

POLICY RESPONSE

OfS Consultation on student protection directions (market exit)

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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?

Disagree

MillionPlus' main concerns lie not so much with the detail or description of the condition as proposed, but with the lack of information about how it would act in practice, and what sort of approach OfS would take in its enforcement. The OfS needs to provide far more clarity and detail on how they think they would manage this without a) increasing burden on providers and b) creating additional instability.

It is stated that providers not in scope of Condition C4 (e.g. those not at material risk of market exit) will not need to concern themselves with this condition. However, without clear indication of how the OfS will assess that material risk, providers will be concerned that, at any point, they could suddenly be moved within the scope of the condition. As it stands the definition of material risk used is vague and is in possible conflict with Condition D, which states financial viability relates to an assumption that the provider is at no material risk of insolvency within a period of three years. If this is an ongoing condition, and OfS confirms this through regular monitoring and data, it is not clear how the judgement will differ for C4, which considers a period of less than 12 months as one triggering concern.

The factors which might lead the OfS to consider that a provider is at risk of material exit is not clear from the consultation document. For example, if a provider engages with the DfE's newly announced restructuring regime, something designed to improve their offer to students, would this trigger a determination by the OfS of material risk of market exit? If the current situation created by Covid-19 or a future No Deal Brexit were to lead to a disruption leading to a short-term decline in recruitment, would OfS consider this to be a material risk?

The factors, criteria and assessment considerations that OfS will take into account when deciding on material risk of market exit need to be made much clearer so providers are aware of what these risks are and where they lie so that providers can anticipate and manage them. The current proposal suggests that the OfS could suddenly decide that a provider is at material risk of market exit without any previous notification that this was likely.

The OfS states in the condition that its judgement will take priority over the provider's own judgement of the material risk of market exit. It is then vital that the OfS states the criteria it will use in making that judgement to enable providers to manage their own risks effectively.

The OfS states that a key reason for not proposing this as a specific condition imposed on particular providers is the need for a quick turnaround in decisions, which the 28-day consultation period with individual providers negates. It is not clear in the proposal how a general ongoing condition would remedy this. Much of what the OfS says would be needed in the event of Condition C4 being imposed on a provider appears to be information that would take considerable time to acquire, requiring the OfS's active support in

brokering conversations. For example, it would appear that C4 will oblige a provider to be clear about the immediate destinations of its students in a market exit plan. For the HE provider to have the relevant conversations and to secure agreement with other providers is likely to take some time and would almost certainly require the support of the OfS.

Although the OfS suggests that C3 and C4 exist independently, MillionPlus would appreciate greater clarity from OfS on how a judgement of material risk will be balanced against the approval of a Student Protection Plan, especially where that SPP is robust and comprehensive. It is not clear that the OfS considers any of the current SPPs in place as sufficient to cover market exit. There is also the risk of "leakage" from C4 to C3 as the OfS gains greater understanding of what needs to be included in a market exit plan. Should this happen, then it will make the process of producing SPPs even harder than now, particularly if the OfS starts to require market sensitive information.

This is at the heart of the issue. Obviously, providers need to be clear with students on what to expect should a provider be at risk of market exit, but the publication of a plan could hasten that exit and create some confusion and anxiety. This could detract from a provider's efforts to recover and avoid market exit. This would clearly not be in the best interests of students.

The uncertainty and breadth of scope concerning this proposed condition is reminiscent of the condition and guidance on reportable events, which has caused considerable confusion among providers.

Question 2: The proposed guidance for inclusion in the regulatory framework (see Annex A) states in paragraph 5 that the OfS expects to require the publication of a market exit plan or student protection measures where it judges that a provider is reasonably likely to exit the market. 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?

All of the points made in response to Question 1 need to be considered as factors the OfS should take into account.

Please also see the response to Question 4.

Question 3: Do you agree or disagree with the proposals for implementation of the proposed new general ongoing condition of registration (in paragraphs 46-49above)?

Disagree

The consultation is taking place over an extremely short timescale when the focus and priorities of providers are elsewhere. The OfS has stated that the current situation creates the need to consult, but there is little time to reflect fully on how the proposed condition will impact on providers prior to its implementation from October 2020. The speed of introduction proposed could create undue uncertainty at a challenging time.

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?

As noted in the responses to questions 1 and 2, should the OfS declare that a provider is at material risk of market exit and compel it to publish a plan on their continued sustainability and recovery, this could have the unintended consequence of further contributing to the conditions that prompted the OfS to consider the provider to be at material risk of market exit in the first instance. All parties would doubtless wish to avoid the paradox that potential OfS decisions and actions may unintentionally elevate the risk of a provider's market exit.

It is also likely that the more innovative providers are, the riskier they are, at least to begin with. The proposed condition runs the risk of discouraging innovation and new providers out of concern that this might lead the OfS to declare they are obliged by Condition C4.

Question 5: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

No.

Question 6: Do you have any other comments?

No.