

EXPLANATORY MEMORANDUM TO
THE HIGHER EDUCATION (REGISTRATION FEES) (ENGLAND)
REGULATIONS 2019

2019 No. 543

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument makes provision under the Higher Education and Research Act 2017 (“HERA”) in relation to the fees which the Office for Students (OfS) may charge to higher education providers for their registration in the register established under that Act. These regulations will enable the OfS to fund the majority of its operating costs using income from registration fees.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 These Regulations introduce new fees. They are the first instrument made under section 70 of HERA. It is intended that the fees, and therefore these Regulations, will be updated on an annual basis.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies only in relation to England.
- 3.3 The instrument makes provision in relation to the fees that the OfS may charge higher education providers for their registration in the OfS register established under HERA. Section 3(3)(b) of HERA provides that an institution can only be registered on the OfS register (and thereby become a registered higher education provider within the meaning of section 3(10) of HERA) if it is, or intends to become, an English higher education provider. An English higher education provider is defined in section 83(1) of HERA as a higher education provider whose activities are carried on, or principally carried on, in England.
- 3.4 In the view of the Department, this instrument either has no effect outside of England, or may have such effects which are minor or consequential. This is because, as explained above, English higher education providers as defined in HERA may include providers of higher education that carry on some activities outside England, provided that their activities are principally carried on in England. The Department considers that any effects outside England resulting from this would be minor or consequential.
- 3.5 In the view of the Department, for the purposes of House of Commons Standing Order 83P, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in

relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

- 3.6 The Department has reached this view because this instrument makes provision relating to education – specifically, the regulation of providers of higher education – which is within the devolved legislative competence of each of the devolved legislatures. Education is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). Education is not included in the list of reserved matters in Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act). Education is not a reserved matter listed within Schedule 7A to the Government of Wales Act 2006 and is not within one of the exceptions listed therein, nor is it otherwise outside the legislative competence of the National Assembly for Wales (see section 108A of that Act).

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 This instrument is one of a number of instruments required to implement HERA. Section 1 of HERA establishes the OfS as the new regulator for English higher education providers. Section 3 of HERA requires the OfS to establish and maintain a register of English higher education providers and the OfS can apply registration conditions to them in accordance with sections 4 to 14.
- 6.2 Section 70(1) of HERA provides that the OfS may charge an institution a fee for its initial registration in the register and/or its ongoing registration for each period of twelve months in accordance with regulations made by the Secretary of State. Section 70(2) and (3) specify the matters which may be included in such regulations. By virtue of section 70(4), such regulations may only be made with the consent of the Treasury.
- 6.3 These Regulations are the first made under section 70 of HERA. The instrument gives full effect to that section by making provision for the fees which the OfS may charge and related matters.
- 6.4 Section 72(1) of HERA provides that the OfS must pay its fee income to the Secretary of State except to the extent that the Secretary of State, with the consent of the Treasury, directs otherwise. “Fee income” is defined by section 72(2) to include sums received by way of fees charged under section 70, as well as costs recovered. Under section 72(3), “other fee income” (which is defined by section 70(4) as sums received

by way of penalties or interest) cannot be retained by the OfS and must be paid to the Secretary of State.

7. Policy background

What is being done and why?

- 7.1 Prior to the creation of the OfS, higher education providers in England were regulated by the Higher Education Funding Council for England, the Office for Fair Access, and (in respect of ‘alternative providers’) the Department of Education. The government funded all these bodies. Since its creation on 1 January 2018, the OfS has also been fully funded by the government for a transitional period. Such government funding has meant that the cost of regulating the sector has been borne by the taxpayer. This Statutory Instrument will shift most of the cost of regulation onto the sector from 1 August 2019, when the new regulatory regime will become fully operational. The fee model set out in this instrument will be reviewed after two years, during academic year 2021/22.
- 7.2 The principle that the bodies being regulated should fund the cost of their regulation is a government policy and will bring the OfS into line with other regulatory regimes. It follows good practice as set out in *Managing Public Money*.¹ Such funding will reduce public spending and will encourage those regulated to hold the OfS to account for its efficiency. Being on the register will allow providers to access student support (student loans) and be eligible for government teaching grant.²
- 7.3 The registration fees in this instrument are set in relation to the size of a provider (see Annex), which fulfils the policy aim for fees to be proportionate. Provider size is calculated by reference to full time equivalent (FTE) number of higher education students. The principles for calculating FTE number of higher education students are that it will be based only on registered students, based on intensity of study rather than mode, include all students aiming for credit or qualification at or above Level 4 of the ‘Framework for higher education qualifications’ or equivalent, and not include students studying wholly outside the UK. Existing datasets will be used wherever possible to make the calculation.³ The FTE approach is fairer than absolute student numbers, as it does not penalise providers with a large number of part-time students.
- 7.4 Proportionate fees realise the key policy intention of HERA to remove barriers to entering the regulated sector and encourage high quality and innovative higher education providers. Grouping provider size into a series of bands makes the fee regime efficient and economical for the OfS to administer. When the fee model is reviewed after two years, the further option of including regulatory effort in the model can be considered, based on operational experience.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742188/Managing_Public_Money_MPM_2018.pdf. Other regulators where the cost of regulation is at least partly borne by the bodies regulated include Ofsted, Ofcom, and Ofgem.

