

Office for
Students



Consultation on the integrity and stability of the English higher education sector

Analysis of responses to consultation

Reference OfS 2020.34

Enquiries to regulation@officeforstudents.org.uk

Publication date 3 July 2020

Contents

Introduction	3
Background	5
Main findings	7
Characteristics of respondents	7
Data: agree/disagree with the proposed introduction of a new ongoing condition of registration	7
Data: agree/disagree with the proposals for implementation	8
The OfS's statutory duties and regulatory remit	9
Scope and purpose of the proposals	13
Retrospectivity	24
Sunset clause	25
Equality, diversity and inclusion	28
Monitoring, enforcement and sanctions	32
Regulatory burden	35
The consultation process for the proposals	36
Annex A: Condition Z3: Temporary provisions for sector stability and integrity	38
Annex B: Section 2 of the Higher Education and Research Act 2017 (HERA)	45

Introduction

1. The Office for Students (OfS) 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. Universities and colleges that are registered with the OfS are regulated by us and must meet certain conditions.
2. Our four regulatory objectives are that all students, from all backgrounds and with the ability and desire to undertake higher education:
 - a. Are supported to access, succeed in, and progress from, higher education.
 - b. Receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure.
 - c. Are able to progress into employment or further study, and their qualifications hold their value over time.
 - d. Receive value for money.
3. This document presents the analysis of responses to the consultation on the integrity and stability of the English higher education sector, held between 4 May 2020 and 26 May 2020.
4. The proposals in the consultation were designed to address the following issues:
 - a. The short-term stability of English higher education providers
 - b. Recruitment practices that are not in the interests of students
 - c. Higher education providers seeking to obtain an unfair advantage over other providers
 - d. The wider interests of students and the public interest.
5. The consultation document¹ proposed the introduction of a new, time-limited, ongoing condition of registration, E6: Sector integrity and stability.
6. In this document we identify and discuss the most significant issues raised by respondents in their responses to the consultation, whether or not these have led to changes to the proposals set out in the consultation.
7. We have decided to implement a new time-limited condition but with a number of important revisions, taking into consideration the responses received to the consultation and the prevailing circumstances. The scope of the new condition is

¹ The consultation document is available at www.officeforstudents.org.uk/publications/consultation-on-the-integrity-and-stability-of-the-english-higher-education-sector/.

narrowed to focus on the types of offer-making practices that are most likely to have a material negative effect on the stability and integrity of the sector and have a negative impact on the interests of past, present and future students, and on certain advertising and marketing activities that would have a similar effect. We have summarised our policy intent in this document and the final wording of the condition is set out in Regulatory notice 5: Condition Z3: Temporary provisions for sector stability and integrity,² and in Annex A of this document. We have numbered the new condition Z3 to underscore its time-limited nature. We have previously used Z numbers for conditions that were in place for a limited period and are now no longer in force.

8. For the reasons set out in this document, we consider that condition Z3 is a necessary and proportionate means to ensure the stability and integrity of the English higher education sector, which protects the interests of current students and preserves diversity of providers and choice for students over the longer term. Our framing of condition Z3 provides clarity to providers about the conduct that could lead to regulatory action being taken in relation to certain admissions and marketing activities in the context of coronavirus.

² Available at www.officeforstudents.org.uk/publications/regulatory-notice-5-condition-z3-temporary-provisions-for-sector-stability-and-integrity/.

Background

9. This was a public consultation and stakeholders were invited to share their views on five consultation questions by using an online survey to submit written responses. Respondents were asked to indicate whether they agreed or disagreed with the proposed introduction of a new ongoing condition of registration and with the proposals for implementation of that proposed ongoing condition. Respondents were also asked whether they had any comments on the proposals, including about any unintended consequences of the proposals and any potential impact on individuals on the basis of their protected characteristics.
10. The consultation was published on the OfS website and accountable officers of higher education providers that are registered with the OfS were notified of the consultation by email.
11. The consultation closed on 26 May 2020. 191 responses were received, the majority of which were from higher education providers, their staff or sector mission groups. We also received a small number of responses from students, student representative groups and other interested parties. A small number of respondents submitted their responses by email or, in one case, by telephone; a note of the telephone call was then agreed with the respondent. A small number of responses were submitted after the deadline, in one case after an extension to the deadline had been agreed in advance with the OfS. Those responses were considered when making our decision.
12. The OfS has undertaken a qualitative analysis of the comments received on the proposals. We considered all responses to the consultation in making our decision. Below, we discuss the issues raised in the responses by theme.
13. Our response to the themes raised focuses on the policy intent of the proposals. However, many respondents also sought clarification on specific aspects of the proposals, including on the proposals for implementation, and we have addressed these as appropriate in this document. These are reflected in the final text of ongoing Condition Z3: Temporary provisions for sector stability and integrity ('condition Z3').
14. In reaching our final decision about these matters, we have had regard to the OfS's general duties, the Regulators' Code and the statutory principles of best regulatory practice, namely that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent, and that regulatory activities should be targeted only at cases in which action is needed.
15. We have also had due regard to the Public Sector Equality Duty and we have published an equality impact assessment (EIA).³ The EIA concludes that, overall, the imposition of condition Z3, as drafted, will have a neutral impact on students with protected characteristics and on other vulnerable learners. It says that there may be a

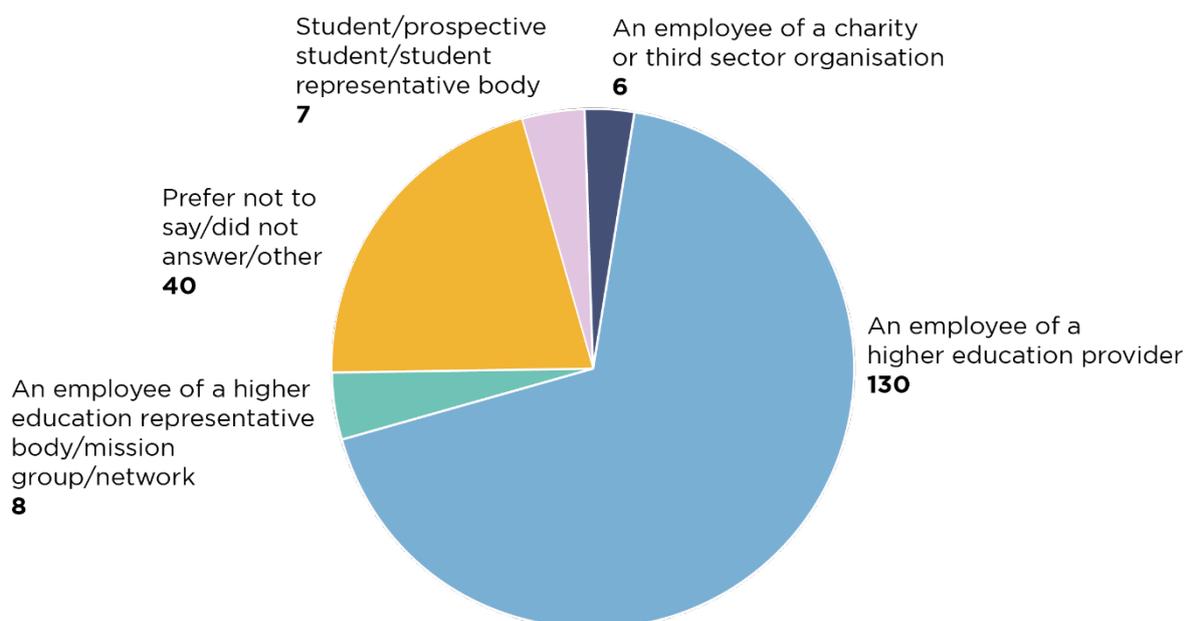
³ Available at www.officeforstudents.org.uk/analysisresponsesz3/.

differential impact across and within providers, and for students at different stages of their higher education experience. This means there is likely to be some positive impact on some types of individual learners, and some negative impact on others. The assessment of impact of condition Z3 takes into account the narrower scope of the condition to focus on offer-making practices and some advertising and marketing activities.

Main findings

Characteristics of respondents

16. We received 191 responses to the consultation, the majority of which were collective responses from English higher education providers or individual responses from employees of those providers. We have grouped respondents into categories and the chart below shows the number of responses that we received from each category of respondent.



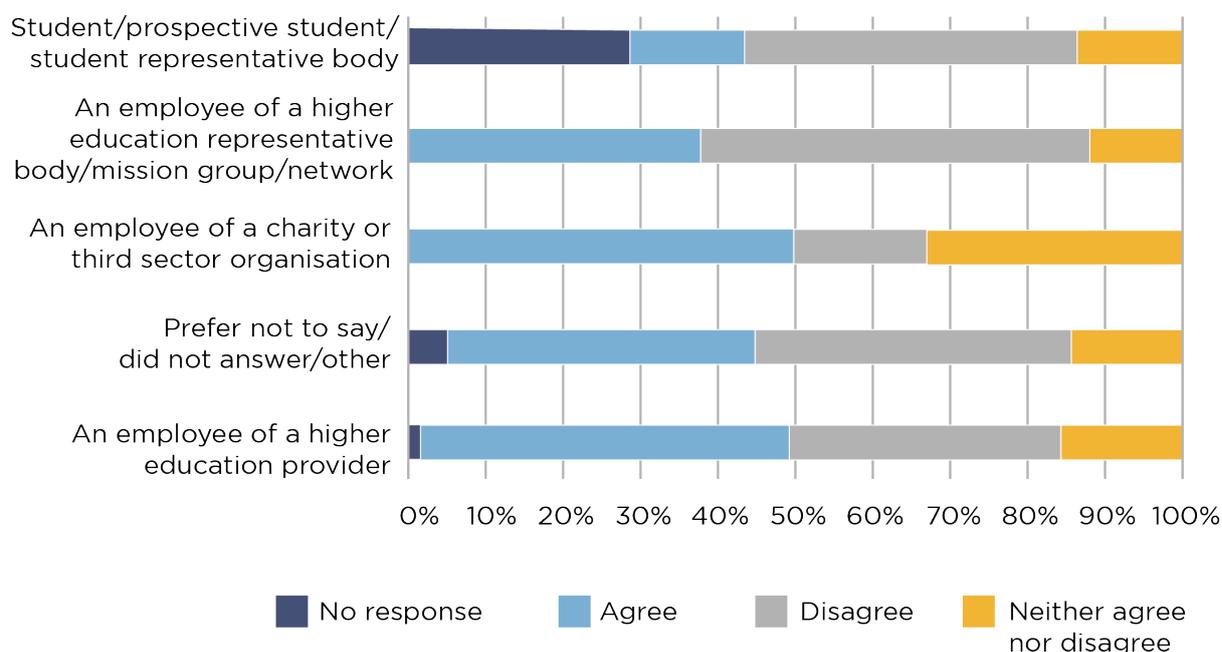
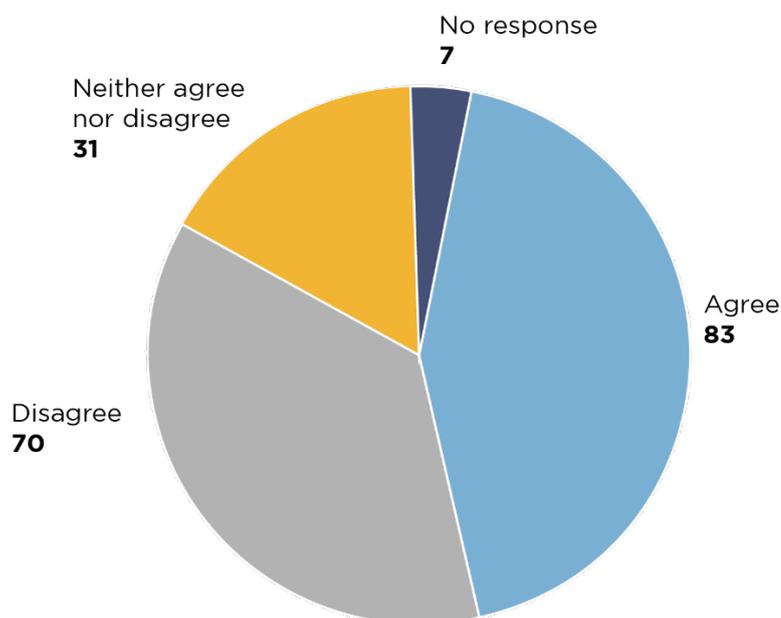
Data: agree/disagree with the proposed introduction of a new ongoing condition of registration

17. Respondents were asked whether they agreed or disagreed with the proposed introduction of a new ongoing condition of registration and associated changes to the OfS's regulatory framework.⁴ In the charts below, we show the proportion of respondents who said they 'agreed', 'disagreed', 'neither agreed nor disagreed' or did not reply to the question, broken down by category of respondent.

