

Office for  
Students



# Office for Students registration process and outcomes 2019-20

**Key themes and analysis**

**Reference** OfS 2019.30

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# Foreword

## Susan Lapworth, OfS Director of Competition and Registration



The OfS's approach to regulation puts students at its heart. Our primary aim is to ensure that English higher education providers are delivering positive outcomes for students. We want students from all backgrounds (particularly the most disadvantaged) to be able to access, succeed in, and progress from higher education.

The OfS's regulatory approach is principles-based. The higher education sector is complex, and the imposition of a narrow rules-based approach would risk leading to a compliance culture that stifles diversity and innovation and prevents the sector from flourishing.

Our regulatory framework therefore sets out a number of conditions that providers can demonstrate are satisfied in a way appropriate to their own context. The conditions relate to access and participation, quality and standards, student protection, financial sustainability and governance. Providers satisfying these are listed on a single Register, which gives assurance to students and others that they offer a high quality education, and are monitored on an ongoing basis according to the level of risk they pose to students.

For the first time, higher education providers of all types are being judged against the same regulatory requirements. This report provides a sector-level analysis of the registration process and outcomes in the OfS's first year of operation. It highlights the areas that have proved challenging for providers, and the range of regulatory interventions we have imposed on those providers we have registered as a result. The implementation of this single regulatory system has revealed variation in the ease with which different providers are able to demonstrate that regulatory requirements are satisfied. In introducing a risk based system of regulation we have to have confidence that providers understand and are capable of satisfying the conditions of registration on an ongoing basis. Some providers were able to demonstrate compliance with ease; others found this challenging

During this time, we assessed over 500 applications and registered a total of 387 providers. We imposed a total of 1,109 regulatory interventions on these providers. Around 90 applications were still in progress at time of writing and there are several possible reasons for this – over 30 of the ongoing applications are from providers that applied in, or after May 2019. For others, we have needed to gather further evidence to assess whether or not the initial conditions of registration are satisfied, either from the provider itself, from the designated quality body, or from a review of management and governance arrangements. We are not permitted to register a provider unless it satisfies each individual condition and gathering evidence to make a proper assessment can take time. At the time of writing we have refused registration for eight providers and told a further 13 that we are minded to refuse registration. We are required by law to seek and fully consider representations about any application that we are minded to refuse and this too can take time.

The process has been challenging, for the OfS and for providers. The timetable set for us by government was tight and the timing of the transition from the old to the new legislative framework set the parameters for the registration process. The Higher Education and Research Act 2017, which established the OfS, received royal assent in April 2017, but most of its provisions did not

come into force until the following year. The OfS was legally established in January 2018 to allow for the publication of the regulatory framework and guidance on how to apply for registration. But we did not commence operations, and were therefore unable to begin the registration process, until April of that year.

We had planned to make registration decisions for providers with an early recruitment cycle and that applied by 30 April 2018 by July 2018 and we achieved this. We had also planned to make registration decisions for providers that applied by 23 May 2018 by September 2018, in time for the beginning of the 2019-20 recruitment cycle. In so doing, we had assumed that applications would be complete, of a good standard and would be ready to assess. However, this was not always the case. The majority (72 per cent of the total number of applications received by 23 October 2019) were incomplete when they were submitted. In many cases, too, the quality of the information that had been provided was poor and did not demonstrate that the initial conditions were satisfied. This necessitated follow-up enquiries and requests for information which contributed to an extended timescale for the registration process for a significant number of providers.<sup>1</sup>

Rather than focus on seeking further information, we could have quickly reached provisional decisions that a greater number of providers had not been able to demonstrate that the initial conditions were satisfied and commenced the process for refusing registration. This would certainly have been quicker in the short-term. However, we decided to take a more proportionate approach, particularly if we judged that the weaknesses we identified related to the way the provider was presenting evidence rather than because of performance or practice that would not satisfy the condition. For a large number of cases therefore we repeatedly sought additional information. Our motives in doing so were to ensure that new and existing students at these providers were able to plan their studies without the disruption that the refusal of an application might bring. But no provider has been registered if we were not confident that the initial conditions were satisfied.

We have imposed some form of regulatory intervention for the vast majority of providers we have registered. Interventions are based on our assessment of the risk of a future breach of a condition and vary in their significance. We have highlighted concerns about issues which need attention to ensure that they are contained and controlled; set out actions we wish a provider to take, or signalled our intention to undertake more frequent or intensive monitoring; and imposed a number of specific conditions where we consider there to be a particularly increased risk of a future breach.

The number of interventions is in large part a reflection of the OfS's level of ambition and challenge in relation to access and participation. Fair access and participation is an important OfS objective and there is an expectation of continuous improvement in relation to reducing the gaps in access, student success and progression into further study and employment between the most and least advantaged students. Many providers not considered to be at increased risk for other conditions of registration were judged to be at increased risk for this condition.

We also imposed a significant number of interventions because the outcomes delivered by some providers for their students were very weak and close to the levels we considered necessary to

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<sup>1</sup>By the end of September 2018 we had registered 111 providers, and by the end of December 2018, 256.

ensure that all students receive an education of a minimum quality regardless of what or where they study, or their backgrounds. We will shortly publish a sector-level version of the indicators we used during the registration process, a description of how these indicators were constructed, and the numerical baselines that guided our decision-making in relation to the condition on student outcomes.

We identified a number of other areas of concern across the range of applications.

Student protection plans, which set out the actions a provider will take to ensure that students can continue their studies in the event of course, campus, or provider closure, were variable in their quality. Some were strong and communicated effectively to students; many were very poor and could not be approved on first or even subsequent submission.

Very few providers demonstrated an understanding of value for money from their students' perspective and few appeared to have considered how they could present information about value for money in a way that would be accessible to their students.

There was a lack of convincing evidence about the adequacy and effectiveness of providers' management and governance arrangements, and a significant number of providers had based their financial viability and sustainability on optimistic forecasts of growth in student numbers without convincing evidence.

We are addressing these and other issues arising from the registration process through the publication of additional guidance in the autumn of 2019 and through our approach to ongoing monitoring.

The registration process has been a significant undertaking and we now know more about individual providers, and the sector as a whole, than has ever been the case before. This gives us a solid foundation for the implementation of a risk-based system of regulation where regulatory activity is focused on those providers and those issues that represent the greatest risk to students. The implementation of an effective monitoring system is the task to which we are now turning.

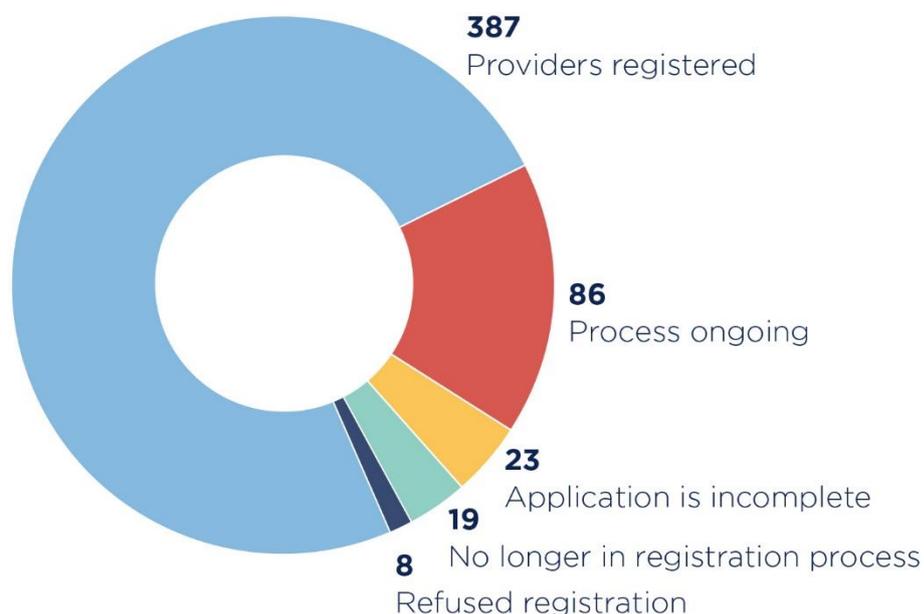
# Key findings

**Note: All figures relate to assessments and decisions made between 30 April 2018 and 23 October 2019.**

## Status of applications, assessments and registrations as at 23 October 2019

- The OfS had received over 500 applications from higher education providers to join the OfS Register.
- A total of 387 providers had been registered, and around 90 applications were at various points in the assessment process. Just over 40 assessments had been discontinued or had not begun because of incomplete applications. Eight providers had been refused registration.<sup>2</sup>
- The majority of applications (446) and registrations (330) were for the 'Approved (fee cap)' category. Of these, the majority of providers registered (243) have the ability to charge the higher fee limit.
- The majority of providers on the Register (373) had been regulated under the previous higher education regulatory systems. 14 providers that had not been regulated under the previous systems or 'new' providers have been registered.

