



Senate

Paper Title	Competition and Markets Authority guidance to universities: next steps and implementation
Outcome requested	Senate is asked to note the Universities UK briefing note on the implications of the Competition and Markets Authority (CMA) guidance for higher education institutions.
Points for Senate members to note and further information	<ul style="list-style-type: none"> • The CMA guidance provides advice to higher education institutions about their consumer law obligations to undergraduate students. • The guidance has a particular focus on: information provision, the fairness of universities terms and conditions and complaint handling. • QMUL has established a Consumer Protection Legislation Task and Finish Group to advise QMSE on actions necessary to comply with the guidance. The Group will also make regular reports to Senate. • The Group agreed that it would be helpful for ARCS staff to meet with schools and institutes to discuss the implications of the guidance in more detail, and to address any specific questions or concerns. This will also enable ARCS to identify any training needs, and to make arrangements for these as appropriate.
Questions for Senate to consider	<ul style="list-style-type: none"> • Do members have any particular concerns in relation to the guidance? • Would members find it helpful to have school/institute based meetings to discuss the implications of the guidance?
Regulatory/statutory reference points	<p>QMUL is required to comply with:</p> <p>Consumer Rights Act (October 2015)</p> <p>Consumer Protection from Unfair Trading Regulations, 2008</p> <p>Consumer Contracts (Information, Cancellation and Additional Charges), 2013</p> <p>Unfair Terms in Consumer Contracts Regulations 1999</p>
Strategy and risk	Non-compliance with the law could result in civil or criminal proceedings. The CMA can also raise non-compliance with the Quality Assurance Agency under its Concern scheme.
Reporting/consideration route for the paper	n/a

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Universities UK

Competition and Markets Authority guidance to universities: next steps and implementation



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Keywords

Student protection, consumer rights, Competition and Markets Authority, student experience

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Action

Members are advised to:

1. consider how the CMA guidance applies to your institution
2. forward issues requiring clarification to Universities UK

Territorial relevance

UK

Suggested distribution

Vice-chancellors, Senior Management Teams, Registrars and Secretaries, Directors of admissions and marketing, Heads of legal advice

Executive summary

This briefing summarises the implications of the advice published on 12 March 2015 by the Competition and Markets Authority (CMA) for universities and provides feedback from workshops with sector practitioners. The CMA will monitor the sector's compliance and conduct a review in October 2015.

Attachments and links

CMA advice for universities and Students

<https://www.gov.uk/cma-cases/consumer-protection-review-of-higher-education>

Annexe A: applying the guidance in your institution

Overview

This briefing summarises the implications of the consumer law guidance to higher education providers published by the Competition and Markets Authority (CMA) on 12 March 2015. This briefing aims to help clarify the steps that institutions should be considering in order to comply with the requirements of consumer rights regulations and demonstrate a proactive direction of travel. It builds on engagement with the CMA as well as a series of workshops with professional groups across the sector.

The original CMA guidance clarified institutions' obligations to students, particularly undergraduate students, under consumer rights regulations. In particular the guidance focused on setting out minimum standards on:

- information provision,
- fairness of universities' terms and conditions and,
- complaint handling.

The CMA distributed this guidance to vice-chancellors with the following recommendations:

- a. To consider how the advice applies to the institution for undergraduates and all types of students studying in the UK.
- b. To review practices, policies, rules and regulations for dealing with students and if necessary amend to ensure compliance.
- c. Ensure all staff, departments and faculties are aware of the CMA advice and have been provided with appropriate training to ensure compliance. The letter states that institutions are *'responsible for the actions of your staff, who are acting in your name or on your behalf'*.

CMA sector review

The CMA will carry out a review of the sector in October 2015. The review will check compliance with consumer protection law and assess progress in implementing the guidance. UUK understands that the review will be intelligence-led with information sought on progress at sector level from a variety of sources, including compliance reporting mechanism and consumer representative organisations such as Which?.

Where necessary, the CMA may request information from an institution on a specific issue where they have received evidence that the institution may be in breach of the law. Consumer protection law is not devolved and therefore relates to all universities across the UK.

