



Department
for Education



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Dear Colleague,

We are writing to respond to points raised during the Lords Committee Stage debate of the Higher Education and Research Bill concerning the role of the OfS in relation to the CMA and consideration of OfS compliance with the Regulators' Code.

Regulator's Code

On the issue of the Regulators Code, we have listened to the arguments around ensuring that the OfS is compliant with recognised standards of good regulatory practice and the assurance this would offer.

So, we want to confirm that we wholeheartedly agree that the OfS should comply fully with the Regulators' Code and will ensure we take all necessary steps to implement this. We will work with BEIS so that the OfS is brought formally into scope as a listed regulator at the first practical opportunity, via statutory instrument. And in the interim, we will work with Sir Michael Barber to ensure that the OfS is voluntarily committed to complying with the code with regard to all its regulatory functions by ensuring that the principles of the Regulators' Code are written into the corporate documents and operating policies of the OfS from the outset.

Competition & Markets Authority

The Department for Education and the CMA agree over respective roles and responsibilities of the Office for Students and the CMA. The explanation I set below, that confirms there is no overlap of, or conflict between the CMA and OfS' roles and responsibilities, is the **joint view of Ministers and of the CMA.**

The CMA is not a sector regulator, but an enforcer of both competition and consumer protection law across the UK economy. It also has a number of other related investigatory

functions across the economy (including investigating mergers and conducting market studies and investigations and taking or recommending remedial action for problems in markets). The CMA has the specific role and specialist expertise to enforce competition law and consumer protection law.

It is perfectly usual for an organisation to be required to comply with legal requirements that are enforced by bodies other than a sector regulator e.g. the Police & CPS enforce the criminal law; HSE enforces health & safety requirements; and the information commissioner enforces data protection laws. It is also not unusual for sector regulators not to have competition enforcement functions or powers; neither the Oil & Gas Authority nor the Office for Nuclear Regulation have these functions.

Competition law enforcement

The CMA's competition enforcement powers mean that it can take action against undertakings that form anti-competitive agreements, or abuse their dominant position. Its role also includes merger control and conducting market studies and investigations in markets where there may be competition (or consumer) problems.

The CMA has reviewed the HE sector quite extensively over the past 3 years, and has not had cause to take an anti-competitive agreement case or an abuse of dominant position case against any HE institution. It has also cleared every merger in the sector that it (or its predecessor organisations) has investigated. Policing illegal anti-competitive behaviour and developing a regulatory system that removes barriers to and encourages competition between existing and potential providers are two very different functions.

In sectors where anti-competitive behaviour is considered to be more of a risk, the CMA and the relevant sector regulator have concurrent enforcement powers so the regulator has a specific role in competition law enforcement in its sector. In these cases an MoU would be appropriate, and the CMA has MoUs with regulators with concurrent competition enforcement powers. However, the CMA would never lose its competition enforcement responsibilities. It has a lead role in deciding who is best placed to conduct a case which is invariably the subject of discussion between it and the regulator, and must publish an annual report containing an assessment of how the concurrency arrangements have operated during the year.

Enforcing competition law is a specialist activity requiring particular operational, economic and legal expertise. Enforcement cases require substantial input of specific skills over a sometimes protracted period of time. The OfS will not have these and it would be unnecessary and expensive to replicate them in a sector where there is no recent evidence of illegal anti-competitive behaviour.

There should be no conflict between providers collaborating for the benefit of students and employers and the OfS's duty to have regard to the need to encourage competition where that competition is in the interest of students and employers. Some collaboration can be pro-competitive. We are wholly supportive of collaboration and innovation where they are in the interest of students. And the CMA has confirmed that collaboration will only generally be of concern to it if it reduces rivalry between providers, and even then may not be problematic if it generates efficiencies of which a fair proportion are passed onto students. To clarify this point we have laid a Government amendment so that as part of the OfS's general duty to have regard to the need to encourage competition, the OfS will also need to have regard to the benefits for students and employers resulting from collaboration between such higher education providers.

Consumer law enforcement

Students also have rights conferred by consumer protection law. Compliance with consumer law is important not only in protecting students, but in maintaining student and public confidence in the higher education sector. There is no overlap of responsibility between the CMA and the OfS. The OfS has no powers to enforce consumer protection law, although it would be expected to take on board the CMA's guidance and best practice when developing the regulatory framework.

The CMA has provided general advice to HE institutions on complying with consumer protection law. In addition, its consumer enforcement powers have been used in relation to the sector. Specifically, it has received undertakings from providers around the following issues:

- The use of academic sanctions for non-tuition fee debt such as accommodation related debt;
- The information provided to prospective students relating to additional costs (i.e. non-tuition fee costs);
- Terms and information provision relating to fee variation (i.e. relating to fees going up); and
- Terms in complaints procedures that could act as a barrier to making or pursuing complaints.

As there is no overlap of, or conflict between the CMA and OfS' roles and responsibilities, a Memorandum of Understanding should not be necessary. However, we will return to this when the consultation on the new regulatory framework is published in autumn 2017.

We will be meeting with Sir Michael Barber to discuss these points further and consider how these will be incorporated into OfS operations. A copy of this letter will be placed in the House Library.

Yours sincerely,



JO JOHNSON MP



VISCOUNT YOUNGER OF LECKIE

cc. David Currie, [Baron Currie of Marylebone], Chairman of the Competition and Markets Authority (CMA);

Sir Michael Barber, Chair of the Office for Students (OfS)