GOVERNMENT FUND FOR THE REPLACEMENT OF UNSAFE NON-ACM CLADDING ON HIGH-RISE BUILDINGS (BUILDING SAFETY FUND)

Guidance for Leaseholders that are Undertakings on completing their State Aid Declaration

Introduction

In March 2020, the Government announced that it will provide £1 billion in 2020 to 2021 to support the remediation of unsafe non-Aluminium Composite Material (non-ACM) cladding systems on residential buildings 18 metres and over in both the private and social housing sectors. The responsible entity for your building intends to apply for funding to pay for the replacement of the unsafe non-ACM cladding on your building. The Government has established a fund that will allow the replacement of the cladding to happen quickly, to restore peace of mind and to allow residents to get on with their lives. It will also mean that leaseholders will not have to pay for the costs of these works, which would normally be paid through your service charge.

In order for the Government to provide funding for replacing the cladding on your building, the following action is needed:

- Each owner of a flat or any commercial occupier must sign and complete a State Aid declaration if they fall into the category of 'Undertaking' – this guidance will help you decide whether you fall into that category or not.
- If you are an Undertaking you must return the original signed declaration to the responsible entity for your building (the organisation which provided you with the State Aid declaration) and keep a copy of your signed declaration for at least three years.
- If you are not an Undertaking you do not need to sign and return the declaration.
- The responsible entity for your building must make an application for funding from the Government for the replacement of the unsafe cladding on your building.

1 Applications to the Fund can only be made by the responsible entity for a building. Responsible entities are those organisations which have a legal responsibility for the repair, condition and safety of the building, and which have a legal right to recover the cost through the service charge. A responsible entity may be the building freeholder or head leaseholder or a management company who has primary responsibility for the repair of the property. A management company which is not the responsible entity will still be able to apply and manage the application as an agent for the responsible entity. Your responsible entity will provide you with a State Aid declaration to complete and return to them if you are an undertaking.
An Undertaking is anybody (including an individual, corporation, a partnership, a family trust, etc.) who either:

- owns and lets out properties to others (for the purposes of the State Aid rules, this counts as operating a business) or
- uses the property in this building solely for the purposes of operating a business.

Undertakings will be subject to limits on the amount of funding that can be received on their behalf from the Government. For the purposes of this fund, the Government will be providing funding under the State Aid *de minimis* rules; the amount the Government can provide in *de minimis* funding for any individual business is limited to €200,000 over three years.

An Undertaking will also include 'Linked Enterprises'. Linked enterprises form a group by controlling the majority of voting rights of an enterprise, either directly or indirectly; or being able to exercise dominant influence over an enterprise.

Enterprises are linked when one enterprise holds a majority of the shareholders’ or members’ voting rights in another enterprise; or can appoint or remove a majority of the other enterprise’s administrative, management or supervisory body; or there is a contract between each enterprise enabling one to exercise a dominant influence over the other; or one enterprise can exercise sole control over a majority of shareholders’ or members’ voting rights in another enterprise. A typical example is a wholly owned subsidiary.

An enterprise can also be linked to another enterprise where it exercises the sorts of control described above through a third party.

Leaseholders who are Undertakings need to sign a declaration because this allows the Government to confirm that payments comply with the requirements of the EU State Aid rules, which is a necessary step before any payments can be made. These rules continue to apply notwithstanding the UK’s departure from the EU in January 2020. The purpose of EU State Aid rules is to prevent a government from giving an advantage to some businesses (undertakings) in a way that could distort competition.

In the case of an Applicant/Leaseholder that has underlet its property on long lease (more than 7 years) terms and passes down either the whole or part of its service charge obligation the undertenant is the aid beneficiary and the liability to pay the service charge (i.e. to cover the costs) should not be waived.

If you live in the building and do not own and let out any other property in the building, State Aid rules are not relevant and you do not need to complete and return the declaration.

If you are an Undertaking you should therefore be aware that there is a risk that the Government may not be able to meet all your service charge obligations to pay for replacement of the cladding. However, the fund is designed to maximise the value of the benefit the Government is able to give you.

If you have already paid service charge for these works, then if the application for funding is successful, the responsible entity for your building will be obliged to
reimburse you the service charge you have already paid for the costs of remediation, subject to the limits described above if you are an undertaking.

Please review the questions below for further guidance on whether you need to complete the State Aid declaration and if so how you should complete it.

If you are an Undertaking and do not complete and return a declaration, this means that if the responsible entity for your building does carry out this necessary work, it or we may be obliged to recover the costs of doing that work directly from you to the value of the amount you would have paid under your service charge.

