

Regulatory case report for University of Buckingham: OfS decisions relating to a breach of condition F3 and the imposition of a monetary penalty

Summary

This report confirms that the Office for Students ('OfS') has found that the University of Buckingham ('the provider') has breached ongoing condition of registration F3 and that the OfS has decided to impose a monetary penalty on the provider. This report summarises the key aspects of this case.

The Higher Education and Research Act 2017 ('HERA') gives the OfS enforcement powers to use if it appears to the OfS that there is, or has been, a breach of one or more conditions of registration. These powers include imposing a monetary penalty – a fine. Regulations made by the Secretary of State¹ set out the factors to which we must have regard when deciding whether to impose a monetary penalty and its amount. These regulations also set out the maximum penalty we can impose for each breach, which is the higher of 2 per cent of a provider's qualifying income² or £500,000. The OfS has published guidance about our approach to the calculation of a monetary penalty in regulatory advice 19.³

On 21 June 2021 the OfS made a final decision that there had been a breach of ongoing condition F3 by the provider because it failed to meet the deadline for submitting its signed audited financial statements for the financial year ending 31 December 2019. The OfS found that this breach had existed from 1 February 2021 until 21 June 2021 and that non-compliance was ongoing at that date. On 4 February 2022 the OfS made a further final decision that the breach had existed from 22 June to 30 September 2021 and that non-compliance remained ongoing at that date.

General ongoing condition of registration F3 allows the OfS to compel the production of information on specific occasions and on an enduring basis. It requires providers registered with the OfS to 'Provide the OfS, or a person nominated by the OfS, with such information as the OfS specifies at the time and in the manner and form specified'. We specify the information to be provided in an 'F3 Notice' issued to providers. Condition F3 sets an absolute requirement for compliance – in other

¹ See www.legislation.gov.uk/ukdsi/2019/9780111185353.

² 'Qualifying income' is defined in paragraph 3 of the Monetary Penalties Regulations as, broadly, the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA, in the 'relevant year'. The 'relevant year' means the 'business year' of a registered higher education provider which immediately precedes the date of the OfS notice [of the OfS's intention to impose a monetary penalty], or if no such business year exists, the 12-month period which ends on the last day of the month preceding the month in which the date of the OfS notice falls.

³ See www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/.

words, providers must meet the deadlines set out in an F3 Notice and it is not enough simply to attempt to do so or take reasonable steps to do so.

This regulatory case concerns a requirement to provide the OfS with signed audited financial statements on an annual basis. This information assists with assessing a provider's financial viability and sustainability. Condition F3 is also often used by the OfS for other important purposes, for example to investigate or monitor a provider's compliance with other conditions of registration, such as quality, student protection and management and governance.

On 27 September 2022, the OfS made a final decision to impose a monetary penalty on the University of Buckingham to address the regulatory harm caused by this breach of condition F3 which arose as a result of its failure to provide audited financial statements by the applicable deadline.

For the purposes of determining this penalty, the provider's qualifying income was £37,230,717. We have imposed a monetary penalty of 0.1 per cent of the provider's qualifying income, which is £37,231.

Background

Requirement to submit signed audited financial statements as required in an F3 Notice

The OfS issued an F3 Notice on 28 October 2019 which required the University of Buckingham to submit its signed audited financial statements for its financial year ending on 31 December 2019 to the OfS:

'within five calendar months of the end of the provider's financial reporting period to which the audited financial statements relate, and no later than 12 noon on the last day of this period'.

This means that the deadline was noon on 31 May 2020. The signed audited financial statements were required to be fully compliant with the OfS's accounts direction which is set out in regulatory advice 9.⁴ In an email to the provider enclosing the F3 Notice, this deadline was extended to Monday 1 June 2020 to recognise that 31 May 2020 fell on a non-working day.

At the provider's request, the OfS granted three extensions to this deadline for various reasons, including complexities the provider reported in completing the external audit of its 2019 financial statements and the impact of the coronavirus pandemic. On 1 October 2020, in response to the third extension request from the provider, the OfS set a deadline of 31 January 2021.

