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Opinion of Mr Advocate General Jacobs delivered on 26 September 2000. - Svenska staten (Swedish State) v Stockholm Lindöpark AB and Stockholm Lindöpark AB v Svenska staten (Swedish State). - Reference for a preliminary ruling: Svea hovrätt - Sweden. - Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Sixth Directive - Exemptions - Letting of immovable property - Practice of sport or physical education. - Case C-150/99.

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Opinion of the Advocate-General

1. Until 1997, all supplies of premises or other facilities for purposes of sport or physical education, together with the making available of accessories or equipment in that connection, were exempt from VAT under Swedish law. Was such an exemption authorised under the terms of the Sixth VAT Directive? If not, in what circumstances may an individual economic operator adversely affected by the application of such an unauthorised exemption rely directly on the directive and/or seek damages from the State? Those are essentially the questions raised in this reference for a preliminary ruling from Svea Hovrätt (Svea Court of Appeal).

Legislative, factual and procedural background

Community provisions

2. Under Article 2 of the Sixth Directive, a supply of goods or services effected for consideration by a taxable person acting as such is to be subject to VAT. According to Article 4(1), a taxable person is a person who carries out an economic activity, whatever the purpose or result of that activity. Economic activities include, under Article 4(2), the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis. The first subparagraph of Article 6(1) defines a supply of services as any transaction which does not constitute a supply of goods.

3. Article 13 of the Sixth Directive lists all the cases, other than in international trade, in which supplies of goods or services must or may be exempted from VAT.

4. Article 13(A) concerns exemptions for certain activities in the public interest. In that category, Article 13(A)(1) lists a number of transactions which must be exempted by Member States, including (m) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education.

5. Article 13(B) lists other mandatory exemptions, one of which is:

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption.

6. Under Article 13(C)(a), however, Member States may allow taxpayers a right of option for taxation in other words, a right to waive the exemption from VAT in cases of letting and leasing of immovable property.

7. With a view to avoiding cumulative taxation, Article 17 provides for a system of deductions. Under Article 17(1), the right to deduct arises at the moment when the deductible tax becomes chargeable, and Article 17(2)(a) provides: In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay ... value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person.

Swedish provisions

8. VAT in Sweden is governed by the VAT Law (Mervärdesskattelagen), under which all supplies of goods or services are taxable unless otherwise provided. Exemptions relating to immovable property are contained in Articles 2 and 3 of Chapter 3 of that Law. Article 2 exempts transactions including the assignment and grant of leases, tenancy rights, housing cooperative rights, leasehold rights, servitudes and other rights in immovable property. Prior to 1 January 1997, it contained a second paragraph (the disputed provision) which provided:

The exemption from value added tax shall also cover the supply of premises or other facilities or part thereof for the purpose of the practice of sport or physical education, as well as in connection therewith the making available of sports accessories or other equipment for the practice of sport or physical education.

9. It appears from documents produced to the Court that in 1994, in preparation for Sweden's accession to the Community, the Swedish parliament made a number of amendments to the VAT Law. An expert report commissioned by the government suggested that the disputed provision was not in conformity with Community law, but it was none the less decided to make no amendment at that stage, pending further consideration.

10. With effect from 1 January 1997, however, the disputed provision was repealed. In its stead, a new Article 11a was introduced, exempting inter alia services allowing individuals access to sports events or the opportunity to engage in sports or physical education, but only where those services are provided by the State, a local authority or a non-profit-making association.

Proceedings

11. Stockholm Lindöpark Aktiebolag (Lindöpark) is a company established in Vallentuna, Sweden, whose principal activity is the running of a commercial golf course. Its customers in that regard are exclusively business undertakings which wish to offer their staff and clients rounds of golf on the

course. Those customers, it appears from what was said at the hearing, pay a membership fee which entitles them to book rounds on the course for persons they select.

12. Until 1 January 1997, the Swedish revenue authorities considered that company golf activity to be exempt from VAT in accordance with the disputed provision. As a result, not only was no VAT levied on the services provided by Lindöpark but since Article 17(2) of the Sixth Directive confines the right to deduct to supplies used for the purposes of taxable transactions Lindöpark was consequently unable to deduct VAT on goods and services acquired for that purpose. Since 1 January 1997, however, the activity has been regarded as taxable and thus as providing a basis for deduction of input tax.

