

# UK higher education providers – draft advice on consumer protection law

Helping you comply with your obligations

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

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## 1. Executive summary

- 1.1 The Competition and Markets Authority (CMA) has produced this compliance advice following the findings of the Office of Fair Trading's (OFT's) Call for Information (Cfi) on the higher education (HE) undergraduate sector in England<sup>1</sup> and further work undertaken by the CMA into potential consumer protection issues in the UK HE sector.<sup>2</sup> Consumer protection law will generally apply to the relationship between HE providers and undergraduate students.
- 1.2 The CMA is a non-ministerial department formed on 1 April 2014. It is a unified competition and consumer authority which took over a number of the functions formerly performed by the OFT and the Competition Commission. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy. The CMA has powers to enforce consumer protection law.<sup>3</sup>
- 1.3 The CMA and the Trading Standards Institute (TSI) share the role of working with businesses to drive up standards through clarifying legal obligations,<sup>4</sup> with the CMA focusing on issues that have emerged as a result of a market study or other in-depth analysis of business practices in a particular sector.
- 1.4 In March 2014 the OFT published the findings of a Cfi on the undergraduate HE sector in England. Although the evidence submitted to the Cfi did not suggest that the HE sector is characterised by pervasive bad practices, engagement with stakeholders highlighted significant scope for clarifying HE providers' responsibilities under consumer protection law. In this respect the Cfi identified some potential consumer protection issues relating to:
- (a) the information available to students to enable them to choose the most appropriate course and HE provider;
  - (b) the terms and conditions used by some universities, including their accessibility, fairness and proportionality;
  - (c) the speed and effectiveness of complaints handling by some universities, as well as an apparent lack of student knowledge about the process.

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

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

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

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

- 1.5 Following the Cfl, the OFT recommended that the CMA take forward work on clarifying HE providers' responsibilities under consumer protection law. The CMA's follow-up work, research and analysis has been UK wide as consumer protection legislation is applicable throughout the whole of the UK.
- 1.6 Based on the CMA's further work, and its engagement with stakeholders including university and student representatives, we have decided at this time is to produce compliance advice for HE providers in the UK to help them understand their responsibilities under consumer protection law in relation to their dealings with students.
- 1.7 HE providers play a crucial role in the UK economy. They contribute directly to economic growth, employment and local economic activity, delivering skilled workers into the wider economy, and contributing to export earnings. The CMA hopes that this advice will help HE providers understand their responsibilities under consumer protection law when dealing with students, and how they can comply with it.<sup>5</sup> In our view, compliance with consumer protection law should help HE providers to compete for and retain students by ensuring that students are treated fairly and that their expectations are met.
- 1.8 The advice is particularly important at a time when a greater share of HE providers' funding is coming directly from students, which has highlighted particular expectations of providers when it comes to, for example, information they provide about degrees and courses available, the choices on offer, students' rights as consumers, and how complaints by students will be handled.
- 1.9 The issues addressed in the advice are important, given that for most students decisions on what and where to study will be a 'one-off' involving the investment of a significant amount of time and money. Therefore, that decision needs to be properly informed and right for them. Once students have enrolled, if they are dissatisfied with their experience, it is practically very difficult for them to switch HE providers or courses. It is very important therefore that HE providers, in their dealings with students, provide clear, comprehensive and timely information, and that their terms and conditions and complaints processes are fair.
- 1.10 HE providers should read and consider the advice and ensure that they are complying with the law. If necessary they should make changes to their practices, policies, rules and regulations. Non-compliance with the law could result in enforcement action by local authority Trading Standards Services (or,

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<sup>5</sup> HE providers include publicly funded universities, further education (FE) colleges that offer HE courses and privately funded universities and colleges.

in Northern Ireland, the Department of Enterprise, Trade and Investment), or by the CMA.

- 1.11 We have specifically considered the law as it applies to HE providers of undergraduate courses but this advice may also be relevant to HE providers of other types of courses. The advice may also be of interest to consumer and student advisers, and to enforcers. There are also sector-specific regulatory obligations that are relevant to some HE providers, for example in relation to information provision and complaint handling processes. **The advice is not a substitute for the law itself, nor does it replace the role of a court, which provides a definitive interpretation of the law. The advice sets out the views of the CMA, and HE providers should seek their own legal advice on the law.**
- 1.12 Information on the purpose and scope of this advice and what you need to do is summarised in the following ‘[Purpose and Scope](#)’ chapter. [Chapter 3](#) provides an overview of the consumer protection law covered in this advice. The subsequent chapters of the advice broadly follow the ‘student’s journey’ and focus on the issues of information provision, terms and conditions and complaint handling procedures and practices. The examples used in the advice are based on issues which we believe are likely to be relevant to students.
- 1.13 [Chapter 4](#) explains what information HE providers need to give to students, and when it should be provided, in order to comply with their obligations under consumer protection law – in particular the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs) – and to enable students to make informed choices about what and where to study.
- 1.14 [Chapter 5](#) sets out advice about ensuring that HE providers’ terms and conditions are fair and comply with the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).
- 1.15 [Chapter 6](#) addresses issues around HE providers’ complaint handling procedures and practices under the CPRs and UTCCRs, which should be transparent, clear and easily accessible, and complaints should be handled fairly.

## Key requirements for HE providers

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

#### 1.16 Student research and application stage:

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

#### 1.17 Offer stage:

- (a) To comply with the CPRs, you should ensure that you continue to provide important information to students to inform their choice of which offer(s) to accept, and this obligation continues throughout your dealings with students. In particular, if any important information from your prospectus or other course promotional materials has changed, it is important to bring this to students' attention. In addition, you should draw students' attention to your full terms and conditions, make sure that these are accessible and flag particularly important terms.
- (b) In addition, for distance contracts (for example, offers and acceptances made via the Universities and Colleges Admissions Service (UCAS)), you should ensure that you:
  - (i) Provide students with the necessary pre-contract information under the CCRs before they accept an offer of a place on a course, such as the requirements of the offer, the main characteristics of the course, the duration of the course, and the total price and other relevant costs (or how these will be calculated). As this information will become a term of the contract, it will be difficult to change it subsequently. If you anticipate that some things might change, this should be made clear

in the pre-contract information by setting out what could change, when and how.

- (ii) Ensure that confirmation of the contract is provided and the information is provided in a durable medium.
- (iii) Remember to give students notice of their 14-day right to cancel.

#### 1.18 Student enrolment stage:

- (a) In principle, the pre-contract information you gave to students at the offer stage should still be accurate on enrolment. You should seek legal advice if you consider any changes have become necessary.
- (b) If there have been any changes to information about the course, etc in any event you should ensure that you tell students about these at the earliest opportunity – failure to do this may be a misleading omission under the CPRs.
- (c) If enrolment takes place on campus, you should ensure that you comply with the CCRs requirements for on-premises contracts – certain information must be provided if it is not already apparent in the context. If enrolment takes place at a distance, comply with the CCRs requirements for distance contracts (see above).
- (d) You should ensure that you draw students' attention to terms, and any other rules and regulations, and make them accessible. Draw important terms to students' attention.

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

- (a) You should ensure that your terms (which are likely to include your rules and regulations and other applicable documentation that contains rules that apply to students) can be easily located and accessed (for example, on your website) and are available to students.
- (b) You should ensure that students are aware of your terms and give them the opportunity to review them before they accept an offer.
- (c) You should ensure that you highlight any important or surprising terms and draw them to students' attention before they accept an offer, so that their significance is not missed.

- (d) You should ensure that your terms are written in plain and intelligible language so that students understand them and understand how they affect their rights and obligations and how the terms could impact them.
- (e) You should ensure that your terms are not drafted in a way that their effect could be unfair. They should strike a fair balance between your rights and obligations and those of students. For example, the following types of blanket term may be open to challenge:
  - (i) terms allowing an HE provider an unreasonably wide discretion to vary course content and structure or increase fees during the duration of the course;
  - (ii) terms seeking to limit an HE provider's liability for non-performance or sub-standard performance of the educational service;
  - (iii) terms giving HE providers a blanket assignment, or a blanket right to receive an assignment, of intellectual property rights (IPRs) from students to the HE provider; and
  - (iv) terms allowing an HE provider to impose academic sanctions against students for non-payment of non-tuition fee debts.

