

Consultation

**Office for
Students**

The logo for the Office for Students, featuring a dark blue square with a yellow square in the top right corner containing the letters 'OfS' in white.

OfS

Consultation on the Office for Students' approach to monetary penalties

This consultation runs from **15 December 2020**
to **26 February 2021**.

Reference OfS 2020.63

Enquiries to regulation@officeforstudents.org.uk

Publication date 15 December 2020

Consultation on the Office for Students' approach to monetary penalties

We are seeking views on our proposed approach to the use of our powers to impose monetary penalties on a higher education provider that breaches its conditions of registration with the Office for Students.

This consultation replaces the consultation 'Consultation on the Office for Students' approach to monetary penalties' (OfS 2020.13), which was launched on 3 March 2020 and then paused because of the early impact of the coronavirus pandemic. That consultation has now been withdrawn and the very small number of responses that we received in March 2020, and which were submitted anonymously, will be destroyed.

Timing of consultation	Start: 15 December 2020 End: 26 February 2021
Who should respond?	Anyone with an interest in the regulation of English higher education providers
How to respond	Please respond by 26 February 2021 Use the online response form available at survey.officeforstudents.org.uk/s/monetarypenalties/
Enquiries	Email regulation@officeforstudents.org.uk Alternatively, call our regulation helpline on 0117 931 7305

The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

Our four regulatory objectives

All students, from all backgrounds, and with the ability and desire to undertake higher education:

- are supported to access, succeed in, and progress from, higher education
- receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure
- are able to progress into employment or further study, and their qualifications hold their value over time
- receive value for money.

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About this consultation

- In response to the coronavirus pandemic (COVID-19), we suspended some of our regulatory requirements while providers adapted rapidly to the changed environment.¹ We now plan a phased resumption. However, we do not intend to reinstate our requirements exactly as before. Instead, we will draw on our experience of the last two years and target our work to ensure that it is focused where it is most needed. This revised approach will reflect the commitment we made in the regulatory framework that providers that do not pose specific increased risk should have less regulatory burden, now that the regulatory framework is established.
- As our regulatory focus moves from the initial registration of providers (since 2018, we have registered more than 400 providers) to the monitoring of registered providers in relation to their conditions of registration, we continue to develop our approach to monitoring and intervention. Alongside this consultation, we have published updated guidance² which explains in more operational detail how the approach to monitoring and intervention set out in the regulatory framework will work in practice. We are also consulting on our approach to our requirements for reportable events³ and the way we make decisions about the publication of information about individual higher education providers and other persons.⁴
- In this consultation, we are seeking views on our proposed approach to the use of our powers to impose monetary penalties on a higher education provider that breaches its conditions of registration. This consultation replaces the consultation 'Consultation on the Office for Students' approach to monetary penalties' (OfS 2020.13), which was launched on 3 March 2020 and then paused because of the early impact of the coronavirus pandemic. That consultation document has been withdrawn and the very small number of responses we received in March 2020, and which were submitted anonymously, will be destroyed.
- The substance of the proposals set out in this consultation remain unchanged from those set out in the previous consultation (OfS 2020.13) with one exception; in this consultation, we are not seeking views on our approach to the publication of information about sanctions, including monetary penalties. This is because we are consulting separately on our approach to publishing information about individual providers and other persons, more generally.⁵
- This consultation sets out the background to the proposals and the reasons for them. In formulating these proposals, we have had regard to our general duties in section 2 of the Higher Education and Research Act 2017 (HERA), as set out in Annex D; the Regulators' Code; statutory guidance issued by the Secretary of State; and the Public Sector Equality Duty.

¹ See www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/.

² See www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/.

³ See www.officeforstudents.org.uk/publications/consultation-on-reportable-events/.

⁴ See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

⁵ See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

- The consultation questions are listed in full in Annex A.

For more information about our approach to regulation, see the regulatory framework at www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/.

Who should respond to this consultation?

- We welcome responses from anyone with an interest in the regulation of English higher education.
- We are particularly (but not only) interested in hearing from **students and their representatives, and higher education providers that are registered or applying for registration**. These are the groups that may be most affected by our proposals. We welcome the views of all types and sizes of provider.

How to respond

The consultation closes at **2359 on 26 February 2021**.

Please submit your response by:

- Completing the online form at: survey.officeforstudents.org.uk/s/monetarypenalties/

If you require this document in an **alternative format**, or need assistance with the online form, please contact regulation@officeforstudents.org.uk. **Please note:** this email address should **not** be used for submitting your consultation response.

Consultation principles

- We are running this consultation in accordance with the government's consultation principles.⁶
- At the OfS we are committed to taking equality and diversity into account in everything we do. We have a legal obligation to have due regard to the Public Sector Equality Duty.

How we will treat your response

We will summarise and/or publish the responses to this consultation on the OfS website (and in alternative formats on request). This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details. If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

⁶ See www.gov.uk/government/publications/consultation-principles-guidance.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy⁷).

We may need to disclose or publish information that you provide in the performance of our functions or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

Next steps

Subject to the representations received as a result of this consultation, we intend to make a decision on whether and how to take forward the proposals set out in the consultation in spring 2021. If our decision is to implement some or all aspects of the proposals, we would do so at that point.

⁷ Available at www.officeforstudents.org.uk/ofs-privacy/.