13. In 1996, Lindöpark brought proceedings against the Swedish State before Solna Tingsrätt (Solna District Court), seeking damages of SEK 541 632. That sum, it appears from the observations submitted to the Court, was made up of SEK 500 000 (an amount agreed between the parties) representing input tax which Lindöpark had been unable to deduct in 1995 and SEK 41 632 by way of interest to compensate for the lack of availability of the principal sum. No reference appears to have been made to the amount of output tax which would have been payable if the exemption had not been applied.

14. On 29 September 1997, Solna Tingsrätt awarded Lindöpark damages of SEK 500 000 (together with interest to run at a stipulated rate from the date of the action, but not the compensatory interest which Lindöpark had claimed) on the basis that, in accordance with the principle laid down in Francovich, the Swedish State was liable for the loss Lindöpark had suffered as a result of the misimplementation of the Sixth Directive.

15. Both parties appealed to Svea Hovrätt; Lindöpark on the ground that its claim should have been awarded in full in other words, so as to include the compensatory interest sought and the Swedish State on the ground that the directive did not create rights for individuals and the infringement was not sufficiently serious to found a claim for damages.

16. Having regard to the arguments of the parties, that court has sought a preliminary ruling on the following questions:

1. Do the provisions of Article 13(A)(1)(m) and 13(B)(b) of the Sixth VAT Directive preclude national legislation providing for a general exemption from VAT for the supply of sports facilities, as laid down in the second paragraph of Article 2 of Chapter 3 of the Swedish VAT Law, in the version in force before 1 January 1997?

2. Does Article 13, in combination with Articles 2, 6 and 17 of the Sixth VAT Directive, confer on individuals rights on which they can rely as against Member States before a national court?

In the event that the first two questions are answered in the affirmative:

3. Does the implementation and application of the exemption provided for in the second paragraph of Article 2 of Chapter 3 of the Swedish VAT Law entail such a serious (clear) infringement of Community law that it can render a Member State liable in damages?

17. Lindöpark, the Swedish State as party to the main proceedings and the Commission have all submitted written and oral observations to the Court. The United Kingdom Government submitted oral observations at the hearing.

Analysis

18. The aspects of Community law to be examined in order to provide Svea Hovrätt with the answers it needs may be outlined as follows. First, it must be determined whether the disputed provision was incompatible with the Sixth Directive, not only in general terms but also since the

broad exemption provided for may be partly compatible and partly incompatible with specific regard to its application to the type of transaction carried out by Lindöpark. If that is the case, it may then be considered whether the relevant provisions of the Directive can be relied upon directly by individuals, and what remedies may be available. Finally, but again only if the disputed provision is incompatible with Community law, it is necessary to examine whether the conditions under which the State may incur liability towards a party such as Lindöpark are met.

Was the disputed provision precluded by the Sixth Directive?

(a) In general

19. The Swedish State argues that the provision was justified on the basis of Article 13(B)(b) of the Sixth Directive, since the services exempted constituted leasing or letting of immovable property, that is to say the making available of property for use by a third party for a limited period in exchange for consideration; nothing in Article 13(B)(b) confines the exemption to leasing or letting for defined purposes or periods. At the hearing, the Swedish State stressed that the fact that Article 13(A)(1)(m) exempts certain sport-related services provided by non-profit-making organisations does not mean that no such services can be exempted on other permitted grounds when provided by commercial undertakings.

20. Lindöpark submits that the provisions of Article 13(A)(1)(m) and (B)(b) implicitly preclude any national rule containing exemptions broader than those in the directive.

21. The Commission stresses that the exemptions under Article 13 must be interpreted strictly. The exemption in Article 13(A)(1)(m) clearly applies only to supplies made by non-profit-making organisations. Leasing or letting of immovable property is generally for a relatively long period and involves exclusive use by the tenant.

22. It may first of all be noted that as is accepted by all those who have submitted observations in this case the exemption in Article 13(A)(1)(m) is confined to non-profit-making bodies.

23. Secondly, the exemption in Article 13(B)(b) cannot apply to anything other than the leasing or letting of immovable property, a concept which, in turn, cannot extend to all transactions granting access to immovable property, whether for the purpose of practising sport or physical education or for any other purpose, regardless of the characteristics of such access, but must in my view be limited by certain of the characteristics inherent in a contract of leasing or letting. Although these will of necessity vary in detail as between national legal systems, some of the core characteristics relevant to the definition of the concept in the context of the Sixth Directive have been set out by Advocate General Alber in his Opinions of 27 January 2000 in the road toll cases. In its judgments of 12 September 2000 in those cases, the Court has stressed in particular the need that the agreement between the parties should take account of the duration of the enjoyment of the property, in particular as a factor determining the consideration due.