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

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

- (d) You should ensure that your complaints handling processes are fair:
- (i) set out clear and reasonable timescales in which students can expect to hear back about their complaint at each stage of the process, as applicable;
  - (ii) provide the ability for students to escalate the matter if they are unhappy and ultimately to appeal if the matter is not satisfactorily resolved; and
  - (iii) follow any guidelines published by any third party redress or complaint schemes of which you are a member.
- (e) You should ensure that your staff are trained in and follow your complaint handling procedures in practice.

## 2. Purpose and scope

### Introduction

- 2.1 HE providers play a crucial role in the UK economy. They contribute directly to economic growth, employment and local economic activity, delivering skilled workers into the wider economy, and contributing to export earnings. In our view, compliance with consumer protection law should help HE providers to compete for and retain students by ensuring that students are treated fairly and that their expectations are met.
- 2.2 The advice is particularly important at a time when a greater share of HE providers' funding is coming directly from students, which has highlighted particular expectations of providers when it comes to, for example, information they provide about degrees and courses available, the choices on offer, students' rights as consumers, and how complaints by students will be handled.

### Aim of this advice

- 2.3 This advice is intended to help HE providers understand and comply with consumer protection law in relation to their dealings with students.
- 2.4 There are also sector-specific regulatory obligations and guidelines that are relevant to some HE providers, for example in relation to information provision and complaint handling processes.
- 2.5 We acknowledge that consumer protection law is not the only aspect of the relationship between HE providers and students, and the existence of an academic community and a learning and pastoral environment is also important.
- 2.6 This advice:
- (a) sets out examples of a number of practices or conduct that may be relevant to the HE sector that, in our view, could potentially breach consumer protection law;
  - (b) sets out some of the practical steps HE providers can take to help them comply with the law;
  - (c) is not intended to be exhaustive: it does not cover every situation or practice in which a breach of consumer protection law may occur; and

(d) is not a substitute for the law itself. Only a court can determine whether a breach of the law has occurred. The CMA's views are not binding on the courts or other enforcers and whether there has been a breach of consumer protection law will depend upon all the factual circumstances of the particular case.

## Who is this advice for?

2.7 The advice is intended for the following HE providers in the UK:

- (a) publicly funded universities, sometimes referred to as traditional HE providers;
- (b) FE colleges that offer HE courses; and
- (c) privately funded universities and colleges, sometimes referred to as alternative HE providers.

2.8 We have specifically considered the law as it applies to HE providers of undergraduate courses. However, this advice may also be relevant to providers of other types of courses. The advice may also be of interest to consumer and student advisers, HE sector organisations and to enforcers.

## What does this advice cover?

2.9 Consumer protection law will generally apply to the relationship between HE providers and undergraduate students. It is our view that HE providers are acting for purposes relating to their trade, business or profession when providing educational services and will be a 'trader' or 'seller or supplier' for the purposes of consumer protection legislation. Conversely, undergraduate students will generally be acting for purposes outside their trade, business or profession, and therefore will be 'consumers' for the purposes of the legislation.<sup>6</sup>

2.10 In this advice we have summarised our views on what we consider HE providers need to do to comply with consumer protection law in relation to the following three issues:

- (a) **Information provision** – the need to provide clear, accurate, comprehensive and timely information to students.

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<sup>6</sup> Consumer protection legislation does not use uniform terms to describe the parties, and the definitions used vary slightly between different legislation. However, the broad thrust of the meaning is similar in each case.

- (b) **Terms and conditions** – the need for terms and conditions that apply to students to be fair and balanced. HE providers should not rely on terms that could disadvantage students.
- (c) **Complaint handling processes and practices** – the need to ensure that complaint handling processes and practices are accessible, clear and fair to students.

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

- (a) Consumer Protection from Unfair Trading Regulations 2008;
- (b) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; and
- (c) Unfair Terms in Consumer Contracts Regulations 1999.

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

2.12 This advice document is based on the relevant consumer protection law at the time of drafting. However, HE providers should be aware of the planned introduction of the Consumer Rights Act (currently known as the Consumer Rights Bill (CRB) as it goes through Parliament), which is proposed to consolidate, simplify and update several pieces of consumer protection legislation, including the UTCCRs and The Supply of Goods and Services Act 1982 (SGSA). Further information about this can be found at: <http://discuss.bis.gov.uk/consumerrightsbill/>. Information about proposed changes to the law, including a document explaining changes to unfair terms law specifically, is currently undergoing consultation, and can be found at: <https://bisgovuk.citizenspace.com/consumer-rights-bill/guidance-2014>.

## **What do HE providers need to do?**

- 2.13 As an HE provider, it is important that you read and consider this advice and ensure that you are complying with consumer protection law in your dealings with students. You should therefore:
- (a) consider how this advice applies to you – and review your relevant practices, policies, rules and regulations for dealing with students;
  - (b) if necessary, make changes to your practices, policies, rules and regulations;

- (c) consider putting mechanisms in place to ensure a consistent approach among your different departments and faculties, for example in relation to information provision; and
- (d) ensure that your relevant staff are aware of, understand and follow both this advice and your own internal procedures and practices, as you are responsible for the actions of your staff, who are acting in your name or on your behalf.

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

- 2.14 **If you do not comply with the law you may face civil and/or criminal sanction.** For example, you may face enforcement action by your local authority Trading Standards Service (or, in Northern Ireland, the Department of Enterprise, Trade and Investment), or by the CMA.
- 2.15 In some circumstances, students may also have the right to take legal action against you, or the right to defend any action brought by the HE provider, for example to recover debts allegedly owed. In particular, in relation to an unfair term, a student may be able to rely on the UTCCRs. If a term is found to be unfair by a court, the term cannot be relied on by the HE provider.
- 2.16 From 1 October 2014, in some circumstances a student may have the right to seek redress under the CPRs in respect of misleading actions and aggressive practices.<sup>7</sup> This is in addition to any other rights to seek redress through any civil action they may pursue for breach of contract.
- 2.17 If you are a member of any external complaint or redress scheme, such as the Office of the Independent Adjudicator for Higher Education (OIA) in England and Wales or the Scottish Public Services Ombudsman in Scotland (SPSO), students may also be able to refer a complaint to that scheme if it falls within its remit.

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

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

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<sup>7</sup> This may include the right to unwind the contract, receive a discount or seek damages for detriment caused by the breach. For further information, see Department for Business, Innovation and Skills, [Guidance on the Consumer Protection \(Amendment\) Regulations 2014](#), August 2014.

### 3. Overview of legislation

- 3.1 This advice focuses on the main obligations that HE providers have towards students under the following consumer protection legislation:

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

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

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

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

## Unfair Terms in Consumer Contracts Regulations 1999

- 3.9 The UTCCRs apply to contract terms that set out the rights and obligations between a trader and consumers (students in this case).<sup>8</sup> As such, terms set out in an HE provider's rules and regulations that apply to students are likely to be subject to the UTCCRs.<sup>9</sup>
- 3.10 The UTCCRs apply a test of fairness to all standard terms, other than those terms which define the main subject matter or set the price. A term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.<sup>10</sup> The requirement of 'good' faith embodies a general 'principle of fair and open dealing'. If terms are found to be unfair they are not enforceable against the consumer.
- 3.11 General guidance on the UTCCRs can be found on the [CMA's webpages](#).
- 3.12 There are other consumer protection laws that HE providers also need to be aware of, including:
- (a) **The Provision of Services Regulations 2009 (PSRs)**, which apply to organisations that provide a service for which they normally charge (including educational services that are provided in return for remuneration). They will therefore apply to HE providers that do not receive public funding and may also apply to other 'traditional' HE providers depending on their funding model, and require that:
- providers make certain information available to students (as service recipients) in good time before the conclusion of the contract; and
  - providers respond to student complaints 'as quickly as possible' and 'make their best efforts to find a satisfactory solution to complaints'.

The requirements of the PSRs in relation to information provision and complaint handling are similar to those under the CPRs and CCRs. General guidance on the PSRs has been provided by the [Department for Business, Innovation and Skills](#).

