

Consultation

**Office for
Students**



Consultation on the Office for Students' approach to monetary penalties

This consultation runs from **3 March 2020**
to **17 April 2020**.

Reference OfS 2020.13

Enquiries to regulation@officeforstudents.org.uk

Publication date 3 March 2020

The Office for Students is the independent regulator for higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.

Our four regulatory objectives

All students, from all backgrounds, and with the ability and desire to undertake higher education:

- are supported to access, succeed in, and progress from, higher education
- receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure
- are able to progress into employment or further study, and their qualifications hold their value over time
- receive value for money.

Consultation on the Office for Students' approach to monetary penalties

We are seeking views on our proposed approach to the use of our powers to impose monetary penalties on a higher education provider that breaches its conditions of registration with the Office for Students.

We are also seeking views on our proposed approach to the publication of a decision to impose a monetary penalty.

Timing of consultation	Start: 3 March 2020 End: 17 April 2020
Who should respond?	Anyone with an interest in the regulation of English higher education providers
How to respond	Please respond by 17 April 2020 . Use the online response form available at https://survey.officeforstudents.org.uk/s/monetary-penalties/
Enquiries	Email regulation@officeforstudents.org.uk Alternatively, call our public enquiry line on 0117 931 7317.

If you require this document in an **alternative format**, or need assistance with the online form, please contact regulation@officeforstudents.org.uk.

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About this consultation

Introduction

The Office for Students (OfS) has a number of powers to apply sanctions to higher education providers that breach their conditions of registration. The conditions of registration are in place to protect students' interests. We consider that the use of a monetary penalty when one of these conditions has been breached is in the interests of students because it incentivises all higher education providers to comply with their conditions of registration.

Our full range of powers came into effect on 1 August 2019. From this date, our powers include the ability to:

- impose a monetary penalty
- recover the qualifying costs of our investigations and sanctions activity where a breach of a condition is found
- impose an interest charge for the late payment of an OfS fee.

These powers supplement our powers to suspend aspects of a higher education provider's registration with the OfS, deregister a provider, vary or revoke degree awarding powers, revoke university title or impose specific conditions of registration.

In October 2019 we published guidance about our approach to using these powers and the range of factors we consider when deciding whether a sanction is appropriate and, for a monetary penalty, the level of that sanction¹.

This consultation sets out our proposed approach to imposing a monetary penalty.

In summary, our proposed approach is as follows:

- We will use sanctions, including the imposition of a monetary penalty, to demonstrate visible consequences for breaches of conditions and to ensure that a provider addresses areas of non-compliance.
- We consider the use of monetary penalties to be in the interests of students because it incentivises compliance with conditions of registration that are designed to protect those interests.
- We will use a five step process to determine the level of a monetary penalty.
- A monetary penalty will normally be calculated by reference to the qualifying income of the higher education provider concerned.

¹ See Regulatory advice 15 at: www.officeforstudents.org.uk/publications/regulatory-advice-15-monitoring-and-intervention/.

- We will normally give providers an opportunity to receive a reduced monetary penalty (a 'settlement') where they agree that they have breached a condition of registration and agree to the penalty at an early stage.
- We may defer the due date for payment of a penalty, or provide flexibility in payment terms, where a penalty is likely to have a material impact on a provider's financial viability or sustainability.
- We will normally apply interest charges where a monetary penalty is imposed for late payment of OfS fees.
- We intend to recover costs in relation to the imposition of sanctions where we are empowered to do so.
- We normally expect to publish details of all sanctions we impose, subject to our usual arrangements for consulting the individual provider concerned.

We are seeking the views of interested parties in response to the specific questions set out in this document. The consultation questions are listed at Annex A.

We are not seeking views on the powers that the Higher Education and Research Act 2017 (HERA) confers on the OfS to impose a monetary penalty, or the matters covered in the supporting regulations.

For more information about our work to date on regulation, please visit the OfS website: www.officeforstudents.org.uk/advice-and-guidance/regulation/

Who should respond to this consultation?