Introduction

1. The OfS's primary aim is to ensure that English higher education is delivering positive outcomes for students – past, present and future. Our regulatory objectives reflect the things that matter most to students: high quality courses, successful outcomes, and the ongoing value of their qualifications. We use the tools in the regulatory framework to mitigate the risk that these regulatory outcomes are not delivered in practice for students from all backgrounds.
2. The OfS's regulatory approach is designed to be predominantly principles-based. Our regulatory requirements are expressed as broad principles rather than as narrow, prescriptive rules. This is because the higher education sector in England is complex and diverse. Imposing a narrow and entirely rules-based approach risks creating a compliance culture that stifles that diversity and discourages innovation, preventing the sector from flourishing. In October 2020, we published an Insight brief,⁸ which describes principles-based regulation in more detail and provides a discussion of the benefits and challenges of such an approach.
3. The Higher Education and Research Act 2017 (HERA) gives the OfS enforcement powers to use if it appears to the OfS that there is or has been a breach of one or more conditions of registration. The OfS has the power to:
 - a. Impose one or more specific ongoing condition of registration
 - b. Impose a monetary penalty
 - c. Refuse to renew a provider's access and participation plan
 - d. Suspend aspects of a provider's registration, to include suspending access to student support funding or OfS public grant funding
 - e. Vary or revoke a provider's authorisation for degree awarding powers, or revoke a provider's authorisation to use 'university' in its title.
 - f. Deregister a provider.
4. The regulatory framework sets out our general approach to the use of these enforcement powers and sets out the processes that we follow if we are minded to impose one or more of these sanctions on a provider. We have also published guidance for providers on how we may use our enforcement powers.⁹
5. The circumstances in which we may impose a monetary penalty are set out in paragraphs 178-181 of the regulatory framework. We are likely to use a monetary penalty where other mechanisms for improving a provider's compliance have been insufficient, where a serious breach has occurred but we consider deregistration to be disproportionate, or where we consider it important to incentivise compliance from all registered providers. We may suspend a

⁸ See OfS Insight brief – A Matter of principles: Regulating in the student interest, available at: www.officeforstudents.org.uk/publications/a-matter-of-principles-regulating-in-the-student-interest/.

⁹ See www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/.

provider's registration to reduce the immediate impact, on students or taxpayers, of a breach of one or more conditions of registration, pending remedial action by the provider.

6. A monetary penalty is particularly likely to be used where:
 - a. A breach is deliberate or negligent.
 - b. A provider has been dishonest or concealed information.
 - c. A provider has benefitted financially or otherwise from failing to comply.
 - d. A provider has made repeated breaches.
7. The Secretary of State has set out in regulations the matters to which the OfS must or must not have regard when imposing a monetary penalty and the penalty amount. The relevant regulations are the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019¹⁰ (referred to in this document as the '**Monetary Penalties Regulations**').
8. In performing our functions, including in deciding to impose a monetary penalty, we must have regard to our general duties, set out in Annex D. We will act proportionately, accepting that a monetary penalty at the maximum of the scale set out in the Monetary Penalties Regulations may be disproportionate for many breaches. In making decisions about an individual case, we will also have regard to our broader obligations, including our responsibilities under the Public Sector Equality Duty.
9. Where we make a provisional decision to impose a monetary penalty, we are required to seek representations from the higher education provider concerned.¹¹ We will have regard to any representations made by the provider before reaching a final decision.
10. The governing body of a provider may appeal to the First-tier Tribunal against a final decision to impose a monetary penalty and the amount of that penalty. Appeals may also be made against a decision about the period for paying the penalty and arrangements for instalments.¹² The tribunal may take a range of actions, including withdrawing the requirement to pay the penalty, confirming or varying the requirement, or remitting the requirement back to the OfS for further decision.
11. The governing body of a provider may also appeal to the First-tier Tribunal against a decision to require a party to pay costs (which could include investigation costs, administration costs and the costs of obtaining expert advice) and the amount of those costs.
12. In this consultation, we are seeking views on our proposed approach to determining the level of a monetary penalty, including any settlement discount, and our approach to the recovery of

¹⁰ The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 are available at: www.legislation.gov.uk/ukxi/2019/1026/contents/made.

¹¹ As set out in Schedule 3 of HERA.

¹² The appeal procedure to the First-tier Tribunal relating to the imposition of a monetary penalty is set out in Schedule 3 of HERA and summarised in paragraphs 180-181 of the regulatory framework.

costs relating to the imposition of sanctions. We are also seeking views on our approach to charging interest for late payment of OfS registration and other fees.

13. We are not seeking views on the powers that the Higher Education and Research Act 2017 (HERA) confers on the OfS to impose a monetary penalty, or the matters covered in the Monetary Penalties Regulations or the Higher Education (Registration Fees) (England) Regulations 2019 (referred to in this document as the '**Registration Fees Regulations**').¹³
14. In developing this consultation, we have considered alternative options for securing our objectives. These options, and the reasons why we do not propose to take them forward, are set out in Annex B.

