

## **UUK response to the Office for Students' consultation on the integrity and stability of the higher education sector in England**

May 2020



Universities UK (UUK) welcomes the opportunity to respond to this Office for Students (OfS) consultation. Universities are under extreme pressure as a result of the COVID-19 pandemic across all aspects of their operations and provision, including in admissions, and continue to respond effectively to the challenging environment faced by their students and staff.

It is these extraordinary circumstances which resulted in the UK government agreeing to put in place a student stability measure for 2020/21 only, to ensure that no English provider recruits a number of home/EU students in a way that would threaten the stability of the higher education sector. It is in this context which UUK views the OfS itself as also having an appropriate role.

### **Summary of UUK's response**

- UUK does not support the full extent of new OfS regulatory powers as outlined in the consultation. The scope of any new regulatory intervention should be targeted more effectively and focus solely on supporting stability for students, using the 2020/21 student stability measure as the central guiding policy intention
- The OfS should not obtain powers to be able to take retrospective action against universities covering activity as far back as 11 March 2020. UUK believes that OfS should instead be able to take action where any new condition is breached in terms of admissions behaviours for UK and EU-domiciled undergraduate admissions from the date the consultation was launched (4 May 2020) or where a university clearly breached the specific terms of the admissions moratorium since it was first introduced on 23 March 2020
- The OfS must provide an unequivocal commitment that any condition of registration would in fact be time-limited, and not simply extendable via a follow-up consultation
- The OfS must provide clearer guidance on what would constitute a breach of the condition while recognising the risks of its approach in limiting universities' ability to adapt and support students through the pandemic, the full impact of which is not yet understood
- UUK believes that the proposals would damage recruitment to courses where factors beyond actual academic attainment are central to admissions decision making, and risk creating new limitations on efforts to promote access or meet Access and Participation Plan targets which must be avoided
- It is also essential that English providers are able to compete effectively within the UK and global student recruitment markets during and beyond the pandemic. We would therefore urge the OfS to avoid any action which inhibits the ability of English providers to compete effectively, as this would clearly not be in the sector or student interest. It is vital that any new measures also support student choice across the whole of the UK rather than in England alone.

**Question 1: Do you agree or disagree with the proposed introduction of a new ongoing condition of registration and associated changes to the OfS's regulatory framework as set out in Annex A?**

UUK recognises the role of OfS as the regulator in taking targeted and proportionate action on a strictly time-limited basis to further support stability for students and universities while the pandemic substantially affects universities' provision. This is a position which UUK would not support in more 'normal' times and is particularly the case in the area of admissions, which are guaranteed as an area of institutional autonomy under the Higher Education and Research Act; that the Secretary of State must have regard to institutional autonomy, which includes the freedom to "determine the criteria for the admission of students and apply those criteria in particular cases".

As drafted, the condition would significantly undermine providers' autonomy, to which OfS acknowledges it must have regard in law – we do not accept the OfS' judgement that, in this case, the interests of students outweigh the autonomy of providers in relation to admissions as we do not believe the condition is in students' interests overall.

UUK does not support the full extent of new OfS regulatory powers as outlined in the consultation and proposes the following:

- **The scope of any new regulatory intervention should be more effectively targeted and focus solely on supporting stability for UK and EU-domiciled undergraduate students, using the 2020/21 student stability measure as the central guiding policy intention.**

Under the proposals as drafted, the OfS could take regulatory action in respect of anything that has the effect described under "Stability and Integrity". Although the consultation document indicates that the OfS's concern is to address conduct that is a direct consequence of the pandemic, the way that conduct is defined in the condition covers all acts or omissions since 11 March 2020 that have the effect of negatively affecting the sector, i.e. not just those that are specifically a response to the pandemic. This could bring into the purview of the condition decisions which are normally strategic or operational choices for individual autonomous institutions.

Without offering evidence of widespread unwarranted behaviour, it would therefore be more appropriate if the condition were more clearly framed as attaching only to such conduct as it relates to UK and EU-domiciled undergraduate admissions, and in this context, framed as: "the provider must not engage in any Conduct *in response to the pandemic* which in the opinion of the OfS...."

