

## Proposed condition E8 – General ongoing condition in relation to subcontracting

### Scope and application

- E8.1 The requirements in E8.6-E8.17 apply to a provider:
- a. in the following circumstances:
    - i. when both of the following apply:
      - A. the provider has one or more **relevant subcontractual arrangements**;
      - B. the total number of students registered on the provider's **relevant subcontractual courses** is 100 or more (or such other number as the OfS may determine from time to time);
    - ii. where the provider has concluded, or reasonably should have concluded, that there is a material likelihood that the total number of students registered on its existing or future **relevant subcontractual courses** will be 100 or more (or such other number as the OfS may determine from time to time) in a given academic year (the '**relevant academic year**'), from the **relevant trigger point** until the end of the **relevant academic year**; or
  - b. if the OfS has determined that it has reasonable grounds to suspect that the provider's existing or future **relevant subcontractual arrangements** pose material risks to the interests of students and/or taxpayers.
- E8.2 For the purposes of this condition, student numbers will be calculated using the methodology set out in one or more document published by the OfS from time to time.
- E8.3 For the purposes of E8.1aii, "**relevant trigger point**" means the later of the following points:
- a. one calendar year prior to the beginning of the **relevant academic year**; or
  - b. the point at which the provider would reasonably have concluded that there is a material likelihood that the total number of students registered on its existing or future **relevant subcontractual courses** will be 100 or more (or such other number as the OfS may determine from time to time) in the **relevant academic year**.
- E8.4 For the purposes of determinations referred to in E8.1b:
- a. A determination will be made by the OfS by notice in writing and the requirements in E8.6-E8.17 will take effect on and from the time and date specified in that notice;
  - b. A determination may be revoked by the OfS by notice in writing and the requirements in E8.6-E8.17 will cease to have effect on and from the time and date specified in that notice.
- E8.5 Where the requirements in E8.6-E8.17 cease to apply to a provider at any time (for any reason), that cessation does not in any way affect the ability of the OfS to investigate

and/or take any form of regulatory or enforcement action in respect of any non-compliance with the requirements (whether or not the non-compliance remains ongoing in nature) which took place during the period that the requirements were in effect.

### **Overarching obligation**

- E8.6 The provider must ensure that any risks to the interests of students and/or taxpayers posed by its existing and future **relevant subcontractual arrangements** are effectively identified and addressed, including, but not limited to, by complying with:
- a. the requirements in E8.7-E8.9 in respect of a single comprehensive source of information;
  - b. the requirements in E8.10-E8.12 in respect of operation in accordance with that single comprehensive source of information; and
  - c. any subcontractual arrangement direction issued by the OfS in accordance with E8.6-E8.17.

### **Comprehensive source of information**

- E8.7 The provider must maintain a single **comprehensive source of information** which sets out policies, procedures and other provisions relating to its existing and future **relevant subcontractual arrangements**. That single **comprehensive source of information** (and any revisions made to it from time to time) must comply at all times with the **minimum content requirements** and the **content principles**.
- E8.8 Where changes are made to the single **comprehensive source of information** referred to in E8.7, the provider must retain the pre-existing version of that information for a minimum period of five years following changes being made to it.
- E8.9 For the purposes of this condition, “**minimum content requirements**” means the requirements set out in Annex 1 to this condition. For the avoidance of doubt, Annex 1 forms part of this general ongoing condition of registration E8.

### **Operation in accordance with the comprehensive source of information**

- E8.10 The provider must operate in accordance with the single **comprehensive source of information** referred to in E8.7.
- E8.11 The requirement in E8.10 includes, but is not limited to, ensuring that the provider implements its **relevant subcontractual arrangements** in accordance with the single **comprehensive source of information** (which could include, for example, making changes to the contractual terms and conditions of those arrangements). This requirement applies to:
- a. any existing arrangements which are in force at the time the requirements in E8.6-E8.17 take effect for the provider (see E8.1); and
  - b. any new arrangements (or variations to existing arrangements) entered into at any point while the requirements in E8.6-E8.17 apply to the provider (see E8.1).
- E8.12 The provider must have the **capacity and resources** necessary to operate in accordance with the single **comprehensive source of information** referred to in E8.7.

### **Subcontractual arrangement direction**

E8.13 The provider must comply with any **subcontractual arrangement direction** in circumstances where the OfS has reasonable grounds to suspect that the provider's existing or future **relevant subcontractual arrangements** pose significant risks to the interests of students and/or taxpayers.

E8.14 For the purposes of this condition, "**subcontractual arrangement direction**":

