of Article 190 of the Treaty if it is addressed to the Member States which took part in its drafting through the meetings of the group of experts of the Committee on Duty-free Arrangements and contains the indispensable elements which permit persons concerned to detect possible irregularities casting doubt on its validity.

2. Article 7 (2) of Regulation No 2784/79 laying down provisions for the implementation of Regulation No 1798/75 on the importation free of Common Customs Tariff duties of educational, scientific or cultural materials provides neither for the participation of the person applying for duty-free importation in the examination carried out by the experts from the Member States within the framework of the Committee on Duty-free Arrangements nor for any right on his part to be heard before the Commission adopts the decision establishing whether or not the instrument or apparatus fulfils the conditions required for admission free of customs duties.

OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 29 May 1986 *

Mr President,
Members of the Court,

I — Facts

The case before you today is the latest in a series of cases which have come before the Court recently concerning the importation free of Common Customs Tariff duties of scientific materials.

In this case, the Hessisches Finanzgericht is seeking a ruling under Article 177 of the EEC Treaty on the *validity* of *Commission Decision No 82/586/EEC* of 6 August 1982 establishing that the apparatus described as 'Nicolet-high speed signal averager, Model 1174, with accessories' may not be imported free of Common Customs Tariff duties (Official Journal 1982, L 243, p. 30).

The parties to the main proceedings are:

On the one hand, Nicolet Instrument GmbH, the plaintiff, which in 1982 imported from the United States two of the abovementioned apparatuses and a NIC-285 diskette system slide-in unit for the Max-Planck-Institut für medizinische Forschung in Heidelberg, and the Universitäts-Nervenklinik in Kiel, and,

on the other, Hauptzollamt Frankfurt am Main-Flughafen [Principal Customs Office, Frankfurt am Main Airport], the defendant, which, by decisions of 3 September and 28

* Translated from the French.

October 1982 and of 10 March 1983 charged customs duty on their importation amounting to DM 7 172.89, in application of Decision No 82/586/EEC.

After submitting several complaints, rejected by the defendant as being without foundation, the plaintiff brought an action before the Hessisches Finanzgericht which, on the basis of an expert's report prepared by Mr Buchwald of the University of Berlin and submitted by the plaintiff, had doubts as to whether the contested decision was well founded.

The basic Community rules are those referred to in Decision No 82/586/EEC, namely:

Council Regulation No 1798/75 on the importation free of Common Customs Tariff duties of educational, scientific or cultural materials (Official Journal 1975, L 184, p. 1), as amended, in particular by Council Regulation No 1027/79 of 8 May 1979 (Official Journal 1979, L 134, p. 1);

Commission Regulation No 2784/79 of 12 December 1979 laying down provisions for the implementation of Council Regulation No 1798/75 (Official Journal 1979, L 318, p. 32), which repealed Commission Regulation No 3195/75 of 2 December 1975.

Those regulations are well known to the Court which has been called upon to interpret them on numerous occasions in the not too distant past. I will not therefore analyse them in detail but will refer to them as need be in the course of my Opinion.

II — Law

The plaintiff contests the validity of Commission Decision No 82/586 on three grounds:

(1) Failure to state, or to state adequately, the reasons on which it is based (Article 190 of the EEC Treaty);

(2) Breach of the fundamental right of all interested parties to be heard;

(3) Error of assessment as to the scientific nature of the apparatuses in question.

The Commission, in the observations submitted by it, seeks principally to show that the apparatuses are not of a scientific nature.

With regard to the *first submission* relied upon (breach of Article 190), the plaintiff emphasizes in particular that in the contested decision the Commission merely referred to the opinion of the group of experts without providing any further details and also stated, without giving any reasons, that 'apparatuses of the same kind are principally used for non-scientific activity', which merely constitutes a secondary criterion of assessment on which the Commission may rely only if no clear conclusion is possible as to whether or not the apparatus is of a scientific nature.

Let me say at once that the interpretation which the plaintiff thus gives to the order of importance of the criteria for assessment is in accordance with Article 5 of Regulation No 2784/79, as interpreted by the Court, which, particularly in its two judgments of 7 March 1985 in *Nicolet* (Case 6/84 [1985] ECR 759 and Case 30/84 [1985] ECR 771), decided that 'the Commission is under an obligation to scrutinize the objective technical characteristics of the apparatus in question in order to determine whether or not it is of a scientific nature. Only if it proves impossible to draw unequivocal conclusions from that examination must

reference be made to the general uses in the Community of apparatus of the same type' (paragraph 12).