The proposed scale and scope of the new condition of registration beyond admissions risks limiting universities' ability to adapt and support students through the pandemic, the full impact of which is not yet understood. For example, the proposals risk impeding universities' ability to modify and flex certain aspects of their teaching provision or from creating new and innovative courses that might better support specific groups of students who might have been negatively affected by wider societal, economic or educational disruption because of the pandemic and in ways not yet fully realised. Universities must

act in accordance with the regulatory framework in its entirety which means using their autonomy to ensure they are delivering a high-quality experience for all students, and this requires some flexibility that the proposed condition could restrict.

It is also arguable whether the concerns the OfS has could not be addressed through the regulatory framework as it currently stands. For example, condition B2 (providers must support students from admissions through to completion) and the Quality Code which requires a “reliable, fair and inclusive” admissions system. Concerns about universities’ duty to support students and ensure a reliable admissions process could be handled through this route. UUK recognises that issues on the stability of admissions are harder to address through condition B2. However, in conjunction with condition C1 which could include regulatory action against aggressive consumer practices, this would address many of the concerns.

More generally, the broad scope of the proposals risks stifling universities’ ability to take decisions in a rapidly changing environment, including on the allocation of funds to promote stability for students. ‘Stability’ and ‘integrity’ as defined cover matters relating to finances, governance, and admissions practices, or which affect the interests of students (past, present or future) or negatively affect public trust and confidence in the sector. It follows from this that there is a very wide range of decisions that providers make which will now have to be sense-checked to see if they negatively affect any of these areas across the sector. The extension of OfS’s powers in this way, and this level of regulatory intervention, would contradict OfS’ existing response to the pandemic which has seen it temporarily relax regulatory requirements to ease burden and bureaucracy – a move which is to be welcomed.

- **The OfS should not obtain powers to be able to take retrospective action against universities covering activity as far back as 11 March 2020.**

The ability to take retrospective action in the form proposed offends against the basic principles of the rule of law (that individuals should know the consequences of their conduct at the time they choose to engage in that conduct) and against public law duties of fairness, clarity and predictability.

Such an approach (i.e. taking retrospective action as far back as 11 March 2020) could leave different parties open to legal challenge, as courts could take into account the precise state of knowledge (including what UK government policy was at the precise point in time) of the institution at the time it took the action or failed to take the action. This could present a challenge for governing bodies and Accountable Officers making future decisions on the basis of the rules at that time. In light of this, UUK believes that OfS should instead be able to take actions in the following circumstances:

1. Where any new condition is breached in terms of admissions behaviours for UK and EU-domiciled undergraduate admissions from the date the consultation was launched (4 May 2020)
2. Where a university clearly breached the specific terms of the admissions moratorium since it was first introduced on 23 March 2020, at which point public communications from OfS made clear that providers would face consequences if they did so, (UUK recognises that the moratorium’s terms were less limiting than

the proposed condition of registration and so OfS might consider this type of breach differently to under point 1)

- **The OfS must provide an unequivocal commitment that any condition of registration would in fact be time-limited, and not simply extendable via a follow-up consultation.**

If a new condition comes into force in June 2020, it is vital that it expires before 12 months from implementation so that it does not roll over into the next recruitment cycle. UUK therefore proposes that it should expire at the end of the recruitment cycle for the 2020/21 academic year and by 15 October 2020 at the latest (being the first application deadline for the 2021/22 cycle). The OfS should be able to justify why a maximum time-limit of 12 months has been proposed and why such a condition is being implemented at this time for the next recruitment cycle.

In its consultation, OfS recognises the temporary nature of the drivers for intervention, and we would expect this to translate irrefutably across to its intentions beyond the pandemic. UUK therefore proposes that a statement should appear in any new regulation that it cannot be renewed. If OfS feels that intervention is needed for the next recruitment cycle then new proposals should be developed, setting out clear justification and evidence, and consulted upon fully.

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

UUK believes the consultation proposals for implementation leave too much open to interpretation which runs the risk of restricting universities at a time of acute financial vulnerability. Therefore, in addition to limiting its scope to admissions, **the OfS must provide clearer guidance on what would constitute a breach of the condition.**

While UUK understands the merits of principles- not rules-based regulation, in these extraordinary circumstances the time available for universities to make new, fundamental decisions to ensure stability for students is under increased pressure. In these conditions, further details of what OfS would deem a breach in admissions behaviours compromising the student interest would be welcomed. There is a risk in creating a condition which could present as being too general to be followable, guided by principles that individually and in conjunction are so broad that it is immensely challenging to identify what conduct falls under them.

