OPINION OF ADVOCATE GENERAL LÉGER

delivered on 23 March 2006 [1]

1. This case concerns the appeal brought by Mr Meca-Medina and Mr Majcen [2] against the judgment of the Court of First Instance of the European Communities of 30 September 2004 in Case T-313/02 *Meca-Medina and Majcen* v *Commission*, [3] by which that Court dismissed their action for annulment of the decision of the Commission of the European Communities of 1 August 2002, [4] rejecting the complaint lodged by them under Article 3 of Regulation No 17 [5] against the International Olympic Committee. [6]

I — Background to the dispute [8]

2. In their complaint, the appellants challenged the compatibility of certain regulations adopted by the IOC and implemented by the Fédération internationale de natation amateur, [7] and certain practices relating to doping control, with the Community rules on competition (Articles 81 EC and 82 EC) and freedom to provide services (Article 49 EC).

3. Following a positive anti-doping test for Nandrolone, [9] the appellants were suspended for a period of four years by a decision of FINA's Doping Panel of 8 August 1999. The appellants appealed against that decision before the Court of Arbitration for Sport, which confirmed the suspension on 29 February 2000 before reconsidering it and subsequently reducing it to a period of two years by an arbitration award of 23 May 2001.

1 — Original language: French.

2 — 'The appellants'.

3 — [2004] ECR II-3291, 'the judgment under appeal'.

4 — Case COMP/38158 Meca-Medina and Majcen/IOC, 'the contested decision', available on the website: http://europa.eu.int/comm/competition/antitrust/cases/decisions/38158/fr.pdf.

5 — Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959–1962, p. 87).

6 — 'The IOC'.

7 — International Swimming Federation, 'FINA'.

8 — For more details about the background to the dispute, reference should be made to the description given by the Court of First Instance in paragraphs 1 to 34 of the judgment under appeal.

9 — Nandrolone is an anabolic substance prohibited by the Olympic Movement Anti-Doping Code.

4. By letter of 30 May 2001, the appellants filed a complaint with the Commission, under Article 3 of Regulation No 17, alleging a breach of Article 81 EC and/or Article 82 EC. They argued, inter alia, that the fixing of the limit for Nandrolone at two nanogrammes per millilitre of urine (the 'rules in dispute') was a concerted practice between the IOC and the 27 laboratories accredited by it. They submitted that the anti-competitive nature of that practice was moreover reinforced by the fact that the tribunals responsible for the settlement of sports disputes by arbitration were not independent of the IOC.

5. By the contested decision, the Commission rejected the appellants' complaint, holding that the rules in dispute did not fall foul of the prohibition under Articles 81 EC and 82 EC. [10]

II — Action before the Court of First Instance and the judgment under appeal

6. By an application lodged at the Registry of the Court of First Instance on 11 October 2002, the appellants brought an action for annulment of the contested decision on the basis of the fourth paragraph of Article 230 EC.

7. In support of their action, the appellants advanced three pleas, alleging that the Commission had committed manifest errors of assessment, firstly, in the characterisation of the IOC, secondly, when examining the rules in dispute in the light of the criteria established by the Court in *Wouters and Others* [11] and, thirdly, in the application of Article 49 EC.

8. The Court of First Instance dismissed that action, holding that those three pleas were wholly unfounded, and ordered the appellants to bear their own costs and to pay those incurred by the Commission.

III — Procedure before the Court and the forms of order sought on appeal

9. The appellants brought this appeal by an application lodged at the Registry of the Court of Justice on 22 December 2004.

10 — Points 72 and 73.

11 — Case C-309/99 [2002] ECR I-1577.

10. They claim that the Court should set aside the judgment under appeal and order the Commission to pay the costs of both sets of proceedings. In addition, they request the Court to grant the claims they submitted before the Court of First Instance.

11. The Commission, the defendant, contends that the Court should dismiss the appeal and, in the alternative, that it should dismiss the action for annulment of the contested decision. In addition, the Commission seeks an order that the appellants pay the costs of both sets of proceedings.

12. The Republic of Finland, the intervener at first instance, claims that the Court should dismiss the appeal.

IV — The appeal

13. Despite referring to specific paragraphs in the judgment under appeal, the notice of appeal is particularly muddled. From my reading of it, I understand that the appellants are raising four pleas.

14. Firstly, they complain that the Court of First Instance misinterpreted the case-law of the Court of Justice stemming from *Walrave and Koch*, [12] *Bosman* [13] and *Deliège* [14] on the application of Articles 39 EC and 49 EC to sporting rules. Secondly, they dispute the assessment made by the Court of First Instance according to which anti-doping rules are purely sporting rules and therefore fall outside the scope of the EC Treaty. Thirdly, the appellants submit that the Court of First Instance erred in holding that the rules in dispute had nothing to do with any economic consideration and did not come within the scope of Articles 49 EC, 81 EC or 82 EC. Fourthly, they criticise the Court of First Instance for having held that the examination of the rules in dispute carried out by the Commission following the method of analysis established in *Wouters and Others* was not necessary.

