



EUROPEAN COMMISSION

Brussels, 18.12.2013

C(2013) 8436 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State aid SA.29769 (2013/C) (ex 2013/NN) – Spain
State aid to certain Spanish professional sport clubs

Sir,

The Commission wishes to inform Spain that, having examined the information supplied by your authorities on the aid referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. Procedure

- (1) In November 2009, the Commission received a complaint on a possible preferential corporate tax treatment of the four Spanish sport clubs Real Madrid CF, Athletic Club Bilbao, Club Atlético Osasuna (Navarra) and FC Barcelona in comparison to sport limited companies. Spain was asked to comment on the complaint on 15 February, 12 April and 28 September 2010. Comments were received on 23 March and 15 December 2010.
- (2) On 3 May 2010 and 14 March 2011 the complainant submitted observations to the comments made by Spain.

Excmo. Sr. D. José Manuel García-Margallo y Marfil
Ministro de Asuntos Exteriores y de Cooperación
Plaza de la Provincia 1
E-28012 MADRID

- (3) On 1 October 2012 the Commission wrote a letter to all Member States to get an overview of the financing of professional football in the EU and the possible impact of the State aid rules of the Treaty on this financing. The Commission referred to the complaints it had received from citizens of several Member States concerning alleged aid measures favouring professional football clubs. Some of these measures would concern a special tax treatment of certain professional football clubs. In the letter the Commission underlined that professional football clubs should receive no exceptional treatment compared to other undertakings as regards taxation and payments for social security. Spain replied to this letter on 5 December 2012. In its reply it addressed in particular the issue of the tax treatment of sport clubs and sport limited companies.

2. Description of the aid

- (4) The "ley del deporte" of 1990¹ obliged all Spanish professional sport clubs (clubes deportivos) to convert into sport limited companies (sociedades anónimas deportivas). The justification for the measure was that many clubs had been managed badly because neither their members nor their administrators bore any financial liability for economic losses. The purpose was to establish with the new sport limited company a model of economic and legal responsibility for clubs which perform professional activities, in order to increase their chance for good management.
- (5) The alleged possible preferential corporate tax treatment of the four Spanish sport clubs Real Madrid, Athletic Club Bilbao, Club Atlético Osasuna (Navarra) and FC Barcelona which could result in State aid is based on the "Seventh Additional Disposition" of the ley del deporte of 1990. This disposition exempts from this obligatory conversion those football clubs which had a positive balance in the preceding 4-5 years. The exemption is, according to the preamble of the law, based on the fact that these clubs have shown "a good corporate management" and would not need that switch. No further justification is supplied in the law and its preamble. They may maintain their current legal structure of a club unless their assemblies agree to the contrary².
- (6) The law does not explicitly mention by name the four clubs that eventually benefited from this exemption. However, they emerged as the only ones fitting this description. The clubs did not convert into a sport limited company although they would be entitled to do so. The Spanish Sports Law does not include a time period for a possible re-assessment of this specific treatment. Thus only the originally qualified four teams will have the option of benefitting from the fiscally favourable status of "sports club", irrespective of how the financial health of the other teams evolves. No commercially viable team may reconvert to club status either.
- (7) The fiscal treatment of sports clubs deviates from the fiscal regime applicable to sports public limited companies. Sports clubs are treated as non-profit entities (*Entidades Sin Animo De Lucro*) which qualify for a partial corporate tax exemption according to Article 9(3)a) of the Spanish Corporate Tax Law (*Ley del Impuesto sobre Sociedades*).

¹ Ley 10/1990, de 15 de octubre, del Deporte, BOE de 17 de Octubre de 1990.

² "Those clubs, that at the time of enactment of this law participate in official football competitions at a professional level and had had a positive shareholders equity balance in all of the audits performed at the request of the Professional Football League since the 1985-1986 season, shall maintain their current legal structure unless their assemblies agree to the contrary..."

As a result of this partial exemption, Article 28(2) of the Corporate Tax Law provides that the exempted clubs, as non-profit entities, shall pay Corporate Tax for their commercial income at a reduced rate of 25% instead of the general rate of 30% (having been 35% until 2006 and 32.5% in 2007).

