Consultation on the Office for Students' approach to monetary penalties

Analysis of responses to consultation

Reference OfS 2021.18

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Contents

The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

Our four regulatory objectives

All students, from all backgrounds, and with the ability and desire to undertake higher education:

- are supported to access, succeed in, and progress from, higher education
- receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure
- are able to progress into employment or further study, and their qualifications hold their value over time
- receive value for money.

Introduction

What we were consulting on

1. The Higher Education and Research Act 2017 ('HERA') gives the Office for Students (OfS) the power to impose a monetary penalty on a registered higher education provider if it appears to us that a provider has breached one or more of its conditions of registration. Our regulatory framework sets out our general approach to the use of our enforcement powers and sets out the processes that we must follow if we are minded to impose a monetary penalty, or other sanction, on a provider. We described our powers to impose a monetary penalty, and the circumstances in which we may do so, in paragraphs 3-11 of the consultation document.[1]

2. Our consultation sought views on our proposed approach to determining the amount of a monetary penalty, including any discount for early settlement. We also sought views on the clarity of our approach to the recovery of our costs relating to the imposition of sanctions and to charging interest for late payment of OfS registration and other fees; both approaches have a basis in legislation.

3. We did not seek views on whether we **should** use monetary penalties as a sanction, the maximum monetary penalty that we may impose,[2] or how monies collected through monetary penalties should be used,[3] since those matters are provided for in legislation. Similarly, we did not seek views on whether we should publish information about the imposition of a monetary penalty, since we are consulting separately on the publication of regulatory information about individual providers.[4] This approach was explained in the consultation document.

Feedback and analysis

4. We undertook a qualitative analysis of the feedback that we received. In this document we identify and discuss the most significant issues raised by respondents. We have not summarised comments received on the issues that we did not consult on. However, in

[1] See www.officeforstudents.org.uk/publications/consultation-on-ofs-approach-to-monetary-penalties/.

[2] See the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 (the 'Monetary Penalties Regulations') available at: www.legislation.gov.uk/uksi/2019/1026/regulation/3/made.

[3] Under paragraph 5 of Schedule 3 of HERA, any sums received by the OfS by way of a monetary penalty, or interest received on any unpaid amount of the penalty (under paragraph 4 of Schedule 3 of HERA), must be paid to the Secretary of State.

[4] See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/. We will publish the outcomes of that consultation later in 2021 and will consider the comments made in this consultation about the publication of information on monetary penalties, in our analysis of that other consultation.

making our final decision to take forward our proposals, we have had regard to all of the feedback that we received.[5]

Implementing our policy

5. We have decided to publish a general policy on how we will calculate a monetary penalty, including a settlement process, and our approach to the recovery of costs and charging interest for late payment of fees. This policy is published as 'Regulatory advice 19: The OfS's approach to determining the amount of a monetary penalty'.[6] We have also summarised our policy in this document.

6. Our policy reflects a number of minor amendments to the consultation proposals, in particular to the five-step process for calculating a monetary penalty and to our approach to settlement discounts. We have made these amendments in response to the feedback that we received. Our amendments, which are summarised in this document, provide further clarification rather than making substantive changes. We have also set out the legislative background to our proposals in more detail. It was clear from the queries raised in responses to the consultation that respondents may find this helpful.

7. In reaching our final decision about these matters, we have had regard to the OfS's general duties in section 2 of HERA. In our view, the general duty which is likely to be particularly relevant is the duty under s.2(g) of HERA to have regard to, so far as relevant, the principles of best regulatory practice, including the principles that all regulatory activities should be transparent, accountable, proportional, consistent, and targeted only at cases in which action is needed. We also had regard to the Regulators' Code in reaching our final decision.

8. We do not expect our policy to create new regulatory burden for compliant providers. Regulatory action will be targeted only in those cases where we have compliance concerns.

9. We have also had regard to the duty under s.2(d) of HERA to promote value for money in the provision of higher education by providers. We accept that the imposition of a monetary penalty would increase a provider's costs (and may therefore affect the value for money delivered by that provider). However, our approach would provide a credible deterrent to prevent breaches of our regulatory requirements – which promote value for money – and encourage providers to address any areas of likely non-compliance. It also seeks to eliminate any gain (financial or otherwise) to a provider as a result of a breach.

[5] We are currently consulting on a revised approach to our regulation of quality and standards and our phase 1 consultation closed in January 2021. In making our decision in relation to this consultation, we have had regard to comments relating to monetary penalties, made in response to our phase 1 consultation on quality and standards.

[6] Regulatory advice 19 is available at www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/.

10. We have considered the duty to promote quality in the provision of English higher education under s.2(b) of HERA. The use of monetary penalties is an important mechanism to ensure compliance with the OfS's regulatory requirements that are designed to promote quality and protect the interests of students.

11. We have also had regard to the duty under s.2(f) of HERA to use our resources in an efficient, effective and economic way. By encouraging compliance, the use of monetary penalties will also ensure that we are able to use our resources efficiently in performing our statutory functions because a more compliant sector will require less regulation.

12. The OfS is required to have regard to the need to protect institutional autonomy under s.2(1)(a) of HERA. This is not an absolute obligation to protect institutional autonomy in all circumstances. We are taking a principles-based approach to calculating a monetary penalty: rigid rules-based mechanisms would not allow us to make decisions that take account of a provider's particular context. We have therefore given weight to institutional autonomy consistent with the need for the OfS to protect the public interest and the interests of students. Decisions about the imposition of a monetary penalty would only arise in circumstances in which a provider had breached one or more of its conditions of registration. In these circumstances, where a provider is non-compliant, we consider it appropriate to attach less weight to autonomy.

13. We have also had regard to any relevant statutory guidance issued to the OfS from the Secretary of State, in particular the guidance referred to in Annex C of the consultation document[7] and the statutory guidance from the Secretary of State to the OfS, dated 8 February 2021.[8]

14. We have also had due regard to our obligations under the public sector equality duty and our consideration of relevant issues is set out in more detail in the section on 'Impact of our proposals' below. In summary, we consider that our approach will have a neutral impact on students on the basis of their protected characteristics.

15. For the reasons set out in this document, we consider that our policy will allow us to use monetary penalties in a proportionate and targeted way, to address non-compliance with our regulatory requirements and to provide a credible deterrent to future non-compliance. We consider this to be in the student interest and in the public interest. By publishing our general policy, we are providing increased transparency about our regulatory approach.

[7] See www.officeforstudents.org.uk/publications/consultation-on-ofs-approach-to-monetary-penalties/.

[8] Available at www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/. In particular, the Secretary of State's comments that the OfS 'should not hesitate to use the full range of its powers and sanctions where quality of provision is not high enough: the OfS should not limit itself to putting in place conditions of registration requiring improvement plans for providers who do not demonstrate high quality and robust outcomes, but should move immediately to more robust measures, including monetary penalties…'.

Qualitative analysis of responses

Proposal 1: Calculation of monetary penalties by reference to qualifying income

We proposed that as a general principle, we would normally calculate a monetary penalty by reference to a percentage of a provider's qualifying income.

16. Respondents expressed a wide range of, sometimes competing, views about this proposal. Some respondents considered it to be 'fair', 'relatively fair' or 'proportionate', in some cases suggesting that it would appropriately take account of the size of the provider and/or result in those with a lower qualifying income, particularly smaller providers, receiving lower monetary penalties.

17. However, many respondents disagreed with our proposal and common themes were:

    - A monetary penalty should be proportionate to the breach of registration condition(s) and using qualifying income may lead to a disproportionate penalty being applied. For example, large providers, or those with 'strong finances', who have very large qualifying incomes, would be unfairly penalised, attracting higher monetary penalties which may be disproportionate to the relevant breach of condition(s) and result in unjustified reputational damage (because of public perceptions that a high monetary penalty reflects a very serious breach).

    - The definition of qualifying income is too narrow because it does not take account of a provider's other wealth or assets or variety of income streams which are relevant to proportionality and/or affordability and/or the deterrent effect of a monetary penalty. Providers whose qualifying income forms a high proportion of their overall income (some respondents referred specifically to small or specialist providers) would be disproportionately affected compared with those with significant other sources of income or wealth. By contrast, some respondents supported the proposal not to take account of wider income, assets or wealth, in some cases noting that, in complex business or group structures, income from other parts of a provider's business or group structure may not be readily transferrable to the higher education part of the business.

    - Qualifying income is too crude a measure which does not indicate whether the monetary penalty would be affordable. Respondents commented that a high qualifying income does not necessarily mean that the provider could afford a large monetary penalty and that other financial indicators should be used as well or instead, such as a provider's financial surplus or cash generation.

    - Because 'qualifying income' does not take into account profitability, large, not for profit, providers (which reinvest qualifying income into teaching and student

services and maintain a minimal operating surplus) would be disproportionately affected compared with small, for profit providers.

- Further education colleges would be disproportionately affected by the proposals – because some types of higher education courses at colleges generate less income per student and many colleges do not charge higher fees. A suggestion was made that the number of students, the nature of courses delivered and the level of fees charged at the provider should all be taken into account.

- Using qualifying income does not adequately consider the potential impact of a monetary penalty on students (particularly those from groups which are underrepresented in higher education), which should be the most important consideration. Some suggested that the starting point should instead be whether a provider has, for example, acted in bad faith and/or not in the interests of students and/or benefitted financially from the breach of condition(s). Some suggested that where an issue affects only some students, or some courses, the starting point should be the level of fee income generated by those students, or the students on those courses.

- A provider's qualifying income fluctuates in the short term, so that its qualifying income in the 'relevant year' may not reflect its current financial position and may not correlate with its ability to pay a monetary penalty. Using an average figure, over a number of years, was suggested as an alternative.

- Some of the terms used within the definition of 'qualifying income', such as 'relevant year income' and 'relevant fees paid to the provider for courses and grants' require further clarification.

18. Some respondents queried what approach the OfS would take where it decided not to, or could not, calculate a monetary penalty by reference to qualifying income, for example where a breach takes place in the first year in which the provider has qualifying income (and so there is no preceding 'relevant year'). Respondents also queried whether monetary penalties for multiple breaches within a year (which could relate to the same qualifying income for the same 'relevant year') would be compounded.

OfS response

19. For the reasons given below, we remain of the view that it is appropriate and proportionate normally to calculate a monetary penalty by reference to 'qualifying income'. This means that the 'baseline' penalty under Step 1 of our five-step process (see below), and the monetary penalty to be imposed (see Step 5 below), will normally be expressed as a percentage of a provider's qualifying income.

