

PART 2 – CONFIDENTIAL FACTS AND ADVICE

MD2774

Title: **Waking Watch Relief Fund**

Information may have to be disclosed in the event of a request under the Freedom of Information Act 2000. In the event of a request for confidential facts and advice, please consult the Information Governance team for advice.

This information is not suitable for publication until the stated date because:

It contains legally privileged information.

Date at which Part 2 will cease to be sensitive or when this information should be reviewed with a view to publication: 1 year after decision date

Legal adviser recommendation on the grounds for not publishing information at this time:

Under section 42 of the Freedom of Information Act information is exempt if its disclosure would, or would be likely to, involve the disclosure of information that is legally privileged. This is a qualified exemption, meaning that information captured under section 42 can only be withheld if the public interest in withholding it outweighs the public interest in releasing it.

The information below contains legally privileged advice relating to the subsidy control position proposed to be taken by MHCLG and the GLA in relation to the Waking Watch Relief Fund. It is considered that, in the circumstances, the public interest lies in maintaining the exemption and withholding the information.

Legal Adviser - I make the above recommendations that this information is not suitable for publication at this time.

Name: TfL Legal

Date: 18 February 2021

Decision and/or advice:

Subsidy control risk

Since 1 January 2021 the State aid system has been replaced with subsidy control. Section 29 of the European Union (Future Relationship) Act (EUFRA) effectively incorporates the subsidy provisions of the EU/UK Trade and Cooperation Agreement (TCA) into UK law. This will apply until such time as the UK introduces bespoke regulations (which when adopted will supplant the associated TCA provisions).

The TCA defines subsidy as including all four of the following characteristics:

- (i) financial assistance arising from the resources of the UK (or EU states);
- (ii) that confers an economic advantage on one or more economic actors;
- (iii) is specific insofar as it benefits certain economic actors over others in relation to the production of certain goods and services; and
- (iv) has, or could have, an effect on trade or investment between the UK and EU.

MHCLG officials have confirmed to the GLA that, informed by the legal advice they have received, MHCLG's position is the grant does not constitute a subsidy. This is on the basis that, in the majority of cases, the beneficiaries of the grant will not be "economic actors" (they will be individual leaseholders occupying the flats as their homes), so limb (ii) of the subsidy definition would not be satisfied. To the extent that grant is being provided to an "economic actor" – for example a buy-to-let leaseholder, limb (ii) would be satisfied but MHCLG's view is that the grant would not satisfy limb (iv).

Insofar as the beneficiaries of the grant are individuals occupying the flats as their homes, on the basis of the current subsidy control system the risk of the grant subsequently being deemed to be unlawful subsidy is considered to be low. A person is an "economic actor" if they are engaged in an economic activity by offering goods or services on the market, which would not appear to be met in such circumstances.

With regard to any beneficiaries who are economic actors, the approach which MHCLG propose – i.e. that there is no subsidy – depends upon limb (iv) of the definition of "subsidy" not being satisfied. If the GLA were to proceed to administer the WWRF in London on this basis, it would need to be comfortable that the grant does not have, nor could have, an effect on trade or investment between the UK and EU. MHCLG take the view that limb (iv) is not satisfied because the grant agreement will not specify where the fire alarms or installation services may come from and consequently trade between the UK and other countries can continue unaffected by this grant. However, it should be noted that the test to satisfy limb (iv) appears to be a low threshold – given that it is satisfied where subsidy *could* have an effect on trade – so in the absence of further guidance and UK case law on the new subsidy system, the GLA would be assuming a risk based approach and there is no absolute certainty about the precise interpretation a UK court might take.

The GLA also has to consider subsidy requirements in the UK's other trade agreements. As the date of this report the TCA's provisions are more comprehensive than the other trade agreements and it is considered that if there is deemed to be no subsidy under the TCA, there would be no subsidy under the other trade agreements.