- a. means a direction requiring the provider to:
  - i. take such actions (or refrain from taking actions) that the OfS considers are appropriate to identify and/or address potential risks to the interests of students and/or taxpayers posed by the provider's existing or future **relevant subcontractual arrangements**; and
  - ii. do (or refrain from doing) any such other consequential, ancillary or incidental actions, as the OfS considers are appropriate, for the purpose of ensuring that those actions (or omissions) are put in place and/or implemented in an effective and expedient manner;
  - iii. at the time and in the manner and form specified by the OfS;
- b. may include, but will not be limited to, requiring the provider to do any of the following:
  - i. make changes to the contractual terms and conditions of its existing **relevant subcontractual arrangements** and/or the single **comprehensive source of information** referred to in E8.7;
  - ii. refrain from entering into new **relevant subcontractual arrangements**;
  - iii. implement specified restrictions on the numbers of students registered on the provider's existing and/or future **relevant subcontractual courses**;
  - iv. step in to directly deliver **relevant subcontractual courses** to students in place of a partner (including in circumstances where this is not permitted under the contractual terms and conditions of a **relevant subcontractual arrangement**);
  - v. pay **refunds** or **compensation** to students in the event of a failure (by the provider or its partner) to provide all or part of a **relevant subcontractual course** to students (for whatever reason);
  - vi. appoint an individual with specified skills and experience to its **governing body** or management team to maintain oversight (on behalf of the provider) of the activity of partners in existing or future **relevant subcontractual arrangements**;
  - vii. appoint an individual independent of the provider to maintain oversight (on behalf of the provider) of the activity of partners in existing **relevant subcontractual arrangements**.

E8.15 A **subcontractual arrangement direction** may be varied or revoked (wholly or in part) by express provision in a subsequent **subcontractual arrangement direction** issued

by the OfS, and the OfS may otherwise revoke a **subcontractual arrangement direction** by notice in writing.

E8.16 A **subcontractual arrangement direction** (or, as the case may be, part of a **subcontractual arrangement direction**) will cease to have effect in accordance with the following provisions:

- a. in circumstances where a **subcontractual arrangement direction** is varied or revoked (wholly or in part) by a subsequent **subcontractual arrangement direction**, on and from the time and date that the subsequent **subcontractual arrangement direction** takes effect; or
- b. in circumstances where a **subcontractual arrangement direction** is revoked by notice in writing, on and from the time and date specified in that notice.

E8.17 Where a **subcontractual arrangement direction** ceases to have effect at any time (for any reason), that cessation does not in any way affect the ability of the OfS to investigate and/or take any form of regulatory or enforcement action in respect of any non-compliance with that **subcontractual arrangement direction** (whether or not the non-compliance remains ongoing in nature) which took place during the period that the **subcontractual arrangement direction** was in effect.

#### Further definitions

E8.18 For the purposes of this condition:

- a. “**capacity and resources**” includes, but is not limited to:
  - i. the financial resources of a provider; and
  - ii. the number, expertise, and experience of a provider’s staff or contractors.
- b. “**compensation**” means offering students compensation to cover any financial costs incurred by students as a result of a failure (by the provider or its partner) to provide all or part of a **relevant subcontractual course** to students (for whatever reason).
- c. “**content principles**” means the following requirements:
  - i. the provider may include other additional information and provisions in the single **comprehensive source of information** in addition to the **minimum content requirements**, but such other information and provisions must:
    - A. not contradict, undermine or conflict with the **minimum content requirements**; and
    - B. be subject to a provision which makes it expressly clear that the **minimum content requirements** take precedence over any other information and provisions;
  - ii. the provider must not include information and provisions on subject matter relating to existing or future **relevant subcontractual arrangements** (and/or any subject matter of a similar nature to matters covered by that defined term) in any other documents which could reasonably be considered to contradict, undermine or conflict with the **minimum content requirements**.

- d. “**comprehensive source of information**” means:
- i. a single document that comprehensively sets out all the information required in order to comply with E8.7; or
  - ii. a single document that gives a clear summary of the information required by E8.7, and refers to additional documents that comprehensively set out the remaining relevant detail as required by E8.7. If the provider adopts this approach, the single document must include a summary of the content to be found in those other documents (insofar as relevant).
- e. “**conflict of interest**” means an interest held by a person (for example, a financial interest or a personal relationship) in relation to a matter or decision that would lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the person in question was biased in relation to that matter or decision.
- f. “**designated institution**” has the meaning given in section 28 of the Further and Higher Education Act 1992.
- g. “**further education corporation**” has the meaning given in the Further and Higher Education Act 1992.
- h. “**governing body**” has the meaning given in section 85 of the Higher Education and Research Act 2017.
- i. “**refunds**” means offering students refunds of tuition fees and other costs (for example accommodation costs and other living costs) incurred by students for whom continuation of study has been disrupted as a result of a failure (by the provider or its partner) to provide all or part of a **relevant subcontractual course** to students (for whatever reason).
- j. “**relevant subcontractual course**” means a higher education course provided for under a relevant subcontractual arrangement where:
- i. students on that course hold (or will hold) a contractual relationship with the provider; and
  - ii. 50 per cent or less of the **total course delivery hours** on that course are provided (or will be provided) by the provider’s staff or contractors.
- k. “**relevant subcontractual arrangement**”:
- i. means an arrangement between the provider and one or more other entities (“**partner providers**”) in relation to the provision of higher education courses in which:
    - A. the provider holds a contract with one or more **partner providers** (in relation to the provision of higher education courses);
    - B. students on one or more of those courses hold (or will hold) a contractual relationship with the provider; and

