

Case C-387/93

**Criminal proceedings  
against  
Giorgio Domingo Banchero**

(Reference for a preliminary ruling  
from the Pretura Circondariale, Genoa)

(Articles 5, 30, 37, 85, 86, 90, 92 and 95 of the EEC Treaty)

Opinion of Advocate General Elmer delivered on 20 June 1995 ..... I - 4666  
Judgment of the Court, 14 December 1995 ..... I - 4683

Summary of the Judgment

1. *Preliminary rulings — Reference to the Court — Need for a preliminary ruling and relevance of the questions raised — Assessment by the national court — Questions submitted without specifying the factual context*  
(EEC Treaty, Art. 177)
2. *State monopolies of a commercial character — Article 37 of the Treaty — Scope — National system for the distribution of manufactured tobacco products*  
(EEC Treaty, Art. 37)

3. *Free movement of goods — Quantitative restrictions — Measures having equivalent effect — National system for the distribution of manufactured tobacco products regulating the detailed arrangements for retail sale in a non-discriminatory manner — Article 30 of the Treaty not applicable*  
(EEC Treaty, Art. 30)
4. *Competition — Public undertakings and undertakings to which Member States grant special or exclusive rights — National system for the distribution of manufactured tobacco products — Issue of operating licences to retail traders conferred on an undertaking with exclusive rights — Dominant position — Not abused — Permissible --*  
(EEC Treaty, Arts 5, 86 and 90(1))
5. *Free movement of goods — Quantitative restrictions — Measures having equivalent effect — National system for the distribution of manufactured tobacco products — Penalties involving confiscation of products obtained outside authorized channels and without payment of excise duty — Community law not applicable*  
(EEC Treaty, Art. 30)

1. It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. However, it is not possible to reply to questions or parts of questions concerning the interpretation of provisions where the national court has not explained the factual circumstances which prompt it to apply those provisions and with regard to which the Court is therefore not in a position to provide a useful interpretation.

rized by the State, provided that the State does not intervene in the operation of tobacco outlets so as to control or influence the procurement choices of retailers in order to ensure an outlet for tobacco products produced by the national tobacco monopoly or to encourage or discourage certain types of imports from other Member States. That article does not apply to national provisions which do not concern the exercise by a public monopoly of its exclusive right but apply in a general manner to the production and marketing of goods, whether or not they are covered by the monopoly in question.

2. Article 37 of the Treaty has no relevance with regard to national legislation which reserves the retail sale of manufactured tobacco products to distributors autho-

3. National legislation which reserves the retail sale of manufactured tobacco prod-

ucts, irrespective of their origin, to authorized distributors but does not thereby bar access to the national market for products from other Member States or does not impede such access more than it impedes access for domestic products within the distribution network does not fall within the scope of Article 30 of the Treaty, in so far as that legislation does not relate to the characteristics of the products but concerns solely the arrangements for their retail sale and the obligation to operate through a system of authorized retailers applies without distinction as to the origin of the products and does not affect the marketing of goods from other Member States differently from that of domestic products.

Furthermore, so far as authorized retailers are concerned, they cannot be regarded as undertakings having the kind of rights referred to in Article 90(1) of the Treaty, nor, *a fortiori*, can it be argued that the legislation in question establishes, in favour of such retailers, a contiguous series of territorially limited monopolies creating over the national territory a dominant position within the meaning of Article 86 of the Treaty, provided that those retailers satisfy at the same time consumer needs and do not enjoy any particular advantages over one another.

4. Articles 5, 90 and 86 of the Treaty do not preclude national legislation from reserving the retail sale of manufactured tobacco products to distributors who have been authorized by the State in so far as the undertaking with exclusive rights which issues operating licences to retail traders does not abuse, in particular to the detriment of consumers, the dominant position which it may enjoy on the market for the distribution of the goods in question. The mere fact that a Member State creates a dominant position by the granting of an exclusive right within the meaning of Article 90(1) is not as such incompatible with Article 86 of the Treaty. The prohibitions contained in those two provisions will be contravened only if, in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position.

5. Article 30 of the Treaty does not preclude national legislation from penalizing as a smuggling offence the unlawful possession by a consumer of manufactured tobacco products from other Member States on which excise duty in accord with Community law has not been paid, where the retail sale of those products is, like the retail sale of identical domestic products, reserved to distributors authorized by the State.

The severity of such penalties is not a matter for assessment under Community law in so far as they do not hinder in any way the importation of manufactured tobacco products from other Member States but merely tend to dissuade consumers from obtaining supplies of tobacco products, on which the above-mentioned duties have not been paid, through unauthorized traders who are themselves acting in breach of the legislation in question.