### Summary of status of applications as of 23 October 2019



<sup>2</sup> Information on applications that have been refused can be found at: [www.officeforstudents.org.uk/advice-and-guidance/the-register/refused-registration-decisions](http://www.officeforstudents.org.uk/advice-and-guidance/the-register/refused-registration-decisions) Decisions are not published until there has been liaison with the provider.

## Quality of applications

- The regulatory framework<sup>3</sup> was published in February 2018 and did not come into full effect until 1 August 2019. The registration process was complex, and needed to be carried out with rigour and to a high standard. The timetable was challenging: there was limited time for providers to absorb the new requirements before compiling and submitting an application. A number of the issues we identified, which were common to a large number of providers, resulted at least in part from insufficient understanding of the differences between the old and new regulatory systems. This report's findings need to be considered in that context.
- This said, many applications demonstrated a deficiency of understanding over and above what might reasonably be attributed to providers' lack of familiarity with the new requirements. They were of significantly poor quality: it was clear that a number of providers were not ready to be regulated.
- Two-thirds of applications to register (66 per cent of the total number of applications) were incomplete when they were submitted. The OfS then needed to make follow-up inquiries or request additional evidence through the assessment process for over 90 per cent of providers. For many providers there were multiple requests for additional information. In many cases, this contributed to significant delays in the progress of a provider's application through the process.

## Regulatory interventions

- The vast majority of registered providers have had some form of regulatory intervention imposed. Only 12 providers had no interventions as part of the registration decision.
- This number of interventions is in large part a reflection of the OfS's levels of ambition and challenge in relation to access and participation. Many providers not at increased risk for other conditions of registration were judged to be at increased risk of a breach of Condition A1, which requires providers to have an access and participation plan.
- Most interventions (615) took the form of a formal communication. There were 464 requirements for enhanced monitoring and 30 specific ongoing conditions (the most significant form of intervention to mitigate increased risk) were imposed.<sup>4</sup>

## Areas of strength

- A number of providers, of all types, made very strong applications with credible evidence that all of the initial conditions of registration were satisfied. The strongest applications had engaged with the new regulatory requirements and identified where further action might be necessary with clear plans to address this.

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<sup>3</sup> [www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england)

<sup>4</sup> For an explanation of these interventions, see page 10 and paragraph 8.

- This included a number of applications from new providers that have now either been registered or have been referred for a quality and standards review by the designated quality body (DQB).
- Some student protection plans were excellent and demonstrated a real engagement with the requirements resulting in plans that had made a comprehensive assessment of risks and were clear on the protection that was available to students.
- Our assessment of financial viability and sustainability revealed a large number of providers in good financial health and the vast majority have no additional monitoring in relation to their financial viability and sustainability – financial strength was not isolated to a particular type of provider.
- Sector-level data suggests there is strong performance in student outcomes and this was reflected in the data of a large number of individual providers. Again, strong performance was seen across all provider types.

## Areas of concern

Many applications were particularly weak in the following areas:

- **Student protection plans** were variable in their quality. Although there were some good plans, a large number were very poor and not approvable on first or even subsequent submissions. 266 providers have been asked to resubmit plans during the assessment process. It would not have been in the interests of students to delay registration in so many cases, so we have approved a number of plans that are significantly below the standard we would expect. The providers concerned are required to resubmit improved plans following the publication of revised guidance by the OfS.
- Very few providers demonstrated a broader consideration of **value for money** encompassing the value their students may feel they receive from their tuition fees. Few also appeared to have considered how they could present information about value for money in a way that would be accessible to their students.
- We found significant weaknesses in providers' responses to the '**fit and proper person**' public interest governance principle. Most relied on declarations from governing body members. It was unclear whether they had conducted checks to determine whether individuals were fit and proper, and there was limited recognition of the indicators and definitions set out in the regulatory framework. Our own investigations uncovered large numbers of discrepancies between the directorships and trusteeships held by individuals declared on providers' application forms and those listed on Companies House or the Charity Commission website.
- There was a lack of convincing evidence about the adequacy and effectiveness of providers' **management and governance arrangements**. A large number of providers were unable to evidence regular external input into reviews of their arrangements. There was also a reliance on what appeared to be paper-based compliance exercises against a chosen code. This did not allow the OfS to make judgements about the effectiveness of arrangements and in a number of cases the OfS required a review of management and governance arrangements before it could reach a registration decision.

- Significant numbers of providers had based their **financial viability and sustainability** on optimistic forecasts of growth in student numbers without convincing evidence of how this growth would be achieved.<sup>5</sup>

## Next steps

The OfS will be publishing new regulatory guidance in autumn 2019 which will address issues arising from this analysis. We have set out arrangements for ongoing monitoring and intervention.<sup>6</sup>

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<sup>5</sup> In April 2019 the OfS wrote to providers about this issue: see [www.officeforstudents.org.uk/publications/financial-sustainability-of-higher-education-providers-in-england](http://www.officeforstudents.org.uk/publications/financial-sustainability-of-higher-education-providers-in-england)

<sup>6</sup> See Regulatory advice 15: monitoring and intervention [www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention](http://www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention)

## Publications referred to in this report

**Higher Education and Research Act 2017 (HERA):**<sup>7</sup> The OfS was established as the regulator for English higher education by the Higher Education and Research Act 2017 (HERA). HERA sets out the OfS's powers, duties and functions.

**OfS regulatory framework:**<sup>8</sup> This document, published in February 2018, constitutes the regulatory framework for higher education in England as required under section 75 of HERA. It sets out how the OfS intends to perform its various functions, and provides guidance for registered higher education providers on ongoing conditions of registration. Additional information about regulatory requirements is also published by the OfS in the form of regulatory notices and regulatory advice.

**Regulatory advice 2: Registration of current providers for 2019-20**<sup>9</sup> and **Regulatory advice 3: Registration of new providers for 2019-20**:<sup>10</sup> These documents set out guidance for providers about the application process for registration with the OfS including the evidence that would be needed to support an application.

| Key terms used in this report |  |
|-------------------------------|--|
| Access and participation plan | A plan produced by a provider in the Approved (fee cap) category of the Register if the provider wishes to charge fees up to the higher limit. This sets out how the provider will sustain or improve access to its provision for students from disadvantaged and underrepresented groups in higher education, and promote success for those students including retention, attainment and employability. |
| Approved                      | Registration category for providers that wish their students to be able to access the student support system and do not want to be eligible for OfS grant funding and/or to have fee cap obligations.  |
| Approved (fee cap)            | Registration category for providers that wish to be eligible for OfS grant funding in return for a fee cap and, where charging the higher fee amount, an access and participation plan.  |

<sup>7</sup> <http://www.legislation.gov.uk/ukpga/2017/29/contents/enacted>

<sup>8</sup> [www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england)

<sup>9</sup> [www.officeforstudents.org.uk/publications/regulatory-advice-2-registration-of-current-providers-for-2019-20](http://www.officeforstudents.org.uk/publications/regulatory-advice-2-registration-of-current-providers-for-2019-20)

<sup>10</sup> [www.officeforstudents.org.uk/publications/regulatory-advice-3-registration-of-new-providers-in-2018-19](http://www.officeforstudents.org.uk/publications/regulatory-advice-3-registration-of-new-providers-in-2018-19)

|   |  |
|---|--|
| Designated data body (DDB)                  | A body that performs the duties set out in sections 64 and 65 of HERA, including data collection, data processing, data storage, data publication and provision. The DDB is designated by the Secretary of State following consultation and a recommendation from the OfS. The Higher Education Statistics Agency (HESA) has been designated by the Secretary of State.  |
| Designated quality body (DQB)               | A body that carries out particular functions set out in sections 23 and 46 of HERA. The DQB is designated by the Secretary of State following consultation and a recommendation from the OfS. The Quality Assurance Agency for Higher Education (QAA) has been designated by the Secretary of State.   |
| Higher education provider                   | An organisation that delivers higher education, as defined in Schedule 6 of the Education Reform Act 1988. A provider can be a body with degree awarding powers or deliver higher education on behalf of another awarding body.  |
| Initial conditions of registration          | The conditions a provider must satisfy to be registered by the OfS.  |
| New provider                                | A provider that, at the point of applying to join the OfS's Register, had not previously been regulated by the Higher Education Funding Council for England (HEFCE) or the Department for Education (DfE). New providers can be start-up organisations that are newly incorporated, organisations that deliver other education and training and are expanding their business into higher education, or organisations that already deliver higher education but have not previously been regulated. |
| Ongoing conditions of registration          | Conditions of registration that a provider must continue to satisfy after it has joined the Register in order to maintain its registration.  |
| Quality and standards review                | A review visit by the DQB to a provider seeking registration in the Register. This visit provides evidence to the OfS to allow it to assess whether a provider is able to meet the initial conditions for quality and standards.   |
| Regulatory interventions                    | If an increased risk of a breach of one or more ongoing conditions of registration is identified, the OfS may use any of the following mechanisms:   |
| Formal communication                        | Regulatory intervention that draws a provider's attention to issues that, if not addressed, may result in further regulatory intervention in future.   |
| Enhanced monitoring                         | Regulatory intervention that imposes more frequent or more intensive monitoring requirements on a provider.  |
| Specific ongoing conditions of registration | Regulatory intervention targeted to mitigate the specific risk that is posed and focus on actions or activities by the provider that the OfS may require, or prohibit, to ensure that the provider is able to satisfy its ongoing conditions of registration.  |

