



AoC response to the OfS consultation on the integrity and stability of the English higher education sector

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?

Answer 1: We broadly agree with the principle of introducing 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 in these unprecedented times. We agree that less intrusive regulatory approaches such as enhanced monitoring will be inadequate to deliver the level of stability that the sector will require during these challenging times. It is right that regulators take a closer involvement in any actions which might undermine the ability of colleges, universities and other providers to meet the diverse and complete needs of every higher education student.

OfS has a metric led approach to regulation which would, in normal times, mean that OfS uses data from previous year(s) for regulatory assessment purposes. We believe if OfS was to apply this normal approach, it would not be able to fix the issues presented to the sector retrospectively. We agree a temporary and time limited condition that applies to providers registered with the OfS can help address some of the issues that can de-stabilise the sector and have long term implications for financial sustainability of providers, thereby limiting student choice for current as well as future students.

We believe that the student interest should be at the heart of all decision making at an institutional as well as sectoral level. Any recruitment practices that are not in the interests of students should be discouraged and wider interests of students and the public interest should be protected. Unconditional offer making for young entrants who have not completed level 3 qualifications, making offers to encourage applicants to choose a provider as their firm choice, and making offers to applicants by lowering entry criteria and accepting students who providers may be unable to support academically, are some of the practices that can distort student decision making and will ultimately not serve the student interests. Such practices need to be evaluated and controlled by the OfS.

We believe OfS should also examine and monitor any providers that place students on four year courses with a foundation year, to help "compensate" or account for the impact of the Covid year, particularly where this is associated with the roll out of unconditional offers.

We support that any provider behaviour that seeks to obtain unfair advantage over other providers should be discouraged. While it is relatively straightforward to

determine any increases in unconditional offers at a provider as well as sectoral level, it will be more complex to evidence breaches where one provider makes false claims against another. It is not clear how OfS will identify and evidence bad behaviour in many areas.

Stability measures proposed by OfS are meant to work alongside DfE's student number control policy. We are raising some of the specific SNC policy issues with DfE, however, there is some overlap between the agreed approach to student number controls and the OfS proposals for condition E6. The stated DfE plan involves the use of student number forecast data returned by providers to OfS in November 2019. OfS did not ask for this data from colleges because it was part of a financial return. ESFA – which is the regulator of colleges – did not ask for the data. Controls applied at a main provider level may lead to the cancellation of franchises (continuing an existing trend) and result in numbers being redistributed away from colleges towards the host university. There is great concern amongst college HE providers that some universities, facing financial challenges, might behave badly towards them, perhaps pulling out of franchise or validation partnerships. We feel OfS should monitor any such behaviour to safeguard the interests of providers that teach HE through franchised arrangements and to protect the interests of students who study at franchised institutions.

Although we agree with the principle that underpins the new regulatory condition E6, we feel the condition is too broad to be interpreted clearly and accurately by providers. The definition of 'conduct' that could have 'a material negative effect' seems all encompassing. The condition also brings into scope 'matters that may directly or indirectly have an impact on the interests of past, present or future students', which is again a broad statement and some matters that impact favourably on the interests of past students may be in conflict with supporting the interests of future students. For instance, recruiting more students through lowering entry criteria may not necessarily serve the best interests of these students however aggressive recruitment could offer financial stability to providers and thereby benefit current students.

OfS provides some examples of potentially non-compliant behaviour however it is not an exhaustive list. It is not clear how OfS will form its opinion and what could constitute a material negative effect, which could mean some providers may be over-cautious and therefore disadvantaged by engaging in marketing and promotional activities that may be less competitive. Therefore, we feel OfS must provide more detail on 'conduct' and 'material negative effect' to help providers understand and assess their conduct and behaviours, particularly as OfS aims to bring into scope actions that may indirectly have an impact on students.

The consultation makes a specific reference to providers offering gifts or discounts as a concern area. It is not clear what type of gifts may be concerning for instance laptops/ipads or tokenistic presents such as pens and the stages at which these gifts are offered during the recruitment process. It would also help if more detail was provided on whether OfS will focus on any change in behaviour, for instance, whether a provider has been offering these gifts historically or these gifts have been introduced this year, which may be more directly related to promotional activity adopted during the pandemic.

It is also not clear how scholarships and bursaries, especially for targeted widening participation groups, will be viewed by the OfS. Bursaries and discounts offered via a transparent process to support disadvantaged students should not normally be viewed as problematic.

