint; and
  - (iv) provide the ability for students to escalate the matter if they are unhappy and, where the regulatory framework allows it, ultimately to appeal if the matter is not satisfactorily resolved;
- (e) you follow any guidelines published by any third party redress or complaint schemes of which you are a member; and
- (f) your staff are trained in and follow your complaint handling procedures in practice.

## 2. Introduction

### Background

- 2.1 The CMA is a non-ministerial department and was formed on 1 April 2014. It is a unified competition and consumer authority which took over many of the functions formerly performed by the Competition Commission and the OFT. The CMA works to promote competition (both within and outside the UK) for the benefit of consumers.
- 2.2 The CMA seeks to empower consumers to exercise informed choice, using both competition and consumer powers to help markets work well. Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers confidently shopping around.
- 2.3 The CMA uses its full range of consumer powers to tackle, in particular, market-wide consumer problems or issues which affect consumers' ability to make choices.
- 2.4 The CMA has powers to enforce a range of consumer protection laws.<sup>3</sup> For the CMA, enforcement action may be appropriate where it has determined that breaches of law point to systemic failures in a market (sector or geographic); where changing the behaviour of one business would set a precedent or have other market-wide implications; where there is an opportunity to set an important legal precedent; or where there is a strong need for deterrence or to secure compensation for consumers.
- 2.5 The CMA and the Trading Standards Institute (TSI) share the role of providing guidance to businesses to drive up standards through clarifying legal obligations,<sup>4</sup> with the CMA focusing on issues that have emerged as a result of a market study or other in-depth analysis of business practices in a particular sector.
- 2.6 In March 2014 the OFT published the findings of a Cfl on the undergraduate HE sector in England. Although the evidence submitted to the Cfl did not suggest that the HE sector is characterised by pervasive bad practices, engagement with stakeholders highlighted significant scope for clarifying HE

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<sup>3</sup> Further details of the CMA's consumer powers and its approach to their use can be found in [Consumer Protection: Guidance on the CMA's approach to use of its consumer powers \(CMA7\)](#), March 2014.

<sup>4</sup> The CMA primarily provides guidance to businesses on specific issues identified in the course of our market studies, the Unfair Terms in Consumer Contracts Regulations 1999 and issues where our particular knowledge of the market makes us best placed to advise business. Other business guidance on consumer law is produced by the TSI and more information on this is available on the [Business Companion website](#).

providers' responsibilities under consumer protection law. In this respect the Cfl identified some potential consumer protection issues relating to:

- (a) the information available to students to enable them to choose the most appropriate course and HE provider;
- (b) the terms and conditions used by some universities, including their accessibility, fairness and proportionality; and
- (c) the speed and effectiveness of complaints handling by some universities, as well as an apparent lack of student knowledge about the process.

2.7 Following the Cfl, the OFT recommended that the CMA take forward work on clarifying HE providers' responsibilities under consumer protection law.<sup>5</sup> The CMA's follow-up work, research and analysis has been UK wide as consumer protection legislation is applicable throughout the whole of the UK.

2.8 Following constructive engagement with stakeholders including university, student and sector body representatives, we have consulted upon and published this advice to help HE providers across the UK understand their responsibilities under consumer protection law in their dealings with undergraduate students.

## **Purpose and scope**

2.9 This advice is intended to help HE providers understand and comply with consumer protection law in relation to their dealings with prospective and current undergraduate students. Compliance with consumer protection law is important not only in protecting students but also in maintaining student confidence and the reputation of the HE sector and supporting competition.

2.10 Consumer protection law sets minimum standards that apply to various aspects of HE providers' dealings with students, as well as helping to protect students if things go wrong. It sits alongside other sector-specific regulatory obligations and guidelines that are relevant to many HE providers, for example in relation to their information provision and complaint handling processes.

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<sup>5</sup> The OFT also recommended that its successor body, the CMA, work with and through stakeholders to inform the design of a regulatory regime which could better contribute to maximising the potential benefits of choice and competition – see the [Competition and regulation in higher education in England](#) case page.

- 2.11 Consumer protection law is an important aspect of an HE provider's relationship with students, together with the existence of a supportive learning and pastoral environment within an academic community.
- 2.12 This advice:
- (a) sets out examples of a number of practices or conduct that may be relevant to the HE sector that, in our view, could potentially breach consumer protection law;
  - (b) sets out some of the practical steps HE providers can take to help them comply with the law;
  - (c) is not intended to be exhaustive: it does not cover every situation or practice in which a breach of consumer protection law may occur; and
  - (d) is not a substitute for the law itself. Only a court can determine whether a breach of the law has occurred. The CMA's views are not binding on the courts or other enforcers and whether there has been a breach of consumer protection law will depend upon all the factual circumstances of the particular case.

### **Who is this advice for?**

- 2.13 The advice is intended for the following HE providers in the UK:
- (a) publicly funded universities, sometimes referred to as traditional HE providers;
  - (b) further education (FE) colleges that offer HE courses; and
  - (c) HE providers that do not receive direct public funding, sometimes referred to as alternative HE providers.
- 2.14 The advice may also be of interest to consumer and student advisers, HE sector organisations and to enforcers.
- 2.15 We have specifically considered the law as it applies to HE providers of undergraduate courses. However, this advice may also be relevant to other types of courses and students.

### **What does this advice cover?**

- 2.16 Consumer protection law will generally apply to the relationship between HE providers and prospective and current undergraduate students. It is our view

that HE providers are acting for purposes relating to their trade, business or profession when providing educational services and will be a ‘trader’ or ‘seller or supplier’ for the purposes of consumer protection legislation. The fact that an HE provider may be structured as ‘non-profit’ or ‘not-for-profit’ is immaterial to the assessment of whether it is a ‘trader’ or ‘seller or supplier’ under consumer protection law.<sup>6</sup>

- 2.17 Conversely, undergraduate students will generally be acting for purposes outside their trade, business or profession, and therefore will be ‘consumers’ for the purposes of the legislation.<sup>7</sup> Students are likely to be covered by the definition of ‘consumer’ when they are acting for purposes relating to their individual or personal needs.<sup>8</sup> In general, this is likely to be the case even where studying a particular subject may lead a person to a related career in the future, as there are likely to be many reasons for undertaking the particular course, including intellectual and personal development and to experience being a member of an HE community, and the student may or may not have a firm intention of pursuing the relevant career in the future. There may be some instances where students do not fall within the definition of ‘consumer’ (for example, this might be the case if a student is studying as part of their job). If in doubt, we would advise that, when thinking about its information, terms, contracts and policies (which will be applicable to all students), an HE provider prepares these materials on the assumption that they are likely to be accessed by prospective or current students who are ‘consumers’.
- 2.18 The focus of this advice is on the provision of educational services by HE providers to undergraduate students. Consumer protection law will also apply to the provision by HE providers of other services such as accommodation, and the availability of funding and other support to students, but that is not covered in detail in this advice.
- 2.19 In this advice we have summarised our views on what we consider HE providers need to do to comply with consumer protection law in relation to the following three issues:

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<sup>6</sup> Where an HE provider is operated on a ‘non-profit’ basis, which may include it having charitable status, it will be regarded as a ‘trader’ by reference to the consumer, and this will include when the organisation is carrying out activities that a for-profit organisation is capable of doing, such as the provision of educational services. See *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (Case C-59/12).

<sup>7</sup> Consumer protection legislation does not use uniform terms to describe the parties, and the definitions used vary slightly between different legislation. However, the broad thrust of the meaning is similar in each case.

<sup>8</sup> Note that in the CJEU case of *Criminal proceedings against Patrice Di Pinto* (Case C-361/89) and the case of *Turner & Co (GB) Ltd v Abi* [2010] EWHC 2078, the courts referred to the distinction between a ‘trader’ and a ‘consumer’ as depending on whether the person was acting primarily for his own ‘family or personal needs’.

- (a) **Information provision** – the need to provide up front, clear, accurate, comprehensive, unambiguous and timely information to prospective and current students.
- (b) **Terms and conditions** – the need for terms and conditions that apply to students to be fair and balanced. HE providers should not rely on terms that could disadvantage students.
- (c) **Complaint handling processes and practices** – the need to ensure that complaint handling processes and practices are accessible, clear and fair to students.

2.20 This advice focuses on compliance with the following consumer protection legislation:

- (a) Consumer Protection from Unfair Trading Regulations 2008;
- (b) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; and
- (c) Unfair terms legislation (at the date of publication, the relevant legislation is the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)).

## **Upcoming changes to consumer protection law**

2.21 HE providers should be aware of the planned introduction of the Consumer Rights Act (currently the Consumer Rights Bill (CRB) as it goes through Parliament), which is proposed to consolidate, simplify and update several pieces of consumer protection legislation, including current unfair terms legislation (the UTCCRs) and the Supply of Goods and Services Act 1982. It is anticipated that the Consumer Rights Act will set out in one place equivalent rights and obligations that currently exist under various legislation, and to provide some additional provisions, including in respect of remedies that may be available to consumers. The changes to unfair terms legislation are unlikely to substantially impact the existing obligations on HE providers under the law (this is addressed in more detail in [Annex C](#)).

2.22 Further information about upcoming changes is published by the [Department for Business, Innovation and Skills \(BIS\)](#). Information about proposed changes to the law can be found at: [Consumer Rights Bill Guidance Testing: Autumn 2014](#). The CMA is currently consulting on draft guidance on the new unfair contract terms provisions in the Consumer Rights Bill, which can be found on the [CMA's webpages](#).

## What do HE providers need to do?

- 2.23 As an HE provider, it is important that you read and consider this advice and ensure that you are complying with consumer protection law in your dealings with prospective and current students. You should therefore:
- (a) consider how this advice applies to you – and review your relevant practices, policies, rules and regulations for dealing with students;
  - (b) if necessary, make changes to your practices, policies, rules and regulations to ensure compliance as soon as possible;
  - (c) consider putting mechanisms in place to ensure that all of your different departments and faculties are complying with the law, for example to ensure they are making available all necessary information; and
  - (d) ensure that your relevant staff are aware of, understand and follow both this advice and your own internal procedures and practices, as you are responsible for the actions of your staff, who are acting in your name or on your behalf.

## What happens if HE providers do not comply with the law?

### *Action by consumer law enforcers*

- 2.24 Non-compliance with consumer protection law could result in enforcement action by the CMA, local authority Trading Standards services or DETI in Northern Ireland.<sup>9</sup> All have powers to enforce the consumer protection legislation referred to in this advice and can bring civil proceedings or criminal prosecutions against certain breaches, as appropriate.
- 2.25 This does not mean that enforcement action must or will be taken in respect of each and every infringement. Instead, enforcers will usually promote compliance by the most appropriate means, in line with their enforcement policies, priorities and available resources. There are a range of compliance options available to enforcers alongside enforcement, including education, advice and warnings. Further guidance on the CMA's approach to use of its consumer powers can be found on the CMA webpages.<sup>10</sup>

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<sup>9</sup> See the [DETI website](#).

<sup>10</sup> [CMA7](#).

### **Action by compliance partners**

- 2.26 Alongside working with other enforcers of consumer protection law such as Trading Standards services and DETI in Northern Ireland, the CMA may, where appropriate, work with other bodies with alternative, and sometimes non-legislative, powers for the purposes of ensuring consumer protection (so called 'compliance partners'). Bodies such as the Advertising Standards Authority may have other methods of gaining compliance but may be best placed to act based on the circumstances of each particular case.
- 2.27 The Advertising Standards Authority is the UK's independent self-regulator of advertising across all media. Its work includes acting on complaints and proactively checking the media to take action against misleading, harmful or offensive advertisements that contravene its Advertising Codes.<sup>11</sup> Its Codes cover advertising and marketing communications, which are likely to include HE providers' course information/prospectuses on websites, leaflets and posters directed at prospective students.

### **Action by HE sector bodies**

- 2.28 The CMA may also work with HE sector bodies in relation to compliance with consumer protection law. In particular, the Quality Assurance Agency for Higher Education (QAA), which is the independent body entrusted with monitoring, and advising on, standards and quality in UK HE, is able to investigate concerns about the standards and quality of HE provision, the fitness-for-purpose of the information that HE providers produce, and the lack of fair, accessible and timely procedures for handling students' complaints, where it thinks such concerns indicate serious systemic or procedural problems. Where appropriate, the CMA may choose to raise concerns about an HE provider with the QAA and ask it to consider an investigation under its Concerns Scheme (in England, Wales or Northern Ireland)<sup>12</sup> or under the Protocol for managing potential risks to quality and academic standards in Scotland.<sup>13</sup>

### **Action students might take**

- 2.29 If you are a member of any external complaint or redress scheme, such as the Office of the Independent Adjudicator for Higher Education (OIA) in England and Wales, students may be able to refer a complaint to that scheme if it falls within the OIA's remit and the student has exhausted internal procedures. The

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<sup>11</sup> The Advertising Standards Authority's website can be accessed at: [www.asa.org.uk/](http://www.asa.org.uk/).