We welcome responses from anyone with an interest in the regulation of English higher education providers.

We are particularly (but not only) interested in hearing from students and higher education providers that are registered, or applying to be registered, and that may have an interest in our approach. We welcome the views of all types and size of provider.

We are also interested in the views of the representative bodies of students and higher education providers, and others with an interest in the regulation of English higher education.

How to respond

The consultation closes at **noon on 17 April 2020**.

Please submit your response by:

- Completing the online form at <https://survey.officeforstudents.org.uk/s/monetary-penalties/>

Consultation principles

We are running this consultation in accordance with the government's consultation principles².

At the OfS we are committed to equality and diversity in everything we do. We have a legal obligation to show due regard to the Public Sector Equality Duty.

How we will treat your response

We will summarise and/or publish the responses to this consultation on the OfS website. This may include a list of the providers and organisations that respond, but not personal data such as individuals' names, addresses or other contact details. If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

The OfS will process any personal data received in accordance with all applicable data protection laws (see our privacy policy).

We may need to disclose or publish information that you provide in the performance of our functions, or disclose it to other organisations for the purposes of their functions. Information (including personal data) may also need to be disclosed in accordance with UK legislation (such as the Freedom of Information Act 2000, Data Protection Act 2018 and Environmental Information Regulations 2004).

Next steps

Following this consultation, the OfS will publish its approach to monetary penalties, interest charges and recovery of costs, having regard to:

- the OfS's duties under HERA and the Equality Act 2010
- the responses to this consultation
- the OfS's strategic objectives³
- the Regulators' Code, the Public Sector Equality Duty and applicable human rights legislation.

We will publish a summary of the consultation responses alongside our published approach and explain how and why we arrived at our final approach and how we have addressed any issues raised by respondents.

² See <https://www.gov.uk/government/publications/consultation-principles-guidance>.

³ See www.officeforstudents.org.uk/about/our-strategy/.

Documents referred to in this consultation

In this consultation we refer to the following documents:

- Securing student success: Regulatory framework for higher education in England⁴
- The Higher Education and Research Act 2017⁵
- The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019⁶ [referred to here as 'Monetary Penalties Regulations']
- Higher Education (Registration Fees) (England) Regulations 2019⁷ [referred to here as 'Registration Fees Regulations']
- The Regulators' Code⁸

Technical and other terms used in this consultation

Registration or other fees: Fees payable to the OfS by a provider of higher education that is registered.

Monetary penalty: A charge that can be imposed on a higher education provider by the OfS where there is, or has been, a breach of an ongoing condition of registration.

Qualifying income: A higher education provider's relevant year income defined as the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA.

Intervention factors: Factors set out in paragraph 167 of the OfS's regulatory framework for higher education in England, to which the OfS must have regard when exercising its power to impose a monetary penalty.

General duties: The OfS's duties as the regulator of higher education providers in England, which are set out in Section 2(1) of HERA.

Interest charges: Charges imposed on a provider by the OfS for late payment of OfS registration or other fees.

⁴ Available at: www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

⁵ Available at: <http://www.legislation.gov.uk/ukpga/2017/29/contents/enacted>.

⁶ Available at: <http://www.legislation.gov.uk/uksi/2019/1026/contents/made>.

⁷ Available at: <http://www.legislation.gov.uk/uksi/2019/543/contents/made>.

⁸ Available at: <https://www.gov.uk/government/publications/regulators-code>.

