

## Condition E10: Subcontracting

### Scope and application

E10.1 The requirements in E10.5 to E10.11 apply to a provider in the following circumstances:

- a. when both of the following apply:
  - i. the provider has one or more **relevant subcontractual arrangements**;
  - ii. the total number of students registered on the provider's **relevant subcontractual courses** is 100 or more (or such other number as the OfS may determine from time to time); and/or
- b. where the provider has concluded, or reasonably should have concluded, that there is a material likelihood that the total number of students registered on its existing or future **relevant subcontractual courses** will be 100 or more (or such other number as the OfS may determine from time to time) in a given academic year (the "**relevant academic year**"), from the **relevant trigger point** until the end of the **relevant academic year**.

E10.2 For the purposes of this condition, student numbers will be calculated using the methodology set out in one or more documents published by the OfS from time to time.

E10.3 For the purposes of E10.1b, "**relevant trigger point**" means the later of the following points:

- a. one calendar year prior to the beginning of the **relevant academic year**; or
- b. the point at which the provider reasonably should have concluded that there is a material likelihood that the total number of students registered on its existing or future **relevant subcontractual courses** will be 100 or more (or such other number as the OfS may determine from time to time) in the **relevant academic year**.

E10.4 Where the requirements in E10.5 to E10.11 cease to apply to a provider at any time (for any reason), that cessation does not in any way affect the ability of the OfS to investigate and/or take any form of regulatory or enforcement action in respect of any non-compliance with the requirements (whether or not the non-compliance remains ongoing in nature) which took place during the period that the requirements were in effect.

### Overarching obligation

E10.5 The provider must ensure that any risks to the interests of students and/or taxpayers posed by its existing and future **relevant subcontractual arrangements** are effectively identified and addressed, including, but not limited to, by complying with:

- a. the requirements in E10.6 to E10.8 in respect of a single **subcontracting information source**; and
- b. the requirements in E10.9 to E10.11 in respect of operation in accordance with that single **subcontracting information source**.

## Subcontracting information source

E10.6 The provider must maintain a single **subcontracting information source** which sets out policies, procedures and other provisions relating to its existing and future **relevant subcontractual arrangements**. That single **subcontracting information source** (and any revisions made to it from time to time) must comply at all times with the **minimum content requirements** and the **content principles**.

E10.7 Where changes are made to the single **subcontracting information source** referred to in E10.6, the provider must retain the pre-existing version of that information for a minimum period of five years following changes being made to it.

E10.8 For the purposes of this condition, “**minimum content requirements**” means the requirements set out in the OfS’s publication ‘Subcontracting information source minimum content requirements’. For the avoidance of doubt, this publication forms part of this general ongoing condition of registration E10.

## Operation in accordance with the subcontracting information source

E10.9 Except as set out in E10.10, the provider must operate in accordance with the single **subcontracting information source** referred to in E10.6. This includes (but is not limited to) ensuring that, where the provider enters into any new contracts (or variations to existing contracts) at any point while the requirements in E10.5 to E10.11 apply to the provider (see E10.1), the terms and conditions of those contracts enable it to operate in accordance with the single **subcontracting information source**.

E10.10 For any existing contracts which are in force at the time the requirements in E10.5 to E10.11 take effect for the provider (see E10.1), the provider must take all reasonable steps to ensure that the terms and conditions of those contracts enable it to operate in accordance with the single **subcontracting information source**.

E10.11 The provider must have the **capacity and resources** necessary to operate in accordance with the single **subcontracting information source** referred to in E10.6.

## Further definitions

E10.12 For the purposes of this condition:

- a. “**capacity and resources**” includes, but is not limited to:
  - i. the financial resources of a provider; and
  - ii. the number, expertise, and experience of a provider’s staff or contractors.
- b. “**conflict of interest**” means an interest held by a person (for example, a financial interest or a personal relationship) in relation to a matter or decision that would lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the person in question was biased in relation to that matter or decision.
- c. “**content principles**” means the following requirements:
  - i. the provider may include other additional information and provisions in the single **subcontracting information source** in addition to the **minimum content requirements**, but such other information and provisions must:

- A. not contradict, undermine or conflict with the **minimum content requirements**; and
- B. be subject to a provision which makes it expressly clear that the **minimum content requirements** take precedence over any other information and provisions;
- ii. the provider must not include information and provisions on subject matter relating to existing or future **relevant subcontractual arrangements** (and/or any subject matter of a similar nature to matters covered by that defined term) in any other documents which could reasonably be considered to contradict, undermine or conflict with the **minimum content requirements**.
- d. “**designated institution**” has the meaning given in section 28 of the Further and Higher Education Act 1992.
- e. “**further education corporation**” has the meaning given in the Further and Higher Education Act 1992.
- f. “**governing body**” has the meaning given in section 85 of the Higher Education and Research Act 2017.
- g. “**mayoral combined authority**” has the meaning given in section 107A(8) of the Local Democracy, Economic Development and Construction Act 2009.
- h. “**relevant subcontractual arrangement**”:
  - i. means an arrangement between the provider and one or more other entities (“**partner providers**”) in relation to the provision of higher education courses in which:
    - A. the provider holds a contract with one or more **partner providers** (in relation to the provision of higher education courses);
    - B. students on one or more of those courses hold (or will hold) a contractual relationship with the provider; and
    - C. 50 per cent or less of the **total course delivery hours** on one or more of those courses is provided (or will be provided) by the provider’s staff or contractors;
  - ii. does not include an arrangement where:
    - A. the **partner provider** falls under one of the following (or, where there are multiple **partner providers**, each of the **partner providers** falls under one of the following):
      - a) is a **school**, a **further education corporation**, a **sixth form college corporation**, a **designated institution**, a provider of National Health Service services (including an NHS trust as defined in section 25 of the National Health Service Act 2006 or an NHS foundation trust as defined in section 30 of that Act), a local

- authority, a police and crime commissioner, a **mayoral combined authority**, the armed forces, or a government department;
- b) holds an authorisation given by or under an Act of Parliament or Royal Charter to grant taught awards or research awards;
- B. the contract relates to the provision of higher education courses where all of the content on all of those courses is either:
- a) delivered in a location which is outside of England, Scotland, Wales and Northern Ireland; or
- b) delivered online, where all of the students registered on the relevant course are ordinarily resident in countries other than England, Scotland, Wales and Northern Ireland;
- C. the contract relates to the provision of a UK primary medical qualification and each **partner provider** is fully accredited by the General Medical Council;
- D. the contract relates to the provision of a UK veterinary degree programme and each **partner provider** is fully accredited by the Royal College of Veterinary Surgeons;
- E. the contract relates to the provision of an initial teacher training course that leads to qualified teacher status and each **partner provider** is fully accredited by the Department for Education to deliver initial teacher training courses;
- iii. For the avoidance of doubt, an “existing” **relevant subcontractual arrangement** refers to an arrangement where the provider has signed a contract of the kind described in paragraph E10.12hiA.
- i. “**relevant subcontractual course**” means a higher education course provided for under a **relevant subcontractual arrangement** where:
- i. students on that course hold (or will hold) a contractual relationship with the provider; and
- ii. 50 per cent or less of the **total course delivery hours** on that course are provided (or will be provided) by the provider’s staff or contractors.
- j. “**risk and audit functions**” means functions which relate to:
- i. identifying and managing risks;
- ii. overseeing internal or external auditing of the provider, as well as the provider’s financial reporting and disclosures.
- k. “**school**” means:

- i. a school as defined by section 4 of the Education Act 1996;
  - ii. an Academy under section 1(10) of the Academies Act 2010;
  - iii. an academy trust; or
  - iv. a federation or federated school as defined by section 24 of the Education Act 2002.
- l. **“sixth form college corporation”** means a sixth form college corporation established under the Further and Higher Education Act 1992.
- m. **“subcontracting information source”** means:
- i. a single document that comprehensively sets out all the information required in order to comply with E10.6; or
  - ii. a single document that gives a clear summary of the information required by E10.6, and refers to additional documents that comprehensively set out the remaining relevant detail as required by E10.6. If the provider adopts this approach, the single document must include a summary of the content to be found in those other documents (insofar as relevant).
- n. **“total course delivery hours”**, in relation to a course, means the total number of hours spent by staff or contractors (of the provider or its **partner providers**) preparing to deliver course content, delivering course content, and assessing student work in relation to the course.

## Summary

**Applies to:** all registered providers

**Initial or general ongoing condition:** general ongoing condition

**Legal basis:** section 5 of HERA

### E.10.1 – E.10.4: Scope and application

1. This condition defines a “relevant subcontractual arrangement” in E.10.12. This is where:
  - a provider (a “lead” provider) holds a contract with a partner (delivery partner) for the provision of teaching;
  - students hold a contractual relationship with the lead provider;
  - and where the lead provider contracts out 50 per cent or more of total course delivery hours to a delivery partner.
2. Some relationships are also intentionally not included in the scope of the definition. For example, those where the provider’s partner (i.e. the “delivery provider”) is a school or a further education corporation, or a sixth form college corporation. Please see the definition set out in

the “further definitions” section of the condition. For the avoidance of doubt, this definition is distinct from the description of a “subcontractual arrangement” as set out in the regulatory framework glossary.

