OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 21 January 1988 *

Mr President,
Members of the Court,

1. In proceedings brought by Nicolet Instrument GmbH ('Nicolet') against the Hauptzollamt (Principal Customs Office) Frankfurt am Main-Airport, the Seventh Senate of the Hessische Finanzgericht (Finance Court, Hesse) has requested a preliminary ruling on the validity of Decision C(85) 1661/2 of 18 October 1985 in which the Commission of the European Communities determined that the apparatus 'Nicolet Data Acquisition and Processing System, model NIC-1180' may not be imported free of Common Customs Tariff duties.

That decision followed the Commission's re-examination of that import in compliance with the judgment of 7 March 1985 (Case 30/84 *Nicolet* [1985] ECR 771) in which the Court declared invalid the decision adopted by the Commission on 7 July 1980 in respect of the same computer. The Court stated that the Commission had not examined 'the objective technical characteristics of the apparatus in question . . . merely applied . . . general considerations applicable to all computers' (paragraph 15). The decision was also criticized for relying on an ancillary criterion, namely reference to the general uses in the Community of apparatus of the same type' (paragraph 17).

2. Although the dispute is the subject of a reference for a preliminary ruling, the comments made by Nicolet in relation to Decision C(85) 1661/2 are formulated like submissions in a direct action. Nicolet alleges that the measure: (a) is retroactive in effect; (b) infringes essential procedural requirements; (c) does not contain an adequate statement of the reasons on which it is based; and (d) is manifestly incorrect on matters of fact and law.

In its first submission, Nicolet laments the fact that the Commission should have given in 1985 a decision on an import which took place five years earlier: it has thus adopted a measure which, having retroactive effect, is unlawful. That allegation is unfounded. The reason for the long delay between the import and the disputed measure is attributable to one specific cause and one only: the fresh examination which the Commission was required to carry out as a result of the judgment of 7 March 1985.

The second submission is based on two arguments: infringement of Nicolet's right to be heard and the secrecy of the procedure conducted by the Commission. In particular, it is claimed, the latter defect made it impossible to assess the extent to which the experts consulted were qualified.

Both those arguments must be rejected. The procedure followed by the Commission is governed by Regulation No 2290/83 of 29 July 1983 (Official Journal 1983, L 220, p. 20), the rules of which, as far as is relevant here, are substantially the same as those laid down in Regulation No 2784/79 (Official

* Translated from the Italian.

Journal 1983, L 220, p. 20). When interpreting the latter, the Court declared that they provided neither for the participation of the applicant for exemption in the examination carried out by the Committee on Duty-Free Arrangements nor for any right to be heard before the Commission adopted its decision (judgments of 25 October 1984 in Case 185/83 *University of Groningen* v *Inspecteur der Invoerrechten en Accijnzen* [1984] ECR 3623, paragraphs 20 and 21; and of 25 June 1986 in Case 283/85 *Nicolet* [1986] ECR 2049, paragraphs 14 and 15).

3. The other two submissions can be considered together. Nicolet states that the reasons for which the Court declared invalid the decision of 7 July 1980 apply also to be present measure. Just as it did five years earlier, the Commission confines itself to putting forward general considerations and does not mention any factor which convincingly contradicts the expert's reports produced in 1982 by Professor Bernhard Schrader. The latter — we are reminded — had stated that the performances of which the apparatus was capable were of too high a level to be used for industrial and commercial purposes; it was therefore specially suited to scientific research.

Moreover, in reply to a question put to it by the court as to its reasons for not choosing one of the computers having the characteristics mentioned in the disputed decison, Nicolet replied that, at the time of the import, those apparatuses were not yet available on the Community market.

A comment is called for before those arguments are considered. The Court has consistently held that the review which it is entitled to carry out is limited to instances of manifest error of fact or of law and of misuse of powers (most recently in its judgment of 21 January 1987 in Case 13/84 *Control Data Belgium* v *Commission* [1987] ECR 275, paragraph 12).

In those respects, Decision C (85) 1661/2 does not display any defects liable to render it invalid. By contrast with the first decision, it does not deny *in abstracto* that computers are scientific in character but gives an exhaustive exposition of the reasons (such as the absence of a high level of precision, possession of structural characteristics common to other apparatus and the language used) for which the NIC-1180 model is not 'mainly or exclusively suited to scientific activities' (Article 3 (3) of Regulation No 1798/75, Official Journal 1975, L 184, p. 1). From the statement of reasons it is also apparent that in carrying out their investigation the Commission experts examined — and treated as an integral part of the application for exemption — the reports produced by Professor Schrader in Case 30/84.

The fact that the apparatuses mentioned in the contested decision were not to be found on the Community market does not indicate a manifest error. The examination conducted by the Commission was in conformity with the requirements concerning the grant of exemption from customs duties. According to the combined provisions of Articles 52 and 54, first indent, of Regulation No 913/83 and Article 7 (6) of Regulation No 2290/83, which in that respect made no innovation by comparison with the corresponding provisions of Regulations Nos 1798/75 and 2784/79, that

investigation is above all concerned with the 'scientific character'of the imported apparatus; and it is only if that characteristic is found to be present that the Commission must verify whether comparable apparatuses produced within the Community are available on the market. However, the NIC-1180 model was not found to be scientific in character and it was not therefore necessary to make assessments of equivalence.

Apart from what the agent of the Commission told us at the hearing, the reference to apparatus 'of the same type' in the decision seems rather indicative of a particularly close examination which the Commission was required to undertake in compliance with the judgment of 7 March 1985. In other words, the Commission concentrated on assessing the utilization characteristics of the computer also by reference to similar apparatus in order to verify whether it was intended to be used for purposes not exclusively scientific.

In conclusion, Nicolet has not shown the existence of any manifest error of fact or of law in the Commission's assessment and has not proved that its investigation was vitiated by misuse of powers.

4. In view of all the foregoing consideration I propose that the Court should reply as follows to the question submitted to it by the Seventh Senate of the Hessische Finanzgericht by order of 21 January 1987 in the proceedings pending before that court between Nicolet Instrument GmbH and Hauptzollamt Frankfurt am Main-Airport:

'Consideration of the question has disclosed no factor of such a kind as to affect the validity of Commission Decision C (85) 1661/2 of 18 October 1985.'