Non-compliance with the law could result in enforcement action by the CMA or other bodies such as the local authority Trading Standards services (or in NI the

Department of Enterprise, Trade and Investment). All have powers to bring either civil or criminal proceedings. The CMA can also raise concerns about an institution with the QAA and ask it to consider an investigation under its Concern Scheme (in England, Wales and Northern Ireland) or under the Protocol for managing potential risks to quality and standards in Scotland.

Only a court can determine whether a breach of the law has occurred. The CMA guidance sets out the CMA view of how consumer rights regulations apply to higher education institutions. Similarly this briefing is intended to help institutions develop their own practice when responding to the CMA guidance. Where necessary, institutions are encouraged to seek their own legal advice.

Recommendations

Members are advised to continue taking active steps to review your practices and ensure that they meet the requirements and principles set out in the guidance. Institutions are defined as traders and as such are already subject to the requirements of the regulations. If you have not already done so, Members may wish to consider the following steps:

- Ensure that senior management teams are fully aware of the consumer regulations framework and what this means for the institution, and include on the institutional risk register with executive level ownership.
- Establish a task group to undertake a review of the implications of the CMA guidance, implement changes and lead the development of a strategic approach to consumer rights issues at the university.
- Give immediate consideration to ensuring that the institution's practices in relation to provision of information to potential applicants are compliant for the start of the 2016 admissions cycle, including:
 - ensuring that student information and marketing materials across the institution are as consistent and up-to-date as possible and compliant with the standards set out in the guidance.
 - ensuring that staff, particularly those involved in student recruitment and admissions, including academics and 'temporary staff' such as student ambassadors, are aware of what the advice means in practice.
 - Identify where changes in procedures for making offers to students may be required, including information provided, terms and conditions and managing notification of material changes, and take appropriate steps in advance of this point in the admissions cycle.

Further analysis on applying the guidance in your institution is set out in Annexe A of this briefing. The analysis is based on discussions with the CMA, the Supporting

Professionalism in Admissions Programme (SPA), and workshops in partnership with the Universities Association of legal Practitioners and the Academic Registrars Council.

Ongoing activities

UUK is working to help develop a strategic approach to consumer rights issues in the sector that fully reflects the nature of the relationship between student and institution. Activities include:

- Working with the funding councils to develop a statement of good practice on course changes and closures to help clarify expectations for institutions and students.
- Engaging with Which?, including a round table with members of the Student Policy Network and Longer Term Strategy Network to explore strategic approaches to the consumer rights agenda in higher education in September.
- Working with the CMA and sector professional groups to identify and disseminate good practice for the sector.

Issues requiring clarification

If there are any issues that arise in relation to the CMAs guidance and the consumer rights agenda please contact: william.hammonds@universitiesUK.ac.uk.

Institutions should also contact the CMA directly with questions at: HEconsumercompliance@cma.gsi.gov.uk.

Annexe A: applying the CMA guidance in your institution

The CMA published guidance to universities on the 12 March to support institutions in responding to their obligations under consumer law. Apart from the Consumer Rights Act which comes in to place in October 2015, consumer protection law is not new. Under consumer law, students are classified as ‘customers’ and universities as ‘traders’. Consumer law is not devolved and therefore the advice relates to all universities across the UK.

The primary consumer protection regulations covered in this advice are:

- Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs)
- Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).

CMA believes students to be in a ‘weak’ position in relation to institutions as the decision to choose a course and institution is viewed as a ‘one-off’ decision which involves significant time and money and can be difficult to change. In its work to date the Competition and Markets Authority (CMA), has identified potential consumer protection issues relating to:

- the **information available to students** to enable them to choose the most appropriate course and institution (this refers to all information but specific attention is being placed by the CMA on the provision of information from the application stage to the enrolment stage)
- the **terms and conditions used by some universities**, including their accessibility, fairness and proportionality (this refers to university regulations and all regulatory documents that relate to students)
- the **speed and effectiveness of complaints handling** by some universities, as well as an apparent lack of student knowledge about the process.

The CMA’s advice relates primarily to undergraduate students, however it is also expected that this will impact on postgraduates, although not necessarily all postgraduates if the latter is undertaking a qualification on behalf of a trade. Institutions may also wish to review the guidance prepared for [students](#) as this sets out:

- what to check when choosing a university and course
- what to expect when at university
- what to do if things go wrong

The CMA has considered the law as it applies to undergraduate students and courses, however, the CMA acknowledges that it may be also be relevant to other types of students and courses. Institutions should also note that the consumer law applies to the provision of other services provided by an institution such as accommodation, and the availability of funding and other support to students but that is not covered in detail in the CMA advice.