- C. 50 per cent or less of the **total course delivery hours** on one or more of those courses is provided (or will be provided) by the provider’s staff or contractors;
- ii. does not include an arrangement where:
    - A. the **partner provider** falls under one of the following (or, where there are multiple **partner providers**, each of the **partner providers** falls under one of the following):
      - a) is a **state-funded school**, a **further education corporation**, a **sixth form college corporation**, a **designated institution**, a provider of National Health Service services (including an NHS trust as defined in section 25 of the National Health Service Act 2006), a local authority, or a police and crime commissioner;
      - b) holds an authorisation given by or under an Act of Parliament or Royal Charter to grant taught awards or research awards;
    - B. the contract relates to the provision of higher education courses where all of the content on all of those courses is either:
      - a) delivered in a location which is outside of England, Scotland, Wales and Northern Ireland; or
      - b) delivered online, where all of the students registered on the relevant course are ordinarily resident in countries other than England, Scotland, Wales and Northern Ireland;
    - C. For the avoidance of doubt, an “existing” **relevant subcontractual arrangement** refers to an arrangement where the provider has signed a contract of the kind described in paragraph E8.18kiA.
  - l. “**risk and audit functions**” means functions which relate to:
    - i. identifying and managing risks;
    - ii. overseeing internal or external auditing of the provider, as well as the provider’s financial reporting and disclosures.
  - m. “**sixth form college corporation**” means a sixth form college corporation established under the Further and Higher Education Act 1992.
  - n. “**state-funded school**” means a school funded wholly or mainly from public funds.
  - o. “**total course delivery hours**”, in relation to a course, means the total number of hours spent by staff or contractors (of the provider or its **partner providers**) preparing to deliver course content, delivering course content, and assessing student work in relation to the course.

## Summary

**Applies to:** all registered providers

**Initial or general ongoing condition:** general ongoing condition

**Legal basis:** section 5 of HERA

### Annex 1: Minimum content requirements

This document contains the definition of “**minimum content requirements**” for the purposes of ongoing condition of registration E8. The document forms part of (and should be read in conjunction with) condition E8. For the avoidance of doubt, where defined terms are used in this Annex, the definitions in condition E8 apply.

For the purposes of condition E8, “**minimum content requirements**” means information in respect of all of the following:

- a. **Rationale:** The provider’s strategic rationale for engaging in subcontractual relationships in relation to the provision of higher education courses, including but not limited to:
  - i. how, in developing that rationale, it ensures that the needs of students are prioritised over financial considerations;
  - ii. the provider’s strategic rationale for its existing **relevant subcontractual arrangements**.
- b. **New arrangements:** The provider’s approach to assessing potential new **relevant subcontractual arrangements**, including but not limited to:
  - i. how the provider assesses the feasibility of potential new **relevant subcontractual arrangements**, including how this approach is in line with its stated strategic rationale for engaging in subcontractual relationships (in relation to the provision of higher education courses);
  - ii. how the provider assesses whether courses to be provided for under potential new **relevant subcontractual arrangements** will comply with the OfS’s regulatory requirements, including conditions B1, B2, B3, B4 and B5;
  - iii. how the provider undertakes due diligence on potential partners in potential new **relevant subcontractual arrangements**;
  - iv. how the provider assures itself that potential partners in potential new **relevant subcontractual arrangements** have the **capacity and resources** necessary to meet their contractual obligations under those arrangements.
- c. **Oversight by governing body and others:** The control and oversight mechanisms that the provider’s **governing body** and, where applicable, committee(s) and/or individual(s) with responsibility for **risk and audit functions**, have in place to:
  - i. meet the overarching obligation contained in E8.6; and
  - ii. ensure delivery of its stated strategic rationale for engaging in subcontractual relationships (in relation to the provision of higher education courses).

This includes, but is not limited to, how the **governing body** and, where applicable, those committee(s) and/or individual(s):

- i. identify and address risks that the provider's existing and future **relevant subcontractual arrangements** pose (or could pose) to the interests of students and/or taxpayers;
  - ii. oversee and ensure the quality and rigour of the internal or external auditing of existing and future **relevant subcontractual arrangements**;
  - iii. ensure that courses provided for (or to be provided for) under existing and future **relevant subcontractual arrangements** comply (or will comply) with the OfS's regulatory requirements, including conditions B1, B2, B3, B4 and B5.
- d. Policies and procedures: The policies and procedures that the provider has in place to meet the overarching obligation contained in E8.6 and ensure delivery of its stated strategic rationale for engaging in subcontractual relationships (in relation to the provision of higher education courses), including but not limited to:
- i. how the provider responds to complaints about courses provided for under its **relevant subcontractual arrangements**;
  - ii. how the provider deals with whistleblowing about activity under its **relevant subcontractual arrangements**;
  - iii. how the provider manages perceived and actual **conflicts of interest** in relation to its **relevant subcontractual arrangements**;
  - iv. how the provider manages and mitigates risks to public funding associated with courses provided for under its **relevant subcontractual arrangements**;
  - v. where the provider uses external recruitment agents (either directly or via its partner) to recruit students onto courses provided for under its **relevant subcontractual arrangements**, how the provider oversees the work of these agents;
  - vi. how the provider oversees the application of the criteria and processes for admitting students onto courses provided for under its **relevant subcontractual arrangements**, including how it oversees the application of exemptions or exceptions to the admissions criteria and processes for particular students;
  - vii. how the provider assesses and approves delivery of courses provided for under its **relevant subcontractual arrangements**;
  - viii. how the provider monitors (on an ongoing basis) courses provided for under its **relevant subcontractual arrangements** to ensure that they comply with conditions B1, B2, B3, B4 and B5;
  - ix. how the provider oversees prevention, identification and management of academic misconduct in relation to courses provided for under its **relevant subcontractual arrangements**;
  - x. how the provider ensures that it has access to information or data held by its partner about students on courses provided for under its **relevant subcontractual arrangements**, insofar as this is necessary to ensure that those courses comply with the OfS's regulatory requirements, including but not limited to conditions B1, B2, B3, B4 and B5;



