

Higher Education in England

An OFT Call for Information

March 2014

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1 EXECUTIVE SUMMARY

- 1.1 Higher education plays a crucial role in UK society. Universities are at the forefront of extending research across the sciences and arts. They offer life-transforming opportunities for students to engage across the wide range of human knowledge and improving life chances for individuals. They also benefit their local and the national economy through creating jobs, delivering highly-skilled individuals to the economy, and developing new products and services.
- 1.2 International league tables highlight the reputation enjoyed by British universities, with six UK universities featuring in a recent ranking of the world's top 20 universities.¹ However, this position at the top of international rankings cannot be taken for granted in the coming years as globalisation leads to increased international competition. Higher education is also a key contributor to the UK economy and one of the country's largest export industries.²
- 1.3 In the space of a few short years there has been a major change in the way that undergraduate education is organised and delivered in England.³ As the result of a number of reforms that followed the 2011 White Paper 'Students at the Heart of the System',⁴ student choice and competition now play a more significant role in the sector, with a greater share of universities' funding coming directly from students and freedom for higher education institutions as to the number of undergraduate places to offer.⁵
- 1.4 The Office of Fair Trading (OFT) embarked on this Call for Information (Cfi) in order to gain a better understanding, including by seeking views and information from interested parties, of how choice and

¹ QS World University Rankings 2014. Available at: www.topuniversities.com

² UUK (2009), 'The contribution of Universities to the UK economy' (available at: www.universitiesuk.ac.uk/highereducation/Documents/2009/EconomicImpact4Full.pdf) estimates that higher education contributes some £60 billion per year to the UK economy.

³ The Call for Information focused on England and did not include Scotland, Wales or Northern Ireland. Higher education policy is a devolved matter, with choice and competition being a more integral part of English higher education policies than in other parts of the UK. However, we consider that some of our findings may be of interest across the UK, including in relation to the development of future policies

⁴ Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31384/11-944-higher-education-students-at-heart-of-system.pdf

⁵ The higher education sector in England has recently undergone a series of substantial policy reforms most notably through changes to the financing of undergraduate courses (with an increase in the funding resulting from student fees and a decrease in direct funding from government), a freeing-up of student control numbers, and the introduction of measures aimed at improving access to and quality of information on courses and degrees.

competition were working in the higher education sector. The work has focused on how analysing whether the benefits from the increased role of choice and competition are materialising to the benefit of students, and whether any associated risks are being managed effectively.⁶

- 1.5 During the course of the Cfl we held more than 50 meetings, attended sectoral events, and analysed over 80 written submissions. A very wide range of issues were raised with us. We believe these can be organised according to four broad themes: informed student choice, relationships between students and institutions, competition between higher education institutions, and the regulatory framework.
- 1.6 The first theme is the importance of the choices students make in relation to which course to study and at which institution. The need to persuade students to attend their course to secure funding should create powerful incentives for English higher education institutions to ensure that their offering addresses student demands. However, this will work only if students have access to accurate information on available courses when choosing what and where to study.
- 1.7 There is a good deal of information available to students, but there are some significant gaps, including in relation to specific long term prospects (such as future income and employment) that result from their choice of course and institution. We believe there is scope for a better integration of different sources of information; for example, given that most students visit the Universities and Colleges Admissions Service (UCAS) website, there might be advantages to clearer links between the UCAS and Unistats websites.
- 1.8 The availability of suitable information when choosing a course and institution is particularly important because, once a student has enrolled on a course, it is often difficult to transfer to a different institution (and there are even difficulties in transferring courses within a specific institution).

⁶ As in other publicly-funded services, competition and choice can play an important role in helping to deliver high quality and consumer-focused services, provided they are implemented in a way which recognises the unique features of these markets. For further background on the role of choice and competition in public service delivery see OFT1214 'Competition and choice in public services'. Available at: www.of.gov.uk/shared_of/business_leaflets/general/of1214.pdf

- 1.9 Some of these difficulties arise inevitably because of the problems of physically relocating and because of variations in the way in which different institutions structure their degrees. But there is some evidence that in addition to these barriers, the process for transferring is poorly understood by students, and some institutions do not appear to have processes in place for assessing whether credits from alternative courses are sufficiently equivalent to allow students to switch mid-way through a course.
- 1.10 UCAS plays a central role in the admissions process. There are clear potential benefits arising from a centralised system, as evidenced by the lower cost and more straightforward system experienced by students and higher education providers in the UK as compared with other countries such as the United States. UCAS also appears to enjoy exceptional levels of user satisfaction from both students and schools. However, concerns were raised by a number of stakeholders in relation to UCAS' corporate governance and the extent to which all institutions have access to its services, the way in which UCAS information is integrated with other sources of information available to students, and the extent to which applications data is available to others (including alternative choice tool providers).
- 1.11 Regarding the relationship between students and higher education institutions, we have identified practices that may mean some institutions could be failing to meet their legal obligations under consumer protection legislation, which could undermine student confidence in the sector. More specifically, some stakeholders raised concerns about the accessibility of terms and conditions, the ability of students to understand terms, and the extent to which they are fair and proportionate. Despite recent improvements to redress processes, concerns were also raised about the timeliness and accessibility of the processes that deal with student complaints.
- 1.12 Although the evidence from the Cfi does not suggest that the sector is characterised by pervasive bad practices, our engagement with stakeholders has highlighted that there is significant scope for clarifying institutions' responsibilities in relation to students (including what students' rights are as a consumer), and for the sector, with the help of the relevant government bodies, to ensure their practices are fair. In addition, there may be more scope for the sector to more

proactively address common complaints, for instance in relation to unexpected costs faced by students.

1.13 We consider, therefore, that there would be benefits in the Competition and Markets Authority (CMA) initiating a compliance review to identify the prevalence of practices that could lead to student harm, establish whether they are likely to breach consumer protection legislation and/or do not represent best practice and consider the most appropriate tools to address concerns. However, it should be noted that it is ultimately the responsibility of universities to ensure they are compliant with the law and, in order to mitigate risks of legal challenge, we strongly encourage higher education institutions to use existing consumer law guidance to assess whether their terms, conditions, and practices are fair.⁷

1.14 In relation to the level and nature of competition between higher education institutions, the responses to the CFI do not suggest a sector characterised by anti-competitive behaviour. While our analysis covered a wide range of potential issues, the most serious and prevalent concerns raised by stakeholders related to the extent to which fears of breaching competition law might hinder beneficial cooperation between institutions, and the nature of the relationship between degree-awarding bodies and teaching institutions.

1.15 Despite many generic references by stakeholders to the potential (perceived) tensions between collaboration and competition, there were no substantive examples that would justify, because of their relevance and/or novel nature, the production of specific OFT guidance beyond that already available. There is, however, scope for the CMA to further highlight that cooperation which delivers countervailing consumer benefits may not pose a problem, while ensuring that where cooperation between higher education institutions can promote efficiency, it is allowed to do so.

1.16 Regarding the relationship between teaching institutions and the degree-awarding bodies on which they rely for validation, a number of

⁷ The OFT has published a range of non-sector specific guidance documents, including OFT979 'CPR Basic Guide' (available at www.oft.gov.uk/shared_of/business_leaflets/cpregs/oft979.pdf) OFT1486, 'UTCCR checklist' (available at www.oft.gov.uk/sitepack/layouts/UTCCR/download-items/OFT1486.pdf) and OFT311 'Unfair contract terms guidance' (available at www.oft.gov.uk/shared_of/reports/unfair_contract_terms/oft311.pdf).

stakeholders suggested that degree-awarding bodies impose overly stringent conditions on teaching institutions which prevent them from competing. However, we did not receive substantive evidence that would warrant, at this stage, further investigation of these practices, especially as there may be legitimate reasons why degree-awarding bodies might act in this manner (including safeguarding their reputation).

1.17 To date, the OFT has received no complaints or evidence of either explicit or tacit collusion between higher education institutions with respect to fee setting. The OFT and its successor body - the CMA - considers allegations of anti-competitive behaviour that it receives carefully, and encourages anyone with specific evidence of this type of behaviour taking place to come forward.

1.18 One consistent theme through many of the meetings we held with higher education institutions, regulators, student representative bodies and other commentators was that the system of regulation that has emerged over many decades is complex and increasingly at odds with a system based on student choice. We have identified a number of challenges to ensuring that the regulatory framework supports student choice as a mechanism to drive improvements in higher education. More specifically, there are considerable challenges in relation to the lack of a level playing field, the role of self-regulation and whether it establishes a proper accountability system that reflects the interests of the wide range of stakeholders, and the lack of exit regimes for situations in which courses close or an institution fails.

1.19 With that in mind, we think that there is scope for the CMA, working with and through stakeholders, to inform the design of the regulatory regime, providing recommendations as to the principles to abide by and how these can best be implemented in an effective and efficient manner in order to ensure competition and choice.

1.20 Overall, our analysis of the higher education sector in England highlights that it is, in many respects, performing to very high standards and enjoys an excellent reputation at the national and international level. However, we have identified a number of challenges that need to be addressed if the sector is to fulfill its

potential to deliver to the benefit of students and the wider society, especially in light of the increased role of competition between higher education institutions (including internationally) and choice by students. In doing so, there is a role for the CMA to play, working with and through stakeholders to address these challenges in a timely and effective manner.

2 INTRODUCTION

2.1 On 22 October 2013, the OFT launched a Cfl on the undergraduate higher education sector in England.

2.2 We launched the Cfl in order to gain a better understanding of how choice and competition were working in the higher education sector. In particular, we wanted to explore whether:

- students are able to make well-informed choices, which would help to drive competition
- students are treated fairly when they get to university
- there was any evidence of anti-competitive behaviour between higher education institutions, and
- the regulatory environment is designed to protect students and facilitate entry, innovation and managed exit by higher education institutions.

2.3 The Cfl deliberately did not explore policy issues such as access to university, whether the cap on fees is set at the appropriate level and the mix of subjects being studied by students. We also did not look in detail at the effectiveness of the student loan system or the wider support prospective students receive (for example, from their schools) to make choices.

Background to the Cfl

2.4 Recent reforms of the higher education sector in England have aimed to drive greater competition between higher education institutions, most notably by enabling students to choose between a more diverse range of institutions and by rebalancing funding for undergraduate education from government to students.⁸ Subsequently, higher education institutions depend more than ever on revenue from tuition

⁸ Reforms include increasing the cap on tuition fees paid by students, the introduction of more information to support student choice, an ambition to remove regulatory barriers imposed on alternative providers (APs) and further education colleges (FECs) and most recently lifting the Student Number Controls so higher education providers can now recruit an unlimited number of students.

fees, and hence on their ability to attract students.

- 2.5 The increasing role of student choice and competition could act as a powerful incentive in the higher education sector. This may lead to higher education institutions more closely tailoring their offer according to the demands of students and future employers; enhancing innovation and raising standards.
- 2.6 However, the introduction of choice and competition in public markets (such as higher education) is not exempt from risks, and the introduction of such 'market-based' incentives should be done in a way which carefully considers the characteristics of the sector.⁹ For instance, the embedding of choice and competition needs to take into account the possibility of a 'race towards the bottom' in standards (and if there is a risk, how it is managed), and the impact that the regulatory framework has on competition.
- 2.7 In the case of the higher education sector, the OFT was particularly keen to gain a better understanding of the extent to which, following the reforms, the potential benefits of choice and competition are materialising (and if not, what are the obstacles), and whether any risks are effectively managed.

The OFT's mission and powers

- 2.8 The OFT's mission is to make markets work well for consumers. Markets work well when businesses are in open, fair and vigorous competition with each other to attract consumers.
- 2.9 In undertaking this CfI we used the powers afforded to us under Section 5 of the Enterprise Act 2002, which sets out the OFT's general function of obtaining, compiling, and keeping under review information about matters relating to the carrying out of its functions. This report sets out a summary of the evidence we received from respondents and the analysis that we conducted. For reasons of commercial confidentiality, material may appear in an anonymous, aggregated, or otherwise redacted form.

⁹ See OFT1214, 'Choice and Competition in Public Services'. Available at: www.of.gov.uk/shared_of/business_leaflets/general/of1214.pdf

The Competition and Markets Authority

2.10 Both the OFT and the Competition Commission (CC) will cease to exist on the 31 March 2014. The CMA was legally established on 1 October 2013 and will become fully operational on 1 April 2014. The new unified Authority will bring together the CC with the competition and certain consumer functions of the OFT and will be responsible for promoting competition for the benefit of consumers.

2.11 Any proposed further action following the findings of this Cfl will be confirmed by representatives of the CMA in due course.

Activities and data sources

2.12 We have collected and reviewed information from a variety of sources during the Cfl. In particular, we have:

- received some 80 formal written submissions from government and sector bodies (6), higher education institutions (20), trade bodies and associations (8), consumer and interest groups (10), and individuals/students (35) carried out over 50 bilateral meetings with sector participants in order to gain further information on the way the sector operates
- co-hosted three roundtables, two with University administrators and vice-chancellors, and one with Further Education colleges, and
- reviewed relevant publicly available data including government reports, and academic literature.

Structure of the report

2.13 This report consists of six chapters and three annexes. The main body of the report is organised as follows:

- Chapter 3 provides an overview of the higher education sector, including recent policy developments
- Chapter 4 sets out our analysis of whether students are making informed choices

- Chapter 5 sets out our analysis of the student experience at university
- Chapter 6 sets out our analysis of the ways in which higher education institutions compete with one another
- Chapter 7 sets out our analysis of the regulatory environment, and
- Chapter 8 sets out the issues that we believe warrant further consideration.

2.14 The three annexes provide further information that supports the analysis contained in the chapters above, as follows:

- Annexe A contains a summary of the types of indicators featured on various choice tool websites
- Annexe B provides a brief explanation of the relevant legal framework to assess university practices, and
- Annexe C provides a brief explanation of the relevant legal framework to assess anti-competitive practices.

3 BACKGROUND

Introduction

- 3.1 The higher education sector involves many different types of institution, course and student. It is subject to a complex regulatory regime, with different bodies influencing or taking responsibility for funding, quality assurance and applications, amongst other things.
- 3.2 As a result of major policy reform, there have been a number of significant developments in the sector over recent years. Amidst other policy objectives, these reforms have aimed to give students more choice and drive greater competition between providers.
- 3.3 The Cfl focuses specifically on the undergraduate higher education sector in England. Undergraduate education is defined as the process of gaining one's first tertiary degree, and typically occurs post-secondary education up to the level of a bachelor's degree.
- 3.4 The purpose of this chapter is to introduce the key elements of the higher education sector and to highlight the changes that have made the sector more 'market based' including:
- the diverse range of higher education institutions
 - an increasing focus on student choice
 - how higher education institutions are regulated, and
 - who attends university (and how they apply).

The diverse range of higher education institutions

- 3.5 The undergraduate higher education sector is characterised by a diverse range of higher education institutions, which vary in terms of whether they can directly award degrees and whether they can access student loan support and government funding. Higher education institutions can be broadly categorised as:
- publicly funded universities and higher education colleges, sometimes referred to as 'traditional providers' (TPs)

- further education colleges (FECs) that offer higher education courses or
- privately funded universities and colleges, sometimes referred to as 'alternative providers' (APs).¹⁰

3.6 Institutions can be 'designated providers' of higher education, that is, they are eligible for public funding and/or student support. Publicly funded higher education institutions are designated at institution-level which means the whole institution will be eligible for public funding and/or student support. APs must apply for course-level designation, meaning some courses could be eligible for student support whereas other courses within the same institution could not be.¹¹ The Department for Business, Innovation and Skills (BIS) is responsible for awarding designation to higher education institutions.

3.7 Only a legally approved degree-awarding body with ultimate responsibility for quality and academic standards can award degrees in the UK.¹² An institution can be granted degree-awarding powers (DAPs) by a Royal Charter, an Act of Parliament or by the Privy Council (a formal body of advisers to the Queen).

3.8 Most publicly funded higher education institutions have DAPs, whereas only some FECs and APs do. FECs and APs without their own DAPs can partner with degree-awarding higher education institutions to validate individual courses, or can enter into a franchise agreement directly or indirectly with the degree-awarding higher education provider.¹³

3.9 Given the diverse nature of the higher education sector it is important that the regulatory environment supports a full range of institutions to

¹⁰ In referring to APs the OFT is using BIS' definition, available at:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/205355/bis-13-903-alternative-providers-specific-course-designation-guidance-for-applicants-criteria-and-conditions.pdf

¹¹ HEFCE (2013) 'Operating Framework for Higher Education' available at:

www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/operatingframework/operating_framework_for_HE_11072013_2.pdf

¹² www.qaa.ac.uk/aboutus/dap/Pages/default.aspx

¹³ HEFCE defines a franchise as 'the agreement by one institution (usually an higher education institution) that another institution may deliver all or part of a programme approved and owned by the first institution. The franchising institution normally retains overall control of the programme's content, delivery, assessment and quality assurance arrangements'. Validation is defined as 'the process by which a course is judged to have met the requirements for an award by the relevant degree-awarding body, or the relevant examining body, or by an accredited institution on behalf of that degree-awarding body'. Available at: www.hefce.ac.uk/glossary

compete for students and does not impose any unjustifiable costs and restrictions on particular institutions. We explore the role of the regulatory environment in supporting choice and competition in Chapter 7.

3.10 Higher education institutions are becoming increasingly free to compete for students. It was announced in the 2013 Autumn Statement that Student Number Controls would be abolished for Higher Education Funding Council for England (HEFCE) funded providers with effect from 2015-16.¹⁴ This completed a process of relaxing the limits on student recruitment that began in 2012. In effect, institutions will be free to recruit, or not to recruit, as many students as they want, further increasing the competitive incentives in the sector.