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<sup>8</sup> Note that the UTCCRs apply to terms that have not been individually negotiated. Pursuant to the Consumer Rights Bill, this is anticipated to change so that unfair terms legislation applies to all terms in consumer contracts.

<sup>9</sup> There may be a variety of names given to these documents, including rules, regulations, policy and ordinances. Regardless of the document name, if it contains terms that students are bound by then those documents will be subject to the UTCCRs.

<sup>10</sup> Regulation 5(1) UTCCRs.

(b) **The Supply of Goods and Services Act 1982 (SGSA)**, which contains implied terms that a service must be carried out with reasonable care and skill in England, Wales and Northern Ireland.<sup>11</sup> In Scotland, the common law provides equivalent requirements. The SGSA and the common law in Scotland are, in our view, applicable to the provision of educational services, and so implies that the educational services need to be provided to this standard. General guidance on the SGSA can be found on the [Business Companion website](#). In respect of Scotland, please refer to the relevant pages on the Business Companion website.

There are other sector-specific regulatory obligations in relation to the quality of course provision.

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<sup>11</sup> Per section 13 of the SGSA.

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

- 4.1 Choosing what and where to study is, for most students, likely to be a ‘one off’ decision and involves the investment of a significant amount of time and money. Students therefore need to be given clear, timely, accurate and comprehensive information by HE providers so they know in advance what is being offered and can compare different courses and HE providers.
- 4.2 You have obligations under consumer protection law relating to the provision of information to students, which are in addition to any other sector-specific regulatory obligations that you may have to comply with (such as providing the Key Information Sets (KIS)).<sup>12</sup>
- 4.3 Each of the following consumer protection laws has distinct information requirements that you must adhere to at certain stages in your dealings with students (see paragraphs 4.7 to 4.29):

### (a) The CPRs.

- (i) The CPRs can apply at **any** stage of your interaction with students. Among other things, they make it unlawful to mislead students by failing to give them the information they need to make an informed choice, known as ‘material information’.<sup>13</sup> Among other practices, they prohibit:
- a practice of not providing students with the necessary material information at the appropriate times. This may constitute a ‘misleading omission’ under the CPRs;<sup>14</sup> and
  - a practice of giving misleading information, whether it is false or deceptive in the way it is presented. This may constitute a

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<sup>12</sup>The KIS provide comparable sets of information about full- or part-time undergraduate courses. This information is published on the [Unistats website](#). The courses that Unistats and KIS cover are (a) all full-time and part-time undergraduate courses planned for 2013/14 where HE providers subscribe to the [Quality Assurance Agency](#) (QAA), and (b) undergraduate programmes taught through FE colleges in England and Wales (this applies to colleges funded indirectly through an HE provider and for courses HEFCE funds directly).

<sup>13</sup> ‘Material information’ is information that the average consumer needs, according to the context, to take an informed transactional decision. It is also any information requirement which applies in relation to a commercial communication as a result of a European Community obligation (Regulation 6). A ‘transactional decision’ is any decision taken by a consumer whether it is to act or refrain from acting concerning – (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or (b) whether, how and on what terms to exercise a contractual right in relation to a product.

<sup>14</sup> A ‘misleading omission’ may occur if you omit material information that the average consumer needs, according to the context, to make an informed transactional decision, or if you hide or provide material information in an unclear, unintelligible, or ambiguous way (Regulation 6).

‘misleading action’ under the CPRs.<sup>15</sup> Information should be correct, clear and comprehensive.

- (ii) The CPRs apply to information you provide verbally as well as in writing, for example what your staff tell students during an open day, over the telephone, or upon enrolment.

**(b) The CCRs.**

- (i) The CCRs require that the relevant pre-contract information must be provided before the student becomes bound by certain types of contract. Among other things, the CCRs set out pre-contract information requirements for contracts entered into at a distance, away from business premises and on business premises.

4.4 There are also obligations under the UTCCRs relating to when information about your terms and conditions, and any other rules and regulations that students will be subject to, is to be provided to students (see [Chapter 5](#)).

## **Information provision during your interaction with students**

4.5 We have looked at how consumer protection law applies at three key stages of interaction between the HE provider and student. These are set out in Figure 1 below, which focuses on the UCAS application route, and sets out the more complex elements of the application process. Other application routes may be used by some HE providers, but these may be more straightforward.

4.6 The three key stages of interaction are:

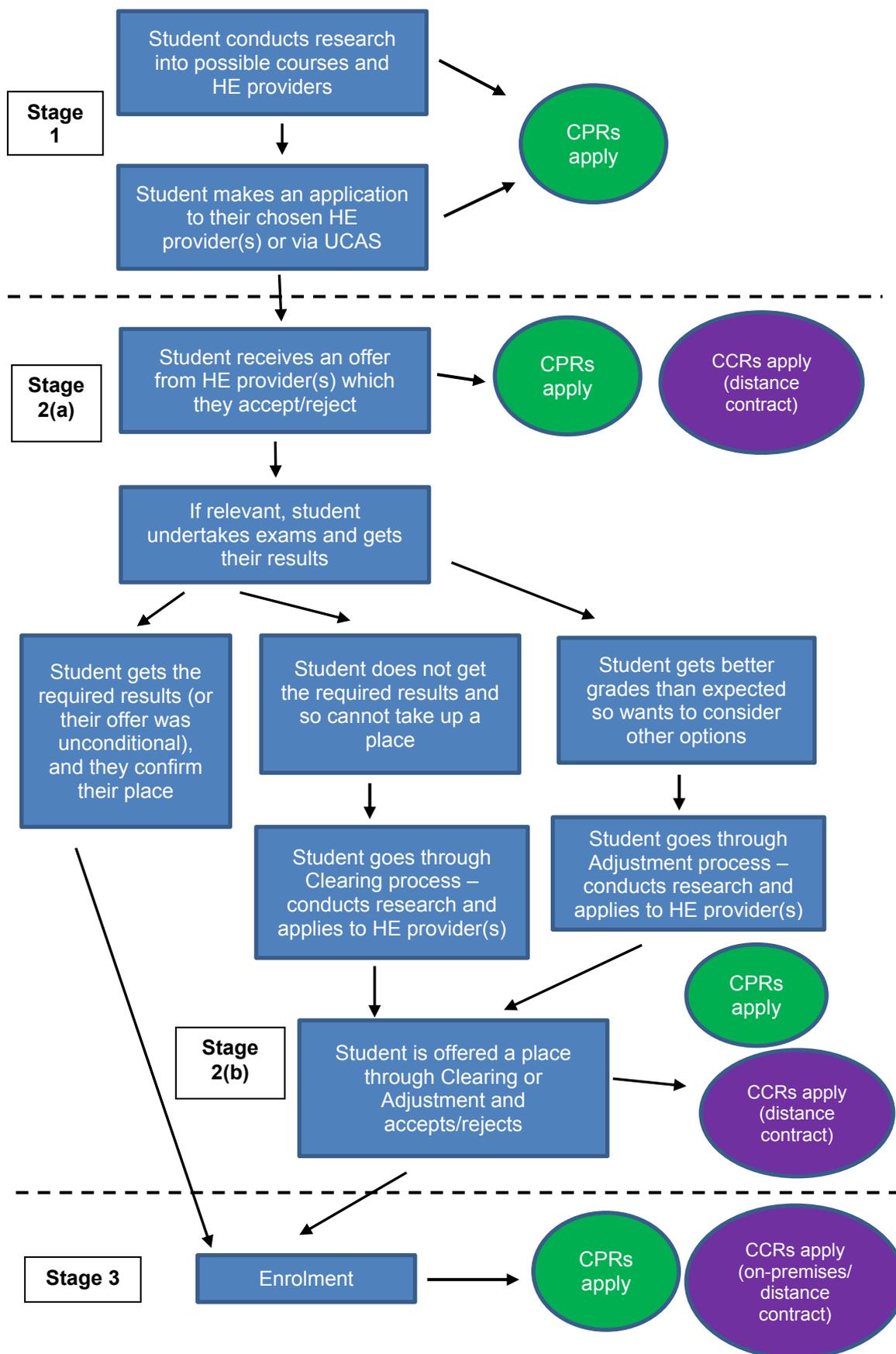
- (a) **Stage 1: Research and application stage** – when the student is considering what and where to study, followed by making an application.
- (b) **Stage 2: Offer stage** – when the student decides whether to accept an offer of a place with an HE provider.
- (c) **Stage 3: Enrolment stage** – when the student enrolls with the HE provider.