- xi. how the provider verifies the information or data held by its partner about students on courses provided for under its **relevant subcontractual arrangements**, including but not limited to via onsite visit inspections;
  - xii. how the provider will protect the interests of students and ensure that they can continue and complete their studies in the event that a partner in one of the provider's **relevant subcontractual arrangements** fully or substantially ceases the provision of a course provided for under that arrangement ("**delivery failure**"), including by providing for arrangements to ensure that students would be able to transfer to the provider, or another higher education provider, to continue and complete their studies in the event of a **delivery failure**;
  - xiii. how the provider will protect the interests of students in the event of poor performance by a partner under one of the provider's **relevant subcontractual arrangements**.
- e. Adaptability: How the provider ensures that the policies, procedures and other provisions set out on the basis of paragraphs a-d above remain fit for purpose and effective in the event of changes to its **relevant subcontractual arrangements**, including where there is significant growth in the number of students registered on courses provided for under those arrangements.

## Draft guidance

### Condition E8.1 – E8.5: Scope and application

1. In a subcontractual arrangement, sometimes known as a franchising arrangement, students are registered with a lead provider and are taught for some or all their course by one or more other provider – a delivery partner. A delivery provider may or may not be registered with the OfS. The student's contractual relationship is with the lead provider.
2. A provider must meet the obligations set out in this condition, in the following circumstances:
  - a. Where it has, or has concluded (or reasonably should have concluded) that there is a material likelihood that they will have, 100 or more students registered on relevant subcontractual courses during a given academic year, or
  - b. Where the OfS has determined that it has reasonable grounds to suspect that the provider's subcontractual arrangements pose material risks to the interest of students and/or taxpayers.
3. The threshold of 100 students is calculated as the aggregate total of students, on a full-time equivalent (FTE) basis across all relevant subcontractual arrangements held by the provider. This total includes students registered in any year or on any module of a subcontracted course and is not limited to the students registering on a course in a single academic intake.
4. A provider must regularly assess whether the obligations of this condition apply to it as it plans student intakes. We expect each provider to have sufficient capability to determine this based on its own student data and recruitment plans.

5. In considering whether a provider has acted reasonably in concluding that there is a material likelihood that the total number of students registered on its current and future relevant subcontractual courses will be 100 or more, the OfS may consider how a reasonable provider, intent on complying with all of its conditions of registration and acting in the interests of students and, where relevant, taxpayers (rather than in its own commercial, reputational or other interests), would have forecast its student numbers.
6. The OfS expects that in most cases the obligations in condition E8 will apply one calendar year before the start of the academic year in which the provider has concluded that it will have 100 or more students registered on relevant subcontractual courses.
7. This reflects the OfS's assessment that many key risks associated with subcontractual arrangements arise during the early stages, when contracts between partners are being agreed, and planning for recruitment is taking place. The OfS would expect a well-controlled and managed subcontractual arrangement to involve proactive planning.
8. The OfS would normally expect a provider to be able to identify whether it will have 100 or more students in relevant subcontractual arrangements in a given academic year at least one year before the start of that year. This is because the provider will need to agree its contract with a delivery provider, set admission criteria and leave time for student recruitment. For existing subcontractual relationships forecasts of student numbers may be set several years in advance of recruitment.
9. Where a lead provider agrees with a delivery partner to deliver a course at short notice the obligations of the condition will begin when the lead provider has concluded, or reasonably should have concluded, that there is a material likelihood that the total number of students would be 100 or more in the relevant academic year.
10. Student numbers may vary from those planned, where recruitment campaigns are more or less successful than expected. Where a provider over recruits, such that there will be more than 100 students in relevant subcontractual arrangements, the obligations in condition E8 will apply from the point students that take the total number over 100 register on their course. Where a provider under recruits, such that there will be less than 100 students in relevant subcontractual arrangements, the obligations in condition E8 will continue to apply until the end of that academic year.
11. A provider may wish to consider, when forecasting student numbers in relevant subcontractual arrangements close to 100 how they will ensure they are ready to meet the obligations of this condition if they over recruit. For the avoidance of doubt, the requirements of the condition apply where a lead provider has more than 100 students in total, counting all years of study, and all courses.
12. Where a provider reaches 100 or more students having failed to identify this as a material likelihood this raises potential concerns. In such circumstances the OfS will likely look to understand more about a provider's forecasting and identification of emerging trends and risks, and whether they remain fit for purpose, including by requiring information from the provider where relevant.