- (8) Although by law the four clubs are considered to be non-profit entities, in reality they conduct for the most part profit oriented professional activities. Real Madrid CF, for example, earned revenues of more than EUR 512 million in the 2011/2012 season from its activities. Of its revenues, 38% derived from the sale of broadcasting rights whereas 36% constituted commercial revenue from sponsoring and merchandising (sale of club related articles like replica shirts, or scarves) and licensing. The remaining 26% are so called match day revenues (ticket sales and other revenues generated in the stadium, membership fees). Similarly, FC Barcelona's EUR 483 million revenues in 2011/2012 derive from professional sport activities, with broadcasting, commercial, and match day revenues accounting for 41%, 34% and 25% respectively. Both clubs have been leading the European Premier League clubs in terms of revenues for several years, followed by Manchester United and Bayern München³. The only other Spanish clubs among the top 20 are occasionally Atlético de Madrid in 2010 (EUR 124 million) or Valencia in 2011 (EUR 116 million).
- (9) These revenue generation activities are economic in nature and conducted in fierce competition with the other large European professional football clubs. The sources of revenue are intimately linked to and depend on the teams' success in sport competitions. In turn, this success very much depends on the amount of funds available to clubs to attract the best players and coaches.
- (10) Spain submitted that [...] * However, according to its annual reports, Real Madrid's earnings before taxes were EUR 25 million for the 2008/2009 season and EUR 31 million for 2009/2010. For 2010/2011 the press reports a net profit of EUR 30 million, for the most recent financial year a net profit of EUR 36.9 million⁴. FC Barcelona had announced earnings of €8 million during the 2008/2009 business year but announced for 2009/2010 a loss of EUR 79.6 million. These figures suggest considerable taxable revenues for 2009 and 2010, at least for Real Madrid. [...]
- (11) According to Spain, Athletic Club Bilbao and Club Atlético Osasuna [...].

3. Assessment of the aid

3.1. Existence of aid within the meaning of Article 107 (1) of the TFEU

- (12) The described specific situation of the clubs constitutes State aid within the meaning of Article 107(1) TFEU, if it supports, through State resources, a certain economic activity which derives thereby a selective advantage which could affect competition and trade between Member States. The concept of State aid covers both, financial expenditure and foregone income by any public authorities in favour of undertakings.

³ All figures obtained from Deloitte Football Money League, 15th edition, 2012.

* Information protected for reasons of professional secrecy, in accordance with the Commission Communication on professional secrecy in State aid decisions, OJ C 297 of 09.12.2003, p. 6.

⁴ Most recently in the Financial Times of 7 September 2013.

- (13) The supported activities have to be of a commercial nature. Professional sport clubs may qualify as commercial undertakings. Having regard to the objectives of the European Union, sport is subject to European Union competition law in so far as it constitutes an economic activity⁵, which is undoubtedly the case for professional football or basketball.
- (14) Article 107(1) TFEU requires it to be determined whether a State measure satisfies the condition of selectively favouring certain undertakings in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the scheme in question. Regarding possibly forgone income in the form of tax measures, the Court of Justice has developed a set of criteria for the application of Article 107(1) TFEU, and in particular with regard to the question whether they accord a selective advantage⁶.
- (15) Differential taxation would be *prima facie* selective if it constituted a departure from the general or reference taxation system. Once the reference taxation system has been identified, it needs to be assessed whether the measure favours certain undertakings in comparison with other undertakings which are in a comparable legal and factual situation in light of the objective of the tax scheme, i.e. whether there is derogation from the reference tax system. If there is derogation from the reference system and it favours certain undertakings, one may conclude that the measure is *prima facie* selective. Although such a measure can be justified by the logic of the system, only intrinsic reasons inherent to the tax system and no external policy reasons can be taken into account. If the differentiation cannot be justified by the logic of the tax system, it would amount to a selective advantage.
- (16) Accordingly, first, a common reference taxation system for both clubs and limited companies has to be established. They are indeed in a comparable legal and factual situation in light of the objective of the tax scheme, i.e. making revenues on the basis of company profits. This allows determining whether there is a selective deviation from the "normal" tax regime. The tax basis is a crucial element for the determination of the tax system. In this case it is the amount of net profit earned by the undertaking at the end of the tax year. The Spanish corporate tax system is therefore the relevant reference system for the purpose of determining whether the tax regime is selective. It is therefore appropriate to compare the taxation of profits of football clubs engaged in the activity of professional premier league football with the taxation of other undertakings which are subject to the normal corporation tax rate.
- (17) Second, it needs to be established whether there is a difference in treatment of the two forms of incorporation. By way of derogation from the normal tax rates applicable to legal persons, the taxable income of the clubs is taxed with a lower rate than that of limited companies. The clubs therefore are treated differently as they enjoy a reduced tax rate to which other undertakings subject to corporate tax, such as sport limited companies, are not entitled.
- (18) It is therefore necessary to determine whether tax exemptions are liable to favour certain undertakings by comparison with other comparable undertakings in the light of

⁵ Case C-415/93 *Bosman*, paragraph 73, Case C-519/04 P *Meca-Medina and Majcen v Commission*, paragraph 22 and C-325/08 *Olympique Lyonnais*, paragraph 23.

