

Office for  
Students



# Consultation on student protection directions

**Decision**

**Reference** OfS 2021.08

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The Office for Students (OfS) 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. Universities and colleges that are registered with the OfS are regulated by us and must meet certain conditions.

Our four regulatory objectives are that 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.

# Introduction

1. This document sets out the decisions taken by the Office for Students (OfS) following analysis of responses to the consultation<sup>1</sup> on student protection directions, held between 17 July and 11 September 2020.
2. The proposals in the consultation document were designed to address the following issues:
  - a. **Issues with the financial viability and sustainability of providers** – higher education providers are facing a range of unprecedented challenges as a result of the pandemic, and for some this may result in financial circumstances that lead to a market exit risk. We have also identified circumstances unrelated to the pandemic where providers face financial challenges that put them at risk of market exit.
  - b. **Issues in the development of student protection plans** – we identified a number of common weaknesses with student protection plans that would have a significant impact on the credibility of these plans where a provider is judged to be at material risk of market exit. This would be the case whether that risk relates to financial viability and sustainability, or other matters.
  - c. **Issues in the implementation of student protection plans** – where we have required providers at risk of market exit to take action to protect the interests of students, the existing student protection plan has been the starting point for discussion rather than being ready for implementation. Events can move quickly, and implementation using existing regulatory tools is likely to result in undesirable delay.
3. The consultation proposed the introduction of a new general ongoing condition of registration, C4: Student protection directions.
4. In this document we identify and discuss the most significant issues raised by respondents in their responses to the consultation, whether or not these have led to changes to the proposals set out in the consultation. Our analysis shows that the majority of respondents to the consultation disagreed with the proposed introduction of condition C4. We have considered all responses carefully and, for the reasons set out in this document, we consider that condition C4 is a necessary and proportionate means to ensure that, when a provider faces a material risk that it will fully or substantially cease the provision of higher education in England, the OfS will be able to direct a provider to take action to protect the interests of students.
5. We have therefore decided to implement a new general ongoing condition of registration, but with a number of important revisions. We have taken into consideration

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<sup>1</sup> The consultation document is available at [www.officeforstudents.org.uk/publications/consultation-on-student-protection-directions/](http://www.officeforstudents.org.uk/publications/consultation-on-student-protection-directions/).

the responses received to the consultation and further consideration of the issues we are seeking to address.

6. The revisions are designed to provide greater clarity about how we understand the term 'market exit' and the narrow circumstances in which student protection directions would be used. We have clarified the relationship between the new condition and the existing condition that relates to student protection plans, and included an explicit power for the OfS to withdraw a student protection direction, if it considers it is no longer necessary. We have also amended the descriptions of the student protection measures set out in the condition, and provided extended guidance to help providers to understand how we are likely to make decisions about the use of the new condition.
7. The final version of condition C4, and a table summarising the changes we have made, can be found in Annexes A and B, along with a reference to the relevant section of the analysis that had led us to make the change.
8. The new condition will be imposed on registered providers from 1 April 2021, but will not apply to providers that are Further Education Bodies as defined by the Technical and Further Education Act 2017. This is because, in the event of insolvency, Further Education Bodies may be covered by a special administration regime, which would provide alternative protection for their students.

## Executive summary

9. The OfS consulted on a proposal to introduce a new general ongoing condition of registration, condition C4, to the OfS regulatory framework.<sup>2</sup> The consultation was launched on 17 July 2020. Stakeholders were invited to share their views on six consultation questions by using an online survey to submit written responses. The consultation questions are set out in Annex C. The consultation was published on the OfS website and accountable officers of higher education providers that are registered with the OfS were notified of the consultation by email. The consultation closed on 11 September 2020.
10. We received 83 responses, the majority of which were from higher education providers, their staff or sector mission groups.
11. Most respondents provided significant commentary in response to the questions posed as part of the consultation. Many of the responses, in addition to commenting on the proposals, also provided commentary related to the higher education market generally (including the desirability or otherwise of market exit<sup>3</sup> as a feature of the market), and the OfS's approach to regulation, including in relation to how student protection activity may be undertaken in the event of market exit.
12. Below we set out quantitative analysis of the questions that asked respondents to record their views on a scale, and a qualitative analysis of the comments received on the proposals organised by themes. We have also set out our response to each of the themes raised. The analysis reflects the full range of responses received.
13. Having considered the responses, we consider the main arguments for introducing C4 as a new general ongoing condition of registration have not changed substantially since launching our consultation on the draft condition. The need for the condition is based on the fact that providers can face financial and other risks which can crystallise with little time to manage exits, and that student protection plans (SPPs) may not provide sufficient protection in market exit cases. Additionally, the use of other regulatory tools, such as the imposition of specific ongoing conditions of registration, does not allow us to act swiftly enough to satisfactorily mitigate the risk that emerges to students.
14. We recognise that a majority of those who responded to the consultation did not support the introduction of condition C4, and that many raised concerns about the impact of the proposals on institutional autonomy. We have considered these issues carefully and, as required by our general duties, we always have regard to the need to protect the institutional autonomy of English higher education providers. However, we do not

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<sup>2</sup> See [www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/](https://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/).

<sup>3</sup> This document refers to 'market exit' throughout. This is a shorthand for the circumstances outlined in C4(i) - "the provider will, or will be required by the operation of law to, fully or substantially cease the provision of higher education in England".

consider that the points made about institutional autonomy are sufficient not to proceed with these measures for a number of reasons.

15. Part of our reasoning is the potential benefit of the measures to students, given they are designed to allow effective intervention to protect the interests of students at a time when those interests may be especially threatened. Condition C4 is designed in such a way that it ensures that any impact on institutional autonomy would be limited for several reasons.
16. First, condition C4 is designed so that binding student protection directions would only be applied if the OfS first judged a provider to be at material risk of market exit. This is in effect a gateway – the OfS cannot issue directions unless it has first determined that a material risk exists.
17. Second, if that gateway is reached this does not mean we would always consider it appropriate to impose a direction, unless we considered it to be an effective and proportionate step to protect the interests of students. When deciding whether to impose a direction under condition C4, the OfS would be required to have regard to its public law duties (which include ensuring that such decisions are reasonable and proportionate for the provider’s situation) and its general duties under section 2 of the Higher Education and Research Act (HERA).
18. Finally, when the OfS considers it to be appropriate to impose a student protection direction, this direction would be a targeted intervention, focusing on measures which the OfS reasonably considers are proportionate in that particular context. One of the changes we have made, as a result of consultation responses, is to update the guidance for the condition to set out how the OfS might engage or consult with a provider (when we judge that students would not be disadvantaged by any delay by doing so).
19. Some responses suggested that the imposition of the condition would be disproportionate, or ought to be time-limited, if the financial risks it is responding to are a product of the coronavirus (COVID-19) pandemic. However, while the pandemic has created a particular need for the condition now, as set out in the consultation document, it is not the only source of risk for providers, and we have encountered significant risk of exit in cases unrelated to the pandemic.
20. Respondents to the consultation raised a significant number of other points in relation to our proposals. In our analysis, we identified a number of themes in the responses. The themes we identified were:
  - Overall regulatory approach
  - Use of existing regulatory mechanisms
  - Terminology
  - Implementation and application of condition C4
  - The impact of the proposed condition on students
  - The publication of market exit plans.

## Overall regulatory approach

21. We have considered issues related to institutional autonomy and regulatory burden raised by respondents. Overall, we consider that the narrow scope of condition C4 means that its use will be targeted only at those providers at material risk of market exit and when we consider a student protection direction to be necessary. In those circumstances we consider such an intervention to be appropriate and we recognise that it would increase regulatory burden for the provider. Some respondents suggested that the OfS does not understand the sector or the context for individual providers sufficiently well to use condition C4 effectively. We consider that these issues are addressed by our normal approach of engaging with a provider, and our public law requirements to act reasonably and to consider all available evidence before making a decision. In response to the feedback received, we have updated the guidance to clarify that in our decision-making we will consider all relevant factors and place particular weight on the interests of students.

## Use of existing regulatory mechanisms

22. When addressing the use of existing regulatory mechanisms, respondents mainly focused on the use of student protection plans (SPPs) and, by extension, condition C3 (student protection plan).<sup>4</sup> Respondents made comments in relation to the use of specific ongoing conditions as an alternative, and there were also suggestions about using other regulatory mechanisms, such as reportable events. Overall, we consider these do not represent viable alternatives that would allow us to address the issues we have identified and ensure students are sufficiently protected, and we set out detailed reasons for this in the section 'Use of existing regulatory mechanisms'. However, following the feedback received we have made updates to the condition and the guidance to show that a student protection direction made under condition C4 may make reference to a provider's compliance with condition C3, in order to seek to avoid any conflict between a SPP and an MEP.

## Terminology

23. A number of respondents provided feedback about various terms used within the proposed condition and the guidance, with particular consideration given to the meaning of 'market exit', and how we identify whether a provider is at 'material risk' of market exit. In response to this feedback, we have made amendments to the condition and to the guidance both adding and removing language in comparison with the proposed condition in order to improve clarity for providers.

## Implementation and application of condition C4

24. Many respondents asked how the new condition would work in practice, and made points about fairness and transparency in the implementation of the proposals, particularly in relation to smaller or more recently registered providers. A number of respondents raised points regarding an appeals process and how student protection directions could be withdrawn once issued. Having considered the feedback received

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<sup>4</sup> For a list of conditions of registration, see [www.officeforstudents.org.uk/advice-and-guidance/regulation/conditions-of-registration/initial-and-general-ongoing-conditions-of-registration/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/conditions-of-registration/initial-and-general-ongoing-conditions-of-registration/).



we have updated the condition in light of some of the points respondents made about our approach to engagement and consultation with providers.

### **The impact of the proposed condition on students**

25. Respondents were invited to comment particularly where they identified a potential impact of the proposals on individuals on the basis of their protected characteristics. While we received little feedback on this basis, many respondents identified the potential impact on students arising from a market exit. Other comments made clear that protecting the interests of students was an important concern for respondents. In response to the feedback, we have amended the guidance to the condition to set out what we will expect of a provider with regard to equality considerations when it undertakes market exit planning, and in the implementation of student protection measures.
26. A number of respondents also provided feedback on the student protection measures we set out in the proposed condition, with many noting that a provider in crisis may find it challenging to implement such measures, although many respondents recognised the importance of the measures. We consider the responses on the measures to be valuable feedback about the challenges and practicalities of implementing measures of this kind. In imposing student protection directions, we would take into account the circumstances for an individual provider. Other factors were highlighted such as the need for the OfS to consider working with third parties, such as insolvency practitioners, something we consider we would do as part of our normal regulatory approach. We have made some changes within the condition as a result of the feedback received in relation to the 'teach out' measure, as well as consequential and clarificatory amendments as a result of other changes.

### **Publication of market exit plans**

27. In addition to views about whether or not market exit plans should be published at all, respondents made points about the impact of publication, the timing of publication, and suggested some alternative options. We have updated the guidance following the feedback received to remove some of the original text (which said that we would be likely to consider directing the publication of a plan or other information when an exit was 'reasonably likely'), and to make clear that we will consider when publication is in the public interest when making a decision about requiring publication of a market exit plan or other information about student protection measures.

### **Decision**

28. We recognise that a number of responses, particularly from higher education providers, suggested that we should not introduce the condition, but we do not consider that sufficiently compelling reasons were provided for us to reconsider alternative options. This is primarily because the purpose of the new condition is to protect the interests of students when they are likely to be particularly vulnerable and, in those circumstances, we have concluded that these interests should carry particular weight. As set out above we have made a number of changes in response to the feedback received to both the

condition and the guidance accompanying the condition where we consider reasonable matters were raised. A table summarising these changes can be found in [Annex B](#).

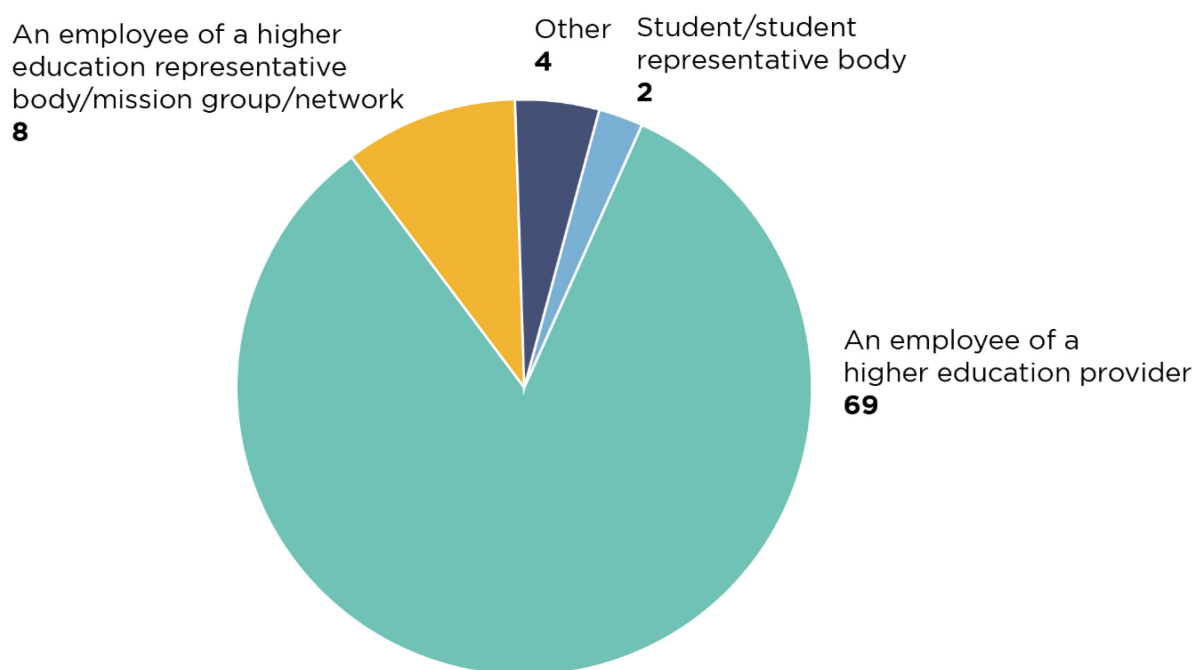
29. We have therefore decided to implement the amended condition C4 as a new general ongoing condition of registration and update the regulatory framework to reflect this. The new condition will be imposed on registered providers from 1 April 2021. The condition will not apply to providers that are Further Education Bodies as defined by the Technical and Further Education Act 2017.
30. In reaching our final decision about these matters, we have had regard to the OfS's general duties, the Regulators' Code and the statutory principles of best regulatory practice, namely that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent, and that regulatory activities should be targeted only at cases in which action is needed. We have also had due regard to the Public Sector Equality Duty.

# Quantitative analysis

## Characteristics of respondents

31. We received 83 responses to the consultation, the majority of which were submitted by an employee on behalf of an English higher education provider. We have grouped respondents into categories and Figure 1 shows the number of responses that we received from each category of respondent.