18. The majority of respondents also provided detailed comments in their responses with many qualifying their responses to this 'agree/disagree' question. For example, some of those who expressed agreement were nevertheless concerned about some elements of the proposals or sought further clarity on some issues. By contrast, some of those who expressed disagreement were supportive of some of the aims of the proposals, if not all of the proposals themselves. We have set out below our qualitative analysis of the comments received on the proposals, by theme.

⁴ The OfS's regulatory framework is available at www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/.

19. Our response focuses on that qualitative analysis and not on the simple numerical analysis set out in the charts below.

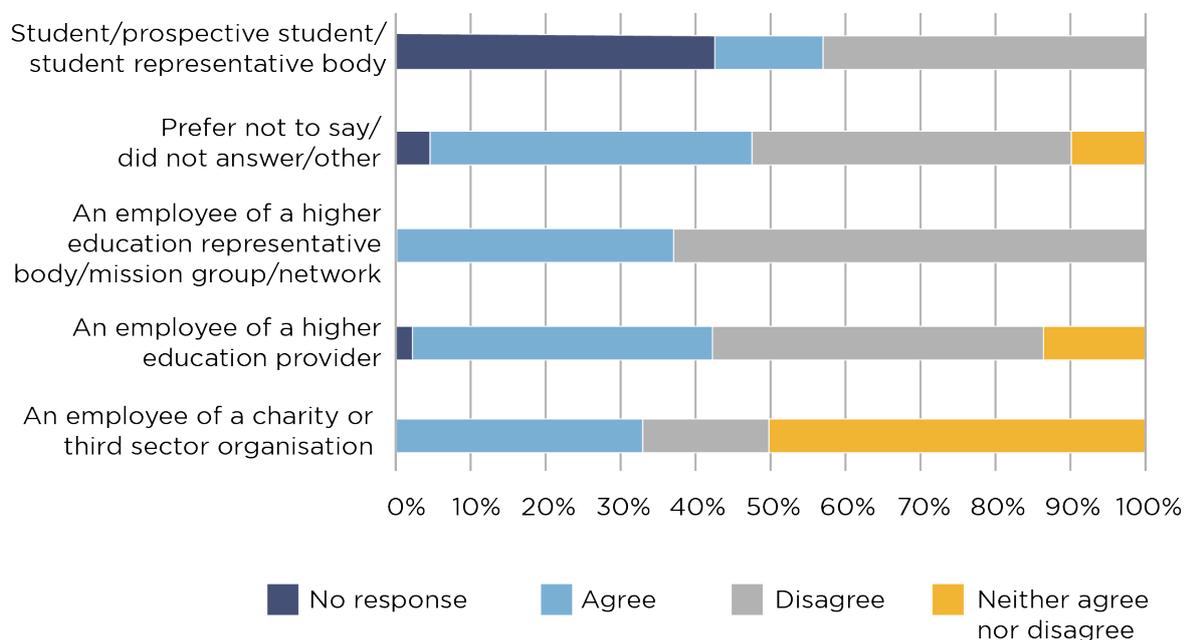
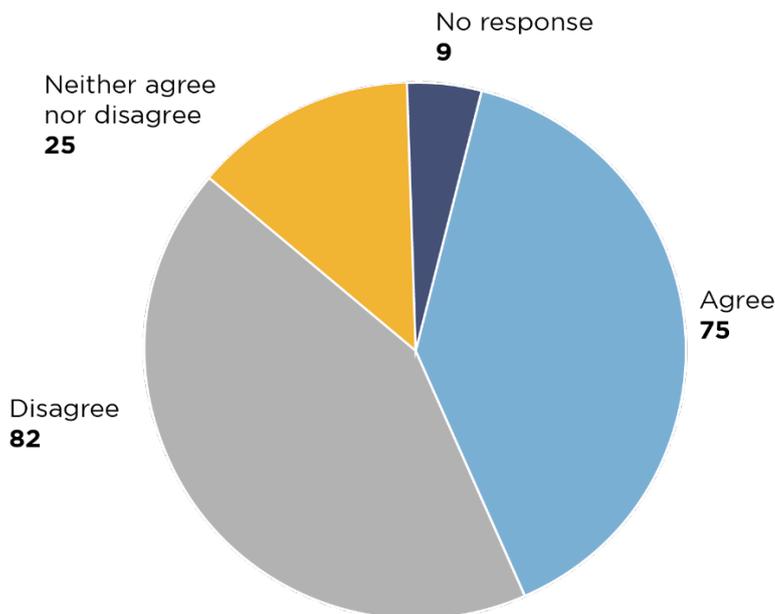


Data: agree/disagree with the proposals for implementation

20. Respondents were also asked whether they agreed or disagreed with the proposals for implementation of the proposed new general ongoing condition of registration.

21. In the charts below, we show the proportion of respondents who said they ‘agreed’, ‘disagreed’, ‘neither agreed nor disagreed’ or did not reply to the question, broken down by category of respondent.

22. It is important to note that the majority of respondents provided detailed commentary in relation to this question. We have set out below our qualitative analysis of the comments received on the proposals, broken down by theme. Again, our response focuses on that qualitative analysis and not on the simple numerical analysis set out in the charts below.



The OfS’s statutory duties and regulatory remit

23. In commenting on the proposals, many respondents referred to the OfS’s statutory duties and regulatory remit. The OfS’s general duties are set out in section 2 of the Higher Education and Research Act 2017 (HERA) and these are reproduced in Annex B.

24. Some respondents argued that the OfS was over-reaching its regulatory remit and seeking to regulate areas, such as anti-competitive practices and consumer law issues, which fall within the remit of other regulatory bodies. Some considered the proposals to be a disproportionate response to the coronavirus pandemic. A few respondents suggested that the OfS was using the pandemic as an opportunity to obtain further powers, which it would then be reluctant to relinquish, and that the OfS was being politicised in seeking to regulate admissions issues. Some referred to the recent moratorium on unconditional offers (offers which are not conditional on future academic attainment) imposed by the UK government.
25. Many of the comments referred specifically to issues of institutional autonomy, particularly in relation to institutions' decision-making powers and freedom to determine their own admissions criteria. Some respondents expressed concern that the proposals would inhibit institutional autonomy and fetter institutions' ability to react to the pandemic in an effective way. Other respondents went further, suggesting that the proposals did not demonstrate that the OfS has had regard to the need to protect institutional autonomy, as required by HERA, or even that the proposals would be inconsistent with HERA (which some respondents considered imposes an absolute duty on the OfS to protect institutional autonomy).
26. Some respondents disagreed with the OfS's judgement, set out in the consultation document, that the student interest outweighed the autonomy of institutions in the exceptional circumstances of the coronavirus pandemic. Some suggested that the student interest is best protected by institutions being able to act autonomously in the interests of their respective students and that the OfS is not best placed to determine what is in the student interest.

Response

27. The OfS has a number of general duties set out in section 2 of HERA, which the OfS is required to 'have regard' to. It is well-established that this statutory formulation does not impose an obligation to achieve the stated outcome in each duty;⁵ rather, the OfS is required to have regard to each of them and afford them rational weight in performing its functions.
28. The 'have regard' wording is of critical importance as it means that we have to consider each duty when we decide whether and how to act. We must weigh each of the duties against one another and decide how to balance any tensions that exist between the different duties.
29. This means that HERA does not impose an absolute obligation on the OfS to protect the autonomy of higher education providers. Section 2(8) of HERA defines institutional

⁵ R (on the application of Baker & Ors) v SSCLG [2008] EWCA Civ 141; [2009] PTSR 809

autonomy by including in that definition matters relating to admissions, but the OfS may nevertheless seek to regulate providers' admissions practices.

30. In reaching a final decision to implement condition Z3, the OfS has had regard to its general duties as set out in section 2 of HERA. We consider that the general duties referred to in section 2 (1) (a), (b), (c), (d), (e) and (g) are of particular relevance here. These relate to institutional autonomy, quality and choice, promoting competition between higher education providers, value for money, equality of opportunity and best regulatory practice.
31. In implementing condition Z3, we have given particular weight to achieving competition where that is in the interests of students. We have also given weight to quality because significant unplanned expansion in some providers and contraction in others raises risks to quality for students. In the exceptional circumstances of the coronavirus pandemic, our judgement is that the interests of students outweigh the autonomy of providers, including in relation to certain admissions matters, in a way that in more usual times might not be the case. However, we also consider that condition Z3, when compared to the original proposals set out in the consultation, has significantly less of an impact on providers' autonomy.
32. We have considered the interests of current students, which are likely to be served by stability across the sector, to ensure that as many existing providers as possible are able to mitigate the financial risks raised by the pandemic such that they can continue to deliver high quality courses. This may sit in tension with the interests of the cohort of students making choices about what and where to study in the 2020-21 and 2021-22 academic years as, for some of these students, less regulatory control over the admissions system might provide greater choice. Beyond 2020-21, the interests of future students are likely to be served by regulatory interventions to preserve the stability and integrity of the sector so that a wide range of providers continue to exist to support student choice and quality.
33. The sector has been working to resolve the issues that we seek to address through condition Z3 on a voluntary basis; specifically, we note the Fair Admissions Agreement published by Universities UK (UUK).⁶ We consider that relying on providers to follow guidance voluntarily as best practice is not in itself sufficient to address our concerns, which are explored in further detail in the section on 'Scope and purpose' below.
34. The OfS is independent of government. However, section 2(3) of HERA requires us to have regard to guidance given to us by the Secretary of State and we have done so in formulating and implementing condition Z3. Specifically, we have had regard to the following guidance:

⁶ See UUK's Ensuring a fair admissions process for 2020/21 entry in England and Wales: <https://www.universitiesuk.ac.uk/covid19/admissions/Pages/Ensuring-a-fair-admissions-process.aspx>

- a. **Statutory Guidance to the Office for Students – Priorities for the Financial Year 2018-19**, dated 20 February 2018, including the request for the OfS to monitor the use of unconditional offers
 - b. **Statutory Guidance to the Office for Students – Priorities for the Financial Year 2019-20**, dated 27 February 2019, including reference to keeping under review provisions in the regulatory framework dealing with provider market and financial sustainability
 - c. **Statutory Guidance to the Office for Students – Additional Priorities for the Financial Year 2019-20**, dated 7 June 2019, which notes concern with the admissions process and a disturbing use of unconditional offers
 - d. **Statutory Guidance to the Office for Students – Ministerial Priorities from the Secretary of State**, dated 16 September 2019, requesting that the OfS continues its review of admissions and in particular the “injudicious use of unconditional offers”, as well as seeking to empower students as consumers.
35. We note that ministers have made other public statements about the higher education sector in the context of dealing with coronavirus. While we agree with the government’s views about the need to protect the interests of students and support the stability and integrity of the sector, for the avoidance of doubt we have not placed any particular weight on these statements⁷ (or otherwise given them any form of special treatment) in deciding to implement condition Z3 as they do not constitute guidance issued under section 2(3) of HERA. For the same reason, we have not placed any particular weight on, or given special treatment to, views expressed by ministers, advisors or officials since the launch of the consultation.
36. As we set out in our response to the section on ‘Scope’ below, we have narrowed the scope of condition Z3 to relate to certain offer-making and marketing activities only; the activities which we consider pose the greatest risk to the stability and/or integrity of the sector and to the student interest, in these exceptional times of the pandemic. In framing condition Z3, we have been mindful of the sector’s requests for greater certainty about the conduct which falls within the scope of the condition and for clarity about our regulatory expectations at this time. We do not however accept that our original proposals, as set out in the consultation document, would have been an over-reach of our regulatory remit.
37. Overall, we consider the implementation of condition Z3 to be proportionate and appropriate in the circumstances of the pandemic. We consider that it ensures that the OfS is able to balance the benefits of protecting students’ interests and ensuring the continuing stability and integrity of higher education providers, against the regulatory burden placed on providers.

⁷ See letters from the Minister of State for Universities: www.officeforstudents.org.uk/advice-and-guidance/coronavirus/letters-from-the-minister-of-state-for-universities/.

Scope and purpose of the proposals

Stability and integrity

38. Many respondents acknowledged the importance of measures to maintain the stability and integrity of the English higher education sector during the current coronavirus pandemic. Some respondents considered that the proposals were an appropriate mechanism to do that. Amongst other things, they highlighted the importance of putting the student interest at the heart of the admissions process and supported the regulation of 'unfair' marketing and recruitment practices, referring to unconditional offer-making activity in particular.
39. Other respondents suggested that the proposals did not go far enough to address issues such as the impact of coronavirus on the ability of lower tariff providers and colleges that deliver higher education under partnership arrangements with universities, to recruit higher education students.

Breadth and scope

40. Many respondents, whilst often acknowledging the importance of maintaining the stability and integrity of the sector and in some cases agreeing with the proposed introduction of a new ongoing condition of registration, were critical of the proposals as described in the consultation document. Common themes emerging from many of the consultation responses were that the proposals:
 - a. were too wide in scope and a disproportionate response to the issues set out in the consultation
 - b. failed to take into account the diversity of the sector, including part-time and postgraduate provision and providers that operate multiple start dates and/or do not use the admissions service provided by the Universities and Colleges Admissions Service (UCAS)
 - c. failed to take into account different student groups and their diverse interests, and wrongly assumed that the OfS was best placed to determine what is 'in the student interest'
 - d. lacked sufficient detail about the conduct that may indicate compliance or non-compliance with the proposed condition
 - e. lacked clarity about the ways in which the OfS would make regulatory judgements under the proposed condition, with a risk of inconsistent and unfair decision-making by the OfS
 - f. should require more than '*in the opinion of the OfS*' to determine whether matters could reasonably have a material negative effect on stability and/or integrity
 - g. were unnecessary because the OfS's existing regulatory powers, existing legislation and/or other existing arrangements are sufficient to deal with the

issues set out in the consultation. (Some respondents referred specifically to the government's undergraduate student number controls for 2020-21 and to UUK's voluntary fair admissions agreement, which those respondents considered to be more appropriate mechanisms through which to maintain the stability of the sector. A few respondents appeared to have conflated the OfS's proposals with the UK government's student number controls or at least used the OfS's consultation as an opportunity to raise concerns or ask questions about those student number controls)

- h. were an inefficient use of the OfS's resources, including because the proposals would be difficult to enforce and likely to be subject to legal challenge, and were diverting the OfS's resources away from other important functions such as the registration of providers.
41. Many respondents expressed concern about the perceived breadth of the definitions of 'Conduct' and 'Stability and/or Integrity' in the proposals, including the reference to '*a similar pattern of behaviour by more than one provider*' within the former. Some providers suggested that the proposals were seeking to hold them responsible for the actions of other providers and noted that they often did not know what approach other providers took to admissions and so could not know in advance if their actions would constitute a pattern of conduct.

Suggestions for narrowing scope

42. Many respondents suggested narrowing the scope of the proposed condition. Suggestions included:
- a. exempting providers which offer open entry or postgraduate-only courses
 - b. focusing only on admissions practices
 - c. focusing only on certain aspects of the admissions system, such as undergraduate admissions or UK/EU undergraduate admissions
 - d. focusing only on activity that took place in response to the coronavirus pandemic
 - e. removing the references, within the definition of 'Conduct', to '*a similar pattern of behaviour by more than one higher education provider*'
 - f. setting de minimis levels of unacceptable conduct or addressing 'extreme' practices only
 - g. excluding consideration of the misuse of government coronavirus funds (given that those funds are already subject to government-imposed conditions).

Impact on the admissions system

43. Many of the responses commented specifically on the potential impact of the proposals, and wider policy changes, on the admissions system in England. Some respondents were concerned that the proposals would limit student choice and many

commented on the impact of the proposals on unconditional offer-making practices. A few respondents expressed support for unconditional offers generally, whilst many more suggested that unconditional offers may be appropriate in certain circumstances, particularly for certain students (such as those with disabilities or from other underrepresented groups)⁸ or for certain courses, for example those in the creative and performing arts which assess applicants by portfolio, audition or interview.

44. Many respondents commented on the references within the proposals to the withdrawal of existing unconditional offers which had not yet been accepted. A small number of providers supported the withdrawal of unconditional offers made in response to the coronavirus pandemic. However, many respondents expressed concern about the withdrawal of existing offers, for reasons which included that withdrawal would:
- a. create more uncertainty for students at what is already a very challenging time
 - b. impact the mental health and well-being of affected students
 - c. discourage affected students from progressing to higher education, particularly those from underrepresented groups
 - d. penalise students who had taken time to consider their different choices and so had not yet accepted their offers (whilst students who had accepted their offers straight away would not be affected)
 - e. be contrary to consumer law
 - f. be unfair to providers who had acted in good faith and without contravening any regulatory requirements at the time that they made those offers
 - g. damage trust and confidence in the sector.
45. Some respondents expressed concern that the proposals would affect providers' ability to use bursaries, scholarships and other support mechanisms for students. These were seen as being appropriate in some circumstances, particularly for students from underrepresented groups.
46. In fact, many respondents suggested that the proposals would reduce providers' willingness to use contextual admissions, for fear of contravening the proposals. Some respondents also suggested that the proposals would interfere with providers' ability to deliver their OfS approved access and participation plans⁹ and broader widening participation activities (including the use of bursaries and other 'incentives' and

⁸ The OfS uses the term 'underrepresented groups' as the focus of our access and participation activities. This term includes students from areas of lower higher education participation, lower household income and/or lower socioeconomic status groups; some black, Asian and minority ethnic (BAME) students; mature students; disabled students and care leavers. In this document, we use the term 'underrepresented groups' to refer to one or more of those groups.

⁹ For more information on access and participation plans, see www.officeforstudents.org.uk/advice-and-guidance/promoting-equal-opportunities/our-approach-to-access-and-participation/.

providers' ability to adjust entry requirements for certain student groups). These issues are considered in more detail in the section on 'Equality, diversity and inclusion' below.

47. Some respondents also suggested that the proposals would affect the ability of providers in England to attract international students, noting in particular concerns that providers would be prevented from offering fee discounts or adjusting English language requirements where the coronavirus pandemic had disrupted English language testing procedures.

Compliant and non-compliant conduct

48. A common theme in many of the responses was a request for more guidance and detail on the sorts of conduct that the OfS would consider likely to comply, or not comply, with the proposed condition. Some respondents referred to some specific conduct and sought express confirmation from the OfS about whether such conduct would or would not fall within the scope of the proposals. Some key themes were:
 - a. circumstances in which unconditional offers, or offers with lower or reduced entry requirements, are acceptable
 - b. whether providers could be flexible in their treatment of private A-level candidates (given concerns around the treatment of those candidates in the Ofqual-awarded grades process)
 - c. whether approaches to contextual admissions, and broader widening participation activities, remain acceptable
 - d. whether the offer of financial support, such as bursaries or scholarships, and IT equipment is acceptable, including for students from underrepresented groups and for postgraduate students
 - e. acceptable provider conduct during the UCAS clearing process (particularly in light of the introduction of Clearing Plus), including the acceptability of accommodation guarantees
 - f. the use of incentives (for example, accommodation guarantees, reduced postgraduate fees for alumni, fee discounts to attract international students)
 - g. approaches to the recruitment of international students
 - h. exemptions for foundation year, partner college and articulation agreements (by contrast, some respondents considered that the use of foundation years to 'compensate' for the impact of coronavirus on students should be monitored).
49. Several respondents commented on the reference to '*bypassing, or seeking to bypass, the admissions processes of the University and Colleges Admissions Service (UCAS), where the provider would normally use UCAS processes*' in the list of potentially non-compliant behaviours in the proposals. Some respondents expressed the view that undergraduate admissions outside UCAS should only be allowed where providers are

not UCAS customers or the individual application is exempt under UCAS terms of service. Some referred to the Record of Prior Acceptance process¹⁰ and queried whether that would be permitted under the proposed condition. Some respondents also commented that UCAS should not be seen as the only acceptable undergraduate admissions route and that providers should be able to use other application routes if they wished.

Other issues

50. A few respondents referred to the, currently paused, admissions review which the OfS launched in February 2020. Some encouraged the OfS to re-start that review whilst others noted the 'open-minded' sentiments expressed by the OfS in that review and questioned whether the proposals in this consultation contradicted such a stance.
51. Finally, some respondents expressed concern about the impact of the proposals on providers which operate across the other UK nations, suggesting that a divergence of regulatory approach across the UK would be unhelpful. A few providers suggested that the proposals might disadvantage them when competing with providers in the other UK nations.