24. There is no need at the present stage to define the concept of leasing or letting any further. The disputed provision was a general one exempting all supplies of premises or other facilities for sports or physical education purposes. Although contained in a part of the VAT Law dealing with exemptions relating to immovable property, its wording was thus such as to cover not only services exempted under Article 13(B)(b) because they constituted leasing or letting of immovable property but also services exempted under Article 13(A)(1)(m) because they were provided by non-profit-making organisations. However, by virtue of the general scope of that wording, it seems also to have been sufficiently broad to cover services, other than leasing or letting, provided by commercial undertakings, in respect of which Article 13 makes no provision for exemption.

25. Since VAT is a general tax on consumption which must apply to all transactions in respect of which no authorised exemption is possible, the national court's first question may thus be

answered in general terms similar to those in which it is posed, to the effect that a national provision laying down a general exemption from VAT for all transactions making premises and other facilities available for the practice of sport or physical education is contrary to the provisions of the Sixth Directive.

(b) With specific regard to Lindöpark's activities

26. However, for the purposes of the main proceedings it is not enough to establish merely that the exemption laid down in the disputed provision went beyond what was permitted by the Sixth Directive and was to that extent incompatible with Community law; it must further be determined whether the specific application of the exemption to the transactions in issue partook of that incompatibility. There being no dispute that Lindöpark, as a commercial undertaking, cannot qualify for the exemption under Article 13(A)(1)(m), the national court must examine the transactions entered into between Lindöpark and its customers and determine whether they fall within the concept of leasing or letting of immovable property, and thus whether they may be exempted under Article 13(B)(b), or not.

27. The Swedish State submits that the system of exemptions is wide-ranging and that categorisations are not always self-evident. The relevant provision has never been interpreted by the Court in a situation such as the present, although in 1997 a German court asked, in a reference which was later withdrawn, whether the hiring-out of tennis courts constitutes leasing or letting of immovable property, showing that the question is not clear. Both Germany and the United Kingdom treat the making available of sports facilities as such leasing or letting, at least in certain circumstances. Lindöpark and the Commission, however, consider that the provisions of Article 13(A)(1)(m) and (B)(b) are perfectly clear in precluding an exemption in the circumstances of this case. The Commission submits that, unlike a lease or let, the making available of sports facilities such as a golf course is for a limited period and purpose, is generally not exclusive and involves constant supervision, management and maintenance by the provider.

28. The concept of leasing and letting of immovable property is not defined in the directive. Nor, as pointed out by the Swedish State, has the Court yet been called upon to provide any comprehensive definition. To the extent that the Court had considered the matter before the present request for a preliminary ruling was made, it was concerned mainly with the scope of the exclusions for hotel and similar accommodation or for premises and sites for parking vehicles and with the status of a transaction surrendering a lease. Since then, however and indeed since the hearing in the present case it has given one more general indication, namely that one essential element of a contract of leasing or letting is that the agreement between the parties should take account of the duration of the lessee's right to use the property, in particular with a view to determining the price paid.

29. In any event, that concept, like all the exemptions from VAT laid down in the Sixth Directive, must be given a Community definition and cannot be allowed to vary from one Member State to another. And, as the Commission has stressed, the Court has consistently held that the exemptions under Article 13 of the Sixth Directive must be interpreted strictly. Consequently, the type of broad definition of leasing and letting argued for by the Swedish State, and by the United Kingdom Government at the hearing, cannot be accepted.

30. Although it is for the national court to ascertain the precise nature of the transactions in question, I consider for at least two reasons that Lindöpark's business, as it has been described to the Court, did not fall within the concept of leasing or letting of immovable property.

31. First, there is the general question whether the transaction should be regarded as the occupation of the immovable property or as the supply of services for which the property is an incidental, albeit essential, prerequisite.

32. An example of that distinction might be provided by comparing the provision of accommodation in a hotel which could be considered to fall within the Community definition of leasing and letting for these purposes on the ground that otherwise there would have been no need to exclude it from the exemption with the provision of a meal in the hotel restaurant. Whereas the occupation of a hotel bedroom for one or more nights (or even for a shorter period) may well be classified as a let in various legal systems, this is unlikely ever to be the case for the consumption of a meal in the public dining room in the same hotel. In the case of the occupation of a bedroom, the dominant feature of the contract is the use of the premises, whereas in the case of the restaurant meal the dominant feature is the provision of the meal, no matter how important the decor or other facilities may be in the customer's choice of venue.