<sup>12</sup> See the [Concerns](#) section on the QAA website.

<sup>13</sup> See QAA, [Protocol for managing potential risks to quality and academic standards](#).

OIA is able to consider complaints from students about consumer issues. It can consider the CMA's compliance advice in looking at whether an HE provider has acted reasonably. In Scotland students may be able to refer a complaint to the Scottish Public Services Ombudsman (SPSO), if it falls within its remit.

- 2.30 In some circumstances, students may also have the right to take legal action against you, or the right to defend any action brought by you, for example to recover debts allegedly owed. In particular, in relation to an unfair term, a student may be able to rely on unfair terms legislation. If a term is found to be unfair by a court, the term cannot be relied on by you.
- 2.31 In some circumstances a student may have the right to seek redress under the CPRs in respect of misleading actions and aggressive practices.<sup>14</sup> This is in addition to any other rights to seek redress through any civil action they may pursue for breach of contract.

### **Where can HE providers get further advice?**

- 2.32 If you are unsure of your consumer protection law obligations you should consider seeking your own independent legal advice. Ultimately it is your responsibility to ensure that you comply with the law.

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<sup>14</sup> This may include the right to unwind the contract, receive a discount or seek damages for detriment caused by the breach. For further information, see BIS, [Guidance on the Consumer Protection \(Amendment\) Regulations 2014](#), August 2014.

### 3. Overview of legislation

- 3.1 This advice focuses on the main obligations that HE providers have towards students under the most relevant consumer protection legislation. Please also refer to [Annex C](#) in relation to upcoming changes proposed under the Consumer Rights Bill.

#### **Consumer Protection from Unfair Trading Regulations 2008**

- 3.2 The CPRs prohibit traders from using unfair commercial practices towards consumers. The term 'commercial practice' is broad in scope and time, and includes anything done in connection with the promotion, sale or supply of goods or services.
- 3.3 The CPRs set out broad rules outlining when commercial practices are unfair. Broadly speaking, the CPRs prohibit HE providers from engaging in unfair practices in their dealings with students and prohibit misleading actions, misleading omissions and aggressive practices where they are likely to have an impact on students' decisions. These prohibitions aim to ensure that students get the information they need to make informed decisions in relation to products or services.
- 3.4 The CPRs can apply at **any stage** of an HE provider's interaction with prospective and current students, including before they have made choices about which courses and HE providers to apply to, when deciding whether to accept an offer of a place, and any time after they have enrolled on a course with a HE provider.
- 3.5 General guidance on the CPRs can be found on the [CMA's webpages](#).

#### **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**

- 3.6 The CCRs came into force on 13 June 2014 and replaced certain other laws relating to distance selling and doorstep selling, and introduced new provisions.
- 3.7 Among other things, the CCRs require that certain relevant pre-contract information must be provided before the consumer (in this case students) becomes bound by a contract, and provide consumers with cancellation rights in certain circumstances for contracts made at a distance or away from business premises (so called 'doorstep contracts').

3.8 General guidance on the CCRs can be found on the [Business Companion website](#).

## Unfair terms legislation

3.9 The current unfair terms legislation applies to contract terms that set out the rights and obligations between a trader and consumers (students in this case).<sup>15</sup> As such, terms set out in an HE provider's rules and regulations that apply to students are likely to be subject to unfair terms legislation.<sup>16</sup>

3.10 The unfair terms legislation applies a test of fairness to all standard terms, other than those terms which define the main subject matter or set the price. A term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.<sup>17</sup> The requirement of 'good' faith embodies a general 'principle of fair and open dealing'. If terms are found to be unfair they are not enforceable against the consumer.

3.11 General guidance on unfair terms legislation can be found on the [CMA's webpages](#).

## Other relevant legislation

3.12 There are other consumer protection laws that HE providers also need to be aware of but which this advice does not cover in detail, including:

(a) **The Provision of Services Regulations 2009 (PSRs)**, which apply to organisations that provide a service for which they normally charge (including educational services that are provided in return for remuneration). They will therefore apply to HE providers that do not receive public funding and may also apply to other 'traditional' HE providers depending on their funding model, and require that:

- providers make certain information available to students (as service recipients) in good time before the conclusion of the contract; and

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<sup>15</sup> Note that the UTCCRs apply to terms that have not been individually negotiated. Pursuant to the Consumer Rights Bill, this is anticipated to change so that unfair terms legislation applies to all terms in consumer contracts.

<sup>16</sup> At the time of writing, the current main unfair terms legislation is the UTCCRs. There may be a variety of names given to these documents, including rules, regulations, policy and ordinances. Regardless of the document name, if it contains terms that students are bound by then those documents will be subject to unfair terms legislation.

<sup>17</sup> The test of fairness is currently set out in Regulation 5(1) UTCCRs.

- providers respond to student complaints ‘as quickly as possible’ and ‘make their best efforts to find a satisfactory solution to complaints’.

The requirements of the PSRs in relation to information provision are similar to those under the CCRs and the requirements in relation to information about making a complaint and complaint handling are in line with the requirements of professional diligence and the prohibition against unfair commercial practices under the CPRs. General guidance on the PSRs has been provided by BIS.<sup>18</sup>

- (b) **The Supply of Goods and Services Act (SGSA)**, which contains implied terms that a service must be carried out with reasonable care and skill in England, Wales and Northern Ireland.<sup>19</sup> In Scotland, the common law provides equivalent requirements. For business-to-consumer contracts, the provisions of the SGSA are anticipated to be replaced by the Consumer Rights Act, and the obligations to provide services with reasonable care and skill will remain the same. The provisions on service contracts in the Consumer Rights Act also apply to Scotland. The legislation regarding the supply of services and the common law in Scotland are, in our view, generally applicable to the provision of educational services, and so imply that the educational services need to be provided to this standard. General guidance on the SGSA can be found on the [Business Companion website](#), and in relation to the Consumer Rights Act please refer to [BIS, Consumer Rights Bill Guidance Testing: Autumn 2014](#). In respect of Scotland, please refer to the relevant pages on the Business Companion website.
- (c) There are also other sector-specific requirements, in particular for quality assurance purposes UK HE providers reviewed by QAA are required to meet the expectations set out in the UK Quality Code for Higher Education.

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<sup>18</sup> BIS, [Guidance for Business on the Provision of Services Regulations](#).

<sup>19</sup> Per section 13 of the SGSA.

## 4. Information provision – ensuring that prospective students are given the information they need in order to make informed decisions

- 4.1 Choosing what and where to study is, for most students, likely to be a ‘one off’ decision and involves the investment of a significant amount of time and money. Prospective students therefore need to be given clear, intelligible, unambiguous and timely information by HE providers so they know in advance what is being offered and can compare different courses and HE providers.
- 4.2 You have obligations under consumer protection law relating to the provision of information to prospective and current students, to ensure that they are provided with the right information at the right time. It is therefore important for you to understand what information you need to provide and when. In particular, you need to ensure that:
- (a) you provide prospective students with important information (known as ‘material information’ under the CPRs), for example about your courses and their costs, at **each** stage of your dealings with them, including at the research and application, offer and enrolment stages;
  - (b) you provide prospective students with the necessary ‘pre-contract information’ required under the CCRs before a contract is entered into, which in our view is before they accept an offer of a place on a course;
  - (c) you ensure the pre-contract information remains accurate and up to date, as any changes to it require the express consent of the prospective student; and
  - (d) you specifically flag any terms and conditions that are particularly surprising or otherwise important.
- 4.3 Alongside these obligations there are also sector-specific requirements that you may need to comply with including the QAA’s Quality Code<sup>20</sup> and the Key Information Sets (KIS).<sup>21</sup>

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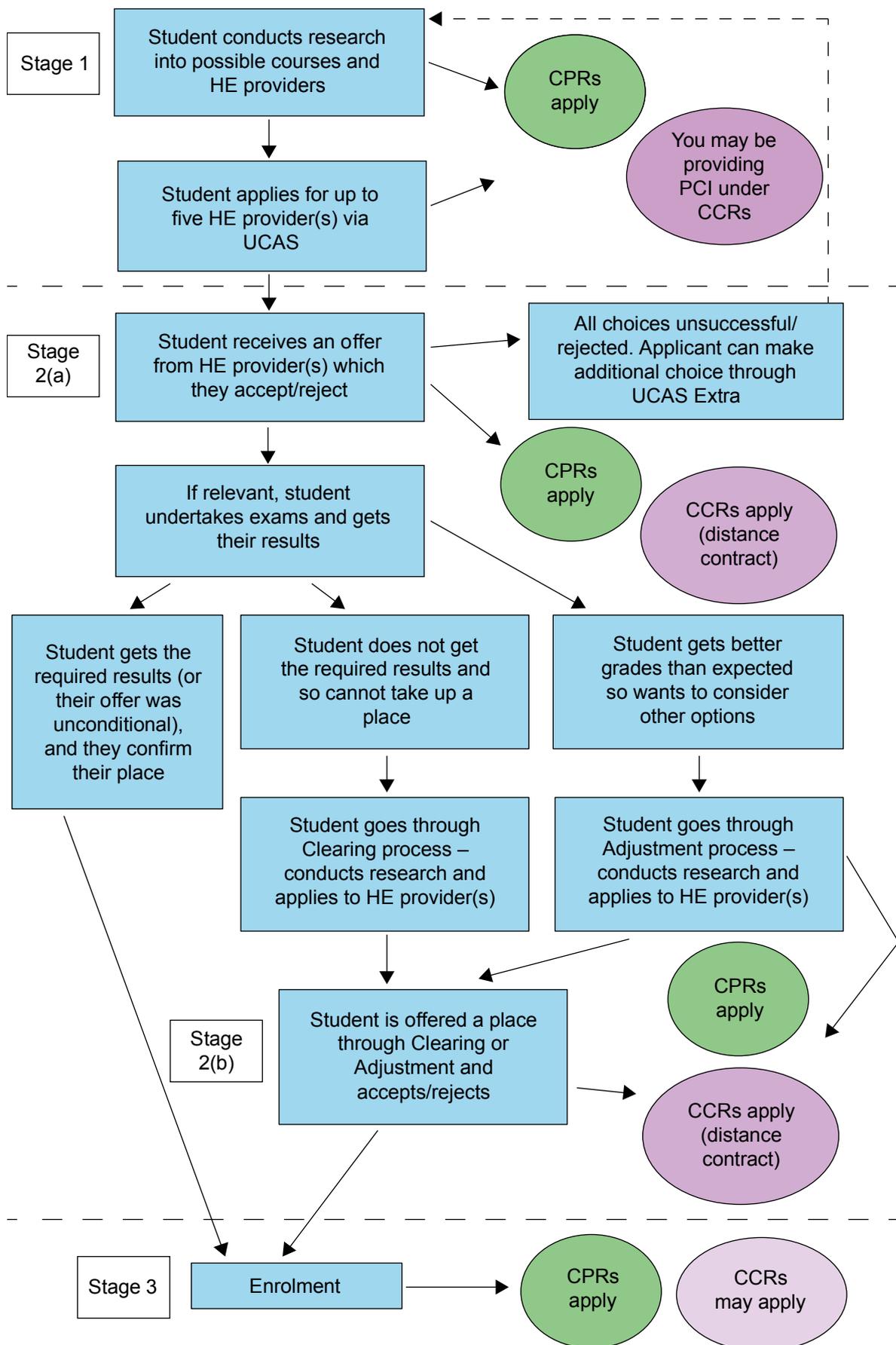
<sup>20</sup> Part C of the QAA Quality Code is concerned with the quality of the information about HE provision in terms of whether it is fit for purpose, accessible and trustworthy.

<sup>21</sup> The KIS provide comparable sets of information about full- or part-time undergraduate courses. This information is published on the [Unistats website](#). The courses that Unistats and KIS cover are (a) all full-time and part-time undergraduate courses planned for the next academic year where HE providers subscribe to the [QAA](#), and (b) undergraduate programmes taught through FE colleges in England and Wales (this applies to colleges funded indirectly through an HE provider and for courses the [Higher Education Funding Council for England](#) funds directly).