Response

Focus on certain offer-making and marketing activities

52. We acknowledge that many of the issues that we identified in the consultation document relate to admissions activities. We also note the concerns raised by respondents about the broad scope of the proposals and their requests for greater clarity about the conduct that may potentially breach the condition.
53. We recognise that the coronavirus pandemic has created exceptional circumstances for the sector. It is appropriate, and proportionate, for us to focus our attention on the areas that we consider pose the greatest regulatory risk in those exceptional circumstances. We have therefore decided to frame condition Z3 so that it relates only to certain offer-making and marketing activities, which we consider pose the greatest risk to the stability and integrity of the sector and to the student interest. For the reasons set out below, we consider that our existing regulatory powers, and other existing measures, are not sufficient to address the risks that we have identified.
54. This, more rules-based, approach is not an indication of the approach we would be likely to take in more normal times. Indeed, the OfS's regulatory approach is purposefully designed to be principles-based because the higher education sector is complex and diverse, and the imposition of a narrow rules-based approach would risk leading to a compliance culture that stifles diversity and innovation.

¹⁰ See UCAS Undergraduate Admissions Guide for entry to university or college in 2020, page 19: <https://www.ucas.com/file/272141/download?token=MEYI9ays> [PDF].

55. In condition Z3, we have set out an overarching principles-based prohibition in relation to conduct that in the reasonable opinion of the OfS could be expected to have a material negative effect on the stability and/or integrity of the English higher education sector. This prohibition is framed narrowly in relation to: (i) unconditional offer-making practices¹¹ for UK domiciled applicants; and (ii) forms of advertising or marketing.
56. Within this overarching prohibition, there are two specific categories of conduct:
- a. Conduct that is prohibited in all circumstances
 - i. Unconditional offers made to UK-domiciled applicants where the unconditional element is conditional on making the provider the first (or only) choice
 - ii. Making false or misleading statements about other providers
 - b. Conduct that is permitted in all circumstances
 - i. Unconditional offers made to UK-domiciled applicants in certain circumstances
 - ii. Adjusting entry requirements for certain groups of applicants for purposes relating to equality of opportunity.
57. It follows that any form of unconditional offer-making practice for UK-domiciled applicants, or form of advertising or marketing, which does not fall into a. or b. above, falls to be considered under the overarching principles-based prohibition set out in condition Z3 and referred to above.
58. The effect of this structure for the condition is that we are identifying particular common offer-making practices about which providers have sought clarity, whilst retaining a principles-based approach that requires us and providers to make good judgements about the broader application of the condition to other types of unconditional offers and marketing activities. The context in which an offer is made is important in determining whether or not it has a de-stabilising effect or is in the interests of students, and it is not possible to reflect every different context in drafting the condition. In drafting the condition, we have sought to balance the sector's requests for clarity and certainty, with a need to retain sufficient flexibility to reflect a very diverse sector.
59. Condition Z3 will take effect from the date of publication and this is considered under 'Retrospectivity' below. The OfS will not take enforcement action in respect of unconditional offers made, or any failure to withdraw existing unconditional offers which had not yet been accepted, before the date that the condition is published. However, the definition of 'conduct' in condition Z3 is expressly clear that pre-existing offers and contracts are subject to the condition for future purposes (but not in respect of whether

¹¹ 'Unconditional offer' is defined within condition Z3 to include offers which are conditional but with very low attainment requirements, such that it is tantamount to an offer without conditions.

the provider should have withdrawn such offers or terminated such contracts before the condition comes into effect).

60. When making regulatory judgements under condition Z3, we are also concerned about conduct by one provider which may not have a material negative effect on the stability and integrity of the sector on its own but could do so if it was replicated by others (whether or not it is so replicated). In deciding whether to act, or not to act, a provider need not assess the likelihood of others following suit. The provider need only consider the possible negative effects on stability and integrity if other providers did follow suit. This is set out on the face of condition Z3.
61. We have previously made clear that recent rises in unconditional offer-making, particularly 'conditional unconditional offers' where the unconditional offer is contingent on the applicant accepting the provider as their first (or only) choice, is a matter of concern.¹² Our concerns are more acute in these exceptional times, where the uncertainties created by coronavirus may exacerbate the pressure placed on applicants to make decisions that may not be in their best interests; in these uncertain times, applicants may be even more swayed by an unconditional offer, with the perceived certainty that it creates, whereas a conditional offer for a course at another provider may actually be better suited to their needs. The use of unconditional offers may also be anti-competitive; providers that have decided not to use them because they consider that they do not work in students' best interests, may attract fewer applications and so recruit fewer students, compared to providers that do use them. In that way, widespread use of unconditional offers could have a de-stabilising effect on the sector.
62. Only unconditional offers made to UK-domiciled applicants fall within the scope of condition Z3. We recognise that offer-making practices for international applicants (including those from the EU) may be different to those used for UK-domiciled applicants, reflecting the diversity of international applicants. We also recognise the important contribution that international students make to the English higher education sector and that it is essential for providers to be able to attract suitably qualified international students to study in England. In implementing condition Z3, we have balanced the need for providers to remain competitive in attracting international students with the need to protect the interests of international applicants and students.
63. The use of unconditional offers and 'attainment offers' is one of the issues that we are exploring through our, currently paused, admissions review. We intend to resume that review as soon as practicable and condition Z3 is not intended to cut across that review or to pre-empt our longer-term regulatory approach to admissions issues. However, given the exceptional circumstances now facing the sector, we consider that it is essential that we act now, to safeguard the student interest and to protect the stability and integrity of the sector, through the implementation of the time-limited condition Z3.
64. However, we recognise that the use of unconditional offers is a well-established practice in relation to creative courses, such as art, music and drama, where the

¹² See www.officeforstudents.org.uk/publications/unconditional-offers-serving-the-interests-of-students/.

aptitude and potential of applicants is assessed by audition or portfolio. We also recognise that unconditional offers can be appropriate where applicants have already obtained their Level 3 (for example, A-levels) qualifications or are able to provide evidence of prior (experiential) learning. Providers may also wish to use unconditional offers (to adjust the terms of existing offers) for private A-level (or equivalent) candidates who will not receive calculated grades in summer 2020, following the cancellation of examinations. Therefore, we have set out, on the face of condition Z3, that unconditional offers made in these contexts are permitted. In doing so, we have reflected the diversity in admissions processes in our framing of condition Z3 and have created the certainty that the sector requested.

65. Condition Z3 expressly permits the continued use of contextual offer-making practices.
66. Condition Z3 prohibits providers from making false and misleading statements about other providers. In our view, the uncertainties created by the pandemic, not least the potential impact on applicant numbers, increase the risk of this sort of conduct. For that reason, we consider it appropriate to expressly prohibit this conduct on the face of condition Z3, even though it would not be acceptable in more normal times in any event. This express prohibition sets out clearly our regulatory expectations in this regard and provides us with obvious regulatory levers to act quickly, should such conduct occur.
67. In the consultation document, we set out examples of conduct that we considered may indicate non-compliance with the proposals. We have not replicated that full list in condition Z3. In part, this reflects the fact that we have taken a more rules-based approach to condition Z3 and it is focused more specifically on certain admissions-related activities which we consider pose the greatest risk to the stability and integrity of the sector and the student interest, in these exceptional times. Our approach does not mean that we will take no regulatory interest in the matters referred to in the consultation document. Nor does it mean that we will not seek to take regulatory action under our existing regulatory powers where we consider that to be appropriate. We consider that issue further below.
68. In the section on 'Enforcement' below, we have explained how the OfS will make regulatory judgements about compliance with condition Z3.

Alternatives to implementing condition Z3

69. Many respondents commented that the issues identified by the OfS in the consultation could be addressed through the OfS's existing regulatory powers or through other existing measures, such as UUK's fair admissions agreement or the UK government's student number controls.
70. The scope of condition Z3 is now narrower than that set out in the proposals; we focus on the areas that we consider pose the greatest risk to the stability and/or integrity of the sector, and to the student interest, in these exceptional times, whilst also being mindful of the sector's requests for more certainty about the circumstances in which we will take regulatory action. In deciding to implement condition Z3 in this form, we

considered whether the regulatory risks that we seek to mitigate, though the condition, could be mitigated through other existing measures.

71. We remain of the view that enhanced monitoring – where we would rely on providers following guidance voluntarily – would not be sufficient to fully protect the stability of the sector and the interests of students at this challenging time. The conduct that we are seeking to address through condition Z3 could have a potentially significant consequences for the stability and integrity of the sector, and we consider that we must go further than simply relying upon providers' adherence to voluntary arrangements.
72. For that reason, we also consider that, whilst the UUK fair admissions agreement may complement condition Z3, it would not be sufficient by itself to address all the issues that we have identified. In part this is because, as we note above, we consider that relying on voluntary arrangements would not be sufficient to fully protect the interests of students at this challenging time. We note that the immediate reaction of some providers to the pandemic was to convert significant numbers of offers made to students that were conditional on A-level (or equivalent results) in summer 2020, to make them unconditional offers. We have also been asked a range of questions by providers during the moratorium and the consultation period on this condition, that indicated their wish to make further unconditional offers. Furthermore, we have not seen widespread formal public commitment from individual UUK members to the fair admissions agreement and many providers on the OfS Register are not UUK members in any event. We also note that the UUK agreement refers only to recruitment for 2020-21 and, for the reasons set out in the section on 'Sunset clause' below, we consider that the condition should also apply to admissions for 2021-22.
73. We have also considered whether existing ongoing conditions of registration would be sufficient to meet the OfS's objectives of securing the stability and integrity of the English higher education sector in these exceptional times. We have concluded that they would not.
74. The existing ongoing conditions most likely to be relevant to the regulatory risks that we are seeking to address through condition Z3, are conditions B2 and E2. Under condition B2, all registered providers must provide all students, from admission through to completion, with the support that they need to succeed in and benefit from higher education. The guidance provided with condition B2 indicates that providers should have a reliable, fair and inclusive admissions system and should support students to achieve successful academic and professional outcomes. We are concerned that, in the exceptional circumstances of the pandemic, providers may engage in the widespread use of unconditional offers or the inappropriate switching of existing conditional offers to unconditional offers, to increase their student numbers. Some providers may seek to put undue pressure on students to accept offers by imposing conditions on those offers. Our view is that the other regulatory mechanisms available to us, for example the use of the E conditions considered below, or of condition B2, would not allow us to directly address this conduct without significant debate with individual providers – we do not consider that such extended debate about compliance

concerns would be in the interests of students, particularly in the current environment, and the imposition of condition Z3 provides necessary clarity.