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<sup>15</sup> A ‘misleading action’ may occur if you give misleading information to consumers, for example by making false or deceptive advertisements or statements, where this causes or is likely to cause the average consumer to take a different transactional decision. (Regulation 5).

FIGURE 1

Key interaction stages and the legislation that applies



## **Stage 1: Research and application stage – ensure that you provide students with the material information they need to make informed choices when considering which courses and HE providers to apply to**

- 4.7 At this first stage, where students are researching what and where to study, the information made available to them – including via your website, prospectus, and course handbooks – is crucial to aid their decision-making. Missing, hidden or inaccurate information may affect students' decisions about which courses and HE providers to apply to. It is important that students are given relevant, clear, accurate and accessible 'material information', as required under the CPRs, so that they can make informed choices.
- 4.8 In our view, among other things, it is important for students to have full information about courses and their costs.<sup>16</sup> There is likely to be other information that students consider important, such as in respect of accommodation options and the availability of funding and support. These are not covered by this advice. The type of information that is 'material information' under the CPRs is likely to include the following.

**(a) Course information, including:**

- (i) course title;
- (ii) entry requirements;
- (iii) core and optional modules for each year of study;
- (iv) information about the composition of the course and how it will be delivered, such as the number and type of contact hours (for example, lectures, seminars, work placements, feedback on assignments), expected workload of students, details about the staff involved in delivering the course;<sup>17</sup>
- (v) how the course is assessed, for example by exams, coursework or practical assessments, etc;
- (vi) the award to be received on successful completion of the course and, if relevant, the awarding body or institution;

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<sup>16</sup> The OFT Cfl report highlighted the concern about hidden additional course costs.

<sup>17</sup> Details about the staff involved in delivery of a course would include information about the level of experience or status of the staff, for example professor, lecturer, postgraduate student.

- (vii) location of study – this should also include the location of any work placements to be undertaken (where known);
- (viii) length of the course;
- (ix) whether the course is regulated and by whom;
- (x) whether the course is accredited, for example by a Professional, Statutory and Regulatory Body, and by whom; and
- (xi) any particular terms of the HE provider’s rules and regulations that apply to the course that students may find surprising or are otherwise important.<sup>18</sup>

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

- (i) **tuition fees** – this should include, if applicable, whether fees in future years will increase, by how much (for example, in line with inflation) and which students increases would apply to. If the future fee is not known, you should indicate clearly the criteria for any future changes and how the changes will be calculated. Note that any possible fee increases should be restricted to limited circumstances where the HE provider has valid reasons for making the change;<sup>19</sup> and
- (ii) **other extra costs** students are likely to incur, such as for field trips, equipment, materials, bench fees or studio hire. You should also indicate how much these extra costs are or are likely to be (and if they are unknown or uncertain, set out how they will be calculated) and whether they are optional or mandatory for completion of the course.

### ***Misleading omissions***

4.9 If you do not provide students with the necessary material information that they need before they make a decision about which HE providers and courses to apply to, this may constitute a ‘misleading omission’ under the CPRs. For example, if you fail to provide information about total tuition fees and associated course costs.

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<sup>18</sup> Note that terms must be substantively fair – it will not necessarily be sufficient merely to highlight a term, if it is otherwise unfair. See Chapter 5 for further details.

<sup>19</sup> In relation to terms concerning fee increases, please refer to paragraphs 5.21–5.23.

## ***Invitations to purchase***

- 4.10 Where a commercial practice is an ‘invitation to purchase’, the CPRs deem certain information to be ‘material information’, and failure to provide this would be a misleading omission under the CPRs.<sup>20</sup> An advertisement for a course, a course webpage or course prospectus could, in our view, amount to an ‘invitation to purchase’ under the CPRs. Therefore, it will be necessary to provide certain information in those materials.
- 4.11 The relevant information that must be provided includes the main characteristics of the product or service (such as the relevant elements of the course) and the money that has to be paid (for example, tuition fees and other relevant costs). This information should be presented together, and not revealed in stages. This is intended to allow students to make properly informed decisions when they see the invitation to purchase. HE providers should ensure that they provide comprehensive information, and not provide only some parts of the characteristics or price later.
- 4.12 Important information should also be easy to find and presented alongside other relevant information. If material information is spread out over a number of locations, such as across different prospectuses and other documents or across different webpages, and is difficult for students to find and access, this may be a misleading omission under the CPRs.
- 4.13 We recommend that you ensure, as far as possible, that course or other core information is presented consistently across your different faculties and is comprehensive, to reduce the risk of breaching the CPRs.

## ***Misleading actions***

- 4.14 Information you provide must be correct, and should not contain inaccuracies that may impact students’ decisions. For example, it could breach the CPRs (as a misleading action) if you give misleading or outdated information. Examples of potential misleading actions may include:
- (a) where an HE provider gives a misleading impression at an open day (either because of the information provided or its overall presentation) that

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<sup>20</sup> The Court of Justice of the European Union has confirmed that an invitation to purchase exists as soon as information is available so that the consumer may take a transactional decision, without there being an opportunity to actually purchase the product or service, per *Konsumentombudsmannen v Ving Sverige AB* (Case C-122/10).

a particular individual will be involved in the teaching of the course, when this is not the case;<sup>21</sup> and

- (b) where an HE provider presents information (for example, in course information materials) that could suggest the course provides a particular qualification by a professional body, when in fact this is not the case and further study would be required to obtain the relevant award.

## **Stage 2: Offer stage – ensure that you provide students with the information they need, including the required pre-contract information, before they accept a formal offer of a place on a course**

- 4.15 At this second stage, the CPRs **and** the CCRs will apply.
- 4.16 To comply with the CPRs, HE providers must provide important information to students to inform their choices of which offer(s) to accept, and this obligation continues throughout your dealings with students. For example, information included in offer letters or other communications made at the offer stage (such as webpages and information packs for students who have been given offers) must be clear, accurate and comprehensive. In particular, if any important information from your prospectus or other course promotional materials has changed, it is important to bring this to students' attention. In addition, you should draw students' attention to your full terms and conditions, ensure that these are accessible and ensure that you flag particularly important terms.
- 4.17 In addition the CCRs, among other things, require you to give students certain information before contracts are entered into, including those that are entered into at a distance.<sup>22</sup> The information must be given in a clear and comprehensible manner, and in a way that is appropriate to the method of communication that is used.

### ***Complying with the CCRs***

- 4.18 In our view, the elements of the CCRs that are relevant to distance contracts will apply where applications by students and offers by HE providers are

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<sup>21</sup> This could be the result of statements made by staff members of the provider.

<sup>22</sup> Under the CCRs, contracts entered into at a distance means those entered into 'under an organised scheme that uses distance communication, where the parties enter into an agreement without being physically present'.

generally conducted at a distance (for example, through UCAS).<sup>23,24</sup> When an HE provider makes an offer of a place to a student, and the offer is accepted, the HE provider effectively agrees to reserve a place and allow the student to enrol if they meet any specified entry requirements (where applicable) and present themselves on the day of enrolment.<sup>25,26</sup> This is also likely to be the case where a student reserves a place on a course directly with an HE provider, without being present at the HE provider's premises.<sup>27</sup>

- 4.19 In our view it is necessary to provide the relevant pre-contract information for distance contracts before the student agrees to accept the offer of a place. This is because once an offer has been accepted by a student, they will be giving up the ability to switch to a different HE provider (should they wish or need to) other than in limited circumstances through the clearing and/or adjustment processes.
- 4.20 The CCRs require you to give certain types of information to students about the service. The key pre-contract information requirements for distance contracts that are relevant to the HE sector are set out in the table in [Annex A](#), together with our views on what type of information should be given by HE providers to meet their obligations under the CCRs. It is important that this information is correct, because under the CCRs the information is treated as being a term of the contract and you may run into legal difficulties if you subsequently try to change it.<sup>28</sup> You may wish to seek legal advice about the pre-contract information you provide.
- 4.21 If you foresee that some things might change between offer and enrolment (for example, if it is anticipated that the main location of study may change), you should make this clear in the pre-contract information itself, by setting out what will change, when and how. It would not be enough for this to be contained in 'small print' terms, and a blanket provision that purports to allow

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<sup>23</sup> 'Distance contracts' are defined in Regulation 5 of the CCRs as '...a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.' In our view, this is likely to include HE providers' application processes that are carried out at a distance.