|                         |   |
|-------------------------|---|
| Risk assessment         | The OfS carries out a risk assessment in relation to each of the ongoing conditions of registration in order to determine the extent of the risk that the provider will breach one or more of its general ongoing conditions. The risk of a future breach is assessed taking into account both the probability of a breach and the potential severity of its impact.  |
| Self-assessment         | <p>A self-assessment is a provider’s own evaluation of how it satisfies initial conditions, including an explanation of how it has reached those conclusions and the evidence used to make that assessment.</p> <p>To be registered, providers must demonstrate that they satisfy the initial conditions of registration that apply to the category of the Register that they are applying to join. The evidence that must be submitted by providers includes self-assessments for the following conditions:</p> <ul style="list-style-type: none"> <li>• Guidance on consumer protection law condition C1, and,</li> <li>• Management and governance conditions, E1 and E2.</li> </ul> |
| Student protection plan | A plan outlining the actions a provider will take to protect the continuation of study for students. The plan includes events that might trigger action by the provider, such as the closure of a course, campus or location or market exit. This document must be approved by the OfS and be readily available to current and potential students.  |
| The Register            | Section 3 of HERA requires the OfS to establish and maintain a Register. The Register lists all the English higher education providers registered by the OfS and provides information about their registration status.  |

## Forthcoming guidance

In autumn 2019 we will be publishing new regulatory advice covering some of the issues raised in this report, and on our ongoing monitoring of providers. This will include:

### **Regulatory advice: Registering with the OfS**

Guidance for providers on how to register with the OfS

### **Regulatory advice: Monitoring and intervention**

Guidance for providers on how the OfS monitors providers and uses its powers of intervention for ongoing conditions of registration

[www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention](http://www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention)

### **Regulatory advice: Reportable events**

Guidance for providers on which events they should report to the OfS and on how the OfS monitors reportable events

[www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events](http://www.officeforstudents.org.uk/publications/regulatory-advice-16-reportable-events)

### **Consultation: Student protection plans**

The OfS will consult on its proposed new approach to the requirements for student protection plans before publishing revised guidance

### **Regulatory advice: Making an application for exempt charity status**

Guidance for providers on how to make an application for exempt charity status

### **Regulatory advice: Accounts direction**

Guidance for providers on preparing and publishing financial statements

# Summary of the registration process

1. Higher education providers<sup>11</sup> in England are required to register with the OfS if they wish to:
  - a. enable their eligible students to access student support loan funding
  - b. access public grant funding
  - c. apply to the Home Office for a Tier 4 licence, or maintain an existing licence
  - d. apply for degree awarding powers and/or university title.
2. There are two categories of registration – Approved and Approved (fee cap). Registration in Approved (fee cap) category gives a provider access to all of the benefits in paragraph 1 above. Registration in the Approved category gives access to all of the benefits other than access to grant funding.
3. The regulatory framework sets out 11 initial conditions of registration framed in terms of outcomes for students. To register with the OfS providers must demonstrate that they satisfy these initial conditions. Once a provider is registered it must satisfy a number of general ongoing conditions of registration.

## Initial conditions of registration

### Access and participation

Condition A1: An Approved (fee cap) provider intending to charge fees above the basic amount to qualifying persons on qualifying course must:

- i. Have in force an access and participation plan approved by the OfS in accordance with HERA.
- ii. Take all reasonable steps to comply with the provisions of that plan.

Condition A2: An Approved provider or an Approved (fee cap) provider charging fees up to the basic amount to qualifying persons on qualifying courses must:

- i. Publish an access and participation statement.
- ii. Update and re-publish this statement on an annual basis.

### Quality and standards

Condition B1: The provider must deliver well-designed courses that provide a high quality academic experience for all students and enable a student's achievement to be reliably assessed.

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<sup>11</sup> All providers that were previously funded by the Higher Education Funding Council for England or regulated by the Secretary of State for Education had to apply for registration in order to continue to access these benefits. Providers that wanted to access these benefits for the first time were also able to apply for registration.

Condition B2: The provider must provide all students, from admission through to completion, with the support that they need to succeed in and benefit from higher education.

Condition B3: The provider must deliver successful outcomes for all of its students, which are recognised and valued by employers and/or enable further study.

Condition B4: The provider must ensure that qualifications awarded to students hold their value at the point of qualification and over time, in line with sector recognised standards.

Condition B5: The provider must deliver courses that meet the academic standards as they are described in the Framework for Higher Education Qualification (FHEQ) at Level 4 or higher.

### **Student protection**

Condition C1: Guidance on consumer protection law

The provider must demonstrate that in developing and implementing its policies, procedures and terms and conditions it has given due regard to relevant guidance about how to comply with consumer protection law.

Condition C3: Student protection plan

The provider must:

- i. Have in force and publish a student protection plan which has been approved by the OfS as appropriate for its assessment of the regulatory risk presented by the provider and for the risk to continuation of study of all of its students.
- ii. Take all reasonable steps to implement the provisions of the plan if the events set out in the plan take place.
- iii. Inform the OfS of events, except for the closure of an individual course, that require the implementation of the provisions of the plan.

### **Financial viability and sustainability**

Condition D: Financial viability and sustainability

The provider must:

- i. Be financially viable.
- ii. Be financially sustainable.
- iii. Have the necessary financial resources to provide and fully deliver the higher education courses as it has advertised and as it has contracted to deliver them.
- iv. Have the necessary financial resources to continue to comply with all conditions of its registration.

## Management and governance

### Condition E1: Public interest governance

The provider's governing documents must uphold the public interest governance principles that are applicable to the provider.

### Condition E2: Management and governance

The provider must have in place adequate and effective management and governance arrangements to:

- i. Operate in accordance with its governing documents.
- ii. Deliver, in practice, the public interest governance principles that are applicable to it.
- iii. Provide and fully deliver the higher education courses advertised.
- iv. Continue to comply with all conditions of its registration.

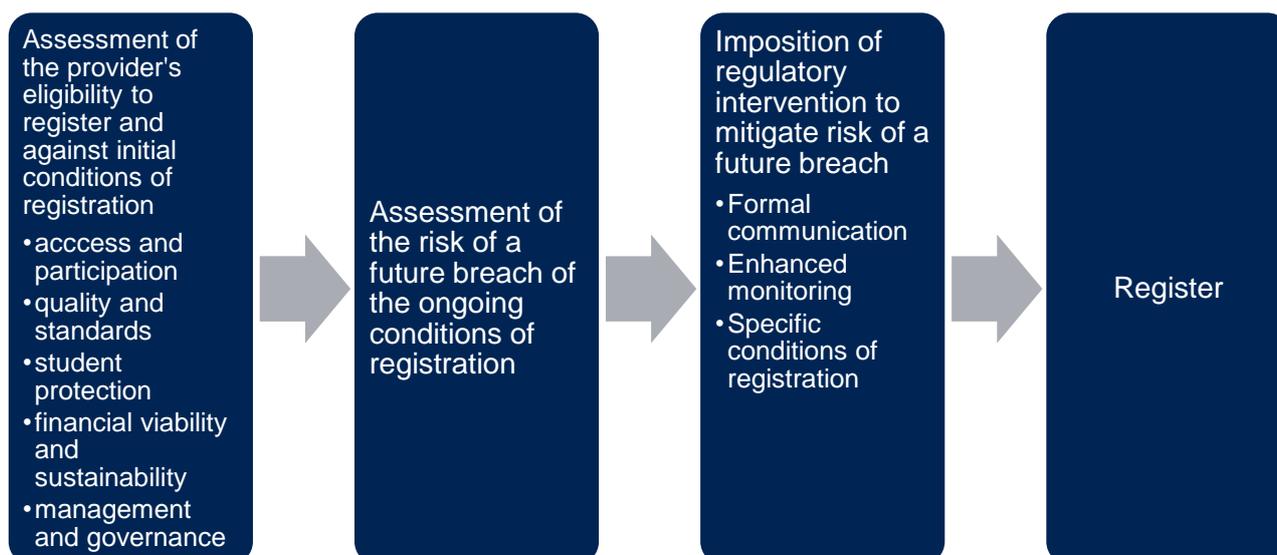
4. In February 2018 the OfS published guidance setting out the evidence providers wishing to be registered need to submit in their application in order to demonstrate that they satisfy the initial conditions of registration.<sup>12</sup>
5. The Higher Education and Research Act 2017 specifies that providers may only be registered where all of the initial conditions are satisfied. The OfS must not register a provider that does not satisfy the initial conditions. When a provider applies for registration we first determine whether it is eligible to apply according to the criteria set out in the regulatory framework<sup>13</sup> and make a detailed assessment of a provider's application to register against the initial conditions of registration. As we assess each application we also conduct a risk assessment to determine the risk of a provider breaching one or more of its general ongoing conditions of registration once it is registered.
6. Where our assessment shows an increased risk of a future breach of the ongoing conditions of registration we can apply regulatory interventions to mitigate these risks.
7. The assessment process is set out in Figure 1.