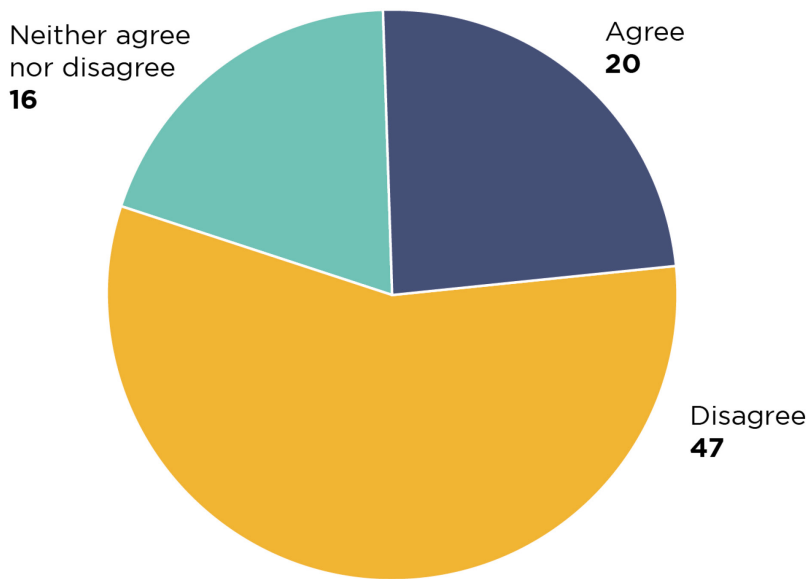
**Figure 1: Characteristics of consultation respondents**



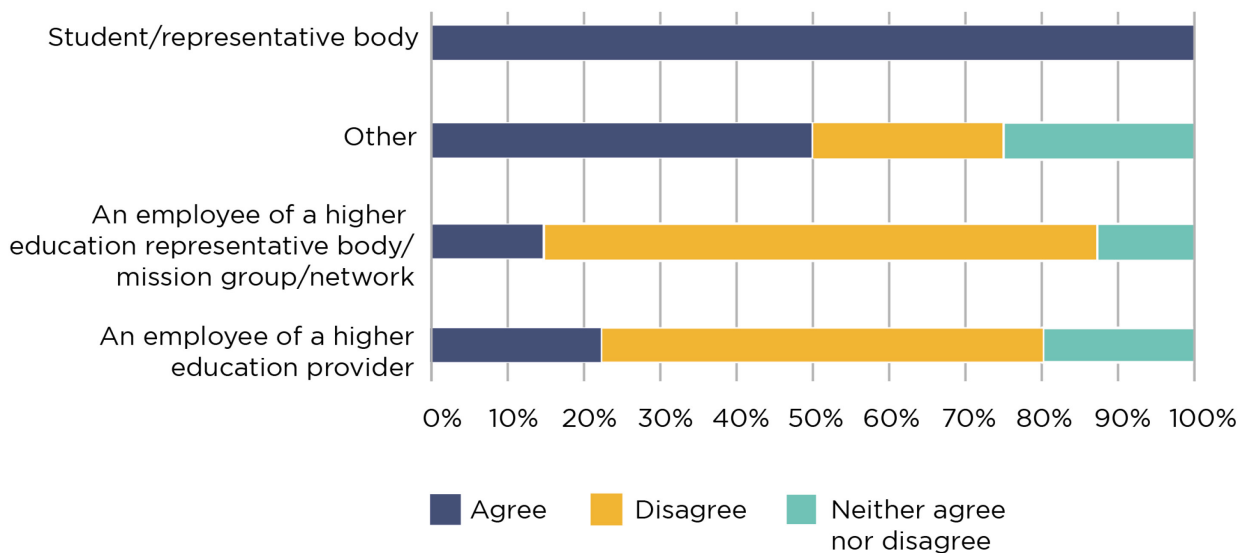
## Data: agree or disagree with the proposed introduction of the proposed condition C4 and guidance

32. Respondents were asked whether they agreed or disagreed with the proposed introduction of the proposed condition C4 and guidance. Figures 2 and 3 show the proportion of respondents who said they 'agreed', 'disagreed', or 'neither agreed nor disagreed' broken down by category of respondent.

**Figure 2: Proportion of respondents who agreed, disagreed, or neither agreed nor disagreed with the proposed condition C4 and guidance**



**Figure 3: Respondents who agreed, disagreed, or neither agreed nor disagreed with the proposed condition C4 and guidance by category of respondent**

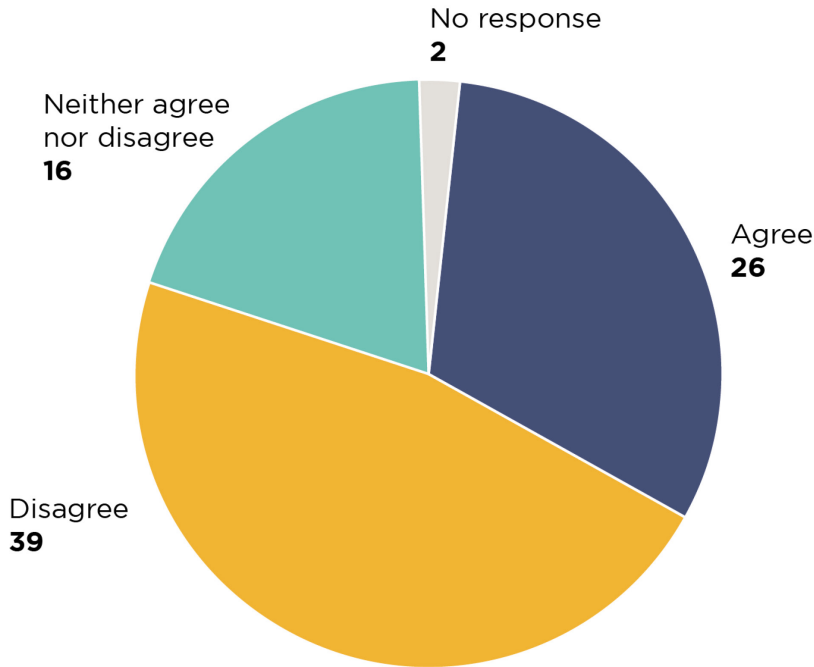


### Data: agree or disagree with the proposals for the implementation

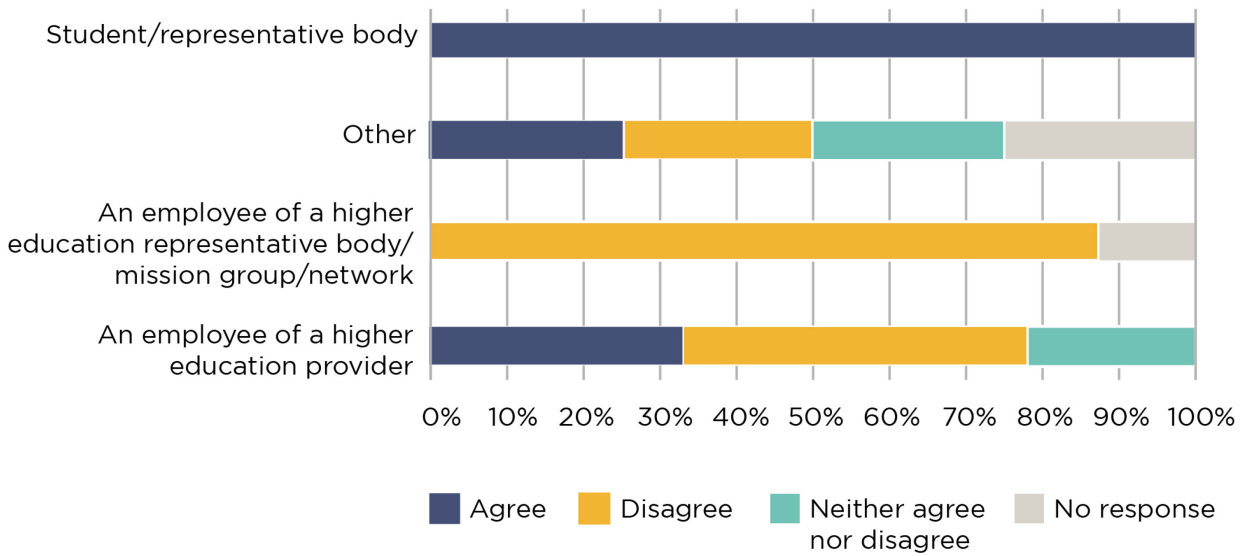
33. Respondents were also asked whether they agreed or disagreed with the proposals for the implementation of the proposed new general ongoing condition of registration. In Figures 4 and 5, we show the proportion of respondents who said they ‘agreed’,

'disagreed', 'neither agreed nor disagreed' or did not reply to the question, broken down by category of respondent.

**Figure 4: Proportion of respondents who agreed, disagreed, or neither agreed nor disagreed with the proposals for implementation**



**Figure 5: Respondents who agreed, disagreed, or neither agreed nor disagreed with the proposals for implementation by category of respondent**



## Qualitative analysis

34. In commenting on the proposals, several respondents included comments in relation to their overall support for the introduction of the condition, noting that:
- The condition is aimed at protecting the interest of students.
  - The condition would support a quick and effective response to a market exit as it is important that providers at risk of market exit have robust and clear plans to safeguard the interests of their students.
  - These matters have become more relevant due to financial and operational challenges in recent years in the context of Brexit, shifting demographics, changes to employer pensions and, most recently, the impact of COVID-19.
35. Supportive comments tended to contain caveats, including for example points about the meaning of the term 'material risk' in the proposals, the availability of other regulatory tools and a perceived increase in regulatory burden. These issues, along with the other feedback received in response to the consultation on the proposed introduction of condition C4, are discussed in the analysis that follows.
36. A few respondents commented on the consultation process itself, with some respondents welcoming the opportunity provided by the consultation, noting it was timely and logical given the current pandemic. The fact that this was the second consultation for the sector during the pandemic was however raised by other respondents, as was the timing of the consultation during the summer period when many staff and students were away.
37. The remainder of this document sets out the themes that were evident in the responses and the OfS's response to these issues.

## A. Overall regulatory approach

### Introduction

38. Many respondents to the consultation provided feedback about the proposed condition, and the impact they considered it may have in relation to the overall approach to regulation of the higher education sector in England. A number offered their perspectives about how the condition would sit within the existing requirements of the OfS's regulatory framework, and their views about how the proposals aligned with HERA.

### Institutional autonomy

39. A few respondents considered that the proposed condition is contrary to the OfS's general duty, as set out in section 2 of HERA, to have regard to the need to protect the institutional autonomy of English higher education providers.
40. Several respondents made points about the potential impact of condition C4 on institutional autonomy. Several respondents contended that there were negative implications for providers' autonomy if the proposed condition were to be implemented and considered that the rationale in the consultation document was not sufficient when compared to the potential impact of the proposals on autonomy. Others took the view that if the condition were to be implemented, it might have an immediate effect on some providers that may become subject to the provisions of the condition. Respondents suggested that the negative impact on autonomy may be disproportionate to the harm the condition is seeking to prevent.
41. Some respondents considered that condition C4 may increase the OfS's regulatory reach and thought that the consultation contained limited detail on what action the OfS might direct providers to take under a C4 direction. They considered that it was not clear how the OfS would utilise these powers or how the proposed approach would take account of the responsibilities of governing bodies. Respondents suggested that it would be helpful to give examples to clarify the limits of the OfS's proposed powers in the event of market exit.
42. Respondents sought clarification that, to avoid unreasonable burden on all providers, the condition would only be used where the OfS considers that there is a material risk that the provider would exit the English higher education sector, and that the OfS would commit to not extending the use of the condition to a larger number of providers that were not considered to be at material risk of market exit. Related to this, respondents also made specific comments in relation to the factors that might cause the OfS to reasonably consider that there is a material risk of a provider exiting the higher education sector – these comments are summarised later in this document in [section C, Terminology](#).
43. Some respondents also took the view that the proposed new condition and the range of proposed measures presented would potentially allow the OfS to alter the shape and structure of the sector, though no further detail or reasoning regarding this was

provided. It is possible that some respondents thought that the OfS might determine that some providers are at material risk of market exit (and thus potentially subject those providers to directions), but not make the same decision for other providers based on different criteria.

44. Some respondents asked whether the OfS has sufficient understanding of the context for individual providers to enable it to identify appropriate directions. There were suggestions that the OfS may not fully understand individual providers' corporate governance or other arrangements (such as validation agreements), especially for small or specialist providers or those with atypical business models. For example, some respondents considered that the OfS may consider small- and medium-sized providers to be at greater risk of market exit as their income is much more closely linked to the ability to attract students, and because these providers are not generally perceived to have as diverse income streams as larger providers. As a result, respondents suggested that the OfS may make decisions about a provider in circumstances that the provider considers to be normal.

### **Response**

In relation to the view that the proposed condition may be contrary to the OfS's general duty to have regard to the need to protect the institutional autonomy of English higher education providers, the OfS has a number of general duties set out in section 2 of HERA, to which the OfS is required to 'have regard'. HERA does not impose an obligation to achieve the stated outcome in each duty, rather the OfS is required to have regard to each of them and afford them rational weight in performing its functions.

The introduction of condition C4 itself does not impinge on any provider's autonomy – the condition is, in effect, a gateway through which directions can be made that may have an effect on a provider's autonomy. As explored further below, a provider must first be judged by the OfS to be at 'material risk' of market exit (in effect, this is the step required to reach the gateway) and then the OfS must consider that further planning or implementation activity of the type envisaged by the condition is required. This means that even if the OfS judges a material risk of market exit to exist, this will not necessarily lead to the use of the condition to impose a direction. The OfS will consider on a case-by-case basis each provider's circumstances, having regard to our general duties and other relevant factors in each case, before issuing any student protection direction.

In relation to the point that the rationale for introducing the condition was insufficient when considered against the measures proposed, it is necessary to consider the reasons set out in the consultation. There is an increased risk to the financial viability and sustainability of some higher education providers as a result of the COVID-19 pandemic, but it is often the case that those providers were already of concern before the pandemic.



In addition, before the pandemic the OfS had already identified issues with the development and implementation of SPPs.<sup>5</sup> We set these issues out in our consultation and we consider that in the event of a provider exiting or being required to exit the market, it is likely that student protection planning would prove to be inadequate to protect the students affected. This includes for reasons relating to risks that go beyond the financial risk we identify above – providers may fully or substantially cease delivering higher education for a number of reasons, not just financial failure. We note that these points were not particularly challenged by respondents, and the existence of these issues was acknowledged by some.

One of the OfS's regulatory objectives is that the interests of students are protected while they study or in the event of provider, campus or course closure. We therefore take the view that it is appropriate to take action to address issues that arise in the context of market exit. A market exit, particularly one which is disorderly, would be a significant event, with the potential for many negative consequences for students whose continuity of study would be disrupted, in addition to affecting the higher education sector generally, such as through reputational damage.

The condition is designed to contribute towards delivery of our regulatory objective by providing a mechanism (student protection directions) that can specifically target the issues that could have a detrimental impact on the interests of students in the event of a market exit. Binding directions would only be used in circumstances where the OfS reasonably considers there to be a material risk of market exit. For example, this could be when a provider faces certain financial challenges, or decides that it is no longer going to operate.

While we acknowledge that the implementation of the provisions of this condition in an individual case would be likely to have an impact on a provider's autonomy, this is restricted to those that fall within this scope of the condition, and to circumstances in which a direction is issued. In terms of how autonomy may be affected, this is further limited to the area of student protection planning, and actions related to the implementation of such plans.

We therefore consider that the introduction of condition C4 would specifically address the issues we have identified. The use of powers contained within the condition would be limited to those providers at material risk of market exit (addressing for example the financial viability and sustainability issue we have identified). It would focus activity on areas such as student protection planning and the implementation of actions within the scope of the proposed directions (addressing the issues of the development and implementation of SPPs we have identified). We therefore consider that intervention using the condition would be justified (in terms of the impact on institutional autonomy) to address the issues identified, for the purposes of protecting the interests of students in

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<sup>5</sup> See 'Office for Students registration process and outcomes 2019-20: key themes and analysis' published in October 2019 and available at [www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/](http://www.officeforstudents.org.uk/publications/registration-key-themes-and-analysis/).

the particular circumstances of a provider, and in a manner which is proportionate to the material risk (or risks) that have been identified by the OfS.

With regard to the point about the immediate impact that the imposition of the condition may have on individual providers, following the introduction of the condition it is possible that a provider may have a direction issued under it. Our view, however, is that this would only occur in situations as explained above – the provider would have to be considered to be at material risk of market exit, and the impact would be that the provider may receive directions as the condition sets out. As we set out above, we consider that addressing issues related to student protection planning and the implementation of student protection measures are clearly linked to our regulatory objectives, and therefore consider that the impact on any individual provider would be justified.

Considering the views raised regarding the extent of the OfS's regulatory reach, and the interaction with providers' governing bodies, we have set out the types of directions that could be issued under the condition at C4(v), under the definitions of 'student protection direction' and 'student protection measures'. We do not consider it would be appropriate to further specify detail in this regard, as the OfS would want to develop directions that were specifically tailored to the circumstances of each individual provider. We consider this would be desirable for the provider as it would ensure that any existing student protection planning and measures could be recognised and reflected, as well as considering what action would be proportionate given the circumstances. We also consider this would benefit students as it means that directions can be targeted at actions that the OfS considers will be most beneficial to protect their interests. If the OfS were to more narrowly specify the range of directions that could be issued, this would create a risk that the directions could not be effectively aligned to the circumstances faced and the risks to students.

With regard to the responsibilities of governing bodies it is already the case that, under condition E3 of the OfS's regulatory framework, governing bodies are responsible for ensuring the provider's compliance with all of its conditions of registration. It therefore follows that the governing body would be responsible for ensuring compliance with any direction issued under condition C4. It is not the OfS's intention that the condition (or any direction made under it) should absolve a governing body of any of its responsibilities for the operation of a provider. This is reflected in the limitations we have placed within the condition restricting the matters on which the OfS can issue a student protection direction. As directions would only be issued according to the individual circumstances of a provider, we consider that governing bodies should not find that their responsibilities are altered.

