EXPLANATORY MEMORANDUM TO

THE HIGHER EDUCATION (MONETARY PENALTIES AND REFUSAL TO RENEW AN ACCESS AND PARTICIPATION PLAN) (ENGLAND) REGULATIONS 2019

2019 No. 1026

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument makes provision under the Higher Education and Research Act 2017 ("HERA") in relation to two of the enforcement powers available to the Office for Students ("OfS"), namely its power to impose a monetary penalty on a registered higher education provider for a breach of its ongoing registration conditions and its power to refuse to renew an access and participation plan of a registered higher education provider if that provider has failed to comply with the provisions of an existing plan or its fee limit condition. The regulations set out the matters that the OfS must have regard to when imposing a monetary penalty and set the maximum penalty that the OfS may impose. In addition, the regulations set out the matters that the OfS must have regard to when refusing to renew an access and participation plan and the procedure to be followed when imposing that sanction.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 This entire instrument applies only in relation to England. This is because its provisions relate to an aspect of the regulation by the OfS of institutions that are, or are applying to become, registered higher education providers within the meaning of section 3(10) of HERA. Section 3(3)(b) provides that an institution can only be registered on the OfS register (and thereby become a registered higher education provider) if it is, or intends to become, an English higher education provider. An English higher education provider is defined in section 83(1) of HERA as a higher education provider whose activities are carried on, or principally carried on, in England.

3.3 In the view of the Department, this instrument either has no effect outside of England, or may have such effects which are minor or consequential. This is because, as explained above, English higher education providers as defined in HERA may include providers of higher education that carry on some activities outside England, provided that their activities are principally carried on in England. The Department considers that any effects outside England resulting from this would be minor or consequential.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

3.5 The Department has reached this view because this instrument makes provision relating to education – specifically, the regulation of providers of higher education. Education is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). By virtue of it not being included in the list of reserved matters in Schedule 5 to the Scotland Act 1998, education is within devolved legislative competence in Scotland. Education is not a reserved matter listed within Schedule 7A to the Government of Wales Act 2006 and is not within one of the exceptions listed therein, nor is it otherwise outside the legislative competence of the National Assembly for Wales (see section 108A of that Act).

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is set out in section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

5.1 The Minister for Universities, Science, Research and Innovation, Chris Skidmore, has made the following statement regarding Human Rights:

"In my view the provisions of the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 HERA establishes the OfS as the regulator for English higher education providers. These are the higher education providers whose activities are carried on, or principally carried on in England. Section 3 of HERA requires the OfS to establish and maintain a register of English higher education providers and the OfS can apply ongoing registration conditions to them in accordance with sections 4 to 14.

6.2 HERA gives the OfS enforcement powers to deal with instances where it appears that there is, or has been, a breach of a provider's ongoing registration conditions. This is important to ensure the OfS can regulate registered higher education providers effectively and appropriately. These powers include the ability under section 15 of HERA to impose monetary penalties.

6.3 One of the registration conditions concerns those registered providers that are subject to a mandatory fee limit condition imposed under section 10 of HERA. Where those providers want to charge fees above the basic amount (determined in accordance with Schedule 2 of HERA), section 12 of HERA requires that they must have in place an

access and participation plan approved by the OfS and comply with it on an ongoing basis. Through these plans, higher education providers will be expected to set out their proposed activities, targets and expenditure to support students from disadvantaged backgrounds and under–represented groups to access, participate and succeed in higher education. Section 21 of HERA also provides that the OfS can refuse to renew an access and participation plan presented by a higher education provider if that provider has failed to comply with the provisions of an existing plan or the provider has breached its fee limit condition.

6.4 The specific provisions in HERA relating to access and participation plans carry forward the effect of the regime in Part 3 of the Higher Education Act 2004 relating to the functions of the Director of Fair Access to Higher Education ("DFA"), for providers that were funded by the Higher Education Funding Council for England ("HEFCE"). Under the 2004 regime, the requirement to have an access agreement in order to charge higher level fees was imposed on HEFCE funded institutions as a condition of their grant funding. The Higher Education Act 2004 included a power for the then Director of Fair Access to refuse to renew a plan. Under HERA, it is a requirement by virtue of Schedule 2 which governs the determination of fee limits, and section 12 which creates a mandatory registration condition. HERA abolished HEFCE and the DFA and repealed the relevant provisions of the 2004 Act.

6.5 These regulations are the first ones made under the powers in sections 15 and 21 of HERA which come into force on 1 August 2019 (see the Higher Education and Research Act 2017 (Commencement No. 5) Regulations 2019, S.I. 2018/1226). They give full effect to those sections by making provision for the matters that must be taken into account by the OfS when imposing a monetary penalty or refusing to renew an access and participation plan and they set the maximum penalty that the OfS can impose. They also set out the procedure for the OfS when it notifies a provider that it will not approve an access and participation plan for that provider when its current plan expires. The Higher Education (Access and Participation Plans)(England) Regulations 2018 (S.I. 2018/470) ("the 2018 Access and Participation Plans Regulations") made under the powers in sections 29, 30, 32, 33 and 34 of HERA provide for the content, approval and variation of access and participation plans. They give full effect to those sections of HERA by establishing arrangements allowing providers to prepare suitable access and participation plans and apply to the OfS to have them approved or subsequently varied.