⁶ Most recently in the judgment of 8 September 2011 in Cases C-78 and C-80/08, *Tax advantages to Italian cooperatives*.

the objective pursued by the corporation tax regime, namely of making revenues on the basis of company profits. Clubs, although they are considered non-profit organisations, and limited companies, which pursue an identical economic activity, are in a comparable situation: a market exists for the activity concerned, the activity is organised on the basis of market principles and it has to be considered economic⁷. The four clubs are engaged in economic activities in the same way as their limited company competitors. For the purpose of the State aid assessment, it is not decisive whether a certain activity is organised by some as "for profit" and by others as a "non-profit" activity. The determining factor is whether the support concerns an activity which is subject to competition on the market. Any entity engaged in an economic activity is to be considered as an undertaking regardless of its legal form, its profit or not-for-profit organisation, or the way it is financed⁸. In any case, the football clubs are not legally prevented from earning profits, and they actually do make profit. Accordingly, clubs and limited companies are treated in a different way without an apparent justification.

- (19) This different treatment may be justified by the nature and overall structure of the tax system⁹. It is, however, for the Member State which has introduced such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question.¹⁰
- (20) Spain argues that such tax differences may be justified by the nature and overall structure of the tax system, according to paragraph 25 of the notice on the application of State aid rules to measures relating to direct business taxation. The lower tax rate would be justified as the benefiting clubs would be non-profit organisations which would not and could not earn any profits.
- (21) However, this argument is weakened by the fact that the clubs actually do make profit. Furthermore, the objective pursued by the overall scheme is the taxation of corporate profits. Spain was so far not able to demonstrate that the difference in taxation of profits could be consistent with this purpose of the reference system.
- (22) Spain further argues that it is justified because clubs, unlike limited companies in relation to their shareholders, do not pursue the aim to distribute profit to the club members. However, if the system of taxation of corporate profits would allow for a distinction of that taxation according to the fact whether these profits will be distributed to owners or be kept in the entity, this would militate for a lower tax on profits which will be distributed because the distributed profits will be taxed another time at the level of the receiving shareholders¹¹. In other words, if at all, it would justify a higher tax rate for clubs. Consequently, such a differentiation as in the present

⁷ Opinion of the Advocate General in Case C-205/03, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission*, par. 13 and 31.

⁸ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979, par. 21.

⁹ Cf. paragraph 25 of the Commission notice on the application of State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3.

¹⁰ Judgment of the General Court of 4.9.2009, Case T-211/05, *Italian Republic v Commission*, paragraph 125.

¹¹ This is in line with the logic developed in the third sentence of paragraph 25 of the Commission notice on the application of State aid rules to measures relating to direct business taxation (cf. footnote 6), to which Spain referred: "Furthermore, it may also be justified by the nature of the tax system that cooperatives which distribute all their profits to their members (emphasis added) are not taxed at the level of the cooperative when tax is levied at the level of their members.".

case is based on objectives other than those pursued by the overall scheme, and the measure in question has to be regarded as selective.

- (23) In any event, an aggravating element in the case under consideration is that the sports law of 1990 singled out a limited number of beneficiaries. It introduced a lasting distinction based on the economic performance of the clubs in 1990, without leaving a choice on how to incorporate to all but four clubs, and without any possible review of that situation which would allow over time also other clubs to benefit from sound management. The four clubs qualified for this distinction decades ago at a given point in time. If Spain considered that the legal entity of club was not appropriate for professional competitions, the system should have been changed for all clubs or it should have allowed regular review of the situation. If economic success during four seasons in a row justified retaining the legal form of a club, it would make sense that sport limited companies should be allowed to re-convert to clubs after four successful seasons.
- (24) Furthermore, regarding the motivation of this different treatment, differences in the economic performance cannot justify different treatment as regards the obligatory form of organisation or the lack of choice in that respect. Losses are not intrinsic to a certain form of organisation. The business performance is therefore not an objective criterion justifying different taxation bases or imposing certain forms of incorporation for an indefinite period.
- (25) Therefore, the denial of free choice how to incorporate to all the other clubs, which for whatever reason did not qualify at a certain point in time, and without any possibility to review or reverse the situation, is not in the logic of any tax system and has the effect of a selective tax advantage for certain clubs¹².
- (26) Furthermore, cursory overview of the forms of incorporation of sports teams in other Member States shows that football clubs in the EU are by no means structured uniformly or similarly. Some legal systems do not make provision for specific structures of relevance to sport clubs. As a consequence, football clubs operating in one of these jurisdictions may adopt any legal structure available under its laws (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Germany, Hungary, Ireland, Lithuania, Latvia, The Netherlands, Poland, Slovakia, Slovenia, and the United Kingdom). Others provide sport-specific legal structures and make the adoption of these structures compulsory at least upon those wishing to participate in the first division of the football league championship (Denmark, Finland, France, Greece, Italy, Portugal, Romania, and Sweden). However, usually the clubs have a choice between different sport specific forms of incorporation (club or limited company), or if not (Finland, France, Italy), the incorporation as limited company is compulsory for all without exceptions¹³.