3. A provider must meet the obligations set out in this condition at any point when it has a total of 100 or more students registered on one or more relevant subcontractual courses. A provider must also meet the condition obligations where it has concluded (or reasonably should have concluded) that there is a material likelihood that it will have 100 or more students registered on relevant subcontractual courses during a given academic year. Where this is the case, a provider must comply with the condition from the “relevant trigger point” (see paragraphs 7-9 below) until the end of that academic year.
4. The threshold of 100 students is calculated as the aggregate total of students, on a headcount basis, across all relevant subcontractual courses of the provider. This total includes students registered in any year or on any module of a subcontracted course and is not limited to the students registering on a course in a single academic intake. The OfS may, from time to time, revise its approach to counting student numbers to ensure it remains appropriate.
5. A provider must regularly assess whether the obligations of this condition apply to it as it plans student intakes. We expect each provider to have sufficient capability to determine this based on its own student data and recruitment plans.
6. In considering whether a provider reasonably should have concluded that there is (or was) a material likelihood that the total number of students registered on its relevant subcontractual courses will (or would) be 100 or more, the OfS may consider how a reasonable provider, intent on complying with all of its conditions of registration and acting in the interests of students and, where relevant, taxpayers (rather than in its own commercial, reputational or other interests), would have forecast its student numbers.
7. In most cases the obligations in condition E10 will apply one calendar year before the start of the academic year in which the provider expects to have 100 or more students registered on relevant subcontractual courses (as set out in E10.3.a).
8. The OfS would normally expect a provider to be able to identify whether it will have 100 or more students on relevant subcontractual courses in a given academic year at least one year before the start of that year. This is because the provider will need to agree its contract with a delivery provider, set admission criteria and leave time for student recruitment. For existing subcontractual relationships forecasts of student numbers may be set several years in advance of recruitment.
9. In a scenario where:
  - a. a provider agrees with a delivery partner to deliver a course at short notice or,
  - b. a provider recruits more students than expected, and this results in 100 or more students being on relevant subcontractual courses

the obligations in condition E10 will apply from the point that a provider reasonably should have concluded that there was a material likelihood that it would have 100 or more students in the relevant academic year (as set out in E10.3.b).

10. A provider forecasting numbers close to 100 should consider how they will ensure they can meet the requirements of this condition if recruitment is higher than expected. This includes considering whether they should reasonably expect that over-recruitment might occur.
11. Where a provider reaches 100 or more students, but it had not identified that this was materially likely, the OfS may consider whether the provider should reasonably have expected to cross the 100-student threshold. In these cases, the OfS may seek to understand the circumstances better, for example through considering a provider's forecasting processes, contracts, monitoring of emerging trends and risk identification. The OfS may consider how a reasonable provider, intent on complying with all of its conditions of registration and acting in the interests of students and, where relevant, taxpayers (rather than its own commercial, reputational or other interests), would have forecast its student numbers. It will then assess whether any regulatory action is appropriate, for example in situations whether there is a breach or increased risk of breach of the condition.
12. If a provider recruits fewer students than expected, and fewer than 100 students are on relevant subcontracted courses, the obligations in condition E10 will continue to apply until the end of that academic year.
13. Condition E10.1 refers to two 100-student thresholds. The OfS may decide to vary these thresholds, where it considers this appropriate. The OfS may also in future decide to amend the definition of 'relevant subcontractual arrangements', or change the types of arrangements that fall within the scope of the exemption categories set out in E10.12. If the OfS decides to do this, we would seek to ensure we understand relevant views before making changes.

## **E10.5: Overarching obligation**

14. A lead provider must ensure that any risks to the interests of students and/or taxpayers posed by its existing and future relevant subcontractual arrangements are effectively identified and addressed.
15. The condition sets out a non-exhaustive set of requirements with which a provider must comply. These requirements are detailed further below. The overarching requirement is that a provider must identify and address the risks to students and taxpayers. The OfS may assess whether a provider has met the overarching obligation of the condition, and take regulatory action if needed. This may occur even if a provider has met specific requirements such as maintaining a subcontracting information source.
16. Box A below sets out an illustrative non-exhaustive list of risks that a provider should consider, when identifying risks to the interests of students and taxpayers that could be posed by its relevant subcontractual arrangements.

### **Box A: Potential risks to students and taxpayers**

#### **Risks to students**

- A delivery partner (or its agents) misrepresenting or mis-selling courses, charging excessive fees, or not complying with consumer protection law.

