



TAX ARBITRATION EVALUATION REPORT

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ABBREVIATIONS AND ACRONYMS

APA	Portuguese Arbitration Association
ARBITRARE	Arbitration Centre for industrial property, domain names, firms and denominations
AT	Tax and Customs Authority
CAAD	CAAD – Administrative Arbitration Centre (CAAD)
CAC	Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry
CACCDC	Consumer Conflict Arbitration Centre of the District of Coimbra
CACCL	Lisbon Consumer Conflict Arbitration Centre
CACCVA	Centre for Arbitration of Consumer Disputes of the Vale do Ave
Charter	Charter of Fundamental Rights of the European Union CASA Automotive Sector Arbitration Centre
CD /CDCAAD	CAAD Code of Ethics
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms / European Convention on Human Rights
ECJ	Centre for Judicial Studies
CIAB	Centre for Consumer Information, Mediation and Arbitration (Arbitration Court)
CICAP	Porto Consumer Information and Arbitration Centre
CIMAAL	Algarve Region Consumer Information, Mediation and Arbitration Centre
CIMPAS	Insurance Information, Mediation and Arbitration Centre
CIRE	Insolvency and Company Recovery Code
CIS	Stamp Duty Code
CIUC	Single Circulation Tax Code

CNIACC	National Centre for Information and Arbitration of Consumer Conflicts of Consumption
Ethics Council	Ethics Council of the CAAD
CPA	Administrative Procedure Code
CPC	Code of Civil Procedure
CPPT	Code of Tax Procedure and Process
CPTA	Code of Procedure in Administrative Courts
CRP	Constitution of the Portuguese Republic
CSTAF	Superior Council of Administrative and Tax Courts
DGAIEC	Directorate-General for Customs and Excise on Consumption
DGCI	Directorate-General for Taxes
DR	Official Gazette
ETAF	Statute of Administrative and Tax Courts
FIIAH	Real estate investment funds for rental housing
FP	Public Treasury
IBA	<i>International Bar Association</i>
ICC	<i>International Court of Arbitration</i>
IMI	Municipal Vehicle Tax
IMT	Municipal Tax on Onerous Transfer of Real Estate
IRS	Personal Income Tax
IRC	Corporate Income Tax
IS	Stamp Duty
ISC	Excise Duty
ISV	Vehicle Tax
IUC	Single Tax on Vehicle Circulation
VAT	Value Added Tax
LAV	Voluntary Arbitration Law
LGT	General Tax Law

NRAA	New Administrative Arbitration Regulations
P/Proc.	Process
“Ordinance of Binding”	Ordinance No. 112-A/2011, of 22 March, amended by Ordinance No. 287/2019, of 3 September
RCAT	Regulation on Costs in Tax Arbitration Proceedings
RJAT	Legal Regime for Tax Arbitration
RSDAMT	Regulations on the Selection and Appointment of Arbitrators in tax matters
SIIAH	Real estate investment companies for residential leasing
SP	Taxpayer
STA	Supreme Administrative Court
TAF/TAFs	Administrative and Tax Court/Administrative and Tax Courts
TC	Constitutional Court
TCA	Central Administrative Court
ECHR	European Court of Human Rights
TFEU	Treaty on the Functioning of the European Union
TGIS	General Stamp Duty Table
CJ	Court of Justice
CJEU	Court of Justice of the European Union
TT	Tax Court
TEU	Treaty on European Union

I. PRESENTATION



The Institute of Legal and Political Sciences of the Faculty of Law of the University of Lisbon, through its *Lisbon Public Law Research Centre* and under the direction of its Scientific Coordinator, prepared, at the request of CAAD — Administrative Arbitration Centre, an Evaluation Report on tax arbitration.

This assessment included the following parameters:

- (i) Selection and appointment of arbitrators, practical compliance with the rules on incompatibility and transparency of procedures.
- (ii) Comparison between the decisions of state tax courts on appeals and the decisions of arbitral tribunals, including, among other variables, the number of appeals and their outcome.
- (iii) Qualitative assessment of tax arbitration, using as criteria changes in legislation as a result of decisions, changes in the legal basis for the Tax Administration's actions, and the impact on future decisions of administrative and tax courts.
- (iv) Assessment of investment in state tax courts since the establishment of the tax arbitration system.
- (v) Recommendations.

This report presupposes compliance with standards of total and absolute independence of investigation and interpretation of the applicable framework.

The researchers involved in the project cannot be CAAD arbitrators in tax matters or intend to become so for a minimum period of two years after the conclusion of the study, nor can they have been actively registered as arbitrators in administrative matters in the last two years prior to the start of the project.

The CAAD provides full and unconditional access to all elements requested by researchers, subject to tax confidentiality obligations.

II. FRAMEWORK FOR TAX ARBITRATION



1. The CAAD

1. The Programme of the 18th Constitutional Government maintained its commitment to alternative dispute resolution, undertaking to provide more expeditious, accessible and economical ways for citizens and businesses to resolve conflicts ⁽¹⁾. Thus, the extension of the traditional model of administrative and tax justice beyond the state courts aimed to overcome the slowness and procedural overload generated by constant recourse to the courts and the subsequent worsening of pending cases resulting from this increase in litigation, particularly in the context of civil service and litigation relating to precarious workers ⁽²⁾. The late nature of decisions harms both the State and taxpayers, since a late court decision delays the effective collection of tax revenue by the State, which is unable to collect large amounts in a timely manner; for citizens, the slowness aggravates the bank guarantees provided to suspend tax enforcement and, for companies, at the management level, the foreseeable time for obtaining the judgment for the purpose of annual provisions is decisive.

2. In this context, as early as 2002, with the approval of the Code of Procedure in Administrative Courts (CPTA) by Law No. 15/2002 of 22 February, Title IX (*Arbitration Court and Arbitration Centres*) enshrined the possibility of creating permanent arbitration centres for the assessment of issues relating to contracts, civil liability of the Administration, legal relations in public employment, public social protection systems and urban planning (Article 187), thus signalling the legislative intention to institutionalise arbitration centres, provided that they are endowed with guarantees of independence and impartiality, so that they can be a real alternative to the state courts.

¹ See Order No. 5097/2009 of the Secretary of State for Justice, which highlights the effectiveness, speed, economy and flexibility as inherent advantages of mediation, conciliation and, of course, arbitration.

² For further details, see NUNO VILLA-LOBOS, "Analysis of the evolution of public policies for the implementation of administrative arbitration in the CAAD", *Revista de Direito Administrativo*, No. 7 (Jan.-Apr. 2020), pp. 62-67.

3. On 19 September 2007, several entities (including the Association of Court Officers, the Trade Union Association of Registry Conservators, the Trade Union Association of Criminal Investigation Officers of the Judicial Police, the Trade Union Association of Auxiliary Administrative Technical Officers and Workers of the Judicial Police, the Trade Union Association of Registry and Notary Officers, the Trade Union Association of Judicial Police Security Guards, the Trade Union Association of Prison Service Workers, the Portuguese Trade and Services Confederation, the Union of Judicial Officials, the National Union of Prison Guards and the Union of Registry and Notary Workers) requested, under the terms of Article 1(1) of Decree-Law No. 425/86 of 27 December (a law that allows entities which, under Law No. 31/86 of 29 August, wish to promote, on an institutionalised basis, the conduct of voluntary arbitration to request authorisation from the Minister of Justice to set up the respective centres), authorisation to set up a voluntary arbitration centre competent to settle disputes arising from legal relations in public employment and contracts.

Thus, the CAAD was subsequently authorized by Order No.5097/2009, of the Justice Secretary of State ⁽³⁾, as a centre for arbitration centre with a national scope, specialised in nature and based in Lisbon, operating under the aegis of the Superior Council of Administrative and Tax Courts (CSTAF) ⁽⁴⁾ – which is competent to appoint the chair of the Ethics Council of the Administrative Arbitration Centre (Article 10-A(2) of the CAAD Statutes) ⁽⁵⁾. Among the elements referred to in the Order as relevant to the assessment of the application, the following stand out: (i) the draft regulations in accordance with the fundamental principles and rules applicable to institutionalised voluntary arbitration and (ii) the list of arbitrators with high technical qualifications and facilities suitable for the operation of an arbitration centre. Thus, the creation of the CAAD aimed not only to implement Article 187 of the CPTA as seeking to restore confidence in the functioning of justice among citizens in general and economic agents in particular. Contributing to this were the legal, patrimonial and functional autonomy of the CAAD and the absence of any hierarchical relationship between its members and the Ministry of Justice.

³ DR, 2nd Series, No. 30, of 12 February 2009, p. 6113.

⁴ Strictly speaking, the arbitration centre operates under the aegis of a private non-profit association called CAAD- Centro de Arbitragem Administrativa (Administrative Arbitration Centre), although the term "CAAD" has come to refer to the arbitration centre itself in everyday language.

⁵ Available at <https://www.caad.org.pt/caad/estatutos>

4. Since 2009, the CAAD has been resolving disputes relating to various administrative matters through mediation and arbitration, including issues relating to contracts and legal relations in public employment. Initially, the Ministry of Justice and the Ministry of Culture were bound by its jurisdiction, but this has been gradually extended to the Ministry of Education and Science, the Polytechnic Institutes of Porto, Coimbra and Bragança, and the Higher Institute of Engineering of Porto.

Subsequently, with the publication of Order No. 5880/2018 of the Secretary of State for Justice, of 15 June ⁽⁶⁾, the CAAD's material jurisdiction in administrative matters was expanded ⁽⁷⁾ enabling it to set up arbitration tribunals to hear disputes concerning "any legal and administrative matters that, under the terms of the law, may be submitted to institutionalised arbitration" ⁽⁸⁾. The CAAD may intervene even beyond cases of advance binding, provided that there is an arbitration clause or arbitration agreement to that effect.

⁶ DR, 2nd Series, No. 114, of 15 June 2018, p. 16782.

⁷ Pursuant to the provisions of Articles 2 and 3 of Decree-Law No. 425/86, of 27 December, and Articles 180 and 187 of the CPTA, as amended by Decree-Law No. 214-G/2015, of 2 October. On 7 October 2016, the CAAD Association requested authorisation to extend the powers conferred by Authorisation Order No. 5097/2009 of 27 January, in order to enable the CAAD to settle disputes arising from any matters for which, under the provisions of Articles 180 and 187 of the CPTA, as amended by Decree-Law No. 214-G/2015 of 2 October, it is possible to set up an arbitral tribunal.

⁸ Under the terms of Article 3(2) of the CAAD Statutes, the association's mission is to promote and resolve "disputes concerning administrative and tax matters through (...) arbitration, under the terms defined by its regulations and which are not subject exclusively to judicial courts or mandatory arbitration under special law".

2. Tax arbitration

2.1. General aspects

5. Following the legislative authorisation contained in Article 124 of Law No. 3-B/2010 of 28 April, tax arbitration was introduced into the Portuguese legal system by Decree-Law No. 10/2011 of 20 January, which approved the Legal Regime for Tax Arbitration (RJAT).

The aim of this law was to establish an *"alternative form of judicial resolution of conflicts in the field of taxation,"* teleologically guided by three purposes, expressly announced in the respective preamble: (i) to strengthen the effective protection of the legally protected rights and interests of taxpayers; (ii) to speed up the resolution of disputes between the tax authorities and taxpayers; and (iii) to reduce the number of cases pending before administrative and tax courts.

6. Tax arbitration is institutionalised in the Portuguese legal system, operating by legal imperative, under the terms of Article 4(2) of the RJAT, within the CAAD — which, being a private law legal entity of an associative nature ⁽⁹⁾, operates, as anticipated, under the aegis of the CSTAF, which was one of the reasons for granting this Centre exclusive responsibility for organising tax arbitration, with the RJAT establishing its jurisdiction in matters of tax dispute resolution.

Thus, unlike administrative arbitration, tax arbitration cannot be conducted by any other institutionalised arbitration centres, nor is it admissible in *ad hoc* tribunals.

7. Recourse to arbitration tribunals by taxpayers is voluntary (strictly speaking, by those who have standing in tax proceedings) – and therefore a genuine *potestative right* of taxpayers – the participation of the tax authorities in such proceedings will result from the precise terms in which it is bound by “an order of the members of the Government responsible for finance and justice, which establishes, in particular, the type and maximum value of the disputes covered” (Article 4(1) of the RJAT).

⁹ See Article 2 of the CAAD Statutes.

This binding nature is ensured by Order No. 112-A/2011 of 22 March, amended by Order No. 287/2019 of 3 September (Ordinance Binding the Ministry of Finance and Public Administration to the Jurisdiction of the CAAD, hereinafter “Binding Ordinance”), which determines the terms of the submission of the various services and bodies of the Ministry of Finance and Public Administration to the jurisdiction of the CAAD.

8. Therefore, the legal framework for tax arbitration can be found in the RJAT, in conjunction with the Binding Ordinance, without prejudice to the subsidiary application of the procedural rules of the tax codes and other tax rules, as well as the rules of the CPTA, the Statute of Administrative and Tax Courts (ETAF), the Code of Administrative Procedure (CPA) and the Code of Civil Procedure (CPC), pursuant to Article 29(1) of the RJAT.

9. We are therefore talking about the possibility of submitting disputes arising from tax legal relationships to the decision of arbitrators – as an alternative to the traditional intervention of judges – who will be equipped with the necessary functional powers to settle them.

As arbitral tribunals are one of the categories of courts under Article 209(2) of the CRP, this would be a *successive* and *alternative* form of dispute resolution. *Successive*, because it operates after the dispute has arisen, seeking to ensure its resolution – as opposed to those that aim to prevent or avoid it; and *alternative*, since the settlement of the dispute does not take place before the state courts in the strict sense, but is entrusted to arbitrators – operating on the basis of a logic of de-statisation of dispute settlement.

In any circumstance, arbitral tribunals decide in accordance with established law, and recourse to equity as a decision-making criterion is prohibited (Article 2(2) of the RJAT). Therefore, arbitration also involves a dispute over legality (rather than expediency), concerning the investigation of the legal (non)compliance of tax acts, which may be annulled (or declared null and void). Thus, the possibility for taxpayers to have their disputes with the tax authorities settled by arbitrators as an alternative to judges does not imply a change in the decision-making criteria governing the latter's actions ⁽¹⁰⁾. In fact, arbitral decisions are equivalent, in terms of legal force, to the decisions of the tax courts (Article 24 of the RJAT).

2.2. Scope of tax arbitration

2.2.1. Identification

10. The jurisdiction of arbitral tribunals does not cover the entire universe of decisions falling within the jurisdiction of state tax courts, as their subjective, objective and quantitative scopes are more limited.

11. From a *subjective* point of view, the following services of the Ministry of Finance and Public Administration are subject to the jurisdiction of arbitration tribunals in tax matters, pursuant to Article 1 of the Binding Ordinance: (i) the Directorate-General for Taxes (DGCI); and (ii) the Directorate-General for Customs and Excise (DGAIEC)".

Interpreted in a contemporary manner, this provision – in light of the provisions of a) of paragraph 2 of Article 12 of Decree-Law No. 118/2011 of 15 December, which approves the organisation of the Tax and Customs Authority – it will be understood that the Tax and Customs Authority (AT) is now bound by the jurisdiction of the tax arbitration courts.

¹⁰ We are "still dealing with a dispute over legality (and not over merit, timeliness or convenience), despite it having been removed from the courts". J. F. ROCHA/F. ESTEVES, *Lições de Procedimento e Processo Tributário* [Lessons in Tax Procedure and Process], 8th edition, Almedina, 2021, p. 474.

Considering that the (legal) notion of "tax administration" is – under the terms of Article 1(3) of the General Tax Law (LGT), approved by Decree-Law No. 398/98 of 17 December, in the version currently in force – substantially broader, it appears that disputes arising from relationships in which the active subjectivity is integrated by any other public entities legally responsible for the assessment and collection of taxes, such as (for example) regional government bodies or local authorities, are excluded from tax arbitration.

12. In turn, from an *objective* point of view, it is important to begin by considering that Article 2(1) of the RJAT limits the scope of tax arbitration to the assessment of the following claims relating to the declaration of illegality of: (i) tax assessment acts (hetero-assessment or self-assessment); (ii) acts equivalent to tax assessments (withholding taxes and payments on account); and (iii) definitive assessment acts (i.e., assessment acts that are not followed by assessment acts, such as acts determining the taxable amount and setting asset values).

It is therefore clear that a very broad range of administrative acts in tax matters are excluded from the possibility of review by arbitration tribunals. This is (in particular) the case for acts of recognition or revocation of tax benefits, access to bank data and precautionary measures, as well as those that take place in the context of tax enforcement (such as reversals, attachments, rejection of requests for payment in instalments, provision or waiver of security).

It is therefore not unreasonable to conclude that, if not most, then at least a very significant part of tax disputes is not arbitrable (in the sense that they cannot be submitted to arbitration).

13. Furthermore, only disputes arising from legal relationships relating to *tax* matters fall within the jurisdiction of tax arbitration tribunals.

Even if, in abstract terms, claims relating to matters concerning any taxes could be legally included in the jurisdiction of tax arbitration tribunals, Article 2 of the Binding Ordinance expressly and unequivocally states that arbitration tribunals shall only hear disputes concerning *tax* matters, from which it follows that disputes concerning fees or financial contributions to public entities are excluded.

Furthermore, under the terms of the same article, claims relating to the following are excluded from tax arbitration: (i) acts subject to necessary administrative reaction when this has been overlooked (cases of self-assessment, withholding tax, payment on account and settlement based on anti-abuse provisions – pursuant to Articles 131 to 133 of the CPPT, respectively; (ii) acts of indirect assessment (including the decision on the review procedure); and (iii) acts relating to customs duties on imports (including indirect

taxes levied on goods subject to import duties and relating to the tariff classification, origin and customs value of goods and tariff quotas, or whose resolution depends on laboratory analysis or steps to be taken by another Member State in the context of administrative cooperation in customs matters).

14. Finally, Article 3(1) of the Binding Ordinance stipulates that access to arbitration is subject to *quantitative conditions*, since disputes involving amounts exceeding €10,000,000.00 are excluded.

In summary, the scope of tax arbitration comprises disputes arising from tax legal relationships that cumulatively meet the following conditions:

- i) **Subjective** – they must involve the AT as the defendant.
- ii) **Objective:**
 - They concern tax matters;
 - They concern acts of assessment, equivalent acts or definitive assessment acts;
 - They do not refer to acts subject to necessary administrative reaction when this has been overlooked, acts of indirect assessment and acts relating to customs duties on imports.
- iii) **Quantitative** – maximum value of €10,000,000.00.

2.2.2. Impact on pending of courts tax courts

15. Although there is only partial overlap between the jurisdictions of state tax courts, on the one hand, and tax courts operating within the CAAD, on the other, the fact is that this overlap does exist. Hence, the existence of an alternative forum to the state tax courts for the handling of some tax litigation previously reserved exclusively for the latter has certainly meant, since 2011, a *shift* in cases. In other words, all tax cases filed with the CAAD correspond to actions that could have resulted in cases filed before the state tax courts. There is therefore no doubt that the introduction of tax arbitration in Portugal aimed, among other things, at the legislatively assumed objective of "*reducing the backlog of cases in administrative and tax courts*" ⁽¹¹⁾

¹¹ See the preamble to Decree-Law No. 10/2011 of 20 January.

16. In any case, it is important to emphasise the true *contingency* of this phenomenon. This is because, as can be understood, there is no way of ascertaining whether, in the absence of a tax arbitration system, all cases dealt with in this forum since 2011 would actually correspond to actions brought before the state tax courts. In fact, various factors, such as speed and consistency in decision-making, serve abstractly as incentives for the use of tax arbitration. This means that it is not possible to establish an absolute correspondence between the number of tax arbitration cases handled by the CAAD since 2011, on the one hand, and the number of cases *not filed* with state tax courts during the same period, on the other. More precisely: had it not been for the existence of a tax arbitration system, some of the tax cases processed by the CAAD since 2011 might not have arisen in the form of lawsuits filed with state tax courts.

17. On another level, it is also worth noting that it is not possible to measure, in relative terms, the impact of this — possible — shift in cases on the overall evolution of pending cases in state tax courts since 2011. Quite simply because other factors have contributed to this overall trend, which in recent years has been clearly downward ⁽¹²⁾, including, but not limited to, the measures *to invest* in state tax justice adopted since 2011, which are listed below ⁽¹³⁾.

18. This is why the following data is limited, in the first instance, to accounting for the total number of tax arbitration proceedings initiated in the CAAD since 2011, without extrapolating any conclusions as to the effective impact of this set on the evolution of pending cases in state tax courts or on the evolution of the number of cases filed in the state jurisdiction. The number of requests for the establishment of a tax arbitration tribunal in tax matters filed with the CAAD since 2011 is as follows ⁽¹⁴⁾:

¹² With reference only to appeals in the courts of first instance, the evolution of pending cases before the tax courts since 2015 is as follows: 22,815 (2015); 22,375 (2016); 21,058 (2017); 20,318 (2018); 19,292 (2019); 17,354 (2020); 15,219 (2021); 13,238 (2022). See <https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Indicadores-de-desempenho-dos-tribunais-administrativos-e-fiscais-de-1-instancia.aspx>

¹³ See *below*, VI.

¹⁴ Data obtained from the CAAD. There are also provisional results for 2023 obtained up to November (810) that will not be included in the table, not only because of their provisional nature but also because they do not fall within the period covered by the study.

Year	Number of cases
(2011)	26
(2012)	150
(2013)	311
(2014)	850
(2015)	789
(2016)	772
(2017)	693
(2018)	709
(2019)	953
(2020)	794
(2021)	862
(2022)	810
TOTAL (2011-2022)	7719

19. Added to these figures are those relating to cases that were initially filed with state tax courts but *were* effectively *transferred* from state jurisdiction to the CAAD under two temporary legal provisions approved specifically for this purpose: one in 2011 ⁽¹⁵⁾ and the other in 2018 ⁽¹⁶⁾. The number is as follows of cases transferred from state tax courts to the CAAD ⁽¹⁷⁾:

Legal qualification	Number of cases
RJAT (30th, no. 1)	28
DL No. 81/2018 (11th, No. 1)	119
TOTAL	147

¹⁵ Under the terms of Article 30(1) of the RJAT, it was provided that "*taxpayers may, from the entry into force of this decree-law and until the end of a period of one year, submit to arbitration tribunals (...) claims relating to tax acts that have been pending a decision in the first instance in the tax courts for more than two years, with exemption from court costs*".

¹⁶ Under the terms of Article 11(1) of Decree-Law No. 81/2018 of 15 October, it was provided that "*taxpayers may, until 31 December 2019, submit to the tax arbitration courts, within their respective jurisdictions, claims they have made in judicial appeal proceedings pending decision at first instance in the tax courts, and which were filed with the latter by 31 December 2016, with exemption from payment of procedural costs*".

¹⁷ Data obtained from the CAAD.

20. More recently, the proposed State Budget Law for 2024 ⁽¹⁸⁾ includes a provision (Article 170) that allows, until 31 December 2024, the migration of pending cases in state tax courts of first instance to tax arbitration, in this case without any value limit, and also provides for the possibility of appealing the arbitration decision to the Central Administrative Court (TCA), under the terms of Articles 280 *et seq.* of the CPPT, provided that the respective value exceeds 10,000,000 (euros), for which purpose the decision handed down by the arbitral tribunals constituted within the scope of the CAAD shall be equivalent to the decision handed down by the tax courts of first instance.

It should be noted that the legislative procedure for the approval of the 2024 Budget Law is still ongoing at the date of completion of this report. In any case, if such a provision is approved, it will be a clear signal from the legislator regarding tax arbitration (and the CAAD, to which the request for the constitution of the arbitral tribunal must be submitted) and its role in relieving the burden on the state tax courts ⁽¹⁹⁾.

2.3. The CAAD as the court of first instance for tax matters

21. When called upon to settle disputes in tax matters — strictly speaking, in fiscal matters (taxes), as seen *above* — the CAAD intervenes as a court of first instance.

In fact, and without prejudice to the transitional regimes that enabled the transition to tax arbitration of cases pending in state tax courts, when arbitrators are called upon to settle tax disputes, their assessment takes place on an original basis (and not in an appeal context). In other words, their cognitive powers are directed at the legal non-conformities of (administrative) tax acts and not at the non-conformities of the judicial decision that has previously dealt with them.