² The register is divided into two parts: ‘Approved’ and ‘Approved (fee-cap)’. Providers in the ‘Approved (fee-cap)’ part of the register will be eligible for teaching grant from the OfS.

³ The OfS has published its principles for calculating FTE, see https://www.officeforstudents.org.uk/media/ee74657b-6971-494a-ab4f-7ac930e90f76/ofs2018_48.pdf

- 7.5 From 1 August 2019, both initial and ongoing fees will be charged, based on the same fee band structure. A provider will be charged an initial fee when it joins the register. The initial fee will be a pro-rated portion of the annual ongoing fee, calculated by reference to the whole months remaining between the point at which the provider joins the register and the following 1 August. The initial fees will only be payable once a provider is successfully registered in the register, so there is no cost to apply to be registered. Ongoing fees will be payable annually on 1 August each year by all providers who remain on the register.

Mitigation of Impacts.

- 7.6 Various measures have been put in place to reduce the impact of paying registration fees on providers. The first of these was to ease the transition to paying fees by the Department continuing to fund the full operational costs of the OfS for the academic year 2018/19. For providers registered in the register before 1 August 2019, no initial fees are payable.
- 7.7 The Regulations will allow for some fees reductions and an exemption for new and very small providers, who may otherwise be subject to a disproportionate impact by the fees.⁴ This fulfils the policy objective of removing barriers to entry and encouraging competition and innovation in the sector. The government will provide funding for these reductions and exemption in 2019/20, while considering how the OfS can move to a full cost recovery basis.
- 7.8 The Regulations will allow for the OfS to charge reduced fees to new institutions. This is to support the policy objective of encouraging new, innovative, and high quality entrants to the sector, thereby enhancing diversity, competition, and student choice. Reduced fees will be payable over the first three years of a new institution being on the register, with the reduction tapering from 75%, in the first year, to 50% in the second year, to 25% in the third year. The department will provide funding to the OfS in 2019-20 to cover the costs of this. Ongoing government support is subject to future spending reviews, as mentioned in paragraph 7.3 above. This support is targeted at institutions with 1000 or fewer FTE students, as the registration fees would have the greatest impact on such smaller institutions.
- 7.9 Support for very small institutions by a Micro Entity Exemption is covered in section 13 below.
- 7.10 These Regulations will allow the OfS flexibility to collect fees in instalments, thereby easing the burden on institutions.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

- 9.1 Not applicable, this is the first instrument made under the enabling power in section 70 of HERA.

⁴ Protection for small and micro-businesses is in accordance with the Better Regulation Framework, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/735587/better-regulation-framework-guidance-2018.pdf p. 23.

10. Consultation outcome

- 10.1 There have been a series of consultations with stakeholders and the public on introducing registration fees. These are outlined chronologically below.
- 10.2 **November 2015, Fulfilling Our Potential, Teaching Excellence, Social Mobility and Student Choice (Green Paper)**.⁵ This initiated the higher education reform programme that led to the creation of the OfS. It proposed a subscription-funding model for the OfS and sought views on this. The consultation made it clear that the fee model should be based on institution size, to prevent barriers to entry. The response was divided between tentative agreement, unsure, and disagreement.⁶
- 10.3 **May 2016, Success as a Knowledge Economy (White Paper)** set out the principle that registration fees would fund most of the OfS operating cost.⁷ The principle that fees would be proportional to institution size was also established.
- 10.4 **June 2016, Detailed Impact Assessment** (to accompany the White Paper and Higher Education and Research Bill) included initial analysis of the impacts of registration fees on institutions.⁸
- 10.5 **December 2016 to March 2017, Stage One Consultation** on registration fees.⁹ This consulted stakeholders such as higher education providers, mission and university and student representative bodies. The consultation document set out the precept that higher education regulation should be paid for by the higher education institutions being regulated, and reaffirmed that fees should be proportional to institution size, as established in the Green and White papers. It sought views on the various options for how the fee structure would achieve this aim.
- 10.6 **October to December 2017, Stage Two Consultation** and updated **Impact Assessment on Registration Fees** on registration fees.¹⁰ This built on the responses to the first consultation to propose a fee band structure based on institution size and reduced fees for new institutions. During the consultation period, five stakeholder events were also held for the various types of higher education providers, the consultation received responses from 157 bodies.

