

EXPLANATORY MEMORANDUM TO
THE HIGHER EDUCATION (FEE LIMITS AND STUDENT SUPPORT)
(ENGLAND) (CORONAVIRUS) REGULATIONS 2020

2020 No. 853

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.

2. Purpose of the instrument

- 2.1 This instrument amends legislation in relation to England which prescribes tuition fee limits and tuition fee loan amounts. Where a higher education provider has recruited first year students starting courses in excess of a level notified to that provider by the Secretary of State in respect of an academic year commencing on or after 1st August 2020 and before 1st August 2021, reduced tuition fee limits will apply to full-time undergraduate courses applicable in an academic year commencing on or after 1st August 2021 and before 1st August 2022. Maximum tuition fee loan amounts available to English-domiciled students starting full-time courses at institutions in Scotland, Northern Ireland or Wales are also reduced in the same circumstances.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 to England only.
- 3.3 The instrument does not have any minor or consequential effects outside England.
- 3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, 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.
- 3.5 The Department has reached this view because it considers that the purpose of the instrument relates to education, which is within the devolved legislative competence of each of the three devolved legislatures. The instrument does not relate to a reserved matter 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). The instrument does not relate to an excepted or reserved matter in Schedule 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 the Act). The instrument does not

relate to a reserved matter in Schedule 7A to the Government of Wales Act 2006 and is not 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 set out in Section 3 under “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)”.

5. European Convention on Human Rights

- 5.1 The Minister of State for Universities has made the following statement regarding Human Rights:

“In my view the provisions of the Higher Education (Fee Limits and Student Support) (England) (Coronavirus) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 10 of the Higher Education and Research Act 2017 (“HERA”) provides that the Office for Students (“OfS”), the higher education regulator in England, must ensure that the ongoing registration conditions applicable to registered providers of a prescribed description include a fee limit condition, which applies to qualifying courses attended by qualifying persons. The Higher Education (Fee Limit Condition) (England) Regulations 2017 (S.I. 2017/1189) set out those providers, courses and persons which are subject to a fee limit condition. The Secretary of State may prescribe the fee limits themselves by regulations under Schedule 2 to HERA. He has done so, and those Regulations are amended by this instrument.
- 6.2 The Education (Student Support) Regulations 2011 (S.I. 2011/1986) (“Student Support Regulations”) provide for support under the Teaching and Higher Education Act 1998 for eligible students attending or undertaking designated courses in the United Kingdom. The support provided for under those Regulations includes loans for tuition fees. This instrument amends those Regulations.

7. Policy background

What is being done and why?

- 7.1 The coronavirus (COVID-19) outbreak has placed significant financial strain on the higher education sector. In order to mitigate potential financial losses caused by the risk that fewer students opt to go to university in academic year 2020/21 (particularly but not exclusively international students, who pay higher fees), some higher education providers have been adopting admissions practices (such as the mass use of unconditional offers) in order to recruit a greater share of domestic students than they had in previous years, to the detriment of other providers and potentially to the detriment of students.
- 7.2 Providers recruiting additional UK and EU students in this way secure the tuition fee income attached to these students, and consequently will draw down a greater share of the public funding available in academic year 2020/21. This behaviour leaves a

smaller pool of prospective students for other providers to draw from and could put some providers at risk of significant financial strain. The change in recruitment practices, driven by funding concerns, also has the potential to be to the detriment of students who have been encouraged to accept an offer from a provider that is not best suited to their needs.

- 7.3 To address this issue, the Government developed provider-level student number controls (“SNCs”) as part of a package to stabilise the admissions system and mitigate the financial impacts of coronavirus (COVID-19) on higher education providers. This general measure was announced by the Secretary of State on 4th May 2020, and is available at <https://www.gov.uk/government/news/government-support-package-for-universities-and-students>.
- 7.4 The SNCs apply to English higher education providers registered in the approved (fee cap) part of the register established by the OfS under section 3 of HERA. They apply, subject to specified exemptions, in relation to UK and EU students starting the first year of full-time undergraduate courses in academic year 2020/21 from 1st August 2020 onwards. The SNCs also apply in respect of England-domiciled students (those students ordinarily resident in England) starting full-time undergraduate courses provided by, or on behalf of, publicly funded institutions in Scotland, Wales or Northern Ireland or regulated institutions in Wales in academic year 2020/21 from 1st August 2020 onwards.
- 7.5 The SNCs for the higher education providers to which they apply were notified to those providers individually in June 2020. They are calculated in accordance with a methodology set out in a document published at the same time as these notifications and available at <https://www.gov.uk/government/publications/student-number-controls>. This document also sets out the relevant exemptions, and the process and criteria for the allocation of additional places that providers may apply for to the Secretary of State. That allocation process is currently taking place and the document will be updated to reflect the outcome of this process, and republished, before this instrument is made. The outcome of the allocation process will be notified to individual providers at the same time.
- 7.6 The purpose of this instrument is to allow for the possibility that a provider recruits more students in academic year 2020/21 than their individual SNC. It addresses the consequences of this for the stability and sustainability of the higher education sector by reducing the sums available to the provider through the student finance system in the subsequent academic year.
- 7.7 Accordingly, this instrument provides for lower fee limits in the academic year from 1st August 2021 for those providers that recruit more students than their individual SNCs in the academic year from 1st August 2020. Maximum fee limits (the basic, higher and floor amounts) for full-time, and in the main, undergraduate courses (as set out in the Higher Education (Fee Limits and Fee Limit Condition) (England) Regulations 2018 (S.I. 2018/903) and the Higher Education (Fee Limits for Accelerated Courses) (England) Regulations 2019 (S.I. 2019/214)), are reduced, whether they are on the first or a subsequent year of their course, where the number of students exceeds the SNC for that provider, as follows:
- by 3% where the level is exceeded but not by more than 6%;
 - by 9% where the level is exceeded by more than 6% but not more than 12%;
 - by 15% where the level is exceeded by more than 12%.