13. The OfS will use its established approach to counting student numbers.<sup>1</sup> This provides a consistent and widely understood basis for reporting student numbers across the OfS's regulation. The OfS may, from time to time, revise its approach to counting student numbers to ensure it remains appropriate.
14. Condition E8.1 sets out that the condition applies to providers with over 100 students on relevant subcontractual courses (or such other number as the OfS may determine from time to time). The OfS may decide to vary the 100-student number, where it considers this appropriate. The OfS may also in future decide to amend the definition of 'relevant subcontractual arrangements', or change the types of arrangements that fall within the scope of the exemption categories set out in E8.18.
15. E.8.1.b means that a provider will need to meet the requirements set out in this condition where the OfS has reasonable grounds to suspect that the provider's existing or future relevant subcontractual arrangements pose material risks to the interests of students and taxpayers. By "material" risks we mean risks that the OfS considers to be comparable to those associated with being in scope of the condition (e.g. having over 100 students in subcontractual delivery), even if, for example, the total student numbers are lower than 100.
16. When assessing whether the provider's relevant subcontractual arrangements pose material risks to the interests of students and taxpayers, the OfS may consider regulatory information and intelligence it holds about the provider. A more detailed list of this information is included at paragraph 70.
17. Risks identified by the OfS could be material even where the relevant subcontractual provision is a small proportion of the provider's overall provision. For example, if a provider delivers education to 90 students through a subcontractual partner and directly itself to 3,000 students, risks relating to those 90 students may still be considered 'material' depending on the circumstances, even though a relatively small proportion of the provider's overall students may have been affected.
18. When assessing whether a risk is material in this context, the OfS may consider both the likelihood of a risk crystallising and the potential impact on students and taxpayers if it does. A risk that is likely to crystallise with a significant impact on students and taxpayers, is likely to be considered material. Conversely, a risk that is unlikely to crystallise and/or would have only a limited impact on students and taxpayers, is less likely to be considered material.

### **Condition E8.6: Overarching obligation**

19. A lead provider must ensure that any risks to the interests of students and/or taxpayers posed by its existing and future **relevant subcontractual arrangements** are effectively identified and addressed.
20. The condition sets out a non-exhaustive set of requirements with which a provider must comply. These requirements are detailed further below. The overarching requirement is that a provider must identify and manage these risks to students and taxpayers. The OfS may choose to assess whether a provider has met the overarching obligation of the condition, and

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<sup>1</sup> See [Student numbers for regulatory purposes](#).

undertake any consequent regulatory or enforcement activity, even when a provider has, for example, complied with the requirement to have a single comprehensive source of information.

21. Box A below sets out an illustrative non-exhaustive list of risks that a provider should consider, when identifying risks to the interests of students and taxpayers that could be posed by its relevant subcontractual arrangements.

#### **Box A: Potential risks to students and taxpayers**

<b>Risk to students</b>
<ul style="list-style-type: none"><li>• A delivery partner (or its agents) misrepresenting or mis-selling courses, charging excessive fees, and not complying with consumer protection law.</li><li>• Students being recruited to courses that are not suitable. For example, where entry requirements (including English language requirements) do not ensure admitted students have the capabilities required to engage with the course without significant additional support, and where this support is not provided to students.</li><li>• Students receiving a lower quality academic experience from the delivery provider than that for students directly taught by the lead provider. For example, a course not being sufficiently stretching for the level of study, poor quality teaching and assessment, or students not receiving an award without early warning that their academic progress was not sufficient.</li><li>• Widespread academic misconduct by students in a relevant subcontractual arrangement, including where a delivery partner supports submission of assessments that are not a student's own work.</li><li>• Poorly monitored or controlled student support services or safeguarding arrangements.</li><li>• Students not being aware that their course is being delivered through a subcontractual partnership, or that a proportion of their tuition fee has been retained by the lead provider.</li><li>• Disruption or discontinuity of a student's course, including in the event of a delivery partner's failure.</li></ul>
<b>Risks to taxpayers</b>
<ul style="list-style-type: none"><li>• Student loan funding being paid to, and on behalf of, students who are not genuinely entitled to that funding, as a result of inaccurate data submitted by a delivery partner to the lead provider, with inadequate controls for collection and submission of data, and inadequate auditing of data and controls.</li><li>• Incorrect payment of student loan funding to a provider because of inaccurate or inflated reporting of student attendance to the OfS and Student Loans Company.</li><li>• Students and third parties accessing public funding in the form of maintenance loans, childcare or other grants, by registering on a course that they do not genuinely intend to study.</li></ul>

- Reduced confidence in the higher education sector and so damage to the wider public interest generated by high profile reports of poor delivery, or the failure of an individual provider.

22. In assessing whether a provider has met the overarching requirement and effectively identified and addressed risks to the interests of students and taxpayers posed by its relevant subcontractual arrangements, the OfS may consider regulatory information and intelligence, as set out in paragraph 70, relevant to reaching a view about whether there are reasonable grounds to suspect risks have crystallised or are likely to do so.
23. In assessing whether a provider has identified and addressed risks effectively, the OfS may consider whether any issues identified from the information or evidence it has reviewed appear to be isolated incidents or indicate a wider, sustained issue. For example, inaccurate course information in a provider's student recruitment materials could lead prospective students to apply to a course that does not meet their expectations or needs. If such an error is narrow, quickly identified, appropriately reported and followed by strengthened controls, the OfS is less likely to conclude that the provider has failed to identify and manage the risk effectively. Conversely, if inaccurate course information appears in successive recruitment campaigns without being identified or addressed, this may indicate a systemic failure in the provider's risk management processes. In such cases, the OfS is more likely to determine that this risk is not being effectively identified and addressed.
24. For the avoidance of doubt, while the other elements of this condition identify particular steps that a provider must take as part of meeting its overarching obligation, the OfS may also identify breach or risk of breach of the condition, and take enforcement action, based on an assessment of compliance with this overarching obligation itself.