- Students being recruited to courses that are not suitable or not accessible to the student. For example, where entry requirements (including English language requirements) do not ensure admitted students have the capabilities required to engage with the course without significant additional support, and where this support may not be provided to students.
- Students receiving a lower quality academic experience from the delivery provider than the experience students at the lead provider receive. For example, a course not being sufficiently stretching for the level of study, poor quality teaching and assessment, or students failing to obtain an award without early warning that their academic progress was not sufficient.
- Academic misconduct by students in a relevant subcontractual arrangement, including where a delivery partner does not have procedures in place to properly identify submission of assessments that are not a student's own work.
- Poorly monitored or controlled student support services or safeguarding arrangements.
- Students not being aware that their course is being delivered through a subcontractual partnership, or that the lead provider has retained a proportion of their tuition fee.
- Disruption or discontinuity of a student's course, including if a delivery partner fails.

#### **Risks to taxpayers**

- Student loan funding being paid to, and on behalf of, students who are not genuinely entitled to that funding, as a result of inaccurate data submitted by a delivery partner to the lead provider, with inadequate controls for collection and submission of data, and inadequate auditing of data and controls.
- Incorrect payment of student loan funding to a provider because of inaccurate or inflated reporting of student attendance to the OfS and Student Loans Company.
- Students and third parties accessing public funding in the form of maintenance loans, childcare or other grants, by registering on a course that they do not genuinely intend to study.
- Reduced confidence in the higher education sector and so damage to the wider public interest generated by high profile reports of poor delivery, or the failure of an individual provider.

17. Information on how the OfS would assess whether a provider has met the overarching requirement and effectively identified and addressed risks to the interests of students and taxpayers posed by its relevant subcontractual arrangements, is included in the assessment section below (see the section on 'Assessment' below).

#### **E10.6 – E10.8: Subcontracting information source (SIS)**

18. A provider must determine the policies, procedures and other provisions that will identify and address risks to the interests of students and taxpayers posed by its relevant subcontractual

arrangements. The minimum content requirements (see the OfS publication, '[Subcontracting information source minimum content requirements](#)') set out some specific requirements, but this is not an exhaustive list. The lead provider should consider the specific context in which delivery will take place.

19. We recognise that a provider may need time to prepare its SIS. We expect a provider to take prompt action to develop (and implement) their SIS and that it will be in place and being implemented (per E10.9-E10.11) by no later than 30 June 2026. The exception to this is where a provider enters into a new contract (or varies an existing contract) relating to relevant subcontractual arrangements on or after the condition comes into force (on 31 March 2026). In these cases, we expect a provider to have developed its SIS by the time it enters into (or varies) the contract and that the terms and conditions of that contract will enable the provider to operate in accordance with the SIS. For more information on implementing (or 'operating in accordance with') the SIS please see the relevant section below.
20. The OfS does not require a provider to regularly share its SIS with the OfS or publish it as a matter of course. However, a provider must maintain it and be prepared to share it with OfS on request. The OfS may decide to compel the provider to provide this information (under condition of registration, F3).
21. A provider must retain historical versions of its SIS for a minimum of five years. This ensures that the OfS can review the oversight and control arrangements that were in place at the time of an event or concern under a previous version of the SIS.
22. Some providers may have documents with a wider purpose that include relevant policies, procedures and other provisions. For example, a provider's procurement or new contract engagement policy may set out controls relevant to all contracts over a certain size, rather than only those relevant to subcontractual arrangements. In such cases, the SIS may serve as a summary document that references these broader policies. Where a provider takes this approach, it must summarise relevant information, including by making it clear how each policy it references applies to its subcontractual provision. The format and structure of the SIS is for each provider to determine.
23. Information on how the OfS would assess whether a provider has satisfied the requirements of E10.6 to E10.8, is included in the assessment section below.

## **E10.8 and minimum content requirements**

24. The requirements set out in 'Subcontracting information source minimum content requirements', represent the minimum content that each provider must include in its SIS. In addition, a provider should judge whether other policies, procedures or provisions are necessary to effectively manage risks to the interests of students and taxpayers relevant to its particular context. If it needs additional arrangements, the provider must document these in its SIS.
25. Information on how the OfS would assess whether a provider's SIS meets the minimum content requirements, is included in the assessment section below.
26. In 'Subcontracting information source minimum content requirements', the minimum content requirements are set out in the following categories:

- a. Subcontractual rationale
- b. New arrangements
- c. Oversight by governing body and others
- d. Policies and procedures
- e. Adaptability

27. More guidance on each of these categories is set out below.

### **Subcontractual rationale**

28. The SIS must set out the provider's overall strategic rationale for entering into subcontractual arrangements, including its rationale for any existing arrangements. This rationale must be clear and fit with its vision and strategic intent. The SIS must also set out how, in developing that rationale, the provider ensures that the needs of students are prioritised over financial considerations. This must be consistent with the rationale the provider publishes in the disclosures of its audited financial statements (see 'Regulatory advice 9: Accounts direction'). The OfS expects this rationale to explain the benefits that the lead provider is expecting from its subcontractual arrangements, including the benefits for current and future students.