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<sup>12</sup> Regulatory Advice 2: Registration for current providers for 2019-20:  
[www.officeforstudents.org.uk/publications/regulatory-advice-2-registration-of-current-providers-for-2019-20](http://www.officeforstudents.org.uk/publications/regulatory-advice-2-registration-of-current-providers-for-2019-20)  
and Regulatory Advice 3: Registration for new providers for 2018-19:  
[www.officeforstudents.org.uk/publications/regulatory-advice-3-registration-of-new-providers-in-2018-19](http://www.officeforstudents.org.uk/publications/regulatory-advice-3-registration-of-new-providers-in-2018-19)

<sup>13</sup> Page 37-39 of the regulatory framework.

**Figure 1: Flow diagram setting out the assessment process**



## Types of regulatory intervention

8. We impose one of three regulatory interventions according to the level of risk established through our risk assessments. The interventions we have imposed during the registration process range in order of risk level:

|   |   |
|---|---|
| <b>Formal communication</b>   | Formal communication has been used as a way of alerting providers to issues that we have concerns about and to signal that there may be regulatory intervention in the future if action is not taken by the provider.                       |
| <b>Enhanced monitoring</b>  | Enhanced monitoring requirements have been imposed where we require the provider to take some action or where we consider that more frequent or intensive monitoring is required to alert us to the possibility of a breach of a condition. |
| <b>Specific ongoing conditions</b>  | Specific ongoing conditions are normally imposed where we consider there is an increased risk of a breach or there is a specific risk that is not addressed by the general ongoing conditions of registration.                              |
| The regulatory framework sets out that details of <b>specific conditions</b> will be published on the OfS Register. Other forms of regulatory intervention are not published. |   |

## Registration process: headline data

9. As of 23 October 2019 we had received 523 applications to register with the OfS, and 387 higher education providers were on the Register. Table 1 sets out the status of applications and assessments received to this date.

**Table 1: Status of applications**

| Application status   | Number of applications |
|--|------------------------|
| Provider registered  | 387                    |
| Decision made but not published on the Register                      | 2                      |
| Refused registration   | 8                      |
| <b>Total decisions</b>   | <b>397</b>             |
| Provider in representations process regarding a provisional decision | 13                     |
| New provider referred for a quality and standards review             | 13                     |
| Active assessment  | 58                     |
| <b>Total ongoing assessments</b>                                     | <b>84</b>              |
| Application incomplete – unable to start assessment                  | 23                     |
| Assessment closed due to merger or at provider request               | 19                     |
| <b>Total</b>   | <b>523</b>             |

10. At the point of this analysis, we had made an initial assessment that 30 providers did not satisfy one or more of the initial conditions of registration. These providers were issued with a notice setting out our intention to refuse registration – this is a provisional decision. They then had an opportunity to make representations against this proposed decision. This is a statutory representation process that we are required to follow before reaching a final decision. Table 2 sets out a summary of the initial conditions that we provisionally concluded were not satisfied.

**Table 2: Conditions judged not to be satisfied in a provisional decision**

| Condition                                 | Number of providers |
|---|---------------------|
| B3: Quality (student outcomes)            | 19                  |
| C1: Guidance on consumer protection law   | 3                   |
| C3: Student protection plan               | 10                  |
| D: Financial viability and sustainability | 11                  |
| E1: Public interest governance            | 11                  |
| E2: Management and governance             | 17                  |

11. In relation to Condition B3, five providers made representations that provided sufficient evidence for us to judge that the initial condition was satisfied. Three of these providers are now registered and two are in the process of making representations against proposed

specific conditions in relation to Condition B3. For four providers new data became available during the representations process which contributed to a judgement that the initial condition was satisfied and a decision that the provider could be registered. Three of those providers were registered with specific conditions. The remaining providers have either been refused registration or are still in the representations process. Not all providers with a specific condition in relation to Condition B3 were issued with a notice of an intention to refuse registration.

12. Table 3 sets out the numbers of applications received for each registration category and the number registered to date.

**Table 3: Registration category applied for**

| Category           | Number of applications | Number of providers registered |
|--------------------|------------------------|--------------------------------|
| Approved           | 77                     | 57                             |
| Approved (fee cap) | 446                    | 330                            |

13. Table 4 sets out the fee levels applied for within the applications received for the Approved (fee cap) category of registration.

**Table 4: Fee limits applied for**

| Approved (fee cap) fee level                        | Number of applications | Number of providers registered |
|---|------------------------|--------------------------------|
| Basic fees  | 154                    | 79                             |
| Higher fees   | 277                    | 243                            |
| No qualifying courses (Postgraduate only providers) | 15                     | 8                              |
| Total   | 446                    | 330                            |

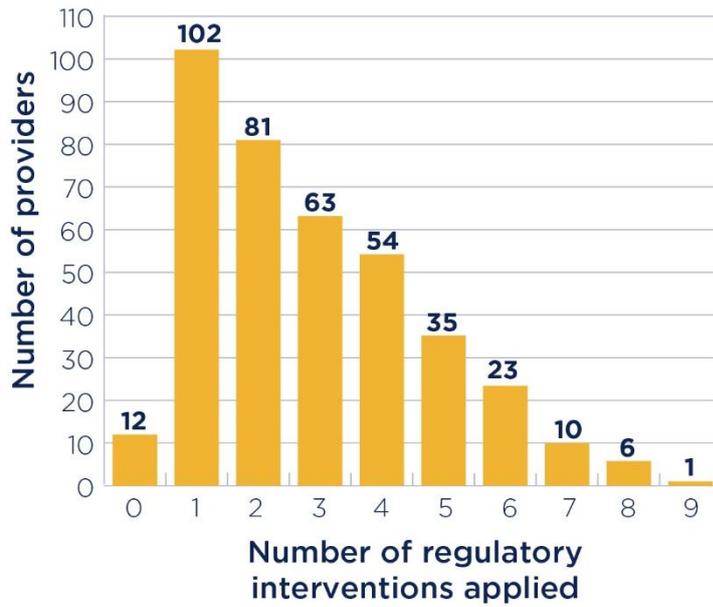
14. Table 5 sets out a summary of the number of applications by provider type.

**Table 5: Number of applications split by type of provider**

| Provider type        | Number of applications | Number of providers registered |
|----------------------|------------------------|--------------------------------|
| Previously regulated | 406                    | 373                            |
| New provider         | 117                    | 14                             |
| Total                | 523                    | 387                            |

15. Of the 387 providers registered by 23 October 2019, the vast majority had some form of intervention imposed – only 12 providers had no regulatory interventions. Figure 2 shows the number of providers and the count of regulatory interventions applied.

**Figure 2: Number of providers and number of interventions**



16. Table 6 shows the numbers of the type of regulatory interventions that were imposed across these providers.

**Table 6: Total number and type of regulatory interventions**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 615    |
| Enhanced monitoring     | 464    |
| Specific condition      | 30     |

17. Table 7 shows the number of regulatory interventions across the different initial conditions.

**Table 7: Regulatory interventions across conditions of registration**

| <b>Condition</b>                          | <b>Formal communication</b> | <b>Enhanced monitoring</b> | <b>Specific condition</b> |
|---|-----------------------------|----------------------------|---------------------------|
| A1: Access and participation plan         | 144                         | 77                         | 8                         |
| B1: Quality                               | 2                           | 3                          | 0                         |
| B2: Quality                               | 30                          | 42                         | 0                         |
| B3: Quality (student outcomes)            | 50                          | 77                         | 20                        |
| B4: Standards                             | 1                           | 4                          | 0                         |
| B5: Standards                             | 0                           | 2                          | 0                         |
| C1: Guidance on consumer protection law   | 15                          | 6                          | 0                         |
| C3: Student protection plan               | 67                          | 27                         | 0                         |
| D: Financial viability and sustainability | 74                          | 71                         | 0                         |
| E1: Public interest governance            | 176                         | 70                         | 1                         |
| E2: Management and governance             | 40                          | 72                         | 1                         |
| F3: Provision of information              | 16                          | 13                         | 0                         |
| <b>Total</b>                              | <b>615</b>                  | <b>464</b>                 | <b>30*</b>                |

\*The number of specific conditions set out in Table 7 is higher than the number currently published on the Register. This reflects the fact that this regulatory intervention was imposed at the point of registration. The requirements of some specific conditions have subsequently been satisfied, and the specific conditions therefore removed.

# Analysis of regulatory interventions

18. The following section sets out an analysis of the regulatory interventions imposed in relation to each of the initial conditions of registration.

## Access and participation for students from all backgrounds

### Conditions A1 and A2

Condition A1: An Approved (fee cap) provider intending to charge fees above the basic amount to qualifying persons on qualifying course must:

- i. Have in force an access and participation plan approved by the OfS in accordance with HERA.
- ii. Take all reasonable steps to comply with the provisions of that plan.

Condition A2: An Approved provider or an Approved (fee cap) provider charging fees up to the basic amount to qualifying persons on qualifying courses must:

- i. Publish an access and participation statement.
- ii. Update and re-publish this statement on an annual basis.