With regard to the point that the OfS should restrict use of the condition to circumstances where a provider is at material risk of market exit, this matter is addressed by the wording of the condition itself, as C4(i) confirms this to be the case. We consider additional clarification of the meaning of 'market exit' in the Terminology section of this paper. Should the OfS seek in the future to utilise a similar approach of issuing directions in circumstances outside of the parameters set out in condition C4, this would require further consultation.

With regard to the point that the OfS may utilise the condition to alter the shape and structure of the sector, this is not our intention and we do not consider that the condition could be used in this way.

This is due firstly to the limitations in C4(i) that binding directions can only be made in “circumstances where the OfS reasonably considers that there is a material risk of market exit and, secondly, to the definition of ‘student protection measures’ in C4 (v) which limits the contents of directions to the planning and implementation of activities related to student protection measures. The OfS could not, for example, directly require a provider to exit through a student protection direction.

With regard to the OfS not understanding the context of individual providers, prior to determining that a provider is at material risk of market exit, we would need to obtain and assess information about the provider’s circumstances, in addition to considering any information we already hold. Furthermore, the OfS is also required, when making any decisions (including those under condition C4), to abide by its public law duties, which include considering all relevant information available to it and ensuring that decisions are reasonable and proportionate.

In some cases, it may be appropriate to issue a direction under condition C4 as an interim measure, to ensure a minimum level of student protection in the short term, allowing us to consider further information as it becomes available. As is normally the case, a provider can always provide information to the OfS, so we envisage that if a direction is issued, dialogue between the OfS and the provider would be ongoing, and further information may change the OfS’s views about the nature of any direction that is necessary. Further, as set out in the consultation, where we consider it appropriate to consult with an individual provider (for a reasonable period in the circumstances) on the content of a direction, we would do so. We consider for these reasons that it is unlikely that the OfS would not understand the circumstances of a provider before issuing a student protection direction.

As set out above, directions issued under the proposed condition (in the limited circumstances allowed for) would be intended to extend the protection available to a provider’s students. Considering a number of points discussed above, we have updated the guidance accompanying the condition to highlight our intention that the interests of students should be given particular weight in our decision-making about the imposition of a student protection direction.

## **Burden and cost of regulation**

45. Responses included comments in relation to the potential additional regulatory burden arising from the introduction of a new condition of registration.
46. Some respondents suggested there would be a compliance cost for all providers, not just those at material risk of market exit, with a view expressed that all providers would consider it necessary to update their student protection plans. Other comments suggested that the introduction of a new condition at this time is at odds with the OfS’s

commitment to reduce regulatory burden while providers are under significant ongoing pressure in responding to the COVID-19 pandemic and its implications. These views were prominently put forward by providers that considered themselves to be small.

47. Related to this, some respondents commented that they considered that the proposed new condition is largely a reaction to the current pandemic and suggested therefore that it is a disproportionate reaction (as the expectation was that the impact of the pandemic would not be experienced on an ongoing basis) and therefore was an unnecessary burden. Others suggested that the proposal may prove to be inadequate as it may not provide a mechanism to deal with, as yet unknown, challenges that result from changes in the sector following the pandemic.

## Response

In relation to points about the compliance costs for all providers, condition C4 only allows for binding directions to be issued to a provider where the OfS considers there to be a material risk of market exit. Therefore, we would expect that the vast majority of registered providers would not face any additional regulatory burden (noting also that the condition will not apply to Further Education Bodies under any circumstance). The introduction of the condition does not require all providers to revise their SPP.

For those providers subject to a direction under the condition, we accept there will be an increase in regulatory burden related to compliance with a direction. This burden would be different according to an individual provider's circumstances and any existing student protection arrangements it has in place. In putting in place any direction, the OfS will consider whether its actions are reasonable and proportionate. Student protection remains the responsibility of each provider and we only propose to intervene where it seems reasonable and proportionate to do so to protect the interests of students.

In relation to the OfS's commitment to reduce regulatory burden during the pandemic, we noted in our letter to providers of 26 March 2020<sup>6</sup> that while we would seek to minimise regulatory burden, we may need to adjust requirements to deal with changing circumstances. The consultation set out how financial risk has, in previous instances, led the OfS to require providers to undertake more detailed student protection planning, and that the pandemic was likely to increase such risk. It also set out issues with the development and implementation of student protection plans that suggest a need to introduce the new condition – market exit risk can occur for many reasons beyond financial risk, and student protection arrangements need to be tailored to the actual circumstances a provider faces.

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<sup>6</sup> See [www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/](http://www.officeforstudents.org.uk/publications/regulatory-requirements-during-the-coronavirus-covid-19-pandemic/).

As we have set out above, we have sought to minimise regulatory burden and focus on those providers where action is required, and we would not expect the majority of providers to experience any increase in burden as a result of the introduction of the new condition.

In relation to the point that the new condition was being proposed as a result of the pandemic, and therefore a permanent change to the regulatory framework would be unnecessary, we set out in the consultation document our reasons for proposing the introduction of the condition and these extend beyond the impact of the pandemic. Our view remains that protecting students is a matter of routine, and that we would have consulted on these proposals irrespective of the pandemic.

### Length and timing of condition

48. Many respondents suggested that the proposed condition should be time-limited. The most common argument in favour of a time-limited condition was that they considered condition C4 was a response to the pandemic and a permanent condition was an unnecessary response. A number of respondents made reference to condition Z3,<sup>7</sup> noting that it was introduced as a time-limited response to COVID-19. They argued that condition C4 should also therefore be imposed on a temporary basis. Some respondents proposed a fixed review point for the new condition of 12 months after its implementation.
49. Some respondents suggested that the proposed new condition should be time-limited to allow time for the OfS to review and consult on broader changes to condition C3 (student protection plan). Further arguments in this regard are considered later in this document in the section 'Use of existing regulatory mechanisms'.
50. Some respondents suggested that providers will need more time to respond to the financial impact of the pandemic before the proposed condition was implemented and that more time was needed to evaluate the wider pressures on the sector, including the wider economic situation and the impact of Brexit. There were, however, counter views from some respondents who expressed support for early implementation, commenting that implementation should take place as soon as possible given the current environment.

### Response

In relation to the views that the condition should be a time-limited response to the pandemic, while we acknowledge that we brought forward the proposal in part due to a period of potentially increased financial risk for individual providers, this is not the exclusive, or main, reason for proposing this condition.

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<sup>7</sup> See [www.officeforstudents.org.uk/publications/regulatory-notice-5-condition-z3-temporary-provisions-for-sector-stability-and-integrity/](http://www.officeforstudents.org.uk/publications/regulatory-notice-5-condition-z3-temporary-provisions-for-sector-stability-and-integrity/).

We consider market exit to be a routine part of the way the sector operates, and risks related to exit (including risks unrelated to a provider's finances) would exist irrespective of the pandemic. This is different to the circumstances surrounding condition Z3, which was introduced to manage the integrity and stability of the higher education sector as a whole during the pandemic – condition C4 in contrast is targeted at individual providers and at circumstances which may occur at any point, including after the impact of the pandemic has subsided. For this reason, we also disagree that the condition needs to be reviewed after 12 months. As with all conditions, this does not preclude the OfS from revising the condition in the future (subject to appropriate consultation), should there be an identified need to do so.

In relation to limiting the time period for the condition in order to allow the OfS to review and consult on changes to condition C3, in putting forward the proposal to introduce condition C4, we considered whether it would be preferable to instead propose amendments to condition C3. However, this would have the potential to create wider regulatory change to which all providers would need to respond, for example by updating existing student protection plans. We remain keen to minimise regulatory burden and focus our attention on the areas of most concern, particularly but not only during the pandemic. The introduction of condition C4 would enable the OfS to target its action towards those providers it considered to be at material risk of market exit. We expect to consult separately on any changes to condition C3; this will provide further opportunity to ensure our wider approach to student protection is coherent. Changes to condition C3 at this time would have an impact on all registered higher education providers, and would go beyond the specific issues we have identified that led us to make this proposal.

In relation to the suggestion that the introduction of the condition should be delayed, while we have not brought forward these proposals exclusively as a result of the COVID-19 pandemic, it does contribute to risk of market exit. We therefore consider that it is important that the new condition comes into effect as soon as possible. We do not consider there is a need to delay introduction in order to consider additional information relating to the financial position of providers arising from the pandemic (or other factors such as Brexit). We consider that the risk of market exit is one that exists on an ongoing basis and will not cease once the impact of these factors is no longer evident.

### **Potential risks to the OfS arising from the proposed condition**

51. A few respondents suggested that the proposed condition may present risks to the OfS. Respondents suggested that:

- The OfS may be at risk of being in the position of a 'shadow director' and therefore would need to manage interventions appropriately.
- The OfS may be considered jointly culpable for a market exit if the governing body of a provider undergoing an unanticipated exit claims that the OfS had the opportunity to intervene and did not do so (presumably by not encouraging a particular form of mitigating action, or requiring a form of action that does not successfully mitigate risk to students).

- The OfS has already added a new condition of registration (condition Z3) and the addition of a further condition will not increase public confidence in the sector or in the OfS itself, though no further detail regarding this was provided. It is possible that the respondent considered that the proposed new condition suggested there are risks arising from market exit and that third parties might assume that these risks are highly prevalent across the sector.
- The proposed condition may discourage providers from developing innovative forms of provision or alternative business models as these may be riskier than established approaches and providers may wish to avoid the risk of OfS intervention. As a result, some respondents suggested that the proposed condition posed a risk to what respondents considered to be the purpose of HERA and the OfS's regulatory framework, to create a market-driven, diverse higher education sector.

## Response

In relation to the need for the OfS to avoid becoming a shadow director of a provider, section 251(1) of the Companies Act 2006 defines a 'shadow director' as, in relation to a company, a person in accordance with whose directions or instructions the directors of the company are accustomed to act. Section 251(2) says that a person is not to be regarded as a shadow director by reason only that the directors act:

(a) On advice given by that person in a professional capacity; or

(b) In accordance with instructions, a direction, guidance or advice given by that person in the exercise of a function conferred by or under an enactment.

We consider that the latter would cover the regulatory role of the OfS in the context of issuing directions under condition C4.

In relation to the risk of culpability for the OfS, we consider this point to be similar to that highlighted previously regarding the role of governing bodies. The OfS does not suggest or consider that by issuing a student protection direction it would be attempting to take control of a provider, or absolve a higher education provider's governing body of its responsibilities (either in relation to the OfS's regulatory framework and student protection measures, or wider legal responsibilities).

Regarding concern over public confidence, we do not consider this to represent a significant issue. This is because we consider that simply by having in place a power to act in a given situation does not mean that a regulator necessarily anticipates that it will need to act. The OfS already has in place a range of powers that would allow it to intervene if needed on a number of topics in relation to higher education providers, but we have not seen evidence that this had led to any increase in the suggestion that these are areas of concern for the higher education sector widely.

In relation to the point that by introducing condition C4 there is a risk that innovation will be discouraged, we do not consider this to be likely. This is because a provider would only be subject to binding directions under condition C4 if the OfS were to reasonably consider it to be at material risk of market exit. This means that a provider would continue to be free to innovate and take business risks and, as with any business decision, we would expect it to seek to identify and mitigate risk that could result in market exit. Where a provider did choose to pursue business strategies that create material risk of market exit, we consider that it is in the interests of students for us to ensure that the potential impact of this risk on them is mitigated, and in pursuit of this it may be appropriate to impose directions under condition C4.

## **B. Use of existing regulatory mechanisms**

### **Introduction**

52. In commenting on the proposal, many respondents mentioned the existing regulatory mechanisms available to the OfS, suggesting that:
- The OfS already has mechanisms within the regulatory framework to make targeted interventions to ensure students' interests are protected in the event of market exit.
  - The OfS does not appear to have fully utilised the current provisions of the regulatory framework.
  - It would be preferable for the OfS's focus to be on improving the effectiveness of these arrangements before seeking to introduce new requirements.
  - It was unclear from the proposal why additional powers are required, and that the OfS's proposal does not adequately demonstrate why the existing interventions available to the OfS would not be effective.
53. Respondents highlighted a range of existing regulatory mechanisms that they considered could be used by the OfS to steer providers towards an orderly exit. Over half the overall responses include comments in relation to condition C3 (student protection plan). In addition, some respondents mentioned the B conditions (quality and standards), condition D (financial viability and sustainability) and the E conditions (management and governance). Further detail of the comments made in relation to the use of existing regulatory tools is set out below.

### **Condition C3: student protection plan**

54. Many respondents made reference to the existing ongoing condition of registration C3 in their response.
55. Respondents reasoned that by utilising condition C3 the OfS already has a mechanism through which it can require providers to undertake the planning that is envisaged through condition C4, and therefore the introduction of C4 is unnecessary. Some stated



that existing student protection plans should already address the circumstances of market exit, given that these plans consider the risks providers may face. Respondents suggested that the OfS should use the existing mechanism within condition C3 to require providers to revise their student protection plan (and take further regulatory action should a provider not do so) and that this would be a better alternative to providers creating a separate market exit plan (MEP).

56. Some respondents suggested that it was unclear what the interaction or overlap would be between a provider's existing SPP and any MEP developed. Some suggested that having an MEP may duplicate existing student protection arrangements if they were already covered in an SPP, or alternatively may diminish an SPP by altering its value and purpose (if it was no longer required to consider market exit for example). Some respondents highlighted that it may not be a good use of a provider's resources (especially should the provider be facing a crisis) to produce two plans in order to comply with conditions C3 and C4. Linked to this, some respondents considered that it was not in students' interests to have seen an SPP at the time of applying but be subjected to a very different plan in a market exit situation. Some respondents considered that the difference between a published SPP and a subsequent MEP risked putting providers in breach of guidance issued by the Competition and Markets Authority (CMA) on consumer law and suggested that for these reasons the OfS should focus solely on a single plan under condition C3.
57. More generally and going beyond exclusively a market exit scenario, some respondents suggested that the OfS should require providers to revise their SPPs and that this would address the issues related to their development and implementation set out in the consultation. Some respondents suggested that if the OfS made such changes then providers could learn from other providers' plans. However, it was argued by some respondents that providers that had produced an inadequate SPP would be unlikely to be able to produce an adequate MEP.
58. Some respondents stated that as the OfS has previously said that it would issue further guidance on condition C3, this should be prioritised rather than introducing a new condition of registration that addresses what respondents reasoned to be the same or very similar issues. Some further contended that the OfS's existing guidance in relation to SPPs was inadequate, and an alternative approach to addressing the issues highlighted in the consultation would be to consult on and publish updated guidance under condition C3, or an updated condition C3.
59. Some respondents stated that they considered the OfS was addressing issues in the wrong order. They considered that only when condition C3 had been properly examined (with potential amendments as noted above) could the OfS reach a conclusion that further regulatory intervention, through the introduction of a condition such as C4, is necessary.

## Response

In considering the points raised by respondents, it is important to take into account the differences between SPPs as required under condition C3 and the sort of intervention that is possible under condition C4.

SPPs by their nature are wider in scope and vary more significantly than we propose for MEPs. This is because SPPs are based on a provider's evaluation of the risks that it may face with regard to continuation of study for students. For some providers, this will relate exclusively to business as usual activity, for example routine decisions to close courses as part of a normal portfolio review.

Our experience of engaging with providers at risk of market exit has been that a detailed level of planning is required with commensurate levels of scrutiny. To make an SPP meet the needs of market exit planning would therefore require the provider to develop the same level of detail as would be required under a student protection direction. For example, this might include a specific timeline exploring the risk a provider faces, with appropriate milestones and trigger points for the implementation of specific activities. This is different to the expectation for SPPs, where proposed actions may need to be valid across a number of different situations operating to different timescales.

If the OfS were to require a provider to revise its SPP, in order for the plan to be approved the provider would be required to undertake a comprehensive assessment of all the risks that may be faced, including risks beyond that of market exit. This would be both burdensome for the provider (given the circumstances), and potentially ineffective because the plan may take significant time to develop. In addition, as a provider's assessment of the risk of market exit does not always reflect the OfS's assessment, this can lead to situations (as outlined in our consultation document) where the OfS needs to return a plan to a provider for amendment one or more times before it can be approved. In a market exit situation, which can escalate quickly, we consider it is more likely to be in the student interest that planning is conducted in an expedient manner, and that actions are taken to protect students through the implementation of student protection measures, and that the introduction of student protection directions would help facilitate this.

In addition, we have noted in our assessment of SPPs previously that there is a tendency for providers to focus SPPs on the mitigation of business risks rather than the specific actions the provider would take to protect students' interests. While it is understandable for providers to wish to do this, we consider that when a material risk of market exit exists it is important for a provider to focus on those plans and actions that are in the student interest (as well as any actions taken to mitigate business risks). We consider the introduction of condition C4 would allow us to ensure this is the case.