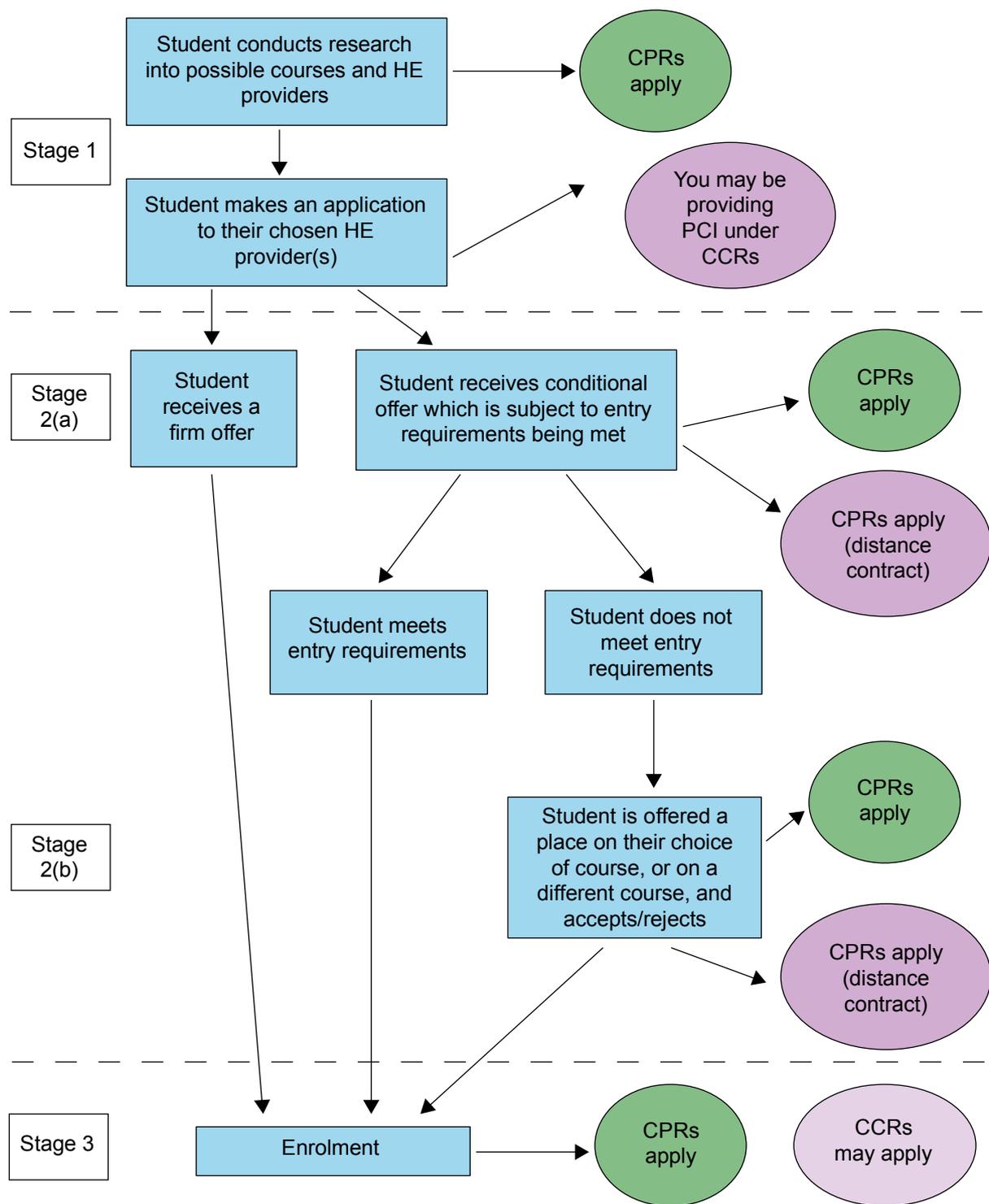
## Information provision during your interaction with prospective students

- 4.4 Consumer protection law applies at each of the three main stages of interaction between an HE provider and prospective student:
- (a) **Stage 1: research and application stage** – when the prospective student considers options for what and where to study, and then makes an application.
  - (b) **Stage 2: offer stage** – when the prospective student decides whether to accept an offer of a place with an HE provider.
  - (c) **Stage 3: enrolment stage** – when the student enrolls with the HE provider.
- 4.5 This is set out below in Figure 1, which focuses on how the CPRs and CCRs apply to the UCAS application route, and in Figure 2, which indicates the route when applying direct to the HE provider. In Figures 1 and 2, 'PCI' refers to 'pre-contract information'.

**Figure 1: How the CPRs and CCRs apply to the main interaction stages between HE providers and prospective students – UCAS application route**



**Figure 2: How the CPRs and CCRs apply to the main interaction stages between HE providers and prospective students – non-UCAS application route**



## Stage 1: research and application

**When prospective students are considering which courses and HE providers to apply to, you need to ensure that you comply with the CPRs by providing them with the material information they need to make informed decisions**

### *Prospective students researching their choices*

4.6 When prospective students are researching what and where to study, they will usually be choosing a particular course or HE provider over others. The information made available to them – including via your website, prospectus, course handbooks and at open days – is therefore crucial to aid their choices.

### *Material information under the CPRs*

4.7 The CPRs make it unlawful to mislead students by failing to give them the information they need to make an informed decision, such as about what and where to study. This is called ‘material information’.<sup>22</sup> Material information does not necessarily include all of the information that might potentially be of interest to a student but is the information the student needs to make an informed decision.

4.8 It is therefore important that you give students clear, intelligible, unambiguous and timely material information, as required under the CPRs. Material information should be provided in all circumstances, whether or not the prospective student requests it.

4.9 In our view, among other things,<sup>23</sup> it is important for students to have full information about courses and their costs up front.

4.10 The type of course-related information that is material information under the CPRs is likely to include the following:

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<sup>22</sup> ‘Material information’ is information that the average consumer needs, according to the context, to take an informed transactional decision. It is also any information requirement which applies in relation to a commercial communication as a result of a European Community obligation (Regulation 6 of the CPRs). A ‘transactional decision’ is any decision taken by a consumer whether it is to act or refrain from acting concerning – (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or (b) whether, how and on what terms to exercise a contractual right in relation to a product.

<sup>23</sup> There is likely to be other, non-course-related information that students consider important and is likely to impact on their decision-making, such as in respect of accommodation options (for example, whether there is accommodation offered by or on behalf of the HE provider, on or off campus, or whether accommodation is provided exclusively or mostly by private landlords) and the availability of funding and support (for example, the type of funding help that may be available and who can apply for it). Consumer protection law will generally apply to these services, and providing misleading information, or omitting information, about such services may breach the CPRs, although they are not covered in detail in this advice.

- (a) **Course information**, including:
- (i) course title;
  - (ii) entry requirements/criteria (both academic and non-academic), and an indication of the standard/typical offer level criteria;
  - (iii) core modules for the course and an indication of likely optional modules, including whether there are any optional modules that are generally provided each year;
  - (iv) information about the composition of the course and how it will be delivered, and the balance between the various elements, such as the number and type of contact hours that students can expect (for example, lectures, seminars, work placements, feedback on assignments), the expected workload of students (for example the expected self-study time), and details about the general level of experience or status of the staff involved in delivering the different elements of the course;<sup>24</sup>
  - (v) the overall method(s) of assessment for the course, for example by exams, coursework or practical assessments, etc (or a combination of these);
  - (vi) the award to be received on successful completion of the course and, if relevant, the awarding body or institution;
  - (vii) location of study or possible locations, which should also include the likely or possible location of any work placements to be undertaken (where known);
  - (viii) length of the course;
  - (ix) whether the course and provider are regulated and by whom, for example, where an institution is regulated by the Higher Education Funding Council for England or the Higher Education Funding Council for Wales or has a specific course designation;
  - (x) whether the course is accredited, for example by a professional, statutory or regulatory body, and by whom; and
  - (xi) additionally, any particular terms, such as those in the HE provider's rules and regulations, that apply to the course that students may find

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<sup>24</sup> This would include general information about the experience or status of the staff involved in delivering the course, for example professor, senior lecturer or postgraduate student.

particularly surprising (such as, for example, a term explaining that the body awarding the degree is different to the HE provider running the course) or are otherwise important (such as, for example, any rules or regulations whose contravention might prevent a student from completing their course).<sup>25</sup>

(b) **Total course costs**, including:

- (i) **tuition fees** – this should include, if applicable, whether fees in future years will increase and by how much (for example, in line with inflation). If increases will apply to only a certain group (such as international students) or in respect of a particular course, this should be made clear. If the future fee is not known, you should indicate clearly the criteria for any future changes and how these will be calculated.<sup>26</sup> Any possible fee increases should be restricted to limited circumstances where the HE provider has valid reasons for making the change;<sup>27</sup> and
- (ii) **other extra costs** students are likely to incur, for example for field trips, equipment, materials, bench fees or studio hire. You should indicate how much these extra costs are or are likely to be. Where they are unknown or uncertain, you should set out how they will be calculated and whether they are optional or mandatory for undertaking or passing the course. It is particularly important that you highlight any course costs that are likely to have a direct impact on the outcome of students' academic success, such as a field trip on which a piece of work will be based.

You should also set out when and how fees and any extra costs are payable and when the student will become liable for payment.

### *Invitations to purchase*

4.11 The CPRs make special provision for certain kinds of commercial practice known as 'invitations to purchase'. They specify that certain information, such as the main characteristics of the product or service, is automatically regarded as material information unless it is apparent from the context, for example the identity of the HE provider where this is clear from the materials (such as a prospectus). An advertisement for a course, a course webpage or course prospectus could, in our view, each amount to an 'invitation to purchase'

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<sup>25</sup> Note that terms must be substantively fair – it will not necessarily be sufficient merely to highlight a term, if it is otherwise unfair. See Chapter 5 for further details.

<sup>26</sup> We acknowledge that the level of tuition fees for future years may be subject to setting by central government.

<sup>27</sup> In relation to terms concerning fee increases, please refer to paragraphs 5.26–5.29.

under the CPRs. Therefore, it will be necessary to provide certain information in those materials.

- 4.12 The relevant information that must be provided in an invitation to purchase includes the main characteristics of the product or service (such as the relevant elements of the course) and the money that has to be paid (for example, tuition fees and other relevant costs). This information should be presented in each invitation to purchase, and not revealed in stages. This is intended to allow students to make properly informed decisions when they see the invitation to purchase. HE providers should ensure that they provide comprehensive information, and not provide only some parts of the characteristics or price later, so that students can make properly informed decisions.
- 4.13 Where a commercial practice is an 'invitation to purchase', the CPRs deem certain information to be material information, and failure to provide this would be a misleading omission under the CPRs where this failure could cause the consumer to take a different decision.<sup>28</sup>

#### *Targeting particular types of student*

- 4.14 Where your advertising and marketing of courses is directed at particular groups of prospective students, for example international students, part-time students or students learning at a distance, the CPRs require that your commercial practices take account of factors that are characteristic of those groups and the factors that will be relevant to those people's decisions.<sup>29</sup> As such, certain information is likely to be included within the scope of material information for prospective students in these groups – such as, for example, the following:
- (a) Information about English language proficiency, together with visa and immigration requirements, is likely to be particularly relevant and impact on the decisions of international students.
  - (b) Information about the accessibility of learning support facilities such as library opening times, the course timetable (for example, the days on which lectures and seminars will be held) and the length of the course is

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<sup>28</sup> The Court of Justice of the European Union has confirmed that an invitation to purchase exists as soon as information is available so that the consumer may take a transactional decision, without there being an opportunity to actually purchase the product or service, per *Konsumentombudsmannen v Ving Sverige AB* (Case C-122/10).

<sup>29</sup> The CPRs provide that, where a commercial practice is targeted at a particular group of consumers, the 'average consumer' will refer to the average member of that group, not the average consumer generally. Indications of whether a group of students is targeted might be found in the way advertising and marketing is placed or the language.

likely to be particularly relevant to and impact on the decisions of part-time students.

### *Taking account of vulnerable groups of consumers*

4.15 The CPRs prohibit unfair commercial practices that are likely to distort the behaviour of the average person in a certain vulnerable group, bearing in mind the characteristics of that group.<sup>30</sup> Even where you do not specifically target your courses and marketing materials at such students, you will still need to take account of the people your advertising materials and other commercial practices are likely to reach, consider the factors that may particularly affect those people's decisions, and then adjust your practices to take account of this where your practices could adversely affect the decisions of people who are vulnerable. Certain practices may particularly impact on decisions of students who have disabilities which affect their ability to move around campus, for example:

- (a) making inaccurate statements about accessibility to your facilities; or
- (b) omitting to mention restrictions on access to buildings where you have not been able to make reasonable adjustments to provide access for people with disabilities (such as wheelchair users).<sup>31</sup>

### *Misleading omissions*

4.16 If you do not provide prospective students with the necessary material information that they need at the appropriate times, including before they make a decision about which HE providers and courses to apply to, this may constitute a 'misleading omission' under the CPRs.<sup>32</sup>

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<sup>30</sup> The CPRs refer to the 'average member' of a vulnerable group of consumers, see Regulation 2(5) of the CPRs.

<sup>31</sup> The Equality Act 2010 provides a duty to make 'reasonable adjustments' to provide access for disabled people.