75. We have also considered whether we could meet our regulatory objectives through use of the current E conditions. However, they relate to the management and governance arrangements and practices of a particular provider, and do not cover the relationship or interdependence of providers across the sector. For example, under condition E1, the public interest governance principle of accountability relates to a provider's ability to operate openly, honestly, accountably and with integrity and that the provider demonstrates the values appropriate to be recognised as an English provider. The principles do not regulate the interaction between providers, nor do they require providers to consider whether their conduct, if replicated by other providers, could have a de-stabilising effect on the sector. We do not therefore consider that reliance on those conditions would be sufficient in the current circumstances.
76. Likewise, reliance on condition D would not be targeted at the conduct the OfS wishes to guard against through condition Z3. Condition D would be focused on a provider that was not financially viable or sustainable, where in fact the OfS wishes to be able to take action against providers whose actions could cause financial distress to others.
77. In these exceptional times, it is essential that the interests of students, as consumers, are protected. All registered providers are already subject to ongoing conditions of registration relating to student protection (the 'C conditions') which require, amongst other things, providers to have due regard to guidance on consumer protection law issued by the Competition and Markets Authority (CMA). Furthermore, the OfS has recently published guidance about its approach to the regulation of student and consumer protection during the period of disruption resulting from the coronavirus pandemic.¹³ We consider that condition C1 by itself – with its emphasis on demonstrating a due regard to guidance – does not go far enough to address the regulatory risks created by certain offer-making practices in the current circumstances. However, using condition Z3 and ongoing condition C1 in combination will allow the OfS to regulate a provider's offer-making and marketing practices, in the student interest and to protect the stability and integrity of the English higher education sector.
78. Another alternative to the imposition of condition Z3 that the OfS has considered is making use of targeted specific conditions in relation to particular providers. The benefit of this approach might be said to be a reduction of the regulatory burden on those providers acting in a way that does not materially affect the stability and integrity of the sector. However, we consider that the narrower scope, and the rules-based elements, of condition Z3 have already minimised any regulatory burden. This issue can also be further addressed by the way we monitor the condition. That is, we do not envisage any universal, sector-wide monitoring relating to the condition Z3. We would instead impose more specific targeted monitoring requirements where we become aware of an increased risk of a particular provider acting in a way that is not compliant with the

¹³ Available at www.officeforstudents.org.uk/publications/guidance-for-providers-about-student-and-consumer-protection-during-the-pandemic/.

condition. So, if a provider were not behaving in a manner contrary to condition Z3, we do not consider it would suffer any additional monitoring burden.

79. The other benefit of imposing a general ongoing condition for all providers, rather than waiting to impose a specific condition on a particular provider when we become aware of an issue, is that the OfS can act in a more agile way to address conduct that could otherwise lead to severe consequences both for providers and students. Relying on the use of specific conditions could cause delays to students receiving the benefit of the proposed regulation, because the OfS would necessarily not be taking steps to impose a condition until after a specific risk relating to a provider had occurred and, even then, only after following the statutory process for imposition of a specific condition.
80. For the same reasons, and because we are not aware of any evidence to suggest that the conduct we are concerned about would be limited to certain categories of the OfS Register, or providers of a particular type, we feel it appropriate to apply condition Z3 to all registered providers, rather than any specific category or type of provider.
81. As we note above, some respondents suggested that the UK government's student number controls would be sufficient to address the OfS's concerns set out in the proposals. In our view, the student number controls alone are unlikely to be sufficient to address the potential instability that could result from the response to the coronavirus pandemic or conduct that harms students' interests that could lead to that instability, and which we seek to address through condition Z3. The student number controls apply only for the current admissions cycle (for 2020-21) and to providers that are registered in the Approved (fee cap) category of the OfS Register. However, for the reasons set out in this document, we consider that the condition should apply to all registered providers and should extend to the next admissions cycle (2020-21 for entry in 2021-22).
82. Furthermore, the UK government's student number control still allows for growth in student numbers. Condition Z3 will regulate the conduct of providers, even where they are acting within that number control, in respect of their offer-making and marketing practices, to safeguard the student interest. Enforcement of the student number control itself is a matter for the government.
83. In conclusion, therefore, we consider that our existing regulatory powers and other existing measures are not, by themselves, sufficient to safeguard the interests of students and the stability and integrity of the sector, in these exceptional times.

Impact on other UK nations

84. In implementing condition Z3, we have also considered the implications for admissions in Scotland, Wales and Northern Ireland, though our regulatory remit only extends to English providers.
85. We acknowledge that the implementation of condition Z3 in England reflects a different approach to that being taken in Scotland, Wales and Northern Ireland. Education, including higher education, is a devolved power and the governments in those other

nations determine their own higher education policy and approach to regulation. Therefore, there is already divergence in the regulatory approach to higher education across the UK.

86. We consider that the implementation of condition Z3 is a necessary and proportionate means to protect the interests of students of English higher education providers and the stability and integrity of the English higher education sector, in the exceptional circumstances of the coronavirus pandemic.

Retrospectivity

87. Many respondents commented on the retrospective elements of the proposals set out in the consultation document.
88. A minority of respondents expressed support for the retrospective elements as drafted, referring to the exceptional circumstances of the coronavirus pandemic and in some cases suggesting that it would offer some protection for providers, including further education colleges, which traditionally recruit later in the admissions cycle. Nevertheless, some of those respondents noted that the application of retrospectivity should not set a precedent for the OfS's future regulatory approach.
89. Many respondents were critical of the retrospective elements of the proposed condition. Some of those considered that any element of retrospectivity would be unfair, or even unlawful, and that providers' actions (or inactions) should only be assessed against the regulatory requirements that were in place at the time. Many respondents also expressed concern that the retrospective nature of the condition would require the withdrawal of existing offers that have not yet been accepted and we consider that issue in the section on 'Scope and purpose' above. A few respondents suggested that only breaches of the UK government's moratorium on unconditional offers should attract retrospective enforcement action by the OfS.
90. Many respondents suggested that, if the proposed condition was to have retrospective effect, this should not be from 11 March 2020, which was the date set out in the proposals. Some respondents commented that 11 March 2020 (the date that the World Health Organisation declared the coronavirus pandemic) had little relevance to the English higher education sector, and in some cases noted that government guidance on social distancing had not been published, and the UK 'lockdown' had not been imposed, until later.
91. Some respondents suggested that any element of retrospectivity should apply from a different date; common suggestions were 23 March 2020 (the date that the moratorium on unconditional offers was first announced by the UK government) or 4 May 2020 (the date that the OfS's consultation on stability and integrity was published). Some of those suggesting a different date disagreed with the principle of retrospectivity and were simply suggesting different dates in the event that the OfS decided to implement the proposals with a retrospective element.

Response

92. The retrospective elements of the proposals were primarily designed to prevent providers from taking action to avoid the regulatory impact of the proposed condition during the consultation period and before the proposed condition came into effect. They were also designed to take account of the conduct of some providers during and before the moratorium, some of which had been drawn to our attention by other providers. This aspect of the proposals would have enabled us to take enforcement action against inappropriate and destabilising conduct which occurred after 11 March 2020 and was still continuing when the condition came into effect.
93. We have refocused the condition on certain offer-making and marketing activities. Since the introduction of the government's moratorium on unconditional offers on 23 March 2020, and throughout the consultation period, we have not seen any significant conduct from providers that we would expect to fall within the scope of the condition. Therefore, we consider that the proposed retrospective elements of the condition are no longer necessary for the current circumstances. Condition Z3 will take effect from the date of its publication and will not include provisions to allow the OfS to take enforcement action in respect of unconditional offers made, or any failure to withdraw existing unconditional offers which had not yet been accepted, before the date that the condition is published. Nevertheless, we believe there could be circumstances in future that necessitate the introduction of a condition that has retrospective effect and do not accept that the inclusion of a retrospective element within a condition is necessarily inappropriate or unlawful.
94. Conduct, as now defined in condition Z3, is expressly clear that pre-existing offers and contracts are subject to the condition for future purposes, but not in respect of whether the provider should have withdrawn such offers or terminated such contracts before the condition comes into effect. This means that, for example, the switching of a conditional offer, which was made before the condition came into effect, to an unconditional offer, other than in the circumstances permitted within condition Z3, may be a breach of condition Z3 where that switching occurs after the condition comes into effect. It remains the case that, should a provider make an offer that is prohibited after the condition comes into effect, we would consider whether it would be appropriate to require that offer to be rescinded.

Sunset clause

95. Respondents expressed a variety of views about the time-limited nature of the proposals (the 'sunset clause').
96. Some respondents noted that the impact of coronavirus, including how long the current disruption caused by the pandemic is likely to last, remains uncertain. A few respondents concluded that the proposed condition should be imposed for a longer

time period, while others suggested that the one-year period set out in the proposals was likely to be too long.

97. Many respondents expressed concern that the one-year period would affect the 2020-21 admissions cycle (for entry in 2021-22) and suggested that this weakened the OfS's argument that the proposed condition was a response to the immediate issues caused by the coronavirus pandemic. Some commented that ending the condition half-way through the 2020-21 admissions cycle would create uncertainty for providers and applicants and may result in changed offer-making practices mid-cycle with associated risks of unfairness for applicants. Some respondents suggested that the proposed condition should end before 15 October 2020 (when the main UCAS undergraduate admissions service for applications during 2020-21 opens). Others suggested that it should end before 15 January 2021 (the 'equal consideration' deadline for undergraduate applications made through UCAS for 2021-22).
98. Many respondents also commented on the provisions within the proposals for extension of the initial time period of the proposed condition. Some requested further information about the circumstances in which the OfS might seek to extend the proposed condition and the criteria which the OfS would use to make that decision. Some also requested more clarity on the circumstances within which the condition might be extended, in some cases suggesting that the OfS should set out specific criteria and/or a timetable for consultation with the sector, and/or expressed concern that the provisions for extension signalled the OfS's intention to retain the proposed condition indefinitely. Some respondents suggested that the proposed condition should not include any provision for extension, in some cases noting the importance of balancing regulatory intervention with protection of institutional autonomy.
99. Some suggested that the OfS should undertake regular reviews of the continuing appropriateness of retaining the condition, rather than simply waiting until the end of the time period to review it.
100. There was also some support for ongoing regulation of admissions practices, with some respondents referring to the OfS's (currently paused) admissions review which was launched in February 2020.

Response

101. There is still significant uncertainty about the duration of the coronavirus pandemic and the effects that it may have on the English higher education sector. Condition Z3 is a response to that uncertainty and seeks to address providers' conduct in certain offer-making and marketing activities which may not be in the student interest and which may negatively impact the stability and integrity of the sector in these exceptional times of the pandemic.
102. It is becoming clear that the impact of the pandemic will be felt into the 2020-21 academic year, at least, and many providers have already indicated that much of their

provision will be delivered online in the autumn term of 2020-21. The OfS's own financial modelling indicates that the financial impact of coronavirus on providers will extend through the 2020-21 academic year. Some providers may seek to recover student numbers from any fall in the 2019-20 admissions cycle and the impact of the pandemic on applicant numbers in 2020-21 is unknown at this stage.

