JUDGMENT OF THE COURT

14 December 1995 *

In Case C-387/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura Circondariale di Genova (Italy) for a preliminary ruling in the criminal proceedings before that court against

Giorgio Domingo Banchero

on the interpretation of Articles 5, 30, 37, 85, 86, 90, 92 and 95 of the EEC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet (Rapporteur) and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray and P. Jann, Judges,

Advocate General: M. B. Elmer,
Registrar: L. Hewlett, Administrator,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— Mr Banchero, by Giuseppe Conte and Giuseppe Michele Giacomini, of the Bar of Genoa,

— the Spanish Government, by Alberto José Navarro González, Director General for Legal, Institutional and Community Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,

— the French Government, by Catherine de Salins, Deputy Director, and Jean-Marc Belorgey, Head of Service, Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agents,

— the Commission of the European Communities, by Enrico Traversa and Anders Christian Jessen, of its Legal Service, acting as Agents, assisted by Alberto Dal Ferro, of the Vicenza Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Banchero, represented by Giuseppe Conte and Giuseppe Michele Giacomini; the Spanish Government, represented by Miguel Bravo-Ferrer Delgado; the French Government, represented by Jean-Marc Belorgey; the Italian Government, represented by Ivo-Maria Braguglia, Avvocato dello Stato, acting as Agent; and of the Commission, represented by Enrico Traversa, at the hearing on 5 April 1995,

after hearing the Opinion of the Advocate General at the sitting on 20 June 1995,

gives the following

Judgment

1 By order of 30 July 1993, received at the Court on 11 August 1993, the Pretura Circondariale di Genova (District Magistrate's Court, Genoa) referred for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 5, 30, 37, 85, 86, 90, 92 and 95 of the EEC Treaty.

2 Those questions have arisen in the course of criminal proceedings brought by the Italian authorities against Mr Banchero for the unlawful possession of manufactured tobacco products of foreign origin.

3 According to the documents on the case-file, since the entry into force of Law No 724 of 10 December 1975 concerning the importation and marketing of manufactured tobacco products and amending the rules on contraband in foreign tobacco products, which amended Article 341 of the *Testo Unico delle Disposizione Legislative in Materia Dogonale* (Single Text on Customs Legislation) adopted by Decree No 43 of the President of the Republic of 23 January 1973, smuggling offences involving tobacco products of foreign origin come exclusively under the criminal-law provisions of Italian customs legislation set out in that decree.

4 Article 25(2) of the abovementioned decree requires a person in possession of foreign goods subject to customs duty to demonstrate that they have been lawfully acquired. If he refuses or is unable to do so, or if the proof he offers is

unacceptable, he will be treated as being guilty of smuggling, unless he is in possession of the goods as a result of another offence which he has committed.

5 Article 282(f) of Decree No 43 provides for the imposition of a fine, of at least twice and at most ten times the amount of customs duty, in the case of possession of foreign goods in circumstances constituting the offence of smuggling under Article 25(2). Article 301 of Decree No 43 provides that in all cases of smuggling the goods involved in the offence are to be confiscated. Finally, Articles 295 and 296 of the decree provide for terms of imprisonment to be imposed if there are exacerbating circumstances (three to five years) or in the event of repetition (up to one year).

6 It appears from the order for reference that Mr Banchero was reported for possession of packets of cigarettes representing 2.32 kg of manufactured tobacco originating in other Member States which did not bear the Italian State marking proving payment of customs duty and whose lawful provenance Mr Banchero was unable to prove. The order also states that Mr Banchero is being prosecuted for non-payment of 'frontier surtax', the amount of which is equal to the excise duty imposed on domestic products.

7 Mr Banchero was also prosecuted for the offence of non-payment of value added tax, although the order making the reference indicates that he has been acquitted on that count. Mr Banchero still stands accused of the offence of smuggling under Articles 282(f) and 341 of Decree No 43 of the President of the Republic.