20. Our approach is rooted in legislation; the Monetary Penalties Regulations[9] set the maximum monetary penalty that the OfS may apply, for an individual breach of a condition of registration, as the higher of 2 per cent of qualifying income and £500,000. Calculating a monetary penalty by reference to 'qualifying income' is therefore consistent with the approach set out in legislation for calculating the maximum monetary penalty.

21. 'Qualifying income' is defined in paragraph 3 of the Monetary Penalties Regulations as, broadly, the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA, in the 'relevant year'[10].

22. Many higher education providers deliver other types or levels of provision and/or have diverse sources of wealth or income streams. Some providers are part of complicated group structures, covering a diverse range of businesses. We consider that it would not be appropriate to calculate a monetary penalty by reference to broader income streams, which are not directly related to the provider's provision of higher education or to the areas of a provider's business that fall outside of the OfS's regulatory remit. In forming that view, we have noted respondents' comments about the complexities of some providers' financial arrangements which may prevent them from diverting funds from other parts of their business, or group structure. We therefore consider that it is appropriate to calculate a monetary penalty by reference to qualifying income, as that income relates to activity within the scope of the OfS's regulatory remit.

23. However, a provider's qualifying income is not the sole determinant of the amount of a monetary penalty. Our five-step approach takes into account other important factors and these are discussed further below, under Proposal 2. We will consider the impact of a penalty on students and whether a penalty is appropriate where a provider is in financial difficulty.

24. Where a provider does not have 'qualifying income' for the 'relevant year', we may calculate the 'baseline penalty' (under Step 1 – see below) by reference to 'qualifying income', if any, for the year in which we issue our notice of our intention to impose a monetary penalty on that provider. If a provider does not have 'qualifying income' in that current year, we may calculate the 'baseline penalty' (under Step 1) by reference to the nature of the breach, as provided for in our five-step approach. We will then apply our five-step approach to determine an appropriate monetary penalty, which would not exceed £500,000, reflecting the limit set out in the Monetary Penalties Regulations.

[9] The Monetary Penalties Regulations are available at: https://www.legislation.gov.uk/uksi/2019/1026/contents/made.

[10] Under paragraph 3 of the Monetary Penalties Regulations, 'relevant year' means the business year of a registered higher education provider which immediately precedes the date of the OfS notice [of the OfS's intention to impose a monetary penalty], or if no such business year exists, the 12-month period which ends on the last day of the month preceding the month in which the date of the OfS notice falls.

Proposal 1: Our proposed five-step approach

We proposed a five-step process to determine the level of a monetary penalty.

General comments

25. Some respondents expressed broad agreement with the proposal, suggesting that it was logical, reasonable, proportionate and/or sensible, and brought welcome clarity to the way in which the OfS would calculate monetary penalties.

26. Many respondents, including some of those who had expressed their broad agreement, commented in detail on the proposal and/or requested further information about how it would operate in practice. Common themes, some of which are considered in more detail below, were that:

    - The proposal provides for too much subjective decision-making by the OfS and lacks transparency including about who at the OfS makes decisions at different stages in the process. The proposal would not result in proportionate and consistent penalties being applied and would not allow external stakeholders, including providers, to evaluate objectively the appropriateness of a monetary penalty.

    - It is not clear at what stage(s) providers would be involved in the discussions about the level of monetary penalty to be applied and/or at what stages(s) they would be able to make representations to the OfS about a proposed monetary penalty (some respondents queried the reference to 'the provider's explanation' in Step 2).

    - The proposal would not incentivise compliance with the OfS's regulatory requirements because providers may consider that the costs of compliance would exceed any penalties for non-compliance and/or would simply take out insurance to cover the costs of penalties for non-compliance.

    - The proposal lacks sufficient detail and, for example, does not indicate what level of monetary penalty might be applied to particular types of breach or breaches of particular conditions.

    - Additional contextual factors should be considered in one or more of the steps and/or some of those already included should be given more, or less, weight. This included a suggestion of greater consideration of the impact of a penalty on the provider itself (taking into account costs the provider may already have expended in connection with an OfS investigation, which may be less affordable for small providers).

27. Some respondents commented that following the 'step by step' approach sequentially would be time-consuming and suggested that an overall timeline should be published and/or that some of the steps should be combined. Other respondents suggested that

additional steps should be added, such as initial consideration of whether a monetary penalty is appropriate, together with alternative sanctions, and an opportunity for a provider to rectify an issue before a sanction is imposed.

A more rules-based approach

28. Many respondents requested specific details and guidance on the way in which we will calculate a monetary penalty. Some commented that the proposals may encourage risk-averse behaviour in providers and that providing additional detail may combat this and create more transparency. Many suggested that we should take a more rules-based approach and suggestions included:

    - Setting out a range of baseline penalties, expressed as percentages of qualifying income, for different types of breach, for example on the basis of 'serious', 'medium' and 'limited' impact;

    - A banded scale of monetary penalties, or indicative thresholds, or fixed rates for different types or severity of breach or by reference to the level of impact of the breach (on students, for example);

    - A hybrid of fixed rates but with some variability, for example by reference to qualifying income or mitigating or aggravating factors;

    - Applying different 'baseline' penalties or scales or fixed rates of penalties to different conditions of registration – in some cases, respondents expressed the view that some conditions are more 'procedural' in nature, for example the F conditions (provision of information), whereas a breach of other conditions (such as the B conditions (quality and standards)) may have a greater impact on the student interest. References were made to the regulatory approaches taken by other (quasi) regulatory bodies such as Companies House and the Charity Commission (which a respondent considered took a 'more nuanced' approach) and the Financial Conduct Authority and Competition and Markets Authority (which, a respondent noted, set out the factors that suggest that a breach of their requirements is deliberate);

    - Setting out which registration conditions would attract, or be more likely to attract, a monetary penalty if breached. Some respondents suggested that monetary penalties should not be imposed in relation to breaches of some conditions: including condition D (financial viability and sustainability) – because a monetary penalty would compound issues where a provider is already in financial difficulties; and the B conditions (quality and standards) – because a monetary penalty may impact the provider's ability to address the issues that resulted in the breach. Some respondents considered that it may be more appropriate to impose a monetary penalty in respect of some conditions only, for example a deliberate breach of the 'C' conditions (consumer protection) for financial gain;

    - Publishing case studies of breaches and the monetary penalty which was applied to those cases (indicating how this was calculated), which some suggested

would build a system of ‘precedents’ for how monetary penalties would be calculated;

- Having different policies or approaches for different types of provider, for example for providers which are charities, and for those which are ‘for profit’ and ‘not-for-profit’ (with some respondents considering that monetary penalties are more appropriate for ‘for profit’ providers). By contrast, some respondents suggested that any approach should be consistently applied to all types of provider.

Step 1 of our proposed five-step approach

Step 1: Consider the nature, seriousness and impact of the breach, which would collectively determine the 'baseline' penalty.

29. Several respondents requested further details about the way in which the ‘baseline’ penalty would be calculated under Step 1, querying how the OfS would assess the different factors set out in Step 1, including the ‘significance’ or ‘severity’ of breach. A respondent queried if the OfS’s starting point would always be 1 per cent of qualifying income (as set out in the example in the consultation document).

30. More specifically, some respondents sought examples of the sort of breaches that the OfS may consider had ‘*otherwise created lack of confidence in the sector’* and some queried how we would assess ‘*the effectiveness of the proposed intervention’*. On the latter point, some respondents queried specifically the basis on which the OfS would (or could) determine whether a monetary penalty is a credible deterrent.

31. There was some support for weighting monetary penalties by reference to the amount of actual gain made by the provider from the breach, and for taking ‘potential gain’ into account also (with one respondent commenting that not doing so would undermine the concept of a ‘level playing field’). Several respondents also agreed that it was appropriate to take *‘any action taken by other regulators’*, in relation to the breach, into account at this stage of the process, and some queried whether this would include any recommendations made by the Office of the Independent Adjudicator in respect of student complaints which had arisen in relation to the conduct that had also given rise to the breach.

32. Some respondents suggested the inclusion of other factors in Step 1, including the following (we note that some of these factors are already referred to, or included in other factors set out in subsequent steps in our proposed five-step approach):

    - Whether the breach was intentional (which respondents considered was directly relevant to issues of proportionality and fairness) or an ‘unintended consequence’ of complying with another registration condition, or reflected the provider’s adherence to (or departure from) other requirements such as codes of conduct

- Whether the provider was following legal advice in acting, or failing to act, resulting in a breach
- Whether the breach suggested any underlying systemic concerns about the provider's management and governance systems and controls
- The impact of the breach on other providers, not least the provider's competitors (where, for example, the provider had sought, or gained, a competitive advantage through the breach)
- The impact that the imposition of a monetary penalty would have on alumni students (damage to the reputation of the provider which would therefore damage the 'value' of their qualification) and future students (impact on the ability of the provider to invest in teaching and student services)
- The profile, characteristics or number of the provider's students, and the impact of a monetary penalty on those students; in particular, on the provider's ability to fund support for students from groups which are underrepresented in higher education and/or to provide reasonable adjustments for students (and staff) with disabilities
- The impact of a monetary penalty on the provider itself – including any consequential impact on: (i) other legal agreements that it may have (where a monetary penalty may trigger termination); (ii) its credit rating and liquidity; and (iii) its performance in data metrics.

Step 2 of our proposed five-step approach

Step 2: Consider any mitigating circumstances that could reduce the baseline penalty, in part or in full, and any aggravating circumstances that could increase the baseline penalty.

33. Many respondents agreed with the proposal that mitigating or aggravating factors should be taken into account when calculating a monetary penalty, to ensure that the penalty was proportionate in all the circumstances. Some suggested that 'provider behaviour', including behaviour to mitigate the breach and co-operate with the OfS, should be given particular weight. One view put forward was that a penalty should be reduced where relevant personnel at the provider had changed since the breach, although the respondent considered that the OfS should not require a personnel change, as this would infringe institutional autonomy.

34. Noting the references in Step 2 to whether the breach had been reported promptly to the OfS, some respondents queried the links between this consultation and the consultation on reportable events, and/or commented that reporting by a third party should not necessarily be an aggravating factor since the provider's judgement about context was important. A respondent queried what the impact of a delay in reporting a

breach might have on the amount of a monetary penalty, where that delay had been due to the provider taking steps to rectify the breach.

35. Several respondents asked for more details about **how** the OfS would take mitigating and aggravating factors into account, for example what range of percentage increases and decreases to the penalty might be applied. Respondents also queried how the OfS would make decisions about issues such as whether a breach was 'deliberate' or 'reckless' or 'involved dishonesty'.

36. Some respondents suggested additional factors that they thought should be considered at Step 2, including external factors (such as economic and political factors, and the impact of the pandemic) which are outside the provider's control and the provider's track record of compliance (as well as or instead of considering it in Step 3). Some considered that the duration of the breach should not be considered relevant if the provider did not know about the breach.