¹⁸ See Draft Law No. 109/XV/2.^a - Approves the State Budget for 2024.

¹⁹ The request for the constitution of an arbitral tribunal, to be submitted to the CAAD, must be accompanied by an electronic court certificate of the application filed for the termination of the judicial proceedings.

22. As for the composition of the arbitral tribunal, Article 5 of the RJAT provides that, in cases where the taxpayer chooses to appoint an arbitrator, the arbitral tribunal shall always operate with a panel of three arbitrators, with each party appointing one of them and the arbitrators thus appointed appointing the third, who shall act as presiding arbitrator.

If the taxpayer does not wish to appoint an arbitrator, the arbitral tribunal shall consist of a single arbitrator in cases where the value of the claim does not exceed twice the value of the jurisdiction of the Central Administrative Court (i.e. €60,000.00 – Article 6(4) of the ETAF and Article 44(1) of Law No. 62/2013 of 26 August); and with a panel of three arbitrators in all other cases, with the CAAD Ethics Council being responsible for their appointment in both situations.

23. The arbitration process is shaped by a series of principles, of which the following stand out due to their relevance to this study the principle of procedural speed, which is ensured, in particular, by the adoption of a procedure without special formalities – in accordance with the principles of the autonomy of arbitrators in conducting the proceedings (Article 16(c) and Article 19 of the RJAT), oral proceedings and immediacy (Article 16(d) and Article 18 of the RJAT) – and by the imposition of a time limit of six months for issuing the arbitral award, which may be extended for successive periods of two months, up to a limit of six months (Article 21 of the RJAT).

Tax arbitration is thus, by legal requirement, a particularly swift form of dispute resolution. The average time taken to reach a decision in tax arbitration jurisdiction under the CAAD – necessarily shorter than the corresponding average time for a decision in the state courts – may contribute, it is admitted, to the relevance of this jurisdiction in deciding new legal issues arising from the introduction of new legislation or its modification in tax matters, with a greater number of decisions within the scope of the CAAD in shorter periods of time.

24. In addition, in view of the aforementioned objectives sought with the introduction of tax arbitration into the Portuguese legal system – namely, increasing the speed of resolution of disputes between the tax authorities and taxpayers and reducing the number of cases pending in administrative and tax courts – the legislator has strongly conditioned the judicial review of decisions rendered by arbitral tribunals. In fact, it refers to a "general rule of non-appealability of decisions rendered by arbitral tribunals" (see Preamble to the RJAT).

In any case, an appeal to the Constitutional Court will be allowed in situations

where the arbitral award refuses to apply any rule on the grounds of its unconstitutionality or applies a rule whose unconstitutionality has been raised (Article 25(1) and Article 17(3) of the RJAT), as well as appeals to the Supreme Administrative Court when the arbitral award is in conflict, on the same fundamental question of law, with another arbitral award or with a judgment handed down by the Central Administrative Court or the Supreme Administrative Court (Article 25(2) of the RJAT). On the other hand, the arbitral award may also be set aside by the Central Administrative Court on the grounds of failure to specify the factual and legal grounds justifying the decision, conflict between the grounds and the decision, improper ruling or failure to rule, or violation of the principles of adversarial proceedings and equality of the parties (Articles 27 and 28 of the RJAT).

Finally, the arbitral tribunal within the scope of the CAAD may or must – when it is the court of last resort for tax disputes – refer a question to the CJEU for a preliminary ruling under Article 267, second and third paragraphs of the TFEU, as interpreted by the case law of the CJEU.

This very limited admission of ‘appeals’ (whether appeals in the strict sense, challenges or, prior to decisions, preliminary rulings) contributes significantly to the stabilisation of decisions made in the context of arbitration, favouring the swift and definitive settlement of tax disputes.

2.4. Selection and appointment of arbitrators

CAAD

25. The selection and appointment of arbitrators in tax arbitration under the CAAD is governed by the RJAT (in particular Articles 6 and 7), the Rules for the Selection and Appointment of Arbitrators in Tax Matters (RSDAMT) and the Code of Conduct of the CAAD ⁽²⁰⁾.

2.4.1. General rules

26. The Ethics Council is the key body in the process of establishing and operating the Arbitration Tribunals that function under the auspices of the CAAD, as it guarantees the independence, impartiality, exemption, objectivity and transparency, but also the high level of technical quality and moral integrity of the arbitrators.

²⁰ Article 10-A(5) of the CAAD Code of Ethics establishes the power of the President of the CAAD Ethics Council to appoint, at the request of the management, the presidents of collective arbitration tribunals, arbitrators, mediators and conciliators, in accordance with objective criteria previously defined in the internal regulations of the Ethics Council, if the selection procedure is not initiated by the parties to the dispute.

The Ethics Council has been tasked with approving a code of ethics for arbitrators, which sets out their ethical obligations, as well as the power and duty to decide on the list of arbitrators organised by the Centre. Article 6(1) and (2)(a), as well as Article 8(3) of the RJAT, grant the President of the CAAD Ethics Council the power to appoint, replace and dismiss the arbitrator or arbitrators in the event of non-compliance with the requirements set out in the RJAT and the Code of Ethics. To this end, as mentioned *above*, it was provided that the President of the Ethics Council, who has the fundamental task of appointing arbitrators, should be appointed by the CSTAF from among retired judges.

27. Specifically, Article 6 of the RJAT provides that when the arbitral tribunal operates with a sole arbitrator, the arbitrator is appointed by the Ethics Council of the Administrative Arbitration Centre from among the list of arbitrators who make up the Administrative Arbitration Centre (no. 1), as already stated *above* (II, 2.3.).

When the arbitral tribunal operates with the intervention of a panel, the arbitrators are appointed (i) by the Ethics Council of the CAAD from among the list of arbitrators who make up the CAAD or (ii) by the parties, with the appointment of the third arbitrator, who acts as presiding arbitrator, being made by the appointed arbitrators or, in the absence of agreement, by the CAAD Ethics Council, at the request of one or both arbitrators.

Article 6(3) of the RJAT also provides that the appointment of arbitrators by the Ethics Council shall be made from among the arbitrators registered on the list by tax category, by public draw, with paragraph 4 establishing that only arbitrators who are not representatives or members of a law firm in which one of its members is a representative in any pending tax arbitration proceedings are eligible for the draw.

Article 7 of the RJAT, in turn, sets out a set of legal requirements for applying to serve as an arbitrator, who shall be chosen from among persons of proven technical ability, moral integrity and public interest (Article 7(1) of the RJAT).

Arbitrators in tax matters must be lawyers with at least 10 years of proven professional experience in the field of tax law, namely through the exercise of public functions, the judiciary, advocacy, consulting and legal advice, teaching in higher education or research, service in tax administration, or scientific work relevant in that field. In matters that require specialised knowledge specialised knowledge of other areas, a graduate in Economics or Management may be appointed as a non-presiding arbitrator (Article 7(2) and (3) of the RJAT).

Following the procedure set out in Article 6(2) of the RJAT, when the Arbitral Tribunal operates with a panel of three arbitrators, the presiding arbitrator is appointed from among lawyers who have held public office as magistrates or who hold a doctorate in legal and economic sciences, provided that, in the last two years, they have not provided professional services of any kind to any party in the context of tax arbitration proceedings (see Article 7(4) of the RJAT). The lists of arbitrators (presiding and assistant) that make up the CAAD are drawn up in accordance with the RJAT, the CAAD Statutes and the Administrative Arbitration Centre Regulations, as required by Article 7(5) of the RJAT, and are further detailed in Article 4 of the Regulations for the Selection and Appointment of Arbitrators in Tax Matters. Arbitrators on the list of chairpersons may not be appointed by the parties as deputy arbitrators (see Article 7(6) of the RJAT), and retired magistrates may act as arbitrators in tax matters, provided that they make a declaration of renunciation of their retired status, in which case the general public retirement regime applies (see Article 7(7) of the RJAT) ⁽²¹⁾.

28. *Transparency and scrutiny* are the cornerstones of the arbitration regimes implemented under the aegis of the CAAD, whose creation, as we have seen, preceded the establishment of tax arbitration. It is estimated that the practical implementation of the latter has benefited from the Centre's *know-how* and organisational structure.

Thus, since its establishment, the CAAD has advocated a broad interpretation of *the principle of publicity*, as evidenced by the publication on its website not

²¹ See the Annual Report on the Functioning of Tax Arbitration (2022), available at https://www.caad.org.pt/files/documentos/relatorios/CAADRelatorio_Anual_Arbitragem_Tributaria_2022.pdf. On 31 December 2021, there were 358 arbitrators on the CAAD list, of whom: 15 were registered as chair arbitrators (all with law degrees); 243 arbitrators with law degrees (including arbitrators registered on the list of presiding arbitrators and assistant arbitrators); 115 arbitrators with degrees in economics or management.

all applicable regulations on administrative and tax arbitration in force, as well as all arbitral awards (ensuring the anonymity of the persons involved), and periodic statistics on the number of cases filed and closed, as well as the outcome of the decision and the total value of the cases.

However, and of particular relevance to this point, the principle of publicity also means that the lists of arbitrators are drawn up on the basis of a public consultation, preferably on an annual basis, promoted by the CAAD and aimed at expressing interest on the part of all persons who meet the requirements set out in Article 7 of the RJAT and Article 2 of the CAAD Code of Conduct (see Articles 3 and 4 of the RSDAMT). Between 2016 and 2021, several public procedures for the selection of arbitrators took place, leading to an increase in the number of arbitrators on the lists, which can be consulted on the CAAD website.

2.4.2. The use of the algorithm

29. As anticipated in the previous section, in accordance with the provisions of Article 6(3) of the RJAT, Article 5(1) of the RSDAMT provides that arbitrators are appointed by the Ethics Council through a public draw, in accordance with an automatic, random and sequential procedure, from among the eligible arbitrators registered on the list by type of tax.

Anyone interested in attending the electronic distribution draw for cases, which is usually held on a monthly basis, may send an email to the CAAD (conselho.deontologico@caad.org.pt) up to 48 hours before it takes place. The distribution will also be broadcast live via teleconference (Zoom), with access guaranteed by a link provided by the CAAD, in accordance with paragraph 7 of the aforementioned Article 5 of the RSDAMT.

Article 5(2) of the RSDAMT establishes that the random order number of each arbitrator is drawn at each new distribution, and that the distribution algorithm is independent of the number of cases pending before each arbitrator, with cases being assigned according to the sequence resulting from Article 5(2) (see Article 5(3)) and the subjects in which the arbitrators are registered. The rapporteur for the case is also determined in the aforementioned draw (see paragraph 4 of the aforementioned Article 5). As seen in the previous section, the principle of publicity implies that the list of arbitrators eligible for each draw, according to the requirements set out in Articles 6 and 7 of the RJAT, must also be published on the CAAD website at least 5 working days before the date of the draw (see

Article 5(5) of the RSDAMT), with the arbitrator whose name does not appear or should not appear on the list referred to in the previous paragraph being guaranteed the right to request clarification from the Ethics Council up to 2 working days before the date of the draw, and the list may be amended (see Article 5(6) of the RSDAMT).

a) Algorithm used between 2018 and 2020

30. The initial version (*version 1*) of the algorithm was based on the distribution philosophy used in state courts, seeking to automatically match the subject matter of the requests with the areas of registration of the arbitrators. Subsequently (*version 1.1*), an indicator was added for cases requiring an "economist" arbitrator, as well as exclusion and fairness rules to be applied to arbitrators, allowing for the indication of a deadline (for entry) for the requests to be distributed.

31. *Version 2* of the algorithm now includes the manual preparation of cases in advance to indicate the areas of the requests (no longer using the automatic equivalence between the subjects of the requests and the areas of the arbitrators), and the exclusion and fairness rules are now parameterisable, with automatic adjustment of the periods. Finally, the date of execution/closure of distribution operations is now recorded in the registers. This algorithm does not use a single random number per arbitrator. To execute the operations, random numbers are assigned to the arbitrators in each draw. Each case has 1 or 3 draws, depending on whether it is a single or collective court. The numbers drawn are recorded in *the log* files produced during the operations. In early 2020, the distribution routine library was updated to fix minor *bugs*. The *logs* generated at that time contain additional data to assess the functioning of the corrections.

In preparing the distribution, the following indicators were collected for each case: 1. Income Tax; 2. Value Added Tax; 3. Property Taxes; 4. Special Consumption Taxes; 5. International Tax Law; 6. Requires an economist.

The following indicators were stored in the arbitrators' profiles for use in the distribution: 1. Income Tax; 2. Value Added Tax; 3. Property Taxes; 4. Excise Duties; 5. International Tax Law; 6. Degree in Economics or Management; 7. May be president; 8. Unavailable (Article 5 of the Regulations).

32. As for the algorithm requirements, only arbitrators who were marked as being on the CAAD lists and who were not marked as unavailable were included in the distribution.

In collective proceedings, the two assistant arbitrators were chosen from among lawyers with expertise in all the matters indicated in the preparation of the request for distribution, and those who could be chairpersons were not included in this pre-

selection (if necessary, one of the arbitrators had to be an economist), while the chairpersons were chosen separately from among the lawyers who had been nominated for this purpose (to be president) and who had expertise in all the matters indicated in the acceptance of the request; in individual proceedings, the arbitrator was chosen from among lawyers with expertise in all the matters indicated in the preparation of the request, with those who could be presidents not included in this pre-selection. The assignment would have to be random, and the distribution should favour fairness (which could only occur within the exact set of similar matters).

The number of cases per arbitrator was calculated only over the previous 12 months (so as not to distort the probabilities of recent/former/reinstated arbitrators on the lists), while arbitrators who had had cases less than 3 months ago would not be included in the selection (there could be another interval or another criterion for excluding the most recent nominees could be used) ⁽²²⁾.

b) Algorithm used from 2021 onwards

33. In accordance with the decision of the CAAD Ethics Council of 29 December 2020, the design of the algorithm for the automatic, random and sequential distribution of cases in tax arbitration adapted the distribution methodology used in administrative and tax courts, in order to ensure compliance with the principle of the natural judge and also the speed of dispute resolution, as a structural objective of the tax arbitration system, provided by an equitable distribution of the workload among the arbitrators available at any given time, without overburdening some in relation to others.

²² SQL selects the set of arbitrators who meet the defined requirements. Based on this selection, a temporary table is created with the identification (id) of these arbitrators; the number of cases assigned to each one is added to this table, calculated individually based on the cases assigned to them in the last 12 months (another period may be defined); The calculated value corresponding to the highest number of cases is identified, and this value is incremented (by adding 1). For each arbitrator in the table, the number of cases already assigned to them is subtracted from the incremented value.

In a second temporary table, a number of records corresponding to the result of the previous operation is inserted, each containing the data of the respective arbitrator. In this second table, at the end of this operation, there will be only one record for each arbitrator who has had the highest number of cases already assigned; for arbitrators who have had zero cases assigned, there will be a number of records equivalent to the highest number of cases assigned plus one; in the remaining cases, there will be a proportional number of records, with those who have fewer cases assigned having a greater number of records. Finally, using a function to obtain a *random* number, a random number is chosen in the range between 1 and the total number of records in this second table. The arbitrator to whom the record corresponding to the number obtained belongs is chosen.

34. The fact that the list of arbitrators is expanded annually and that there is a permanent transit of legal arbitrators between the qualities of available and unavailable, due to the fact that they are part of law firms with cases pending before the CAAD (among other causes of temporary unavailability) made it difficult to better understand the operation of the automatic system then in application. Thus, and after 10 years of validity of the RJAT, the Deontological Council decided to introduce a new distribution algorithm, regardless of the number of pending cases of each arbitrator.

Thus, *version 3* of the algorithm changed the philosophy of the basic distribution algorithm, with a prior random draw now being used to order the arbitrators (see Article 5(2) of the RSDAMT), and cases being assigned sequentially to arbitrators according to the order of the draw and the subject matter (no longer using exclusion or fairness rules) ⁽²³⁾.

²³ SQL selects the set of arbitrators compatible with the defined requirements. Based on this selection, a temporary table is created with the identification (id) of these arbitrators; the number of Processes assigned to each one is added to this table, calculated individually based on the Processes assigned to them in the last 12 months (another period may be defined);

Note that these are initial parameterised timeframes. The routines then adapt, dynamically reducing the timeframes if the selection is empty. In the extreme case, all arbitrators could be included.

The calculated value corresponding to the highest number of cases is identified, and this value is incremented (by adding 1). For each referee in the table, the number of cases already assigned to them is subtracted from the incremented value.

A number of records corresponding to the result of the previous operation is inserted into a second temporary table, each containing the data for the respective referee. In this second table, at the end of this operation, there will be only one record for each arbitrator who has had the highest number of cases already assigned; for arbitrators who have had zero cases assigned, there will be a number of records equivalent to the highest number of cases assigned plus one; in the remaining cases, there will be a proportional number of records, with those who have fewer cases assigned having a greater number of records. Finally, using a function to obtain a *random* number, a random number is chosen in the range between 1 and the total number of records in this second table. The arbitrator to whom the record corresponding to the number obtained belongs is chosen.

Once the request has been accepted, there is an operation, prior to distribution, where the cases are prepared. In this operation, information relating to the subject matter of the request will be collected and an indication of whether an economist is required.

The distribution operation will then be carried out periodically by a user with the specific profile of the Ethics Council. The distribution includes all cases that have already been prepared, have not been excluded and have been accepted by a date to be specified.

Exclusions will be occasional and marked with a deadline (i.e. until that date they will not be included in the distribution). What the distribution will do is apply a pre-selection of arbitrators to each of the cases included in it, according to the algorithm described above.

The distribution is controlled through the existing list with the respective results. The list is for consultation and any notes to be made in the assessment to be carried out by the Ethics Council. The list of arbitrators in force until 2021 has been adapted to show specifically which arbitrators are available and unavailable. This information must be consulted and validated prior to distribution in order to avoid errors.

It will not be possible to edit the pre-selection of referees dictated by the automatic distribution. If errors are detected, the distribution should be cancelled and repeated in its entirety. Consultation of the pre-selection of referees is limited and only accessible to users of the Ethics Council.

After validation of the distribution by the Ethics Council, the pre-selection of referees becomes final. This is done through a simple "Close distribution" option that inserts a marker in each record associated with the distribution, indicating the date on which the distribution was considered complete.

35. As in the previous algorithm, the following indicators are collected for each case when preparing the distribution: 1. Income Tax; 2. Value Added Tax; 3. Property Taxes; 4. Special Consumption Taxes; 5. International Tax Law; 6. Requires an economist.

The following indicators to be used in the distribution are also stored in the arbitrators' profiles: 1. Income Tax; 2. Value Added Tax; 3. Property Taxes; 4. Special Consumption Taxes; 5. International Tax Law; 6. Degree in Economics or Management; 7. May be president; 8. Unavailable (with possible indication of the date range).

36. As for the algorithm requirements, all arbitrators who are marked as being on the CAAD lists and who are not marked as unavailable are included in the distribution. In individual cases, the arbitrator is selected at random from among the lawyers who are competent in all the matters indicated in the case, with the exception of those who may be chairpersons, while in collective cases, the assistant arbitrators are selected at random from among the lawyers who are competent in all the matters indicated in the case, with the exception of those who may be chairpersons (if necessary, the second assistant arbitrator is selected at random from among economists who are competent in all matters indicated in the proceedings), while presiding arbitrators are selected at random from among lawyers who are competent in all matters indicated in the proceedings and who are indicated as being eligible to serve as presiding arbitrators.

The assignment of cases to arbitrators must be random, so that operations must run sequentially within each group of arbitrators – lawyers, economists and presidents – regardless of their specialities.

As follows from the RSDAMT, each distribution always constitutes an independent operation, and previous assignments of cases by each arbitrator are not considered, with cases marked 'with choice of arbitrator' not included in the distribution ⁽²⁴⁾

²⁴ At the same time, it creates a record in the Secretariat associated with the appointment of each arbitrator. This operation will definitively block the possibility of cancelling and repeating the distribution. From that point on, the appointment of arbitrators is available for consultation and use by Secretariat profiles. Subsequently, emails will be sent to arbitrators requesting acceptance of the assignment. This is done in the Secretariat area using the existing option. This option automatically sends emails to all arbitrators indicated in the distribution and inserts these acts into the Case, in the Secretariat area.

Associated with the records of the appointment of arbitrators (in the Secretariat), there are fields for collecting the date of acceptance or refusal and the respective reason. Replacements of arbitrators due to refusals are made manually. After a refusal has been registered, the Ethics Council will appoint a new arbitrator. The registration of this appointment and the sending of the email requesting acceptance by the new arbitrator are operations carried out manually using the existing options.

The acceptance or refusal of appointments is made by the arbitrators directly in the SGP. Emails requesting acceptance contain a link to access the form containing the three possible options: acceptance without reservation, acceptance with disclosure, and refusal with indication of the reason. The SGP already has a list available for checking pending acceptances.

Thirty working days after the AT has read the notification of the new request, the CAAD must notify the parties of the appointment of the arbitrators. Before this notification, it will be necessary to move from the appointment of arbitrators (in the Secretariat) to the nomination of arbitrators in the Case (in the Proceedings). The appointment is made using the option already available in the Secretariat area, which enters the records of the appointment of arbitrators in the Case. In order to invoke this option, all arbitrators appointed in a Case must have already filled in the date of acceptance.

The parties are notified manually on the required date, through the acts already existing in the proceedings area.

III. INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS



1. Attributes of the arbitral function and fundamental legal concepts

37. *Independence and impartiality* are constitutive attributes of the exercise of judicial functions, which consist of resolving conflicts through the application of the law, as set out, first and foremost, in Article 202 of the CRP. As such, these two principles must govern the activity of the bodies and their respective members who exercise this function, i.e. both the judges of the state courts and the arbitrators of the arbitral tribunals which, under the terms of Article 209(2) of the CRP, are also considered courts ⁽²⁵⁾. According to established case law of the Constitutional Court (TC), not only do arbitral tribunals constitute an autonomous category of courts and exercise judicial functions, but arbitral justice, whether voluntary or necessary, shares characteristics specific to judicial functions ⁽²⁶⁾.

In full confirmation of this assertion, the Constitutional Court, in Judgment No. 52/92 of 14 March (case No. 10/89), considered that purpose of establishing a necessary arbitral tribunal, that independence and impartiality were characteristics that should be present in this type of jurisdiction and without which one could not speak of a true tribunal ⁽²⁷⁾.

²⁵ Also for the purposes of Article 267 TFEU, according to the case law of the CJEU, one of the requirements that must be met in order to be considered a genuine court or tribunal is precisely *independence*, understood as the absence of *external dependence* (particularly in relation to the executive power) and *internal dependence* (in relation to the parties to the proceedings and the subject matter of the dispute), which leads back to the concept of *impartiality*. See, in this regard, with regard to the necessary arbitral tribunal, the order of the Court of Justice (CJ) of 13 February 2014, *Merck Canada*, C-555/13, ECLI:EU:C:2014:92, paragraphs 16-25, in particular paragraph 23; and, with regard to the Tax Arbitration Court (Administrative Arbitration Centre - CAAD), the judgment of the CJ of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, ECLI:EU:C:2014:1754 (para. 32), 'On the other hand, Article 9^o of Decree-Law No 10/2011 provides that arbitrators are subject to the principles of impartiality and independence. Furthermore, Article 8^o(1) of that decree-law provides that any family or professional connection between the arbitrator and one of the parties to the dispute constitutes an impediment to the exercise of the function of arbitrator. This ensures that the arbitral tribunal concerned is a third party in relation to the authority that adopted the decision under appeal (see judgment *RTL Belgium*, C-517/09, EU:C:2010:821, paragraph 38 and the case law cited therein, and order *Devillers*, C-167/13, EU:C:2013:804, paragraph 15). Arbitration tribunals within the CAAD itself have also had the opportunity to refer questions for a preliminary ruling to the CJEU, as *the referring court*, see the list in *the Annual Report on the Functioning of Tax Arbitration 2021*, CAAD, p. 45 et seq. – infra, V, 2. See, for example, the request for a preliminary ruling submitted by the Tax Arbitration Court (Administrative Arbitration Centre — CAAD) (Portugal) on 24 May 2022 — *Cofidis v Tax and Customs Authority* (Case C-340/22), (2022/C 359/26) or, more recently, the requests submitted on 31 May 2022, 21 June 2022, 13, 24 and 27 July 2022 (Cases C-349/22, *NM v Autoridade Tributária e Aduaneira*, C-416/22, *EDP v Energias de Portugal*, *SA v Autoridade Tributária e Aduaneira*, C-472/22, *NO v Autoridade Tributária e Aduaneira* and C-505/22, *Deco Proteste – Editora Lda v Autoridade Tributária e Aduaneira*. For a list of requests for preliminary rulings made within the scope of the CAAD, see *the 2021 Annual Report on the Functioning of Tax Arbitration*, CAAD, pp. 45-46. On the recognition of arbitral tribunals as courts for the purposes of treaties, see NUNO VILLA-LOBOS AND TÂNIA CARVALHAIS PEREIRA, "The special nature of tax arbitration courts", *The Portuguese Tax Arbitration Regime*, 2015, pp. 49-83 and FRANCISCO PEREIRA COUTINHO, "Tax arbitration and preliminary references", *The Portuguese Tax Arbitration Regime*, Coord. NUNO VILLA-LOBOS AND TÂNIA CARVALHAIS PEREIRA, Almedina 2015, pp. 235-260.