In this case, the plaintiff claims that the Commission's findings as to the utilization of the apparatus in question for non-scientific purposes is valueless because, as may be seen from the preamble to its decision, the Commission did not correctly apply the first criterion of assessment. Here again, the plaintiff is supported by the previous decisions of the Court, which held in its judgments in Cases 6/84 and 30/84 that 'since the Commission did not lawfully apply the principal criterion, it could not base its decision on the second ground concerning the use to which apparatus of the same type is put' (paragraph 17).

What is the situation in this case? In the second recital in the preamble to Decision No 82/586, the Commission finds that 'in accordance with the provisions of Article 7 (5) of Regulation (EEC) No 2784/79, a group of experts composed of representatives of all the Member States met on 2 July 1982 within the framework of the Committee on Duty-free Arrangements to examine the matter'. In the third recital, it adds that 'this examination showed that the apparatus in question is a signal analyser; ... it does not have the requisite objective characteristics making it specifically suited to scientific research ...'.

I admit that that statement of reasons is fairly summary and laconic. However, it meets the conditions laid down in that regard by the Court. In its judgment of 25 October 1984 in Case 185/83 (*Interfacultair Instituut Electronenmicroscopie* v *Inspecteur der Invoerrechten en Accijnzen* [1984] ECR 3623) the Court considered, in regard to an equally summary statement of reasons, that it 'satisfies the minimum requirement of Article 190 of the Treaty taking into account the fact that the decision is addressed to the Member States which took part in the meetings of the group of experts and are therefore sufficiently familiar with the details of the case to be able to assess the scope of the decision, and that it also contains the indispensable elements which permit [the person] concerned to establish whether the decision is vitiated by a manifest error or by misuse of power' (paragraph 39). It added that the person concerned could always bring the matter before a national court which could then, if need be, refer the matter to the Court of Justice for a preliminary ruling. That is what the plaintiff in this case did.

A brief reference to the same judgment is also sufficient to permit me to reject the *second submission* relied upon by the plaintiff, namely breach of the *right to be heard.* The Court finds first that Regulation No 2784/79 provides neither for the participation of the applicant for exemption in the examination of equivalence carried out by the Committee on Duty-free Arrangements nor for a right on the part of the applicant to make submissions before the Commission adopts the decision declaring whether or not the instrument or apparatus fulfils the conditions required for duty-free admission (paragraph 20). It then adds that the decision is addressed only to the Member States and that the Treaty does not even require that it be published. It concludes that the plaintiff does not have the right to demand information from the Commission regarding the basis for its decision.

It must also be noted that Nicolet Instrument GmbH, a company incorporated under German law, was in no way involved in the procedure which led to the adoption of Commission Decision No 82/586. The decision was adopted on the occasion of the importation into the United Kingdom of an apparatus of the same type. During the oral procedure, the Commission confirmed that a complete set of documents concerning the special characteristics of the apparatus at issue, submitted by the importer to the United Kingdom authorities, had been forwarded to it and to the members of the Committee on Duty-free Arrangements.

Finally, Nicolet Instrument GmbH could avail itself of all the appropriate means of defence, both at national and at Community level.

With regard to the first two submissions which have just been referred to, the interpretation which the plaintiff places on the Court's judgment of 17 March 1983 in Case 294/81 (*Control Data* v *Commission* [1983] ECR 911), namely that the decision at issue in that case was declared void precisely on the grounds that it contained an insufficient statement of the reasons on which it was based and that there was no consultation, is wrong.

In the first place, paragraph 17 of the judgment shows clearly that the Court expressly rejected the submission alleging that the procedure followed was inadequate inasmuch as it did not permit an exchange of views or give the parties concerned an opportunity to be heard. In the second place, the decisive ground for the annulment of the decision at issue was not that the statement of the reasons on which it was based was inadequate, but rather that it was erroneous: the Court found that the Commission had not had sufficient regard for the *particular objective characteristics of the apparatus in question*, as it was required to do under the relevant Community rules (paragraph 31). The Court confirmed that interpretation in its judgment of 2 May 1985 in Case 81/84 (*Deutsche Forschungs- und Versuchsanstalt für Luft- und Raumfahrt* v *Hauptzollamt Stuttgart West* [1985] ECR 1277), in which it held that a decision in which the statement of grounds was formulated in exactly the same terms as in Decision No 82/586 was valid and decided that, contrary to what had occurred in Case 294/81, the procedure before the Court had revealed no new evidence to cast doubt on the Commission's appraisal (paragraph 16).