### **Condition E8.7 – E8.8: Comprehensive source of information**

25. A provider must identify the policies, procedures and other provisions that are required to effectively identify and address risks to the interests of students and taxpayers posed by its relevant subcontractual arrangements. Some specific requirements are set out in the Minimum Content Requirements in Annex 1 to condition E8, but this is not an exhaustive list. When determining the appropriate policies, procedures and other provisions for a particular subcontractual arrangement, the lead provider should consider the specific context in which delivery will take place, rather than only the minimum content requirements set out in Annex 1 to condition E8.
26. When the provider has determined the necessary policies, procedures and other provisions, it should document these clearly in a comprehensive source of information (CSol).
27. The OfS does not require a provider to regularly share its CSol with the OfS or publish it as a matter of course. However, a provider must maintain it and be prepared to share it with OfS on request. The OfS may use its normal approach to require a provider to provide such information.
28. A provider must retain historical versions of its CSol for a minimum of five years. This ensures that the OfS can review the oversight and control arrangements that were in place at the time

of an event of a concern arising from a period where a previous version of the CSol was in place.

29. Some relevant policies, procedures and other provisions may be embedded in documents with a wider purpose. For example, a provider's procurement or new contract engagement policy may set out controls relevant to all contracts over a certain size, rather than only those relevant to subcontractual arrangements. In such cases, the CSol may serve as a summary document that references these broader policies. Where this approach is taken, we expect the provider to ensure it is clear how each referenced policy applies to its subcontractual provision. Beyond this requirement, the format and structure of the CSol is for each provider to determine.
30. In assessing whether a provider has satisfied the requirements of E8.7 – E8.9, the OfS will consider whether the CSol meets the minimum content requirements and content principles. The OfS may also then consider whether the provider is operating in accordance with its CSol as required by condition E.10; further information about this assessment is set out below.

### **Condition E 8.9: Minimum content requirements**

31. The requirements set out in Annex 1 to condition E8, represent the minimum content that each provider must include in its CSol. In addition, a provider is required to exercise judgement in determining whether other policies, procedures or provisions are necessary to effectively manage risks to the interests of students and taxpayers relevant to its particular context. If additional arrangements are needed, the provider must document these in its CSol.
32. If the OfS decides to assess whether a provider's CSol meets the minimum content requirements, the OfS may consider whether the content of the CSol includes the content set out in the minimum content requirements and whether that content is appropriate for the provider's relevant subcontractual arrangements.
33. For example, the OfS would be unlikely to consider that a generic complaints policy, intended for students taught directly by the provider, and lacking specific provisions for subcontracted delivery, adequately demonstrates effective complaints management in a subcontractual arrangement. In particular, the OfS would likely to be concerned where a policy does not address how data about complaints is incorporated into the provider's contract management process and key performance indicators (KPIs) for a delivery partner, or how complaints are shared and escalated between the lead provider and delivery partner.
34. In Annex 1 to condition E8, the minimum content requirements are set out in the following categories:
  - a. Rationale
  - b. New arrangements
  - c. Governing body oversight
  - d. Policies and procedures
35. More guidance on each of these categories is set out below.

## Rationale

36. The CSol must set out the provider's overall rationale for entering into subcontractual arrangements. It is important that a lead provider has a clear strategic rationale for entering into subcontractual arrangements that fits with its vision and strategic intent. This must be set out within the CSol and be consistent with the rationale published in disclosures in its audited financial statements (see Regulatory advice 9).<sup>2</sup> The OfS expects this rationale to explain the benefits that the lead provider is expecting to flow from its subcontractual arrangements, including the benefits for current and future students.

## New arrangements

37. The CSol must clearly explain the strategic rationale for intended new partnerships and how the provider will demonstrate that appropriate due diligence requirements and procurement or new contract engagement processes have been followed.

38. To do this, the CSol must explain how the provider will determine whether a potential new partnership aligns with its overall strategic objectives. This is likely to include an explanation of the strategic decision-making process that will take place; an explanation of how a new partnership would support the provider's wider strategy, including consideration of benefits and risks to students.

39. The CSol must also include a description of the provider's procurement or new contract engagement process. This includes how its approach aligns with the provider's policies that identify and manage risk in relation to its subcontractual arrangements and any relevant legal or regulatory requirements. A provider may draw on its existing procurement or new contract engagement policies and procedures where these are appropriately adapted to reflect the specific risks and responsibilities associated with subcontractual provision. 'Procurement or new contract engagement' is used here as a term to describe the process by which providers identify, assess and contract with potential delivery partners. We acknowledge that providers may have different terms for this process.

40. A lead provider continues to hold responsibility for regulatory compliance in relation to its subcontractual arrangements, including in relation to the quality of courses delivered by partners. The OfS therefore requires a provider's consideration of potential new arrangements to ensure that the lead provider will be able to continue to meet its regulatory responsibilities with respect to delivery of courses by its partner.