Our proposals

The issues

15. The power to impose a monetary penalty where there is, or has been, a breach of an ongoing condition of registration is set out in HERA.¹⁴ The maximum penalty that the OfS may impose for each breach of a condition is the higher of 2 per cent of the provider's 'qualifying income'¹⁵ or £500,000 as set out in the Monetary Penalties Regulations.¹⁶
16. We also have the power to require a provider to pay the costs we incur in relation to the use of certain sanctions.¹⁷ These include investigation costs, administration costs and the costs of obtaining expert advice (including internal and external legal advice).
17. Furthermore, we can apply an interest charge for late payment of OfS registration and other fees, under the Registration Fees Regulations.¹⁸ This provision allows us to charge a provider interest on any unpaid amount of its registration fee. This is set at the official Bank of England rate at the time plus 5 per cent (at the date of publication of this consultation, this would be 5.1 per cent in total) accruing on a daily basis until the unpaid amount is paid in full.

¹³ The Higher Education (Registration Fees) (England) Regulations 2019 are available at: www.legislation.gov.uk/ukSI/2019/543/contents/made.

¹⁴ See Section 15(1).

¹⁵ Defined in paragraph 3 of the Monetary Penalties Regulations as a provider's relevant year income. This is defined as the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA.

¹⁶ As set out in paragraph 2 of the above regulations. The Monetary Penalties Regulations also set out, in paragraph 4, the factors to which the OfS must have regard when exercising its power to impose a penalty. The intervention factors are also set out in paragraph 167 of the OfS's regulatory framework.

¹⁷ This power is set out in section 73 of HERA. Under section 73(2) of HERA the relevant sanctions to which it applies are imposing a monetary penalty, suspending a provider's registration or removing a provider from the OfS Register.

¹⁸ This power is set out in Regulation 11 of the Registration Fees Regulations.

What are we proposing and why?

Summary of proposals

18. In summary, our proposals are:

- a. **Proposal 1:** A monetary penalty will normally be calculated by reference to the qualifying income¹⁹ of the higher education provider concerned. We will use a five-step process to determine the level of a monetary penalty. We may defer the due date for payment of a penalty, or provide flexibility in payment terms, where a penalty is likely to have a material impact on a provider's financial viability or sustainability.
- b. **Proposal 2:** We will normally give providers an opportunity to receive a reduced monetary penalty (a 'settlement') where they agree that they have breached a condition of registration and agree to the penalty at an early stage.
- c. **Proposal 3:** We propose to recover costs in relation to the imposition of sanctions where we are empowered to do so.
- d. **Proposal 4:** We will normally apply interest charges where a monetary penalty is imposed for late payment of OfS registration and other fees.

19. We are not seeking views on the powers that the Higher Education and Research Act 2017 (HERA) confers on the OfS to impose a monetary penalty, or the matters covered in the Monetary Penalties Regulations or the Registration Fees Regulations.

20. In addition, in this consultation, we are not seeking views on our approach to the publication of information about sanctions, including monetary penalties. This is because we are consulting separately on our approach to publishing information about individual providers and other persons, more generally.²⁰

Proposal 1: Proposed approach to determining the level of a monetary penalty

21. We propose that, as a general principle, we would normally calculate a monetary penalty by reference to a percentage of a provider's 'qualifying income'.²¹ This is a different approach to expressing monetary penalties as a series of fixed rates that apply to particular types of breaches regardless of the qualifying income of an individual provider. This is to ensure that our approach is proportionate and consistent with the approach taken in the secondary

¹⁹ Defined in paragraph 3 of the Monetary Penalties Regulations as a provider's relevant year income. This is defined as the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA.

²⁰ See www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/.

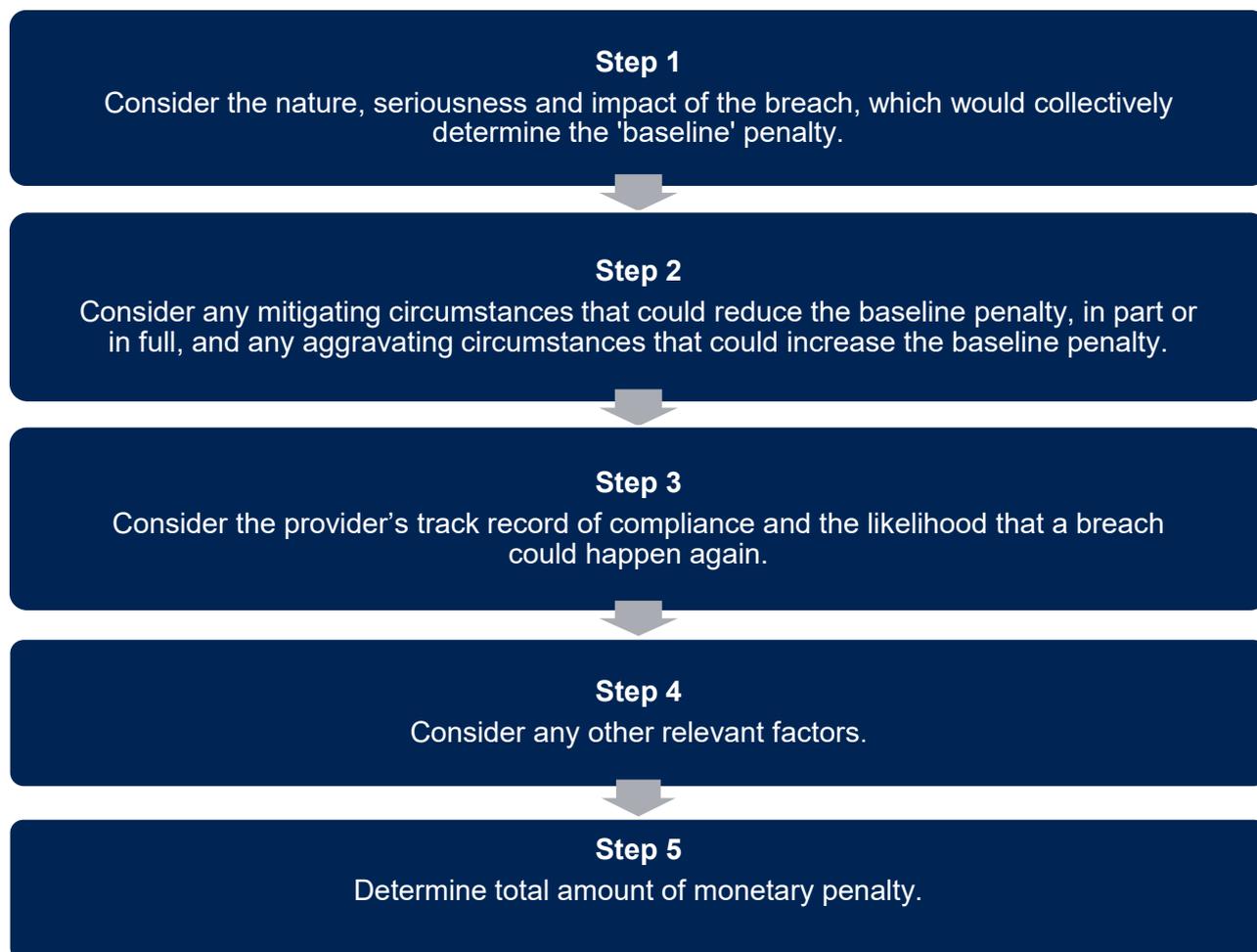
²¹ Defined in paragraph 3 of the Monetary Penalties Regulations as a provider's relevant year income defined as the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA.