²⁶ In particular, the summary of Judgment No. 2/13, II. Grounds, 9.3, Judgment No. 230/13, II. Reasons, 13, and Judgment No. 123/15, II. Reasons, b), B1), 11.3.1.

²⁷ BERNARDO REIS, 'Practical Reflections on Ethics in Arbitration: An Arbitrator's Perspective', in AAVV *VI Congress of the Arbitration Centre of the Chamber of Commerce and Industry*, Coimbra, 2013, p. 75, states that there is no arbitration if the arbitral tribunal is not independent and impartial, without prejudice to the fact that compliance with this categorical imperative is not always easy to achieve. See Constitutional Court Ruling No. 52/92, III. Grounds, 6.

38. The status of independence and impartiality of those who perform judicial functions also appears to be a requirement arising from the fundamental right to effective judicial protection for the defence of the legally protected rights and interests of citizens enshrined in Article 20 of the Constitution ⁽²⁸⁾ and from sources of international, universal and regional law, and European Union law to which the Portuguese State is bound, whether the European Convention on Human Rights ([ECHR] Article 6(1)), the Treaty on European Union ([TEU] Articles 2 and 19(1), second paragraph) and the Charter of Fundamental Rights of the European Union ([Charter] Article 47, second paragraph).

39. Within the European Union, on the one hand, independence is one of the integral elements of the concept – in Union law – of a court or tribunal of a Member State within the meaning of Article 267 (second paragraph) of the Treaty on the Functioning of the European Union (TFEU) as established by the case law of the Court of Justice and codified in the text of the Recommendations to national courts concerning the submission of preliminary rulings. On the other hand, the guarantees of independence and impartiality of the national court, in relation to the requirements of the rule of law, have been further developed by recent case law of the Court of Justice and the European Court of Human Rights (ECHR) in a demanding manner.

²⁸ Thus, for all, Constitutional Court Ruling No. 353/2017, handed down in Plenary Session, II, c), 7., reaffirming the decision in Ruling No. 178/2016, II, 5.

40. Following the case law established in the case of *Portuguese Judges Union Association* ⁽²⁹⁾, the concept of independence has, according to the Court of Justice, two aspects: one external and one internal.

The first – external independence – presupposes that ‘the body in question exercises its functions with complete autonomy, without being subject to any hierarchical or subordinate relationship with anyone and without receiving orders or instructions from any source and is thus protected from external interventions or pressures that could affect the independence of its members’ judgement and influence their decisions’. Furthermore, ‘the irremovability of the members of the body concerned is an inherent guarantee of the independence of judges, in that it aims to protect the person whose function is to judge’ and, ‘although it is not absolute, this principle can only be subject to exceptions where legitimate and compelling reasons justify it, in accordance with the principle of proportionality’.

The second – internal independence – “is linked to the concept of impartiality” and aims at equal distance from the parties to the dispute and their respective interests, taking into account the subject matter of the dispute. This aspect requires respect for objectivity and the absence of any interest in the resolution of the dispute other than the strict application of the rule of law.” According to the CJEU, ‘the concept of “independence”, which is inherent in the task of adjudicating, implies, above all, that the body in question must be a third party in relation to the authority that adopted the decision which is the subject of the appeal’. Such guarantees of independence and impartiality “require the existence of rules, in particular with regard to the composition of the court, the appointment and term of office of its members, as well as the grounds for abstention, challenge of appointment and dismissal of its members, which allow any legitimate doubt in the minds of individuals as to the imperviousness of that body to elements and its neutrality in relation to the interests at stake (...)” ⁽³⁰⁾.

²⁹ Judgment of the CJEU of 27/2/2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, ECLI:EU:C:2018:177, paragraphs 41-45.

³⁰ Judgment of the CJEU of 21 January 2020, *Banco Santander SA*, C-274/14, ECLI:EU:C:2020:17, paragraphs 57 to 59 and 61 to 63, respectively – see, subsequently, inter alia, the judgments of the CJEU of 15 July 2021, *Commission v. Poland*, C-791/19, ECLI:EU:C:2021:596, paragraph 59, and of 26 January 2023, *SC NV Construct SRL*, C-403/21, ECLI:EU:C:2023:47, paragraphs 44-46.

The Court of Justice, based on the requirement of effective judicial protection enshrined in Article 19(1) TFEU, within the meaning of Article 47 of the Charter, states, in short, that the '(...) requirement of independence of the courts, which is inherent in the task of adjudicating, is part of the essential content of the right to effective judicial protection and the fundamental right to a fair trial, which is of crucial importance as a guarantee of the protection of all the rights which the law of the Union confers on litigants and of the preservation of the values common to the Member States, as set out in Article 2TEU, in particular the value of the rule of law (Judgment of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311, paragraph 51 ⁽³¹⁾ and the case law cited). In a similar vein, the independence and impartiality of the judiciary as a principle deriving from the rule of law – and a means of ensuring effective judicial protection – have already been enshrined in various sources of secondary Union law ⁽³²⁾ .

41. Now, as is the case in the legal order of the European Union, also within the framework of the Council of Europe, where the rule of law is one of its three core values, independence and impartiality are included in the list of criteria for assessing the rule of law in the field of access to justice adopted by the Venice Commission (*Rule of Law Check-List*) ⁽³³⁾

³¹ Judgment of the CJEU of 15 July 2021, *Commission v Poland*, C-791/19, ECLI:EU:C:2021:596, paragraph 58.

³² See, in particular, the Communication from the Commission to the European Parliament [EP] and the Council, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final, 2, p. 4; Communication from the Commission to the EP and the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Report on the Rule of Law. Situation in the European Union, COM(2020) 580 final, 30/9/2020, 1. Introduction, p. 1; or, more recently, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of financial conditionality for the protection of the Union budget (OJ L 433 I/1, 22 December 2020), Articles 2(a) and 3(a) – according to which, respectively, ‘the rule of law includes the principle of effective judicial protection, including access to justice, by independent and impartial courts’ and ‘jeopardising the independence of the judiciary’ may indicate violations of the principles of the rule of law.

³³ Cf. List of Criteria for the Rule of Law, CDL-AD(2016)007, of 18/3/2016, adopted by the Venice Commission at its 106th plenary session, E. Access to justice, 1, a. a. c., pp. 20-23.

The ECHR, within the framework of the ECHR system, has also focused on the guarantees of independence and impartiality inherent in the judicial function – in particular in the context of assessing violations of Article 6 of the ECHR and, more recently, in relation to the issue of the lack of independence of the judiciary and systemic dysfunctions in the procedure for appointing judges ⁽³⁴⁾.

In particular, it follows from the case law of the ECHR that, while Article 6 of the ECHR – and the right of access to the courts inherent therein – does not preclude the existence of arbitral tribunals and recourse to them for the resolution of certain disputes, the guarantees required by Article 6 of the ECHR apply in the case of compulsory arbitration ⁽³⁵⁾ – and, even in the case of voluntary arbitration, the parties' choice of arbitration does not automatically imply a waiver by the parties of their rights under Article 6 of the ECHR and, where the applicants have raised the issue of the independence and impartiality of the arbitrator, the arbitration proceedings must offer the guarantees of Article 6(1) of the ECHR ⁽³⁶⁾.

The requirement of impartiality of the tribunal – and the appearance of impartiality – arising from Article 6(1) of the ECHR (and Article 47(2) of the Charter) is, moreover, supported by various sources of non-domestic law ⁽³⁷⁾.

³⁴ See, in particular, the judgments of the ECtHR [1st Section], *Dolińska-Ficek and Ozimek v. Poland*, 8/11/2021, 49868/19 and 57511/19, §§ 357, 281-355, in particular 315 and 329; ECtHR [1st Section], *Advance Pharma sp. z o.o v. Poland*, 1469/20, 3/2/2022, §§ 353 and 303-351, in particular no. 332; ECtHR [Grand Chamber], *Grzeda v. Poland*, 15/3/2022, 43572/18, §§ 339-350, in particular §§ 343 and 348; and ECtHR [1st Section], *Zurek v. Poland*, 16/6/2022, 39650/18, §§ 147-151 and 219-229, in particular § 224.

³⁵ ECtHR [3rd Section], *Tabbane v. Switzerland*, 41069/12, 1.3.2016, §§ 26-27 and case law cited therein; ECHR [3rd Section], *Mutu and Pechstein v. Switzerland*, 2/10/2018, 40575/10 and 67474/10, §§ 94 and 95; ECHR [5th Section], *Suda v. Czech Republic*, 28 October 2010, 1643/06, § 49; and ECtHR [2nd Section], *Ali Riza and Others v. Turkey*, 28 January 2020, 30226/10 and Others, §§ 173-174.

³⁶ ECHR [3rd Section], *Mutu and Pechstein v. Switzerland*, 2 October 2018, 40575/10 and 67474/10, §§ 121-123, and ECHR [1st Section], *Beg S.p.a. v. Italy*, 20/5/2021, 5312/11, §§ 136-143) – see also, in detail, the ECHR documents entitled European Court of Human Rights, Key Theme – Article 6 (civil) Arbitration (Last updated: 20/02/2023) and Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), Updated to 31 August 2022, II, B., 1, nos. 152-153 and 2, nos. 154-156, regarding the application of the guarantees of Article 6(1) to arbitration, and also III, C, 1 to 3, nos. 254 to 318 and the case law indicated therein handed down by the ECHR regarding the independence and impartiality of the court (both available at www.echr.coe.int).

³⁷ E.g., the Model Rules on Civil Procedure approved by ELI/UNIDROIT in 2020 (ELI/UNIDROIT *Model European Rules on Civil Procedure*, 2020), Rule 13 (1) and Comment 1, regarding communications between the parties and the court.

42. In Portuguese doctrine, although different, the concepts of *independence* and *impartiality* are associated. One can be independent but partial ⁽³⁸⁾.

Independence takes on an objective tendency ⁽³⁹⁾ and implies, in fact, that an arbitrator has no ties to one of the parties or risks of effective pressure from one of them that affects their freedom of decision ⁽⁴⁰⁾.

Impartiality, on the other hand, is a predominantly subjective attribute ⁽⁴¹⁾ that implies intellectual exemption from the dispute, in the sense of a predisposition of favouritism or antipathy towards one of the parties or their corresponding ⁽⁴²⁾.

Both attributes are legally guaranteed by a set of "rules pertaining to the composition of the court, appointment, term of office, as well as grounds for abstention, challenge of appointment and dismissal" ⁽⁴³⁾ in particular a set of duties, incompatibilities and impediments that should be even more stringent in the case of arbitrators than in the case of judges in state courts.

43. While judges exercise their profession on an exclusive basis, with a strict regime of incompatibilities, arbitrators, as has been stated, "travel the world" ⁽⁴⁴⁾.

³⁸ MÁRIO RAPOSO "Impartiality of Arbitrators", "VI Congress of the Bar Association" - Bar Association Portal (portal.oa.pt).

³⁹ AGOSTINHO PEREIRA DE MIRANDA, "Duty of Disclosure and Right of Refusal of Arbitrators", *Revista da Ordem*, Year 73, Lisbon, Oct/Dec, 2013, p. 1267; SELMA FERREIRA LEMES, "Arbitrator, Principles of Independence and Impartiality", S. Paulo, 2001, p. 52.

⁴⁰ MIGUEL GALVÃO TELES, "Independence and Impartiality in Arbitrators as a Constitutional Requirement" in *Studies in Honour of Professor Carlos Ferreira de Almeida*, III, Coimbra, 2011, p. 258 et seq. and 261.; MÁRIO RAPOSO, *ult. loc. cit.* See the classic work by MARC HENRY, *Le devoir d'indépendance de l'arbitre*, Paris, 2001, p. 1 and 151-152.

⁴¹ AGOSTINHO PEREIRA DE MIRANDA *ult. loc. cit.*; SELMA FERREIRA LEMES, *ult. loc. cit.* MARC HENRY states, however, that the independence of the arbitrator also predicates his impartiality and objectivity (*ult. loc. cit.*, p. 152) and MIGUEL GALVÃO TELES (*ult. loc. cit.*, p. 262) states that pressure that clouds independence also affects impartiality.

⁴² AGOSTINHO PEREIRA DE MIRANDA (*ult. loc. cit.*, pp. 1268-1269) writes that "*the existence of an intellectual predisposition on the part of the arbitrator in favour of the party that appoints him can only be questioned by a naive or hypocritical person. But one thing is this general predisposition - some call it sympathy - and another is what Lopes dos Reis calls commitment to the party. The latter violates the law and ethics. The former is simply ineffective if it is not tempered by a righteous attitude in the search for truth and justice*". The same author states that partiality is real when it translates into favouritism or antipathy towards one of the parties. The issue is, however, much more demanding in terms of guarantees when choosing a sole arbitrator or the chair of an arbitral tribunal.

⁴³ In the wording of the ECJ judgment of 21/1/2020, *Banco Santander SA*, C-274/14, cit., no. 63.

⁴⁴ MIGUEL GALVÃO TELES, *ult. loc. cit.*, p. 278.

Firstly, their interests are diverse, since in addition to arbitration they practise law or provide legal advice, have been or are experts remunerated by public and private institutions, often hold executive positions in companies or have been professionally linked to the public administration.

On the other hand, party-appointed arbitrators are chosen and remunerated by the party, which will naturally tend not to choose lawyers who are clearly out of line with its position. The impartiality of party-appointed arbitrators is therefore relative ⁽⁴⁵⁾, and it is therefore necessary to ensure greater rigour around incompatibilities, especially for the presiding arbitrator, to ensure a higher degree of neutrality. This must also be effective in the case of a sole arbitrator.

44. There is therefore a much greater risk of conflict of interest in the process of appointing arbitrators and the corresponding rules on suspicion than is the case with judges in state courts. Hence, as stated above, the rules on impediments and grounds for suspicion must be clearly more rigorous in the case of arbitrators.

In administrative arbitration proceedings in which the Administration is a party and in which public funds and private assets are at stake, it is essential to ensure that arbitrators, with particular emphasis on the chair of the panel (if any), are not in a relationship of excessive connection or proximity to the Administration. It is also essential that the arbitrator, their family members and the professional structures to which they belong do not have relationships of dependence or excessive proximity to the party or its representatives.

⁴⁵ See JOSÉ MIGUEL JÚDICE - DIOGO CALADO, "Independence and Impartiality of the arbitrator: some controversial aspects from a Portuguese-Brazilian perspective", in *Revista Brasileira de Arbitragem*, no. 49, 2016, p. 46 et seq.; AGOSTINHO PEREIRA DE MIRANDA, *ult. loc. cit.*, p. 1268 et seq.

2. Analysis of the system of guarantees of independence and impartiality of CAAD arbitrators

2.1. General aspects

45. The special regime contained in the RJAT applicable to tax arbitration determines the non-uniqueness of the legal regime applicable to tax arbitration, on the one hand, and administrative arbitration, on the other. This is particularly the case regarding specific impediments (of legal origin) to arbitrators in tax matters (Article 8(1)(a) and (b) of the RJAT) or arbitration fees (Article 12(2) and (3) of the RJAT).

This is despite the approximation of the administrative arbitration regime to the tax arbitration regime, resulting in the referral rules contained in:

- a. Article 1 of the CAAD Code of Ethics ([CDCAAD] amended and republished in 2021, which determines the application to all arbitrators of the list of facts, circumstances and/or relationships likely to give rise to reasonable doubt as to their independence, impartiality or exemption, contained in subparagraphs a) to f) of paragraph 5 of Article 6 of the CDCAAD, which constitute grounds for refusal, as well as the general grounds for their removal provided for in subparagraphs a) and b) of paragraph 1 of Article 5 – and, in general, the requirements of Article 2 of the CDCAAD ⁽⁴⁶⁾;
- b. Article 1(2) of the RSDAMT (amended and republished in 2022), according to which this Regulation applies, with the necessary adaptations, to administrative arbitration proceedings organised within the scope of the CAAD.

46. This duality of regimes is also supported by the autonomous validity of the New Administrative Arbitration Regulations (NRAA) and the different Tables of Costs – Tables of costs for tax arbitration (Tables attached to the Rules on Costs in Arbitration Proceedings ⁽⁴⁷⁾ [RCAT]) and Tables of procedural costs for administrative arbitration attached to the NRAA) ⁽⁴⁸⁾.

⁴⁶ See Article 5(1)(a) of the New Administrative Arbitration Regulations regarding the impartiality and independence of arbitrators in administrative arbitration proceedings conducted within the CAAD.

⁴⁷ See Article 5(2) regarding the fact that the entire arbitration fee is borne by the taxable person in the event of the appointment of an arbitrator by the taxable person, as provided for in Article 10(2)(f) of the RJAT and Article 12(3) and Article 6(2)(b) of the RJAT.

⁴⁸ See Article 29 (Procedural costs), in particular paragraphs 3 and 6 (regarding the determination, by final decision, of the criteria for the allocation of procedural costs), and paragraphs 3 and 4 of Article 15 of the NRAA, regarding the choice of arbitrators.

This duality of regimes means that, as already mentioned (see II, 2.3 *above*), and as will be seen more clearly below, the tax arbitration regime significantly reduces the parties' freedom to choose arbitrators.

47. According to a comparative analysis carried out in a academic dissertation ⁽⁴⁹⁾ the CAAD, which was established as the only institutionalized center for tax arbitration, as explained in more detail *above*, is subject to a reinforced regime of guarantees of impartiality, as set out in the (i) RJAT, approved by Decree-Law No. 10/2011 of 20 January, with particular reference to Articles 8 and 9 (*Impediments and duties of arbitrators*); (ii) RSDAMT, revised by the Ethics Council in 22 January ⁽⁵⁰⁾, with emphasis on Article 6 (*Impediments, refusals and substitutions*) and (iii) the Code of Ethics of that ⁽⁵¹⁾ with particular emphasis on Articles 2, 5 and 6 (*Requirements for arbitrators, General grounds for the removal of an arbitrator, Grounds for refusal - Lack of independence and/or competence*).

48. From an comparative analysis restricted with other arbitration, the investigation draws the following conclusions ⁽⁵²⁾:

⁴⁹ INÉS DE OLIVEIRA VIEIRA, *The Duty of Impartiality of Arbitrators in Administrative Arbitration*, Lisbon, UNL, 2021, available at https://run.unl.pt/bitstream/10362/141395/1/Vieira_2022.pdf.

⁵⁰ Following the decision of the CAAD Ethics Council on 20 January 2022 and the favourable ruling of the Council of Representatives on 24 January 2022.

⁵¹ The Author used as a reference what she considers to be the two most important institutionalised arbitration centres, the CAC (Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry) and the CAAD, as well as two centres linked to private institutions, such as the APA (Portuguese Arbitration Association) and the IBA (*International Bar Association*). On page 27, n. 70 of her master's thesis, INÉS DE OLIVEIRA VIEIRA states that she selected the "CDCAAD considering that the CAAD is the most recognised arbitration centre for dealing with legal and administrative issues, and the CDCAC because it is the most emblematic national arbitration centre and settles the largest number of disputes each year."

⁵² INÉS DE OLIVEIRA VIEIRA, *ult. loc. cit.*, p. 39 et seq.

- (i) The CAC and APA Codes of Conduct refer to the *soft law* of the IBA guidelines, as these allow for a more detailed definition of the vague concepts that shape the duty of independence and impartiality of arbitrators, both in arbitration in general and in administrative arbitration in particular. Nevertheless, the CAAD Code does not make the same reference, perhaps because, as noted elsewhere, there are court decisions administrative and ⁽⁵³⁾ that, given the nature of the subject matter of arbitration, consider that the IBA guidelines are *soft law* (“mere guidelines”, lacking binding force of their own), applying to private international arbitration, but not applicable “as such” in the field of administrative arbitration and, by analogy, in tax arbitration. The investigation concludes that, from the two judgments analysed in the administrative jurisdiction, it follows that for administrative courts, as one of the decisions expressly points out, *“no contribution that is not already included in the system”* can be drawn from the IBA guidelines, and, in the other, that they are not sources of law, and that no contribution to the implementation of the regime can be drawn from them, under penalty of unconstitutionality for alleged violation of the principles of constitutionality and legality, as set out in Articles 1, 2, 8, 112 and 203 of the CRP” ⁽⁵⁴⁾. Conversely, in private law arbitration, the dissertation points to the frequent application by state courts of these guidelines as a mediate, interpretative or integrative source, both of the law and of the centers’ codes of conduct ⁽⁵⁵⁾.
- (ii) All Arbitration Centre Codes list, by way of example, circumstances that may, in the parties’ view, give rise to *reasonable doubts* as to the *impartiality* and/or *independence* of the arbitrator and therefore imply a duty of disclosure by the arbitrator. By way of example, these circumstances are included in *“the Red Waivable and Orange Lists of the IBA Guidelines and are voluntarily incorporated in Article 7(5) of the CDCAAD ⁽⁵⁶⁾ in Article 4(2) of the CDCAC; and in Article 7(5) of the CDAPA”* ⁽⁵⁷⁾

⁵³ Judgment of the TCA-S of 16 February 2017, case no. 20011/16.3BCLSB, Paulo Pereira Gouveia and Judgment of the TCA-S of 30 August 2016, case no. 13580/16, Cristina dos Santos.

⁵⁴ INÊS DE OLIVEIRA VIEIRA, *op. cit.*, p. 62.

⁵⁵ INÊS DE OLIVEIRA VIEIRA, *op. cit.*, p. 54 et seq

⁵⁶ See Article 6(5).

⁵⁷ INÊS DE OLIVEIRA VIEIRA, *ult. loc. cit.*, p. 40.

- (iii) The grounds for refusal must be based on objective criteria, as stated in *"subparagraph (c) of General Principle (3) of the IBA Guidelines, applicable to the CDA and the CDCAC by virtue of the reference made in paragraph 2 of the respective Articles 1, and also to the CDCAAD, due to the provisions of paragraph 1 of Article 7"*⁽⁵⁸⁾

49. Having examined, in general terms, the complex set of rules governing the appointment of arbitrators in the CAAD, as well as their impediments, refusals and dismissals in tax arbitration matters, it is possible to extract the following key ideas:

- (i) Comparing the rules on arbitrator disqualification under the Voluntary Arbitration Law (LAV, approved by Law No. 63/2011 of 14 December) with those of the RJAT (which binds the CAAD), it can be seen that both: (i.1) enshrine the principles of impartiality and independence (see Article 9(3) and Article 13(1) of the LAV and Article 9(1) of the RJAT); (i.2) establish the duty to disclose conflicts of interest which, in the opinion of the arbitrators themselves, may call into question that impartiality and independence (Article 13(1) of the LAV and Article 8(2) of the RJAT, implemented by Articles 6(4) to (8) of the CAAD Code of Conduct (CD)).
- (ii) In the context of this comparison, the rules on arbitrator disqualification under the LAV involve more vague and less restrictive criteria than those under the RJAT, which, in addition to also referring to the regime of impediments for civil servants regulated in Article 69 of the CPA, it also adds an impediment that prohibits the selection of an arbitrator who, in the last two years: (ii.1) has been a manager, official or agent of the tax administration or a member of corporate bodies, employee, representative, auditor or consultant of the taxpayer who is a party to the proceedings, of an entity that is in a relationship of control with the taxpayer, or of a person or entity that has an interest in the claim being upheld; or (ii.2) has been an employee, collaborator, member, associate or partner of the entity that has provided auditing, consulting, legal advice or advocacy services to the taxpayer.