103. However, we are mindful of the concerns expressed through the consultation about the impact of a regulatory or policy shift mid-way through an admissions cycle, particularly given the type of offer-making practices on which condition Z3 now focuses. Therefore, condition Z3 will be in effect until 30 September 2021, and so will cover all, or the vast majority of, the 2020-21 admissions cycle.
104. We have noted concerns about the provisions for extension of the condition set out in the proposals. The condition is intended to be time-limited, a direct response to the coronavirus crisis, and we would not wish to use this condition to regulate providers' admissions practices over a longer term without further consultation with the sector. Given the time period over which the condition will now apply, we have decided to remove the extension provisions from the condition. This means that the condition will cease to be in effect on 30 September 2021.
105. Condition Z3 will allow the OfS to investigate and/or take regulatory action in respect of non-compliant conduct (whether or not it remains ongoing in nature) which took place whilst the condition was in effect. That provision was also set out in the proposals.
106. Some respondents referred to the OfS's currently paused admissions review which was launched in February 2020. It is our intention to re-start that review as soon as practicable. That review, and its outcomes, will inform our judgements about whether and where the OfS might focus further attention on admissions by considering our prioritisation framework and our general duties, and about where actions might fall to parties other than the OfS. We will conduct a public consultation should we propose to impose any additional conditions of registration in relation to admissions practices, as is required under section 5(5) of HERA.
107. Respondents encouraged the OfS to keep any new condition under review, and in fact the proposals included provisions which would have allowed the OfS to reduce the time period over which it applied. Those provisions are included in condition Z3. However, noting some respondents' concerns about a change in regulatory approach mid-way through an admissions cycle, condition Z3 requires us to undertake a public consultation before deciding whether or not to end the condition early. Just as we have now, we will consider the prevailing circumstances at the point of any review and the balance of our duties in considering those circumstances.
108. We acknowledge that many providers do not operate on a standard academic year basis, and/or have multiple start dates during a year. That is why we have placed a time limit on the condition rather than defining the time period by reference to particular admissions cycles. Where an applicant is recruited in the 2020-21 admissions cycle but subsequently defers their place until 2022, conduct of the provider which is within the

scope of the condition and which takes place before the condition ends on 30 September 2021 (or such earlier date as is subsequently applied) would remain within scope.

Equality, diversity and inclusion

109. In our consultation, we included specific questions asking respondents to comment on: (i) any unintended consequences of the proposals, for example for particular types of provider or for any particular types of student; and (ii) the potential impact of the proposals on individuals on the basis of their protected characteristics. The majority of respondents responded to those questions although many also included comments on these issues in their responses to the other questions.
110. Some respondents referred specifically to the potential impact of the proposals on individuals on the basis of their protected characteristics. However, many commented on equality, diversity and inclusion issues in a broader sense, referring to students from underrepresented groups rather than to specific protected characteristics. In this section and our response, we use the over-arching term 'underrepresented groups', which is the focus of our access and participation activities, rather than referring separately to applicants and students with protected characteristics.
111. 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 providers and mission groups provided detailed comments on the proposals. Common themes, which are considered in more detail below, included that:
- a. the proposals created uncertainty about which admissions practices fall within the scope of the proposals
 - b. the use of contextual admissions approaches would be restricted
 - c. there would be adverse impact on providers' ability to deliver their widening participation activities
 - d. specifically, there would be adverse impact on providers' ability to deliver their OfS-approved access and participation plans.¹⁴
112. Some respondents commented that the lack of clarity in the proposals would make providers more cautious in their approach to admissions and therefore more reliant on examination results alone, with a negative impact on students from underrepresented groups who have previously benefitted from more contextualised approaches to admissions. Many noted that contextual admissions approaches are an important element in supporting access to higher education for many student groups including those from underrepresented groups, students returning to higher education or mature students offered a place on the basis of work experience or other experiential learning.

¹⁴ For more information on access and participation plans, see www.officeforstudents.org.uk/advice-and-guidance/promoting-equal-opportunities/access-and-participation-plans/.

Respondents sought clarification on whether current approaches to contextual admissions would remain acceptable under the proposals and expressed the view that the proposals may restrict or curtail providers' use of contextual admissions.

113. Some respondents were concerned that the breadth and scope of the proposals may affect their ability to deliver their OfS-approved access and participation plans. Some providers considered that they would no longer have the required level of flexibility to respond in an appropriate and timely way to students' needs. Some providers also queried whether the proposals would mean that they would not be able to make changes to their existing access and participation plans.
114. Respondents also expressed concern about the impact of the proposals on access and participation activities, querying whether the elements of the proposals which sought to restrict the incentivisation of student choice were too broad.
115. In particular, many respondents queried whether they could continue to offer bursaries, scholarships or other financial support schemes to students from underrepresented groups. Some respondents also queried whether offers of guaranteed accommodation or provision of equipment, such as laptops to certain student groups, would be acceptable under the proposals, noting that there is likely to be an increase in online provision in 2020-21. Many respondents felt that their ability to support students from underrepresented groups would be significantly reduced if these sorts of measures were not permitted under the proposals.
116. Some respondents suggested that unconditional offers may be appropriate for students from certain groups, including those with mental health issues, and requested clarity on whether such offer-making practices would be permitted under the proposals. Many also suggested that the withdrawal of existing unconditional offers may impact particular student groups, including those with mental health issues or those from disadvantaged backgrounds who, respondents suggested, may then be put off from progressing to higher education altogether.
117. Some respondents also commented that the implementation of the proposed condition at a relatively late stage of the 2019-20 admissions cycle would disproportionately affect students from underrepresented groups as there is some evidence that they are more likely to make decisions later in the cycle.
118. A number of respondents noted the importance of information, advice and guidance for students. They suggested that changes to admission processes caused by the proposals would adversely impact those students without access to high quality information, advice and guidance, including many from underrepresented groups. Some respondents were supportive of the aims of the proposals in this regard, noting that students without access to proper advice through schools would be vulnerable to aggressive recruitment practices that may not be in their best interest, especially during the 2020 UCAS clearing process.

119. Providers also submitted some broader feedback around equality, diversity and inclusion concerns. Some felt that the impact on students from underrepresented groups was more likely to affect newer universities or further education colleges who may recruit a higher percentage of students from those groups, or students who wished to study locally.
120. Several providers also noted that they were keen to see the outcomes of the OfS's own equality impact assessment for the proposals.

Response

121. The OfS has legal duties under the Equality Act 2010 and the Public Sector Equality Duty, as well as 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'*.
122. We have undertaken an equality impact assessment (EIA) of the decision to impose condition Z3 and this is published on our website.¹⁵ In our EIA, we refer to our original proposals and consider how the changes that we have made to our approach, not least to the scope of condition Z3, mitigate the impact on equality, diversity and inclusion of those proposals.
123. The OfS's ambition is that future generations should have equal opportunities to access and succeed in higher education, and to achieve successful and rewarding careers. We have previously argued¹⁶ that contextual admissions could be further developed to make more radical progress towards narrowing the gaps between the most and least advantaged groups in higher education. We are reforming our regulation of access and participation to provide the time and flexibility that providers need to make a major change in progress.¹⁷
124. Many respondents expressed concern that the breadth and scope of the proposals may have a negative impact on access and participation activities. We have now framed condition Z3 to focus only on certain unconditional offer-making and marketing activities. We note that unconditional offer-making is not a normal part of contextual admissions. However, the definition of unconditional offers in condition Z3 also includes conditional offers with very low attainment requirements. Therefore, for clarity, we have also included an express provision, within condition Z3, to permit contextual offer-making practices.

¹⁵ Available at www.officeforstudents.org.uk/analysisresponsesz3/.

¹⁶ See OfS Insight brief: Contextual admissions: Promoting fairness and rethinking merit' – May 2019, available at www.officeforstudents.org.uk/publications/contextual-admissions-promoting-fairness-and-rethinking-merit/.

¹⁷ See www.officeforstudents.org.uk/advice-and-guidance/promoting-equal-opportunities/our-approach-to-access-and-participation/.

125. Given the narrower framing of condition Z3, other access and participation activities such as the offer or provision of financial or IT support to existing or prospective students from underrepresented or vulnerable groups,¹⁸ are not within scope.
126. In condition Z3, we refer to contextual offers in the broader sense, rather than more specifically in relation to commitments made by individual providers in their approved access and participation plans. This is, in part, because many OfS-registered providers are not required to have an approved access and participation plan; providers are only required to have an access and participation plan if they have eligible students on eligible courses and wish to charge higher tuition fees.
127. In our letter of 26 March 2020 to accountable officers of OfS registered providers, we made clear that we expect providers to seek to meet their commitments under approved access and participation plans for 2019-20 or 2020-21, and in particular to seek to deliver in full: (i) the financial commitments made to current students under a 2019-20 plan; and (ii) the financial commitments made to future students under a 2020-21 plan.
128. We have also previously stated that providers with uncommitted funding for outreach activities, that were cancelled as a result of the pandemic, may wish to consider diverting those funds towards other activities for vulnerable students.¹⁹ In doing so, we recognise that students from underrepresented and vulnerable groups may need financial support beyond the level initially set out in providers' access and participation plans.
129. In our letter of 26 March 2020, we also indicated that, after this pandemic period, we will assess how providers sought to meet their commitments in their access and participation plans, but in doing so will take into account the circumstances and assess whether a provider has made reasonable decisions that take into account the needs of students, especially students from underrepresented groups.
130. In our view, the implementation of condition Z3 should not affect the ability of providers to meet their commitments in their OfS-approved access and participation plans for 2019-20 or 2020-21.

¹⁸ The UK government has identified groups of students who will need particular support during the period of the coronavirus outbreak, and these include students from underrepresented groups and other vulnerable students, such as estranged students and those who live with people in high risk groups.

¹⁹ See common questions: www.officeforstudents.org.uk/advice-and-guidance/coronavirus/provider-guide-to-coronavirus/regulatory-requirements.

Monitoring, enforcement and sanctions

Monitoring

131. A number of respondents queried how the OfS would monitor compliance and non-compliance with the proposed condition.
132. Some respondents expressed concern that the proposals may encourage providers to report other providers to the OfS for what they considered to be 'unfair practices' and asked how the OfS would assess those reports. The role of students' unions in reporting undesirable practices to the OfS was also commented on, as were concerns that students' unions may be reluctant to report undesirable practice given that many rely on their providers for funding.
133. Some respondents queried how the OfS would monitor admissions activity outside the UCAS system. Some respondents commented more generally on the role of UCAS in monitoring compliance with the proposed condition. Some expressed concern about proposed changes to the UCAS terms of service and sought more clarity about the circumstances in which UCAS may report to the OfS potential breaches of the condition. Some respondents also commented that UCAS appeared to be assuming a regulatory role, which those respondents considered inappropriate because UCAS is a subscription service provider.

Enforcement

134. Some respondents suggested that the proposals lacked clarity about the ways in which the OfS would make regulatory judgements under the proposed condition, with a risk of inconsistent and unfair decision-making by the OfS. Some commented that the proposals should require more than '*in the opinion of the OfS*' to determine whether matters could reasonably have a material negative effect on stability and/or integrity of the sector.
135. Some respondents also questioned how the OfS would be able to reach sound judgements in the interest of students and whether the OfS's student panel and/or students would be consulted in making decisions about breaches of the condition.
136. Many respondents commented that the breadth and retrospective nature of the proposals could make them difficult, costly or resource intensive to enforce. Others expressed concern that the OfS would be able to take action against a broad range of activities which had not been specified, creating uncertainty about what conduct may breach the proposed condition and what conduct would not.

Sanctions

137. Many respondents commented on the references within the proposals to the sanctions that the OfS may impose in the event of a breach of the proposed condition. Common themes included:

- a. Sanctions imposed should be proportionate, with some suggesting that suspension of registration or de-registration would be too severe a penalty
- b. Requests for further information about how sanctions would be determined and imposed
- c. Queries about how monetary penalties would be calculated and what the money collected would be used for
- d. Clarification sought on how the proposals relate to the OfS's (currently paused) consultation on its approach to monetary penalties (some respondents noted that the OfS has not utilised monetary penalties to date and considered it to be inappropriate for the OfS to do so before that consultation has been concluded)
- e. Monetary penalties are not appropriate, particularly where providers are already in financial difficulties, and may cause further instability in the sector
- f. Monetary penalties are not in the student interest, and would not represent value for money for students, because they would be funded from student tuition fees
- g. There should be a clearly set out appeals process against the imposition of sanctions, including monetary penalties, with some suggesting that such a process should be independent from the OfS or that the appeals panel should contain representation from the senior leaders in the sector.