legislation, which frames the maximum value of a penalty in terms of a percentage of qualifying income.

22. We propose a five-step assessment process for determining the level of a monetary penalty. The proposed process takes into account the intervention factors listed in the supporting regulations and the regulatory framework.²²

23. Figure 1 summarises the proposed process, and the paragraphs that follow provide a more detailed explanation.

Figure 1: Summary of proposed five step approach to determining a monetary penalty



Step 1

Consider the nature of the breach in order to determine the 'baseline' penalty. This would cover:

- the significance of the breach (for example, its seriousness and impact on students)
- the impact that an intervention would have on students

²² See Regulation 4 of the Monetary Penalties Regulations and paragraph 167 of the regulatory framework.

- the effectiveness of the proposed intervention
- any actual or potential gain (financial or otherwise) made by the provider as a result of the breach
- any action taken by other regulators to address the breach
- whether the breach has otherwise created a lack of confidence in the higher education sector.

Step 2

Consider any mitigating or aggravating circumstances that could either reduce the baseline penalty, in part or in full, or increase it (for example, as evidenced in the provider's explanation). This would cover:

- whether the breach was identified and promptly reported to the OfS by the provider, or alternatively reported by a third party
- the duration of the breach
- evidence that the breach was likely to have been deliberate, reckless or involved dishonesty
- steps taken by the provider to mitigate the risk or remedy the breach
- the provider's co-operation with the OfS's enquiries and investigations
- the provider's behaviour since the breach.

Step 3

Consider the provider's formal track record of compliance (for example, whether there have been multiple breaches of the same or different conditions) and the likelihood that a breach would happen again.

Step 4

Consider any other relevant factors, for example:

- action the OfS has taken in similar cases (as set out in paragraph 167 of the regulatory framework)
- adjustment for deterrence, for example: where the OfS considers the absolute value of the penalty too small to be a deterrent to the provider or other providers; where similar action in the past has failed to improve compliance; or where the penalty may not act as a deterrent in light of the provider's income or net assets.

Step 5

Determine the appropriate monetary penalty.

24. The process proposed above might mean, for example, that a baseline penalty is assessed at 1 per cent of a provider's qualifying income on the basis of the nature, seriousness and impact of the breach. An assessment of mitigation might then decrease the penalty by up to 100 per cent (i.e. to zero). Likewise, an assessment of aggravating circumstances might increase the penalty to up to the maximums stated in the Monetary Penalties Regulations.
25. The OfS has discretion over the time period for payment of a monetary penalty and the ability to allow payment in instalments.²³
26. We will consider the impact on students when considering the imposition of a monetary penalty, the time period for payment and payment by instalments, including whether such a penalty would be appropriate in circumstances where a provider is in financial difficulty. This would apply to cost recovery and interest charges too. In such circumstances, it may be appropriate to consider suspension or deregistration of a provider instead of a monetary penalty.

Question 1

Do you have any comments on our proposal that, as a general principle, we would normally calculate a monetary penalty by reference to a percentage of a provider's qualifying income?

Question 2

Do you have any comments on our proposed five-step approach to determine the level of a monetary penalty? Are there any additional factors that we should take into account in determining the level of a monetary penalty? Do you have any comments on our proposed approach to the time period for payment or payment by instalments?

Question 3

Is our proposed approach to determining the level of a monetary penalty clear? If not, please explain what is unclear or missing.