⁵⁸ *Ibid.*

50. The rationale for establishing stricter rules regarding the autonomy or freedom of the parties to choose arbitrators, as well as a more demanding regime of impediments, derives from *the nature* of the dispute (administrative ⁽⁵⁹⁾ or tax arbitration), in which the public interest, public funds and, subsidiarily, the institutional nature of arbitration are at stake.

In fact, the entire CAAD tax arbitration regime – and, to the extent that it applies to administrative arbitration – significantly reduces the parties' ability to choose arbitrators, in comparison with the voluntary arbitration regime. Thus:

- (i) Cases up to a value of €60,000 are, as a rule, decided by a single arbitrator appointed by the Ethics Council through a public draw, in accordance with an automatic procedure for selection from the list of arbitrators, as described in II, 2.4.1, *above* (see Article 6(1) of the RJAT and Article 5 of the RSDAMT) ⁽⁶⁰⁾.
- (ii) As a rule, cases worth more than € 60,000 are heard by a collective court, with arbitrators also being appointed by lot by the Ethics Council, as *described above* (Article 6(2)(a) and (3) of the RJAT).
- (iii) For cases of any value, each of the parties (the taxpayer and the AT in the tax courts) may always choose to appoint an arbitrator, with the presiding arbitrator being co-opted or, in the absence of agreement, appointed by the Ethics Council through a public draw, in accordance with the terms set out in subparagraph *b)* of paragraph 2 of Article 6 of the RJAT.

⁽⁵⁹⁾ The applicability of the rules on impediments contained in the RJAT to administrative arbitration results from the reference (introduced into law only in 2019) in Article 181(4) of the CPTA: "*the duties and impediments provided for in the legal regime for arbitration in tax matters shall apply to arbitrators, with the necessary adaptations*".

⁽⁶⁰⁾ See Article 5(2) and (3)(a) of the RJAT, referred to *above*, which establish as a criterion whether or not the value of the claim exceeds twice the value of the jurisdiction of the Central Administrative Court.

51. Thus, the CAAD regime in matters of tax arbitration discourages the parties from choosing arbitrators, since it establishes a system of costs (arbitration fee) for this purpose, which the parties must pay in full when they request the constitution of the tribunal, i.e. whether they win or lose the case (see Article 12(3) of the RJAT). This fee is not as high if the parties choose not to select arbitrators, as it is only payable at the time of submitting the request for the constitution of the arbitral tribunal payment of the initial arbitration fee ⁽⁶¹⁾ and the payment of the initial arbitration fee and the arbitral award sets the amount and distribution among the parties of the costs directly resulting from the arbitration proceedings (cf. Article 12(2) and Article 22(4) of the RJAT). In proceedings with the choice of arbitrator, the costs are the sole responsibility of the taxable person, i.e. even when they win the case, they are solely responsible for paying the costs in full (cf. Article 22(4) of the RJAT, *a contrario*).

In 2022, only in 9.5% of cases did the parties choose to select arbitrators ⁽⁶²⁾.

52. As can be seen from the summary above, the substantive and procedural provisions relating to impediments are scattered between the RJAT, the CPA (to which the previous law refers, as seen), the RSDAMT and the CAAD Code of Ethics.

As this is a particularly sensitive issue for the credibility of arbitrators and arbitration in an area of public law, and given the need for easy identification of the applicable criteria and procedures, one might ask whether it would be possible to opt for greater consolidation of these rules, particularly by including in the RJAT the main provisions contained in the Code of Ethics regarding impediments.

⁶¹ Set at 50% of the arbitration fee – cf. Tax arbitration cost tables attached to the RCAT, Table I – Article 4 of the RCAT.

⁶² Cf. Annual Report on the Functioning of Tax Arbitration 2022, *op. cit.*, p. 8

2.2. Comparison with the guidelines of the *International Bar Association* (IBA)

53. It is now necessary to verify to what extent the impediments applicable to CAAD arbitrators or the relationships subject to the duty of disclosure incorporate in some way the content of the IBA's red and orange guidelines ⁽⁶³⁾ or whether the "case law" of the CAAD Ethics Council has implicitly adopted them as an indirect source. These IBA guidelines are reflected, albeit partially, in the rules adopted by the ICC - International Court of Arbitration, in particular in the document *Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration* ^(64_65).

54. Each of the *soft law* guidelines will be listed and a brief comment will be made on each one to assess whether the CAAD regulations (integrated, as seen, by the CPA, RJAT, RSDAMT and Code of Ethics) incorporate these guidelines, and to what extent, whether in terms of *impediments* or the arbitrator's *disclosure duties*.

2.2.1. Comparison

55. "The Non-Waivable Red List includes situations resulting from the fundamental principle that no one can judge themselves. Thus, acceptance of such a situation does not remedy the conflict" ⁽⁶⁶⁾. The red lines contain a non-exhaustive list of specific situations which, depending on the relevant facts of a particular case, raise justifiable doubts as to the impartiality and independence of the arbitrator ⁽⁶⁷⁾. Thus:

⁶³ On the IBA (*International Bar Association*) guidelines, see AGOSTINHO PEREIRA DE MIRANDA-PEDRO SOUSA UVA, "The IBA Guidelines on Conflicts of Interest in International Arbitration" in AAVV *Estudos de Direito da Arbitragem*, Lisbon, 2015.; BERNARDO REIS, *ult. loc. cit.*, p. 84 et seq.; JOSÉ MIGUEL JÚDICE-DIOGO CALADO, *ult. loc. cit.*, p. 44.

The IBA *Guidelines on Conflicts of Interest in International Arbitration* include lists of specific situations that indicate whether or not the disclosure or disqualification of an arbitrator is justified, identified as 'Red', 'Orange' and 'Green', although the boundaries may in some cases be fluid. They reflect the IBA Arbitration Commission's understanding of current international best practice and are based on the legislation and case law of a wide range of jurisdictions, as well as on the understanding and experience of experts in international arbitration, cf. *IBA Guidelines on Conflicts of Interest in International Arbitration*, v2014, approved by resolution of the IBA Council, 23 October 2014, available at <https://www.ibanet.org/>. The Green List contains a non-exhaustive list of specific situations in which there is no apparent or actual conflict of interest from an objective point of view. Thus, the arbitrator has no duty to disclose situations that fall within this Green List (see p. 18). The Orange List, on the other hand, is a non-exhaustive list of specific situations which, depending on the facts of the case, may, in the eyes of the parties, raise doubts as to the impartiality or independence of the arbitrator (see pp. 16-17). The Red List consists of two parts (see p. 16): a "Non-Waivable Red List" (see General Principles 2(d) and 4(b)), and a "Waivable Red List" (see General Principle 4(c)). These lists contain a non-exhaustive enumeration of specific situations which, depending on the relevant facts of a particular case, give rise to justifiable doubts as to the impartiality and independence of the arbitrator. In other words, in these circumstances, there is an objective conflict of interest from the perspective of a reasonable third party with knowledge of the relevant facts and circumstances (see General Principle 2(b)). The Non-Waivable Red List includes situations arising from the fundamental principle that no one can be the judge in their own case. Thus, acceptance of such a situation does not remedy the conflict. The Waivable Red List, in turn, identifies serious but not so grave situations. In view of their seriousness, unlike the circumstances described in the *Orange List*, such situations should be considered waivable only if and when the parties, once aware of the conflict of interest, expressly state their intention to maintain the arbitrator in his or her role, in accordance with General Principle 4(c).

⁶⁴ See *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, III, A, 22-36, in particular No. 27 and the nine grounds for disclosure (not exhaustive) provided therein, which partly coincide with some of the IBA guidelines – corresponding to the situations identified in, respectively, 2.3.1 and 3.1.4; 3.1.4 and 3.4.1; 1.3 and 2.3.6; 1.2 and 2.3.4; 2.1.1 and 2.1.2; 2.3.2 and 3.3.6; 3.1.3; 3.1.5; and 3.1.3., all from the IBA Lists (red and orange, as applicable).

⁶⁵ See also the *Code of Ethics for Arbitrators in Commercial Disputes* (2014) under the ICDR-International Centre for Dispute Resolution – referred to in Article 14, 1, of the International Dispute Resolution Procedure (2021).

⁶⁶ IBA Guidelines on Conflicts of Interest in International Arbitration, v2014, p. 16.

⁶⁷ IBA Guidelines on Conflicts of Interest in International Arbitration, v2014, pp. 16-17.

Unavoidable situations on the IBA Red List Red List	Comment – comparison with CAAD standard
1.1. There is identity between a party and the arbitrator, or the referee is legal representative or official of an entity that is a party to the arbitration proceedings.	See, in this regard, subparagraph a) of no. Article 8(1) of the RJAT and subparagraph (a) of Article 5(6) of the Code of Ethics (CD). <i>The Ethics Council rejected the request for recusal submitted by the taxable person in relation to</i>
	<i>to the arbitrator appointed by the AT, given that he ceased to be an employee and collaborator of the tax administration in 2011, so that in 2014, the year of his appointment as arbitrator, a period of time exceeding the legally required "two years" had already elapsed for the effect (Proc. 655/2014-T).</i>
1.2. The arbitrator is an administrator, director or member of a supervisory body, or has control over one of the parties or an entity that has a direct economic interest in the arbitral award to be rendered.	See Article 6(5)(a) of the CD, with no reference to the supervisor in the CAAD regulations. <i>With regard to the second part of the article, the Ethics Council refused to appoint an arbitrator who was a director/executive director of companies, whose arbitral award could have an impact on the business environment where operated (Proc. 488/2022-T).</i>
1.3. The arbitrator has a significant financial or personal interest in one of the parties or in the outcome of the arbitration.	See Article 6(5)(d) of the CD.
1.4. The arbitrator or his or her law firm regularly advises the party that appointed him or her, or an affiliate of that party, and the arbitrator or his or her law firm derives significant financial benefit from such advice.	See Article 8(1)(b) of the RJAT. <i>It should be noted that the Ethics Council does not consider the appointment as an arbitrator of a person who, in separate arbitration proceedings, provides services to the AT on a retainer basis or represents it outside the country as an agent before the CJEU to be an impediment, because that person is not a "manager", "official" or "agent of the tax administration". (Case 93/2015-T; Case 377/2014-T). On the other hand, it considers (Case 162/2015-T and Case 882/2019-T) that and "professional or</i>

	<i>personal relationship” is only relevant if established “with the parties or their legal representatives”. In any case, the grounds for impediment or recusal provided for in Article 6(5) of the CAAD CD must be assessed in relation to a specific case and never by reference to previous positions taken in any other venue.</i>
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56. The Waivable Red List, in turn, identifies serious situations, but not so serious (...) that *“they should be considered waivable only if and when the parties, once aware of the conflict of interest, expressly state their intention to keep the arbitrator in office”* ⁽⁶⁸⁾. Thus:

Waivable situations on the IBA Red List	Comment – comparison with the CAAD standard
2.1. Relationship of the arbitrator to the dispute	
2.1.1. The arbitrator has provided legal advice or given an opinion on the dispute to a party or an affiliate of one of the parties.	Comment: Article 69(1)(d) of the CPA, Article 8(1)(b) of the RJAT and Article 6(1)(b) of the CD. <i>The Ethics Council repeatedly emphasises that the grounds for disqualification or recusal provided for in Article 6(5) of the CD of the CAAD must be assessed in relation to a specific case and never by reference to previous positions taken in any other forum, see, for example, Proc. 14/2011-T. In Proc. 63/2013-T, in which the arbitrator had formulated a technical opinion on the dispute, the Court clarified that, for an impediment to exist, it is not sufficient that, previously and</i>

⁶⁸ *Ult. loc. cit.*, p. 16.

	<i>outside the proceedings in question, the arbitrator had expressed an opinion on the issue to be decided, as such an interpretation would prevent the most qualified and specialised lawyers, whose merit is recognised through the publication of relevant scientific works in that field, from becoming arbitrators. It also adds (cf. Proc. 434/2018-T) that the aforementioned normative provision does not contemplate the possibility that the arbitrator has already issued a ruling on the issue to be decided, but only that he has intervened in the case by giving an opinion, consultation or advice to one of the parties or as a representative or expert. Similarly, in Proc. 217-2022T, the taxpayer suspected the impartiality and independence of the arbitrator appointed by the AT, given that he was a former AT employee for four decades, bound by general guidelines, representative of the public treasury on several occasions, having been appointed successively by the AT as an arbitrator and having a position that tended to favour the tax authorities in arbitration, with the Ethics Council understood, based on the jurisprudence of the STJ, that the normative provision does not contemplate the possibility of the arbitrator having already issued a ruling on the matter to be decided, but only that of having intervened in the case in question, giving an opinion, consultation or advice to one of the parties or as a representative or expert.</i>
2.1.2. The arbitrator had prior involvement in the dispute	<i>Comment: Article 69(1)(d) of the CPA.</i>

2.2. Direct or indirect interest of the arbitrator in the dispute	
2.2.1. The arbitrator directly or indirectly holds shares or stock in one of the parties or in an affiliate of one of the parties, where that party or affiliate is a private legal entity.	<i>Comment:</i> Article 8 of the RJAT and subparagraph d) of paragraph 1 of Article 6 of the CD.
2.2.2. A close relative of the arbitrator has a significant financial interest in the outcome of the dispute.	<i>Comment:</i> Article 69(1)(b) of the CPA, which extends the scope the partners and godchildren civil partners.
2.2.3. The arbitrator, or a close family member of the arbitrator, has a close relationship with a third party who may be held liable in a recourse action brought by the party that lost the dispute.	<i>Comment:</i> There does not appear to be any correspondence in the rules applicable to CAAD.
2.3. Relationship of the arbitrator with the parties or legal advisers	
2.3.1. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.	<i>Comment:</i> subparagraphs a) and b) of paragraph 1 of Article 6 of the RJAT regarding past acts and, by majority reasoning, applies to present acts, with reference also to subparagraph b) of paragraph 1 of Article 6 of the CD. <i>In the case Proc. 694/2014-T, a AT communicated its opposition to the appointment of the nominated arbitrator, as he was acting as legal counsel in another case in which the AT was the respondent. The Ethics Council considered that this was a circumstance likely to give rise to well-founded doubts as to the independence, impartiality and impartiality of the appointed arbitrator.</i>

2.3.2. The arbitrator currently represents or advises the solicitor or law firm acting as representative of one of the parties.	<i>Comment:</i> Generally speaking, Article 6(5)(a) of the CD, although this impediment may be more precisely defined in the CAAD's rules on this matter. Nevertheless, Article 6(4) of the RJAT, as introduced in 2021, will have addressed the issue by providing that "(...) only arbitrators who are not representatives or who do not belong to a law firm in which one of its members is a representative in any pending civil, commercial, arbitration or tax proceedings are eligible for the draw pending."
2.3.3. The arbitrator is a solicitor in the same law firm as the solicitor representing one of the parties.	<i>Comment:</i> Article 8(1)(b) of the RJAT, involving the last two years. <i>In Case 696/2020-T, it was indicated that the representative had collaborated with the law firm of which the appointed arbitrator was a founding partner. The Council understood that the decisive factor would be the relationship of the rejected arbitrator "with the parties or with their representatives legal representatives", which would not occur in practice.</i>
2.3.4. The arbitrator is an administrator, manager or member of a supervisory body, or has controlling influence in an affiliate of one of the parties, if such affiliate is directly involved in the matters at issue in the arbitration.	<i>Comment:</i> there is no perfect correspondence in the rules applicable to CAAD, although Article 69(1)(a) a) of the CPA seems to cover the issue.
2.3.5. The arbitrator's law firm has had previous involvement in the dispute, which has since ended, without the arbitrator's involvement.	<i>Comment:</i> Article 8(1)(b) of the RJAT, covering the last two years. <i>According to the Council, the impediment is relevant in the same specific case</i>

	<i>and not in other proceedings, and it is irrelevant that the arbitrator has previously expressed an opinion on the matter. The arbitrator did not intervene in the proceedings in question by giving an opinion or intervening procedurally as an expert or representative – cfr. Proceedings 417/2019-T and 341/2022-T.</i>
2.3.6. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or with an affiliate of one of the parties.	<i>Comment:</i> Article 6(5)(d) of the CD.
2.3.7. The arbitrator provides regular advice to one of the parties or to an affiliate of one of the parties, but neither the arbitrator nor his or her law firm derives any significant financial or other benefit from such activity.	<i>Comment:</i> Article 8(1)(b) of the RJAT and, generally, Article 6(5)(a) of the CD.
2.3.8. The arbitrator has a close family relationship with one of the parties, or with the administrator, manager or member of a supervisory body, or with any person with controlling influence over one of the parties or over an affiliate of one of the parties, or with the representative representing one of the parties.	<i>Comment:</i> subparagraph b) of paragraph 1 of Article 69 of the CPA, not covering all situations, such as supervision.
2.3.9. A close family member of the arbitrator has a significant financial or personal interest in one of the parties or an affiliate of one of the parties.	<i>Comment:</i> Article 69(1)(b) of the CPA, not covering all situations, such as supervision.

57. *The Orange List is a non-exhaustive list of specific situations which, depending on the facts of the case, may, in the eyes of the parties, raise doubts as to the impartiality or independence of the arbitrator. Thus, the Orange List reflects situations that (...) "may impose "on the arbitrator the duty to disclose their existence. In all such cases, it is understood that the parties have accepted the arbitrator if, after such disclosure, no*

Situations on the IBA Orange List	Comment – comparison with CAAD regulations
3.1. Previous services provided to one of the parties or other involvement in the case	
3.1.1. The arbitrator has, in the previous three years, acted as representative of one of the parties or an affiliate of one of the parties, or provided legal advice or been consulted by the party or an affiliate of the party that appointed him on an unrelated matter, but the arbitrator and the party or its affiliate do not have an ongoing relationship.	<i>Comment: Article 8(1)(a) of the RJAT for the last two years; Article 6(5)(b) of the CD; in the case of occasional or retainer-based consultancy, the Ethics Council admits this possibility.</i> <i>The Council also considers that the "professional relationship between principal and agent" arising from the fact that the arbitrator, acting as the legal representative of the company, has granted power of attorney to the Applicant's representative in the proceedings to represent the said company, in no way contributes to establishing a professional or personal relationship between the arbitrator and the entity that is the subject of the proceedings (Case 162/2015-T).</i>
3.1.2. Over the last three years, the arbitrator has acted as an agent against one of the parties or an affiliate of one of the parties in an unrelated matter.	Comment: Article 8(1)(a) of the RJAT for the last two years and Article 6(5)(b) of the CD.
3.1.3. The arbitrator has been appointed, in the last three years, as an arbitrator on two or more occasions by one of the	C o m m e n t : Article 6(5)(b) of the CD.

⁶⁹ *Ult. loc. cit.*, pp. 16-17.

parties or by an affiliate of one of the parties.	
3.1.4. The arbitrator's law firm has acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter within the last three years, without the involvement of the arbitrator (partially, in the first part).	<i>Comment: Article 6(5)(b) of the CD.</i> <i>In Case 882/2019-T, the taxpayer understood that one of the appointed arbitrators had been and was a representative in several court cases (more than 40) in which the opposing parties were represented by lawyers from the firm that specifically represented the Applicant. The arbitrator claimed that it was another member of the law firm who was handling those cases and that he had not handled a single case in proceedings or drafted any applications.</i> <i>The Ethics Council understood that the arbitrator's alleged connection did not concern lawyers representing the parties in the present arbitration proceedings or in other proceedings that may be pending before the CAAD, but rather lawyers representing the "counterparties" in "several legal proceedings," all of which were therefore unrelated to the CAAD organisation and its jurisdiction, and there was no basis for to replace the arbitrator.</i>
3.1.5. The arbitrator currently acts, or has acted in the last three years, as an arbitrator in another arbitration proceeding on a related matter involving one of the parties, or affiliate of one of the parties.	<i>Comment: partially, subparagraphs (a) and (b) of Article 6(5) of the CD.</i>
3.2. Current services provided to one of the parties	

3.2.1. The arbitrator's law firm currently provides services to one of the parties, or to an affiliate of one of the parties, without this constituting a significant commercial relationship for that firm and without the involvement of the arbitrator.	<i>Comment:</i> Article 6(5)(d) of the CD may cover this situation to some extent.
3.2.2. A law firm or other entity that shares fees or other significant revenues with the arbitrator's law firm that provides services to one of the parties to the dispute, or to an affiliate of such a party.	<i>Comment:</i> Article 6(5)(d) of the CD may cover this situation to some extent.
3.2.3. The arbitrator or his or her law firm regularly represents a party or an affiliate of one of the parties, but such representation does not relate to the current dispute.	C o m m e n t : Article 8(1)(b) of the RJAT.
3.3. Relationship between the arbitrator and another arbitrator or representative and another arbitrator or representative	
3.3.1. The arbitrator and another arbitrator are solicitors in the same law firm.	<i>Comment:</i> although not explicitly stated, the broad wording of Article 6(5)(a) of the CD covers this situation, which should be more clearly specified in the same document.
3.3.2. The arbitrator and another arbitrator or the representative of one of the parties are members of the same chamber of <i>barristers</i> .	<i>Comment:</i> <i>idem</i> , in relation to the previous conclusion.
3.3.3. The arbitrator was, in the previous three years, a partner of, or otherwise affiliated with, another arbitrator or any of the representatives in the arbitration proceedings.	<i>Comment:</i> <i>idem</i> , without this necessarily being grounds for disqualification, although it may be relevant in the disclosure.
3.3.4. A solicitor in the solicitor's firm of the arbitrator acts as an arbitrator in another dispute	<i>Comment:</i> No is reason for disqualification, according to the Ethics Council of Ethics.

involving the same party or parties, or an affiliate of one of the parties.	
3.3.5. A close relative of the arbitrator is a partner or employee of the law firm representing one of the parties but does not provide assessorial in the dispute.	<i>Comment:</i> Article 69(1)(b) of the CPA may, although not clearly, cover the family member who is a partner in the law firm.
3.3.6. There is a close personal friendship between an arbitrator and a representative of one of the parties.	<i>Comment:</i> This appears to be covered, albeit indeterminately, by Article 6(5)(a) of the CD, but it may also fall under Article 73(1)(d) of the CPA, <i>ex vi</i> Article 8(2) of the RJAT, and should be included the duty of disclosure.
3.3.7. There is enmity between an arbitrator and a representative acting in the arbitration proceedings.	<i>Comment:</i> although it generally falls under Article 6(5)(d) of the CD, it is not included in Article 69 of the CPA, but rather in Article 73(1)(d) of the CPA, which refers to serious enmity as a reason for recusal or suspicion, and which is considered applicable to disclosure duties. The <i>Ethics Council has rejected cases in which a deterioration in relations was invoked without invoking serious enmity (Proc. 696/2020-T; 701/2020-T).</i>
3.3.8. The arbitrator has been appointed more than three times in the last three years by the same representative or law firm	<i>Comment:</i> This situation has not been considered by the CAAD Ethics Council, including with regard to the duty of disclosure – even when the arbitrator has previously participated in a ruling on a similar issue that was unfavourable to the party (see Proc. 434/2018-T; Proc. 882/2019-T). The reason may be related to the fact that the information subject to duty of be disclosed in the arbitral awards and that these are public.

	<i>The courts, with regard to voluntary arbitration, have considered successive appointments in a significant number of trials to be grounds for impediment. Perhaps a limit in this area.</i>
3.3.9. The arbitrator and another arbitrator, or representative of one of the parties to the arbitration proceedings, currently act or have acted in the last three years as co-representatives.	<i>Comment:</i> Article 6 of the CD gave the Ethics Council discretion to decide on disqualification. <i>This may be an area where it is worth clarifying the duty of disclosure.</i>
3.4. Relationship between the arbitrator and the party and third parties involved in the arbitration proceedings arbitration	
3.4.1. The arbitrator's law firm currently represents interest's contrary to those of one of the parties or an affiliate of one of the parties.	<i>Comment:</i> This does not appear to be covered by the CAAD rules, unless the interests relate to the dispute or there are interests favourable to one of the parties, but not contrary. However, Article 6(4) of the RJAT appears to include this situation.
3.4.2. The arbitrator has, in the last three years, been professionally associated, for example as a former employee or partner, with a party or an affiliate of one of the parties.	<i>Comment:</i> Article 6(5)(b) of the CD and Article 8(1)(b) of the RJAT.
3.4.3. There is a close personal friendship between an arbitrator and an administrator, director or member of a supervisory body of: one of the parties; an entity with a direct economic interest in the arbitral award to be rendered; any person with controlling influence, such as a controlling shareholder, affiliated to one of the parties, or a witness or expert.	<i>Comment:</i> There is no specific provision for supervision in the CAAD regulations. Subparagraphs a) and d) of paragraph 5 of Article 6 of the CD covers the second and third parts, and subparagraphs d) and e) of paragraph 1 of Article 73(1) of the CPA covers the first part.

