

DRAFT CONSULTATION RESPONSE

Office for Students' approach to monetary policies

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

MillionPlus would argue that qualifying income is not always the best indicator of the financial power of an organisation. In the case of universities, qualifying income as defined in the consultation document does not necessarily capture the full spread of wealth of institutions, including historic investments and endowments. Similarly, some private providers are part of a wider network of wealth and revenue that is not explicit in the qualifying income of the institution. If the rationale of the policy is deterrence (as outlined in Step 4 of the 5 stage process on page 12) rather than cost recovery for the Treasury, then basing fines on regulated teaching income alone may not serve that purpose fully for those universities with large private or research income streams.

Qualifying income is a useful indicator of the income generated by a HEI in the most recent academic year for which data is available. But in a environment where competition between providers is actively encouraged by the Office for Students (OfS), and within the wider context of a turbulent economic period, there is a strong possibility that qualifying income could fluctuate substantially for many providers from year to year. It may also be important to take into consideration a longer timeframe of financial income. In connection to this, in order to fully appreciate the relative financial health of a HEI, it would also seem wise to consider qualifying income in over a time series.

As is outlined in the consultation document, the OfS is seeking to strike the right balance between establishing effective deterrents to breaches of conditions while not enforcing penalties that place excessive financial burden on HEIs that would be harmful to students in the longer term. In order to achieve this, it may be advisable for the OfS to consider the wider revenue streams and financial power of an organisation as well as its recent financial record beyond that of a single year.

The risk is that the approach monetary penalties disproportionately penalises providers where their OfS qualifying income is a large proportion of their overall income. Providers with significant sources of income beyond OfS qualifying income are likely to find the financial impact less of an impact and disincentive when compared to overall income.

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

In the section describing step 2 of the process, the document states that mitigating circumstances can be considered "as evidenced in the provider's explanation". It is not explicit as to which part of the process this refers to. Is the provider given opportunity to give their own account through the process of reportable events or is this a separate opportunity within the 5 step process? This is important because it has implications as to how providers will notify and communicate reportable events to the OfS. It is therefore surprising, if the implication is that this refers to the reporting of events, that no reference is made to the

process, or the current consultation on this subject. It would seem wise to tie the two together on this point to ensure joined up thinking across different aspects of the OfS's regulatory functions. In any regard, it is important for the OfS to clarify if providers will always have the right to submit their own explanations for breaches of conditions to the OfS, at what point this happens in the process, and how it will be weighed against any other evidence.

MillionPlus would also advocate that external factors be considered in step 2 of the process to consider mitigating circumstances. Wider economic factors are something that should arguably be considered that are out of the control of individual providers. The country is likely to be approaching a period of significant economic turbulence over the coming months, perhaps years. It is surprising then that such external factors are not mentioned in this section. However, external factors are not exclusively economic but also macro political and social forces that impact on providers and are beyond their control.

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

It is unclear from the summary of the five step approach depicted in figure 1, or the subsequent description of each step, exactly who will be making the decisions at each stage of this process. The consultation states a desire for this aspect of regulation to attain a level of transparency. To this end, more detail may be required as to who will be involved in the decision-making process. Will there be one ultimate arbiter of the five stage process for each case within the OfS, or will decisions be reached across different parts or levels of the regulator? Will the decision maker be one individual – and if so, will they be named – or will it be a decision taken by the OfS Board? Will those making decisions be the same across all 5 steps of the process? How will decisions on monetary penalties relate to wider governance of the OfS?

In the consultation document, it is stated:

"We will act proportionately, accepting that a monetary penalty at the maximum of the scale set out in the Monetary Penalties Regulations may be disproportionate for many breaches."

This sentence raises some questions. The implication here is that information within the current Monetary Penalties Regulations is insufficient for making a judgment on the proportionality of different cases. That is to say, all that is currently codified is a maximum penalty, but this will not be appropriate for all cases, or even all types of breach. However, the consultation document does not offer any indication of the scale of proportionality, or how much emphasis will be placed on this. The OfS does clearly explain that mitigating circumstances will be considered in the process, but there is no information or even a sense of how proportionality might be applied.

As a principles-based regulator, it would be of benefit for the OfS to outline how these principles might be applied in practice or give some indication as to the criteria on which decisions concerning monetary penalties might be based. It is the interests of students for providers to have an approximate understanding of the scale and weight of monetary penalties that could be enforced in the sector. This does not mean an exhaustive list of offences and penalties, or even prescriptive notions of level of monetary penalty. It could simply be a worked example of a hypothetical monetary penalty that was enforced, or an indication of the maximum and minimum penalties for the breach of a condition.

There is no explanation given in the consultation document as to how these monetary penalties relate to the different conditions within the regulatory framework. Consequently, providers may reasonably assume that all are of equal weight and all likely to carry the same maximum penalty if breached without any further information. The OfS may therefore want to reflect on whether this uncertainty that providers are faced with

is desirable, and if it is in the interests of students. It is also worth noting that the OfS is currently undertaking a consultation on quality and standards that is proposing establishing absolute baselines for student and graduate outcomes that relate to conditions in the regulatory framework. If this were to be adopted, this would constitute a divergence in how different conditions are monitored across the framework. No comment is offered on how such a divergence would correspond to monetary penalties and decision-making related to this. Would such changes affect the 5 step process in any way?

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

MillionPlus would endorse the idea that all intentions of the publication of information should be clearly outlined before any settlement is reached between a provider and the OfS. This is in the interest of students as well as providers. In addition, the confidentiality of settlement discussions will be paramount.

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

It is unclear from the document as to how the OfS has arrived at the different levels of settlement discount (30%/20%/10%) that are suggested. It would be useful if the reasoning for these percentage discounts were explained in some way. Are these based on any modelling the OfS has conducted or any evidence on previous settlements (in education or elsewhere)?

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

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

In answer to both question 6 and 7, there appears to be little information on the rate of interest, whether this is fixed or not, and who is taking decisions within the OfS on matters relating to interest, and how this will be accountable. MillionPlus would take the view that the interest rate charged should be no higher than that the Treasury's offers in interest rates on their gilts (government bonds).

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

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

In answer to questions 8 and 9, there is not enough information at this stage to be able to accurately predict the impact of monetary penalties with respect to equality and protected characteristics. Without more of a sense of who will be penalised, and by how much, any statements will be conditional on events or speculative. However, it should be noted that modern universities represent high numbers of students with protected characteristics. Indeed for some of these protected characteristics, the proportion of students represented at modern universities is much higher than other parts of the sector. Modern universities have higher percentages of:

- students from disadvantaged socioeconomic groups
- students with a history of free-school meals
- black students
- Muslim students

- part-time students
- mature students
- first in family experiencing HE students

The history of modern universities is one where institutions have reached into communities that have traditionally been overlooked by higher education, both in respect of recruitment of students but also interaction and collaboration with local businesses and community organisations. It follows then, that if monetary penalties fall disproportionately heavily on modern universities, the net effect will be disproportionate and potentially harmful towards the protected characteristics listed above, and the communities that modern universities serve.

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

A more general risk to this system, and its approach to monetary penalties, is that while the OfS defines the principles underpinning these processes more clearly, the practical reality of how institutions are sanctioned and the relationships involved become shrouded in more uncertainty. That is, in focusing so heavily of the theory of how things should happen, the sector becomes less clear of how things actually happen in practice.

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