<sup>32</sup> A 'misleading omission' may occur if you omit material information that the average consumer needs, according to the context, to make an informed transactional decision, or if you hide or provide material information in an unclear, unintelligible, or ambiguous way (Regulation 6 of the CPRs).

Examples of misleading omissions could include where you:

- (a) fail to provide information about total tuition fees and associated course costs up front (the OFT's Cfl highlighted a particular concern about 'hidden' additional course costs which prospective students did not know about when choosing where to apply, because the student may not be able to make an informed decision about where to apply and may not be able to afford the charge);
- (b) fail to make clear that certain modules must be completed in order for the award to be accredited on completion of the course;
- (c) only make material information available to prospective students after they have applied, for example where it can only be accessed on an applicant portal;
- (d) fail to make prospective students aware at the earliest opportunity of changes to any of the material information that was contained in a prospectus or other marketing materials.

4.17 Important information should also be easy to find and presented up front and in the same place as other relevant information. If material information is on a website that is hard to navigate or held in a number of places (for example, across different prospectuses and other documents or across different webpages), so that it is difficult for students to find and access, there may be a misleading omission under the CPRs.

4.18 It is important to consider where prospective students will look for information, and ensure that the material information is provided in the right places. For example, if information that is applicable to all applicants is provided on the webpages for some courses but not others, there could be a misleading omission under the CPRs. We recommend that you ensure all departmental materials, course pages, etc provide the required material information.

### *Misleading actions*

4.19 Information you provide in writing, verbally or visually must be correct, and should not contain inaccuracies that may impact students' decisions. Providing misleading information (which is false or deceptive in any way, including how it is presented) or outdated information could breach the CPRs as a misleading action. You should ensure that any claims you make, for example in prospectuses or other marketing materials, as well as information your staff tell prospective students at an open day or over the telephone, are accurate.

Examples of potential misleading actions may include:

- (a) where an HE provider gives a misleading impression at an open day that a particular individual will be involved in the teaching of the course, when this is not the case;<sup>33</sup>
- (b) where an HE provider presents information (for example, in course information materials) that could suggest the course provides a particular qualification by a professional body, when in fact this is not the case and further study would be required to obtain the relevant award; or
- (c) where an HE provider gives a misleading impression about its location – for example, where wording or images imply that the campus is based in central London when this is not in fact the case (this may be particularly relevant for international students).

#### *The relevance of the CCRs at this stage*

- 4.20 There is a significant overlap between the type of information that is likely to be material information under the CPRs and the ‘pre-contract information’ that must be given to a prospective student under the CCRs. Details about pre-contract information are set out below under Stage 2: the offer. The information required under the CPRs is likely to be broader in scope than pre-contract information under the CCRs.
- 4.21 Where you are giving information that is in fact ‘pre-contract information’ under the CCRs you should be careful that the information is accurate because the pre-contract information will be binding on you where a prospective student subsequently accepts an offer. For example, pre-contract information is likely to be set out on your website or course pages, or in your prospectus. The CCRs say that if any of this information does change before the contract is agreed, you need to get the student’s express agreement to the change. In practical terms this means you will need to highlight any changes when the student is sent their offer, or before (see paragraphs 4.31 to 4.36 below for further details).

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<sup>33</sup> This could be the result of statements made by staff members of the provider.

## Stage 2: the offer

**You must provide prospective students with the information they need to make a decision, including the required pre-contract information, before they accept a formal offer of a place on your course**

4.22 It is important that you provide prospective students with the information they need up to and including the offer stage, as when they accept one offer they may be rejecting others and giving up the ability to switch to a different HE provider (should they wish or need to) other than in limited circumstances (for example, through the clearing and/or adjustment processes).

### ***Contract between an HE provider and a prospective student***

4.23 When an HE provider makes an offer of a place to a prospective student, and the offer is accepted, in our view a contract is made between the HE provider and student. This is because the HE provider agrees to reserve a place and allow the student to enrol on the relevant course if they meet any specified entry requirements (where applicable) and enrol.

4.24 English case law has established that once an offer of a place has been provided, the HE provider is obliged to admit the student on the relevant course of study if they meet the entry requirements and enrol. The courts have viewed the contract to admit the student as a binding and enforceable agreement for the HE provider, even though the obligation on the student to pay course fees has been held to arise only when the student enrolls on the course.<sup>34,35</sup> As such, the parties enter into a contract to admit the prospective student to the relevant course (which may be subject to certain conditions), and the student accepts the offer at this stage. This is also likely to be the case where a student reserves a place on a course directly with an HE provider, without being present at the HE provider's premises.<sup>36</sup>

### ***CCRs requirements***

4.25 A contract for education services is one which falls within the CCRs, and accordingly HE providers must provide certain pre-contract information, and

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<sup>34</sup> See *Moran v University College Salford (No. 2)*, (1993) Times 23 November, and *Orphanos v Queen Mary College* (1985) 1 AC 761.

<sup>35</sup> Where an offer is unconditional, there will not be any requirements to achieve certain grades or other requirements. As such, in this circumstance the HE provider promises to reserve a place for the student if they present themselves at enrolment.

<sup>36</sup> There are a number of FE colleges offering HE, and some alternative HE providers, which do not use UCAS's application services and take applications directly. Distance learning providers, including the Open University, also handle their own applications, and applicants for part-time courses may also apply directly to the HE provider.

where the contract is a distance contract must provide notice of the right to cancel. In our view, the elements of the CCRs that are relevant to distance contracts will apply where applications by students and offers by HE providers are generally conducted at a distance (for example, through UCAS).<sup>37</sup>

#### *When is there a distance contract?*

4.26 A 'distance contract' is defined in the CCRs as:

... a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.<sup>38</sup>

This is therefore likely to include HE providers' application processes that are carried out at a distance.

4.27 The relevant consideration to determine whether there is a 'distance contract' is whether the agreement is **negotiated and entered into at a distance**. If there has been some 'face-to-face' contact between a prospective student and HE provider the contract may still be a 'distance contract' under the CCRs. For example, an open day visit or an interview typically provides a general opportunity for a prospective student to get to know about the HE provider and the course and for the HE provider to assess the student. Such types of contact between the provider and student, which are unlikely to involve contract negotiations, are unlikely to affect whether a distance contract has been entered into because the agreement has been negotiated and entered into online or by other distance means.

#### *What pre-contract information needs to be provided?*

4.28 The CCRs require you to provide certain types of information to students about the service. **The pre-contract information requirements that are relevant to the HE sector are set out in the table in Annex B** together with our views on what type of information should be provided by HE providers to meet their obligations under the CCRs.

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<sup>37</sup> Note that the application of the CCRs in this section will apply similarly where applications are made directly to institutions at a distance under an applications scheme.

<sup>38</sup> Regulation 5 of the CCRs.

- 4.29 The necessary pre-contract information that must be given or made available under the CCRs in relation to distance contracts includes:
- (a) the ‘main characteristics of the service’ (such as important information about the conditions of the offer and details about the course);
  - (b) the ‘duration of the contract’ (this is likely to include the standard length of the course); and
  - (c) the ‘total price for the service’ and ‘details of any other costs’ (this is likely to include tuition fees payable per year and the total fees cost for the course, including where any increases are envisaged and the method by which any increases would be calculated, together with the total amount of any other costs).
- 4.30 The CCRs also contain provisions about a student’s right to cancel within 14 days from when the contract is concluded, where a contract is concluded at a distance (and you must give them notice of this right as well as a copy of the model cancellation form, although the form does not have to be used by the student in order to cancel – see [Annex B](#) for more information). The prospective student does not need to give a reason for cancelling. If the required information is not provided, the cancellation period will be extended.<sup>39</sup> This may be facilitated through a central admissions service or by the HE provider itself.

*Information under the CPRs and CCRs, and making changes to it*

- 4.31 The requirements of the CPRs continue to apply at the offer stage, so any information given should be accurate and should not include false information or information presented in a misleading way. If this is not the case, there may be a misleading action under the CPRs. You should bear this in mind in any material information you provide to prospective students to whom you are making offers, for example through information packs or applicant portals, You may be providing more tailored material information at the offer stage than you have given previously, including, for example, the conditions a prospective student needs to meet to get their place confirmed.
- 4.32 As mentioned above, any pre-contract information (as defined in the CCRs) that is included in your advertising materials, such as your prospectus, university website or course pages, must be accurate. Because of the binding

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<sup>39</sup> If you give the required information about the right to cancel within 12 months after the contract is entered into the cancellation period will end 14 days after the student receives the information. If you do not give this information at all the cancellation period ends after 12 months and 14 days (per Regulation 31 of the CCRs).

nature of the pre-contract information, any changes to pre-contract information require the express consent of the prospective student. Similarly, any pre-contract information provided directly to a prospective student, such as in or alongside an offer letter or other communications (such as webpages, applicant portals and information packs for students who have been given offers) should be accurate because it will be binding, and become a term of the contract you conclude with the student.

- 4.33 Where any information changes between you making it available and the time an offer has been made and can be accepted, you need to be very clear about such changes because:
- (a) where the change is to pre-contract information under the CCRs, in order for the change to be effective, you must obtain the prospective student's express agreement to the change; and
  - (b) any changes to material information that are not brought to the prospective student's attention at the earliest opportunity could amount to a misleading omission under the CPRs (in respect of which, refer to paragraphs 4.16 and 4.18 above).
- 4.34 'Express agreement' to a change could be obtained, for example, by email or other express communication, or at the latest it could be by highlighting very clearly the proposed changes in the offer letter, so it is clear on what basis the student is accepting the offer.
- 4.35 The need to obtain express agreement to changes to pre-contract information should not preclude you from providing more detail or clarifying information that you have already provided, as long as the additional detail or clarification does not constitute a change to the pre-contract information.
- 4.36 Under the CCRs the pre-contract information is treated as being a term of the contract. Difficulties will therefore arise if you seek to make changes after the contract is concluded, and any terms that purport to permit you to do so are subject to the test of fairness under unfair terms legislation. A blanket provision that purports to allow the HE provider to change important elements of the course would not be acceptable (and is likely to be unfair under unfair terms legislation, in respect of which see Chapter 5 below, particularly paragraphs 5.16 to 5.25).

*When does the pre-contract information need to be provided?*

- 4.37 **In our view it is necessary to give or make available the relevant pre-contract information before a prospective student agrees to accept the offer of a place.** The CCRs oblige HE providers to provide certain information

before prospective students are bound by the contract, and in our view this will usually have to be supplied, at the latest, at the offer stage (because this is generally when a contract for admission to the course will be concluded).

*How does the pre-contract information need to be provided?*

- 4.38 You should 'give or make available' the pre-contract information to prospective students in a clear and comprehensible manner. Where it is a distance contract, this must be in a way that is appropriate to the means of distance communication used.<sup>40</sup>
- 4.39 Where it is a distance contract, it is also necessary to give or make available to prospective students a cancellation form at the latest when the offer is made (as set out in Part B of Schedule 3 to the CCRs).<sup>41</sup>
- 4.40 To comply with these requirements, you could, for example, send the information to prospective students or direct them to a web link where the information is made available, via which prospective students could access and download the information. Some or all of the pre-contract information may have been provided in previous materials accessed by prospective students, such as your website, course pages or prospectus. All information you provide under the CCRs must be straightforward to find.

*Taking into account the needs of those accessing the information*

- 4.41 When providing the information you should also take into account the needs of prospective students accessing the information, who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity, in a way you can be reasonably expected to foresee.<sup>42</sup> For example, some recipients of the information may have sight impediments, in which case you should make the information available to them in an accessible format.

*Requirement to give confirmation of a distance contract using a 'durable medium'*

- 4.42 The CCRs require you to give confirmation of a distance contract using a durable medium, within a reasonable time after the contract is entered into. The confirmation must include all the pre-contract information, unless it was

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<sup>40</sup> Per Regulation 13(1)(a) of the CCRs.

<sup>41</sup> Per Regulation 13(1)(b) of the CCRs.

<sup>42</sup> Under Regulation 8 of the CCRs, something is made available to a consumer only if the consumer can reasonably be expected to know how to access it. Recital 34 of the Consumer Rights Directive (Directive 2011/83/EU) says that when providing information, traders should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.

already provided on a durable medium.<sup>43</sup> A durable medium is defined in the CCRs as

Paper or email, or any other medium that:

- (a) allows information to be addressed personally to the recipient,
- (b) enables the recipient to store the information in a way accessible for future reference for a period that is long enough for the purposes of the information, and
- (c) allows the unchanged reproduction of the information stored.<sup>44</sup>

An example of a durable medium would be an email with documents attached, which the student can retain and use to access the documents at a later date. A website link would not be a durable medium as websites may be changed and so would not be a permanent record of what the student had been given.<sup>45</sup>

#### *Other information you should provide*

- 4.43 You should draw prospective students' attention to your full terms and conditions, ensure that these are accessible and ensure that particularly surprising or important terms (especially those whose significance may be missed) are specifically brought to the student's attention. There are also obligations under unfair terms legislation relating to when information about your terms and conditions, and any other rules and regulations that students will be subject to, is to be provided to students (see Chapter 5).