3.4.4. There is enmity between an arbitrator and an administrator, director or member of a supervisory body of: one of the parties; an entity with a direct economic interest in the arbitral award; any person with controlling influence over one of the parties or an affiliate of one of the parties, or a witness or expert.	<i>Idem</i>
3.4.5. If the arbitrator has previously served as a judge and has adjudicated, within the last three years, a significant case involving one of the parties, or an affiliate of one of the parties	<i>Comment:</i> see 3.3.8.
3.5. Other circumstances	
3.5.1. The arbitrator directly or indirectly holds shares or stock which, by virtue of their volume or nature, constitute a significant interest in one of the parties, or in an affiliate of one of the parties, such party being or affiliate being a listed company.	<i>Comment:</i> Article 6(5)(d) of the CD.
3.5.2. The arbitrator has publicly advocated a position regarding the arbitration proceedings, in print, orally or in any other form.	<i>Comment:</i> in some way, Article 69(1)(d) of the CPA; however, according to the Ethics Council, a technical opinion on a similar issue in another case is not relevant. <i>However, in case 694/2004-T, the Council ruled in a case where a case with an identical subject matter was pending before a TAF in which the arbitrator was a lawyer, that the arbitrator could not defend one thing as a lawyer and another different as an arbitrator.</i>

3.5.3. The arbitrator holds a position in the appointing authority in relation to the dispute.	<i>Comment:</i> Article 6(5)(a) and (d) of the CD, although the issue of supervision has never clear.
3.5.4. The arbitrator is a director, manager or member of a supervisory body, or has controlling influence in an affiliate of one of the parties, but that affiliate is not directly involved in the matters under discussion in the arbitration.	<i>Comment:</i> subparagraphs (a) and (d) of Article 6(5) of the CD, although the issue of supervision has never been clear, and even less so in this indirect relationship.

2.2.2. Observations and recommendations

58. All things considered, the following recommendations and reflections may be considered:

- (i) Compared to other voluntary arbitration centres ⁽⁷⁰⁾, the CAAD has a reinforced and more demanding regime of impediments, due to the subject matter and its institutional nature as the only tax arbitration centre, given that it involves public interests and public funds.
- (ii) Similarly, the system for appointing arbitrators and its practical application constitute a random model, inspired by the procedural distribution of judges in the Administrative Courts, which limits the parties choice and reinforces the independence and distance of arbitrators from them.
- (iii) Nevertheless, the use of artificial intelligence in this selection process (either as an aid to procedural processing for the purposes of statistical purposes, but above all in the context of possible future predictive analyses of the individual behaviour of arbitrators), even though it is not the subject of this report, it should be considered with caution to avoid undue pressure on the arbitrator and the exercise of judicial functions ⁽⁷¹⁾.

⁷⁰ Without claiming to be exhaustive, it should be noted that in the area of consumer affairs [the Coimbra District Consumer Conflict Arbitration Centre (CACCDC), the Lisbon Consumer Conflict Arbitration Centre (CACCL), the Vale do Ave Consumer Conflict Arbitration Centre (CACCVa); the Porto Consumer Information and Arbitration Centre – CICAP; the Algarve Consumer Region Information, Mediation and Arbitration Centre – CIMAAL; CIAB – Consumer Information, Mediation and Arbitration Centre (Arbitration Court); the National Centre for Consumer Conflict Information and Arbitration – CNIACC], in the insurance sector [Insurance Information, Mediation and Arbitration Centre [CIMPAS], Automotive Sector Arbitration Centre (CASA)] and in matters of industrial property, domain names, firms and names (ARBITRARE – Arbitration Centre for industrial property, domain names, firms and names). See the list of authorised arbitration centres at www.dgpj.justica.gov.pt.

- (iv) An examination of the IBA guidelines reveals that the CAAD largely incorporates or integrates their meaning, with emphasis on the so-called red list guidelines.
- (v) The dispersion of the CAAD's rules on impediments across various normative instruments does not favour objectivity and certainty (the clear identification of the corresponding criteria being a central issue at the time of selection, disclosure of conflicts of interest, acceptance and refusal of arbitrators), and it is therefore recommended that all current grounds for impediment be consolidated either in the law (RJAT) ⁽⁷²⁾ or in the CAAD Code of Ethics.
- (vi) The decisions of the Ethics Council involve the need to incorporate into the consolidation referred to in the previous paragraph some criteria underlying this case law that express a degree of novelty in the implementing decision (namely, cases 488/2022-T and 694/2014-T).
- (vii) In the consolidation process described, it would be appropriate to adjust a small number of the Council's guidelines to the meaning of the IBA guidelines, ensuring even greater rigour in the area of incompatibilities, namely:
 - (vii.1) The representation of the AT by an arbitrator with a long-term retainer agreement (two consecutive years) relating to Legal representation or expert opinion should, unless there is a better opinion, be equated with a form of relationship justifying a duty of disclosure and, possibly, of impediment, if the other party opposes the application (in a somewhat different sense Procs. 377/2014-T, 93/2015-T and 882/2019-T) ⁽⁷³⁾.

⁷¹ See, for further details, *Agenda da Reforma da Justiça, Uma reflexão aberta e alargada do Judiciário* [Justice Reform Agenda, An open and broad reflection by the Judiciary], coordinated by NUNO COELHO, Almedina, 2023, p. 302 et seq., with particular interest for analysis, in the French legal system, of *Law No. 2019-222*, on the programming and reform of the judiciary, particularly with regard to the necessary precautions from the point of view of the use of artificial intelligence to avoid the personalisation of the professional practices of arbitrators, concluding that the use of artificial intelligence by the courts can be a relevant aid in simpler cases, but risky if used in more complex cases.

⁷² Although in this context only naturally for tax arbitration, not applicable to administrative arbitration.

⁷³ In Case 377/2014, there was an appeal to the Southern Court of Appeal, which upheld the understanding of the CAAD Ethics Council.

- (vii.2) In view of the guidance of the courts of appeal on voluntary arbitration and the IBA guidelines, the following could be established: (i) a duty of disclosure in the event that an arbitrator is appointed more than five times in two years by the same party and (ii) disqualification if such appointment concerns matters of the same legal nature as the subject matter of the dispute, as well as (iii) a disqualification in the event that, within a period of 3 to 5 years, the same arbitrator has been appointed by the Party more than 15 times, regardless of the subject matter of the dispute, seeking to promote the diversification of arbitrators to be appointed (this measure would, of course, have a particular impact on the AT, as there are a significant number of cases in which it appoints the same arbitrator).
- (vii.3) For this reason, it would also be relevant to consider the of the number of cases in which each Party has appointed a particular arbitrator, in an easily understandable form (tables and/or graphs), without incurring the risk of personalisation. The anonymisation of the parties in the decisions available on the website would, of course, remain safeguarded.
- (vii.4) In particular with regard to the presiding arbitrator, it would be relevant to consider introducing a *numerus clausus* (maximum 15/18 names), limiting the appointment of presiding arbitrators to one list previously validated by the CSTAF and reviewed every four years.
- (vii.5) Both the RJAT (see Article 8(3)) and the CA of the CAAD (see Article 2(10), Article 5 and Article 8) ⁽⁷⁴⁾ provide grounds for the termination of an arbitrator's mandate in specific cases. However, in the case of an arbitrator who repeatedly and/or seriously violates objective performance criteria – such as compliance with decision deadlines, availability to perform duties and the number of unfounded requests for recusal and refusal or removal – it seems relevant to apply a generic mechanism that allows for their exclusion from the list of arbitrators. Thus, it is considered that the procedure for verifying the maintenance of the requirements for inclusion in the CAAD lists of arbitrators referred to in Article 7 of the RSDAMT, to which the provisions of Article 7 of the Code of Conduct apply, would be appropriate, with the necessary adaptations.

⁷⁴ It is incumbent upon the Ethics Council of the Administrative Arbitration Centre to dismiss the arbitrator or arbitrators in the event of non-compliance with the requirements set out in the preceding paragraphs.

- (vii.6) It would be appropriate for to Ethics Council, to promote

periodically, every four years, an analysis of the lists of arbitrators, and may, by means of a decision based on the applicable legal and regulatory rules, propose the exclusion of an arbitrator from the CAAD's list of arbitrators in tax matters, with the CAAD's Management being responsible for taking the final decision on the matter. The CAAD Board of Directors, after consulting the Council, may reinstate arbitrators who were previously excluded within four years of their exclusion, if they have again expressed an interest in being included on the lists and meet the objective conditions for this purpose.

- (vii.7) It would also be relevant to consider a maximum age for serving as presiding arbitrator.
- (viii) In the event of an amendment to the Code of Ethics, it should be established that, once an arbitrator has been appointed and objections have been raised, the arbitrator's resignation may only take place if there are objective reasons inherent in the Code and not other reasons that are not based on them and that are rooted only in an excess of zeal for impartiality or in the mere subjective discomfort of the arbitrator in the face of refusals by a party that have no objective basis. It should be noted that in two cases, the Council had the opportunity to clarify, under the terms of Article 4 of the CAAD Code of Conduct, that no one can be compelled to act as an arbitrator, but if the assignment has been accepted, the arbitrator assumes that they have adequate knowledge to assess the subject matter of the dispute, as well as the time likely to be necessary to conduct the arbitration proceedings.
- (ix) In that case, the only legitimate excuse would be based on a supervening circumstance that would make it impossible for the appointee to perform such duties, and therefore an arbitrator who, having accepted the appointment, unjustifiably excuses himself from performing his duties, should be excluded from the Centre's list of arbitrators. Thus, a communication based on subjective discomfort is irrelevant, and also does not reflect, in the context in which it occurred, a clear and unequivocal desire to "excuse" the previously assumed responsibility, without prejudice, of course, to a possible request to that effect, to be assessed in the appropriate forum and at the appropriate time (see Cases 407/2019-T and 882/2019-T).

The CAAD has, compared to other voluntary arbitration centres, a reinforced and more demanding regime of impediments, due to the subject matter and its institutional nature as the only tax arbitration centre, given that it involves public interests and public funds.

2.3. Decisions of the Ethics Council

2.3.1. Statistical overview

59. To date, **28** decisions have been handed down by the Ethics Council on refusals of arbitrators on the grounds of incompatibility.

Subject or Party raising the incompatibility or refusal

- Tax Authority: **9**.
- Taxpayer: **18**.
- Ethics Council considered that the arbitrator appointed by the Tax Authority was disqualified: **1**.

Success rate of incidents raised

- Tax Authority: **3** (out of 9) ⁽⁷⁵⁾.
- Taxpayer: **1** (out of 18). The arbitrator withdrew from the case (Case No. 496/2022-T) ⁽⁷⁶⁾.
- Approval of arbitrator's resignation at the initiative of the Ethics Council: **1**.

In summary, there were **28** cases of refusal, **27** requests were submitted by the AT and the Taxpayer, with a success rate of 3/28 for the AT and 1/28 for the taxpayers.

Granting of requests for the resignation of arbitrators

- Granting of requests for the resignation of arbitrators: **3** ⁽⁷⁷⁾ because of requests for recusal submitted by the AT (1) and the taxpayer (1), as well as ex officio proceedings by the CD (1).
- Rejection of requests for resignation: **2** ⁽⁷⁸⁾.

Direction of decisions

- Rejection of refusal requests: **23**.
- Approval: **4**.
- CD decides *ex officio*: **1**.

⁷⁵ Case 69/2013-T (the appointed arbitrator resigned from the case), Case 694/2014-T and Case 488/2022-T.

⁷⁶ Of the remaining 17 cases, there was also a withdrawal of the request for refusal after clarification by the arbitrator (Case 216/2013-T).

⁷⁷ Case 69/2013-T; Case 616/2017-T; Case 496/2022-T.

⁷⁸ Case 407/2019 T; Case 882/2019-T.

2.3.2. Grounds for decisions

Grounds	Decisions of the CAAD CD
4.1. The issue of arbitrators who have previously served on tax administration bodies tax administration bodies.	
The Council is consistent in relation to the criterion of disqualification for a period of two years from the date on which the arbitrator ceased to hold office in the tax administration. (See Article 8(1)(a) and (b)).	Approval: Proc. 219/2016-T (1 in total) Rejection: Case 33/2018-T; Case 655/2014-T; Case 374/2015-T; Case 217/2022-T (4 in total)
4.2. Issues regarding arbitrators who represented the AT in court or in arbitration tribunals as representatives	
A. <i>With regard to Article 8(1)(a) and (b), the Council considers that anyone who has acted as a representative on the basis of a contract representing the State is not an official, manager or agent of the AT.</i>	The representation of the AT in separate arbitration proceedings is not a cause for impediment (Article 6(5)). Only in relation to a specific case, in which they have acted as an arbitrator, expert or representative, should the request be granted.

	Rejection: Case 93/2015-T; Case 377/2014-T; Case 882/2019-T (3 in total).
B. <i>Proceedings pending before an appeal court (where the arbitral tribunal is no longer involved) on the same matter in which the firm/solicitor acted as arbitrator and has already issued an opinion.</i>	The impediment applies to the specific case in question and not to other cases, and it is irrelevant that an opinion has been issued on the matter. The arbitrator did not intervene in the case in question by giving an opinion or intervening procedurally as an expert or representative. The Council states that the pendency is not relevant regarding other proceedings as grounds for impediment. Dismissal: Case 417/2019-T and Proc. 341/2022-T (2 in total).
C. <i>The arbitrator appointed by the claimant and the claimant's representative have a professional relationship as principal and agent, in which the arbitrator benefits from the legal services of the claimant's representative, or the arbitrator has been a member of the governing bodies of the company</i>	Rejection: Proc. 162/2015-T - The fact that, as a representative of a company, he had been granted a mandate to represent it in another case would not be grounds for disqualification. Case 742/2016-T - The arbitrator was vice-president of the General Meeting of Banking institution that referred you. The

functions in question, in a non-managerial body managerial not were performed in the two years preceding the appointment, therefore, in accordance with Article 8(1) of the RJAT, the performance of these duties would not be grounds for disqualification. (2 in total).

Approval:

Proc. 488/2022-T - As the arbitrator a member of executive of companies and there is already a decision of a certain orientation that may impact the corporate perimeter where the arbitrator is an executive director, the requirement of impartiality is affected (Article 6(1) and (5)(c) and (d)). The Council follows the criterion of the need for the appearance of impartiality in the case law of the Constitutional Court.

Proc. 694/2014-T - Reconsideration of decision. Pending before a TAF (Administrative Court) is a case with an identical subject matter in which the arbitrator is a lawyer. Given the letter and spirit of Article 8 of the RJAT and Articles 2, 5 and 6 of the CAAD Code of Conduct (2 in total), the arbitrator cannot defend one thing as a lawyer and another as an arbitrator.

Ex officio action by the Council in Case 616/2017-T The arbitrator resigned after the Council officially noted that the same arbitrator was a partner in the law firm that had appointed him and that had submitted a case to the CAAD.

<i>D. Representative belonged to the arbitrator's law firm, having damaged relations with him</i>	In view of Article 8 of the RJAT, the situation does not fall within the grounds for refusal relating to relations between parties. Rejection: Case 616/2020-T and Case 701/2020-T (2 in total).
4.3. Issue relating to arbitrators who have already taken doctrinal positions on the subject publicly or in other arbitral decisions	
A. Generally	A refusal based on the content of previous decisions taken on the basis of a guideline is abusive, and the refusal is only valid if the arbitrator has intervened in the proceedings in question by giving an opinion as a representative, expert, etc.

	Granted; with acceptance of the arbitrator's resignation: Proc. 69/2013-T (1 in total). Rejection: Proc. 14/2011-T, Proc. 714/2015-T, Proc. 434/2018-T and Proc. 217/2022-T (4 in total).
B. <i>Collective courts with a majority of the same arbitrators who have already taken a position on the same issue in another case</i>	Dismissal: Case 407/2019-T (and refusal of the request for the arbitrator's recusal); Case 434/2018-T; Case 827/2019-T; Case 882/2019-T (4 in total).
4.4. Legal competence of arbitrators	
A. <i>Invocation of possible errors in other arbitration proceedings</i>	Dismissal: The parties could have appealed to the state courts and did not do so See Proc. 55/2017-T, Proc. 109/2017-T and Proc. 374/2015-T
B. <i>Lack of experience</i> (10 years)	Dismissed. The arbitrator has experience and if he did not, he would not have been appointed See Proc. 94/2014-T.
4.5. Compelling reasons presented by the arbitrator	
1 case upon request by the passive subject	Granted: Proc. 496/2022-T (1 on 24).
4.6. Duty of disclosure of conflicts of interest by arbitrators	
In 7 proceedings, one of the parties expressly raises non-compliance with the duty of disclosure when invoking the disqualification of an arbitrator. Arbitrators, in general, have not exercised their duty of disclosure on their own initiative.	In all of these cases, the Council rejected the non-compliance with the duty of disclosure by the appointed arbitrator. As a rule, the Council uses the following argument (e.g. in case 207/2022-T): "Given this regulatory framework, it should be noted that, in the first instance, it is incumbent upon the appointed arbitrators to assess the necessity/advisability of rejecting their appointment, pursuant to Article 8(2), or to provide the

	information referred to in Article 6(4), both provisions transcribed above, without prejudice, of course, to the power/duty of the Ethics Council in this area. <i>This means that if the arbitrator considers, in his or her prudent judgement, that there are no "circumstances that could reasonably cast doubt on his or her impartiality and independence" and that there are no "well-founded doubts as to his or her independence, impartiality or exemption", he will not have to take the initiative to "reject the appointment" or "inform" anyone of anything, given that, in case of doubt, the "duty of disclosure" always prevails (see paragraph 6 of the aforementioned Article 6).</i> <i>In the present case, Mr (...) saw no reason to exercise the duty of "rejection" or "information" and therefore did not take - nor did he have to take, from that perspective - any kind of initiative.</i> <i>Consequently, as there was no procedural action or omission worthy of censure, no repair will be required in this domain."</i>
4.7. Resignation of arbitrators after suspicion	
<i>In four cases, the appointed arbitrator requested to be removed after a request for refusal or ex officio action by the Ethics Council.</i>	Of these cases, the Ethics Council accepted the request in two cases (Proc. 69/2013-T and Proc. 616/2017-T) and rejected it in two (Proc. 407/2019-T and Case 882/2019-T).

2.3.3. Notes and recommendations

60. The following aspects are also noteworthy in this regard:

- (i) The Council rejected the vast majority of requests for refusal under strict and stable guidelines. It is considered whether these guidelines could be harmonised by adjusting the system of impediments to certain IBA criteria mentioned *above*.
- (ii) The AT has been more successful than taxpayers in granting requests for refusal on which the request is based (3/1).
- (iii) The Council rejected about half of the requests for arbitrator withdrawal made after recusal requests, dismissing frivolous withdrawals and limiting granting decisions to clear cases of impediment. It demonstrated its supervisory capacity by ex officio urging the withdrawal of an arbitrator in one case.
- (iv) The Council's decisions appear to be balanced with regard to decisions on incidents involving suspicions concerning arbitrators' professional relationships with law firms or companies connected to the proceedings.
- (v) ~~The~~ appointed arbitrators are not very inclined to exercise their duty of disclosure, and the Council takes a somewhat flexible approach to the criteria that law or *soft law* prescribes for this duty. The CAAD could operate at the regulatory level to harmonise with the IBA criteria mentioned above regarding the duty of disclosure corresponding to the red and orange lists.
- (vi) An amendment to Article 8 of the RJAT could be considered in order to extend the period of disqualification for arbitrators who have held positions in the management bodies of one of the parties or positions in the AT.

The AT has been more successful than the parties concerned in granting requests for refusal on which the request (3/1).

IV. COMPARATIVE ANALYSIS BETWEEN DECISIONS OF STATE TAX COURTS AND THE CAAD



1. Framework

1.1. Parameterisation and methodology

61. This section provides a comparative study between the decisions of the administrative and tax courts and the decisions of the CAAD in tax matters, taking into account their respective decision-making.

This is no easy task, considering (in particular) (i) the difficulty in accessing the decisions of the courts of first instance of the administrative and tax jurisdiction, (ii) the fact that the conditions under which decisions are issued in state jurisdiction and tax arbitration are not at all comparable; as well as (iii) the (very broad) range of causes and circumstances which, for various reasons, are likely to influence the formation of their decisions, which cannot be ignored when formulating comparative judgements.

Having made these caveats, we believe it is possible to draw some valid conclusions in order to understand whether or not there are significant asymmetries in the overall distribution of decisions handed down by state courts and arbitration tribunals, regardless of the causes that may justify them. In addition, it will be relevant to ascertain how the decisions of each are distributed, according to the periods considered and/or matters covered.

62. Since the study aims to provide a comparative analysis between the decisions of administrative and tax courts and the decisions of the CAAD in tax matters, it is necessary to clearly define the methodology of the research and analysis, as well as the parameters of comparability, otherwise the "conclusions" will be nothing more than disconnected comparisons between realities that cannot be adequately compared.

Thus, some methodological pillars are outlined below, the observance of which will prove fundamental.

63. Firstly, considering that, in the settlement of tax disputes, the CAAD acts as a court of first instance, a study aimed at comparing its decisions with those of the administrative and tax courts should take as its point of comparison the decisions handed down at first instance.

It is, of course, well known that the Central Administrative Courts and the Supreme Administrative Court also hear disputes in first instance (Article 26(c) and Article 38(b) of the ETAF). However, it must be acknowledged that these are relatively rare and quantitatively insignificant situations from the point of view of the total number of decisions handed down each year by the traditional tax courts. We therefore sought to focus our analysis on the decisions of the Administrative and Tax Courts and the

Lisbon Tax Court – that is, the courts of first instance par excellence.

64. In order to ensure a representative sample, four courts of first instance were selected, based on the criterion of identifying those with the highest number of cases concluded in the last year for which data is available (2020), according to the CSTAF Annual Report for 2020 ⁽⁷⁹⁾ (page 57) – namely:

- a. Beja Administrative and Tax Court;
- b. Braga Administrative and Tax Court;
- c. Porto Administrative and Tax Court; and
- d. Lisbon Tax Court.

65. For these, a time frame was selected consisting of the years 2019, 2020, 2021 and 2022, considering the need to spread the sample over different years, enabling a comprehensive analysis (diluting the specificities and circumstances of each year) and an individualised analysis for each year (capturing its specificities and concrete circumstances).

The decisions collected were subject to a preliminary analysis to identify those that relate to claims submitted before those courts, but which could, alternatively, have been brought before the CAAD.

66. Thus, and as a result of what we have had the opportunity to explain, the preliminary analysis consisted of selecting the decisions handed down (by the aforementioned courts) following disputes arising from tax legal relationships:

- a. Where the contested entity is the AT;
- b. Which concern tax matters;
- c. That concern acts of assessment, equivalent acts or definitive assessment acts;
- d. That do not refer to acts subject to necessary administrative reaction when this has been overlooked, acts of indirect assessment and acts relating to customs duties on imports.
- e. Where the value of the action is up to a maximum of €10,000,000.00.

⁷⁹ Latest available at the start date of this study.

67. The starting point was the universe of decisions (effectively) made available by the courts, as those that did not meet these conditions were excluded from the analysis. The decisions that did meet these conditions were analysed in their entirety.

In accordance with the above, a total of 2,896 decisions were selected, distributed as follows:

- a. Beja Administrative and Tax Court – a total of 209 decisions, distributed across the years 2019 (34 decisions), 2020 (81 decisions), 2021 (49 decisions) and 2022 (45 decisions);
- b. Administrative and Tax Court of Braga – a total of 672 decisions, distributed across the years 2019 (121 decisions), 2020 (139 decisions), 2021 (237 decisions) and 2022 (175 decisions);
- c. Lisbon Tax Court – a total of 1,054 decisions, distributed across the years 2019 (244 decisions), 2020 (42 decisions), 2021 (299 decisions) and 2022 (469 decisions); and
- d. Porto Administrative and Tax Court – a total of 961 decisions, distributed across the years 2019 (205 decisions), 2020 (258 decisions), 2021 (303 decisions) and 2022 (195 decisions).