Condition C3 also requires a provider to publish an SPP immediately, something which may be undesirable if a provider is planning in advance of an exit. Our judgement is that it is not appropriate for that information to be published at that time.

Further details about the OfS's approach to publication of MEPs or information about student protection measures can be found in section F of this document.

Given these issues, we consider that the student protection directions would allow a more prompt and effective response to circumstances where there is a material risk of market exit than would be the case if we were to rely on condition C3 and SPPs. Given the differences between SPPs and MEPs, an attempt to deliver both through the same condition would risk increased burden and reduced effectiveness.

In relation to the interaction between an SPP and an MEP, we recognise that there may be occasions where there is overlap, or potentially conflict, between the two (which may depend on the content of the provider's SPP). In a market exit situation, we may also require a provider to amend its SPP where it makes sense to do so – for example if a provider is considering activity short of full exit that would fall into the usual contents of a SPP as part of mitigations to avoid exit.

However, we also recognise that there may be occasions where a provider or the OfS may consider there to be an unhelpful conflict between the two plans and it may not be clear for a provider or students which regulatory requirements should have priority. This could impact on the effectiveness of a student protection direction. Requiring a provider to resolve this conflict may have the effect of creating undesirable burden – it could, for example, lead to situations where a provider focuses on revisions to an SPP rather than putting in place the mitigations required in an MEP. We consider that these issues can be mitigated by clarifying that condition C4 would allow us to direct a provider not to comply with requirements in condition C3, or comply in a different way.

To reflect feedback from the consultation, we have updated the wording of the condition to provide more clarity on this point. While the scope of the proposed power of direction as consulted on already covers requiring providers to do (or refrain from doing) anything to ensure the effectiveness and expediency of market exit plans and student protection measures, the amendment expressly refers to compliance with condition C3 as one of the illustrative examples of the things that are within scope. This would be considered on a case-by-case basis where we consider such a direction is necessary to make a student protection direction effective.

In relation to the comments made regarding consumer law, it is the responsibility of a provider to remain compliant with its consumer law obligations and any material published to students should therefore be considered by the provider in this context. Providers will need to continue to seek their own legal advice to ensure compliance with the law.

In relation to the suggestion that the OfS should require providers to revise their existing SPP in order to address the issues identified with the development and implementation of SPPs, we consider there may be a need for wider consideration of condition C3.

However, we do not consider that it would be appropriate to delay implementation of condition C4 to allow time for a broader review of student protection arrangements and condition C3. Our reason for this is that there is an increased risk to students due to the pandemic in relation to market exit. We do not feel that this is the right time to amend

condition C3 as it may lead to wider regulatory changes that could affect providers that we would not consider to be at material risk of market exit (because condition C3 addresses a wider range of circumstances).

We also remain committed to minimise regulatory burden and, through our risk-based approach to regulation, focus our attention on the areas of most concern, including in light of the impact of the pandemic. We consider that the introduction of condition C4 will enable the OfS to better target its activities towards those providers it judges to be at material risk of market exit – because we consider that this represents the most significant risk to the interests of students.

The OfS would consult separately on any proposed changes to condition C3 in the future – this will provide further opportunity to ensure our student protection requirements are coherent and proportionate.

### **Specific conditions of registration**

60. A few respondents included comments in relation to the OfS's ability to impose specific ongoing conditions of registration, suggesting that it would be more appropriate for the OfS to use this mechanism. They reasoned that the proposed condition is targeted at a subset of providers that are at material risk of market exit, and therefore individually targeted specific conditions would be preferable to a new condition applied to all providers.
61. A few respondents included comments in relation to the 28-day statutory consultation period for the imposition of a specific condition and the view we set out in the consultation document that this can result in undesirable delay. In relation to this, respondents variously reasoned that:
  - Having a period of consultation is appropriate given the potential consequences for a provider of being judged as at 'material risk' of market exit (suggesting a view that some delay for consultation is considered acceptable).
  - The current statutory consultation period of 28 days offers sufficient time in all but the most extreme of market exit scenarios given the requirement for providers to report financial issues to the OfS as a reportable event.
  - If the OfS is concerned that the consultation period required in relation to the imposition of a specific condition is too long, then it would be more proportionate to temporarily reduce the consultation period (particularly during the pandemic).
  - In cases where the 28-day statutory consultation period would be a hindrance, it is unlikely there will be the resource available within the provider to produce a robust MEP (a view which we have understood to suggest that the proposed condition would be ineffective, because a provider may be unable to develop an MEP and implement appropriate student protection measures).

## Response

With regard to the suggestion that the OfS should use specific conditions of registration rather than introduce a new general ongoing condition, we consider that the use of condition C4 would be preferable to a specific condition in circumstances where the risks to students may be imminent or a provider has been unable or unwilling to engage in timely and effective student protection planning or the implementation of student protection measures. This is primarily because a specific condition has a statutory consultation period of 28 days and this could result in a delay in action being taken to protect the interests of students. We do not agree that a period of delay is acceptable where it results in student protection measures being ineffective.

We acknowledge that in some cases consultation with a provider would be possible, and it is important to be clear that the proposed approach does not preclude the OfS from consulting or engaging with a provider prior to issuing a student protection direction. To address these points, we have amended the guidance that underpins the condition to be clear that where the OfS judges it necessary to impose a student protection direction, it will normally expect to engage with a provider before doing so, and where the OfS judges that students will not be disadvantaged by any delay to the imposition of a direction, it may consult with a provider on all or part of a student protection direction.

In relation to the suggestion that the consultation period for specific conditions could be reduced, section 6 of HERA requires the OfS to specify the period during which the governing body of the institution may make representations about a proposal to impose, vary, or remove a specific condition and that this period must be no less than 28 days. Reducing this period would require primary legislation, and this is not within the gift of the OfS. We do not rule out that this could be an option to explore with government in the future, although we do not consider it to be immediately likely.

In relation to the suggestion that providers will have insufficient resource to produce an MEP, we do not consider it to be necessarily the case that a provider would not have the resource to conduct appropriate market exit planning and the implementation of resultant actions if there is insufficient time to conduct a statutory 28-day consultation. In such circumstances we consider it likely that the provider will want to focus resource onto this matter, and if it were not, this arguably strengthens the reason for needing a student protection direction.

## Reportable events

62. Some respondents included comments in relation to the OfS's approach to reportable events. They suggested that the existing reportable event requirements, including the reportable event requirements introduced in response to the pandemic,<sup>8</sup> will give the

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<sup>8</sup> These include the requirement for providers to inform the OfS if its liquidity will drop below 30 days' average expenditure at any point in a 12-month rolling period, to report any potential breaches of financial covenants and to report significant changes to delivery of higher education.

OfS early warning of financial challenges and enable the OfS to take action to protect the interests of students using existing regulatory mechanisms. In doing so, these respondents indicated that they considered condition C4 to be unnecessary.

## Response

The regulatory framework currently sets out that a reportable event is any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's legal form or business model, and/or its willingness or ability to comply with its conditions of registration.<sup>9</sup> Reportable events are an important component of the OfS's risk-based approach to regulation that enable the OfS to obtain information about events which may require regulatory action.

The OfS's requirements for reportable events impose a reporting obligation on providers; they do not provide the OfS with a mechanism to intervene to require substantive actions from a provider. Identifying a potential issue for a provider, whether from a reportable event or another mechanism, does not provide confidence that a provider will take necessary actions in accordance with the interests of its students.

In addition, we consider that it is possible for risks to crystallise rapidly, and we have some experience of providers failing to report events in a timely manner. The period between becoming aware of a risk and action being needed to protect the interests of students may therefore be short. Our view is that this uncertainty about the timing of risks becoming visible and then crystallising supports the argument for the introduction of condition C4.

For this reason, we consider that reportable events do not provide a suitable mechanism for the OfS to respond to the circumstances of market exit.

## Alternative approaches

63. Rather than introduce a new condition some respondents suggested that the OfS should consider other options in relation to providers exiting the market. These suggestions included:

- Increased engagement with a provider – respondents suggested that as the OfS had shown that it was possible to protect student interest through engaging with providers at risk of market exit, the proposed new condition is unnecessary.
- That it would be more helpful to providers and students for the OfS to address the underlying issues causing market exit. An example suggested was that the OfS could provide funding to prevent providers from exiting the market or more

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<sup>9</sup> The OfS is currently consulting on changes to the definition of a reportable event contained in the regulatory framework. At the time of writing, no decisions have been taken as a result of that consultation.

information to the provider (e.g. data) so that it could change its approach and avoid market exit.

- That there should be a sector-wide approach to ensure adequate protection for students, such as a central funding source for protection arrangements.
- The establishment of a re-brokerage scheme similar to that operated by the DfE in relation to multi-academy trusts<sup>10</sup> or the extension of the further education special administration regime<sup>11</sup> to cover higher education.
- New legislation to allow the OfS to act as an administrator (under insolvency law) with powers to prioritise students' interests over creditors' interests.
- New legislation to enable the OfS to 'step in' and replace executive and non-executive posts.

## Response

In relation to the suggestion that the OfS can protect the interest of students through engaging with providers, the OfS would normally expect to have significant engagement with a provider prior to a judgment that it is at material risk of market exit. We would expect this engagement to continue as the provider undertakes detailed market exit planning. However, our view is that engagement on its own does not provide us with the regulatory tools we may need. For example, where a provider has been unable or unwilling to engage in timely and effective student protection planning, we consider that action is required to ensure the interests of students are protected.

Many of the other approaches suggested by respondents would require changes in primary legislation to enable the OfS to act in the ways suggested. The OfS's powers are governed primarily, though not exclusively, by HERA and this does not enable the OfS to 'step in' and replace staff within a provider or to act as an administrator in cases of insolvency. Nor is the OfS able to prevent a market exit from occurring by, for example, providing additional funding. The DfE has established the Higher Education Restructuring Regime<sup>12</sup> for providers at risk of insolvency as a result of the pandemic. While the OfS may be in a position to suggest potential changes to legislation, it would require the government to make such changes.

With regard to the suggestion that the OfS should provide information to the provider, we consider that a provider should already have information available to it regarding its own operations. The OfS does not consider that any additional information it holds should allow the provider additional insights that it would not already hold as an autonomous

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<sup>10</sup> Re-brokerage is the term the DfE uses where one academy trust is asked by the Regional Schools Commissioner to transfer one, some, or all of its academies to another academy trust.

<sup>11</sup> See <https://www.gov.uk/government/publications/further-education-bodies-insolvency-guidance>.

<sup>12</sup> See <https://www.gov.uk/government/publications/higher-education-restructuring-regime>.

institution. As a principles-based regulator, the OfS does not have fixed indicators that would automatically signal that a provider is at risk of market exit. For these reasons, we do not consider that providing information to providers would mitigate the issues we have identified.

In relation to the further education special administration regime, this is underpinned by specific legislation that is not currently in place for other higher education providers. In relation to brokerage arrangements for academies, the OfS considers that the market in higher education operates significantly differently to the arrangements for the provision of primary and secondary education. Such a system would require the OfS to operate significantly differently, noting the different type of role held by the DfE as a government department rather than an independent regulator.

Under the proposed approach the OfS might, where appropriate, intervene in relation to student transfer arrangements between providers; this is not the same as ensuring that the existing provider continues to operate, albeit under new ownership or management, which we consider to be a matter for the provider itself.

It is our view that the alternative approaches suggested would not provide an appropriate alternative to condition C4 as we consider they are either not in our gift to deliver or would not address the issues that we have identified and offer a level of student protection that we would consider adequate.

## C. Terminology

### Introduction

64. Some respondents commented on the need for clearer explanations of the terminology used in the proposed condition and guidance, with suggestions that without further definition more providers would be brought into the scope of the condition than was intended. Respondents also commented on the need for clear information on the approach that the OfS would take to making a judgment that a provider was at 'material risk' of market exit. The reasons given for this included:

- To support providers' internal planning and management processes
- To provide assurance that providers would be treated equitably
- To give reassurance that the OfS will act reasonably and proportionately.

65. Respondents also raised further questions, including:

- How will the OfS make a judgement that a provider is at material risk of market exit?
- Who would make the decision that a provider is at material risk of market exit?



- Will providers have an opportunity to input into the OfS’s decision-making process?

66. Some respondents also made comments regarding the meaning of ‘reasonably likely to exit’ included within the proposed guidance for the condition. This is considered in the section below regarding publication of market exit plans. Further details of the comments made by respondents in relation to the meaning of ‘market exit’ and ‘material risk’ are set out below.

### Meaning of ‘exit’

67. The proposed condition sets out that providers ‘must comply with any student protection direction in circumstances where the OfS reasonably considers that there is a material risk that the provider will, or will be required by the operation of law to, exit the English higher education sector’ and some respondents sought clarity on the meaning of ‘exit’ that would be used by the OfS. Those who commented on this were unanimous in their view that ‘exit’ should only apply to the full closure of a provider. Reasons given by respondents for seeking this clarification were that otherwise student protection directions could be used in the event of cost-cutting activities, course or campus closures, or in response to re-structuring of programmes undertaken by a provider. Respondents suggested that these were common organisational change activities that should not be treated as an indication that a provider is at significant risk of closure.

68. Respondents also highlighted other areas for clarification including:

- How the proposed condition would apply in the event of a Further Education Corporation (FEC) exiting the higher education market
- Whether the proposed condition would apply in the event of a provider voluntarily choosing to cease the aspects of its provision that require OfS registration.

### Response

We consider ‘exit’ to mean circumstances where the provider will, or will be required by the operation of law to, fully or substantially cease the provision of higher education in England.

The OfS does not intend that the condition should cover circumstances that would be considered part of the normal day-to-day course of business of any higher education provider, such as the examples given by some respondents of course closure, or normal restructuring of higher education programmes (which we consider to mean during normal academic development and the refreshing of courses and their content). This is unless this would result in a circumstance where the provider fully or substantially ceased the provision of higher education in England – for example if it only offered one course. We consider that where there is a risk to students in relation to day-to-day activities this will be covered by condition C3 and a provider’s SPP.

By way of example, the OfS would consider a provider to be at risk of exit if it faces significant financial issues and is unable to secure and evidence lending or other income to meet its cash flow requirements so that it is at risk of administration or liquidation. This is because the effect of such a situation could be that the provider fully or substantially ceases providing higher education. These circumstances may develop quickly or may be forecast to happen in the future. Conversely, ordinary restructuring activities to reduce costs (unaccompanied by significant financial problems) may not in themselves indicate a risk of exit, but may lead the OfS to require a revised SPP under the provisions of condition C3.

An important exception is that while some of the examples given by respondents above may represent circumstances that a Further Education Body may face, condition C4 would not apply to such providers in any circumstance. This is because in the event of a Further Education Body ceasing to operate in its entirety for financial reasons, a special administration regime<sup>13</sup> may apply, which we consider offers a reasonable alternative form of student protection. Special administration regimes are based on the existing insolvency procedure of administration, but with modification to secure the continuity of essential services if a supplier fails. In the case of Further Education Bodies, the special objective of the education administration includes the aim of avoiding or minimising disruption to the studies of existing students of the body as a whole. The education administrator may achieve its special objective by:

- Rescuing the further education body as a going concern
- Transferring some or all of its undertaking to another body
- Keeping it going until existing students have completed their studies
- Making arrangements for existing students to complete their studies at another institution.

This covers both those students already in attendance on a course at the college in question, or those who have accepted a place on a course at the college, when the education administration order is made.

Where a Further Education Body decides to cease offering higher education for strategic reasons (but continues to deliver other provision that is not higher education), we consider it likely an existing or revised SPP will apply, as the protections offered by the special administration regime would not be in place.

Noting the points of respondents in this regard, and not wishing the circumstances under which we may apply the condition to be misunderstood, we have updated the wording of condition C4 to clarify that it relates to material risk that a provider will, or will be required by the operation of law to, fully or substantially cease the provision of higher education in England. Further, we have made necessary consequential amendments to the guidance accompanying the condition, including putting beyond doubt that our meaning of exit

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<sup>13</sup> See <https://www.gov.uk/government/publications/further-education-bodies-insolvency-guidance>.

includes circumstances where insolvency law leads to a provider exiting the higher education sector.

We have also considered the suggestion for clarification about whether binding directions might be imposed for providers that voluntarily choose to cease the aspects of their activity that require OfS registration. Where this takes place, a provider would need to apply for voluntary deregistration. We do not consider that, in itself, a provider ceasing to be registered would mean that it was at material risk of market exit, as a provider that is deregistered may continue to deliver higher education outside of the OfS's regulatory oversight. Where a provider seeks deregistration, we will therefore consider these issues on a case-by-case basis. It should be noted that in deregistration cases we also have access to other regulatory tools, such as the use of savings provisions, which give us other means to mitigate any risks to students. For this reason, we have updated the guidance to remove the reference to voluntary deregistration, because if there is not a risk a provider will, or be required by the operation of law, to fully or substantially cease the provision of higher education in England, then the provider would not be subject to student protection directions.