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

Answer 2: We only partly agree (or broadly disagree) with some of the proposals for implementation of the proposed new condition. We do not agree that for the purposes of E6, conduct taking place on or after 11 March could reasonably be considered as being part of a continuum of ongoing conduct. We believe applying rules retrospectively can be problematic. Providers will not have known which behaviours and practices may be unacceptable to OfS. Even on unconditional offers, the moratorium came into effect on 23 March and it could be legally challenging to assess provider behaviour between 11 March and 23 March.

We agree that the time limited condition should apply for one year from the date when it is imposed and we also support that the new condition comes into effect in late May or early June to help address and correct any unfair provider behaviour as soon as possible in these challenging times.

While we agree that a less intrusive regulatory approach will be less effective during the current times, it is important that OfS adopts a proportionate approach when using imposing any monetary penalties. It is also important that the context of the provider, any direct financial benefits from the conduct and whether the actions were intentional should all be taken into consideration when assessing monetary penalties.

Less detail has been provided on OfS approach to investigating any 'conduct' that may be in breach of condition E6. A clear process underpinning any investigations and the ability to appeal against any decisions will be crucial to ensure that providers (especially those that are financially weak) are not unduly penalised. In other words, the condition should not unintentionally cause more financial distress and burden for providers when the purpose of the condition is essentially to help stabilise the sector.

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?

Answer 3: Colleges play a crucial role in widening participation, offering opportunities to those who would otherwise not participate. College HE is a relatively small but strategically important part of the college offer. Colleges are drivers of social mobility and play an important role in:

- improving life chances of young people as well as mature learners
- offering courses on a part-time basis, working with employers.
- technical and professional education with a clear line of sight to work.

- offering choices in small town, rural and coastal cold spots.
- providing an alternative to large universities with courses that often involve small class sizes, with more individual tutorial support and progression from FE courses.

We ask when setting the number caps, the tolerance threshold for colleges should be higher than 5% because of smaller cohorts and could be expressed in numerical terms. Rather than an across the board 5% threshold, the threshold should be 10% or 100 students whichever is the larger.

During the pandemic, more students may wish to study locally and therefore some colleges may experience an increase in HE numbers. It is likely that students, particularly mature and part time, may prefer low-cost and local alternatives at this time and colleges should not be penalised for any increase in recruitment which is not an outcome of any aggressive marketing or unfair practices. If these students are not offered a place at their local college, they may not pursue HE because they may either not have the confidence to study at an HEI or their personal circumstances may not allow them to study elsewhere. It is therefore important that OfS communicates and providers clearly understand the conduct that might be treated as one that compromises the stability of the sector.

Careful consideration must be given to not penalise providers seeking to widen access or social mobility, for example through some form of targeted discounts aimed to increase participation in HE of students with certain characteristics. Such incentives may be implemented to support reduction in gaps identified via the Access and Participation Plan.

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

Answer 4: As above.

Question 5: Do you have any other comments?

Answer 5: Although OfS has slimmed down its regulatory requirements during the pandemic, there is some tension for providers in meeting Financial sustainability and viability condition (condition D) and condition E6. It is important that OfS remains committed to avoiding placing any unnecessary burdens on providers as they work to minimise the impact of the virus in their students and staff.

It is likely that the effect of this condition will help regulate a provider's admissions practices and there will be few cases where monetary penalty is imposed on providers. However, we are concerned that some providers may still use unfair and aggressive practices and even if they are subsequently identified and penalised by the OfS, the damage done to other providers is likely to be irreversible in these unprecedented times.

We have an additional comment on the way in which OfS should use the condition with respect to FE and sixth form colleges. OfS is the charitable regulator of universities (as defined by Schedule 3 of the Charities Act 2011) but Education Secretary has this role for colleges, working through ESFA. OfS uses its registration

and monitoring process to fulfil the charitable oversight of universities in the areas of governance (condition E1 to E5), financial viability (condition D) and compliance with various laws (eg freedom of speech or electoral registration laws), OfS's approach conflates the role of regulating the provider as a whole with that of regulator of the higher education courses in that provider. For the 168 colleges who are on the OfS register, this has created overlap, confusion and unnecessary cost because ESFA already oversees and instructs them in these issues via a 100 page funding agreement and via the intervention arrangements set out in the College Oversight and Intervention Policy. If OfS have evidence that a college on its register is falling short on one of these financial, governance or legal compliance issues, then really communication should be from OFS to ESFA to college rather than the current situation in which the regulators overlap.