### **New arrangements**

29. The SIS must explain the provider's approach to assessing potential new subcontractual arrangements, including how it assesses their feasibility. The SIS must also explain how this assessment approach is in line with the provider's overall strategic rationale for entering into new subcontractual arrangements. This is likely to include an explanation of the strategic decision-making process that will take place and an explanation of how a new partnership would support the provider's wider strategy, including consideration of benefits and risks to students.

30. The SIS must also describe how the provider undertakes due diligence on potential partners in new subcontractual arrangements, including the provider's procurement or new contract engagement process. This should include how its approach aligns with the provider's policies that identify and manage risk in relation to its subcontractual arrangements and any relevant legal or regulatory requirements. A provider may draw on its existing procurement or new contract engagement policies and procedures where these are appropriately adapted to reflect the specific risks and responsibilities associated with subcontractual provision. 'Procurement or new contract engagement' is used here as a term to describe the process by which providers identify, assess and contract with potential delivery partners. We acknowledge that providers may have different terms for this process.

31. A lead provider remains responsible for regulatory compliance in relation to its subcontractual arrangements, including for the quality of courses that its partners deliver. The OfS therefore requires the SIS to set out how, when assessing new arrangements, the provider considers whether it will be able to continue to meet its regulatory responsibilities with respect to delivery of courses by its partner (including in relation to compliance with conditions B1, B2, B3, B4 and B5).

### **Oversight by governing body and others**

32. The SIS must include information setting out how a provider's governing body (and any committee and/or individual with responsibility for risk and audit functions) maintains control and oversight of subcontractual arrangements. A governing body must clearly understand how the provider's particular subcontractual arrangements support its strategic approach, and how it will meet, and continue to meet, its regulatory obligations in relation to this provision.
33. Each provider should determine how best to deliver governing body oversight, for example whether the governing body, or relevant committee(s) and/or individual(s) should deliver it. It should also decide how responsibility should be split, shared or otherwise structured between these individuals or bodies. A provider should also determine how accountability for these issues is to be managed on a day-to-day basis by the provider's leadership team. However, the governing body retains responsibility for the provider's subcontractual activity and the OfS expects the governing body to be properly engaged on arrangements that represent risks to students or taxpayers. A provider's oversight arrangements must be clearly set out in its SIS.
34. A provider may wish to set out how its general approach to identifying and managing risk integrates the particular risks for its relevant subcontractual arrangements.
35. The governing body must also assure itself of the quality and rigour of internal or external auditing of existing and future relevant subcontractual arrangements. Normally, this would be delivered via an internal audit function and overseen by a risk and audit committee of a provider's governing body. We accept that some providers (especially smaller providers) may not have a risk and audit committee and may have established a different arrangement to undertake these duties as part of the governing body. Providers will be familiar with our expectations around disclosures related to internal controls set out in our accounts direction (Regulatory advice 9) under 'Statement of Internal Controls'.

## **Policies and procedures**

36. The SIS must include the policies and procedures the provider has in place to meet the overarching obligation in the condition (in E10.5) and ensure delivery of its strategic rationale for subcontracting.
37. A provider may have existing policies and procedures that address some or all of the minimum content requirements in condition E10. Where this is the case, these documents should be referenced in the SIS, with a clear explanation of how existing policies apply to the provider's subcontractual arrangements and identifying the relevant sections.
38. There are a number of matters listed in the 'policies and procedures' section of 'Subcontracting information source minimum content requirements' which the SIS must cover. Among these, the SIS must include the provider's policies and procedures as to how it verifies information or data held by its partner about students on subcontracted courses, including providing for verification via onsite inspections. There may be several appropriate mechanisms for a provider to verify the information or data held by its delivery partner, for example student interviews or assessment sampling. Beyond the specific requirement to undertake onsite testing it is for the provider to determine which mechanisms are appropriate to effectively manage risks to students and taxpayers. For the avoidance of doubt, we expect these verification methods to go above and beyond relying on information or activity provided by the delivery partner.

