

Consultation

**Office for
Students**

The logo for the Office for Students, featuring a dark blue square with a yellow square in the top right corner containing the letters 'OfS' in white.

OfS

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

This consultation runs from **4 May**
to **26 May 2020**.

Reference OfS 2020.20

Enquiries to regulation@officeforstudents.org.uk

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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.

About this consultation

3. This consultation addresses issues that have arisen, and have the potential to arise, because of specific circumstances relating to the impact of the coronavirus (COVID-19) pandemic. Our proposals are therefore a response to these extraordinary circumstances and are not necessarily an indication of the approach we would be likely to take in more normal times.
4. Universities and colleges are currently dealing with a range of unprecedented challenges as a result of the pandemic, and they will be concerned about a potential loss of income. But their responses must be consistent with the high standards of probity and good governance that students and the public expect. Students need to have confidence that the admissions process will be conducted as fairly and transparently this year as it would be in any other year. Current students need to know that their university will be able to continue delivering high quality courses. And potential future students will be best served by a higher education system that continues to offer a wide range of course options. We are particularly concerned that any unfair admissions practices during this crisis could particularly harm the chances of those who are already more vulnerable, at a time when information, advice and guidance is less readily available than might normally be the case.
5. This consultation therefore sets out proposals to prevent providers from engaging in any form of conduct which, in the view of the OfS, could reasonably have a material negative effect on the interests of students and the stability and/or integrity of all or part of the English higher education sector. The consultation includes, but is not limited to, conduct relating to the 2020 admissions process. We propose to achieve this by creating a new, time-limited ongoing condition of registration applicable to all registered providers, as an amendment to the OfS's regulatory framework.¹ This new condition would enable us to consider imposing penalties that

¹ The OfS's regulatory framework, including the conditions of registration, is available at: www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

would cancel out any financial benefit to providers of acting inappropriately, significantly reducing the likelihood of such behaviour occurring in the first place, but allowing us to intervene if it did. The proposed text of the new ongoing condition is set out in Annex A.

6. This document constitutes our consultation for the purposes of sections 5(5) and 75(8) of the Higher Education and Research Act 2017 (HERA). In formulating these proposals, we have had regard to our general duties under section 2 of HERA, as set out in Annex B. We have also considered the implications for admissions in Scotland, Wales and Northern Ireland, though our regulatory remit only extends to English higher education providers.
7. This consultation contains proposals that relate to the higher education admissions system. They supersede the OfS's consultation on the admissions system published on 27 February 2020.² That consultation has been paused due to the coronavirus pandemic. When the consultation resumes, we will make clear what its relationship is with any new time-limited condition of registration imposed as a result of the current consultation.

The issues

8. Higher education providers are currently dealing with a range of unprecedented challenges as a result of the coronavirus pandemic. The OfS has made clear its commitment to reducing regulatory burden and supporting providers in the interests of students during this period.³ This includes taking steps to ensure the ongoing stability and integrity of the sector.
9. The proposals in this consultation are designed to address the following issues, which are discussed in turn below:
 - a. The short-term stability of English higher education providers
 - b. Recruitment practices that are not in the interests of students
 - c. Providers seeking to obtain an unfair advantage over other providers
 - d. The wider interests of students and the public interest.
10. The OfS's primary concern is to protect the interests of students and each of a.-d. above reflect this regulatory focus. In the exceptional circumstances of the coronavirus pandemic, our current judgement (which we will revisit in light of consultation responses) is that the interests of students outweigh the autonomy of providers, including in relation to admissions matters, in a way that in more usual times might not be the case. Annex D sets out the basis on which we have reached this view by reference to the OfS's general duties. There are a number of different student interests and those we have considered include: current students; those being considered for admission in 2020; and those who might apply for admission in the future.

² See www.officeforstudents.org.uk/publications/consultation-on-the-higher-education-admissions-system-in-england/.

³ See www.officeforstudents.org.uk/advice-and-guidance/coronavirus/provider-guide-to-coronavirus/.