68. As will be explained in more detail below, in the case of the Lisbon Tax Court, only some of the decisions that meet the above criteria were made available, as the others were not (according to the information provided) available in digital and consolidated format, highlighting (in fact) a discrepancy in the number of decisions made available in 2020, when compared to the number of decisions made available in other years.

Despite this, it was considered that the sample obtained was adequate for the purposes of this study, considering that the overall number of decisions collected – which, after the sorting imposed by the selection criteria set out, allowed for the formation of an overall sample of 2,896 decisions for the reference period (2019-2022) – appears to be close to the total number of decisions handed down by arbitration tribunals in the same period (2,990).

69. The analysis carried out comprised – for each decision – an objective collection of information relevant to the determination of the outcome of the case, without analysing the merits/material correctness of the decisions, which would always depend on subjective judgements, likely to contaminate the results obtained.

Thus, the decisions that form the subject of the analysis – as defined above

– were collected and recorded in a table prepared for the purposes of this study ("Table I"), which breaks down the information by court and by year, with the following (objective) information:

- Case number.
- Subject (tax type).
- Value of the action (with amounts still presented in escudos converted into euros).
- Decision outcome by winning the case (based on a criterion of exceeding 50% in the definition of winning the case – '1'; dividing the result in the event of a tie – '0.5'): Taxpayer (SP); Public Treasury (FP); Formal decision (dismissal of the case).
- Decision based on economic value (awarding the value in proportion to the success of the case): Taxpayer (SP); Public Treasury (FP); Formal decision (dismissal of the case).

Considering that in the universe of actions that fall within the scope of tax arbitration, the procedural initiative always lies with the taxpayer, in this study, formal decisions – even though they do not involve an effective assessment of the court's decision on the merits – were included in the Public Treasury's defeat.

Considering that in the universe of actions that fall within the scope of tax arbitration, the procedural initiative always lies with the taxpayer, in this study, formal decisions – even though they do not involve an effective assessment of the court's decision on the merits – were included in the Public Treasury's defeat.

70. Based on this collection, the results in terms of the distribution of the outcome of the case – by number of actions or by their economic expression – were organised in order to assess the trends in the outcome of the case: in overall terms; by value range; by year; by court; by court, in each year; by subject matter (tax) of the actions; by subject matter (tax) of the actions, in each court.

71. With regard to the collection of information on the distribution of CAAD decisions in tax arbitration, as well as their economic expression, in addition to being available for consultation free of charge – through its website – it was possible to obtain from that entity a document in Excel format containing the data necessary to carry out the study. The elements were analysed and entered into a table prepared for the purposes of this study ("Table II"), which breaks down the following information for each decision:

- Value of the action.
- Decision-making direction per successful case (based on a criterion of exceeding 50% in the definition of a successful case – "1"; dividing the result in the event of a tie – "0.5"): Taxpayer (SP); Public Treasury (FP).
- Decision direction by economic value (awarding the value in proportion to the winning case): Taxpayer (SP); Public Treasury (FP).

72. The information collected – relating to the Administrative and Tax Courts

and the CAAD – was then organized into different tables, which (respectively) comprise:

Administrative and Tax Courts
• Results calculated for the four courts as a whole, during the reference period (2019-2022) considered globally; • Results calculated for the four courts as a whole during the reference period (2019-2022) considered globally, distributed across the following value ranges: < €60,000; ≥ €60,000.00 and < €275,000.00. ≥ €275,000.00 and < €500,000.00; ≥ €500,000.00 and < €1,000,000.00; ≥ €1,000,000.00. • Results calculated for each year of the reference period (2019-2022), across all four courts; • Results calculated for each court during the reference period (2019-2022) as a whole; • Results calculated for each court in the different years of the reference period (2019-2022); • Results calculated by subject (tax) of the actions – with a breakdown of actions relating to IMI, IMT, IRC, IRS, VAT, IS, ISP, IUC and Others – across all four courts during the reference period (2019-2022) considered as a whole; • Results calculated by subject matter (tax) of the actions – with a breakdown of actions relating to IMI, IMT, IRC, IRS, VAT, IS, ISP, IUC and Others – in each year of the reference period (2019-2022).
CAAD
• Results calculated during the reference period (2019-2022) considered as a whole; • Results calculated during the reference period (2019-2022) considered as a whole, distributed across the following value ranges: < €60,000; ≥ €60,000.00 and < €275,000.00; ≥ €275,000.00 and < €500,000.00; ≥ €500,000.00 and < €1,000,000.00; ≥ €1,000,000.00. • Results calculated for each year of the reference period (2019-2022);

- Results calculated by object (tax) of the actions – with a breakdown of actions relating to IMI, IMT, IRC, IRS, VAT, IS, ISP, IUC and Others – during the reference period (2019-2022) considered as a whole;
- Results calculated by subject (tax) of the actions – with a breakdown of actions relating to IMI, IMT, IRC, IRS, VAT, IS, ISP, IUC and Others – in each year of the reference period (2019-2022).

73. Finally, the data and results (respectively) relating to the administrative and tax courts and the CAAD were subjected to a comparative exercise, by reference:

- The total number of decisions during the reference period (2019-2022) considered as a whole;
- The results obtained during the reference period (2019-2022) considered as a whole, distributed across the following value ranges:
< €60,000; ≥ €60,000.00 and < €275,000.00; ≥ €275,000.00 and < €500,000.00; ≥ €500,000.00 and < €1,000,000.00; ≥ €1,000,000.00;
- The results calculated for each year of the reference period (2019-2022);
- The results calculated by object (tax) of the actions – with a breakdown of actions relating to IMI, IMT, IRC, IRS, VAT, IS, ISP, IUC and Others – during the reference period (2019-2022) considered as a whole;
- The results calculated by object (tax) of the actions – with a breakdown of actions relating to IMI, IMT, IRC, IRS, VAT, IS, ISP, IUC and Others – in each year of the reference period (2019-2022).

1.2. Study constraints

74. The development of a study involving the analysis of decisions issued by administrative and tax courts of first instance faces, first and foremost, the (great) difficulty of accessing their content, since they are not freely available.

In fact, only the decisions of the higher courts (STA and TCA) are available for public consultation in the case law database (<http://www.dgsi.pt/>), which is not the case with courts of first instance in administrative and tax jurisdiction, even though this would be required (at least) for decisions in administrative matters, in view of the provisions of Article 30(2) of the CPTA – without prejudice to the (possible) discussion on the extension of this requirement to decisions on tax matters, by reference to Article 2(c) of the CPPT.

75. In view of this circumstance, the Superior Council of Administrative and Tax Courts (CSTAF) was asked for special authorisation to access the decisions that form the subject of the study. This was granted by CSTAF Resolution of 4 November 2022, which formed the basis for the conclusion, on 23 November 2022, of a Protocol between the CSTAF and the ICJP, which regulated the terms of such access (in particular the commitment to secrecy and confidentiality regarding the processing of personal data contained in the judgments).

Despite all the willingness and speed shown by that body in granting authorisation and issuing instructions to the courts involved (TAFs of Beja, Braga and Porto and TT of Lisbon) to make the decisions available, the collection of and access to them faced several practical difficulties, which are set out below:

- a. There is no centralised ‘access point’ – namely, through an internal database – through which it is possible to consult the decisions handed down by the different courts;
- b. Decentralised access to decisions was implemented by each court, and the platform used (SITAF) does not allow for the consolidated collection of decisions according to criteria to be defined (e.g. year, subject matter, organisational unit, judge, etc.), only allowing case-by-case consultation for the identification and extraction of the respective decision;
- c. In each court, it was necessary to find *ad hoc* solutions for the collection and availability of decisions;
- d. In the case of the Lisbon Labour Court, only some of the decisions that met the criteria defined for the study were made available, as the others were not – according to the information provided – available in digital and consolidated format;

- e. According to the Court (Lisbon Tax Court), the decisions made available corresponded to 60% of the total number of decisions on tax matters;
- f. In addition, there was a significant discrepancy in the number of decisions made available in 2020 compared to the number of decisions made available in other years;
- g. When confronted with this circumstance, the Court was informed that the decisions available in digital and consolidated format for 2020 corresponded to the above-mentioned number;
- h. In the various courts, the authors of the study did not participate in the identification and collection of decisions, but merely received them in the exact terms in which they were made available;
- i. The decisions made available were organised according to the (different) criteria of each court (in folders: by judge, by year, by month, by organisational unit, etc.) or in bulk, requiring their prior reorganisation for subsequent analysis.

76. Throughout the collection process, the various stakeholders (magistrates and civil servants) showed an attitude of constant availability and collaboration with the study. This aspect was decisive in overcoming several of the adversities that arose.

Access to CAAD decisions, on the other hand, was not problematic, since all its decisions are published (with personal data duly redacted), as mentioned above (*supra*, II, 2.4.1.), and that body provided, for the reference period (2019-2022), in a detailed Excel format (by decision) and also in a consolidated format, all the information necessary for the intended comparative exercise (namely, for each decision: case number; subject matter; value of the action; decision, expressed as a percentage of successful cases).

77. A study that seeks to compare the decisions of the courts of first instance and tax arbitration will always be conditioned by various circumstances arising from the characteristics and circumstances of each of these dispute resolution channels. In fact, an analysis based on a quantification of the decisions made by a particular court in a certain period or with reference to a particular type of matter will necessarily be limited, since the results obtained are conditioned by an indeterminable universe of factors that are not always demonstrable and are often not even discernible.

The results obtained from the objective analysis carried out should therefore be properly contextualised and understood, particularly in light of the circumstances listed below:

- a. The scope of application of arbitration is substantially narrower, both from an objective and subjective point of view;
- b. In this study, a sample collection is developed, which does not consist of all the decisions of the Administrative and Tax Courts (and the Lisbon Tax Court) that are susceptible to (alternatively) being included in tax arbitration;
- c. In the case of the Lisbon Tax Court, it was possible to obtain a very significant part of the decisions for the reference period, but not all of them;
- d. The time constraints to which tax arbitration is subject mean that disputes submitted to it must be decided within a maximum period of one year (six months, with an extension for an equal period);
- e. As no such time limit applies to them, tax disputes submitted to the "state courts" have an average time limit of decision of approximately 6 years (71 months in 2022; 73 months in 2021, 71 months in 2020 and 70 months in 2019) ⁽⁸⁰⁾;

⁸⁰ Cf. '<https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Duracao-media-dos-processos-findos-nos-tribunais-administrativos-e-fiscais-de-1-instancia.aspx>

f. Since the average decision times vary from year to year, the decisions handed down by arbitration tribunals and state courts will tend not to coincide in terms of the "issues" that are discussed and decided in them (respectively);

g. In other words, even if in a given year disputes with similar contours may be brought before them (the arbitral tribunals and the "state courts"), the timing of their decisions will be mismatched - thus, in a given year, the issues (matters) that are actually decided in one or the other may not coincide;

h. It follows that, even if a homogeneous group of disputes share the same decision (which, of course, will not be certain – because it will not be certain even between courts of the same jurisdiction), such decisions will tend to contribute to the formation of a certain decision-making trend at different times (years);

Even if, in a given year, disputes with similar contours may be brought before arbitration tribunals and "state courts" in a given year, the moment when they are decided will be temporally mismatched, and in a given year, the issues that are specifically decided.

Still related to this aspect (the time factor in decision-making decision-making), considering that – in challenge proceedings – the initiative to bring the action will always lie with the passive subjects, it may happen that the decisions made by arbitration have a screening effect, encouraging them to litigate in matters where the history of decisions is favourable to them favourable, and discouraging them when the history of decisions is unfavourable to them;

— This will naturally end up conditioning the results obtained – considering that the aforementioned "screening" effect does not benefit the Public Treasury, since it is not responsible for initiating the action;

— The same may happen (naturally) with the decisions of the "state courts", but with substantially more moderate effects, considering the time lag between when claims are filed and when they are decided (and thus made known);

— The fact that the decisions of the courts of first instance of the administrative and tax jurisdiction are not available for consultation in free access (unlike those of the CAAD) ultimately means that arbitration decisions are rendered and made publicly available in a relatively short period of time, while state court decisions tend to be known only when they are reviewed on appeal, since only these are published.

As the initiative to bring an action will always lie with the taxable persons, it may happen that the decisions of the arbitration have a screening effect, encouraging them to litigate in matters where history of decisions is favourable to them, and discouraging them when the history of decisions is unfavourable.

This will ultimately condition the results obtained – considering that the aforementioned "screening" effect does not benefit the Public Treasury, since it is not responsible for initiating the action.

It is not uncommon for the aforementioned "screening effect" to be lost in state courts due to the fact that of changes in the regulatory framework between the filing and the decision of the claims.

78. More importantly, the existence of administrative appeals guarantees means that a portion of the disputes arising from tax legal relationships – resulting from acts performed by the AT or even acts performed by taxpayers and appropriated by the AT (as is the case, in particular, with self-assessment acts) – can be resolved in the “antechamber” of their judicial discussion;

a. This also results in a certain “screening” effect, especially with regard to the most obvious issues of illegality, many of which do not even reach the judicial discussion stage;

b. In addition, the tax procedure is characterised by the massification of tax acts, which are carried out in a relatively standardised manner – usually automatically and computerised – which increases the occurrence of situations of repetition (massification) of illegal acts and, thus, of the judgements of legal (non)compliance that end up being produced on them;

c. The effects of this 'massification of judgements' on the distribution of revenue between taxpayers and the Public Treasury will (certainly) not be negligible, especially in the context of a decision-making body characterised by particularly swift decision-making, as is the case with tax arbitration.

d. As can be understood, once a given understanding of the legal non-compliance of a typical action by the Tax Administration is consolidated, the repetition of the illegality tends to be projected at the jurisdictional level – whether in state jurisdiction or in arbitration – through the repetition of grounds and decisions that are relatively similar to previous decisions and the exercise of the power to revoke illegal acts by the Tax Administration during the jurisdictional discussion itself (with the consequent dismissal of the case);

e. Relatively frequently, certain "issues" become the focus of litigation, giving rise to strong demand for tax arbitration by taxpayers, in view of the assessment of relatively homogeneous settlement acts with the same grounds for illegality;

f. The consolidation of a certain decision-making approach to these issues – especially following the intervention of decision-making bodies such as the TCA, the STA or the CJEU – ultimately leads to a concerted decision-making approach, characterised by the unidirectional reproduction of the approach previously established in pending cases;

g. As examples of this, we can look at the cases that have been brought before arbitration tribunals in recent years, relating to discussions on: the environmental component of the ISV; the VPT of land for construction, in the IMI; the taxation of

Due to the fact that the consolidated decision determines the recognition of the illegality of the contested settlement acts, it is not surprising that (i) a significant proportion of arbitral decisions consist of verifying the existence of a factual and legal similarity with cases previously decided by certain courts; (ii) in other cases, arbitral awards consist of the "ratification" of administrative annulment decisions by the AT, after the tribunal has been constituted.

capital gains on real estate by non-residents; corporate income tax on dividends paid to collective investment undertakings based in another Member State; the IMT and Stamp Duty exemptions provided for in the special regime for real estate investment funds and companies for residential rental; or the IMT exemption for real estate investment funds (Decree-Law No. 1/87 of 3 January);

— In all these cases, the consolidated decision-making process has determined that the actions of the Tax Administration were unlawful – and, therefore, that the contested assessment notices were unlawful;

— It is therefore not surprising that: (i) a significant proportion of arbitration decisions ultimately consist of verifying the existence of factual and legal similarities with cases previously decided by certain courts,

— following the respective decisions; (ii) in other cases, arbitral decisions are limited to the "approval" of administrative revocation (annulment) decisions by the AT, after the tribunal has been constituted;

— According to information obtained from the CAAD, this type of decision amounted to approximately 23.4% - therefore, about $\frac{1}{4}$ of the total decisions handed down in the reference period (2019-2022). It is thus clear that the impact of such decisions on the distribution of successful cases is not negligible;

— It is also important to take into account that the Portuguese legal system provides for bonus schemes, through which tax administration officials are compensated in terms of salary based on collection results. We refer to the salary supplements awarded to tax administration officials through the Tax Stabilisation Fund (FET), whose revenue consists (essentially) of a percentage of up to 5% (which has repeatedly been set at its maximum value, as was recently the case for 2022, by Order No. 449/2023 of 22 December of the Secretary of State for Tax Affairs). Although these benefits are indexed to the success of revenue collection, it is certain that this is positively influenced by the volume and quantitative expression of the assessments issued.

— Although there are no known studies that have addressed this issue, it is accepted that (as it is currently formulated) this regime can be associated with the perverse consequence of rewarding (blindly) the issuance of assessments by the tax administration (and collection of the amounts assessed), leading to the entronement of purely revenue-raising interests over all others. This aspect is particularly problematic if the interests to be sacrificed include the legality of the revenue collected.

— Finally, the fact that the procedural initiative rests with the taxpayers implies that "formal" decisions (dismissal of the case) ultimately benefit the Public Treasury, even if no position is taken on the merits of the case.

79. The conclusions to be drawn from the results of a strictly objective comparative exercise between the decisions made in the context of state tax jurisdiction and in 'tax arbitration' must be properly contextualised on the basis of these aspects and dimensions.

This means that it is not enough to look at the results, neglecting the reasons on which they are based, at least in terms of plausibility.

80. Although this was included in the initial request, the comparative analysis between the appealability of administrative and tax court decisions and arbitration decisions in the reference period (2019 to 2022) was not included in this study, since its implementation is called into question (in particular) by the following circumstances:

- a. Even if it were possible to collect information on the number of decisions of the tax courts of first instance against which judicial appeals were lodged, this would only provide information on whether or not the parties complied, but would add little (or nothing) to the material correctness of those decisions – the number of appeals will certainly not correspond to the number of changes in the decisions on appeal;
- b. However, information on the number (percentage) of first instance court decisions (which meet the selection criteria for this study) that are ultimately reversed on appeal could be relevant.

- c. However, this analysis is hampered by the fact that only a very limited number of the appeals lodged against those decisions have already been decided;
- d. Alternatively, it would be possible to consider, not the outcome of judicial appeals of first instance decisions handed down in the years 2019 to 2022, but the universe of decisions handed down by the higher courts on appeal, in the context of disputes that could (alternatively) have been submitted to tax arbitration.
- e. However, the usefulness of the information extracted would always be frankly limited, considering that these would be judicial appeals handed down in relation to decisions not included in the sample selected for this study;
- f. In addition to all this, the results obtained from a comparative study of the type proposed would (naturally) be conditioned by the fact that the opportunity to appeal in tax arbitration is strongly conditioned by the aforementioned rule of non-appealability, unlike in state jurisdiction, where no such rule exists;
- g. In this context, it is worth noting that information on the meaning of final (*res judicata*) decisions of state courts can be found in the Tax Administration Report of the Organisation for Economic Co-operation and Development (OECD) (<https://www.oecd.org/ctp/tax-administration-23077727.htm>), which, based on data collected in 2021, points to a success rate for the Portuguese tax administration (in state tax courts) of 43.6%. In this report, which includes data on the success rate of tax administrations in 46 countries, the Portuguese tax administration ranks 42nd.

- h. The study also suggests that, in state tax courts, the State loses more as the case moves up through the various higher courts of appeal, with a gap of around 10% compared to the data from the court of first instance.
- i. It is important to bear in mind, however, that this is a study whose object and methodology are different from ours, considering final decisions in which more than 50% of the decisions were favourable to one of the parties.

2. Analysis

81. Based on the analysis of a universe of 2,896 decisions originating from the Administrative and Tax Courts of Beja, Braga and Porto and the Tax Court of Lisbon, in the years 2019 to 2022, and taking as a reference the parameters and methodology that we presented in the previous section, it was possible to extract the results that are detailed below.

2.1. State tax courts

82. Results calculated for the four courts as a whole, during the reference period (2019-2022) considered globally ⁽⁸¹⁾:

2019-22	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
	1290	44,5%	1606	55,5%	242 641 340,38 €	46,0%	285 261 835,80 €	54,0%

83. Results calculated for the four courts as a whole during the reference period (2019-2022) considered globally, distributed by value segment:

⁸¹ Acronyms used in the tables: SP – taxpayer; FP – Public Treasury.

2019-22	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
Total <60k€	858	44,9%	1052	55,1%	14 580 325,65 €	44,2%	18 395 834,27 €	55,8%
Total >=60k€ e <275k€	259	41,8%	360	58,2%	36 272 896,27 €	41,5%	51 041 817,63 €	58,5%
Total >=275k€ e <500k€	71,5	44,1%	90,5	55,9%	27 338 364,93 €	42,9%	36 380 688,03 €	57,1%
Total >=500k€ e <1M€	62	54,4%	52	45,6%	45 071 439,94 €	54,3%	37 985 546,72 €	45,7%
Total >=1M€	39,5	43,4%	51,5	56,6%	119 378 313,58 €	45,8%	141 457 949,15 €	54,2%

84. Results calculated for each year of the reference period (2019-2022) for all four courts:

Ano	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
2019	274,5	45,4%	329,5	54,6%	52 788 963,66 €	57,0%	39 749 073,95 €	43,0%
2020	236	45,4%	284	54,6%	32 556 029,11 €	33,0%	65 997 112,22 €	67,0%
2021	413	46,5%	475	53,5%	69 908 562,24 €	42,7%	93 638 610,78 €	57,3%
2022	366,5	41,5%	517,5	58,5%	87 387 785,37 €	50,4%	85 877 038,85 €	49,6%

85. Results calculated for each court during the reference period (2019-2022) considered as a whole:

Tribunal	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
Beja	98,5	47,1%	110,5	52,9%	23 891 739,92 €	77,7%	6 868 311,57 €	22,3%
Braga	338	50,3%	334	49,7%	29 492 439,58 €	36,2%	52 000 753,38 €	63,8%
Lisboa	435	41,3%	619	58,7%	71 058 611,26 €	46,4%	82 188 981,54 €	53,6%
Porto	418,5	43,5%	542,5	56,5%	118 198 549,63 €	45,0%	144 203 789,30 €	55,0%

86. Results calculated for each court, in the different years of the reference period (2019-2022):

Tribunal	Ano	Por ganho de causa				Por expressão económica do ganho de causa			
		SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
Beja	2019	15	44,1%	19	55,9%	2 283 365,85 €	64,9%	1 234 565,64 €	35,1%
Beja	2020	43	53,1%	38	46,9%	8 757 603,06 €	82,0%	1 918 579,59 €	18,0%
Beja	2021	26	53,1%	23	46,9%	4 451 667,35 €	74,1%	1 559 471,13 €	25,9%
Beja	2022	14,5	32,2%	30,5	67,8%	8 399 103,65 €	79,6%	2 155 695,22 €	20,4%
Braga	2019	73	60,3%	48	39,7%	6 847 536,98 €	44,3%	8 609 659,64 €	55,7%
Braga	2020	68,5	49,3%	70,5	50,7%	4 315 434,62 €	30,7%	9 723 721,51 €	69,3%
Braga	2021	113,5	47,9%	123,5	52,1%	7 934 132,45 €	32,0%	16 852 587,56 €	68,0%
Braga	2022	83	47,4%	92	52,6%	10 395 335,53 €	38,2%	16 814 784,67 €	61,8%
Lisboa	2019	95	38,9%	149	61,1%	15 605 099,23 €	55,9%	12 302 350,65 €	44,1%
Lisboa	2020	23	54,8%	19	45,2%	2 775 323,03 €	65,3%	1 473 536,02 €	34,7%
Lisboa	2021	130,5	43,6%	168,5	56,4%	12 036 280,72 €	31,6%	26 030 367,04 €	68,4%
Lisboa	2022	186,5	39,8%	282,5	60,2%	40 641 908,28 €	49,0%	42 382 727,83 €	51,0%
Porto	2019	91,5	44,6%	113,5	55,4%	28 052 961,60 €	61,4%	17 602 498,02 €	38,6%
Porto	2020	101,5	39,3%	156,5	60,7%	16 707 668,40 €	24,0%	52 881 275,11 €	76,0%
Porto	2021	143	47,2%	160	52,8%	45 486 481,72 €	48,0%	49 196 185,05 €	52,0%
Porto	2022	82,5	42,3%	112,5	57,7%	27 951 437,91 €	53,3%	24 523 831,13 €	46,7%

