

Universities' Terms and Conditions

An OFT report

February 2014

OFT1522

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1 EXECUTIVE SUMMARY

- 1.1 In July 2013 the Office of Fair Trading ('the OFT') opened an investigation under the Enterprise Act 2002 to consider whether there are problems with the terms and practices used by some universities to prevent students from graduating or enrolling onto the next academic year or using university facilities if they owe monies to the university which relate to non-tuition fee debts, or impose wide ranging sanctions if they engage in conduct (unrelated to academic performance) of which the university disapproves.
- 1.2 The investigation was launched to establish whether there were problems on an institutional level or across the sector following a complaint from the National Union of Students ('NUS') about the terms used by some universities. The investigation took place against a background of previous third party guidance that the use of academic sanctions in relation to non-tuition fee debts may be problematic¹ and previous OFT enforcement action regarding the use of similar contract terms in the higher education sector. As these issues have been raised a number of times and the concerns remain a live issue, we considered there was a need to investigate current terms and practices and to set out the OFT's views on the legal position and provide clarity to the higher education sector, and to students, about the risks of continuing to use such terms and practices.
- 1.3 The OFT wanted to understand if the relevant terms and practices were currently being used and, if so, to understand the effect on students, the reasons why universities were using them, and the possible impact if they did not or were unable to use them.
- 1.4 We have engaged extensively with stakeholders including university and student representatives throughout the investigation and have carefully considered all views received in coming to our conclusions. This report sets out our findings from the investigation, our views on

¹ In 2005 the Active Risk Management in Education (ARMED) consortium produced a guide on Student Debt discussing how universities should deal with students that owe them money. See Chapter 4 for further details.

the terms and practices, and proposed next steps to address the identified issues.

- 1.5 Universities receive very substantial sums of money in tuition fees (much of it usually paid by students, often by way of loans), in order to provide a tertiary education service to students.²
- 1.6 Generally undergraduate students can be considered vulnerable and in a relatively weak position compared to the university. Some are likely to have limited experience of contracts, and contractual obligations are unlikely to be at the forefront of their minds at a time when they are seeking to enrol at university. Preventing graduation or further enrolment as a result of debts or conduct of a secondary or ancillary nature may have a significant impact, both on students' ability to pay any legitimate debts, and on their future employment prospects. In general whatever the age of the student, the nature of studying full or part time is likely to put pressure on them financially.

Our findings

Sanctions relating to student conduct

- 1.7 We were concerned that a number of universities included provision in their terms and conditions to prevent students from enrolling onto the next academic year or using university facilities (such as internet or library access, or access to tuition) if they engage in conduct of which the university disapproves. In particular, we were concerned that services, which students may be said to be paying for, may be withheld from students under the auspices of disciplinary action, without due process, or when it is unfair to withhold the service in any event.
- 1.8 We consider that any rules about student conduct, and the possible consequences for not following such rules, should be clearly set out in a university's terms and conditions, and flagged to students up front.

² We note that income from tuition fees is not only used for teaching but to deliver a wider range of features of university life for example, investment in facilities. Universities UK publication, 'Where students fees go?': www.universitiesuk.ac.uk/highereducation/Documents/2013/WhereStudentFeesGo.pdf

Such rules should not impose surprising or onerous restrictions on what would otherwise be the student's legal rights.³ If there is an allegation that the student has broken the university's rules, the student should be notified of the details of the allegation, and have an opportunity to present their side of the matter, before the sanction is invoked. If the sanction is applied, there should be a right of appeal to an independent decision maker.

- 1.9 Having looked into this point, we have found that most UK universities whose terms and conditions we assessed⁴ have defined disciplinary procedures set out in their rules and regulations that provide for involvement of students in a disciplinary matter and allow for decisions to be challenged. As long as these are followed, and provided that the sanctions used are appropriate and reasonable in the circumstances, we do not currently consider there is a need to be concerned. This general conclusion is based on the evidence available to us at this time, which we have reviewed. **None of these types of terms used by any university should be seen as approved by the OFT for general use.**

- 1.10 The OFT published a note on its website clarifying its views on this issue in January 2014⁵ which can be found in Annexe A. The report therefore deals with the use of academic sanctions to enforce non-tuition fee debts.

Academic sanctions relating to student debt

- 1.11 Of the terms and conditions we assessed, we have found that a significant majority of UK universities, approximately 75 per cent, include provision in their terms and conditions to use 'academic sanctions' that have a direct impact on a student's academic progress or attainment when they owe any monies to the university, including charges for ancillary services (such as accommodation and childcare). 'Academic sanctions' include preventing graduation, academic progression, enrolling for the next year of study, registration for exams, withholding a student's academic results or any other

³ For example, universities should exercise caution before seeking to restrict students' freedom of expression or association.

⁴ We reviewed 115 universities' terms and conditions. We understand that in total, there are more than 130 universities across the UK.

⁵ www.offt.gov.uk/shared_offt/consumer-enforcement/UTC-conduct-sanctions.pdf

academic processes, or withholding academic services like tuition or access to university facilities that are critical to study.

1.12 Such terms generally appear to be found in a university's overarching rules and regulations. We have seen that the drafting of such terms varies widely by institution but that the results are the same: progression and/or graduation can be withheld for non-payment of ancillary services. We have also identified that the application of these sanctions varies widely by institution.

1.13 We have concluded that use of and reliance upon contract terms that allow the university to withhold graduation or progression or otherwise to exclude students from tuition for non-payment of ancillary services, in a blanket fashion and regardless of the circumstances, is open to challenge as potentially unfair under the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCRs') and/or may be unreasonable under the Unfair Contract Terms Act 1977 ('UCTA'). We also consider that practices around the use of such terms may constitute unfair commercial practices under the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs') (see paragraphs 2.9 to 2.10 below for further detail). We set out our findings more fully in chapters 5 and 6.

1.14 The use of such terms appears to be a longstanding practice amongst much of the sector, and several reasons have been put forward to justify this. These reasons are essentially that the sanction acts as a backstop, when ordinary requests for payment have not been successful, and is a cost effective means of ensuring legitimate debts are paid. This is said to benefit the whole cohort of students in keeping costs down, and reducing the need for larger up front payments. It is also said to reduce the need for earlier intervention, which it is feared could impact the pastoral relationship universities have with their students.

1.15 While we understand these points, we have identified that not all universities have terms and conditions that provide for the use of academic sanctions in cases of student debt. In the region of a quarter (25 per cent) of UK universities that we looked at appear to manage student debts effectively without the provision for using academic

sanctions, for example, by intervening earlier to prevent students from accruing high levels of debt, by withholding services of the same type until the outstanding amounts have been paid or by using reasonable and appropriate debt collection methods. Following our analysis of the information provided by a number of these institutions, we do not consider that the use of sanctions other than academic sanctions needs necessarily to impact negatively on the pastoral relationship between university and student or to lead to higher costs for students. Refraining from using academic sanctions is also in line with previous guidance to and intervention in the higher education sector.

Next steps

1.16 We have assessed that consumer protection legislation is applicable and that the terms and practices considered in the investigation may be open to challenge as potentially unfair and/or otherwise unlawful. The OFT and other enforcers have powers to stop universities from using unfair terms in contracts with their students. In chapter 6, we set out the factors that are relevant to our views on the fairness of these terms and practices and of the law and in chapter 7, we set out our proposed next steps and recommendations for the sector.

1.17 We recommend that universities review their rules and regulations, other terms and conditions, and practices in light of the OFT's views outlined in the report, and make amendments where necessary. We would expect universities to refrain from using unfair terms and practices, and from misleading students about either the university or student's legal rights.⁶

1.18 Universities should note that if a term is unfair then it is not enforceable against students. Students may seek to rely upon the unfair terms legislation in legal proceedings they bring themselves. Further, it is likely to be misleading to give the impression that the university will withhold a degree or examination results, if the student actually has a legal entitlement to receive or to see them.

⁶ For example, these rights include a student's legal right to obtain information under the Data Protection Act 1998 and the extent of the university's rights to rely on the terms of its rules and regulations.

- 1.19 Our objective in publishing the report is to raise awareness of and encourage better compliance with the law.
- 1.20 It is a matter for individual universities how they manage debts that their students owe in compliance with the law. But we consider that universities may be able to reduce the risk of legal challenge by reviewing their terms and conditions and practices and amending them, if necessary, to ensure terms and practices considered by the OFT to be potentially unfair are not being used. Ultimately the final decision on whether there has been a contravention of the consumer protection legislation referred to in this report rests with the courts.
- 1.21 We will be writing directly to all universities in the UK to bring to their attention the report and our recommendation to review and, where appropriate, amend their terms and conditions and practices. We will also continue to liaise with sector representatives such as Universities UK ('UUK') about how they can support and encourage increased awareness and compliance with the law amongst their members.
- 1.22 As well as unfair terms being unenforceable against students, universities that continue to use the terms and engage in the practices we are concerned about may be subject to enforcement action by a number of agencies, as set out further in chapter 5.
- 1.23 Finally, the findings from this investigation are being fed into the OFT's call for information on the provision of undergraduate higher education in England⁷ and will be used to inform the OFT's understanding of how the higher education ('HE') sector is functioning.