33. Into which of those categories did Lindöpark's transactions fall?

34. It is clear that some transactions making sports facilities available may constitute leasing or letting of immovable property, while others do not. If a sports field belonging to a private owner is placed at the exclusive disposal of a club or other sporting entity for a lengthy period in exchange for payment, that clearly falls within the definition. Where, however, an individual pays an entrance fee to gain transient access, amongst other individuals, to a public swimming pool, it would be stretching the concept beyond any reasonable limit to regard such a transaction as leasing or letting.

35. A similar contrast may be drawn with specific regard to a golf course. If a person or entity were to pay for the exclusive use of a course for a specified period say, in order to organise a tournament or championship with a concomitant right to charge entrance fees for players and/or spectators, that would appear to partake fairly clearly of the nature of a lease or let. The same would not apply, however, to the casual golfer or group of golfers coming to play a round. Whilst it is obviously difficult to play golf without a course to play it on, the service provided in that case is the opportunity to play the game and not the opportunity to occupy the course. Indeed, a golfer may be thought of not as occupying the course in any sense but as traversing it. He or she has the right merely to move from one part of a golf course to the next, at a pace usually determined in part by other users of the course, for the sole purpose of enjoying the facilities provided at each stage. In that, the first 18 holes do not perhaps differ in essence from the 19th.

36. Only the national court can make the findings of fact necessary to categorise Lindöpark's activities but in doing so it should bear in mind that, in order to be classified as a lease or let of immovable property, a contract must not lack any of the essential characteristics of a lease or let and, in the words of Advocate General Alber in his Opinion alluded to at the hearing in this case by the United Kingdom Government in the road toll cases, the characteristics of a lease should predominate in the contract.

37. The Court has now held in those same cases that an essential characteristic of such contracts is that the agreement between the parties should take account of the duration of the enjoyment of the property, in particular as a criterion for determining the price. Advocate General Alber also stressed that the characteristics of a lease are not dominant where a road user pays a toll, the chief purpose of the contract between the parties being not the use of the property but the provision of a service using that property, and pointed out that the situation of a number of drivers using a road at the same time can in no way be compared with that of joint tenants of immovable property. Such drivers and the same applies to golfers have no protection from unauthorised use by third parties, nor can they make general use of the property.

38. I would add, as salient and typical characteristics of a lease or let, that it necessarily involves the grant of some right to occupy the property as one's own and to exclude or admit others, a right which is, moreover, linked to a defined piece or area of property. In the light of all those considerations, Lindöpark's activities, as described to the Court, do not appear to me to be of the nature of a lease or let of its golf course or any part thereof.

39. Secondly, and more specifically, it is clear from item 13 in the list in Annex H to the Sixth Directive, of supplies which may be subject to reduced rates of VAT, that the use of sporting facilities is in principle subject to VAT. It is very difficult to imagine that sporting facilities, in that context, could not include immovable property in fact, I take that to be the type of facility primarily envisaged. For Lindöpark's services to be exempt, it would thus be necessary for there to be some definite factor distinguishing them from the use of sporting facilities in the normal sense and characterising them as a lease or let. No evidence of any such factor appears to have been adduced in the national proceedings and certainly none has been referred to before this Court. In its absence, I consider that provision of the use of sporting facilities on a commercial basis falls conclusively within the category of taxable transactions in the scheme of the Sixth Directive.

40. Additional guidance can therefore be given to the national court in the context of its first question by saying that the commercial provision of premises or other facilities for the purpose of practising sport or physical education may not in principle be exempted from VAT. In order to qualify for exemption under Article 13(B)(b) of the Sixth Directive, a transaction must be distinguished from normal instances of the provision of sports facilities by having the essential characteristics of a lease or let, which include the grant of a right to occupy a defined piece or area of immovable property as one's own and to exclude or admit others, and an agreement between the parties taking account of the duration of that occupation, in particular as a criterion for determining the price; such characteristics must, moreover, predominate in the contract.

Do the relevant provisions of the Sixth Directive have direct effect?

41. In its second question, the Hovrätt asks whether the provisions of Article 13, in combination with those of Articles 2, 6 and 17, of the Sixth Directive confer on individuals rights on which they can rely as against Member States before a national court. I consider however that, since what Lindöpark seeks to establish is essentially its right to deduct input tax, the issue is rather whether Article 17, in combination with the other provisions, confers such rights.

42. In so far as it relates in general to the direct effect of those provisions, that question may be answered without great difficulty.

43. The Court has consistently held that individuals may effectively plead before national courts the provisions of the Sixth Directive which are sufficiently clear, precise and unconditional. It expressed that ruling first in 1982, in Becker, and has since confirmed it in a number of cases, notably Balocchi and BP Supergas. There are, it seems to me, no grounds for considering that the provisions relevant in the present case do not comply with those criteria.

