



Draft minutes of the exceptional OfS Board meeting, 4 June 2020

Location: by video conference

Timings: 08.15-09.30

Present members: Sir Michael Barber (chair)
Martin Coleman (deputy chair)
Nicola Dandridge (chief executive)
Gurpreet Dehal
Elizabeth Fagan
Katja Hall
Verity Hancock
Kathryn King
Kate Lander
Simon Levine
Martha Longdon
Chris Millward (Director for Fair Access and Participation)
David Palfreyman
Monisha Shah
Steve West

Attendees: Ian Coates, Department for Education (DfE) representative

Apologies: None

Officers: Jamie Black, Competition and Registration Manager
Ed Davison
Josh Fleming
Paul Huffer, Head of Legal
Hilary Jones, Senior Officer, Competition and Registration
Susan Lapworth, Director of Competition and Registration
Paula McLeod, Corporate Governance Senior Adviser (clerk)
Richard Puttock, Director of Data, Foresight and Analysis
Conor Ryan, Director of External Relations
Nolan Smith, Director of Resources, Finance and Transformation
Ben Whitestone, Head of Governance

Chair's welcome and introduction

1. The chair welcomed members to the meeting and noted that no apologies had been received.
2. This meeting had been convened to consider the outcomes of the consultation on the integrity and stability of the higher education sector issued in response to the coronavirus (COVID-19) pandemic.
3. He reminded members that at its meeting on 21 May 2020, the board had agreed to delegate its authority to a sub-group comprised of the chair, deputy chair, chief executive and Director of Competition and Registration to decide whether to impose a new condition of registration and make associated changes to the regulatory framework, and if so, the date on which these should take effect. The purpose of this meeting was to discuss the key themes emerging from the consultation responses and for the board to share views that may assist the decision making of the sub-group when it meets during the week commencing 8 June 2020.

Consultation on the integrity and stability of the higher education sector: preliminary summary of responses

4. In introducing the discussion, the Director of Competition and Registration thanked Jamie Black, Hilary Jones, and the relevant teams for all the work they had done in analysing the consultation responses in a short period of time.
5. She advised that around 190 consultation responses had been received, the majority from providers or representative bodies, a small number from students and one from the NUS. A plurality but not a majority of respondents had expressed support for the introduction of the condition.
6. A number of concerns were raised in the following areas and the board's views would be sought on each in turn:
 - a. The purpose and scope of the proposed condition
 - b. The retrospectivity element
 - c. The 'sunset clause'
 - d. Enforcement
 - e. Equality, diversity and inclusion.

Purpose and scope of the proposed condition

7. The Director of Competition and Registration highlighted the four themes arising in this area:
 - a. Vires and regulatory remit of the OfS: many responses misunderstood the OfS's duties and powers under the Higher Education and Research Act (HERA), including in respect of institutional autonomy.
 - b. Scope and proportionality: some felt that the condition was unnecessary or the scope too wide, though it had been noted that the proposed condition still provided an opportunity for the OfS to disincentivise undesirable conduct.
 - c. Principles-based approach: a number of responses indicated a desire for more clarity on permissible conduct, and a more prescriptive rules-based approach.
 - d. Unintended consequences in relation to admissions: a number of responses had suggested the condition could limit student choice and have a negative effect on the availability of student support such as bursaries and scholarships.

8. The following points were raised in discussion:
 - a. The lack of sector understanding of the regulatory framework and HERA should be addressed. In particular, this would save time in the long-term clarifying misunderstandings.
 - b. The OfS should support providers to understand the rationale behind the condition – that it is about doing the right thing to support both students and the sector in extraordinary times.
 - c. Any conflict between ensuring financial sustainability and recognising the needs of students needs to be balanced. The OfS should bear in mind action which might inadvertently damage English higher education providers' standing domestically or put them at a disadvantage internationally.
 - d. Clarifying the scope and limits of the condition would be important, including setting out what would be considered acceptable and unacceptable behaviours. This would then engender more support from the sector which would secure the objectives of the consultation proposals, and also help students have clarity when making choices.
 - e. Clarity would be helpful for small and medium providers who may struggle more than larger providers to comply with new condition.

9. Noting that the board were supportive of the general approach being taken, it was agreed that, should a decision be taken to impose the condition, the wording of the condition could usefully be revised to give greater clarity of scope. In addition, a more general explanation of the legal powers and duties of the OfS could be published.