- 7.8 A fee limit condition is one of a number of conditions of registration which the OfS is required to impose under sections 8 to 12 of HERA. The OfS has specified sanctions available under sections 15 to 21 of HERA if it believes that there is, or has been, a breach of a registration condition.
- 7.9 The rationale for introducing reducing fee limits for providers who recruit in excess of their control is about the effective and fair use of public money during a time of unexpected financial crisis. A higher education provider that recruits a comparatively higher number of domestic students disproportionately increases the public funding flowing to it through the taxpayer funded student loans system. In doing so, the provider reduces the available student base for other providers and increases the risk that other providers will become insolvent, potentially leading to a call on public funds to address the consequences of their failure. This potential call on public funds represents a contingent exposure which the Government has to take into account in making spending decisions elsewhere.
- 7.10 The Government's policy position is that it is reasonable to conclude that, where a provider has chosen not to abide by its SNC, it has taken more than its fair share of taxpayer funding, and this imbalance should be redressed the following academic year. The Government has chosen to address this through the fees system as this is the place where the Government has the ability to control the flow of public funds to higher education. The mechanism the Government has adopted is to apply a reduced fee limit in circumstances where a provider has exceeded its SNC, redressing the imbalance caused by over-recruitment by reducing payments per student in the subsequent academic year, and therefore the total funding available to those providers.
- 7.11 The scale of fee limit reductions the Government has applied has been calculated in proportion to the extent by which a provider exceeds its SNC, so there is a proportionate correlation between the additional income secured by the provider by recruitment of additional UK and EU students in excess of the SNC and the fee limit reduction. The fee limit reductions are also intended to protect public funds by disincentivising recruitment in excess of the SNCs, and therefore avoiding the negative consequences of such excessive recruitment.
- 7.12 In relation to eligible students domiciled in England who study on courses provided by, or on behalf of, Scottish, Welsh or Northern Irish institutions, tuition fee policy is in the hands of the respective devolved administrations. Accordingly, a different approach is required in relation to such students.
- 7.13 This instrument provides for lower maximum fee loans in the Student Support Regulations for full-time undergraduate courses offered by, or on behalf of, publicly funded institutions in Scotland, Wales or Northern Ireland and regulated institutions in Wales. Maximum fee loans are reduced in the first academic year of a course commencing between 1st August 2021 and before 1st August 2022 where the number of students exceeds the SNC for that institution in the academic year from 1st August 2020, at the same percentages as set out at paragraph 7.7 above, and for the same reasons.
- 7.14 The reduction in fee limits and fee loans set out in this instrument are temporary, applying only to academic year 2021/22 from 1st August 2021 onwards. Aside from the changes set out in this instrument, the maximum fee limits for undergraduate courses for academic year 2021/22 will remain unchanged from the 2020/21 academic year.

7.15 Further details of the Government's higher education support package can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882884/Government_support_package_for_higher_education_providers_and_students.pdf.

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.

9. Consolidation

9.1 The Department keeps the feasibility of consolidating the various sets of regulations relating to student finance under periodic review. It has no plans to do so before academic year 2022/23.

10. Consultation outcome

10.1 There is no statutory requirement to consult on this instrument. However, the Government's development and introduction of SNCs took into account discussions with, and proposals made by, representatives from within the higher education sector. There have also been discussions with the devolved administrations in relation to the effect of the SNCs in relation to English-domiciled students who attend institutions in Scotland, Northern Ireland or Wales.

11. Guidance

11.1 The Secretary of State announced its general arrangements for SNCs for academic year 2020/21 on 4th May 2020. The SNCs themselves were notified individually to providers and institutions in June 2020. The document setting out information on which type of students are covered and how the SNCs should be applied was published at the same time as the notifications and is available at <https://www.gov.uk/government/publications/student-number-controls>. The document will be updated to reflect the outcome of allocation of additional places, and republished, before this instrument is made.

12. Impact

12.1 There is no, or no significant impact on business, charities or voluntary bodies. There is no, or no significant impact, on those higher education providers registered in the approved (fee cap) part of the OfS register that do not exceed their SNC. There is an impact on those higher education providers registered in the approved (fee cap) part of the OfS register that do exceed their SNC, but it is not long-term owing to the temporary nature of the instrument. The fee limit reductions have been designed to ensure that there is a proportionate correlation between the additional income secured by the provider by recruitment of additional UK and EU students in excess of the SNCs and the fee limit reduction. It is expected that the financial impact of exceeding SNCs will be proportionately greater for more teaching-intensive providers (which have a greater reliance on domestic tuition fee income) and smaller providers (which have smaller and less diversified income streams than their larger counterparts). A similar analysis applies to institutions in the devolved administrations.

12.2 There is no, or no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because, while the fee reductions are judged to have a financial impact on those higher education providers that exceed their SNC, the direct effects of the instrument will last for less than 12 months.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that the Department will be monitoring the impact on stakeholders of the introduction of SNCs alongside the impact of the coronavirus (COVID-19) outbreak on the student finance system in general. We will also be monitoring the number of students who receive fee loans. Relevant information is published in the Student Loans Company's Statistical First Releases. The Department will further monitor the impact of any fee limit reductions on providers and students.

15. Contact

15.1 William Couchman at the Department for Education, telephone: 07384211016 or email: StudentNumbers.Control@education.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Clare Macdonald, Deputy Director for Future Student Finance and Funding at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Michelle Donelan, Minister of State for Universities at the Department for Education, can confirm that this Explanatory Memorandum meets the required standard.