#### ***'Clearing' and 'adjustment' processes***

- 4.44 Where a prospective student fails to meet any specified entry requirements attached to a conditional offer by an HE provider, they may enter a central admissions 'clearing' system (such as that operated by UCAS), to see what other places may be available to them. The individual will therefore potentially go through another research stage and possibly another offer stage if there are HE provider(s) willing to offer places.

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<sup>43</sup> The [guidance](#) by BIS sets out that, 'a durable medium allows the consumer to access information directed personally to them, in an unchangeable format for as long as they might reasonably need it.'

<sup>44</sup> Per Regulation 5 of the CCRs.

<sup>45</sup> Please refer to the judgment of the CJEU in Case C- 49/11, *Content Services Ltd v Bundesarbeitskammer*.

- 4.45 You are subject to the same information requirements and obligations under the CCRs and CPRs described in Stage 1 and Stage 2 in any dealings you may have with students going through a clearing process. Given the time pressures associated with this process, you need to take particular care to present the information clearly and in a timely way.
- 4.46 Similarly, you will have the same obligations if a student wishes to revisit their choices as a result of doing better than they anticipated, and goes through a central admissions 'adjustment' process, to see what other places may now be available to them.

### **Stage 3: enrolment**

**When prospective students enrol ensure that you have provided them with the information required under the CPRs and CCRs**

#### ***Application of the CCRs on enrolment***

- 4.47 As set out above, a contract will have been entered into at the stage an offer is accepted by a prospective student. The pre-contract information is binding and for any changes to be effective, the student's express agreement must be obtained. There is scope for you to clarify information that may have been given before, for example about the detail of course modules or the staff involved in the delivery of these modules, as long as this is not a change to pre-contract information.
- 4.48 Depending on the circumstances, a second separate contract for educational services might be entered into on enrolment. Whether there is a second separate contract will depend on the specific contractual and factual circumstances. Where there is a second separate contract, HE providers will need to ensure they comply with the requirements under the CCRs, as set out under Stage 2: the offer above. This means that HE providers will need to ensure they provide the necessary pre-contract information to students, in a clear and comprehensible manner, before the student is bound by the second contract, and confirm the contract on a durable medium. Where enrolment is carried out at a distance, there will be a fresh cancellation right.

#### ***Specific considerations where there is a second contract***

- 4.49 Because the contract on enrolment is for the course of study offered to the student at the offer stage, it is likely that much of the pre-contract information will already have been supplied, and confirmed on a durable medium. It is not necessary to supply this information again with the confirmation. However, if any pre-contract information is specific to the second contract, this will need to

be provided or made available and, if necessary, confirmed on a durable medium.

- 4.50 Regardless of whether there is one contract or two separate contracts, in our view difficulties will arise if you seek to change and replace pre-contract information about the educational service that was given at the offer stage.

*On-premises contracts: enrolment*

- 4.51 Where HE providers carry out enrolment of new students face to face on campus, this is likely to be an 'on-premises contract' under the CCRs. The CCRs require that certain information is given or made available about the service before entering into an on-premises contract if that information is not already obvious from the context.<sup>46</sup> The pre-contract information requirements for on-premises contracts that are relevant to the HE sector are set out in [Annex B](#).

- 4.52 As noted above, much of the pre-contract information will already have been provided or made available at the offer stage and, where it is the same, this does not need to be given again on enrolment.

- 4.53 Where HE providers use web-based enrolment through university facilities (such as an IT suite or other learning facilities) for enrolment on a campus-based course (and a separate contract for educational services is entered into on enrolment), in our view it is unlikely that this would be a distance contract as the agreement is finally concluded at the HE provider's premises.

*Distance contracts: enrolment*

- 4.54 If web-based enrolment is accessed remotely by the prospective student, or enrolment is otherwise carried out remotely, then there is likely to be a distance contract made at this point. Where this is the case, the student will have a 14-day cancellation right (in addition to the cancellation right at the offer stage).<sup>47</sup>
- 4.55 For certain courses or HE providers, both enrolment and study may take place at a distance (for example, undergraduate degree courses undertaken on a remote learning basis). In those cases, where a separate contract for educational services is entered into on enrolment, you should check that you

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<sup>46</sup> Some of this information is likely to already be apparent in the circumstances, for example the identity of the HE provider is likely to be apparent when the individual is at the university campus.

<sup>47</sup> The student can ask you to start providing the educational service before the cancellation period expires. In respect of this, see Regulation 36 of the CCRs.

have complied with the requirements of the CCRs for distance contracts as set out in this chapter.

***Re-enrolment for each year of study***

- 4.56 In our view re-enrolment for each year of study, where applicable, does not trigger a new contract being entered into for each year of study (and hence does not trigger the CCRs requirements). The contract for educational services is for the full duration of the course, with milestones to be achieved in order to progress to the next year or other period of study.

## **5. Ensuring that terms and conditions between HE providers and students are fair**

- 5.1 Where we refer to 'terms' in this advice, this includes all contracts, rules and regulations documents that students are bound by, which together form the contract terms between you and the student.
- 5.2 Your rules and regulations for students are likely to form part of the contract for admission to a course and for the provision of educational services. As such, the terms set out in these rules and regulations are likely to be subject to the test of fairness under unfair terms legislation (currently, the UTCCRs).
- 5.3 It is important that you ensure you do not use terms that are unfair. Students are likely to be in a relatively weak position compared with you as it is likely to be difficult to switch if a course or HE provider does not meet their expectations and they are dissatisfied with their experience.
- 5.4 If a term is found by a court to be unfair, it will not be binding on students and cannot be enforced. Students may also be able to rely upon the unfair terms legislation in any legal proceedings they bring themselves against an HE provider, or in defence of a claim where an HE provider tries to enforce an unfair term.

### **Ensure that your terms are easily located and accessible and that important terms are drawn to prospective students' attention before they accept an offer**

- 5.5 Students should always have an appropriate opportunity to read and understand terms before they accept them.
- 5.6 You should ensure that the existence of terms and conditions are brought to prospective students' attention before they accept an offer (for example, at the latest when they get their offer letter). Terms should be easily located by and accessible to prospective students (for example, they should be clearly signposted on your website). See also paragraph 4.43 on information provision.
- 5.7 A provision that purports to bind students to terms that they have not had the chance to become familiar with or understand may be unfair under unfair terms legislation. In our view, this may occur where, for example:
- (a) terms are referred to in an offer letter or are deemed to be accepted by virtue of a student accepting the offer but are located in a number of

documents and in different places on a website, making them difficult to find and review;

- (b) very lengthy documents are used to set out the terms that apply to students;
- (c) several separate documents and policies are used to set out the terms;
- (d) the terms are written in language that is difficult to understand (for example, using jargon or unfamiliar expressions);
- (e) terms are only provided at the time a student meets the requirements of their conditional offer and are not made available to them before then;
- (f) terms are only provided at the time of the enrolment process and are not available to students before then; or
- (g) terms are only available on your student intranet, which can only be accessed by current students.

5.8 You should also ensure that any terms that may be particularly surprising or important, and especially those whose significance may be missed, are specifically brought to the student's attention. Such terms should not be hidden within a long list of overarching regulations. Non-exhaustive examples of such terms could include:

- (a) a term whose contravention may prevent a student from completing their course;
- (b) a term explaining that the degree awarding body is different to the HE provider running the course;
- (c) a term that sets out how tuition fees may change over the duration of the course.

5.9 By way of example, you could consider drawing surprising or important terms to students' attention as follows:

- (a) Within the offer letter, significant points could be highlighted.
- (b) Explanatory material – for example, an executive summary – could also be provided alongside the offer letter to draw attention, among other things, to the more important terms.
- (c) Particularly important terms could be highlighted in a factsheet.

- 5.10 Important information, including about important terms, should also be conveyed earlier on, for example in your prospectuses and on your website, in order to comply with the requirements under the CPRs and CCRs.
- 5.11 The extent to which a term is brought to a student's attention up front is likely to be relevant to the assessment of fairness. However, providing information up front will not necessarily transform a term that is not substantively fair into a fair one. It is important that terms, rules and regulations are substantively fair (see paragraphs 5.13 to 5.15 below).

### **Ensure that your terms are clear and unambiguous**

- 5.12 Unfair terms legislation requires that your terms must be written in plain and intelligible language – they must be clear, transparent and legible, and students must be able to understand the terms, how they affect their rights and obligations, and how the terms could impact them. You are more likely to achieve this if your contracts and rules and regulations are intuitively laid out, use meaningful headings, are written in plain English and explain any terminology used. Even if a term would be clear to a lawyer, it may breach the legislation if it is unintelligible to students. Where terms are ambiguous, and there is doubt as to the meaning, the most favourable interpretation for the student will prevail.

### **Ensure that your terms are fair and balanced**

- 5.13 A term in an HE provider's rules and regulations will be unfair under unfair terms legislation if it creates a significant imbalance between the parties' rights and obligations under the contract to the detriment of the student, and is contrary to the requirement of 'good faith'.<sup>48</sup> 'Good faith' embodies a general principle of 'fair and open dealing'.<sup>49</sup>
- 5.14 In particular, the concept of fair dealing means that an HE provider should not take advantage of students' weaker bargaining position, such as a lack of experience or unfamiliarity with the subject matter of the contract.
- 5.15 In assessing fairness, consideration would be given to how a term is currently being used, or how it could be used to have an unfair effect on students.

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<sup>48</sup> The assessment of fairness is carried out having regard to the nature of the goods or services supplied, all the circumstances attending the conclusion of the contract and the contract as a whole. The fairness test is currently set out in Regulation 5(1) of the UTCCRs.

<sup>49</sup> Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52.

Including an unfair term in a contract or relying on an unfair term may in some circumstances also be a breach of the CPRs.<sup>50</sup>

The following is a non-exhaustive list of examples of the types of term the CMA has identified as being used by some HE providers that, in our view, could be open to potential legal challenge under unfair terms legislation:

- (a) terms allowing an HE provider an unreasonably wide discretion to vary course content and structure or to increase fees during the duration of the course;<sup>51</sup>
- (b) terms seeking to limit an HE provider's liability for non-performance or sub-standard performance of the educational service;<sup>52</sup> and
- (c) terms that give a blanket assignment, or a blanket right to receive an assignment, of any IPRs from students to the HE provider.

The OFT also previously investigated the fairness of terms allowing an HE provider to impose academic sanctions against students in a blanket and disproportionate fashion for non-payment of non-tuition fee debts, and considered these to be potentially unfair under the UTCCRs.

## Terms that allow a wide discretion to vary

- 5.16 Terms that allow an HE provider to vary something – such as the course content or fees – may be unfair where they allow wide discretion to the HE provider to make changes to important aspects of the service. It is important that students receive what they expected, rather than something different. This does not rule out all variation, however, and HE providers are able to make adjustments, for example, that may be necessary to reflect changes to the theory in an area of research or practices around the subject or its delivery.
- 5.17 Importantly, any need for variation must be balanced against the overarching requirement that students should receive the educational service they expect. A term allowing variation that gives an HE provider too wide a discretion to make changes to the detriment of students can upset the balance between

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<sup>50</sup> Per *OFT v Ashbourne Management Services Limited* (2011) EWHC 1237 (Ch).

<sup>51</sup> Terms with this effect are mentioned in paragraph 1 of Schedule 2 to the UTCCRs, which sets out that terms may be unfair if they have the object or effect of: 1(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristic of the product or services to be provided; and 1(l) providing for the price to be increased without giving the consumer the corresponding right to cancel the contract if the final price is too high.

<sup>52</sup> Similarly to the above, paragraph 1(b) of Schedule 2 to the UTCCRs states that terms may be unfair where they have the object or effect of 'inappropriately excluding or limiting the legal rights of the consumer vis à vis the seller or supplier ... in the event of total or partial non-performance ... or inadequate performance by the seller or supplier.'

the parties, even though it may only have been intended to facilitate minor adjustments.