Proposal 2: Proposed approach to a settlement discount

27. Where we consider it appropriate, we propose to offer a settlement discount to a provider that agrees that it has breached a condition of registration and agrees to a monetary penalty at an early stage. The purpose of offering a settlement discount would be to:
 - a. Save the OfS and the provider the resources that would be required to produce and respond to a provisional decision to impose a monetary penalty

²³ See paragraph 2(6)(b) of Schedule 3 to HERA.

- b. Encourage the provider to address the compliance concerns identified more quickly
- c. Ensure other providers are aware of the penalty and the reasons it has been imposed as soon as possible
- d. Ensure timely and effective action is taken to improve or restore student confidence.

28. The availability of a settlement discount would be conditional on a provider:

- a. Admitting to the breach of condition(s), and accepting that a breach has occurred
- b. Not publicly suggesting that it disagrees with the imposition of a monetary penalty, or challenging it or appealing against it
- c. Accepting (if the provider requests a settlement early) that the OfS may need to complete its investigation to assess the nature of the breach and the harm caused.

29. We propose to offer a differentiated settlement discount. This would reflect the stage at which an agreement about a settlement is reached, and so the extent to which the OfS may avoid incurring costs:

- a. A provider can instigate a discussion with the OfS about an appropriate settlement discount as soon as it becomes aware of a potential breach of a condition of registration (this could be before we have begun an investigation relating to the breach)
- b. A 30 per cent discount may be applied to the level of the penalty that we estimate may be imposed (if the case proceeded to a final determination about a breach without a settlement) where settlement is reached before we make a provisional decision to impose a monetary penalty
- c. A 20 per cent discount may be applied to the level of the penalty where settlement is reached after we issue a provisional decision to impose a monetary penalty but before expiry of the period in which the provider may make representations (usually 28 days)
- d. A 10 per cent discount may be applied to the level of the penalty that we estimate may be imposed (if the case proceeded to a final determination about a breach without a settlement) where settlement is reached after expiry of the period in which the provider may make representations but before we have completed our consideration of those representations and reached a final decision.

30. In all cases we would make a provisional decision confirming the discounted monetary penalty and any related matters. The provider would then have an opportunity to make representations if it felt the provisional decisions did not reflect what had been agreed. In discussing a possible settlement discount with a provider, we would make clear our intentions about publication of information about the breach, the monetary penalty, the fact of the settlement and the percentage reduction that has been applied.

31. Settlement discussions would be confidential and admissions made by a provider in the course of settlement discussions would not be used outside of the context of the settlement discussion unless legally required. Similarly, information we convey in such discussions is confidential and should not be used outside the context of the settlement discussion.

32. We would reserve the right not to enter into, or to abandon, any discussion about a settlement discount and continue with the process to determine a monetary penalty where we considered this to be appropriate. For example, a settlement discount may not be offered in the most serious cases or where there were significant aggravating factors (see Step 2 after paragraph 23 above), as this could undermine the credibility of our regulatory approach.

Question 4

Do you have any comments on our proposed approach to settlement discounts?

Question 5

Is our proposed approach to settlement discounts clear? If not, please explain what is unclear or missing. Are there particular factors that you think are relevant in the context of our general duties, the Public Sector Equality Duty, the Regulators' Code or other issues?

Proposal 3: Recovery of the OfS's costs relating to the imposition of sanctions

33. We intend to recover the costs we incur in relation to the process that results in the imposition of sanctions. We will calculate the internal and external costs we have incurred in carrying out these activities. This will include investigation costs, including professional legal costs, administration costs and the costs of obtaining expert advice. We will consider all relevant factors, including proportionality, in each case when deciding the extent of the costs we will recover.
34. As the ability of the OfS to recover its costs in these circumstances is provided for in HERA, we are seeking views in this consultation only in relation to matters of clarity about our approach.

Question 6

Is our proposed approach to recovering our costs relating to the imposition of sanctions clear? If not, please explain what is unclear or missing.

Proposal 4: Interest charges for late payment of OfS fees

35. We intend to charge interest for late payment of our registration or other fees, as provided for in the Registration Fees Regulations.²⁴ This charge would be in addition to any monetary penalty we impose for a breach of the relevant condition of registration. As there is likely to be an administrative burden associated with imposing and recovering such charges, we do not intend to impose interest charges for late payment when the charges are below a minimal amount.

²⁴ Available at: www.legislation.gov.uk/uksi/2019/543/contents/made.

36. As the ability of the OfS to impose an interest charge for late payment of its fees is provided for in the Registration Fees Regulations,²⁵ we are seeking views in this consultation only in relation to matters of clarity about our approach.

Question 7

Is our proposed approach to charging interest for late payment of OfS fees clear? If not, please explain what is unclear or missing.

General consultation questions

Question 8

Are there ways in which the policy objectives under consultation in this document could be delivered more efficiently or effectively than are proposed here?

Question 9

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

Question 10

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

What would be the effect of these proposals?

37. These proposals would result in the publication of a general policy about the OfS's approach to the use of monetary penalties. The publication of such a policy would provide increased transparency about the factors the OfS would consider in calculating the amount of a monetary penalty. It would ensure that providers understand the approach that the OfS is likely to take.
38. More generally, the proposals are likely to result in increased transparency about the OfS's regulatory activities and decisions, for students and other stakeholders. Our approach ensures that the imposition of a monetary penalty would be proportionate, in the student and public interest, and would take account of the impact of that imposition on a provider, its staff and students.
39. We also consider that our proposed approach would allow us to deliver a credible deterrent to breach of conditions of registration by providers. In particular, when calculating the amount of a

²⁵ Available at: www.legislation.gov.uk/uksi/2019/543/contents/made.

monetary penalty, we propose to take into account any actual or potential gain (financial or otherwise) made by the provider as a result of the breach.