87. Results calculated by subject matter (tax) of the actions, across all four courts during the reference period (2019-2022):

Objeto	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
IMI	54,5	44,0%	69,5	56,0%	2 824 159,24 €	53,3%	2 478 399,63 €	46,7%
IMT	57	51,8%	53	48,2%	4 334 286,76 €	57,4%	3 219 430,64 €	42,6%
IRC	390	46,8%	443	53,2%	130 458 365,74 €	50,5%	127 829 023,02 €	49,5%
IRS	321	45,3%	387	54,7%	17 911 090,73 €	38,6%	28 528 321,97 €	61,4%
IVA	236,5	40,3%	350,5	59,7%	57 605 958,37 €	45,9%	67 971 942,25 €	54,1%
IS	78,5	52,7%	70,5	47,3%	14 879 626,73 €	53,0%	13 179 486,61 €	47,0%
ISP	5	50,0%	5	50,0%	1 125 442,78 €	94,1%	70 510,99 €	5,9%
IUC	65,5	36,4%	114,5	63,6%	319 867,68 €	54,5%	266 711,72 €	45,5%
Outros	82	42,1%	113	57,9%	13 182 542,36 €	24,0%	41 718 008,97 €	76,0%

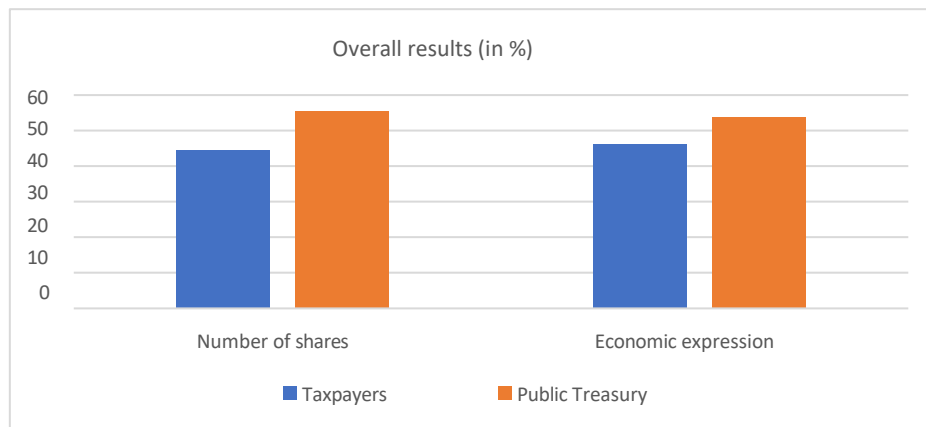
88. Results calculated by subject matter (tax) of the actions, in each year of the reference period (2019-2022):

Objeto	Ano	Por ganho de causa				Por expressão económica do ganho de causa			
		SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
IMI	2019	14,5	37,2%	24,5	62,8%	1 835 124,66 €	58,7%	1 291 165,28 €	41,3%
IMI	2020	12	60,0%	8	40,0%	3 80 824,49 €	64,7%	207 630,98 €	35,3%
IMI	2021	18	64,3%	10	35,7%	1 082 114,94 €	88,7%	137 440,83 €	11,3%
IMI	2022	12	33,3%	24	66,7%	210 117,96 €	22,1%	742 111,73 €	77,9%
IMT	2019	15	48,4%	16	51,6%	1 702 047,76 €	56,9%	1 289 043,03 €	43,1%
IMT	2020	4,5	34,6%	8,5	65,4%	103 688,91 €	8,1%	1 182 072,13 €	91,9%
IMT	2021	20	52,6%	18	47,4%	1 137 167,20 €	61,8%	703 573,08 €	38,2%
IMT	2022	17,5	60,3%	11,5	39,7%	2 039 147,59 €	79,4%	530 076,06 €	20,6%
IRC	2019	93	49,2%	96	50,8%	31 014 269,58 €	63,6%	17 774 474,91 €	36,4%
IRC	2020	70,5	43,5%	91,5	56,5%	8 668 043,16 €	25,2%	25 765 020,55 €	74,8%
IRC	2021	122	47,5%	135	52,5%	37 246 364,40 €	48,0%	40 323 672,72 €	52,0%
IRC	2022	101,5	45,3%	122,5	54,7%	44 689 923,57 €	50,7%	43 420 525,39 €	49,3%
IRS	2019	54	34,8%	101	65,2%	2 479 332,35 €	27,2%	6 629 567,28 €	72,8%
IRS	2020	57,5	53,7%	49,5	46,3%	5 353 755,27 €	68,4%	2 474 988,26 €	31,6%
IRS	2021	92	47,7%	101	52,3%	5 334 673,81 €	29,6%	12 665 450,04 €	70,4%
IRS	2022	112,5	49,3%	115,5	50,7%	6 685 558,63 €	52,8%	5 975 835,09 €	47,2%
IS	2019	18,5	47,4%	20,5	52,6%	934 648,17 €	14,7%	5 437 979,92 €	85,3%
IS	2020	10	55,6%	8	44,4%	1 695 928,23 €	71,7%	668 303,60 €	28,3%
IS	2021	35	67,3%	17	32,7%	4 193 119,39 €	54,9%	3 438 380,37 €	45,1%
IS	2022	16	39,0%	25	61,0%	8 055 857,89 €	69,8%	3 477 692,86 €	30,2%
ISP	2019	6,5	50,0%	6,5	50,0%	609 716,02 €	74,6%	207 213,06 €	25,4%
ISP	2020	9	47,4%	10	52,6%	647 706,98 €	66,4%	327 659,41 €	33,6%
ISP	2021	7	46,7%	8	53,3%	3 378 452,41 €	89,9%	380 983,42 €	10,1%
ISP	2022	1	100,0%	0	0,0%	865 290,97 €	100,0%	0,00 €	0,0%
IUC	2019	8	80,0%	2	20,0%	2 941,20 €	73,5%	1 060,63 €	26,5%
IUC	2020	10	62,5%	6	37,5%	13 637,72 €	84,5%	2 499,32 €	15,5%
IUC	2021	26,5	51,0%	25,5	49,0%	150 210,62 €	58,3%	107 397,26 €	41,7%
IUC	2022	26,5	24,3%	82,5	75,7%	226 251,80 €	51,0%	217 340,63 €	49,0%
IVA	2019	54	50,5%	53	49,5%	13 589 742,59 €	72,2%	5 227 940,83 €	27,8%
IVA	2020	42	37,5%	70	62,5%	17 969 667,82 €	55,8%	14 257 054,84 €	44,2%
IVA	2021	67	36,0%	119	64,0%	8 535 697,18 €	27,3%	22 769 923,93 €	72,7%
IVA	2022	61	36,1%	108	63,9%	18 704 863,73 €	42,7%	25 144 045,34 €	57,3%
Outros	2019	17,5	46,1%	20,5	53,9%	698 477,67 €	15,4%	3 845 408,45 €	84,6%
Outros	2020	15	35,7%	27	64,3%	1 044 654,73 €	4,9%	20 230 194,99 €	95,1%
Outros	2021	24	39,3%	37	60,7%	8 281 125,10 €	39,4%	12 761 384,50 €	60,6%
Outros	2022	19	40,4%	28	59,6%	3 081 195,88 €	35,3%	5 646 725,08 €	64,7%

89. The systematisation of the data collected in light of the above criteria allows us to observe that:

- From an overall perspective and considering the number of cases decided (respectively) in favour of taxpayers and the Public Treasury, there is a slight advantage for the latter, which was successful in 55.5% of the cases (1,606 decisions), as opposed to 44.5% (1,290 decisions) won by taxpayers.

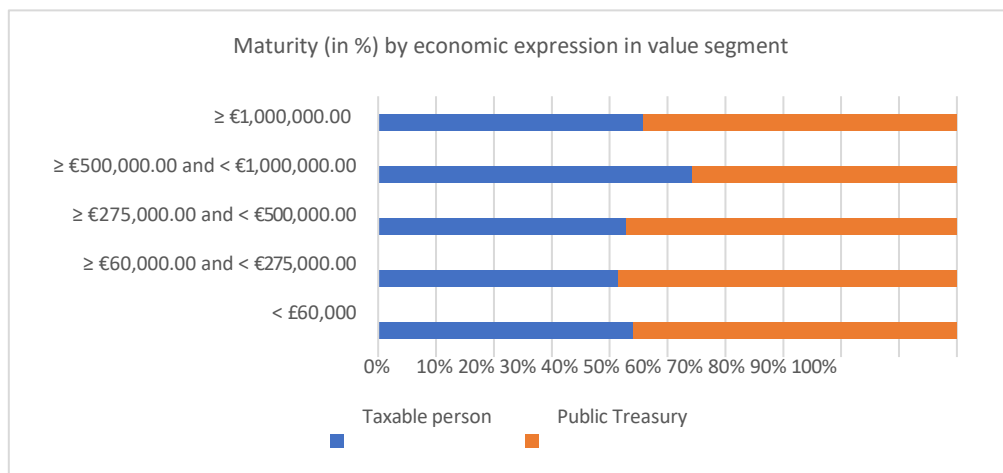
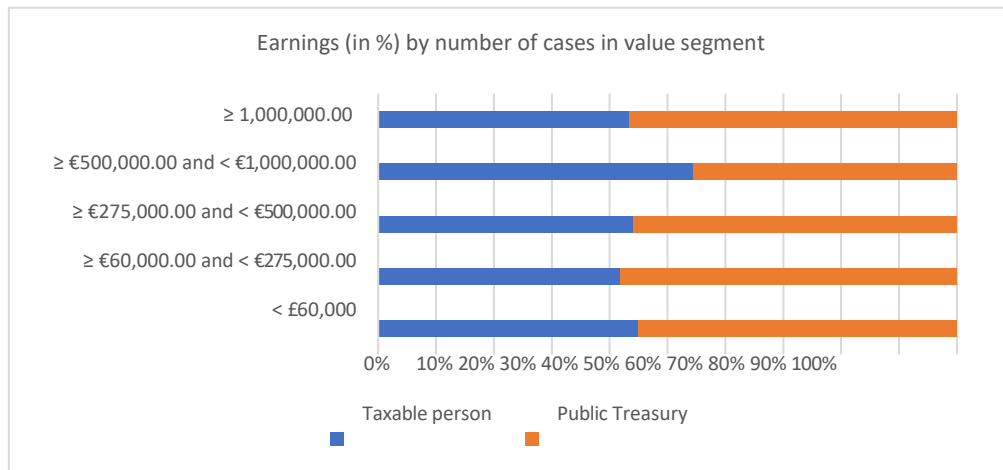
- However, if the focus is not on the cases won per se, but on the economic value they represent, the trend of the Treasury winning remains, albeit less pronounced: 53.7% (€281,402,405.42), compared to 46.3% (€242,211,906.13) won by taxpayers.



- It is important to note, however, that the results presented are based on the assumption that formal decisions constitute Public Treasury liabilities, even though in such situations the court did not rule on the merits of the cases. If, alternatively, only decisions on the merits were considered, the balance would be greater ⁽⁸²⁾.
- Regardless of the criteria used, there is a slight advantage for the Public Treasury.
- However, the (relative) balance of the overall results ultimately conceals a certain asymmetry when they are broken down by value range, court, year or subject (tax).

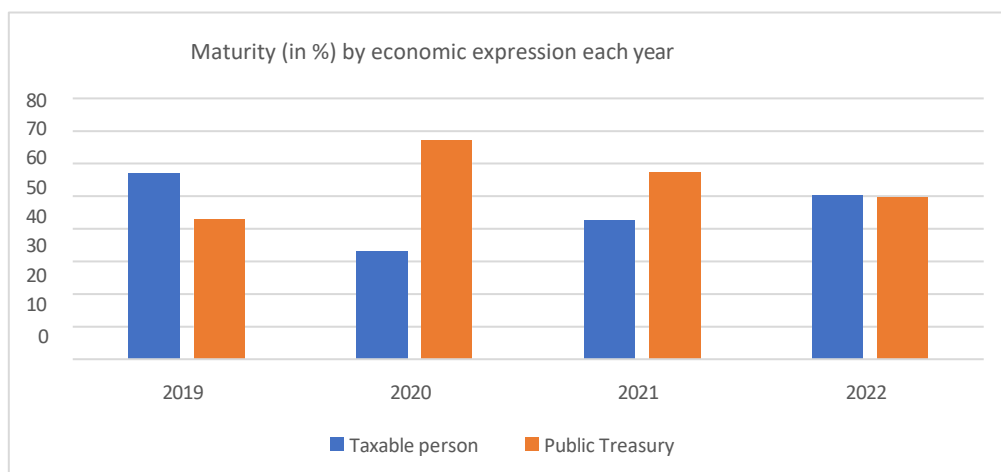
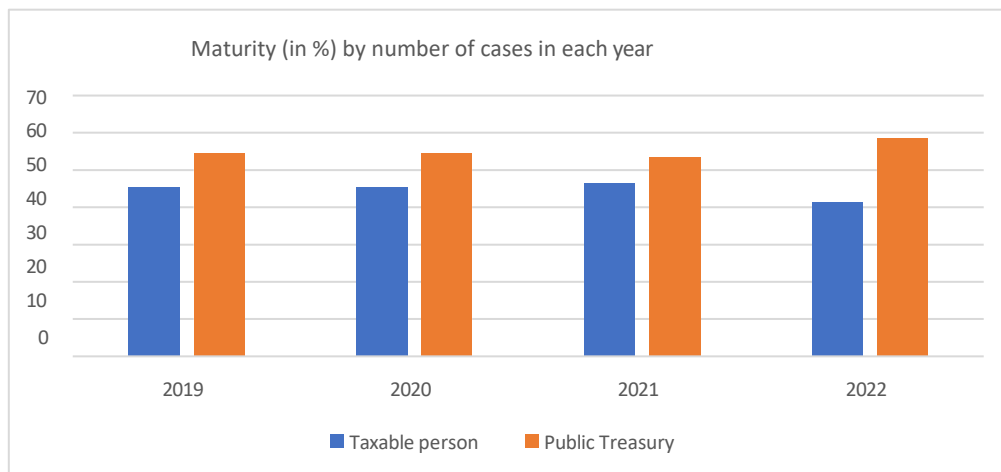
⁸² Specifically: (i) by number of cases decided: 53% (1,447 decisions) in favour of the Public Treasury, as opposed to 47% (1,290 decisions) in favour of taxpayers; (ii) by economic expression: 52% (€261,563,279.43) in favour of the Public Treasury, as opposed to 48% (€242,211,906.13) in favour of taxpayers.

- Analysing the distribution of successful cases in different value ranges, it can be seen that taxpayers only win more – both in terms of number of cases and in economic terms – in the range $\geq \text{€}500,000.00$ and $< \text{€}1,000,000.00$; while in all others, it is the Public Treasury that wins the most (i.e., in the brackets: $< \text{€}60,000$; $\geq \text{€}60,000.00$ and $< \text{€}275,000.00$; $\geq \text{€}275,000.00$ and $< \text{€}500,000.00$; $\geq \text{€}500,000.00$ and $< \text{€}1,000,000.00$).



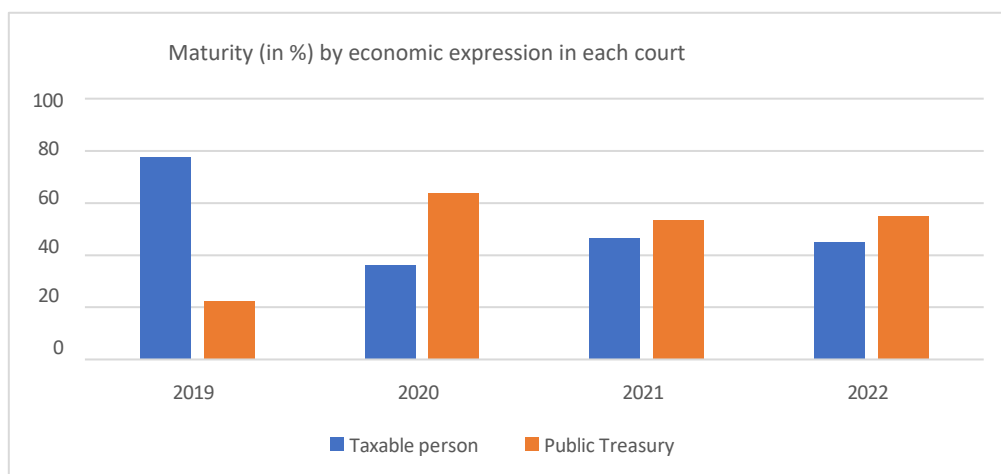
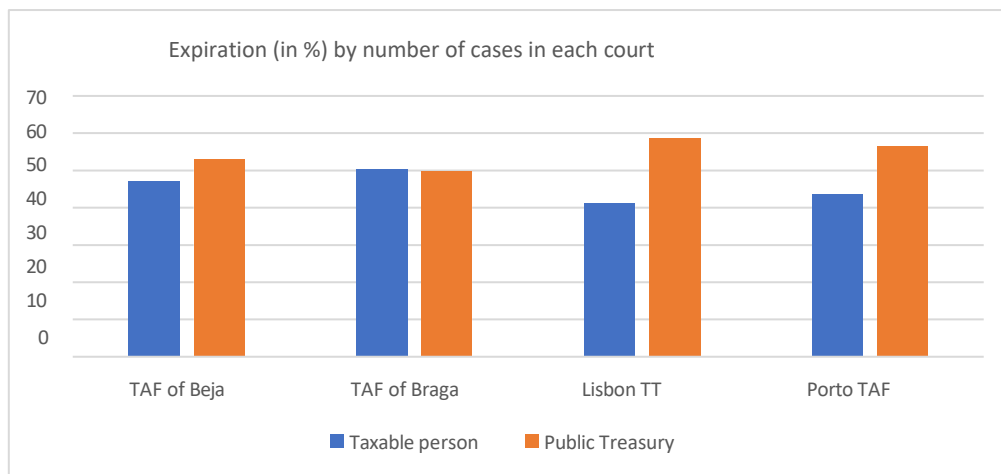
- When the analysis takes as a reference the results obtained each year in the four courts as a whole, it is clear – once again – that it is not irrelevant to consider the number or value of cases won.

- If the criterion is the number of favourable decisions, the Public Treasury wins every year, with relatively balanced results, although its advantage is accentuated in 2022.
- However, if the criterion is the economic value of the award, the results calculated each year are less balanced (especially in 2020 and 2021), with taxpayers winning in two of them (2019 and 2022) and the Public Treasury in the other two (2020 and 2021).



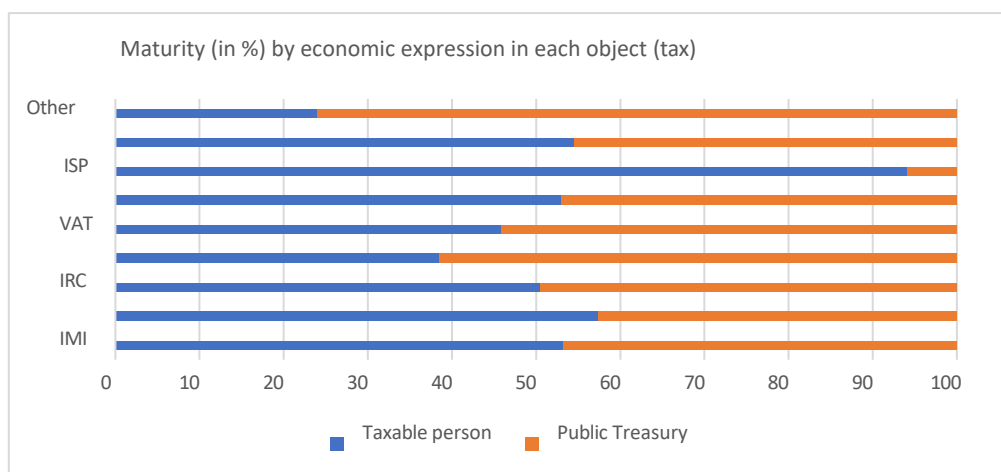
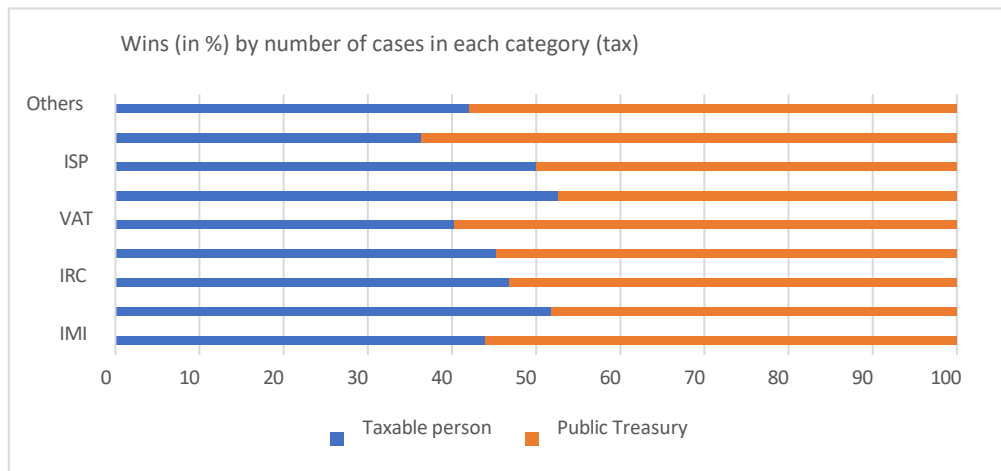
- Once the annual distribution of decisions is disregarded and attention is focused on their distribution by court (i.e., the data observed in each court throughout the reference period), the results again diverge significantly, depending on the criterion considered.

- According to the criterion of the number of cases won, it appears that only in the Administrative Court of Braga did taxpayers win in a greater number of cases, while in the others the advantage was in favour of the Public Treasury.
- However, according to the criterion of the economic expression of the win, it appears that it is in the Beja TAF that taxpayers win the most, with the Public Treasury recording the highest percentage of wins in the others.
- The discrepancy in results based on the criterion used is particularly significant in the cases of the Beja TAF (number of cases won: SP - 47.1% / FP - 52.9%; economic expression of the outcome - SP - 77.7% / FP - 22.3%) and the Braga TAF (number of cases won: SP - 50.3% / FP - 49.7%; economic expression of the outcome - SP - 37.2% / FP - 62.8%).



- In turn, considering the number of cases decided each year by the different courts, it can be seen that: in the Administrative Courts of Beja and Braga and in the Labour Court of Lisbon, in some years the taxpayers obtain higher awards and in others the Public Treasury does; this is not the case in the Administrative Court of Porto, where the Public Treasury obtains the highest number of wins every year.
- However, if the criterion is the economic value of the case won, the results change substantially: in the Administrative Court of Beja, taxpayers win more cases in all years, and in the Administrative Court of Braga, the Public Treasury wins more cases in all years; in the Administrative Court of Porto and the Labour Court of Lisbon, the preponderance changes in each year of the reference period.
- Under the criterion of the number of cases won, the results (in terms of awards) obtained by taxpayers and the Public Treasury are more balanced than under the criterion of the economic expression of the award, according to which their asymmetry is significantly accentuated, both in favour of the former and the latter (in particular, see Beja Administrative Court of Appeal from 2019-2022; Lisbon Administrative Court from 2020 and 2021; and Porto Administrative Court of Appeal from 2019 and 2020).
- Once again, it can be seen that a greater number of favourable actions is not necessarily reflected proportionally in the economic expression of this maturity, with situations even occurring in which the maturity trend is reversed, depending on the criterion considered (for example, see: TAF of Beja 2019 and 2022; TAF of Braga 2019; Lisbon Administrative Court, 2019; Porto Administrative Court of Appeal 2019 and 2022).
- Finally, when segregating the decisions handed down during the reference period (2019-2022) according to the subject matter (tax) to which they relate, there is a clear trend towards the Public Treasury winning (IMI, IRC, IRS, VAT, IUC and in the "Others" category) – when considering the criterion of the number of cases won.