Response

Monitoring

138. Our approach to monitoring providers' compliance against the conditions of registration is set out in our regulatory framework.²⁰ The OfS uses a range of information including from providers through reportable events and data submissions, from third party notifications and from information shared by other bodies, including UCAS. We will take the same approach in relation to the monitoring of condition Z3.

139. UCAS routinely shares data with the OfS, through a formal data sharing agreement. The data provided to the OfS by UCAS is data that the OfS could require directly from individual providers. The provision of data to the OfS by UCAS ensures consistency in format and reduces the regulatory burden on individual providers. The OfS will use all relevant information that it holds, including any from UCAS, to inform its regulatory judgements about whether or not a provider is at increased risk of a breach, or has breached, condition Z3.

140. Interested parties, including students and students' unions, are encouraged to notify us of any matters that may be of regulatory interest to us. This includes matters that may

²⁰ The OfS's regulatory framework is available at www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/.

indicate a potential breach of condition Z3. These other sources of information will allow us to monitor the compliance of providers that do not use UCAS. Details of how to contact us are on our website.²¹ We have published a privacy notice which sets out what to expect when the OfS collects personal information, including as part of the notifications process.²²

141. We do not envisage making any universal, sector-wide, requests for information from individual providers in relation to monitoring compliance with condition Z3. We will instead impose targeted requirements where we become aware of an increased risk of a particular provider acting in a way that may not be compliant with the condition. So, if a provider is not behaving in a manner contrary to condition Z3, we do not consider it would be likely to experience any additional regulatory burden.
142. Monitoring of condition Z3 is a matter for the OfS, as the regulator of higher education in England, and not other parties.

Enforcement

143. The general principles-based prohibition in condition Z3 now refers to conduct which, in the reasonable opinion of the OfS, could be expected to have a material negative effect on stability and/or integrity. In reaching such an opinion, the OfS is making a regulatory judgement and is required to act reasonably as a matter of public law in any event. Any enforcement action that the OfS takes under condition Z3 will be proportionate, in accordance with the principles of public law.
144. Where the OfS makes a preliminary decision that a provider has breached condition Z3, we will provide a detailed written decision setting out our reasoning to the provider. This is the approach that we already take in relation to other regulatory judgements, such as a provisional decision to refuse registration or to impose a specific condition of registration. Providers will be given an opportunity to make representations in relation to our provisional decision of a breach of condition Z3 and in relation to any proposed sanction.
145. HERA sets out the process that we must follow if we decide to suspend registration or de-register a provider or to impose a monetary penalty. Under HERA, a provider may appeal to the First-tier Tribunal against a decision by the OfS to impose a monetary penalty or to de-register it.
146. Condition Z3 sets out clearly the conduct that we consider will and will not have a material negative impact on the stability and integrity of the sector. Framing the condition in this more rules-based way, as many respondents to the consultation requested us to do, provides greater clarity about the circumstances in which we may seek to enforce condition Z3.

²¹ How to notify the OfS about matters that may be of regulatory interest to us: www.officeforstudents.org.uk/contact/complaints-and-notifications/.

²² The OfS privacy notice is available at www.officeforstudents.org.uk/ofs-privacy/privacy-notice/.

147. Enforcement of condition Z3 is a matter for the OfS, as the regulator of higher education in England. Students and student representative groups responded to the consultation on the proposals. It is neither appropriate, nor permitted by HERA, for other parties, including students, to make regulatory judgements under the OfS's regulatory framework.

Sanctions

148. We remain of the view that existing sanctions available to the OfS, including the imposition of monetary penalties and, in some circumstances, suspension of all or part of the benefits of registration or deregistration, are appropriate means to address breaches of condition Z3.

149. We consider that monetary penalties are an appropriate sanction because the incentives to engage in conduct that breaches condition Z3 are largely financial. Condition Z3 allows the OfS to remove any financial benefit of conduct that breaches the condition. The ability of the OfS to issue monetary penalties was included in HERA in part to allow the OfS to address the potential financial gain to providers of acting in breach of OfS conditions of registration. This allows the OfS to take targeted action that is short of suspension of registration or de-registration.

150. We are bound by the requirements set out in HERA regardless of the outcome of our, currently paused, consultation on monetary penalties. We will resume that consultation as soon as practicable but are not prevented from issuing monetary penalties before that consultation is concluded. In the meantime, we will consider the appropriateness of issuing a monetary penalty, on a case by case basis. In doing so, we may have regard to the concepts and/or process set out in the monetary penalties consultation alongside consideration of our general duties and the relevant provisions of HERA.

151. When considering whether to impose a monetary penalty, we will act proportionately. We may take into account the financial circumstances of the provider and the potential impact on students when considering the imposition, level and payment terms of any monetary penalty. We will consider other options available to us including, for example, the imposition of specific conditions of registration.

152. Under HERA, a provider may appeal to the First-tier Tribunal against a decision by the OfS to impose a monetary penalty and the amount of the penalty.

153. Under HERA, monetary penalties received by the OfS must be paid to the UK government.

Regulatory burden

154. Some respondents commented that the proposals would place additional regulatory burden on providers, particularly small providers, during what is already a very challenging time. Some suggested that reporting requirements under the proposed condition should be minimal, to reduce any unnecessary burden. Some noted the OfS's

recent reduction in its regulatory requirements during the pandemic, which they welcomed, and expressed concern that the proposals may counter that.

155. Some respondents commented that decision-making at providers would become slower and more bureaucratic as they spent time trying to understand how to comply with the proposals, which would also impact on staff workload.
156. Some respondents also expressed concerns that the proposals may set a precedent for the future – with the introduction of additional conditions of regulatory requirements – resulting in future regulatory burden on providers.

Response

157. As we note above, we do not envisage making any universal, sector-wide, requests for information from individual providers in relation to monitoring compliance with condition Z3. We will instead impose targeted requirements where we become aware of an increased risk of a particular provider acting in a way that may not be compliant with the condition. So, if a provider is not behaving in a manner contrary to condition Z3, we do not consider it would be likely to experience any additional regulatory burden.
158. We have now framed condition Z3 to focus on some specific offer-making and marketing activities. Providing this additional clarity will allow providers to make decisions with greater confidence and without additional regulatory burden.
159. The more focused scope and time-limited nature of condition Z3 both act to reduce any regulatory burden; condition Z3 is a direct response to the coronavirus crisis, and we would not wish to use this condition to regulate providers' admissions practices over a longer term.

The consultation process for the proposals

160. Some respondents commented on the relatively short (three week) consultation period for the proposals, in some cases indicating that they felt this had not been sufficient time within which to frame a constructive response.
161. A small number of respondents also queried whether the OfS had sought views of students on the proposals.
162. Some respondents noted the timeframe set out in the proposals for the publication of the OfS's response ('late May or early June') and queried whether the OfS would undertake a rigorous analysis of consultation responses.

Response

163. The consultation period of three weeks was shorter than the period that we would ordinarily set for a consultation. This reflects the unprecedented circumstances that the higher education sector is currently facing. It was essential for the OfS to act quickly, to protect the stability and integrity of the higher education sector and to protect the interests of students, past, present and future.
164. We were particularly concerned that any unfair admissions practices during this crisis could particularly harm the chances of those applicants who are already more vulnerable, at a time when information, advice and guidance is less readily available than might normally be the case.
165. We received 191 responses to the consultation, the vast majority of which set out detailed comments upon the proposals. A number of these responses were received after the consultation deadline but were nevertheless considered by the OfS in our analysis. We responded positively to all requests for additional time and to permit submission of responses other than through the online form. Students and student representative groups were given the opportunity to respond to the proposals and a small number did so. The OfS directly engaged with the National Union of Students (NUS), which provided a consultation response by telephone. We also discussed the policy issues arising from the consultation at a meeting of the OfS board, whose membership includes the chair of the OfS's student panel. In our view, the number and substance of the responses received indicates a wide engagement with the consultation across the sector.
166. The OfS has undertaken a qualitative analysis of the responses received, and this is summarised by themes within this document. We have carefully considered every consultation response that we received.

Annex A: Condition Z3: Temporary provisions for sector stability and integrity

The following provisions collectively constitute general ongoing condition of registration Z3:

Scope of condition and general prohibition

1. This condition only applies to Specified Activities (see paragraph 6 for the definition of this expression and for other words and expressions that are defined for the purposes of this condition) and prohibits a provider from engaging in any form of Conduct which, in the reasonable opinion of the OfS, could be expected to have a material negative effect on the Stability and/or Integrity of the English Higher Education Sector.

Conduct treated in particular ways

Conduct prohibited in all circumstances

2. Without prejudice to the OfS's discretion in respect of whether or not to take any form of regulatory or enforcement action, the following descriptions of Conduct are, in all circumstances, deemed to have a material negative effect on the Stability and/or Integrity of the English Higher Education Sector for the purposes of paragraph 1:
 - a. the use of Unconditional Offers for the provision of higher education in circumstances where acceptance of that offer is subject to requirements (whether or not they could constitute terms and conditions of a contract) for a prospective or existing student to decide to make a provider their first or only choice of provider for higher education;
 - b. making false or misleading statements (including comparative claims) about one or more higher education providers with the object or effect of discouraging a prospective or existing student from accepting offers made by, or registering with, those higher education providers.

Conduct permitted in all circumstances

3. The following descriptions of Conduct are, in all circumstances, deemed not to have a material negative effect on the Stability and/or Integrity of the English Higher Education Sector for the purposes of paragraph 1 (but only to the extent that such Conduct does not fall within a description contained in paragraph 2):
 - a. the use of an Unconditional Offer in respect of a prospective or existing student who has already attained particular academic achievements which are at, or equivalent to, level 3 or above of the Regulated Qualifications Framework;
 - b. the use of an Unconditional Offer in connection with admissions policies and criteria which wholly or mainly require a prospective or existing student to demonstrate abilities in a practical way (including, but not limited, by any type of

- live performance or submission of evidence of abilities through videos, drawings, paintings, photographic pictures, audio recordings, or any other tangible object);
- c. the use of an Unconditional Offer in respect of a prospective or existing student who has already accredited prior learning (APL), or prior experiential learning (APEL), that can be accredited under academic regulations that were made and brought into force by the provider before 1 September 2019;
 - d. the use of an Unconditional Offer in respect of a prospective or existing student who meets all of the following requirements:
 - i. the student was a private candidate registered to take examinations for A-level qualifications (or other qualifications which are equivalent to level 3 qualifications for the purposes of the Regulated Qualifications Framework) in 2020; and
 - ii. was unable to take examinations for such qualifications before 31 August 2020 due to the coronavirus pandemic or obtain grades for such qualifications on an alternative basis as a result of arrangements put in place by the Office of Qualifications and Examinations Regulation (or, as the case may be, the equivalent body in Scotland, Wales or Northern Ireland); and
 - iii. is seeking admission to a higher education course which will commence before 1 September 2021;
 - e. The use of a Contextual Offer in connection with implementing any policy which could reasonably be considered as having the primary aim of promoting Equality of Opportunity.

