

## Russell Group response to Office for Students monetary and financial penalties consultation

### 1. Summary

- 1.1 We welcome the commitment in the Higher Education and Research Act 2017 for the Office for Students to operate in a proportionate and accountable manner in all its regulatory activities. We are concerned, however, that the proposed maximum monetary penalty does not represent a proportionate response to any breach of registration conditions.
- 1.2 Whilst we recognise that the maximum penalties would apply only in exceptional circumstances, the application of the maximum penalty could have serious consequences for the financial stability of institutions. At 2% of “qualifying income” (the Government’s preferred option), the average fine at Russell Group universities would be around £5.7m (with a range between £3.5m to £9.7m approximately) and at 5% of qualifying income, the average penalty would be around £14.3m (with an estimated range between £8.9m and £24m).
- 1.3 Applying a fine at a maximum of 2% of qualifying income would equate to a loss of tuition fee contributions from over 600 students at an average Russell Group university – more than the number of undergraduates on a significant modern languages course at one of our institutions or indeed any Cambridge college. At 5% of qualifying income, the maximum penalty would equate to the fee contributions from a total of 1,500 students - equivalent to 40% of all UK-domiciled students at one of our institutions. By removing such significant sums from institutions, difficult decisions would need to be made about resource allocation with the potential to affect course viability and quality for students.
- 1.4 Applying the maximum penalties proposed could also impact on the net liquidity of affected institutions and on their credit rating with knock-on consequences on the ability to borrow for key investments in capital infrastructure, for example.
- 1.5 Further clarification is needed about when a breach of a registration condition would be judged to have taken place, whether a monetary penalty would be applied (versus another type of sanction), and then how the regulator will set the level of the penalty proportionate to the breach. In the absence of fixed thresholds, the current proposals provide the OfS with a significant amount of discretion about when and how to take action.
- 1.6 As well as working to ensure that any penalties awarded closely reflect the actual cost or detriment caused by a breach, the OfS should seek to adhere to the intention set out in the regulatory framework consultation that monetary penalties are only considered when a provider has breached their conditions repeatedly, deliberately or negligently.
- 1.7 We would like to see an additional step introduced within the regulatory process after an issue has been identified but before sanctions become necessary. In such circumstances, the OfS should work with the provider in question to seek to address the issue and provide sufficient time to act and so avoid a formal regulatory intervention.

### 2. Context

- 2.1 We welcome the opportunity to respond to the consultation on monetary and financial penalties. The Russell Group has responded to the OfS consultations on the regulatory framework, market entry and registration fees, copies of our submissions are available [here](#).
- 2.2 Appropriate safeguards are required to ensure that institutions adhere to baseline standards as a means of protecting students and the reputation of the sector. However, it is important

that sanctions are applied in a proportionate and risk-based manner, taking into account the need to avoid a negative impact on students as a result of penalties undermining the financial stability of the institutions they attend.

### 3. Proposed maximum penalties could undermine financial sustainability

3.1 The consultation paper sets out a preferred proposal for the maximum penalty to be set at 2% of “qualifying income”<sup>1</sup> or £500k (whichever is greater). In addition, the paper outlines an alternative, more punitive proposal for the maximum penalty at 5% of qualifying income or £500k (whichever is greater). The table below sets out how the maximum penalties could apply to Russell Group universities<sup>2</sup> :

Level of penalty	2% of qualifying income	5% of qualifying income
RG average	£5.7m	£14.3m
Maximum for RG	£9.7m	£24m
Minimum for RG	£3.5m	£8.9m

3.2 At 2% of qualifying income, one penalty levied at the maximum level would equate to:

- the tuition fee contributions (£9,250) from around 615 students at an average Russell Group university, or
- more undergraduates than, for example, those on a significant modern languages course at one of our institutions or indeed any Cambridge college.

3.3 At 5% of qualifying income, one penalty levied at the maximum level would equate to:

- the tuition fee contributions from a total of 1,500 students at an average Russell Group university, equivalent to 40% of all UK-domiciled students at one of our institutions, or
- more than the total annual spending on access and participation at the average Russell Group university<sup>3</sup>.

3.4 By removing such significant sums from institutions, difficult decisions would need to be made about resource allocation. This could variously affect the financial viability of particular courses, the quality of the provision students could expect to receive and opportunities to support vital access and participation initiatives to facilitate social mobility and widen participation. If course choice or quality were to be reduced, this could damage the student experience and the ability to train a highly-skilled workforce with the skills employers require.

3.5 Even the threat of such high penalties may divert funding from activities of benefit to students to compliance mechanisms, further impacting upon the funding available to fulfil the principal functions this funding is designed to support.

