Amendment to the Legal Regime of Arbitration in Tax Matters, February 2021

Member State
Portugal

Topic

Not applicable.

Deciding Court Original Language
Not applicable.

Deciding Court English translation
Not applicable.

Registration N
Not applicable.

Date Decision
Not applicable.

ECLI (if available)
Not applicable.

National Follow Up Of (when relevant)
Not applicable.

EU legal sources and CJEU jurisprudence
Not applicable.

ECtHR Jurisprudence
Not applicable.

Subject Matter

Arbitration – Impartiality – Independence.

Legal issue(s)

The legal issue here is whether a lawyer, being a representative in a given pending tax arbitration proceeding or, failing that, belonging to a law firm where one or more of his colleagues are in that position, may be appointed as arbitrator in another tax arbitration proceeding.

Request for expedited/PPU procedures

Not applicable.

Interim Relief

Not applicable.

National Law Sources

Law No. 7/2021, of 20 January, amending the Legal Regime of Arbitration in Tax Matters

Facts of the case

Lei 7/2021, 26 February has introduced an amendment to the Legal Regime of Arbitration in Tax Matters[1], in particular its article 6, which refers to the appointment of arbitrators. The main purpose of this amendment is to avoid a possible conflict of interest and thus strengthening impartiality and independence of arbitrators. This is an amendment that was proposed by the Centre for Administrative Arbitration (CAAD). According to the explanatory memorandum that precedes this proposal, the intention was to "develop and densify the ethical and deontological requirements applicable to the selection and appointment of arbitrators, as assumptions of transparency and rigour, essential to the credibility of the system and the creation of a favourable public perception of its implementation".[r1]

Under the new regime, the appointment of arbitrators by the Deontological Council is now carried out by public lottery; chosen arbitrators are drawn from the list. In addition, trustees, or members of a law firm in which one of its members (anda colleague) is also a trustee in the pending tax arbitration proceeding are not eligible for the draw.

Previously, an arbitrator used to be appointed by the Deontological Council. In addition, it was possible that the appointee was also simultaneously a lawyer in the law firm representing one of the parties to those proceedings. Nowadays, lawyers who work in large law firms are rarely eligible arbitrators as the probability of a colleague being mandated in a pending tax arbitration case is quite high[3].

This contributes to dissociating large law firms from the resolution of disputes arising from large contracts with the State. This[r3] amendment, thus, aims at a more robust legal framework protecting the independence and impartiality of arbitration in Portugal. This is particularly relevant as the perception is that judicial independence is average to low, the main reason being given for this perception the possible pressure put on the justice system by economic interests, like those of law firms.

This legislative amendment reflects growing consensus in Portugal about European and International standards on impartiality. It also results from consistent interpretation, and vertical

and horizontal judicial interaction techniques at national and European levels. In this context, we highlight Ruling of the Supreme Court of Justice of 12 July 2011 that quotes not only the Arbitrator's Code of Ethics approved in 2010 by the Portuguese Arbitration but also the Association Recommendations on the Independence and Impartiality of Arbitrators of the Spanish Arbitration Club and the Guidelines on Conflicts of Interest in International Arbitration, approved by the International Bar Association in 2004. This national jurisprudential understanding is also in line with the interpretation that the ECtHR has made of Article 6 of the ECHR, which, among other aspects, requires that a court that falls within what the ECHR understands as a judicial body must be impartial.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

Not applicable.

Relation of the case to the EU Charter

Not applicable.

Relation between the EU Charter and ECHR

Not applicable.

Use of Judicial Interaction technique(s)

Not applicable.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not applicable.

Strategic use of judicial interaction technique (purpose aimed by the national court)

Not applicable.

Impact on Legislation / Policy

It is important to note that this legislative amendment cannot be understood in isolation, as it is part of a context of sedimentation, at national level, of a common European standard on impartiality, as far as arbitration is concerned. It is therefore useful to understand this context.

The starting point is Law No. 63/2011 of 14 December, better known as the Voluntary Arbitration Law. Its Article 9(3) states that "[t]he arbitrators shall be independent and impartial". While it is true that this is a reference without further concretization in the law, the truth is that it has been made in jurisprudence.

In effect, national jurisprudence has been firm in demanding guarantees of independence and impartiality of arbitrators. And it has done so in the light of an arbitration law (the old one) which

was less than clear on this matter, namely by referring to the regime of impediments and suspicions of judges provided for in the Portuguese Civil Procedure Code. In this regard, it is important to quote Constitutional Court Ruling 52/92, which, in a case it considered to meet the requirements of a necessary arbitral tribunal, held that all arbitrators must guarantee independence and impartiality, without which - it said - a body cannot be set up as a court of law. According to the Court, the precepts of articles 20, no. 1 and 206 (now 202) of the Portuguese Constitution require this.

