INSTITUTION OVERBOARD

Managing the Risk of Disorderly Market Exit in English Higher Education

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July 2024

Public First is a global strategic consultancy that works to help organisations better understand public opinion, analyse economic trends, and craft new policy proposals.

Public First Ltd, 20 Victoria Street, London, SW1H 0NB
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Finally, thanks to fellow HE enthusiasts at Wonkhe and Times Higher Education for having written a number of very useful longreads and policy articles which we have shamelessly taken from.

All errors of fact, as they say, remain our own (and errors of judgement and opinion are always our own....)

Jonathan Simons and Jess Lister
Public First
July 2024

Foreword

As Vice-Chancellor and President of the University of Warwick, I am pleased to be able to contribute this foreword. A strong and diverse higher education sector is critical to Warwick's future success, and it is in that spirit that we have sponsored this paper - as part of a wider contribution to the debate about the future of the higher education sector.

That the UK's higher education sector faces significant financial challenges will come as no surprise to anyone reading this.

In principle, the potential 'market exit' of a higher education institution is a feature, not a bug of the current regulatory framework. In practice, exit - orderly or otherwise - of an institution from the sector has not been adequately prepared or planned for. Action is required to both protect students and to ensure that the reputation of the higher education sector is safeguarded.

Disorderly exit also risks wider systemic issues: the collapse of one institution will lead to doubt about the future of others. This risks contagion as international students are dissuaded from applying to UK institutions. To re-frame: the disorderly exit of just one institution threatens us all.

The authors of this paper are clear eyed about the scale of the challenges that face the sector, including the limits of the current legislative framework. The paper does not call for an increase in the tuition fee, though a modest increase may be required to stabilise some institutions. The paper assumes instead that there will not be a significant increase in the tuition fee, and that international student recruitment will remain challenging or more difficult in the coming years.

What we have now does not provide sufficient protection to the students who trust us with their futures. With the benefit of hindsight, the regulator, the Office for Students, was set up with too little emphasis on financial sustainability. The creation of a new function – a Higher Education Commissioner within the DfE – is needed to oversee financial sustainability. The purpose of this new function would be to investigate instances of financial vulnerability within the sector, enabling earlier intervention than is currently possible.

The paper provides further recommendations, mostly to the new Government, as to how these challenges might be addressed, including the creation of the Higher Education Enhancement and Transformation Scheme, a loan backed fund for institutions that are able to bring forward a compelling case to restructure their university so they may deliver sustainable and high quality provision. The paper additionally envisages the creation of a new Special Administration Regime, where the transformation scheme is insufficient.

These recommendations will help stabilise the higher education sector in England, but it will be obvious to anyone thinking earnestly about the issue that there are also a wider set of medium- and longer-term issues to address. Some have described this as a "crisis," but I am hesitant to use that word. It is true that difficult and important decisions need to be made at some universities and at the sector level, but these are challenges that can and should be addressed. It cannot be the case that our sector, with its prodigious wealth of talent, is unable to find a way through.

It is true that the current model of student finance in England has led to significant growth in the number of students able to study at university. This is a significant achievement that should be welcomed. But the economic engine that has driven this growth is now brittle, dependent on international student recruitment and programmes that appeal to ephemeral demands.

This engine, too, has led to the creeping homogenisation of the sector. This cannot and will not be sustained in the context of international competition for students and rising geopolitical tensions. Over time, both will have an impact on the number of international students who choose the UK as their destination of choice.

The UK's offer to international students remains compelling. For example, the University of Warwick continues to attract international students from all over the world. In part, this is driven by our reputation for graduate employability – we are the 6th most targeted university in the UK by the UK's top 100 graduate employers. But we need to be clear eyed about the future. Student recruitment will continue to get more competitive, and not every UK university will be able to sustain, let alone grow, current levels of international student recruitment.

There are those who suggest we can simply tinker with the current model. It is suggested that by making the current, already arcane, system of student finance more complex still, that issues of financial sustainability will disappear. I am unconvinced. Both because each change introduces a new distortion, and because tinkering does nothing to address public or political support for the loans backed system.

Do we really think that the current system, with its high overall costs, its lack of resilience, its insufficient recognition of the contribution that institutions make to the public good is unimprovable? New thinking is required to build widespread public and political support for a tertiary education that incorporates both further and higher education.

In the last few weeks, I have watched as thousands of our graduates have completed their studies and gone on to bright and brilliant futures. It is a special time of year, and offers complete vindication of all the work and effort that our staff and students put in. More work is now required to increase the resilience of this wonderful sector, to safeguard it so that future generations can enjoy the benefits of an education that I and millions of others have benefitted from.

We should take our time when discussing reform. The issues are complex, and the ecosystem is far more fragile than it appears. The recommendations in this paper are intended to buy the time to have that conversation. I hope that this is a useful contribution to the debate, and that it provokes further discussion about the future of one of the UK's leading sectors.

Professor Stuart Croft DL
Vice-Chancellor and President of the University of Warwick

Executive Summary

The last decade or more of higher education policy in England has been predicated on the idea that some elements of a market in HE should exist. There are 3 main elements to this: (i) students / graduates pay some or all of the cost (as opposed to the state); (ii) students / learners are a central focus of policy and regulation; (iii) student choice and competition is the determinant of activity. This is sometimes summarised as "students being at the heart of the system".

It is a core underlying premise of the system that institutions should compete for students, who should have choice (and pay, supported by loans); there should be space for new entrants to enter; and exit of poor providers if needed is a necessary and positive thing.

But consideration of failure has been premised on an individual level - where each year, a handful of institutions may experience a level of financial distress which needs to be managed, and an implicit assumption that the worst case scenario is a relatively small institution undergoing formal closure / merger. The system is not built to deal with either widespread failure, or the systemic problems which flow from it, and which are currently undervalued within the protective framework. There is hence no playbook for how to manage institutional failure at scale (multiple institutions or even one large institution) or failure in a disorderly way.

Given the current political and economic environment, the absence of a plan in current legislation or policy is leading to an unsustainable level of uncertainty within the sector, and for students, and government.

This paper sets out to:

- Briefly summarise why this has become a top of mind policy question - rather than an abstract possibility (chapter 1)
- Set out what the impact of "disorderly market exit" without government intervention or oversight might mean (chapter 2)
- Sketch out what a potential proactive approach could look like to pre-empt the need for exit, and what the tests for government should be as it considers these (chapter 3)
- Suggests a potential route for a new regime for "orderly" exit if it becomes necessary (chapter 4)
- Considers the legislative action and broader political action needed (chapter 5)

The paper calls for a generally more proactive approach towards active risk management, and specifically calls for the introduction of a three step process to hopefully preempt exit, or to manage it in a more orderly way if it does occur:

Stage 1:

A rebalancing of the role of the OfS such that it can take a more proactive approach to not just forecasting financial risk, but addressing it. This should be underpinned by a new statutory direction from the Secretary of State. Specifically, the new statutory guidance should direct that the requirement under HERA for the OfS have "*regard to the benefits for students and employers resulting from collaboration between such providers"* should be the regulatory priority over the next few years, over "*the need to encourage competition between English higher education providers*". This means that the OfS is considering its regulatory activity that it should prioritise collaboration and continuation of provision of the sector, and seek to more actively address the risks that extend beyond students and individual institutions. Within this new approach, Student Protection Plans should also be strengthened.

Stage 2:

The creation of a new Higher Education Commissioner and team – directly within the DfE, to act as the primary liaison between the sector and the regulator, with a view to overseeing financial sustainability and efficient engagement in future. It would be the duty of the HE Commissioner and team to investigate instances of financial vulnerability in the sector, whether identified by the institution itself or by the regulator.

Also within Stage 2, the creation of the Higher Education Enhancement and Transformation Scheme (HEEATS) worth between £2bn and £2.5bn over the Parliament, to offer loans to institutions that can make a compelling case for restructuring their university such as to deliver a more sustainable and high quality provision – thus pre-empting either exit or forced closure of provision where that is not in response to student demand. The paper posits six 'tests' which universities would have to meet: what their plan is for economic growth in the region; how place and community will be protected; what the impact will be on public service training; the future flow of graduate labour in the region; protection of scientific assets and the research base; and protection of academic specialisms where needed.

Stage 3:

A creation of a new Special Administration Regime, modelled on that which exists in Further Education and other critical national sectors such as railways. This would allow for a more orderly form of exit should restructuring not be possible or effective, and would allow for protection for students and other national public assets under the law, in advance of a more orderly wind-down.

The paper considers, but does not endorse, other interventions. It recognises that the current freeze on tuition fees, and a more unstable environment for international students, is putting the sector under greater financial pressure, but decisions on funding levels and fees are out of scope. The paper also rejects a possible "backstop" where local institutions are mandated to take existing students if an institution closes – on the grounds that sufficient spare capacity cannot reasonably be held in perpetuity in the system, and that unlike in the utilities market, customers / students cannot be seamlessly switched between providers.

The paper also considers - briefly - the potential impact on the classification of universities into the public sector, should further government intervention be taken. This is, unhelpfully, not a topic on which there are firm criteria set out by the ONS, nor is there a binary state on one side of which sits institutions in the public sector, and on the other side sits other definitions. We recognise the risk to the sector of a reclassification. But on balance, given the way in which interventions have been suggested, and recognising that there is little firm criteria on which to take a judgement, we still see the case for such interventions.

The reason that the paper calls for this approach is not because we argue that the current system must remain exactly as it does now, nor that it should not evolve in response to student (and economic, and wider social) demand. Successive governments and regulators have been right when they have prioritised university autonomy, which includes the right and indeed responsibility of institutions to manage their own offerings, including growing and shrinking.

But the reason that disorderly exit is particularly worrying is threefold:

- **Firstly, because it is clear that disorderly exit insufficiently protects students**. Student Protection Plans, and even the more interventionist Student Protection Directions, have no force in law. Should an institution enter administration or

liquidation, students have no additional rights above other creditors. This is wholly unsatisfactory.

- **Secondly, because disorderly exit does not limit itself to one institution**. There is a knock on effect geographically around that institution, and to the wider ecosystem of teaching and research which is strategically important to the UK, culturally and socially and economically. And there is a huge risk of contagion – to student behaviour, staff behaviour, lender behaviour – and most importantly in the current financial model, it could deter international students from the UK as a market to study.

- **And thirdly, because exit (or even actions made in advance of exit) of one or more institutions can have a knock on effect**, given the inter-related nature of higher education. The aggregate impact of the many discrete decisions individual autonomous institutions are making, may over time reduce student choice: in some subject areas, or in some regions, or for some types of students; and the impact on the research infrastructure and support for businesses is also likely to be impacted more than through just one exit.

In other words, failure of one institution is bad for students and staff at that one institution, but can also lead to a *systemic* impact, through spread of financial risk, the loss of specific provision across the country, and the loss of spillover benefits to localities around universities associated with research and civic mission.

Government, policymakers and indeed all citizens benefit from a financially sustainable HE system that delivers both individual benefit, and wider national goals for the country. Changes in provider shape and size are acceptable - and even to be welcomed when they come in respond to student demand, but they need to be managed in a strategic way, and the systemic impact constantly monitored.

Chapter 1: Why has this become such an issue?

In its recent report on the financial position of the English higher education sector[1], the Office for Students (henceforth OfS) set out five main drivers for the increasing financial vulnerability:

1. Continuing decline in the real-terms value of income from UK undergraduates combined with inflationary and economic pressures on operating costs and the costs of developing buildings and facilities, as well as increasing employer contributions to some pension schemes.
2. A recent apparent reduction in UK and international applications after years of strong growth, especially from international students.
3. A higher education financial model that has become reliant on fee income from international students, with a particular vulnerability where recruitment is predominantly from a single country.
4. The affordability of necessary estate maintenance and development and the significant cost of investment needed to reduce carbon emissions as part of providers' commitments to achieve net zero.
5. Cost of living difficulties for students and staff, which challenge both student recruitment and the support needed by students during their time in higher education.