44. The use of the terms clear and precise here may be misleading. The requirement is not that the meaning of the provision must be beyond dispute. In many cases, including Balocchi and BP Supergas, the Court has first provided the national court with an interpretation of a directive provision before stating that the provision has direct effect. Indeed, it would be a strange approach to the administration of justice in general to hold that a legislative provision could not be applied simply because it required interpretation by the courts. What is meant is rather that the content of the provision must be capable of clear and precise interpretation and of direct application by the national courts.

45. The provisions of Article 17(1) and (2), establishing the right to deduction, have already been held to confer rights on individuals on which they may rely before a national court. Article 2 and the first subparagraph of Article 6(1) (which is the only part of that provision to have any bearing on this case) are unequivocal. None of those provisions, moreover, allows any scope for national discretion and their nature and wording are such that, given the existence of a system of VAT within a Member State, they are capable of being applied immediately by national courts and other authorities without even the need for specific implementing measures. Nor, it may be said, has any of the parties submitting observations in the present case suggested that they do not have direct effect.

46. What of Article 13 which, in the context of the present case, lays down a condition governing the exercise of the right to deduct? The exemption provisions were examined by the Court at some length in Becker and a number of general objections to their direct effect were dismissed; they may thus, in principle, be relied upon by individuals before a national court. Indeed, it would be surprising if that were not the case for provisions which require Member States to exempt certain transactions from VAT. Article 13(B)(b) is capable of clear and precise interpretation and of direct application. Nor is it accompanied by any conditions other than those which permit Member States to limit (and not to extend) its scope. Article 13(B)(b) may thus be pleaded by an individual against a Member State before a national court.

Remedies available to a taxable person adversely affected by an unjustified exemption from VAT

47. In the main proceedings, however, Lindöpark seeks not merely to challenge the applicability of the disputed provision but to obtain reparation for the loss it claims to have suffered as a result thereof. On the ground that it was prevented from deducting VAT on its input transactions because its output transactions were wrongly classified as exempt, it seeks from the Swedish State an amount of damages based on the loss it claims to have suffered in that regard. In its observations, the Swedish State has stressed that Lindöpark chose to seek redress in this manner rather than by submitting the question of its tax debt and concomitant entitlement to deduct to a competent tax court.

48. It should be pointed out in that connection that where a taxable person has wrongly been prevented from deducting VAT, the remedy may often be a retroactive adjustment of the tax situation. Not only does this follow from the direct effect of the relevant provisions but Article 20(1)(a) of the Sixth Directive provides for adjustment of the initial deduction, in particular where it was higher or lower than that to which the taxable person was entitled, and the Court has confirmed that Member States must make provision in their internal legal systems for the correction of errors.

49. However, that is not the context in which the national court seeks a ruling in the present case. The decision which it has to take depends on the circumstances in which a Member State may incur liability in the event of an unjustified exemption in national law.

Criteria for State liability

50. It is settled law that a Member State may incur liability for loss caused to individuals as a result of breaches of Community law for which it can be held responsible. Such breaches include in particular cases where a directive has been incorrectly transposed. The right to reparation cannot be excluded on the ground that the provision infringed may be relied upon directly before the national courts.

51. Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the loss sustained by the injured party. In Dillenkofer, with particular regard to situations involving a failure to transpose a directive, the Court additionally formulated the first condition in a slightly different way the result prescribed by the directive must entail the grant of rights to individuals and the content of those rights must be identifiable on the basis of the provisions of the directive whilst stressing that the two formulations were in substance the same.

52. According to the case-law, it is in principle for the national courts to determine whether the conditions for State liability for breach of Community law are met. In some cases, the Court has none the less considered that it possessed the necessary information to make an assessment, whilst in others it has indicated circumstances which the national courts might take into account. I consider, in any event, that the question of the grant of rights to individuals is more properly a matter for this Court. Starting with that question, I shall consider the three conditions in turn.

Rights conferred on individuals

53. The Swedish State concedes that Article 13 of the Sixth Directive confers a right to exemption and Article 17 a right to deduction, on both of which individuals may rely before a national court. However, the right to deduct is dependent on the obligation to pay VAT, which cannot be considered to be a right conferred on individuals. Specifically, individuals cannot claim a right to deduct input tax when they have paid no output tax.

54. Lindöpark submits that all tax legislation imposes obligations but the Sixth Directive also confers a concomitant right to deduct. Exemption removes both the obligation and the right, which is one conferred on individuals.