40. Our proposals would also allow us to use monetary penalties in a proportionate and targeted way, to ensure that providers address areas of non-compliance with our conditions of registration. We propose to take provider behaviour into account when calculating the amount of a monetary penalty and where, for example, the provider has brought the breach to the attention of the OfS and taken steps to mitigate that breach, this may reduce the amount of the monetary penalty that is applied. We also propose that, where providers admit to a breach of a condition at an early stage, the amount of the monetary penalty payable may be reduced.

What is the reasoning for these proposals?

41. Sanctions, including monetary penalties, are designed to deter providers that have committed breaches from committing further breaches, and to deter other registered providers from committing similar breaches. Using monetary penalties in the way set out in our proposals would deliver fairness for those providers that have incurred costs in order to comply with the regulatory requirements by ensuring there is no financial or other benefit to a provider from non-compliance. By encouraging compliance, the use of monetary penalties will also ensure that we are able to use our resources efficiently in performing our statutory functions because a more compliant sector will require less regulation.
42. We consider the use of monetary penalties to be in the interests of students. They are an important mechanism to ensure compliance with the OfS's regulatory requirements that are designed to protect the interests of students. They underpin our ability to deliver meaningful consequences for breaches of conditions of registration. They complement other interventions, such as enhanced monitoring and the imposition of specific conditions of registration.
43. Our proposal to recover the costs that we incur in relation to the process leading to the imposition of sanctions on providers, and to impose interest charges for late payment of OfS registration and other fees, will also help us to ensure that we use our resources in an efficient, effective and economic way.

Proposed implementation

44. Subject to the representations received as a result of this consultation, we intend to make a decision in spring 2021. If our decision is to implement some or all aspects of the proposals, we would do so at that point.

Annex A: List of questions in consultation

Question 1: Do you have any comments on our proposal that, as a general principle, we would normally calculate a monetary penalty by reference to a percentage of a provider's qualifying income?

Question 2: Do you have any comments on our proposed five-step approach to determine the level of a monetary penalty? Are there any additional factors that we should take into account in determining the level of a monetary penalty? Do you have any comments on our proposed approach to the time period for payment or payment by instalments?

Question 3: Is our proposed approach to determining the level of a monetary penalty clear? If not, please explain what is unclear or missing.

Question 4: Do you have any comments on our proposed approach to settlement discounts?

Question 5: Is our proposed approach to settlement discounts clear? If not, please explain what is unclear or missing. Are there particular factors that you think are relevant in the context of our general duties, the Public Sector Equality Duty, the Regulators' Code or other issues?

Question 6: Is our proposed approach to recovering our costs relating to the imposition of sanctions clear? If not, please explain what is unclear or missing.

Question 7: Is our proposed approach to charging interest for late payment of OfS fees clear? If not, please explain what is unclear or missing.

Question 8: Are there ways in which the policy objectives under consultation in this document could be delivered more efficiently or effectively than are proposed here?

Question 9: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

Question 10: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider or course or for any particular types of student?

Annex B: Consideration of alternative proposals

1. In formulating the proposals in this consultation, we have considered alternative approaches. These are summarised below.

Make no changes to our current approach

2. We have considered whether it is necessary to make any changes at all to our approach to the use of monetary penalties and whether we could instead continue to make decisions on a case-by-case basis. Our view is that this approach would be reasonable, but there are benefits to increased transparency about the way in which we calculate a monetary penalty and the factors we will take into account in reaching individual decisions.
3. Setting out the steps that we will take to determine the level of a monetary penalty also means that providers will be better informed about the issues that we consider particularly relevant to that determination and this will improve their ability to make relevant representations about a provisional decision to impose a monetary penalty.
4. We are mindful of the context within which higher education providers are currently operating because of the coronavirus pandemic. We have made clear our commitment to reducing regulatory burden and supporting providers in the interests of students during this period.²⁶ This has included limiting the number of consultations and requests for information to which providers are subject. We wrote to providers in July 2020 setting out our intention to move back to more normal regulatory activity and signalled that we expected to relaunch our consultation on our proposed approach to the use of monetary penalties (originally published in March 2020). The current proposals are designed to provide clarity to providers about our approach and our view is therefore that it would not be helpful to return to a more normal regulatory environment without resolving these issues.

Take a more rules-based approach to determining the level of a monetary penalty

5. We have considered whether we should adopt a more rules-based approach to determining the level of a monetary penalty in the event of a breach of one or more conditions of registration. For example, we considered whether we should introduce fixed rates of monetary penalties, which would apply to specified types of breach of each condition of registration or to specified 'types' (or size) of provider. We also considered whether to adopt a banded scale of monetary penalties (or different scales for different conditions of registration) by reference to the severity of breach of a condition. For example, a three-point scale where 1 is 'least severe' breach and 3 is 'most severe' breach.
6. However, we have decided not to take such a rules-based approach. This is because detailed rules would add complexity to our approach and would not properly take into account the different circumstances in which a breach – of one or more of the conditions of registration – occurs or the context of the provider committing that breach. Our view is that we should maintain a broadly principles-based approach to calculating a monetary penalty. Such an approach will allow us to take into account the specific circumstances of the provider and the

²⁶ See our letter of 25 March 2020: www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/.

breach and so to impose a monetary penalty which is proportionate to those circumstances, taking into account the impact that the imposition of the penalty will have on the provider, its staff and students. This is consistent with the approach set out in the regulatory framework. Our proposals set out our step-by-step approach to calculating a monetary penalty, to provide transparency for providers, students and others about our regulatory approach.