The short-term stability of English higher education providers

11. One of the consequences of the pandemic is a likely reduction in income for providers, particularly if international students choose not to come, or are unable to come, to study in England. The OfS, the government⁴ and Universities UK⁵ have expressed concerns that as a consequence of this anticipated reduction in income, individual providers may change their student recruitment strategies and seek to increase their domestic student intake. This conduct could destabilise the sector because providers that were successful in recruiting additional domestic students could draw students away from other providers, increasing the exposure of those other providers to significant financial risk at a time when they are already facing significant pressures.
12. Supporting the short-term stability of the higher education sector is not an end in itself for the OfS. Stability during this period matters because it is in the interests of current students that existing providers are able to continue to operate so that students can complete their courses. Over the longer term, interventions to support stability now would make it more likely that the diversity of the sector is preserved so that future students have a wide range of opportunities and choices. Support for short-term stability also means that any provider at increased risk of market exit would have time to resolve its position, or to make arrangements to support its students through an orderly exit.

Recruitment practices that are not in the interests of students

13. Changes in providers' recruitment practices, as described in paragraph 11 above, could also have a direct effect on those students planning to start higher education courses in 2020-21. Such recruitment practices could involve the use of incentives that would result in students not choosing the provider or course best suited to their needs; this would be unfair on individual students even if the practice was not widespread. For example, changed recruitment practices might involve the inappropriate switching of existing conditional offers to unconditional offers, or to very low conditional offers. It might involve making offers to international students that significantly lower the academic or language requirements for a course. Some providers might also seek to put undue pressure on students to accept new offers, or engage in aggressive marketing activity, such as offering gifts or discounts, designed to attract domestic or international students away from their original choices.
14. Our view is that these practices risk distorting student decision-making and taking advantage of their behavioural biases at a time when information, advice and guidance for students is less available than would normally be the case. Some of this behaviour was observed immediately after the outbreak of the pandemic in the UK, and was only stopped by the moratorium announced by the Minister of State for Universities on 23 March 2020.

⁴ See <https://www.gov.uk/government/news/universities-told-not-to-alter-applicants-offers> and www.officeforstudents.org.uk/news-blog-and-events/press-and-media/universities-must-pause-unconditional-offers-for-two-weeks-in-student-interest-says-regulator/.

⁵On 10 April 2020, Universities UK, which represents a significant number of registered higher education providers, published a paper setting out its concerns about the financial stability of the sector and the use of some undesirable admissions practices during the 2020 admissions process. As a way of addressing this risk, it put forward proposals to help support the financial stability of the sector, and to address undesirable admissions practices.

15. We are particularly concerned about the impact of these issues on students who may be especially vulnerable during this period, or who have protected characteristics. In formulating these proposals, we have considered issues relating to the public sector equality duty and will publish an equality impact assessment when we announce the outcome of this consultation, taking into account the responses to consultation question 4 and other relevant matters.

Unfair advantage over other providers

16. It is also clear that it is not just providers' conduct in relation to the admissions process which could affect the integrity and stability of the English higher education sector. Using the coronavirus epidemic to take advantage of a temporary reduction in regulatory requirements, making misleading statements about other providers or failing to comply with public commitments are just some of the ways a provider could seek to gain an unfair commercial advantage over competitors. Such behaviour from providers would not be in the interests of current or future students.

The wider interests of students and the public interest

17. We would expect registered higher education providers to demonstrate the highest standards of probity and good governance during this period because this is in the interests of students and the public more broadly. Beyond the higher education sector, some organisations have been subject to public criticism where they are judged not to have acted in the public interest during this period, for example by seeking financial support from government lending schemes at the same time as paying dividends to shareholders. Students and the public have a particular interest in the conduct of higher education providers because they receive funding from taxpayer-backed student loans, and would expect providers to act appropriately during a period of national crisis.

Our proposals

18. To address the issues identified in paragraph 9 above, and in particular to protect the interests of students, we propose to:

- a. amend the regulatory framework by creating a new time-limited general ongoing condition of registration (Condition E6) requiring a provider not to engage in any form of conduct which could reasonably have a material negative effect on the stability and/or integrity of the English higher education sector (see paragraphs 22-24 below);
- b. define the scope of the proposed condition so that it covers conduct taking place on or after 11 March 2020,⁶ before the date the condition would come into effect, where that conduct forms part of a series of events continuing beyond the date on which the condition would come into effect (see paragraphs 25-30 below);
- c. place a maximum time limit of one year on the continued effect of the condition from the date the condition would come into effect (see paragraph 31 below);

⁶ The date on which the World Health Organisation (WHO) declared coronavirus to be a pandemic.