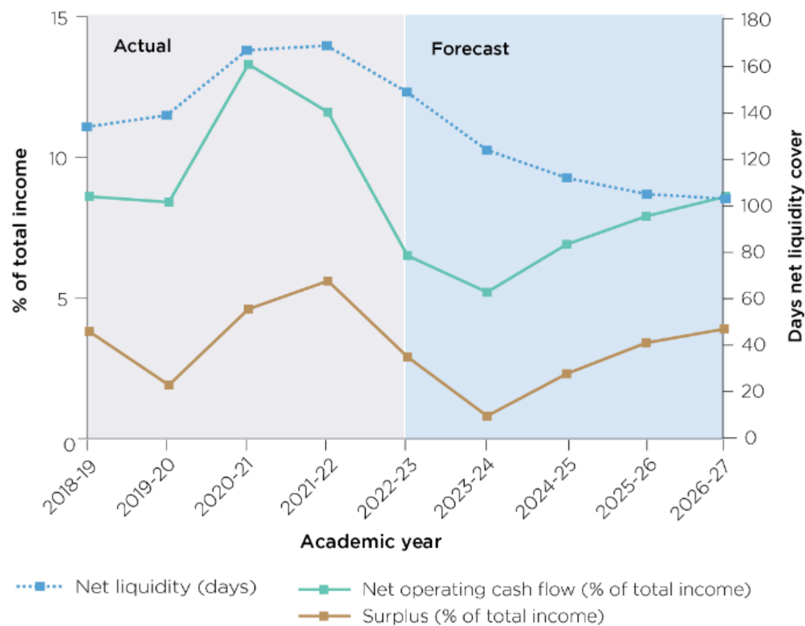
And this perspective doesn't even take account of real terms reduction in unit funding for other activities, particularly research.

A sustained increase in costs, together with declining real terms domestic income and more recent falls in international income, would lead to challenges for any sector, however robust their starting position.

[1] Office for Students, "Financial sustainability of higher education providers in England" https://www.officeforstudents.org.uk/media/ly1buqlj/financial-sustainability-report2024.pdf

The question that has moved from discussions among university finance directors, to wider sector conversations including between vice chancellors, to the front pages of mainstream print media and broadcast discussion and national political commentary, is what the consequences of this might be if there isn't a change. And specifically, whether England might see what is termed a "market exit" – or in layperson's terms, a university reaching financial unviability and 'going bust'.

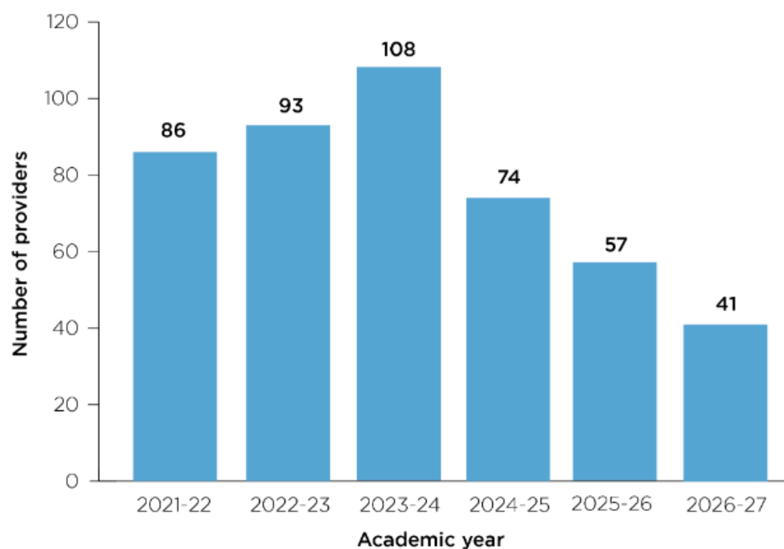
The wider OfS analysis provides some broader context for the financial headwinds of the sector. The graph below from the OfS summary[2] shows that net operating cash flow – that is, the difference between cash income and cash expenditure (green line) – has fallen from 11.6% of income in 2021-22 to 6.5% in 2022-23. Overall surplus levels – that is, income over costs when accounted for on a serviced level, as opposed to in cash (brown line) have fallen from 5.6% in 2021-22 to 2.9% in 2022-23. 2023-24 is projected to become even tighter.



The graph below shows the number of institutions recording deficits – 93 in the year of reporting for this data, 2022-23, projected to rise to 108 by 2023-24. More than 40% are in

[2] Office for Students Insight Brief, "Navigating financial challenges in higher education"
https://www.officeforstudents.org.uk/media/kegazm0o/insight-brief-21-financial-challeges.pdf

deficit for 2022-23 last year, with the OfS projecting up to 80% could be in deficit under a reasonable worst case scenario in 2027.



These sector averages mark increasing heterogeneity within the sector, between institutions that are relatively more and less robust. And leadership and management of institutions can be a contributing factor to an institution's financial strength. But all institutions are feeling under increasing financial pressure.

Both graphs above show an increase in financial resilience from 2024-25 onwards. But there are three very important caveats to this projected recovery.

- Firstly, in aggregate, OfS observes that universities and colleges predict that their financial performance will become weaker still in the short term, before making a slower recovery than previously expected towards 2027-28.
- Secondly, as noted, averages do not tell the whole story. There could well be increasing difficulty in some institutions, even as the average performance improves.
- And thirdly, and most importantly, a lot of the increase is based on what OfS coyly describe as *"plans to increase student recruitment significantly. In our view, based on the latest trends in recruitment, these plans are likely to be unrealistic for many institutions".*

We are already seeing the impacts of financial retrenchment. At time of writing, the UCU branch of Queen Mary University's list of universities making announcements of redundancies and course closures[3] records over 64 institutional announcements (though these vary a lot in size and scope). The OfS also notes increased conversations around mergers between institutions, mostly but not wholly focused on shared services:

> *"Providers reported that mergers are becoming an increasing part of conversations about financial sustainability. Discussions included the potential efficiencies if providers in close geographical proximity could use a shared services approach, with functions such as finance, human resources and IT being operated from a central hub. Providers also suggested that merger objectives could vary; focusing on diversifying provision, merging local providers or seeking economies of scale from similar but geographically spread providers".*[4]

Does this matter? Ought we see mergers, or exits, as a perfectly natural (albeit difficult for individuals involved in such scenarios) occurrence in a market? To some extent, yes. Most current UK universities are the product of a continual process of merger and integration: one can think about the gradual merger of art and design, teacher training and nursing schools into universities over the last century, or the activities within many post-92 universities in the recent past. This paper, and the authors, do not argue for the current system to be preserved in aspic, nor that the current size and shape of the sector is perfect in terms of financial efficiency and responding to student and wider social and economic needs.

But neither is it as simple to say that if a change in student numbers leads to exit, then so be it. As the OfS, again, puts it:

> *"At an aggregate level, the steps providers take to address financial risks could affect the size, shape and reputation – both national and international – of the English higher education sector. In the longer term, sustained reductions in income to higher education providers and their ability to invest may have a significant impact. It will be important to recognise where this results in:*
>
> - *significant rationalisation of courses that are not financially sustainable, which reduces the breadth and depth of academic provision available to students.*
> - *consolidation of courses and providers, as well as potential market exits, which reduces the range and diversity of providers and limits student choice.*

[3] "UK HE shrinking" https://qmucu.org/qmul-transformation/uk-he-shrinking/
[4] OfS, "Financial sustainability of higher education providers in England", op cit, page 50

- *reduction of providers' research activities, particularly research they fund, which has an impact on system-wide research capacity and innovation.*
- *reduction in the extent to which providers can contribute to local and national economies"[5].*

In other words, the rational interests of an individual institution, responding to student demand, may create a negative outcome for future students, and the UK, at an aggregate level. Everyone loses out if there is less student choice, particularly as not all students are geographically mobile, and because certain universities have higher entry requirements than others. If it becomes increasingly difficult to study archaeology, say, at any institution that is not a high tariff institution that can sustain lower demand because of its world leading research in this area, then this hampers many prospective future students of archaeology.

And the spillover benefits – whether in terms of research capacity, or local and national economic and social benefit – are also lost. Universities are a classic example of public goods, where simply measuring private costs and benefits would lead to an undersupply of socially and economically worthwhile outputs.

That is why, ultimately, there is a regulator for HE – and one that is specifically aimed at students' interests. Regulation exists in civil society so that government is able to ensure that where a market does not or cannot meet the interests of citizens, the state is able to. This is especially important in cases of power imbalance, which exists between students and institutions, and given students are primarily young people, they are deemed as vulnerable in legal terms (young is up to 24 in the eyes of the Charity Commission).

This is not, again, a case for propping up universities when they are not responding to demand in the hypothetical collective student interest. But it is a case for thinking more broadly than simply institutions responding to student demand, in a context of diminishing income. The state benefits from universities over and above graduate numbers – whether that's through research and development, business and industrial knowledge exchange, or the production of public sector workers. The collective value-add of the HE sector, measured purely in economic terms (ie not even taking account of life changing graduate status for many), is into the hundreds of billions, and supports hundreds of thousands of jobs[6].

[5] OfS, "Financial sustainability of higher education providers in England", op cit, page 12
[6] Universities UK, "The impact of the higher education sector on the UK economy" May 2024 https://www.universitiesuk.ac.uk/what-we-do/policy-and-research/publications/impact-higher-education-sector-uk

That's why the current funding system seeks contributions from the individual and the state. Moving wholly to a state funded model is not sustainable. But neither is making decisions on provision purely on the decisions of individuals.

It is also worth noting that there is some public concern about a hypothetical case of university exit. Polling for the UCU, by Savanta, found recently that 81% of Labour supporters and 77% of Conservatives said it was "important" or "very important" that the next government take action to support any university at risk of closure because of financial issues, "including providing emergency funding."[7] Other extensive public opinion work by The Policy Institute at King's College London finds that universities ranked low as an issue in the voting intention for the recent 2024 General Election and low level awareness of universities' financial position; but when asked how they'd feel about "widespread closures of UK universities because of funding challenges" (the authors' term, not elaborated to poll respondents), 68% of people say they'd be worried, with 61% likely to blame the UK government in such a scenario (76% of those who voted in Labour in 2019 say the government would be most to blame, while 44% of Conservative voters also hold this view.)[8]

This is why the discussion about possible market exit is important, and why it is worth thinking through the consequences.

Market exit is, however, by no means unprecedented. As a non-exhaustive list, in the last five or six years the English system has seen:

- Heythrop College, previously part of University of London, closing in 2018
- The closure of Greenwich School of Management in 2019
- The closure of the Academy of Live and Recorded Arts (ALRA), with students transferring to Rose Bruford College, in 2022
- The merger of Writtle College with Anglia Ruskin University in 2024

This list is limited to what we might call "major UK public providers", to use the term of Stephen Hunt and Vikki Boliver, two academics who have studied market exit in higher education. (Although GSM itself was private, it taught several thousand publicly funded students via its validating arrangement with Plymouth). If one thinks more broadly about the

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[7] Times Higher Education, "Voters back using public money to bail out UK universities", June 2024 https://www.timeshighereducation.com/news/voters-back-using-public-money-bail-out-uk-universities-poll

[8] The Policy Institute, "High esteem, low priority? Perceptions of UK universities and their importance in deciding the general election" June 2024 https://www.kcl.ac.uk/policy-institute/assets/high-esteem-low-priority-uk-universities-and-the-election.pdf

UK higher education sector, change is far more commonplace. Hunt and Boliver show between 1995/1996 and 2016/2017, there were 49 higher education institution mergers in the UK (35 in England) and in the private HE market, of the 732 private HE providers identified as operating in the UK in 2014, 198 had ceased to operate by 2019, representing 27% of the total 2014 population of private providers[9].

What this also shows is that historically, there has been a difference in the way that government and policymakers view "public" universities and "private" universities (the quotation marks reflecting the blurred edges between these two categories in practice), with the Higher Education Funding Council for England (HEFCE) and the University Grants Committee (UGC) as the OfS' predecessors being more concerned to intervene and support the former.