A — *The first plea*

15. In the first plea, [15] the appellants criticise the interpretation given by the Court of First Instance, in paragraphs 40 and 41 of the judgment under appeal, to the case-law of

12 — Case 36/74 [1974] ECR 1405.
13 — Case C-415/93 [1995] ECR I-4921.
14 — Joined Cases C-51/96 and C-191/97 [2000] ECR I-2549.
15 — Appeal (paragraphs 21 to 32).

the Court of Justice stemming from *Walrave and Koch*, *Bosman* and *Deliège* on the application of Articles 39 EC and 49 EC to sporting rules.

16. First of all, the appellants dispute the Court of First Instance's assessment that the prohibitions enacted by Articles 39 EC and 49 EC do not affect purely sporting rules, which by their nature have nothing to do with any economic consideration. They submit that the Court of Justice did not lay down any such general exclusion in *Walrave and Koch*. On the contrary, it limited that exception to the composition and formation of sports teams. The appellants subsequently contend that only rules relating to the particular nature and context of sporting events, and which are thus inherent in the organisation and proper conduct of competitive sport, can be regarded as purely sporting rules.

17. Like the Commission and the Republic of Finland, I think the Court of First Instance correctly applied the case-law of the Court of Justice. [16]

18. The Court has consistently held that, having regard to the objectives of the European Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC. Thus, where such an activity takes the form of paid employment or the provision of services for remuneration (that applies to, for example, the activity of professional or semi-professional football players) it falls, more specifically, within the scope of Articles 39 EC to 42 EC or 49 EC to 55 EC. [17]

19. On the other hand, the Court has accepted, on numerous occasions, a restriction on the scope of those provisions where the sporting rules in question were warranted by 'reasons which [were] not of an economic nature, which [related] to the particular nature and context of [the sports] matches and [were] ... of sporting interest only'. [18] In those cases, I think the Court identified an exception of general application which cannot be restricted, as the appellants contend, to the composition and formation of sports teams.

20. In those circumstances, I think the Court of First Instance could properly hold, in paragraphs 40 and 41 of the judgment under appeal, that the prohibitions enacted

16 — See the Commission's response (paragraphs 16 to 28) and the Republic of Finland's statement in intervention (paragraph 8).

17 — See, inter alia, *Walrave and Koch*, paragraphs 4 and 5, *Bosman*, paragraph 73, and Case 13/76 *Donà* [1976] ECR 1333, paragraphs 12 and 13.

18 — See, inter alia, *Donà*, paragraphs 14 and 15, *Bosman*, paragraphs 76 and 127, and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 34.

by Articles 39 EC and 49 EC apply to the rules which concern the economic aspect which a sporting activity can present, but 'do not affect purely sporting rules, that is to say rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity'. [19]

21. Consequently, I take the view that the first plea is unfounded and must therefore be rejected.

B — *The second plea*

22. By their second plea, the appellants dispute the Court of First Instance's line of reasoning according to which anti-doping rules by their nature have nothing to do with economic activity and consequently fall outside the scope of the Treaty. They put forward two arguments in support of this plea.

23. Firstly, the Court of First Instance's line of reasoning is based on cdontradictory grounds or gives insufficient reasons. That Court asserts, in paragraphs 44 and 47 of the judgment under appeal, that anti-doping rules do not pursue any economic objective. By contrast, it admits in paragraph 57 of that judgment that, when adopting such rules, the IOC might have been concerned to safeguard the economic potential of the Olympic Games. In addition, the Court of First Instance, in paragraph 45 of that judgment, made an artificial distinction between the economic and non-economic aspects of engaging in sport.

24. Secondly, the Court of First Instance erred in relying on *Walrave and Koch*, *Donà* and *Deliège* in order to hold that anti-doping rules fall outside the scope of Articles 49 EC, 81 EC and 82 EC. The appellants submit that, in fact, anti-doping rules may be distinguished from rules relating to the composition of national football teams (*Walrave and Koch*, and *Donà*) and to the selection of athletes for high-level events (*Deliège*).

25. My view, in agreement with the Commission and the Republic of Finland, is that this plea must likewise be dismissed. [20]

19 — First sentence of paragraph 41 of the judgment under appeal.

20 — See the Commission's response (paragraphs 29 to 41) and the Republic of Finland's statement in intervention (paragraphs 11 to 13).