Step 3 of our proposed five-step approach

Step 3: Consider the provider's track record of compliance and the likelihood that a breach could happen again.

37. Some respondents commented that any determination by the OfS of '*the likelihood that a breach would happen again'* would be too subjective and queried how the OfS would reach conclusions on that issue.

38. Some respondents agreed that a provider's track record (referred to in Step 3) is an important consideration. Other common themes arising out of responses relating to consideration of a provider's track record included:

    - Only consider proven breaches, and only consider those with a causal link or where there is evidence of systemic failure (or large, complex providers, which may be more likely to be investigated for breaches of different conditions, would be unfairly penalised).

    - Persistent breaches should be considered as evidence of an underlying issue and not as separate repeat events.

    - There should be a time limit for the period over which the track record is considered, with suggestions including the preceding three years, or the period since registration.

Step 4 of our proposed five-step approach

Step 4: Consider any other relevant factors.

39. Some respondents requested further examples of what might constitute 'other relevant factors' in Step 4 of the proposed process.

40. Some respondents considered it appropriate for the OfS to consider action taken in other cases (or 'precedents') when calculating a monetary penalty, to ensure consistency in our approach. One respondent commented that this information should be disclosed, to ensure transparency about the way in which the monetary penalty had been calculated, whereas others expressed concerns about how the OfS might balance commercial sensitivity (over the circumstances of breach in other cases) with the need for transparency. However, other respondents suggested that cases should be considered on a case-by-case basis, given that no two cases are likely to be the same.

41. Many respondents commented on the 'adjustment for deterrence' factor proposed in Step 4. Common themes were that it would not be 'fair', 'transparent', 'reasonable' and/or 'proportionate' for the OfS to:

    - Penalise one provider to deter (or incentivise compliance from) others (deterrence should not override the provider's individual mitigating circumstances);
    - Consider action taken against other providers when determining whether '*similar action in the past has failed to improve compliance*' (a provider should not be 'scapegoated' to deter others);
    - Increase a penalty for a provider that is committed to compliance to deter providers that are not committed to compliance;
    - Increase a penalty for a provider just because it is, for example, in a healthy financial state or is large (and 'net assets' should not be relevant when considering 'deterrence' because a monetary penalty is calculated by reference to qualifying income).

42. Some respondents also queried the evidential basis on which the OfS had determined that a smaller monetary penalty would not act as a deterrent and/or suggested that if a 'reasonable' monetary penalty was considered insufficient as a deterrent, the OfS should consider other sanctions instead. One respondent noted the importance of context (no two cases are the same) and expressed concern about what they considered to be 'benchmarking' of penalties in step 4, which they thought might lead to the 'ratcheting up' of penalties.

Step 5 of our proposed five-step approach

Step 5: Determine total amount of monetary penalty.

43. In commenting on Step 5, many respondents sought further information about the OfS's decision-making process and the basis on which a penalty might be increased or decreased; for example, which mitigating factors might reduce a penalty to zero and which aggravating factors might double it from the original starting point (as shown in the example set out in the consultation document). Some suggested that, notwithstanding the five-step process, the final determination of the monetary penalty would remain at the complete discretion of the OfS, which was a matter of concern.

44. Other comments included that this final step should:

- Expressly provide for waiver of a monetary penalty if that was in the best interests of students;
- Provide for the issue of a 'formal warning' where a monetary penalty is not in the end imposed, and/or explain on what basis the OfS would decide that suspension of registration, or deregistration (other sanctions), would be more appropriate;
- Include some sort of judicial oversight of the eventual calculation of a penalty and expressly refer to the provider's right to make representations and appeal (some respondents also supported the inclusion of an internal OfS appeals process, before the external process to the First-tier tribunal).

OfS response

The OfS's principles-based approach

45. A common theme running through many of the consultation responses was that our proposals provide for too much discretion on the part of the OfS and do not sufficiently explain the basis on which the OfS would determine the amount of a monetary penalty. Respondents wanted to know **how** the OfS would assess the different factors set out in the five-step process to determine the 'baseline penalty' and the eventual monetary penalty. For example, how will the OfS determine the 'significance' or 'severity' of a breach, or whether it was 'deliberate' or 'reckless' or 'involved dishonesty'? Or whether a breach 'has created a lack of confidence in the sector'? Or 'the likelihood that a breach would happen again'? Respondents wanted to know what weight the OfS would place on the different factors set out in the five-step process, and how we would weigh (and apply) different mitigating or aggravating factors.

46. In a similar vein, many respondents suggested different versions of a more rules-based approach, which they proposed would provide more certainty for providers and reduce the amount of subjectivity in OfS decision-making.

47. In formulating the proposals in the consultation, we considered whether we should adopt a more rules-based approach to determining the level of a monetary penalty. We decided not to propose a rules-based approach because we considered that detailed rules would add complexity to our approach and would not properly take account of the circumstances of a breach or the context of the provider committing that breach.

48. We have carefully considered the responses to the consultation. However, we remain of the view that the principles-based approach set out in the consultation document is more appropriate than detailed rules.

49. Our conditions of registration cover a range of requirements, from access and participation and quality and standards, through to financial viability and sustainability, consumer protection and management and governance. We regulate a wide range of providers, from large, multi-faculty universities to small private companies offering bespoke courses in a single discipline. A principles-based approach will allow us to take into account the specific circumstances of the provider and of the breach in a way that we consider a more rules-based approach would not. For example, the 'severity' and 'impact' of a breach will depend on the circumstances of the case. Seeking to define those terms within banded scales, for example, to cover every set of circumstances would, in our view, introduce a level of complexity to our approach that would not be helpful for providers, students or the OfS.

50. Our principles-based approach also enables us to respond to a changing environment, in a way that a more rules-based approach would not.

51. Furthermore, in our view, a more rules-based approach, such as banded scales or fixed rates, would risk leading to a culture in which providers see the costs of non-compliance with our regulatory requirements (a monetary penalty) as an additional business cost. This may reduce the deterrent effect of monetary penalties and encourage non-compliance with our regulatory requirements. This would not be in the interests of students.

52. Some respondents suggested that we should take a different approach to different conditions of registration, and in some cases that particular conditions of registration should not attract monetary penalties at all. Quality and standards and equality of opportunity are at the heart of our work, and our other regulatory requirements underpin them. That does not mean that those other requirements – consumer protection, financial viability and sustainability, management and governance and so on – are not important. HERA gives us the power to impose a monetary penalty for a breach of any condition of registration and we will do so where we consider that to be appropriate and proportionate to the circumstances of the individual case.[11]

[11] We are currently consulting on a revised approach to our regulation of quality and standards. Our phase 1 consultation closed in January 2021. In making our decision in relation to this consultation, we have had regard to comments relating to monetary penalties, made in response to our phase 1 consultation on quality and standards.

53. Whilst we consider that a more rules-based approach would not be appropriate, for the reasons set out above, there are nevertheless elements of the approaches suggested by respondents that are not inconsistent with our principles-based approach. In particular, we propose to publish case studies – anonymously or (subject to the outcomes of the consultation on publication of information,[12] on a named basis) – to provide a helpful illustration of how our principles-based approach operates in practice.

The OfS's decision-making framework

54. Some respondents commented that the proposals provided for too much subjectivity in OfS decision-making; that our decisions may not be transparent, or consistent, or proportionate.

55. As in all decisions that we make, when deciding the amount of a monetary penalty – and so when working through our five-step process – we must have regard to our general duties in section 2 of HERA. We must also have regard to other relevant matters, including the public sector equality duty (considered further below) and any relevant statutory guidance issued by the Secretary of State under section 2(3) of HERA.

56. In our view, the general duty which is likely to be particularly relevant is the need to have regard to, so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed.

57. Our principles-based approach provides transparency about how we will calculate a monetary penalty but also allows us to take into account the individual circumstances of the breach, and the impact of a monetary penalty on the provider, its staff and students, to ensure that the penalty imposed is proportionate in all those circumstances. Our risk-based approach to regulation targets our regulatory activity where it is most needed; and in any event, a monetary penalty will only be imposed where a provider has breached our regulatory requirements. Where we propose to impose a monetary penalty, the provider concerned will have an opportunity to make representations before we make a final decision. Our decisions to impose a monetary penalty can be appealed to the First-tier tribunal, holding us to account for those decisions. We also intend to publish case studies (anonymously or, subject to the outcomes of the consultation on publication of information,[13] naming the provider) which will highlight the circumstances in which we have imposed a monetary penalty, and our reasons for doing so, so that our interventions may be subject to public scrutiny.

58. Any decisions that we make on individual cases will normally be taken in accordance with our scheme of delegation. We have published that document to provide

[12] See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

[13] See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

transparency for stakeholders about who, within the OfS, is able to make decisions about particular matters.[14]

Our five-step approach

59. It is also important to note that secondary legislation[15] sets out particular matters to which the OfS **must** have regard in exercising our powers to impose a monetary penalty. These matters are set out in the table below. We have also set out the step(s) (in our five-step process) which refer to those matters.

Matters set out in the regulations[16]	Steps in our five-step process
The nature, seriousness, duration and impact of the relevant breach	Step 1 and Step 2
Any financial or other gain made by the provider, or alternatively any financial or other loss avoided, either of which benefits the provider (including, where it can be quantified, the amount of any such gain or avoided loss)	Step 1
Any previous breach of the provider's ongoing registration conditions	Step 3
Any steps taken by the provider to avoid a future breach	Step 2
The impact that imposing a monetary penalty on the provider is likely to have on students on higher education courses at the provider; or students generally or of a particular description on higher education courses at a registered higher education provider	Step 1

60. Paragraph 167 of the regulatory framework sets out some additional factors ('intervention factors') that we may take into account when deciding whether to intervene and, if so, what form that regulatory intervention should take.[17] Importantly, not all of the factors will be relevant in every circumstance, and we will consider the relevant factors in the round when we are making our decision.

61. In the table below, we have set out examples of the intervention factors which are reflected in our five-step process for calculating a monetary penalty. We may consider other relevant intervention factors, in the round, depending on the individual circumstances of the case.

[14] Our scheme of delegation is available at www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/.

[15] The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 referred to in this document as the 'Monetary Penalties Regulations'.

[16] The Monetary Penalties Regulations.