- d. allow for amendment to the time period for which the condition is in force, with any extension to the period only being permissible where the OfS publicly consults on the reasons for the proposed extension (see paragraph 32 below); and
- e. clarify our ability to take enforcement action in relation to the condition, even after the condition ceases to be in force, if a breach of the condition occurred while the condition was in effect (see paragraph 33 below).

19. The proposed text for the new general ongoing condition of registration, and associated elements of the regulatory framework, is set out at Annex A to this consultation. The intention is that it would form part of the OfS's regulation of management and governance matters. The way in which the OfS regulates management and governance is summarised in Annex C.

20. We consider that the proposed new condition is a necessary and proportionate means to protect the interests of students by:

- a. ensuring the stability and integrity of the higher education sector because this protects the interests of current students and preserves diversity of providers and choice for students over the longer term;
- b. minimising the risk of behaviour that distorts student decision-making to ensure that students planning to start courses in 2020-21 are able to choose a course and provider suited to their needs;
- c. providing further clarity to the sector about the behaviours that could lead to regulatory action being taken in the context of coronavirus;
- d. giving confidence to students that the admissions process will be conducted fairly and transparently;
- e. giving confidence to the public that the conduct of higher education providers will continue to meet high standards of probity and good governance during this period;
- f. ensuring that the OfS can act swiftly to ensure that students' interests are protected, and the stability and integrity of the higher education sector is best secured.

21. A detailed explanation of the effect of and reasons for our proposals, as well as how they address our regulatory concern, is set out below.

Creating a new general ongoing condition of registration preventing a provider from engaging in any form of conduct which would be likely to have a serious and prejudicial effect on the stability and/or integrity of the English higher education sector (as defined in Annex A)

22. Our proposals mean that where a provider takes any action which, in the view of the OfS, could reasonably have a material negative effect on the stability and/or integrity of the English higher education sector, it will be in breach of the proposed new general ongoing condition of registration. In reaching a judgement about such a breach, we will take into account the fact that the conduct of a single provider in isolation may not have a material negative effect on the

stability and/or integrity of the higher education sector, but such conduct in combination with similar conduct from other providers may have such an effect. We will therefore consider the conduct of a provider in the context of the conduct of other providers, whether or not there is coordination or cooperation between providers. Where the OfS finds that there has been a breach of the proposed condition, we would have discretion to use the powers available to us under HERA in respect of breaches, including the imposition of monetary penalties, suspension of registration or de-registration.⁷

23. In the current circumstances, we would expect to consider the use of monetary penalties up to the maximum level permitted under the regulations.⁸ The regulations are drafted in such a way that it would be possible for a penalty to be imposed for each instance of a breach. For example, if a provider switched existing conditional to unconditional offers in a way that increased its student numbers and destabilised other providers, and the OfS concluded that this constituted a breach of the condition, it would be possible to impose a penalty that substantially outweighed any financial benefit generated by the provider's changed recruitment strategy.

24. Examples of behaviours that may be compliant or non-compliant are set out at Annex A.

Reasoning: Without this condition, the OfS would be unable to intervene where a provider was taking steps that had a material negative impact on students and on other higher education providers. Having this power is likely to both reduce the likelihood of such events occurring and, where they do occur, allow the OfS to act in a way that is proportionate to the consequences of such a breach.

Extending this requirement to conduct taking place from 11 March 2020, before the date the condition would come into effect, where that conduct forms part of a series of events continuing beyond the date on which this condition would take come into effect

25. The proposed definition of "Conduct" in the proposed new general ongoing condition would mean that conduct which began before the condition came into effect but was part of a continuum of events would be captured by the condition.

26. A continuum of events would include all the steps leading up to a binding contract being entered into between a student and higher education provider. It follows from this that, where a provider makes an offer of admission to an applicant, further steps are necessary for a binding contract to be formed, including acceptance of the offer by the applicant.

27. This provision is designed, in particular, to prevent a provider from taking action to avoid the regulatory impact of the proposed condition during the consultation period, and before the new condition could come into effect. We would therefore consider action taken by a provider to avoid the regulatory impact of the proposed condition to be a relevant factor in determining any breach of the condition.

⁷ As set out in sections 15-19 of HERA.

⁸ See regulation 2 of The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019.

