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The OfS's power to impose conditions

Among the raft of documents put out as part of the OfS's consultation on its new regulatory framework is one on the proposed registration conditions. The power to impose conditions of registration is a key part of the OfS's regulatory functions and so, in formulating their responses to the consultation, it is worth universities bearing in mind the statutory basis for the power to assess whether amendments to the proposed conditions should be proposed. As a creature of statute, the OfS is expected to operate within the framework set out by the statute, together with the public law principles that underpin good decision making and exercise of discretion.

The Higher Education and Research Act (HERA) sets out various mandatory conditions which the OfS must impose, other specific conditions that the OfS may impose and gives the OfS a broad discretion to impose other registration conditions as necessary. Conditions may be imposed in respect of all providers, particular categories of provider or indeed specific providers. Conditions may be revised from time to time.

HERA stipulates that in exercising any of its functions (including in deciding what registration conditions to impose) the OfS must have regard to a range of matters, such as institutional autonomy, the need to promote competition and choice, access and participation and value for money. The list is an exhaustive one and includes the following:

"So far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be –

(i) Transparent, accountable, proportionate and consistent, and

(ii) Targeted only at cases in which action is needed."

The OfS must also have regard to guidance issued by the Secretary of State, who must herself have regard to the need to protect institutional autonomy.

The phrase "have regard to" in the context of the OfS's functions requires it to balance the specified range of different considerations and depending on the precise circumstances, may mean more or less weight attached to any particular one than to the others. So in some cases, the need to promote equality of opportunity might take precedence over the need to protect institutional autonomy. In others, the need to ensure quality might take precedence over the need to promote competition.

It is noteworthy that even the Secretary of State's guidance is only a matter to which the OfS must have regard. Legally, at least, the OfS is free to decide that in the particular circumstances at hand, its other considerations must be given greater weight. That after all is what regulatory independence means. Where the Secretary of State considers it necessary to do so, she can give directions with which the OfS must comply – regulatory independence must have its limits, after all.

In every case, transparency requires that the OfS can explain the rationale for its regulatory choices by reference to the statutory requirements. It should also demonstrate that the condition is necessary, (i.e. the desired statutory outcomes could not be achieved without a condition) and proportionate, that is to say it should go no further than is needed to achieve whichever of the statutory considerations the condition relates to. Further, it must demonstrate that the condition has been properly targeted at "cases where action is needed". This might be the whole sector, a particular part of the sector or indeed particular providers.

Beyond the mandatory conditions, then, the OfS should justify the exercise of the power to impose conditions by explaining why they are necessary, why they are considered proportionate, and how they have been targeted only on those institutions or providers where action is needed. In some cases (for example, senior executive pay), the consultation falls short of such an explanation.

Transparency, accountability and proportionality are important qualities for the new HE regulatory framework to demonstrate from the outset. The first tranche of conditions imposed by the OfS will operate as a floor not a ceiling for future regulatory intervention. The sector needs to ensure that its response to the consultation, wherever possible, holds the OfS to account for its regulatory choices.

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Preparing for REF2021

Much of the energy in universities is currently devoted to responding to, and anticipating how, the regulatory framework proposed by the Office for Students will be implemented. The framework will require successful registration as a provider during the period from April next year. The attention this demands is magnified by the debates about senior pay and fees, the unsatisfactory senior management of the Student Loans Company, and proposals for the next iteration of TEF. Meanwhile, but of major consequence to many universities, the arrangements for the Research Excellence Framework 2021 are rapidly taking shape but feature less publicly.

In the next six months the assessment panels will have met and broadly decided on their criteria for consultation over the summer of 2018. Submission will be required in 2020 and we will soon learn how the funding bodies intend to implement the Sterne recommendation, broadly accepted by universities, that the next REF should be based on an all-staff submission and how that will be auditable.

The REF will distribute more than £1.6bn recurrently and is separately material to the reputation of many universities whose missions enjoin them to pursue research as a joint mission with education. The REF also influences distributions from the Research Partnership Investment Fund (RPIF is worth £900m over the current funding period) and HEIF. The REF also provides opportunities for academic colleagues and professional staff to chair or serve on panels and to act as secretaries to these. Many careers have been enhanced significantly by these means.

Now that impact will carry 25% of the weight of assessment (with 15% for environment and 60% for outputs), much preparation is needed from colleagues expert in research translation and knowledge exchange. Taking account of the White Paper on industrial strategy promised shortly will also be necessary. Colleagues who have been closely involved in previous RAEs or the last REF will know how much work is involved to provide funds for investment, clearly-defined academic oversight and assessment, professional support, and the governance arrangements to ensure a successful submission. Most of these arrangements need to be in place now or planned for with certainty.

REF2021 will have as much impact on the fortunes of research-involved universities as will the consequences of the regulatory and assessment arrangements overseen by the Office for Students. If you would like to discuss any aspect of preparing for a successful REF, please do get in touch.

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Tax and procurement

The recent publication of the "Paradise Papers" - a leak of over 13 million files from two offshore services providers - follows from the leak last year of the "Panama Papers" - a leak of over 1.5 million documents from the database of Mossack Fonseca, a Panamanian law firm specialising in offshore services.

Both leaks have lifted the curtain, shone a spotlight and pretty much worn out every cliché in the book on lawyers, accountants and tax advisers and their methods of tax avoidance / evasion / planning, depending on your point of view.

There are two themes which universities may wish to consider. The first is the extent to which contracting authorities need to avoid being associated with service providers who provide aggressive tax planning advice; and the second, to consider the risk and fall-out of being associated with offshore structures.

