

Russell Group response to Office for Students (OfS) consultation on the integrity and stability of higher education

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?

Disagree

The Russell Group recognises the importance of maintaining stability across the sector and the necessity to protect the student interest during the unique and challenging set of circumstances created by the COVID-19 pandemic. We understand the insecurity felt by applicants and students during this period, and the importance of ensuring the admissions system does not create any undue pressure on them or damage the overall reputation of the sector.

However, we have significant concerns about both the short and long-term implications associated with the proposed regulatory condition. We consider it vital that institutions maintain autonomy over their admissions processes as provided for in the Higher Education and Research Act 2017 (HERA), which also established the Office for Students. Under HERA, the OfS must have regard for protecting institutional autonomy, including on practices surrounding admissions, so it is unclear how the proposed registration condition enables the OfS to fulfill this general duty. Indeed, the proposed condition could carry the risk of undermining the intention of HERA.

Nor can we agree to the implementation of such broad, unspecific obligations which create the risk of unfair behaviour by the regulator, particularly over a period where the sector is experiencing increased pressure. It has been suggested that a condition of this nature could lead to legal challenges.¹

When this proposed condition was being discussed in the context of the sector support package, it was originally aligned to the undergraduate admissions stability mechanism. What has been proposed is a broad-reaching general purpose regulatory condition covering aspects of university performance that have little bearing on the undergraduate recruitment market.

Therefore, **we do not support the introduction of condition E6 as currently envisaged**. We also encourage the OfS to publish its legal advice on how the proposed condition meets with both the obligations and spirit of HERA.

If, following full consideration of the consultation responses, the OfS still decides it is necessary to introduce a new regulatory condition, as proposed in Annex A of the consultation document, we recommend the following more specific details need to be addressed:

- **Subjectivity:** the way in which condition E6 is framed leaves significant levels of scope for subjectivity surrounding where a breach has occurred. As it is currently worded, providers can be found to have breached condition E6 if, 'in the opinion of the OfS' their conduct has had a material negative effect on the stability and integrity of the sector. If the OfS is to impose condition E6, we urge it to publish the rationale for how any breaches are

¹ Jamdar [OFS Consultation on temporary "admissions" condition of registration: some initial thoughts](#) (2020)

determined which should clearly illustrate how the regulator will reach these judgements (i.e. process). In the interests of commanding the confidence of the sector, we would also advise that any decision making process should involve representatives from the sector (including students).

- **Time-limited application:** any condition in this space should come with a cast-iron guarantee that it will expire at the earliest opportunity. We would recommend expiry after no more than six months – in other words to cover only the current admissions round. As currently framed, we are concerned that the proposals (or a modified version thereof) could apply indefinitely to the sector and that there will be a temptation to ‘justify’ an ongoing extension at a future date on the basis that ‘it has been done before’ – even if there has been a further consultation. The shorter the time-limit for any intervention, the greater the confidence universities will have that this will only be a temporary measure.
- **Clarification on how the condition would be applied:** Annex A of the consultation states that a breach could occur for “conduct in the form of taking action, or failing to take action”. It is vital that we avoid ambiguity surrounding the new regulatory conditions with which institutions must comply. We recognise the OfS wishes to be a principles-based regulator, but it would be helpful to provide additional clarity about its intentions with some specific examples of the activities it would not deem permissible.
- **Conduct of multiple providers:** it is concerning that the proposals allow for a breach to occur where a pattern of behaviour by multiple providers would have a material impact on the HE sector. This may mean universities acting in good faith as individual institutions are then judged by the OfS to have acted collectively in a way which constitutes a breach. If collective anti-competitive action has been taken then this should fall under the auspices of the Competition and Markets Authority (CMA), not the OfS. We are also concerned here about the danger of perceptions being misinterpreted as actual actions: for example, there has already been mis-reporting in the media (and other channels) about the actions of some institutions, which in turn may have been a trigger for others to take action. The OfS will need to be clear how this sort of circumstance stemming from ‘fake news’ will be treated.
- **International recruitment:** across the sector, there are a range of pre-existing practices which apply to international recruitment (such as making use of fee discounts). To ensure stability in the sector, UK providers must be able to compete in the international student market. Therefore, it is important that the sector is able to continue such practices, as per the UUK proposed fair admissions agreement. Other ‘non-compliant behaviour’, such as ‘making offers to international students that significantly lower the academic or language requirements for a course’, are already adequately covered by conditions B1-B5. We do not believe the OfS has factored in the scale of competition of the international student recruitment market. It is in the interest of the long term stability of the sector for English higher education to remain dynamically competitive in the international higher education recruitment market. This condition should be tempered with an awareness that HE providers are not just competing against each other domestically but are competing in a highly competitive and globally disrupted HE landscape.
- **Monetary penalties:** there is a risk that it could prove counter-productive if significant penalties of 2% of their qualifying income are levied against institutions. The OfS should be

mindful that tuition fees will be used to pay any fines. A balance needs to be struck between the impact on students of a regulatory breach with the consequences students will experience as a result of a fine being levied. We strongly encourage the regulator to adopt a proportionate approach in any use of monetary penalties, which does not unintentionally destabilise parts of the sector. The OfS should also clarify if it is proposing to exceed maximum penalties as per current regulation, or whether the methodology for applying penalties will reflect their ongoing consultation into monetary penalties. Furthermore, the OfS should clarify if breaches are enforced at recipient or provider level (i.e. could multiple unconditional offers be considered one breach, or would one unconditional offer be considered a breach?).