Thank you

- 1.24 We would like to thank all of those who have contributed to this investigation.

⁷ www.offt.gov.uk/OFTwork/markets-work/othermarketswork/higher-education-cfi/

2 WHY LAUNCH AN INVESTIGATION?

- 2.1 In July 2013 the OFT opened an investigation under the Enterprise Act 2002 to consider whether there are problems with the terms and conditions used by some universities to prevent students from graduating or enrolling onto the next academic year or using university facilities if they owe monies to the university which relate to non-tuition fee debts, or imposing wide ranging sanctions if they engage in conduct (unrelated to academic performance) of which the university disapproves.
- 2.2 This investigation was launched after the OFT was approached by the NUS with concerns that some students were being prevented from graduating or re-enrolling when they owed non-tuition fee debts to the university.
- 2.3 The investigation considered whether the contract terms and/or practices breached consumer protection legislation including:
- the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCRs')
 - the Unfair Contract Terms Act 1977 ('UCTA')
 - the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs').

As important contextual background, we also considered the application of the Data Protection Act 1998 ('the DPA'), English contract law and the European Convention on Human Rights ('ECHR') and the Human Rights Act 1998 ('HRA').

- 2.4 We have considered the effect of such terms and practices on students, how and why they are used, and the implications for the sector.

What is the scope of this report?

- 2.5 Our investigation related to the provision of university/tertiary (undergraduate) education only. It did not cover other Higher Education or Further Education institutions or post-graduate courses such as PhDs, Masters etc. As these institutions and courses are outside the scope of this report, on this basis alone, it cannot be assumed that if similar terms and/or practices are used by such institutions and/or courses, the concerns which we express in this report have no relevance.
- 2.6 Contract terms relating to non-payment of tuition fees did not form part of the OFT's investigation. The fact that tuition fees were outside the scope of the investigation, and therefore this report, should not be taken as an indication that the OFT considers that terms providing for the university to withhold enrolment or graduation for non-payment of tuition fees, regardless of the circumstances, are fair.

Who is this report aimed at?

- 2.7 This report is aimed at universities providing tertiary education, students and their representatives. However, we hope that this report will also be of interest and use to other educational institutions, as well as providers of paid for secondary education, who may find our reasoning helpful in assessing whether their terms and practices are fair.
- 2.8 While we appreciate that the current situation regarding tuition fees and contract law varies between the devolved administrations within the UK, the legislation we have considered during our investigation is applicable throughout the whole of the UK. This report is therefore of interest to all relevant institutions within the UK.

What is the purpose of this report?

- 2.9 In light of previous OFT enforcement action in the higher education sector, and third party guidance that the use of academic sanctions may be problematic, this report sets out the OFT's views on these

terms and practices and sets out factors that could be relevant in considering whether they may be unfair and/or unreasonable. Its purpose is to raise awareness of consumer protection law, with the aim of achieving improved compliance. Our views are not binding on the courts or other enforcers and whether there has been a breach or contravention by a particular university of the consumer protection provisions (namely the UTCCRs, CPRs and UCTA) will depend upon all the factual circumstances of the particular case.

2.10 While the final decision on whether a term or practice is unfair (or unreasonable in the case of a contract term under UCTA) rests with the courts, we consider that universities can greatly reduce the risk of a legal challenge by reviewing their rules and regulations and other terms and conditions to ensure that they are not using terms or practices that have the potential for unfairness. This report cannot be a substitute for independent legal advice as to whether a court would consider a particular term or practice to be fair or unfair.

What we have done

2.11 The OFT carried out initial research into the allegations made by the NUS and found that it was common for universities to include provision in their rules and regulations to apply academic sanctions for ancillary debts. It was therefore decided that a formal investigation should be launched.

2.12 In conducting the investigation, we:

- wrote to 124 universities in the UK informing them of our investigation and asking them to provide us with a copy of their terms and conditions. One hundred and fifteen universities supplied the OFT with a copy of their rules and regulations or other terms and conditions which we analysed
- sought and analysed further information from a sample of universities that we identified as using academic sanctions on how their terms may be applied in practice. We also sought further information from a sample of universities that we identified were

not using academic sanctions in order to assess how alternative practices may operate⁸

- analysed complaints and case studies received directly from students and/or their representatives to assess the impact of the academic sanctions
- engaged with a wide variety of stakeholders, including individual universities, the NUS, the National Association of Student Money Advisers, UUK, the Office of the Independent Adjudicator ('OIA') and other Government departments such as the Department for Business, Innovation and Skills ('BIS') and the Information Commissioner's Office ('ICO'). This included corresponding and meeting with stakeholders, holding roundtable discussions, and asking for examples and evidence of their views. We also presented our initial findings at meetings with sector representatives - UUK, AMOSSHE: The Student Services Organisation, the Association of Heads of University Administration, the Association of University Legal Practitioners, the Academic Registrars Council, and the NUS.

Call for information on the provision of HE in England

2.13 In October 2013 the OFT issued a call for information on the higher education sector (undergraduate) in England which amongst other things asked for information on the student experience. The call for information is separate from this investigation; however, the findings are being fed into the call for information and will contribute to the OFT's understanding of how the HE sector is functioning.

⁸ Samples selected by the OFT to include the different categories of universities and to ensure UK-wide coverage.

3 WHAT WE HAVE FOUND?

Context

- 3.1 Annually, there are approximately 1.3 million undergraduate admissions within the UK and approximately 390,000 graduating students.⁹ Since the recent reforms in the sector, universities may charge tuition fees of up to £9,000 per year for undergraduate courses for UK and European Economic Area students¹⁰ while, with regard to student accommodation provided by an educational institution, the average annual cost of a basic room with an average contract length is now £3,980.¹¹
- 3.2 In the course of our investigation we have reviewed the terms and conditions of the vast majority of UK universities to identify whether:
- these include provision to use academic sanctions for ancillary debts, and
 - there are potential problems on an institutional level or across the sector.
- 3.3 The headline finding from our analysis is that approximately three-quarters of universities include provisions in their terms and conditions to prevent students from graduating or progressing if they owe any monies to the university which relate to non-tuition fee debts. Approximately a quarter of universities do not appear to use such terms and conditions.
- 3.4 We have also reviewed the way such terms have been applied in practice and found that application varies widely by institution.

Transparency

- 3.5 The OFT approached universities directly for copies of their terms and conditions. Initial desk based research found that it was often difficult

⁹ Source: Universities UK.

¹⁰ We note that the current situation regarding tuition fees varies across the UK

¹¹ Source: NU/Unipol 'Accommodation Costs Survey 2012/2013'

to find terms and conditions on universities' websites. The relevant terms were generally found in a university's 'general regulations' or overarching rules and regulations rather than under specific regulations relating to debt or contracts for ancillary services.

- 3.6 We have identified that the overarching rules and regulations tend to be lengthy and we consider they may be difficult for students to navigate. We understand that some universities may provide students with information in other sources such as in joining information, student handbooks and on intranet sites. However, it is not clear how aware the average student may be about a university's terms and conditions. Student representatives have suggested that students are often surprised by the application of academic sanctions for non-payment of ancillary services when this occurs.

Terms and conditions: prevention of progression or graduation

- 3.7 We have found that approximately three-quarters of universities have provisions in their terms and conditions to prevent students from graduating and/or progressing for any monies owed, including non-tuition fee debts. Generally these terms may:
- prevent students from graduating, attending their graduation ceremony, receiving their formal certificate and certified result transcripts
 - prevent students from re-enrolling on to their next academic year
 - enable universities to suspend students or cancel their registration so that they are no longer a student with the university
 - enable universities to withhold registration for exams, examination results, and to delay marking papers
 - enable universities to restrict access to facilities that are critical to study.
- 3.8 The drafting of these terms and conditions varies widely between institutions and some provide for wide discretion. For example, some universities state they reserve their position to apply sanctions for any

debt whereas others will only do so if the debt reaches a certain level - we have seen this range from anywhere between £30 and £1,000. In our view, the circumstances in which the sanctions are deemed to apply, and for example whether they apply in a blanket fashion in all cases, are relevant to the assessment of unfairness and/or unreasonableness of the term. Regardless of how the specific terms are drafted, the ultimate sanction is the same: progression and/or graduation can be withheld for non-tuition fee debts.

3.9 The application of sanctions also varies widely by institution and we have identified a range of conduct. For example we have seen that:

- some universities allow progression where a payment plan is in place while others will not allow progression under any circumstances
- some universities allow students to accrue relatively high levels of debt (over £3,000) while others prevent students from incurring further charges of the same type 'in year' until their debts are cleared
- some universities appear to apply sanctions quickly 'in year' while others do so towards the end of an academic year, or at the end of studies.