[17] Paragraph 167 of the regulatory framework, available at www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

Examples of intervention factors (Paragraph 167 of our regulatory framework)	Relevant step in our five-step process
Whether the impact of the breach on students is significant	Step 1
The extent to which any breach has created a lack of confidence in the higher education sector	Step 1
The provider's behaviour	Step 2
How long the underlying causes of the breach have existed and the extent to which these occurred deliberately or recklessly, or whether there is dishonesty involved including whether the provider has concealed information	Step 2
The extent to which the provider cooperates with the OfS's enquiries	Step 2
The likelihood that a breach could happen again	Step 3
The action taken by the OfS in previous similar cases	Step 4

62. Some respondents suggested that some of the factors set out in the steps should be included in one or more of the other steps instead and/or as well. We have set out our approach in five steps to provide clarity for providers, students and other stakeholders. However, this does not mean that each step in the process results in a separate 'decision'. Instead, we will take a more holistic approach – setting a 'baseline penalty' under Step 1 and then applying the steps, in the round, to calculate a monetary penalty (Step 5) that is proportionate in all the circumstances of the case. Our decision will be made after we have considered the different factors set out in **all** the steps.

63. The 'baseline penalty' will not necessarily be the maximum amount provided for in the Monetary Penalty Regulations, or the 1 per cent referred to in the consultation document, which was simply an illustrative example.

64. We have carefully considered the additional contextual factors suggested by respondents for inclusion in the steps and have made some amendments to our approach, summarised below. These changes provide further clarity and do not substantively change our approach.

    a. In Step 1 we have made clear that in considering the significance of the breach, we will consider its impact on past, present and future students of the provider and of registered providers more generally.

    b. In Step 1, we have made clear that we will consider the impact that an intervention would have on students – past, present and future – of the provider and of registered providers more generally.

    c. In Step 1, we have included avoiding an actual or potential loss (financial or otherwise) as a result of the breach. We have also clarified that, where it can be quantified, we will consider the amount of any actual gain made, or actual loss

avoided, and that potential gain made, or potential loss avoided, will be estimated by the OfS.

d. In Step 1, we have clarified that we will consider any action taken by other regulators, or by other relevant bodies (including any directions or recommendations made by those bodies with which the provider has complied), to address the same or very similar matter(s) that gave rise to the OfS's findings of a breach. Whether action taken by the Office of the Independent Adjudicator, in relation to a student complaint, is relevant will depend upon the circumstances of the individual case.

e. In Step 2, we have clarified that 'the provider's explanation' may refer to its engagement with the OfS in relation to the breach.

f. In Step 2, we have clarified that our consideration of evidence that the breach was likely to have been deliberate, reckless or involved dishonesty, will include a consideration of the provider's conduct and context, and any external factors that may have influenced that conduct.

g. In Step 2, we have made clear that we will consider steps taken by the provider to mitigate or remedy matters that gave rise to a finding of breach by the OfS.

h. We expressly state, in Step 5, that we will consider the impact of a monetary penalty on the financial viability and sustainability of the provider and whether such a penalty would be appropriate where a provider is in financial difficulty. We also state that we will consider the impact that a monetary penalty would have on the provider's staff, for example where that imposition may impact the provider's financial viability or sustainability which could put employment at risk.

i. We have clarified that, where in our five-step process we indicate that we will consider the impact that a monetary penalty may have on the provider's staff or students (or on students of registered providers more generally), we will do so where such an impact is apparent from the provider's context or circumstances, or where the provider has itself referred to such an impact in its engagement with the OfS about the breach or the imposition of that monetary penalty. For the avoidance of doubt, the OfS does not intend to engage directly with students or the provider's staff about such matters.

65. Our principles-based approach enables us to take account of other relevant factors – referenced in Step 4 – in addition to those specified within the steps and that will enable us to take account of factors that are specific to the circumstances of the breach or the provider. In our view, it is unnecessary to refer to additional factors, beyond those already included, and that doing so may add unnecessary complexity to our approach.

66. We also note that some of the factors suggested by respondents are already encapsulated within existing factors. For example, our consideration of the impact of the monetary penalty on students will include consideration of the impact on particular

groups of students. A change in personnel at the provider, since the breach, may be relevant if, for example, it is evidence of actions taken by the provider to remedy the breach. However, we regulate at provider level and a change in personnel since a breach does not obviate the provider's responsibility for a breach.

67. Some respondents suggested that particular factors should **not** be included in the steps. For example, when considering a provider's track record, the OfS should only consider breaches with a causal link, or more recent breaches (within a particular timeframe). We have carefully considered these suggestions but have determined that the factors set out in our five-step process are relevant and appropriate to enable us to determine a proportionate monetary penalty. Expressing the factors in a principles-based way enables us to apply them proportionately.

68. Some respondents queried the relationship between this consultation and the OfS's consultation on reportable events.[18] We consider that provider behaviour – including whether the provider identified a breach and reported that to the OfS – to be a relevant consideration in determining the amount of a monetary penalty. We reasonably expect providers to monitor their own compliance with our regulatory requirements (and so we consider duration of a breach may be relevant even where a provider says it did not 'know' about that breach). Under existing reporting requirements, providers should report a potential breach to the OfS promptly. The proposals on which we have recently consulted – including a proposed amendment to the definition of a 'reportable event' – do not propose changes to that approach. We will publish our analysis of responses to the reportable events consultation, and our policy response, later in 2021.

69. Respondents referred to the monetary penalty regimes operated by other regulatory bodies. In formulating our policy, we have had regard to the approaches taken by other regulators and stakeholders will note some similarities, for example in setting out a stepped approach. For the reasons set out above, we consider that our principles-based approach strikes an appropriate balance between simplicity, transparency and clarity, and is the most appropriate approach for our varied and complex higher education sector.

The deterrent effect of monetary penalties

70. The OfS takes a risk-based approach to regulation. This means that we focus regulatory attention on those providers that are at greatest risk of breaching their conditions of registration. We do not routinely assess each provider against each of our conditions. To do so would increase regulatory burden and would not be an efficient use of our resources.

71. For such a risk-based approach to work effectively, we need to use our regulatory tools – including monetary penalties – to create incentives for compliance with our regulatory requirements. Using monetary penalties as a deterrent is, therefore, a necessary element of our risk-based approach. Any adjustment of a monetary penalty for

[18] See www.officeforstudents.org.uk/publications/consultation-on-reportable-events/.

deterrence will be made within our decision-making framework referred to above, which requires us to act proportionately.

72. Our approach will deliver fairness for those providers that have incurred costs in order to comply with our regulatory requirements by ensuring there is no financial or other benefit to a provider from non-compliance. By encouraging compliance, the use of monetary penalties will also ensure that we are able to use our resources efficiently in performing our statutory functions because a more compliant sector will require less regulation.

73. There are two elements of the deterrent effect – deterring the provider that has committed the breach from committing further breaches and deterring other providers from committing breaches. We recognise that publication of information about a monetary penalty is a factor in the latter. As we note above, we propose to publish case studies of where we have intervened. Our analysis of the responses to our consultation on the publication of regulatory information will also inform our policy on this area, and we will update Regulatory advice 19 to reflect the outcomes of that consultation, as necessary.

Provider representations and the appeals process

74. It is likely that the OfS will engage with the provider as part of its investigation into compliance concerns. The information provided by the provider during that process will inform the OfS's view of the nature of the breach and, in turn, the calculation of a monetary penalty under the five-step process. Furthermore, where we intend to make a finding of breach, we will notify the provider and it will have an opportunity to make representations about our provisional decision. We will consider those representations and other relevant factors in reaching a final decision about a breach.

75. Similarly, Schedule 3 of HERA requires us to notify a provider where the OfS intends to impose a monetary penalty, setting out our reasons and the proposed amount of that penalty. We may do this at the same time as we notify the provider of our intention to make a finding of breach, or subsequently. The provider will then have at least 28 days within which to make representations to us. We must then have regard to any representations that the provider makes, in ultimately deciding whether to impose a monetary penalty and the amount of any penalty.

76. HERA also provides for a right of appeal to the First-tier tribunal in respect of the imposition of a monetary penalty. Given the representations process set out above, we consider that it would not be an efficient use of resources – the OfS's or the provider's – to build in an additional appeals process within the OfS.

Proposal 1: Flexible payment terms

We proposed that we may defer the due date for payment of a monetary penalty, or provide flexibility in payment terms, where a penalty is likely to have a material impact on a provider's financial viability or sustainability.

77. Many respondents broadly welcomed our proposal. In doing so, many suggested that flexibility in payment terms would help to mitigate the impact of a monetary penalty on students and on providers' financial viability and sustainability, issues which respondents considered should be taken into account by the OfS.

78. Some respondents asked for more information about the circumstances in which payment of a monetary penalty may be deferred and the terms on which deferral may be offered, including possible deferral periods.

79. Similarly, some respondents asked for more information about the circumstances in which a payment by instalments option would be offered; with some suggesting that this option should always be made available. Some respondents queried whether the OfS would charge interest on instalment payments as a matter of course (in some cases, suggesting that this would not be appropriate) and/or whether such interest would be payable for late payment of one or more instalments.

80. Some respondents suggested that the OfS should always take into account the individual circumstances of the provider concerned, when deciding whether or not to offer flexible payment terms.

OfS response

81. The OfS has discretion over the time period for payment of a monetary penalty and the ability to allow payment of a penalty in instalments (Paragraph 2(6)(b) of Schedule 3 of HERA).

82. Monetary penalties are an important mechanism to ensure compliance with the OfS's regulatory requirements that are designed to protect the interests of students. We may consider flexible payment terms where, for example, the imposition of a monetary penalty might otherwise impact a provider's financial viability or sustainability, or otherwise have an adverse impact on the interests of students. This will allow us to protect the interests of students whilst also addressing the provider's non-compliance in a proportionate way.

83. Respondents asked for more information about the circumstances in which we may offer flexible payment terms. Whether we do so will depend on the context of an individual case. In our view, a more rules-based approach, in which we set out specific criteria for example, would add complexity and may not allow us to properly take into account that context. As in all decisions that we make, in deciding whether to offer

flexible payment terms, we will have regard to our general duties (set out in Section 2 of HERA) and any other relevant considerations. In particular, we will act in a way that is proportionate to the individual circumstances of the case, taking into account the impact that the imposition of a monetary penalty will have on the provider, its staff and students. Decisions on individual cases will normally be taken in accordance with our published scheme of delegation.[19]

84. Providers may appeal to the First-tier tribunal against a decision by the OfS to impose a monetary penalty, including any decision made by the OfS in relation to payment terms (Paragraph 3 of Schedule 3 of HERA).

85. Under Paragraph 4 of Schedule 3 of HERA, any (part of) a monetary penalty, that is unpaid when it is required to be paid, carries interest at the rate specified in that paragraph. It follows that, where the OfS allows payment by instalments, or defers the payment date of a penalty, interest will not be charged if the provider makes the (instalment) payment(s) on or before the payment date or dates notified to that provider by the OfS.

Proposal 2: Proposed approach to settlement discounts

We proposed that we will normally give providers an opportunity to receive a reduced monetary penalty (a 'settlement') where they agree that they have breached a condition of registration and agree to the penalty at an early stage.