Any assessment of a breach – and an associated response or mitigation – will also need to be mindful of universities' wider regulatory and legal requirements, particularly in the realms of consumer protection. Withdrawing an unconditional offer, for example, where a student has rejected other opportunities may be to the detriment of the individual and universities will need to tread carefully to ensure students are not disadvantaged by retrospective changes to policies. Cases will need to be considered on an individual basis.

In response to the pandemic, and to ensure stability in student numbers for 2020/21, UUK has published a [Fair Admissions Agreement](#) which ought to inform the basis for a new

condition's parameters. This agreement acts as a code of practice through which the higher education sector can ensure the student interest is protected while promoting stability and integrity in admissions (including in relation to maintaining public confidence).

More widely, **certain definitions used in the consultation are problematic** and would need to be more clearly applied in practice:

- The accompanying guidance makes it clear that the OfS will take into account the **“potential” cumulative effect of multiple providers** adopting the same approach. It follows that, in making decisions, providers will have to consider how likely it is that others will follow suit and, if so, what that cumulative effect might mean for the stability and integrity of the rest of the sector. This is an extremely difficult judgement for universities to be able to make. The proposed condition would hold universities responsible for things they currently have no capacity to know and does not provide any tools to address this issue. For example, universities might wish to consider more informal co-operation between them about their recruitment practices to ensure they are not contravening this requirement, but this runs the risk of being deemed anti-competitive behaviour. It is particularly challenging for institutions to operate in an environment where actions taken on their individual merits might be fair but, when considered together with actions at other institutions, might be deemed to be unfair.
- **Conduct which affects “the interests of students”** could be an area of risk for universities as they seek to implement changes to courses and delivery in response to the pandemic. Although both the Universities Minister and the OfS have so far supported the right of universities to make such changes, whilst sustaining an equivalent level of provision, some students may argue that these changes are not in their interests and this could create pressure on the OfS to intervene. There have also been statements from the Minister for example in relation to deferrals of entry (which the Minister discouraged) which might again begin to limit the potential for institutions to determine their own responses to the pandemic by excluding measures that would otherwise form part of a portfolio of responses on the grounds that in the eyes of some they are “not in the interests of students”.
- **Incentives** – clarification is needed on whether bursaries intended for students from disadvantaged and underrepresented groups are included in the category of potentially prohibited incentives, as this could impact universities’ delivery of their Access and Participation Plans where they form a part of an institution’s offering.

OfS must also be mindful that students might reconsider the factors influencing their choice of university as a result of the pandemic; some may instead choose to stay local rather than move away, at an institution not previously chosen. The ability to ensure student choice is retained as a result is very important and is of particular concern where disadvantaged students may be affected by such changes in practise.

**Question 3: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider or for any particular types of student?**

Given the broad nature of the proposals and the lack of regulatory targeting on the specific problem which they are intended to solve, the risk of unintended consequences is significant.

The proposals risk disproportionately affecting specialist and creative institutions as well as those specialising in distance learning due to a specific reference that admissions decisions which are “not subject to criteria linked to prior educational attainment” might constitute a breach of the condition. Universities recruit on the basis of potential to succeed at university, and UUK believes that such a blanket approach would damage recruitment to courses where factors beyond actual academic attainment are more central to admissions decision making, and that unconditional offers can be perfectly appropriate for those applying to courses where admissions decisions have been informed by an interview, audition or additional application procedure (such as a submission of a portfolio or skills test).

In addition, UUK believes the proposals could have negative effects on certain groups of students, and recommends that OfS refine these further to minimise risk:

- **Students from disadvantaged backgrounds** – the proposals risk a conflation between contextual offers (used to widen access) and what OfS has previously labelled ‘attainment offers’. Both of these types of offer-making can include a reduced entry offer in terms of tariff points, and any new limitations on efforts to promote access must be avoided. The proposals risk leaving universities unclear on how contextual offers could be made confidently in line with the condition. This may result in fewer contextual offers being made which undermines one of the underpinning regulatory objectives of ensuring all students from all backgrounds are supported to access higher education. In already challenging circumstances, universities have adapted their access and outreach interventions to ensure recent progress in widening participation continues. However, the impact of the cancellation of Level 3 and other exams on disadvantaged students, in particular, remains unknown. [Research has](#) suggested that among high-achieving applicants, disadvantaged students are more likely to be underpredicted than more advantaged applicants. The OfS must recognise the role universities might need to play this summer in responding to this year’s A-Level (and other) exam profiles across applicants of different backgrounds and should not curtail universities’ efforts in this context, recognising that the principles and behaviours as set out in UUK’s Fair Admissions agreement remain very relevant as an institutional code of practice in this context.