26. The appellants' argument that there is a contradiction between, firstly, paragraphs 44 and 47 of the judgment under appeal and, secondly, paragraph 57 of that judgment is in my view unfounded.

27. The Court of First Instance, after having observed, in paragraph 44 of the judgment under appeal, that 'high-level sport has become, to a great extent, an economic activity', stated that the primary aim of the campaign against doping is to safeguard the ethical values of sport and the health of sportsmen and women. The reference, in paragraph 57 of the judgment under appeal, to the economic objectives that the IOC might possibly have been pursuing is not enough, in my opinion, to prove a contradiction in the Court of First Instance's reasoning.

28. Given the commercial and financial stakes which surround high-level sport, I think it may be impossible for purely sporting rules, such as anti-doping rules, to possess no economic interest. However, that interest is purely secondary, in my opinion, and cannot prevent anti-doping rules from being purely sporting in character. As the Commission rightly observed, the appellants' proposition effectively favours, under the cover of the argument that sporting activity is indivisible, a secondary aspect — the economic dimension — in order to ensure that the rules of the Treaty are wholly applicable to the professional or semi-professional practice of sport. [21]

29. I consider that the appellants' argument that the Court of First Instance could not profitably refer to *Walrave and Koch*, *Donà* or *Deliège* is likewise unfounded. The appellants seem to be adopting an especially restrictive reading of those judgments in so far as in those cases the Court has, in my view, excluded in general terms purely sporting rules from the scope of Articles 39 EC and 49 EC. The appellants are thus trying to set out an artificial distinction between the rules considered in those cases and the rules in dispute here.

30. I therefore suggest that the Court should dismiss the second plea as unfounded.

C — *The third plea*

31. In the third plea, [22] the appellants claim, in substance, that the Court of First Instance

21 — Response (paragraph 35).

22 — Appeal (paragraphs 40 to 53).

erred in finding, in paragraph 48 of the judgment under appeal, that the rules in dispute had nothing to do with any economic consideration and consequently did not come within the scope of Articles 49 EC, 81 EC or 82 EC.

32. My understanding is that the appellants put forward two arguments in support of this plea.

33. In the first place, they call into question the Court of First Instance's analysis, set out in paragraphs 49 and 55 of the judgment under appeal, that the excessive nature of the rules in dispute, were it to be proved, would not result in them ceasing to be purely sporting rules. According to the appellants, that analysis is not only based on contradictory and inadequate reasoning, but is also contrary to the case-law of the Court established in *Deliège* and *Wouters and Others*. [23]

34. Next, the appellants claim that the Court of First Instance made a materially incorrect finding of fact by holding, in the second sentence of paragraph 55 of the judgment under appeal, that the rules in dispute are anti-doping rules whereas, in their opinion, the level set by those rules can also be reached following physical effort and/or the consumption of products other than drugs, such as boar meat.

35. Like the Commission, I am of the opinion that this plea must be dismissed. [24]

36. It need only be stated that the appellants in actual fact dispute the limit of two nanogrammes per millilitre of urine set by the rules in dispute and are attempting to have the assessment of the facts carried out by the Court of First Instance re-examined by the Court of Justice.

37. It follows from Article 225(1) EC and Article 58 of the Statute of the Court of Justice that an appeal may be based only on grounds relating to breaches of rules of law, to the exclusion of any appraisal of the facts. It is thus settled case-law that it is not for the Court, in an appeal, to give judgment on the appraisal of the facts and evidence carried out by the Court of First Instance, unless their clear sense has been distorted by it. [25]

23 — The appellants refer to, inter alia, *Deliège*, paragraph 69, and *Wouters and Others*, paragraphs 97 to 109 and 123.

24 — Response (paragraphs 42 to 56).

25 — See to that effect, inter alia, Case C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-4167, paragraph 40 and the case-law cited.

38. Furthermore, in my view it is not for the Court, when ruling on an appeal against a Court of First Instance judgment, to decide whether or not a rule adopted by the IOC in the campaign against doping is scientifically justified.

39. In those circumstances, and given that the appellants have not proved, nor even in truth argued, that the clear sense of the facts was distorted, I suggest that the Court should declare the third plea manifestly inadmissible and dismiss it.

D — *The fourth plea*

40. In the fourth plea,[26] the appellants dispute paragraphs 61, 62 and 64 of the judgment under appeal, in which the Court of First Instance held that the examination of the rules in dispute carried out by the Commission following the method of analysis established in *Wouters and Others* was not necessary.

41. In support of this plea, the appellants submit three complaints alleging, firstly, an incorrect assessment as regards the relevance of applying the method of analysis established in *Wouters and Others,* secondly, distortion of the sense of the contested decision and, thirdly, infringement of the right to a fair hearing.