However, it was the Ruling of the Supreme Court of Justice of 12 July 2011 that clearly and definitively addressed the issue of the independence and impartiality of the arbitrator. Very generally, this was a case in which the arbitration clause inserted in a construction contract provided that the parties' lawyers and other direct representatives would perform the functions of arbitrators in a future arbitration panel consisting of 5 elements. The arbitration agreement was declared null and void as the Supreme Court considered that the arbitral tribunal would be manifestly lacking the characteristics of independence and impartiality. This decision also bases the source of these guarantees on the constitutional precepts cited in the Constitutional Court's decision. But it also appeals to the requirements set out in the Arbitrator's Code of Ethics approved in 2010 by the Portuguese Arbitration Association. In terms of comparative law, the judgment quotes the Recommendations on the Independence and Impartiality of Arbitrators of the Spanish Arbitration Club and the Guidelines on Conflicts of Interest in International Arbitration, approved by the International Bar Association in 2004.

While none of these case law decisions provides us with a definition of what independence and impartiality are (and particularly what eventually distinguishes them), the truth is that the requirements of these attributes in the persons of arbitrators seems to be a peaceful issue in our courts.

In this regard, see, by way of example, these recent decisions:

- Judgment of the Lisbon Court of Appeal of 29 September 2015, which concluded that, upon appointment, an arbitrator who refuses to disclose his previous participations in identical or similar arbitrations, as well as opinions or professional activities related to the same subject matter, incurs a breach of the duty of disclosure, creating well-founded doubts about his independence and impartiality;

- Judgment of the Supreme Court of Justice of 15 February 2017, which determined that if during an arbitration proceeding well-founded doubts arise as to the impartiality and independence of an arbitrator, he shall be replaced and the arbitration proceeding shall continue, and the court may even order the repetition of the acts performed by the replaced arbitrator.

Finally, it is also worth mentioning that this national jurisprudential understanding is in line with the interpretation that the ECtHR has made of Article 6 of the ECHR, which, among other aspects, requires that a court that falls within what the ECHR understands as a judicial body must be impartial.

Thus, and as far as the latter judgment is concerned, the decision of the Supreme Court of Justice is in line with the understanding of the ECtHR, which stipulates that where impartiality is disputed during the domestic proceedings on a ground that does not immediately appear to be manifestly devoid of merit, the national court must itself check whether such concerns are justified so that it can remedy any situation that would breach Article 6 § 1 (Cosmos Maritime Trading and Shipping Agency v. Ukraine, §§ 78-82).

The European Court of Human Rights stipulates that the existence of impartiality must be determined based on the following – see, Micallef v. Malta [GC], § 93; Nicholas v. Cyprus, § 49:

- a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case;
- and also an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

Based on this distinction, the ECtHR provides that a situation in which the question of a lack of judicial impartiality may arise may be functional in nature, concerning, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links between the judge and other actors in the proceedings (Micallef v. Malta [GC], §§ 97-98); and also of a personal character, deriving from the conduct of the judges in a given case or the existence of links to a party to the case or a party’s representative.

Thus, professional, financial or personal links between a judge (or an arbitrator) and a party to a case, or the party’s advocate, may raise questions of impartiality (Pescador Valero v. Spain, § 27; Tocono and Profesorii Prometei?ti v. Moldova, § 31; Micallef v. Malta [GC], § 102; Wettstein v. Switzerland, § 47).

With specific regard to one of the concerns that motivated the legislative amendment under

analysis – v.g., try to dissociate the possible resolution of disputes arising from large contracts with the State from large law firms -, it should be noted that the ECtHR considers that the fact that a judge has blood ties with a member of a law firm representing a party to a case does not automatically mean that there has been a violation (Ramljak v. Croatia, §§ 29). A number of factors should be taken into account, including: whether the judge's relative has been involved in the case concerned, the relative's position in the law firm in question, the size of the firm, its internal organizational structure, the financial significance of the case for the firm, and any potential financial interest or benefit (and the extent thereof) for the relative (Nicholas v. Cyprus, § 62).

With this frame in mind, and looking at the legislative amendment that is the subject of this template, it is important to note that in order that the courts may inspire in the public the confidence, which is indispensable, account must be taken of questions of internal organization. For the Court, the existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor (see the specific provisions regarding the challenging of judges, Micallef v. Malta [GC], §§ 99-100, and Mikhail Mironov v. Russia, concerning the requirements under Article 6 where a challenge for bias is submitted by a litigant and decided by a judge, including where the judge concerned is the one taking the decision, §§ 34-40 and case-law references cited). Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (Mežnari? v. Croatia, § 27 and A.K. v. Liechtenstein, §§ 82-83, concerning the withdrawal of judges of a supreme court in a small jurisdiction).

Thus, as mentioned, this legislative change in terms of arbitration in tax matters is in line not only with national jurisprudence on the matter, but also with the understanding of the ECtHR regarding the impartiality associated with Article 6 of the ECHR.

Notes on the national implementation of the preliminary ruling by the referring court

Not applicable.

Impact on national case law from the same Member State or other Member States

Not applicable.

Connected national caselaw / templates

Not applicable.

(Link to) full text

Decision of the Tax arbitration Court:
https://caad.org.pt/tributario/decisoes/decisao.php?s_irs=1&s_processo=&s_data_ini=&s_data_fim=&s_re

CJEU Decision:
https://curia.europa.eu/juris/document/document.jsf?text=&docid=239005&pageIndex=0&doclang=PT&mo