39. The scope of onsite testing should be appropriate for the teaching delivery methods, and be sufficient to mitigate the risks to students and taxpayers identified by a provider. A non-exhaustive list of illustrative examples are set out below:
- a. Where students are taught physically on campus, the OfS would expect onsite testing to include in-person visits to that campus to observe teaching and other physical facilities that are provided by the delivery partner.
  - b. Where learning is online, the OfS would expect onsite testing to involve accessing the online learning environment to verify the services reported (e.g. access to pre-recorded or live teaching) are being delivered to expected quality standards.
  - c. Where student data is held physically at a separate location (for example a head office) it may be appropriate to conduct onsite testing at that location. We would not normally expect onsite testing to extend to visits to third party data centres, e.g. cloud storage providers.
40. The SIS should also explain how it will protect the interests of students if a partner's delivery fails. A provider's approved student protection plan (SPP) as required under initial and ongoing condition C3, or key documents as set out in initial condition of registration C5,<sup>1</sup> should already include measures for protecting the interests of students if a delivery partner fails. Where this is the case, the provider must clearly set out in its SIS:
- a. How the SPP (or key documents) will be implemented specifically for students taught at each of its subcontractual partners. For example, this may include plans for the lead provider to take over course delivery directly, or to transfer students to a suitable alternative course delivered by another provider.
  - b. Any additional or tailored arrangements that would apply in such scenarios.
41. When setting out how it will protect the interests of students in the event of poor performance by a delivery partner, a lead provider should take a broad interpretation of 'poor performance', beyond performance that may be expressed in contractual KPIs or other formal metrics. In this context 'poor performance' should be defined sufficiently broadly to include performance by a delivery partner that introduces risk to students and/or taxpayers. A provider should consider risks to students and taxpayers, included but not limited to those set out in Box A above and explain how it would:
- a. Identify when such risks are crystallising or are likely to do so, and ensure that performance monitoring and metrics can identify these issues with a delivery partner's performance.
  - b. Intervene where necessary to protect the interests of students and taxpayers, including setting out the tests it would use to identify situations in which the lead provider needs to escalate a concern and the range of remedial actions that could be taken.
  - c. Escalate concerns and take action where necessary, including the steps the provider will take if a delivery partner fails to act or takes insufficient action to address concerns.

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<sup>1</sup> "key documents" means the provider's terms and conditions, other documents with contractual effect, notices, policies relating to the circumstances in which it may make changes to its courses, refund and compensation policies, and complaints processes.

## **Adaptability**

42. The primary purpose of the SIS is to ensure a provider is effectively identifying and addressing risks to the interests of students and taxpayers arising from its relevant subcontractual arrangements. The OfS recognises that these risks may evolve over time, particularly where new subcontractual arrangements are introduced or where there is a significant increase in the number of students studying in relevant subcontractual arrangements.
43. A provider must therefore explain in its SIS how it keeps its policies and procedures under regular review and how it adapts them in response to changes, including to the scale or nature of its subcontractual provision.

## **E10.9 – E10.11: Operation in accordance with the subcontracting information source**

44. The SIS will contain the policies, procedures and other provisions required to effectively identify and address risks to the interests of students and taxpayers posed by its relevant subcontractual arrangements. Condition E10.9 requires a provider to operate in accordance with its SIS. In doing so, the provider must ensure that any risks to the interests of students and/or taxpayers posed by its relevant subcontractual arrangements are effectively identified and addressed, in line with the overarching requirement. A provider should determine how to achieve this but this could include, for example, deploying staff to implement policies set out in the SIS or ensuring the governing body or appropriate subcommittee receives relevant monitoring information.
45. Any new contracts (or variations to existing contracts) must allow the provider to operate in accordance with its SIS. The OfS would expect to see the provisions in a provider's SIS reflected in its new contracts (or variations to existing contracts) with delivery partners. Each contract does not need to explicitly include all content from the SIS, but contracts must be capable of being implemented in a way that supports compliance with the SIS.
46. For its existing contracts only, a provider must take all reasonable steps to ensure that the terms and conditions of its existing contracts enable it to operate in accordance with the SIS. 'Existing contracts' are defined in the condition. By all 'take all reasonable steps' we mean taking all reasonable steps to amend any existing contracts to comply with this requirement as promptly as possible. What is reasonable will depend on the facts. It is likely to include but is not limited to:
  - a. Taking all reasonable steps to renegotiate contract terms with partner providers where necessary.
  - b. Using all potential contract clauses (for example those that allow contract change in response to regulatory action) to allow renegotiation where appropriate.
  - c. Using the soonest possible contract break or endpoints to enable changes to contractual terms where that would not lead to a significant financial penalty.