Q1. What is State Aid and why are State Aid rules relevant to the replacement of unsafe ACM cladding on my building?

EU rules constraining the use of State Aid apply to the UK until at least 31 December 2020. The purpose of the State Aid regime is to prevent governments from giving financial advantages to businesses in a way which could distort competition. As an example, payments under this fund for the benefit of leaseholders whose properties are run as buy-to-lets could be giving them an advantage compared to other buy-to-let owners who have to pay for repair costs without Government funding.

Q2. For whom might State Aid rules limit the amount of funding that can be provided?

*De minimis* State Aid rules may limit the amount of funding which can be provided for the benefit of anyone (including an individual, corporation, a partnership, a family trust, etc.) who owns and lets out properties to others, or uses the property in this building solely for the purposes of operating a business. This includes whether the business being operated or letting out of properties is in addition to other business activities or as the only business activity they carry out. The amount the Government can provide in funding for any individual business is limited to €200,000 over three years. If you are linked to any other businesses (for example you own a controlling interest, or direct that other business), then you will have to take those businesses into account as well for the purpose of determining whether the €200,000 limit has already been met or will be met under this fund.

The State Aid rules will not limit the amount of funding that leaseholders can benefit from where they are an owner-occupier of a single property, even if the leaseholder also runs a business from the same property.

Q3. I am a private individual, is this really relevant for me?

If you live in the building and do not own and let out any other property in the building, you are not an Undertaking (business) for State Aid purposes, and will not be subject to the limits on funding. You do not need to complete the declaration.

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2 For a more detailed guide, see: https://www.gov.uk/guidance/state-aid
3 Linked business will include (a) one organisation which holds the majority of the shareholders’ or members’ voting rights in another organisation, (b) one organisation is entitled to appoint or remove a majority of the administrative, management or supervisory body of another organisation, (c) a contract between the organisations, or a provision in the memorandum or articles of association of one of the organisations, enables one to exercise a dominant influence over the other, (d) one organisation is able by agreement, to exercise sole control over a majority of shareholders’ or members’ voting rights in another organisation.
Worked Example: Arminder owns Flat 6 Acacia Towers having bought a long lease of a residential property in that building, which is his main residence. He does not own and let out property in this building or in any other building with unsafe cladding. He will not be subject to the limits on funding which can be provided as part of the Fund, and so he does not need to complete the declaration. The responsible entity for his building can still apply for funding to cover the cost Arminder would otherwise have had to pay for through the service charge.

Q4. How will I know if I have previously received de minimis State Aid?

If you are an Undertaking you will have received a formal notification of any previous de minimis State Aid received from the body that granted that aid to you. If you have an accountant or legal adviser, please check with them whether you have received any such notifications. If you have not received any notifications, then it is unlikely you have received any de minimis State Aid. If you have received any such notifications, then the amount should be set out in the declaration (in Part 2 of the declaration).

Q5. What about the costs of works which do not qualify for funding?

Government intervention is limited to providing funding for the replacement of non-Aluminium Composite Material (non-ACM) cladding. If the responsible entity for your building also intends to carry out other works, these will not qualify for government funding. The costs of these works will not be counted in the State Aid calculation. The Government has been clear that building owners are responsible for building safety, and should protect leaseholders from the costs of remediation.

Q6. What happens if there is more than one leaseholder?

If you let out a flat and you are one of a number of owners named on the lease, each leaseholder that is an Undertaking will have a separate State Aid threshold of up to €200,000.

As you will know, each of the leaseholders of a flat are liable to pay the full service charge amount. Where a flat has more than one owner, we will apportion on an equal basis the amount of funding provided for the benefit of each individual leaseholder.

We've provided a worked example below.

Worked Example: Jack and Sarah own Flat 1 Acacia Towers and Flat 2 Acacia Towers having bought two long leases of residential property in this building. They have both signed both leases as individuals. Flat 1 is their main residence and Flat 2 they rent out. The following applies:

- In respect of Flat 2 the fact that Jack and Sarah are renting out this property means that they are regarded as a 'business' for State Aid purposes on the funding of Flat 2's works. If neither of them have received any other de minimis State Aid in the last 3 years, and they do not own and let out any other flats in buildings covered by this Fund, Jack's State Aid threshold for Flat 2 will be €200,000 and Sarah's State Aid threshold for Flat 2 will be €200,000. That
would mean there is potentially €400,000 worth of de minimis State Aid allowance available to them.