<sup>24</sup> Note that the application of the CCRs in this section will apply similarly where applications are made directly to institutions at a distance under an applications scheme.

<sup>25</sup> Note that English case law has established that once an offer of a place has been provided, the HE provider is obliged to enrol the student on the relevant course of study if they present themselves. The obligation to pay course fees arises when the student enrolls on the course (see *Moran v University College Salford (No. 2)*, (1993) Times, 23 November, and *Orphanos v Queen Mary College* [1985] 1 AC 761).

<sup>26</sup> Where an offer is unconditional, there will not be any requirements to achieve certain grades. As such, in this circumstance the HE provider promises to reserve a place for the student if they present themselves at enrolment.

<sup>27</sup> There are a number of FE colleges offering HE, and some alternative providers, which do not use UCAS's application services and take applications directly. Distance learning providers, including the Open University, also handle their own applications.

<sup>28</sup> Per Regulations 13(6) and (7) of the CCRs in relation to distance contracts.

the HE provider to change important elements of the course would not be acceptable (and would potentially breach the UTCCRs, in respect of which see [Chapter 5](#) below). You should seek legal advice if you subsequently feel it is necessary to depart from any of the information set out in your pre-contract information.

- 4.22 As well as providing pre-contract information before the agreement is entered into, the CCRs require you to provide confirmation of the distance contract on a durable medium, within a reasonable time. This must include all the pre-contract information, unless it was already provided on a durable medium in advance.<sup>29</sup> An example of a durable medium would be an email with documents attached. Please note that a website link would not be a durable medium as websites may be changed and so would not be a permanent record of what the student had been given.
- 4.23 The CCRs also contain provisions about a student's right to cancel within 14 days where a contract is concluded at a distance (and you must give them notice of this right).

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

- 4.24 In our view, if a student fails to meet any specified entry requirements attached to a conditional offer by a HE provider, and goes through a central admissions 'clearing' system (such as that operated by UCAS), to see what other places may be available to them, the student will effectively go through another research stage and possibly another offer stage if there are HE provider(s) willing to offer places. You are subject to the same essential information requirements and obligations in any dealings you may have with students going through a clearing process (including those under the CPRs), but because they will also be under the extra time pressures associated with this process to make a decision you should be careful that you do not engage in practices that could be seen as exploiting this to pressurise students into taking a decision. Similarly, you will have the same obligations if a student wishes to revisit their choices as a result of doing better than they anticipated, and goes through a central admissions 'adjustment' process, to see what other places may now be available to them.

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<sup>29</sup> The [guidance](#) by the Department for Business, Innovation and Skills sets out that, 'a durable medium allows the consumer to access information directed personally to them, in an unchangeable format for as long as they might reasonably need it.'

### Stage 3: Enrolment stage – ensure that you provide students with required information before they enrol on to the course

- 4.25 When a student enrolls with an HE provider, a significant amount of time may have passed since they submitted their application and accepted your offer. Under the CCRs, the pre-contract information provided (as set out in the table in [Annex A](#)) will form part of the agreement for the HE provider to admit the student on enrolment. Please see paragraph 4.21 above about the need for this information still to be accurate, and for any anticipated changes to have been clearly explained in the pre-contract information. If any information has changed, irrespective of whether this is permissible under the CCRs, failing to make students aware of such changes at the earliest opportunity, and before they enrol, may amount to a misleading omission under the CPRs.
- 4.26 In our view, when a student enrolls to study with an HE provider the parties enter into a contract for educational services. This is likely to be a separate agreement, with different obligations on the parties, from the offer the HE provider to admit the student made previously.<sup>30</sup>
- 4.27 For HE providers who carry out enrolment of new students on campus, by which the parties enter into a contract for educational services, in our view this will be an ‘on-premises contract’ under the CCRs.<sup>31</sup> The CCRs require that certain information is given about the service before entering into an on-premises contract if that information is not already obvious from the context. Some of this information is likely to already be apparent in the circumstances, for example the identity of the university or college.
- 4.28 The key pre-contract information requirements for on-premises contracts that are relevant to the HE sector are broadly the same as those set out for distance contracts (see [Annex A](#)). However, for on-premises contracts it is **not** necessary to provide information on the following:
- (a) details of any applicable codes of conduct you are a member of, and how to obtain a copy of that code;
  - (b) where applicable, details of deposits required to be paid by the student and when; and

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<sup>30</sup> For example, under the contract for educational services, the HE provider will agree to provide the educational services and the student will agree to study and be obliged to pay tuition fees (where applicable).

<sup>31</sup> Under the CCRs, an ‘on-premises contract’ means a contract between a trader and a consumer which is neither a distance contract nor an off-premises contract.

- (c) information about the right to cancel a distance contract, plus the model cancellation form (because cancellation rights are not relevant for on-premises contracts).

4.29 For certain courses or HE providers, enrolment and study may both take place at a distance (for example, undergraduate degree courses undertaken on a remote learning basis). In those cases, the requirements for distance contracts under the CCRs will be relevant at the time of enrolment, including information requirements and information about the right to cancel and withdraw (in respect of which, see [Annex A](#) in relation to 'stage 2' above).

### **Compliance checklist summary: information you need to provide to help students make informed decisions**

#### **Stage 1: When students are making their choices – ensure that you comply with the CPRs by providing the 'material information' students need.**

- (a) You must provide students with important information – including about the courses you offer, the structure of courses, and the fees/costs – **before** they make a decision about which courses and HE providers to apply to. This includes information given in writing and verbally. You should ensure that this information is accurate and should not omit important information that could affect students' decisions about their choices.
- (b) Where published materials such as prospectuses or HE providers' websites give enough information about the service and costs for the student to decide to make an application (and so are an 'invitation to purchase') you should ensure that you provide what is automatically 'material information', such as the main characteristics of the course and the total tuition fees and other costs in a comprehensive way.
- (c) You should ensure that information is easily accessible – for example, via your website, prospectuses, course and departmental handbooks and at open days.
- (d) You should ensure that you draw students' attention to your rules and regulations, and make them accessible to students. Draw important terms to students' attention.

#### **Stage 2: When students are preparing to accept offers from you ensure that you comply with the information requirements.**

- (a) You should ensure that you continue to provide important information to students to inform their choice of which offer(s) to accept, and this obligation continues throughout your dealings with students. In particular, if any important

information from your prospectus or other course promotional materials has changed, it is important to bring this to students' attention.

- (b) You should draw students' attention to your full terms and conditions, ensure that these are accessible and that you flag particularly important terms.
- (c) In addition, you should ensure that you provide students with the necessary pre-contract information for distance contracts under the CCRs before they accept an offer of a place on a course, such as the requirements of the offer, the main characteristics of the course, the duration of the course, and the total price and other relevant costs (or how these will be calculated). As this information will become a term of the contract, it will be difficult to change it subsequently. If you anticipate that some things might change, this should be made clear in the pre-contract information by setting out what could change, when and how.
- (d) You should ensure that confirmation of the contract is provided and the information is provided in a durable medium.
- (e) Remember to give students notice of their 14-day right to cancel.

**Stage 3: When students enrol with you – ensure that you comply with the CPRs and CCRs.**

- (a) In principle, the pre-contract information you gave to students at stage 2 should still be accurate on enrolment. You should seek legal advice if you consider that any changes have become necessary.
- (b) If there have been any changes to information about the course, etc in any event you should ensure that you tell students about these at the earliest opportunity – failure to do this may be a misleading omission under the CPRs.
- (c) If enrolment takes place on campus, you should ensure that you comply with the CCRs requirements for on-premises contracts – certain information must be provided if it is not already apparent in the context. If enrolment takes place at a distance, comply with the CCRs requirements for distance contracts (see above).
- (d) You should ensure that you draw students' attention to terms, and any other rules and regulations, and make them accessible. Draw important terms to students' attention.