Retrospectivity element

10. The Director of Competition and Registration advised that being able to take retrospective action against providers that had adopted inappropriate admissions practices had demonstrated to the sector the willingness of the OfS to use its regulatory powers. However, a number of consultation responses had expressed the view that 11 March (the date the World Health Organisation declared a pandemic) was too early and that 23 March (the start of the admissions moratorium) or 4 May (the date of the publication of the consultation) would be more appropriate dates to use to determine the limits of potential retrospective action. It had also been suggested that the scope for taking retrospective action could be narrowed to conduct relating directly to the requirements of the admissions moratorium.

11. Further concern was expressed in the consultation responses that there could be a breach of the law if retrospective action resulted in offers to students being unwound after a contract had already been formed. The Head of Legal gave advice on the legal issues and risks associated with retrospectivity and the meaning of retrospectivity from a legal perspective. This included advice on whether the proposed condition would be retrospective if it only applied to pre-existing offers that remained live and were legally capable of being withdrawn by providers.

12. The following points were raised in discussion:
 - a. The inclusion of a retrospective element in the consultation had already achieved an important purpose as there had been little evidence of undesirable admissions practices during the moratorium and the consultation period.
 - b. There could be questions about the appropriateness of introducing an element of retrospectivity that changed the principles or rules to which providers had thought they were working at the time they engaged in relevant conduct.

- c. It could be unfair to students if offers made to them were unwound, especially if students had been using the time since the offer was made to ensure they would be making the best choices, while other students who had made quicker decisions were left unaffected.

'Sunset' clause

13. The Director of Competition and Registration advised that the proposal in the consultation was for the condition of registration to be in place for a one-year period. She noted that some respondents felt this was too short and others too long. It was important to be clear that the condition would be time-limited as a specific response to coronavirus and not an indirect way of seeking additional powers on a permanent basis or of unnecessarily undermining institutional autonomy.
14. The following points were raised in discussion:
 - a. There should be clarity on arrangements for the 2021-20 admissions cycle, as there will be a significant likelihood of increased competition from providers to recruit as many students as they can for the 2021-22 academic year as well as for 2020-21.
 - b. Beyond the immediate issues relevant to decisions about the imposition of the proposed condition, there should be some scenario planning to consider the impact of coronavirus on admissions over a longer period, not just for the 2020-21 academic year. Having the proposed condition of registration in place over a longer period could be helpful in ensuring that there were not significant swings on the OfS's policy approach to admissions.
15. The board agreed that, should a final decision be taken to impose the proposed condition, it would be important to emphasise in communication materials that this was a response to the particular circumstances of the pandemic rather than the introduction of a more permanent set of measures. The board were supportive of the inclusion of the proposed 'sunset clause' but suggested that, to be transparent, we should signal that OfS retains the flexibility to introduce future measures, subject to consultation. In this regard, the board also noted that it would not be lawful for the OfS to seek to fetter its discretion by giving any form of commitment that it would not introduce the same or similar measures in the future.

Enforcement

16. The Director of Competition and Registration noted that there had been some concern about the application of monetary penalties when some providers may already be in financial difficulty.
17. The board were supportive of the proposed approach in the consultation document, noting that further explanation and engagement may be required.

Equality, diversity and inclusion

18. The Director of Competition and Registration noted that respondents had identified areas in which they considered that the introduction of the condition could potentially impact on some groups of students, in particular, vulnerable students. The Director for Fair Access and Participation set out how EDI issues are being considered. He noted that:
 - a. A full equality impact assessment is being carried out which will be published with the final consultation outcomes.
 - b. Beyond the immediate issues relating to the proposed condition, providers would be expected to take action to support disadvantaged students and we will need to be clear about the link to access and participation plans.

- c. The Ofqual grading approach will need to be taken into account when providers make contextual offers.
- d. It would be helpful to reflect on the position of HE in FE and on the progression of students into postgraduate studies.

19. The following points were raised in discussion:

- a. Access and participation should remain a priority and there should be no dampening down of expectations.
- b. As coronavirus is likely to affect disadvantaged groups disproportionately, it was important to keep the focus on EDI and explain why our interventions seek to address those disadvantages.
- c. The behaviours of providers working through validation or sub contractual arrangements need to be kept under review to ensure they did not have a destabilising effect on HE in FE or act in a way that is not in the best interests of students.
- d. In trying to address a challenging financial situation, we need to ensure the quality of provision is maintained by providers who seek to recruit increased numbers of students.

Closing remarks

- 20. On behalf of the board, the chair thanked Jamie Black, Hilary Jones, and their colleagues for all of the work they had done in analysing the consultation responses so rapidly. He also thanked the Director of Competition and Registration and the Head of Legal for taking the board through the key points in preparation for the decision-making meetings of the sub-group.
- 21. He thanked the board for their thoughtful contributions and for attending the meeting at short notice.
- 22. The next formal scheduled meeting of the board will be on 2 July 2020.
- 23. The meeting closed at 09.22.