55. The Commission notes that it may be advantageous to be subjected to VAT, since exemption can give rise to an increased tax burden in that input tax cannot be deducted and no charge can be passed on. There is thus no paradox in reasoning that Article 13, by granting exemption in certain circumstances, confers a corresponding right to be taxed on taxable persons making supplies in other circumstances.

56. Here, I agree essentially with Lindöpark. Although the case-law refers in general to rights conferred on individuals, it is of course essential that the rule of law infringed should be intended to confer the particular right in respect of which the claim for damages is made. In the main proceedings in the present case, Lindöpark is claiming damages in respect of a failure to allow it to deduct input tax. The right to deduct input tax is one conferred by Article 17(2) of the Sixth Directive, which has been recognised as accepted by the Swedish State as conferring rights on individuals on which they may rely before a national court. Its content is clearly identifiable from the terms of Article 17(2), read in conjunction with the other relevant provisions. A national provision exempting transactions for which there is no basis for exemption under the Sixth Directive denies individuals that right and thus infringes a rule intended to confer rights on individuals.

Sufficiently serious breach

57. According to the Court's well-established case-law, a breach of Community law is sufficiently serious where, in the exercise of its legislative powers, the Member State manifestly and gravely disregarded the limits on its discretion in that regard. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and whether the position taken by a Community institution may have contributed to the omission or, as the case may be, to the adoption or retention of national measures or practices contrary to Community law. In the context of breaches involving the inadequate implementation of a directive, the Court has concentrated more particularly on the first two factors, although the others may remain relevant.

58. It is perhaps worth stressing in that regard that these various factors are to be taken into consideration globally and are not cumulative requirements the absence of any one of which means that there is no serious breach. Indeed, depending on the circumstances, any one of them may be a sufficient though not a necessary condition to establish State liability. For example, the Court has held that if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

59. Another instance is the situation where the breach is particularly obvious. In French, the Court has always used originally with regard to liability incurred by the Community the term violation suffisamment caractérisée. This is now normally translated into English as sufficiently serious breach. However, the underlying meaning of caractérisé, which gives rise to its inherent implication of seriousness, includes the notion that the breach (or other conduct) has been clearly established in accordance with its legal definition, in other words, that it is a definite, clear-cut breach. This may help to explain why the term was previously translated as sufficiently flagrant violation and may throw additional light on the choice of factors which the Court has indicated should be taken into consideration when deciding whether a breach is sufficiently serious. Svea Hovrätt may have had similar considerations in mind when referring to a sufficiently serious (clear) breach in its question.

60. Thus, in any event echoing the Court's basic definition of a manifest and grave disregard by the relevant entity of the limits on its discretion a clear-cut breach an act or omission about which there can be no doubt that it goes frankly beyond what is permitted by Community law will normally be a breach serious enough for the Member State responsible to incur liability.

61. These are, as I have said, properly matters for the national court to decide, but this Court may give guidance when it is in a position to do so. That, I consider, is the case here. I shall accordingly consider in turn the factors regarded by the Court as significant.

(a) Clarity and precision

62. A distinction should be drawn between the need for a provision to be clear, precise and unconditional in order to have direct effect and the factor of clarity and precision to be taken into account when considering whether the breach of a provision is sufficiently serious to give rise to liability on the part of the State. In the former case, the possible need for clarification by interpretation is no bar to direct application by the courts. In the latter case, the focus is on the breach itself and whether the act or omission involved was of a kind whose inconsistency with the Community law provision in question cannot be doubted if so, unless there is doubt as to the application of that provision in the particular circumstances in issue, the breach will be clear-cut and thus normally sufficiently serious.

63. In this case, the question is whether the application to Lindöpark's activities of the exemption in the disputed provision fell clearly outside the terms of Article 13(B)(b) of the Sixth Directive. (There can be no doubt that it fell outside Article 13(A)(1)(m).)

64. I have set out, in the context of the national court's first question, the reasons which led me to conclude that the general exemption contained in the disputed provision is contrary to the terms of the Sixth Directive and that the type of service provided by Lindöpark cannot qualify for exemption under Article 13(B)(b) unless its transactions are distinguished from normal instances of the provision of sports facilities by having all the essential characteristics of a lease or let and unless those characteristics predominate in the contract.

65. On those same grounds and subject to the same proviso, I consider that there is no room for any doubt that Lindöpark's activities, as they have been described to the Court, are taxable and that any application to them of the general exemption, itself indisputably in excess of what is authorised by the Sixth Directive, is a clear breach of Community law, sufficient in itself to give rise to State liability. In particular, item 13 in Annex H to the Directive is a clear indication that the provision of sports facilities is in principle a taxable transaction. The position would change only if the facts found by the national court showed that Lindöpark's activities did not in fact fall within that category but were distinguished and characterised by the features of a lease or let.