8 Before the national court, Mr Banchero has contested the compatibility with Community law of the Italian monopoly in manufactured tobacco products and of a number of provisions which apply to manufactured tobacco products originating in other Member States.

9 By order of 14 March 1992, the Pretura di Genova stayed the proceedings and referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 5, 30, 37, 85, 86, 90, 92 and 95 of the Treaty and of Articles 2, 4(1) and 6(2) of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ, English Special Edition 1972, 31 December 1972).

10 By order of 19 March 1993 (Case C-157/92 *Banchero* [1993] ECR I-1085), the Court declared the reference for a preliminary ruling to be inadmissible on the ground that the national court had not set out the legal issues and facts of the case in sufficient detail to enable the Court to give a useful interpretation of Community law.

11 Against this background, the Pretura di Genova has once again made a reference to the Court under Article 177 of the EEC Treaty and has submitted the following questions for a preliminary ruling:

'1. Is there any conflict between Articles 5, 30, 37, 85, 86, 90, 92 and 95 of the EEC Treaty, taken together, and the legislative nature and characteristics of a national monopoly such as that which, in itself and in its implementation, derives from the legislation in force in the Italian State governing the tobacco sector, with particular reference to the exclusive rights of production, marketing, sale and distribution in general, such exclusive rights being granted to the national monopoly by a set of rules which is inherently liable to lead to discrimination within the meaning of Article 37 of the Treaty, to allow preferential choices to be made which may be regarded as constituting "measures having equivalent effect" within the meaning of Article 30 of the Treaty, and to allow abuse of a dominant position in breach of Articles 86 and 90 of the Treaty?

More specifically:

Is there any conflict between Article 30 of the Treaty and national legislation which restricts the retail distribution of foreign manufactured tobacco products to an undertaking which has a monopoly over the sale of such products, with the result that the only channel for the marketing of foreign manufactured tobacco products is made up solely of retailers authorized by that monopoly, and, in the case of such a conflict being found, does the national legislation constitute *ab initio* a measure having an effect equivalent to a quantitative restriction on imports, contrary to Article 30 of the EEC Treaty?

2. Is there any conflict between Article 30 of the EEC Treaty, in the light of the interpretation given by the Court of Justice, and national legislation which penalizes the evasion of a tax on consumption levied on manufactured tobacco products coming from other Member States, in whatever quantity, by a penalty which is excessive in relation to the gravity of the offence, in that it provides that in every case, even where the quantity of tobacco is extremely small, there is to be both a criminal penalty and confiscation of the goods? If such a conflict exists, does such national legislation constitute a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the Treaty?

3. Is there any conflict between Article 90(1), in conjunction with heading (b) of the second paragraph of Article 86 of the EEC Treaty, and national legislation which restricts the retail distribution of manufactured tobacco products, including tobacco products from other Member States, to an undertaking which has a monopoly over the sale of such products, even where that undertaking is not in a position to satisfy the demand existing in the market for that product, and

therefore the restriction gives rise to a limitation on the free movement of Community goods and an abuse of a dominant position by the monopoly undertaking?'

The question whether the reference for a preliminary ruling is admissible

12 During the oral procedure, the Italian Government submitted that the first and third questions were inadmissible on the ground that a reply by the Court to those questions was not necessary for a resolution of the dispute.

13 That observation cannot be accepted.

14 According to the Pretura di Genova, the provisions infringed by Mr Banchero also protect the national monopoly in manufactured tobacco products. The Pretura di Genova adds that, if the entire national monopoly were incompatible with the provisions of Community law to which it refers, and in particular with Articles 30 and 90 of the Treaty, this would have a bearing on the proceedings brought against Mr Banchero.

15 The Court has consistently held that 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 (see, *inter alia*, the judgment in Case C-30/93 *AC-ATEL Electronics Vertriebs* v *Hauptzollamt München-Mitte* [1994] ECR I-2305, paragraph 18).