28. To comply with the proposed condition, it may therefore be necessary for providers to withdraw offers that are yet to be accepted by students. The OfS considers that this would be legally possible because a contract would not be formed until the student has formally communicated their acceptance of the offer. The OfS is more likely to consider that it would be appropriate for offers to be withdrawn if they are made on or after the date this consultation commenced. However, where a contract has already been validly entered into, the OfS would not normally envisage that it would be appropriate for providers to seek to terminate the contract in an attempt to comply with the condition. For avoidance of doubt, the fact that a contract has been entered into would not prevent the OfS from reaching a judgement that the condition has been breached. Where we judged there to have been such a breach, we would expect to make use of our power to impose monetary penalties as set out in paragraph 23 above.
29. Limiting the conduct to that taking place after 11 March 2020 more closely ties the condition to actions a provider took in response to the coronavirus pandemic, which is the purpose of the condition. Likewise, conduct which started while the condition was in effect and continued after such time as the condition ceased to have effect would be captured.
30. In addition to the retrospective provisions in the proposed condition, the OfS would be able to take enforcement action in relation to the existing general ongoing condition C1 (guidance on consumer protection law) where we judge there to be evidence of a breach of that condition. Using the proposed time-limited condition and condition C1 in combination would allow the OfS to vigorously regulate a provider's offer-making practices during this period, including whether it had complied with important consumer protection law requirements in respect of providing information to students before they enter into contracts.

Reasoning: This provision affords the condition a limited type of retrospectivity. We consider this to be reasonable given the significant consequences of any breach, and the fact that the conduct that the condition seeks to address is specific to the circumstances of the coronavirus pandemic, which started to have impact on providers and the sector from 11 March 2020. It is therefore particularly important to include this element of retrospectivity, for the avoidance of doubt about the extent of the OfS's powers of enforcement, to avoid any situation where a provider seeks to avoid regulatory consequences for breaches which continue to be a risk to the interests of students and the stability and integrity of the sector.

Placing a time limit on the continued effect of the condition

31. The effect of this proposal is that the condition will be time-limited, such that it ceases to apply after a period of one year from the date of a decision to impose the condition being published, unless the OfS issues a Notice of Continuance as to the extension of the condition, or otherwise notifies that it will cease to apply sooner.

Reasoning: This provision recognises that the four issues set out in paragraph 9 above are due to coronavirus and so are expected to be temporary. In proposing this provision, we have had particular regard to the need to protect the autonomy of providers, including in relation to admissions practices. The effect of the condition is that we would more actively regulate a provider's admissions practices during this period than might otherwise be the case, and we would not wish to use this condition to do so over a longer term without further consultation and consideration of impacts.

Allowing for an amendment to the time period for which the condition is in force

32. The effect of this proposal is that the time period for which the new general ongoing condition is in force can either be reduced or extended. Amendments to reduce the time period for the condition would be made by way of notice, but further restrictions would be placed on extending the time period. Before the time period can be extended, the OfS would be required to issue a public consultation. If, after considering consultation responses, the OfS decided to extend the time period for the condition, it would be necessary for us to publish a notice of our reasons for that decision.

Reasoning: It is important to retain the flexibility to amend the time period of the condition, given the current significant uncertainty about the time period over which the impact of coronavirus, including the risks to the interests of students and the stability of the sector, may continue. Any decision to extend the condition should be capable of a greater degree of notice to providers than was possible in relation to this initial proposal.

Clarifying the ability to take enforcement action in relation to the condition, even after the condition ceases to be in force, if a breach of the condition occurred whilst it was in effect

33. The effect of this proposal is to clarify that, from the date on which the general ongoing condition ceases to be in effect, the OfS will have the ability to take enforcement action in relation to any breach that took place (or partly took place, if a continuing event) whilst the condition was in force.

Reasoning: We consider it is important to include this clarificatory provision for the avoidance of doubt, given the expected significance of any breach and in case of any confusion that might otherwise be caused by the inclusion in the proposed condition of the sunset clause (which means that it will cease to apply automatically on a particular date). However, the removal of any condition of registration would not, as a matter of law, affect the ability of the OfS to investigate and take enforcement action in respect of non-compliant behaviours that took place when the condition was in force.

Proposed implementation

34. Subject to the representations received as a result of this consultation, we intend to make a decision on whether to amend the regulatory framework and general ongoing conditions to insert a new condition E6, as set out in these proposals, in late May or early June 2020. The new condition would come into effect on the date of publication of that decision.