Further, given the likelihood of online and blended learning taking prominence at the start of the 2020/21 year, it is more important than ever that students disadvantaged by digital poverty are supported in accessing higher education. The proposals as drafted make it unclear as to whether any offer of devices to entrants to counter this disadvantage will be considered unwarranted behaviour.

Further flexibility should also be given to key recruitment routes which can support access. These should be out of scope of any new condition and includes: foundation year students; students from partner colleges, and students coming from institutions with existing articulation agreements.

- **Postgraduate (taught) students** – the proposals risk damaging recruitment to certain postgraduate courses at a time when course provision might already be left vulnerable from a substantial decline in international student enrolments. UUK recommends that OfS' central focus is on UK and EU-domiciled undergraduate students, using the 2020/21 student stability measure as context for any regulatory intervention.
- **International students** – UUK is concerned that usual international recruitment practices could be affected by the new condition of registration which would damage the international competitiveness of English higher education at its most vulnerable time. Practices likely to be affected include:

Equivalence to local qualification: Universities routinely make independent assessments of a student's suitability for a programme, and on the equivalence of their local qualification. This is likely to be even more challenging as a result of COVID-19 as examinations around the world have been impacted differently. Whilst guidance from UK NARIC and others can support this decision-making, institutions need to be enabled to make this assessment independently.

English language entry requirements: Baseline standards on English language testing set by the Home Office variation above is an institutional decision. For example a university may flex its position during the clearing process depending on demand. Removing this ability will create problems with international competitiveness where such a requirement does not exist and where in some cases there is already substantially more flexibility on English language levels.

Definition of "aggressive marketing" in an international context: if this terminology is to be used, a clearer definition of what is considered aggressive is necessary. Within this, due consideration of how action institutions may need to take to remain competitive internationally whilst not acting to compete with other English institutions would be required.

In order to overcome the challenges set out above, UUK proposes that, in line with the remit of the student stability measure, any regulation should be exclusively limited to Home and EU undergraduate admissions and not widen further.

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

UUK believes OfS should conduct an Equality Impact Assessment as a matter of urgency in order to fully understand how its proposals could impact underrepresented and disadvantaged groups of applicants in particular.

Although Ofqual's guidance on teacher assessments this year is much broader than standard predicted grades, OfS should be mindful of the potential disproportionate impact that this year's assessment outcomes could have on BAME applicants. Any potential for unconscious bias in grade predictions should be avoided; Ofqual has noted the risk of bias in assessments, while UUK has recommended that [universities continue to address](#) the issue in their own practices. Building on a point made earlier in relation to applicants from

disadvantaged backgrounds, OfS must not limit a university's ability to address any inequalities through their admissions processes resulting from an as-yet untested form of Level 3 assessment.

#### **Question 5: Do you have any other comments?**

The focus of OfS in protecting students would naturally lead the sector to expect to be asked to collaborate more closely when faced with the current challenges. The effect of the proposals, however, could increase barriers to cooperation as a result of the perceived risks of appearing to be working together. During this time, we would strongly encourage the OfS to focus effort on how institutional collaboration could assist the sector, supporting much of the collaborative effort already underway in their support of students.

One long-established admissions principle is equitable and fair consideration for all those who applied by 15 January. Therefore, where a university made an offer prior to 15 January that student should not be disadvantaged simply because they did not make their decision by March (when the published deadline at that time was in May).

Finally, in relation to possible monetary penalties for transgression of the proposed condition of registration, UUK notes that the OfS consultation on monetary penalties (ref. OfS 2020.13) has been suspended during the current crisis. The proposed imposition of maximum penalties despite the absence of consultation with the sector more broadly on penalties has the potential to undermine the sector at a time of great financial vulnerability. There is also a potential risk of conflicting approaches being adopted and the resumption of the monetary penalties consultation being impacted on by events overtaking it. UUK is calling on the OfS to provide greater clarity on how the approach to monetary policies for the proposed condition of registration E6 will interact with those proposed in consultation OfS 2020.13.