

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 20 May 2019

Working Party No. 2 on Competition and Regulation**A market regulator for higher education in England – Contribution by the UK
Office for Students****Roundtable on Publicly Funded Education Markets**

3 June 2019

This paper by Nicola Dandridge was submitted by the author as part of the background material in support of their presentation for Item 3 of the 67th meeting of Working Party 2 on Competition and Regulation on 3 June 2019.

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/publicly-funded-education-markets.htm>.

JT03465406

The Office for Students: a market regulator for higher education in England

1. The Office for Students ('the OfS') was established in 2017 by the Higher Education and Research Act 2017 ('the 2017 Act') as a market regulator for higher education in England. It became operational in April 2018, acquiring all its powers on 1 August 2019.
2. The OfS was established as a non-departmental public body¹, which means that it formally answers to the Secretary of State for Education, while also having its own independent board.² The board determines the OfS's strategy, in line with its underpinning legislation and the direction of the Secretary of State.
3. The 2017 Act determines the OfS's broad priorities, creates a framework for the OfS to regulate in the interests of students, and requires a student representative to serve on the board. It has a particular focus on social mobility which recognises that without constraints the university system in England can entrench disadvantage, whereas regulated effectively it can drive profound social change. To signal the importance of social mobility, the 2017 Act established the senior executive role of Director of Fair Access and Participation within the OfS. The Director also serves on the board.³
4. The OfS defines students broadly to include undergraduate and postgraduate, full time and part time, campus-based and distance learners, domestic and international.⁴ It also has responsibility for the interests of current, previous and future students. The 2017 Act splits the regulation of teaching (to be carried out by the OfS) from research funding (to be carried out on a UK-wide basis by UK Research and Innovation (UKRI, a separate body)).⁵ Nonetheless, in recognition that for many universities teaching and research are closely interlinked, the 2017 Act requires close collaboration between the OfS and UKRI.
5. The OfS board approved the following mission for the organisation:

¹ A non-departmental public body (NDPB) is a "body which has a role in the processes of national government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers".

² Comprised of the chair, Sir Michael Barber, the Chief Executive Officer, the Director for Fair Access and Participation, and 7 to 12 other members including a student representative, all appointed by the Secretary of State as stipulated in Schedule 1 of HERA.

³ HERA Schedule 1

⁴ OfS Strategy, <https://www.officeforstudents.org.uk/about/our-strategy/>

⁵ HERA Section 91

*'We ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.'*⁶

6. Although students are its primary stakeholders, the OfS is also required to have regard to the interests of taxpayers (for instance, in terms of value for money in relation to the significant taxpayer subsidy that supports student loans and grants) and employers.⁷

7. This paper uses the expression 'provider' to describe universities and other higher education providers registered with the OfS, reflecting the terminology of the 2017 Act. The reason for this is that there are specific rules that apply to bodies who wish to categorise themselves as universities, and there are many higher education providers who are not universities. The generic expression 'higher education provider' therefore encompasses that broader group.

1. Context

8. The creation of the OfS as a regulator was closely tied to the government's policy, introduced in 2012, of increasing the cap on tuition fees to £9000 per annum. Tuition fees are paid by the state to the university on behalf of each student as an interest-bearing loan. After graduation, the student pays back this loan on an income-contingent basis. In practice, therefore, the loan involves a substantial state subsidy. In effect, this system ensures that higher education tuition in England is free to students at point of entry, with repayment dependent on their graduate earnings.

9. The view that a new regulator was required for the English higher education sector reflected many issues:

- Previously, higher education was primarily funded by state grant, paid by the funding council⁸ to the university. Regulation was secured by attaching conditions to the grant. However, as state grant became largely eclipsed by tuition fee loans, so was the funding council's capacity to regulate by attaching conditions to grant.
- The previous funding council regulatory model was effective for a smaller system of higher education providers made up of 'traditional' universities, with co-regulation (for instance in relation to quality assurance) built into the model. With the expansion of the sector, this model was no longer fit for purpose. In 1990, approximately 20 per cent of English young people went into higher education. This figure now stands at almost 50 per cent. In 1990, there were 36 universities. There are currently some 350 higher education providers on the OfS's register.
- In the early 2010s, there was a political (and perhaps wider societal) perception that universities had prioritised research over teaching. This reflected the relevance of research performance to league tables in a globally competitive sector, and the strength of the academic voice over the student voice. The extent to which 'quality'

⁶ OfS Strategy, <https://www.officeforstudents.org.uk/about/our-strategy/>

⁷ HERA Section 2

⁸ The Higher Education Funding Council for England, established under the Further and Higher Education Act 1992

in teaching and learning should be defined by academics rather than students remains controversial⁹.