## Governing body oversight

41. The CSol must include documents setting out how a provider's governing body will maintain effective oversight of subcontractual arrangements. A governing body must have a clear understanding of how the provider's particular subcontractual arrangements support its strategic approach, and how it will meet, and continue to meet, its regulatory obligations in relation to this provision.

42. Each provider should determine whether oversight is best delivered directly by its governing body, or by a relevant committee, and how accountability for these issues is to be managed on a day-to-day basis by the provider's leadership team. However, the governing body retains

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<sup>2</sup> OfS, '[Regulatory advice 9: Accounts direction](#)'.

responsibility for the provider's subcontractual activity and the OfS expects the governing body to be properly engaged on arrangements that represent risks to students or taxpayers. A provider's oversight arrangements must be clearly set out in its CSol.

43. A provider may wish to set out how the particular risks for its relevant subcontractual arrangements are integrated into its general approach to identifying and managing risk.
44. The governing body also has a role to test the lead provider's internal controls and risk management that are used to control their partners' delivery. Normally, this would be delivered via an internal audit function and overseen by a risk and audit committee of a provider's governing body. We accept that some providers (especially smaller providers) may not have a risk and audit committee and may have established a different arrangement to undertake these duties as part of the governing body. Providers will be familiar with our expectations around disclosures related to internal controls set out in Regulatory advice 9 under 'Statement of Internal Controls'.

### **Policies and procedures**

45. The CSol must include the provider's policies and procedures to control and manage its relevant subcontractual arrangements.
46. A provider may have existing policies and procedures that address some or all minimum content requirements in condition E8. Where this is the case, these documents should be referenced in the CSol, with a clear explanation of how existing policies apply to the provider's subcontractual arrangements and identifying the relevant sections.
47. There may be several appropriate mechanisms for a provider to verify the information or data held by its delivery partner. A non-exhaustive list of examples is included in the condition (onsite visit inspections, student interviews, assessment sampling). It is for the provider to determine which mechanisms are appropriate to effectively manage risks to students and taxpayers. For the avoidance of doubt, we expect these verification methods to go above and beyond relying on information or activity provided by the delivery partner.
48. A provider's approved student protection plan (SPP) should already include measures for protecting the interests of students in the event of the failure of a delivery partner. Where this is the case, the provider must clearly set out in its CSol:
  - a. How the SPP will be implemented specifically for students taught at each of its subcontractual partners. For example, this may include plans for the lead provider to take over course delivery directly, or to transfer students to a suitable alternative course delivered by another provider.
  - b. Any additional or tailored arrangements that would apply in such scenarios
49. When setting out how it will protect the interests of students in the event of poor performance by a delivery partner, a lead provider should take a broad interpretation of 'poor performance', beyond performance that may be expressed in contractual KPIs or other formal metrics. In this context 'poor performance' should be defined sufficiently broadly to include performance by a delivery partner that introduces risk to students and/or taxpayers. A provider should consider



risks to students and taxpayers, included but not limited to those set out in Box A above and explain how it would:

- a. Identify when such risks are crystallising or are likely to do so, and ensure that performance monitoring and metrics can identify these issues with a delivery partner's performance.
- b. Intervene where necessary to protect the interests of students and taxpayers, including setting out the tests it would use to identify situations in which escalation of a concern is needed within the lead provider and the range of remedial actions that could be taken.
- c. Escalate concerns and take action where necessary, including the steps the provider will take if a delivery partner fails to act or takes insufficient action to address concerns.

### **Adaptability**

50. The primary purpose of the CSol is to ensure a provider is effectively identifying and addressing risks to the interests of students and taxpayers arising from its relevant subcontractual arrangements. The OfS recognises that these risks may evolve over time, particularly where new subcontractual arrangements are introduced or where there is a significant increase in the number of students studying in relevant subcontractual arrangements.

51. A provider must therefore explain in its CSol how it keeps its policies and procedures under regular review and how these are adapted in response to changes, including to the scale or nature of its subcontractual provision.

### **Condition E8.10 – E8.12: Operation in accordance with the comprehensive source of information**

52. A provider must operate in accordance with its CSol. The CSol will contain the policies, procedures and other provisions required to effectively identify and address risks to the interests of students and taxpayers posed by its relevant subcontractual arrangements. Operating in accordance with the CSol should therefore have the effect that a provider effectively identifies and addresses such risks. It is for a provider to determine how to achieve this.

53. The OfS would expect to see the provisions in a provider's CSol reflected in individual contracts with delivery partners. Not all content from the CSol needs to be explicitly included in each contract, but contracts must be capable of being implemented in a way that supports compliance with the CSol.

54. The OfS does not intend to routinely approve or review individual contracts between subcontractual delivery partners, but may require such contracts to be submitted. A lead provider remains responsible for ensuring contractual terms and conditions do not conflict with compliance with its regulatory responsibilities, including but not limited to those in condition E8.

55. In assessing whether a provider is operating in accordance with its CSol, the OfS may also consider whether a provider responds promptly to the OfS's request for information. For example, if a provider's CSol states that the lead provider must have access to student data held by a delivery provider within 48 hours, and the lead provider has been unable to retrieve

that data and share it with the OfS within a week, this may indicate that the lead provider's arrangements are not working effectively and as designed in practice.