- 5.18 A term that allows you to change aspects of the educational service is more likely to be considered fair if it is restricted to allowing minor adjustments that are unlikely to negatively impact students, or changes that are required by necessity. For example, a term that allows for changes to a course to be made as a result of a commissioning or accrediting body requiring certain course content to be added or changed (such as requiring that a particular module is included on a course) is more likely to be considered fair than a term allowing for any changes to be made, for any reason, to the course content.
- 5.19 Where some flexibility to make changes is required, it is vital that the student is given clear information up front about how the variation will operate, and also is given the right to cancel and switch HE providers if changes are made – rather than being locked into a contract that they cannot get out of without penalty. In these circumstances, the right to cancel must, however, be real and capable of being exercised in practice.
- 5.20 In the HE sector, switching course or, in some cases, withdrawing and switching HE provider, is likely to be difficult or impractical in practice, bearing in mind that in many cases the student will not be able simply to transfer their credits to another HE provider, and so saying the student can switch may not improve matters for them, or alleviate the potential unfairness of a variation term. In the case of a three-year degree, for example, it is likely that the student will not derive substantive value from their investment until they receive their qualification. This underlines why it is important for students to be able to predict, from the outset, what their course will involve and how much it will cost. It is therefore important that terms are substantively fair. In order to achieve this, you should plan and clearly set out in your contractual material how the course will operate and how the student must pay for it. If some aspects of this may need to change during the period of study, you should set these out clearly up front, so that the student can predict what will change, and when, and plan accordingly.
- 5.21 In any event, where changes are proposed to be made that would surprise a reasonable consumer in their position, students should be permitted to switch courses (or in some cases withdraw from a course without penalty), even though this is likely to be difficult or impractical. They should not remain tied in to a contract under which they have to pay an increased sum, or receive a materially different service, to that which they agreed at the outset. Because this may be difficult for students in practice, it may be helpful for you to set out how you will offer assistance to students in the event of changes (for example,

to help affected students switch to another course or HE provider if they wish to do so).

### **Course content and structure changing**

- 5.22 A term that allows blanket changes and affords the HE provider a broad discretion to change significant aspects of the course (such as the course content, the location of study, the overall method of assessment or the final qualification to be awarded), without describing the circumstances when and reasons why this might happen so that the student is able to foresee how and when changes might be made, is unlikely to be considered fair given the potential detriment that could be caused to the student by significant changes to what was expected. Changes provided for in a term should be narrow in scope and limited to what is objectively necessary.
- 5.23 A term that says variations will be ‘reasonable’ or will only be made ‘reasonably’ will not make such a term fair, because the student will still not be able to foresee the circumstances in which changes may be made.
- 5.24 A term that affords a wide discretion to the HE provider to withdraw or cancel a course in its entirety before it commences, for any reason, effectively means the HE provider could simply choose not to run a course, and not comply with the terms of offers it made to prospective students. As such, a provision that has this effect would be likely to be unfair under unfair terms legislation. Similarly, a term that allows the HE provider to provide a different course would also be likely to be unfair.

#### **Example of a course variation term that may be open to challenge<sup>53</sup>**

‘The University may alter the timetable, location, campus, amount of contact time, how the course is delivered, the course content and assessment of any course, provided such alterations are reasonable. The University may also withdraw Courses before they have started.’

- 5.25 In our view, a variation term may be less likely to be open to legal challenge for potential unfairness if:
- (a) it is narrow in its scope and effect;

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<sup>53</sup> Note that we provide the example terms in this chapter for illustrative purposes only in the context of this advice. The assessment of fairness for the purposes of unfair terms legislation requires consideration of all the circumstances of each case and of the effect of other terms in the contract.

- (b) it sets out valid reasons for why changes might be necessary, and students are able to foresee when and what changes might be made;<sup>54</sup>
- (c) it sets out how the HE provider will deal with any changes that become necessary (for example, it will provide adequate notice of proposed changes to students and take all reasonable steps to minimise disruption to students);
- (d) the term is set out in plain and intelligible language so students can understand and foresee its potential impact on them, and is actively drawn to the student's attention up front;
- (e) the HE provider informs students about any proposed changes in good time before they become effective. However, note that providing notice of changes will not alleviate the unfairness of a term that is not substantively fair; and
- (f) the student is able to terminate their obligations where they are adversely affected by the change (in respect of which, refer to paragraphs 5.20 and 5.21 above).

### ***Fees increasing during the course***

- 5.26 It is important that students know how much their course is likely to cost in total to allow them to fully assess their options and to better financially plan. Before students apply, they should be able to foresee how much the total fees will be for the course. If an HE provider has a genuine need to keep some flexibility about the level of fees for each period of study (for example, where the costs of delivering an aspect of a course depends on the charges of an external provider), this should be made clear.
- 5.27 Terms allowing fees to be increased must be considered in the context of the information given to prospective students when they chose the course and HE provider. **If no mention is made about fee increases up front, a term that allows fee increases is unlikely to be considered fair.** It is also likely to constitute a misleading omission under the CPRs and breach the pre-contract information requirements of the CCRs.
- 5.28 Terms allowing HE providers a wide discretion to increase fees during a course – for example, by reserving the right to increase fees at any time and by an unlimited amount – are likely to raise concerns about potential

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<sup>54</sup>As set out in paragraph 5.23 above, it is not sufficient in our view for a term to simply say that a variation will be 'reasonable', as this does not provide the foreseeability that the law requires.

unfairness under unfair terms legislation given that degree courses are of a relatively long duration, are outcome-oriented and students cannot easily 'walk away' and find alternative HE providers, if fees are increased.

**Example of a term that allows fee increases that may be open to challenge**

'Tuition fees for most courses will increase from year to year. Therefore, if you are on a course of more than one year's duration you can expect to pay higher tuition fees in subsequent years. It is your responsibility to find out what the tuition fee will be for each year of your course.'

- 5.29 In our view, a term that provides for fee increases may be less likely to be open to legal challenge for potential unfairness if:
- (a) clear, accurate information about potential fee increases is actively drawn to a student's attention up front alongside information about the course fees generally, so they can foresee whether and how fees could change;
  - (b) the term sets out limited circumstances and valid reasons why fees might increase – for example, the provider sets out its ability to increase fees in line with inflation to reflect increased costs of delivering the course;
  - (c) increases are linked to an objective verifiable index, such as the Retail Prices Index for inflationary rises, which would give an objective, clear framework for students to foresee when the fees would be expected to change. Fairness is more likely to be achieved if increases are limited to a relevant cap, as this assists foreseeability of changes. In addition, the method of calculating any variation should be clearly explained so students can foresee how the increase would affect them in practice;
  - (d) the term sets out a clear framework of who may be subject to fee rises (for example, if fee rises will only apply to some students, which particular group of students or in relation to which courses, and in respect of which funding models), so students can foresee the circumstances in which a change could occur;
  - (e) the HE provider informs students about any fee increases in good time ahead of the next academic year. However, note again that providing notice of a fee increase will not alleviate the unfairness of a term that is not substantively fair; and
  - (f) the student is able to terminate their obligations where they are adversely affected by the change (in respect of which, refer to paragraphs 5.20 and 5.21 above).

## Terms that seek to limit liability

5.30 Terms which seek to limit (or exclude) the liability of the HE provider for their performance of the service beyond what is possible under the general law may be challengeable for unfairness under the UTCCRs and for unreasonableness under the Unfair Contract Terms Act 1977 (UCTA).<sup>55</sup> For example, terms that exclude or limit the liability of an HE provider if it fails or is unable to provide the necessary educational service it has agreed to (for example, the relevant course), or fails to provide it to the required standard (for example, delivers poor service<sup>56</sup>), may be open to legal challenge.

### Example of a limitation of liability term that may be open to challenge

'If the University fails to or is not able to provide the educational services, and this is a result of its own default, the liability of the University shall not exceed the amount of one year's course fees.'

5.31 In our view, terms that purport to limit the liability of the HE provider in this way are inappropriate and potentially unfair under the UTCCRs and may be unreasonable under UCTA. Under the forthcoming Consumer Rights Act, which will replace the UTCCRs and the provisions of the UCTA that relate to consumer contracts, it will not be lawful to exclude liability or limit it to less than the total contract price for not providing a service with reasonable care and skill. It will also not be possible to exclude or limit liability in relation to certain information about the HE provider or the service. Other limitations of liability, such as for total or partial non-performance or inadequate performance (for example, where all or part of the educational service is not provided at all because the course is withdrawn), or terms which purport to limit the loss that is recoverable will remain subject to the test of fairness under the unfair terms provisions of the CRA. Please refer to [Annex C](#) for more detail about this.

## Blanket intellectual property rights terms

5.32 In general, HE providers will not have an automatic statutory claim to intellectual property (IP) generated by students given that they are not employees, but many HE providers do set out rules about IP ownership in

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<sup>55</sup> The UCTA covers a narrower range of types of contract term than the UTCCRs and deals only with exclusion and limitation clauses.

<sup>56</sup> Under section 13 of the SGSA in England, Wales and Northern Ireland, and the common law in Scotland, there are implied terms that a service must be carried out with reasonable care and skill.

their IP policy/terms and conditions.<sup>57</sup> Undergraduate students can generate significant IP products, for example in creative sectors this could include designs, artworks and writings.

- 5.33 A term that has the object or effect of changing the ownership of IPRs from the position that would exist under the general law is potentially unfair. Where IPRs are created by a student during their time studying and they would belong to them under the general law, the starting position should be that they retain the IPRs.
- 5.34 A blanket term that applies so that all students' IPRs (for example, all written work, creations, inventions and discoveries) are assigned by students to the HE provider, regardless of the circumstances of study or the type of course, may be open to challenge as unfair under unfair terms legislation.

#### **Example of an IPR term that may be open to challenge**

'In order to allow the University to protect and exploit commercially valuable intellectual property arising from activities within the University, any intellectual property which a student may generate in connection with their studies will be assigned to and owned by the university.'

- 5.35 There may be some courses or programmes where assignment of certain types of IPR to the HE provider is appropriate, such as some postgraduate research that is part of an ongoing research programme, and where there are sufficient safeguards to protect students' interests. Where the nature of the research programme means that some assignment of IPRs to the HE provider is appropriate, the sorts of safeguards that are relevant to an assessment of fairness include:
- (a) the scope of the term is narrow, and is restricted to what is necessary, for example to protect the HE provider's legitimate interests in the IPRs created as party of a research programme;
  - (b) the application of the assignment is clearly defined, so it is clear to which students and in what circumstances the term will apply;
  - (c) where the assignment of IPR is appropriate in the circumstances, the rights of the parties are fairly balanced. This may include the student's involvement in the work being treated in an appropriate way (for example,

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<sup>57</sup> The Intellectual Property Office has published a [guide to intellectual asset management for universities](#), including student IP ownership.

the student's work being acknowledged in publication and, where appropriate, subject to an appropriate revenue sharing scheme); and

- (d) the treatment of IPR is made clear up front for relevant programmes of study.

## **Terms that prevent students from progressing if they owe non-academic debts**

- 5.36 The OFT previously investigated terms and conditions (and practices) that prevent students from graduating or enrolling on to the next academic year or using the HE provider's facilities if they owe monies to the HE provider which relate to non-tuition fee debts, such as for accommodation or childcare. The OFT published a report in February 2014<sup>58</sup> – for further information see the press release.
- 5.37 As set out in the OFT's report, the use of academic sanctions for non-tuition fee debts when applied in a blanket fashion and regardless of the circumstances, will be open to challenge under unfair terms legislation. Practices around the use of such terms may also constitute aggressive commercial practices under the CPRs.<sup>59</sup>

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<sup>58</sup> The OFT also wrote directly to all UK universities and other HE institutions to draw to their attention to the report and to encourage them to not use terms and practices that the OFT considered may be unfair.

<sup>59</sup> For more information on what may constitute an aggressive practice, see the OFT report, [Universities' Terms and Conditions](#) (OFT1522), published in February 2014, paragraphs 6.23–6.25.

## 6. Ensuring that complaint handling processes and practices are accessible, clear and fair to students

- 6.1 Even though you may endeavour to treat students fairly, it may still be the case that some students are disappointed or dissatisfied with their experience. Poor complaints handling can undermine your relationship with students and mean you incur unnecessary time and expense dealing with grievances that could have been resolved sooner. Investing time in early resolution of a complaint will free up the time of academic and support staff and ultimately contribute to the continued positive experience of students.
- 6.2 You may have different complaints procedures for prospective students (such as applicants) and current students. To comply with consumer protection law, you need to ensure that your complaint handling procedures and practices are easy to locate, accessible, clear and fair to students.
- 6.3 Alongside your consumer law obligations, there are also sector guidelines on complaint handling such as the OIA's Good Practice Framework for handling complaints<sup>60</sup> and the SPSO's Model Complaints Handling Procedures.

### Ensure that your complaints processes are transparent, clear, easily located and accessible

- 6.4 The CCRs require you to give or make available to prospective students information about your complaint handling policy before the contract is concluded (which in our view means before they accept an offer for a course), and to give confirmation of this information on a durable medium such as a letter or email with a document attached. You should provide information about your complaints policies for applicants and current students if there are separate procedures; the information you need to provide is likely to include details about the process for handling academic and non-academic complaints and where to locate the full policy, and any other redress options that are available to the student with third parties such as the OIA or the SPSO (where applicable).
- 6.5 You should also ensure that your complaints procedure can be **easily located** and is **accessible** to current students, for example on your website and intranet – not doing so could amount to a misleading omission under the CPRs, as it may influence students' decisions whether or not to pursue a complaint.