An increased focus on student choice

3.11 In addition to an increasingly diverse 'supply side', reforms to the 'demand side' of the sector should also mean institutions are increasingly incentivised to compete for students. The most significant recent changes to the demand side of the market are moves to enable students to make more informed choices that they, in principle, should carefully consider given that they are also increasingly contributing to the cost of their undergraduate education.

3.12 In order to help students make an informed decision about which courses and institutions to choose (which is arguably becoming increasingly important given the additional financial costs), there has been a government-backed drive to reform information provision to prospective students. This resulted in the launch of the 'Key Information Sets' (KIS) and the Unistats website.¹⁵ Some of the data that features on the Unistats website is managed by the Higher

¹⁴ Student Number Controls currently impose a limit on the number of students that each university can recruit, with certain exemptions for high-achieving students. Autumn Statement 2013 available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/263942/35062_Autumn_Statement_2013.pdf

¹⁵ The 'Key Information Set' (KIS) displays the National Student Survey results, the proportion of time spent in various learning and teaching activities, the proportion of summative assessment by method, professional, statutory and regulatory bodies that recognise the course, average annual costs for institution owned and privately rented accommodation, financial support available from the institution, average fees, the destination of leavers six months after completing a course (and of those in employment the proportion in managerial/professional jobs) and the salary data for those in full time employment four months after completing the course.

Education Statistics Agency (HESA). Chapter 4 discusses the use of these tools in more detail.

- 3.13 The Government withdrew a significant portion of direct funding for teaching new undergraduate students from 2012-13 onwards. This grant is administered by HEFCE, a non-departmental public body responsible for distributing funding for higher education to universities and colleges in England.¹⁶
- 3.14 The withdrawal of the HEFCE teaching grant occurred simultaneously with an increase in the tuition fee cap for undergraduate students.¹⁷ Figure 3.1 below shows how direct fees from students have recently become - and will remain - the most significant source of funding.¹⁸ The average headline tuition fee for 2014-15 will be £8,647 (falling to £8,006 taking into account all financial support from institutions).¹⁹
- 3.15 The vast majority of undergraduate students domiciled in England receive funding support through the Student Loans Company (SLC), both in the form of tuition fee loans and maintenance loans/grants. Graduates repay debt on an income-contingent basis, making payments once their earnings pass beyond a certain earnings threshold.

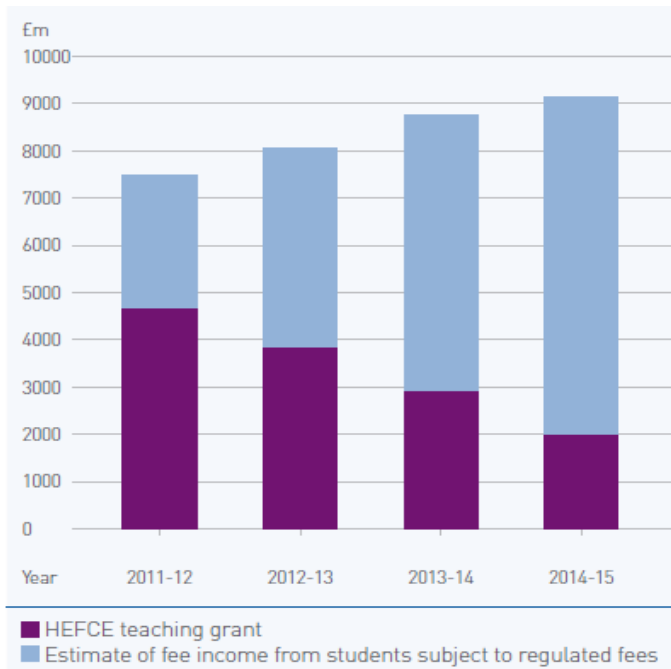
¹⁶ www.hefce.ac.uk/about

¹⁷ Tuition fees were first introduced in the UK higher education sector in 1998-99, at which time Government imposed a cap of £1,000 pa (increasing in line with inflation). This was increased to £3,000 pa in 2005-06, and most recently increased to £9,000 pa in 2012-13 following recommendations in the 2011 White Paper.

¹⁸ Figure 3.1 shows a gradual rather than steep decline in HEFCE funding because the Government withdrew funding for new undergraduate students only. Students already in higher education did not face higher tuition fees, and the HEFCE teaching grant remained in place for these students. The portion attributable to each source of funding will become stable from 2015-16.

¹⁹ OFFA (2013) '2014-15 access agreements: institutional expenditure and fee levels'. Available at: www.offa.org.uk/wp-content/uploads/2013/07/2013-04-Access-agreements-2014-15.pdf

Figure 3.1: Balance between HEFCE teaching grant and tuition fee outlay to 2014-15



Source: Universities UK²⁰

Regulation of higher education institutions

3.16 BIS has ultimate responsibility and accountability for higher education policy in England. Individual responsibilities are delegated to bodies such as HEFCE and the Office for Fair Access (OFFA), which are overseen by BIS.

3.17 Designated higher education institutions are subject to the regulations described in HEFCE's Operating Framework (the 'Operating Framework'). The Operating Framework is designed to protect student interests, institutional autonomy and academic freedom, as well as ensuring accountability for public funding.²¹

²⁰ Universities UK (2013) 'Where Student Fees Go'. Available at: www.universitiesuk.ac.uk/highereducation/Documents/2013/WhereStudentFeesGo.pdf

²¹ HEFCE (2013) 'Operating Framework for Higher Education'. Available at: www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/operatingframework/operating_framework_for_HE_11072013_2.pdf

3.18 The Quality Assurance Agency (QAA) forms part of the Operating Framework and is contracted by HEFCE (who has a statutory duty to make provision for the assessment of the quality of provision it funds) to conduct qualitative assurance reviews. Approximately every six years the QAA review team assesses how an institution sets and maintains academic standards, manages the quality of students' learning opportunities, enhances its educational provision and manages the quality of its public information.²² After an institutional review, the QAA will publish an Institutional Audit Report outlining elements of good practice and recommendations for action.

3.19 In the 2011 White Paper 'Students at the Heart of the System', it was proposed that a more 'level-playing field' between different types of higher education institutions should be created by removing unjustified regulatory barriers imposed on APs and FECs. This was intended to enhance competition and diversity in the sector. Chapter 7 explores some of the outstanding barriers to a level playing field between different types of institutions.

3.20 The Office of the Independent Adjudicator (OIA) serves as an independent ombudsman of last resort for students who have exhausted the internal complaints or appeals processes at the institution. The OIA will not rule on matters of academic judgment or admissions but can look at, for example, a service provided by the universities, teaching and facilities. Students must escalate their complaint to the OIA within three months of receiving their Competition of Procedures Letter from their university (which students receive once they have completed the university's procedures). Each university has its own arrangements for handling complaints.

Who attends university and how they apply

3.21 There were 1.8 million undergraduate students enrolled at 161 UK higher education institutions in the 2012-13 academic year.^{23,24} Figure 3.2 highlights the composition of the undergraduate student body at

²² More information about the review process is available at: www.qaa.ac.uk/institutionreports/types-of-review/ireni/pages/default.aspx

²³ Institutions reporting to HESA.

²⁴ HESA (2014) '2012-13 students by institution'. Available at: www.hesa.ac.uk/content/view/1897/239

this time,²⁵ of which UK-domiciled full time students of socio-economic classes 1-3 formed the majority.

Figure 3.2: The undergraduate student body at UK higher education institutions, 2012-13



Source: OFT²⁶

3.22 Participation in higher education, as measured by the Higher Education Initial Participation Rate (HEIPR), has grown from 39 per cent to 49 per cent between 1999-00 and 2011-12.^{27,28} The participation rate in the UK has been close to the OECD average in recent years.²⁹

3.23 UCAS is the centralised provider of admissions services, linking applicants to institutions. The significant majority of full time undergraduate student applications are managed through UCAS,³⁰

²⁵ Mode of study and domicile based on the population of student enrolments 2012-13. Gender/subject type based on qualifications obtained 2012-13. Age at entry based on incoming first year students 2012-13. NS-SEC measures the Socio-Economic Class of first year students in 2011-12.

²⁶ HESA (2014) 'Overview of student data'. Available at: www.hesa.ac.uk/content/view/1897/239

²⁷ Parliamentary Briefing Paper SN02630 (2013). Available at: www.parliament.uk/briefing-papers/SN02630/participation-in-higher-education-social-indicators-page.pdf

²⁸ The HEIPR replaced the Age Participation Index, which measured the proportion of under-21s entering higher education. This increased from 12 per cent in 1979 to 32 per cent in the late 1990s.

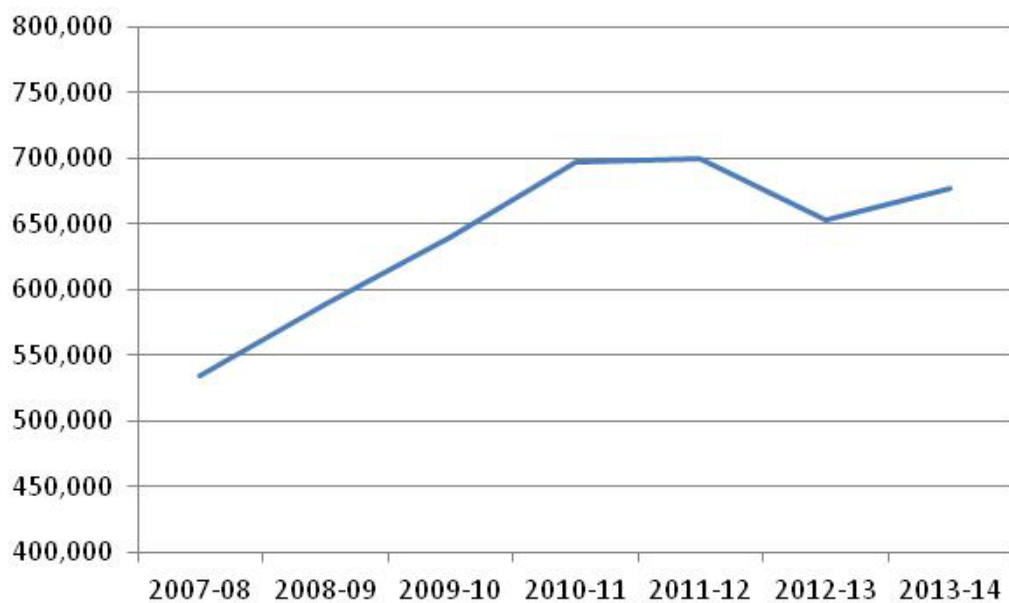
²⁹ Available at: www.oecd-ilibrary.org/education/tertiary-education-entry-rates_20755120-table2

³⁰ A number of courses outside the HEFCE framework are not listed on UCAS. In addition, a small minority of full time students apply directly to institutions, rather than having their application administered through UCAS. Part time students apply directly to the institution.

which allows students to submit a maximum of five choices of course in any applications cycle. Students' application forms are processed in a single common format to streamline the process.

3.24 Figure 3.3 highlights the number of applications to UK higher education institutions in recent years. The graph shows a consistent upward trend between 2007-08 and 2010-11, but was affected beyond this point by the changes to the fee regime. An upwards trend has been resumed in 2013-14, however at a lower rate than previous years.

Figure 3.3: Number of applications to UK higher education institutions, 2007-08 to 2013-14



Source: OFT³¹

³¹ UCAS (2013) 'Application Cycle: End of Cycle Report'. Available at: www.ucas.com/sites/default/files/ucas-2013-end-of-cycle-report.pdf

4 ENABLING STUDENTS TO MAKE INFORMED CHOICES

- 4.1 Making the right choice about where and what to study is essential both from the student's individual perspective and also to ensure that the higher education sector delivers the highly qualified workforce needed to compete in an increasingly globalised economy.
- 4.2 Choosing what to study at undergraduate level is, for most students, a 'one off' decision given the high economic and social costs of switching between universities.³² The student's choice will have an effect on their knowledge, skills, future careers and earnings as well as less tangible, yet crucial, factors such as social development.
- 4.3 Student choices of where and what to study are influenced by a number of 'tangible' and less tangible factors. Students appear to take into account aspects of the learning experience and likely longer-term career prospects, such as course content, academic reputation, league table rankings and employment prospects.³³ Student choices are also likely to be influenced by other factors related to class (connected to confidence, awareness and expectation), tradition, culture and ethnicity.³⁴ The advice and information students receive also influences their choices. Advice and information can come from a range of sources including students' parents, teachers, and institutional open days, institutions' websites and via third parties.³⁵
- 4.4 The Cfl has focused on whether the information available on institutions' and third party 'choice tool' websites allows students to make informed choices. We have focused on information for two key reasons. First, if students can access information which allows them to understand clearly what institutions offer, and the differences between these offers, they may make more informed choices. This in

³² We discuss barriers to switching in more detail in paragraphs 4.44-4.50.

³³ See for example, the Department for Business, Innovation and Skills (BIS) and the Sutton Trust (2012) 'Tracking the decision making of high achieving higher education applicants'. Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/82789/12-1240-tracking-decision-making-of-high-achieving-higher-education-applicants.pdf.

³⁴ Stephen Ball, Jackie Davies, Miriam David, Diane Reay (2010) 'Classification of judgment: social class and the 'cognitive structures' of choice in higher education'. *British Journal of Sociology of Education*, Vol. 23, issue 1, pp.51-72.

³⁵ HEFCE has explored the importance of information, and different types of information, in informing student choice. See HEFCE (2010) 'Understanding the information needs of users of public information about higher education.' Available at: www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12_10b.pdf

turn may improve student engagement, satisfaction, retention and success whilst at university and employability after university.

- 4.5 Second, access to clear information which informs student choice can also help to drive effective competition between higher education institutions. If students are better able to choose institutions that meet their preferences on the basis of actual information, as opposed to reliance on received wisdom or other factors, it may create an incentive for institutions to be responsive to student preferences.
- 4.6 Through the Cfl the OFT sought to find out whether students can access, assess and act on comparable information to enable them to make informed choices about institutions and courses. We were particularly keen to identify any issues or practices which meant that students were not getting useful, valid and reliable information. We also wanted to understand how the application process supports students in acting on their choices and whether the switching process between courses and institutions might allow students to mitigate a poor initial choice.
- 4.7 However, given that in some respects education may be characterised as a 'post-experience good' (meaning that quality is not known before the student has been through university) ,³⁶ and that quality can be interpreted differently by different students, there are limits to what information provision can achieve. Therefore, we also considered the extent to which choice could be relied upon to drive improvements in quality in our analysis.

Information sources available to prospective students

- 4.8 Through the Cfl the OFT set out to gather views from a range of stakeholders about the extent to which existing information is useful and easily accessible to prospective students. We also wanted to know whether there are any 'information gaps which, if addressed, would allow students to make better informed choices.

³⁶ Weimer and Vining (1992) categorised higher education as a 'post-experience' good, the quality of which can only be established well after it has been 'consumed', and perhaps not even then - see Weimer, D. L and Vining, A R. (1992) 'Policy Analysis: Concepts and Practice.' Also see Roger Brown (2012) 'Competition and Choice in Higher Education'. Available at: <http://cdbu.org.uk/competition-and-choice-in-undergraduate-education>

4.9 Many respondents emphasised that the undergraduate sector is served by many (third-party) choice-tools, including websites and publications which help students make choices.³⁷ These range from league tables which rank institutions according to certain criteria, more interactive websites such as the government-hosted Unistats website, which displays the KIS (a set of information about student satisfaction, teaching methods and employment outcomes), through to websites such as The Student Rooms which are run by students.³⁸ As illustrated in Annexe A, the information available on choice tool websites is increasingly focused on the university experience (including the teaching and learning aspects of higher education) as opposed to the institutions' research outputs, which has traditionally been the focus of league tables.

4.10 From our review of third party choice tools, it appears that information provision is becoming increasingly user friendly.³⁹ For instance, it is now possible for students to input their preferences (in terms of location and courses) and compare information about options that match their preferences. Unistats 'widgets'⁴⁰ also appear on higher education institutions' websites, giving students an easily digestible summary of KIS data.

4.11 In addition, more detailed information is usually accessible on higher education institution websites. Websites usually contain information on course content, university rules and regulations, and facilities available to students.

4.12 However, and despite recent improvements in information provision, respondents highlighted some information gaps and ways in which the information that is presented could be improved. The concerns centered on:

³⁷ The OFT defines choice tools as structured sources of information, discussion and comparison that help consumers compare and choose between alternative service and product offerings. See OFT1321 'Empowering consumers of public services through choice-tools'. Available at: www.of.gov.uk/shared_of/reports/consumer_protection/of1321.pdf

³⁸ Students can set up their own discussion forums on the The Student Rooms to discuss any aspect of the university experience. Students can also access official university profiles on The Student Rooms website. Available at: www.thestudentroom.co.uk

³⁹ For a full list of the websites we reviewed see Annexe A. We focused our assessment on a sample of more 'interactive' websites where students can input their preferences and receive suggestions about suitable courses and institutions. It should be noted however, that there are also numerous league tables that students can (and do) use to inform their choices.

⁴⁰ A Unistats widget runs on the higher education institution website and displays a summary of the information contained on the Unistats website.

- information gaps about the learning experience
- information gaps about the course outcomes
- information gaps about the offer beyond the learning experience
- the ways in which existing information is displayed, and
- factors to consider when re-designing the system of information provision.