Non-compliance with the law could result in enforcement action by the CMA or other bodies such as the local authority Trading Standards services (or in NI the Department of Enterprise, Trade and Investment). All have powers to bring either civil or criminal proceedings¹. The CMA can also raise concerns about an institution with the QAA and ask it to consider an investigation under its Concern Scheme (in England, Wales and Northern Ireland) or under the Protocol for managing potential risks to quality and standards in Scotland.

Only a court can determine whether a breach of the law has occurred. The CMA guidance sets out the view of the CMA. Similarly this briefing is intended to help institutions develop their own practice when responding to the CMA guidance. Where necessary, institutions are encouraged to seek their own legal advice.

Overview of consumer regulations

The CPRs apply throughout all stages of the relationship between the student and the university including before the student has accepted an offer through to enrolment and prohibit the use of unfair commercial practices toward consumers

The CCRs require universities to give students access to certain information before the contractual relationship is formed and to inform students of their cancellation rights if the contract is made off premises.

University rules and regulations are likely to be subject to the UTCCRs and to a test of fairness. Consequently, terms may be considered unfair if they are not made in good faith or create a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

The guidance also links to the Consumer Rights Act (CRA) which will come into force in October 2015. The CRA was primarily intended to consolidate and clarify existing legislation rather than introduce extensive new consumer rights. However, there are new provisions which provide for a student to demand 'repeat performance' as a remedy for a contract not being fulfilled satisfactorily.

The Act requires 'reasonable care and skill' on the part of the provider in fulfilling the contract. The 'contract' is taken to include anything said to the consumer on or behalf of the provider which influences the consumer's decision to enter into the contract, or

¹ Further guidance on the CMA's approach to use of its consumer powers can be found on the CMA webpages.

decisions about the service made after the contract was entered into. In practice this means that materials in prospectuses and university websites are likely to be taken as part of the contract where it influences the choices made by students as spoken statements, for example, on open days.

It is likely that the 'repeat performance' provision would apply to the service as a whole (normally the degree) rather than to particular components, such as lectures or courses, which are deemed unsatisfactory. However, it is possible that unsatisfactory delivery of part of a degree may contribute to the whole being considered to have not been delivered with reasonable care and skill. In cases where repeat performance is impossible, a consumer may demand a price reduction which may equal the total cost paid or payable.

The CRA makes references to refunds. The refund can be a part refund to reflect the difference in value between the service the consumer paid for and the value of the service as provided. In practice, this will mean that the reduction in price from the full amount takes into account the benefit which the consumer has derived from the service. Depending on the circumstances, the reduction in price could mean a full refund for the degree programme.

Information provision

Institutions are required to provide prospective students with all **material information**, for example *the information a student needs to make an informed decision*. The CMA recognises that not all information is 'material' and that some information will be used for other purposes such as advertising. It is for each institution to determine what 'material' information is. Institutions should consider asking '*what would the average student needs to know to make an informed choice?*' The CMA's student guide provides a good indication of what a student will be expecting.

Institutions may want to consider clearly collating material information in one place. Much of the information is already provided by institutions, such as the Key Information Set (KIS), however, material information may be held in multiple of places. The UCAS Course Search tool is now linked to the KIS and allows students to look at the relevant KIS data for the courses they are looking at on UCAS.com.

Institutions should consider reviewing what material information would mean to the student and whether it could be made clearer, more transparent and better signposted. Consideration may be given to the development of an online repository for collecting up-to-date university policies in a single place. Institutions may also wish to consider develop protocols for information provision for agents and staff at open days.

Key questions when providing information

What information does the average student need to know to make an informed choice?