In 1987, the Department for Education and the UGC made an intervention into University College Cardiff via paying down debt to allow it to merge with University of Wales Institute of Technology, to form Cardiff University.[10] This intervention ran counter to the political instincts of Margaret Thatcher's administration, where advocates for the closure of institutions as an example of the importance of financial management would have had a much stronger voice. And most recently, if one examines the financial difficulties around London Metropolitan University in the late 2000s and early 2010s, HEFCE took a conscious decision to continue the institution's provision[11], even though it explicitly considered closure as an option.[12] Similar considerations were made around supporting Gloucestershire and Cumbria[13] universities, and the 2010 merger of Leeds College of Music into Leeds City College (an example of HE/FE merger which resulted in loss of degree awarding powers for the conservatoire, later then validated by the University of Hull). In all these cases. HEFCE put an observer on the board, made loans, and engineered a change in leadership and governance - a hands-on

[9] Hunt and Boliver, "Private providers and market exit in UK higher education", May 2020 https://link.springer.com/article/10.1007/s10734-020-00546-x

[10] Shattock, "Financial management in universities: the lessons from University College Cardiff" June 2008 https://www.researchgate.net/publication/229444366_Financial_Management_in_Universities_The_Lessons_from_University_College_Cardiff

[11] As described by Professor Gillian Evans in this piece: "Struggling universities will be shut down, not saved – it's not fair for students", Guardian, Feb 2018 https://www.theguardian.com/higher-education-network/2018/feb/05/struggling-universities-will-be-shut-down-not-saved-its-not-fair-for-students

[12] Times Higher Education, "Hefce considered 'nuclear option' over London Met", June 2009 https://www.timeshighereducation.com/news/hefce-considered-nuclear-option-over-london-met/407156.article

[13] Guardian, "Cash crisis puts squeeze on Cumbria", May 2010 https://www.theguardian.com/education/2010/may/04/university-cumbria-cuts-closures-debt

approach from a market regulator. In each case the intervention was based on options analysis that showed the cost of closure to be higher.

The question is whether the OfS would take a similar approach, or a more market focussed one that is more comfortable with greater prevalence of exit in the public sector, either because of tightening circumstances, or because of a fundamentally different approach between OfS and HEFCE.

Certainly, rhetorically the current regulator is a different beast. In 2018, during transition from HEFCE to OfS, the regulator made a small financial loan of £900,000 to an institution in financial difficulty under the transition rules from one regulator to another. The Universities Minister at the time, Sam Gyimah was quoted as saying *"They [i.e. universities] should be responsible for their decisions, they should make sure that if they are borrowing and making their financial plans that they think about the downsides of that as well as all the upsides. That is a very clear message. No bailouts."*[14] Similarly, the recently departed chair of the OfS, Lord Wharton, recently told the House of Lords Committee that *"it is not our role to fix their problems. It is their business and their business model"*[15]

It should be noted, though, that the DfE (also during the time in which the OfS was the regulator, in 2019) allowed GSM London to continue to access public funding despite officials knowing about its financial circumstances, and whilst Ministers were saying no bailouts[16].

But each case is different. And it is therefore possible that a university in 2024 or onwards, facing a situation in which it required additional financial support, would not receive it, even if that led to market exit.

[14] Quoted in this report "Struggling university handed £1m bailout to stay afloat" November 2018 https://inews.co.uk/news/education/struggling-university-handed-bailout-223565

[15] House of Lords Industry and Regulators Committee corrected oral evidence: the work of the Office for Students, evidence from Susan Lapworth, Chief Executive, Office for Students; Lord Wharton of Yarm, Chair, Office for Students, 9 May 2023, Question 130 https://committees.parliament.uk/oralevidence/13124/html/

[16] Times Higher Education, "What would happen if a UK university went bankrupt?" June 2024 https://www.timeshighereducation.com/depth/what-would-happen-if-uk-university-went-bankrupt

Chapter 2: The trouble with disorderly exit

Disorderly exit is defined for the purposes of this paper as a scenario in which one, or a number of institutions, "go bust" - i.e. are no longer financially viable – without much or any advance warning. This is what the OfS defines as *"the unplanned closure of a university, perhaps in the middle of an academic year, without arrangements in place to support students to complete their courses."*

The OfS is primarily concerned with publicly funded institutions (which is not to say that disorderly exit of a private provider would not have a systemic impact, especially if it taught publicly funded students), and is mostly focussed on the risk from what we might, slightly vaguely, call "major institutions" – which is to say, those with large numbers (thousands or more) of students.

Going by all the descriptions of how previously managed institutions in financial difficulty have been handled – including those described in the OfS briefing document around "Financial sustainability and market exit cases"[17] – it is likely that any disorderly exit would follow a period of potentially intensive activity by the regulator, other bodies, and the university itself in order to try and manage its way out of financial difficulty.

But it is also possible that a scenario emerges in which such remedial action isn't sufficient, and there is no nearby institution that wants to, or can be, a "lifeboat" for students. In that case, disorderly exit may occur.

Legally, this is known as insolvency – when an institution (ie a university) cannot pay its debts as they become due.

[17] Office for Students, "Financial sustainability and market exit cases", April 2023
https://www.officeforstudents.org.uk/media/65b55faa-07b7-4d37-b3cdfe416154cc81/financial_sustainability_and_market_exit_cases.pdf

There are three types of ways in which insolvency can occur:

- **Liquidation**: where an institution is closed down. This can happen in one of three ways.
    - A creditors voluntary liquidation: where there is an organised wind down agreed between the institution and its creditors. This would typically take around 4 weeks, and involve a formal liquidator being appointed.
    - A members' voluntary liquidation: similar to the above, which is driven by shareholders / owners of an institution to wind down an asset in an organised way.
    - A compulsory liquidation: something forced by a creditor through a petition to the court, in an effort to recover assets, This would normally take 6-8 weeks from the petition to the court, and the appointment of an Official Receiver to manage the process. This is the most disorderly of all exits.
- **Administration**: a temporary legal status to offer interim protection to an insolvent business. Under administration (which can be triggered by creditors in a petition to the court, or by the institution itself), there is a period of time granted to either save the institution as a going concern, or to begin an orderly wind down/sale of part, before moving to liquidation or dissolution of the remainder of the institution
- **Receivership**: where a fixed charge receiver is appointed over an asset caught by a charge, triggered by the creditors. In effect, a way to trigger compulsory liquidation.

Even more confusingly, which process(es) are available for insolvent HE institutions depends on their own legal structure.

Structure	Available Insolvency Process	Obligations and Risks
Company Limited by Guarantee, or Charitable Incorporated Organisations	Liquidation, Administration or Receivership	Companies Act and Insolvency Act obligations.
Entities incorporated by the Royal Charter	Liquidation or Fixed Charge Receiver	Insolvency Act obligations.
Charitable Trusts, or Unincorporated Associations	No corporate insolvency options	Risk of personal liability.
Statutory corporations	Unclear	Unclear

Importantly, also, it is very possible that disorderly exit – under whatever legal process - would come almost out of the blue for many stakeholders. One of the issues that the OfS discusses is the extent of public discourse that a university should undertake in such a

situation. For example, in the three case studies outlined in the document referred to above, the OfS unsurprisingly made the universities update their Student Protection Plans (and indeed, as discussed in more detail later in the paper, has a power to force a more detailed plan called a Student Protection Direction *"in circumstances where the OfS reasonably considers that there is a material risk that the provider will, or will be required by the operation of law to, fully or substantially cease the provision of higher education in England").* Yet in all of these instances – including ALRA, the only named institution in the three case studies given that its exit has come to fruition – the OfS says:

> *"We did not take a decision to compel the provider to publish its market exit plan but reserved the right to consider this further. We took the view that public statements about a market exit plan and ALRA's financial position would have affected its ability to progress its acquisition and would have increased the likelihood of a disorderly market exit. We considered that the need to minimise the risk in relation to the continuation of study for current students outweighed other factors, such as the interests of prospective students."*[18]

In other words, although current students would have their attention (probably) drawn to an updated Student Protection Plan, such a plan would not have detailed provision for market exit, on the grounds that causing some current students or staff to pre-emptively exit the institution might precipitate the very crisis that the OfS and institution was trying to avoid.

Imagine, therefore, a plausible scenario in which a major public university does exit in a disorderly fashion, and with limited advance notice to many people affected by it. In such a scenario, what would be the impact on various different aspects of a university life? The table below attempts to set out, to the best of our knowledge, the official current position in case of exit with minimal planning.

[18] Office for Students, "Financial sustainability and market exit cases", April 2023 https://www.officeforstudents.org.uk/media/65b55faa-07b7-4d37-b3cdfe416154cc81/financial_sustainability_and_market_exit_cases.pdf, page 21

What is clear from the table is two things:

- **Many of the impacts which we can see, legally, would play out are significantly undesirable.** There are few guarantees for students or staff as relating to monies they are owed, continuity of provision, or access to facilities and a university. In most instances, all of this is trumped by insolvency law which places them all as unsecured creditors.
- **There is no clear answer to some of the questions raised.** In some instances, it seems obvious that the best case scenario would be for all parties to simply agree an ad hoc solution – to students mid-way through an accommodation contract, or for research funds currently in operation which would be best to transfer, or for the OfS to manage the institutional memory of previous degrees awarded and physical records where appropriate. But none of these things are legally guaranteed.

In addition to the immediate impact within the university itself, there are two further, perhaps equally as important consequences to a disorderly exit.

Firstly, there is a question of strategically important or lesser supplied provision disappearing, locally or (less likely) nationally. This could be thought of in three ways:

- **Volume of subject provision shrinking or becoming less accessible, in the case of a closure.** This is likely to be especially the case if such provision is relatively rare, and / or other institutions have been reducing supply of that in the past. For example, access to modern language provision, or specialist high end creative arts provision, or other subjects with lower student demand, but where the aggregate impact is loss of access including for those who do want to study it.

- **Subject provision that has a direct public sector benefit, most commonly in issues such as education, or allied health profession training.** In such an instance, not only do the students and staff involved in such provision lose out, but so too do the recipients of such graduate trained labour. For certain health and social care professions, there is also a risk of strategic provision disappearing, where the number of providers currently offering such training is a handful, and in the case of a single health and social care profession, just one provider.

- **Subjects which have a particular strategic merit for a region, or potentially even nationally.** If a university which trains nuclear engineers, for example, exits the market, then this affects supply. If a university which supports a major domestic industry exits, then that affects that industry, particularly where industry has a very heavy concentration of provision near to the university.

Secondly, none of the impacts below accounts for the wider ripple effects of a disorderly exit. We know, from the various economic analyses commissioned by universities and UUK, that each institution and the sector as a whole has a positive spillover effect in their local area. Universities are often a large employer, a procurer of goods and services for the local economy, and support a significant amount of positive spillover economic growth through the spending power of staff and students.

In extremis, all that is at risk (in an instance where disorderly exit meant no provision at all, physically, in the area where the university was). There is also a contagion risk to other universities, should one exit the market in a disorderly way. Lenders may look more cautiously at lending to other institutions. Students may ask more questions about security over their own provision. Staff may want greater clarity on long term financial health. And perhaps most significantly at all under the current financial model, would-be international students may look elsewhere because of nervousness not just about their preferred UK university, but all potential universities. All of these ripple effects have the potential to cause seismic difficulties in other institutions unaffected directly by the exit of another institution.

All in all, it seems clear from the below that the current status quo – of very minimal protection in the case of a disorderly exit, and potentially significant systemic impact beyond that institution – is not optimal, and efforts should be made to strengthen it as a matter of urgency.

Table 1: Current legal provision in the case of market exit of a Higher Education Institution in England

Category of stakeholder	Specific issue	Procedure
1. Students	1a: Fee refunds	Each university will have a complaints procedure that details the scenarios in which students can and can't have fee repayments. Many have exclusions for particular events (most recently seen in the marking boycott), though the Consumer Rights Act Part 1 potentially gives students some statutory remedies, as consumers, for a breach of contract for the supply of services, in particular the right to repeat performance or (in certain circumstances) a refund, and they may also be able to take a case to the OIA. But in reality, all of this is trumped by a university going into administration or similar, in which students are likely to be given an option for teach out or transfer of their studies, rather than refunds, via their Student Protection Plan. In the case where there was no transfer (because there was no one available or interested), students are likely to be treated simply as unsecured creditors along with others, and – potentially – in line to receive a smaller proportional payout from the administrator of X p in the £. The SPP has no legal status in this scenario. Even in the case where the OfS has required a stronger Student Protection Direction, there is no read across to insolvency obligations (e.g. OfS may wish, or the SPD may require, refunds to students, but this could be seen as preference to one creditor group over others and would not have legal weight in insolvency).
	1b: Continuity of teaching	Similarly to the above, the Student Protection Plan is meant to offer a plan for a teach out of all existing students in the case of market exit. But in many instances, commentators have argued that the provisions are too tightly drawn – that is, continuity of teaching can be satisfied on a technical, legal level but not in a way that is practical for some students (because, for instance, particular modules have not been transferred, or provision is some physical distance away, or facilities are not easily available, or similarly qualified staff are not available to handle teach-out). Moreover, it is possible that in the case of a rapid disorderly exit, any form of teach out provision is not available or possible for some or all students. In such an instance, students simply have to exit the course without completion, and the SPP provides no legal protection.