16 The Commission and the Spanish Government also point out, in their written observations, that the national court refers to Articles 5, 85, 92 and 95 of the Treaty without providing any detailed reasons or even explaining the factual circumstances which prompt its questions.

17 Article 5 requires Member States to carry out their obligations under Community law in good faith. It is, however, settled case-law that this provision cannot be applied independently when the situation concerned is governed by a specific provision of the Treaty, as in the present case (see the judgment in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* v *Receveur Principal des Douanes de La Pallice-Port* [1992] ECR I-1847, paragraph 19). For that reason, in so far as they relate to a series of provisions of the Treaty, including Article 5, the questions submitted require to be examined in regard to Article 5 only in relation to the specific provisions which call for an answer from the Court and, in particular, given the information contained in the case-file, Articles 90 and 86.

18 With regard to Articles 85 and 92, the Pretura has not explained the factual circumstances which prompt it to consider that agreements between undertakings or concerted practices within the meaning of Article 85, or aid within the meaning of Article 92, may be in point.

19 The Court is thus in no more of a position to provide the national court with a useful interpretation of those articles in the present case than it was in Case C-157/92.

20 The same applies with regard to Article 95 of the Treaty. The order for reference appears to suggest that the national court is not asking the Court whether a system of penalties such as that at issue in this case is contrary to Article 95, but rather whether a penalty such as that facing Mr Banchero may be regarded as a measure

having an effect equivalent to a quantitative restriction on trade prohibited by Article 30 of the Treaty in so far as it is disproportionate to the gravity of the offence found to have been committed. This is a question which concerns the interpretation of Article 30 itself.

21 It is therefore unnecessary to reply to the questions submitted in so far as they concern the interpretation of Articles 85, 92 and 95 of the Treaty.

Substance

22 It appears from the legal and factual information provided by the Pretura di Genova in its second order that the point of its three questions, thus limited to the interpretation of Articles 5, 30, 37, 86 and 90 of the Treaty and notwithstanding the apparent generality of the first part of the first question, is essentially whether a distribution system which reserves the retail sale of tobacco products to outlets authorized by the State is compatible with those provisions of the Treaty (first and third questions). It also inquires whether Article 30 precludes the application of penal provisions provided for under such a system (second question).

23 The case-file does not in fact contain sufficiently precise information to allow the other aspects of the national legislation at issue, such as those concerning the production, importation or the packaging of those products, to be examined properly.

24 It is appropriate first of all to reply to the first and third questions.

The first question

25 The national court asks whether a distribution system for manufactured tobacco products, such as that provided for by the Italian legislation, is compatible with Articles 30 and 37 of the EEC Treaty.

Article 37 of the Treaty

26 As is evident from its wording, the second subparagraph of Article 37(1), which is a provision specific to State monopolies of a commercial character, applies to situations in which the national authorities are in a position to control, direct or appreciably influence trade between Member States through a body established for that purpose or a delegated monopoly (judgments in Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479, paragraph 13, and in Case C-393/92 *Municipality of Almelo and Others* v *Energiebedrijf IJsselmij* [1994] ECR I-1477, paragraph 29).

27 As the Court has held in its judgments in, *inter alia*, Case 59/75 *Pubblico Ministero* v *Manghera and Others* [1976] ECR 91, Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935 and Case 78/82 *Commission* v *Italy* [1983] ECR 1955, Article 37 of the Treaty does not require the abolition of national monopolies having a commercial character outright but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. It is clear not only from the wording of Article 37 but also from its position in the general scheme of the Treaty that the article is designed to ensure compliance with the fundamental rule of the free movement of goods throughout the common market, in particular by the abolition of quantitative restrictions and measures having equivalent effect in trade between Member States, and thereby to maintain normal conditions of competition between the economies of Member States where a given product is subject, in one or other of those States, to a national monopoly of a commercial character.

28 First of all, the points of concern to the national court relate only incidentally to the production and importation of tobacco products in Italy.