3.10 We have also found that sanctions can be applied inconsistently within individual institutions. For example, we have seen sanctions applied when the level of debt is lower than the amount that is set out within internal policies as the threshold for such action.

Alternative practices

3.11 Approximately a quarter of universities do not appear to use academic sanctions to enforce non-tuition fee debts. We have identified that these universities appear to manage their debts effectively by using alternative practices, for example by:

- intervening early where students are facing financial hardship, for example by discussing the sources of financial assistance available and repayment options with students
- using commercial debt collection practices
- incentivising timely payment
- withholding services of the same type.

3.12 Following our analysis of the information provided by a number of institutions that do not appear to use academic sanctions in these circumstances, we do not consider that the use of alternative practices needs necessarily to impact negatively on the pastoral relationship between university and student or to lead to higher costs for students.

3.13 Universities that use, or intend to use, commercial debt collection methods should ensure that their practices comply with the law, and should be aware of what constitutes good practice. In this regard, universities may find the OFT's Debt Collection Guidance helpful in formulating their practices.¹²

Potential Consumer Harm

3.14 A university is in a position of influence over students by reason of its sole ability to determine progression and award a degree. The threat of not obtaining qualifications on which future prospects may depend can loom large for students, and may apply more pressure even than the serious consequences of conventional debt-collection methods. We have identified from the information and evidence obtained during the investigation that application of these sanctions is likely to cause some students to pay monies that they can ill afford, possibly in advance of other pressing financial obligations. Though financial difficulties do not absolve students of debts that universities are legitimately owed, applying strong academic sanctions may nonetheless cause detriment that other collection measures may not, and may further impair a

¹² OFT Debt Collection Guidance (OFT664Rev2). It is noted that the primary aim of this Guidance is to provide clarity for businesses licensed under the Consumer Credit Act 1974 engaging in the recovery of consumer credit debts.

university's ability to collect further debts if students impoverish themselves. Academic sanctions may also compel students to pay debts that they might justifiably dispute, for example when services were inadequate.

3.15 We have seen that, where students do not pay the money demanded on time for ancillary services, the application of academic sanctions can cause hardship for them by:

- restricting access to sources of advice and welfare
- restricting access to sources of funding (such as hardship funds or the ability to apply for student loans) or benefits
- impacting employment prospects as students may be unable to evidence academic achievement

all of which may exacerbate the student's financial hardship and may make it more difficult for students to pay back the debt owed.

3.16 We outline in Annexe B examples of some of the complaints and case studies that the OFT has received during the course of the investigation. The terms and practices that the OFT has considered fall within the remit of the OIA, which can consider complaints made by students against a university.¹³

¹³ www.oiahe.org.uk/about-us/using-the-scheme.aspx

4 STAKEHOLDER VIEWS

- 4.1 The OFT has engaged extensively with stakeholders throughout the investigation to understand the context and reasons why academic sanctions have been used. We have received a range of views which we have summarised below. We have carefully considered all views received during the investigation in reaching our conclusions.

Relationship between the university and student

- 4.2 We have been told that going to university is not akin to buying any other service and of the specific importance of maintaining an effective relationship between the student and the university. It has been emphasised to the OFT that, for many institutions, being a student is about being part of a community in which staff and students each have rights and responsibilities.
- 4.3 Related to this, several universities have said that they do not make a separation between 'academic' and 'non-academic' services and debts which are all said to relate to the overall academic experience. Withholding graduation, progression or use of university facilities for non-payment of debts is seen as a sanction placed on students who have failed to fulfill their obligations to the community.

Academic sanctions only used in extremis

- 4.4 We have been told that academic sanctions are rarely used and only as a last resort typically following on from several attempts to resolve debt issues. The mere threat of academic sanctions is said to be sufficient to mean that the majority of students pay.
- 4.5 Some universities and their representatives have argued that the current arrangements work for the benefit of the vast majority of students, enabling a university to resolve any debts without recourse to what appears to be considered by many in the sector as more formal and potentially harsher sanctions, for instance pursuing outstanding monies through conventional debt collection methods.

- 4.6 Further the use, or threat, of academic sanctions is said to facilitate a flexible, phased approach to the provision of hardship and other support. For example, it is said to enable the university to provide access to sources of advice and guidance, to assist in setting up repayment plans and access to sources of funding intended to assist the student in resolving their financial difficulties.

Reasons for using academic sanctions

- 4.7 Most universities in the UK operate as not-for-profit charities and are in receipt of some form of public funding. The main reason cited for use of academic sanctions is to reduce the debt position of individual students and minimise the monies owed to the university. Many universities have said that academic sanctions, or the threat of academic sanctions, offer an effective and inexpensive form of collecting outstanding monies owed.
- 4.8 We have been told that there are limited opportunities to enforce the collection of outstanding monies once the student has graduated. There are said to be particular difficulties in respect of students who leave the UK on completion of their studies. Some universities and their representatives have suggested that in the latter situation recovering debts by conventional means can be problematic.

Alternatives to academic sanctions

- 4.9 We have also been told that if universities were not able to use academic sanctions to enforce outstanding monies they would need to consider alternative measures to manage their debt exposure, the costs of which may be passed on to the wider cohort of students. These could include:
- advance measures, for example taking rent upfront, larger deposits, insurance or third party guarantees
 - wider use of eviction from university accommodation
 - greater reliance on commercial debt collectors.

4.10 It has been suggested that alternative measures could be worse for students and may also have a materially negative impact on a university's relationship with its students.

4.11 There is also a concern expressed by some universities that alternative measures for recovering outstanding monies would not be as effective as academic sanctions and could result in higher debt defaults.

Earlier guidance

4.12 We are aware that the sector has previously been warned that the use of academic sanctions may be problematic.

4.13 Access to Learning Fund Guidance 2012/13 (guidance delegated by BIS first produced in 2004) indicates that an institutional contract for accommodation is separate to the student's educational contract and states 'An institution should not normally refuse a student access to any subsequent year of study because there is an outstanding accommodation debt as opposed to a debt for tuition fees.'¹⁴

4.14 In 2005 the Active Risk Management in Education (ARMED) consortium produced a guide on 'Student Debt' discussing how universities should deal with students that owe them money.¹⁵ This guide stated that universities should not prevent students from graduating or withhold results for outstanding debts and questioned the legality of such sanctions. It encouraged universities to take a more proactive and commercial approach to debt recovery and provided a good practice checklist setting out suggestions for proactive debt management.

4.15 The OIA published a policy note on student accommodation in 2009. This note questioned whether universities can legitimately withhold a degree due to any type of accommodation debt and whether such action would be enforceable in court.¹⁶

¹⁴ www.practitioners.slc.co.uk/policy-information/access-to-learning-fund.aspx

¹⁵ A copy of the guide is included at Annexe C. The ARMED project closed in 2008. Its aim was to produce guidance for higher education institutions to reduce legal risk and was funded by HEFCE in its Leadership, Governance and Management Programme from 2003 to 2008.

¹⁶ www.oiahe.org.uk/media/1237/oia-policy-seminar-march2009.pdf

4.16 The OIA has made adjudication on similar issues, where a number of students were prevented from using academic services due to non-payment of a fine for damage to accommodation, even though the students disputed that the monies were owed. The dispute was considered by the OIA in the context of being a disputed debt. In that case, the OIA recommended 'the University to undertake a review of its policies as to the withholding of university services and bursaries in the event of outstanding accommodation debts generally ... with a view to severing the link between such outstanding charges and the contract to supply educational facilities.'¹⁷

4.17 The OFT has also previously challenged the use of academic sanctions, on the basis that such terms may be unfair. For example, in 2002 a university voluntarily agreed to make changes to its terms and conditions and to cease using terms which had the effect of preventing students from receiving their academic results due to debts relating to another course not being paid.¹⁸ We note that the relevant term in that case related to non-payment of fees in relation to another course, rather than in relation to ancillary services. However it is relevant because it involved a challenge to a term which the OFT considered allowed academic sanctions to be applied inappropriately in the context of recovering debts.

¹⁷ Office of the Independent Adjudicator for Higher Education, case study 46: www.oiahe.org.uk/decisions-and-publications/recent-decisions-of-the-oia/older-case-studies.aspx

¹⁸ www.ofc.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/ofc656

5 LEGAL FRAMEWORK

Overview of relevant legislation

- 5.1 Where a contract exists between parties, the basic position is that each party should carry out and perform its major obligations. It is not appropriate to withhold performance of a major element of a contract in the case of a minor breach by the other party. The appropriate remedy in relation to minor breaches is to bring a claim for breach of contract against the other party to seek to recover losses, rather than to withhold performance of a major element of the arrangement to try to force compliance.