- Have prospective applicants been given information on structure of courses, fees/costs (including any extras) at all stages leading up to enrolment? This should also include non-course-related information e.g. accommodation options and availability of funding and support and the institution's terms and conditions.
- Have **important** or **'surprising'** rules and regulations, i.e. any rules which are unusual been highlighted? At this stage this means they must be on an institution's website and outside an applicant portal that requires the applicant to log in.
- Is information transparent, clear, unambiguous, upfront, accurate and timely (ie available **before** a decision is made)?
- Is all the information that could affect an applicant's decision included? Eg if a module may not run because it needs at least 10 students then the institution will need to make this clear (the rationale being that the average consumer would need to know this as this could affect the choice they make).
- Is information about how to complain presented clearly?
- Is the information accessible and consistent across different sources, including written material and verbally? eg website, prospectuses, handbooks, open days, advisors.

In order for information to 'stand the test of time', institutions may wish to consider the appropriate level of detail needed for students at different stages of the process. For example, instead of referring to modules on a website institutions may find it helpful to refer to programme specifications; as programmes are broader this may help to address some issues associated with specifying individual modules. Alternatively where information is known to be potentially subject to change this should also be made clear, eg minimum required enrolment for a module to proceed.

If a change is necessary (e.g. in terms of a change of lecturer, a module, the location of a course etc.) this should be made clear by stating what will change and why and ensure that this is communicated internally and externally. This includes updating the website as well as informing affected students directly where necessary. If something happens outside the control of the institution the test will be on what the institution has done to mitigate the impact on the student.

Guidance on good practice in events of course changes and closure is currently being developed in collaboration between the funding councils and sector representative groups.

Offer stage

When an applicant accepts an offer of a place, the university and prospective student enter into a contract and the Consumer Contract Regulations (CCR) come into play². At this stage the institution should provide the necessary pre-contract information and draw attention to terms and conditions. This also applies to offers made to students through Adjustment and during Clearing.

UCAS's interpretation is that applicants accepting conditional or unconditional offers during the admissions cycle, Adjustment or Clearing should have 14 days in which to change their mind. UCAS is working with the CMA to ensure that these changes are embedded into the UCAS process for the 2016 cycle. However, for the 2015 cycle, in line with current UCAS practice, applicants will be asked to seek permission from institutions after seven days although to comply with the legislation there is an expectation that institutions will grant permission throughout the 14 day period.

Key questions when making offers

- Have students been given the necessary **pre-contract** information **before** the offer is accepted? Necessary information can include:
 - requirements of the offer
 - main characteristics and duration of the course (eg core modules or programme)
 - specifications, specify number and type of contact hours)
 - fees and all other costs and how increases/changes will be calculated (as this will become a term of the contract it may be difficult to change at a later stage).
 - make clear what could change in the future; setting out when and how so that the student can agree to this
- Have applying students been notified if information has changed before making an offer and have they agreed?
- Has confirmation of the contract been provided in **durable** form and with notice of their 14-day right to cancel where an offer is made at distance?
- Have you drawn students attention to the institution's full **terms and conditions** so that they have an opportunity to review them **before** they accept an offer?

The CPRs continue to apply at this stage; therefore any important information needed by an applicant to inform a decision to accept or decline an offer should be available.

Acceptance stage

The CMA states that the contract between a student and an institution is formed when a student accepts an offer. At the offer stage the contract is normally a distance contract if it is made by a third party, for example, as is the case where an offer and acceptance is made via UCAS or via an agent. This triggers consumer protection regulations including a right to cancellation and an option to 'buy' educational services.

Confirmation

UCAS has stated that students holding conditional offers (both firm and insurance), who are placed during Confirmation (i.e. they have received their results and are confirmed to have met the entry requirements) do not have a 14 day cooling off period.

Clearing and Adjustment

Where a prospective student fails to meet any specified entry requirements and enters 'Clearing' institutions are subject to the same information requirements and obligations under the CCRs and CPRs as outlined earlier. Similarly, an institution will have the same obligations if a student wishes to revisit their choices as a result of doing better than they anticipated, and goes through 'Adjustment', to see what other places may now be available to them.

Additional information about contracts outside the 'norm'

Institutions should be particularly careful in the information conveyed upfront in relation to non-standard contracts, such as dual enrolled students or students attending overseas campuses. For example if a course contained an overseas placement which involved different rules and regulations then the student should be informed of these beforehand.

Terms and conditions

The guidance outlines how institutions should present their terms and conditions to ensure that they are consistent with consumer protection law. These relate to any student regulations, rules and contracts. As contracts entered into between students and universities relate to the provision of educational services these will be subject to the test of fairness under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).