29 Next, Article 37 is irrelevant with regard 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 (judgment in Case 120/78 *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ('the *Cassis de Dijon* case'), point 7). In the precise case of a distribution system such as that which the questions submitted in the present instance concern, the position could be different only if the provisions in question allowed the national authorities to intervene in the procurement choices of retailers.

30 It must be pointed out in this regard that the Italian legislation reserves the exclusive right of retail sale of manufactured tobacco products to individuals to whom the Amministrazione Autonoma dei Monopoli di Stato (Autonomous Administration of State Monopolies, hereinafter 'the AAMS') has issued a concession or authorization. On this point, it does not appear from the information before the Court that the Italian legislation allows the national authorities to intervene, through the AAMS, in the operation of tobacco outlets so as to control or influence the procurement choices of retailers, to ensure an outlet for the monopoly's tobacco products (see, in contrast, Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraphs 43 and 44), or to encourage or discourage certain types of imports from other Member States. Indeed, in its reply to a question put by the Court, the Italian Government stated that procurement choices were a matter entirely for retailers to determine on the basis of market demands.

31 The answer to the first part of the first question must therefore be that Article 37 of the Treaty has no relevance with regard to national legislation, such as that in

force in Italy, which reserves the retail sale of manufactured tobacco products to distributors authorized by the State, provided that the State does not intervene in the procurement choices of retailers.

Article 30 of the Treaty

32 Article 30 prohibits quantitative restrictions on imports between Member States and all measures having equivalent effect.

33 The Court has consistently held that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions (judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5).

34 However, as the Court ruled in its judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

35 In the present case, the conditions mentioned above are met by the national legislation in question in so far as it reserves the retail sale of tobacco products to authorized distributors.

36 That legislation does not relate to the characteristics of the products but concerns solely the arrangements for the retail sale of manufactured tobacco products, since it prohibits the sale of such tobacco products otherwise than through authorized outlets. The fact that it applies to specific products, here manufactured tobacco products, and not to retail trade in general, is not such as to alter this assessment (see, in this regard, the judgments in Case C-292/92 *Hünermund and Others* v *Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787 and in Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621).

37 Furthermore, the obligation on all traders to have their products distributed by authorized retailers applies without distinction as to the origin of the products in question and does not affect the marketing of goods from other Member States differently from that of domestic products.

38 The national court considers that, in view of the geographical spread of tobacco outlets in Italy, their opening hours and functional deficiencies, such as inadequate supplies in some outlets of cigarette brands less frequently requested by consumers or occasional disruptions to supply because of strikes, the system of authorized tobacco outlets gives rise to restrictions on trade contrary to Article 30 of the Treaty.

39 It does not, however, appear from the information before the Court that authorizations to operate outlets are limited to the extent of jeopardizing a satisfactory supply of domestic and imported tobacco products to consumers. The Italian Government has stated, in reply to a question put by the Court, that the legislation in question seeks to ensure an optimum geographical spread of retailers, particularly in view of considerations relating to territorial planning and the proximity of outlets to customer concentrations.

40 In any event, any shortcomings which may affect the retail sale network do not adversely affect the sale of tobacco products from other Member States any more than the sale of tobacco products manufactured in Italy.

41 Referring to the judgments in Case C-369/88 *Delattre* [1991] ECR I-1487 and Case C-60/89 *Monteil and Samanni* [1991] ECR I-1547, the Commission argues that, by channelling tobacco sales, a retail-sale system for tobacco products such as the Italian system may affect marketing possibilities for imported products and may, in those circumstances, constitute a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty. The AAMS has control over the distribution network and this 'centralized channelling' is reinforced higher up by the *de facto* monopoly which the authorities enjoy over the wholesale trade in all tobacco products in Italy.