Introduction

1. Our conditions of registration are imposed on registered higher education providers to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers.
2. The power to impose a monetary penalty where there is, or has been, a breach of an ongoing condition of registration is set out in HERA.⁹
3. The maximum penalty that the OfS may impose for each breach of a condition is the higher of 2 per cent of the provider's 'qualifying income' or £500,000.^{10 11}
4. Since 1 August 2019, we have also had the power to require a provider to pay the costs we incur in relation to the use of certain sanctions.¹² These include investigation costs, administration costs and the costs of obtaining expert advice (including internal and external legal advice).
5. Furthermore, we can apply an interest charge for late payment of OfS registration and other fees.¹³ This provision allows us to charge a provider interest on any unpaid amount of its registration fee. This is set at the official Bank of England rate at the time plus 5 per cent (at the date of publication, this would be 5.75 per cent in total) accruing on a daily basis until the unpaid amount is paid in full.
6. This paper sets out our approach to the use of these powers.
7. In developing this approach we have had regard to our general duties set out in section 2 of HERA, in particular the need to have regard to the principles of best regulatory practice. We have also had regard to the Regulators' Code, the Public Sector Equality Duty and applicable human rights legislation.

Context

8. We consider the use of sanctions, including monetary penalties, to be in the interests of students. They are an important mechanism to ensure compliance with the OfS's regulatory requirements. They underpin our ability to deliver meaningful consequences for breaches of conditions of registration. They complement other interventions, such as enhanced monitoring and the imposition of specific conditions of registration.

⁹ See Section 15(1).

¹⁰ Defined in paragraph 3 of the Monetary Penalties Regulations as a provider's relevant year income defined as the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA.

¹¹ As set out in paragraph 2 of the above Regulations. The Monetary Penalties Regulations also set out, in paragraph 4, the factors to which the OfS must have regard when exercising its power to impose a penalty. The intervention factors are also set out in paragraph 167 of the OfS's regulatory framework.

¹² This power is set out in section 73 of HERA. Under section 73(2) of HERA the relevant sanctions to which it applies regarding imposing a monetary penalty, suspending a provider's registration or removing a provider from the OfS Register.

¹³ This power is set out in Regulation 11 of the Registration Fees Regulations.

9. Sanctions, and publication of information about those sanctions, are designed to deter providers that have committed breaches from committing further breaches, and to deter other registered providers from committing similar breaches. They deliver fairness for those providers that have incurred costs in order to comply with the regulatory requirements by ensuring there is no financial or other benefit to a provider from non-compliance. By encouraging compliance, sanctions also ensure that we are able to use our resources efficiently in performing our statutory functions because a more compliant sector will require less regulation.
10. We intend to use monetary penalties and other sanctions to deliver:
- credible deterrence from breaching conditions of registration
 - visible consequences for breaching conditions of registration
 - targeted regulatory intervention to ensure that a provider addresses areas of non-compliance.
11. The circumstances in which we might use the sanctions available to us are set out in paragraphs 178-196 of the regulatory framework. In brief:
- We will use monetary penalties where it is appropriate to do so. This will often be where other mechanisms for improving provider compliance have been insufficient, where serious breaches have occurred but we consider deregistration to be disproportionate, or where we consider it important to deliver a deterrent to other registered providers. A monetary penalty is particularly likely to be used where:
 - a breach is deliberate or negligent
 - a provider has been dishonest or concealed information
 - a provider has benefitted financially or otherwise from failing to comply
 - a provider has made repeated breaches.
 - We will normally use suspension of registration to reduce the immediate impact of a breach on students or taxpayers, pending remedial action by the provider.
 - We will normally use deregistration where monetary penalties and/or suspension have been used previously and a provider continues to breach conditions or where other sanctions are insufficient to address the breach.
12. In performing our functions we are required to have regard to our general duties, including the principles of best regulatory practice.¹⁴ We will act proportionately, accepting that a monetary penalty at the maximum of the scale set out in the Monetary Penalties Regulations may be disproportionate for many breaches. In making decisions about an individual case, we will also have regard to our broader obligations, including our responsibilities under the Public Sector Equality Duty and human rights legislation.

¹⁴ As set out in section 2 of HERA.