7. Our proposals – where a monetary penalty is calculated by reference to a percentage of a provider’s qualifying income – are also consistent with the approach taken in the secondary legislation,²⁷ which frames the maximum value of a penalty in terms of a percentage of qualifying income.

²⁷ The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 are available at: www.legislation.gov.uk/ukSI/2019/1026/contents/made.

Annex C: Matters to which we have had regard in reaching our proposals

The OfS's general duties

1. In formulating these proposals, the OfS has had regard to its general duties as set out in section 2 of HERA – these are reproduced in Annex D. We consider that the proposals in this consultation are particularly relevant to general duties (a), (b), (d), (f) and (g), which relate to institutional autonomy; quality, choice and opportunities for students; value for money; the need to use OfS resources in an efficient, effective and economic way; and best regulatory practice
2. In formulating these proposals, we have given particular weight to (b), (d), (f) and (g): quality, choice and opportunities for students; value for money; the need to use OfS resources in an efficient, effective and economic way; and best regulatory practice.
3. We have considered the principles of best regulatory practice and, in particular, considerations of transparency, accountability and proportionality. The proposals in this consultation are designed to ensure that the OfS's regulatory approach and the way this is applied to individual providers is proportionate, transparent and accountable. We consider that there is a strong public interest in the OfS delivering a credible deterrent to providers' breaching its regulatory requirements. We consider the proposed approach set out in this consultation to be proportionate and appropriate in ensuring that the OfS can make decisions about the imposition of a monetary penalty on a proportionate, consistent and transparent basis. In particular, our proposals set out our step-by-step approach to calculating a monetary penalty, which takes into account the circumstances of the breach and the impact of the imposition of the penalty on the provider concerned, its staff and students. Setting out our approach in this way provides transparency for providers, students and others, about our regulatory approach. It also ensures that the value of any monetary penalty imposed is a proportionate regulatory response to a particular breach.
4. We have considered the need to promote quality in the provision of English higher education. The use of monetary penalties is an important mechanism to ensure compliance with the OfS's regulatory requirements that are designed to promote quality and protect the interests of students.
5. Value for money in the provision of higher education is important for both students and the taxpayer. Students normally pay significant sums for their higher education and incur debt for tuition fees and maintenance costs. Similarly, the taxpayer contributes significantly to higher education through the provision of government-backed student loans and, for some providers, public grant funding. We accept that the imposition of a monetary penalty would increase a provider's costs (and may therefore affect value for money delivered by that provider). However, our proposals would provide a credible deterrent to prevent breaches of our regulatory requirements – which promote value for money – by all providers and would encourage each provider to address any areas of likely non-compliance. Our proposals also seek to eliminate any gain (financial or otherwise) made by a provider as a result of a breach. Our proposals set out a proportionate approach to the calculation of a monetary penalty and, in determining the amount of a monetary penalty, we propose to take into account the impact that

the penalty would have on students. We may also decide that a monetary penalty is not appropriate where a provider is in financial difficulties.

6. We have also had regard to the need to use our resources in an efficient, effective and economic way. By encouraging compliance, the use of monetary penalties will also ensure that we are able to use our resources efficiently in performing our statutory functions because a more compliant sector will require less regulation. Our proposals also set out our proposed approach to recovering the internal and external costs that we have incurred in relation to the imposition of sanctions. Because of the likely administrative burden involved, we do not intend to impose interest charges for late payment of OfS registration and other fees when those charges are below a minimum amount.
7. In formulating these proposals, we consider general duty (a) important, but have given less weight to this.
8. The OfS is required to have regard to the need to protect institutional autonomy. We do not, however, have an absolute obligation to protect the autonomy of providers. Our proposals take a principles-based approach to making decisions about the imposition of monetary penalties because using rigid rules-based mechanisms would not allow us to make decisions about imposition that take account of a provider's particular context. We are therefore giving weight to autonomy insofar as this is consistent with the need for the OfS to impose monetary penalties that we consider necessary to protect the public interest and the interests of students. Decisions about the imposition of a monetary penalty would only arise in circumstances in which a provider had breached one or more of its conditions of registration. In these circumstances, where a provider is non-compliant, we currently consider it appropriate to attach less weight to autonomy.

The Regulators' Code

9. We have had regard to the Regulators' Code and our view is that the following sections are particularly relevant:
 - a. Section 1 which says that regulators should choose proportionate approaches to those they regulate, based on relevant factors including, for example, business size and capacity. It also says that, when designing and reviewing policies, operational procedures and practices, regulators should consider, among other things, how they can best: (i) improve confidence in compliance for those they regulate, by providing greater certainty; and (ii) encourage and promote compliance.
 - b. Section 2 which discusses the importance of regulators providing simple and straightforward ways to engage with those they regulate, to offer views and contribute to the development of their policies. That section also discusses the approach that regulators should take in responding to non-compliance that they identify, noting the importance of clarity, proportionality and consistency and the provision of rights to representation and appeal.
 - c. Section 3 which discusses the need to base regulatory activities on risk, including when choosing the most appropriate type of intervention.