- Flat 1 is Jack and Sarah’s main residence and so the State Aid rules do not apply to the funding of that Flat 1. They do not need to list that property on their State Aid declaration for Flat 2.
- The cost of the works attributable to Flat 2 are €15,000. The amount of funding provided will be split equally between Jack and Sarah’s *de minimis* State Aid allowance.
- If Jack and Sarah had instead formed a company or partnership which signed up to the lease for Flat 2, the cap for Flat 2 would be €200,000, as there was only one leaseholder not two. The State Aid declaration in respect of Flat 2 would be signed on behalf of the company or partnership.

**Q7. What if I rent out more than one flat?**

The total amount of lawful State Aid an undertaking can benefit from is €200,000 over 3 fiscal years, no matter how many flats you own and rent out. This means if you own and rent out any one or more flats in the building, or you own and rent out a flat, or flats, in another building with unsafe cladding, the total amount of benefit you could benefit from across all the flats you rent out is €200,000. How much of that €200,000 will actually be available will also depend on how much (if any) de minimis State Aid you have already been granted within the last 3 years. To check this point, you will be asked to sign a State Aid declaration in relation to each of the buildings where you own a flat and rent it out and that may benefit under the Fund.

**Worked example:** Tom received the equivalent of €70,000 State Aid in other circumstances over the last two financial years. That means he has €130,000 left available of his State Aid threshold. He owns and lets out five flats in Acacia Towers, ten flats in Blackton Towers and six flats in Garden Rise, all of which have unsafe cladding. The value of the benefit for Tom under the funding applications submitted for Acacia Towers and Blackton Towers amount to €100,000. That leaves €30,000 of his State Aid threshold still available if he needs it in other circumstances. If, on the other hand, the funding applications for Acacia Towers and Blackton Towers was for €150,000, then the funding would be capped at €130,000.

**Q8. Who should sign the declaration?**

If you let out your property for financial gain (i.e. you rent it out) or you use the property only for commercial purposes and you do not also live there, everyone named on the lease of your flat, including you, should sign a separate declaration. So, if your lease is in the name of three people, then each of those three people named on the lease should sign a separate declaration (there is a section on the declaration for you to explain if there is more than one leaseholder of your flat). The reason for asking you each to sign separate declarations is that the answer to whether or not you are a business may be different and your entitlement to benefit under the State Aid rules is individual. If you are no longer in contact with any of these individuals or if any of them are no longer alive, then please explain this in the declaration form (at the beginning of the declaration).

**Q9. What if I sell my flat whilst the remediation work is being carried out?**
You should let your solicitor or conveyancer know and provide them with a copy of this guidance\textsuperscript{4} and a copy of the letter we will send you setting out how much State Aid you will have benefitted from (if there is more than one leaseholder, then a copy of the letter for each of you). Please also let the responsible entity for your building know as soon as possible and provide them with details of your buyer (or buyers).

**Q10. What if it turns out that I have been paid unlawful State Aid?**

If you have been paid unlawful State Aid, we may be obliged to recoup from you some or all the funds you have benefitted from under the Fund, together with interest. The Fund is designed to try and limit this risk and this is why, if you are an Undertaking, you should sign and return the declaration to the responsible entity for your building.

**Q11. How will applications to the Fund work?**

The responsible entity for your building is responsible for works on your building, and will therefore be making an application for funding and managing the works. However, the funding is being provided for the benefit of leaseholders, who would otherwise ordinarily be required to pay for the works via the service charge as per the provisions in their lease. Leaseholders will not directly receive any funding (unless they have already paid for works), as the benefit they receive is the service charge which they would otherwise have had to pay. If you have already paid service charge for these works, then if the application for funding is successful, the responsible entity for your building will be obliged to reimburse you some or all of the service charge you have already paid.

**Q12. But we are leaving the European Union? Is State Aid still relevant?**

The EU State Aid rules continue to apply in the UK until 31 December 2020 at least even though the UK has left the EU.

**Q13. How can I find out more information about the Fund?**

If you have any questions about filling in this declaration, please first contact the responsible entity for your building, who will pass on your query to MHCLG’s Delivery Partners if they are unable to answer it.

If you would like to understand more about the works planned for your building, please contact the responsible entity for your building. If you would like to find out more about the Building Safety Fund in general, please see here: [https://www.gov.uk/guidance/remediation-of-non-acm-buildings#prospectus---outlining-eligibility-for-the-fund](https://www.gov.uk/guidance/remediation-of-non-acm-buildings#prospectus---outlining-eligibility-for-the-fund)

You can access specialist advice for help to understand your rights through the Leasehold Advisory Service (LEASE). The Government has allocated additional funding to LEASE to provide independent, free, initial advice to leaseholders on building safety issues to ensure they are aware of their rights and are supported to

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understand the terms of their leases. More information on LEASE, including how to contact them for advice, is available here: https://www.lease-advice.org/