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

- 5.1 Where we refer to 'terms' in this advice, this includes all contracts, rules and regulations documents that students are bound by, which together form the contract terms between you and the student.
- 5.2 Your rules and regulations for students are likely to form part of the contract for admission to a course and for the provision of educational services. As such, the terms set out in these rules and regulations are likely to be subject to the test of fairness under the UTCCRs.
- 5.3 It is important that you ensure you do not use terms that are potentially unfair. Students are likely to be in a relatively weak position compared with you as it may be difficult to switch if a course or HE provider does not meet their expectations and they are dissatisfied with their experience. This means it is particularly important that the rules and regulations are substantively fair.
- 5.4 If a term is found by a court to be unfair under the UTCCRs, it will not be binding on students and cannot be enforced. Students may also be able to rely upon the UTCCRs in any legal proceedings they bring themselves against an HE provider, or in defence of a claim where an HE provider tries to enforce an unfair term.
- 5.5 The OFT published a report in February 2014 that, among other issues, considered the application of the UTCCRs to universities' rules and regulations that prevent students from graduating or progressing to the next academic year or using the provider's facilities if they owe monies to the provider which relate to non-tuition fee debts, such as for accommodation or childcare (see also paragraphs 5.29 and 5.30 below). The report was called *Universities' Terms and Conditions, an OFT report*.

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

- 5.6 Students should always have an appropriate opportunity to read and understand terms before they accept them.
- 5.7 You should ensure that the existence of terms and conditions are brought to students' attention **before they accept an offer** (for example, at the latest when they get their offer letter) and that they can easily locate and access them (for example, they are clearly signposted on your website).

- 5.8 A term that purports to bind students that they have not had the chance to become familiar with or understand may be unfair under the UTCCRs. In our view, this may occur where, for example:
- (a) terms are referred to in an offer letter or are deemed to be accepted by virtue of a student accepting the offer but are only located in a number of documents and in different places on a website, making them difficult to find and review; or
  - (b) terms are only provided at the time of the enrolment process and are not available to students before then.
- 5.9 You should also ensure that any terms that may be particularly surprising (and whose significance may be missed) or important (for example, a term explaining that the degree awarding body is different to the HE provider running the course or a term that sets out how tuition fees may change over the duration of the course, are brought to the student's attention) and are not hidden within a long list of overarching regulations. For example, you could consider doing this as follows:
- (a) Within the offer letter, significant points could be highlighted.
  - (b) Explanatory material – for example, an executive summary – could also be provided alongside the offer letter to draw attention, among other things, to the more important terms.
  - (c) Important information should also be conveyed earlier on, for example in your prospectuses and on your website, in order to comply with the requirements under the CPRs and CCRs.
- 5.10 The extent to which a term is brought to a student's attention up front is likely to be relevant to the assessment of fairness. However, providing information up front will not necessarily transform a term that is not substantively fair into a fair one. It is important that rules and regulations are substantively fair (see paragraphs 5.11 to 5.13 below).

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

- 5.11 The UTCCRs require that your terms must be written in **plain and intelligible** language – students must be able to understand the terms, how they affect their rights and obligations, and how the terms could impact them. Where terms are ambiguous, and there is doubt as to the meaning, the most favourable interpretation for the student will prevail.

## Ensure that your terms are fair and balanced

- 5.12 A term in an HE provider's rules and regulations will be unfair under the UTCCRs if it creates a significant imbalance between the parties' rights and obligations under the contract to the detriment of the student, and is contrary to the requirement of 'good faith' (Regulation 5(1) of UTCCRs).<sup>32</sup> 'Good faith' embodies a general 'principle of fair and open dealing'.<sup>33</sup>
- 5.13 In particular, the concept of fair dealing means that a provider should not take advantage of students' weaker bargaining position, such as a lack of experience or unfamiliarity with the contract. In assessing fairness, consideration would be given to how a term could potentially be used in practice to have an unfair effect, even if it was not currently being used unfairly. Including an unfair term in a contract or relying on an unfair term may in some circumstances also be a breach of the CPRs.<sup>34</sup>

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

- (a) terms allowing an HE provider an unreasonably wide discretion to vary course content and structure or to increase fees during the duration of the course;<sup>35</sup>
- (b) terms seeking to limit an HE provider's liability for non-performance or sub-standard performance of the educational service;<sup>36</sup> and
- (c) terms that give a blanket assignment, or a blanket right to receive an assignment, of any IPRs from students to the HE provider.

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

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<sup>32</sup> The assessment of fairness is carried out having regard to the nature of the goods or services supplied, all the circumstances attending the conclusion of the contract and the contract as a whole.

<sup>33</sup> Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52.

<sup>34</sup> Per *OFT v Ashbourne Management Services Limited* (2011) EWHC 1237 (Ch).

<sup>35</sup> Terms with this effect are mentioned in paragraph 1 of Schedule 2 to the UTCCRs, which sets out that terms may be unfair if they have the object or effect of: 1(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristic of the product or services to be provided; and 1(l) providing for the price to be increased without giving the consumer the corresponding right to cancel the contract if the final price is too high.

<sup>36</sup> Similarly to the above, paragraph 1(b) of Schedule 2 to the UTCCRs states that terms that terms may be unfair where they have the object or effect of 'inappropriately excluding or limiting the legal rights of the consumer vis à vis the seller or supplier ... in the event of total or partial non-performance or inadequate performance by the seller or supplier.'

## Terms that allow a wide discretion to vary

- 5.14 Terms that allow an HE provider to vary something – such as the course content or fees – may be unfair where they allow wide discretion to the HE provider to make changes to important aspects of the service. Terms allowing variation are not automatically unfair, and there is likely to be a need for an element of flexibility, given that unforeseen events or circumstances may arise, but this has to be balanced against giving an HE provider too wide a discretion to make changes to the detriment of students. A term allowing variation can upset the balance between the parties, even though it was intended to facilitate minor adjustments, if its wording means it can be used to make more substantial changes.
- 5.15 In relation to variation terms generally, achieving fairness may be assisted where the consumer is given clear information up front about how the variation will operate, and is given the right to cancel and switch HE providers if changes are made – rather than being locked into a contract that they cannot get out of without penalty. In these circumstances, the right to cancel must, however, be real and capable of being exercised in practice. In the HE sector, switching course or, in some cases, withdrawing and switching HE provider is likely to be difficult or impractical in practice, bearing in mind that in many cases the student will not be able simply to transfer their credits to another HE provider, and so saying the student can switch may not improve matters for them, or alleviate the potential unfairness of a variation term. In the case of a three-year degree, for example, it is likely that the student will not derive substantive value from their investment until they receive their qualification. This underlines why it is important for students to be able to predict, from the outset, what their course will involve and how much it will cost. It is therefore important that terms are substantively fair. In order to achieve this, you should plan and clearly set out in your contractual material how the course will operate and how the student must pay for it. If some aspects of this may need to change during the period of study, you should set these out clearly up front, so that the student can predict what will change, and when, and plan accordingly.
- 5.16 In any event where changes are proposed to be made students should be permitted to switch courses (or in some cases withdraw from a course without penalty), even though this is likely to be difficult or impractical, if a change is made that would surprise a reasonable consumer in their position. They should not remain tied in to a contract under which they have to pay an increased sum, or receive a materially different service, to that which they agreed at the outset. Because this may be difficult for students in practice, it may be helpful for you to set out how you will offer assistance to students in

the event of changes (for example, to help affected students switch to another course or HE provider if they wish to do so).