1. Incorrect assessment by the Court of First Instance as regards the relevance of applying the method of analysis established by the Court of Justice in *Wouters and Others*

42. The appellants complain, in substance, that the Court of First Instance, in paragraphs 65 and 66 of the judgment under appeal, held that this case can be distinguished from *Wouters and Others* in so far as the rules in dispute concern conduct — doping — which cannot be likened to market conduct, and apply to an activity, sport, which, in essence, has nothing to do with any economic consideration. According to the appellants, the criteria established by the Court in that case were perfectly applicable to the present instance.

43. I am of the view that this complaint is not well founded.

44. It is enough to note that the rules at issue in *Wouters and Others* concerned market conduct — namely, the establish-

26 — Appeal (paragraphs 54 to 64).

ment of networks between lawyers and accountants — and applied to an essentially economic activity, that of lawyers. However, because the rules in dispute are purely sporting rules, which have nothing to do with any economic consideration, the Court of First Instance could rightly, in my view, hold that examination of the rules on the basis of criteria established in that judgment was not necessary.

2. Distortion of the clear sense of the contested decision by the Court of First Instance

45. The appellants complain that the Court of First Instance held that the Commission examined the rules in dispute in the light of the rules on competition only 'in the alternative', or 'for the sake of completeness'. By doing so, the Court of First Instance distorted the clear sense of the contested decision.

46. While the Court of First Instance has exclusive jurisdiction to assess the factual evidence produced to it, the question whether there has been distortion of the sense of that evidence or of the measure under appeal is an issue which can be subject to review by the Court of Justice on appeal. [27] A plea alleging distortion of the sense of the measure under appeal seeks a declaration that the Court of First Instance has altered the meaning, content or scope of the measure in dispute. The distortion can thus stem from a modification of the content of the measure, [28] a failure to take account of its essential aspects [29] or a failure to have regard to its context. [30]

47. As the present complaint alleges distortion of the sense of the contested decision, it is thus admissible under the case-law of the Court of Justice.

48. Nevertheless, I think the complaint is not well founded.

49. Such distortion must be obvious from the documents in the case without its being necessary to undertake a fresh assessment of

27 — See, inter alia, Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 26; Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraphs 45 to 47; and the orders of 27 January 2000 in Case C-341/98 P *Proderec* v *Commission*, not published in the ECR, paragraph 28, and of 9 July 2004 in Case C-116/03 P *Fichtner* v *Commission*, not published in the ECR, paragraph 33.

28 — See, to that effect, inter alia, Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 67.

29 — See, to that effect, inter alia, the order in Case C-459/00 P(R) *Commission* v *Trenker* [2001] ECR I-2823, paragraph 71.

30 — See, to that effect, inter alia, Case C-277/01 P *Parliament* v *Samper* [2003] ECR I-3019, paragraph 40.

the facts and evidence.[31] However, the assessment which the Court of First Instance made of the contested decision in paragraphs 61, 62 and 64 of the judgment under appeal does not seem to constitute a distortion of its clear sense.

50. It is apparent on simply reading the contested decision that the Commission did indeed hold, primarily, that the adoption of the rules in dispute did not fall within the sphere of the IOC's economic activities.[32] My opinion, in agreement with what is maintained by the Commission,[33] is that it only examined in the alternative whether any restrictions caused by those rules could be justified pursuant to the criteria established in *Wouters and Others*.[34]

51. Furthermore, I note that the appellants simply dispute the assessment made by the Court of First Instance and do not provide any evidence to show that it made a manifest error.

31 — See, inter alia, *New Holland Ford* v *Commission*, paragraphs 72 and 73.

32 — Contested decision (paragraph 38).

33 — Response (paragraph 62).

34 — Contested decision (paragraphs 42 to 55).

3. Infringement by the Court of First Instance of the appellants' right to a fair hearing

52. The appellants claim that the Court of First Instance, by holding that examination of the rules in dispute in the light of the rules on competition was not necessary, did not allow them to give their view on whether those rules amounted to purely sporting rules falling outside the scope of Articles 49 EC, 81 EC and 82 EC.

53. In my opinion, this complaint is not founded either and must be rejected. Like the Commission, I take the view that the appellants were able to submit their arguments not only in the procedure opened before the Commission, but also during the written and oral stages of the proceedings before the Court of First Instance.[35]

54. Having regard to the foregoing, I thus suggest that the Court should dismiss the fourth plea as unfounded.

35 — Response (paragraphs 65 to 72).

V — Conclusion

55. In the light of all the foregoing considerations, I suggest that the Court should dismiss the appeal and order David Meca-Medina and Igor Majcen to pay the costs, with the exception of those incurred by the intervener, in accordance with Articles 69 and 118 of the Rules of Procedure of the Court of Justice.