Information gaps about the learning experience and educational gains

4.13 There appears to be a degree of consensus across the sector that students should be able to access information about the learning experience offered by different higher education institutions. However, what these indicators should be is more contested, as exemplified by the different views on the extent to which contact hours should be considered a key variable to include in the information provided to students.⁴¹

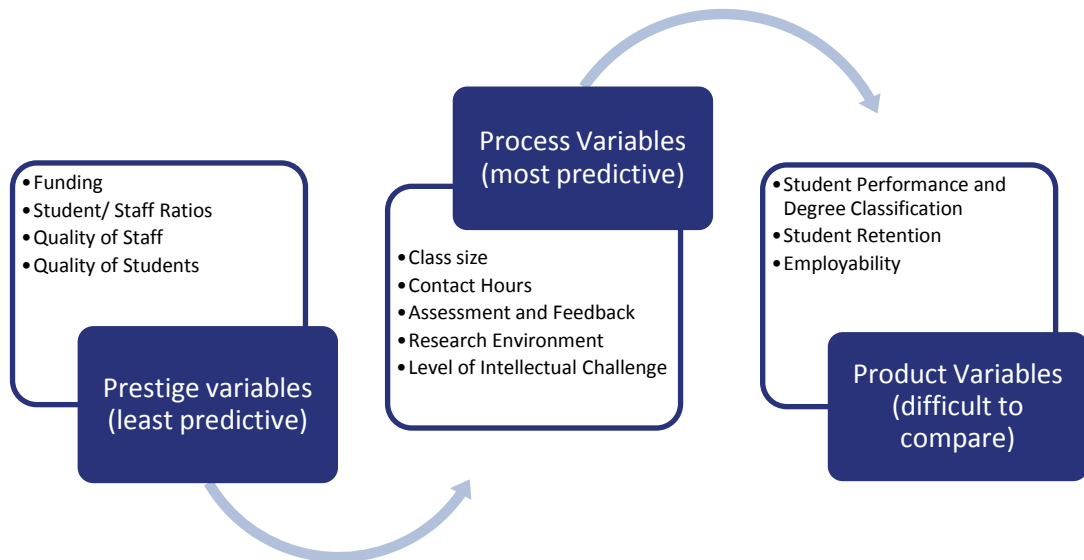
4.14 Notwithstanding that the inclusion of certain variables might prove controversial, there are a number of indicators that, if available, are likely to give students an insight into the quality of the course. For example, Professor Graham Gibbs has looked at the factors, summarised in Figure 4.1, that predict the quality of the undergraduate experience which he defines as the 'educational gains' students are likely to achieve at university.⁴² Gibbs finds that certain indicators are better predictors of educational gains than others, pointing to process variables which encourage student engagement such as class size,

⁴¹ A recent Which?/HEPI student experience survey (Which?/HEPI (2013) 'The student academic experience survey'. Available at: www.staticwhich.co.uk/documents/pdf/the-student-academic-experience-survey-319689.pdf) found that significant differences, unacknowledged in the information available to prospective students, between the contact hours available to students studying the same course at different institutions. For instance, the survey found students studying physical sciences can receive anywhere between 11 and 25 hours per week and social studies students anywhere between nine and 16 hours. However, a number of respondents to our CfI questioned whether students should be able to access comparable information about contact hours without being able to access other indicators which reflect quality. Their concerns were that students might interpret contact hours and reflecting quality (when a range of factors reflect quality) and an undue focus on contact hours could lead to unintended consequences such as class sizes increasing.

⁴² Gibbs argues that as educational performance is predicted by the entry standards of students, to compare institutional performance in a valid way it is necessary to measure 'educational gain', that is, the difference on a particular measure before and after the student's experience of university. See Gibbs (2010) 'Dimensions of Quality'. Available at: www.celt.mmu.ac.uk/policy/ltmmu/docs/Dimensions_of_Quality%20%20Graham%20Gibbs.pdf

who undertakes the teaching and the quality and quality of feedback as being the most valid indicators.

Figure 4.1: Dimensions of Quality according to Gibbs⁴³



Source: Gibbs⁴⁴

4.15 Using this framework to assess the main choice tools reveals a number of information gaps around the indicators most likely to predict educational gains.⁴⁵ As outlined in Annexe A, the main information gaps appear to be the staff to student ratio, funding per pupil, who the students will be taught by, a direct proxy for the quality of their teaching, class sizes and contact hours.⁴⁶

4.16 A number of respondents highlighted that it is difficult for prospective students to identify differences between institutions on these dimensions, as differences can be significant. The implication is that institutions may not, through the mechanism of student choice, be incentivised to focus on the factors that would improve educational gains and ultimately students' learning experience.

⁴³ Presage variables define the context before students start learning, process variables describe what goes on as students learn, and product variables relate to the outcomes of that learning.

⁴⁴ Gibbs (2010) 'Dimensions of Quality.' Available at:

www.celt.mmu.ac.uk/policy/ltmmu/docs/Dimensions_of_Quality%20%20Graham%20Gibbs.pdf

⁴⁵ As illustrated in Annexe A, we analysed six 'choice tool' websites to determine whether they display information about the 12 elements of quality according to Gibbs. For 'Research Environment' we looked for any information on the Research Assessment Exercise and for 'Level of Intellectual Challenge' we looked for NSS results stating whether the 'course is intellectually stimulating'.

⁴⁶ The National Student Survey scores, which are displayed on a number of third party websites, only indirectly measure the quality of teaching at an institution.

Information gaps about course outcomes

- 4.17 Employment prospects are a key outcome of the undergraduate experience that students appear to want to know about when applying.⁴⁷ However, a number of respondents highlighted that the employment and salary data currently available does not necessarily help inform student choice.
- 4.18 For example, the Destinations of Leavers from Higher Education (DLHE) survey (which is used by a number of third party websites, including Unistats) records the type of employment and salary of graduates six months after completing the course.⁴⁸ The Longitudinal DLHE also records the salaries of graduates in full-time employment 40 months after graduation. However, because the long-term data is collected from a stratified sample of students who responded to the six-month survey, there is usually insufficient data to calculate robust institution or course level statistics. It is therefore difficult for prospective students to compare the likely longer term employment and earning prospects of attending different courses and institutions.
- 4.19 Respondents also highlighted that, at the moment, the employment data that is used by choice tool websites does not take into account the fact that some institutions take on students with different backgrounds and abilities.⁴⁹ This means that institutions which take on more privileged and/or capable students (who have better employment prospects) are looked on more advantageously in the rankings. More generally, it is also difficult for prospective students to know what employers think about different courses.
- 4.20 Notwithstanding the challenges in collecting and publishing longer-term employment data (not least how to take into account the value added by universities), the sector in general, and HEFCE in particular,

⁴⁷ HEFCE have also found that students value information about employability (see HEFCE (2010) 'Understanding the information needs of users of public information about higher education'. Available at: www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12_10b.pdf). Information gaps should be seen as distinct from information that is not easy to assess, covered in the section below.

⁴⁸ Whilst the actual salary data is collected, Unistats displays the average salary of graduates six months after graduation. The type of employment consists of 'working, studying, working and studying, unemployed and not available for work'. Of those in employment the proportion of managerial/professional jobs six months after graduation is also displayed.

⁴⁹ This means that from current employment data it is difficult to disentangle the raft of variables that would explain why students' career progression differs.

might perhaps focus their ongoing efforts on improving the quality and comparability of information on long term employment and salary prospects.

Information about the 'offer' beyond the learning experience

4.21 When choosing between institutions and courses, students are interested in a broader range of factors than those related to the quality of the teaching and the likely learning outcomes.⁵⁰ In this respect, respondents highlighted a number of information gaps which they felt were undermining the extent to which students understood the broader offer made by institutions. The main information gaps were in relation to additional charges, the 'regulatory status' of the university, and financial support.

Additional charges

4.22 Additional charges can be defined as charges, on top of the tuition fee, that students have to (or are strongly encouraged to) incur in order to complete their course or degree.⁵¹ 'Hidden' additional charges, which students do not know about when choosing where to apply, are a particular concern because the student may not be able to afford the charge, may not be able to make an informed decision about where to apply, and is not in a good position to put pressure on the institution to keep charges low once they are at university.

4.23 In recent years there has been increased focus on making additional charges clear to students before they get to university, including a 2012 National Union of Students (NUS) campaign.⁵² As a result, there

⁵⁰ Although the OFT has not done a comprehensive analysis of what students say they want to know about when choosing between higher education institutions, this has been a recurrent message from our engagement with stakeholders.

⁵¹ The Teaching and Higher Education Act 1998 and Higher Education Act 2004 (HEA04) set the rules about what has to be included in a student's tuition fee. The HEA04 defines tuition fees as 'fees in respect of, or otherwise in connection with, undertaking the course, including admission, registration, tuition and graduation fees'. However, there are various exceptions including fees payable for board and lodging, fees for field trips, fees related to goods that become the property of the student and fees payable for attending any graduation or other ceremony.

⁵² In 2012 the NUS ran a 'hidden costs' campaign for universities to get rid of additional charges, secure financial support to help cover additional costs or ensure such costs are upfront and transparent before students apply.

are examples of good practice in terms of disclosure of additional charges to prospective students.⁵³

4.24 However, students still appear to be incurring additional charges when at university or college which they did not know about when applying. A 2012 NUS student survey found that 69 per cent of 8,871 undergraduate students surveyed stated they incurred additional charges.⁵⁴ Some of these charges students knew about in advance of applying, but there are some types of charges, mainly related to course specific costs (such as equipment/studio hire and bench fees), that some students appear not to know about in advance. The existence of hidden charges was corroborated by the Cfl responses. For instance, one respondent that worked with media and drama students was particularly concerned about the high cost of equipment and studio hire which he thought students did not know about in advance.

4.25 With budgets in the sector remaining tight, there is a risk that the cap on fees may result in institutions increasing additional charges. To try to place some competitive pressure on additional charges, we recommend universities follow best practice and provide students with a course-specific summary of the additional charges they are likely to incur, ideally both alongside course information when students are considering where to apply and when they are sent an offer. The prevalence, significance and fairness of hidden charges is an issue that the CMA could explore in further detail as part of its compliance review.

The 'regulatory status' of the provider

4.26 In public service sectors where the quality of services is difficult to assess ex-ante, regulators and government bodies often have a role to play in assessing quality and the risks facing providers. The 'regulatory status'; both in terms of which regulatory institutions oversee the provider and what the regulators think of the provider's performance, is usually communicated to prospective service users either directly or through third party websites.⁵⁵

⁵³ For example, the University of Wolverhampton publishes an 'all inclusive fee' detailing what is, and is not, included in the tuition fee. Available at: www.wlv.ac.uk/PDF/transparent-fee.pdf

⁵⁴ NUS (2012), 'Pound in Your Pocket' survey. Available at:

www.poundinyourpocket.org.uk/downloads/PIYP_Summary_Report.pdf

⁵⁵ For example, parents can look at Ofsted ratings when choosing schools for their children.

4.27 From the summer of 2014, HEFCE will publish and maintain a register of all higher education institutions that are subject to the higher education assurance framework.⁵⁶ Whilst the details are still being finalised, HEFCE has stated that the register will set out the accountability responsibilities of each organisation and the latest publicly available information (such as the latest QAA Institutional Review) about each university and college, including critical risk factors (such as imminent corporate failure).⁵⁷ The aspiration is that the register will explain what assurances can be given about a higher education institution, and which aspects of the institution's performance the student should seek further information about.

4.28 The development of the register is welcomed, as it will provide a single portal through which students will be able to access and assess performance risks faced by institutions which HEFCE considers should be in the public domain. We encourage HEFCE to consider how the information and risks identified in the register can best feed into choice tools and student decision making, such as linking the register with the UCAS portal.⁵⁸

Financial support

4.29 There is some evidence to suggest that students do not know about the financial support that will be available to them from their higher education institution. For instance, a 2013 NUS survey found that 29 per cent of the 754 respondents reported that the financial support available (for example, bursaries and scholarships) was a little or a lot worse than they had expected when they applied⁵⁹. This could indicate that students are not sufficiently informed about (or the information available leads them to overestimate) the financial support available to

⁵⁶ This will include all English institutions with UK degree awarding powers, those which are grant funded by HEFCE and/or those which have been designated so that students on a course they teach may apply for student support.

⁵⁷ Regulatory Partnership Group (2013), 'Operating framework for higher education in England' (available at: www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/operatingframework/operatingframework_for_HE_11072013_2.pdf). It should be noted, however, each higher education institution in England will take part in an Institutional Review approximately every six years so the information available may be quite old.

⁵⁸ Currently, prospective students can access Quality Assurance Agency (QAA) assessments via Unistats, but there is no flag or indicator to highlight when an institution is not directly overseen by the QAA and whether or not the institution is part of the Office of the Independent Adjudicator (OIA).

⁵⁹ Information submitted to the OFT.

them at university, something corroborated by a number of respondents to our Cfl. As we outline below, there appears therefore to be scope for institutions to make it clearer when students apply and when they receive an offer what financial support will be available.

The way in which information is displayed

4.30 Respondents to our Cfl also raised some concerns about how the information currently available to students through third-party and/or provider websites was displayed. The main concerns related to information displayed in percentages, description of accreditation, and institutions' terms and conditions.

Information displayed in percentages

4.31 A number of third party websites display information about academic experience (in particular, what activities the student will undertake and what type of assessment they will have to do) as percentages rather than in absolute terms. For example, Unistats (using KIS data) displays the proportion of time the student will spend in various learning and teaching activities. As a result, and as highlighted above, significant differences in the actual amount of time spent in these activities across different institutions cannot be assessed by prospective students.

Descriptions of accreditation

4.32 Following concerns raised by one respondent that descriptions of accredited courses on institutional and third party websites did not make it clear to prospective students that they had to do further study to qualify as a professional,⁶⁰ the OFT conducted a small analysis of how engineering degrees on institutional and third party websites are described. From this (limited) sample, it seems the wording on some websites is quite vague and there may be scope for universities and

⁶⁰ For example, the educational base to be a Chartered Engineer is a four-year accredited Master of Engineering (MEng) degree, or a three- year Bachelor of Engineering (BEng) degree plus a one-year masters degree. One respondent raised concern that it was not clear to students whether or not the BEng undergraduate degree is accredited by a professional body and that further study is required to become a Chartered Engineer.

third parties to emulate 'best practice' descriptions that we found on other websites.⁶¹

4.33 It should be noted, however, that so far we have found no strong evidence that institutions are making misleading claims. Accreditation bodies have a strong reputational incentive to ensure that higher education institutions do not make misleading claims about accreditation and may be advised to check how universities are marketing their accreditations to students. Nevertheless, the scope for misleading information about accreditation (and about courses more generally) is an issue that the CMA could explore in further detail as part of a compliance review.

4.34 A related issue raised by one stakeholder was that students applying to foundation courses are not made sufficiently aware of the risk that the institution might not accept them onto the full undergraduate degree once they have completed their foundation course. We have not looked at the way in which universities are describing the route from foundation to undergraduate degree, but encourage universities to make it clear on what grounds students will be considered for further study.

Higher education institution terms and conditions

4.35 Based on the OFT's brief analysis of websites of higher education institutions, the terms and conditions students will be subject to when at university (which may take the form of the university's rules and regulations for students) are sometimes difficult to find.⁶² They can be contained in a number of documents accessible in different places on the website or in different policy documents. As we discuss in Chapter 5, a contractual term binding students to a variety of terms and conditions in different places may be unfair and may therefore not be enforceable.⁶³ It is particularly important, therefore, that students can

⁶¹ For example, the University of Southampton and University College London both clearly state: BEng (Hons) Accredited CEng (Partial) - this degree is accredited as: fully satisfying the educational base for an Incorporated Engineer (IEng) partially satisfying the educational base for a Chartered Engineer (CEng). A programme of accredited Further Learning will be required to complete the educational base for CEng.

⁶² This was also the experience of the OFT team that worked on the University Terms and Condition project. OFT1522 Universities' Terms and Conditions. Available at www.of.gov.uk/shared_of/consumer-enforcement/OFT1522.pdf

⁶³ We cover unfair terms in more detail in Chapter 5.

have the existence of terms and conditions brought to their attention, can easily access them and know their rights and obligations.

4.36 There appears to be scope for improving access to terms and conditions. One option would be for institutions to send terms and conditions (along with summaries of additional charges and financial support) to students when an offer is made. When, in what form, and the fairness of the way in which terms are communicated to students is an issue that the CMA could explore in further detail as part of a compliance review.

Factors to consider when re-designing information provision

4.37 Respondents highlighted a number of challenges that would need to be taken into account if the KIS were to be re-designed, as changing information provision requirements may increase the possibility of institutional gaming and unintended consequences. For example, if institutions respond to standardised quality metrics, this may lead to greater course homogenisation and may contradict efforts to increase diversity of provision in the undergraduate sector.

4.38 In addition, adding more sources of information could make it too difficult for students to process the information available. As part of any reforms to information provision, thought should be given to the linkup between different information sources. For example, there may be ways of strengthening the links between the UCAS website (which gets the most student traffic) and the Unistats website (which contains the comparable information about courses).

The role of UCAS in supporting student choice

4.39 Making the right choice about where to apply to university is not solely dependent on students being able to access accurate and useful information. An application process that is easy for students and does not unfairly advantage certain students or particular higher education institutions can arguably play a pivotal role in helping students apply to the institutions that best meet their needs.

4.40 UCAS supports student choice by providing a system that appears efficient and easy for students to navigate. UCAS, as a single provider of application services, provides efficiencies to both applicants and higher education institutions.⁶⁴ UCAS also enjoys high user satisfaction scores from students which suggests that students find the UCAS application process easy to navigate.⁶⁵

4.41 Nevertheless, as outlined in Annexe A, our review of choice tool websites demonstrates that, in comparison to the Unistats website, there is relatively little information about higher education institutions' performance on the UCAS website (for example, student satisfaction, time spent in different activities and employment outcomes). Whilst we recognise that the websites serve different purposes, given that the vast majority of students use the UCAS website there is scope for clearer links between the UCAS and Unistats websites in order for students to be 'nudged' towards the KIS data available via Unistats.