### **Meaning of 'material risk'**

69. Some respondents suggested that the matters that might cause the OfS to reasonably consider that there is a 'material risk' of market exit included within the proposed guidance were too broad. The main point made by respondents was that a lack of definition would result in regulatory intervention in a much wider range of cases than the OfS's intention and rationale for intervention would suggest. Respondents considered that this would have the effect of increasing regulatory burden unnecessarily, that it may result in intervention happening too early when a provider is likely to recover, or that the use of the condition would not be proportionate.
70. To resolve this, respondents suggested the OfS publish examples of situations that would (or would not) be included under the proposed condition and that more consideration be given to providing a detailed definition of 'material risk'.
71. There were a significant number of comments where respondents sought clarity and reassurance about how the OfS would make judgements in relation to providers it considered to be at 'material risk' of market exit. Some respondents considered there to be a lack of clarity about the thresholds and circumstances that would trigger OfS intervention under condition C4. They requested further detail on how the OfS would arrive at a judgment about material risk and suggested that the OfS publish its expected evidence base for judgements to give providers more clarity about how material risk would be assessed, with some suggesting that the OfS would make subjective judgements.
72. In the same regard, some respondents suggested that the OfS should draw on evidence and input from a range of stakeholders, including banks, auditors, and external advisors, as part of an assessment of a provider's risk of market exit. It was suggested this would be particularly valuable in cases where the OfS's view of risk of market exit differs from

that of the provider. These respondents also sought reassurance about the OfS's expertise in making judgements that a provider was at material risk of market exit, especially when the provider had been signed off as a going concern by its auditors.

73. Some respondents offered examples of metrics they considered should inform the OfS's decisions, such as financial information including recovery plans and student number data. They also argued for transparency about the selection and use of contributing information.

## Response

In relation to the proposals about particular sources of information that the OfS should use, we consider that there could be a wide range of evidence, from a range of sources (including for example from a provider's external auditors and other third parties), to consider when determining whether a provider is at material risk of market exit. We consider that the nature of these sources and the weight we can place on them will vary from case to case.

In addition, where a provider faces a material risk of market exit but may be able to take mitigating action, the OfS would wish to consider the effectiveness of the actions being taken by the provider and the likelihood that these can be delivered in the way and timescale required to protect students. Our judgement about whether there is a material risk of market exit will therefore draw not only on the current position or the provider's projections, but our assessment of the credibility of its plans and any action to implement to those plans.

In determining that a provider is at material risk of market exit the OfS would need to have regard for its general duties and comply with public law requirements, which include the requirement to consider all relevant information available to it, and to ensure that decisions are reasonable and proportionate.

We therefore consider that prescribing in detail the factors and scenarios that the OfS might consider when determining whether a provider is at material risk of market exit would be unnecessarily restrictive and not in keeping with our public law duties. This therefore means it is not possible to provide a definition of 'material risk', because what constitutes such a risk will be different for each provider. Avoiding such prescriptiveness is also in keeping with the principles-based approach set out in our regulatory framework.

However, given the feedback, we have amended the guidance to include some examples of the financial indicators that might be used by the OfS in relation to our consideration of whether a provider is at material risk of market exit. This is because financial indicators represent commonly understood factors that can be defined at this time, and so it is possible to highlight them as examples. However, the list of matters that may be considered by the OfS (included within the guidance) is not intended to be exhaustive and, as set out above, the OfS would need to consider all relevant evidence when considering whether a provider is at material risk of market exit.

## D. Implementation and application of condition C4

### Introduction

74. Some respondents provided detailed comments in relation to the implementation of the proposed new condition if it were to be introduced, many of which asked how condition C4 would work in practice.
75. An overarching theme raised by respondents was the importance of fairness and transparency in the implementation of the proposals. Some respondents suggested that providers wanted additional information about the OfS's operational processes, and that it would be helpful if the OfS shared its decision-making framework or process map.
76. Details of the comments made in relation to the implementation of condition C4 are set out below.

### OfS engagement and consultation with providers

77. Some respondents suggested that, before using condition C4, the OfS should first engage with a provider's leadership team and governing body, focusing on specific concerns, mitigating actions and how a market exit might be avoided.
78. Some respondents stressed their view that decisions need to be made in consultation with a provider, arguing that the OfS should not be able to impose student protection measures without consultation with the provider. It was suggested that without ongoing dialogue and engagement between a provider and the OfS, the process could become contentious.
79. A number of respondents commented that there should be a clear timeline for decision-making that allows for negotiation between all stakeholders to occur. Respondents considered that in seeking to respond quickly, the OfS might not have a full understanding of the wider implications of its decisions. Some respondents stated they understood the potential need for rapid action, but also considered that a period of consultation between the OfS and the provider would be appropriate given the likely impact of market exit on a provider and its students. It was also suggested by respondents that speed of decision-making should not be a consideration and that the priority must be managing the consequences for students.

### Response

In relation to respondents' comments requesting that the OfS provide more information about its decision-making framework, in making regulatory decisions the OfS is required by public law to act reasonably. We must have regard to our general duties set out in HERA and other relevant factors. This includes the requirement for the OfS to have regard to the principles of best regulatory practice, including that regulatory activities should be transparent, accountable, proportionate and consistent. In making any decisions in relation to the use of this condition, we would act in accordance with HERA

and as set out in the regulatory framework and the OfS's scheme of delegation.<sup>14</sup> The OfS considers that together these documents provide an appropriate level of information about its decision-making framework and processes.

In relation to how the OfS will engage with a provider, we would normally expect significant engagement both before determining that a provider is at material risk of market exit, and throughout any subsequent regulatory intervention. In response to feedback, we have amended the guidance that underpins the condition to set out that when we judge that students would not be disadvantaged by any delay to the imposition of a direction, we may consult with a provider regarding any direction that may be issued. In making such a decision, the OfS will act in accordance with public law requirements and have regard to its general duties and other relevant factors.

We do not consider that it would be possible for the OfS to specify a standard timeline for decision-making, because the circumstances of each individual case are likely to be different and so it would not be practical to do so. As we have noted elsewhere, a provider may choose to provide information to the OfS at any point, if it considers that it would be relevant to the OfS's view of the provider's circumstances. We consider that providing updated guidance should address some of the points in this regard, highlighting the consideration we will give to whether students will be disadvantaged by any delay to issuing a direction.

In relation to the comments made about the speed of regulatory decision-making and subsequent action, the OfS will make decisions on a case-by-case basis to reflect the specific situation and take into account factors such as those outlined by respondents to the consultation. As set out above, we will normally expect to engage with a provider before imposing a direction. However, where the risk to students is imminent, or where we consider that planning or implementation needs to begin straight away, the OfS will act swiftly to protect students' interests.

## **Role of the OfS, providers and other stakeholders**

80. Some respondents suggested that greater clarity about the respective roles of the OfS and the provider in managing a market exit situation was required in order to enable providers to plan appropriately. Respondents requested that the OfS clarify the role and remit of a provider's governing body during a market exit scenario and whether any of a governing body's responsibilities would be removed. Respondents also asked where responsibility lay for a number of processes including teach out and the design of student protection measures.
81. Some respondents asked how condition C4 would interact with other requirements faced by providers at risk of market exit including, for example, insolvency law and employment law. Respondents suggested that the interventions of the OfS could potentially place a provider at greater risk of breaching these obligations because, for example, OfS directions would be designed to protect students' interests and insolvency

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<sup>14</sup> See [www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/](http://www.officeforstudents.org.uk/about/who-we-are/our-board-and-committees/).

administrators would be acting in the interests of a provider's creditors. It was suggested that the OfS should work alongside administrators to help resolve these possible tensions. Similarly, some respondents suggested that a provider's individual commercial partnerships or funding agreements could contain termination clauses that could be triggered by regulatory action of this nature, and that this might increase the risk of financial failure.

82. In addition, a number of respondents asked about the relationship between the OfS's market exit proposals and the DfE's higher education restructuring regime (HERR).<sup>15</sup> Some noted that while the OfS's consultation did not mention the HERR, the HERR document makes reference to providers engaging with the OfS. This prompted requests for further information about how the two processes might interact. For example, some respondents asked whether a successful application to the DfE for restructuring finance would negate the need for an MEP, or if an MEP would only be required if DfE restructuring finance was either denied or deemed to have failed to rectify a provider's financial position. Some respondents also asked whether an application to the HERR would automatically prompt an OfS judgement that a provider was at material risk of market exit, and asked how any conditions linked to the restructuring regime might sit alongside OfS student protection directions.
83. Some respondents also suggested that where a provider was at material risk of market exit, there would be a need for the OfS to engage with other relevant stakeholders including the CMA and the Office of the Independent Adjudicator for Higher Education (OIA). Respondents suggested that a joined-up approach between the OfS and other bodies would be essential to ensure a provider in a market exit situation was not receiving conflicting guidance, or being subjected to irreconcilable demands.

## Response

In relation to the comments regarding the roles of the OfS and a provider in managing a market exit situation, higher education providers are autonomous institutions and we are not proposing that any of the responsibilities of a governing body would be removed as part of this condition.

As set out in our response in [section A](#) to comments made in relation to institutional autonomy, it is the responsibility of the governing body to ensure a provider's compliance with all its conditions of registration. It is not the role of the OfS to undertake planning on behalf of a provider in relation to its student protection arrangements. However, the OfS will engage with a provider in these circumstances and this could involve supporting engagement between the provider and other stakeholders.

It therefore follows that a provider's governing body would be responsible for ensuring compliance with any direction issued under condition C4 (including in relation to the need to develop and implement student protection measures). It is not the OfS's intention that

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<sup>15</sup> See <https://www.gov.uk/government/publications/higher-education-restructuring-regime>.

the condition (or any resultant direction) should absolve a governing body of any of its responsibilities regarding the operation of a provider.

We now consider the comments made regarding other legal requirements to which a provider in a market exit situation may be subject. Under condition C4 the ability of an individual provider to develop and implement an MEP given its wider circumstances will be an important consideration in the OfS's regulatory interventions. This would include where the OfS is made aware of other obligations that a provider has, including private agreements (such as existing contractual arrangements) or other legal requirements (such as relevant legislation regarding insolvency). We recognise that this may require a provider to amend the approach that it might normally have taken in order to be compliant with any directions imposed through this condition. For example, in the event of insolvency arrangements, a provider would need to consider how the interests of students may be met, while also fulfilling the legal obligations that exist in relation to insolvency. We consider that it would not be in students' interests for the OfS to hesitate to issue a student protection direction in circumstances where it might prove challenging for a provider to implement it.

In relation to the HERR, both the HERR and the introduction of condition C4 are designed to protect the interests of students where a higher education provider is at material risk of market exit. The HERR does this through providing last resort financial support in the form of repayable loans. However, the OfS considers that the existence of the HERR does not negate the need for a mechanism to be in place to protect the interests of students should market exit occur, given that the HERR is not designed to prevent all market exits. The DfE has stated it will only intervene in cases where certain conditions are met:

- There is a clear economic and value for money case for intervention.
- The problems are related to COVID-19 and there is a clear and sustainable model for future provision as a result of restructuring, meaning that the provider should not need further assistance.
- The failure of the provider would cause significant harm to the national or local economy or society.

We do not consider that applying to the HERR would automatically result in a provider being considered to be at material risk of market exit by the OfS. Under condition C4 the OfS would make its own assessment about whether a provider is at material risk of market exit, considering all the evidence available to it.

In relation to the issues raised by respondents about the role of the OIA and CMA, both organisations have important and distinct roles in relation to the higher education sector. Where it is in the interests of students, the OfS will work closely with other relevant stakeholders, including in relation to a provider deemed to be at a material risk of market exit. The arrangements for the OfS to share information with other organisations is set out in section 63 of HERA.



## Partnership arrangements

84. Respondents highlighted the complexity of partnership arrangements across the sector including for example validation, sub-contractual and overseas partnerships. Respondents suggested that further information was needed about how the proposed condition would apply to these arrangements. Other respondents suggested that further complexities would arise in situations where not all partners are on the OfS Register. Respondents asked whether MEPs would need to include arrangements for a provider's partner organisations and whether there would be a requirement for partner institutions to also produce an MEP. In addition, some respondents suggested that the proposals should provide information about the roles and responsibilities of partners, including for example the role of a degree awarding body in a market exit situation.
85. Some respondents emphasised the need to engage partner providers at the earliest opportunity so they could help develop an MEP for students. Other respondents considered that partner providers would be able to choose whether or not to be involved in delivering student protection measures and this would not be helpful.
86. Some respondents suggested that the publication of an MEP at one provider might have a negative impact on the financial stability, reputation and student recruitment of a partner provider, due to its relationship with a provider deemed to be at material risk of market exit.

### Response

In relation to comments made about partnership arrangements, the OfS recognises the complexities of partnership arrangements that exist within the sector and that individual partnership arrangements will be subject to specific contractual arrangements. Therefore under condition C4, judgements about whether a provider is at material risk of market exit, including due to its relationship with another provider, would need to be made on a case-by-case basis. If, for example, a validating provider were considered to be at material risk of market exit, the OfS may form a view in relation to both the validating and validated providers if it were likely that the validating provider's exit would have a material effect on the validated provider.

In relation to sub-contractual arrangements,<sup>16</sup> the lead provider is responsible for all students that are registered with it. Therefore, where a lead provider is judged to be at material risk of market exit, its MEP and student protection measures would need to consider all of its students (including those taught by another provider).

The OfS recognises that a registered provider may carry out some activity outside the UK, for example, by operating an overseas campus where it awards its own English degrees, or by delivering distance learning provision to students based outside England. Paragraph 88 of the regulatory framework states that the OfS will regulate such overseas

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<sup>16</sup> Where students are registered with one provider (the lead provider) but the course, or part of it, is delivered by another (the delivery provider). This is also commonly known as a franchise arrangement.

activity on the basis that the obligations of the registered provider extend to students for whom it is the awarding body, wherever and however they study. Therefore, if we issued a direction to a provider, we would be likely to expect a provider to consider these students in its plans under that direction.

In relation to engaging with partner providers, where the OfS considers that there is likely to be a material effect on another registered provider, or where that other provider has regulatory responsibilities for affected students, we may engage directly with that provider. We would be able to share relevant information with that provider, subject to the normal decision-making process about disclosure. In making any decision to require the publication of an MEP or other student protection measures, the impact on partner providers may be a relevant consideration that the OfS would take into account.

### **Impact on small, specialist or new providers**

87. Some respondents suggested the proposed condition would disproportionately affect small, specialist or new higher education providers. The reasons given for this included:

- That the OfS's approach to assessing financial risk may not be suitable for smaller or specialist providers, or those relying on alternative sources of funding such as donations
- That there would be a disproportionate level of regulatory burden placed on smaller providers that had limited administrative capacity
- The difficulty in transferring students from specialist programmes to a suitable alternative provider.

88. In addition, some other respondents suggested that students may be dissuaded from pursuing specialist educational pathways as these are often offered by smaller, specialist providers, which might be perceived to be at greater risk of market exit.

### **Response**

In terms of the OfS's approach to assessing financial risk, when forming a view about whether a provider is at material risk of market exit, we will consider on a case-by-case basis the information that we hold about a provider. It does not follow that a registered provider will automatically be considered at material risk of market exit simply because its financing arrangements are different to other providers. We would not apply a one-size-fits-all approach to assessing risk for providers.

The student protection measures operated by providers would need to take account of the context in which an individual provider is operating, including for small or specialist provision. The OfS intends that student protection directions, where issued, would be tailored to a provider's particular circumstances. While responding to a student protection direction may be challenging for a provider with limited operational capacity, as we have

set out above, we consider the burden should be proportionate to the risk posed to students.

We recognise that there will be additional challenges if it is necessary to transfer students from specialist courses or providers. We consider this to be a reason to ensure that a provider has in place robust plans to deliver this type of student protection measure.

Regarding the point that students might be deterred from studying at some types of provider, we do not consider that imposing a condition that allows the OfS to address material risk of market exit is likely to lead students to consider particular providers to be at increased risk of exit. We consider that increased confidence that prompt, robust action can be taken if necessary, might ameliorate any concerns students may have about pursuing opportunities at particular registered higher education providers where they may consider the risk of exit to be increased.

## Content of market exit plans

89. A few respondents requested more information about the form and content of MEPs. Respondents wanted to know how plans might differentiate between alternative scenarios, such as a sudden market exit versus a longer winding down of business, and who the intended audience is for these plans.