7. Policy background

What is being done and why?

7.1 With the introduction of the new OfS regulatory regime, it is important to ensure there are meaningful consequences for higher education providers who breach ongoing registration conditions. The ability to impose monetary penalties is an important tool that will enable the OfS to regulate higher education providers effectively and appropriately. These regulations are needed to ensure the power works as intended. The maximum level of penalty is set at 2% of the income that the provider receives through grant funding from the OfS and from tuition fees in a twelve month period, with provision that the maximum will be £500,000 in circumstances where that calculation results in a figure lower than £500,000. The maximum penalty is set at a level to allow the OfS to ensure that there are visible and meaningful consequences

for a provider that is in breach of an ongoing registration condition without being unduly punitive.

7.2 The OfS has discretion as to whether to impose a monetary penalty and, if so, the level of the penalty (up to the maximum). These regulations set out the factors that the OfS must consider when exercising that discretion. These factors are intended to help ensure that the imposition of a monetary penalty and the amount of any penalty is appropriate, reasonable and proportionate given the circumstances of a particular breach of a registration condition. The factors are intended to support the OfS' student-focussed approach (in particular, the OfS will be required to have regard to the impact of imposing a penalty on higher education students at the provider in question and on higher education students more generally). The OfS is able to take into account relevant matters other than those set out in the regulations. The OfS' approach to how it intends to exercise its power to impose monetary penalties is also set out in its regulatory framework[1]. The factors and the maximum penalty amount were determined following the consultation described in paragraph 10.3 and 10.4 below.

7.3 As regards access and participation, the OfS has a key role in securing greater, faster progress in ensuring that students from disadvantaged backgrounds and under-represented groups in higher education can access, participate and succeed in higher education. The main tool for driving improvements in this area are access and participation plans. Each higher education provider wishing to charge higher level fees (currently £9000/£9250) must have a plan agreed with the OfS setting out the measures the provider will take to improve access and participation.

7.4 The content of and arrangements for managing access agreements was governed by The Student Fees (Approved Plans) (England) Regulations 2004 (SI No. 2004/2473) ("the 2004 regulations"), made under the Higher Education Act 2004. The policy intent has been to carry forward the substance of these arrangements for access and participation plans under HERA, with some important changes and updates. The main change from access agreements is to ensure that plans should cover not only access to higher education but also participation activities, ensuring that students are supported to participate, succeed and progress to good outcomes. The 2018 Access and Participation Plans Regulations which now set out the arrangements for agreeing access and participation plans including the content of plans were made on this basis. These new regulations cover the enforcement arrangements for access and participation plans.

7.5 These regulations ensure that the OfS is able to sanction providers who appear not to have met the commitments made in their plans and so have not met their access and participation registration condition. In such circumstances the OfS is able to refuse to renew an access and participation plan, once the current one expires. The OfS is also able to use this sanction if the provider has not complied with its fee limit condition. This sanction is in addition to other sanctions at the OfS' disposal in circumstances where a provider appears to the OfS to be in breach of an ongoing registration condition (namely, monetary penalties, suspension of registration and de-registration).

7.6 The Explanatory Memorandum accompanying the 2018 Access and Participation Plans Regulations set out the intention to ensure a consistent approach between the sanction of refusing to renew a plan and the OfS' other enforcement powers.

[1] https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf

Consequently, the matters to which the OfS must have regard when exercising its power to refuse to renew a plan are in line with the matters the OfS must consider when exercising its power to impose a monetary penalty.

7.7 Refusing to renew a plan prevents a provider from being able to charge higher level fees. This is likely to have a major impact on the operation of a registered higher education provider. Provisions to ensure a fair procedure are therefore included in the regulations. The decision to refuse to renew is initially a provisional decision and can be reviewed. As has been the case under the 2004 regulations, the Secretary of State is required to appoint a person or panel to carry out reviews of provisional decisions of the OfS, and in doing so must act in accordance with the principles set out in the Governance Code on Public Appointments issued by the Government in December 2016. The intention is not that this should constitute a public appointment within the remit of the Commissioner for Public Appointments, but that the Secretary of State should apply the principles set out in the Governance Code when making the appointment. This is the same review arrangement as set out in the 2018 Access and Participation Plans Regulations.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 This statutory instrument does not amend another instrument.