**(i) Course content and structure changing**

- 5.17 A term that allows blanket changes and affords the HE provider a broad discretion to change significant aspects of the course (such as the course content, the location of study, method of assessment or the final qualification to be awarded), without describing the circumstances when and reasons why this might happen so that the student is able to foresee how and when changes might be made, is unlikely to be considered fair under the UTCCRs. Changes provided for in a term should be narrow in scope and limited to what is necessary.
- 5.18 A term that says variations will be 'reasonable' or will only be made 'reasonably' will not make such a term fair, because the student will still not be able to foresee the circumstances in which changes may be made.
- 5.19 A term that affords a wide discretion to the HE provider to withdraw or cancel a course in its entirety before it commences, for any reason, effectively means the HE provider could simply choose not to run a course, and not comply with the terms of offers it made to prospective students. As such, the provision is potentially unfair under the UTCCRs.

**Example of a course variation term that may be open to challenge<sup>37</sup>**

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

- 5.20 In our view, a variation term may be less likely to be open to legal challenge for potential unfairness if:
- (a) it is narrow in its scope and effect;
  - (b) it sets out valid reasons where changes might be necessary, and students are able to foresee when and what changes might be made;<sup>38</sup>

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<sup>37</sup> Note that we provide these example terms for illustrative purposes only in the context of this advice. 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.

<sup>38</sup>As set out in paragraph 5.17 above, it is not sufficient in our view for a term to simply say that a variation will be 'reasonable', as this does not provide the foreseeability that the law requires.

- (c) it sets out how the HE provider will deal with any changes that become necessary (for example, it will provide notice of proposed changes to students and take all reasonable steps to minimise disruption to students);
- (d) the term is set out in plain and intelligible language and actively drawn to the student's attention up front;
- (e) the HE provider informs students about any proposed changes in good time before they become effective. However, note that providing notice of changes will not alleviate the unfairness of a term that is not substantively fair; and
- (f) the student is able to terminate their obligations where they are adversely affected by the change (in respect of which, refer to paragraphs 5.15 and 5.16 above).

### ***(ii) Fees increasing during the course***

- 5.21 It is important that students know how much their course is likely to cost in total to allow them to fully assess their options and to better financially plan. Before students apply, they should be able to foresee how much the total fees will be for the course. If an HE provider has a genuine need to keep some flexibility about the level of fees for each period of study (for example, where the costs of delivering an aspect of a course depends on the charges of an external provider), this should be made clear. Terms allowing fees to be increased must be considered in the context of the information given to students when they chose the course and HE provider. If no mention is made about fee increases up front, a term that allows fee increases is likely to be particularly problematic.
- 5.22 Terms allowing HE providers a wide discretion to increase fees during a course – for example, by reserving the right to increase fees at any time and by an unlimited amount – are likely to raise concerns about potential unfairness under the UTCCRS given that degree courses are of a relatively long duration, are outcome-oriented and students cannot easily 'walk away' and find alternative HE providers, if fees are increased.

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

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

- 5.23 In our view, a term that provides for fee increases may be less likely to be open to legal challenge for potential unfairness if:
- (a) clear, accurate information about potential fee increases is actively drawn to a student's attention up front alongside information about the course fees generally, so they can foresee whether and how fees could change;
  - (b) the term sets out limited circumstances and valid reasons why fees might increase – for example, the provider sets out its ability to increase fees in line with inflation to reflect increased costs of delivering the course;
  - (c) increases are linked to an objective verifiable index, such as the Retail Prices Index for inflationary rises, which would give an objective, clear framework for students to foresee when the fees would be expected to change. Fairness is more likely to be achieved if increases are limited to a relevant cap, as this assists foreseeability of changes. In addition, the method of calculating any variation should be clearly explained so students can foresee how the increase would affect them in practice;
  - (d) the term sets out a clear framework of who may be subject to fee rises (for example, which category of students, and in respect of which funding models), so students can foresee the circumstances in which a change could occur;
  - (e) the HE provider informs students about any fee increases in good time ahead of the next academic year. However, note again that providing notice of a fee increase will not alleviate the unfairness of a term that is not substantively fair; and
  - (f) the student is able to terminate their obligations where they are adversely affected by the change (in respect of which, refer to paragraphs 5.15 and 5.16 above).

### **Terms that seek to limit liability**

- 5.24 Terms which seek to limit (or exclude) the liability of the HE provider for their performance of the service beyond what is possible under the general law may be challengeable for unfairness under the UTCCRs and for unreasonableness under the Unfair Contract Terms Act (UCTA).<sup>39</sup> For example, terms that exclude or limit the liability of an HE provider if it fails or is unable to provide the necessary educational service it has agreed to (for example, the

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<sup>39</sup> The UCTA covers a narrower range of types of contract term than the UTCCRs and deals only with exclusion and limitation clauses.

relevant course), or fails to provide it to the required standard (for example, delivers poor service<sup>40</sup>), may be open to legal challenge.

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

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

5.25 In our view, terms that purport to limit the liability of the HE provider in this way are inappropriate and potentially unfair under the UTCCRs and may be unreasonable under UCTA.

### **Blanket intellectual property rights terms**

5.26 A term that has the object or effect of changing the ownership of IPRs from the position that would exist under the general law is potentially unfair. Where IPRs are created by a student during their time studying and they would belong to them under the general law, the starting position should be that they retain the IPRs.

5.27 A blanket term that applies so that all students’ IPRs (for example, all written work, creations, inventions and discoveries) are assigned by students to the HE provider, regardless of the circumstances of study or the type of course, may be open to challenge as unfair under the UTCCRs.

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

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

5.28 There may be some courses or programmes where assignment of certain types of IPR to the HE provider is appropriate, such as some postgraduate research that is part of an ongoing research programme, and where there are sufficient safeguards to protect students’ interests. Where the nature of the research programme means that some assignment of IPRs to the HE provider

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<sup>40</sup> Under section 13 of the SGSA in England, Wales and Northern Ireland, and the common law in Scotland, there are implied terms that a service must be carried out with reasonable care and skill (section 13).

is appropriate, the sorts of safeguards that are relevant to an assessment of fairness are:

- (a) the scope of the term is narrow, and is restricted to what is necessary, for example to protect the HE provider's legitimate interests in the IPRs created as party of a research programme;
- (b) the application of the assignment is clearly defined, so it is clear to which students and in what circumstances the term will apply;
- (c) where the assignment of IPR is appropriate in the circumstances, the rights of the parties are fairly balanced. This may include the student's involvement in the work being treated in an appropriate way (for example, the student's work being acknowledged in publication and, where appropriate, subject to an appropriate revenue sharing scheme); and
- (d) the treatment of IPR is made clear up front for relevant programmes of study.

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

5.29 The OFT previously investigated terms and conditions (and practices) that prevent students from graduating or enrolling on to the next academic year or using the HE provider's facilities if they owe monies to the HE provider which relate to non-tuition fee debts, such as for accommodation or childcare. The OFT published a report in February 2014<sup>41</sup> – for further information see the [press release](#).

5.30 As set out in the OFT's report, the use of academic sanctions in such instances, especially where applied in a blanket fashion and regardless of the circumstances, is open to challenge as unfair under the UTCCRs and/or may be unreasonable under the UCTA. Practices around the use of such terms may also constitute aggressive commercial practices under the CPRs.<sup>42</sup>

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<sup>41</sup> The OFT also wrote directly to all UK universities and other HE institutions to draw to their attention the report and to encourage them to not use terms and practices that the OFT considered may be unfair.

<sup>42</sup> For more information on what may constitute an aggressive practice, see the OFT report, [Universities' Terms and Conditions](#) (OFT1522), published in February 2014, paragraphs 6.23–6.25.

## Compliance checklist summary: your contract terms and conditions

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

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

- 6.1 Even though you may endeavour to treat students fairly, it may still be the case that some students are disappointed or dissatisfied with their experience. Poor complaints handling can undermine your relationship with students and mean you incur unnecessary time and expense dealing with grievances that could have been resolved sooner. Investing time in early resolution of a complaint will free up the time of academic and support staff and ultimately contribute to the continued positive experience of students.
- 6.2 To comply with consumer protection law, you need to ensure that your complaint handling procedures and practices are **easy to locate, accessible, clear** and **fair** to students.