Unfair Terms in Consumer Contracts Regulations 1999

- 5.2 The Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCRs') protect consumers against unfair standard terms in contracts with sellers or suppliers of goods and services. Regulation 7 requires that any written term is to be expressed in plain, intelligible language. Regulation 5(1) states that a standard term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. 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.
- 5.3 The requirement of 'good faith' embodies a general 'principle of fair and open dealing'.¹⁹ It means that terms should be expressed fully, clearly and legibly containing no concealed pitfalls or traps and that terms that might disadvantage the consumer should be given appropriate prominence. However transparency of terms is not enough on its own, as good faith relates to the substance of terms as well. Fair dealing requires a supplier 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

¹⁹ Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52

contract. Schedule 2 to the UTCCRs contains an indicative and non exhaustive list of terms that may be unfair.

- 5.4 In assessing fairness we consider how a term could potentially be used in practice, as well as how it is actually relied on. A term is open to challenge if it is drafted so widely that it could cause consumer detriment.
- 5.5 It is the OFT's view that a university's rules and regulations that purport to govern the relationship between the university 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 UTCCRs.
- 5.6 Terms in a university's rules and regulations that provide for a very wide discretion for the university to apply academic sanctions in cases of debts for ancillary services, **regardless of the total debt owed or other relevant circumstances are**, in the OFT's view, likely to be unfair. We set out our reasoning in chapter 6.
- 5.7 Where a term is found by a court to be unfair, it is not binding on the consumer. Please refer to the OFT's guidance on unfair terms for further discussion in relation to the UTCCRs.²⁰

Unfair Contract Terms Act 1977

- 5.8 The Unfair Contract Terms Act 1977 ('UCTA') also offers protection to consumers. Apart from where it is reasonable, where one party deals as a consumer (or on the other's written standard terms of business) section 3(2) of UCTA prohibits a contracting party from claiming by reference to any contract term -

²⁰ OFT Unfair Terms Guidance (OFT 311), www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/oft311

'(b)...to be entitled:

- (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
- (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all.'

Note that in respect of UCTA's application in Scotland, the equivalent provision is section 17 of UCTA. A term that breaches these sections of UCTA is not valid and cannot be relied on.

Consumer Protection from Unfair Trading Regulations 2008

5.9 The Consumer Protection from Unfair Trading Regulations 2008 ('CPRs') prohibit 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.

5.10 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.

5.11 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)).

5.12 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)).

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

5.14 Breach of the CPRs may be a criminal offence and may also be enforced by way of civil enforcement.²¹

5.15 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 Competition and Markets Authority), Trading Standards Services and other enforcers under Part 8 of the Enterprise Act 2002. An enforcement order can be sought to stop a potentially unfair or unreasonable term being relied on and included in contracts, or an unfair commercial practice being used.²²

²¹ www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

²² www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf

Other relevant legislation

European Convention on Human Rights and Fundamental Freedoms (1950) and the Human Rights Act 1998

5.16 Under the Human Rights Act 1998, further to the European Convention on Human Rights ('ECHR'), it is a Convention right that '**No person shall be denied the right to education...**' (Article 2 of the First Protocol to the European Convention on Human Rights). It has been established by the courts that this protocol right necessarily includes the right to official recognition of academic achievement.²³ It is also evident from the case law that, where higher education is available, the rights guaranteed by Article 2 of the First Protocol also extend to higher education.²⁴ Interference with this right to education would only be justified if there was a foreseeable and legitimate aim, and the interference is proportionate to that aim. In the OFT's view, it is questionable whether it would, in every circumstance, be proportionate to withhold progression or award of a degree as a method of ensuring prompt and straightforward payment of monies due, for example for ancillary services such as accommodation.

5.17 In the OFT's view, using a term in a university's rules and regulations that may interfere with a right under the ECHR is likely to place the term, and the commercial practice of utilising the term, under particular suspicion of unfairness.

Data Protection Act 1998

5.18 In certain circumstances the Data Protection Act 1998 ('DPA') requires a 'Data Controller' to release personal data to a 'Data Subject' when so requested by the Data Subject (section 7 DPA).

²³ CJEU: *Belgian Linguistics (No. 2)*, 1968; English courts: *Holub v Secretary of State for the Home Department* [2001] 1 WLR 1359

²⁴ See *Sahin v Turkey* (2005) 41 EHRR 8 at paragraphs 137 and 141 and *Temel v Turkey* (2009) at paragraph 39.

5.19 The Information Commissioner is the regulator for data protection complaints. Guidance on the website of the Information Commissioner's Office (Subject Access Code of Practice (Information about Examinations section)) indicates that the right of access includes exam results.²⁵ The guidance provides: 'Where a SAR [subject access request under section 7] is made for an individual's examination marks, a response may only be refused (or delayed) for reasons permitted by the DPA. So it would not be appropriate to refuse to provide details of examination marks in response to a SAR because the requester had failed to pay their tuition fees. Clearly, though, providing information about examination results is not the same as conferring a qualification.' As such, under the DPA it would not be lawful for a university to withhold information about an individual's academic results after a request has been made, and to do so would be a potential breach of the DPA. Withholding information about academic results for reasons of outstanding debt is not permitted. If an individual suffers damage as a result of a breach of the DPA by a university, including in relation to non-compliance with a subject access request, the individual may be able to claim compensation against the university. In addition, the university could be subject to enforcement action by the ICO.

5.20 Further information can be found in the Subject Access Code of Practice (Information about Examinations section) published by the ICO.²⁶

5.21 In the OFT's view, a term which purported to restrict or otherwise mislead students about this right would be under particular suspicion of unfairness.

²⁵ www.ico.org.uk/for_organisations/data_protection/~ /media/documents/library/Data_Protection/Detailed_specialist_guides/subject-access-code-of-practice.PDF

²⁶ www.ico.org.uk/for_organisations/data_protection/~ /media/documents/library/Data_Protection/Detailed_specialist_guides/subject-access-code-of-practice.PDF

6 OFT VIEWS

Use of academic sanctions to pursue non-tuition fee debts

- 6.1 We have carefully considered the various arguments that a number of universities and their representative bodies have put to the OFT in the course of the investigation (outlined in chapter 4) in coming to our conclusions. In particular we have considered the suggestion that not being able to use academic sanctions to enforce non-tuition fee debts may mean that universities employ the alternative measures outlined in paragraph 4.9 which could be worse for students.
- 6.2 Whilst we recognise the arguments put forward and potential difficulties faced, we consider that terms that allow the university to withhold graduation or progression or otherwise exclude students from tuition for non-payment of ancillary services (such as accommodation and childcare), in a blanket fashion and regardless of the circumstances are potentially unfair, and the use of such terms and practices may amount to unfair commercial practices. The OFT is not suggesting that students should be absolved of non-tuition fee debts that are legitimately owed to the university, but that students should not be subject to academic sanctions which may be considered disproportionate.
- 6.3 In the event that the student is in default in making payment to the university in respect of some aspect of ancillary services, then the university has available to it the usual means of enforcing payment, including pursuing a debt claim or withholding further services of the same type until the outstanding amounts are settled. Such alternative measures presuppose earlier intervention and need not be used in a way that is detrimental to students or expensive or inefficient for the university.²⁷ Indeed, as highlighted in chapter 3, we have found that around 25 per cent of universities whose terms and conditions we reviewed appear to manage student debts effectively using such means (see paragraph 3.11 above).

²⁷ For example, see checklist in ARMED guidance referred to in 4.14 above and reproduced at Annexe C

- 6.4 We do not consider that it is inevitable those students should face higher costs, or that the use of sanctions other than academic sanctions needs necessarily to impact negatively on the pastoral relationship between university and student. For instance, we have seen that commercial debt collection, if undertaken in line with good practice and the law, may be less harsh on students than academic sanctions.
- 6.5 The terms and practices the OFT has concerns about give the university significant powers to enforce outstanding monies over and above those that are typically available to other suppliers that may be providing ancillary services to students (such as accommodation or childcare services). For example, an accommodation provider in the private rental sector would not have recourse to prevent a student from progressing or graduating unless and until they paid an outstanding debt. They would need to use conventional debt collection methods to pursue payment. As such, universities that provide accommodation and use the terms and practices in question would be in a position of significant power as compared with a private sector accommodation provider. We have looked in detail at the way that the terms have been invoked in some cases, and in the way they could potentially be used, and it is our view that the inclusion and use of these terms and practices could be considered unfair and otherwise unlawful if considered by a court. We explain our reasoning below.

Unfair terms - 'the UTCCRs'

Examples of terms that may be open to challenge:

'No degree, diploma, or other qualification shall be conferred on any student who has not fulfilled all financial obligations to the university.'