¹² This reasoning is similar to the one of the General Court in its judgment of 4.9.2009 in Case T-211/05, *Italian Republic v Commission*, paragraph 120, which considered selective a tax advantage available only to undertakings admitted to listing on a regulated market during a brief period, whereas all other undertakings were excluded from the advantages conferred by that scheme because they could not satisfy the conditions required for listing during the period covered by the aid scheme.

¹³ Source: Swiss Institute of Comparative Law, *Comparative Study of the legal structures of football clubs and supporter's organisations in 45 European jurisdictions*, Lousanne, 2008, commissioned by UEFA.

- (27) Regarding the Navarra and the Basque Region, Spain points to the autonomy of these regions in tax matters. However, the ley del deporte was adopted for the entirety of Spain. The different regional tax legislation powers or the selective character of a regional tax regime are not at stake but the selective character of national provisions of company law regarding professional football entities.
- (28) As a result, the four sport entities in question enjoy a preferential tax rate which is not justified by the nature of the tax system. This advantage derives from State resources, as the State forgoes possible tax revenues. The advantage for clubs playing in their national first league may furthermore have an effect on competition and trade between Member States and constitutes operating aid. These clubs compete for presence in European competitions and are active on the markets for merchandising and TV rights. Broadcasting rights, merchandising and sponsoring are sources of revenue for which premier league clubs compete with other clubs within and outside their home country. The more money clubs have available for top players the more success they may have in sport competitions, which promises more revenue from the activities mentioned. Furthermore, the ownership structure of the clubs is international.
- (29) Therefore, the financial State support providing an advantage to the professional sport clubs Real Madrid CF, Athletic Club Bilbao, Club Atlético Osasuna (Navarra) and FC Barcelona will in all likelihood have the potential to distort competition and affect trade. Thereby it constitutes State aid in the meaning of Article 107(1) TFEU.

3.2. Compatibility of the aid

- (30) Article 165 TFEU underlines the specific nature of sport which needs to be taken into consideration by the Commission when dealing with cases in this sector, as sport fulfils educational, public health, social, cultural and recreational functions. On the other hand, the economic importance of sport is growing constantly.
- (31) The Commission has not adopted guidelines on the application of the State aid rules of the Treaty to commercial sport activities. Spain does also not claim any public service mission of the professional sport clubs which could be assessed under Article 106(2) TFEU. An assessment has therefore to be based directly under Article 107(3)c TFEU. According to that provision, aid may be considered compatible with the internal market if it facilitates, in the common interest, the development of certain economic activities or of certain economic areas.
- (32) However, the Commission at this moment doubts that there is an objective of common interest which could justify selective operating support to very strong actors in a highly competitive economic sector. Also Spain does not forward arguments which could support the compatibility of the aid under Article 107(3)c TFEU.

4. Statement of the Commission's doubts

- (33) Accordingly, the Commission considers at this moment that Spain grants operating aid through a preferential tax rate to the four sport clubs Real Madrid CF, Athletic Club Bilbao, Club Atlético Osasuna (Navarra) and FC Barcelona which cannot be justified under Article 107(3)c or any of the rules implementing this Article.

- (34) The actual amount of the aid from the year 2001 until today needs yet to be determined.
- (35) The Commission therefore has doubts about the compatibility of this aid measure with the internal market.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Spain to submit its comments and to provide all such information as may help to assess the aid within one month of the date of receipt of this letter. This includes in particular information on the amount of corporate tax which was or was to be paid by the four clubs under consideration in the years 2001 to 2012. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Spain that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Spain that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State aid registry
1049 Brussels
Belgium

Fax No: +32 2 2961242

Yours faithfully
For the Commission

Joaquín ALMUNIA

Vice-president

NOTICE FOR PUBLICATION IN THE OJ, C SERIES
(decision to initiate the formal investigation procedure)

STATE AID – Spain

STATE AID SA.29769 (2013/C) (ex 2013/NN)
- State aid to certain Spanish professional sport clubs

**Invitation to submit comments pursuant to Article 108(2) of the Treaty on the
Functioning of the European Union.**

Text with EEA relevance

By means of the letter dated dd/mm/yyyy reproduced in the authentic language on the pages following this summary, the Commission notified Spain of its decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union concerning the abovementioned aid/measure.