86. Respondents were asked if they had any comments on our proposed approach to settlement discounts and whether our proposed approach was clear. Respondents were also asked to identify any particular factors that they thought were relevant in the context of our general duties, the public sector equality duty, the Regulators' Code or other issues.

The use of settlement discounts

87. Some respondents expressed support for the inclusion of settlement provisions in our proposals, including the differentiated discount model set out in paragraph 29 of the consultation document, and commented that the proposals were clear. Reasons given included that the proposals would encourage providers to act quickly to identify regulatory issues and engage with the OfS, reduce costs for providers and the OfS, and lead to better and more effective regulatory outcomes for all stakeholders.

88. However, many respondents did not support the proposals, and common themes arising from their responses included:

    - The OfS should follow its full process to calculate a monetary penalty. Settlement before that process has been completed, and in particular before any potential

[19] Available at www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/.

breach has been fully investigated, would lack transparency and would discourage (or inhibit) scrutiny of regulatory decisions.

- The proposals will result in a lack of transparency around regulatory decision-making and may result in more serious breaches not being investigated fully by the OfS, which is not in the best interests of students.

- A settlement process creates a 'perverse incentive' for, or undue pressure on, providers to agree they have breached a condition (even if they consider that they have not), to hedge against the possibility of a larger monetary penalty being imposed subsequently. The proposals may encourage providers to base decisions on cost analysis and discourage a healthy environment of challenge. Several respondents considered that some providers, for example smaller providers or those with more limited resources to engage with OfS investigations or to challenge OfS decisions, or those facing specific financial challenges, may feel particular pressure to accept a settlement. Respondents suggested that larger, better resourced providers may not feel that pressure, and so would be at an advantage.

- Providers may feel pressurised into beginning settlement discussions without being given sufficient time and information to consider their case, or the amount of any potential monetary penalty. Respondents also commented that providers should be given the opportunity to discuss the alleged breach with the OfS before starting formal settlement discussions.

- The proposals will not achieve the OfS's stated objectives because providers will not be motivated by a settlement discount, with some respondents viewing settlement negotiations as inappropriate and not in keeping with providers' objectives. It was also suggested that providers may consider it a better use of public money to challenge an OfS decision about a breach of a condition of registration, than to settle the matter and accept a monetary penalty.

- If the purpose of monetary penalties is to penalise providers (which respondents did not necessarily agree with), then a settlement process is inconsistent with that purpose.

89. A few respondents suggested alternatives to the proposed approach, which they considered would be more appropriate and/or would better meet the OfS's stated objectives. Suggestions included:

    - a discount for providers that paid a monetary penalty promptly;

    - suspension or deferral of monetary penalties rather than discounts;

    - greater flexibility in the proposed approach (with, for example, no fixed rates and with the percentage discount being determined in the individual case);

    - some other form of mediation or alternative dispute resolution.

90. There was also some support for the publication of case studies by the OfS of settlement arrangements, for transparency, to improve sector understanding of the OfS's regulatory requirements and to support consistency in OfS decision-making in relation to settlements.

Availability of settlement discounts

91. Many respondents commented on the OfS's proposed conditions for the availability of a settlement discount. Many considered it appropriate for providers to be required to admit to the breach of a condition in order to agree a settlement, although a few respondents suggested that should not be the case.

92. Similarly, some respondents suggested that providers should be able to disagree with a monetary penalty publicly, having reached a settlement, particularly where they considered they had not breached the condition and/or there were mitigating circumstances connected to the breach. In a similar vein, some respondents considered that providers should be able to make formal representations against the OfS's decision to impose a monetary penalty without losing the right to enter into settlement discussions. Some queried whether a settlement discount would be available after a provider had submitted a formal appeal, against the imposition of a monetary penalty, to the First-tier tribunal.

93. As we note above, a central theme in many of the comments was a perceived lack of transparency about the settlement process and OfS decision-making, and of providers being deprived of opportunities to bring relevant information to the OfS's attention or to challenge the OfS's decisions. Some respondents suggested that this may undermine public confidence in the robustness of OfS decision-making.

94. A few respondents had understood the proposals to mean that the OfS would sometimes agree a settlement but then continue to investigate the matter thereafter, an approach which those respondents considered to be inappropriate and/or unfair.

95. Some respondents advocated for a more rules-based approach to settlement discounts, including suggestions that the OfS should indicate when discounts 'will' be applied (rather than 'may' be applied, as set out in the proposals), to provide more certainty for providers. Respondents commented that clear examples would be useful, of where a provider would or would not be eligible for a settlement discount, based on issues such as the type of breach (including mitigating and aggravating circumstances), provider context and provider actions.

96. Some respondents also sought more clarity about the overall timescales for settlement discussions.

Differentiated settlement discounts

97. Whilst some respondents supported our proposals for differentiated settlement discounts, some suggested that they were too complex and/or lacked clarity and/or did not go far enough. Common themes included:

- The proposals lack clarity on how the OfS will make decisions on settlements – for example, how will we take factors such as provider behaviour, into account - and who will make those decisions.

- The rationale for the 30 per cent, 20 per cent or 10 per cent discount has not been explained. Some respondents suggested that settlement at the earliest stages in the process should attract a higher discount, with 50 per cent being suggested by one respondent, and that the proposed discount figures may not be a sufficient incentive to settle.

- It is not clear how the 30 per cent discount will be applied (paragraph 29b of the consultation document) given that the proposals suggest that this would apply before the OfS has reached a provisional decision to impose a monetary penalty and potentially before the OfS had fully investigated a breach.

- The proposed approach encourages a provider to instigate a discussion about a settlement discount, even before an investigation commences or a decision to impose a monetary penalty has been made, which seems to pre-determine the outcome (that a finding of breach would be made) and/or undermines the robustness of the OfS's decision-making process.

Confidentiality and publication

98. Many of the respondents commented on the aspects of the proposals which related to the confidentiality of settlement discussions (particularly where those discussions do not result in a settlement) and to the publication of information about monetary penalties imposed through settlement discussions.

99. Respondents sought clarity on the circumstances in which information disclosed during settlement discussions would be (or would be required to be) disclosed or made public (for example, pursuant to a freedom of information request or in connection with a third-party legal action) either by the provider or by the OfS.

100. Several respondents noted the references, within the proposals, to the publication of information about the monetary penalty and wanted more detail about the information that would be published. Some also sought confirmation that the content, tone and timing of any such publication would be agreed with the provider in advance and suggested that publishing information may have an adverse impact on a provider's reputation. As we note above, some respondents also suggested that providers should be permitted to publicly disagree with a monetary penalty, which had been imposed pursuant to a settlement agreement.

OfS response

Inclusion of settlement provisions

101. It is common for regulators to provide, expressly, for discounted penalties where a regulated entity admits a breach of regulatory requirements at an early stage. Differentiated settlement discounts, where the discount differs depending on the stage at which settlement is reached, are also common. For example, both Ofgem and the Financial Conduct Authority offer differentiated settlement discounts.

102. For the reasons set out below, we consider that it is appropriate and proportionate to set out settlement provisions, including differentiated discounts, in our approach to calculating monetary penalties, in substantively the same form as those on which we consulted. However, in response to the comments that we received, we have reframed some of the wording in our proposals, to provide further clarity about our approach. Those changes are highlighted below and are reflected in Regulatory advice 19. In particular, we have clarified the different steps in the OfS decision-making process to which the different discounts relate.

103. It is apparent from the 'intervention factors' set out in the regulatory framework,[20] that a provider's behaviour plays an important role in our assessments of when and how to intervene. More specifically, when we are calculating a monetary penalty, we will consider mitigating circumstances including: whether a provider identified and promptly reported a breach to us; the provider's co-operation with the OfS's enquiries and investigations; and steps taken by the provider to mitigate or remedy matters that gave rise to a finding of a breach by the OfS. These factors are set out in our five-step process and, in our view, are relevant to the proportionality of a penalty.

104. Therefore, even if we did not expressly set out settlement provisions, some of the principles that underpin the concept of 'settlement' are already included in our approach to calculating monetary penalties. A provider which reports a breach to the OfS might reasonably expect that to be taken into account when we are calculating a monetary penalty.

105. In our view, by expressly providing for settlement, we are providing increased transparency about our regulatory approach. Our approach sets out a clear framework which may inform providers' decision-making, when considering how they will engage with the OfS in relation to a breach of our regulatory requirements.

106. Offering settlement discounts provides an incentive for providers to agree a breach at an early stage. This will enable timely and effective action to be taken to remedy the breach, and such action is in the student interest. The OfS and the provider will not have to expend resource in going through the full statutory process leading to the

[20] See paragraph 167 of the regulatory framework, available at www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

imposition of a sanction. Our general duties, to which we must have regard in exercising our functions, include the need to use our resources in an efficient, effective and economic way.

107. We will only engage in settlement discussions with a provider where we consider that to be appropriate. This will depend on the circumstances of the case and we will act proportionately in deciding whether to offer a settlement. In the proposals on which we consulted, we provided examples of some of the circumstances in which we may decide not to engage in, or to abandon, settlement discussions. For example, we may decide not to offer settlement in the most serious cases or where we consider there to be significant aggravating factors (see Step 2 of our five-step approach), as this could undermine the credibility of our regulatory approach. We consider that to be an appropriate approach. A more rules-based approach, for example setting out types of breach for which a settlement would always be offered, would not allow us to take the individual circumstances of the case into account to the same degree, and would create additional complexity given the breadth of our regulatory requirements and the many different types of breach that could occur. It would also be incompatible with our principles-based approach to the calculation of a monetary penalty.

108. We have set out differentiated settlement discounts, which will apply where we do reach a settlement. This provides transparency about our approach. Publication of information about settlements – see below – also provides transparency.

109. Where a provider initiates a discussion about settlement at an early stage, for example where it admits to a breach before we have initiated any investigation, we may decide that we need to investigate the matter further before we progress with those discussions. We may do this where we consider that we need more information to understand the extent of the breach and any detriment to students, or others, that results from that breach. We will not agree to a settlement unless we are satisfied that it is reasonable in the circumstances of the breach.

110. Where we do agree to a settlement at an early stage, we will estimate the level of monetary penalty that would have been imposed if we had proceeded to a final decision about a breach and a monetary penalty, without a settlement. In doing so, we will have regard to our five-step process for calculating a monetary penalty. That monetary penalty will then be discounted in accordance with our differentiated discount model referred to below. We have explained this in Regulatory advice 19, since this is an issue on which respondents sought further clarity.