- d. Whether it will be reasonable for a provider to pay a financial penalty as part of its 'all reasonable steps' will depend on the specific circumstances, including the amount of the penalty and the financial position of the provider.
47. If after exhausting all reasonable steps a provider still cannot operate in accordance with the SIS, it must submit a reportable event, as set out in the OfS's guidance on reportable events (Regulatory advice 16). The provider should also consider ways to mitigate risks to students, for example by using contract provisions to limit student numbers.
48. Where a provider submits a reportable event under Regulatory advice 16, we may take steps to understand how it has met its obligation to take 'all reasonable steps'. This may involve, for example:
- a. Requiring a provider to provide further information (for example the contract document, as well as information about actions that a provider has already undertaken to attempt to operate in accordance with the SIS).
  - b. The OfS undertaking a review of the arrangements the provider has in place to oversee the relevant subcontractual arrangement and the compliance with wider regulatory requirements.
  - c. The OfS contacting a delivery partner to discuss their reasons for not renegotiating, or for refusing changes to contractual terms that would support operation in accordance with the SIS. Where an unregistered delivery partner applies for registration, we may consider any information we hold about that provider when considering its application for registration.
49. The OfS does not intend to routinely review individual contracts between subcontractual delivery partners, but it may require such contracts to be submitted. A lead provider remains responsible for ensuring contractual terms and conditions do not conflict with compliance with its regulatory responsibilities, including but not limited to those in condition E10.
50. Information on how the OfS would assess whether a provider is operating in accordance with its SIS is included in the assessment section below (see paragraph 52 onwards).
51. Condition E10.11 requires a provider to have the capacity and resources necessary to operate in accordance with the SIS. Each provider is responsible for determining its approach to meeting this requirement. Information on how the OfS would assess whether a provider has the capacity and resources necessary to operate in accordance with the SIS is included in the assessment section below (see paragraph 52 onwards).

## **Assessment**

52. When making assessments about any aspect of this condition, the OfS may consider any regulatory information and intelligence it holds. This may include, but is not limited to:
- a. third party notifications
  - b. reportable events
  - c. the outcomes of any OfS investigation or improvement work with the provider

- d. any OfS quality assessment
- e. any OfS data audit
- f. any data submitted to the OfS by a provider (for example B3 outcomes monitoring)
- g. information received from other regulatory or relevant public bodies

53. The overarching requirement in the condition is that a provider must ensure that any risks to the interests of students and/or taxpayers posed by its relevant subcontractual arrangements are effectively identified and addressed. The nature and scale of these risks will depend on a provider's context and the characteristics of each subcontractual arrangement.

54. Some factors which are likely to be relevant to assessing the risks of a particular arrangement will be inherent to the nature of the arrangement, for instance:

- the number of students
- the range of courses or delivery modes,
- the speed at which provision is expanding.

55. Other relevant factors may be more amenable to change and mitigation, for instance lead providers may well want to take into account any relevant audit findings or complaints associated with the provision to determine the appropriate level of oversight required, and keep this under review if these trend up or down. The OfS expects that the oversight arrangements that a provider sets out in its SIS would reflect the risk associated with the subcontractual arrangement.

### **Overarching obligation**

56. Where the OfS decides to assess whether a provider is meeting the overarching obligation (E10.5) it may consider whether any of the information or intelligence it holds suggest that risks to the interests of students and/or taxpayers posed by a provider's existing and future relevant subcontractual arrangements may not have been effectively identified and addressed. An illustrative non-exhaustive list of these risks is set out in Box A, above.

57. For example, if the OfS receives information that a delivery partner is misrepresenting courses, charging excessive fees, or breaching consumer protection law, this may indicate that the provider has not effectively identified or addressed the associated risks.

58. In assessing whether a provider has identified and addressed risks effectively, the OfS may consider whether there have been repeated incidents, as well as isolated incidents. The former are more likely to indicate poor oversight by lead providers. If an issue is narrow, quickly identified, appropriately reported and followed by strengthened controls, the OfS is less likely to conclude that the provider has failed to identify and address the risk effectively. Conversely, if the same issues arises repeatedly without being identified or addressed or happen on a larger scale, this is more likely to indicate a systemic failure in the provider's risk management processes. However, we would consider each case dependent on the facts of that case.

59. For the avoidance of doubt, while other elements of this condition identify particular steps that a provider must take as part of meeting its overarching obligation, the OfS may also identify a breach or risk of breach of the condition, and take enforcement action, based on an assessment of compliance with this overarching obligation itself.
60. Where the OfS determines that these risks are not being effectively identified and addressed, this may indicate weaknesses in how a provider meets other aspects of condition E10. It may also suggest that the provider's SIS is inadequate, or that the provider is not operating in accordance with it.