- This resulted in a political drive to improve teaching quality by encouraging greater competition between providers. Within the English higher education system, as in other countries, there was already considerable competition for international students and postgraduate students. However, student number controls for domestic students had to some degree shielded the domestic student recruitment market from competitive forces. In the absence of competition, oversight of quality was more reliant on approaches that advocated enhancement and collaboration, incentivised by funding and a degree of contained student choice. There were concerns that this model was not as effective as it could be.
- There was growing political frustration with the persistent, significant gaps in participation and outcomes between students from advantaged and disadvantaged backgrounds, suggesting that a new approach was required.¹⁰ Indeed, notwithstanding the political controversy surrounding the creation of the OfS, particularly visible during the passage of the Higher Education and Research Bill, there was nonetheless a degree of consensus in relation to the role that higher education can play in driving social mobility, and the need for a strong regulator to promote equality of opportunity.
- The government was also keen to establish a new regulator that was expressly set up to encourage and incentivise innovation in provision.¹¹

10. However, it was also acknowledged that higher education is not a traditional market, not least because students themselves contribute to their education – by learning rather than simply consuming. The consultation that led to the OfS’s Regulatory Framework described the ways in which higher education differed from more traditional markets, including the fact that there is little competition on price within the sector. Partly in response to this, there is a statutory obligation on the OfS to regulate in order to secure value for money.¹² It was also noted in the consultation that higher education is a service unlike others in that there are almost never repeat ‘purchases’ of the same type of courses by individual students. Further, many of the benefits that accrue to students (for instance, learning and knowledge) accrue over their lifetime, and the cost of the service is largely paid for after the event. Provider failure has significant repercussions for current and past

⁹ <https://www.theguardian.com/higher-education-network/2015/aug/13/the-national-student-survey-should-be-abolished-before-it-does-any-more-harm>

¹⁰ ‘There is obviously agreement on both sides that social mobility is a huge priority, all the more so now for this Government. Widening access and participation in higher education is one of the key drivers of that.’ Higher Education and Research Bill (Fourth sitting), 8 Sept 2016, col 136

¹¹ ‘We believe strongly that there is a need for competition to generate the driving forces that push up the quality of provision in the HE system and enable a more meaningful range of choices for students. We think that that would be in the student interest. Our overarching purpose is to make sure that the OFS operates in the student interest.’ Col 192 Higher Education and Research Bill (Sixth sitting), 13 Sept 2016, col 192

¹² The OfS must have regard to ‘the need to promote value for money in the provision of higher education by English higher education providers’, HERA Section 2

students, and there are significant information asymmetries. These considerations were taken into account in the drafting of the legislation that created the OfS.

2. Summary of the OfS's role

11. The OfS's role is framed by its general duties under the 2017 Act, the first of which is to have regard to the need to protect the institutional autonomy of higher education providers. This principle informs the way in which the OfS has shaped its regulatory role.

12. The OfS's regulatory approach is outlined in its Regulatory Framework¹³, which sets out two levels of regulation: provider-level and sector-level. Provider-level regulation describes the relationship between the OfS and individual providers. Its purpose is to ensure a common quality threshold that applies to every registered provider. Above that threshold, the Framework explains how choice and competition will drive quality improvement, and how the OfS will act to incentivise that. Sector-level regulation addresses market failure (for instance, in relation to social mobility or funding of high cost subjects) and ensures that the whole 'system' works effectively – for instance, by incentivising informed choice by students.

13. Provider-level regulation is the OfS's primary regulatory mechanism. Registration is voluntary, but all providers who wish to access grant funding and enable their students to access state tuition fee loans must be registered with the OfS. Registration requires providers to satisfy the OfS's 24 regulatory conditions (both at the point of application and subsequently).