19. In line with the OfS's wider regulatory approach, a risk-based approach was applied to the assessment of 2019-20 access and participation plans. For Condition A1 there is an expectation of continuous improvement in ambition and practice in relation to reducing gaps in access, student success, and progression into further study and employment between the most and least advantaged students.
20. Condition A1 is satisfied when the Director for Fair Access has approved an access and participation plan that meets the OfS's requirements. We assessed the risk of a breach of Condition A1 by taking into consideration a provider's context, its ambition, and the credibility of its strategy. All stages of the student lifecycle were considered, including access to, success during, and progression from higher education.<sup>14</sup>
21. As a result of the assessment process, only 12 providers received no regulatory intervention. 142 providers received a formal communication, 79 were subject to enhanced monitoring requirements, and five received one or more specific ongoing conditions of registration (see Table 7) at the point that they were registered (some specific conditions have now been removed as the required actions have been completed). Two plans were not approved by the Director for Fair Access and Participation.

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<sup>14</sup> More information can be found in Regulatory notice 1, available at [www.officeforstudents.org.uk/publications/regulatory-notice-1-access-and-participation-plan-guidance](http://www.officeforstudents.org.uk/publications/regulatory-notice-1-access-and-participation-plan-guidance)

22. The types of enhanced monitoring and specific conditions imposed included requirements for cooperation with monitoring visits by the Director for Fair Access and Participation and additional reporting by providers, over and above routine monitoring requirements, on commitments in their plans. The OfS ran a series of workshops for providers to address specific areas of weakness in access and participation plans – such as rigorous self-assessment of performance, setting stretching outcomes-based targets and evaluating activity and investment – identified in a number of plans.
23. The high number of interventions applied to this condition reflects the fact that fair access and participation is a key objective for the OfS. It highlights the extent of the gaps in outcomes between underrepresented students and their peers in the English higher education system which we are working to eliminate. Many providers not at increased risk in relation to other conditions of registration were judged to be at increased risk for Condition A1.
24. Following extensive consultation during 2019, the OfS announced reforms to access and participation plans from 2020-21 which aim to enable providers to increase their ambition, deliver their strategies and evaluate their impact over a longer time period. Providers started submitting new plans on this basis during summer 2019. We began announcing decisions on these plans in August 2019 and will have announced the majority during autumn 2019.
25. The number of regularity interventions imposed in relation to Condition A1 (2019-20) are set out in Table 8.

**Table 8: Regulatory interventions imposed in relation to Condition A1**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 144    |
| Enhanced monitoring     | 77     |
| Specific condition      | 8      |

26. Condition A2 requires providers to publish an access and participation statement. The condition cannot be satisfied unless the statement is published. A number of providers had not published their statements at the point of their application to register.

## Quality, reliable standards and positive outcomes for all students

### Conditions B1, B2, B4 and B5

**Condition B1:** The provider must deliver well-designed courses that provide a high quality academic experience for all students and enable a student's achievement to be reliably assessed.

**Condition B2:** The provider must provide all students, from admission through to completion, with the support that they need to succeed in and benefit from higher education.

**Condition B4:** The provider must ensure that qualifications awarded to students hold their value at the point of qualification and over time, in line with sector recognised standards.

**Condition B5:** The provider must deliver courses that meet the academic standards as they are described in the Framework for Higher Education Qualification (FHEQ) at Level 4 or higher.

27. To assess whether Conditions B1, B2, B4 and B5 were satisfied we used evidence from the previous regulatory systems for providers, where this existed. New providers were required to undergo a quality and standards review conducted by the designated quality body to demonstrate that the conditions were satisfied. A small number of providers had previously undergone a higher education review conducted by the QAA and we were able to use this as evidence in our assessment of these conditions.

28. The number of regularity interventions imposed in relation to Conditions B1, B4 and B5 are set out in Table 9.

**Table 9: Regulatory interventions imposed in relation to Conditions B1, B2, B4 and B5**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 33     |
| Enhanced monitoring     | 51     |
| Specific condition      | 0      |

29. The majority of interventions imposed relate to Condition B2. For this condition, which requires that students have the support they need to succeed, we used data indicators, for example continuation and progression rates that were constructed to assess Condition B3 to inform our risk assessment. Where the data indicators demonstrated a low rate of continuation this raised concerns that students may not be receiving appropriate support.

30. Examples of interventions imposed include:

- Formal communication to alert providers that we may require a quality and standards review to test the extent to which the conditions are satisfied if student outcomes do not improve.
- Enhanced monitoring requiring a quality and standards review by the designated quality body.

**Condition B3: Quality (student outcomes)**

**Condition B3:** The provider must deliver successful outcomes for all of its students, which are recognised and valued by employers and/or enable further study.

31. In judging whether a provider satisfied Condition B3, we considered a number of indicators based on data returned by providers, as well as the context in which the provider operates, for example, the type of students it recruits, the subjects and modes it delivers, and the location of the provider.

32. For providers that had been regulated previously, we developed indicators based on data returned by providers to HESA or through the Individualised Learner Record collected annually by the Education and Skills Funding Agency (ESFA) and its predecessors from 2009-10 to 2016-17. New indicators become available in around March of each year – providers still going through the registration process in March 2019 were assessed using this further year of data (which relates to data returned in 2017-18). Providers already on the OfS Register will have their performance reassessed based on the updated indicators as part of our routine monitoring and intervention activities.
33. For providers that had not previously been regulated and therefore had not made data returns to either HESA or the ESFA, the relevant context in which they operated was also used to inform the judgement of whether Condition B3 was satisfied.
34. We started by looking at data that showed the performance of the provider in relation to three key indicators broken down to show outcomes at different modes and levels of study, and for students with different characteristics:
  - a. Student continuation and completion indicators.
  - b. Degree and other higher education outcomes, including differential outcomes for students with different characteristics.
  - c. Graduate employment and, in particular, progression to professional jobs and postgraduate study.
35. We considered a provider's performance in aggregate, over a time series (for the number of years up to a five year period for which indicators can be derived from available student data), as well as across 'split indicators' for each data indicator described in paragraph 34 a-c above.
36. These 'split indicators' show the performance within each data indicator for students from different demographic groups broken down by mode (full or part-time) and level of study (for example 'other undergraduate', first degree), as well as by age, participation of local areas (POLAR), English indices of multiple deprivation (IMD), ethnicity, disability, sex and domicile.
37. Our approach was to establish a baseline for each indicator described in paragraph 34 a-c (in each mode and level of study that the provider delivers) as a guide to whether performance in relation to a particular indicator raised concerns. The baseline varied according to the mode and level of the course.
38. We considered each data indicator described in paragraph 34 a-c above to determine whether, in each case, the indicator's value was likely to be of:
  - i. no concern;
  - ii. concern; or
  - iii. significant concern.
39. We then considered the proportion of the provider's current students who were at risk of experiencing the outcome(s) that were identified as being 'of significant concern' and the extent to which different demographic groups experienced outcomes of significant concern.

This calculation was based on recording the relative proportion of the most recent student population for which data was available (for most providers this was 2016-17 students) who were represented by a student demographic split indicator that may be 'of significant concern'.

40. We determined that, as a starting point, a provider was not likely to satisfy the condition if more than 75 per cent of its student population fell into a demographic group which was identified as experiencing an outcome that may be of significant concern.
41. However, we then considered contextual information, including data relating to the type of provision the provider offers, the characteristics of its students and the size of student cohorts and if necessary adjusted our consideration of the performance shown in the data indicators to take account of these factors.
42. We will shortly publish the baselines that were used as part of the analysis of whether Condition B3 was satisfied and a technical explanation of how the indicators described in paragraph 34 were constructed. We have also constructed an anonymised sector level workbook of B3 indicators, which we will also publish shortly.
43. As set out in the regulatory framework, we assess a provider's performance in absolute terms rather than against sector adjusted benchmarked data which compares performance against the performance of similar students on similar courses at other providers. This is because the OfS expects providers to deliver successful outcomes for all students.
44. In circumstances where our initial judgement was that a provider did not satisfy Condition B3, we gave the provider the opportunity to make representations about our proposed findings, including any other relevant contextual factors (for example the steps that the provider was taking to address the concerns raised by the data indicators).
45. The number of regulatory interventions imposed in relation to Condition B3 is set out in Table 10.

**Table 10: Regulatory interventions imposed in relation to Condition B3**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 50     |
| Enhanced monitoring     | 77     |
| Specific condition      | 20     |

46. The main reason for interventions in relation to this condition was to address concerns about student continuation rates, although some interventions were also directed at concerns about the rate of progression to professional employment or further study. Many interventions were applied in relation to more than one area of concern, across different modes of study and level of study.

47. Examples of the interventions imposed include:

- Enhanced monitoring requiring the provider to submit an action plan setting out the actions it will take to improve outcomes for students in areas specified by the OfS. Most of these relate to continuation rates for ‘other undergraduate’ students – those studying at level 4 and 5 which includes Higher National Certificates (HNC), Higher National Diploma (HND) and foundation degrees.
- Formal communication notifying the provider about our concerns about its performance and our expectations for improvement.

