

OfS Student Protection Directions

11th September 2020

About GuildHE

GuildHE is an officially recognised representative body for UK Higher Education. Our members are universities, university colleges and other institutions, each with a distinctive mission and priorities. They work closely with industries and professions and include major providers in technical and professional subject areas such as art, design and media, music and the performing arts; agriculture, food and the natural environment; the built environment; education; law; health and sports. Many are global organisations engaged in significant partnerships and producing locally relevant and world-leading research.

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

We recognise that there can, in some circumstances, be a need for a provider to create a more detailed strategy for ceasing programmes, for parts/all of its operation (where teach-out is not an option) when faced with the real risk of these situations and so in principle agree with a change to the regulatory framework at this current time, but with a caveat as detailed below. Whilst many established providers in the sector have always had robust policies to deal with such issues, and have done long before the regulatory framework, not all providers have the institutional memory, or had not prioritised scenario planning for this event.

We understand why the OfS needs to think a little differently about student protection planning, especially in light of the increased risks on the sector. However, whilst we agree that at present the condition C3 does not allow swift intervention, we think that this additional proposed condition should be time-limited for one year whilst a more thorough review of C3 takes place. Ultimately we believe that there could be a longer term solution to amending C3 which allows the OfS to support providers and their students who are at a genuine risk of market exit without the need for a new permanent condition. Having two conditions specifically on student protection in light of provider changes is confusing to students and burdensome on providers where there is negligible risk.

In light of the new DfE Restructuring Programme, we would expect the OfS, and the enactment of this condition, to work more collaboratively with this DfE process to ensure that any imposition of this new condition is not over burdensome or contradictory, and that ultimately for the processes to compliment each other.

We do have concerns with the ambiguity of the current language used in the consultation document on when the OfS would intervene and the types of activities it would mandate a provider to undertake, especially as we believe that there is potential for significant OfS overreach. These will be detailed in subsequent consultation questions.

Question 2: The proposed guidance for inclusion in the regulatory framework (see Annex A) states in paragraph 5 that the OfS expects to require the publication of a market exit plan or student protection measures where it judges that a provider is reasonably likely to exit the market. What factors should the OfS take into account in deciding whether and when to require a provider to publish its market exit plan, or information about other student protection measures?

We agree that where a provider is at a genuine financial risk, or has been struck from the OfS register then these would be reasonable causes to implement condition C4 during this current time, whilst Condition C3 is consulted on. However we would expect to see in the final publication a clear and defined set of criteria and list of reasons why the OfS would impose the condition, taking account of an institution's size, subject mix etc. to ensure providers are treated equitably and to eliminate chances of some institutions being looked on more favourably, for reasons other than the state of their finances. This set of criteria should be consulted on with relevant representative bodies, including BUFDG as well as GuildHE, before it is published to ensure that it does not adversely affect smaller or specialist institutions on the register.

We believe that there is also an additional step the OfS could take before it mandates the provider to act on this condition, in that it could put the provider on notice that the decision is pending and therefore have the opportunity to rectify the situation thereby avoiding the need for the OfS to formally step in.

It is also unclear from the consultation document how the SPP and this new plan work with each other when the risk of exit becomes real. We don't think it is in the interests of students to have seen the SPP at the time of choosing their provider and then when the reality of course/ campus closure hits, the provider (as mandated by the OfS) has to do something completely different. We therefore wish to see a more detailed list of actions the OfS may impose on the provider so that when the SPPs are revised, they can be considerate of the heightened expectations. Any significant changes from the SPP to this market exit plan could put providers at risk of breaching CMA compliance. This is why in the longer term we believe that there should be a consultation on C3 to ensure that the SPP and market exit plans are complementary.

We believe that it would be an inevitable consequence that the publication of a market exit plan/enhanced SPP would have a negative impact on the providers ability to turn their situation around. Therefore we do not think it is appropriate for such plans to be published at all if there is an opportunity for institutional redemption, and instead should only be published where exit has already been finalised or the risk has crystalised.

Question 3: Do you agree or disagree with the proposals for implementation of the proposed new general ongoing condition of registration (in paragraphs 46-49 above)?

Disagree

As highlighted above we would like to continue to work with the OfS after the close of this consultation to provide additional feedback on a revised list of factors in which the condition would be triggered (the criteria could possibly include commentary from an institution's Auditor "Going Concern" statement or other material risks" such as cashflow or student recruitment) etc. The regulatory burden is most greatly felt by small and/or specialist institutions, as well as having more complex operating models. We therefore wish to ensure that the final condition and its framing is genuinely equitable across all types and sizes of provider.

Question 4: 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?

The condition is likely to have a disproportionate effect on newer providers with lower net liquidity thresholds and therefore risk damaging sector competition. It may also limit student choice by dissuading students that wish to pursue specialist educational pathways (as often offered by smaller, newer providers) from doing so.

Students with non-traditional entry routes into HE may also be unexpectedly impacted should their entry qualification for the failed provider not be accepted as sufficient by an alternative provider (e.g. in the case of seeking to transfer). For the OfS to genuinely work in the interests of students we hope the OfS would work with the providers students transfer to in order to support their transition and in some cases help to broker those partnerships. Reflecting back on previous experiences of where students have had to be moved onto other providers, students were better served when HEFCE was working together with the provider to coordinate this move. The OfS can do a lot to support students finding places where alternative providers may be reluctant to take them due the potential impact it might have on their ongoing data and regulatory standing. We think you would agree that the best outcome for the student in this scenario would be to find an alternative course, rather than drop out of HE completely with a fee refund. But finding these places are not always easy, and there could be the need for the OfS to encourage other providers to take in students. This would not constitute as sharing the risk with the failing provider, but to support and incentivise alternative providers to come forward and take in affected students. We therefore think a taskforce should be created where a provider is undergoing market exit, made up of a handful of experts and experienced persons (such as those who have helped their validating partners to exit) including the OfS who can help ensure the best possible outcome for the student affected.

We would also welcome the OfS being transparent and sharing their own equality impact assessment of the proposed measure on different types of provider and characteristics of students.

Question 5: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

Students from a WP background are far more likely to be adversely impacted should their course provider close. They are less able to travel long distances, may not have the prerequisite qualifications an alternative provider may expect or have the finances to reside in an alternative location. As above we hope that OfS will work with the provider in ensuring that these students are able to be placed

elsewhere. There may also be financial barriers to another provider taking on these students due to equipment costs/ T-Funding etc. We believe the provider should be compensated where they take on the additional students, including any additional teaching which may need to occur to bring the student up to speed with their new curriculum. If the insolvent provider cannot meet this cost, then the OfS/DfE must financially contribute to this and further incentivise HEIs to take on these students. There may also need to be additional statements, or risk mitigations, for institutions taking these students as happened in the 2014 Tier 4 clampdown and institutions wary of Home Office intervention without suitable guarantees.

Question 6: Do you have any other comments?

We would like to see far more detail on the reasons the OfS would deem a provider to be needing to act in accordance with C4 and for there to be more detail on the types of things the provider would be expected to do, whilst being mindful of the individual situations of our diverse HE sector.

We think that at the current time, a specific time limited condition related to market exit is a useful stop-gap whilst the OfS re-starts its planned consultation on the C3 condition. We do believe that longer term activity should be captured in a revised C3 condition.

Whilst we do not think that market exit plans should be published unless the risk has been crystalised, we do think that it is important for the sector to learn from the experiences of others in order to best serve our students. We therefore welcome the opportunity to work with the OfS to share practice on the good practice of SPP's and how we can support providers to improve SPPs in the future, whilst being mindful of the additional burden and risk.