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The OFT's Higher Education Report: Could do Better

The Office of Fair Trading's (OFT) 14 March 2014 report on higher education found that England's higher education sector is largely "working well", but it scratched at the surface of the problems that are facing the higher education market.

The OFT launched a call for evidence in October 2013 to examine whether students are able to make informed choices as a driver for competition in higher education; whether students are treated fairly; whether there was any evidence of anti-competitive behaviour between higher education institutions; and whether the regulatory environment protects students and facilitates entry, innovation and managed exit by higher education institutions.

The higher education sector in England is characterised by a range of providers. These vary in terms of whether they can award degrees directly and access government funding and student loan support. The sector comprises the traditional publicly funded universities and higher education colleges, further education colleges and alternative providers (i.e. privately funded universities and colleges). Participation in higher education has increased from 39 per cent to 49 per cent in the last decade (between 1999/00 and 2012/13).

Regulatory framework

The regulatory framework for the sector is complex and comprises government departments, regulators, industry bodies and the individual institutions. The Department for Business, Innovation and Skills (BIS) has ultimate responsibility for policy on higher education, with individual responsibility delegated to bodies such as the Higher Education Funding Council for England (HEFC) and the Office for Fair Access, itself overseen by BIS. The Quality Assurance Agency (QAA) conducts qualitative assurance reviews every six years. The Office of the Independent Adjudicator (OIA) is an independent ombudsman of last resort where students have exhausted the internal complaints and appeals procedures at their institution. UCAS is the central provider of admissions services.

Competition in higher education

A headline issue for the OFT was whether there was any evidence of collusion between the higher education institutions in setting tuition fees. The OFT did not find evidence of explicit or tacit collusion with regard to fee setting. The report includes a short discussion on why almost all universities in England charge tuition fees at, or close to, £9,000 a year. It presents a number of possible reasons why this might be the case. The tuition fee increases coincided with a significant reduction in direct funding in 2012/13. There is excess demand for university places which reduces the incentives to charge much below the £9,000 ceiling.

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Demand for places appears to indicate that, at this level of fees, demand is not particularly price-sensitive.

The OFT commented that where consumers have limited information about the true quality of a product or service they may use price as an indicator of quality. It concluded that students may interpret lower fees as a signal of lower quality, thereby reducing the incentives to reduce fee levels. It did not believe that further investigation was warranted on these issues. Further, there is no discussion in the report of the real impact on students of having to pay back £9,000 fees. Few students may be expected to reach the £21,000 salary repayment trigger in their early years after graduating. Even if they did, it may be questioned how burdensome the repayment obligations would be in practice. The record of the Students Loan Council in chasing up payments has been relatively lax.

The OFT also examined a potential tension between collaboration amongst higher education institutions and competition law compliance. It was put to the OFT that universities might decide not to engage in potentially beneficial collaboration for fear of infringing competition law. The OFT did not find any evidence to support that any excessive caution on the part of universities is operating to the detriment of students. It did, however, put down a marker on the need for further engagement with the sector on this issue, although in the absence of any specific follow-up, the matter is left hanging.

The restriction on student applicants applying to both Oxford and Cambridge was examined by the OFT to see whether the elimination of competition in the post-application stage would allow the universities to manipulate price, quality or choice to the detriment of students. The OFT considered that any adverse impact on competition arising from the current system is likely to be minimal and that, in any event, there might be efficiencies such as allowing universities to interview a larger pool of candidates in greater depth. This is not an entirely convincing answer to the question but the OFT decided not to pursue this issue any further.

A similar conclusion was reached by the OFT in relation to the limit to a maximum of five courses when students apply through UCAS. The OFT found that even if this restriction limits competition it may be justifiable on efficiency grounds. As to the latter, it pointed to the fact that each additional choice of course puts an added cost on the institution. It therefore concluded that restricting the number of choices may be acceptable on cost grounds.

While the rather cursory treatment is a disappointment, what is more striking is the preoccupation with price as a benchmark of competition and very little assessment of competition on quality. In general, it seems that rather limited consideration has been given to the nature of the competitive process and – importantly – to how it has been evolving. Competition in higher education was considered in terms of a number of rather narrow points (such as the issue of applications to both Oxford and Cambridge), without much attention apparently given to how students and providers are responding to the evolving environment. For example, are ‘high’ quality areas of provision being further developed/expanded and, if so, in what ways and with what impacts? Are there examples of responses to poor quality

provision? (e.g. de-listing or reconfigurations of ‘poor’ courses). And more generally, how are market disciplining processes working (to the extent that they are); and how are competitive processes operating?

Areas for improvement

The OFT did not give the sector a complete clean bill of health and identified areas for improvement. It decided that there are areas where the CMA should take a deeper look at the sector.

The report says that students should be better informed about courses. It recommends that its findings should be shared with the HEFC to inform the latter’s review of this area. This focus on transparency of information is a familiar theme in market inquiries. Where information remedies have been recommended in, for example, the financial services sector, these have typically focused on making the process of switching easier. The ability of students to switch between courses could provide another competitive lever. Switching between various institutions is low (1.9 per cent in 2010/11) and is rendered more complex by the issue of transferability of funding. Any information remedies should focus on the importance of selecting the right course in the first place.

The OFT recommended improvements in the complaints system and noted that the OIA is already working to introduce standard redress mechanisms, including in relation to the number of internal stages, independence of persons dealing with complaints and reporting on case outcomes.

The OFT suggested that the CMA should undertake a “compliance review” of the sector. It cited hidden charges for students and increases in fees for international students among practices that “might breach” consumer protection regulation.

Of greater substance for those with an interest in competition and regulatory matters, the OFT believed that the regulatory system is “overly complex and does not reflect the increased role of student choice”. Among the concerns raised were the lack of a comprehensive and holistic regulatory regime underpinned by primary legislation and the potential disproportionate or unequal application of regulation to different types of institution. The OFT did not advocate that all institutions should be subject to the same regulation but it did believe that the perception of a two-tier system requires further examination. The role of self-regulatory bodies including UCAS and the QAA also came under scrutiny. The OFT saw scope for the CMA to consider governance and accountability arrangements to see how they might be enhanced. A concern was raised that students may not be adequately protected in the event of a provider or part of its activities leaving the market. The OFT said that “exit needs to remain a possibility for competition to work in a sector” but it did say that this issue should be examined along with the substantive review of the regulatory environment.

The OFT’s report has a somewhat ‘end of term’ feel to it coming only a matter of weeks before the OFT closed its doors and made way for the CMA. It may not be surprising that it has set the CMA to further work rather than closing its file completely. The OFT did not ask

the CMA to undertake a 'market study'; nor did it recommend that the sector should be subject to a full-blown market investigation reference which could last up to 18 months. Despite the inconclusive nature of the OFT's findings in a number of respects, one feature that is pervasive is the identification of the regulatory regime as in need of an overhaul to create a system of regulation which is more conducive to competition and consumer choice.

Sources: OFT press release, *OFT study finds scope for improvement in English higher education*, 14 March 2014 and *Higher Education in England, An OFT Call for Information*, March 2014 (OFT1529).