### Response

MEPs would focus on the actions that a provider would take to protect the interest of students in the event of market exit. We consider that the content of an MEP would need to be determined on a case-by-case basis as this needs to be tailored to the specific circumstances of a provider. As a result, different MEPs would be likely to focus on different kinds of student protection measures.

We do not intend to prescribe a particular form or content for an MEP, as this would risk creating a one-size-fits-all set of arrangements that may increase burden without delivering the protection needed for particular groups of students.

## Appeals process

90. Some respondents suggested that there should be an appeals process in relation to condition C4, whereby a provider could challenge the OfS's judgement of whether the provider was at material risk of market exit, or the imposition of student protection measures. Respondents highlighted that the Regulators' Code<sup>17</sup> requires regulators to provide impartial and clearly explained routes for appeal against regulatory decisions. Some respondents also commented that any appeals process should be impartial, and consequently considered that appeal panel members should be independent.

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<sup>17</sup> See <https://www.gov.uk/government/publications/regulators-code>.

91. A number of respondents suggested that providers should have access to the OfS's assessments of financial viability and sustainability to enable them to determine their grounds for appeal.

## **Response**

Regulators whose functions are specified by order under section 24(2) of the Legislative and Regulatory Reform Act 2006 (which includes the OfS) must have regard to the Regulators' Code when developing policies and operational procedures that guide their regulatory activities. In relation to appeals, section 2.3 of the code sets out that regulators should provide an impartial and clearly explained route to appeal against a regulatory decision; that individual officers who took the decision or action against which the appeal is being made should not be involved in considering the appeal and that this route to appeal should be publicised to those who are regulated.

The code also sets out that if a regulator concludes that a specific provision is outweighed by another relevant consideration, the regulator is not bound to follow that provision set out in the code, but should record that decision and the reasons for it.

Having considered the responses to the consultation we have not changed the approach proposed for condition C4 to include an appeals process as this would have the effect of limiting our ability to act quickly and in a targeted way to protect the interests of students, which is one of the matters we have sought to address through this condition.

However, in response to the issues raised by respondents, and as outlined above, we have amended the guidance accompanying the condition to reflect that where the OfS considers it necessary to impose a student protection direction, we would normally expect to engage with a provider before doing so, and where we consider that students will not be disadvantaged by any delay to the imposition of a direction, we may consult with a provider on all or part of a student protection direction.

In relation to sharing our assessments of financial viability and sustainability with a provider, the OfS is required to act reasonably as a matter of public law. In making regulatory decisions, the OfS is required to have regard for the general duties set out in HERA, which include the requirement to have regard for the principles of best regulatory practice, including transparency. Therefore, when making regulatory decisions, including in relation to directions under condition C4, we would set out clearly our decision and the evidence that led to that decision. This provides clarity for an individual provider about how a judgement has been made.

## Withdrawal of student protection directions

92. Some respondents asked what would happen where financial recovery was possible and the situation improves for a provider. Respondents wanted to know at what point the OfS would withdraw student protection directions. Respondents suggested that where a provider recovered financially, the continued existence of published student protection directions and an MEP could cause confusion for students and other stakeholders.

### Response

As with any regulatory intervention, the OfS would keep a student protection direction under review to ensure that it remains necessary and proportionate. This means that if the situation improves for a provider, the OfS could propose the direction is withdrawn. We recognise that there may be situations where it may be desirable to remove parts of a direction but leave others in place, according to how the situation has changed and the contents of the direction.

The condition would apply to any risk of market exit, whether due to financial reasons or otherwise. Where it is related to financial risk, we consider that the point at which we determine a direction is no longer necessary or proportionate to mitigate the risk of market exit to students, may not be at the same point at which financial recovery becomes possible – as suggested by respondents. This is because the OfS would want to understand that the risk was being sufficiently mitigated (i.e. recovery was taking place), and would want to consider evidence of that.

In considering such matters, we would consider all relevant factors including the need to protect students' interests and the interests of the provider. In line with our proposal above, however, we would give particular weight to the interests of students in this regard.

Considering the views raised by respondents, we have updated condition C4 to make it clear that we have a power to remove directions made under the condition, which we consider to be reasonable and in the providers' interest.

### Impact on local area

93. A few respondents commented on the effect that a market exit of a provider could have on a local area. They suggested that the closure of a provider could damage the local area given the contribution universities and higher education providers make to the economy, including as major employers, through their supply chains and also their role in up-skilling the local workforce.
94. Respondents also suggested that, where a provider exits the market in an area with limited alternative higher education provision, there could be a negative impact on student choice.

## **Response**

The OfS notes that this point is largely focused on market exit as a part of the normal operation of the higher education market, rather than on student protection measures taken by a provider to mitigate the negative impact of an exit on students.

We recognise the important contribution that higher education providers can make to local and regional economies and communities. The purpose of the condition is to mitigate the impact on students where there is a material risk of market exit, rather than to mitigate the underlying risk itself, although we note that it is likely that providers will wish to address both matters.

## E. The impact of condition C4 on students

### Introduction

95. The consultation included a question asking respondents to comment on any potential impact of the proposals on individuals on the basis of their protected characteristics.<sup>18</sup> This section sets out respondents' views on this and the impact on students in more general terms. The most common view was an overarching concern that student interests should be protected in the event of potential market exit.
96. In addition, this section sets out comments made by respondents in relation to the student protection measures included in the consultation.

### Impact on underrepresented students and students with protected characteristics

97. Some respondents referred specifically to the potential impact of the proposals on individuals on the basis of their protected characteristics. However, many respondents commented on equality, diversity and inclusion considerations in a broader sense and we note that socioeconomic related issues were prominent. In line with this we have taken a holistic approach to our analysis, and use the over-arching term 'underrepresented groups',<sup>19</sup> which aligns with the focus of our access and participation activities, rather than referring separately to individuals with protected characteristics.
98. Most responses relating to underrepresented groups focused on the potential impact of market exit on individuals, rather than the impact of the proposed condition. Respondents suggested that students would be negatively affected by market exit, giving the following reasons:
- The potential for there to be a disproportionate impact on students who were not geographically mobile, as in some cases students may be unable to easily arrange continuation of study in another location.

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<sup>18</sup> Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

<sup>19</sup> We use the term 'underrepresented groups'. It includes all groups of potential or current students where the OfS can identify gaps in equality of opportunity in different parts of the student lifecycle. In determining the groups falling within this definition, the OfS has given due regard to students who share particular characteristics that are protected under the Equality Act 2010 as well as students who are otherwise underrepresented or disadvantaged. When referring to underrepresented groups, the OfS considers this to include, among others, students from deprived areas, areas of lower higher education participation, or both; some black, Asian and minority ethnic students; mature students; and disabled students (whether or not they are in receipt of Disabled Students' Allowance). There are some student groups with protected characteristics under the Equality Act 2010 where the OfS has been prevented from determining whether they are underrepresented at different points of the student lifecycle, because either: data is collected at a national level but there are gaps in disclosure and absence of comprehensive data (for example in relation to religion or belief, sexual orientation and gender reassignment); or data is not collected at a national level (for example in relation to marriage and civil partnership, and pregnancy and maternity).

- Students whose provider is their sole residence, such as care leavers, would face a disproportionate impact as they may encounter homelessness in addition to losing their place of study.
- Students accepted by their original provider through a contextual or non-traditional admissions process may not find it possible to transfer to another provider that would be willing to admit students on the same terms.
- Where there is an attainment gap between different student groups, students may find it challenging to succeed at another provider.
- Students from underrepresented groups may not be able to access the same level of support or equivalent provision in another provider following a transfer.

99. In relation to prospective students, some respondents suggested that market exit would have a negative effect on students entering higher education through non-traditional routes, or those facing other real or perceived barriers to participation. Respondents suggested that these students may be more risk-averse, including in relation to the prospect of their provider being at material risk of market exit, and that this might discourage them from entering higher education.
100. Some respondents stated their view that low tariff and smaller providers might be at greater risk of market exit, and if such providers had a higher proportion of students from underrepresented groups, these students may be disproportionately affected by a market exit (suggesting a view that providers with students with student demographics more traditionally represented in higher education are less likely to be at material risk of market exit).
101. A few respondents asked that an equality impact assessment (EIA) of the proposal be published by the OfS. A number of respondents also suggested that any MEPs published under the proposed condition should be subject to EIAs, suggesting that respondents considered this was necessary to ensure negative impacts of a market exit on certain student groups were appropriately considered and mitigated by a provider.

## Response

The majority of issues highlighted by respondents in relation to equality considerations refer to potential adverse consequences of a market exit itself, rather to the proposed condition. We have considered these issues and further reflected on whether the implementation of the condition could adversely affect equality issues, and thus create adverse impact on students beyond that created by a market exit itself. We consider that the imposition of the condition is likely to have a positive impact, because it is designed to improve a provider's planning for the impact of market exit on students. There is a greater likelihood that the issues identified by respondents can (to varying extents, depending on the circumstances of an individual provider) be mitigated through effective and timely



student protection planning and the implementation of effective student protection measures.

In relation to the suggestion that MEPs should be subject to an EIA, we note that providers in the Approved (fee cap) registration category are subject to the Public Sector Equality Duty, and therefore will need to give such matters appropriate consideration in line with those obligations. However, those in the Approved category are not subject to the Duty, and market exit is not a phenomenon that is restricted to a particular registration category.

We have thought further about this issue and consider that, although the power to make student protection directions under C4 in general would benefit all students (including those with protected characteristics), it is reasonable and desirable to encourage all providers to actively think about the impact of their situation on these students when devising and putting in place student protection measures. This would increase the likelihood that these students are afforded a level of protection that properly meets their needs in market exit situations. For this reason, we have updated the guidance to the condition to reflect this position.

This does not impose any further regulatory requirements on providers, but helps to ensure that the issue of protecting students with protected characteristics is given good consideration by providers in market exit situations, and reflects the importance of this issue in the sector, as highlighted in the consultation responses.

## **Practical challenges for students related to market exit**

102. Respondents also commented on the potential practical effects of a market exit, or a potential exit, on students, suggesting that:

- Cost cutting measures implemented by a provider to try to avoid an exit could have a detrimental effect on the student experience (with the implication that providers and students should not have to face such circumstances).
- International students may experience difficulties with visa sponsorship if their provider were to exit the market.
- Students from underrepresented groups may need additional support to understand MEPs and may require support through any decision-making process about the future of their studies.

103. Some respondents suggested mitigations for the negative effects of market exit on students:

- For students who incurred additional costs as a result of a market exit, it was suggested that adequate financial support should be provided (suggesting a view that this should be provided from public funds).

- That it was important to preserve student choice in the event of market exit, particularly for students with protected characteristics including, for example, students with disabilities or caring responsibilities.

## Response

Considering our proposals alongside these risks to students, we do not consider that our proposals would have the effect of worsening the situation for students. This is because the issues raised by respondents are consequences of a market exit itself rather than of the proposed condition. We consider that the imposition of the condition is likely to have a positive impact, because it is designed to improve a provider's management of the impact of market exit on students; there is a greater likelihood that the issues identified by respondents can (to varying extents, depending on the circumstances of an individual provider) be mitigated through effective and timely student protection measures.

Under condition C4, the OfS would be able to direct a provider to put in place student protection measures that respond to the specific context of the provider and its students – such as the planning needed for international students to address issues related to student transfer.

Our proposals were intended to increase the protection of students' interests and we have amended the guidance to better reflect that, where the OfS decides to impose a student protection direction, or to require a provider to publish information, we will consider all factors but will place particular weight on the importance of protecting students' interests.

In relation to the proposed mitigations for the impact of market exit itself on students, the OfS's powers are governed primarily, though not exclusively, by HERA. Therefore, the OfS is not able to provide direct financial support to students affected by market exit.

In relation to the issue of preserving student choice, we consider this to be an important part of a student transfer measure. We consider that if the situation warranted it, the OfS could utilise a student protection direction to ensure that the transfer arrangements developed by a provider meet the needs of its students.

## Feedback on student protection measures

104. The consultation did not directly ask for views about the example student protection measures included within the proposal, but nearly half of respondents commented on at least one of them.
105. Some respondents suggested that transparency and timely communication with those students affected by market exit is critical. Some respondents suggested that providers need to be clear with students about what to expect, should the provider be at material risk of a market exit. A few respondents suggested that the OfS should produce generic guidance for students about what to expect if their provider exits the market and this should focus on students' rights and how students could seek advice.

106. An overarching theme raised by respondents in relation to student protection measures was that a provider in crisis might not have the resources or expertise to implement actions directed by the OfS at pace, and many responses sought clarification about the role of the OfS in supporting this process. Some respondents were keen for the OfS to play an active role in relation to the measures, for example by supporting archiving activities as well as teach out and transfer arrangements. Respondents also suggested that dialogue with a provider was essential as they considered that the provider would have the best understanding of the needs of different student groups and the impact of student protection measures on them.

## Response

The OfS agrees with the comments made by respondents in relation to the need for transparency and timely communication with students likely to be affected by a market exit. Condition C1 (guidance on consumer protection law) requires a registered provider to 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. As set out in the CMA's guidance,<sup>20</sup> there are three areas where providers have obligations to students under consumer protection law:

- Information, which must be clear, accurate and timely
- Terms and conditions of contracts, which must be fair and transparent
- Organisational complaint handling processes and practices, which must be accessible, clear and fair.

Providers at risk of market exit must continue to comply with both consumer protection law and condition C1.

In relation to the suggestion that the OfS should produce generic guidance for students at a provider at material risk of market exit, at this time the OfS does not consider that wider communication to students about market exit is a necessary step. We note particularly that, as each market exit situation is likely to be markedly different, there would be significantly different matters to communicate to students in each situation and that this is best done by a provider. However, where a provider at material risk of market exit is failing to provide appropriate information to students, condition C4 would enable the OfS to intervene in a timely way to protect the interests of students by requiring the provider to put in place student protection measures (including information, advice and guidance for students).

We operate a notification process through which students, staff or members of the public can tell us about a registered provider, including one at risk of market exit, that may not be meeting our regulatory requirements. Submitting a notification would give us

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<sup>20</sup> 'UK higher education providers – advice on consumer protection law' is available at <https://www.gov.uk/government/publications/higher-education-consumer-law-advice-for-providers>.

information about a particular issue or issues, and we could take regulatory action, where necessary and appropriate, to protect the interests of students who study at that provider.

In relation to the view expressed by respondents that some providers may not have the resources to implement student protection measures, we consider this point supports the introduction of condition C4. The condition would enable the OfS, where it considered it necessary, to issue student protection directions that require a provider to implement particular elements of its plan at particular times – for example, ensuring that measures are implemented at a sufficiently early stage before resource becomes more scarce. However, we also recognise that there was some concern from respondents about whether or not the OfS would have realistic expectations about student protection measures, given the views expressed about providers' resources and expertise.

The contents of student protection directions will always be considered on a case-by-case basis by the OfS. We consider that providers should develop student protection measures that take into account the situation and address the practical challenges they may present. It is important that providers develop student protection measures that can be delivered in practice, and not just in theory, otherwise they would not be likely to provide sufficient protection to students. We have amended the drafting contained in the condition to set out clearly that, in relation to the student protection measures noted in the condition, we are setting out what the measures could be in principle. The actual detail will reflect the OfS's judgement on what is proportionate in each situation.

In relation to the suggestion that the OfS could play a more active role regarding student protection measures, it is not the role of the OfS to undertake planning or actions on behalf of a provider in relation to its student protection arrangements. However, the OfS will engage with a provider in these circumstances; this could involve supporting engagement with other organisations that may be able to assist.

107. Set out below are the main themes raised by respondents in relation to the student protection measures included within the consultation.

### **Teach out**

108. Comments about teach out measures focused primarily on the resources required to successfully implement such arrangements, for example financial support or staffing, which could prove particularly challenging for a provider in financial difficulty, including not being available at all. Some respondents suggested that the OfS would need to consider such factors before issuing a direction to a provider that may not be deliverable in practice. As noted above, respondents also commented on the need to ensure suitable teach out arrangements for students from underrepresented groups, and how this may prove additionally challenging.

109. A few respondents noted practical difficulties with teach out arrangements generally. Of these, some took the view that regulatory intervention could impede the successful implementation of teach out, for reasons including the provider being in breach of

banking covenants, or the provider's governing body deciding it is at risk of wrongful trading and ceasing operations on that basis.