	1c: Transferring of degree award (and record keeping of that)	Students transferring institutions in the case of an exit midway through a degree, would be awarded a degree by the new institution, in the case of completion. The Degree Awarding Powers of the old institution remain with that institution and cannot be transferred to a new institution; these would, in principle, simply cease to exist when the old institution was wound up (that is, they could not be transferred during any administration or liquidation process). In theory, records of degrees awarded to previous students would still hold validity, though there is no clear process for validating or checking whether someone held a degree from the institution – this might logically fall to the regulator or whoever would 'inherit' the institutional memory and intangible assets of an institution later into administration.
	1d: Accommodation	Students will hold an accommodation contract with wherever they are living, whether that is in university owned halls, halls owned privately and managed under contract to the university, or a private tenancy. The precise obligations and rights of the students would depend on that contract. In the case of halls, it is likely that the contract would set out notice that a student needs to give, and a procedure for refunds in the case of advance payments. In practice, it is possible, as with fees, that refunds could not be guaranteed. Continued residence in accommodation would depend on any administration regime. In the case of private accommodation, it is likely that the contract would be unaffected – that is to say on the one hand that the student could continue to stay and the accommodation would not be closed, but on the other hand, the contract may well not allow for early exit even in the case of institutional closure, so a student could remain liable for ongoing rent to the end of the year even in the case of disorderly exit meaning the students wants to or has to move.
	1e: Access to facilities	In the case of disorderly exit, control over university facilities would pass to the administrators, or in the case of liquidation to any new owners. In extremis, these would simply close. There would be no guaranteed right of access to them to students during any wind down process (though in practice an administration would probably try to maintain them for as long as possible).
2. Staff	2a: Terms of employment	In a scenario where some or all of the university was transferred as part of a 'lifeboat', then staff would transfer as part of that. For staff on permanent terms and conditions, then these would likely transfer over as part of TUPE which still exists. However, for large numbers of university staff on fixed term contracts (which applies especially for

		those in research, and more junior staff), then it is not clear that there would be an obligation to transfer them across. For provision which didn't transfer in the case of a disorderly exit, then either staff would be maintained only during teach-out, or potentially not even in that organised a way if such provision could not be agreed, and they would simply also become an unsecured creditor during administration and / or liquidation.
	2b: Pensions	There are three main pension schemes which university staff would be a part of: USS, TPS, and LGPS. All benefits accrued to date within these sector wide schemes would be fully secure; that is, they would not be affected by the institution ceasing to exist (unlike in private schemes where the employer 'owns' the pension fund and protection for fundholders exists via the statutory Pension Protection Fund, which only guarantees future payouts in part). It is possible that staff transferring from institutions where they were previously enrolled in USS, to a new institution that did not offer it for incoming staff, would leave the scheme – it would depend on the terms on which staff transferred.
	2c: Research partnerships and grants	UKRI set out procedures for transferring grants between institutions in the normal course of business – that is to say when a principal investigator of a funded project moves to a new organisation and the grant goes with them. This needs to be raised with UKRI and agreed in advance, otherwise the grant can be stopped at UKRIs discretion. It is likely that, albeit at high speed, a similar process would apply in the case of disorderly exit, but only when the member of staff was also transferring. In instances where non UKRI bodies have given partnerships, it will similarly depend on the conditions of the grant, and the new institution (if any) that the lead researcher is going to. In some instances, either because the researchers do not have a new institution, or because transferring it to a new institution would not make sense (ie the grant is linked to very local R+D or other local research), then it is possible that the grant or research partnership would simply wind up, and non-principal investigators funded by the grant would lose their research funding.
3. University (institutionally)	3a: Endowments	Endowments wouldn't be available to creditors in an insolvency – they would need to be reallocated to another suitable charity or in accordance with the donor's wishes.
	3b: Physical assets owned by the university	Any body in receipt of public funds for capital assets accepts an "Exchequer interest" in such assets that builds up over time – i.e. the Exchequer acts in a similar way to an investor taking equity in such schemes. OfS condition of funding sets out explicitly that in the case

	(funded initially via public money)	of insolvency, the OfS has the right to immediately trigger immediate liability for the provider to repay to the OfS the full amount of the Exchequer interest balance. The OfS sets out that *"the provider will recognise the OfS as an unsecured creditor until such repayment is made. If a liability to make repayment arises, we may agree to accept repayment of some other sum, or to delay repayment, at our absolute discretion, and such agreement may be on such terms and conditions as we think fit"*. It also states that *"We have the right, but not the obligation, to request repayment of the Exchequer interest balance: the OfS has discretion to waive the requirement for repayment. In making this decision, we will consider the extent of any continuing public benefit arising from the use of previous OfS or HEFCE capital grants".* In other words, a lot depends on the future use of such capital assets: if an insolvent institution manages to continue to use the assets for public benefit but cannot make repayments, then the OfS may waive the repayment; in a rapid disorderly insolvency the OfS would become an unsecured creditor for the sale of such an asset.
	3c: Bonds and other loans	It is likely that failure to meet conditions of lenders is what precipitated a university into disorderly exit. As the chapter above notes, insolvency may have been voluntarily triggered by the institution, or they may have been forced into it by a creditor through a petition to the court. In either instance, the commercial lenders would become creditors in a liquidation or administration process, but may well have a charge over some assets held by the institution (i.e. the loan is at least partly guaranteed against an asset with a value). In such instances, the creditors would gain control of the asset in the case of entering some form of insolvency and would have the right to use it to recover their loan value, even if this came at the expense of the orderly wind down of a university or the interests of other unsecured creditors or users of the university.
	3d: Assets jointly owned / contracted by the university and a third party (accommodation, research facilities)	It will depend on the contract between the university and the third party – but it is very possible that the contracts for ownership may include provisions that automatically transfer the title to the other party if one party becomes insolvent. In such a situation, the users of such an asset would depend entirely on the willingness of the counterparty to continue to have them used (which they may do, if they were deriving an ongoing revenue from them), but this is not guaranteed. But the assets would not therefore be available to creditors in an insolvency.

	3e: International campuses	The arrangements for insolvency in the international location would apply – i.e. that the campus would fall under the legal system in which it is physically based, rather than under UK law. There may also be relevant arrangements in the agreements with any partners or funders, transferring such assets to them – at which point international students fall under the ambit of their home country (not the UK university), and the asset would not be part of any insolvency or credit proceedings in the UK.

Chapter 3: Pre-empting exit

If we assume, as set out in the previous chapter, that disorderly exit as a result of insolvency is to be avoided, then how best might this be done?

One option is, of course, to simply raise the revenue of all higher education institutions either through an increase in the tuition fee or through the re-introduction of teaching grants. While this would logically address the problem, it is not especially likely in the short to medium term (though not impossible). Nor is it a wholly effective response, unless all higher education providers are operating at maximum efficiency and effectiveness, and there were no changes to shape and size of the sector which could or should be delivered. This paper does not take such a position.

Similarly, it could be argued for a targeted uplift in certain areas and courses, which have an outsized benefit to the UKs social and economic fabric. This might include courses which suffer from relatively low student demand but are important to exist in some instance; it might include courses that have high delivery costs; it might include courses linked to particular industries or geographies; it might include courses or institutions that serve a particular geography that would not be well served otherwise and hence provides a unique provision for large numbers of individuals; or it might include courses linked to the wider public sector.

Some of this, of course already exists – in terms of high cost uplift, support for public sector courses, and some national institutions providing research and teaching for strategically important areas. The specific interventions which may be deployed on the 'income' side are out of scope for this specific paper. But the broader topic of targeted support is worth acknowledging precisely because of the balance that should be struck between a purely market driven model of higher education and one which actively recognises the wider social and economic positive spillovers. To re-frame, the financial model that underpins the higher education sector already tacitly accepts that a sector entirely driven by market forces is suboptimal.

A purist approach to provision would say that there is a risk of moral hazard even on targeted support: of continued inefficient delivery in particular instances, or universities engaging in rent seeking behaviour where courses are "propped up" as an alternative to designing them to the budget that would be available and demand that exists, and activity is devoted in an inefficient way to maintaining subsidies. But on balance, as chapter 1 and 2 set out, the case for seeking to prevent disorderly exit rests on the wider systemic impact of such exit and contagion risk.

This chapter therefore considers what action may be taken to reduce the risk of unplanned exit. If disorderly exit is bad, and increases in revenue to be implausible beyond those targeted elements which exist at present, then what are the options for ensuring a more orderly reshaping of the size and shape of the sector, should that become necessary?

There are a number of options, of increasing complexity and impact, that can be considered.

At the lowest level comes some form of course rationalisation. This may involve shrinking of modules within a course; shrinking of courses within a degree programme or degree programmes within a department; or shrinking or closure of whole subject areas or faculties within an institution. As per chapter 1 above, we see this is already happening in many institutions now – though finding a comprehensive list is almost impossible, because course rationalisation is not a reportable event to the regulator. In addition, the wording of Student Protection Plans is often such that any even considerable reworking of a university's provision is still deemed to have offered students what they have purchased as consumers[19].

Secondly**,** mergers of institutions, in whole or in part. Again, this is not unprecedented within the sector, as chapter 1 set out. Most recently, at time of writing, City University and St George's University of London announced an intention to merge. The case for a merger rests on the ability of the merged institution to deliver efficiency both in 'back office' functions and in course delivery, and to utilise the income from a larger number of students to deliver services where costs of the new merged institution have not risen as much as income. A variant of a full merger, at a lower end of complexity, would be greater use of shared services in back office operations.

As the OfS reported in their last report on financial sustainability of the sector, providers are reporting that "*mergers are becoming an increasing part of conversations about financial sustainability…including the potential efficiencies if providers in close geographical proximity could use a shared service approach".* However, it should be noted that the track record of successful mergers in public services is mixed, and in particular, in the sister FE sector, the official DfE evaluation of 40 FE college mergers from 2005 to 2015 shows *"there is no strong statistical evidence of college mergers leading to an improvement or deterioration of college performance on average. We find that, on average, the effect of merging is statistically indistinguishable from zero."*[20]

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[19] For an exhaustive discussion of this topic, and indeed all one would ever want to know about Student Protection Plans and their weaknesses as currently drafted, we are indebted to multiple articles from Wonkhe Associate Editor Jim Dickinson including "If the HE plane goes down, there's little in place to protect students" November 2023 https://wonkhe.com/blogs/if-the-he-plane-goes-down-theres-little-in-place-to-protect-students/

[20] DfE / Frontier Economics, "The impact of college mergers in Further Education" September 2019 https://assets.publishing.service.gov.uk/media/5f202521e90e071a58f9a820/The_impact_of_college_mergers_in_FE.pdf

Thirdly, restructuring of an institution. This takes, in effect, the change to course provision, and to structure of an institution, as set out in the first and second options, and applies them across the institution as a whole. It could involve more significant closure or restructuring of departments and faculties, sale of assets in whole or part, utilisation of a shared services approach to back office and professional service functions, or consolidation or indeed expansion of an estate in specific areas. Such restructuring could take place from a position of financial strength, or as a response to financial weakness.