4.42 The unique applications dataset that UCAS gathers through the applications process could also be valuable to third parties who could use the information to help students make choices as well as providing, for example, analytical services to universities. Through the Cfl, a number of stakeholders raised concerns that they have not been able to access the applications data that UCAS gathers.⁶⁶ It is possible that third parties could make use of the dataset to create valuable services but are unable to do so without access to the information.

4.43 The OFT has been unable to clarify what UCAS' policy is regarding access to its unique dataset. We propose that the CMA further explores the issue of access to UCAS' dataset as part of its broader work looking at the regulatory framework of the sector, including

⁶⁴ In the United States, students have to apply to each university individually and often have to write tailored applications as well as complete additional entry tests. In the UK students use a single process for applying to up to five providers, and a UCAS application costs £23 in 2014.

⁶⁵ When asked 'how would you rate your overall experience of UCAS' 44.8 per cent of respondents said 'great', 49.5 per cent said 'good', eight per cent said 'fair', 0.9 per cent said 'bad', 0.4 per cent said 'awful'. UCAS (2013) 'Applicant satisfaction survey'. (Information submitted to the OFT)

⁶⁶ The data is used by UCAS Media in the provision of analytical services. UCAS Media is a wholly owned subsidiary of UCAS that provides analytical services to higher education institutions, in part based on insight it garners from the applications data it gathers. UCAS Media provides approximately £12.2m per year of revenue for UCAS – approximately one third of its total revenue (with approximately £13m revenue per year from applicants' fees and £9.4m from higher education institutions' fees). The revenue generated by UCAS Media is used to subsidise the cost of UCAS' applications services.

accountability of industry bodies to ensure that their incentives are aligned with those of the sector at large.⁶⁷

Supporting students' choice to switch

4.44 The ability of students to switch between courses could provide an additional mechanism through which higher education institutions are incentivised to respond to student preferences after they get to university. From a student's perspective, the ability to switch would mean not spending further money on a course which does not meet their needs. The threat of losing students, and their associated funding, may also increase the incentives of institutions to tailor their courses to students' preferences throughout their time at university.

4.45 Overall switching rates between higher education institutions appear, at first approach, to be low. The rate of switching between different UK higher education institutions amongst full time first degree entrants in 2010-11 was 1.9 per cent,⁶⁸ although the rate of switching between departments in the same institution is likely to be higher.⁶⁹

4.46 These rates of switching are likely to be influenced by a number of barriers to switching, including:

- the lack of strong incentives for institutions to invest in assessing whether students have studied equivalent credits
- limited information about switching being available to students, and
- the high financial and social costs faced by students when switching.⁷⁰

⁶⁷ The OFT identified similar concerns in its Commercial Use of Public Information (CUPI) market study. In the study the OFT found that when a public body is the sole supplier of unrefined information and is also engaged in making refined information products, there is a danger that it will restrict access to its unrefined information and treat its own refined information operations more favourably than competing businesses. OFT861 'The commercial use of public information (CUPI)'. Available at: www.of.gov.uk/shared_of/reports/consumer_protection/oft861.pdf

⁶⁸ HESA (2013) 'Non-continuation following year of entry: full-time first degree entrants 2010-11'. Available at: www.hesa.ac.uk/content/view/1897/239

⁶⁹ The rate of switching between courses at the same institution is not reported to HESA but the OFT considers intra-institutional switching is likely to be higher because institutions have the incentive to keep the student (and their associated funding) and processes might be easier for students to navigate.

⁷⁰ Around 90 per cent of higher education institutions award credits which should, in theory, allow them to operate a credit transfer system. The idea is that students can transfer credits (which equate to a notional 10 of hours of learning per credit) between institutions should they wish to switch. However, in the UK there is no guaranteed right to switch. Higher education institutions will assess students' applications to switch (and the credits) on a case-by-case basis and will take into account existing capacity, the student's prior learning

4.47 The differences in curriculum and qualification design hinder the assessment of whether students have 'banked' the necessary core modules.⁷¹ If a student decides, and is able to transfer from one institution to another part of the way through an academic year, depending on when they transfer their tuition fee loan or funding might not cover the tuition fees for their new institution. In addition to the financial costs, students face the cost of familiarising themselves with a new geographical location and circumstances.⁷²

4.48 Even if students can overcome all these barriers, they may find the switching process difficult to navigate. For instance, a 2012 Higher Education Academy review found information on credit accumulation, transfer and related mechanisms is often presented in a technical, non-user friendly way and information can be difficult to find.⁷³

4.49 Stakeholders were keen to highlight that there is a trade-off between making switching easier (which would require greater course homogenisation) and maintaining a diverse range of courses across the higher education sector. The introduction of a more structured system to facilitate switching is also likely to come at an administrative cost (such as investing in ways of judging whether students have studied the necessary core modules) and it is not currently clear that there is sufficient demand from students to switch to justify this cost, nor is it clear who should pay.

4.50 The complexities and possible unintended consequences of making switching between courses and institutions easier reiterates the importance of students being enabled to make an appropriate choice

experience and whether they have studied necessary core modules. Higher Education Academy (2013) 'Review of credit accumulation and transfer policy and practice in UK higher education'. Available at: www.heacademy.ac.uk/assets/documents/flexiblelearning/Flexiblepedagogies/Review_of_Transfer_of_Credit_Report.pdf

⁷¹ This is particularly the case given the low numbers (currently) involved in switching. A more detailed discussion of the credit transfer system can be found here:

www.heacademy.ac.uk/assets/documents/flexiblelearning/Flexiblepedagogies/Review_of_Transfer_of_Credit_Report.pdf

⁷² The switching rate between universities based in London is appears to be about 50 per cent higher than elsewhere in the country (3.1 per cent in 2010-11) (HESA (2013) 'Non-continuation following year of entry: full-time first degree entrants 2010-11'. Available at: www.hesa.ac.uk/content/view/1897/239). This could be explained by lower social and economic costs to switching between institutions in the same area – students could keep the same friendship groups and potentially stay in the same accommodation.

⁷³ Higher Education Academy (2013) 'Review of credit accumulation and transfer policy and practice in UK higher education'. Available at: www.heacademy.ac.uk/assets/documents/flexiblelearning/Flexiblepedagogies/Review_of_Transfer_of_Credit_Report.pdf

of where to study initially. Nevertheless, for those students who do want to switch, they need to have access to the information and support necessary so that they can switch to institutions that better meet their needs.

5 THE STUDENT EXPERIENCE AT UNIVERSITY

5.1 A healthy interaction between choice by active students and competition between higher education institutions for enrolments should result in institutions providing a university experience which reflect the needs and preferences of their undergraduate students. Through the Cfl, the OFT wanted to get a better understanding of how this dynamic was developing in practice by looking at the actual student experience at university. In particular, we wanted to explore:

- whether there are particular institutional practices which may result in student harm
- what universities can do to ensure they have a fair relationship with their students, and
- what students can do when things go wrong.

Institutional practices

5.2 Whilst the majority of undergraduate students appear to be satisfied with their experience at university, information on some practices emerged through the Cfl which suggests that the experience for some students is less positive.⁷⁴ These practices primarily were:

- students incurring additional charges which they do not know about when applying to university
- fees increasing mid-way through the course, and
- course structure and content changing mid-way through the course.

Additional charges

5.3 In Chapter 4 we outlined the concerns respondents raised in relation to students not knowing about additional charges when they apply to university. To the extent that hidden additional charges would affect a

⁷⁴The 2013 National Student Survey found that 85 per cent of all UK students are satisfied with their overall university experience (available at: www.thestudentsurvey.com/). Similarly, a 2013 NUS survey found that 78 per cent of the 287 undergraduate respondents thought that their course had met or exceeded their expectations (information submitted to the OFT).

student's transactional decision had they known about the charges when applying, then they could represent a breach of consumer protection legislation.⁷⁵ We outline what constitutes a breach of the relevant consumer protection legislation in more detail below.

Fees increasing mid-way through the course

- 5.4 It is important that prospective students know how much their university experience is likely to cost them. Knowing the total cost of higher education upfront allows students fully to assess the options available and to better financially plan their time as a student. Fee increases in the higher education sector are a particular concern given the high barriers to switching between universities (discussed in paragraphs 4.43-4.49) which means students cannot easily 'walk away' should their fees increase mid-way through the course.
- 5.5 There is some reporting of increases in fees mid-way through a course, particularly for international students.⁷⁶ The practice seems to stem from a large number of universities having discretion to change fees paid by international students on an annual basis.⁷⁷ Such practices may create cause for concern and, as fees appear to be increasing for some international students, could affect the international reputation of the sector. However, because the responses to the CFI did not cover the entire sector we do not yet know the full extent of fee increases and whether such fee increases have a justifiable explanation. The prevalence of fee increases and the fairness of such practices is an issue that the CMA could explore in further detail as part of a compliance review.

⁷⁵ The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) define a transactional decision as '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 a 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.' OFT1008 'Consumer protection from unfair trading'. Available at: www.of.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf

⁷⁶ Information submitted by the NUS to the OFT.

⁷⁷ A UUK survey of international student tuition fees found that 58 per cent of institutions do not offer fixed tuition fees for international students on courses that last longer than one year. UUK (2013) 'International student tuition fees: survey results 2013-2014'. Available at: www.universitiesuk.ac.uk/highereducation/Pages/InternationalTuitionFeesSurvey2013-2014.aspx

Course content and structure changing mid-way through the course

- 5.6 An area of concern raised by a number of respondents, particularly students themselves, was that elements of their course structure changed after they enrolled at their institution. The OFT received examples of courses changing to different locations, the number of modules being reduced, and lectures being taught at weekends instead of in the week as advertised. The OFT also received examples of course content changing and modules not being available once students got to university.
- 5.7 Universities need discretion to be able to adjust module options to accommodate changes to staff specialism and changes to the academic staff employed by the university. Students should therefore expect some degree of reasonable change. However, student representatives raised concerns that some universities were affording themselves broad discretion to change elements of the course beyond what is reasonable.
- 5.8 The OFT has not conducted a full analysis of university terms and conditions so cannot at this stage comment on whether terms are drafted too broadly. Nevertheless, as highlighted below, institutions should be aware that broad terms that provide excessive discretion to make changes might be open to challenge under consumer protection law. The prevalence of course content and structure changes and the fairness of such practices is an issue that the CMA could explore in further detail as part of a compliance review.

Ensuring a fair relationship between higher education institutions and students

- 5.9 Consumer protection legislations provide a legal framework through which higher education institutions can assess their terms, conditions and practices and ensure that they are fair. In the time available we have not collected enough evidence to form a view about whether the concerns identified through our CfI amount to breaches of consumer protection law. However, the practices identified may be potentially unfair and/or otherwise unlawful. Higher education institutions should

therefore be aware of the legislation that governs their behaviour towards students and how to avoid infringing it (we provide a more detailed discussion of the relevant legislation in Annexe B).

Unfair terms

5.10 It is the OFT's view that a higher education institution's rules and regulations that claim to apply to the relationship between the institution and undergraduate students are likely to form part of a contract for the provision of educational services. The terms set out in rules, regulations and written agreements (to the extent they exist) are likely to be subject to the test of fairness under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) and Unfair Contract Terms Act 1977.⁷⁸

5.11 The OFT has not conducted a comprehensive analysis of institutions' terms and conditions.⁷⁹ However, in Box 1 we have endeavored to set out a non-exhaustive list of features that would contribute to improved fairness of terms and conditions. It would be advisable for institutions to consider these features when drafting, reviewing or amending their terms and conditions and making them available to students.⁸⁰ The OFT strongly encourages universities to seek further guidance on whether their terms, conditions and practices are compliant with the relevant consumer protection laws.⁸¹

⁷⁸ The OFT strongly encourages institutions to make sure they are compliant with UTCCRs. More information about the UTCCRs can be found here: www.of.gov.uk/business-advice/unfairterms/detailed/explained/

⁷⁹ However, the OFT has analysed conduct terms and the withholding of degrees for non-academic debt ; the relevant report is available here: www.of.gov.uk/shared_of/consumer-enforcement/OFT1522.pdf

⁸⁰ This list is an attempt to apply the law referred to above and should not be read as a substitute to the law set above and these example should only be read as illustrative of how the law could be applied. The examples do not represent a minimum standard to be achieved.

⁸¹ Where a term is found by a court to be unfair, it is not binding on the student. Please refer to OFT guidance for further discussion in relation to the UTCCRs (available at: www.of.gov.uk/business-advice/unfairterms/detailed/explained www.of.gov.uk/business-advice/unfairterms/detailed/explained)

Box 1: Features that would contribute to improved fairness of terms and conditions in the higher education sector

- Be clear and unambiguous
- Be fair and balanced
- Be easy to access
- Not bind students to terms that the student has not had the opportunity to consider and become familiar with
- Be prominently brought to the student's attention if terms are particularly surprising or important, or, for example, if breach of a term is likely to have a serious consequence
- Not have the effect of causing students to pay increased fees without the option of withdrawing and continuing to study elsewhere
- Not impose disproportionately severe sanctions on students for being in breach of the terms and conditions
- Not permit key features of the educational services to be changed without a valid reason
- Not be open to challenge if a term is drafted so widely that it could cause student detriment
- Not permit universities to withhold degrees or progression to the next year of study as a sanction for the non-payment of a non-academic debt

Unfair commercial practices

5.12 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibit unfair commercial practices which distort consumers' transactional decisions. Broadly speaking, the CPRs require institutions not to treat students unfairly, and prohibit misleading actions, omissions or aggressive commercial practices, where these are likely to have an impact on a consumer's transactional decision. The CPRs

also set out some practices that are considered unfair in all circumstances.⁸²

5.13 The OFT has not undertaken detailed research into the way that students make decisions and therefore cannot definitively conclude whether or not the concerns about certain practices raised in the Cfi influence students' transactional decisions and so might breach the CPRs. However, in Box 2 we have set out the types of practices that might be considered misleading actions, misleading omissions or aggressive commercial practices based on our concerns arising from the responses to the Cfi.⁸³ The OFT strongly encourages institutions to seek further guidance and assess their practices to ensure they comply with the CPRs.⁸⁴

5.14 It is also important to remember that being compliant with consumer protection legislation is a 'minimum standard'. The sector should be aware that acting in ways that could disadvantage students - even if such practices do not infringe the law - might harm the reputation of the sector and student confidence.

5.15 We have not been able fully to assess the prevalence of certain practices in the sector and whether they breach consumer protection law. Given the willingness amongst stakeholders to get more clarity about the application of consumer law, we propose that the CMA carries out further work to clarify the application of consumer protection legislation to the sector.

⁸² For an overview of banned practices see OFT1008 'Consumer protection from unfair trading'. Available at: www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

⁸³ This list is not an exhaustive list of practices that might breach the CPRs. Higher education institutions should consider the CPRs themselves and the OFT guidance produced concerning them.

⁸⁴ Further guidance on the CPRs can be found at: www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

Box 2: types of practices that might breach the CPRs if they affect students' transactional decisions

Potential misleading actions, in each case in terms of the content of the information or the overall presentation

- Providing information concerning the prospects of graduates from the course that is untrue or misleading
- Providing information about the accreditation of a course that is untrue or misleading
- Providing information about the quality or type of qualification that can be achieved by students that is untrue or misleading

Potential misleading omissions

- Failing to inform students of potential changes to the fees they are charged
- Failing to inform students of potential changes to course content and structure
- Failing to inform students of additional charges that they must incur (or are beneficial to incur) to complete their course

Potential aggressive practices

- Unilaterally increasing the fees part way through the course
- Unilaterally varying fundamental elements of the course, for example

What students can do when things go wrong

5.16 Universities should seek to prevent student harm from occurring and one of the ways in which they can do so is by ensuring they are compliant with consumer protection legislation. However, even if institutions endeavor to treat students fairly it may still be the case that not all students have a satisfactory experience. It is important

therefore that redress processes across the sector are fit for purpose, efficient and effective.

5.17 Through the Cfl, the OFT wanted to gather views about how the redress process was working in the undergraduate higher education sector. This section examines the current redress system, outlines improvements that are already underway and makes a few suggestions for further improvement. In doing so, the OFT has drawn on responses received from students and stakeholders across the industry, including key players in the complaints process.

5.18 Most providers' redress processes involve tiers of escalation, starting with informal internal channels, progressing to more formal internal stages. Students at universities that belong to the OIA Scheme who are not content with the university's decision have the option to escalate their complaint to the OIA. This system appears to be an improvement on the situation before the Higher Education Act 2004 where over a third of providers had no formal complaints procedure and there was no independent body for escalation of complaints.

5.19 The OIA is an ombudsman of last resort for complainants. As well as providing an extra independent complaint tier for students, the OIA sets standards for institutions by issuing recommendations on the robustness of their processes. It is also more cost effective for students and providers to resolve complaints in this manner than to resort to court proceedings. Students can also complain to the QAA about academic standards and quality and about public information published by higher education institutions about their courses, where concerns indicate serious systemic or procedural problems.⁸⁵

Use and speed of the redress system

5.20 In order for the redress system to work effectively, students should be able to find out how to complain should a dispute arise and complaint processes should be as quick and efficient as possible. There may be scope to further improve redress processes. Some students that responded to the Cfl suggested, for example, that complaint forms

⁸⁵ More information about the QAA's complaint procedures can be found at: www.qaa.ac.uk/Complaints/concerns/Pages/default.aspx

were not available online, that they were afraid of complaining and that they were put off by bureaucratic processes. However, the speed of the redress process does seem to be improving. A survey carried out in 2009 found that one fifth of cases dealt with by providers took more than a year to reach a decision.⁸⁶ More recent analysis by the NUS found that only five per cent of cases were taking longer than a year to resolve, suggesting that improvements have been made but further improvement is still possible.⁸⁷

5.21 Further improvements in providers' redress processes are expected in the future. The OIA is currently working with the sector to introduce standardised redress practices, such as the number of internal stages, the independence of people dealing with the complaint or appeal and the reporting of the outcome of cases. It has also recently launched early resolution pilots, run by universities and student unions, which should further improve the efficiency of complaint processes.