35. The urgency of this timetable reflects the potential negative impact on students' decision-making and the extent of the risk to the integrity and stability of higher education providers. We consider this departure from our normal approach to consultation and the speed with which we would expect to introduce new regulatory requirements to be reasonable in the current extraordinary circumstances.

36. Issues relating to the risks facing the higher education sector have been highly publicised in recent weeks and the OfS has been in constant dialogue with the sector about how best to ensure sector stability and integrity as a consequence of coronavirus. This has included the sector being afforded an opportunity to voluntarily implement measures with the aim of achieving a similar purpose to those of the proposed condition.
37. In developing this consultation, we have considered alternative options for securing our objectives. These options, and the reasons why we have decided not to take them forward, are set out in Annex D.

Consultation questions

Question 1: Do you agree or disagree with the proposed introduction of a new ongoing condition of registration and associated changes to the OfS's regulatory framework as set out in Annex A?

Question 2: Do you agree or disagree with the proposals for implementation of the proposed new general ongoing condition of registration?

Question 3: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider or for any particular types of student?

Question 4: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

Question 5: Do you have any other comments?

How to respond to this consultation

To respond to this consultation, use the online survey available on the OfS website.⁹

The deadline for responses is **noon on 26 May 2020**.

If you have any questions about this consultation, or require this document in an alternative format or assistance with the consultation response form, please contact us on 0117 931 7305 or email regulation@officeforstudents.org.uk. Please note that this email address should not be used to submit your consultation response.

How we will treat your response

We will summarise and/or publish the responses to this consultation on the OfS website (and in alternative formats on request). This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details. If you want the information that you provide to be treated as confidential, please tell us but be aware

⁹ The link to the online survey is available alongside this document at: www.officeforstudents.org.uk/publications/consultation-on-the-integrity-and-stability-of-the-english-higher-education-sector/.

that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy¹⁰).

We may need to disclose or publish information that you provide in the performance of our functions, or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

¹⁰ Our privacy policy is available at www.officeforstudents.org.uk/ofs-privacy/.

Annex A: Proposed amendments to the OfS's regulatory framework

We propose to publish a Regulatory Notice that constitutes material published by the OfS under section 75 of the Higher Education and Research Act 2017 (HERA), and that should be read in conjunction with the OfS's regulatory framework (OfS 2018.01) which sets out in full the approach to registration and regulation. The Regulatory Notice would contain the information set out below:

Condition E6: Sector integrity and stability

Condition E6: Sector integrity and stability

The substantive and procedural requirements of this condition are as follows:

- i. The provider must not engage in any form of Conduct which in the opinion of the OfS could reasonably have a material negative effect on the Stability and/or Integrity of the English Higher Education Sector.
- ii. For the purposes of condition E6:
 - a. "Conduct" includes, but is not limited to:
 - conduct which took place prior to the date Condition E6 came into effect in so far as any form of that prior conduct took place on or after 11 March 2020 and could reasonably be considered as being part of a continuum of ongoing conduct (including, but not limited to, steps leading up to the conclusion of a legally binding contract);
 - conduct in the form of taking action, or failing to take action;
 - conduct in the form of isolated behaviour by one higher education provider or as a similar pattern of behaviour by more than one higher education provider (whether or not there is any form of express or tacit coordination).
 - b. "English Higher Education Sector" is to be interpreted broadly and includes (but is not limited to):
 - 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
 - any part of the sector or any class of higher education providers, irrespective of whether or not that part or class would constitute a distinct economic market;
 - c. "Stability and/or Integrity" (in the context of the English Higher Education Sector) covers:
 - financial and economic matters;
 - matters relating to good governance;
 - matters relating to admissions practices including offers to students;

- matters that may directly or indirectly have an impact on the interests of past, present or future students; and
 - any matters that may negatively affect public trust and confidence in the English Higher Education Sector.
- iii. Condition E6 will cease to apply at 23:59 on the date that is 365 calendar days after the date this condition was published by the OfS for the purposes of section 5 of the Higher Education and Research Act 2017 (“the Relevant Time”), unless one of the following events takes place:
- a. the OfS publishes a notice before the Relevant Time to the effect that the condition ceases to apply;
 - b. the OfS publishes a notice before the Relevant Time to the effect that the condition will continue to apply for a further specified period or indefinitely (a “Notice of Continuance”) and the OfS has taken all of the following steps:
 - a public consultation has been conducted on a proposal to issue a Notice of Continuance; and
 - following consideration of responses to that consultation, the OfS has published details of its decision to issue a Notice of Continuance and the reasons for it.
- iv. Where condition E6 ceases to apply 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 action in respect of any non-compliant conduct (whether or not it remains ongoing in nature) which took place before that time.