Representations and appeals

13. Where we make a provisional decision to impose a monetary penalty, we are required to seek representations from the higher education provider concerned.¹⁵ We will have regard to any representations made by the provider before reaching a final decision.
14. The governing body of a provider may appeal to the First Tier Tribunal against a final decision to impose a monetary penalty and the amount of that penalty. Appeals may also be made against a decision about the period for paying the penalty and arrangements for instalments.¹⁶ The Tribunal may take a range of actions, including withdrawing the requirement to pay the penalty, confirming or varying the requirement, or remitting the requirement back to the OfS for further decision.
15. The governing body of a provider may also appeal to the First Tier Tribunal against a decision to require a party to pay costs (which could include investigation costs, administration costs and the costs of obtaining expert advice) and the amount of those costs.

¹⁵ As set out in Schedule 3 of HERA.

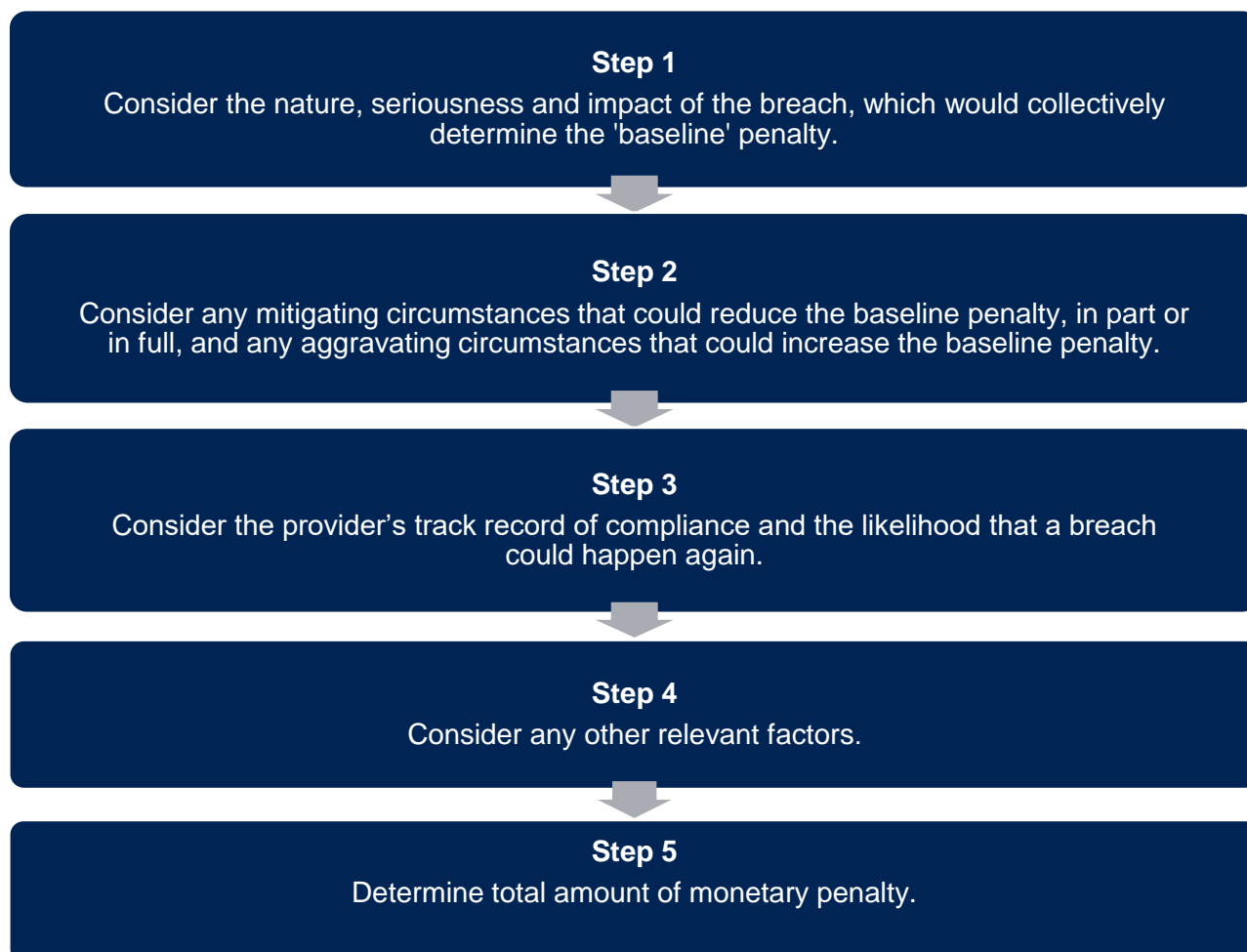
¹⁶ The appeal procedure to the First Tier Tribunal relating to the imposition of a monetary penalty is set out in Schedule 3 of HERA and summarised in paragraphs 180-181 of the regulatory framework.