Compliance and deterrence

5.22 The OIA can issue recommendations to institutions to provide redress to individual students including, where appropriate, compensation and recommendations to change their practices or procedures.⁸⁸ The OIA can publish details of non-compliance with its recommendations in the Independent Adjudicator's annual report. To date it has done so on three occasions, following which the university complied with the OIA's decision.

5.23 The OIA publishes anonymised case studies of its recent decisions which explain how a decision was reached and detail any

⁸⁶ A study conducted in 2009 found that 64 per cent of students considered that the provider did not deal with their case within a reasonable time. King's Institute for the Study of Public Policy on behalf of the OIA (2010) 'Student Satisfaction with the Office of the Independent Adjudicator for Higher Education: Report of the OIA student survey 2009'. Available at: www.oiahe.org.uk/downloads/Final-Report-of-the-OIA-Student-Survey-with-Appendices_4.pdf

⁸⁷ NUS 2013 survey evidence submitted to the OFT. In the NUS' sample 12 per cent of cases still lasted six months or more, five per cent of cases took longer than a year to resolve, and some students finished their course before the complaint had been settled.

⁸⁸ For example, in one recent case where a cohort of students was dissatisfied with the course delivery after the course leader went on sick leave, the OIA recommended the University should offer each of the remaining group members the sum of £1,500 for the disappointment, distress and inconvenience experienced in relation to the service provided by the University. See: www.oiahe.org.uk/decisions-and-publications/recent-decisions-of-the-oia/older-case-studies.aspx

recommendations made.⁸⁹ It also publishes the annual personalised letter it sends to each university which provides a summary of the number of complaints escalated to the OIA that year by students at the university, the nature of those complaints, and how the figures compares with universities of a similar type.

The transparency of the redress system

5.24 Data is not currently publicly available on the level or subject of complaints received and resolved internally by higher education institutions. From the complaints that reach them, the OIA and QAA can identify common themes across more than one provider and take action to change practices across the sector.⁹⁰ However, the OIA is not privy to (and therefore cannot act on) common complaints that are not escalated to the OIA. The QAA can examine internal complaint information when it visits a university, but there is no requirement on universities to publically report common complaints and no system through which internal complaints are routinely monitored and common themes (that occur in more than one university) identified.

5.25 We are of the view that making information about institution-level common complaints more widely accessible could allow the appropriate bodies to be able readily to identify areas of common concern. It could also be beneficial for the QAA to identify common areas of dissatisfaction about which students rarely lodge official complaints.

The scope of the redress system

5.26 All 'qualifying' institutions, as set out in the Higher Education Act 2004 in England and Wales, must subscribe to the OIA's complaints scheme.⁹¹ 'Non-qualifying' private and alternative providers are able to join the scheme providing they can demonstrate they have effective due diligence and governance.

⁸⁹ See for example: www.oiahe.org.uk/decisions-and-publications/recent-decisions-of-the-oia/older-case-studies.aspx

⁹⁰ For example, the QAA could contact several universities and request they change their practices or they could promote best practice across the sector.

⁹¹ Qualifying institutions include publically funded institutions and APs (or courses offered by APs) that have been 'designated' by HEFCE.

5.27 Whilst a growing number of non-qualifying institutions are approaching the OIA, at the time of writing, only four non-qualifying institutions are part of the scheme and therefore students at many higher education institutions are unable to access the OIA's route to redress. Compulsory subscription would require the enactment of legislation.

6 COMPETITION BETWEEN HIGHER EDUCATION INSTITUTIONS

6.1 During the CfI, the OFT considered a number of concerns in relation to behaviours and/or practices that may have the potential to weaken or distort competition in the higher education sector. In considering these issues, we have been informed by our engagement with stakeholders and our internal thinking.

6.2 This chapter sets out the OFT's assessment of a range of specific issues relating to the way that higher education institutions compete. We arrived at this list of issues through stakeholder engagement and submissions, recent press coverage of competition issues in higher education, and the OFT's own internal thinking:

- whether there is any evidence of collusive behaviour between higher education institutions in setting tuition fees
- the nature of the relationship between degree-awarding bodies and third party teaching institutions that have their degrees validated by them
- the (perceived) potential tension between collaboration amongst higher education institutions and compliance with competition law
- the restriction imposed on applicants to the University of Oxford and the University of Cambridge
- the restriction imposed on all applicants relating to the number of courses for which they can apply.

6.3 This chapter sets out these concerns, summarises the views of stakeholders, and outlines the OFT's initial assessment of each of these issues.

The risk of collusive behaviour between higher education institutions

6.4 It has been widely reported that, since the 2011 reforms, a large number of higher education institutions have set fees at, or around,

the £9,000 cap,⁹² raising concerns as to whether this is the result of collusive behaviour.⁹³ If such collusive behaviour were taking place it would be to the detriment of students, as it would result in higher fees and/or lower levels of quality than under more competitive conditions.

6.5 To date, the OFT has received no complaints or evidence of either explicit or tacit collusion between higher education institutions with respect to fee setting.

6.6 We have analysed why tuition fees may be concentrated around the level of the fee cap, and have found that there are a range of possible explanations that would not require collusion between institutions, including:

- The increase in tuition fees to, or close to, £9,000 occurred simultaneously with a considerable reduction in the public funding of teaching through the HEFCE teaching grant. As a result, it is not surprising that fees increased significantly at this point in time.
- There is excess demand for university places overall and, and likely at the level of most individual institutions.⁹⁴ In the presence of excess demand for places at the £9,000 level, there is limited incentive to charge below this level.
- Demand for undergraduate places seems to indicate that, at current fee levels, demand is not particularly price sensitive.⁹⁵ The low responsiveness of demand to fee levels might be linked to a number

⁹² According to OFFA, the average headline tuition fee for 2014-15 will be £8,647 (falling to £8,006 taking into account all financial support from institutions). 72 per cent of institutions with an access agreement 'will charge a maximum fee of £9,000 for some or all of their courses in 2014-15', and 27 per cent of these institutions 'will charge £9,000 for all of their courses in 2014-15'. OFFA (2013) '2014-15 access agreements: summary of outcomes and data'. Available at: www.offa.org.uk/wp-content/uploads/2013/07/2013-04-Access-agreements-2014-15.pdf

⁹³ Recent articles in the press have questioned whether this concentration of prices around £9,000 is the result of collusive behaviour. For example, see Times Higher Education, 31 March 2011, 'Union calls on MPs to investigate possible collusion over tuition fees'. Available at www.timeshighereducation.co.uk/415732.article.

⁹⁴ UCAS (2013) 'UCAS End of Cycle Report 2013' (available at: www.ucas.com/sites/default/files/ucas-2013-end-of-cycle-report.pdf) provides an indication of the level of overall excess demand, reporting that 35,000 applicants in the 2013 cycle received no offers. At the individual institution level, excess demand could be even more pronounced than this statistic suggests, as popular providers could likely fill their available places several times over, even when charging fees at the level of the cap.

⁹⁵ Despite an almost three-fold increase in fees at many institutions following the increase of the tuition fee cap to £9,000, demand for undergraduate places has remained broadly stable (although, admittedly, it is difficult to know the exact impact of the increase in tuition fees on demand, since there was an artificially high peak in the year preceding the change in fees, and an artificially low trough in the year following the reforms). Whilst figure 3.3 appears to show a reduction in the previous upward trend in student numbers following the increase in tuition fees, this represents a relatively small reduction, given the scale of the increase in fees.

of factors, including the limited scope for variations in fees to impact the overall level of individual student debt, and the nature of the student loans system more broadly.^{96,97}

- The economic literature suggests that in markets where consumers have limited information about the true quality of a product or service, they may use price as a signal of quality.⁹⁸ In the case of higher education, and despite continued efforts to improve the scope and quality of information provided, applicants have to make decisions based on imperfect information.⁹⁹ In this scenario, some students may interpret lower fees as an indicator of lower quality. This would likely decrease the extent to which demand increases for courses with lower fees, and hence may decrease the incentives for higher education institutions to compete on fee levels.

6.7 In conclusion, there seem to be a number of explanations, beyond collusive behaviour, for why higher education institutions set tuition fees at, or close to, £9,000 per year. With that in mind, and given that the OFT did not receive any complaints or evidence about collusive behaviour between higher education institutions, it is not appropriate to undertake further investigation of these issues at this stage. However, it should be noted that the OFT and its successor body - the CMA - considers allegations of anti-competitive behaviour that it receives carefully.¹⁰⁰

⁹⁶ For a student taking the maximum maintenance loan for living costs, paying annual tuition fees of £6,000 as opposed to £9,000 will result in an overall reduction in the level of debt on graduation of less than 20 percent. The impact on actual repayments might be smaller than this, depending on the level of post-graduation income. In addition, the nature of the student loans system means that students choosing courses with higher tuition fees face a longer period of repayments, but not higher monthly repayments. This deferred impact of fee levels on graduates' repayments could also explain applicants' relatively low sensitivity to the level of fees.

⁹⁷ It is important to acknowledge that the student loans system is the result of wider higher education policy, including facilitating wider participation, and its impact on competition is only one of many factors that the government has to consider.

⁹⁸ For example, see Scitovsky, T. (1944) 'Some consequences of the habit of judging quality by price', *The Review of Economic Studies*, Vol. 12, no. 2, pp. 100-105.

⁹⁹ See chapter 4 for further detail on the role and limits of information provision.

¹⁰⁰ Any parties who suspect that a cartel is operating in any market can notify the OFT's Cartels Hotline by telephoning 0800 085 1664 or emailing cartelshotline@oft.gsi.gov.uk. After the 1 April 2014 the cartels email address becomes cartelshotline@cma.gsi.gov.uk (the Cartels Hotline will continue to be 0800 085 1664) Any parties who suspect some other form of anti-competitive behaviour can notify the OFT by emailing enquiries@oft.gsi.gov.uk.

The relationship between degree-awarding bodies and third party teaching institutions

6.8 It is common for third party teaching institutions (both FECs and APs) to partner with a traditional higher education institution – a 'degree-awarding body' - to validate their degrees.

6.9 In the course of the Cfl, some third party teaching institutions raised the concern that some degree-awarding bodies may impose overly stringent conditions on them. More specifically, some third party teaching institutions referred to a number of behaviours and practices that they considered hinder their ability to compete, including that some degree-awarding bodies:

- dictate the level of tuition fees that third party teaching institutions have to charge
- refuse to validate courses on the basis that these courses will compete with their own
- 'load' costs onto third party teaching institutions for unwanted services, so as to increase the overall cost of providing a degree, making these teaching institutions less competitive
- withdraw validation without sufficient notice to allow third party teaching organisations to find alternative partner institutions
- take an excessive amount of time to validate courses
- do not honour agreements relating to students at the third party teaching organisation progressing to further qualifications at the partner institution.

6.10 Regarding the first of these issues raised, despite stakeholder comments during meetings that degree-awarding bodies try to dictate the pricing of courses offered by third party institutions whose courses they validate, the OFT has not received any evidence that would amount to a compelling case of anti-competitive behaviour. The OFT considers that this type of behaviour would amount to a serious restriction of competition. As noted above, the OFT and its successor body - the CMA - considers allegations of anti-competitive behaviour

that it receives carefully, and encourages anyone with specific evidence of this type of behaviour taking place to come forward.¹⁰¹

6.11 The extent to which the other practices set out above have the potential to restrict competition appears to be less clear cut, and would require an in-depth assessment of the specific impacts of each. A key issue in assessing the impact of these types of behaviour is the extent to which third party teaching institutions are tied to a single validating partner. More specifically, it is important to understand whether third party teaching institutions:

- are able to partner with degree-awarding bodies outside their local area, and therefore the extent to which they are able to 'shop around' for validating partners
- face high switching costs once partnered with a validating partner that could result in the validating institution enjoying a position of market power with respect to third party teaching organisations
- face significant barriers to becoming degree-awarding bodies themselves, and therefore the extent to which these teaching institutions are dependent on partnering with a degree-awarding body.

6.12 Regarding these points, it has been brought to our attention that a number of third party teaching institutions partner with degree-awarding bodies outside their local area. This suggests that these teaching institutions may not be restricted to a small number of potential partners, and may be able to 'shop around', potentially reducing the extent to which degree-awarding bodies could behave in an anti-competitive manner. We have not received specific evidence relating to these other two points.

6.13 In addition, it is important to note that there may be justifiable reasons for these types of behaviour that do not involve any anti-competitive intent on the part of the degree-awarding bodies. As a result, any further assessment of these types of behaviour would need to

¹⁰¹ Any parties who suspect that a cartel is operating can notify the OFT's Cartels Hotline by telephoning 0800 085 1664 or emailing cartelshotline@oft.gsi.gov.uk. Any parties who suspect some other form of anti-competitive behaviour can notify the OFT by emailing enquiries@oft.gsi.gov.uk. After the 1 April 2014 the cartels email address becomes cartelshotline@cma.gsi.gov.uk (the Cartels Hotline will continue to be 0800 085 1664).

consider the potential benefits of these restrictions.¹⁰²

6.14 While stakeholders provided numerous examples of behaviour that they consider to be anti-competitive, they did not submit substantive evidence that suggests that these types of behaviour limit the extent to which third party teaching institutions are able to compete. Given this, and because there may be legitimate reasons why degree-awarding bodies may act in this manner, the OFT is not proposing to undertake further work on this issue at present, but remains open to receiving more substantive evidence of anti-competitive behaviour.

The potential tension between collaboration and competition law

6.15 Cooperation and collaboration between higher education institutions present significant opportunities to undertake a range of activities that can benefit students. For example, a wide range of benefits could arise from information sharing in the establishment of benchmarking data, academic partnerships, or sharing facilities and joint procurement. These types of collaboration could result in efficiencies and innovations that could benefit students. However, agreements between institutions that otherwise compete with each other can raise competition concerns in some cases.¹⁰³

6.16 Both EC and UK competition law make allowances for agreements that may have an anti-competitive effect, provided they deliver countervailing benefits to consumers that exceed any detriment from reduced competition. Since 2004, parties wishing to engage in cooperation and collaboration have been required to self-assess whether they are compliant with applicable competition law. In addition, UUK commissioned legal guidance on these issues in December 2012. Annexe C provides further detail on EC and UK competition law.

6.17 In the context of our engagement with stakeholders, several parties commented on what they perceived to be a risk that higher education

¹⁰² For example, degree-awarding bodies are responsible for the quality of courses provided by institutions whose qualifications they validate. In such circumstances, a degree-awarding body may be justified in taking actions it considers necessary to maintain high quality, and therefore protect its academic reputation.

¹⁰³ For more information, see 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', OJ [2011] C11/1. Cooperation is of a 'horizontal nature' if it takes place between actual or potential competitors.

institutions may choose not to pursue potentially beneficial collaboration as a result of unfounded fears of breaching competition law, potentially to the detriment of students. In order to ascertain the relevance and nature of these concerns, we engaged with stakeholders, including through two roundtables with senior university representatives (organised in conjunction with UUK).

6.18 Throughout our engagement, we offered stakeholders the opportunity to discuss these issues in further detail, with OFT representatives providing generic guidance on the economic and legal assessment of cooperation agreements and the potential tools that the OFT can use to clarify any outstanding concerns. We also encouraged stakeholders to provide specific examples of instances where such tensions might arise. However, to date, stakeholders have not provided specific examples that we consider would merit further specific guidance.¹⁰⁴

6.19 A substantive issue raised in responses to the Cfl was stakeholders' perceived tension between competition law and the BIS drive for publication of benchmarking (cost) data in order to enhance efficiencies in the sector.¹⁰⁵

6.20 As set out above, the extent to which this type of behaviour would raise a competition concern would depend on whether engaging in this type of benchmarking runs the risk of reducing the level of competition between institutions, and whether there are any benefits to consumers that exceed any detriment from reduced competition.

6.21 On this particular issue, there is scope for the CMA to engage with BIS, and other government departments where necessary, to ensure that competition considerations are embedded in government-promoted initiatives relating to the sector.

¹⁰⁴ In addition to informal engagement, the Short Form Opinion (SFO) is the main tool that the OFT can use to provide clarity on issues relating to prospective agreements between parties, and whether a certain type of agreement would likely be considered to breach competition law. The OFT did not receive any specific requests to issue an SFO during the Cfl. Furthermore, it is not clear that the issues raised by stakeholders relate to 'novel or unresolved questions', which is one of the OFT criteria for issuing an SFO. For further information see www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions

¹⁰⁵ Benchmarking is a form of comparative analysis to construct a 'standard measurement of effective performance' within a sector (see HESA (2010) 'Benchmarking to improve efficiency'. Available at: www.hesa.ac.uk/dox/benchmarking_to_improve_efficiency_nov2010.pdf). The process identifies efficiencies and potential cost savings; the effective use of which could bring considerable benefits to the sector.

6.22 Throughout the Cfl, it has become evident that some of the perceived tension between collaboration and competition may result from institutions' lack of familiarity with competition issues and the work and priorities of the competition authorities. There may be scope for the CMA to engage further with the sector to reiterate the main messages emerging from existing guidance documents, including under what circumstances cooperation may be considered anti-competitive.

6.23 In conclusion, we will continue to engage with the sector (and relevant government departments where necessary) to increase further their understanding of these issues, but we do not propose any specific follow up intervention at this stage.