Summary

Applies to: all registered providers

Initial or general ongoing condition: general ongoing condition

Legal basis: section 5 of HERA

Guidance

Condition E6(i)

1. Matters that constitute Conduct that has a material negative effect, for the purposes of this condition, 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 of multiple providers adopting the same approach. So, for example, whilst it might be argued that one provider making several hundred unconditional offers is not enough, by itself, to threaten the integrity and stability of the sector, if this same behaviour was likely to be adopted by others it could do so.
2. A material negative effect of a provider's Conduct on individual students is relevant, regardless of the number of students affected. For example, unconditional offers may not be in the interests of individual students, regardless of the number of such offers made.

Condition E6(ii)

3. 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 already made to students, if the approach to such offers would be contrary to the requirements of general ongoing condition E6. However, the OfS would not normally envisage that it would be appropriate for a provider to seek to terminate contracts that have already been entered into – but, for the avoidance of doubt, the fact that a contract has been entered into does not prevent the OfS reaching a judgment that a provider has breached the condition.

Condition E6(iii)

4. A notice under Condition E6(iii)(a) may specify that the condition ceases to take effect immediately or will cease to take effect from a specific date in the future.
5. Notices under Condition E6(iii)(a) or (b) may be revised or revoked by the OfS until such time as the condition ceases to apply. Any revision or revocation must follow the same process as the initial notice.

Examples of potentially non-compliant behaviour

6. The following are non-exhaustive examples of behaviours that may indicate non-compliance with this general ongoing condition because of their (direct or indirect) negative effects on the integrity and/or stability of the English Higher Education Sector:
 - Reacting to a major crisis or emergency affecting the UK in ways which may take advantage of behavioural biases of students or could lead to other higher education providers reacting in a similar way to protect their own commercial or financial interests. For example, by making offers of admission to a large number of UK domiciled students (actual or prospective) in a manner which is likely to influence a student's choice of higher education provider, such as where all or a significant proportion of such offers are:

(a) conditional on the student making a particular provider their first or only choice; and/or
(b) not subject to criteria linked to prior educational attainment (or are subject to criteria based on prior educational attainment at a particularly low level and therefore could reasonably be considered to be tantamount to having no criteria at all, or to represent criteria that are not consistent with the normal academic requirements of the course).

- Adopting admissions practices that risk distorting student decision-making. For example, by offering gifts or discounts, designed to attract students away from their original choices and to discourage them from carefully considering other important factors about their choices.
- Making false or misleading statements (including comparative claims) about one or more higher education providers with a view to discouraging students (whether or not successfully) to accept offers from, or register with, those higher education providers. For example, making inaccurate claims that other providers are failing to support or provide tuition to students during the coronavirus pandemic.
- Making decisions that do not demonstrate the highest standards of probity and good governance during the pandemic, such that there is a likelihood of damage to public trust and confidence in (all or part of) the English higher education sector. For example, by using financial support packages made available by the government for purposes that do not serve the interests of students or the public, or failing to secure the standard of qualifications awarded to students, or making offers to international students that significantly lower the academic or language requirements for a course.
- Seeking to circumvent the spirit or purpose of requirements in primary or secondary legislation (including a regulatory requirement made under, or pursuant to, such legislation), or the OfS's temporary relaxation in regulatory requirements as a result of the pandemic, in order to gain an unfair commercial advantage over other higher education providers. For example, seeking to circumvent the requirements of a direction made under the Coronavirus Act 2020 or seeking to rely on statements made by the OfS about relaxing particular regulatory requirements during the coronavirus pandemic for wider compliance purposes.
- Failing to comply with a public commitment. For example, publicly agreeing to abide by voluntary requirements (such as a code of practice) and failing to comply with such requirements.
- Bypassing, or seeking to bypass, the admissions processes of the University and Colleges Admissions Service (UCAS), where the provider would normally use UCAS processes.

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

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.

