

Jo Johnson MP
Minister of State
Department for Education
1 Victoria Street,
London, SW1H 0ET

From: Andrea Coscelli
Chief Executive

27 July 2016

Dear Minister,

CMA recommendations on the Higher Education and Research Bill

I am writing to you on behalf of the Competition and Markets Authority (CMA) regarding the Higher Education and Research Bill (HERB).

The Enterprise Act 2002¹ includes provision for the CMA to ‘make recommendations to ministers on the impact of proposals for legislation on competition within any UK market(s)’. In the strategic steer to the CMA published in December 2015, the government said that “the CMA has a clear mandate to look at any Government rules and regulations...and advise on any implications they might have on competition...there will be a presumption that the Government will accept all of the CMA’s published recommendations unless there are strong policy reasons not to do so”. This letter contains the recommendations of the CMA in relation to the HERB.

The CMA’s work on the Higher Education (HE) sector includes our policy paper on effective regulation² as well as our review of consumer protection law compliance in the sector.³ In our policy paper we found that competition and choice can, and do, play an important role in helping to deliver high quality services, provided that they are implemented in a way that recognises the unique features of the sector.

We believe that, as a package, your proposals have the potential to improve competition and choice, thereby helping to improve the quality of HE provision. However, building on our past work, we have made three specific recommendations in this letter that relate to the HERB or the implementation of the reforms.

We are talking separately to HEFCE about their proposals for changes to the provision of information to prospective students through the Unistats service. For

¹ Section 7, as amended by the Small Business, Enterprise and Employment Act 2015.

² [An effective regulatory framework for higher education: a policy paper; March 2015](#)

³ [Higher Education: Consumer Protection Review](#);

choice and competition to work, students need access to reliable and comparable information on HE courses. Changes made to the provision of information must not undermine students' ability to make choices.

Regulation of the sector, the student protection requirement, and entry and exit in the sector

We welcome the creation of a single regulatory structure for the regulated HE sector in England, with faster routes for entering the sector. As we highlighted in our policy paper, regulation of the sector should be applied consistently across all providers and enforced on the basis of risk to ensure that the cost of compliance is related to the risk of a provider, irrespective of status. The level of this regulation should be no higher than it needs to be, in order to avoid imposing unnecessary entry barriers.

We also welcome your proposal to introduce a student protection requirement on institutions for the first time, as well as the proposal not to rescue failing providers as a matter of policy. These proposals are consistent with the recommendations in our policy paper and reflect the principles outlined in the OFT's *Orderly Exit* report, which include mitigating the risk of service disruption rather than the risk of exit per se, and mitigating moral hazard. To achieve the latter, it is important to create the credible threat of exit from the market by making it clear that failing providers will not usually be rescued by government. The policy statements in the White Paper send a credible signal to the market that failing providers will not be rescued.

Validation arrangements

The White Paper highlights concerns about the risk that current validation arrangements create barriers to entry. Under the rules of the Quality Code, in many cases the validating partner has regulatory responsibility for the validated institution, but often without commensurate powers to impose changes on it. The risk that failings in the validated institution will have regulatory consequences for potential validators appears to be dissuading some providers from providing validation services. Therefore our policy paper recommended introducing a regulated quality baseline for all providers (i.e. including validated institutions) and removing the current practice of 'indirect' regulation.

This is consistent with our view that competition below the regulatory baseline is undesirable and that the regulator (OfS) should have responsibility for ensuring compliance with the baseline regulation. It is therefore our view that validated providers should have "approved" status conferred by the OfS.

We recognise the benefit to students of the system where validator institutions only validate institutions that they perceive to be of a certain quality in order to protect their own reputations. When combined with "approved" status, this reputational incentive should be sufficient to assure students of the credibility of the validated

institution. Validating institutions will then need to maintain such oversight of provision as is necessary to protect their reputation, a burden that should not prove excessive to the validated nor so burdensome on validators as to unduly affect their willingness to validate.

Recommendation 1: We recommend that you consider requiring all validated providers to have “approved” status, and that where a validated provider has “approved” status, that the responsibility for enforcing the baseline regulation is held by the Office for Students.

Choice for students

Our policy paper also considered the provision of information to prospective students. We found that while there is a plethora of information sources, there are areas relevant to student choice, such as the learning environment, where information could be improved. Our recommendations focussed on information provided through the Key Information Set (KIS), but we recognise that the proposed Teaching Excellence Framework (TEF) also has a role to play in the provision of information. Like you, we consider that the TEF should be made as effective as possible in supporting student choice and providing incentives for providers to compete on quality. Students choosing between courses at different institutions are likely to be most interested in the quality of the specific course for which they are applying, rather than the institution generally, and as such are likely to derive significantly more value from a TEF award that relates to specific disciplines. We therefore welcome your proposals to run “disciplinary pilots” of the TEF, and we recommend that you move to a disciplinary level TEF as soon as practically possible.

Also, as outlined in our response to the Green Paper, we consider that there would be benefits from making *the link between the TEF and the fee cap* at a disciplinary rather than institutional level. Firstly, given that actual fee levels are likely to be determined by TEF award in future, the fee level itself is likely to convey a signal of quality. A TEF award and fee cap (and hence likely fee level) at the discipline level is likely to convey a more accurate signal on course quality than a fee cap and fee level at an institution level. Secondly, there is a risk that an institution with a high TEF award may have less incentive to expand into a new discipline if the fee cap is set at an institution level. This is because expansion might jeopardise the institution’s overall TEF award so it would receive lower fees not only on the new courses, but on its existing courses as well. From conversations with your officials, we understand that there are practical difficulties with applying fee caps at discipline level, however it is our view that there are significant benefits from doing so. We would encourage you to seek ways to overcome these difficulties so that the TEF can reach its full potential as an aid to student choice and an indicator of excellence.

Recommendation 2: We recommend that you implement a disciplinary level TEF as soon as is practical and that you consider making the link between the fee cap and the TEF award operate at the disciplinary rather than institutional level.

Call for evidence on accelerated courses and switching degree

We are separately responding to your call for evidence on switching degree and accelerated courses, drawing on our knowledge of how to assist switching in other regulated markets, whilst recognising the special characteristics of this market.

We found in our policy paper that one of the main barriers to the development of accelerated courses is the annual structure of the fee cap which means that institutions are not able to charge an appropriate fee for the same course delivered over a shorter period of time. Currently, accelerated degrees effectively face a substantially lower total fee cap (a two year accelerated course cannot charge more than £18,000 in total, whereas a three year 'standard' duration course can charge up to £27,000 over the three years). This reduces providers' incentive and ability to find more flexible and efficient ways of delivering courses and therefore is likely to restrict the provision of accelerated courses that may be beneficial to students who wish to complete their degree faster. We believe that providers would have an incentive to compete on the price of such courses below the higher cap. Therefore our policy paper recommended that the government consider restructuring the fee cap to deal with this barrier. It may be necessary to introduce safeguards to ensure that accelerated courses were delivering similar quality to those of standard duration.

Recommendation 3: We recommend that you consider introducing a more flexible fee cap for accelerated courses, whilst maintaining the same aggregated fee cap as a standard duration course.

We are grateful for the constructive engagement we have had with your officials on all these issues and we are very happy to assist you and them further as necessary.

I am copying this letter to the Secretary of State for Education.

Yours faithfully,

Andrea Coscelli
Acting Chief Executive