The restriction imposed on applicants to the universities of Oxford and Cambridge

6.24 Prospective undergraduate students are not allowed to apply to courses at both the University of Oxford ('Oxford') and the University of Cambridge ('Cambridge') in any given application cycle. Recent articles in the press have referred to this rule as potentially anti-competitive,¹⁰⁶ and the issue was also raised by one stakeholder during the Cfl.

6.25 We considered the extent to which this rule could distort competition between the two universities to the detriment of students. In doing so, we need to consider whether it is likely to result in a net reduction of competition, and if so, whether it results in efficiencies that are passed on to consumers and that outweigh any detriment from reduced competition.

6.26 When considering the impact on competition, it is useful to consider competition taking place in two stages: pre-application (when applicants are choosing to which institutions they would like to apply), and post-application (once applicants have submitted their UCAS forms). This rule could have the effect of eliminating competition between Oxford and Cambridge in the post-application period, as

¹⁰⁶ See for instance 'Oxbridge applications rule 'could be challenged'', available at www.timeshighereducation.co.uk/news/oxbridge-applications-rule-could-be-challenged/2006511.article

applicants would have chosen between the two universities before making their applications.

6.27 In considering the impact on competition, the OFT considered the extent to which elimination of competition between Oxford and Cambridge in the post-application period would result in a risk that either institution could manipulate price, quality or choice, to the detriment of students. The OFT's assessment of the rule suggests that this is unlikely, for the following reasons:

- Competition in the pre-application period is likely to remain strong. Even if competition in the post-application period is affected, the two universities compete to attract prospective students in the pre-application period.¹⁰⁷ In addition, it is likely that the effect of eliminating competition in the post-application period could be to intensify competition between the two universities pre-application.
- Both universities still face competition in the post-application period from other higher education institutions, both in the UK and abroad. Prospective students can apply for up to five courses via UCAS. As such, Oxford and Cambridge candidates may still benefit from post-application competition between institutions, even if Oxford and Cambridge do not compete with each other during this period.
- It is not clear to what extent institutions are able to compete in the post-application period. This is because the main factors on which higher education institutions compete to attract students – course features, institutional facilities and tuition fees, for example – are generally set in the pre-application period. As such, potential student detriment caused by reduced post-application competition may be only negligible.

6.28 Moreover, even if the rule were to result in an overall negative net impact on competition, it might not be a concern if it results in efficiencies that exceed the detriment from any reduced competition, and if those efficiencies are passed on to students.

¹⁰⁷ University open days, which are a key driver of applicants' choices, tend to be before the deadline for applications. This suggests that there is likely to be strong competition in the pre-application period. See for example www.theguardian.com/education/2013/jul/02/university-open-days-dates-for-2013

6.29 In this case, Cambridge's submission to the Cfl set out that this rule enables it to interview a higher proportion of applicants than it would without the rule, which allows it to make a more in-depth assessment of each candidate, and not rely only on academic qualifications. This could result in better matching between students and courses, potentially to the benefit of both students and the university.

6.30 The OFT considers that under the current arrangements, any impact on competition is likely to be limited and there may be efficiency benefits. As a result, the OFT does not propose to pursue this issue further at present.

The restriction imposed on all applicants relating to the number of courses to which they can apply

6.31 Prospective students are limited to applying for a maximum of five courses in any given cycle when they apply to higher education institutions through UCAS. In 2008 UCAS reduced the number of choices applicants can make from six to five following advice from the then Department for Education and Skills in 2006, with the aim of encouraging students to make more focused applications, and making the process more efficient for institutions.¹⁰⁸

6.32 As part of the Cfl, the OFT considered whether restricting the number of choices that applicants can make when applying could harm competition between institutions, to the detriment of students. In considering the impact of this restriction, we considered whether it is likely to reduce competition between higher education institutions, and whether it may result in any countervailing benefits for students.

6.33 As with the rule limiting applicants to applying to only Oxford or Cambridge (discussed above), in considering the likely impact on competition, it is useful to consider competition taking place in two periods: pre-application and post-application. By limiting the number of

¹⁰⁸ These arguments are set out in the Department for Education and Skills (2005) consultation 'Improving the Higher Education Applications Process'. The initial consultation document is available at [www.education.gov.uk/consultations/downloadableDocs/Improving%20the%20HE%20Applications%20Process%20-%20summary%20paper%20\(PDF\).pdf](http://www.education.gov.uk/consultations/downloadableDocs/Improving%20the%20HE%20Applications%20Process%20-%20summary%20paper%20(PDF).pdf), and the summary of responses, which sets out the proposal to reduce the number of choices to five is available at <http://dera.ioe.ac.uk/6107/1/improving%20the%20he%20applications%20process%20-%20government%20response%20.pdf>.

courses for which a prospective student can apply to five, institutions may reduce the extent to which they have to compete with each other in the post-application period.

6.34 In considering whether the rule is likely to have a significant impact on competition, the OFT considered whether reduced competition in the post-application period is likely to result in prices above (and potentially quality or choice below) the level that would be observed absent this restriction. The OFT's assessment of the rule suggests that this is unlikely, for the following reasons:

- As highlighted in the previous section, while competition may be reduced in the post-application period, there is likely to be considerable competition in the pre-application period. Applicants are free to apply for any course offered across all UK higher education institutions, and institutions compete to attract students. In addition, it is possible that any reduction of competition in the post-application period could result in more intense competition pre-application.
- It is also unclear to what extent restricting applicants' choices to five courses would affect the level of competitive constraint that institutions exert on each other in the post-application period, relative to a situation where applicants could make more than five choices.¹⁰⁹ As discussed above, it is also not clear whether institutions are able to compete in the post-application period, as the main factors on which they compete to attract students tend to be set in the pre-application period. As a result, any student detriment caused by the dampening of post-application competition may be limited.
- The Clearing, Adjustment and UCAS Extra processes facilitated by UCAS offer prospective students the opportunity to submit additional applications beyond their initial five choices.¹¹⁰ These processes potentially limit any impact this restriction has on

¹⁰⁹ That is, the incremental impact on competition of additional choices is unclear.

¹¹⁰ Clearing is the process by which institutions fill any places they still have on their courses following exam results. Adjustment is the process for students who have met and exceeded the conditions of their firm choice, and wish to change to an alternative course. UCAS Extra is the process by which applicants who are not accepted to any of their five choices, or wish to decline all their offers, can add extra choices to their application.

competition in the post-application period.

6.35 Even if it reduces competition, there may be a valid argument for this type of restriction, if it results in a more efficient application process, to the benefit of students. In this case, since each additional choice that an applicant makes puts a cost on the institution, it may be efficient to restrict the number of choices that each applicant can make.

6.36 The OFT considers that this restriction may be unlikely to have a significant negative impact on the overall level of competitive constraint that institutions exert on each other. As a result, we are not proposing to pursue this issue further at present. However, any further restrictions to number of choices would require careful consideration of the costs of restricting choice, versus the benefits of a potentially more efficient application system.

7 THE REGULATORY ENVIRONMENT

The regulatory regime

7.1 Regulation, defined as a range of rule-based tools designed to influence behaviours and/or economic activity, provides a framework for markets to operate, for instance by providing certainty as to the rights and obligations of different parties in a transaction.¹¹¹ Regulation becomes particularly crucial when policy objectives require specific outcomes that may not materialise without some form of intervention, such as where market failures compromise the achievement of these outcomes.¹¹² A regulatory framework should create an environment in which choice and competition can drive beneficial outcomes to the extent possible, while recognising that further intervention may be needed to achieve these goals in some circumstances.

7.2 Regulation in the higher education sector can be a complement to market dynamics, supporting the achievement of a number of policy objectives. For example, regulation can help to protect students (especially in so far as there is uncertainty about what is on offer before places are accepted), protect the national and global reputation of the sector (which would be put at risk if there were not an effective system of establishing agreed minimum standards) and facilitate embedding fair access considerations into the decision-making of institutions.¹¹³

7.3 However, while regulation is necessary and can protect the interests of students, it is important to ensure that too much regulation or inappropriate regulation does not get in the way of fair competition by institutions for student applicants.¹¹⁴ Badly designed regulation can

¹¹¹ Regulation captures a wide range of actions, including from primary legislation to regulations established and/or administered by specialist sectoral regulators.

¹¹² See OFT1113, 'Government in Markets' for a detailed discussion of the role of regulation in markets. Available at: www.offt.gov.uk/shared_offt/business_leaflets/general/OFT1113.pdf;jsessionid=9C5007E724E9039629E1EC86300D1229

¹¹³ A detailed discussion of the case for regulation in the higher education sector, including on the views on the purposes of regulation appears in the 2013 report by the Higher Education Commission on 'Regulating Higher Education'. Available at: www.policyconnect.org.uk/hec/sites/site_hec/files/report/333/fieldreportdownload/hecommission-regulatinghighereducation.pdf

¹¹⁴ Although it is not the role of competition authorities to question the policy objectives established in the higher education sector, it falls within its advocacy role to advise government and regulators as to how these objectives can be best achieved in a competition-friendly manner.

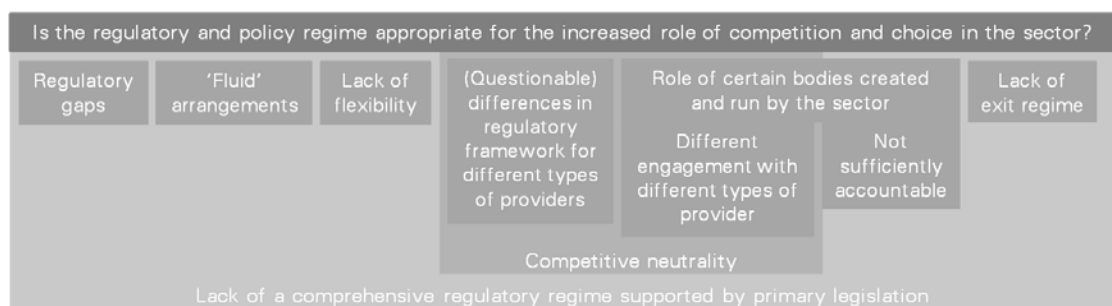
hinder competition, for example, by impacting on entry, expansion, and/or exit, or by creating a bias in favour of certain types of institutions

7.4 In addition, regulation can help to manage some of the risks associated with 'unrestrained' competition. For instance, in markets such as higher education, where students cannot know everything about what an institution will deliver in advance, effective regulation can play a vital role in preventing a potential 'race to the bottom' in standards which might harm not only students, but also the overall reputation of the sector.

7.5 The effectiveness of a regulatory framework is not only influenced by the scope of the framework itself, but also by its inherent features including how rules are complied with and enforced. As such, our analysis has adopted a holistic approach, considering whether the higher education regulatory framework is suitable to the new environment within which the sector operates.

7.6 Given the importance of regulation in achieving policy objectives and its potential impact on choice and competition, it is particularly concerning that respondents have, almost by consensus, clearly indicated that the regulatory framework for the higher education sector is overly complex, outmoded and unfit to support current and future policy ambitions. Notwithstanding the efforts of those involved (particularly HEFCE) to respond to the demands of a changing environment in the absence of suitable tools (most notably primary legislation), the evidence submitted to our Cfl highlights a number of interrelated concerns, highlighted in Figure 7.1 below.

Figure 7.1 Concerns about the regulatory landscape highlighted in the Cfl



7.7 The issues identified highlight a number of challenges in ensuring that the regulatory framework supports student choice as a mechanism to drive improvements in higher education.

7.8 Specifically, stakeholders have highlighted a number of issues, including the following:

- Significant concerns from different parties, including a range of providers and student representatives, as to whether the current framework favours effective competition between different types of institutions, and whether it sufficiently mitigates the risk of a 'race to the bottom' (in standards/quality) as competitive pressure intensifies.
- Competitive neutrality concerns or whether the regulatory system treats all higher education institutions in a fair and equitable manner, especially given the existence of a multi-tier system of regulations and the existence of sectoral bodies such as UCAS and QAA.
- Questions as to whether the corporate governance arrangements and accountability of bodies created by the sector (UCAS and QAA, for example) is appropriate in light of a more varied range of providers and the increased role of competition and choice. Specific concerns relate to the extent to which all types of institution are appropriately represented and provided for, and the accountability of these bodies.
- Lack of an adequate 'exit regime' that reconciles the protection of students in the event of a higher education institution abandoning an activity or closing down altogether, and the fact that exit needs to remain a possibility for competition to work in a sector.

Lack of a comprehensive and holistic regulatory regime supported by primary legislation

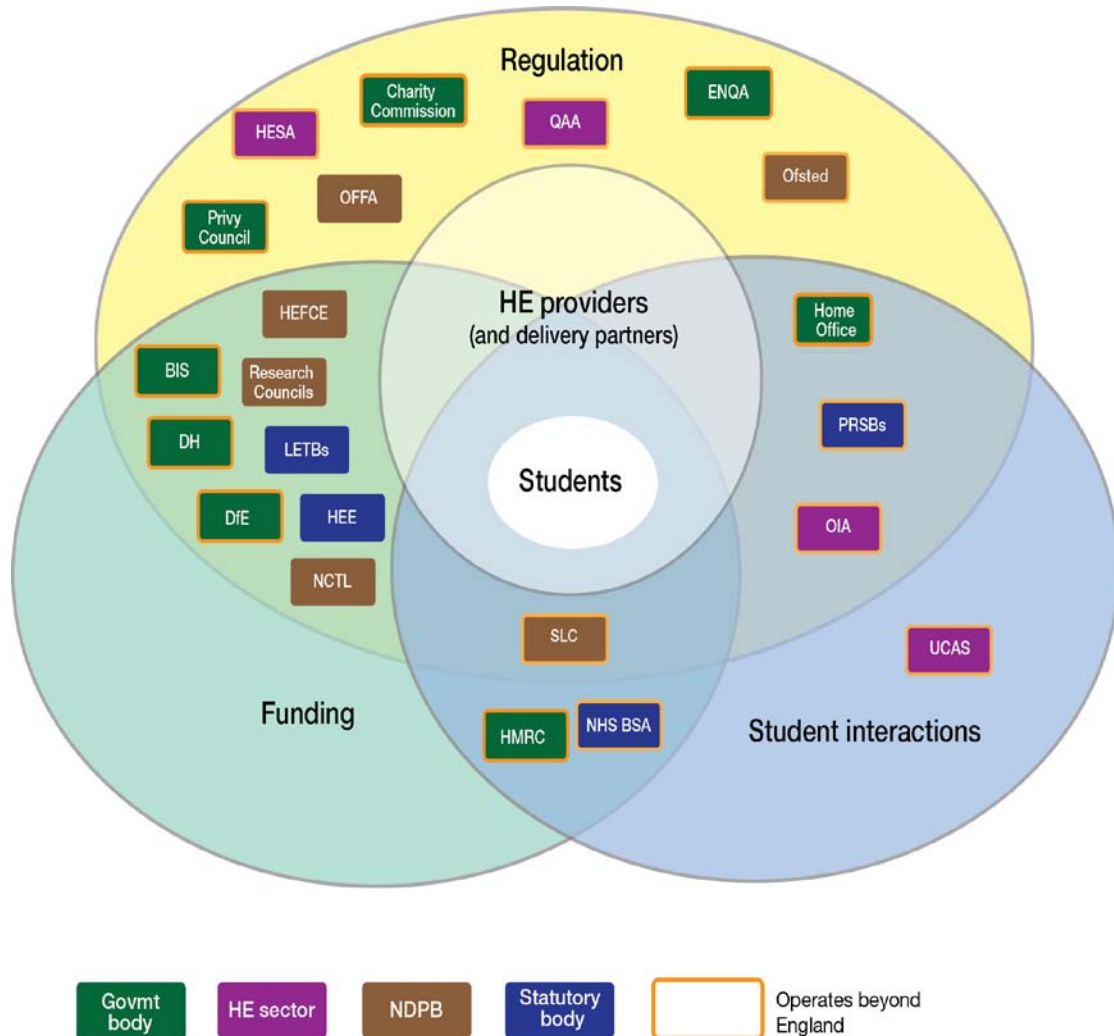
7.9 Respondents to our CfI have questioned the long term sustainability of the existing complex regulatory structure of the sector. In particular, concerns were raised about whether the combination of pre-reform regulation and ad hoc changes is fit to achieve the desired policy

objectives in a system in which funding crucially depends on success in recruiting students.

7.10 Stakeholders also highlighted the complexity of the regime, with different government departments, regulators, industry bodies and individual institutions responsible for, or influencing aspects of, regulation. The very fact that one of the first tasks of the Regulatory Partnership Group (RPG) has been to produce a seminal description of how the current higher education funding and regulatory arrangements relate to the changing broader English higher education sector (the 'Operating Framework') bears witness to the complexity of the arrangements.¹¹⁵ Figure 7.2 illustrates the complexity of the regulatory and funding landscape.