Much of the recent consideration around restructuring has focussed on estate rationalisation – as it has in other sectors facing financial difficulty such as local government. This is given an additional impetus because of the cost of the alternative, which is the cost to decarbonise the university estate to achieve Net Zero, estimated at around £6.5bn across the sector.[21]

The challenge with restructuring is it often requires up front capital to deliver it, with savings coming later down the line – which is not often available for institutions in financial difficulty. The most recent example of restructuring came during Covid, with the introduction of the Department for Education's Higher Education Restructuring Regime (HERR) which offered support to universities in financial difficulty for reasons outside their control, most commonly around international students no longer being able to come to the UK. Although HERR was a short term intervention, now withdrawn, it was used – as VWV law firm sets out:

> *"We understand that three HEIs applied to HERR following its launch in July 2020 and, of those three institutions, only one received financial support under HERR, with the other applicants refused support under the regime because they failed to meet the necessary criteria. We understand that the support that was provided to the successful applicant was in the form of a repayable loan in the sum of £7.3 million and that to date the repayment terms of that loan have been complied with."*[22]

Fourthly comes sale of an institution, in whole or in part. The ability to sell (as opposed to merge) an institution depends on the legal status of the institution, but there have been a handful of instances where a private university has been sold on to someone else. This includes the sale of the College of Law – a charitable institution with a Royal Charter – to Montagu private equity firm in 2012 (and then on to Global University Systems as the

[21] Times Higher Education, "Transition to net zero 'will cost UK universities £37 billion" July 2023 https://www.timeshighereducation.com/news/transition-net-zero-will-cost-uk-universities-ps37-billion
[22] VWV, "Higher Education Institutions and financial distress – what are the options now?" February 2024 https://www.vwv.co.uk/news-and-events/blog/higher-education-law/heis-financial-distress-options

University of Law in 2015); and the sale of the New College of the Humanities to Northeastern University (a North American university) in February 2019, which is an instance of a private university in the UK (and a private US owner) then becoming a publicly funded university in 2020.

Not included within this categorisation is a 'bail out' – an injection of funds from the government to prevent an institution from becoming insolvent, via loan or grant. There has been much discussion in recent months – in the House of Lords report into the OfS, in the OfS report on financial sustainability in the sector, in the Office of the Independent Adjudicator for Higher Education's recent work, and in trade press and national press – about the possibility and likely scenario of a 'bail out' should a university find itself in financial difficulty. By its very nature, such a 'bail out' would be bespoke to the situation, and come as the result of a decision made in practice by politicians, albeit with advice from the OfS.

We do not formally categorise it here because according to the stated arguments of both government and regulator, there is no such provision. As the 2016 White Paper set out:

> *"The possibility of exit is a natural part of a healthy, competitive, well-functioning market and the Government will not, as a matter of policy, seek to prevent this from happening. The Government should not be in the business of rescuing failing institutions – decisions about restructuring, sustainability, and possible closure are for those institutions' leaders and governing bodies."*[23].

This was echoed most recently by the OfS chair who, as cited in chapter 1, told the House of Lords that "*"it is not our role to fix their problems. It is their business and their business model"*[24]. We leave alone, for now, discussions as to whether such an approach is politically viable or sustainable, but it remains the stated position.

In extremis, if none of the above options are deliverable for an institution, or do not address the financial difficulties, then exit is a likely consequence. As chapter 4 will set out, there is a need for a special regime for universities in this instance, to avoid the consequences of even the most orderly wind down within current insolvency law.

[23] Department for Business Innovation and Skills, "Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice" May 2016 https://assets.publishing.service.gov.uk/media/5a7f3f67ed915d74e62294af/bis-16-265-success-as-a-knowledge-economy.pdf page 10

[24] House of Lords Industry and Regulators Committee corrected oral evidence, op cit.

But there are three actions which the state can, and we argue should, take before moving to a new administration regime. These relate to the creation of a new post - a Higher Education Commissioner - with a remit to oversee financial sustainability; a general steer that OfS should take a more collaborative approach within its existing duties; and the creation of a dedicated Transformation Fund to help provide state backed loans for universities wanting to restructure their organisations for financial sustainability. We take each in turn below.

1. A more collaborative OfS

Currently, the OfS has a range of outcomes which it is required to 'have regard to' in law. These include *"the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers".* Similarly, the regulator has to have regard *to "the need to protect the institutional autonomy"*, and *"the need to promote quality, and greater choice and opportunities for students"*, and it also has to pay regard to *"the need to promote value for money in the provision of higher education"* and *"the need to promote equality of opportunity in connection with access to and participation in higher education".*

We argue here not for a change to these duties, but for a new piece of statutory guidance from the new Secretary of State to the OfS Board that the requirement under HERA for the OfS have "*regard to the benefits for students and employers resulting from collaboration between such providers"* should be the regulatory priority over the next few years, over "*the need to encourage competition between English higher education providers*". This means that the OfS is considering its regulatory activity that it should prioritise collaboration and continuation of provision of the sector, and seek to more actively address the risks that extend beyond students and individual institutions.

As discussed further in chapter 5, we do not believe this requires any additional powers or changes to the OfS' remit – simply a requirement to take the direction from the Secretary of State as to what to prioritise when balancing the objectives for which they are required to have regard.

Readers familiar with the English higher education sector over the past thirty years may detect in this something of an implied critique of the decision to move away from the approach of the Higher Education Funding Council for England (HEFCE), the predecessor body of the OfS. And so to be explicit, we are indeed suggesting that the role of "sector gardener", using tools to mould and shape a sector of independent providers, is not only valuable but

necessary in a system as complicated as English HE. That said, the weaknesses of HEFCE — governance systems dominated by the providers it oversaw, a lack of strong levers apart from funding (a lever which became less effective as more funding moved to student choice), and a lack of legal precision its work — were rightly done away with by the move to the OfS. Students should be a major part of consideration in the system, even if they cannot be given an untrammelled role in its construction and continuation. We think that a repurposing of the areas that the regulator should have regard to, without changing its wider governance or powers, is an appropriate shift.

2. The creation of an HE Commissioner

It seems clear to us from the review of the current legal framework, and financial vulnerability of the sector generally that there is a need for a more dedicated function somewhere within government, to be the point person on what will certainly need to be a more activist approach towards sector sustainability in order to manage the risk of disorderly exit. We call this role an HE Commissioner.

The function of the Commissioner, and his / her team, should be to act as the primary liaison between the sector and the state, overseeing financial sustainability and efficient engagement in future. It would be their duty to investigate instances of financial vulnerability in the sector, whether identified by the institution itself or by the OfS.

The Commissioner would have a range of services which it could offer, initially on a voluntary basis but with statutory backdrop, to institutions facing difficulty. This could include:

- Support with governance reviews for an institution, including whether there needs to be senior leadership change or additional personnel on a university board to address issues of financial and operational weakness.
- Support for the Vice Chancellor and Senior Leadership teams at an executive level, on issues of financial management and operational and change management.
- A light touch financial health check, privately, for institutions who would value an independent assessment of their financial situation and delivery plans.
- Support for internal restructuring of an institution, where needed, including financial benchmarking of efficiency of courses or of estate utilisation, for example.

Should a university find itself in a more challenging financial situation, then it would be the HE Commissioner that led on much of the work around greater engagement with the regulator, including on a Student Protection Direction.

There are instances of parallel structures in other aspects of education. The FE Commissioner[25] and team are the closest parallel, which this function is explicitly modelled on – but with the important caveat that universities occupy considerably more legal autonomy than FE Colleges do and did, even before they were brought back into the public sector. Similarly, within the school sector, the Regional Directors of the DfE (formerly Regional Schools Commissioners) have an explicit function around overseeing financial health of school trusts and providing interventions on this basis[26].

We think there are three ways of designing and creating this role, and we acknowledge that this function would need to be funded centrally if it sat in OfS, as it cannot come from increased subscriptions from universities directly (otherwise it simply exacerbates the issue of financial precarity):

Option 1: would be to create a new Director level role within OfS to execute on this function. This would build on the OfS' existing duty to monitor financial sustainability, and to protect student interest if and when a provider gets into financial difficulty.

Option 2: would be to create this Commissioner role directly within DfE. This avoids a potential skew of OfS' role too much towards financial sustainability as opposed to all of their other duties, and reflects the fact that such decisions are in practice likely to be taken by Ministers in the DfE (and HM Treasury). This is also how the FE Commissioner and Regional Director roles work.

Option 3: would be to create a small function directly within DfE, but for the majority of the work to be done by commissioned private sector support to deliver on the advisory function – whether audit and accountancy terms, or individual consultants, perhaps former HE senior leaders. This most closely reflects how FE support works on a day to day basis, and also reflects the 'soft engagement' between the Department and universities throughout the 1990s and early 2000s when financial or governance problems occurred.

Each model has pros and cons. On balance, we favour option 2 – a team created directly within the Department, reporting to the new Minister for HE and indirectly to HMT, with a remit to manage sector sustainability. This will protect the OfS from additional burdens and cost pressures, and recognises the cross cutting nature of this role. The Commissioner will need access to OfS financial information and powers, and powers to engage with other funders

[25] Department for Education, "The Further Education Commissioner", https://www.gov.uk/government/organisations/further-education-commissioner
[26] Department for Education, "Regional Directors", https://www.gov.uk/government/organisations/regional-department-for-education-dfe-directors/about

and regulators of universities (Research Councils, NHS, regional agencies, IFATE), as well as work closely with the FE Commissioner.

3. A new Transformation Fund

Under whichever delivery model is chosen, we believe that a new HE Commissioner and team should also be equipped with the ability to deliver a new Transformation Fund – to support the sector, and to protect the interests of students and the wider public in higher education.

A Transformation Fund would work to provide upfront capital for institutions wanting to restructure their university for longer term sustainability, but where the benefits of such cost savings accrue in latter financial years. It would operate where a university was not able to access private capital for such restructuring, and in the absence of which, a university would be felt to have no option but to engage in less optimal downsizing of provision in various different ways. Such a fund would operate via a loan, backed by the state and agreed with the HE Commissioner's team, in order to cover the upfront costs of transformation. We call this new scheme the Higher Education Enhancement and Transformation Scheme (HEEATS)

The premise of such a loan – money upfront in exchange for later cost savings and improvements in productivity (including through saving the state money, via more effective utilisation of future research funding and tuition fees) is one which Labour administrations have historically been amenable to. For example, under the last Labour government, the very first Comprehensive Spending Review introduced a programme known as Invest to Save, to encourage cost saving and productivity initiatives that would otherwise not go ahead, but where both government and the wider public sector had a shared goal, rather than simply offering state bailouts.[27]

The aim of the HEEATS fund is to be proactive. Rather than a restructure driven by immediate and unsolvable financial pressures, the intention of this scheme is to offer a more advanced option from a position of relative financial strength, such that an (even) more difficult and painful restructure would not be needed. The intention is for it to have limited take up, but not wholly be seen as taken up as a position of weakness / using the state as lender of last resort.

In practice, we do think HEEATS would be modelled quite closely on HERR, in terms of a series of conditions that the HE Commissioner would assess, in exchange for a loan to enact the

[27] The Invest to Save Budget was created *"to help develop projects which bring together two or more public service bodies to deliver services in an innovative and more efficient fashion. It will encourage such bodies to work more closely with each other and identify projects which would otherwise not go ahead"* Taken from HM Treasury, "Modern Public Services for Britain: Investing in Reform" July 1998
https://assets.publishing.service.gov.uk/media/5a7c6088e5274a7ee501a8e2/4011.pdf

plan[28]. There would of course be some element of negotiation between the institution and the Commissioner's team (and indeed, quite possibly from HMT as well, who took a close interest in FE college restructuring loans), but there would also inevitably be some loss of autonomy in such a situation for the university – this should not be entered into too lightly.

Importantly though, unlike HERR, HEEATS should be positioned more positively – including being available and presented as a good option for institutions who are perhaps one or two recruitment cycles (say 18 - 24 months) away from real challenges, to maximise their optionality. Timelier interventions would also be cheaper to execute.

Discussions over entering HEEATS could be triggered by the HE Commissioner, the institution, or both. In extremis, the Commissioner, working with the OfS, could have a backstop power to compel a university to enter it, as part of its general provisions for preparing for possible market exit (likely to happen at the same time as OfS mandating a Student Protection Direction).

To successfully access HEEATS, a university would need to provide a business case which set out exactly what it wanted to change, how much this would cost, and over how many years the benefits of cost savings would be seen to repay the loan. They would also be expected to show what changes they are already making, for example around selling off of capital assets and physical estates[29].