10. Consultation outcome

10.1 On the reform of higher education more generally, the former Department for Business, Innovation and Skills published a consultation as part of the Green Paper on higher education "Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice" in November 2015. The responses to the consultation were published alongside the White Paper "Success as a Knowledge Economy: Teaching Excellence, Social Mobility & Student Choice" which summarised the decisions made by Government. The consultation responses are available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523420/bis-16-261-he-green-paper-fulfilling-our-potential-summary-of-responses.pdf

10.2 A consultation was carried out in relation to the OfS' regulatory framework which is required by section 75 of HERA to set out how the OfS intends to perform its functions (including its enforcement functions) and guidance for registered higher education providers on the registration conditions. In October 2017 the DfE issued the consultation "Securing Student success: a risk-based regulation for teaching excellence, social mobility and informed choice in higher education" on behalf of the yet-to-be established OfS and, once established, the OfS responded to the consultation at the same time as publishing its regulatory framework in February 2018. These documents are available at: https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework and https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework.

10.3 As regards monetary penalties, the DfE conducted a public consultation between December 2017 and March 2018 on detailed proposals for the factors the OfS must

take into account when considering the imposition of a monetary penalty and the maximum penalty that can be imposed. In total, the government received 54 responses to the consultation from a cross-section of the providers in the HE sector, including previously HEFCE funded institutions; Alternative Providers; Further Education Colleges delivering HE; mission and representative associations representing groups of providers; and two individuals. There were no responses from students.

10.4 The consultation process identified some concerns that monetary penalties could take away provider income that would otherwise be used for the benefit of students. The majority of respondents did not support the Department's proposals for the maximum penalty but respondents were broadly supportive of the proposed factors, especially the factor relating to impact on students. In response, the government adopted the lower of its options for a maximum penalty amount (2% of income rather than 5% of income) but remains of the view that monetary penalties need to be set at a level that ensures there are visible and meaningful consequences for providers that are in breach of an ongoing registration condition. The legal restraints these regulations place on the OfS, including the mandatory factors to which it must have regard when setting a penalty, are designed, as mentioned in paragraph 7.2 above, to ensure that it is required to take appropriate, reasonable and proportionate action, and that the interests of students are taken into account. The consultation, and Government response, are available here: https://www.gov.uk/government/consultations/office-for-students-monetary-and-financial-penalties

10.5 Plans for access and participation activities were covered extensively in both the Green and White Paper (2015 and 2016) and the responses and comments were taken into account during the preparation of HERA. There was general support for the incorporation of access and participation activities within the OfS.

10.6 There has been no further consultation on the refusal to renew an access and participation aspect of these regulations. Sufficient input from the sector was received during the above engagement to guide policy.

10.7 As part of the quality review process the draft regulations were sent to the OfS to advise on the extent to which the regulations can be effectively implemented.

11. Guidance

11.1 The OfS has published its regulatory framework setting out how it intends to perform its functions (including its enforcement functions) and guidance for registered higher education providers on the registration conditions.

11.2 The Secretary of State has issued guidance to OfS setting out the Government's priorities for widening access to and successful participation in higher education (in his Strategic Guidance to the OfS of February 2019). The Secretary of State also issued guidance to the OfS on access and participation in February 2018. Section 2(3) of HERA requires the OfS to have regard to any guidance given to it by the Secretary of State when performing its functions including access and participation functions. This guidance is available at: https://www.officeforstudents.org.uk/advice-and-guidance/regulation/guidance-from-government .

11.3 The OfS has issued its own guidance to higher education providers (February 2019) setting out the arrangements for approving access and participation plans for 2020/21. This is available here: https://www.officeforstudents.org.uk/publications/regulatory-advice-6-how-to-prepare-your-access-and-participation-plan-effective-advice .

12. Impact

12.1 There is no, or no significant, impact on businesses, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An impact assessment has not been prepared for this instrument because these regulations do not introduce further burdens that would have an impact on businesses, charities or voluntary bodies. The OfS can only impose a monetary penalty or refuse to renew an access and participation plan where it appears to the OfS that the provider has breached an ongoing registration condition. There will be no financial impact on those providers who are compliant.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 The policy in relation to monetary penalties and refusal to renew an access and participation plan has no impact on providers that comply with their ongoing registration conditions.

14. Monitoring & review

14.1 The approach to monitoring is that the Department will ask the OfS to monitor the effectiveness of the regulations in delivering the policy aims to have effective sanctions where a registered higher education provider fails to comply with an ongoing registration condition and identify whether changes should be considered.

14.2 The regulations do not include a statutory review and in line with the requirements of the Small Business, Enterprise and Employment Act 2015. Chris Skidmore has made the following statement: "The provisions in relation to monetary penalties and the refusal to renew an access and participation plan in these regulations have been estimated to have minimal additional impact on business. As such the Department has concluded that it would be disproportionate on cost grounds to include a review provision within the instrument."

15. Contact

15.1 Sophie Breach at the Department for Education, email: Sophie.breach@education.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jenny Bradley Deputy Director for Higher Education Regulatory & Provider Policy, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Skidmore at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.