## **Student transfer**

110. Respondents who commented on student transfer were keen to stress the diversity of the student population and the need for any arrangements to carefully consider the needs of students from underrepresented groups in particular. Some respondents addressed student preference, highlighting that students may not want to transfer. It was also noted that students at a specialist provider may be unlikely to be able to easily transfer to a similar course at another provider.
111. Some respondents took the view that it is not within any provider's power to 'ensure' that its students are able to transfer to another provider, and at best it could only liaise with other providers on behalf of affected students. It was also suggested that when an MEP was put in place by a provider, other providers would have a choice about accepting incoming students.
112. Some respondents asked about the role of the OfS in supporting student transfer, suggesting that the OfS could play a valuable role in negotiating and supporting transfer arrangements – especially as there were considerable practical difficulties with student transfer, including for example where the catchment areas of affected providers crossed national boundaries.

## **Exit awards and unit certification**

113. Some respondents suggested that the OfS should consider the ability of students to achieve an exit award and that the OfS should require more information in student protection plans about provision for exit awards, unit recognition and certification as an alternative to introducing the proposed new condition of registration.

## **Information, advice and guidance**

114. Some respondents highlighted the importance of information, advice and guidance for students. While it was agreed this was an important part of planning for a market exit, respondents questioned whether a provider in this situation would have the resources or capacity to manage this effectively. Another respondent commented that a lack of formal and high quality information, advice and guidance could lead to students not understanding the implications of applying to, or continuing to study at, a provider in this situation, and that this could disproportionately affect students from underrepresented groups.

## **Complaints**

115. The main theme in relation to this student protection measure was the role of other organisations (in particular the OIA). Respondents highlighted that:
  - The OIA was likely to have relevant learning about complaints in general which could be deployed to assist providers to address these in the future.

- The OfS should consider how students could receive effective redress in relation to complaints in a market exit context, given the 12-month timeframe that currently exists for complaints to be taken to the OIA.
- Providers in financial difficulty would not have the time, capacity or opportunity to administer a student complaints system.

### **Refunds and compensation**

116. Financial constraints were of note for respondents commenting on refunds and compensation, particularly relating to how providers would be able to fund these measures while going through a market exit. Respondents also recommended a collaborative approach between the OfS and other bodies such as the OIA or CMA.

### **Archiving arrangements**

117. Some respondents identified a role the OfS could play in maintaining student records and verifying qualifications. They noted the difficulties that providers exiting the market may have in this area. Respondents suggested that the OfS should consider making funding available to support this measure.

118. Some respondents requested further information about where archiving responsibilities would fall. This included in relation to validating providers whose partners exited the market, and how transcripts and historic records could be produced by other providers.

### **Response**

While not all suggestions provided would be possible for the OfS to implement based on our legal powers, we consider these comments to be valuable feedback about the challenges and practicalities of implementing student protection measures. This will be helpful in shaping future thinking on implementing student protection directions, although noting that any such direction would be determined on a case-by-case basis.

Having considered the feedback we received about the wording of the section of the proposed condition that relates to ‘teach out’, we have amended the drafting of the definition contained in the condition to express more succinctly and simply the definition of teach out. We have removed some of the language, because the feedback received suggested that respondents had not understood this definition. We consider that, combined with the change proposed above, the overall effect should be to improve clarity without changing our original intention.

## F. Publication of market exit plans

### Introduction

119. Respondents were asked to comment on the factors that the OfS should take into account when deciding whether and when to require a provider to publish an MEP or information about other student protection measures.
120. In addition to responding to this question, many respondents provided more general comments about this aspect of the proposal. The issues raised are set out below.

### Decision to publish a market exit plan

121. Some respondents asked for further information about the proposed process for determining if or when an MEP or information about other student protection measures should be published. The proposed guidance for the condition in the consultation stated that 'if the OfS judges that a provider is reasonably likely to exit the market, it will require the provider to publish its MEP and/or information about student protection measures.' A few respondents made points about the use of the phrase 'reasonably likely to exit' in this context. These respondents did not consider that this term was adequately defined in the proposed guidance. In addition, some respondents suggested that it would be helpful to clarify the relationship between the term 'reasonably likely' (used in relation to the publication of MEPs) and the term 'material risk' (used in relation to assessing a provider's likelihood of exiting the market).
122. Respondents suggested the following factors should be taken into account by the OfS when it made decisions about requiring a provider to publish information:
- Whether publication is proportionate to the level of risk posed by the potential market exit. Respondents suggested that the OfS should take into account the strength of the evidence about the provider's financial situation and the prospects for recovery, including any mitigations available to the provider.
  - The risk arising from the publication of information to the continuation of study for students (particularly disadvantaged students).
  - The timing of any potential market exit in relation to the academic year. Respondents suggested that this should include consideration of when students would need to access the information contained in the plan.
  - The level of certainty about the measures included in the plan, especially in relation to student transfer or teach out.
  - The impact that publication would have on the reputation of the provider. Some respondents took the view that publication would have a negative effect on the value of degrees held by a provider's alumni.
  - The provider's compliance with other conditions of registration and previous engagement with the OfS.

- The impact on any collaborative delivery such as partnerships or validated provision.

123. Some respondents suggested that any decision to publish an MEP should be taken solely by the provider, to give it the opportunity to mitigate negative consequences of publication. Other respondents asked whether a provider would be consulted about publication requirements, expressing a view that a mutual decision about publication based on the circumstances involved would be preferred. Some respondents were of the view that a lack of consultation may result in publication coinciding with a sensitive stage of recovery negotiations (for example with third party lenders), or could result in a lack of due consideration of the potential negative effect of publication in an individual case.

124. In addition, some respondents asked whether there would be an opportunity to make representations in relation to an OfS decision that required a provider to publish its plan, or information about other student protection measures.

## Response

With regard to the views about the process for deciding whether a plan or other information should be published, we consider there is an important distinction between the circumstances when we might impose a student protection direction and those in which we might require a provider to publish a plan, or other information regarding student protection measures. We would not expect that every provider with a student protection direction imposed would be required to publish an MEP or other information. This would only apply to those where the OfS judged publication of information to be in the public interest.

In making regulatory decisions, the OfS is required by public law to act reasonably and consider all relevant information available to it. It is also required to have regard to its general duties and other relevant factors. Therefore, when making a decision to require a provider to publish an MEP or other information, the OfS would need to consider the potential impact on the provider's operations (including its financial arrangements) and any information about the provider's financial position. The OfS would consider each provider on a case-by-case basis in this regard, and take into account the factors specific to the provider's circumstances and context.

Our priority in considering publication issues would be to ensure that the interests of a provider's students are protected. Our intention would be to ensure that appropriate information is available to students when we consider that to be necessary for them to make decisions about their future studies – this is the case for current and prospective students. This is because we consider it important that students are able to make informed choices.

We therefore have updated the guidance accompanying the condition to clarify that we may require a provider at material risk of market exit to publish information where this is in the public interest, for example in order to ensure that current and future students



receive information, where we judge it to be in their interest. Further, we propose to remove the term 'reasonably likely.' This is because, having considered consultation responses, we have taken the view that there may be some confusion over our policy intention, and we can more clearly present our position in the guidance. Our view is that it is important to be clear that we would want to ensure that information is published when we consider it is in the student interest to do so. Feedback from the consultation suggested respondents may have understood that our intention was to require publication of information in all circumstances where we judged an exit to be reasonably likely, irrespective of other considerations. We consider tying a decision about publication more explicitly to the interests of a provider's current and future students, will increase confidence that publication would be beneficial for the students concerned. For example, if we considered that the timing of publication was important to allow students to have sufficient time to make a decision at a particular point in the academic cycle, then we may conclude publication should take place at that point.

With regard to the factors suggested by respondents that the OfS should consider before making a decision to require publication, many of the points put forward are helpful suggestions. As a principles-based regulator the OfS will consider a range of factors in relation to publication decisions, and decisions will be made on a case-by-case basis. In addition, in determining that a provider should publish information, the OfS would need to act reasonably and have regard to its general duties and other relevant factors.

As set out above, we consider it important to put beyond doubt our intention to ensure that students have access to information about the position of their provider when they need it, while recognising that we also need to take into account other interests and factors. Access to timely information is important to ensure students can make informed choices. We consider that while this is implicit in the proposals in the consultation document (and explicit in our regulatory objectives), it would be helpful to set out in advance of any decision-making process those matters to which we wish to give particular weight.

We consider that the change set out above (in the section on institutional autonomy), reflecting that we intend to give weight to students' interests, should make explicit reference to circumstances regarding publication. Along with the removal of the 'reasonably likely' language in the original proposed guidance, we consider that such a change should address feedback from respondents that they would like to have further information about how the OfS would approach decisions to require a provider to publish information. In each case, the OfS would have regard to all relevant factors before making any final decision.

With regard to consulting a provider before requiring the publication of an MEP or other information, we would in most cases expect to have significant engagement with a provider judged to be at material risk of market exit. This means that a requirement to publish an MEP, or other information about student protection measures, is likely to have been discussed with the provider. The guidance sets out this approach.

In relation to the comments made by respondents regarding whether there would be a representations process, we do not propose to introduce a representations process in relation to a decision to require the publication of an MEP or other information. Doing this could have the effect of delaying the release of information to students, and we consider that the interests of students are paramount in relation to these considerations. However, as noted above, when making a decision to require a provider to publish information, the OfS would be required by public law to consider all evidence it has available to it, and to ensure that decisions are reasonable and proportionate.

We are currently consulting on the approach we should take to the publication of information by the OfS relating to an individual provider.<sup>21</sup> Publication of information by the OfS itself (i.e. separately to any direction to require the provider to publish such information) about a decision to impose a student protection direction on the basis of the provisions of condition C4, or any decision about non-compliance with such a direction or the condition, would be approached on the basis of the policy position that results from that separate consultation.

## Impact of publication

125. A number of responses, largely from providers, made points about the potential negative effect of publication of an MEP or other information. Some suggested that the publication of an MEP would have a detrimental effect on the provider and would make market exit more likely. Reasons given for this included that the publication of an MEP would have a negative impact on recruitment and retention, for both students and employees, and that it would have a negative effect on the provider's financial recovery as, for example, it may limit a provider's ability to secure borrowing. Respondents also suggested that a provider could face significant pressure from shareholders, creditors or external organisations seeking control of the provider which could pose a greater threat to the continuation of the provider, and thus to students, than the original risk of market exit.
126. Similarly, some respondents suggested that if a number of providers were required to publish MEPs over a short period, it would undermine public confidence in the sector as a whole and may have a negative effect beyond those providers, for example in relation to the terms offered by lenders.
127. There were mixed views about whether publication would be in the student interest. Some respondents took the view that publication would be essential to protect students' interests and provide them with the best options about continuation of study. In these comments, respondents were keen for plans to be published early in the market exit planning process. Others commented that publishing plans could be detrimental to students' interests, particularly in relation to student mental health. These respondents suggested plans should only be published when exit was

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<sup>21</sup> See [www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/](http://www.officeforstudents.org.uk/publications/consultation-on-publication-of-information-about-higher-education-providers/).

confirmed and student protection measures were settled, to avoid confusion and anxiety among the student population.

128. Those responses that were received from organisations representing the views of students were more strongly in favour of early publication and the provision of clear and transparent information for students.

### **Timing of publication**

129. Given their views that publication of an MEP could make an exit more likely, some respondents suggested that the most appropriate timing of publication would be at the point where the provider had exhausted all recovery options and market exit was confirmed. Some respondents suggested that plans should not be published at all.
130. Some respondents said that a requirement to publish an MEP too early would result in conflicting and confusing information being published. For example, respondents commented that a market exit scenario was likely to be a fast-moving and evolving situation, that could potentially result in an inability to deliver commitments contained in a published plan.

### **Response**

With regard to the points made on the potential impact on a provider of requiring the publication of a market exit plan or other information, we recognise there would likely be a range of potential consequences, depending on the provider's circumstances. We acknowledge that, as highlighted by respondents, where a provider publishes an MEP or other information about student protection measures this may have a negative impact on student recruitment and retention. Our view, however, is that in such circumstances it would be likely that the same students would also be negatively affected by the market exit of the provider. In considering whether and when to require publication, we would look at the likely consequences of publication on current and future students, as well as considering other relevant factors.

In considering whether an MEP should be published, the evidence available to us would also include information about the mitigations a provider may be putting in place to resolve its financial situation (where this is relevant to the reasons behind requiring an MEP). Where a provider can evidence that those mitigations have been, or are likely to be, successful, it may mean that it is less necessary for students to be aware of student protection arrangements. It is important to be clear, however, that where a provider is considering mitigations, but cannot evidence their actual or likely success, this is less likely to give confidence to the OfS.

With regard to the point that publication of a number of MEPs might have a negative impact on the sector, our view is that the negative impact of having a number of disorderly market exits, without effective and timely communication with students, would likely be greater than a situation where plans are published. This is because it may seem that the sector is unable to manage the impact of market exit and it is unpredictable in

terms of its effect on students. Where a provider is at material risk of market exit, we are likely to consider it preferable to require the publication of information to ensure that the interests of current and prospective students are protected by having access to timely information. In addition, given that we cannot reasonably predict the number of providers that may be at material risk of market exit that would be required to publish information, we consider that the benefit to students in having timely information outweighs the theoretical risk of reputational damage to the sector.

In relation to the points made by respondents about the student interest, we agree with the views setting out the benefits of publication. However, we do not agree that it is possible to determine that publication should always be required at the earliest stage possible in the planning process. For example, where a provider has mitigations in place for its financial situation that may be effective, the OfS may determine that it is not necessary for information to be published at that point, especially if publication could have a detrimental effect on the provider's recovery.

In relation to the views expressed by respondents that plans should not be published at all, our view is that an impact detrimental to students' mental health would be more likely if an exit were to occur without warning and without a published plan and information in place, or where students were required at very short notice to undertake actions linked to the student protection measures (for example choosing an alternative provider at which to continue their studies). However, we agree that an MEP and student protection measures will need to be well-explained so that students understand them and their implications. The condition allows us to direct a provider to specify timescales for the development of their MEP.

Where a provider is at material risk of market exit, the OfS does not have a fixed view about when students would need to have access to information and therefore when it might require a provider to publish information. We do not consider it possible to set this out in a general policy. This is because we will consider information and evidence at the time and make decisions on a case-by-case basis. As part of this we would also consider a range of issues including, for example, the likelihood that a provider will be able to resolve its financial situation. As part of a decision about whether to require publication, we would also consider the impact on current, past and prospective students.

## **Alternative approaches**

131. A few respondents suggested alternative approaches to the publication of MEPs including:

- Requiring all providers to create and publish an MEP as part of a new condition of registration. This would avoid providers considered to be at risk of market exit from being identified through the publication of their MEP.
- Requiring providers to publish parts of a full MEP.

- That to avoid the negative connotations of the term 'market exit' alternative terminology should be used to describe these plans, for example 'enhanced student protection plan'.

## **Response**

The OfS does not consider that it would be appropriate to require all providers to produce an MEP, regardless of whether or not they are at material risk of market exit. This is because developing an MEP is a significant undertaking for a provider and needs to respond to a specific scenario that the provider is facing. Requiring this from all providers would not be proportionate to the risk for most providers, and we do not consider that it would represent an appropriate regulatory burden for the OfS to place on all providers.

We consider that it would be reasonable when determining whether or not to direct a provider to publish an MEP, that we could determine whether only certain parts should be published. This may be because, for example, some sections contain commercially confidential information that may harm the success of student protection measures if in the public domain (for example, the terms of arrangements developed with other providers).

We do not consider an alternative name for the plan to be necessary. As the plan is restricted to the specific circumstances of market exit, we consider that alternative names would obscure the purpose of the plan and the reasons it is necessary. In particular, we consider it important that students understand the provider's circumstances and plain, unambiguous language is more likely to achieve that.

# Annex A: Condition C4: Student protection directions

## Condition C4: Student Protection Directions

i. The provider must comply with any Student Protection Direction in circumstances where the OfS reasonably considers that there is a material risk that the provider will, or will be required by the operation of law to, fully or substantially cease the provision of higher education in England (“Market Exit Risk”).

ii. A Student Protection Direction may be varied or revoked (wholly or in part) by express provision in a subsequent Student Protection Direction issued by the OfS in accordance with this condition of registration, and the OfS may otherwise revoke a Student Protection Direction by issuing a notice in writing to the provider.

iii. A Student Protection Direction (or, as the case may be, part of a Student Protection Direction) will cease to have effect in accordance with the following provisions:

- a. in circumstances where a Student Protection Direction is varied or revoked (wholly or in part) by a subsequent Student Protection Direction, on and from the time and date that the subsequent Student Protection Direction takes effect; or
- b. in circumstances where a Student Protection Direction is revoked by a notice in writing, on and from the time and date specified in that notice in writing.

iv. Where a Student Protection Direction ceases to have effect at any time (for any reason), that cessation does not in any way affect the ability of the OfS to investigate and/or take any form of regulatory or enforcement action in respect of any non-compliance with that Student Protection Direction (whether or not the non-compliance remains ongoing in nature) which took place during the period that the Student Protection Direction was in effect.

v. For the purposes of this condition:

“Student Protection Direction” means, irrespective of whether or not an approved student protection plan exists, a direction requiring a provider to:

- a. produce a special type of plan setting out Student Protection Measures for approval by the OfS and thereafter implementation by the provider (both in timescales specified in writing by the OfS) (“Market Exit Plan”);
- b. instead or in addition to a), put in place and/or implement any Student Protection Measures which are specified in writing by the OfS (in timescales specified in writing by the OfS); and
- c. do (or refrain from doing) such other consequential, ancillary or incidental actions, as the OfS considers is reasonably necessary, for ensuring that a Market Exit Plan or Student Protection Measures are put in place and/or implemented in an effective and expedient manner (including, but not limited to, compliance with general ongoing condition of registration C3, publishing information, deploying human

resources, and consulting a registered insolvency practitioner on the feasibility of the Market Exit Plan (all in timescales specified in writing by the OfS)).