3.6 Since the penalties are designed to remove funding from institutions and transfer it to the exchequer rather than reinvesting it in higher education provision, there is also a risk that the value for money students are receiving would be undermined. It may be that a portion of this

<sup>1</sup> Defined as grant funding from OfS and tuition fee income for all domiciles and levels of study.

<sup>2</sup> These calculations are estimates based on our understanding of the exact definition of “qualifying income”.

<sup>3</sup> Average OFFA-countable spend at RG universities in 2018/19 was £12,146,709.

funding could be used to rebate OfS registration fees for compliant institutions, freeing up funding for additional investment in education in these institutions.

- 3.7 The application of a maximum penalty would inevitably impact on the net liquidity of an institution. The average university had just 93 days of expenditure in liquid terms in the 2015/16 financial year, and this is projected to fall to 81 days by the end of 2019/20<sup>4</sup>. Further pressure on net liquidity could therefore have a dramatic impact on an individual provider's financial stability. It is important that this and the realities of cash flow in the sector are taken into account when setting penalty levels.
- 3.8 There is also a need to consider the potential impact on the credit rating of institutions and the subsequent effects on that institution's ability to borrow. Borrowing often represents a key route to attract investment and is therefore essential in ensuring that students are able to benefit from the kind of capital investment in their universities that will provide high quality facilities and equipment for them and for future students, ensuring the value of their degrees is retained in future.
- 3.9 We are concerned, therefore, that the proposed maximum monetary penalty levels do not represent a proportionate response to any breach of registration conditions. Whilst any proposed penalties need to be effective in discouraging, remedying and responding to breaches of registration conditions, they should avoid adversely affecting the financial sustainability of providers and the choice or quality of experience available to students.

#### **4. Greater clarity is needed on decision making in applying monetary penalties**

- 4.1 We welcome the commitment for the OfS to impose a penalty which is reasonable and proportionate to the circumstances of any breach. The proposed mandatory factors (set out in Chapter 4 of the consultation documents) are helpful. It may be sensible to go further and ensure that each penalty applied is demonstrably determined more directly by the actual cost or detrimental impact incurred by the affected party as a result of the breach in question. This would help protect against the application of arbitrary fees and prevent some of the more significant damage that much larger fees may cause. We would also underline the importance of proper consideration of the impact of any application of a penalty on students, which may be significant.
- 4.2 Further detail is required about how the mandatory factors will be applied in practice and how the regulator will make decisions about where a breach has been judged to have occurred. It is unclear, for example, what providers may expect the average or minimum penalty to be and how this will be decided by weighing up the mandatory factors to be considered. In the absence of clear thresholds for the baseline conditions it is difficult to understand in what circumstances a breach will even have been judged to have occurred.
- 4.3 In considering the need for the application of a monetary penalty, the OfS should have regard to whether the breach was as a result of frequent, deliberate or negligent activity, potentially opting for dialogue and engagement or other non-monetary sanctions (such as increased monitoring) when a provider is found to have breached their conditions unknowingly or unintentionally. This would chime with the intentions set out in paragraph 299 of the regulatory framework consultation, which sets out that a monetary sanction may be appropriate where 'a provider has deliberately or negligently breached its ongoing conditions, has been dishonest and concealed information, or has had repeated breaches<sup>5</sup>'.

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<sup>4</sup> HEFCE – Financial health of the higher education sector: 2016/17 – 2019/20 forecasts

<sup>5</sup> Securing student success: risk-based regulation for teaching excellence, social mobility and informed choice in higher education: Government consultation on behalf of the Office for Students, para 299

- 4.4 In addition, we would like to see an additional step introduced within the regulatory process described after an issue has been identified but before sanctions become necessary. In such circumstances, the OfS should work with the provider in question to seek to address the issue and provide sufficient time to act and so avoid a formal regulatory intervention.
- 4.5 As currently drafted the proposals on monetary penalties provide the regulator with significant discretion as to the kinds of sanction to apply and when to apply them. The OfS could usefully publish illustrative examples of where a breach would be judged to have occurred, when a monetary penalty would be applied, and at what level it would be set proportionate to the breach.

## **5. Other issues**

- 5.1 The consultation document references the use of payment plans where large fines may impact upon institutional financial stability. It would be useful to have clarity as to the necessary prerequisites for triggering use of a payment plan.
- 5.2 The consultation asks for views on the application of late payment penalties for registration fees. Providers need to be able to plan their finances to ensure the sustainability of their institutions, so it is vital that sufficient notice is given when fees are due.

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