- d. Section 6 which discusses the need for regulators to ensure that their approach to their regulatory activities is transparent, including their enforcement policy and how they respond to non-compliance (Section 6.2).

Guidance issued by the Secretary of State

10. We have had regard to guidance issued to the OfS by the Secretary of State under section 2(3) of HERA, and specifically the following guidance:²⁸
 - a. Strategic guidance to the OfS – Priorities for financial year 2018-19 (20 February 2018).
 - b. Strategic guidance to the OfS: Priorities for financial year 2019-20 (27 February 2019).
 - c. Supplementary strategic guidance to the OfS (16 September 2019).
 - d. Strategic guidance to the OfS - additional teaching grant and funding/reducing the bureaucratic burden on providers (24 September 2020).
11. We have specifically had regard to the emphasis here on the importance of the OfS using its full range of enforcement powers; for example, the Secretary of State's comments in the guidance dated 16 September 2019 that '... to further support students' and taxpayers' interests and to protect the sector's reputation, you have my full backing to continue to exercise your powers boldly to ensure that you are an effective regulator... I am sure you will continue in your rigorous decision-making during the initial registration process and taking action where monitoring of providers' compliance with ongoing conditions of registration suggests that there are courses and providers that are not delivering value for students. Where, for example, there are unacceptable levels of drop-out rates or failures to equip students with qualifications that are recognised and valued by employers, falling short of what is required of a provider under its registration conditions, we fully support the OfS in using the full range of monitoring and enforcement powers it now has at its disposal... and use of the OfS's statutory powers to suspend a provider's registration; to apply additional and specific registration conditions; and to impose financial penalties.'
12. We have also had regard to the emphasis on the importance of transparency; for example, the Minister of State's comments in the strategic guidance of February 2018 about the OfS 'paying close attention to the elements of the regulatory framework that will deliver transparency, accountability and consequently drive better value for money...'. We have also had regard to the Secretary of State's comments in the Strategic guidance to the OfS: Priorities for financial year 2019-20 (27 February 2019) that 'Transparency is key to ensuring justification and accountability' (referring specifically to the publication of senior staff remuneration data and analysis).
13. We have also had regard to the Minister of State's comments in her strategic guidance of September 2020 that 'I would like to see immediate progress...to reduce unnecessary bureaucracy: to ensure the higher education regulatory system is truly proportionate, risk-based, transparent and accountable'.

²⁸ All guidance cited is available at: www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government/.

The Public Sector Equality Duty

14. We have had regard to Schedule 1, paragraph 21 of HERA, which extends the Equality Act 2010, and therefore the Public Sector Equality Duty, to the OfS. This requires the OfS to have due regard to eliminating unlawful discrimination, foster good relations between different groups and take steps to advance equality of opportunity.
15. Through this consultation we are seeking views on any unintended consequences of our proposals, for example on particular types of provider or student. We are also seeking views about the potential impact of our proposals on individuals on the basis of their protected characteristics. Responses to this consultation will inform our assessment of the impact of our proposals on different groups.

Annex D: Section 2 of the Higher Education and Research Act 2017

2. General duties

- (1) In performing its functions, the OfS must have regard to—
- a. the need to protect the institutional autonomy of English higher education providers,
 - b. the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers,
 - c. the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers,
 - d. the need to promote value for money in the provision of higher education by English higher education providers,
 - e. the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers,
 - f. the need to use the OfS's resources in an efficient, effective and economic way, and
 - g. so far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be—
 - i. transparent, accountable, proportionate and consistent, and
 - ii. targeted only at cases in which action is needed.
- (2) The reference in subsection (1)(b) to choice in the provision of higher education by English higher education providers includes choice amongst a diverse range of—
- a. types of provider,
 - b. higher education courses, and
 - c. means by which they are provided (for example, full-time or part-time study, distance learning or accelerated courses).
- (3) In performing its functions, including its duties under subsection (1), the OfS must have regard to guidance given to it by the Secretary of State.
- (4) In giving such guidance, the Secretary of State must have regard to the need to protect the institutional autonomy of English higher education providers.
- (5) The guidance may, in particular, be framed by reference to particular courses of study but, whether or not the guidance is framed in that way, it must not relate to—

- a. particular parts of courses of study,
 - b. the content of such courses,
 - c. the manner in which they are taught, supervised or assessed,
 - d. the criteria for the selection, appointment or dismissal of academic staff, or how they are applied, or
 - e. the criteria for the admission of students, or how they are applied.
- (6) Guidance framed by reference to a particular course of study must not guide the OfS to perform a function in a way which prohibits or requires the provision of a particular course of study.
- (7) Guidance given by the Secretary of State to the OfS which relates to English higher education providers must apply to such providers generally or to a description of such providers.
- (8) In this Part, “the institutional autonomy of English higher education providers” means—
- a. the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way,
 - b. the freedom of English higher education providers—
 - i. to determine the content of particular courses and the manner in which they are taught, supervised and assessed,
 - ii. to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and
 - iii. to determine the criteria for the admission of students and apply those criteria in particular cases, and
 - c. the freedom within the law of academic staff at English higher education providers—
 - i. to question and test received wisdom, and
 - ii. to put forward new ideas and controversial or unpopular opinions,
- without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.



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