¹¹⁵ Regulatory Partnership Group (2013) 'Operating framework for higher education in England'. Available at: [www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/operatingframework/operating_framework_for HE 11072013 2.pdf](http://www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/operatingframework/operating_framework_for_HE_11072013_2.pdf)

Figure 7.2. Higher Education Regulatory and Funding landscape



Source: RPG¹¹⁶

7.11 Notwithstanding the best efforts of all parties involved, a number of respondents argued that the absence of primary legislation is a concern.¹¹⁷ They argue that the subsequent use of administrative rather than legislative means in addressing issues creates an absence of certainty and timeframes which might undermine the ability of providers appropriately to plan and invest. Crucially, this might impact not only the ability of institutions to compete at the international level,

¹¹⁶ Regulatory Partnership Group (2013) 'Operating framework for higher education in England'. Available at: www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/operatingframework/operating_framework_for_HE_11072013_2.pdf

¹¹⁷ HEPI (2014), 'Unfinished business?: Higher education legislation' states that 'The Government's position is that new primary legislation remains necessary but there is no time in the legislative calendar for it.' Available at: www.hepi.ac.uk/files/Unfinished%20Business.pdf

but also might have a differential impact depending on the kind of institution (raising competitive neutrality issues). This finding resonates with the message emerging from the analysis of the regulatory framework undertaken by other parties, including the RPG, HEFCE and the Higher Education Commission (HEC).¹¹⁸

7.12 The limits to the current regulatory framework manifest themselves in the emergence of ad hoc arrangements to manage policy aims, which have resulted in three specific concerns: the uncertainty of arrangements, a lack of flexibility, and scope for regulatory gaps and associated competitive neutrality concerns.

7.13 Since the 2011 reforms, and in the absence of primary legislation, the sector has experienced a considerable amount of regulatory uncertainty, with regulations being changed often with little or no notice. For instance, the timing and nature of the announcement in December 2013 further to relax and later eliminate Student Number Controls may have hindered the ability of higher education institutions to plan in advance their optimal strategies on courses, student numbers and investment.¹¹⁹

7.14 Higher education institutions responding to the Cfi have highlighted that, in their view, the absence of stable timelines, consistent policy and the lack of information on when further reforms might occur creates a high degree of uncertainty which undermines their ability appropriately to plan and invest. This, in turn, has the potential to impact the overall ability of the sector to tailor its offer to student demands, and its ability to compete at the international level.

7.15 APs consider that this uncertainty particularly impacts them in a negative manner, as it hinders their ability to attract investors to

¹¹⁸ The Regulatory Partnership Group has referred to 'the new regulatory regime (.....) means that the provisions of existing legislation are being pushed to the limit' (RPG Meeting minutes (20th March 2013). Available at: www.hefce.ac.uk/media/hefce/content/about/introduction/workinginpartnership/rpg/march13/note_march_2013.pdf). HEFCE highlighted, in its submission to the BIS Technical Consultation on 'A new, fit for purpose regulatory framework for the higher education sector' that legislation is needed in the long term in order to perform its role effectively. The Higher Education Commission, in its report on 'Regulating Higher Education', has called for Government to commit to legislation or, alternatively, to the main political parties to do so in their manifestos.

¹¹⁹ In its 2013 Autumn statement, the Chancellor announced the decision to expand student number controls by 30,000 students in 2014/15, and to abolish student number controls altogether for 2015. The announcement came after the admissions process had already begun and institutions would have taken key decisions for the upcoming year(s). In addition, at the time of writing, clarification had yet to be given as to APs as to the impact of this policy decision on their own student number controls.

support their programmes. As such, an additional concern in relation to the high level of regulatory uncertainty is the extent to which it creates an additional barrier to entry and/or expansion for APs.

7.16 A few respondents have highlighted in their responses to the Cfl that the current regulatory framework should be reviewed to provide greater flexibility to respond to the needs of students and employers. Such that the system will also, by becoming more innovative and varied, be likely to be more competitive internationally.

7.17 More specifically, an employer representative responding to the Cfl was of the opinion that the rigidity of parts of the current regime (including the funding and student support systems) is potentially hindering innovation. The respondent believed more could be done to encourage flexibility in creating courses that are more responsive to business needs and student preferences. For example, two year courses can be an attractive option for firms and students, but with potential fee incomes currently capped at £18,000 for a two-year course (as opposed to the cap of £27,000 for a three-year course), there is little financial incentive.

7.18 Similarly, the lack of flexibility within the student support system does not create incentive to provide courses for students who may wish to combine full and part time studying within a degree.¹²⁰

7.19 In addition to issues relating to the regulatory uncertainty and the lack of flexibility in the sector, respondents have highlighted concerns about regulatory gaps and the associated scope for a lack of competitive neutrality.

Competitive neutrality

7.20 'Competitive neutrality' is the principle that, as far as possible, there must be a 'level playing field' between the various types of providers within a market.¹²¹ If competitive neutrality is absent from a market it

¹²⁰ For instance, students wanting to transfer from full time to part time studying will face challenges in relation to their student loan arrangements.

¹²¹ For more information on competitive neutrality see OFT1242 'Competition in mixed markets: ensuring competitive neutrality'. Available at: www.ofg.gov.uk/shared_ofg/economic_research/ofg1242.pdf

can lead to bias which has the impact of allowing inefficient providers to remain in the market to the detriment of consumers. The 2011 White Paper recognised, but did not explore in any detail, the need to establish a level playing field amongst higher education institutions in so far as this was possible.

7.21 It should be noted that the OFT does not advocate that all types of institutions should be subject to the same regulations; as such the OFT does not pursue the removal of all regulatory differences but rather the establishment of a clear and consistent approach to regulation, with differences being objectively justified. In this respect, it was a common view from stakeholders that, while more can be done to level the playing field, a one size fits all approach to regulation is not appropriate for a diverse higher education sector increasingly characterised by a range of types of provider. The regulatory environment should treat participants equitably while remaining flexible and risk based.

7.22 Many respondents to the Cfl agree that the current regulatory system has its limits, and is characterised by some regulatory gaps. As the focus and leverage of regulation remains linked to historical funding arrangements that no longer exist, regulatory gaps are likely to emerge, especially in those areas where public funds are not present. For instance, the absence of a recognised and comprehensive exit regime has become a widespread concern.¹²²

7.23 Respondents have also highlighted that, even when the sector has sought to address the emerging regulatory gaps, the system that has emerged has created an imbalance in regulation for different types of higher education institution.

7.24 As highlighted in paragraph 7.21, stakeholders have reservations about the creation of a single regulatory framework for all institutions. Notwithstanding this, respondents to the Cfl, including regulators, expressed their concerns that regulatory differences between different types of providers in a range of dimensions seem unjustified and have the potential to create significant market imbalances, undermining effective competition and creating a two tiered system.

¹²² See subsection 'Exit regime' to follow.

7.25 While all types of institutions perceive other groups to have an unfair advantage, APs were particularly vociferous in their view that regulation is heavily biased towards supporting TPs.

7.26 During the course of the Cfl, stakeholders have raised a number of issues, including in relation to differences concerning:

- student protection and experience (OIA membership and participation)¹²³
- subscription and access to essential sector support facilities, such as claims that HEFCE offers various support services to TPs that APs are not offered, or that the QAA charge tiered rates are considerably more expensive to APs
- access to funding, with students at APs being able to access loans capped at £6,000, while the cap is at £9,000 for TPs
- immigration policy issues, including the ability of international students at APs to obtain work visas, work part-time or even take up internships
- financial sustainability requirements
- the conditions pertaining to obtaining (and renewing) degree awarding powers
- APs not being able to access widening participation funding.

7.27 During the course of the Cfl the OFT has not undertaken a comprehensive analysis of the justification or the impact of the regulations applied to various higher education institutions. However, the evidence received appears to suggest that further work is required in order to ensure that - at the very least, perception of - the lack of competitive neutrality is addressed. This resonates with the relevance given in a recent report by the HEC to the issue of competitive neutrality and the equal application of quality assurance approaches.¹²⁴

¹²³ See Chapter 4 for further detail.

¹²⁴ Higher Education Commission (2013) 'Regulating Higher Education: Protecting Students, Encouraging Innovation, Enhancing Excellence, Higher Education Commission'. Available at: www.policyconnect.org.uk/hec/sites/site_hec/files/report/333/fieldreportdownload/hecommission-regulatinghighereducation.pdf

The role of self regulatory bodies

7.28 Further to the competitive neutrality issues discussed above APs commented that many other factors continue to undermine effective competition and create the perception of a two-tier higher education system, most notably the role and workings of self-regulatory bodies.

7.29 The OFT acknowledges the benefits of sectors seeking to regulate themselves to deliver high standards for consumers, and considers that self-regulatory regimes are important alongside other tools. However self-regulation can also restrict competition whether intentionally or not. For instance, the cooperation between parties required for self-regulation may lead to anti-competitive practices, such as creating barriers to entry. Therefore, self-regulatory initiatives must be designed and maintained in such a way as to avoid anti-competitive consequences.¹²⁵

7.30 During the CfI, stakeholders have highlighted their concerns in relation to the higher education sector's continuing reliance on self-regulation, most notably in relation to corporate governance, and the incentives and accountability of sector bodies. Stakeholders have argued that with the move to a more competitive environment, the focus on self regulation and peer review might need to be re-assessed, and that governance and decision making processes could be functioning more effectively.

7.31 Concerns have been raised in relation to a number of bodies and processes, including those dealing with admissions and quality assurance.¹²⁶ Specific concerns relate to the extent to which all types of higher education institutions and users are appropriately represented and provided for at Board and decision making levels, and lack of clarity about accountability.

¹²⁵ This longstanding commitment to self-regulation is reflected in the OFT's policy statement, (2009) 'The role of self-regulation in the OFT's consumer protection work' (available at: www.of.gov.uk/shared_of/reports/consumer-policy/oft1115.pdf) and we support the development of competitive, efficient and innovative markets.

¹²⁶ Other concerns mention relate to the role and membership of groups that fulfill a range of functions in the sector, including in relation to the degree designation process, or the role of representative organisations in ensuring that members are held accountable.

7.32 In relation to the admissions process, it is important to note that an efficient and user-friendly application process should facilitate access and application to a full range of institutions (see Chapter 4 for further detail). The success of higher education institutions may be dependent on (the nature of) their participation in UCAS, and it is important therefore that UCAS, as the centralised admissions system, does not unduly restrict entry or distort competition in any manner.¹²⁷

7.33 UCAS has a tiered membership structure, with different rights and obligations depending on the type of membership.¹²⁸ Through the Cfi, stakeholders suggested that UCAS' members may have a conflict of interest in assessing applications for (different types of) membership by higher education institutions seeking to become new members. The concerns relate to the possibility that UCAS' members have the ability to restrict access to the UCAS platform through their control of membership, either by making it difficult for institutions to become members, or by restricting the access rights of certain membership groups.

7.34 We have not found evidence to suggest that UCAS is currently unduly restricting membership and hence access to the UCAS portal to higher education institutions.¹²⁹ However, and despite our repeated attempts to get a better understanding (including through engagement with UCAS) of the structure and criteria for access to different categories of UCAS membership, we have been unable to assess whether stakeholders' concerns are justified or not. Should they be justified, there is a risk that, as the sector becomes more diversified, UCAS' governance arrangements (particularly the rights of full members to vote on resolutions) will create barriers to some institutions being able to compete for students.

7.35 With that in mind, and in the context of (further) advocacy work to address the general concerns identified in this chapter in relation to the regulatory framework,¹³⁰ we propose that the CMA works with the

¹²⁷ UCAS subscribers are those higher education providers that have their courses listed on the UCAS application system.

¹²⁸ Under its membership arrangements only full members (as opposed to associated or partnership members) have the right to attend annual general meetings and vote on certain resolutions and call or propose resolutions at general meetings.

¹²⁹ The current UCAS membership consists of 373 institutions; of these 149 are universities, medical schools or university colleges, 180 are FE colleges and 44 are private universities and colleges

¹³⁰ It should be noted that this chapter deals with some of the concerns relating to UCAS, with others being analysed in further detail in Chapter 4, under the epigraph of 'the role of UCAS in supporting student choice'

sector to explore how the governance and accountability arrangements of UCAS can be improved so as to address the concerns identified during the Cfl.

7.36 In relation to quality assurance, stakeholders have expressed concerns as to whether the signalling of quality provided by the QAA is appropriate. Information on many variables widely considered relevant to the assessment of the value added provided by higher education institutions is not collected or is insufficiently signposted (for example, qualifications of teaching staff, engagement between teaching staff and students).¹³¹ Moreover, respondents considered the QAA to be too focused on process rather than outcome, and expressed concerns that even in those cases where performance below acceptable standards has been identified, no sanctions have been enforced.¹³²

7.37 More specifically, it has been argued that lack of external and independent accountability might be a significant QAA weakness when addressing issues that are relevant for the sector but might be challenging for some institutions. As such, the current system seems to favour the maintenance of a status quo characterised by 'peer review' and process-focused compliance that has yet to evolve in response to the more central role of student choice in the sector.

7.38 Similarly to UCAS, we propose that, the CMA works with the sector to explore how the accountability arrangements within the quality assurance regime can be enhanced so as to reflect the interests of the wider stakeholder community - most notably students - and the changing environment within which the sector operates.

Lack of an exit regime

7.39 Exit, in this context, is taken to mean the departure from the market of either an entire institution, or part of its activities, for example a department or a particular degree. Introducing strong competition to the sector will not be enough to prevent the social costs associated with exit, as there is a risk of students being left without any

¹³¹ See Chapter 4 for a further analysis of the factors driving quality in the higher education sector.

¹³² As exemplified by the fact that work by Which? has identified a number of institutions that fail to follow the QAA guidelines on contact hours. Which?/HEPI (2013) 'The student academic experience survey'. Available at: www.staticwhich.co.uk/documents/pdf/the-student-academic-experience-survey-319689.pdf

education provision (and in debt). Exit needs to remain a real possibility for competition to have the desired policy impact in this sector, however it is important to reconcile this with the effective management of the social costs associated with exit.¹³³

7.40 Within the current policy environment the chances of a higher education institution exiting the sector have increased, while the recent removal of Student Number Controls reduces the incentives of institutions to pick up students from those 'exiting' the sector.¹³⁴

7.41 The OFT had identified this as an area to explore in its Cfl, especially as regards to how exit regimes are designed in public markets matters. A well designed regime can support a 'virtuous' competitive cycle if it mitigates the risk of service disruption when courses or institutions close. A poorly designed one in this sector could severely blight students' long term prospects.

7.42 Respondents across the board (including regulators and student representative groups) have expressed strong concerns about the absence of a clear exit regime.

7.43 Although these concerns might be addressed within any future legislation, in the interim HEFCE is undertaking some work exploring the regulatory consequences for higher education institutions that no longer meet the requirements for designation. We advise the CMA, drawing on the OFT's experience on the design of market oversight in public markets, to work with HEFCE and other relevant parties on how best to reconcile the effective management of the social costs associated with exit and the fact that exit needs to remain a real possibility for competition to work in a sector.

¹³³ OFT1468 'Orderly Exit: Designing continuity regimes in public markets'. Available at: www.of.gov.uk/shared_of/public-markets/OFT1468.pdf

¹³⁴ Higher Education Commission (2013) 'Regulating Higher Education, Protecting Students, Encouraging Innovation, Enhancing Excellence'. Available at: www.policyconnect.org.uk/hec/sites/site_hec/files/report/333/fieldreportdownload/hecommission-regulatinghighereducation.pdf

Conclusions and recommendations

7.44 Our analysis has indicated that there is a need for substantive reform to the regulatory environment in order to make it better suited for a sector increasingly defined by choice and competition.

7.45 With that in mind, we think that there is scope for the CMA, working with and through stakeholders, to inform the design of the regulatory regime, providing recommendations as to the principles to abide by and how they can be best implemented in an effective and efficient manner in order to ensure competition and choice. This work should focus, amongst other issues, in addressing the concerns related to competitive neutrality, self-regulation and lack of exit regime identified in this report.

8 ISSUES THAT WARRANT FURTHER CONSIDERATION

- 8.1 The OFT's overall impression is that the English undergraduate higher education sector is working well for students. Levels of satisfaction are high, higher education institutions do appear to be competing for students (albeit more on the quality rather than the price of provision), and there are numerous sources of information to help students decide which courses to apply for.
- 8.2 However, this Cfl has identified scope for improvements which if implemented the OFT believe would further strengthen the sector. This section outlines what further work could be done by government, the sector and our successor body the CMA to address the issues identified in this report.

Enabling student choice

- 8.3 As outlined in Chapter 4, the Cfl revealed that the information provided to students can be improved. More specifically, stakeholders have expressed their concerns about the coverage, accuracy, and comprehensiveness of the information provided to students through government-endorsed websites and other similar sources. Getting a more rounded picture of the learning environment (including contact hours, class size and teaching approach) and employment prospects figured prominently amongst the concerns raised by stakeholders.
- 8.4 HEFCE is currently leading a review of information provision to prospective students.¹³⁵ We recommend the CMA shares the insights we have gathered with HEFCE in order to inform their on-going review.
- 8.5 There are also steps higher education institutions can take to ensure students are fully informed about their likely undergraduate experience. There is scope to follow best practice by making clear to prospective students any additional charges, options of financial support and terms and conditions in an easily accessible and prominent way. Ideally, such information could be made available to students when they are considering where to apply and when they are made an offer. We

¹³⁵ For more information about the review see: www.hefce.ac.uk/whatwedo/lt/publicinfo/review

advise the CMA to work with relevant sectoral bodies on their ongoing work in this area, including HEFCE and OIA, as well as higher education institutions, to address these issues and to help to ensure the way in which universities and third parties describe the university experience is useful and valid.

Ensuring higher education institutions treat students fairly

- 8.6 It is important that students are treated fairly by higher education institutions. Consumer protection legislation provides the legal framework through which to assess university practices to ensure that they are fair.
- 8.7 As outlined in Chapter 5, we have identified some practices students experience at university which appear to be at odds with the spirit of consumer protection legislation. These practices include fees increasing mid-way through students' courses, course content and structure changing without adequate notice or reason, and students incurring unexpected additional charges. We have not established the prevalence of these practices or reached a conclusion as to whether they are likely to breach consumer regulations, but consider that further work is necessary.
- 8.8 Therefore, the OFT recommends the CMA takes forward a compliance review to identify the prevalence of practices that have the potential to lead to student harm, establish whether they are likely to breach consumer protection legislation and/or do not represent best practice and, consider the most suitable tools to address any related concerns.
- 8.9 It is also important that students can access appropriate channels of redress when things go wrong. Despite significant improvements to the complaint and redress processes, students' awareness of redress processes could be improved and the speed with which institutions deal with complaints could be enhanced. Further, we encourage the OIA and QAA, together with BIS, to consider whether suitable tools are in place to address common complaints that arise across different institutions, thematic areas of concern, and to ensure all students can access appropriate channels of redress.