Breach of condition F3

On 27 January 2021, the provider told us that it was unable to submit its signed audited financial statements by the deadline of 31 January 2021. The financial statements were not submitted during 2021. So, on 21 June 2021, we decided that a breach of condition F3 had existed between 1 February 2021 and 21 June 2021 and that at the time of that decision, non-compliance remained ongoing.

⁴ See www.officeforstudents.org.uk/publications/regulatory-advice-9-accounts-direction-accounting-periods-beginning-before-1-august-2019/.

On 30 September 2021, we subsequently decided that, for the same reasons set out in our decision of 21 June 2021, the breach of condition F3 continued to exist for the period 22 June to 30 September 2021, and that on that date non-compliance remained ongoing.

On 1 June 2022 the provider submitted its signed audited financial statements for the financial year ending on 31 December 2019.

Reasons for imposing a monetary penalty

A finding of a breach of a condition of registration will not necessarily result in the OfS imposing a monetary penalty in all cases.

In deciding whether to impose a monetary penalty as a result of this breach of condition F3, we considered a number of factors.

The OfS's regulatory scheme has been designed to require timely submission of information that enables the OfS effectively and efficiently to regulate in the interests of students and taxpayers. This includes requiring relevant information from providers to monitor their financial viability and sustainability, including signed audited financial statements each year.

Condition F3 is one of the OfS's main regulatory tools to carry out its regulatory functions. Where a provider fails to comply with condition F3 and the requirements of an F3 Notice, this can affect the ability of the OfS to perform its functions, including monitoring and intervention activities in respect of compliance with other conditions of registration. This could have an adverse effect on the OfS's ability to regulate effectively and in a timely manner. It could also have a negative effect on the areas targeted by the OfS's other conditions of registration, such as quality, student protection and management and governance.

In this case, the breach of condition F3 related to a failure to provide signed audited financial statements which are externally verified. The OfS's ability to assess a provider's financial viability and sustainability and to act to protect students' interests is impeded when audited accounts are not provided in a timely manner. This is because they contain independently verified information about a provider's financial position, which is an important element of the OfS's scrutiny of a provider's financial viability and sustainability. This information can highlight weaknesses in a provider's financial position and prompt the OfS to investigate further and take steps to protect students' interests where necessary and appropriate. Where this information is not provided in a timely manner, the OfS's ability to anticipate financial risks and to act swiftly to protect students' interests is adversely affected. We consider this to be a significant regulatory risk given the potential impact on students and the sector in the event of financial failure of a provider.

We considered paragraph 167 of the OfS's regulatory framework.⁵ This paragraph sets out the intervention factors that the OfS will consider before deciding whether to intervene, and if so, the form that intervention should take. In deciding that we should intervene in this case, and that it would be appropriate, having regard to reasonableness and proportionality that our intervention should take the form of a monetary penalty, we placed particular weight on the following factors:

⁵ See www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

- it had been established that a breach of condition F3 had already occurred;
- the importance of fair treatment for providers that do comply with condition F3 requirements;
- the breach had caused the regulatory harm described above, and this regulatory harm had an impact on students because it impeded the OfS's ability to effectively and efficiently regulate the provider's financial viability and sustainability in the interests of students;
- we considered that any monetary penalty could, in principle, have a general negative impact on the provider's students (for example, because funds used by the provider to pay a monetary penalty cannot be used for purposes related to students). On balance, we considered that such a general potential impact is outweighed by the need for the OfS to take action to protect the wider interests of all students and given the regulatory harm that has occurred in this case;
- the OfS considers that there is an increased risk of the provider breaching condition F3 again and that this weighed in favour of imposing a monetary penalty;
- the steps taken by the provider to attempt to avoid, and thereafter attempt to remedy the breach, including the significant cost the provider had incurred in seeking to facilitate the conclusion of the audit of its financial statements for the year ending 31 December 2019, and the provider's cooperation with the OfS were also considered. Given that that condition F3 sets an absolute requirement to comply, and noting the regulatory harm caused by the breach (described above), the OfS decided that it remained appropriate to impose a monetary penalty in this case. However, these matters were treated as mitigating factors in calculating the amount of the penalty.