'Any student whose sessional fees or whose accommodation fees have not been paid in full will not be allowed to proceed to the next year of the programme and will be required to withdraw from the University. If a student is in debt to the University at the time when they enter for the last examination necessary to qualify for a degree,

their award will not be conferred and no certificate will be issued until the debt has been paid in full.'²⁸

- 6.6 As highlighted earlier pursuant to regulation 5(1) of the UTCCRs a standard term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. As explained in the OFT's Unfair Terms Guidance (OFT 311) terms are unlikely to be considered fair and balanced if they give one party the power to impose disproportionately severe sanctions on the other, or if they misleadingly threaten sanctions over and above those that can be imposed.²⁹
- 6.7 Where a contract exists, the basic position is that each party should carry out and perform its core obligations. It is not appropriate to withhold performance of a major element of a contract in the case of a minor breach by the other party. Generally, it is a major obligation to provide for students to re-enrol for each year of study and ultimately to award a degree where the necessary academic attainments have been reached. Rather than withholding re-enrolment or graduation, we consider that the appropriate contractual remedy in cases of a minor breach, which may include where a student has not paid all amounts in relation to ancillary services, would be for the university to bring a claim for breach of contract and to seek to recover its losses from the student using ordinary debt recovery methods.
- 6.8 At the time the academic sanction for non-tuition fees debts is invoked, it is likely that the university will often have received substantially all of the payment for its side of the educational bargain. The student is likely to have paid (or incurred a student loan to pay) fees of up to £9,000 per academic year, amounting to up to £27,000 over the duration of a three-year undergraduate degree course. By contrast, without the ability to progress to the next year of study, or the award of the degree, the student is likely to be deprived of substantially all of the principal benefit to them under the contract. In

²⁸ Note that we provide these terms (and those above paragraph 6.15) for illustrative purposes only in the context of this report. The assessment of fairness for the purposes of the UTCCRs requires consideration of all the circumstances of each case and of the effect of other terms in the contract (Regulation 6(1)).

²⁹ OFT Unfair Terms Guidance (OFT 311), Group 18(c) at paragraph 18.3.1 onwards and also see Group 18(f) at paragraph 18.6.1, exclusions and reservations of special rights.

the context of the total amounts paid by students in tuition and other fees, the OFT considers that it is particularly open to objection to apply academic sanctions in situations where relatively small amounts remain outstanding, taking into account the impact on the individual concerned.

- 6.9 Further, in the OFT's view, the term puts the university in a significant position of power, both in absolute terms, as the student is entirely reliant on the university to award the degree, and in relation to the situation if the ancillary services were provided by someone else. The term allows the university to exercise what may be characterised as disproportionately severe or heavy-handed sanctions for non-payment of monies that may be disputed, simply by virtue of the fact that it provides multiple services to students (that is, academic tuition and ancillary services such as accommodation and childcare).
- 6.10 The OFT considers that terms that apply to all debts, regardless of amount or the circumstances of non-payment, and in a blanket fashion are particularly open to suspicion of unfairness. This is especially so where the monies owed are small amounts or are the subject of a dispute, and also where other methods of seeking payment of the monies have not been reasonably exhausted.
- 6.11 In assessing fairness we take note of how a term could be used. A term is open to challenge if it is drafted so widely that it could cause consumer detriment. It may be considered unfair if it could have an unfair effect, even if it is not at present being used unfairly in practice and there is no current intention to use it unfairly.
- 6.12 We have seen some examples where students have been prevented from graduating or progressing for non-payment of relatively small ancillary debts such as where they owe less than £50 for accommodation debts when other available debt recovery methods have not been pursued.
- 6.13 In the OFT's view even where a financial threshold is specified in the term below which the university may not apply the sanctions, this alone is unlikely to make a term fair as the sanctions may still apply in

a blanket fashion, for instance where the student may have a legitimate dispute with the university.

- 6.14 Ultimately, only a court can decide if a term is unfair. Universities should be aware that under regulation 8 of the UTCCRs, any terms which are found to be unfair will not be binding on a consumer, and are therefore unenforceable. Consumers may seek to rely upon the legislation in legal proceedings they bring themselves.

Other factors relevant to unfairness

Example of a term that may be open to challenge:

'Any student in debt to the university will not be notified of the marks of any completed assessments until such time that the outstanding debts have been paid... Any students in debt to the university one month before the date of the award of a degree, diploma, or other qualification will not be eligible to be presented for such an award...'

- 6.15 The OFT further considers that terms which prevent students from graduating or which reserve for the university a right to withhold information about grades and awards in cases of ancillary debts may be potentially unfair as they may exclude students' other legal rights.
- 6.16 The first sentence of Article 2 of the First Protocol to the European Convention of Human Rights states that 'no person shall be denied the right to education', and as discussed in chapter 5 this includes the right to have educational achievement officially recognised.
- 6.17 Under the DPA the student has the right to request information about their results (see chapter 5 for more information).

6.18 In the OFT's view, a term that purports to exclude or reduce these rights, merely to facilitate collection of debts for ancillary services, is likely to be unfair.

Hidden terms

6.19 Terms which have the effect of irrevocably binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract are open to challenge.³⁰ A term which deems students to be bound by the university's rules and regulations, unless they are given an appropriate chance to read them, is likely to be considered unfair. In our view, providing the relevant rules and regulations at the time of the enrolment process is unlikely to be considered sufficient to mitigate the potential unfairness of binding students to terms they have not have the chance to become familiar with.

Prominence and clarity of terms

6.20 We have seen examples where information about the sanctions for non-payment of debts is provided in very lengthy terms and conditions without appropriate flagging, or at a late stage in letters or invoices seeking to recover outstanding monies. The OFT considers that some students may have been surprised by the terms.

6.21 A term may be more likely to be considered fair if it was expressed in plain and intelligible language and was actively flagged to the student. However, the OFT considers that transparency of the term, on its own, is unlikely to address the kinds of substantial potential unfairness discussed above. Students are unlikely to anticipate getting into financial difficulty, and are unlikely to consider that the term would have an adverse affect on them at the time of enrolment.

³⁰ Paragraph 1 of Schedule 2 to the UTCCRs states that terms may be unfair if they have the object or effect of '(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. See OFT's unfair terms guidance (OFT 311) paragraphs 9.1 to 9.6.

Unfair Contract Terms Act - 'UCTA'

6.22 In the OFT's view, the award of a degree at the end of the course if the necessary academic attainment is reached is a contractual obligation and contractual performance that is reasonably expected of a university. Without the award of a degree, several years of study and achievement will not be formally recognised. As discussed in chapter 5, section 3(2)(b)(ii) of UCTA provides protection where a contracting party seeks to render no performance at all in respect of all or part of its obligations, unless this is reasonable in the circumstances. We consider it is unlikely that it would be reasonable for a university to render no performance of this important element of the contract, by withholding the award, or refusing to re-enrol the student because, for instance, a comparatively small sum of money is owed by the student.

Unfair Commercial Practices - 'CPRs'

Potentially aggressive practices

6.23 In the OFT's view, the practice of not allowing graduation or progression as a means to pressurise the student to pay outstanding monies for ancillary services, particularly in respect of small or disputed debts, may also be an aggressive commercial practice under regulation 7 of the CPRs.³¹

6.24 Generally, it is the OFT's view that the university may be regarded as being in a position of power and influence in relation to the student as the only body that can allow progression on the course or grant a degree and, by using the term in the university's rules and regulations relating to unpaid amounts for ancillary services the OFT considers that the university may be at risk of exploiting its position of power by threatening to withhold the degree or progression in relation to the educational services it provides in order to compel payment of ancillary services. Such a practice may significantly impair the student's ability to make an informed decision. For example, this practice may impair

³¹ Whether a particular commercial practice is considered 'aggressive' for the purpose of the CPRs depends on the factual context and all the features and circumstances surrounding it.

the student's freedom of choice or conduct in relation to the ancillary services provided and in particular in relation to making or withholding a payment.

- 6.25 The OFT considers that the student may make a transactional decision he or she would not make otherwise, by either paying off the amount where the debt might otherwise be genuinely disputed, or where they can ill afford to do so (for example, ahead of other priority debts), because of the pressing, time-critical, need to obtain the degree award or to be allowed to progress to the next year of study.

Potentially misleading practices

- 6.26 The OFT also considers that purporting to be able to withhold progression, the award of a degree or information about an examination result, in order to persuade the student to pay outstanding monies when the university is not lawfully entitled to do so may be a misleading commercial practice under regulations 5 and/or 6 of the CPRs.

- 6.27 For instance, where a student has legal rights to access examination marks under the DPA, they should not be misled about them. The OFT considers that a university should not present standard terms that are likely to deceive or mislead a student in relation to his rights. This may amount to a misleading action or a misleading omission pursuant to regulations 5 and/or 6 of the CPRs.

Next steps for universities

- 6.28 It is a matter for individual universities how they manage debts that their students owe, in compliance with the law. But we consider that universities may be able to reduce the risk of legal challenge by reviewing their terms and conditions and practices and amending them, if necessary, to ensure terms and practices considered by the OFT to be potentially unfair are not being used.

6.29 Fairness may be more likely to be achieved where less onerous ways of seeking payment have been exhausted (including repayment plans and other usual methods of seeking recovery of debts).

6.30 Although specifically published in relation to consumer credit debt collection practices, the principles outlined in the OFT's Debt Collection Guidance such as treating debtors fairly, exercising forbearance and consideration and acting proportionately are likely to be relevant to universities seeking to recover unpaid debts.³²

³² OFT Debt Collection Guidance (OFT664Rev2), Overarching Principles of Fair Dealing Business, Ch 2.