The HE Commissioner and the DfE (and HMT) would be expected to set out conditions for HEEATS. But unlike HERR, with there being conditions of entry, we think that the conditions for HEEATS ought to be framed more positively, as university features which the Commissioner would like to see protected. A successful bid to the fund would likely need to show how changes would need to meet six protective 'tests':

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[28] Wonkhe "Money, but at a cost", July 2020 https://wonkhe.com/blogs/money-but-at-a-cost/

[29] There is a strong parallel here with local government, who can apply to enter a similar scheme of loans from the government under what are termed section 114 agreements, to avoid them breaching section 114 of the Local Government Finance Act 1988 which forbids them from running deficits. The parallels are not exact, because universities are allowed to run deficits in the short term, but a university entering a section 114 agreement is expected to have made various asset sales, and then enters an agreement to take loans from the government in the short term while restructuring their services. Local Government Commissioners are sent in from central government to help manage this process and agree a recovery plan. For more details, see Institute for Government, "Local government section 114 (bankruptcy) notices" October 2023 https://www.instituteforgovernment.org.uk/explainer/local-authority-section-114-notices

Six Tests for a Higher Education Enhancement and Transformation Scheme

1. **Economic growth** – for the region of the university, as well as potentially nationally.
2. **Place & community** – what would be the impact of transformation on the local area, and how can disruption be minimised. Ideally, such a fund would actively incentivise collaboration within a local area (and could even, perhaps, be a bid sponsored by more than one institution, jointly).
3. **Impact on public services** – and the protection both of a flow of public sector staff but also the infrastructure needed to deliver public services (including things like university hospitals, or research partnerships in health, education, policing, social work or other fields).
4. **Education and skills** – a flow of graduate labour but also support for other young people and adults in the area.
5. **Science and research gain** - including strategic infrastructure – protecting vital regional and national assets.
6. **Other academic specialisms that are unique and distinctive** – including a sense check as to whether minority subject provision would be maintained for some or all students.

Alongside these six tests, it is likely that a bid would need to be assessed so as to provide satisfaction that:

- There is no duplication – that restructuring as provided wouldn't simply duplicate resources that are effectively delivered elsewhere (i.e. there is a lower value for money case for funding being used to protect provision in this instance).
- There is high demand (or strategic demand) for provision – i.e. that in the first instance there is a need to keep such research or teaching available, or that if demand is low, there is nevertheless a strategic reason for keeping such provision available.
- That it will work – that the plan is likely to actually deliver the benefits stated, and that the loan can therefore be paid back.
- That it can be delivered – that executive capacity, and governance capacity, exists to oversee a restructuring plan so as it can be implemented in the way envisaged.

A brief note here on territoriality. This report considers the situation in English HE - because most elements of HE policy are devolved, and most pertinently because the fees and funding

system is different in each of the home nations, and the regulatory ambit of the OfS is for England only. As such, the majority of our recommendations apply to England only. The one exception to this may be the HEEATS scheme. In a world in which a Scottish, or Welsh, or Northern Irish university was at risk of disorderly exit, we think it likely that pressure would fall on the Westminster government, instead of the Devolved Administrations, to reply. Equally, the systemic and knock on impact we discuss in this paper does not stop at the borders of the home nations. As such, we think that the HEEATS scheme should be designed such that it could apply to any university within any of the home nations.

In terms of the likely size that the HEEATS fund would need to be, and how many institutions would be able to access it at any one time. That would be a function both of money that government decided to make available (though such transformation funds being offered as loans would mean they would score as additional government debt rather than revenue funding from DfE or DSIT), and the capacity of the new HE Commissioner, working with OfS, to oversee bids in for the fund, and then to oversee its implementation.

It seems to us plausible that there could be two tiers of support. The first would likely be more tactical and likely impact the university on its own. This could be for loans in the region of say £5-£20m. The second - more transformative and wider reaching HEEATS loans might offer up to, say, £100m available. This second tier would have a higher bar and expectation that it would be transformative not just for a specific institution but a locality, including multiple institutions and involving FE as well as HE.

If we imagine, for instance, 4 'Tier 2' proposals in operation in any one year, and ten or so 'Tier 1' proposals, this would imply a pot of perhaps £2-£2.5 billion available in borrowing over the whole Parliament, though almost certainly it would not all be taken up. This is roughly on a par with the FE Capital Transformation Programme of £1.5bn over 6 years for physical estate rejuvenation (as grants, rather than loans)[30], a £1bn NHS primary care transformation fund that operated between 2015 to 2020[31], and an Industrial Energy Transformation Fund run for private sector businesses with high energy use to transition to a low carbon future, which operates in phases between 2020 and 2028 with a total budget of £500m.[32]

[30] FE Week, "Revealed: Funding split for final stage of FE capital transformation fund", March 2023
https://feweek.co.uk/revealed-funding-split-for-final-stage-of-fe-capital-transformation-fund/
[31] NHS England, "NHS England announces £1bn investment in primary care over the next four years" January 2015
https://www.england.nhs.uk/2015/01/pc-investment/
[32] Department for Energy Security and Net Zero and Department for Business, Energy and Industrial Strategy, "Industrial Energy Transformation Fund", July 2019
https://www.gov.uk/government/collections/industrial-energy-transformation-fund

Chapter 4: Creating a legal and regulatory path for orderly exit

Despite all the additional work suggested above – a more interventionist and less market driven OfS, combined with a potential restructuring or transformation fund, and an HE Commissioner with a remit to support sector sustainability – it is possible that one or more major universities would remain at risk of disorderly exit. In such an instance, the necessary policy response is to strengthen provisions to allow for an orderly exit – with protection for students, staff, community and the wider higher education sector, as much as possible.

As chapter 1 sets out, under the current legal framework, there are three options once a university becomes insolvent – that is, cannot pay its debts as they become due – and would need to exit provision in a disorderly way. These are liquidation, administration, and receivership.

Chapter 1 also discussed the various unknown issues if a university were to enter into any one of these states. But in particular, it is worth emphasising again here that the legal status of moving to insolvency and entering administration or liquidation or receivership, trumps the status of a Student Protection Plan, or the enhanced Student Protection Direction which may have been put in place by OfS. That is, the regulator and the university may well have designed a plan for teach out, and for ongoing maintenance of some assets to allow students to complete their courses and access the materials they need from the institution. But all of this has no legal status compared to one of the legal insolvency regimes. If the decision is made to close the institution, or sell assets in whole or in part, then no special consideration is given to existing students – they are treated in law as simply another creditor (as regards their tuition fees paid for a service not yet delivered).

This is – clearly – unsatisfactory. A purely legalistic approach to administration or the like, which doesn't allow for protection of students, underplays the non-market element of Higher Education Institutions.

In such an instance, it is therefore clear that we need a Special Administration Regime (SAR) for higher education.

A special administration regime (SAR) is a modified insolvency procedure that gives an administrator special objectives. Such regimes are necessary because the usual statutory purposes of an administration are very limited and may have undesirable consequences for some or all of the affected organisation's customers and stakeholders.

The statutory purposes of a normal administration are as follows:

- Rescuing the business as a going concern, or
- Achieving a better result for creditors as a whole than would be likely if the business were wound up (without first being in administration), or
- Liquidating assets and distributing to one or more secured or preferential creditors.

SARs therefore often exist where the industry in question provides a statutory or public service or supply function. and the continuity of the service is particularly important to consumers or stakeholders, or is important to the stability of the overall system. The special objectives of the administrator in a SAR usually prioritise the continued supply of the service or require consultation with the industry regulator in deciding how to proceed or require the safeguarding of certain assets.

It can readily be seen that if a university were to go into administration, the usual statutory purposes would be completely inadequate, and some sort of SAR would be required.

Such a SAR would draw heavily from other instances – most notably Further Education Colleges - but also rail, energy, and housing associations.

The Technical and Further Education Act 2017 introduced a regime in further education known as education administration. Under this regime, the Secretary of State can apply for an education administration order (EAO) appointing an education administrator to manage a college's affairs, business and property.

The objective of an education administration is to:

- Avoid or minimise disruption to the studies of existing students as a whole (rather than the interests of each individual student), and
- Ensure that it becomes unnecessary for the college to remain in education administration for that purpose

"Existing students" include students who have accepted a place at an institution but *not* those who have applied but not yet been offered or accepted a place.

To achieve the objective, the steps the education administrator may consider include, but are not limited to the following:

- Rescuing the college as a going concern
- Transferring some or all of its undertaking to another body
- Keeping it going until existing students have completed their studies
- Making arrangements for existing students to complete their studies at another institution.

The education administrator retains a duty to achieve the best result for a college's creditors as a whole, but only so far as is consistent with the objective of the education administration. There is no clear guidance on how those potentially conflicting purposes are to be balanced. Special administration can therefore create particular risks to the administrator, students, creditors and funders where there is a tension between the interests of the students and the interest of creditors.

The SAR in FE also permits the Secretary of State to provide emergency funding to enable the objective of the education administration to be achieved, by grants or loans on such terms as (s)he sees fit.

Special Administration in FE and the case of Hadlow College – a case study

1. There are 225 FE corporations in England and, as with universities or HE institutions that are corporations, there was uncertainty for many years about what would happen in cases where government refused to provide cash as a last resort to pay the monthly payroll. There have been dozens of cases dating back to 1993 where funding agencies have provided short-term advances, but an increasingly sophisticated set of rules surrounding these. In its College Oversight policy[33] DfE list a number of sanctions and measures that apply in such cases.
2. The Technical and Further Education Act 2017 confirmed that normal insolvency law applies to colleges but additionally created a special administration regime in which DfE can appoint an education administrator who has a dual duty to protect students and creditors.
3. BIS and DfE papers on the proposals stated that the model for the college education administration regime should be similar to other special administration

[33] Department for Education, "College oversight: support and intervention", April 2019 https://www.gov.uk/government/publications/college-oversight-support-and-intervention

regimes in the postal services or energy which ensure that services keep running despite corporate insolvencies[34].

4. The plans for a college insolvency law were announced in spring 2016 at the same time as announcements of time-limited restructuring funding to support the Post-16 Area Review programme. This funding ended in March 2019. The area review programme encouraged (and partly funded) more than 70 mergers, the conversion of 30 sixth form colleges to become academies and 2 demergers[35]. The college insolvency law took effect in spring 2019.

5. It is worth noting that the introduction of a college insolvency law created nervousness among the banks lending to colleges, Local Government Pension Scheme (LGPS) funds (who provide support staff pensions) and governors. That is, despite the law providing greater protection for students, the fact it was deemed necessary itself caused a lack of confidence in the underlying financial strength of the sector.

6. The case of the winddown of Hadlow College explores – for both good and ill – how such a regime worked.

7. Hadlow College and West Kent College joined in a federation in the mid-2010s which meant they had a single leadership team and a common set of governors but were two legally separate colleges operating from 7 campuses (6 in Kent, 1 in SE London). The colleges ran out of cash in 2019 and asked for an emergency loan from DfE. This prompted the departure of the two most senior staff members and the appointment of interim leaders and governors with emergency funding provided to the college on a weekly drawdown. To prevent creditors using commercial insolvency proceedings, DfE petitioned the courts to appoint an education administrator (BDO) in May 2019.[36]

8. The use of education administrators at Hadlow and West Kent College was not planned but resulted from the complexity of the colleges. In a handful of other

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[34] Department for Education "Developing an insolvency regime for the further education and sixth-form sector: consultation response", July 2016 https://www.gov.uk/government/consultations/developing-an-insolvency-regime-for-the-further-education-and-sixth-form-sector

[35] Department for Education, "Area review: end of programme report", September 2019 https://www.gov.uk/government/publications/area-review-end-of-programme-report

[36] FE commissioner report on Hadlow college summarises the background to the financial problems and the education administrator appointment https://www.gov.uk/government/publications/fe-commissioner-intervention-hadlow-college.

cases where college corporations ran out of cash between 2019 and 2022 (3 because of Covid), DfE, working with the non-statutory FE commissioner and ESFA, forced leadership changes, provided short-term support and prompted strategic reviews, but did not appoint special administrators. There was another education administrator appointment at St Mary's Blackburn, a Catholic sixth form college with no assets (property owned by the church), declining student numbers and no neighbour interested in a takeover.