111. We do not accept that the inclusion of settlement provisions within our approach amounts to pressure on providers to admit a breach. It is entirely a matter for a provider to determine whether to admit a breach and/or whether to engage in settlement discussions with the OfS. The OfS will not pressurise providers into doing so and when conducting settlement discussions (or deciding not to), we will have regard to our general duties which include, so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be transparent, accountable, proportionate and consistent.

112. A provider will not be required to enter into settlement discussions. It will need to decide whether it wants to do so, taking into account its own legal advice and the need to comply with other legal requirements (for example, charity law where a provider is a charity).

Essential elements of a settlement

113. Agreeing to a breach is a fundamental principle underpinning the concept of 'settlement', and of our policy objectives in providing for settlement discounts. Such agreement is itself evidence of the breach and helps to ensure that the provider addresses compliance concerns and takes action to remedy the breach. It follows that publicly disagreeing with the details of the breach set out in the settlement agreement, or with the imposition, amount or payment terms of a monetary penalty imposed under a settlement agreement, would be wholly inconsistent with the principles of a 'settlement'. That is why a settlement is conditional on a provider not making such statements. This includes not making comments in a way that the OfS considers reasonably likely to become public and we make this clear in Regulatory advice 19.

114. A settlement is also conditional on the provider not challenging the imposition, amount or payment terms of the monetary penalty or appealing against it to the First-tier tribunal. Challenging or appealing against a monetary penalty would be incompatible with the provider's admission of breach and acceptance of the penalty (which are essential elements of a settlement) and would also be incompatible with our policy objective of saving resources.

Transparency and challenge of OfS decision-making

115. We do not accept that the inclusion of settlement provisions, or a settlement itself, will result in a lack of transparency about, or scrutiny of, OfS decision-making or OfS decisions. A key policy objective of our settlement provisions is ensuring that other providers are aware of the monetary penalty and the reasons that it has been imposed, as soon as possible. Doing so will highlight areas of regulatory concern and provide an incentive for other providers to comply with our requirements. We therefore expect, normally, to publish information about a settlement where we have imposed a monetary penalty. Our intentions in relation to publication will be made clear in any settlement proposal made to a provider and if the provider does not agree with these, it need not agree to the settlement.[21]

116. Similarly, we do not accept that our settlement provisions unfairly deny providers an opportunity to challenge OfS decision-making. Where we are minded to settle a case, we will set out our settlement proposal in a draft settlement agreement. This will include a summary of the issues which relate to the breach (and so the basis on which a breach would be (or has been) determined), the discounted monetary penalty and any related matters such as payment terms, our intentions in relation to recovery of our

[21] We have recently consulted on our approach to publishing regulatory information about providers. We are currently analysing responses to that consultation and will publish our response later in 2021. In a settlement, our intentions in relation to publication of information will be set out in the settlement proposal, which the provider can then decide whether or not to accept.

costs in relation to the imposition of the penalty (if relevant) and our intentions in relation to the publication of information about the breach and the settlement. The provider may then comment on that proposal.

117. We will consider the provider's comments and, if we decide to proceed with the settlement, we will issue a provisional decision to impose a monetary penalty on the basis set out in the draft settlement agreement. If the provider agrees not to make representations in respect of that provisional decision, and not to appeal against or challenge the imposition of the monetary penalty, the settlement will be agreed. If the provider wishes to make representations in respect of that provisional decision to impose a monetary penalty, the settlement proposal will cease to be relevant. We will then continue with the process to determine a breach (if we have not already made a final determination in respect of that breach) and a monetary penalty. This process is set out in Regulatory advice 19.

Differentiated settlement discounts

118. A key policy driver behind our inclusion of settlement provisions is to enable efficient use of OfS (and provider) resources. It is therefore appropriate for the level of discount offered to reflect the level of efficiency savings made. We have adopted a simple model, which clearly sets out the different discounts that would be available, by reference to clearly identifiable steps in the OfS's decision-making process. This creates further transparency of our approach.

119. In Regulatory advice 19, we have provided additional clarity about the different steps within the OfS decision-making process to which the different discounts relate. This reflects the fact that a decision to find a breach and a decision to impose a monetary penalty are separate decisions and may be made at different times. We have made clear that the largest discount may be available before we have made a provisional decision about a breach, reflecting the significant resource-saving opportunities that that represents. We have also made clear that the discounts in our differentiated discount model are not cumulative; only one discount (whichever is the highest that would apply) will be applied in any given case.

120. There are, of course, many different ways in which a system of settlement discounts could be designed. We consider our differentiated discount model to be proportionate. It is in keeping with the range of discounts offered by other regulators, for example by Ofgem. If, in future, we consider that we are not providing appropriate and proportionate incentives for providers to agree settlements, we will reconsider this issue. We would consult on any substantive changes to our policy in this regard.

Confidentiality

121. Unless (and until) a final settlement is agreed, settlement discussions are intended to be confidential and therefore the OfS will always seek to maintain the confidentiality of the existence of settlement discussions and any admissions or statements made by the provider during such discussions. This means that where a settlement does not proceed to a final agreement for any reason, or settlement discussions covered wider

issues than those covered by a final settlement agreement (such as statements about potential wider forms of wrongdoing that may indicate non-compliance with other conditions of registration), the OfS will seek to maintain confidentiality permanently in so far as that is legally possible. The OfS would expect providers to adopt a similar position in relation to the existence of settlement discussions and any statements made by the OfS.

122. In the spirit of maintaining confidentiality, the OfS does not intend to use admissions and statements made by the provider as evidence of wrongdoing (for example, for the purposes of establishing a breach of relevant conditions of registration and imposing sanctions), unless such admissions and statements form part of a final settlement agreement. However, the OfS may still use other admissions and statements made by the provider as intelligence of potential wrongdoing. This means that where settlement discussions do not proceed to a final settlement agreement, or a final settlement agreement is limited in scope, any admissions or statements made by the provider may be used by the OfS in the way it targets information-gathering activities such as investigations and monitoring. For example, if a final settlement agreement was reached in respect of a breach of a condition of registration relating to quality, any admissions or statements made by the provider which are relevant to conditions of registration on management and governance could result in the OfS opening an investigation into potential concerns about management and governance.

123. The OfS will not be able give any absolute assurances about confidentiality and there will be circumstances where confidentiality cannot be maintained as a matter of law. This would include circumstances where the OfS is compelled to disclose information by the courts or another regulatory body. Providers will need to give careful consideration as to the precise information that is shared with the OfS during different stages of settlement discussions.

124. Once we have agreed a settlement with a provider and issued a final decision to find a breach of one or more conditions of registration and impose a monetary penalty, that normally concludes the matter for the particular breaches in respect of particular periods of time specified in the OfS's decision.[22] We will not normally continue to investigate the issues underlying the particular breach(es) to which the settlement relates thereafter. Those issues, and so our understanding of the breach, will be set out in the settlement agreement and the OfS's decision. The main exception to this position would be in circumstances where any relevant OfS decisions were subject to a legal challenge by the provider or a third party, for example where the provider decided to challenge the amount of the monetary penalty imposed despite the settlement agreement. We have made this clear in Regulatory advice 19.

[22] This means that there would be nothing to restrict the OfS from investigating a potential breach of the same conditions of registration in respect of the same or similar underlying issues for different time periods. For example, it would not restrict the OfS investigating a potential future breach.

Proposal 3: Recovery of the OfS's costs

We proposed to recover costs in relation to the imposition of sanctions where we are empowered to do so.

125. Our ability to recover costs is provided for in HERA and so we sought views only on whether our proposal is clear. We have not summarised feedback received on whether we **should** seek to recover our costs. However, in making our final decision to take forward our proposals, we have regard to all of the feedback that we received.

126. Several respondents commented that the proposal was clear. However, some also requested further information about how the proposal would operate in practice. This included whether the OfS would seek to recover its costs where it does not impose a sanction following an investigation (even if a finding of breach is found) and whether any settlement discount applied to a monetary penalty would also apply to any costs that the OfS seeks to recover.

127. Some respondents suggested that the proposals were not transparent about how the OfS would calculate its costs – and what would be included – and who within the OfS would make those calculations. Some respondents commented that the OfS should not seek to recover costs relating to 'general monitoring' activities (respondents considered those activities to be covered by registration fees). Some commented that providers would themselves incur costs or expenses in relation to OfS monitoring activities and investigations, and in remedying a breach, and so attempts at costs recovery by the OfS would be 'duplication'.

128. Several respondents commented that the OfS should provide a detailed breakdown of any costs that it seeks to recover, with some also suggesting that this breakdown should be published, alongside any information about the sanction imposed, to increase transparency.

129. A few respondents suggested that a provider should be able to recover its costs from the OfS – together with what one respondent referred to as 'damages for reputational damage' – where the OfS does not make a finding of breach following an investigation, or where a provider successfully challenges an OfS decision made against it.

130. Some respondents commented that providers, particularly small providers, may be dissuaded from appealing to the First-tier tribunal against an OfS decision to require them to pay costs, because of the costs of bringing such an appeal. There was also some support for an appeals or representations process within the OfS, to enable a provider to challenge a decision to require it to pay costs, as an initial step before the appeals process to the First-tier tribunal.

OfS response

131. Section 73 of HERA gives the OfS the power to recover the costs we incur in relation to the process that results in the imposition of sanctions.[23] Imposing a sanction means imposing a monetary penalty, suspension of a provider's registration with the OfS, or removing a provider from the OfS Register. In Section 73, costs 'includes, in particular, investigation costs, administration costs and costs of obtaining expert advice (including legal advice)'. The costs that we seek to recover need not be limited to those costs.

132. If the OfS does not impose a sanction, then Section 73 of HERA is not relevant, even if the OfS concluded that the provider had breached a condition of registration.

133. Schedule 7 of HERA sets out: the procedure that the OfS must follow if it wishes to recover its costs; the provider's right of appeal to the First-tier tribunal against the requirement to pay (or the amount of) costs; the way in which the OfS may recover any unpaid amount of costs (including interest on that unpaid amount) as a civil debt;[24] and that the sums received (costs and any interest) must be paid to the Secretary of State (unless, in respect of costs recovered, the Secretary of State, with the consent of the Treasury, directs otherwise).

134. Decisions about the amount of costs that the OfS will seek to recover will normally be made in accordance with our published scheme of delegation.[25] The amount that we seek to recover will be appropriate to the circumstances of the breach and to the provider's circumstances. We will consider whether recovery of costs is appropriate in circumstances where a provider is in financial difficulty. We will also consider the impact that recovery of costs may have on the provider's staff or students, where such an impact is apparent from the provider's context or the particular circumstances of the case, or where the provider has itself referred to such an impact in its engagement with the OfS. For the avoidance of doubt, the OfS does not intend to engage directly with students or the provider's staff about such matters.