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<sup>60</sup> [www.oiahe.org.uk/good-practice-framework.aspx](http://www.oiahe.org.uk/good-practice-framework.aspx).

- 6.6 It is also important that you provide students with **clear and accurate information** about your complaint handling procedures in writing and where applicable verbally, as failing to do so may constitute a breach of the CPRs. For example, the following practices may amount to misleading omissions:
- (a) Not making clear to students where responsibility for complaint handling lies where a course is offered in partnership with, or sponsored or awarded by, another provider.
  - (b) For providers that are part of a collegiate system, not making clear where responsibility for complaint handling lies between the particular college and the collective university body, and at what stage a complaint can be escalated from the college.
  - (c) Not providing students with details of any external complaint or redress scheme that they can access, for example, where applicable the services provided by OIA or the SPSO.
  - (d) Not clearly setting out the remit and any applicable time limits or other requirements of any external complaint or redress scheme – for example, in relation to the type of complaints it can consider.
  - (e) Withholding information about, or not making clear, how to use your complaints procedure, for example not telling students who raise concerns at an informal level that it is possible to make a complaint more formally if the matter is not satisfactorily resolved. This could also amount to an aggressive commercial practice under the CPRs (as this could influence a student's ability to decide what to do about a problem they would otherwise complain about and escalate if it was not resolved).

### **Ensure that your complaint handling processes are fair**

- 6.7 You should ensure that your complaint handling processes are fair. You may risk infringing the CPRs by engaging in unlawful practices in relation to the handling of student complaints, for example:
- (a) if you fail to adequately respond to and address student complaints this could fall below the standards of 'professional diligence' expected in the sector (see paragraph 6.9 below);
  - (b) if you mislead students about their rights under the contract (such as their right to have the educational service carried out with reasonable care and skill), or how they can exercise these rights (for example, giving them misleading information indicating they may not be able to complain to a

third party) there could be a misleading action or misleading omission under the CPRs; or

- (c) if you place barriers in the way of students exercising their rights under the contract (such as ignoring legitimate complaints), or pressure them not to bring complaints this could be an aggressive practice under the CPRs.

6.8 In respect of the above, your actions could affect a student's behaviour or 'transactional decision' in relation to their rights, for example whether to raise a complaint initially or whether to pursue a complaint if it is not resolved satisfactorily. One approach HE providers could take to address compliance with the CPRs is to have a written complaints procedure which is applied consistently through the institution and is drafted and followed in such a way that student complaints are dealt with in a fair and reasonable manner.

### ***Complaints procedure***

6.9 An HE provider's complaints procedure may contravene the CPRs (by falling below the standards of professional diligence expected in the sector)<sup>61</sup> and potentially breach unfair terms legislation where, for example, it:

- (a) states that the HE provider's view is final, or that the HE provider may close the complaint at any time;
- (b) does not include an internal process to escalate complaints that have not been satisfactorily resolved in the first instance;
- (c) prevents, hinders or deters students from raising or discussing concerns (for example, if the procedures are too lengthy or involve an unreasonable number of stages or if there are evidence requirements that are unduly expensive or difficult to obtain at short notice); and/or
- (d) creates an unreasonable barrier for certain types of student, for example, by requiring students to attend a particular location, some distance from the student's location, to progress complaints (this may be particularly pertinent for distance learners or those studying at satellite campuses).

6.10 Complaints procedures are more likely to comply with the CPRs and with unfair terms legislation where they:

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<sup>61</sup> 'Professional diligence' is defined in Regulation 2 of the CPRs as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice in the trader's field of activity, or (b) the general principle of good faith in the trader's field of activity'.

- (a) set out clear and reasonable timescales in which students can expect to hear back about their complaint at each stage of the process, as applicable;
- (b) set out clear and reasonable timescales relating to how long students will be given to respond to any requests for further information that you may make;
- (c) allow students the ability to escalate the matter if they are unhappy and, where the regulatory framework allows it, ultimately to appeal if the matter is not satisfactorily resolved;<sup>62</sup> and
- (d) follow any guidelines on complaint handling published by a third party redress or complaint scheme of which the HE provider is a member – for example the OIA’s Good Practice Framework for handling complaints<sup>63</sup> and the SPSO’s Model Complaints Handling Procedures (MCHP).<sup>64</sup>

6.11 Regardless of any written or other complaints policy or procedures, not following that policy or procedure in practice – for example, by failing to respond to complaints or not properly investigating them – may mean you are not acting in accordance with the standards of ‘professional diligence’ under the CPRs.<sup>65</sup>

6.12 You should therefore ensure that your staff are trained in and follow your complaints procedures, as you are responsible for the actions of staff who are acting in your name or on your behalf. It is not enough to have an accessible and clear complaints handling procedure; it also has to be followed in practice.

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<sup>62</sup> We note that in Scotland, the SPSO’s MCHP allows two stages of escalation within an organisation (which are referred to as the ‘frontline resolution’ and ‘investigation’ stages in the MCHP) before unresolved complaints are referred to the SPSO.

<sup>63</sup> [www.oiahe.org.uk/good-practice-framework.aspx](http://www.oiahe.org.uk/good-practice-framework.aspx).

<sup>64</sup> [www.valuingcomplaints.org.uk/further-and-higher-education/](http://www.valuingcomplaints.org.uk/further-and-higher-education/).

<sup>65</sup> See definition in footnote 61 above.

## Annex A: Checklist summaries of Chapters 4, 5 and 6

### 1. Compliance checklist summary: your information provision

#### *Research and application stage*

You should ensure that:

- (a) You provide prospective students with 'material information' – including about the courses you offer, the structure of those courses, and the relevant fees/costs – before they make a decision about which courses and providers to apply to.
- (b) This information is accurate, clear, unambiguous, and is given up front. (This includes information given verbally, visually, and in writing.)
- (c) The information is easily accessible, for example, via your website, prospectuses, course and departmental handbooks, and at open days.
- (d) You draw prospective students' attention to important and surprising rules and regulations, and make them accessible.
- (e) You do not omit important information that could affect students' decisions about their choices and bear in mind particularly important information for certain groups of prospective students, for example part-time or international students.

You should also note that:

- (f) Where you publish materials (such as prospectuses or information on your websites) which provide sufficient information about the courses being offered and the costs for the prospective student to make a decision about applying, this will be an 'invitation to purchase' under the CPRs. In each invitation to purchase, you should ensure you are providing all the necessary 'material information', for example the main characteristics of the course, the total tuition fees and other costs, in a comprehensive way.
- (g) Although 'material information' required under the CPRs is broader in scope than the pre-contract information required under the CCRs, there is a significant overlap. Where you are giving information that is in fact 'pre-contract information' under the CCRs, you should be careful that the information is accurate because the pre-contract information will be binding.

#### *The offer stage*

The CPRs and the CCRs both apply at the offer stage. When an offer is accepted, the HE provider and prospective student enter into a contract. This is likely to be a

'distance contract' under the CCRs where offer and acceptance take place at a distance (for example, via the UCAS system). To comply with both pieces of legislation you should ensure that:

- (h) You continue to provide important information to prospective students to inform their decision on which offer(s) to accept. (This obligation continues throughout your dealings with prospective students and, in particular, where any important information from your prospectus or other course promotional materials has changed this should be brought to students' attention.)
- (i) You draw prospective students' attention to your full contractual terms and conditions, that these are easily accessible, and that you highlight particularly surprising or important terms.
- (j) You provide prospective students with the necessary pre-contract information required under the CCRs at the latest before they accept an offer of a place on a course. For example, this would include the requirements of the offer, the main characteristics of the course, the duration of the course, and the total price and other relevant costs (or how these will be calculated).
- (k) Where any pre-contract information (as defined in the CCRs) that you have already provided changes, you have obtained the student's express agreement to the change before or at the time of making the offer.
- (l) Where you anticipate that some things might change after the offer is accepted, you make clear in the pre-contract information what could change, when, and how, so that the student can agree to this.
- (m) Any terms in the contract that purport to allow changes to the pre-contract information are fair under unfair terms legislation.
- (n) You provide prospective students with a notice of their 14-day right to cancel, where the application and offer is carried out at a distance.
- (o) Once an offer is accepted, you provide confirmation of the contract on a durable medium, for example as attachments to an email. The confirmation must include all pre-contract information, unless it has already been provided on a durable medium.

### ***Enrolment stage***

When prospective students enrol ensure that you have provided them with the information required under the CPRs and CCRs. You should ensure that:

- (p) You check the pre-contract information you gave to prospective students at the offer stage or before is still accurate on enrolment.
- (q) In any event, where any changes have been made to material information, you inform students about these at the earliest opportunity because failure to do so may be misleading omission under the CPRs.
- (r) Where a separate contract for educational services is entered into on enrolment, and enrolment takes place on campus, you comply with the CCRs requirements for 'on-premises' contracts. (This requires certain information to be provided if it is not already apparent in the context, for example the HE provider's identity is likely to be apparent if the enrolment takes place at the main campus.)
- (s) Where a separate contract for educational services is entered into on enrolment, and enrolment takes place at a distance, you comply with the CCRs requirements for 'distance' contracts, including in relation to the student's right to cancel.
- (t) You draw students' attention to your terms and conditions, and any other rules and regulations, and make them accessible. You should highlight important and surprising terms and provisions to students.

## **2. Compliance checklist summary: your contract terms and conditions**

You should ensure that:

- (a) Your terms (which are likely to include your rules and regulations and other applicable documentation that contains rules that apply to students) can be easily accessed, for example on your website, and are available to students.
- (b) Students are aware of your terms and that you give them the opportunity to review them before they accept an offer.
- (c) Your terms are written in plain and intelligible language and are clear and transparent so that students understand them, how they affect their rights and obligations, and how the terms could impact them.
- (d) You highlight any important or surprising terms and draw them to students' attention before they accept an offer, so that their significance is not missed. For example, a term that sets out how tuition fees may change over the duration of the course should be brought to students' attention up front.
- (e) Your terms are not drafted in such a way that their effect could be unfair. They should strike a fair balance between your rights and obligations and those of

students. For example, the following types of term applied in a blanket way may be open to challenge:

- (i) terms allowing an HE provider an unreasonably wide discretion to vary course content and structure or increase fees during the duration of the course;
- (ii) terms seeking to limit an HE provider's liability for non-performance or sub-standard performance of the educational service;
- (iii) terms that give HE providers a blanket assignment, or a blanket right to receive an assignment, of intellectual property rights from students to the provider; and
- (iv) terms allowing an HE provider to impose academic sanctions against students for non-payment of non-tuition fee debts.

### **3. Compliance checklist summary: your complaint handling processes and practices**

You should ensure that:

- (a) Your complaints procedure is easily located and accessible to students, for example on your website and intranet.
- (b) You provide prospective students with information about your complaints process(es) before they accept an offer of a course (this includes procedures relating to applicants and current students if they are separate).
- (c) You provide students with clear and accurate information about your complaint handling procedures, in writing and (where applicable) verbally, for example:
  - (i) where you offer a course in partnership with, or sponsored or awarded by, another HE provider it should be clear where responsibility for complaint handling lies;
  - (ii) you should provide accurate details of any external complaint or redress scheme that students can access; and
  - (iii) where students raise concerns at an informal level, you should inform them that they can make a complaint under your formal complaints process if the matter is not satisfactorily resolved.
- (d) Ensure that your complaints handling processes are fair. This is more likely to be achieved where you:

- (i) set out clear and reasonable timescales in which students can expect to hear back about their complaint at each stage of the process, as applicable;
  - (ii) set out clear and reasonable timescales relating to how long students will be given to respond to any requests for further information that you may make;
  - (iii) do not create unreasonable barriers for students pursuing a complaint; and
  - (iv) provide the ability for students to escalate the matter if they are unhappy and, where the regulatory framework allows it, ultimately to appeal if the matter is not satisfactorily resolved.
- (e) Follow any guidelines published by any third party redress or complaint schemes of which you are a member.
- (f) Ensure that your staff are trained in and follow your complaint handling procedures in practice.