9. The Hadlow College and West Kent College education administrations took three years, involved a higher spending on professional fees than in non-statutory college intervention,[37] required DfE to provide continued funding to allow the administration to continue, resulted in the transfer of all 7 campuses (courses, staff, assets, liabilities) to 3 different college corporations and a financial settlement in which Barclays bank and the Kent LGPS fund avoided losses (secured loans, transferred staff) but where unsecured creditors took a loss.
10. The administration became a liquidation in 2022. OfS removed Hadlow College from the HE register in 2023, three years after the transfers to other colleges had taken place.
11. In 2023, the liquidators reported that they had agreed settlements with the two most senior staff at the college involving a small fine. The former principal agreed not to take a position in the education sector as a trustee, director, governor, principal, manager, consultant and/or employee while the former deputy principal – now a senior partner in an accountancy firm – reached a confidential undertaking.[38]

[37] £6 million in fees paid via BDO according to November 2020 evidence to the Public Accounts Committee (some of which went to others; BDO were paid £2.8m)
[38] The administrator and liquidator make regular reports which are on Companies House https://find-and-update.company-information.service.gov.uk/company/FE000002 This news article summarises some points of interest https://feweek.co.uk/ex-college-principal-banned-from-education

There are two other things to be considered at this level of intense intervention.

The first is that should a SAR be introduced into higher education, this would not negate the need for Student Protection Plans, nor Student Protection Directions. Indeed, we strongly support the premise of a plan which is publicly available, and which represents the interest of the student. Under a special administration regime, the administrator would be expected to play close heed to the delivery of such a plan – unlike at present, where the duty of insolvency administrators is solely to creditors. We think there would therefore also be scope alongside the SAR to strengthen the requirements of institutions as to their SPPs – for example, in being very clear how teach-out will work, setting reasonable expectations as to what constitutes a remaining course during teach-out, or a new power for the OfS to mandate that universities (and possibly administrators) exercising the SPP / SPD must, for example, use the UCAS platform for students to gain impartial information and be matched to a new provider(s) that were willing to take them in a consistent way.

We also considered, at this level of intervention, whether there might be a case for some of collective risk pooling – and in particular whether a Special Administration Regime in HE might, as it does in the utility markets, also place an obligation on the regulator and the system to ensure continuity of supply for customers[39]. In other words, whether the HE system as a whole might have a regulatory obligation to provide places for students if their original university entered administration and subsequently closed.

We do not think that such a requirement would be desirable, or more importantly deliverable. Higher education is not, conceptually, the same as an essential service such as gas or electricity. However disruptive it would undoubtedly be and has been in the past – and we don't seek to underplay that – it is a different status to literal life saving energy supply. Placing such a regulatory expectation on autonomous institutions would be an overreach of state authority that is not applied beyond normal consumer protection law in many other areas. More practically, perhaps, it is not clear to us that a lifeboat of guaranteed provision in any instance could be delivered. Unlike energy, for which the supply is (in theory) limitless, and geographically unconstrained, students and student places are neither. It would not be realistic to have sufficient spare capacity built into the system in every major geographic conurbation, for many major subjects, at different tariff levels, such that a guarantee could ever be exercised in principle.

It is worth taking several points of note from the use of an SAR in Further Education:

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[39] Ofgem, "How you're protected when energy firms collapse", October 2021
https://www.ofgem.gov.uk/blog/how-youre-protected-when-energy-firms-collapse

- Such a regime can be introduced relatively quickly by government, though it does require primary legislation.
- The mere passing of legislation itself can shake confidence among institutions, as well as (perhaps more importantly) creditors, and customers / students.
- Execution of such a plan is complex, and expensive. The case study of Hadlow College above suggests a fee of £6m just to professional services, and the whole process took around 3 years.
- There is a tension for an administrator, who has a dual responsibility to achieve the best result for a college's creditors as a whole, but only so far as is consistent with the objective of the education administration. There is no clear guidance on how those potentially conflicting purposes are to be balanced.
- It is not possible to devise a SAR that guarantees the rights of each individual student. There will inevitably be winners and losers as the administrator seeks to balance the competing interests of different student groups with each other and with the wider creditors of the institution.
- The objectives of any SAR for HE will need to be considered as the interests that required protection are far broader than in FE. For example, community assets, research assets, and partnership assets all require potentially a more complex operation of wind down.

The fact that special administration regimes exist for railway operators, energy suppliers, housing associations and other large and complex organisations suggests it would be possible to develop a regime covering universities and other registered HE providers.

But the college experience also suggests that rescues and reorganisations should remain a primary resort. Alongside Hadlow College that went through the SAR, there were many others where interventions were needed but were effected through discussions with the department and the funding body, rather than formal administration. These resulted in similar outcomes, but were quicker and cheaper. The reclassification of colleges into the public sector in November 2022 makes it unlikely that DfE will choose to use the college insolvency regime again.

There are also risks in the setting up of a SAR. Establishing a premise whereby commercial creditors 'share' proceeds of wind-down with students could, in fact, make such creditors increase their risk premium and price financial support to universities more highly. And the

process of setting up such a process through legislation also risks a wider sense of panic in the sector, and among creditors.

So while we argue that a SAR is a necessary backstop to create, it should be seen in this light – and that it is not only a legal question, but one of financial market and customer response as well. There remain other measures which might be delivered quicker, at lower cost and with more confidentiality via non-statutory measures, such as the HEEATS scheme and a regulator explicitly prioritising collaboration and equality of opportunity.

As with the HEEATS scheme discussed earlier, we think that there is potentially a case for such a regime to be deployed across all four home nations. Insolvency rules are consistent across England and Wales; Scotland has its own; and Northern Ireland also has its own though closely mirroring the English and Wales system. As with HEEATS, given that the consequences would flow across all four nations of any disorderly exit, we think there is a case for encouraging a mirroring of any SAR into legislation that covers universities in all four nations - with the agreement of the devolved administrations, where necessary.

Chapter 5: What does government need to do

So far, the paper has outlined three stages of increasing intervention, in order to mitigate the possibility of disorderly exit:

1. **An OfS with a new statutory direction** towards collaboration and equality of opportunity,
2. **A new HE Commissioner**, with responsibility for upholding financial sustainability, and with responsibility for a **new Transformation Fund** (the Higher Education Enhancement and Transformation Scheme (HEEATS))
3. **A new Special Administration Regime for HE**, modelled on that for FE colleges and other elements of critical national infrastructure including rail.

This chapter considers how each of these might be brought into effect, legislatively and policy wise.

It seems clear that there is no need for legislation to act generally, certainly as regards the powers of the OfS. We can identify four specific responsibilities and duties which the OfS already has within law, which could allow the regulator to deliver our first level of intervention.

Firstly, as discussed in chapter 3 earlier, the current legislation (Higher Education and Research Act 2017, henceforth HERA) requires the regulator to have regard to collaboration in the system where this is in the interests of students and employers, alongside the responsibility to ensure choice and competition. Specifically, section 2 of HERA sets out that the OfS must have regard to *"the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers".*[40]

Similarly, while the regulator has to have regard *to "the need to protect the institutional autonomy"*, and *"the need to promote quality, and greater choice and opportunities for students"*, it also has to pay regard to *"the need to promote value for money in the provision of higher education"* and *"the need to promote equality of opportunity in connection with access to and participation in higher education".*

[40] "The Higher Education and Research Act 2017" https://www.legislation.gov.uk/ukpga/2017/29/section/2/enacted

In other words, the remit of the OfS allows them to take a balanced approach, depending on the specific needs and priorities at any one time. In the recent House of Lords inquiry into the functioning of the OfS, the consensus of most people giving evidence was that this balance of duties is clear, and deliverable:

> *"There was a strong consensus among most witnesses that the OfS' duties were clearly set out in legislation. Sir Michael Barber, the former Chair of the OfS, said he had never had concerns that the legislation was insufficiently clear on the OfS' role. Vivienne Stern MBE, Chief Executive of Universities UK, agreed: "the remit of the OfS is clear. I do not think it is in dispute". For Alex Proudfoot, Chief Executive of Independent Higher Education, the legislation underpinning the OfS was "fundamentally sound". This was supported by numerous written submissions."*[41]

It seems likely, therefore, that a decision by the OfS Board to place more weight on to their requirements to support value for money, equality of opportunity, and collaboration, would be entirely in line with their current regulatory duties.

Secondly, OfS also has existing powers to give funds to registered providers – so it would be legally possible, if desired, for this power to be used (via grant or loan) to support providers in financial difficulty, without the need for additional legislative cover. It is also likely that provision of emergency financial support to institutions in difficulty under s40 of HERA would give legal cover here.

Thirdly, OfS has an existing duty to *"monitor and report on the financial sustainability of most providers and the sector as a whole".* This happens via an annual report – of which the most recent one, published shortly before this paper was put together, provided a very clear picture of the deterioration of the sector's financial health as discussed in chapter 1. It would seem very likely that a more activist approach towards "monitoring" and "reporting" would fit within this existing duty, and not require further legislation. One could also argue that the need for the regulator to promote value for money in the provision of higher education by English providers could be best served by ensuring that assets funded by the taxpayer are protected to the greatest extent possible, by helping institutions to avoid disorderly exit.

[41] House of Lords Industry and Regulators Committee "Must do better: the Office for Students and the looming crisis facing higher education", Chapter 2, paragraph 21
https://publications.parliament.uk/pa/ld5803/ldselect/ldindreg/246/24605.htm

Lastly, OfS already has**,** as previously discussed, an existing power under condition C4 to require a stronger version of a Student Protection Plan for institutions deemed at higher risk. A 'Student Protection Direction' can be imposed where there is a material risk of a provider stopping all or most of its higher education provision – and which might include a requirement for a market exit plan. This duty is meant to provide for greater oversight over the day to day operations of a provider in difficulty, with an explicit intention to protect students over and above the plans in an SPP. But as we have heard, in some instances a regulatory approach that demands updates and data with great frequency can hamper, rather than help, an institution that is capacity constrained and trying to execute reform. A requirement to support sustainability of the sector ought to take account of what they are asking and how and when.

And as discussed in chapter 4, even a Student Protection Direction does not trump insolvency law if the provider enters insolvency in one form or another. We discuss the legal necessity to create a SAR further below.

It is possible that signals from the regulator ought to weigh significantly on the behaviours of individual regulated institutions – primarily through activities they take forward themselves, even in advance of any formal legislative action. In other words, a strong signal from the OfS that they would look supportively on mergers and collaborations, or other activity designed to protect students even at the possible expense of autonomy and competition, should drive different behaviours in the system.

However, *legal* clarity is not the same as *political* clarity, or risk appetite. In theory, any or all OfS actions described above, or earlier in the paper, could be deemed to be in breach of their regulatory powers and responsibilities under HERA. This could only, ultimately, be tested in court – presumably by a provider who wanted to see greater competition in the market, rather than government led action which could be seen to tell against innovation and new entrants. If such a risk is deemed too high, or the consequences too severe, this may stymie action.

There are some indications that OfS is cautious on its own powers and responsibilities. As they set out in their latest financial monitoring report:

> *"At a system level, we are concerned about the aggregate impact of the many discrete decisions individual autonomous institutions are making in response to significant financial risk. Across the sector as a whole this may over time reduce student choice: in some subject areas, or in some regions, or for some types of students.* ***The OfS has an important role in monitoring and reporting on financial sustainability, and intervening to protect the interests of students, as far as is***

possible, if a provider is at risk of closure. But we do not have the powers or remit to intervene to preserve provision or providers in support of sustaining the system as a whole *"* [our emphasis][42].

And in their response to the House of Lords enquiry, the OfS said [our emphasis again]:

*"**Our regulatory tools are limited, the system-wide protections for consumers in other sectors such as finance, water or energy are not present, and there is no special administration regime for higher education**, as exists for further education colleges. We continue to discuss these issues with the government."*[43]

It does not take an expert in reading between the lines to surmise that OfS is – at least currently – cautious about its legal and political ability to intervene to the extent to which this paper suggests.