Competition between higher education institutions

8.10 If higher education institutions were to engage in anti-competitive practices (such as agreeing fee levels or limiting courses on offer), the potential benefits of competition, such as increased efficiency and innovation in response to student demands, will not be realised.

8.11 Through the Cfl, the OFT sought to give respondents the opportunity to come forward if they had evidence of anti-competitive practices. The intention was to consider whether such evidence suggested further action was required by the OFT or CMA. As outlined in Chapter 6, we have not received complaints or evidence that would grant, at this stage, launching a competition investigation.¹³⁶

8.12 In addition, we also analysed a number of practices that could potentially restrict competition. These include the restriction placed on applicants relating to the number of courses for which they can apply through UCAS, and the restriction imposed on potential applicants to the universities of Oxford and Cambridge. On balance, we consider that the impact on competition of these practices is, at best, ambiguous and need to be considered in the context of other potential benefits for students. With that in mind, we do not consider these as priority areas for further CMA work.

Regulatory concerns

8.13 Respondents have, almost unanimously, clearly indicated that the regulatory framework for the higher education sector is overly complex, outmoded and unfit to support current and future policy ambitions. Notwithstanding the efforts of those involved (particularly HEFCE) to respond to the demands of a changing environment in the absence of suitable tools (most notably primary legislation), the evidence submitted to our Cfl highlights a number of interrelated concerns.

¹³⁶ Nevertheless, the OFT and its successor body - the CMA - will take any allegations of behaviour which breaches of the Competition Act, such as agreements between Higher Education institutions to set fees or limit the range of courses on offer, extremely seriously. We encourage parties to provide any relevant information via 0800 085 1664 or email cartelshotline@oft.gsi.gov.uk

8.14 As outlined in Chapter 6, the regulatory issues and gaps that were raised by respondents include:

- significant concerns as to whether the current framework facilitates effective competition between different types of institution and sufficiently mitigates the risk of a 'race towards the bottom' (in standards/quality)
- whether the regulatory system treats all higher education institutions in a fair and equitable manner, especially given the existence of a multi-tier system of regulations and the existence of sectoral bodies such as UCAS and QAA
- whether the corporate governance arrangements and accountability of bodies created by the sector (for example UCAS, QAA) is appropriate
- concerns about the lack of an adequate 'exit regime' in the event of a higher education institution abandoning an activity (or closing down altogether).

8.15 With that in mind, the OFT think that there is scope for the CMA, working with and through stakeholders, to inform the design of the regulatory regime, providing recommendations as to the principles to abide by and how they can be best implemented in an effective and efficient manner in order to ensure competition and choice. Therefore, the OFT recommends that the CMA considers how to best take forward this work, aiming to address the concerns identified above.

ANNEXE A: COVERAGE OF QUALITY INDICATORS ON CHOICE TOOL WEBSITES

Indicator	UCAS	Unistat	Complete university guide	Which? university	Push	What Uni?
	Institution AND course specific	Institution AND course specific	Institution OR course specific	Institution AND course specific	Institution level only	Institution AND course specific
Number of institutions featured	379	406	155	287	138	409
Gibbs' quality indicators	Spending	No	No	Yes	No	No
	Staff to student ratio	No	No	Yes	No	No
	Quality of teaching staff	No	No	No	No	No
	Quality of students (entry requirements)	Yes	Yes	Yes	Yes	Yes
	Class size	No	No	No	No	No
	Teaching methods	No	Yes	No	Yes	No
	Research environment	No	No	Yes	No	No
	Level of intellectual challenge	No	Yes	No	Yes	No
	Assessment methods	No	Yes	No	Yes	No
	Extent and timing of feedback	No	Yes	No	Yes	No
	Student performance (degree classification)	No	Yes	Yes	Yes	Yes
	Student retention	No	Yes	Yes	Yes	Yes
	Percentage of graduates in employment/further study	No	Yes	Yes	Yes	Yes
	Percentage of graduates in related work	No	Yes	Yes	Yes	No
Other quality indicators	Additional/specific entry requirements	Yes	No	No	Yes	No
	A Level choices of previous/current students	No	No	No	Yes	No
	Fees	Yes	Yes	Yes	Yes	No
	Bursaries/scholarships	Yes	Yes	Yes	No	Yes
	Percentage of applicants receiving offers	No	No	Yes	Yes	Yes
	Student satisfaction	No	Yes	Yes	Yes	No
	Module information	No	No	No	Yes	No
	Average salary 6 months after graduation	No	Yes	Does not specify	Yes	No
	Average salary 40 months after graduation	No	Yes	Does not specify	No	No
	Student reviews	No	No	No	Yes	Yes
	Link to university website	Yes	Yes	Yes	Yes	Yes
Advertisements	Yes	No	Yes	Yes	Yes	

ANNEXE B: THE RELEVANT LEGAL FRAMEWORK TO ASSESS HIGHER EDUCATION INSTITUTIONS' PRACTICES

Unfair Terms in Consumer Contracts Regulations 1999

- B1 It is the OFT's view that a higher education institution's rules and regulations that apply to the relationship between the institution and undergraduate students are likely to form part of a contract for the provision of educational services. The terms set out in the rules and regulations are likely to be subject to the test of fairness under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).
- B2 This section of the report provides an introduction to the consumer protection legislation and should help higher education institutions start to assess whether their practices are compliant with the law. It should not be considered a complete list of the law that applies to the sector or as a guide to compliance with the law.
- B3 The assessment of fairness is carried out having regard to the nature of the goods or services to be supplied, all the circumstances attending the conclusion of the contract and the contract as a whole. In assessing fairness, institutions should consider how a term could potentially be used in practice, as well as how it is actually relied on.
- B4 The UTCCRs protect consumers against unfair standard terms in contracts with sellers or suppliers of goods and services. Terms should be expressed in plain, intelligible language (Regulation 7) and should not, contrary to the requirement of 'good faith', cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Regulation 5(1)).
- B5 The requirement of 'good faith' embodies a general 'principle of fair and open dealing'.¹³⁷ It means that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps and that terms that might disadvantage consumers should be given appropriate prominence.

¹³⁷ Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52.

- B6 However, transparency of terms is not enough on its own, as 'good faith' relates to the substance of terms as well. Providers should not to take advantage of consumers' weaker bargaining position including his or her needs, lack of resource, lack of experience or unfamiliarity with the subject matter of the contract.
- B7 Schedule 2 to the UTCCRs contains an indicative and non exhaustive list of terms that may be unfair. All of the potentially unfair terms in Schedule 2 have the aim or effect of reducing the consumer's rights under the ordinary rules of contract or the general law. Broadly, they either:
- limit the rights of consumers and stop them making certain legal claims against the supplier, which they could otherwise have made or
 - give the business rights against the supplier, which it would not otherwise have had.
- B8 When assessing a term for unfairness, the OFT's considerations normally include
- how a term could be used - it may be considered unfair if it could be capable of causing detriment to consumers, even if it is not at present being used unfairly in practice
 - whether the term changes the normal position seen by the law as striking a fair balance
 - whether a term is weighted in favour of the business
 - all other terms of the contract
 - the nature of the goods or services for which the contract was concluded
 - any relevant circumstances when the contract was concluded.
- B9 A term is open to challenge if it is drafted so widely that it could cause consumer detriment. Where a term is found by a court to be unfair, it will not be binding on the consumer. Please refer to the OFT's

guidance on unfair terms for further discussion in relation to the UTCCRs.¹³⁸

Consumer Protection from Unfair Trading Regulations 2008

- B10 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibits unfair commercial practices which distort consumers' transactional decisions. Broadly speaking, the CPRs require firms not to treat consumers unfairly, and prohibit misleading or aggressive commercial practices, where these are likely to have an impact on a consumer's transactional decision, as well as setting out some practices that are considered unfair in all circumstances.
- B11 The concept of a 'transactional decision' covers a wide range of decisions that have been, or may be, taken by consumers in relation to products or services. It is wide in chronological scope, covering decisions taken before, during and after a contract is formed.
- B12 Under Regulation 5 of the CPRs, a commercial practice is a misleading action if it contains certain false information (including about the parties' commitments and rights), or if its overall presentation is misleading, and the consumer takes, or is likely to take, a transactional decision he would not have otherwise taken as a result (Regulation 5(2)).
- B13 Under Regulation 6 of the CPRs, a commercial practice is a misleading omission if it omits or hides material information, or provides it in an unclear, unintelligible, ambiguous manner and the consumer takes, or is likely to take, a transactional decision he would not have otherwise taken as a result (Regulation 6(1)).
- B14 Under Regulation 7, the CPRs also prohibit aggressive commercial practices. A commercial practice is aggressive if in its factual context it is likely to significantly impair the consumer's freedom of choice or conduct in relation to a product or service, through '... the use of harassment, coercion or undue influence'. The effects of the practice

¹³⁸ OFT311

'Unfair Terms Guidance'. Available at: www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/oft311

must be to cause or be likely to cause the consumer to take a transactional decision he would not otherwise have taken.

B15 In assessing whether a commercial practice uses harassment, coercion or undue influence, relevant factors include the timing and nature of the practice (Regulation 7(2)(a)) and '... any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product' (Regulation 7(2)(c)) and 'any threat to take action which cannot legally be taken' (Regulation 7(2)(e)). The CPRs specifically set out that 'undue influence' means '... exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision' (Regulation 7(3)(b)).

B16 Breach of the CPRs may be a criminal offence and may also be enforced by way of civil enforcement.¹³⁹

B17 In relation to the potential breaches of the UTCCRs [UCTA] and the CPRs set out above, where there is harm to the collective interests of consumers, enforcement action may be taken by the OFT (and the OFT's successor from April 2014, the CMA), Trading Standards Services and other enforcers under Part 8 of the Enterprise Act 2002. An enforcement order can be sought to stop unfair commercial practice being used, or a potentially unfair or unreasonable term being relied on and included in contracts.¹⁴⁰

Other Relevant Legislation

B18 Other legislation is relevant to the relationship between higher education institutions and students that ought to be borne in mind by institutions when considering their and their students' rights and obligations. For example, consideration should be given to the Supply of Goods and Services Act 1982, the Unfair Contract Terms Act

¹³⁹ OFT1008 'Consumer Protection from Unfair Trading'. Available at: www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

¹⁴⁰ OFT512 'Enforcement of consumer protection legislation'. Available at: www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf

1977, the Data Protection Act 1998 and the Human Rights Act 1998, as well as to other applicable laws.

B19 It is not within the scope of this report to consider all relevant legislation or its application to the sector in detail. However, the OFT published a report entitled 'Universities' Terms and Conditions'¹⁴¹ in February 2014 that considers the application of consumer protection legislation and other relevant laws in relation to certain terms in university contracts (in particular terms that prevent students from graduating if they owe monies to the institution which relate to non-tuition fee debts). The report may be helpful regarding the application of certain legislation that is likely to be relevant to institutions operating in the higher education sector. Neither report can be a substitute for independent legal advice on these matters.

¹⁴¹ OFT1522 'Universities' Terms and Conditions'. Available at: www.offt.gov.uk/shared_offt/consumer-enforcement/OFT1522.pdf

ANNEXE C: THE RELEVANT LEGAL FRAMEWORK TO ASSESS ANTI-COMPETITIVE BEHAVIOUR

Agreements - legal background

- C1 Since 2004, parties concerned about breaching competition law have been required to self-assess whether their agreements comply with applicable UK and EU competition law, including laws preventing anti-competitive agreements.
- C2 Section 2 of the Competition Act 1998 (CA98) prohibits agreements or concerted practices which have as their object or effect an appreciable¹⁴² prevention, restriction or distortion of competition within the UK (or a part of it) and may affect trade within the UK (or a part of it), unless they fall within an excluded category¹⁴³ or are exempt in accordance with section 9 of the CA98. The prohibition in section 2 of the CA98 is referred to as 'the Chapter I prohibition'. Any agreement which falls within the Chapter I prohibition and is not exempt is void and unenforceable.¹⁴⁴
- C3 The European equivalent of the Chapter I prohibition is Article 101 of the Treaty on the Functioning of the European Union (TFEU), with exemptions possible in accordance with Article 101(3) of the TFEU. When the OFT applies national competition law to an agreement or concerted practice that has the potential to affect trade between EU Member States, it is required also to apply Article 101 of the TFEU to that agreement or concerted practice.¹⁴⁵
- C4 Under section 60 of the CA98, when determining a question arising under Part 1 of the CA98 – which includes the Chapter I prohibition – the OFT must ensure that (having regard to any relevant differences between the provisions concerned) there is no inconsistency with the

¹⁴² As to the requirement for appreciability, see OFT401 'Agreements and concerted practices' at paragraphs 2.15 to 2.21. Available at: www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of401.pdf

¹⁴³ Section 3 of the CA98 provides that the Chapter I prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedules 1-3 to the CA98.

¹⁴⁴ Section 2(4), CA98.

¹⁴⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L1/4, Article 3.

principles laid down by the TFEU and the European Court¹⁴⁶ and any relevant decision of the European Court. It must also have regard to any relevant decision or statement of the European Commission.

- C5 For any competition law analysis of an agreement between relevant parties, the OFT would consider it appropriate to have regard to the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU¹⁴⁷ ('De Minimis Notice'), Commission Notice Guidelines on the application of Article 101(3) of the Treaty¹⁴⁸ ('Article 101(3) Notice') and Commission Notice: Guidelines on the applicability of Article 101 of the TFEU to horizontal-cooperation agreements (EU Horizontal Guidelines).¹⁴⁹
- C6 In addition, the assessment of an agreement between parties represents a restriction of competition by object or effect contrary to the Chapter I prohibition (and/or Article 101(1) of the TFEU) is only one side of the analysis in this area. The other side, possible exemption under section 9 of the CA98 (and/or Article 101(3) of the TFEU), relates to the assessment of the pro-competitive effects of restrictive agreements.
- C7 The European Commission may adopt block exemption regulations so that particular categories of agreement which it considers satisfy the conditions in Article 101(3) are not prohibited under Article 101 ('Block Exemption Regulations'). Where an agreement is covered by a Block Exemption Regulation the parties to the agreement are relieved of the burden of showing that their agreement satisfies the conditions in Article 101(3) and must only demonstrate that the agreement is block exempted.

¹⁴⁶ The European Court comprises the Court of Justice and the General Court (previously the Court of First Instance).

¹⁴⁷ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) OJ [2001] C368/13.

¹⁴⁸ Guidelines on the application of Article 81(3) of the Treaty OJ [2004] C101/97.

¹⁴⁹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ [2011] C11/1. Co-operation is of a 'horizontal nature' if it takes place between actual or potential competitors.

C8 Even if, in an individual case, no block exemption regulations apply and a restriction of competition by object has been proven, an individual exemption under section 9 of the CA98 (and/or Article 101(3) of the TFEU) can be invoked as a defence. Four cumulative conditions (the 'exemption criteria') must be met for such an exemption to apply. The party claiming such an exemption bears the burden of proof for substantiating, with specific evidence, that the exemption criteria are met.¹⁵⁰

Abuse of a dominant position - legal background

C9 Since 2004, parties have been required to self-assess whether their agreements comply with applicable UK and EU competition law, including laws preventing abuses of a dominant position.

C10 Section 18(1) of the CA98 prohibits, in certain circumstances, conduct by one or more parties which amounts to an abuse of a dominant position, unless it falls within an excluded category.¹⁵¹ The prohibition in section 18(1) of the CA98 is referred to as 'the Chapter II prohibition'. Conduct which amounts to the abuse of a dominant position is prohibited and the parties involved may be subject to a financial penalty and/or to directions appropriate to bring the infringement to an end.

C11 The European equivalent of the Chapter II prohibition is Article 102 of the TFEU. When the OFT applies national competition law to conduct amounting to an abuse of a dominant position which has the potential to affect trade between EU Member States, it is required also to apply Article 102 of the TFEU to that conduct.¹⁵²

C12 Under section 60 of the CA98, when determining a question arising under Part 1 of the CA98 – which includes the Chapter II prohibition – the OFT must ensure that (having regard to any relevant differences between the provisions concerned) there is no inconsistency with the

¹⁵⁰ For further guidance, see for example OFT401 'Agreements and concerted practices.' Available at: www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/offt401.pdf

¹⁵¹ Section 19 of the CA98 provides that the Chapter II prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedule 1 or Schedule 3 to the CA98.

¹⁵² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L1/4, Article 3.

principles laid down by the TFEU and the European Court¹⁵³ and any relevant decision of the European Court. It must also have regard to any relevant decision or statement of the European Commission.

C13 Unlike the Chapter I prohibition or Article 101 of the TFEU, there are no block or parallel exemptions from the Chapter II prohibition or Article 102 of the TFEU. In other words, neither the CA98 nor the TFEU provides that an abuse can be exempted because it produces benefits. However, conduct may not be regarded as an abuse, even if it restricts competition, where there is an objective justification for the conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the customer. However, it will still be necessary for a dominant party to show that its conduct is proportionate.¹⁵⁴

¹⁵³ The European Court comprises the Court of Justice and the General Court (previously the Court of First Instance).

¹⁵⁴ For further guidance, see for example OFT402 'Abuse of a dominant position'. Available at: www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft402.pdf