Consultation proposals

Proposed approach to determining the level of a monetary penalty

16. We propose that, as a general principle, we would normally calculate a monetary penalty by reference to a percentage of a provider's 'qualifying income' (see paragraph 3 above). This is a different approach to expressing monetary penalties as a series of fixed rates that apply to particular types of breaches regardless of the qualifying income of an individual provider. This is to ensure that our approach is proportionate and is consistent with the approach taken in the legislation which frames the maximum value of a penalty in terms of a percentage of qualifying income.
17. We propose a five step assessment process for determining the level of a monetary penalty. The proposed process takes into account the intervention factors listed in the supporting regulations and the regulatory framework.¹⁷ Figure 1 summarises the process, and the paragraphs that follow provide a more detailed explanation.

Figure 1: Summary of proposed five step approach to determining a monetary penalty



¹⁷ See Regulation 4 of the Monetary Penalties Regulations and paragraph 167 of the regulatory framework.

Step 1

Consider the nature of the breach in order to determine the 'baseline' penalty. This would cover:

- The significance of the breach (for example, its seriousness and impact on students)
- The impact that an intervention would have on students
- The effectiveness of the proposed intervention
- Any actual or potential gain (financial or otherwise) made by the provider as a result of the breach
- Any action taken by other regulators to address the breach
- Whether the breach has otherwise created a lack of confidence in the higher education sector.

Step 2

Consider any mitigating or aggravating circumstances that could either reduce the baseline penalty, in part or in full, or increase it (for example, as evidenced in the provider's explanation). This would cover:

- Whether the breach was identified and promptly reported to the OfS by the provider, or alternatively reported by a third party
- The duration of the breach
- Evidence that the breach was likely to have been deliberate, reckless or involved dishonesty
- Steps taken by the provider to mitigate the risk or remedy the breach
- The provider's co-operation with the OfS's enquiries and investigations
- The provider's behaviour since the breach.

Step 3

Consider the provider's formal track record of compliance (for example, whether there have been multiple breaches of the same or different conditions) and the likelihood that a breach would happen again.

Step 4

Consider any other relevant factors, for example:

- Action the OfS has taken in similar cases (as set out in paragraph 167 of the regulatory framework)
- Adjustment for deterrence, for example: where the OfS considers the absolute value of the penalty too small to be a deterrent to the provider or other providers; where similar action in the past has failed to improve compliance; or where the penalty may not act as a deterrent in light of the provider's income or net assets.

Step 5

Determine the appropriate monetary penalty.

18. The process proposed above might mean, for example, that a baseline penalty is assessed at 1 per cent of a provider's qualifying income on the basis of the nature, seriousness and impact of the breach. An assessment of mitigation might then decrease the penalty by up to 100 per cent (i.e. to zero). Likewise, an assessment of aggravating circumstances might increase the penalty to up to the maximums stated in the Monetary Penalties Regulations.
19. The OfS has discretion over the time period for payment of a monetary penalty and the ability to allow payment in instalments.¹⁸
20. We will consider the impact on students when considering the imposition of a monetary penalty, the time period for payment and payment by instalments, including whether such a penalty would be appropriate in circumstances where a provider is in financial difficulty. This would apply to cost recovery and interest charges too. In such circumstances, it may be appropriate to consider suspension or deregistration of a provider instead of a monetary penalty.