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

- 6.3 The CCRs require you to provide information to prospective students about your complaint handling policy, in a 'durable medium' (such as a letter or email with a copy of the policy attached), before the contract is concluded. In our view students should therefore be made aware of your complaint procedures before they accept an offer for a course.
- 6.4 You should also ensure that your complaints procedure can be **easily located** and **accessible** to current students, for example on your website and intranet – not doing so could amount to a misleading omission under the CPRs, as it may influence students' decisions whether or not to pursue a complaint.
- 6.5 It is also important that you provide students with **clear** and **accurate information** about your complaint handling procedures in writing and where applicable verbally, as failing to do so may constitute a breach of the CPRs. For example, the following practices may amount to misleading omissions:
- (a) not making clear to students where responsibility for complaint handling lies where a course is offered in partnership with, or sponsored or awarded by, another provider;
  - (b) not providing students with details of any external complaint or redress scheme that they can access, for example, where applicable the services provided by OIA, or the SPSO;

- (c) not clearly setting out the remit of any external complaint or redress scheme – for example, in relation to the type of complaints it can consider; and
- (d) withholding information about how to use your complaints procedure, for example not telling students who raise concerns at an informal level that it is possible to make a complaint more formally if the matter is not satisfactorily resolved. This could also amount to an aggressive commercial practice (as this could influence a student’s ability to decide what to do about a problem they would otherwise complain about and escalate if it was not resolved).

## Ensure that your complaint handling processes are fair

6.6 The CPRs prohibit practices that fall below the standards of ‘professional diligence’, and so prohibit behaviour or actions that fall below the standard expected in the sector.<sup>43</sup> This prohibition applies to practices surrounding complaint handling. To comply with the CPRs, you should have an effective complaints procedure, preferably set out in writing, to ensure that student complaints are dealt with in a **fair** and **reasonable** manner.

6.7 Problematic complaints procedures may contravene the requirements of professional diligence and amount to unfair commercial practices because they may influence students’ decisions whether to complain and whether to escalate a complaint further. They may also be potentially unfair under the UTCCRs. Examples of potential problems with complaints procedures that could be problematic include procedures that:

- (a) state that the HE provider’s view is final, or that the HE provider may close the complaint at any time;
- (b) do not include an internal process to escalate complaints that have not been satisfactorily resolved;
- (c) prevent, hinder or deter students from raising or discussing concerns (for example, if the procedures are too lengthy or involve an unreasonable number of stages).

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<sup>43</sup> ‘Professional diligence’ is defined in Regulation 2 of the CPRs as: ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice in the trader’s field of activity, or (b) the general principle of good faith in the trader’s field of activity’.

- 6.8 Complaints procedures are more likely to comply with the CPRs and the UTCCRs where they:
- (a) set out clear and reasonable timescales in which students can expect to hear back about their complaint at each stage of the process, as applicable;
  - (b) allow students the ability to escalate the matter if they are unhappy and ultimately to appeal if the matter is not satisfactorily resolved; and
  - (c) follow any guidelines on complaint handling published by a third party redress or complaint scheme of which the HE provider is a member.<sup>44</sup>
- 6.9 Regardless of any written or other complaints policy, not following that policy or procedures in practice – for example by failing to respond to complaints or not properly investigating them - may mean you are not acting in accordance with the standards of ‘professional diligence’ under the CPRs.<sup>45</sup>
- 6.10 You should ensure that your staff are trained in and follow your complaints procedures – as you are responsible for the actions of staff who are acting in your name or on your behalf. **It is not enough to have an accessible and clear complaints handling procedure – it also has to be followed in practice.**

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

- (a) Ensure that your complaint processes are transparent, clear and easily accessible:
- You should ensure that you provide students with information about your complaints process before they accept an offer of a course.
  - You should ensure that your complaints procedure is easily located and accessible to students, for example on your website and intranet.
  - You should ensure that you provide students with clear and accurate information about your complaint handling procedures in writing and (where applicable) verbally, for example:

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<sup>44</sup> For example, the OIA in England and Wales, or the SPSO in Scotland.

<sup>45</sup> See definition in footnote 44 above.

- where you offer a course in partnership with, or sponsored or awarded by, another HE provider it should be clear where responsibility for complaint handling lies;
- you should provide accurate details of any external complaint or redress scheme that students can access; and
- where students raise concerns at an informal level, you should inform them that they can make a complaint under your formal complaints process if the matter is not satisfactorily resolved.

(b) Ensure that your complaints handling processes are fair:

- You should set out clear and reasonable timescales in which students can expect to hear back about their complaint at each stage of the process, as applicable.
- Provide the ability for students to escalate the matter if they are unhappy and ultimately to appeal if the matter is not satisfactorily resolved.
- Follow any guidelines published by any third party redress or complaint schemes of which you are a member.

(c) Ensure that your staff are trained in and follow your complaint handling procedures in practice.

## Information provision requirements under the CCRs for distance contracts (per Schedule 2 to the CCRs)

<i>Pre-contract information required for distance contracts under the CCRs</i>	<i>Types of information the CMA considers HE providers should provide to comply with the requirements of the CCRs</i>
The main characteristics of the service	<p>In our view this is likely to include the following:</p> <p>(a) The conditions under which the university will reserve a place for the student on the course.</p> <p>(b) Important information about the course, including:</p> <ul style="list-style-type: none"> <li>• the course title</li> <li>• core and optional modules for each year of study</li> <li>• the award to be received on completion and, if different from the HE provider, the awarding body</li> <li>• whether the course is accredited, eg by a Professional, Statutory and Regulatory Body, and by whom</li> </ul>
The duration of the contract and, where applicable, the minimum duration	This is likely to include the standard length of the course.
<p>The total price for the service and (if the price is not known up front) how it will be calculated</p> <p>Details of any other costs or (if those costs are not known up front) how they will be calculated</p>	<p>This is likely to include the following:</p> <p>(a) Tuition fees payable per year and the total fees cost for the course. This should include, if applicable, clear and intelligible criteria for how fees may change for future years and how any changes will be calculated, so the student can foresee possible changes and how they could affect them. This would include information about:</p> <ul style="list-style-type: none"> <li>• whether fees in future years might or will increase</li> <li>• which students this would apply to</li> <li>• the method by which any increases will be calculated (which could set out an explanation of how the fees will increase,</li> </ul>

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

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

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	<p>eg setting out that fees may increase in line with inflation, and how this would be calculated)</p> <p>(b) If applicable, information about the total cost of any extra costs, such as for field trips, equipment, materials, bench fees or studio hire. Information should include:</p> <ul style="list-style-type: none"><li>• whether these extra costs are mandatory and/or optional</li><li>• when they are due to be paid</li><li>• how much these extra costs are or are likely to be (and if they are unknown or uncertain, how they will be calculated)</li></ul>
<p>The identity of the HE provider the student is contracting with, and the address at which they are established, telephone number, fax number and email address. If different, the address of the trader's place of business.</p>	<p>This is likely to include the name and address of the HE provider awarding the degree, plus the relevant contact details.</p> <p>If the HE provider operates a course from a campus or site that is different from their place of establishment (eg the registered address), the details of this address should also be provided.</p>
<p>The complaint handling policy and complaint/redress mechanism</p>	<p>This is likely to include the complaint handling process for academic and non-academic complaints, and any other redress options that are available to the student with third parties such as the OIA or the SPSO (where applicable).</p>
<p>Payment, service delivery and performance arrangements</p>	<p>This is likely to include:</p> <p>(a) the payment arrangements for tuition fees and the 'extra costs' referred to previously in this table;</p> <p>(b) the location of study. This should also include location of any work placements to be undertaken; and</p> <p>(c) information about the composition of the course and how the course will be delivered, such as the number and type of contact hours (eg lectures, seminars, work placements) and how the course will be</p>

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

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

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assessed (eg by exams, coursework or practical assessments etc).

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Details of any applicable codes of conduct you are a member of, and how to obtain a copy of that code

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Where applicable, details of deposits required to be paid by the student and when

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Information about the right to cancel a distance contract, plus the model cancellation form.

The student has the right to cancel and withdraw during a 14-day period from the date the contract is entered into (the day the student accepts the offer). Students should be provided with a copy of the model cancellation form, though the student is not obliged to use the form to cancel. See Schedule 3 to the CCRs for a model cancellation form.