

Restatement of the CMA's views on Consumer Protection Law

Introduction

1. The CMA has previously published its views on consumer law specifically in relation to the Higher Education (HE) undergraduate sector and more generally. The purpose in doing so was to help HE providers, and other businesses, to understand and comply with their consumer law obligations.
2. The CMA has been asked by some HE stakeholders to re-iterate its views on consumer law, particularly in relation to:
 - the provision of information to prospective students about potential changes to educational services;
 - terms which allow HE providers a wide discretion to vary aspects of their educational service; and
 - terms which exclude or limit liability for a failure to deliver the agreed educational service or for delivering a different educational service to that agreed.
3. The CMA's views on these issues are not new and are set out in the CMA's consumer law compliance advice for HE providers,¹ the CMA's HE consumer law compliance review findings report² and its general unfair contract terms guidance.³ They apply equally to existing and future contracts. These views are summarised below.

Providing information to prospective students

4. As set out in Chapter 4 of the CMA's advice, HE providers should ensure that they comply with their legal obligations under consumer law, especially the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs') and the Consumer Contracts (Information, Cancellation and Additional Charges)

¹ [CMA - HE consumer law advice](#) As explained in paragraph 2.13 of the CMA's consumer law advice published in 2015, HE providers' means (a) publicly funded universities; (b) further education (FE) colleges that offer HE courses; and (c) HE providers that do not receive direct public funding, sometimes referred to as alternative HE providers.

² [CMA - HE undergraduate - compliance review findings](#)

³ [CMA 37 - unfair contract terms guidance](#)

Regulations 2013 ('CCRs') when providing information to prospective students.

5. In order to comply with the legal obligations HE providers should ensure that information provided to prospective students is clear, accurate and complete. This should enable students to make informed decisions about their higher education choices.

Potential changes before an offer is accepted

6. HE providers must provide prospective students with pre-contract information (as defined in the CCRs) before they accept an offer. This includes details of the educational service to be provided. The pre-contract information will be binding on HE providers where a prospective student subsequently accepts an offer.
7. HE providers will need a student's express agreement to make changes to the pre-contract information before or at the time of making the offer, unless they have already made clear what may change, when and how. It should be noted that it is not sufficient for the information about the possible changes to be in 'the small print' and it would not be acceptable for the HE provider to reserve the right to make any changes it wants. The pre-contract information provided for the purposes of the CCRs is assessable for fairness under unfair terms legislation, as are the wider terms used by HE provider.
8. In any event, HE providers should highlight any changes when the student is sent their offer, or before.

Potential changes after an offer is accepted

9. As noted in the CMA's HE consumer law compliance review findings report, it is possible for HE providers to make provision for both the variation of course content (including withdrawal of the course) and course delivery after students have accepted the offer of a place. However, the combined effect of the CCRs and unfair terms legislation is to require HE providers to give transparent and full information about the potential for such variation before the student is bound to the contract. Where an HE provider anticipates that some things might change after the offer is accepted, they must make clear in the pre-contract information what could change, when, and how, so that the student can agree to this. Further, any terms in the contract that purport to allow changes to the educational service (and other pre-contract information) must be fair under the Consumer Rights Act 2015 ('CRA').

Terms that allow a wide discretion to vary

10. Terms⁴ that allow an HE provider to vary something – such as the course content – may be unfair under the CRA where they allow wide discretion to the HE provider to make changes to important aspects of the service. This includes so-called ‘Force Majeure’ terms, which purport to give the HE provider a right to make changes in response to events which are completely outside its control. If terms are found to be unfair then they are not enforceable. Seeking to rely on an unfair term may itself be a breach of consumer law.
11. As set out in paragraphs 5.16 to 5.29 of the CMA’s advice to HE providers, the CMA’s view is that a variation term may be less likely to be open to legal challenge for potential unfairness if:
 - it is narrow in its scope and effect;
 - it sets out valid reasons for why changes might be necessary, and students are able to foresee when and what changes might be made;
 - it sets out how the HE provider will deal with any changes that become necessary (for example, it will provide adequate notice of proposed changes to students and take all reasonable steps to minimise disruption to students);
 - the term is set out in plain and intelligible language so students can understand and foresee its potential impact on them, and is actively drawn to the student’s attention up front;
 - the HE provider informs students about any proposed changes in good time before they become effective. However, note that providing notice of changes will not alleviate the unfairness of a term that is substantively unfair; and
 - the student is able to terminate their obligations without penalty where they are adversely affected by the change (there should be no fees or charges, the student should no longer be required to make further payments and they should be entitled to receive a refund of advance payments for services not yet provided).

⁴ ‘Terms’ are likely to include an HE provider’s rules and regulations and other applicable documentation that contains rules that apply to students.

12. It should also be noted that term 'Force Majeure' is legal jargon and best avoided. It should never be used without clear explanation. Plain language is required for terms in consumer contracts under the CRA.
13. Chapter 5 of the CMA's unfair terms guidance (in particular paragraphs 5.22.1 to 5.22.13) set out the CMA's views on variation clauses generally.

Terms that seek to limit liability

14. As set out in chapter 5 of the CMA's advice to HE providers, terms which exclude or limit liability for a failure to deliver the agreed educational service or for delivering a different educational service to that agreed are subject to unfair terms legislation. Again, this includes so-called 'Force Majeure' terms, which purport to set out what happens in response to events which are completely outside the HE provider's control.
15. As set out in paragraphs 5.30 and 5.31 of its advice, in the CMA's view terms that purport to limit the liability of the HE provider in this way are inappropriate and potentially unfair.
16. Chapter 5 of the CMA's unfair terms guidance (in particular paragraphs 5.1 to 5.11.6) sets out the CMA's views on exclusion and limitation clauses generally.
17. The CRA also makes certain contract terms legally ineffective – not binding on or enforceable against consumers – in a number of specific situations (so-called 'blacklisted' terms). Contract terms seeking to exclude or restrict statutory rights and any remedies are not binding on the consumer, for example the right to a price reduction where a service is not performed as described.
18. Chapter 4 of the CMA's unfair terms guidance sets out further details about consumer's statutory rights and 'blacklisted' terms.
19. In addition to their statutory rights and remedies consumers may have other remedies under the general law, for example a right to treat the contract as at end or to claim damages.