That brings me to the *third submission* relied on by the plaintiff: error of assessment. The Court's previous decisions on that matter are clear: it is not for the Court to make a finding as to whether or not the apparatus at issue is of a scientific nature; on the other hand, it must ascertain whether the criteria applied by the Commission are in accordance with Community rules and whether in applying those criteria the Commission took account of the objective characteristics of the product which the decision concerns (see judgment in Case 294/81, cited above, paragraph 19).

The Court cannot, save in the event of manifest error of fact or law or misuse of power, find fault with the contents of the decision which the Commission has adopted in conformity with the opinion of the Committee on Duty-free Arrangements (judgment of 27 September 1983 in Case 216/82 *Universität Hamburg* v *Hauptzollamt Hamburg-Kehrwieder* [1983] ECR 2771, paragraph 14).

In its judgment of 29 January 1985 in Case 234/83 (*Gesamthochschule Duisburg* v *Hauptzollamt München-Mitte* [1985] ECR 327), the Court stated that the scientific

activities to which the instruments or apparatus must be specifically suited are those which have as their object 'the acquisition and development of scientific knowledge' (paragraph 32), and it had already pointed out that the criterion of being specifically suited 'requires only that the instrument or apparatus must be primarily suitable for scientific activity without excluding the possibility that the instrument or apparatus might also be, even if only secondarily, suitable for other purposes, such as, for example, industrial uses' (paragraph 27).

From that need to make an objective assessment, the Court deduced that 'the fact that the instrument or apparatus is used, in industry or elsewhere, for commercial purposes does not of itself necessarily exclude its being of a scientific nature within the meaning of Regulation No 1798/75, and hence its right to exemption from customs duty under that regulation, provided that the other requirements laid down for those purposes are also satisfied' (judgment of 2 February 1978 in Case 72/77 *Universiteitskliniek Utrecht* v *Inspecteur der Invoerrechten en Accijnzen* [1978] ECR 189, paragraph 18).

Thus the Commission's general remark, at p. 4 of its observations, that the customs declaration showed that the apparatus in question could also be used in applied medicine, cannot be decisive in assessing whether the apparatus is mainly suited for scientific activities.

On the contrary, it is for the competent national authorities to verify in regard to each individual apparatus in respect of which an application for duty-free importation is made whether it is being imported exclusively for non-commercial purposes (Article 3 (1) of Regulation No 1798/75, as amended by Regulation No 1027/79).

However, that does not seem at first sight to be the case in regard to the apparatus purchased by the Universitäts-Nervenklinik in Kiel because in the customs declaration the use to which the apparatus is to be put is stated to be as follows: 'intensive medical use in clinical medicine . . . '.

On the other hand, the apparatus purchased by the Max Planck Institut für medizinische Forschung in Heidelberg seems, at first sight, to fulfil the condition of being used for 'non-profit making scientific research' (second indent of Article 3 (3) of the same regulation).

It remains to be determined whether apparatus of this type, 'by reason of its objective technical characteristics and the result which it makes it possible to obtain is mainly . . . suited to scientific activities' (first indent of Article 3 (3) of the abovementioned regulation).

However, 'the "objective technical characteristics" of a scientific instrument or apparatus shall be understood to mean those characteristics resulting from the construction of that instrument or apparatus or from adjustments to a standard instrument or apparatus which make it possible to obtain high-level performances above those normally required for industrial or commercial use' (Article 5 (1) of Commission Regulation (EEC) No 2784/79).

In its written observations and during the oral procedure, the Commission reviewed the various objective characteristics of the type of apparatus in question. It pointed out that all of those characteristics, or at least nearly all of them, were also to be found in

a large number of other apparatuses available on the market and that they did not make it possible to obtain the kind of special performances normally required only for scientific activities.

With regard in particular to the resolution limit ('zeitliche Auflösungsgrenze') referred to in the expert's report submitted by the plaintiff, the Commission found that it could only be obtained with the help of an auxiliary apparatus which had not been imported in this case and that the performance obtained by the normal version of the apparatus was necessary for a great many uses, including commercial ones.

The consequence of the preceding observations is that the Commission has not committed a manifest error either of fact or of law, nor has there been a misuse of power.

III — Conclusion

I therefore propose that the Court reply to the Hessisches Finanzgericht as follows:

Consideration of Commission Decision No 82/586 of 6 August 1982 has disclosed no factor of such a kind as to affect the validity of that decision.