66. The situation here may be contrasted with that in British Telecommunications, where the Court held that the provision in issue there was both imprecisely worded and reasonably capable of bearing the interpretation given to it by the United Kingdom, which was not manifestly contrary to either the wording or the objectives of the directive in question. None of those criteria are met in the present case.

(b) Discretion left to national authorities

67. The Swedish State points in particular to the Member States' discretionary power, under the last sentence of Article 13(B)(b), to apply further exclusions to the scope of the exemption for leasing and letting. Lindöpark submits that the Sixth Directive allows Member States a certain discretion only in specific cases, and that Article 13(A)(1)(m) is not one of them. Sweden was not given any latitude in the Treaty of Accession, nor is there any ground for allowing new Member

States any wider margin of discretion than others. The Commission considers that the provisions of Article 13(A)(1)(m) and (B)(b) preclude an exemption in the circumstances of this case and do not allow any margin of discretion in that regard.

68. I agree with Lindöpark and the Commission. There was no margin of discretion available or none of such a kind as to allow Member States to extend the exemptions in the way done by the disputed provision. Article 13(A)(1)(m) implies a discretion to define the certain services covered by the exemption, but not to extend that exemption to services provided by any person other than a non-profit-making organisation. Article 13(B)(b) allows Member States to apply further exclusions to the scope of the exemption in other words, to extend taxation to other categories of leasing and letting but not to exempt transactions which do not constitute leasing or letting of immovable property. Finally, Article 13(C) only authorises Member States to allow taxpayers a right of option for taxation.

69. It is thus clear that the provisions cited afforded the Member States no latitude to introduce or maintain legislation exempting from VAT services such as those provided by Lindöpark.

(c) Intentional or unintentional nature of the breach; excusable or inexcusable nature of the error in law; contribution of a position taken by a Community institution

70. Having reached the view that application of the exemption to Lindöpark's activities constituted a clear breach of the Sixth Directive in a context which allowed Member States no legislative discretion, I shall deal only briefly with the remaining factors which the Court has identified as relevant. I consider, however, that they too tend to confirm the existence of a sufficiently serious breach in the circumstances of this case.

71. The Swedish Government was apparently alerted in 1994, by an expert report which it had commissioned, to the likelihood that the disputed provision was not in conformity with Community law. A decision was taken to postpone the proposed amendment, although it appears from Lindöpark's observations that the changes finally made in 1997 (repeal of the disputed provision and insertion of a new Article 11a providing for an exemption only in the circumstances allowed by Article 13(A)(1)(m) of the Sixth Directive) were the same as those recommended in the 1994 report. Those facts, taken together with the clarity of the relevant Directive provisions as regards the impossibility of exempting the type of transactions in issue, make it very difficult to conclude that the breach was involuntary or the error in law excusable.

72. Finally, the Swedish State submits that, in the absence of a Court ruling on the matter, it had no reliable indication that its approach was wrong when implementing the Sixth Directive on acceding to the European Union; nor did the Commission initiate any infringement proceedings concerning the pre-1997 version of the law. Thus, in accordance with British Telecommunications, the State should not be held liable.

73. I cannot agree that there is any relevant parallel with British Telecommunications here, or with any other of the Court's dicta concerning the position taken by a Community institution. It is clear that absolutely no position is alleged to have been taken by any Community institution which in any way encouraged the Swedish authorities to believe that the general exemption contained in the disputed provision was justified under the Sixth Directive or could be applied to the commercial provision of sports facilities; the Swedish State seeks merely to rely on the absence of any contrary position. In British Telecommunications, such lack of guidance was cited by the Court merely as further support for its principal conclusion that the directive provision in issue was imprecisely worded and reasonably capable of bearing two interpretations. Similarly, in Brasserie du Pêcheur, the Court referred to the absence of a clarifying judgment only in the context of breaches which were not already clear from the previous state of the law.

74. Since, in my view, there is no room for any doubt in the present case as regards the import of the relevant Community provisions but only (conceivably) as regards the factual nature of Lindöpark's business, I do not regard that case-law as in any way relevant here.