135. As in all decisions that we make, we must have regard to our general duties (set out in Section 2 of HERA) when deciding whether to seek recovery of our costs. This includes the need to have regard to the principles of best regulatory practice, where relevant, including the principle that our regulatory activities are transparent, accountable, proportionate, and consistent. Under Schedule 7 of HERA, a provider may require the OfS to provide a detailed breakdown of the amount of costs that it is seeking to

[23] See section 73 and Schedule 7 of HERA, available at: https://www.legislation.gov.uk/ukpga/2017/29/schedule/7/enacted.

[24] One respondent referred to the Late Payments Directive. That Directive (and relevant UK legislation) relates to commercial transactions for delivery of goods/provision of services for payment and so is not relevant to the issue of OfS costs recovery.

[25] Available at www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/.

recover, ensuring transparency of our approach. If a provider has any queries about that breakdown, it would be able to discuss those with the OfS.

136. Schedule 7 also states that a requirement to pay costs is suspended where an appeal could be brought to the First-tier tribunal or is pending. Ultimately, the tribunal would decide who should bear the costs associated with the appeal process itself in accordance with its own rules and procedures.

137. Similarly, where a provider challenges an OfS decision through the courts more generally, for example through judicial review, the issue of costs (the OfS's and the provider's) will be a matter for the court to decide.

138. A provider wishing to remain registered with the OfS, and so to receive the benefits that registration confers such as public funding, must satisfy its conditions of registration. Those conditions are designed to protect the interests of students and taxpayers. A provider may incur costs in order to comply with those conditions, including in connection with an OfS investigation into a potential breach of those conditions. The OfS is a risk-based regulator. We regulate providers in proportion to the regulatory risk that they pose and we will continue to target our work to ensure that it is focused where it is most needed. In doing so, we will reflect the commitment that we made in the regulatory framework that providers that do not pose specific increased risk should have less regulatory burden.

139. Where a provider agrees a settlement with the OfS in relation to the imposition of a monetary penalty, under proposal 2, the issue of OfS costs recovery would be addressed as part of that settlement agreement.

140. Our proposal to recover the costs that we incur in relation to the imposition of sanctions will help us to ensure that we use our resources in an efficient, effective and economic way. This will also deliver fairness for those providers that have incurred costs in order to comply with our regulatory requirements.

Proposal 4: Interest charges for late payment of OfS fees

We proposed that we would normally apply interest charges where a monetary penalty is imposed for late payment of OfS registration and other fees.

141. Our ability to impose an interest charge for late payment of registration fees is provided for in the Higher Education (Registration Fees) (England) Regulations 2019 (the 'Registration Fees Regulations').[26] Therefore, we sought views only on whether our approach was clear. We have not summarised comments received about whether we **should** charge interest. However, in making our final decision to take forward our proposals, we have regard to all of the feedback that we received.

[26] Available at https://www.legislation.gov.uk/uksi/2019/543/introduction/made.

142. Some respondents commented that the proposal was clear or 'relatively' clear. Some respondents requested further information about how the proposal would operate in practice. For example, respondents queried the meaning of 'late' (as in 'late' payment of fees) and what would fall into 'other fees' (referred to in our proposal) and commented on the interest rate that would (or in their views should) be applied. Some respondents also queried whether the OfS would retain monies collected in interest charges and, more generally, the rationale for charging interest at all.

143. Several respondents commented that early engagement or discussion with a provider could potentially minimise the risks of late payment and the need to apply interest and suggested that the option for payment by instalments of fees (which is provided for in the Registration Fees Regulations) was particularly important when considering the affordability of fees for providers.

144. Some respondents commented that a decision on whether to charge interest should be made on a case-by-case basis, taking the provider's context into account, including any reasons that it gives for the late payment (which, for example, could be cash flow issues because of the timing of receipt of payments from the Student Loans Company). Some respondents suggested that procedural, communication or systems shortcomings by OfS may be a factor in the late payment of fees.

145. Some respondents queried whether the provider would have to pay any costs incurred by the OfS in seeking to recover unpaid fees, and any associated interest.

146. Many respondents strongly welcomed our proposal not to impose interest charges for late payment when the charges are below a minimal amount, although some queried what would constitute a 'minimal amount'.

OfS response

147. Section 70 of HERA provides for the payment of registration fees to the OfS, by providers which wish to become, and remain, on the OfS Register.

148. The Registration Fees Regulations[27] make provision for the calculation of registration fees and set out the process that the OfS must follow to notify a provider that a fee is payable. In particular, the OfS must notify the provider of the period within which a fee must be paid (and whether this is by lump sum or in instalments) and that period must begin not less than 30 days beginning with the date on which the provider receives that notice. The Regulations also set out the process by which a provider may make representations to the OfS about the fee and the payment process.

[27] Available at: https://www.legislation.gov.uk/uksi/2019/543/contents/made.

149. We have recently published guidance for registered providers, which outlines the process for payment of annual registration fees, with specific timings and information for the 2021-22 registration year (1 August 2021 to 31 July 2022).[28]

150. The Registration Fees Regulations provide that the OfS may charge interest on any part of a registration fee which is unpaid at the time that it is required to be paid (in other words, for late payment of fees). The Regulations specify the interest rate that is to be applied, being the 'Bank of England rate + 5'. The 'Bank of England Rate' means the official bank rate as announced at the most recent meeting of the Bank of England Monetary Policy Committee. At the time of publication of this document, the Bank of England rate is 0.1 per cent. Therefore, at the time of publication of this document, the interest rate that would be applied is 5.1 per cent. The monies received in interest charges are retained by the OfS.

151. The Registration Fees Regulations also state that the total amount of interest imposed must not exceed the amount of the fee and that the OfS may recover from the provider, as a civil debt, the unpaid amount of the fee and any unpaid interest. The payment of the OfS's costs in relation to such recovery, would be determined in accordance with the civil debt recovery process.

152. The OfS is funded, principally, by registration fees paid by registered providers. Late payment or non-payment (with its consequential impact on OfS resources) may affect the OfS's ability to deliver its regulatory objectives, and so be detrimental to students. Our ability to charge interest for late payment is intended to incentivise providers to pay promptly. It also helps to deliver fairness for providers that do pay their registration fees on time.

153. The conditions of registration require providers to pay their registration fees and late payment (or non-payment) may constitute a breach of one or more of those conditions. Any interest charged for late payment would be in addition to any sanction imposed on the provider for a breach of a condition of registration in relation to that late payment (and in addition to any costs in relation to the imposition of that sanction that the OfS seeks to recover under Section 73 of HERA). Under the Registration Fees Regulations, we may decide to charge interest for late payment even where we do not impose a sanction on the provider for a breach of a condition in relation to that late payment.

154. Decisions about whether to charge interest will normally be made in accordance with our published scheme of delegation. As in all decisions that we make, we must have regard to our general duties (set out in Section 2 of HERA), and other relevant considerations, when deciding whether to charge interest. Our general duties include the need to have regard to the principles of best regulatory practice, where relevant, including the principle that our regulatory activities are transparent, accountable, proportionate, and consistent. We will not seek to recover interest where the administrative burden of doing so is disproportionate to the amount that would be recovered. This will depend on the individual circumstances of the case.

[28] Available at: www.officeforstudents.org.uk/publications/payment-of-annual-ofs-registration-fees/.

155. We will consider whether interest charges are appropriate in circumstances where a provider is in financial difficulty. We will also consider the impact that interest charges may have on the provider's staff or students, where such an impact is apparent from the provider's context or the particular circumstances of the case, or where the provider has itself referred to such an impact in its engagement with the OfS. For the avoidance of doubt, the OfS does not intend to engage directly with students or the provider's staff about such matters.

156. Currently, the only fees which the OfS has power to charge are registration fees under s.70(1) HERA. It is possible that in the future, the OfS would have the power to charge other kinds of fees under s.71 HERA and that further regulations would be introduced under that section. In that eventuality, the OfS would need to review how the specific power had been expressed at the relevant time in order to consider how it should be used. However, if those regulations give the OfS the power to charge interest in relation to late payment of those other fees, the OfS would normally expect to apply the same policy position as is set out in this document.

Impact of our proposals

We asked for comments about any unintended consequences of our proposals, for example for particular types of provider, course or student, and about the potential impact of our proposals on individuals on the basis of their protected characteristics.

Financial impact on providers with consequential impact on students and others

157. A recurrent theme in consultation responses concerned the financial impact that a monetary penalty may have on a provider and the negative consequences that respondents considered would arise from that financial impact. We were not seeking views on whether we should use our powers to impose a monetary penalty, nor the circumstances in which that might be appropriate. However, it was not always possible to separate out comments on our more specific proposals – how we calculate a monetary penalty – from those about the use of monetary penalties as a sanction more generally. We have, therefore, provided a general summary below of the views expressed.

158. Some respondents also referred to the financial impact on providers (and impact on students) of our other proposals – recovering our costs related to the imposition of sanctions and charging interest for late payment of fees – although we were only seeking views on the clarity of our approach. A common narrative emerged – namely that paying a monetary penalty, paying costs or paying interest could all have a financial impact on a provider, with consequential adverse impacts on students. To that extent, our consideration below of views expressed about the impact of a monetary penalty, and our policy response, are equally relevant to those other proposals.

159. Some respondents suggested that a monetary penalty, of any size, could jeopardise the financial viability and sustainability of providers, particularly those already in financial difficulties as a result of the pandemic or for other reasons related to their individual circumstances. This, respondents considered, could lead to an increased number of providers being de-registered by the OfS or of provider closure, which they considered would not be in the student interest, and may impact students with protected characteristics in particular since they may be less able to relocate to complete their studies, in the event of provider closure.

160. Many respondents also suggested that a monetary penalty would result in resources being diverted away from other uses. Some described it as 'money out of students' pockets' and commented on numerous negative consequences that they considered would flow from this. Common themes included:

- Providers may have to reduce their investment in access and participation, widening access, or general social mobility work or programmes, with a consequential impact on students on the basis of their protected characteristics, as well as on students from other groups that are underrepresented in higher education.

- Resources may have to be diverted or stripped away from services or support provision for students with a consequential impact on the student experience. Widening participation students, students with protected characteristics and students from underrepresented groups, would be most heavily impacted if services or support provision were reduced. Some respondents suggested that the OfS should take into account the number of students eligible for student premium at a provider when assessing the impact on students with protected characteristics.

- Possible disruption to, or negative impact on, activities that providers deliver in connection with their obligations under the public sector equality duty, such as positive action programmes and reasonable adjustments for staff and students with disabilities.

- Resulting impact on a provider's liquidity, cashflow, credit rating and/or ability to borrow. Respondents suggested that this could affect all institutional activities (including staff recruitment and retention), investments and capital projects, affecting students, staff and local communities alike.