Question 1

Do you have any comments on our proposal that, as a general principle, we would normally calculate a monetary penalty by reference to a percentage of a provider's qualifying income?

Question 2

Do you have any comments on our proposed five step approach to determine the level of a monetary penalty? Are there any additional factors that we should take into account in determining the level of a monetary penalty? Do you have any comments on our proposed approach to the time period for payment or payment by instalments?

¹⁸ See paragraph 2(6)(b) of Schedule 3 to HERA.

Question 3

Is our proposed approach to determining the level of a monetary penalty clear? If not, please explain what is unclear or missing.

Proposed approach to a settlement discount

21. Where we consider it appropriate, we propose to offer a settlement discount to a provider that agrees that it has breached a condition of registration and agrees to a monetary penalty at an early stage. The purpose of offering a settlement discount would be to:

- save the OfS and the provider the resources that would be required to produce and respond to a provisional decision to impose a monetary penalty
- encourage the provider to address the compliance concerns identified more quickly
- ensure other providers are aware of the penalty and the reasons it has been imposed as soon as possible
- ensure timely and effective action is taken to improve or restore student confidence.

22. The availability of a settlement discount would be conditional on a provider:

- admitting to the breach of condition(s), and accepting that a breach has occurred
- not publicly suggesting that it disagrees with the imposition of a monetary penalty, or challenging it or appealing against it
- accepting (if the provider requests a settlement early) that the OfS may need to complete its investigation to assess the nature of the breach and the harm caused.

23. We propose to offer a differentiated settlement discount. This would reflect the stage at which an agreement about a settlement is reached, and so the extent to which the OfS may avoid incurring costs:

- i. A provider can instigate a discussion with the OfS about an appropriate settlement discount as soon as it becomes aware of a potential breach of a condition of registration (this could be before we have begun an investigation relating to the breach).
- ii. A 30 per cent discount may be applied to the level of the penalty that we estimate may be imposed (if the case proceeded to a final determination about a breach without a settlement) where settlement is reached before we make a provisional decision to impose a monetary penalty.
- iii. A 20 per cent discount may be applied to the level of the penalty where settlement is reached after we issue a provisional decision to impose a monetary penalty but before expiry of the period in which the provider may make representations (usually 28 days).
- iv. A 10 per cent discount may be applied to the level of the penalty that we estimate may be imposed (if the case proceeded to a final determination about a breach without a

settlement) where settlement is reached after expiry of the period in which the provider may make representations but before we have completed our consideration of those representations and reached a final decision.

24. In all cases we would make a provisional decision confirming the discounted monetary penalty and any related matters. The provider would then have an opportunity to make representations if it felt the provisional decisions did not reflect what had been agreed. In discussing a possible settlement discount with a provider, we would make clear our intentions about publication of information about the breach, the monetary penalty, the fact of the settlement and the percentage reduction that has been applied.
25. Settlement discussions would be confidential and admissions made by a provider in the course of settlement discussions would not be used outside of the context of the settlement discussion unless legally required. Similarly, information we convey in such discussions is confidential and should not be used outside the context of the settlement discussion.
26. We would reserve the right not to enter into, or to abandon, any discussion about a settlement discount and continue with the process to determine a monetary penalty where we considered this to be appropriate. For example, a settlement discount may not be offered in the most serious cases or where there were significant aggravating factors (see Step 2 after paragraph 17 above), as this could undermine the credibility of our regulatory approach.

Question 4

Do you have any comments on our proposed approach to settlement discounts?

Question 5

Is our proposed approach to settlement discounts clear? If not, please explain what is unclear or missing. Are there particular factors that you think are relevant in the context of our general duties, the Public Sector Equality Duty, the Regulators' Code or other issues?

Proposed approach to publishing information about a monetary penalty

27. We will normally publish information about any sanctions imposed on a registered provider.¹⁹ For a monetary penalty, publication will normally include:
 - The amount of the monetary penalty
 - The reason for the imposition of the monetary penalty, including information about the breach
 - How the monetary penalty was calculated, including any cost recovery or interest charges
 - Any settlement discount applied and the reasons for this.