## Protecting the interests of all students

### Condition C1: Guidance on consumer protection law

The provider must demonstrate that in developing and implementing its policies, procedures and terms and conditions it has given due regard to relevant guidance about how to comply with consumer protection law.

48. To assess Condition C1, we asked providers to submit a self-assessment demonstrating how they had given due regard to relevant guidance about how to comply with consumer protection law. We explained that in this context, ‘relevant guidance’ referred to the Competition and Market Authority’s (CMA’s) advice to UK higher education providers on consumer protection law.<sup>15</sup> Our own guidance to providers explained that this self-assessment should take the form of an evaluation setting out how and why the provider believed it satisfied the condition, along with the evidence it had used to underpin its conclusion.
49. Of the 500 providers where assessments have started we had to ask 147 (29 per cent) for additional evidence or clarification on their self-assessment because it did not include sufficient information for us to judge that the condition was satisfied.
50. Some providers did not make any reference to the CMA guidance. Many did not provide sufficient evidence of how they had demonstrated due regard to CMA guidance. Providers generally stated their compliance with the law, rather than explaining how compliance is ensured through the consideration of relevant guidance.
51. A large number of self-assessments simply stated that a provider’s contractual terms and conditions for students were fair, and their information clear and accurate, without demonstrating how they knew that this was the case. In particular, new providers did not demonstrate a clear understanding of consumer protection law, its relation to the provision of higher education, and the rights of students.
52. We found inconsistencies between a number of providers’ self-assessments and the information on their website. Some stated that their policies were publicly available, but we were unable to find them. In a number of cases, published policies and information were

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<sup>15</sup> CMA, ‘UK higher education providers: Advice on consumer protection law’: see <https://www.gov.uk/government/publications/higher-education-consumer-law-advice-for-providers>

inconsistent with the guidance published by the CMA, leading us to a judgement that the condition could not be satisfied.

53. Applications from providers operating in partnership with another higher education provider tended to demonstrate a reliance on the policies and approach of the partner provider. Once registered, a provider is responsible for ensuring its own compliance with the ongoing conditions of registration. It is important that governing bodies understand this.
54. The clearest assessments described the mechanisms they used to demonstrate due regard, such as student testing and monitoring through complaints and queries.
55. The number of regulatory interventions imposed in relation to Condition C1 is set out in Table 11.

**Table 11: Regulatory interventions imposed in relation to Condition C1**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 15     |
| Enhanced monitoring     | 6      |
| Specific condition      | 0      |

56. Examples of the interventions applied include:
  - Formal communication to reinforce the need for providers to complete actions that they had identified were necessary in relation to compliance with consumer protection legislation, in particular where a provider was unable to demonstrate at the point of application that it had previously had due regard to CMA guidance in the development of its policies.
  - Enhanced monitoring requiring providers that had identified more significant actions to report to the OfS that these have been completed.

### **Condition C3: Student protection plan**

The provider must:

- i. Have in force and publish a student protection plan which has been approved by the OfS as appropriate for its assessment of the regulatory risk presented by the provider and for the risk to continuation of study of all of its students.
- ii. Take all reasonable steps to implement the provisions of the plan if the events set out in the plan take place.
- iii. Inform the OfS of events, except for the closure of an individual course, that require the implementation of the provisions of the plan.

57. To assess Condition C3 we required providers to submit a student protection plan which would provide assurance to current and future students, and to the OfS, that it has appropriate arrangements in place to protect the quality and continuation of study for its students.
58. Our guidance stipulated that plans should be written with students as the key audience. They should set out a provider's approach to protecting its students' interests transparently and clearly. They should be tailored to the provider's specific circumstances, and based on its own assessment of the extent of the risks to the continuation of study for its students. They must also include the actions a provider would take to ensure continuation of study.
59. Our guidance required student protection plans to cover the following main areas:
- Risks to continuation of study.
  - The actions a provider would take to ensure the continuation of study for students for any risks identified that are reasonably likely to crystallise.
  - Refunds and compensation.
  - Communication with students and review of the plan.
60. We assessed student protection plans as part of a wider risk assessment exercise to determine the extent of the risk of a future breach by a provider of any of its ongoing conditions of registration. We considered the provider's student protection plan in the context of both the wider risk assessment and the provider's own assessment of risks to the continuation of study for its students (as set out in its draft student protection plan). We then determined whether, in our view, the plan was appropriate for the provider's circumstances and for its students.<sup>16</sup>
61. Student protection plans are a new requirement. This may help to explain the variable quality of the plans we received. Many were of very poor quality on first submission and we had to ask for resubmission of 266 plans because they were not approvable. Many of these plans were submitted multiple times before they could be approved.
62. Because of the large number of weak plans we took an early view that we would need to publish new guidance on our student protection plan requirements. As a result, a large number of providers have been told they will need to resubmit their plans once this guidance is published later in 2019.
63. Some common weaknesses in student protection plans were:
- Plans often did not address all aspects of the guidance. In particular, they were not student-facing. This meant that students were unlikely to be able to understand the protection that is offered and the actions that a provider would take in the event of course, campus or provider closure.

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<sup>16</sup> See regulatory framework, paragraph 390.

- Many providers made only a very generic assessment of risk in their plans, using the examples set out in the OfS guidance. Some included risks that did not appear to be relevant to them, for example referring to loss of university title where no title was held.
- As more providers were registered, and more student protection plans published, we began to discern a pattern of provider application submissions which drew heavily on plans published by other registered providers. While we would expect providers to seek out examples of good practice from other providers, the extent of the replication meant that in some cases risk assessments were not specific to the provider. It was also not clear that the provider’s governing body had properly engaged with the requirements and the importance of these to the provider’s students.
- Risk assessments in some plans were overly optimistic, and in some cases contradicted other publicly available information about the financial position of the provider. For example, we received a number of applications from further education colleges with Education and Skills Funding Agency (ESFA) notices of concern in relation to financial performance. This indicates a potential risk to continuation of study, but their student protection plans did not reflect this. In some instances, this resulted in a difference between the OfS’s risk assessment and set out by the provider, particularly in relation to financial viability and sustainability and the potential risk this posed to continuation of study.
- Some student protection plans demonstrated a misunderstanding of the guidance. They focused on an assessment of business risks rather than risks to continuation of study for students. Mitigations were framed as the actions a provider was taking to prevent the risks crystallising, rather than the actions it would take in the event that risks were realised.
- Refund and compensation policies were weak because they were not always clear that refunds and compensation would be available to students in the circumstances that the provider could no longer deliver a course as advertised. Many student protection plans reflected providers’ existing policies, which only referred to refunds in the event of a student choosing to withdraw from their course.
- Details of the compensation offered were also limited in detail and scope, with some providers seeking to restrict the circumstances in which compensation might be available.
- Proposed mitigations in student protection plans often lacked detail. They contained broad statements, and it was often not clear how mitigations would be implemented in the event that they were needed.

64. The number of regulatory interventions imposed in relation to Condition C3 is set out in Table 12.

**Table 12: Regulatory interventions imposed in relation to Condition C3**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 67     |
| Enhanced monitoring     | 27     |
| Specific condition      | 0      |

65. Examples of the interventions applied include:

- Formal communication requiring providers to publish their refund and compensation policies on their websites.
- Formal communication requiring providers to send the OfS updated documentation where they had informed us they would be making changes to policies.
- Enhanced monitoring requirements where we had concerns relating to a provider's financial position and its ability to fund the measures set out in its student protection plan.
- Enhanced monitoring requirements where a provider has told us that a policy associated with its student protection plan is due to be reviewed, and to submit to us details of changes to the plan following this review.

## Financial viability and sustainability

### Condition D: Financial viability and sustainability

The provider must:

- i. Be financially viable.
- ii. Be financially sustainable.
- iii. Have the necessary financial resources to provide and fully deliver the higher education courses as it has advertised and as it has contracted to deliver them.
- iv. Have the necessary financial resources to continue to comply with all conditions of its registration.

66. To assess Condition D we used different information for each provider depending on its regulatory status in the previous regulatory system. For higher education institutions previously funded by the Higher Education Funding Council for England (HEFCE), and those previously regulated by the Secretary of State for Education, we used the latest audited financial statements and financial forecasts and commentary previously submitted to HEFCE.
67. For those providers – mainly further education colleges – whose principal regulator is ESFA, we used the financial dashboard produced by ESFA, and any published notices of concern. If a provider's most recent ESFA financial health rating was 'inadequate' we asked for further information from ESFA before making a decision about whether the provider satisfied this condition. In these circumstances the ESFA often has an intervention strategy and is working to monitor and support the provider.
68. The insolvency scheme that applies to further education and sixth form colleges provides for the protection of higher education students in these institutions. This therefore provides a level of student protection that mitigates the consequences of the potential financial failure of these providers. The insolvency scheme and the intervention strategies employed by the ESFA have

allowed the registration of a number of further education providers offering higher education that are financially weak.