- **Other penalties:** the OfS has stated that a breach of this condition could result in the deregistration of a provider, or a suspension to registration. Presumably this is to be used only as the sanction of absolute last resort by the regulator? Even so, we urge the OfS to provide supporting guidance which clarifies the approach to issuing penalties (monetary and otherwise) for transparency. We also encourage the regulator to introduce a fair appeals process whereby institutions can challenge the decision as well as the proportionality of the penalty with adequate representation on the appeals panel by senior leaders from the higher education sector, who are independent of the Office for Students.
- **Governance:** condition E6 will also apply to matters relating to good governance and conduct which may negatively affect public trust and confidence in the English Higher Education Sector. These terms are very broad and could cover a range of scenarios, including an institution's decision to furlough staff whilst in receipt of public funds. The OfS should clarify how it intends to apply the condition in this area, and how it will ensure this is not excessively burdensome during a time of significant strain. This is especially important given the lack of clarity provided by the Government in relation to how universities may use the Coronavirus Job Retention Scheme (CJRS).
- **Disparity across the sector:** it is in both the student and public interest to avoid a fragmented approach to sector regulation. We urge the OfS to ensure we have a joined-up approach with Northern Ireland, Scotland and Wales in order that we can collectively safeguard the integrity and stability of the UK higher education sector.

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

Disagree

The Russell Group notes that the OfS intends to introduce condition E6 in late May or early June. While we recognise the need for a time-sensitive response, it is vital that the views expressed by the sector are fully taken into account and we urge the regulator to ensure that consultation responses receive sufficient consideration.

The OfS has also stated plans to back-date the application of condition E6 to the 11 March 2020 (the point when the World Health Organisation declared COVID-19 to be a pandemic). We are very concerned by this approach. It is vital that the conduct of universities is measured only against the regulatory conditions which are in place at the time of decision-making. We urge the OfS (as we

would all regulators) to **avoid applying conditions to university practices in a retrospective manner**, not least because this sets a dangerous precedent for future regulatory activity.

Furthermore, the OfS states that it may be necessary for institutions to withdraw offers that have yet to be accepted by students. While the regulator notes that these actions would not subject institutions to legal challenge, this is open to interpretation as the sector is still awaiting official guidance from the CMA around their contractual obligations to students in the next academic year. It is also difficult to see how rescinding offers to applicants could be regarded as being in the student interest, despite the OfS stating that this is the driving force behind this regulatory shift.

According to the OfS, where a contract has already been entered into by a student, it would not be appropriate to terminate the contract and we agree with this conclusion. However, this would not prevent the regulator from reaching a judgement that condition E6 has been breached. This could leave institutions in a position where they have inadvertently breached regulatory conditions, meanwhile the only way in which they can retrospectively ensure compliance would be to breach consumer law.

We strongly disagree with the retrospective application of the condition. The only grounds on which the OfS might have justification for backdating a new condition would be if it is linked to the date of a specific related action by the OfS for which it might be reasonable to conclude that a future rule change would be applied. In this case 23 March 2020, the date when the admissions moratorium started, would be a more appropriate choice. However, even this sets a precedent and **we urge the OfS to only introduce regulatory changes in the future, not the past.**

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?

Russell Group universities offer world-leading education, and are key players in the global higher education market. To ensure these universities remain competitive in the international student market, it is important that English HE institutions are allowed to continue such practices in line with UUK's proposed fair admissions agreement.

Universities that have a large postgraduate offering may also be unduly impacted by the condition. Some of our members offer alumni fee reductions to support a transition into postgraduate study. If these are included in the recruitment practices that are considered to 'distort student decision-making' then this would be problematic for these institutions. The Russell Group strongly recommends that the condition does not apply to this practice. Postgraduate higher education has always been a market where there is more flexibility for providers to adjust provision and make differentiated offers to students (e.g. a discount for a student from a partner institution or a discount for existing students enrolled at UG level considering PGT study).

There is a concern that the new condition could impact on the ability of institutions to make offers to applicants from widening participation (WP) backgrounds. These groups are most vulnerable during the Coronavirus pandemic. The OfS should ensure that an unintended consequence of this condition is not to further disadvantage these groups. The ability to make contextualised offers, as well as guaranteed accommodation or financial scholarships to WP students is vital to the long term success of the social mobility agenda in English higher education. Furthermore, it is unclear

whether other WP practices such as foundation years and relationships with schools would be deemed as disrupting the market, and therefore considered a breach.

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

Vulnerable students rely on financial support and contextual offers which recognise the challenges these applicants have faced or their participation in an access programme. In some cases, members also provide applicants with guaranteed accommodation places, such as care leavers, estranged students, and other groups which may need permanent accommodation.

Offers of this nature will be particularly important in the current climate if we are to ensure that the disadvantages these students typically face are not compounded by the circumstances which have arisen as a result of COVID-19. There is a risk that these initiatives, which are often instrumental in enabling students to commence their studies, could be misconstrued as practices that distort student-decision making. Universities should, under no circumstances, be prevented from supporting these students.

We welcome the commitment from the OfS to publish an equality impact assessment and we encourage the OfS to undertake a comprehensive exploration of the unintended consequences of this condition for vulnerable students. Furthermore, it would be useful for the OfS to articulate clearly the types of activities and behaviours which they deem to be not permissible under this condition.

Question 5: Do you have any other comments?

We strongly support **the continued application of UUKs proposed fair admissions agreement** which has offered a robust and successful form of self-regulation. We encourage the OfS to support this approach rather than introduce new regulation. The sector-wide support for the UUK proposal of self-restraint on student intakes this coming academic year should be adequate if the Government is serious about providing other support and investment for universities in response to the COVID-19 crisis, as we believe it is.

The long-term stability of the sector during COVID-19 does not solely rely on a new approach to home admissions practices alone. It relies on the interrelationship between home recruitment, research funding and international student recruitment. All three elements must be adequately supported if the sector is to provide the world-leading teaching and research it offered prior, and during, the crisis and help lead the post COVID-19 economic recovery.

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