42 It must, however, be pointed out, as the Commission has itself done in its written observations, that the Italian monopoly in tobacco products has been reorganized in such a way that the AAMS has abandoned direct management of tobacco outlets and authorized retailers are guaranteed direct access to wholesalers. The Commission has also confirmed that the complaints submitted to it did not point to any discriminatory conduct by the monopoly towards Community producers. Finally, as the Court has already noted at paragraph 30 of this judgment, the Italian Government has stated that retailers could freely choose how to stock their outlets according to the state of the market. The Commission has not contested that statement.

43 The fact that producers of tobacco products manufactured in the other Member States prefer to use the AAMS depots rather than set up their own wholesale depots, as they are allowed to do under Article 1 of Law No 724 of 10 December

1975, cited above, cannot lead to the conclusion that the Italian legislation channels sales of manufactured tobacco products and may constitute a measure having an effect equivalent to a quantitative restriction on imports. The choice of those traders may be attributable to considerations specific to them, in particular considerations relating to the reduced costs of wholesale distribution of tobacco products.

44 It follows from all of the foregoing that national legislation, such as that in force in Italy, which reserves the retail sale of manufactured tobacco products, 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.

The third question

45 The national court asks whether Articles 5, 90 and 86 of the Treaty preclude national legislation from reserving the retail sale of manufactured tobacco products to distributors authorized by the State. It asks, in particular, whether a distribution system organized in that way, control over which is entrusted to an undertaking holding a monopoly in sales of those products, entails an abuse of a dominant position, within the meaning of heading (b) of the second paragraph of Article 86, which prohibits undertakings from limiting production, markets or technical development to the prejudice of consumers.

46 The obligations which Member States must perform in good faith under Article 5 include the obligation, set out in Article 90(1), whereby they must not let public undertakings and undertakings to which they grant special or exclusive rights enact

or maintain in force any measure contrary to the rules contained in the Treaty, in particular those provided for in Article 7, now Article 6 of the EC Treaty, and Articles 85 to 94.

47 It must first be held that, contrary to what the wording of the national court's question might suggest, the AAMS does not hold exclusive rights in relation to the distribution of all manufactured tobacco products, whatever their origin.

48 Article 1 of Law No 724 of 10 December 1975, cited above, which reorganized the Italian tobacco monopoly, allows manufactured tobacco products from other Member States of the Community, which represent a large part of the market, to be brought into wholesale distribution depots other than those of the AAMS. That provision therefore allows manufacturers of these tobacco products to set up their own wholesale depots and thus directly ensure the marketing of their products at retail outlets.

49 Next, as the Commission has pointed out in its written observations, the activity of the AAMS at the stage of retail sale, which consists essentially in authorizing the opening of tobacco outlets and in controlling their number and distribution throughout Italy, amounts in effect to the exercise of a State right and not an economic activity *stricto sensu*. Moreover, it is common ground that the State tobacco outlets directly operated by the monopoly were abolished in 1983 and it does not appear that the AAMS is involved in the strictly commercial activity of the retailers (see paragraphs 30 and 42 above).

50 Added to the storage activities which the AAMS itself carries on in relation to all tobacco products, the combined effects of the exclusive rights which it retains in the sphere of production and wholesale trade in domestic tobacco products and of the State right of monopoly which the AAMS has at the retail level may indeed

place that undertaking in a dominant position on the market for distribution of manufactured tobacco products.

51 Nevertheless, the mere creation of 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. A Member State will contravene the prohibitions contained in those two provisions only if, in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position (see the judgments in Case C-179/90 *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli* [1991] ECR I-5889, paragraph 17, and in Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle* v *Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, paragraph 18).

52 As pointed out in paragraph 43 of this judgment, the fact that producers of tobacco products manufactured in the other Member States prefer to use the AAMS depots rather than set up their own wholesale depots may be attributable to considerations specific to those traders. It cannot lead to the conclusion that the Italian legislation, which was amended precisely in order to open up wholesale trade in tobacco products from other Member States of the Community, causes the AAMS to channel sales of manufactured tobacco products and thereby abuse the dominant position which it may enjoy on the distribution market.