“Student Protection Measures” means measures (including supporting arrangements and procedures) which the OfS reasonably considers are proportionate in the context of Market Exit Risk and fall within the scope of the following descriptions:

- a. Teach out: ensuring students are able to complete their intended course of study and achieve a qualification that could reasonably have been expected, or complete their current academic year or term and receive an exit award or credit to recognise their academic achievement at the provider;
- b. Student transfer: ensuring students are able to transfer to another higher education provider to continue and complete their studies, including providing students with appropriate support to understand their options and make an informed choice, and to ensure that administrative arrangements are in place to facilitate such transfers;
- c. Exit awards and unit certification: providing students with a formal record of their achievement at a provider;
- d. Information, advice and guidance for students: ensuring all students receive effective information, advice, guidance and support in relation to any Market Exit Risk;
- e. Complaints: ensuring that robust arrangements are in place for handling and responding to complaints from students;
- f. Refunds and compensation:
  - i. offering students refunds of tuition fees and other costs (for example accommodation costs and other living costs) incurred by students for whom continuation of study has been disrupted as a result of any Market Exit Risk;
  - ii. offering students compensation to cover any financial costs incurred by students as a result of any Market Exit Risk;
- g. Archiving arrangements: ensuring that arrangements are in place to enable students to access evidence of their academic achievements in the future, including arrangements with third parties to store records if necessary.

This condition does not apply to Further Education Bodies (as defined in section 4 of the Technical and Further Education Act 2017).

## Summary

**Applies to:** all registered providers, except Further Education Bodies (as defined in section 4 of the Technical and Further Education Act 2017) as these can be subject to the special administration regime in place for further education (detailed in Part 2 chapter 4 of that Act).

**Initial or general ongoing condition:** general ongoing condition

**Legal basis:** section 5 of HERA

## Guidance

### Condition C4(i)

1. Matters that might cause the OfS to reasonably consider that there is a material risk that a provider will, or will be required by the operation of law to fully or substantially cease the provision of higher education in England (“Market Exit Risk”) include, but are not limited to:
  - a. where a provider cannot demonstrate that it is likely to have access to sufficient funds (for example, operating cash funds, investments, or funding that can be released from surplus assets or obtained from other sources) to meet its day-to-day costs, and any other liabilities due, within the next 12 months, including where a provider’s ability to meet its day-to-day costs or liabilities is likely to be reliant on specific factors and the OfS judges that there is material uncertainty about whether these will be delivered in practice. These specific factors might include, but are not limited to:
    - i. Securing additional borrowing or investment;
    - ii. Delivering significant business restructuring or other cost saving measures;
    - iii. The decision or actions of a third party.
2. For the avoidance of doubt, any assessment would need to be considered on its own facts, and matters other than those in paragraph 1 above may also lead the OfS to conclude that there is a Market Exit Risk.
3. The reference to a provider being “required by the operation of law” to fully or substantially cease the provision of higher education in England includes any relevant law which might have that effect, including insolvency law.



## Condition C4(v)

4. 'Student protection plan' means a document or documents approved by the OfS under initial and general ongoing condition C3, imposed pursuant to sections 5 and 13(1)(c) of HERA.
5. When the OfS considers whether it is necessary to impose a Student Protection Direction, it will consider all relevant factors and place particular weight on the importance of protecting the interests of current and future students.
6. Where the OfS judges it necessary to impose a Student Protection Direction, it will normally expect to have engaged with a provider before doing so. Where the OfS judges that students would not be disadvantaged by any delay to the imposition of a Direction, it may consult with a provider on all or part of a Student Protection Direction.
7. A provider registered in the Approved (fee cap) category is subject to the public sector equality duty under section 149 of the Equality Act 2010. The OfS expects any registered provider directed to develop and/or implement any Student Protection Measures, to consider the needs of its students, and in particular to develop and implement the measures in a way that minimises the adverse impact of the situation on students with protected characteristics (as defined under section 4 of the Equality Act 2010).
8. Where a Student Protection Direction requires the production of a Market Exit Plan, or requires a provider to put in place and/or implement any Student Protection Measures, the OfS may or may not direct the publication of that plan or of information about those measures. If the OfS judges that publication is in the public interest, the OfS is likely to direct a provider to publish the Market Exit Plan and/or information about the Student Protection Measures. The circumstances in which the OfS might judge publication to be in the public interest include (but are not limited to) where it is in the interests of current or future students to have information contained in a Market Exit Plan and/or Student Protection Measures available (for example to enable students to make informed choices about their future plans for study).
9. For the avoidance of doubt, any type of a direction under this condition can be issued and notified in any written form or manner, including by notifying a provider electronically.

## Annex B: Summary of amendments to condition C4 following consultation

No.	Location	Topic	Previous text (if applicable)	Amended text	Reason for amendment
1	Condition; part (i)	Market Exit Risk	...exit the English higher education sector.	...fully or substantially cease the provision of higher education in England ("Market Exit Risk").	<p>This provides clarification regarding what is meant by 'exit', which is important because this is part of the test for whether the condition can be used in relation to a provider.</p> <p>The introduction of the defined term 'Market Exit Risk' provides clarity and consistency throughout the remainder of the condition when it refers to the same test.</p>
2	Condition; new parts (ii) to (iv)	Power for the OfS to withdraw (or vary) Student Protection Directions	<p>N/A</p> <p>Previous part (ii) (definitions of Student Protection Directions and Student Protection Measures) has become part (v).</p>	ii. A Student Protection Direction may be varied or revoked (wholly or in part) by express provision in a subsequent Student Protection Direction issued by the OfS in accordance with this condition of registration, and the OfS may otherwise revoke a Student Protection Direction by issuing a notice in writing to the provider.	<p>This additional text provides a clear power for the OfS to withdraw or vary any Student Protection Direction, and clarifies the effect of such a direction being withdrawn. This power will therefore facilitate the OfS keeping any Student Protection Direction under review, for example, to consider whether it remains necessary and proportionate.</p>

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				<p>iii. A Student Protection Direction (or, as the case may be, part of a Student Protection Direction) will cease to have effect in accordance with the following provisions:</p> <ul style="list-style-type: none"> <li>a. in circumstances where a Student Protection Direction is varied or revoked (wholly or in part) by a subsequent Student Protection Direction, on and from the time and date that the subsequent Student Protection Direction takes effect; or</li> <li>b. in circumstances where a Student Protection Direction is revoked by a notice in writing, on and from the time and date specified in that notice in writing.</li> </ul> <p>iv. Where a Student Protection Direction ceases to have effect at any time (for any reason), that cessation does not in any way affect the ability of the OfS to investigate and/or take any form of regulatory or enforcement action in respect of any non-compliance with that Student Protection Direction (whether or not the non-compliance remains</p>	

No.	Location	Topic	Previous text (if applicable)	Amended text	Reason for amendment
				ongoing in nature) which took place during the period that the Student Protection Direction was in effect.	
3	Condition; part (v) (previously part (ii)); Student Protection Direction; (c)	Non-exhaustive examples of things within the scope of the power of direction	N/A	...compliance with general ongoing condition of registration C3...	This amendment provides clarification by adding reference to compliance with condition C3, as one of the non-exhaustive examples of things the OfS can direct a provider to do (or refrain from doing). For example, this clarifies that the OfS could direct a provider not to comply with the requirements of a student protection plan approved under condition C3, if the OfS considered it was reasonably necessary to ensure that a Market Exit Plan could be implemented effectively.
4	Condition; part (v) (previously part ii); Student Protection Measures	Student Protection Measures	...relating to:	...which the OfS reasonably considers are proportionate in the context of Market Exit Risk and fall within the scope of the following descriptions:	This clarifies that the OfS will only be able to include one or more Student Protection Measures (within the scope of the descriptions set out in the definition) in a Student Protection Direction, if it reasonably considers that each of them are proportionate in the context of the provider's Market Exit Risk.
5	Condition; part (v) (previously part ii); Student Protection	Teach-out	Teach out: ensuring students are able to complete their	Teach out: ensuring students are able to complete their intended course of study and achieve a	This new definition of teach out is clearer and more succinct in terms of what teach out means. While this

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	Measures; (a) Teach-out		intended course of study and achieve their expected qualification with little or no tangible difference between their expectations at the start of the course and their actual experience in light of the circumstances of the provider, or complete their current academic year or term (and receive an exit award or credit to recognise their academic achievement at the provider);	qualification that could reasonably have been expected, or complete their current academic year or term and receive an exit award or credit to recognise their academic achievement at the provider;	definition describes the ultimate scope of what teach out means, the complementary effect of the amendment in row 4 is that any particular teach out measure could only be imposed by the OfS if it reasonably considered that it was proportionate in the context of the provider's Market Exit Risk.
6	Condition; part (v) (previously part (ii)); Student Protection Measures; (d) Information, advice & guidance	Market Exit Risk	...likely market exit event;	...Market Exit Risk;	Consequential amendment to reflect the defined term 'Market Exit Risk'.
7	Condition; part (v) (previously part (ii)); Student	Grammar	and	N/A	Removal of unnecessary conjunctive.

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	Protection Measures; (e) Complaints				
8	Condition; part (v) (previously part (ii)); Student Protection Measures; (f) Refunds and compensation	Market Exit Risk	i. N/A ii. ...the provider's situation;	i. ...as a result of any Market Exit Risk; ii. ... any Market Exit Risk;	Consequential amendment to reflect the defined term 'Market Exit Risk'.
9	Guidance; paragraph 1	Market Exit Risk	...of a provider exiting the higher education sector...	...that a provider will, or will be required by the operation of law to fully or substantially cease the provision of higher education in England ("Market Exit Risk")...	Consequential amendment to reflect the defined term 'Market Exit Risk'.
10	Guidance; paragraph 1 (previously subsection (a))	Voluntary deregistration	...where a provider asks to be removed from the OfS's Register;	N/A	Providers may voluntarily deregister themselves (under section 22 of HERA) for several reasons. Some may be indicative of a Market Exit Risk but others are not. Therefore, to avoid any confusion regarding this, we have removed voluntary deregistration from the examples of events that are indicative of such a risk.
11	Guidance; paragraph 1; new subsection (a) (previously subsection (b))	Financial issues	N/A	...(for example, operating cash funds, investments, or funding that can be released from surplus assets or obtained from other	This additional text provides further detail and examples of financial issues that are indicative of a Market Exit Risk.

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				sources)... and any other liabilities due... or liabilities...	
12	Guidance; paragraph 2	Market Exit Risk	...of the risk of market exit...  ...a provider is at a material risk of exiting the market.	-  ...there is a Market Exit Risk.	Consequential amendment to reflect the defined term 'Market Exit Risk'.
13	Guidance; paragraph 3	Market Exit Risk and insolvency law	...exit the English higher education sector...	...fully or substantially cease the provision of higher education in England... including insolvency law.	The first part of this amendment is consequential to reflect the revised text in paragraph (i) of the condition regarding market exit, and the second is to clarify that 'required by the operation of law' includes insolvency law (such as the Insolvency Act 1986).
14	Guidance; new paragraph 5	Importance of students' interests	N/A	When the OfS considers whether it is necessary to impose a Student Protection Direction, it will consider all relevant factors and place particular weight on the importance of protecting the interests of current and future students.	This explains that when the OfS makes decisions in relation to directions under this condition (such as whether to impose a direction, the contents of it, whether to require publication of an MEP and/or other information, and whether to withdraw a direction), it will consider all the factors that are relevant to the provider's circumstances, in line with its normal regulatory approach and public law principles. In particular, it will place weight on protecting the interests of students, because they are often in the most vulnerable

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					position in market exit scenarios, and their protection is the purpose of this condition. See the response that follows paragraph 103.
15	Guidance; new paragraph 6	Engagement with providers and consultation (before imposition of a Student Protection Direction)	N/A	Where the OfS judges it necessary to impose a Student Protection Direction, it will normally expect to have engaged with a provider before doing so. Where the OfS judges that students would not be disadvantaged by any delay to the imposition of a Direction, it may consult with a provider on all or part of a Student Protection Direction.	<p>The OfS's normal regulatory approach is that it has ongoing discussions with any registered provider that risks breaching a registration condition. It also consults with providers before making regulatory decisions that affect them, when this is required by HERA and otherwise in line with public law principles (the latter is subject to any risk that such a delay may pose to students).</p> <p>Similarly, in accordance with this, if a provider is at material risk of market exit, the OfS would expect to have ongoing discussions with it about this before imposing a Student Protection Direction. The OfS needs information from the provider about the situation to decide whether it is appropriate to impose the direction, and to decide the contents of any such direction. The OfS would also expect to consult with a provider on the contents of any Student Protection Direction before it is issued, subject to any risks to</p>



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					<p>students posed by such a delay (as above).</p> <p>This paragraph therefore explains that this approach regarding engagement and consultation with providers remains the OfS's intention in relation to directions made under this condition. See the response that follows paragraph 79.</p>
16	Guidance; new paragraph 7	Equalities	N/A	<p>A provider registered in the Approved (fee cap) category is subject to the public sector equality duty under section 149 of the Equality Act 2010. The OfS expects any registered provider directed to develop and/or implement any Student Protection Measures, to consider the needs of its students, and in particular to develop and implement the measures in a way that minimises the adverse impact of the situation on students with protected characteristics (as defined under section 4 of the Equality Act 2010).</p>	<p>Improving equality is an important issue in the sector and this was highlighted in the consultation responses. This paragraph therefore encourages any provider that receives a Student Protection Direction (regardless of whether the provider is subject to the public sector equality duty) to actively think about the needs of students with protected characteristics when designing and implementing Student Protection Measures, to minimise the impact of the market exit on them. This increases the likelihood that these students are afforded a level of protection that properly meets their needs in such a situation. See the response that follows paragraph 101.</p>
17	Guidance; new paragraph 8	Publication	Where a Student Protection Direction	Where a Student Protection Direction requires the production	The OfS recognises that requiring publication of an MEP (or other

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	(previously paragraph 5)		requires the production of a Market Exit Plan, or requires a provider to put in place and/or implement any Student Protection Measures, the OfS may or may not direct the publication of that plan or of information about those measures. The OfS's expectation is that, if the OfS judges that a provider is reasonably likely to exit the market, it will require the provider to publish its Market Exit Plan and/or information about Student Protection Measures.	of a Market Exit Plan, or requires a provider to put in place and/or implement any Student Protection Measures, the OfS may or may not direct the publication of that plan or of information about those measures. If the OfS judges that publication is in the public interest, the OfS is likely to direct a provider to publish the Market Exit Plan and/or information about the Student Protection Measures. The circumstances in which the OfS might judge publication to be in the public interest include (but are not limited to) where it is in the interests of current or future students to have information contained in a Market Exit Plan and/or Student Protection Measures available (for example to enable students to make informed choices about their future plans for study).	information about Student Protection Measures) may adversely affect a provider's financial position, but has to balance this with the fact that such publication is sometimes in the public interest, to enable students to have access to the information to be able to make informed decisions about their future. This paragraph therefore explains and clarifies the factors that the OfS will consider when making decisions regarding publication. See the response that follows paragraph 124.
18	Guidance; paragraph 9 (previously paragraph 6)	Notices	-  Likewise, notification of other matters	...any type of... under this condition...  -	This paragraph has been made clearer and more succinct, to avoid any confusion on this topic.

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			under this condition, for example of timescales and approvals, can be issued and notified in any written form or manner.		

## **Annex C: Consultation questions**

### **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?

### **Question 2:**

What factors should the OfS take into account in deciding whether and when to require a provider to publish its market exit plan, or information about other student protection measures?

### **Question 3:**

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

### **Question 4:**

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

### **Question 5:**

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

### **Question 6:**

Do you have any other comments?



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