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/474227/BIS-15-623-fulfilling-our-potential-teaching-excellence-social-mobility-and-student-choice.pdf p. 63

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523420/bis-16-261-he-green-paper-fulfilling-our-potential-summary-of-responses.pdf p. 44

⁷ <https://www.gov.uk/government/publications/higher-education-success-as-a-knowledge-economy-white-paper> pp. 19, 61,

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/528005/bis-16-295-he-research-bill-detailed-impact-assessment.pdf pp. 152-69.

⁹ https://consult.education.gov.uk/he-landscape-reform/office-for-students-registration-fees/supporting_documents/OfS%20registration%20fees%20consultation.pdf

¹⁰ https://consult.education.gov.uk/he-landscape-reform/ofs-registration-fees-and-other-fees-stage-2/supporting_documents/Office%20for%20Students%20registration%20fees%20%20stage2.pdf

https://consult.education.gov.uk/he-landscape-reform/ofs-registration-fees-and-other-fees-stage-2/supporting_documents/OfS%20consultation%20Impact%20Assesment%20.pdf

- 10.7 **February 2018, Response to the Stage 2 Consultation.**¹¹ There was general support for a fee model based upon student numbers, but the proposed fee banding structure raised concerns about the impact on smaller institutions. Hence, a new fee band structure was introduced which made the bands more granular at the lower end, thereby reducing fees for the smallest institutions. The Micro Entity Exemption was also introduced to protect the very smallest institutions.
- 10.8 **December 2017 to February 2018, a consultation on OfS Monetary Penalties** was also carried out.¹² This included a question on what should happen in the case of late payment of registration fees. There was no objection to the OfS charging interest on late fees of 5% above the base rate, as this instrument stipulates.
- 10.9 **March 2019, an updated Impact assessment on Registration Fees** to accompany the instrument was published.

11. Guidance

- 11.1 The OfS plans to publish its detailed guidance to the sector on the registration fee regime in Spring 2019.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies has been considered in the consultations and Impact Assessments. Many higher education institutions are charities.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 This instrument applies to activities that are undertaken by small businesses. Following concerns about the impact on smaller providers during the second stage consultation, the lowest fee bands were further divided; so instead of three bands for institutions with 0-300 FTE students, there are now five bands in the same range, thereby reducing fees for the smallest institutions.
- 13.2 A **Micro Entity Exemption** has been devised to protect the very smallest higher education providers from the impact of introducing fees by providing a 100% exemption. An institution will qualify for this exemption if they meet the criteria for a micro-entity under section 384A of the Companies Act 2006 and have 300 or fewer FTE students.¹³ Government funding for this exemption beyond 2019/20 will be subject to future spending reviews.

¹¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683764/OfS_registration_fees_govt_response_final_version.pdf

¹² https://consult.education.gov.uk/regulatory-policy-reform-team/office-for-students-monetary-penalties/supporting_documents/Monetary%20and%20financial%20penalties%20consultation%20document%20%20final.pdf

¹³ <http://www.legislation.gov.uk/ukpga/2006/46/contents>

14. Monitoring & review

- 14.1 The fee model will be reviewed after two years of operational experience, during academic year 2021/22. It is intended that the fees will be updated annually by statutory instrument.
- 14.2 The instrument does not include a statutory review clause because the relevant requirements of the Small Business, Enterprise and Employment Act 2015 do not apply to provisions imposing fees.¹⁴

15. Contact

Maggie Bullett at the Department for Education. Telephone: 07384 452120 or email: Maggie.bullett@education.gov.uk can be contacted with any queries regarding the instrument.

- 15.1 Verity Prime, Deputy Director for Higher Education Strategy Development and Implementation, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.2 Chris Skidmore, Minister of State for Universities, Science, Research and Innovation at the Department for Business Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

¹⁴ <http://www.legislation.gov.uk/ukpga/2015/26/section/22>

Annex

The band fees for academic year 2019/20 are

<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>
Fee band	Number of full time equivalent students	Ongoing fee
A	No more than 25	£12,300
B	More than 25 but no more than 50	£15,350
C	More than 50 and no more than 75	£19,200
D	More than 75 but no more than 100	£24,050
E	More than 100 but no more than 300	£30,100
F	More than 300 but no more than 500	£37,750
G	More than 500 but no more than 1,000	£47,350
H	More than 1,000 but no more than 1,500	£59,400
I	More than 1,500 but no more than 2,500	£74,600
J	More than 2,500 but no more than 5,000	£93,750
K	More than 5,000 but no more than 10,000	£117,900
L	More than 10,000 but no more than 20,000	£148,350
M	More than 20,000	£186,800