We considered Regulation 4 of the Monetary Penalties Regulations, which sets out the matters to which the OfS must have regard when deciding whether or not to impose a monetary penalty.⁶ In particular, we placed weight on the nature, seriousness, duration and impact of the relevant breach. These were considered serious due to the nature of regulatory harm caused (described above) and because the duration of eight months was considered very significant. As explained above, although the OfS considered that any monetary penalty could, in principle, have a general negative impact on the provider's students; on balance, the OfS considered that this was outweighed by the need to protect the wider interests of all students. All these factors weighed in favour of imposing a monetary penalty.

However, we also considered that there was no evidence that the provider has benefited financially or otherwise, including avoiding financial or other loss, as a result of the breach.

We also considered: (1) the steps taken by the provider to attempt to avoid, and thereafter attempt to remedy the breach of condition F3; and (2) that there were no previous separate findings of a breach of any conditions of registration against the provider. We decided that it was still appropriate to impose a monetary penalty in this case given the duration of the breach and its nature and seriousness, including the regulatory harm caused. However, we decided to treat the

⁶ See www.legislation.gov.uk/ukdsi/2019/9780111185353.

steps taken by the provider as a mitigating factor for the purposes of calculating the amount of the monetary penalty.

We also considered the OfS's general duties (set out under section 2 of the Higher Education and Research Act 2017).⁷

We considered in particular the principles of best regulatory practice, including the principles that regulatory activities should be transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed. We considered that the imposition of a monetary penalty was appropriate having regard to proportionality considerations and that action was needed in this case because of the regulatory harm caused by the breach of condition F3 and because of the significant duration of the breach. We considered that more significant sanctions, such as suspension or deregistration would not be appropriate.

We also had regard to:

- the need to use the OfS's resources in an efficient, effective and economic way. If the requirement to provide audited financial statements on time is not met, gaining an equivalent level of assurance would require the OfS to undertake lengthy work to essentially duplicate the work the auditor is already required to carry out. We consider that sending a clear signal about our willingness to take action in these circumstances where a provider fails to comply with its conditions of registration will be effective in achieving greater compliance with condition F3, and other conditions in the future and reduce the OfS resources needed to pursue future compliance concerns of this type; and
- the need to promote value for money in the provision of higher education by English higher education providers. As explained above, the imposition of a monetary penalty in this case could potentially divert funds that may have been used for the benefit of students. However, the provider in this case did not submit any information about how it will respond to the monetary penalty in its budgets or how it may have otherwise used those funds for students. In any event, we consider that a general negative impact on students is outweighed by the need for the OfS to take action to protect the wider interests of all students, particularly given the regulatory harm that has occurred in this case.

We also considered the public sector equality duty (under section 149 of the Equality Act 2010).⁸

We did not consider that the imposition of a monetary penalty would have a particular or materially adverse impact on a particular group of people with protected characteristics. Our view is that the need for the OfS to take action to protect the wider interests of all students includes those students with protected characteristics.

How the amount of the penalty was calculated

As set out in regulatory advice 19, the OfS takes a five-step approach to determining the amount of any monetary penalty. Our considerations in this case at each of these five steps are set out below.

⁷ See www.legislation.gov.uk/ukpga/2017/29/contents/enacted.

⁸ See www.legislation.gov.uk/ukpga/2017/29/contents/enacted Equality Act 2010.

