

Russell Group response to the OfS consultation on monetary penalties and the publication of information

1. Summary

- 1.1 We welcome the opportunity to respond to the OfS' proposals surrounding the application of monetary penalties and its approach to publishing information. We urge the OfS to consider each of the following issues as it finalises its approach in this area:
- We are concerned about the implication of the proposed 'adjustment for deterrence'. This represents a departure from a fair and proportionate approach, and we urge the OfS to remove this from the process.
 - The OfS should provide more clarity on how and when it will engage with institutions in instances where a monetary penalty is being considered.
 - We encourage the regulator to define what constitutes a serious or material breach of registration conditions and to ensure where penalties are used that this is both proportionate and risk-based.
 - In deciding whether to levy a penalty and/or whether information surrounding breaches should be published, the OfS must consider the impact this is likely to have on students, as well as the significant reputational damage this could cause the institution and the wider sector.

2. The definition of a 'serious breach'

- 2.1 It is problematic that there remains a lack of clarity around how the OfS would decide what constitutes a "serious" breach of a registration condition. While we recognise the latest guidance letter from the Secretary of State encourages the OfS to "*use the full range of its powers and sanctions ... [and] move immediately to more robust measures, including monetary penalties*" we propose that such interventions should only be considered for the most serious breaches where imposing alternative conditions on registration are deemed unlikely to mitigate the problems identified. For example, this could be where a breach might have a material and significantly detrimental impact on a provider's and/or the sector's reputation and past experience suggests the provider is otherwise unwilling to act.

3. Application of penalties

- 3.1 It is not clear how the OfS intends to apply penalties where "other mechanisms for improving provider compliance have been insufficient". It will be important for the OfS to communicate with an institution where it considers other mechanisms have not worked and seeks a resolution before escalating to the use of a monetary penalty.
- 3.2 The OfS should also provide clarity on how it will seek to engage with those it is investigating for the purpose of levying a penalty more broadly. We urge the OfS to ensure this occurs much earlier than the formal representation phase. We would also welcome further detail from the OfS on how monetary penalties will intersect with other regulatory interventions. Early engagement with providers suspected of a breach will support the regulator to minimise the cost associated with investigating and obtaining expert advice.

4. Level of monetary penalties

- 4.1 We have significant concerns about the proposed 'adjustment for deterrence' outlined in step 4. This represents a departure from a fair and proportionate approach and places far too great a weight on the income of a provider as opposed to the seriousness of the regulatory breach. We urge the OfS to remove this from the process of determining the level of monetary penalties imposed. In addition to considering the financial impact on institutions as a method of deterring non-compliant behaviour, the OfS should factor in the impact a public fine would have on the reputation of providers, as well as the wider sector.
- 4.2 The use of monetary penalties could have a material impact on institutions' financial sustainability – not just from the fine itself but from the wider consequences that could have long-lasting repercussions. We therefore call on the OfS to ensure that the maximum penalty is only applied in "the most exceptional circumstances" as pledged by Viscount Younger of Leckie during the passage of the statutory instrument regarding monetary penalties in 2019.
- 4.3 In determining whether a monetary penalty is appropriate, we encourage the OfS to consider that students' fees will ultimately be used to pay monetary penalties, which could lead to knock-on consequences for both education and student experience. The reputational damage incurred as a result of a public fine could also indirectly affect students in terms of the standing of their degree qualification among employers, as well as their own confidence in their institution. We urge the OfS to ensure each of these factors is considered in their decision-making process.

5. Settlement discount

- 5.1 We are concerned that the proposed discount approach could put pressure on institutions to accept the judgement from the OfS even in instances where the institutions have insufficient detail of the issue. It will therefore be important that the OfS is fully transparent with providers regarding the nature and detail surrounding the alleged breach and ensures robust investigations take place.

6. Time period for payment

- 6.1 Given that any fine would equate to a significant unplanned cut and would be difficult to manage in-year, we seek greater clarity on the regulator's expectations in terms of the time period for payment. We urge the regulator to work with any institution to consider their individual circumstances to work out an appropriate time frame.

7. Alternatives to monetary penalties

- 7.1 While we recognise that a financial penalty will not always be appropriate, particularly in instances where a provider is experiencing financial difficulties, we seek assurances from the regulator that in these circumstances, alternative methods will be pursued to ensure that students remain sufficiently protected.

8. Publication of information surrounding regulatory compliance

- 8.1 We are concerned about the intention to publish information surrounding providers compliance with regulatory conditions, breaches of conditions and the imposition of monetary penalties. This is likely to result in significant reputational damage both for the providers in question, as well as the UK higher education system. The OfS should consider these factors in deciding on its approach.
- 8.2 As a minimum, we urge the OfS to ensure that actions which institutions have taken to respond to, and rectify, breaches are also published in order to provide assurance to students, the wider public and the international community.