As we reported in our **September bulletin**, the Criminal Finances Act 2017 has introduced a new financial crime of failing to prevent tax evasion. This is similar in nature to section 7 of the Bribery Act 2010 which created the offence of failure by commercial organisations to prevent bribery by those acting on their behalf. Following the introduction of the Bribery Act, many contracting authorities have considered that bribery offences should be taken into account in assessing the suitability of a bidder to take part in a public procurement exercise. Government guidance confirmed that a conviction for "failing to prevent" bribery would constitute grounds for discretionary (rather than mandatory) exclusion, depending on the circumstances. There is, as yet, no equivalent guidance on the Criminal Finances Act, but it is reasonable to consider that a conviction for "facilitating" the fraudulent evasion of tax or cheating the public revenue could constitute "grave professional misconduct", entitling a contracting authority to exclude a bidder from the procurement exercise.

A more difficult issue is dealing with tax issues as part of the general commercial approach to dealing with a client's finances, which is particularly true for clients with endowments. The reporting of tax affairs tends to be pretty headline-grabbing and can be pretty unsophisticated. The general tone is that any means of reducing a tax bill, or any use of offshore accounts, is nefarious. This is, I think, pretty absurd: if I pay more of my salary as a pension contribution, I will pay less tax on my income. This is entirely normal. Making use of tax advantages which are intended to encourage positive commercial behaviour such as investing in film production or intellectual property, to name two recently maligned examples, seems to me to be entirely legitimate and necessary. The danger, of course, is that the perception that "tax planning" is synonymous with "tax dodging" means that universities can be wary of getting the best advice.

You can find out more at the following **website.**

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Shedding light on acquired easements

Assessing who might have acquired rights of light can be a tricky exercise. This is particularly so when rights of light can be acquired by reason of long use i.e. over 20 years' use. The right can also accrue for the benefit of multiple parties, for instance for the benefit of a tenant and its landlord/freeholder.

This can be a point of contention in a number of ways, particularly when a party, such as a developer, is seeking to develop land and potentially obstruct a right to light for nearby buildings. A recent case which highlighted the issue is *Metropolitan Housing Trust Ltd v RMC FH Co Ltd ([2017] EWHC 2609 (Ch)).*

In that case, a developer was seeking to build a mixed use development which was going to interfere with the light to a building across the road. The tenant of that building had accrued a right to light by virtue of its long use of over 20 years, but that right also accrued for the benefit of the landlord of the building.

The tenant was willing to enter into an agreement to release its rights, but the landlord argued that doing so would put the tenant in breach of a covenant under its lease which imposed an obligation on the tenant not to give permission for any new 'encroachment' that might inconvenience the landlord.

In its judgment, the court found that the release would amount to a breach of that covenant as, even if the landlord could continue to enjoy its own right to light, the interference might require the landlord to litigate to assert its own right and that would be an inconvenience.

Therefore the tenant could not release his rights of light without breaching the covenants of the lease, and, furthermore, the release would not have only been a partial release and would not have bought off the landlord's rights against the developer.

Being on the defending end of a claim asserting rights to light can be a costly, time-consuming process which could lead to delays and hidden issues such as the possibility that a developer might need to apply for new planning consent if the development needs to be reconfigured. It could even result in an order for the demolition of the constructed development.

Any university that might be seeking to redevelop any of its property should consider whether to obtain insurance in relation to any potential infringement of a right of light before negotiations begin with the party who has the benefit of that right. Once negotiations have begun, insurance will not then be available.

The sea of easements can often be difficult to navigate. Almost certainly, the owner of the right will require some sort of compensation for their consent to the development or the release of their right, such as money or a reciprocal benefit. Negotiations and agreements with the right people are key. Metropolitan Housing Trust emphasises the importance of identifying who might have acquired the relevant rights and who is capable of releasing the rights of light. The critical issue is to ensure that when negotiations are ongoing and rights are being released, the developer is not acquiring a partial release only so that it can seek to avoid costly disputes further down the line.

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Practical steps in managing industrial action

A recent indicative ballot by the University and College Union (UCU) showed overwhelming support for industrial action to protect the pensions of university employees. This means that there is the potential for strike action by such employees, subject to a further ballot meeting the statutory requirements for industrial action.

Eighty-seven per cent of UCU members who voted in the ballot stated they would be prepared to take industrial action in order to defend the existing benefits of the Universities Superannuation Scheme (USS).

How can universities prepare for strike action?

If industrial action does go ahead, those universities affected should be prepared for the impact that this will have on them as a business and on their students.

Below we have provided points to be considered if strike action is anticipated, how you can prepare for a strike and what action you can take against employees who strike.

Before

- Write to staff to explain your position – ensure that they understand both sides of the story
- Keep lines of communication open – try to avoid being combative and be open to communication from unions and employees
- Remind staff of consequences of industrial action – this is important if you are considering deductions from wages

Preparation for action

- Plan your PR strategy – unions may try to paint the university as the "bad guy"; how will you combat this?
- Consider staffing options – how many lectures/classes will be affected? Can cover be arranged or will lectures be cancelled? How will you treat any requests for annual leave for the strike day?
- Record-keeping for payroll purposes – these will be needed if deductions are to be made from wages. Understand who is on strike.
- Refuse to accept partial performance
  - Make it clear that if employees attend work they must complete all their duties and any partial performance is voluntary and unpaid

Afterwards

- Withhold pay for breach of contract
  - Advance notice of why and how deductions will be made needs to be given to employees
  - Deductions have typically been based on 1/260 of the employee's annual salary, but consider the recent Hartley case on appropriate deductions, any contractual or other policy you have and seek advice if necessary
- Detriment
  - There are no express provisions protecting employees from detriment as a result of strike action. For example, holding participation against an employee when they have applied for a promotion would be lawful. However, given the potential overlap with detriment in relation to trade union membership or activities, such a decision would not be without risk.

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