Interested parties may submit their comments within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
1049 Brussels
Belgium
Fax No: +32 2 2961242
stateaidgreffe@ec.europa.eu

These comments will be communicated to Spain. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

1. Description of the aid

The "ley del deporte" of 1990¹ obliged all Spanish professional sport clubs to convert into sport limited companies. The purpose was to establish with the new sport limited company a model of economic and legal responsibility for clubs which perform professional activities. The "Seventh Additional Disposition" of this law exempted those football clubs from this obligation which had had a positive balance in the preceding 4-5 years. No specific clubs were mentioned, but only the four clubs Real Madrid CF, Athletic Club Bilbao, Club Atlético Osasuna (Navarra) and FC Barcelona benefited from this exemption and did not convert into a sport limited company. No other commercially viable team may reconvert to club status.

The fiscal treatment of sports clubs deviates from the fiscal regime applicable to sports public limited companies. Sports clubs qualify, as non-profit entities, for a partial corporate tax exemption according to Article 9(3)a) of the Spanish Corporate Tax Law (*Ley del Impuesto sobre Sociedades*). Article 28(2) of that law provides that the exempted entities shall pay

¹ Ley 10/1990, de 15 de octubre, del Deporte, BOE de 17 de Octubre de 1990.

corporate tax for their commercial income at a reduced rate of 25% instead of the current general rate of 30%.

Although by law the four clubs are considered to be non-profit entities, they conduct, as premier league clubs, profit oriented professional activities in competition with the other large European professional football clubs.

2. Assessment of the aid

2.1. Existence of aid within the meaning of Article 107 (1) of the TFEU

The Commission is of the view that the described specific situation of the clubs constitutes State aid within the meaning of Article 107(1) TFEU. The supported activities of professional sport clubs are of a commercial nature and are, although they are sport, subject to European Union competition law.

The lower taxation rate constitutes an advantage in the form of foregone income on the part of the State. It is selectively favouring certain undertakings in comparison with other undertakings which are in a comparable legal and factual situation. Differential taxation amounts to a selective advantage if it constitutes a departure from the general or reference taxation system and if it cannot be justified by the logic of the tax system.

The common reference taxation system for both clubs and limited companies is the amount of net profit earned by the undertaking at the end of the tax year. The Commission compared the taxation of profits of football clubs engaged in the activity of professional premier league football with the taxation of other undertakings which are subject to the normal corporation tax rate. It found that, by way of derogation from the normal tax rates applicable to legal persons, the taxable income of the clubs is taxed with a lower rate than that of limited companies. The clubs therefore are treated differently as they enjoy a reduced tax rate to which other undertakings subject to corporate tax, such as sport limited companies, are not entitled.

However, clubs and limited companies pursue an identical economic activity and are in a comparable market situation. The preferential tax rate for the four sport entities in question does not seem to be justified by the nature and overall structure of the tax system². Accordingly, clubs and limited companies are treated in a different way without an apparent justification.

The advantage for clubs playing in their national first league may furthermore have an effect on competition and trade between Member States. Therefore, the financial State support to the professional sport clubs Real Madrid CF, Athletic Club Bilbao, Club Atlético Osasuna (Navarra) and FC Barcelona constitutes State aid in the meaning of Article 107(1) TFEU.

² Cf. paragraph 25 of the Commission notice on the application of State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3.

3.2. Compatibility of the aid

The Commission has not adopted guidelines on the application of the State aid rules to commercial sport activities. An assessment has therefore to be based directly on Article 107(3)c TFEU. According to that provision, aid may be considered compatible with the internal market if it facilitates, in the common interest or the development of certain economic activities.

The Commission is not able to identify an objective of common interest which could justify, under Article 107(3)c TFEU, selective operating support to single very strong actors in a highly competitive economic sector.

3.3. Statement of the Commission's doubts

Accordingly, the Commission finds that Spain grants operating aid to the four sport clubs Real Madrid CF, Athletic Club Bilbao, Club Atlético Osasuna (Navarra) and FC Barcelona which cannot be justified under Article 107(3)c TFEU. The Commission therefore has doubts about the compatibility of this aid measure with the internal market.

In accordance with Article 14 of Council Regulation (EC) No 659/1999, all unlawful aid can be subject to recovery from the recipient.

[Text of letter]