69. New providers were asked to provide audited financial statements for the last three years (or for as many years as were available), or a business plan if statements were not available. We also asked them to provide financial forecasts and a commentary in support of these forecasts.
70. The regulatory framework sets out that in assessing the financial viability and sustainability of a provider the OfS will take account of any financial facilities or legally binding obligation of financial support that is available through a third party, such as a parent company.<sup>17</sup>
71. We had to ask 61 providers for additional evidence or clarification about their financial information because their initial submission did not include sufficient information for us to assess that the initial condition was satisfied. These submissions included:
- Errors in financial tables or inconsistencies between the financial tables and the audited financial statements.
  - Failure to provide audited financial statements when these were a requirement.
  - Failure to provide cash flow statements.
  - Obligations of financial support from a third party that did not meet the requirements of the regulatory framework.
  - Insufficient detail in the financial commentary to explain and support the provider’s financial forecasts.
72. The number of regulatory interventions imposed in relation to Condition D is set out in Table 13.

**Table 13: Regulatory interventions imposed in relation to Condition D**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 74     |
| Enhanced monitoring     | 71     |
| Specific condition      | 0      |

73. The most significant reason for imposing interventions across all provider types was forecast financial performance underpinned by optimistic growth in student numbers with little or no supporting evidence about how that growth would be achieved. There was also insufficient evidence of stress testing of the underlying financial position in the event that forecasts were not realised. Of the 71 instances of enhanced monitoring being imposed in relation to Condition D, 34 relate to concerns about providers' financial forecasts being reliant on what we

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<sup>17</sup> The regulatory framework sets out that a legally binding obligation of financial support means an unqualified undertaking enforceable by court action to meet the financial obligations of the provider as they fall due, or to put the provider in funds so that it may itself meet those obligations, if the provider is unable to do so. Further details are set out in paragraphs 403-407 of the regulatory framework.

considered to be inadequately evidenced and over-optimistic improvements in student recruitment. In a number of these cases, there is a reliance on growth in international student numbers.

74. In May 2019 we published a sector-level report on the financial results and forecasts submitted by 183 providers (excluding further education colleges) registered with the OfS on 1 March 2019.<sup>18</sup> The report found that these forecasts indicated a general weakening of financial performance over the coming year, with improvements thereafter. Some of this improvement was attributable to ambitious assumptions about growth in student numbers.
75. Most providers are assuming growth in the total numbers of UK, EU and overseas students, with 122 (out of 183) projecting increases in total student numbers of more than five per cent over the next four years. While the analysis showed that the majority of these providers are not reliant on projected growth to ensure their financial viability and sustainability, they may need to reduce their projected costs if their student recruitment ambitions are not realised.
76. The higher education sector continues to face a number of uncertainties and challenges arising from the wider policy and political environment. Some providers are also facing increased cost pressures, not least following recent valuations of large multi-employer pension schemes and more general inflationary pressures. In light of these uncertainties and challenges, they will need regularly to reassess their financial assumptions and forecasts and ensure that they have adequate contingency measures in place to ensure their financial viability and sustainability.
77. We will continue to monitor individual providers for early signs of financial difficulties and will intervene where we consider there to be increased risk that a provider may not be viable or sustainable in the future.
78. For new providers there is no requirement for audited accounts if they are not available. Instead, we rely on a business plan. However, many submitted business plans have provided insufficient detail and market analysis to provide confidence in the forecast financial performance.
79. For further education colleges, in order to avoid dual regulation we relied on information from ESFA. We have, however, also undertaken our own analysis, and have noted through the registration process a number of concerns with financial performance which differ in some respects from ESFA assessments.
80. Of the 74 instances of formal communication imposed in relation to Condition D, 56 related to concerns about the financial performance of further education colleges regulated by ESFA. The communication alerted the provider that as part of ongoing monitoring we would be seeking further information from ESFA about the college's financial performance.
81. Some examples of the interventions imposed in relation to Condition D are:

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<sup>18</sup> 'Financial sustainability of higher education providers in England: see [www.officeforstudents.org.uk/publications/financial-sustainability-of-higher-education-providers-in-england](http://www.officeforstudents.org.uk/publications/financial-sustainability-of-higher-education-providers-in-england). Registered further education colleges were excluded because the OfS is not the principal regulator for these providers and does not receive financial returns to be able to include in the analysis.

- Enhanced monitoring requiring providers to notify the OfS during the recruitment cycle if student recruitment targets may not be achieved, as well as the actions being taken to address the financial consequences of targets not being achieved.
- Enhanced monitoring requiring providers to report at regular intervals on their financial performance.
- Enhanced monitoring requiring the submission of annual audited accounts of the organisation providing financial support to the provider through a deed of undertaking if the financial viability and sustainability of a provider is dependent on this. In these circumstances, providers are also required to notify the OfS if there are any changes to the deed of undertaking or to the financial position of the guarantor.
- Enhanced monitoring requiring a provider to obtain written approval from the OfS before increasing its financial commitments.
- Formal communication notifying further education colleges regulated by ESFA that the OfS will require regular updates on their financial position from ESFA, and setting out our expectation that they should continue to engage and cooperate with ESFA in relation to their financial position and performance in order to continue to satisfy Condition D.
- Formal communication to providers claiming a VAT exemption where the basis for claiming the exemption was not clear, resulting in a risk of future tax liability. We also notified providers that we would be sharing information with HMRC about VAT exemptions claimed by providers.
- Formal communication reminding providers of the need to report to the OfS any material changes to financial performance and position.<sup>19</sup>

## Management and governance

### Condition E1: Public interest governance

The provider's governing documents must uphold the public interest governance principles that are applicable to the provider.

82. To assess Condition E1 we asked each provider to set out in a self-assessment how its governing documents uphold the public interest governance principles that are relevant to it and the category of registration it was seeking.<sup>20</sup> Our guidance specified that where a provider followed a particular governance code and this code was, in its judgement, consistent with the public interest governance principles, the self-assessment could also explain how the provider ensures compliance with this code.

<sup>19</sup> See in paragraph 494 of the regulatory framework.

<sup>20</sup> A full list of the public interest governance principles is set out in Annex B of the regulatory framework.

83. To assess this condition we consider the self-assessment submitted by the provider. As necessary, we also looked at the underlying evidence in support of the self-assessment, for example Articles of Association and relevant terms of reference or policy documents.
84. We had to ask 269 providers (54 per cent) for additional evidence or clarification about their self-assessment in relation to Condition E1 because their initial submissions did not include sufficient information for us to assess whether the condition was satisfied.
85. Providers often did not clearly state in their self-assessments which of their governing documents upheld the public interest governance principles. Instead, they described practice, often linked to compliance with their chosen code.<sup>21</sup> In many instances, providers had failed to recognise that their chosen code did not fully cover all of the public interest governance principles published in the regulatory framework.
86. For the 'value for money' principle, the majority of providers (70 per cent) described mechanisms such as audit or finance committees and the publication of accounts as evidence to demonstrate that the 'value for money' principle was upheld. However, they failed to address the issue of how transparency for students was achieved.
87. Another common area of weakness was the 'fit and proper' principle. Providers described practices of relying on declarations from members of the governing body, but in many cases it was not clear whether any checks were conducted. There was limited recognition that the 'fit and proper' indicators described in the regulatory framework are wider than, for example, Charity Commission requirements in this area.<sup>22</sup>
88. It was also notable that during the fit and proper person checks conducted by the OfS as part of the registration process, there was widespread non-disclosure on the application form of directorships and trusteeships held by individuals. This indicates that there may be weaknesses in providers' processes, particularly if they are relying solely on an annual declaration by individuals. We also identified a number of providers that had very long serving members on their governing bodies and no limitations to terms of office.
89. A significant number of providers, in particular further education colleges, did not have a freedom of speech code of practice, despite this being a legal requirement for publicly funded higher and further education providers. Many self-assessments failed sufficiently to distinguish between the principle of academic freedom (which relates specifically to the rights and protection of staff at a provider) and freedom of speech more broadly (which relates to both students and external speakers as well as staff).
90. Some further education providers did not indicate in their self-assessments that these principles were articulated in their governing documents. For example, although we were able

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<sup>21</sup> Most providers cited either the 'Higher Education Code of Governance', published by the Committee of University Chairs, or the 'Code of Good Governance for English Colleges' published by the Association of Colleges. <https://www.universitychairs.ac.uk/wp-content/uploads/2015/02/Code-Final.pdf>

<sup>22</sup> See Annex B of the regulatory framework. The Charity Commission requirements for trustees can be found in 'The essential trustee: what you need to know, what you need to do'. <https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3/the-essential-trustee-what-you-need-to-know-what-you-need-to-do#s3>

to find academic freedom within the articles of many of these providers, the self-assessments did not refer to this.

91. Providers applying to the OfS in the Approved (fee cap) category had often failed to provide sufficient evidence that the two additional public interest governance principles in relation to the receipt of public grant funding were upheld. These two additional principles relate to the provider’s eligibility to receive public grant funding and require at least one independent member of the governing body and that there are arrangements to demonstrate regularity, propriety and value for money.<sup>23</sup>
92. Some privately owned providers have established advisory boards which they call ‘governing bodies’, but which do not have legal decision making responsibility. In these instances, providers appeared to have expected that this would meet the requirement for independent members of the governing body. This was not the case.
93. The number of regulatory interventions imposed in relation to Condition E1 is set out in Table 14.

