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Dear Colleagues,

Following the debate on the Draft Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 on 20th May I agreed to respond on a number of points.

Office for Students – Approach to Risk Assessment

Baroness Warwick of Undercliffe referred to concerns raised by Universities UK about the need for further guidance from the Office for Students (OfS) on their approach to the risk assessment of access and participation plans and associated timeframes. Following our discussions, the OfS has now written to UUK providing some detailed additional information on this.

The OfS regulatory framework sets out the OfS general approach to risk and it also includes guidance on behaviours that are compliant and non-compliant with the registration conditions, including condition A1 which applies to providers that have an access and participation plan. In February 2019 the OfS published Regulatory Notice 1: Access and Participation plan guidance which gives further guidance on risk assessment and is available through the link below. I trust that this new guidance and the correspondence between the OfS and UUK has answered the questions raised by UUK members.

<file:///C:/Users/cmurrell/AppData/Local/Microsoft/Windows/INetCache/IE/F7BAXN90/regulatory-notice-1-access-and-participation-plan-guidance.pdf>

Access and Participation Plans

Lord Storey also asked whether access and participation plans include numerical targets. Each higher education provider wishing to charge higher level fees is required to set out in their plans the measures including numerical targets they will take to support students from disadvantaged backgrounds and underrepresented groups to access and successfully participate in higher education. These plans must then be agreed by the OfS.

The latest guidance from the OfS asks higher education providers to set ambitious, clearly defined outcomes-based targets that reflect the providers aims and objectives. The guidance also makes clear that the OfS expects those providers, where the gaps are widest, for access, success and progression, to set the most ambitious targets in those areas and to contribute most to national priorities.

When agreeing access and participation plans, the OfS will have regard to guidance from Government on its priorities for access and participation. Copies of the guidance, including the strategic guidance issued this year are available through the links below.

<https://www.officeforstudents.org.uk/media/8c8219d4-b565-4310-ad80-84f3872e628f/ofS-strategic-guidance-2019.pdf>

<https://www.officeforstudents.org.uk/media/11112/access-and-participation-guidance.pdf>

Monetary Penalties

In relation to Lord Bassam's question on how the Government made its decision to go for the lower maximum of 2% of income (rather than 5%), as set out the Government's response, the Government considered that provider compliance is in the interest of students and is vital to the OfS's student focussed approach. To encourage that compliance, the maximum penalty amount needs to be set at a level that is high enough to ensure sufficient visibility and impact on a provider. Further, the maximum penalty amount needs to allow the OfS to be able to deal effectively with a diverse range of circumstances including varying provider and student risk levels, varying types and size of provider, and breaches of different registration conditions of varying levels of seriousness and impact.

The Government considered the views submitted in response to the 5% of income proposal and decided not to pursue it due to the high number of respondents disagreeing with it; although we wished to ensure there was a high enough maximum penalty to encourage all providers to comply (including larger and wealthier ones). We agreed that 5% could be deemed excessive, and determined that the lower maximum of 2% of qualifying income or £500,000 (whichever is the higher amount) would provide the desired flexibility, visibility and impact.

The Government considered lowering the maximum below 2%. However, when comparing this amount with other regulators, it is considerably lower than the 10% of turnover some others use. We also did not think that lowering it to 1% or 0.5% of income would meet the requirements relating to visibility, impact and flexibility as well as the 2% proposal, and it would not in any event adequately satisfy some respondents' concerns.

In relation to the matter of flexibility for the OfS in issuing these penalties, it is worth stressing that these regulations set the maximum amount of penalty the OfS can impose, not the amount of penalty the OfS must impose, or is expected to impose in most cases. Subject to this cap, the OfS has the discretion to impose penalty amounts that it considers appropriate. The OfS's discretion is constrained in a number of ways to help ensure that the amount of any penalty it imposes is appropriate and proportionate in the circumstances of a particular case.

The regulations set out a number of mandatory factors that the OfS must consider when deciding whether to impose a monetary penalty and, if so, what amount of penalty is appropriate. These factors received broad support from consultation respondents and, we believe, will ensure the OfS has sufficient flexibility to set monetary penalties that are appropriate and proportionate in the particular circumstances.

It will be for the OfS to determine whether, and how, it prioritises the mandatory factors and whether there are any other relevant factors to be taken into account in a particular case. One of the mandatory factors relates to the likely impact on students of imposing a monetary penalty. In assessing this impact, we would expect the OfS to consider, where relevant, the impact of imposing a penalty on the financial position of the provider in question.

When imposing monetary penalties, the OfS will also be required to have regard to its regulatory framework (which includes a list of factors that the OfS will consider where relevant), as well as the matters set out in section 2(1) of the Higher Education and Research Act 2017, in particular the principles of best regulatory practice (including that regulatory activities should be proportionate and targeted only at cases in which action is needed). In addition, the OfS will also be bound to comply with the Regulators' Code which notes that regulators should choose proportionate approaches to those they regulate, based on relevant factors including, for example, business size and capacity.

I hope you find this information helpful. A copy of this letter will be placed in the House of Lords library and sent to all Peers who spoke.

Best wishes,

James

VISCOUNT YOUNGER OF LECKIE