Key questions for fair terms and conditions

- Are the terms and conditions easily located and accessed and in plain and intelligible language? For example, accessible via website or student portals and accompanied by a leaflet explaining core terms and conditions
- Have applicants had an opportunity to review them **before** accepting an offer?
- Have any **important or surprising** terms for students been highlighted to an applicant before an offer is accepted? For example, in the offer letter.
- Do the terms and conditions create a **balanced relationship** between the rights and obligations of both the student and university? Terms that may be considered unfair include:
 - limitations on liability for non-performance
 - blanket provisions for widespread changes to course structure, content or cost. Where an adjustment is needed these can still be made but would need to be drawn to the student's attention
 - blanket assignment of intellectual property rights to the university
 - academic sanctions for non-tuition fee debts (such as accommodation or library debts)
- Have any **material changes** to terms and conditions been updated on the website and have affected students been informed directly if necessary?
- Do you have a process to review 'full terms and conditions' and manage different cohort versions e.g. of general regulations and provision of correct terms and conditions in durable media?

Complaint handling

Universities are encouraged to ensure that their complaint handling processes and practices are accessible, clear and fair to students. Institutions should ensure that relevant staff receive appropriate training and follow the complaints procedures since any failure to follow a procedure is the responsibility of the institution.

Key questions for complaints processes

- Have prospective and enrolled students been informed of how to make a complaint in writing and (where applicable) verbally and which is the responsible body? eg if a course is offered in partnership with, or sponsored or awarded by, another institution the applicant/student should be clear where responsibility for complaint handling lies
- Do you have separate complaints procedures for applicants and existing students and if so are they both easily locate, for example on a website and intranet?
- Have prospective students been given information about the complaints process before they accept an offer? This includes procedures relating to applicants and current students if they are separate. The OIA scheme does not apply to admissions so institutions may wish to refer to the good practice advice on handling admissions complaints and appeals provided by [SPA](#). SPA is currently updating its good practice in admissions complaints and appeals.
- Do your complaint handling processes operate to clear and reasonable timescales and provide for escalation and appeal?
- Do you provide details of any external complaint or redress scheme that students can access, such as the OIA?
- Is information on how to raise concerns 'formally' made available alongside information on raising concerns at an 'informal' level?

Further information

CMA Higher Education: Consumer Law guidance for providers 2015
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428549/HE_providers_-_advice_on_consumer_protection_law.pdf)

CMA Undergraduate students: your guide to consumer law 2015
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415732/Undergraduate_students_-_your_rights_under_consumer_law.pdf)

CMA Response to the consultation on advice to higher education providers on consumer law 2015
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411687/Consultation_response_document.pdf)

HEFCE – Helping students choose (<http://blog.hefce.ac.uk/2015/03/12/helping-students-to-choose-cma-publishes-advice-on-consumer-law-and-higher-education/>)

QAA UK Quality Code for Higher Education - Chapter B2: Recruitment, selection and admission to higher education, October 2013
(<http://www.qaa.ac.uk/en/Publications/Pages/Quality-Code-Chapter-B2.aspx#.VcnSraNwbGq>)

Supporting Professionalism in Admissions (SPA) has developed a set of slides to support staff involved in the marketing, recruitment and admission of students
(<http://www.spa.ac.uk/support/goodpractice/competitionconsumerlaw>)

Supporting Professionalism in Admissions Good practice statement on Applicant complaints and appeals, January 2012. This is currently being updated by SPA in light of the CMA advice.
(http://www.spa.ac.uk/documents/Applicantcomplaintsandappeals/Applicant_complaints_and_appeals_JAN2012.pdf)

Which? A degree of value: Value for money from the student perspective, November 2014 (<http://press.which.co.uk/wp-content/uploads/2014/11/Which-A-degree-of-value-Nov-2014.pdf>)

Which? CMA – universities must be compliant with consumer law
(<http://conversation.which.co.uk/consumer-rights/cma-uni-university-higher-education-course-law/>)

Which? Higher education: a review of providers' rights to change courses, February 2015 (<http://press.which.co.uk/wp-content/uploads/2015/02/Which-Investigation-Higher-education-courses-a-review-of-providers-right-to-vary-courses-2.pdf>)

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