**Table 14: Regulatory interventions imposed in relation to Condition E1**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 176    |
| Enhanced monitoring     | 70     |
| Specific condition      | 1      |

94. Of the 176 formal communications sent to providers, 118 were about the provider’s approach to ensuring that members of its governing body are fit and proper persons, as it was not clear that the provider’s processes allowed it to make a judgement in relation to the indicators set out in Annex B of the regulatory framework.
95. Other examples of the interventions imposed include:
  - Formal communication alerting providers to their legal obligations under section 43 of the Education (No 2) Act 1986 which requires them to issue and keep up to date a code of practice on freedom of speech.
  - Formal communication reminding providers registered in the Approved (fee cap) category and that might receive public grant funding for the first time from 1 August 2019 of the additional actions they will be required to take in relation to receipt of this funding.<sup>24</sup>
  - Enhanced monitoring requiring the provider to submit draft governing documents that fully uphold one or more of the public interest governance principles. This intervention for the

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<sup>23</sup> See Annex B of the regulatory framework for a full list of public interest governance principles.

<sup>24</sup> See paragraph 447 of the regulatory framework.

most part concerned the principles relating to academic freedom, freedom of speech, and independent members of the governing body.

- Enhanced monitoring requiring the provider to ensure that the principle of academic freedom explicitly addresses the protection of staff from loss of privilege or employment.
- Enhanced monitoring requiring evidence that the freedom of speech principle is upheld.
- Enhanced monitoring requiring confirmation that independent appointments to the governing body had been made or to require amendments to governing documents in order to limit the terms of office that independent members can serve.
- Enhanced monitoring requiring the provider to ensure that the public interest governance principles are incorporated into governing documents.

## **Condition E2: Management and governance**

The provider must have in place adequate and effective management and governance arrangements to:

- i. Operate in accordance with its governing documents.
- ii. Deliver, in practice, the public interest governance principles that are applicable to it.
- iii. Provide and fully deliver the higher education courses advertised.
- iv. Continue to comply with all conditions of its registration.

96. To assess Condition E2 we asked providers to submit a self-assessment describing their management and governance arrangements. We also asked for an evaluation of why the provider considered these arrangements appropriate to its size and complexity. We also asked for a self-assessment of the extent to which management and governance arrangements are considered to be adequate (designed appropriately) and effective (operating properly), and the reasons for this assessment. Where necessary we requested underlying evidence to support the self-assessment.
97. We had to ask 240 providers (48 per cent) for additional evidence or clarification about their self-assessment because the initial submission did not include sufficient information for us to assess that the condition was satisfied.
98. There was generally a lack of evidence regarding the effectiveness of governance arrangements and on whether, and if so how, providers proposed to use appropriate external input and independent views on the adequacy and effectiveness of their management and governance arrangements. A significant number of providers appear to rely on internal and self-assessments of governing bodies to gain assurance. Many providers that were previously regulated by the Secretary of State had no evidence of every having reviewed the effectiveness of their arrangements.

99. A large number of providers cited compliance with a university or college governance code (see paragraph 85 above) as evidence that their arrangements were adequate and effective. While this is reasonable evidence of appropriateness and adequacy of arrangements, compliance with such a code does not, in itself, demonstrate that arrangements are effective (i.e., that they are operating properly).
100. New providers were often not sufficiently clear on their plans for establishing management and governance arrangements. We were often unsure whether the structures and arrangements they described were already established or were planned for the future. We will be publishing revised guidance for new providers on this issue and the need to set out clear milestones for delivery of plans.
101. Some providers stated their intention to adopt the Council of University Chairs' (CUCs') Higher Education Code of Governance. They presented this as evidence of adequate and effective governance arrangements, but without providing any detail of the work they would be undertaking to map their arrangements against the code, or to assess how appropriate the code might be for their organisation.
102. There were some general weaknesses in the arrangements providers described in relation to Condition E1. In particular, there was limited information about how they approach academic risk within their wider risk frameworks. Academic governance often appeared to be a reporting protocol rather than a robust approach of the governing body to testing the assurances it receives in this area.
103. The number of regulatory interventions imposed in relation to Condition E2 is set out in Table 15.

**Table 15: Regulatory interventions imposed in relation to Condition E2**

| Regulatory intervention | Number |
|-------------------------|--------|
| Formal communication    | 40     |
| Enhanced monitoring     | 72     |
| Specific condition      | 1      |

104. Examples of the regulatory interventions imposed included:
- Enhanced monitoring requiring the provider to submit evidence that it acts in accordance with its governing documents: for example, where governing documents state that independent members have limited terms, but there is evidence that this is not carried out in practice.
  - Formal communication informing the provider that it should ensure it is aware of the provisions within its governing documents and is upholding these in practice, for example if the provider failed to refer to its governing documents as the primary evidence for a principle being upheld.
  - Formal communication to note the OfS's concerns about the extent to which the governing body has sufficient oversight and understanding of the OfS's regulatory requirements as a result of inconsistencies or weaknesses in the evidence provided at registration, and the

engagement required to gain appropriate evidence that the initial conditions were satisfied.

- Enhanced monitoring requiring a provider to undertake a management and governance review. In some instances these reviews are instigated by the OfS through an external review of our choice and to our specification. In other cases, the provider has been asked to commission a review. The purpose of these reviews is to demonstrate that the provider has adequate and effective management and governance arrangements, and to ensure that it can continue to comply with all ongoing conditions of registration. Providers must submit the outcomes of reviews to OfS and state what actions will be taken as a result of the review.

105. Examples of the reasons for requiring a management and governance review include:

- The provider had already committed to a review and we have requested to see the results.
- Concerns that the governing body was not challenging issues that were material to the credibility of the provider's financial strategy and performance.
- New or substantial changes to management and governance arrangements had been put in place and were untested.
- A lack of external evidence about the effectiveness of management and governance arrangements.
- Concerns regarding the governing body's oversight and understanding of the OfS's regulatory requirements.
- Risk identified through other regulatory outcomes.

## Ongoing risk assessment

106. As well as assessing whether a provider satisfies the initial condition of registration we conduct a risk assessment to determine the extent of the risk that a provider will breach one or more of its general ongoing conditions of registration once registered. Mitigation has therefore also been imposed in relation to the ongoing condition relating to the provision of information to the OfS.

### Condition F3: Provision of information

For the purpose of assisting the OfS in performing any function, or exercising any power, conferred on the OfS under any legislation, the governing body of a provider must:

- i. 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.

ii. Permit the OfS to verify, or arrange for the independent verification by a person nominated by the OfS of such information as the OfS specifies at the time and in the manner specified, and must notify the OfS of the outcome of any independent verification at the time and in the manner and form specified.

iii. Take such steps as the OfS reasonably requests to co-operate with any monitoring or investigation by the OfS, in particular, but not limited to, providing explanations or making available documents to the OfS or a person nominated by it or making available members of staff to meet with the OfS or a person nominated by it.

The requirements in paragraphs (ii) and (iii) do not affect the generality of the requirement in paragraph (i).

107. To assess the risk of a future breach of Condition F3 we considered the provider’s previous track record in making data returns and notifications to its regulator. We also considered the quality of the information supplied as part of the registration process.

108. The number of regulatory interventions imposed in relation to Condition F3 is set out in Table 16.

**Table 16: Regulatory interventions imposed in relation to Condition F3**

| <b>Regulatory intervention</b> | <b>Number</b> |
|--------------------------------|---------------|
| Formal communication           | 16            |
| Enhanced monitoring            | 13            |
| Specific condition             | 0             |

109. Examples of the regulatory interventions imposed include:

- Formal communication to notify the provider of the OfS’s concerns about the quality of its data or the timeliness of its data returns. Providers were also warned that failure to submit accurate information when requested in the future may be a breach of Condition F3, and may result in further regulatory action.
- Enhanced monitoring that the OfS will continue to monitor data quality and may take further regulatory action unless there are improvements.
- Enhanced monitoring requiring providers to continue to engage with the work of the OfS data audit team.

## List of acronyms

|       |   |
|-------|---|
| CMA   | Competition and Markets Authority             |
| CUC   | Council of University Chairs                  |
| DAPs  | Degree awarding powers                        |
| DDB   | Designated data body                          |
| DfE   | Department for Education                      |
| DQB   | Designated quality body                       |
| ESFA  | Education and Skills Funding Agency           |
| FEC   | Further education college                     |
| HEFCE | Higher Education Funding Council for England  |
| HERA  | Higher Education and Research Act 2017        |
| HESA  | Higher Education Statistics Agency            |
| HNC   | Higher National Certificate                   |
| HND   | Higher National Diploma                       |
| ILR   | Individualised Learner Record                 |
| IMD   | Indices of multiple deprivation               |
| OfS   | Office for Students                           |
| POLAR | Participation of local areas                  |
| QAA   | Quality Assurance Agency for Higher Education |
| UT    | University title                              |



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