14. The 24 conditions fall into seven broad categories: social mobility; quality (primarily defined by reference to student outcomes, particularly for students from disadvantaged backgrounds and the experience of groups marginalised by race, gender, and/or disability); financial sustainability; effective governance and management; promotion of consumer rights; student protection plans on market exit; and a number of other requirements (relating to data etc).

15. The OfS will monitor and intervene if there is a risk of breach of a condition, to ensure compliance with the threshold conditions. Its monitoring will primarily rely on data returns but also notifications from third parties, including students and whistle-blowers. It can also carry out inspections (either itself or through the Quality Assurance Agency as its 'designated quality body'), and random sampling of provision. Its intervention powers and potential sanctions are extensive, and include reporting requirements, specific disclosure of evidence, imposition of conditions, monetary penalties, and, as a last resort, suspension from the register and deregistration.

16. Students are explicitly characterised as consumers in relation to consumer protection legislation. The entirety of a student's relationship with the higher education provider cannot be characterised as that of consumer. But it is an essential component (paragraphs 20-23 below).

17. At sector level, the OfS is undertaking various targeted programmes of work. For instance, it is investing in new approaches to the provision of effective information and data to students, together with more personalised advice and guidance, to inform students'

¹³ <https://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/>

choice at the point of entry to higher education. It will be undertaking a programme of work over the course of the next year to facilitate transfer – between courses or providers – if a student decides they have made the wrong choice. It is also taking steps to address other priorities. For instance, in relation to student mental health, and closing skill gaps to address current and future employer needs.

18. The OfS is committed to a deregulatory agenda through a risk-based approach to its regulatory responsibilities. It has made explicit that if a provider complies with the 24 threshold regulatory conditions, it should see less regulation, not more. Conversely, a provider at risk of breaching one or more of its regulatory conditions may be subject to a greater level of intervention.

3. Market failure

19. The OfS has explicit powers to address market failure through its provider-level and sector-level regulation:

- It has a statutory duty to address social mobility (paragraphs 24-27 below)
- It has funding powers, for instance for high cost subjects
- It has funding powers to support students who require additional support (for instance by reason of their background, or disability)
- It is committed to an extensive programme of work to enhance information, advice and guidance for current and future students
- It can incentivise good practice by, for instance, funding collaborative activities.

20. The OfS will not, however, automatically intervene to prevent a provider from exiting the market. Its statutory obligations are to protect the interests of students, not the interests of providers. To ensure that students' interests are protected, it is a condition of registration that a provider has a Student Protection Plan in place – in effect, a living will – that will be assessed and approved by the OfS on an ongoing, risk-based basis.

4. Students as consumers

21. There is a specific regulatory condition that relates to students as consumers. This requires a provider to demonstrate 'that in developing and implementing its policies, procedures and terms and conditions it has given due regard to relevant guidance about how to comply with consumer protection law.'

22. 'Policies, procedures and terms and conditions' refers to the arrangements that a provider has put in place to:

- Ensure that applicants and students are provided with accurate information about their course and the provider and that such information is quantifiable, timely, accessible and enforceable
- Enter into student contracts that have transparent and fair terms and conditions
- Ensure that complaint handling practices are clear, accessible and fair.

23. ‘Student contracts’ include the contract for academic services and other contracts into which a student may enter as part of their higher education experience, including but not limited to contracts governing the provision of accommodation, disability support packages, scholarships, sports facilities and additional course costs.

24. ‘Relevant guidance’ refers to the UK Competition and Market Authority’s publication ‘UK higher education providers: advice on consumer protection law’¹⁴, or other guidance that the provider can demonstrate to the OfS’s satisfaction is similarly authoritative.

5. Social mobility

25. A particular feature of the English system of higher education is its relationship with socio-economic status, and its impact on the participation, experience and outcomes of different equality groups (defined for these purposes by reference to gender, race and disability).

26. A substantial body of research provides compelling evidence of the extent to which socio-economic background affects a student’s experience of higher education – particularly in terms of access to the most selective providers; continuation rates; degree outcomes; and subsequent employment and salary outcomes.

27. Addressing these issues is a central part of the OfS’s responsibilities as set out in the Regulatory Framework:

- It is a condition of registration that a provider have an Access and Participation Plan that is approved by the Director for Fair Access and Participation;
- The plan will reflect the particular priorities and context of the provider, but should also align with the OfS’s priorities¹⁵
- Unlike the general regulatory approach of a common threshold, plans require continuous improvement.