53 Moreover, it does not follow from the information before the Court that the system of wholesale distribution of tobacco products put in place by that legislation, in so far as it allows only the AAMS to issue authorizations to operate outlets, results in a situation which prejudices consumers, within the meaning of heading (b) of the second paragraph of Article 86 of the Treaty. In any event, it cannot be argued, particularly in view of the points already set out in paragraph 39 of this judgment, that this system is manifestly unable to satisfy consumer demand (see, *a contrario*, the judgment in Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 31).

54 So far as retailers are concerned, these traders do not themselves have any exclusive or special distribution right at their place of establishment. The contested legislation merely governs their access to the market in the retail distribution of tobacco products. Authorized retail traders thus satisfy at the same time consumer needs for tobacco products and cigarettes and no outlet enjoys a particular advantage over its competitors. They cannot therefore be regarded as undertakings having the kind of rights referred to in Article 90(1) of the Treaty.

55 *A fortiori*, it cannot be argued that the Italian legislation establishes, in favour of authorized 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 (on this point, see paragraph 17 of the judgment in *Centre d'Insémination de la Crespelle*, cited above).

56 It follows that Articles 5, 90 and 86 of the Treaty do not preclude national legislation, such as that in force in Italy, from reserving the retail sale of manufactured tobacco products to distributors who have been authorized by the State.

The second question

57 The national court also asks whether Article 30 of the Treaty precludes legislation providing for criminal sanctions such as that under which Mr Banchero is being charged.

58 While, in principle, criminal legislation and rules of criminal procedure are matters which remain within the Member States' area of competence, the Court has consistently held that Community law sets certain limits in relation to the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. Administrative measures or penalties must not go beyond what is strictly necessary, and the control procedures must not be framed in such a way as to restrict the freedom required by the Treaty and must not be accompanied by a penalty which is so disproportionate to the gravity of the

infringement that it becomes an obstacle to the exercise of that freedom (judgment in Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; see also the judgments in Case 157/79 *Regina* v *Pieck* [1980] ECR 2171, paragraph 19, and in Case 299/86 *Drexl* [1988] ECR 1213, paragraph 18).

59 In the present case, as the Advocate General observes at points 45 and 46 of his Opinion, Mr Banchero does not stand charged with illegal importation of manufactured tobacco products but with possession of tobacco products on which excise duty, which is in fact in accordance with Community law, has not been paid.

60 The penalties facing Mr Banchero do not hinder in any way the importation of tobacco products from other Member States, but merely tend to dissuade consumers from obtaining supplies of tobacco products, on which duties that are in accord with Community law have not been paid, through unauthorized traders who are themselves acting in breach of the Italian legislation applicable to the distribution of manufactured tobacco products.

61 The severity of those penalties is thus not a matter for assessment under Community law.

62 Article 30 of the Treaty does not therefore preclude national legislation, such as that in force in Italy, 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.

Costs

63 The costs incurred by the Spanish, Italian and French Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Pretura di Genova by order of 30 July 1993, hereby rules:

1. **Article 37 of the EEC Treaty has no relevance with regard to national legislation, such as that in force in Italy, which reserves the retail sale of manufactured tobacco products to distributors authorized by the State, provided that the State does not intervene in the procurement choices of retailers.**

2. **National legislation, such as that in force in Italy, which reserves the retail sale of manufactured tobacco products, 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 EEC Treaty.**

3. **Articles 5, 90 and 86 of the EEC Treaty do not preclude national legislation, such as that in force in Italy, from reserving the retail sale of manufactured tobacco products to distributors who have been authorized by the State.**

4. **Article 30 of the EEC Treaty does not preclude national legislation, such as that in force in Italy, 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.**

Rodríguez Iglesias Edward Puissochet

Hirsch Mancini Schockweiler

Moitinho de Almeida Kapteyn Gulmann

Murray Jann

Delivered in open court in Luxembourg on 14 December 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President