## Annex B: Information provision requirements under the CCRs

**All the information below is required for distance contracts (per Schedule 2 to the CCRs)<sup>66</sup>**

**Except for the information shaded in blue, the information below is required for on-premises contracts (per Schedule 1 to the CCRs)**

<i>Pre-contract information required for distance contracts under the CCRs</i>	<i>Types of information the CMA considers HE providers should provide to comply with the requirements of the CCRs</i>
The main characteristics of the service	<p>In our view this is likely to include the following:</p> <p>(a) Where relevant, the conditions under which the university will reserve a place for the student on the course.</p> <p>(b) Important information about the course, including:</p> <ul style="list-style-type: none"> <li>• the course title</li> <li>• core modules for the course, and an indication of likely optional modules, including whether there are any optional modules that are generally provided each year</li> <li>• the award to be received on completion and, if different from the HE provider, the awarding body</li> <li>• whether the course is accredited, eg by a Professional, Statutory and Regulatory Body, and by whom</li> </ul>
The duration of the contract and, where applicable, the minimum duration	This is likely to include the standard length of the course.
The total price for the service and (if the price is not known up front) how it will be calculated	<p>This is likely to include the following:</p> <p>(a) Tuition fees payable per year and the total fees cost for the course. This should include, if applicable, clear and intelligible criteria for</p>

<sup>66</sup> For information, the pre-contact information requirements for distance contracts are the same as for off-premises contracts under the CCRs.

*Pre-contract information required for distance contracts under the CCRs*

*Types of information the CMA considers HE providers should provide to comply with the requirements of the CCRs*

<p>Details of any other costs or (if those costs are not known up front) how they will be calculated</p>	<p>how fees may change for future years and how any changes will be calculated, so the student can foresee possible changes and how they could affect them. This would include information about:</p> <ul style="list-style-type: none"> <li>• whether fees in future years might or will increase</li> <li>• which students this would apply to (for example, if increases will apply to only a certain group such as international students or in respect of a particular course, this should be made clear)</li> <li>• the method by which any increases will be calculated (which could set out an explanation of how the fees will increase, e.g. setting out that fees may increase in line with inflation, and how this would be calculated)</li> </ul> <p>(b) If applicable, information about the total cost of any extra costs, such as for field trips, equipment, materials, bench fees or studio hire. Information should include:</p> <ul style="list-style-type: none"> <li>• whether these extra costs are mandatory and/or optional</li> <li>• when they are due to be paid</li> <li>• how much these extra costs are or are likely to be (and if they are unknown or uncertain, how they will be calculated)</li> </ul>
<p>The identity of the HE provider the student is contracting with, and the address at which they are established, telephone number</p>	<p>If different from the HE provider offering the course, this is likely to include the name and address of the HE provider awarding the degree, plus the relevant contact details.</p>
<p>The HE provider's fax number and email address. If different, the address of the trader's place of business.</p>	<p>If the HE provider operates a course from a campus or site that is different from their place of establishment (eg the registered address), the details of this address should also be provided.</p>
<p>The complaint handling policy and complaint/redress mechanism</p>	<p>This is likely to include details about the complaint handling process for academic and non-academic complaints and where to locate</p>

*Pre-contract information required for distance contracts under the CCRs*

*Types of information the CMA considers HE providers should provide to comply with the requirements of the CCRs*

	<p>the full policy, and any other redress options that are available to the student with third parties such as the OIA or the SPSO (where applicable).</p>
<p>Payment, service delivery and performance arrangements</p>	<p>This is likely to include:</p> <ul style="list-style-type: none"> <li>(a) the payment arrangements for tuition fees and the 'extra costs' referred to previously in this table</li> <li>(b) the location of study. This should also include the likely or possible location of any work placements to be undertaken (where known)</li> <li>(c) information about the composition of the course and how the course will be delivered, and the balance between the various elements, such as the number and type of contact hours that students can expect (eg lectures, seminars, work placements, feedback on assignments), the expected workload of students (eg the expected self-study time) and details about the general level of experience or status of the staff involved in delivering different elements of the course; and the overall method(s) of assessment for the course (eg by exams, coursework or practical assessments or a combination of these).</li> </ul>
<p>Details of any applicable codes of conduct you are a member of, and how to obtain a copy of that code</p>	
<p>Where applicable, details of deposits required to be paid by the student and when</p>	
<p>Information about the right to cancel a distance contract, plus the model cancellation form.</p>	<p>The student has the right to cancel and withdraw during a 14-day period from the date the contract is entered into (the day the student accepts the offer). Students should be provided with a copy of the model cancellation form, though the student is not obliged to use the form to cancel. See Part B of Schedule 3 to the CCRs for a model cancellation form.</p>

## **Annex C: Upcoming changes under the Consumer Rights Act**

1. As outlined in Chapter 2, the Consumer Rights Act (CRA, currently the Consumer Rights Bill (CRB) as it goes through Parliament) is anticipated to come into force in October 2015. The CRA is proposed to consolidate, simplify and update several pieces of consumer protection legislation, including current unfair terms legislation (the UTCCRs), the Unfair Contract Terms Act 1977 (UCTA) and the provisions that apply to consumers under the Supply of Goods and Services Act 1982 (SGSA).
2. It is anticipated that the CRA will set out in one place rights and obligations that currently exist in various legislation, and provide some additional provisions, including in respect of remedies that may be available to consumers. While some of the language used and legislative references are anticipated to change, the obligations on HE providers will substantially be the same under the CRA as they are at the time of publication of this advice.
3. In this annex, we outline the main proposed changes in the CRA that are relevant to HE providers. The provisions that are set out in the CPRs and the CCRs, such as regarding information provision, will not be affected by the CRA.

### **Unfair terms (Chapter 5 of this advice document)**

4. Part 2 of the CRA will consolidate the existing unfair terms legislation which applies to consumers when dealing with businesses. The current law is found in the UCTA and the UTCCRs.
5. The CRB applies the test of fairness to notices as well as terms (both standard terms and negotiated terms) and introduces three new examples of terms that are likely to be unfair, in addition to those currently set out in Schedule 2 to the UTCCRs. In summary, these are terms that have the object or effect of:
  - (a) allowing disproportionate charges in compensation or requiring the consumer to pay for services which have not been supplied, if the consumer decides not to conclude or perform the contract;
  - (b) allowing the trader to decide the characteristics of the subject matter of the contract after the consumer is bound by the contract; and

- (c) allowing the trader discretion to set the price after the consumer is bound by the contract, where no price or method of determining the price is agreed when the consumer is bound.<sup>67</sup>
6. HE providers will need to consider whether these are relevant to their terms and conditions. For example, term (a) above may be relevant to the charges that HE providers impose on students that withdraw from a course.
  7. Part 1 of the CRB ‘blacklists’ some terms (and notices) so that they are never binding on the consumer, such as terms that have the effect of restricting the service provider’s liability if services are not provided with reasonable care and skill. Some of the ‘blacklisted’ items in the CRB are a consolidation of those currently found in the UCTA, for example a term in a consumer contract or notice that seeks to exclude or restrict a trader’s liability for death or personal injury resulting from his negligence is not permitted under the CRB.<sup>68</sup>
  8. For terms setting the price and main subject matter of the contract, these will only be excluded from the assessment of fairness provided they are transparent and prominent.
  9. For further detail about the changes please refer to the CMA draft publication ‘What’s new in unfair contract terms’, which can be found on the [CMA’s webpages](#).
  10. In relation to the examples of terms that, in the CMA’s view, could be open to challenge under unfair terms legislation set out in Chapter 5 of this advice document, it is not anticipated that the law that applies to variation of courses or fees (see paragraphs 5.16 to 5.29) or the law relating to assignment of IPRs (see paragraphs 5.32 to 5.35), will be different under the CRA. In relation to terms limiting an HE provider’s liability and terms imposing academic sanctions in cases of non-payment of non-tuition fee debts, there are anticipated to be some changes under the CRA, and we set the out the important points HE providers should be aware of below:

***Terms seeking to limit the HE provider’s liability for non-performance or sub-standard performance of the educational service (paragraphs 5.30 and 5.31)***

11. At the date of publication of this advice, terms that seek to limit or exclude liability for non-performance or poor performance of a service, for example in

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<sup>67</sup> The three new examples of terms that are likely to be unfair are set out in the CRB as follows: (a) in Schedule 2, Part 1, paragraph 5; (b) in Schedule 2, Part 1, paragraph 12; and (c) in Schedule 2, Part 1, paragraph 14.

<sup>68</sup> This blacklisted term is subject to some exceptions, and does not apply to contracts so far as they relate to the creation or transfer of interests in land or insurance contracts.

breach of the requirements of the SGSA, may be unfair under the UTCCRs and may be unreasonable under the UCTA.

12. HE providers' current obligations under the SGSA to provide the educational services with reasonable care and skill will remain substantially the same under the CRA.<sup>69</sup> The provisions of the UCTA that relate to consumer contracts will be replaced by the CRA.
13. Under the CRA, terms excluding liability for not providing educational services with reasonable care and skill will not be permitted (per clause 57 CRB). Terms limiting liability to less than the total contract price will not be permitted because under the CRA consumers will be able to request a refund up to the total contract price (per clause 56 CRB). It will also not be possible to exclude or limit liability in relation to certain information about the trader or the service.
14. It is our view that other types of limitation terms (eg terms that seek to restrict or limit liability more generally, such as for partial performance or in relation to the level of damages that can be pursued by students) will remain subject to the test of fairness under Part 2 of the CRA, and in our view such terms limiting the liability of an HE provider will remain inappropriate in any event. As such, the view set out in Chapter 5 that it is inappropriate to exclude or limit the liability of an HE provider will continue following the changes under the CRA, and as set out above, in some cases such exclusion or limitation would be unlawful under the CRA.

***Terms that allow an HE provider to impose academic sanctions against students in a blanket and disproportionate fashion for non-payment of non-tuition fee debts (paragraphs 5.36 and 5.37)***

15. Because the provisions of UCTA for consumer contracts are being moved into the CRA, whether or not a term is unreasonable under UCTA will not be relevant to these types of terms. As such, it will not be relevant to consider whether a term having this effect is 'unreasonable' for the purposes of the UCTA.
16. HE providers using terms that allow them to impose academic sanctions against students in a blanket and disproportionate fashion for non-payment of non-tuition fee debts will remain open to challenge under the unfair terms provisions of the CRA as potentially unfair.

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<sup>69</sup> The requirement for services to be provided with reasonable care and skill, and for this to be treated as a term of the contract, is set out in section 49 of the CRA.

## Enhanced consumer measures under the CRA

17. Enhanced consumer measures (ECMs) are proposed to be introduced under the CRA. ECMs will give enforcers of consumer protection law greater flexibility to get better outcomes for consumers, for example to improve compliance in the future and to seek redress for consumers who have suffered detriment linked to a breach of the law. The ECMs are in addition to enforcers' current powers to bring civil or criminal proceedings for breaches of the law, as appropriate.
18. ECMs will widen the provisions that a consumer law enforcer can agree in an undertaking with a trader, and the orders that can be sought in the civil courts, giving the flexibility to seek outcomes aimed at achieving one or more of the following:
  - redress for consumers who have suffered loss from breaches of consumer law;
  - remedies from traders who have breached consumer law to improve their compliance and reduce the likelihood of future breaches; and
  - remedies to give consumers more information so they can exercise greater choice and help improve the functioning of the market for consumers and other businesses.

The measures should always be just, reasonable and proportionate. ECMs may be appropriate for breaches of consumer law by HE providers.

## Additional statutory remedies under the CRA – repeat performance and reduction of price

19. As stated, in relation to students who are 'consumers' within the definition of the CRA, an HE provider's current obligation under the SGSA to provide educational services with reasonable care and skill will remain substantially the same under the CRA.<sup>70</sup> Alongside the usual common law rights to end a contract in cases of serious breach, as well as the right to claim damages for loss, the CRA will introduce additional statutory remedies for consumers, for example in relation to services that fall below the required standard. As such, if an HE provider delivers a substandard service a student may be entitled to ask them to put the service right and bring it up to the level it should have

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<sup>70</sup> The definition of 'consumer' under the CRA is anticipated to be consistent with the definition of 'consumer' under the consumer protection legislation detailed in this document.

been. This might mean, for example, repeating a part of the course that did not meet the required standard.

20. If it is impossible to repeat the service or if that has not been done within a reasonable time and without significant inconvenience to the student, under the CRA the student has the right to a price reduction which may in some circumstances be the full amount of the price. Any partial or full refunds required must be provided without undue delay, and in any case within 14 days from your agreement that a refund is due.
21. If an HE provider cannot agree a course of action with the student, the student could take them to court to enforce their rights under the CRA. In addition to the remedies set out in the CRA it also remains open to the student to claim common law remedies for breach of contract, which could include damages for loss. In considering whether an HE provider has provided a service with reasonable care and skill we would expect a court to have regard to the standards of the sector in question, since that may be regarded as the level of care and skill that is generally considered reasonable for providers in the HE sector.

### **Further information about the CRA**

22. For further information about the upcoming changes under the CRA, please refer to [BIS, Consumer Rights Bill Guidance Testing: Autumn 2014](#). The CMA is currently consulting on draft guidance on the new unfair terms provisions in the CRB, which can be found on the [CMA webpages](#).