Step 1: The following factors were taken into account in determining the 'baseline' penalty:

- the significance of the breach. We considered this to be a serious breach because of the regulatory harm it caused (described above) and considered that a monetary penalty was an effective intervention. Ordinarily we would expect to set a high baseline penalty in a case involving delayed submission of signed audited financial statements;
- we considered that any general negative impact on the provider's students of imposing a monetary penalty is outweighed by the need to take action to protect the wider interests of all students. In any event, no particular impact on students that materially affects our decision to impose a monetary penalty in this case had been identified;
- there was no evidence suggesting that the provider has received a positive financial benefit from the breach of condition F3. This was treated as a neutral factor;
- no other regulatory bodies have taken regulatory action against the provider in relation to the breach of condition F3 and the regulatory harm caused by it. This was also treated as a neutral factor; and
- although the information about the provider's significant delay in filing its 2019 audited financial statements being in the public domain could lead to a reduction in confidence in the sector; the failure to publish its audited accounts had already been made public by the Charity Commission, which had recorded on its website that the provider was granted a 'COVID filing extension' for the filing of its accounts for financial years ending 31 December 2019 and 31 December 2020. Therefore, we decided to take a lenient approach and treat this as a neutral factor on this occasion.

Based on these considerations, we started with a baseline penalty of 0.45 per cent of qualifying income.

Step 2: The baseline amount was then adjusted in light of the mitigating and aggravating factors in this case.

We considered that the significant duration of the breach was a significant aggravating factor, and we therefore applied an increase of 0.1 per cent of qualifying income to the baseline penalty.

The following were treated as mitigating factors:

- the steps taken by the provider to attempt to facilitate conclusion of the audit of its 2019 accounts and therefore attempt to avoid, and thereafter attempt to remedy, the breach of condition F3; and
- the provider's cooperation with the OfS's enquiries and investigations and the open and transparent way in which it had acted.

Considering these mitigating factors together, the OfS applied a decrease of 0.35 per cent of qualifying income for mitigating factors to the baseline penalty.

The following were treated as neutral factors:

- the provider had told us that it would fail to meet the deadline for its signed audited financial statements. However, even if the provider had not brought this to our attention, non-compliance would have been apparent after the deadline had passed;
- on the basis of the information we currently hold, we did not consider that the breach was deliberate or reckless or that the provider had concealed issues; and
- the provider's behaviour since the breach because we have already separately granted mitigation for the steps taken by the provider to attempt to avoid, and thereafter attempt to remedy the breach, and the open and transparent manner in which it has acted.

Step 3: We considered that the provider did not have a record of non-compliance. We also noted that there is an increased risk of breach of condition F3 in the future in respect of the provider's publication of its signed audited financial statements for its financial years ending 31 December 2020 and 2021. However, on this occasion, based on the facts of this particular case, we decided it was appropriate to make further adjustments to decrease the penalty to reflect that this is the first time that we have imposed a monetary penalty on any higher education provider for a breach of any condition of registration, and a decrease of 0.05 per cent of qualifying income was applied to the baseline penalty at this stage. For the avoidance of doubt, the fact that the OfS took this approach in this particular case should not be taken as an indication that we will (or are required to) decrease the amount of a penalty in other cases on the grounds that it is the first time the OfS is imposing a penalty on a provider, or it is the first time a provider has been found to have breached a particular condition of registration.

Step 4: We considered other relevant factors. This is the first case in which the OfS has found a breach of condition F3 and the first time that it has imposed a monetary penalty. Therefore, there are no previous decisions that we needed to consider for general consistency. We considered that the amount of the overall penalty is sufficient to act as a deterrent to the provider and other providers and is appropriate in absolute terms and as a proportion of the provider's qualifying income. However, on the basis of the information we currently hold, we accepted that the provider has spent substantial costs (of around £1.8 million) in seeking to facilitate the finalisation of the audit of its 2019 accounts, and attempting to avoid, and thereafter attempting to remedy, the breach of condition F3. A reduction of 0.05 per cent of qualifying income was applied to the overall penalty amount to reflect the significant cost incurred by the provider. We also considered our general duties under section 2 of HERA (as above).

Step 5: We considered the impact the penalty may have on the provider's financial viability and sustainability, whether the amount of the penalty would be affordable to the provider, and the related impact this might have on the provider's staff or students. In this case, we did not make any further adjustments as we considered the proposed penalty to be affordable to the provider.

We determined the final amount of the penalty as 0.1 per cent of the provider's qualifying income, which was calculated as £37,231 (rounded).