Cessation of condition

4. Condition Z3 will automatically cease to have effect at 23:59 on 30 September 2021, unless (following a public consultation process) the OfS publishes a Notice to the effect that the condition ceases to apply on an earlier date.

Clarification on effect of cessation

5. Where condition Z3 ceases to have effect 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-compliant Conduct (whether or not it remains ongoing in nature) which took place during the period that Condition Z3 was in effect.

Definitions for condition

6. For the purposes of condition Z3:

- a. "Conduct" includes, but is not limited to:
 - i. conduct relating to offers and contracts for the provision of higher education which were already in existence before the date Condition Z3 came into effect, but only in so far as:
 - (A) that conduct took place on or after the date Condition Z3 came into effect; and
 - (B) that conduct does not concern, or otherwise relate to, the fact that such offers and contracts exist, or whether or not the provider should, or could, unilaterally withdraw such offers, or terminate such contracts;
 - ii. conduct in the form of taking action, or failing to take action;
 - iii. conduct in the form of isolated conduct by one higher education provider which, if repeated by other providers, is likely to have a material negative effect on the Stability and/or Integrity of the English Higher Education Sector (whether or not there is any form of express or tacit coordination, and whether or not a provider is able to anticipate the actions of other providers).
- b. "Contextual Offer" means an offer to adjust requirements for a prospective or existing student to have academic achievements at particular grades (rather than no grades at all) in circumstances where all of the following (cumulative) requirements are satisfied:
 - i. the provider has conducted an assessment of the circumstances applying to the prospective or actual student, including by giving consideration to their prior educational attainment and potential future educational attainment in the context of those circumstances; and
 - ii. the academic achievements which would be adjusted are at, or equivalent to, level 3 of the Regulated Qualifications Framework.
- c. "English Higher Education Sector" is to be interpreted broadly and includes (but is not limited to):
 - i. any activities of higher education providers in England that are registered with the OfS, irrespective of the location of where activities take place or have any effects; and
 - ii. any part of the sector or any class of higher education provider, irrespective of whether or not that part or class would constitute a distinct economic market.

- d. "Equality of Opportunity" has the meaning given in section 32(5)(a) of the Higher Education and Research Act 2017, except that the reference to "higher education" in that section has the meaning given in section 83(1) of that Act (rather than section 32(5)(b)).
- e. "Regulated Qualifications Framework" (and references to "levels" of qualifications in that context) is to be interpreted in accordance with the descriptions of qualifications (including different numerical levels) used by the Office of Qualifications and Examinations Regulation for purposes relating to the register known as the "Register of Regulated Qualifications" and functions under sections 139 and 140 of the Apprenticeships, Skills, Children and Learning Act 2009;
- f. "Specified Activities" is to be interpreted narrowly and only covers one or both of the following:
 - i. offering to enter into a contract with any prospective or existing student for the provision of higher education by using any type of Unconditional Offer; and
 - ii. any form of advertising or marketing for the provision of higher education which involves one higher education provider making statements (directly or indirectly) about one or more other higher education providers (irrespective of whether or not such advertising or marketing relates to the description of an offer set out in (f)(i));
- g. "Stability and/or Integrity" (in the context of the English Higher Education Sector) covers:
 - i. financial and economic matters;
 - ii. matters that may affect or distort decision making by prospective or current students in respect of their choice of higher education provider or course; and
 - iii. matters that may affect public trust and confidence in the English Higher Education Sector.
- h. "Unconditional Offer" means, in the context of the provision of higher education to a prospective or existing student ordinarily resident in England, Wales, Scotland or Northern Ireland, any type of offer which falls within one of the following descriptions:
 - i. it is not subject to any requirements (whether or not they could constitute terms and conditions of a contract) for a prospective or existing student to have academic achievements at, or equivalent to, level 3 of the Regulated Qualifications Framework; or

- ii. it is subject to requirements (whether or not they could constitute terms and conditions of a contract) for a prospective or existing student to have academic achievements at, or equivalent to, level 3 of the Regulated Qualifications Framework, but the number of achievements and/or the particular level of grades required could reasonably be considered to be so low as to be tantamount to not having any requirements at all.

Summary

Applies to: all registered providers

Initial or general ongoing condition: general ongoing condition

Legal basis: section 5 of HERA

Guidance

Paragraph 1 of Condition Z3

1. This paragraph (and relevant defined words and expressions, particularly the 'Specified Activities') clarifies the scope of Condition Z3 and provides for a general principles-based prohibition on Conduct which (in the reasonable opinion of the OfS) could be expected to have a material negative effect on the Stability and/or Integrity of the English Higher Education Sector. Matters that constitute Conduct that has a material negative effect, for these purposes, will be assessed not just by reference to the direct consequence of a provider's actions, but also indirect effects, including the potential cumulative effect if multiple providers were to adopt the same approach (whether or not they actually do so). So, for example, whilst it might be argued that one provider making a number of unconditional offers is not enough, by itself, to threaten the stability and integrity of the sector, if this same behaviour was to be adopted by others it could do so.
2. It follows that, when a provider is deciding whether to act, or not to act, it need not assess the likelihood of others following suit. The provider needs only to consider the possible negative effects on stability and integrity if other providers did follow suit.
3. A material negative effect of a provider's Conduct on individual students is relevant to the Stability and/or Integrity of the sector, regardless of the number of students affected. For example, unconditional offers may not be in the interests of individual students, even where only a low number of such offers has been made.

Paragraph 2 of Condition Z3

4. This paragraph sets out two descriptions of Conduct which are treated as having a material negative effect on the Stability and/or Integrity of the English Higher Education Sector in all circumstances. It follows that, where Conduct fell within one of these descriptions, the OfS would not need to make any assessment of the effect of such conduct in determining whether or not a provider has complied with Condition Z3. However, the OfS would still need to consider whether the conduct in question falls within the relevant descriptions and, on a case-by-case basis, whether it was appropriate to proceed with making a formal decision about compliance (and, if so, whether to take any form of regulatory or enforcement action).
5. If the OfS decided that it was minded to make a formal decision that a provider has not complied with Condition Z3 on the basis on paragraph 2, the provider would have the opportunity to make representations on matters such as (amongst others) whether its Conduct did in fact fall within one of the relevant descriptions and whether it was appropriate for the OfS to take regulatory or enforcement action.

Paragraph 3 of Condition Z3

6. This paragraph sets out various descriptions of Conduct which involve an Unconditional Offer and which are not treated as having a material negative effect on the Stability and/or Integrity of the English Higher Education Sector in any circumstances. It follows that, where Conduct genuinely falls within one of these descriptions (and does not fall within the description of prohibited Conduct in paragraph 2), such Conduct would (in effect) be exempt from compliance with elements of Condition Z3 that relate to Unconditional Offers. However, it would still be necessary for a provider to ensure compliance with Condition Z3 in respect of the narrow scope of advertising and marketing activities that fall within the definition of Specified Activities.
7. For the avoidance of doubt, the OfS would still be able to investigate potential non-compliance with any element of Condition Z3 (and consider taking further action) if it suspects that Conduct does not in fact fall within the scope of the descriptions set out in paragraph 3 (exempt descriptions). In the event that the OfS decided that it were minded to make a formal decision that a provider has not complied with Condition Z3 (e.g. on the basis that Conduct relating to Unconditional Offers does not fall within one of the exempt descriptions and breaches the prohibition set out in paragraph 1), the provider would have an opportunity to make representations on whether the Conduct does in fact fall within one of the exempt descriptions (amongst other matters).

Paragraph 4 of Condition Z3

8. A Notice under paragraph 4 of Condition Z3 may specify that the condition ceases to take effect immediately or will cease to take effect from a specific date in the future.

Sub-paragraph 6(a) of Condition Z3

9. The scope of the definition of Conduct means that compliance with the condition as a whole may require providers to refrain from taking action and/or to take action. An example of where action may need to be taken would be with a view to remedying conduct that has already taken place, such as action to withdraw pre-contractual offers a provider has made to students after condition Z3 came into effect, if the approach to such offers would be contrary to the requirements of general ongoing condition Z3. However, sub-paragraph 6(a)(i) makes clear that that condition Z3 does not have the effect of requiring a provider to unilaterally withdraw a pre-contractual offer that was made before the condition came into effect.

Sub-paragraph 6(g) of Condition Z3

10. The purpose of the definition of “Stability and/or Integrity” is to clarify the matters that could be negatively affected by Conduct within the scope of Condition Z3. It follows that, unless Conduct is treated as prohibited or permitted, the OfS would consider the matters described in this definition as part of any assessment of compliance.

Annex B: Section 2 of the Higher Education and Research Act 2017 (HERA)

2. General Duties

- (1) In performing its functions, the OfS must have regard to—
 - a. the need to protect the institutional autonomy of English higher education providers,
 - b. the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers,
 - c. the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers,
 - d. the need to promote value for money in the provision of higher education by English higher education providers,
 - e. the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers,
 - f. the need to use the OfS's resources in an efficient, effective and economic way, and
 - g. so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be—
 - i. transparent, accountable, proportionate and consistent, and
 - ii. targeted only at cases in which action is needed.
- (2) The reference in subsection (1)(b) to choice in the provision of higher education by English higher education providers includes choice amongst a diverse range of—
 - a. types of provider,
 - b. higher education courses, and
 - c. means by which they are provided (for example, full-time or part-time study, distance learning or accelerated courses).
- (3) In performing its functions, including its duties under subsection (1), the OfS must have regard to guidance given to it by the Secretary of State.
- (4) In giving such guidance, the Secretary of State must have regard to the need to protect the institutional autonomy of English higher education providers.

- (5) The guidance may, in particular, be framed by reference to particular courses of study but, whether or not the guidance is framed in that way, it must not relate to—
- a. particular parts of courses of study,
 - b. the content of such courses,
 - c. the manner in which they are taught, supervised or assessed,
 - d. the criteria for the selection, appointment or dismissal of academic staff, or how they are applied, or
 - e. the criteria for the admission of students, or how they are applied.
- (6) Guidance framed by reference to a particular course of study must not guide the OfS to perform a function in a way which prohibits or requires the provision of a particular course of study.
- (7) Guidance given by the Secretary of State to the OfS which relates to English higher education providers must apply to such providers generally or to a description of such providers.
- (8) In this Part, “the institutional autonomy of English higher education providers” means—
- a. the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way,
 - b. the freedom of English higher education providers—
 - i. to determine the content of particular courses and the manner in which they are taught, supervised and assessed,
 - ii. to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and
 - iii. to determine the criteria for the admission of students and apply those criteria in particular cases, and
 - c. the freedom within the law of academic staff at English higher education providers—
 - i. to question and test received wisdom, and
 - ii. to put forward new ideas and controversial or unpopular opinions,without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.



© The Office for Students copyright 2020

This publication is available under the Open Government Licence 3.0.

www.nationalarchives.gov.uk/doc/open-government-licence/version/3/