¹⁹ As set out in the table following paragraph 72 of the regulatory framework.

28. In deciding whether to publish our regulatory decisions we will take into account our general duties and other relevant factors. Any decision to publish such information is subject to the normal arrangements for consultation in an individual case.²⁰
29. Our general intention to publish information about sanctions is set out in the regulatory framework. This means that we are seeking views in this consultation only in relation to matters of clarity about our approach (see question 6 below).

Question 6

Is our proposed approach to publishing information about the imposition of a monetary penalty clear? If not, please explain what is unclear or missing.

Recovery of the OfS's costs relating to the imposition of sanctions

30. We intend to recover the costs we incur in relation to the process that results in the imposition of sanctions. We will calculate the internal and external costs we have incurred in carrying out these activities. This will include investigation costs, including professional legal costs, administration costs and the costs of obtaining expert advice. We will consider all relevant factors, including proportionality, in each case when deciding the extent of the costs we will recover.
31. As the ability of the OfS to recover its costs in these circumstances is provided for in HERA (see paragraph 4 above), we are seeking views in this consultation only in relation to matters of clarity about our approach (see question 7 below).

Question 7

Is our proposed approach to recovering our costs relating to the imposition of sanctions clear? If not, please explain what is unclear or missing.

Interest charges for late payment of OfS fees

32. We intend to charge interest for late payment of our registration or other fees, as provided for in the Higher Education (Registration Fees) (England) Regulations 2019. This charge would be in addition to any monetary penalty we impose for a breach of the relevant condition of registration. As there is likely to be an administrative burden associated with imposing and recovering such charges, we do not intend to impose interest charges for late payment when the charges are below a minimal amount.

²⁰ A provider will be invited to make representations about a provisional decision to publish information about a breach and the imposition of a monetary penalty.

33. As the ability of the OfS to impose an interest charge for late payment of its fees is provided for in the Registration Fees Regulations (see paragraph 5 above), we are seeking views in this consultation only in relation to matters of clarity about our approach (see question 8 below).

Question 8

Is our proposed approach to charging interest for late payment of OfS fees clear? If not, please explain what is unclear or missing.

Question 9

Are there ways in which the policy objectives under consultation in this document could be delivered more efficiently or effectively than is proposed here?

Question 10

Do you have any comments on any aspects of these proposals that could have a particular impact on individuals or groups who have protected characteristics?

Annex A: List of questions in consultation

Question 1: Do you have any comments on our proposal that, as a general principle, we would normally calculate a monetary penalty by reference to a percentage of a provider's qualifying income?

Question 2: Do you have any comments on our proposed five step approach to determine the level of a monetary penalty? Are there any additional factors that we should take into account in determining the level of a monetary penalty? Do you have any comments on our proposed approach to the time period for payment or payment by instalments?

Question 3: Is our proposed approach to determining the level of a monetary penalty clear? If not, please explain what is unclear or missing.

Question 4: Do you have any comments on our proposed approach to settlement discounts?

Question 5: Is our proposed approach to settlement discounts clear? If not, please explain what is unclear or missing. Are there particular factors that you think are relevant in the context of our general duties, the Public Sector Equality Duty, the Regulators' Code or other issues?

Question 6: Is our proposed approach to publishing information about the imposition of a monetary penalty clear? If not, please explain what is unclear or missing.

Question 7: Is our proposed approach to recovering our costs relating to the imposition of sanctions clear? If not, please explain what is unclear or missing.

Question 8: Is our proposed approach to charging interest for late payment of OfS fees clear? If not, please explain what is unclear or missing.

Question 9: Are there ways in which the policy objectives under consultation in this document could be delivered more efficiently or effectively than is proposed here?

Question 10: Do you have any comments on any aspects of these proposals that could have a particular impact on individuals or groups who have protected characteristics?



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