(d) Conclusion as to the existence of a sufficiently serious breach

75. In the light of those considerations, and in particular of the fact that the exemption of which Lindöpark complains fell clearly outside the relevant provisions of the Sixth Directive, which leave Member States no margin of discretion of the kind argued for by the Swedish State, I thus conclude that the application to Lindöpark's activities of the unlawful general exemption contained in the disputed provision constituted, in the circumstances of the main proceedings, a sufficiently serious breach of Community law for the State to incur liability in respect of any loss suffered as a result. However, since that conclusion is based on the nature of Lindöpark's activities as presented to the Court, it may be subject to qualification in the light of any contrary findings of fact by the national court.

Direct causal link

76. The existence of a direct causal link between the breach of the obligation resting on the State and the loss sustained by the injured party is the final condition which must be met for a right to reparation to arise. Again, this is primarily a matter for the national court, although this Court may provide guidance, or even make a specific ruling where it has sufficient information at its disposal.

77. In the present case, Svea Hovrätt has neither sought a ruling as to the existence of a direct causal link, nor even raised that aspect of the case in its order for reference. Nor, moreover, have the parties to the main proceedings, the Commission or the United Kingdom Government addressed the issue in their observations. Indeed, it appears that the Swedish State did not deny the existence of such a link in the proceedings at first instance.

78. In those circumstances, I consider that it would be inappropriate for the Court to make a specific ruling. Nevertheless, there is in my view one aspect of this case which merits some brief comment, namely the relationship between the alleged loss and the reparation sought.

79. It appears that what is being sought in the main proceedings is an agreed principal sum of SEK 500 000, equivalent (presumably in round figures) to the amount of VAT which Lindöpark was unable to deduct during the relevant period (apparently 1995), together with interest thereon, which is still in dispute.

80. Whilst there has thus apparently been agreement between the parties on the amount of the basic claim in this case, it should be pointed out that in principle reparation for loss caused to individuals as a result of breaches of Community law must be commensurate with that loss. In the case of an unjustified exemption from VAT on outputs leading to an inability to deduct VAT on inputs, the loss sustained will in general be the difference between the amount of input tax which could have been deducted and the amount of output tax which would have had to be accounted for. Because of the value added (including any profit element), that difference will normally be in favour of the revenue authorities and not the taxpayer, although there may be situations where the reverse is true. On a different level, a business may suffer as a result of being exempt from VAT on its outputs because customers who are also taxable persons will find themselves having to pay and pass on VAT charges which have become frozen in the price and will thus tend to seek alternative supplies on which they can deduct the whole of the VAT.

81. Additionally in this regard, Lindöpark has asked the Court to address a point on which Svea Hovrätt has not sought a ruling, namely whether it is entitled, if successful in its claim, to specific interest on the principal sum to compensate it for the unavailability of that sum between the date

on which it should have been able to deduct it and the date of the award. Here again, although it is not for this Court to rule on a matter on which it has not been requested to do so, it may be borne in mind that the reparation should be commensurate with the loss suffered. With specific regard to interest, although in the slightly different context of Article 6 of the Equal Treatment Directive, the Court has held that full compensation cannot leave out of account factors such as the effluxion of time which may in fact reduce its value, and that the award of interest must be regarded as an essential component of compensation. A final point to remember is that the criteria for determining the extent of reparation must not be less favourable than those applying to similar claims based on domestic law.

Conclusion

82. I am therefore of the opinion that the national court's questions should be answered in the following way:

(1) A national provision laying down a general exemption from VAT for all transactions making premises and other facilities available for the practice of sport or physical education is contrary to the provisions of the Sixth Council Directive 77/388/EEC of 17 May 1977.

The commercial provision of premises or other facilities for the purpose of practising sport or physical education may not in principle be exempted from VAT. In order to qualify for exemption under Article 13(B)(b) of the Sixth Directive, a transaction must be distinguished from normal instances of the provision of sports facilities by having the essential characteristics of a lease or let, which include the grant of a right to occupy a defined piece or area of immovable property as one's own and to exclude or admit others, and an agreement between the parties taking account of the duration of that occupation, in particular as a criterion for determining the price; such characteristics must, moreover, predominate in the contract.

(2) The provisions of Article 17(2), read in conjunction with those of Articles 2, 6 and 13 of the Sixth Directive, are sufficiently clear, precise and unconditional to be pleaded by an individual against a Member State before a national court.

The right to deduct VAT conferred by Article 17(2) is, moreover, a right conferred on individuals, which may form the basis of a claim for reparation against a Member State in the event of its breach.

(3) Where an exemption from VAT is applied to a transaction which clearly should not have been exempted under the terms of the Sixth Directive, in a situation where Member States had no discretion to extend the scope of the exemptions prescribed, there is a sufficiently serious breach of Community law to found a claim for reparation against the State by an individual who has suffered loss as a result.