7 NEXT STEPS AND RECOMMENDATIONS

- 7.1 As set out in chapter 6, our view is that certain terms and practices discussed in this report are potentially unfair and otherwise unlawful. A term found to be unfair by a court will not be binding on a consumer, and will therefore be unenforceable. The use of terms and practices that are potentially unfair and otherwise unlawful could be the subject of enforcement action.

We recommend that universities review their rules and regulations, other terms and conditions, and practices in light of the OFT's views outlined in the report, and make amendments where necessary. We would expect universities to refrain from using unfair terms and practices.

- 7.2 Although we have identified that there may be problems under consumer protection legislation with using academic sanctions to enforce ancillary (non-tuition fee) debts, the OFT has, with the publication of this report, closed its current investigation into the use of academic sanctions. At this stage, we are encouraging all universities in the UK to pro-actively review and, where appropriate, revise their terms and conditions and practices in light of this report and to actively flag to students the relevant terms and practices, and their right to appeal. We will be writing directly to individual institutions to bring this to their attention. We are also encouraging representative organisations to help support improved awareness and compliance with consumer protection legislation amongst their members.
- 7.3 Rather than commencing enforcement action at this time against any university which may be using potentially unfair terms and/or practices, we will monitor how the sector responds to this report, and any further complaints that we may receive.

- 7.4 In adopting this approach we expect the sector to identify ways that they can change their terms and practices.
- 7.5 Finally, the findings from this investigation are being fed into the OFT's call for information on the provision of higher education (undergraduate) in England and will be used to inform the OFT's understanding of how the HE sector is functioning.
- 7.6 We would like to thank all those who have contributed to this investigation. A copy of this report and annexes are available on the OFT's website at: www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/university-terms

ANNEXE A: SANCTIONS RELATING TO STUDENT CONDUCT - SUMMARY OF FINDINGS - PUBLISHED JANUARY 2014

Purpose

The purpose of this summary note is to outline the Office of Fair Trading's ('OFT') views on the terms and conditions that we have reviewed, used by some universities to prevent students from enrolling onto the next academic year or withholding paid-for services (such as internet connection or access) if they engage in certain conduct of which the university disapproves.

Background

In July 2013 the OFT opened an investigation under the Enterprise Act 2002 to consider whether there are problems with the terms and conditions used by some universities to prevent students from graduating or enrolling onto the next academic year or using university facilities (i) if they owe monies to the university which relate to non-tuition fee debts or (ii) if they engage in conduct (unrelated to academic performance) of which the university disapproves.

The purpose of the investigation was to ascertain whether the practice of using academic sanctions to enforce debts ancillary to tuition fees, or certain conduct, could be unfair under consumer protection legislation.

The OFT intends to publish a report setting out its findings from the investigation in early 2014. However, this note has been produced ahead of the report to clarify the OFT's findings and views in respect of conduct terms and practices only. This follows representations from sector representatives for early clarification on this issue.

Conduct issues

The OFT was concerned that services (such as internet access), which students may be paying for, may be withheld from students under the auspices of disciplinary action, without procedures being in place, or when

it is unfair to withhold the service in any event such as when used as a sanction to punish unrelated to the conduct in question and/or when such punishment may be considered to be disproportionate.

The OFT clarified that it was not looking to influence when or how universities took disciplinary action in situations of criminal misbehaviour such as assault, drug-dealing, hate crimes etc, or where they were considering whether a student was fit to continue with their course or graduate for reasons of serious misconduct, related to suitability to enter their profession.

Our views

The OFT considers that terms providing a university with a wide discretion in matters of student discipline, without the requirement to liaise with the student concerned or the ability for students to contest the issue and appeal against any decision, would be likely to be unfair under the Unfair Terms in Consumer Contracts Regulations 1999.

For example, terms allowing paid-for services to be withheld or applying academic sanctions for disciplinary matters in a blanket fashion or without a clear process may be open to challenge under the UTCCRs. We are aware of instances where students have alleged that their internet access was suspended without due process for criticising their institution on social media, for example.

Any ability to withhold services must be clearly set out in the university's terms and conditions, and properly brought to the student's attention. Fairness is more likely to be achieved where the student is properly notified of the allegations against them, and has a fair hearing to put their side of the story, before any sanction is invoked, and the student has a right of appeal to an independent decision maker.

The OFT considers that terms withholding paid-for services should not be used to restrict any legitimate rights of expression or other human rights. It is unlikely to be reasonable for universities to withhold internet access as part of an exercise in managing their own reputation for instance.

Our findings

The OFT has not identified any widespread concerns with terms regarding disciplinary sanctions for conduct of which the university disapproves. We found that the majority of UK universities whose terms and conditions we assessed have defined disciplinary procedures set out in their overarching rules and regulations or other terms and conditions.

In general, terms we have seen allow discretion to universities, and set out fairly comprehensive procedures for contacting the student concerned to inform them of the issue, allowing them the opportunity to contest the issue, informing them of the proposed sanction and having an appeals process in place. We accept that there are likely to be situations where applying such sanctions may be an appropriate and proportionate means of exerting discipline on students and regulating behaviour that may disadvantage the wider student community.

However, the university must act reasonably in these matters. In particular, where a student has a contract for the supply of services, the OFT considers that it would be unreasonable to withdraw those services unless there are clear rules that have already been brought to the student's attention, and a fair process is followed.

The OFT would have concerns if universities were not following defined disciplinary processes, withholding paid-for services, suspending students from study or applying other sanctions inappropriately or in a way that is disproportionate to the matter concerned.

This general conclusion is based on the evidence available to us at this time, which we have reviewed. Ultimately the final decision on whether a term is fair or unfair rests with the courts. None of these type of terms used by any university should be seen as approved by the OFT for general use. Our view is not binding on the courts, or upon other enforcers, nor does it fetter the OFT's discretion to take future action, as appropriate.

ANNEXE B: STUDENT COMPLAINTS

The numbers of student complaints regarding the use of academic sanctions by universities to enforce ancillary debts appears to be relatively low. However, in the OFT's view it does not follow that there is an absence of harm to students from these terms and practices. Students may be unaware of their rights under consumer protection legislation and/or of their ability to make a complaint to the OIA.

We outline below some examples of the types of complaints and case studies that we have received from students and/or their representatives during the course of the investigation. We have categorised the examples by the nature of the harm to the student.

Restricting access to sources of funding

A student was prevented from progressing onto year two of their degree programme because of an overdue accommodation debt of less than £300. The student suggested to their university that they be allowed to enrol so that they could access their student loan and make payment as soon as they received their first instalment but was told they could not re-enrol whilst there was an outstanding balance on their account.

Impacting on employment prospects

A student was allocated what they found to be inappropriate accommodation. After three weeks they gave notice to their university that they intended to quit their accommodation and move into more suitable private accommodation.

The student went on to pay all their tuition fees, attend all lectures, complete all coursework and assignments and pass their degree with honours. However, they were then told that their student rental contract was for the full academic year and that their degree would be withheld and they would not have access to their degree ceremony unless they paid off the arrears which came to approximately £3,500.

The student disputed the debt and brought a legal case against the university. While this action was ongoing the student was unable to find

employment as they had no evidence of their academic achievement to show to prospective employers.

An out-of-court settlement was subsequently agreed and the student was allowed to graduate and the monies allegedly owed waived. However, the university did not make any admission of liability regarding its right to bar students from graduating while in debt and stated that it had reached this settlement in order to save costs.

Restricting access to sources of advice and welfare

A student was not allowed to re-enrol because they owed money to the accommodation department of their university. This meant that they were unable to access sources of advice or the various financial aid/hardship funds available to 'registered' students. It also meant that they could not claim benefits from the Government as they were still classed as a student.

Punishing students disproportionately

A student had considerable personal problems during their first year at university which resulted in them having to move out of student accommodation into private accommodation. Despite moving out, they were charged the full year's rent for their student accommodation which resulted in them accruing debts of over £3,000.

The student did not dispute that they owed this money and was happy to repay it. They put forward a repayment plan which would have resulted in their debt being paid off by the time they were due to graduate. However, this was rejected and they were told that they could not re-enrol until they had reduced their debt below £1,000. The student did not have the ability to do this and was therefore required to withdraw from their studies.

ANNEXE C: ARMED GUIDANCE

The ARMED Guidance on Debt is reproduced with kind permission of the copyright owner, the University of Bristol. Further reproduction is prohibited without the copyright holder's permission.

The ARMED Project was funded by Higher Education Funding Council for Education ('HEFCE') in its Leadership, Governance and Management Programme from 2003 to 2008. It involved a consortium of universities led by Bristol University and produced units of general guidance and checklists and specimen policies in the main areas of staff and student management. The Project closed in 2008 when HEFCE funding for updating the units came to an end. The materials created in connection with the ARMED project were taken down from the Bristol University website in January 2008 because it was no longer possible to ensure that they were up to date in terms of the law's requirements and accepted good practice in the sector.