- Effective reduction in income leading to less investment in teaching and research with a consequential negative impact on the quality of courses and/or research provision and/or on the overall student experience.

- Providers having to make difficult decisions about resource allocation, with the result that some courses, delivery modes or delivery models may no longer be seen as viable. References were made to potential negative impacts on innovative and specialised programmes, programmes leading to vulnerable or

shortage professions (such as programmes associated with the NHS), international partnerships, apprenticeships provision and dual or joint awards, in particular.

- Local economies, businesses and communities may be negatively impacted if providers experience financial difficulties, particularly where providers are critical to the economic prosperity of their local area and/or are a major employer in that area, especially where this is an area of high social deprivation. Respondents noted that providers in these areas may have a high number of students from underrepresented groups so that a disproportionate impact on those providers would have a knock-on disproportionate impact on students from those groups.

Impact on different types of students

161. Some respondents said that a lack of clarity about the proposals made it difficult to comment on the potential impact of those proposals on particular student groups. However, many respondents provided detailed comments on the perceived impacts of the proposals and these are summarised above.

162. As we note above, a central theme emerging from the responses was that the imposition of a monetary penalty would divert resources away from student support and investment. Many respondents considered that this would disproportionately affect students with protected characteristics, who often have the greatest need for this support or investment. Specific protected characteristics mentioned included: age (mature students), disability (disabled students), and race (black, Asian and minority ethnic (BAME) students). Other underrepresented groups mentioned, many of which will cross-cut protected characteristics, included students from disadvantaged socioeconomic groups, students who have had free school meals, part-time students, first-in-family higher education students, students who are less geographically mobile, and students with caring commitments.

163. Some respondents commented that our proposals may result in providers being less able, or willing, to recruit students from underrepresented groups (because supporting those students is more expensive or because recruiting those students may increase the risk of breach of our regulatory requirements (and so the risk of a monetary penalty being imposed), with references made to our consultation on our approach to the regulation of quality and standards).[29]

Impact on different types of provider

164. Similarly, many respondents suggested that some types of provider may be particularly affected by our proposals, with different respondents referring to different provider types, including: smaller and specialist providers; modern, newer or less established providers; and providers with a large number of students from underrepresented groups or students with protected characteristics (including those in diverse metropolitan areas). Reasons given for suggesting a differential impact often centred

[29] See www.officeforstudents.org.uk/publications/consultation-on-regulating-quality-and-standards-in-higher-education/.

around the financial impact of a monetary penalty and the financial status of those types of provider; for example, that the provider types referred to may be less wealthy, or have less resource to meet the OfS's regulatory requirements, or carry lower surpluses, or have higher expenditure because they have a large number of students from underrepresented groups who require more support.

165. Some respondents suggested that larger providers would be disproportionately affected because they have larger qualifying incomes, noting our proposal (proposal 1) to calculate monetary penalties by refence to qualifying income. We have already considered comments on that issue under proposal 1, above.

Reputational damage

166. Many respondents also commented on the reputational damage for providers that they considered would flow from the imposition of a monetary penalty, where this is made public.

Equalities impact

167. A couple of respondents questioned whether the OfS had, or intended to, conduct and publish an Equality Impact Assessment in relation to these proposals.

OfS response

168. The OfS has legal duties under the Equality Act 2010 and the public sector equality duty, which require us to have due regard to eliminating unlawful discrimination, foster good relations between different groups and take steps to advance equality of opportunity. We also have a general duty under section 2(e) of HERA to have regard to the need to '*promote equality and diversity in relation to student access and participation in higher education'*.

169. We have concluded that, overall, our policy approach will have a neutral impact on students with protected characteristics.

170. Sanctions, including monetary penalties, are designed to deter providers from breaching our regulatory requirements, and so are in the student interest. In this way, our policy approach will have a positive impact on all students.

171. Our policy approach will not in, and of, itself automatically affect students on the basis of their protected characteristics or the wider student population; and our policy is of relevance only where a provider has breached our regulatory requirements or has not paid its registration fees (which fund the OfS's regulatory activities), in a timely manner. However, we recognise that our policy approach may have differential impact on students with protected characteristics and other vulnerable learners depending on a provider's specific context. This includes the provider's financial circumstances, student demographic and type of provision, amongst other factors. These variables may also change over time, both over the short and long term.

172. Our policy approach will allow us to use monetary penalties in a proportionate and targeted way, taking into account the impact of the monetary penalty on a provider, its staff and students, including on the basis of students' protected characteristics. We may set flexible payment arrangements where the imposition of a monetary penalty may otherwise affect a provider's financial viability or sustainability or otherwise have an adverse impact on the interests of students. We will also act proportionately in seeking to recover our costs in relation to the imposition of sanctions, or to charge interest for late payment of fees, both of which are provided for in legislation. These factors will mitigate against negative impacts for all students, including for students on the basis of their protected characteristics.

173. We monitor registered providers in relation to their conditions of registration, including those relating to financial sustainability, quality and standards, and access and participation activities; areas which respondents frequently cited as potentially being negatively affected by monetary penalties. We may intervene where we consider that a provider is at increased risk of a breach, or has breached, our regulatory requirements and in so doing may mitigate potential unintended consequences of implementing our policy approach.

174. We have explained above how we will make decisions about whether to impose a monetary penalty and how we will wrap the feedback on publishing information about monetary penalties into the analysis of our consultation on publishing information.[30]

Other ways for the OfS to deliver its policy objectives

We asked respondents whether they considered that there were other ways in which the policy objectives under consultation could be delivered more efficiently or effectively than were set out in the proposals.

175. We have highlighted above where respondents considered that we might take a different approach, such as being more rules-based, and we have responded to those points above. Many respondents also suggested other interventions or sanctions which they considered should be used instead of (or in some cases, together with) monetary penalties. Common themes included:

- Increased oversight of providers' governing bodies, by the OfS
- Improved engagement with providers (including with operational staff), to understand the challenges they face, and to support them to prevent breaches or to remedy breaches without using formal sanctions

[30] See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

- Share the OfS's risk profile[31] with a provider so that it understands the OfS's view of its 'risk' of breaching conditions of registration
- Publish more, or better, advice and guidance, for example highlighting common areas in which breaches occur, to prevent repeated breaches on similar grounds. This might include publication of anonymous case studies (or named case studies, which might incentivise compliance)
- Use enhanced monitoring or specific conditions, to require evidenced improvements and/or targeted action to remedy a breach
- Deny access to funding instead of imposing a monetary penalty and/or offset a monetary penalty from future grant funding
- Direct a provider to use grant funding to remedy a breach and/or require a provider undertake additional expenditure to remedy issues (which approaches the respondents considered would provide a more direct and measurable benefit for students).

OfS response

176. Our ability to use monetary penalties as a sanction is set out in HERA. They are one of a range of interventions available to the OfS. Other interventions include the imposition of a specific condition of registration, suspension of registration (which can include suspension of funding) and de-registration. Our regulatory framework sets out our general approach to the use of these enforcement powers.

177. In practice, we may give a provider that breaches our regulatory requirements an opportunity to improve its performance, for example through the imposition of a specific condition. If the provider does not do so, we may intervene further. However, the approach that we take will always be determined by the particular features of the case. We may use sanctions in combination and a particularly serious breach could mean that we would, for example, move immediately to suspend a provider's registration with the OfS, or de-register the provider.

178. We have signalled an intention to minimise our use of enhanced monitoring requirements. This is one of the ways in which we are delivering on our commitment

[31] During the initial registration process, the OfS assesses for each provider the risk of a future breach of each ongoing condition of registration. This assessment forms the basis of a 'risk profile' for that provider. The OfS then monitors a registered provider in relation to its conditions of registration and this monitoring is used to update the provider's 'risk profile'.

that providers that do not pose specific increased risk should experience less regulatory burden.[32]

179. Some respondents suggested that we should monitor the management and governance arrangements of providers more closely. Our conditions of registration reflect our predominantly principles-based approach. They set out the minimum levels, or 'baselines', that a provider must satisfy to be registered with the OfS. This gives providers the flexibility to meet our requirements in ways they judge best for their context and their students. Our risk-based approach, of which monetary penalties are an important part, targets our work where it is most needed and focuses on reducing burden on those that do not pose a specific regulatory risk.

180. In our recent consultation on our approach to the publication of regulatory information about providers, we indicated that we would not normally expect to publish our risk profile for a provider because it is not equivalent to a regulatory judgement. We will publish the outcomes from this consultation later in 2021.[33]

181. We do however already incorporate some of the other proposals suggested by respondents. We recognise the challenges presented by our principles-based approach and will continue to engage with providers to build a shared understanding of our regulatory requirements. We published revised guidance about our approach to monitoring and intervention in December 2020,[34] to help providers to understand and meet our regulatory requirements. We also propose to publish case studies – anonymously or (subject to the outcomes of the consultation on publication of information, on a named basis) – to provide a helpful illustration of how our principles-based approach operates in practice.

[32] See blog post, 'Balancing act: measuring our progress on minimising regulatory burden': https://www.officeforstudents.org.uk/news-blog-and-events/blog/balancing-act-measuring-our-progress-on-minimising-regulatory-burden/.

[33] For more information, see www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

[34] See www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/.

Annex A: The consultation

Background

1. The consultation was held between 15 December 2020 and 5 March 2021. It replaced a consultation launched in March 2020 which was then paused because of the early impact of the coronavirus pandemic. That consultation was subsequently withdrawn. The very small number of responses to it that we had received, and which were submitted anonymously, have not been considered in relation to this consultation.

2. The consultation was published on the OfS website and accountable officers of higher education providers registered with the OfS were notified of it by email. Stakeholders were invited to share their views on 10 consultation questions by using an online survey to submit written responses.

3. The OfS also held a roundtable event for sector representative bodies. The discussions at that event were not recorded and were not considered when making our decision. Attendees were invited to submit formal responses to the consultation through the online survey.

4. The consultation closed on 5 March 2021, after an extension of one week to the original closing date in response to requests from stakeholders. One respondent submitted their response by email instead of the online survey. One respondent requested, and was granted, an extension to the deadline. We considered all responses.

Characteristics of respondents

5. We received 62 responses to the consultation, the majority of which were from English higher education providers, including a small number of responses from employees at those providers who indicated that they were submitting an individual response (rather than a collective response on behalf of the provider).

6. We have grouped respondents into categories and Figure 1 below shows the number of responses that we received from each category of respondent.

Figure 1: Responses by category

Category	Number of responses
Higher education providers	*47
Sector representative bodies and/or mission groups	7
Other/anonymous	8
Total	**62**

* Includes six individuals from higher education providers who indicated that they were submitting an individual (rather than a collective) response.