Annex C: The OfS's approach to regulating management and governance of providers

1. The OfS determines and publishes initial and ongoing conditions of registration.¹¹
2. The E conditions relate to good governance of providers. There are currently five E conditions, each with a specific focus. The E conditions relate to providers in both the Approved (fee cap) and the Approved registration category. Condition E1 and E2 are both initial and general ongoing registration conditions, and this means they must be satisfied initially, for a provider to be registered, and continue to be satisfied once a provider is registered. Conditions E3, E4 and E5 are not initial conditions and are instead general ongoing conditions, that apply once a provider is registered.
3. In summary, the E conditions are as follows:
 - a. Condition E1: The provider's governing documents must uphold the public interest governance principles that are applicable to the provider. The public interest governance principles are set out at Annex B of the Regulatory Framework and they apply to all registered providers. They include principles such as accountability, academic governance, risk management and value for money. There are additional public interest principles for providers who have degree awarding powers or are in receipt of financial support from the OfS or from UK Research and Innovation (UKRI).
 - b. Condition E2: The provider must have in place adequate and effective management and governance arrangements to:
 - i. Operate in accordance with its governing documents.
 - ii. Deliver, in practice, the public interest governance principles that are applicable to it.
 - iii. Provide and fully deliver the higher education courses advertised.
 - iv. Continue to comply with all conditions of its registration.
 - c. Condition E3: The governing body of a provider must accept responsibility for the interactions between the provider, the OfS and its designated bodies. The governing body must ensure the provider's compliance with all of its conditions of registration and with the OfS's accounts direction. The governing body must also nominate a senior officer as the 'accountable officer' who has the responsibilities set out by the OfS from time to time.
 - d. Condition E4: The governing body of the provider must notify the OfS of any change of which it becomes aware which affects the accuracy of the information contained in the provider's entry in the Register.

¹¹ Pursuant to section 5 of HERA.

- e. Condition E5: The provider must comply with guidance published by the OfS to facilitate, in co-operation with electoral registration officers, the electoral registration of students.
4. Financial viability and sustainability of providers is dealt with via Condition D. Condition D requires that a provider must be financially viable and sustainable as well as having the necessary financial resources to provide and fully deliver the higher education courses it has advertised and as it has contracted to deliver them. A provider must also have the necessary financial resources to continue to comply with all conditions of its registration.
 5. The OfS uses the following definitions in relation to the requirements of condition D:¹²
 - a. 'Financially viable' means that the OfS judges that there is no reason to suppose the provider is at material risk of insolvency within a period of three years from the date on which the judgement is made.
 - b. 'Financially sustainable' means the OfS judges that the provider's plans and protections show that it has sufficient financial resources to fulfil conditions D(iii) and D(iv) for the period of five years from the date on which the judgement is made, and that it is likely to be able to operate in accordance with these plans and projections over this period.
 6. As with conditions E1 and E2, Condition D is an initial condition of registration, as well as a general ongoing condition following registration. As such, providers will need to ensure they continue to be financially viable and sustainable to continue to satisfy Condition D. The unprecedented nature of the coronavirus outbreak could have major implications on providers' financial forecasts.

¹² See paragraphs 399-410 of the OfS's regulatory framework.

Annex D: Consideration of alternative proposals

Matters to which we have had regard in reaching our proposals

1. Since April 2018, the OfS has undertaken detailed assessment of the financial viability and sustainability of English higher education providers, and of their management and governance arrangements. These assessments relate to conditions of registration with the OfS. We have drawn on these assessments in forming our views about the appropriate next steps to best ensure the integrity and stability of the English higher education sector during this period.
2. In formulating these proposals, the OfS has had regard to its general duties as set out in section 2 of HERA – these are reproduced in Annex B. We consider that the proposals in this consultation are particularly relevant to general duties (a), (b), (c), (d), (e) and (g), which relate to institutional autonomy, quality and choice, promoting competition between providers, value for money, equality of opportunity and best regulatory practice.
3. Section 2(8) of HERA defines institutional autonomy for the purposes of interpreting section 2 and includes in that definition matters relating to admissions. It does not, however, impose an absolute obligation on the OfS to protect the autonomy of providers in this, or any other, area and the OfS is required to balance each of its general duties, giving more or less weight to each in a particular context.
4. In formulating these proposals 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 admissions matters, in a way that in more usual times might not be the case.
5. In considering these issues 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 academic year 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.
6. We consider the proposed approach set out in this consultation to be proportionate and appropriate in ensuring that the OfS is able to balance the clear benefits of protecting students' interests and ensuring the continuing integrity and stability of higher education providers against the regulatory burden placed on them.
7. We have also had regard to Schedule 1, paragraph 21 of HERA, which extends the Equality Act (2010), and therefore the Public Sector Equality Duty, to the OfS. This requires the OfS to have due regard to eliminating unlawful discrimination, foster good relations between different

groups and take steps to advance equality of opportunity. Related to this, we have had regard to our published equality and diversity objectives and action plan¹³ in particular:

- a. objective 4 which relates to ensuring students receive a high quality higher education experience;
- b. objective 5, which states that the OfS will work to reduce the risk that some students are prevented from maximising their outcomes through their higher education experience and therefore not maximise their potential in terms of employment or further study.

8. We have also had regard to guidance issued to the OfS by the Secretary of State under section 2(3) of HERA, and specifically the following guidance:

- 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 continue its review of admissions and in particular the “injudicious use of unconditional offers”, as well as seeking to empower students as consumers.

9. 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 had specific regard to these statements¹⁴ in formulating our proposals as they do not constitute guidance issued under section 2(3) of HERA.

Enhanced monitoring

10. One alternative to our current proposals is the use of other less intrusive regulatory approaches, such as the imposition of enhanced monitoring requirements, to seek to ensure compliance with our preferred approach on a voluntary basis. Under this approach we would not impose a condition to require compliance, but rather rely on providers following guidance voluntarily as best practice.

¹³ Our equality and diversity statement and objectives and our equality and diversity action plan are available at: www.officeforstudents.org.uk/about/equality-and-diversity/.

¹⁴ 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/.

11. The sector has been working to resolve these issues on a voluntary basis and the efforts of government and sector representative bodies have achieved some results. We do not, however, consider this to be sufficient to deliver the purposes of this consultation, for example to fully protect the interests of students at this challenging time. We have been engaging with a number of providers about their admissions practices during the current moratorium and our view is that behaviour that is not in the interests of students and undermines the financial stability of other providers is likely to resume at the end of the moratorium. Such action from even a small number of providers may lead to others following as they are likely to consider themselves at a commercial disadvantage. Indeed, a number of providers have already contacted us to say that they consider others to have taken such steps to gain a commercial advantage. We therefore consider we must go further given the potential significant consequences of this.

Use of existing ongoing conditions of registration

12. The existing ongoing conditions of registration most likely to be applicable to the current circumstance are the current E conditions (i.e. E1-E5, as described in Annex C of this consultation). However, each of the current E conditions 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 higher education provider. The principles do not currently regulate the interaction between providers. We do not therefore consider that reliance on those conditions would be sufficient to mitigate the risks of the issue identified. More significantly, conditions E1-E5 are designed to protect a baseline level of good governance in a context in which the OfS is giving weight to factors including autonomy and competition. In the current environment, given the need to protect the interests of students and to mitigate the risk of instability, a condition with different requirements is necessary.

13. Likewise, reliance on condition D would not be targeted at the conduct the OfS wishes to guard against with the proposed condition E6. 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 cause could financial distress to others through such actions.

Imposing specific conditions

14. Another alternative to the proposals, which the OfS has considered, is making use of targeted specific conditions in relation to particular providers, rather than introducing a general ongoing condition for all providers. The OfS is empowered by section 6 HERA to impose such specific conditions on a provider as it may determine, at the time of a provider's registration or later. 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 seriously prejudice the integrity and stability of the sector.

15. However, we consider we can instead address this additional regulatory burden by the way we monitor the condition. That is, we envisage that any universal, sector-wide monitoring relating to the proposed condition would be relatively limited in relation to ongoing reporting requirements placed on individual providers. We would instead impose more specific targeted monitoring requirements through our existing ongoing condition F3, where we become aware

of an increased risk of a particular provider acting in a way that is not compliant with the condition. So, if a provider were not behaving in a manner contrary to condition E6, we do not consider it would suffer any serious additional burden.

16. 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 behaviour 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.¹⁵
17. For the same reasons, and because we are not aware of any evidence to suggest that providers in certain categories of the OfS Register, or providers of a particular type (for example, further education colleges), are more likely to act in a way contrary to condition E6, we feel it appropriate to apply general ongoing condition E6 to all registered providers, rather than any specific category or type of provider.

¹⁵ As provided for by section 6 of HERA.



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