Ultimately, if the regulator is concerned about interpreting its duties in the way expressed in the paper, we argue that the Secretary of State should, if necessary, issue the OfS with formal directions and statutory guidance through regulations under s77 of HERA. This might include strengthening the specific requirement on OfS to move from monitoring and reporting on financial sustainability, to having a (more) explicit responsibility to "promote and protect" the financial sustainability of the sector (in aggregate, which is not the same as promoting and protecting any individual institution). We take inspiration in part here from the proposed new football regulator[44].

But additionally, even when it is clear that the OfS can act, there is a question about capacity in the system at regulatory level, as well as institutional level. The case study of the ALRA "lifeboat" is instructive here. As the OfS set out in their very helpful case study note,[45] the level of engagement that was needed was significant:

"We also established a multi-agency taskforce to coordinate planning for the implementation of ALRA's market exit plan if that became necessary. This included representatives from the OfS, ALRA, its validating partners, the Office of the Independent Adjudicator for Higher Education (OIA), the Student Loans Company

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[42] OfS, "Financial sustainability of higher education providers in England 2024", page 4
https://www.officeforstudents.org.uk/media/ly1buqlj/financial-sustainability-report2024.pdf
[43] OfS "Response to the House of Lords Industry and Regulators Committee Report", page 10
https://committees.parliament.uk/publications/42303/documents/210300/default/
[44] Professor Julia Black and the British Academy, "Just like football, UK universities need a regulator" April 2024
https://www.thebritishacademy.ac.uk/news/just-like-football-uk-universities-need-a-regulator/
[45] OfS, "Financial sustainability and market exit cases" page 22
https://www.officeforstudents.org.uk/media/65b55faa-07b7-4d37-b3cd-fe416154cc81/financial_sustainability_and_market_exit_cases.pdf

(SLC) and the Department for Education (DfE). There were more than 60 meetings of the taskforce, or sub-groups of taskforce members, between 12 February 2022 and 27 April 2022."

In other words, over 69 days, including weekends, the OfS and others held more than 60 meetings, for an institution that at time of closure had 284 students. Although not all the issues that would need to be addressed would scale as the size of the institution scaled - some would. We can only imagine the level of work for a market exit plan for an organisation with several thousand students, multiple numbers of physical and intangible assets, and the like.

It therefore seems clear that as well as greater direction, the Secretary of State may well need to grant greater human and financial resource to the regulator if needed, especially in the case of significant market exit, to pay for external administrators, and additional staff at OfS and associated bodies on a short term basis (though potentially not that short term – this could be months or potentially years in the case of a complex exit).

It is possible, though not definite, that our second stage of intervention – a restructuring regime or transformation fund, backed by a newly created role of HE Commissioner either within the OfS or within the DfE – would need some form of legislation.

The recent introduction of the Higher Education Restructuring Regime[46] (henceforth HERR, now formally dissolved) under Covid provides a parallel for what a similar scheme would be like. As chapter 3 above discussed, the new fund would be similar in structure, though it would attempt to be more proactive than HERR – and thus encourage institutions to apply ahead of funding difficulties, rather than after them.

HERR did not require additional legislation – it drew from the existing powers of the Secretary of State (via OfS) to give financial support to registered providers with the regulator. As chapter 3 discusses, it is likely that any system of financial support would be via loans, but similarly to HERR, it seems that this would not require new legislation beyond existing OfS powers.

Similarly, if the HE Commissioner is modelled on the FE Commissioner process, then this may not require legislation. The FE Commissioner was introduced in 2013 as part of the "rigour and responsiveness in skills" document under the Coalition. But the appointment did not require legislation, as it was a public appointment created under the existing authority of the Secretary of State, and the duties of the commissioner fell under existing legislation regarding

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[46] Department for Education, "Higher education restructuring regime guidance for applicants" December 2020 https://www.gov.uk/government/publications/higher-education-restructuring-regime-guidance-for-applicants

colleges. We would hope that, as chapter 3 sets out, the work of the HE Commissioner, including support on governance and managing the approval process for the Transformation Fund, would operate on a voluntary basis, and hence not require additional powers.

However, it is possible that the HE Commissioner and their team might, in extremis, want to take action against that of the agreement of the university. Much of this could be delivered under the powers of the OfS. But it is possible that some specific duties might require additional legislation. This would need to be determined by the government, depending on the exact scope of the responsibilities, and we do not conclude more definitively here.

As discussed in Chapter 3, there has been much discussion in recent months – in the House of Lords report into the OfS, in the OfS report on financial sustainability in the sector, in the Office of the Independent Adjudicator for Higher Education's recent work, and in trade press and national press – about the possibility and likely scenario of a 'bail out' should a university find itself in financial difficulty.

This report does not discuss the political debate in such a scenario, and this chapter focuses only on the reality of implementing such a 'bail out' should that be decided. If government decided to offer financial support to an institution – which might be linked to some form of required restructuring via the Transformation Fund, but would likely be more of a financial injection in response to financial crisis, not in advance of it, then this would likely not require legislation, but it would obviously be a decision that escalated beyond the OfS to Ministers. As Lord (Jo) Johnson said in evidence to the House of Lords:

> *"The Office for Students is not set up to be an entity that can bail out failing institutions. It does not have pots of money that it can draw on to do that. If Ministers, for political reasons, were to decide that they wanted to save an institution, it would be a matter for the DfE and the Treasury. The OfS would not want to get involved"*.[47]

As regards a new Special Administration Regime, and the third and most formal level of intervention, it is very clear that this would require new primary legislation. We do not draft such legislative text here, but it seems clear that it ought to be modelled on The Technical and Further Education Act 2017, which introduced a regime in further education known as education administration. Under this regime, the Secretary of State can apply for an education administration order (EAO) appointing an education administrator to manage a

[47] House of Lords Industry and Regulators Committee corrected oral evidence: the work of the Office for Students, evidence from Rt Hon Lord Johnson of Marylebone, Former Minister for Universities, Science and Innovation; Rt Hon Charles Clarke, Visiting Professor, Lancaster University and King's College London, and Former Education Minister, Question 26
https://committees.parliament.uk/oralevidence/12833/html/ 14 March 2023

college's affairs, business and property – and grants such administrator wide ranging powers and reasonable discretion to:

- Avoid or minimise disruption to the studies of existing students as a whole (rather than the interests of each individual student), and
- ensure that it becomes unnecessary for the college to remain in education Administration for that purpose

Given the relative size of universities compared to FE colleges, and the legal complexities within them, such legislation will be difficult. It is difficult to see how an administrator could manage the affairs of a university for a couple of months, let alone years. Colleges, for example, do not usually award their own qualifications, and so there are fixed external requirements that an administrator can relatively easily ensure there are resources allocated to comply with. For universities, with their own degree-awarding powers and flexibility around quality assurance, there could be a high degree of risk that an administrator may not fully understand the resourcing of such processes with a risk to both quality and standards. Introducing such a SAR, while necessary, should also be seen very much as a last resort before insolvency, and to prevent disorderly exit.

It is also worth considering the potential impact on the classification of universities into the public sector, should further government intervention be taken. A decision taken by the Office of National Statistics to reclassify universities as public bodies, on the grounds that the government exercises a level of control over them, could have potentially significant impact both for government and for institutions. Most notably, university borrowing would become an item on the government balance sheet. As part of that - and following the example of government action around FE Colleges which were reclassified in late 2022,[48] the government could immediately place controls and restrictions on borrowing by institutions. This would have a potential significant negative impact on the ability of universities to manage their finances.

When considering the risk of such a reclassification, it is, unhelpfully, not a topic on which there are firm criteria set out by the ONS, nor is there a binary state on one side of which sits institutions in the public sector, and on the other side sit institutions classified differently.

[48] Gov.uk, "Further education reclassification", November 2022
https://www.gov.uk/government/publications/further-education-reclassification

According to the ONS website, classification involves the following considerations:

- whether the institutional unit is a non-profit institution (NPI), or not;
- whether the unit is subject to public sector control, or not;
- whether the unit produces financial services, or not; and
- whether the unit is a "market" or "non-market" producer.

As Shakespeare Martineau point out[49]:

"Public sector control can be established in a number of ways. In the case of colleges, a key factor was the power of intervention the Secretary of State has in cases of mismanagement or failure to meet local skills needs, and it was the existence of these rights rather than the exercise of them that was sufficient to meet the relevant threshold for control. However, control via intervention rights is not the only test, for example, excessive regulation, contractual conditions or the right to stop an entity from terminating its relationship with the government are also relevant considerations."

We recognise the risk to the sector (and to government, from a managing public money perspective) of a reclassification - and the fact that control via intervention or regulation are possible criteria. We also emphasise that this is an issue on which very little specificity can be measured.

As such, we would make the following arguments as to why the interventions based here are not ones which excessively add to government control or intervention rights:

- The OfS' regulatory powers are not increasing, under our model. The proposed new direction from the Secretary of State merely requires the OfS to give priority to one of its existing duties under HERA, over others - there are no new duties being introduced.
- The HE Commissioner will likely work, in almost all instances, on a voluntary basis. Governance reviews, judgements of finances and the like are already things which universities can avail themselves of.
- The HEEATS scheme, equally, would be a voluntary scheme in the majority of instances. Universities would not, except in extremis, be compelled to enter. The

[49] Jamdar, "The potential reclassification of universities by the Office for National Statistics: some initial thoughts" January 2023
https://www.shma.co.uk/our-thoughts/the-potential-reclassification-of-universities-by-the-office-for-national-statistics-some-initial-thoughts/

scheme would operate via loans, not government grant - and universities would repay such loans through the same mixture of public and private funding which they already receive. This is not an additional public funding stream into the HE sector in exchange for greater control.

- The Special Administration Regime would, clearly, offer some form of greater control in the case of exit. But such a scheme also operates a backstop for other sectors such as energy markets, where there is no question of the institutions themselves being considered as public sector bodies, even though they work in a market with a strong public interest in consistency of supply.

We take note of judgements both by Shakespeare Martineau cited above, and Julian Gravatt from the AoC on the relatively unlikely (ie less than 50%) prospects of HE reclassification[50]. We also note that, since these pieces were written, the timescale for reclassification consideration has been put back again, and is now due to report "during 2025",[51] having been initially set out in 2017, which Gravatt suggests might indicate a possible lack of urgency.

Therefore, on balance, given the way in which interventions have been suggested, and recognising that there is little firm criteria on which to take a judgement and the very clear need to address weaknesses that appear to us to be greater than 50% in coming to fruition, we still see the case for such interventions.

[50] Gravatt / HEPI, "Are universities really at risk of ending up in the public sector?" March 2023 https://www.hepi.ac.uk/2023/03/21/are-universities-really-at-risk-of-ending-up-in-the-public-sector/
[51] ONS, "Public sector classification guide and forward work plan" July 2024
https://www.ons.gov.uk/methodology/classificationsandstandards/economicstatisticsclassifications/introductiontoeconomicstatisticsclassifications

Chapter 6: Conclusions

This paper has outlined the case for a more proactive approach to deal with the increasing possibility of what is termed "disorderly exit" by one or more universities – a scenario in which one major, or a number of, institutions become no longer financially viable – without much or any advance warning. This is defined by the OfS as *"the unplanned closure of a university, perhaps in the middle of an academic year, without arrangements in place to support students to complete their courses."*

This has become an increasingly pressing question because of the tightened financial circumstances in which higher education in England finds itself, as the paper summarises.

In response to this increased risk, this paper calls for a generally more proactive approach towards active risk management, and specifically calls for the introduction of a three step process to hopefully preempt exit, or to manage it in a more orderly way if it does occur.

All policymakers and those who have an interest in the higher education sector should care about disorderly risk: to students; because of a contagion effect; and because of the risks of systemic impact over time.

This is not an argument for preserving the current system in aspic – or saying that the higher education system must always grow. It's an argument that government, policymakers and indeed all citizens benefit from a financially sustainable HE system that delivers both individual benefit, and wider national goals for the country. Changes in provider shape and size are acceptable - and even to be welcomed if they come in response to sustained student preferences - but they need to be managed in a strategic way, and the systemic impact constantly monitored.

For the new government, this issue ought to be near the top of their priority list. Everyone benefits from a flourishing HE sector; and everyone shares the risk from a disorderly exit.