

Office for
Students



Regulatory notice 5: Condition Z3: Temporary provisions for sector stability and integrity

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THE OFFICE FOR STUDENTS

Condition Z3: Temporary provisions for sector stability and integrity

Presented to Parliament pursuant to section 75 of the Higher Education and
Research Act 2017

Introduction

1. This regulatory notice contains a time-limited ongoing condition of registration imposed to protect the stability and integrity of the English higher education sector during the unprecedented circumstances of the coronavirus pandemic.
2. The condition applies from 3 July 2020 until 30 September 2021 to all providers registered with the Office for Students (OfS). The condition makes provision for the OfS to withdraw the condition, subject to public consultation, before 30 September 2021.
3. This document constitutes material published by the OfS under section 75 of the Higher Education and Research Act 2017, and should be read in conjunction with the regulatory framework (OfS 2018.01), which sets out in full the OfS's approach to registration and regulation.

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.

Conducted 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.



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