### **Subcontracting information source**

61. Where the OfS decides to assess whether a provider is meeting its SIS requirements the OfS may consider the below non-exhaustive list of factors:
- a. The specific tests set out in E10.6 and E10.7. For example, where a provider cannot produce current or historical versions of its SIS, or when produced it does not comply with the content principles described, the OfS may conclude the provider has failed to meet the requirements of E10.
  - b. Whether the SIS includes the specific information set out in 'Subcontracting information source minimum content requirements', for example whether the SIS includes information on how the provider deals with whistleblowing about activity under its relevant subcontractual arrangements. Where a provider's SIS does not include all or part of the specific information set out in 'Subcontracting information source minimum content requirements', the OfS may conclude the provider has failed to meet the requirements of E10.
  - c. Whether the information included in the SIS meets the specific tests for each section of 'Subcontracting information source minimum content requirements', for example: whether the mechanisms for oversight by the governing body (and others) (part (c)) and policy and procedures (part (d)) would enable the provider to meet the overarching obligation contained in E10.5, and ensure delivery of a provider's stated strategic rationale for engaging in subcontractual relationships.
  - d. When considering whether the provider's oversight mechanisms and policies and/or procedures would enable it to meet the overarching obligation contained in E10.5, as above, the OfS may consider any regulatory intelligence or information that suggests the provider may not have met the overarching requirement to effectively identify and address risks to the interests of students and taxpayers posed by its relevant subcontractual arrangements.
  - e. The OfS may also consider whether an oversight mechanism or policy and/or procedure is consistent with a provider's ability to comply with the overarching obligation of the condition. For example, the OfS would be unlikely to consider that a generic complaints policy, intended for students taught directly by the provider, and lacking specific provisions for subcontracted delivery, would be sufficient to meet the overarching obligation contained in E10.5. In particular, the OfS would likely be concerned where a policy does not address how data about complaints is incorporated into the provider's contract management

process and key performance indicators (KPIs) for a delivery partner, or how complaints are shared and escalated between the lead provider and delivery partner.

- f. When considering whether the provider's oversight mechanisms or policies and/or procedures would ensure the delivery of its stated strategic rationale, the OfS may consider whether the documentation provided in the SIS is consistent with the rationale set out. For example, a provider's strategic rationale for subcontracting might be to increase access to higher education for students with a diverse set of experiences and academic backgrounds. In this case, the OfS would expect that the provider's process for assessing and approving delivery of courses provided by its delivery partner would include significant detail on how the lead provider's governing body ensures that the courses are suitable for a breadth of student experiences and academic backgrounds. Where this is not the case, the OfS may have concerns about the oversight and control mechanisms in place to ensure delivery of the strategic rationale.

## **Operating in accordance with the SIS**

62. If the OfS decides to assess whether a provider is operating in accordance with its SIS, the OfS may consider the following non-exhaustive list of factors:

- a. As above, any information or regulatory intelligence, that suggests the provider may not have met the overarching requirement.
- b. Any information or regulatory intelligence that suggests that a provider may not, in practice, be able to operate in line with its SIS. For example, if a provider's SIS states that the lead provider must have access to student data held by a delivery provider within 48 hours, and the lead provider has been unable to retrieve that data in that time in order to share it with the OfS promptly, this may indicate that the lead provider's arrangements are not working effectively and as designed in practice.
- c. Whether the provisions in a provider's SIS are reflected in its new contracts (or variations to existing contracts) with delivery partners, and whether a provider has taken all reasonable steps to ensure that existing contracts reflect provisions in a provider's SIS. Each contract does not need to explicitly include all content from the SIS, but if contracts do not support compliance with the SIS, this may suggest that the provider is not operating in accordance with it. It may also suggest that the provider is not meeting:
  - i. the requirement as set out in E10.9 that the terms and conditions of the provider's new contracts enable it to operate in accordance with the SIS
  - ii. the requirement in E10.10 for the provider to take all reasonable steps to ensure that the terms and conditions of its existing contracts enable it to operate in accordance with the SIS.

## **Capacity and resources**

63. If the OfS decides to assess whether a provider has the capacity and resources necessary to operate in accordance with the SIS it may consider the below non-exhaustive list of factors:

- a. As above, any regulatory evidence or intelligence, that suggests the provider may not have met the overarching requirement.

b. the scale and nature of controls set out in the provider's SIS and the scale and nature of the provider's subcontractual arrangements.

64. A provider may wish to subcontract to widen access to higher education. For example, it may wish to support students who do not have traditional entry qualifications (e.g. A levels). In this scenario, the OfS would expect the provider to have a clear and detailed process for applying any exemptions or exceptions to its admissions criteria. This process should enable the provider to assess potentially large numbers of applicants who fall into these categories.

65. The provider must also ensure it has the capacity and resources to implement this process effectively. If the process requires large numbers of manual, qualitative reviews of applicants' work histories, the provider must ensure that the team responsible for this work is appropriately staffed. Team members should have the skills and experience needed to make and assess these judgements reliably.