56. The OfS may also consider regulatory information and intelligence it holds about the provider. A more detailed list of this information is included at paragraph 70.
57. Condition E8.12 requires a provider to have the capacity and resources necessary to operate in accordance with the CSol. Each provider is responsible for determining its approach to meeting this requirement.
58. Where the OfS decides to assess whether E8.12 has been satisfied, it may consider the scale and nature of the provider's subcontractual arrangements, the risks to students and taxpayers, and the scale and nature of controls set out in the provider's CSol. The OfS may also consider regulatory information and intelligence it holds about the provider. More detail about regulatory information we may consider is included at paragraph 70. The OfS may use this information as it considers whether the CSol is deliverable in practice with the capacity and resources assigned to it.

### **Condition E8.13 – E8.17: Subcontractual arrangement direction**

59. For the purposes of condition E8.13, the OfS may determine that it has 'reasonable grounds' to suspect significant risks to the interests of students and/or taxpayers on the basis of regulatory intelligence (for example, with reference to the source, scale or nature of the intelligence). This includes circumstances in which the OfS has not opened or completed an investigation.

### **Imposing a direction**

60. Risks identified by the OfS could be 'significant' even where the relevant subcontractual provision is a small proportion of the provider's overall provision. For example, if a provider delivers education to 90 students through a delivery partner and directly to 3,000 students, risks relating to those 90 students may still be considered 'significant' depending on the circumstances, even though a relatively small proportion of the provider's overall students may have been affected.
61. When assessing whether a risk is significant in this context, the OfS may consider both the likelihood of a risk crystallising and the potential impact on students and taxpayers if it does. A risk that is likely to crystallise with a significant impact on students and taxpayers, is likely to be considered significant. Conversely, a risk that is unlikely to crystallise and/or would have only a limited impact on students and taxpayers, is less likely to be considered significant.
62. Condition E8.1 sets out that the OfS may bring a provider into scope of condition E8 when it has reasonable grounds to suspect that the relevant subcontractual arrangements pose 'material' risks to the interests of students and/or taxpayers. When considering whether to impose a Direction, the OfS will consider if the risks are 'significant'. 'Significant' risks are more severe and/or likely than 'material' risks.
63. 'Material' risks are those that the OfS considers serious enough that it is appropriate to impose the requirements set out in this condition to mitigate them, even if the student numbers concerned fall below 100. 'Significant' risks are those that the OfS considers serious enough that it is appropriate to require further action, beyond that already set out in the condition, to mitigate them.

64. A significant risk may arise in relation to a one-off event that is significant in its own right (for example, relating to the potential failure of a delivery partner, or an inability to teach courses as planned, or teaching significantly falling below the OfS's quality requirements). A significant risk may also arise in relation to a collection of multiple, repeated, or widespread failings (for example, evidence that student academic misconduct is happening regularly).
65. In considering whether to impose a subcontractual arrangement direction, the OfS will consider all relevant factors and would expect to place particular weight on the importance of protecting the interests of current and future students and taxpayers.

### **Content of a direction**

66. The OfS would expect to determine the content of a direction to be imposed on an individual provider in the context of the circumstances at the relevant time. A direction may include the actions set out in condition E8.14. In addition, the following is an illustrative, non-exhaustive list of further actions the OfS may consider requiring a provider to take:
- a. taking specified steps to improve the quality or standards of its existing **relevant subcontractual courses**
  - b. conducting unannounced visits to the premises of a delivery provider with an existing **relevant subcontractual arrangement**
  - c. arranging for completion of an independent audit of the activity of a delivery provider with an existing **relevant subcontractual arrangement**
  - d. arranging for completion of an independent audit of the lead provider's own mechanisms for maintaining control and oversight of the activity of delivery providers in its existing **relevant subcontractual arrangements**
  - e. taking specified steps to increase the lead provider's involvement in admissions decisions for individual students applying to join an existing **relevant subcontractual course**, for example, increasing the proportion of a delivery provider's decisions that are checked by the lead provider or making changes to how such decisions are selected for the lead provider to check
  - f. taking specified steps to manage perceived or actual **conflicts of interests** in relation to **relevant subcontractual arrangements**
  - g. publishing specified information about existing **relevant subcontractual arrangements**
  - h. taking specified steps to conduct due diligence on potential delivery providers before entering into a new **relevant subcontractual arrangement**
  - i. taking specified steps to manage poor performance in an existing **relevant subcontractual arrangements** by a delivery provider.
67. When considering whether to vary or revoke a subcontractual arrangement direction, the OfS may consider whether the significant risk it had identified has been appropriately controlled or mitigated.

68. For the avoidance of doubt, any type of a direction imposed under condition E8 may be issued to a provider in any written form or manner, including by notifying a provider electronically.
69. If the OfS judges it appropriate, it may decide to publish information about that direction, including that it has been imposed and the requirements it places on the provider. More information about the approach the OfS will take to the publication of information about a provider is set out in Regulatory advice 21.

### **Assessment – regulatory information and intelligence**

70. When making assessments about several aspects of this condition, the OfS may consider regulatory information and intelligence it holds about the provider. This may include, but is not limited to:
- a. third party notifications
  - b. reportable events
  - c. the outcomes of any OfS investigation or improvement work with the provider
  - d. any OfS quality assessment
  - e. any OfS data audit
  - f. information received from other regulatory or relevant public bodies.