28. The Director for Fair Access and Participation also has a statutory responsibility to promote effective practice. Funding is also used as a regulatory tool, for instance to incentivise collaboration between providers.¹⁶

¹⁴ <https://www.gov.uk/government/publications/higher-education-consumer-law-advice-for-providers>

¹⁵ These are reflected in the OfS’s key performance measures on participation, <https://www.officeforstudents.org.uk/about/measures-of-our-success/participation-performance-measures/>

¹⁶ For instance the £60m National Collaborative Outreach Programme <https://www.officeforstudents.org.uk/advice-and-guidance/promoting-equal-opportunities/national-collaborative-outreach-programme-ncop/>

6. Involving students as consumer in the regulatory model

29. As well as regulating in the student interest, the OfS has been set up to ensure that students shape what it does and the way in which it operates. The Regulatory Framework commits the OfS to involving students in its work:¹⁷

- As a matter of course, in developing its policies the OfS will consult with students and student representatives
- It has set up a Student Panel to advise it on what the OfS does, and how it does it. The Panel reports to the OfS board and is chaired by a student panel member (who is herself a member of the board)
- Students are involved in specific OfS programmes – on programme boards, on project panels, etc
- The OfS is in the process of drawing up an extensive and ambitious student engagement strategy
- Student priorities inform the OfS’s programme of work. For instance, students have identified mental health, and the gap in degree outcomes between white students and black students as priorities for them. These issues have therefore in turn become priorities for the OfS.

7. Features of this model singular to England

30. Treating higher education as a market, and creating a market regulator, is particularly relevant for English higher education. Unlike some continental European models of higher education, there is a tradition in England of students being geographically mobile when choosing which university to attend. Providers in England are diverse – this is commonly regarded as one of the UK’s strengths. They vary in size and specialism. Some are highly competitive to access; others have low entry requirements. Some providers offer campus provision, others distance learning. It is also a large sector, with over 350 providers already registered with the OfS. As such, a market system is a good fit for mobile students seeking to choose a course from among these diverse providers. However, it should be noted that not all students are mobile: many cannot move due to care responsibilities, disability or work (especially part-time mature students), and some may simply prefer to study close to home (a decision strongly correlated with their socio-economic background.)¹⁸

¹⁷ Regulatory Framework paragraph 22: ‘The OfS will engage with students to ensure that their voice is heard. The OfS’s Student Panel will operate with a clear link to the formal governance structure of the OfS, and will support the ability of the student representative on the main board in ensuring that students’ views on regulation and other issues are taken into account. Alongside the student representation on the board and Student Panel, the OfS will seek the input of individual students and their representative bodies, including student unions.’

¹⁸ Over three times more students in the lowest social class group commute from home than do so from the highest group (44.9% compared with 13.1%) <https://www.suttontrust.com/research-paper/home-and-away-student-mobility/>

31. There is a tradition of competition within the sector. For example, here has long been a market for research funding, postgraduate students, and for international students. Further, outside of higher education, there are multiple examples of the introduction of market models in public services.¹⁹

8. Discussion

32. The OfS is a work in progress and is not yet fully operational. However, even at this early stage there are emerging positive impacts on students:

- There is already evidence of greater focus by providers on the interests of students.
- It is increasingly the norm for students to be involved in decision-making and contributing their views to definitions of quality²⁰
- There is evidence of a positive increased focus on outcomes by providers (for instance, evidence of increased focus of the evaluation of the impact of social mobility interventions)
- New providers are seeking to enter the sector – there have been 67 applications to the register by new providers.

33. The OfS's work is not, however, without challenges:

- As with other markets, prospective students do not behave as perfectly rational consumers, and are influenced by other factors including traditional values and accepted wisdom – for instance, established universities and the power of the brand are influential.
- Competition has introduced some undesirable behaviours by providers (eg in student recruitment), though those behaviours can and will be addressed through effective regulation.
- Competition among autonomous providers has put considerable responsibility onto provider governing bodies.

¹⁹ https://webarchive.nationalarchives.gov.uk/20140402165057/http://oft.gov.uk/shared_of/busines/leaflets/general/oft1214.pdf

²⁰ <https://www.qaa.ac.uk/quality-code/advice-and-guidance/student-engagement>