Student Debt

3

Document Notes

Date 2 June 2005

Summary

This unit discusses how institutions should deal with students who owe them money. Debts will mainly relate to tuition fees and payments for accommodation. The unit discusses legal limits on the steps institutions are entitled to take to recover the money. The aim is to be sympathetic to students in need, but to recover debts wherever possible.

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1. INTRODUCTION

Since 1998/99, many full-time home and EU students pay a contribution to their tuition fees. Universities UK estimates that £336,000,000 of private contributions to fees was due in the UK in 2000/2001.

Some institutions have student debts of over £1,000,000, although a Universities UK survey suggests that between 97% and 98% of private contributions to tuition fees payable by full-time home and EU undergraduates was collected each year over the first three years of operation of the new tuition fee system.

2. IMPORTANCE OF THE TOPIC

2.1 Reasons for action

Taking appropriate action will:

- ☐ Help institutions to recover student debt
- ☐ Prevent delays, which may make debts difficult to collect
- ☐ Reduce the risk of litigation with students
- ☐ End practices which may be indefensible in law, such as refusing to allow students to graduate
- ☐ Prevent students becoming upset because they do not understand their position
- ☐ Improve institutions' cash flow and reduce their borrowing requirements
- ☐ Help students manage their finances better
- ☐ Improve communication with students
- ☐ Improve student record data
- ☐ Improve financial awareness among non-Finance Department staff
- ☐ Improve liaison between academic and administrative staff over student matters

2.2 Key issues

Keys to reducing student debt are:

- ☐ Clear and properly understood procedures
- ☐ Ensuring the policy and procedures on debt are part of the contract with the student (see Unit 1)
- ☐ Good record-keeping
- ☐ Close monitoring of students' accounts
- ☐ Good communication
- ☐ Prompt action

2.3 Case Studies

Study A

A student in a chartered university owed some £800 in fees. The university sued the student for the fees, unaware that the student had, 15 months before, lodged a complaint that he had been unfairly treated by staff and as a result had not achieved the qualification he had sought. The student defended the proceedings and counterclaimed for some thousands of pounds in damages. The case was settled, but only after the university had consulted its lawyers. The university lost the tuition fee and had to deal with a complaint which might not have been pressed if the student had not been sued. There had been a lack of communication between the Finance Department, the Registry and the Teaching Department, to check whether there was any outstanding complaint by the student.

Study B

A student seeking a qualification in a profession allied to medicine passed her final examinations, but was not awarded a certificate because she was in debt to the awarding institution. It came to the attention of the institution that she was claiming to have the qualification. The institution informed the professional body that, because of the debt, she did not have the qualification. Disclosure of this information was not permitted under the Data Protection Act 1998. Withholding the certificate on the basis of debt was not good practice and was probably contrary to the Human Rights Act 1998.

3. OVERVIEW OF THE LAW

3.1 Student contract

For detailed information about contracts with students, see Unit 1.

The contract with a student comes into being when the student accepts an offer made by the university. If the offer is conditional, the contract becomes operational when the condition is fulfilled, for example on the student obtaining certain examination results. The contract comprises only that which has been agreed by the parties when the contract is made. The contract consists of the obligations of the university and the obligations of the student.

The offer of a place to the student must indicate the fees and other sums which the student must pay. The contract should also require the student's adherence to university regulations. Thus in order to bind the student a good deal of information must be contained in the prospectus or offer-letter, or referred to by them. The university's regulations for students should ideally be collected into one document. They may then be included into the contract by means of a reference to this document in the prospectus, on a Web site, or by reference to a booklet sent to the student. The regulations should be easily accessible.

The university should have a written, public policy on student debt, forming part of the university's regulations, to which the contract should make explicit reference. The University should reserve the right to vary the policy from time to time, in the light of prevailing circumstances. Provided this policy is reasonable, the university can then take action against the student when money is owing. Separate policies will be needed for tuition and accommodation fees, as different remedies will apply.

If the university wishes to withdraw facilities in response to a debt, this must be made clear in the policy. This includes a requirement that the student leave the university. The policy should say that enforcement action may be taken against an enrolled student, as well as against a student who has been required to withdraw.

As the contract is made before the start of the academic year, it is technically possible to sue the prospective student for the tuition fee if the student does not turn up. However for practical purposes the university is likely only to take forward contracts with students who turn up at registration.

Just as the university should ensure that no unauthorised persons commit the university to contracts, so it should ensure that members of staff do not give concessions and waivers on student debt without the university's authority.

3.2 Recovery in the institution

The debt policy must be reasonable and fair, and action taken under it must be relevant and proportionate. Students may otherwise invoke the Human Rights Act 1998 (even though it has not yet been clearly established in the courts whether the right to education laid down by the European Convention on Human Rights applies to higher education). Thus it might be proper to withdraw library facilities in the event of outstanding library fines, to withdraw accommodation for outstanding rent or to withdraw all facilities if there are outstanding tuition fees.

It is illegal to withhold examination marks because of outstanding debt, in that these must be supplied on a formal request being made under the Data Protection Act 1998.

It is legally doubtful to withhold a degree certificate for outstanding debt, since the right to education under the European Convention on Human Rights includes the right to have educational achievement recognized. Withholding the degree may also prevent a student proceeding with a chosen career. (Some colleagues have expressed disagreement with this view, claiming that, while marks cannot be withheld, certificates can, and this gives a final lever to reclaim money from recalcitrant students.)

Refusing access to a degree ceremony should not present a problem, provided this is mentioned as a sanction in the institution's debt policy which is drawn to students' attention. Non-attendance at the ceremony will not prevent students from receiving evidence of their educational achievements.

Suggestions for effective debt collection are set out in the check-list. These methods can be used either by the university's Finance Department or by outside solicitors.

3.3 Recovery through the courts

If the above methods fail, then a decision must be made about court proceedings. These should be undertaken only if there is reason to believe the student can, but will not otherwise, pay.

Most student debts will come within the Small Claims procedure, being less than £5,000.

Finance Departments may wish to consider whether, with appropriate training, they wish to take court proceedings themselves, or alternatively commission outside solicitors or debt collectors to do so. Outside agents will normally expect to be paid on a percentage of debts recovered. Finance Departments will need to consider whether they have the resources, particularly the staff time and IT back-up, to undertake what is essentially an administrative procedure.

Complex cases involving debts of more than £5,000, or involving disputes with the student, for example over the quality of the course, should be referred to the university's in-house lawyer or to the manager responsible for dealing with litigation.

3.4 Data Protection Act 1998

Institutions should consider the need for confidentiality about financial information, under the Data Protection Act 1998. Access to information about student debt should be restricted to those who need to know it, and computer systems should be set up accordingly.

3.5 Consumer Credit Act 1974

Institutions should consider whether they should be licensed under the Consumer Credit Act 1974 and whether their arrangements with students in relation to the payment of tuition fees or accommodation fees are agreements which are regulated by the Act. If the agreement is regulated by the Act, and/or if the institution should be licensed under the Act and the institution does not comply with the provisions of the Act, it could affect the ability of the institution to recover the debt. Institutions should seek specialist advice on these issues.

4. FUTURE DEVELOPMENTS

Student debt is a matter of increasing public concern and political activity. Institutions which enter access agreements with the Office for Fair Access (OFFA) will be able to charge fees in excess of the ordinary statutory maximum under the Higher Education Act 2004 and despite the package of student support introduced by the government and individual institutions student debt may well increase. Increased intervention by Parliament or the courts is a real possibility, particularly in the light of the Human Rights Act 1998, under which it is possible for the courts to find a statutory provision incompatible with the European Convention on Human Rights.

The Office of Fair Trading has secured changes to a number of clauses in contracts between teaching institutions and students under the Office of Fair Trading's existing powers - see Unit 1 and the regular bulletins on unfair contract terms available on the Office of Fair Trading's web site at <http://www.OFT.gov.uk>. The Office of Fair Trading is particularly concerned where institutions try to give themselves powers to vary course content substantially or to retain deposits which exceed the institution's administrative costs. To date the Office of Fair Trading has been able to negotiate changes to an institution's terms and conditions without the need for litigation, but of course the publicity given to such negotiations is unwelcome.

5. IMPLICATIONS

5.1 Governance

Governing bodies in general and Audit Committees in particular should be concerned if a university is not taking active steps to keep its student debt figure under control. An excessive student debt figure is likely to be commented upon unfavourably on audit.

In one case, external auditors qualified their opinion on the accounts of a further education college. This was because the senior management refused to accept that the student debt figure of £250,000 on a college income of £6,000,000 was a problem. (Most of this sum was eventually paid in the following academic year because the college, against legal advice, withheld certificates from students in debt to the college. However, this approach was not ideal from the point of view of the institution's cash flow, and risked litigation from students.)

5.2 Funding

The HEFCE is likely to be concerned if the university's student debt figure appears to be out of control and affecting the university's cash flow adversely; it will expect institutions to be identifying and addressing such issues through their risk management procedures.

5.3 Quality

There are indirect quality implications, in that increasing student debt reduces the ability of the institution to provide resources to all students.

5.4 Employment relations

Finance Department staff may be apprehensive about student reaction to more efficient recovery of student debt. There will be a need to review security measures to ensure the safety of staff and to explain to students that an efficient but sympathetic debt recovery system is in the interests of all students.

Tutors, who will naturally be sympathetic to students in difficulty, will need to understand the importance to the institution overall of robust policies and efficient collection of student debt.

5.5 Public relations

While aggressive recovery procedures will cause problems, such procedures are not appropriate or necessary. An efficient and persistent approach based on accurate information about the student is what is required.

Media publicity given to institutions with serious student debt problems has been largely negative, and the institutions' commitment to widening access has not been recognised in media reports.

It is suggested that the best approach is to couple a careful and well-explained debt recovery process with measures to strengthen the institution's Access funds.

5.6 Information management

Accurate records of student addresses and telephone numbers are essential. When accepting a place, students should be asked to agree that this information may be passed to third parties, for purposes connected with the institution's provision of the course.

Information about student debt should be kept confidential. The fact that a student was or is a debtor should not be mentioned on transcripts.

Staff should refrain from giving financial advice to students, who should instead be referred to suitable agencies such as the local citizens' advice bureau or the students' union. Merely extending time for students to pay their debts to the institution on an exceptional basis is unlikely by itself to require the institution to be licensed under the Consumer Credit Act 1974, if the institution should not otherwise be licensed (see 3.5 above).

Before they start their programmes of study, students should be given advice on managing their finances. Packs of information may be sponsored by local banks.

5.7 Health and safety

The security of Finance Department staff must be considered.

5.8 Staff development

Academic staff may need some training in the basic problem of student debt and how the institution will tackle it through its Access and Debt Recovery policies.

Finance Staff will need training in the operation of any new debt recovery procedures, and in managing Small Claims in the County Court, if it is decided to handle such claims in-house.

5.9 Insurance

Institutions' insurers should be consulted in relation to the potential impact, if any, upon the institution's insurance premium of any risk management measures, particularly if the university intends to take over functions previously contracted out (such as small claims in the County Court).

Professional Indemnity Insurance should include cover in respect of any professional liability which might be incurred by the institution, for example an allegation that the institution's staff gave poor financial advice which may be the cause of the student debt or a breach of confidentiality. It is important to notify insurers of any potential claim as soon as the institution is aware that a claim may arise.

6. MATERIALS

6.1 Checklist

- ❑ The fresher the debt, the easier it is to collect. Ensure there is a computer system giving early information to the relevant university officer that money is owing.
- ❑ Even £100 is worth chasing.
- ❑ The watchword is communication: telephone the student or see the student face to face.
- ❑ Give training to those collecting student debts.
- ❑ Don't purport to offer the student financial advice.
- ❑ Be open about the debt collection policy.
- ❑ Consider early settlement discounts.
- ❑ Have realistic expectations, but distinguish deliberate avoidance and inability to pay.
- ❑ Debts should be chased quickly and for a limited period, after which they should be outsourced to debt collectors.
- ❑ Agree boundaries on collection methods with the debt collectors.
- ❑ Only go to litigation when the student has the money to pay.
- ❑ Ensure the student knows exactly what is owing and why, and that he has been given every opportunity to pay.
- ❑ The County Court small claims fee is on the Court service web site at <http://www.courtservice.gov.uk> (for over £1,000 and under £5,000 at present it is £120) although this will be included in the claim against the student.
- ❑ Always check with the Registry or equivalent to see that the student is not currently making a claim against the university, which may be used against it if court proceedings are used to recover the debt.
- ❑ Debts may be sold; this does not contravene the Data Protection Act.
- ❑ The university should adopt a written policy (or policies) on student debt, to be included in a Rules and Regulations booklet and on the Internet.
- ❑ The policy should be firm, but may be relaxed in cases of hardship.
- ❑ There should be a debt collection officer responsible for collection of student debt.
- ❑ The university should ensure that the student computing system gives early and reliable information to the debt collection officer of all student debts. The system should trigger standard letters to the student.
- ❑ The draft tuition fees policy says that debts owing on day one are payable within 28 days. Thereafter they may attract interest. After a further 28 days, the student will be offered an interview. Without evidence of hardship and an agreed payment programme, after a further 28 days the student will be required to leave the university. He or she may be re-instated on payment of the outstanding fees before the end of the academic year in question. If a student is in genuine difficulty with payment, terms will be negotiated.
- ❑ The draft policy on accommodation fees gives comparable deadlines, the sanction being eviction from residence, following a court order which will be necessary unless the student leaves voluntarily.

- ❑ A student would not be required to withdraw from the university for non-payment of accommodation fees or library fines. In these cases, the university should ensure by prompt action that they do not grow unduly large, and can take legal action if necessary.
- ❑ Students should be able to appeal against penalties, including a requirement to withdraw, under the Student Grievance Procedure.

6.2 Specimen policy

University X: student fees for the year 200.../200...

Payment of fees: due date

Tuition fees become due on the first day of your programme of study. For most full-time undergraduate students, tuition fees are due in full on Accommodation fees become due when you arrive to take up your place in University accommodation.

28-day period

Within 28 days of the due date, all students must either pay their tuition and accommodation fees in full or arrange with the Finance Office to pay by instalments. If you choose to pay in full within the 28-day period, you may use a cheque, credit card or direct debit.

Payment by instalments: tuition fees

You may choose to pay tuition fees by two or three instalments, rather than by a single payment. This may be arranged by cheque, credit card or direct debit, as follows:

Two instalments: 1/2 by 1/2 by.....

Three instalments: 1/3 by 1/3 by 1/3 by.....

Payment by instalments: accommodation fees

You may choose to pay accommodation fees by three instalments, rather than by a single payment. This may be arranged by cheque, credit card or direct debit, as follows:

35% by 35% by 30% by

Payment by a sponsor

Remember that even if your fees are to be paid by a sponsor such as an embassy or employer, it is your personal responsibility to ensure that they are paid.

What happens if payment is late?

Payment of interest on overdue amounts

Unless you have chosen to pay by instalments, if your tuition or accommodation fees remain unpaid 28 days after they are due, you will become liable to pay interest at 2.5% above UK clearing bank base rate per annum on the full amount. Interest will run from the due date to the date when the fees are eventually paid. Thus for most full-time students, without an agreement to pay by instalments, if tuition fees are unpaid on..... you will be liable to pay interest from until the fees are paid. If you have chosen to pay by instalments, interest on a late instalment will run from the due date to the date when the instalment is paid.

Interview

If tuition or accommodation fees are still unpaid 4 weeks after the end of the 28-day period, or if an instalment is late, you will be offered an interview with the Income Officer. If you are in genuine difficulty with payment, the Income Officer will try to agree with you a programme of payment that you can afford. You will then be required to pay at the agreed rate.

Requirement to leave the University

Without both evidence of hardship and a payment programme agreed with the Income Officer, if tuition fees are still outstanding 8 weeks after the end of the 28-day period or 4 weeks after an instalment was due, you will be asked to leave the University. The University will put your debt into the hands of a debt collector.

Reinstatement on payment of full tuition fees

On payment in full of outstanding tuition fees before the end of the academic year in question, the University may permit your reinstatement on your programme of study. However, if you are behind with your work you may have to repeat parts of the programme, thereby incurring further fees.

Requirement to leave accommodation

Without both evidence of hardship and a payment programme agreed with the Income Officer, if accommodation fees are still outstanding 8 weeks after the end of the 28-day period or 4 weeks after

an instalment was due, you will be given notice to leave your accommodation. The University will put your debt into the hands of a debt collector.

Degree ceremonies

The University will normally refuse to allow you to attend a degree ceremony if tuition fees are outstanding.

Appeal process

If you are unhappy about a decision concerning payment of your fees, including a requirement that you withdraw from the University, you may contact the Student Complaints Officer, and bring a complaint under the University's Student Grievance Procedure. A separate leaflet explaining how to bring a complaint is available from the Students' Union.

Early withdrawal

If you leave your programme of study early, you may be liable for fees for the full academic year, although in some instances refunds may be claimed - your Faculty Office will advise you. If you leave your accommodation early, the sum for which you are liable is set out in the terms and conditions of residence in University accommodation.

Difficulty with payment

Students who are experiencing financial difficulties in paying tuition or accommodation fees should seek help at the earliest possible opportunity. The University will be sympathetic and assist where it can. However, in order to maintain the quality of teaching for everyone else, the University must act to recover debts. Initially you should approach the University's Student Finance Officer, whose office is located in the Students' Union Building. You may also wish to speak to a personal tutor, hall warden or someone at the Students' Union for support and advice. It is important to keep the Income Officer in the Finance Office, informed of developments.

Contacts

Student Finance Officer
Income Officer
Student Complaints Officer