- However, if the criterion of the economic expression of the outcome is taken into account, the results change significantly: in addition to greater asymmetry in the distribution of successful cases, the trend in outcomes is reversed, with taxpayers coming out on top in cases relating to IMI, IMT, IRC, IS, ISP and IUC.



- However, if we look at the distribution of successful cases by subject (tax) in each year – considering the number of cases in one direction or another or their respective economic expression – the results are even more diverse, with the highest number of favourable decisions (or their economic expression) in the four-year reference period being underpinned by a significant variation in the outcome in different years.

90. Before proceeding with the analysis of the results in “arbitration jurisdiction”, it is important to note the following: in state jurisdiction, the Public Treasury loses almost as many cases as it wins.

This point is important, since the Tax Administration benefits – in light of the interests underlying its actions – from a set of prerogatives, among which the presumption of legality (or, at least, enforceability) of the tax acts it performs and those it appropriates (as is the case, in particular, with self-assessment acts) stands out.

In general terms, the debt declared by them will be subject to collection (voluntary and coercive) even if the person to whom it is addressed does not agree and even seeks to take action (administrative or judicial) to challenge its legal compliance. Taxpayers first pay and then argue – unless, in conjunction with the use of the means of reaction, they provide a guarantee or are granted exemption from payment in the specific cases provided for by law.

91. At this point, it is important to bear in mind that some of the disputes arising from the practice of tax acts are not within the scope of this study, as they do not meet the legal requirements for submission to “arbitral jurisdiction,” as explained *above*, cf. II, 2.2.1.; others, which might meet these requirements, end up being resolved at the administrative stage, through administrative remedies; and others are not even discussed administratively or judicially, either because the taxpayers are unaware of their illegality or because they comply with them. This means that the universe of illegal tax acts will necessarily be broader than that which is evident here.

For all these reasons, it is reasonable to assume that, for an entity that benefits from a presumption of legality in its actions (under the terms and for the reasons stated), an analysis of case law reveals that the Tax Administration often engages in illegal behaviour. This behavioural tendency will legitimise the discussion about its decision-making criteria and, ultimately, about the maintenance of some of its prerogatives for action.

2.2. CAAD

92. Results calculated during the reference period (2019-2022) considered as a whole:

2019-22	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
	2030,5	67,9%	959,5	32,1%	594 084 861,2 €	58,9%	413 769 739,1 €	41,1%

93. Results calculated during the reference period (2019-2022) considered as a whole, broken down by value segment:

2019-22	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
Total <60k€	1077,5	70,1%	458,5	29,9%	23 410 002,9 €	67,0%	11 507 974,3 €	33,0%
Total >=60k€ e <275k€	548,0	68,8%	249,0	31,2%	79 772 477,3 €	67,0%	39 252 529,3 €	33,0%
Total >=275k€ e <500k€	157,5	62,0%	96,5	38,0%	62 536 900,4 €	62,0%	38 320 934,7 €	38,0%
Total >=500k€ e <1M€	125,5	63,4%	72,5	36,6%	93 499 725,5 €	63,2%	54 492 714,8 €	36,8%
Total >=1M€	122,0	59,8%	82,0	40,2%	334 865 755,1 €	55,4%	269 195 585,9 €	44,6%

94. Results calculated for each year of the reference period (2019-2022):

Ano	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
2019	437,0	60,8%	282,0	39,2%	186 595 199,45 €	56,5%	143 598 830,33 €	43,5%
2020	434,0	68,8%	197,0	31,2%	150 503 063,61 €	61,7%	93 412 224,18 €	38,3%
2021	593,0	71,9%	232,0	28,1%	129 192 331,95 €	61,4%	81 061 199,25 €	38,6%
2022	566,5	69,5%	248,5	30,5%	127 794 266,23 €	57,2%	95 697 485,34 €	42,8%

95. Results calculated by object (tax) of the actions during the reference period (2019-2022):

Objeto	Por ganho de causa				Por expressão económica do ganho de causa			
	SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
IMI	172,5	59,5%	117,5	40,5%	19 226 005,47 €	72,2%	7 405 503,38 €	27,8%
IMI	81,0	66,4%	41,0	33,6%	35 956 581,89 €	86,1%	5 795 300,65 €	13,9%
IRC	571,0	64,4%	316,0	35,6%	278 107 922,77 €	53,1%	245 593 760,28 €	46,9%
IRS	571,0	76,1%	179,0	23,9%	66 311 060,61 €	70,6%	27 631 682,89 €	29,4%
IVA	313,0	64,7%	171,0	35,3%	156 099 387,23 €	62,0%	95 639 663,31 €	38,0%
IS	100,5	68,4%	46,5	31,6%	23 295 647,65 €	59,2%	16 043 352,09 €	40,8%
ISP	2,0	40,0%	3,0	60,0%	222 909,27 €	35,6%	402 425,55 €	64,4%
IUC	26,5	52,0%	24,5	48,0%	284 368,98 €	64,6%	156 051,11 €	35,4%
Outros	193,0	76,0%	61,0	24,0%	14 580 977,37 €	49,1%	15 101 999,84 €	50,9%

96. Results calculated by object (tax) of the shares, in each year of the reference period (2019-2022):

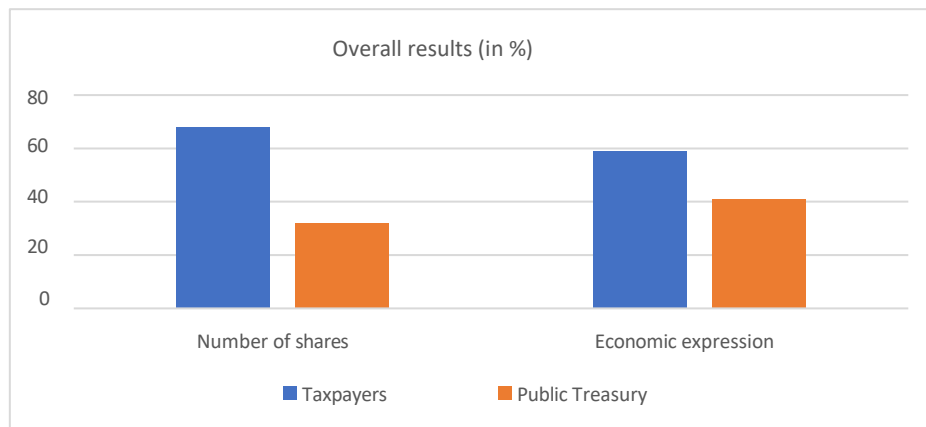
Objeto	Ano	Por ganho de causa				Por expressão económica do ganho de causa			
		SP	% - SP	FP	% - FP	€ - SP	% - € - SP	€ - FP	% - € - FP
IMI	2019	25	27,2%	67	72,8%	1 095 293,03 €	26,5%	3 045 438,35 €	73,5%
IMI	2020	23,5	65,3%	12,5	34,7%	5 627 107,92 €	94,2%	343 880,64 €	5,8%
IMI	2021	23	63,9%	13	36,1%	1 450 987,81 €	59,9%	971 983,91 €	40,1%
IMI	2022	101	80,2%	25	19,8%	11 052 616,71 €	78,4%	3 044 200,48 €	21,6%
IMT	2019	37	80,4%	9	19,6%	21 464 281,25 €	95,1%	1 103 945,85 €	4,9%
IMT	2020	17	70,8%	7	29,2%	6 480 898,65 €	95,4%	314 842,79 €	4,6%
IMT	2021	16	53,3%	14	46,7%	1 351 533,45 €	37,5%	2 252 585,59 €	62,5%
IMT	2022	11	50,0%	11	50,0%	6 659 868,54 €	75,8%	2 123 926,42 €	24,2%
IRC	2019	143,5	58,8%	100,5	41,2%	86 773 664,18 €	47,7%	95 154 322,70 €	52,3%
IRC	2020	122,5	62,8%	72,5	37,2%	63 129 709,92 €	54,5%	52 718 840,63 €	45,5%
IRC	2021	125,5	63,4%	72,5	36,6%	63 432 173,82 €	58,8%	44 463 719,54 €	41,2%
IRC	2022	179,5	71,8%	70,5	28,2%	64 772 374,86 €	54,9%	53 256 877,41 €	45,1%
IRS	2019	95,5	73,5%	34,5	26,5%	13 040 805,38 €	70,5%	5 452 801,90 €	29,5%
IRS	2020	121	75,6%	39	24,4%	20 146 523,15 €	79,8%	5 111 914,82 €	20,2%
IRS	2021	213,5	81,2%	49,5	18,8%	12 668 329,04 €	67,1%	6 214 710,89 €	32,9%
IRS	2022	141	71,6%	56	28,4%	20 455 403,03 €	65,3%	10 852 255,29 €	34,7%
IS	2019	34,5	75,0%	11,5	25,0%	6 142 403,67 €	79,6%	1 576 277,40 €	20,4%
IS	2020	21	75,0%	7	25,0%	6 463 492,53 €	71,6%	2 560 228,74 €	28,4%
IS	2021	31	73,8%	11	26,2%	8 275 860,80 €	61,5%	5 186 986,85 €	38,5%
IS	2022	14	45,2%	17	54,8%	2 413 890,65 €	26,4%	6 719 859,10 €	73,6%
ISP	2019	2	66,7%	1	33,3%	222 909,27 €	96,7%	7 514,49 €	3,3%
ISP	2020	0	0,0%	1	100,0%	0,00 €	0,0%	160 684,27 €	100,0%
ISP	2021	0	0,0%	0	0,0%	0,00 €	0,0%	0,00 €	0,0%
ISP	2022	0	0,0%	1	100,0%	0,00 €	0,0%	234 226,79 €	100,0%
IUC	2019	12	46,2%	14	53,8%	115 284,77 €	48,7%	121 404,85 €	51,3%
IUC	2020	6	66,7%	3	33,3%	41 459,53 €	78,2%	11 560,59 €	21,8%
IUC	2021	4,5	45,0%	5,5	55,0%	116 002,35 €	87,0%	17 358,14 €	13,0%
IUC	2022	4	66,7%	2	33,3%	11 622,33 €	67,0%	5 727,54 €	33,0%
IVA	2019	80,5	68,8%	36,5	31,2%	54 111 678,18 €	60,4%	35 420 837,24 €	39,6%
IVA	2020	88	67,7%	42	32,3%	47 960 605,53 €	63,5%	27 585 338,40 €	36,5%
IVA	2021	85,5	63,8%	48,5	36,2%	37 446 333,55 €	66,8%	18 643 774,49 €	33,2%
IVA	2022	59	57,3%	44	42,7%	16 580 769,96 €	54,2%	13 989 713,19 €	45,8%
Outros	2019	7	46,7%	8	53,3%	3 628 879,72 €	67,9%	1 716 287,56 €	32,1%
Outros	2020	35	72,9%	13	27,1%	653 266,38 €	12,4%	4 604 933,30 €	87,6%
Outros	2021	94	83,9%	18	16,1%	4 451 111,13 €	57,4%	3 310 079,85 €	42,6%
Outros	2022	57	72,2%	22	27,8%	5 847 720,14 €	51,7%	5 470 699,13 €	48,3%

97. The systematisation of the data collected in light of the above criteria allows us to observe that:

— From an overall perspective and considering the number of actions decided (respectively) in favour of taxpayers and the Public Treasury, the former have an advantage over the latter. The former won 67.9% of the actions (2,030 decisions), as opposed to 32.1% (959.5 decisions) won by the Public Treasury.

If the focus is not on the cases won per se, but on the economic expression they represent, the aforementioned trend of taxpayers winning cases remains, albeit less pronounced: 58.9% (€594,084,861.2), compared to 41.1% (€413,769,731.1) won by the Treasury.

- Regardless of the criteria used, there is an advantage for taxpayers, although significantly less pronounced when the criterion used is the economic expression of the outcome of the case.



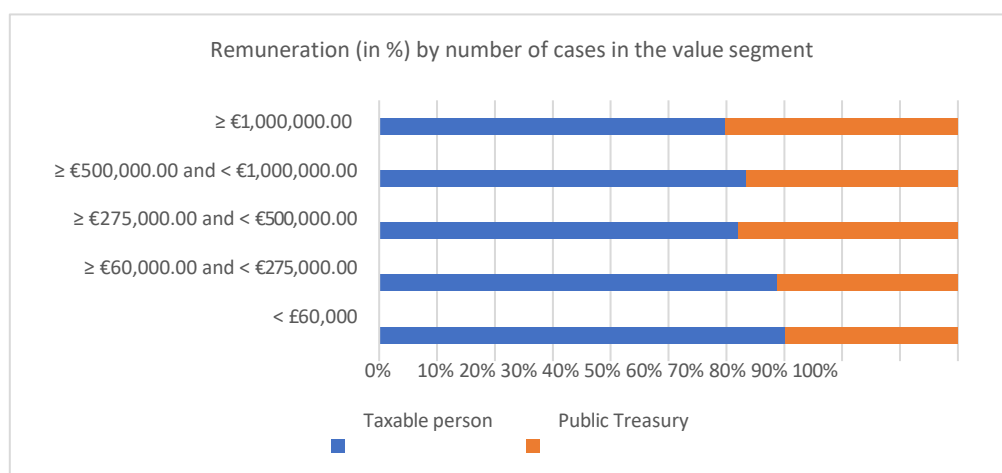
- Analysing the distribution of successful cases across different value ranges, it can be seen that taxpayers win more in all of them – both in terms of number of cases and their economic expression – However, it can be observed that their winnings are significantly less significant in the segment consisting of cases with a value equal to or greater than €1,000,000.00.
- In fact, there is a tendency for the percentage of wins (both in terms of number of cases won and their economic value) to decrease as the value of the cases increases.
- The advantage of the taxable persons is clearly more significant in the two lower value brackets, at around 70% (criterion of number of actions) / 67% (economic value criterion); it decreases in the two intermediate brackets, around 63% (in both criteria); and it also decreases in the highest value bracket, around 60% (number of actions criterion) / 55% (economic value criterion).
- This means that, despite the advantage they enjoy in all value segments, the percentage of taxpayers varies downward as the value of the shares

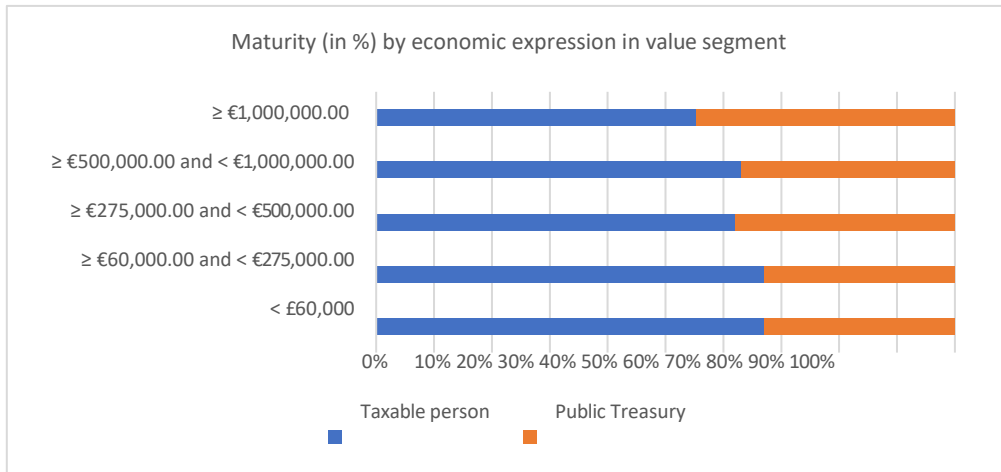
increases: between maximums of 70.1% (number of shares criterion) / 67.0% (economic expression criterion) in

cases of value less than €60,000.00; and minimums of 59.8% (number of shares criterion) and 54.4% (economic expression criterion) economic expression criterion), in cases with a value equal to or greater than €1,000,000.00.

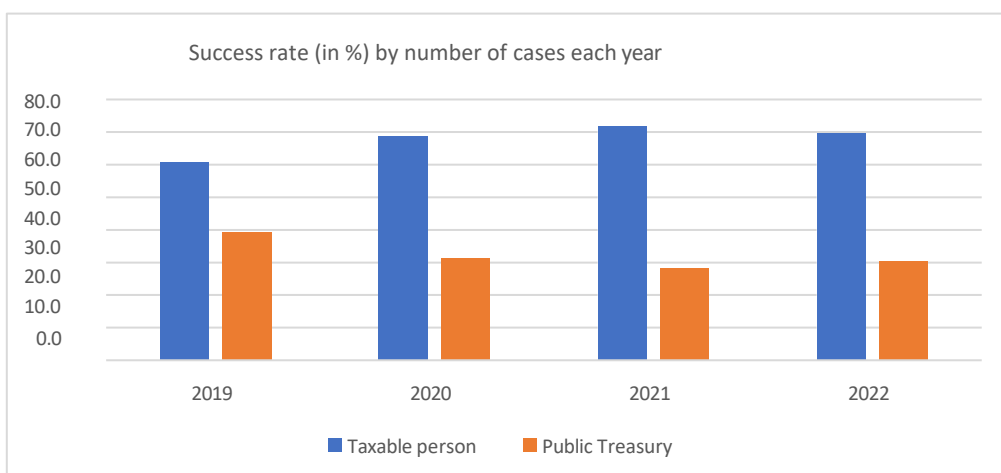
Looking at the distribution of winnings in different value ranges, it can be seen that taxpayers win more in all of them – both in terms of number of cases and their economic expression – although it can be observed that their winnings are significantly less significant in the segment consisting of cases with a value equal to or greater than €1,000,000.00

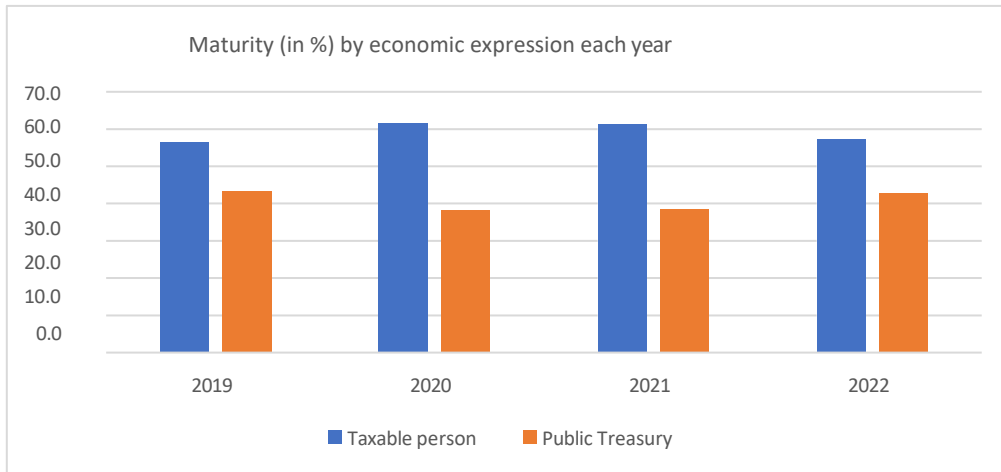
— At this point, it is worth considering that in the bracket consisting of shares with a value equal to or greater than €1,000,000.00, in which there was a greater balance in the distribution of wins, a total of €604,061,341.03, while the sum of the value of the shares included in the remaining brackets totalled €402,793,259.31.



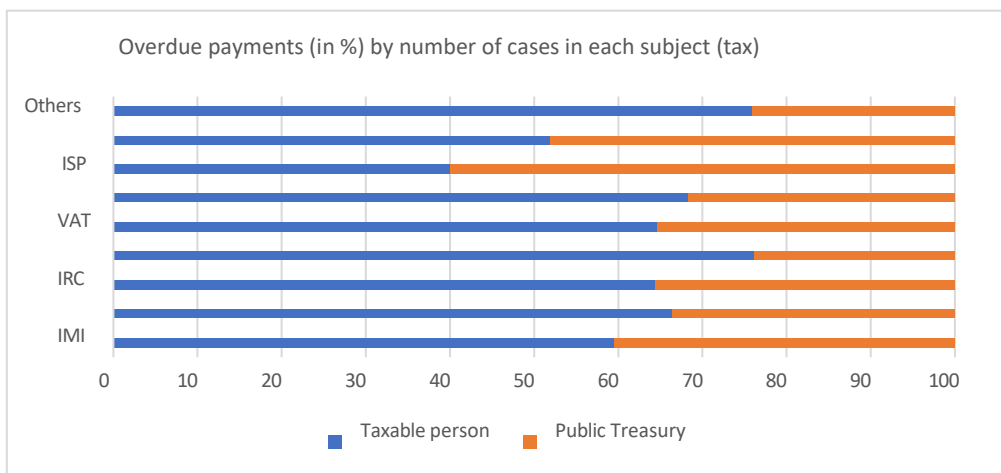


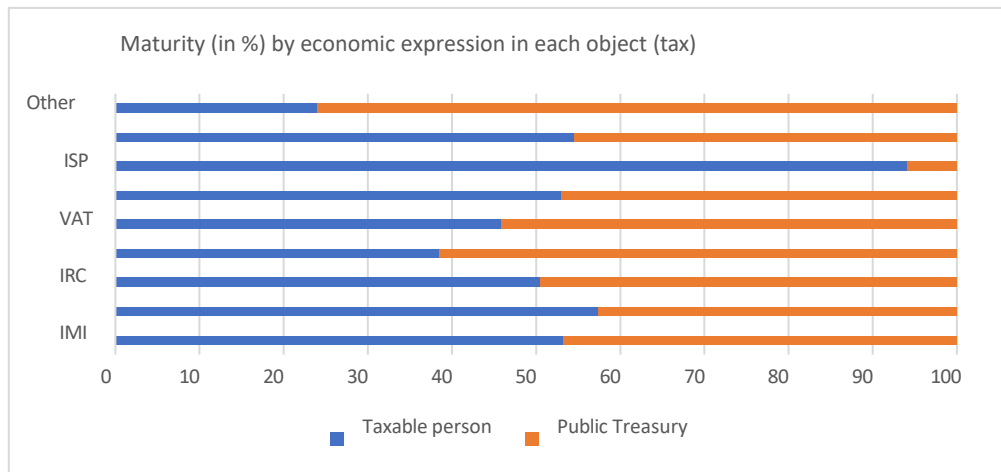
- When the analysis takes as a reference the results calculated for each year of the reference period (2019-2022), there is a higher number of cases won by taxpayers in all of them, although it is important to consider the number or economic value of the cases won, given the variation in results recorded according to one criterion or another.
- According to the criterion of the number of cases, the success rate of taxpayers is clearly more significant: although in 2019 it stands at 60.8%, in the following years it rises to 68.8%, 71.9% and 69.5%, respectively.
- However, according to the criterion of the economic value of successful cases, the success rate of taxpayers is, after all, more modest, at 56.5%, 61.7%, 61.4% and 57.2%.





— Finally, by segregating the decisions handed down during the reference period (2019-2022) according to the object (tax) to which they relate, there is a clear trend towards taxable persons winning cases in the different taxes (regardless of the criterion used), which is only reversed in the ISP and in the "Others" category (although, in the latter case, only when considering the criterion of the economic expression of the overdue amount).





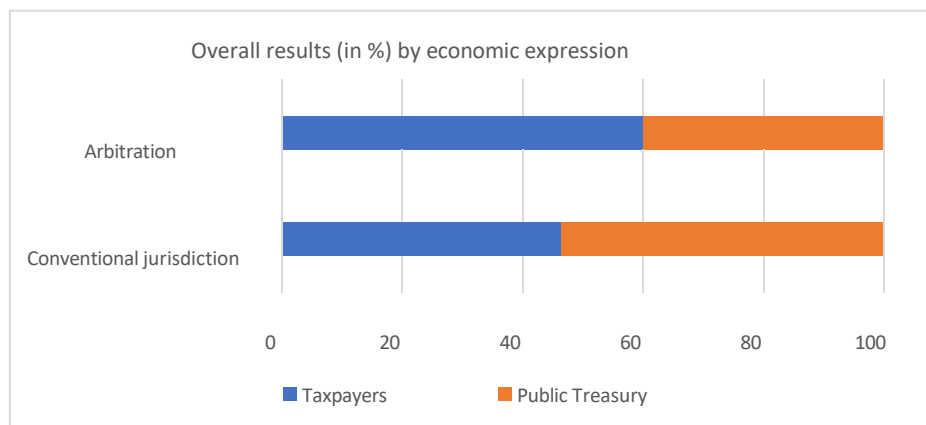
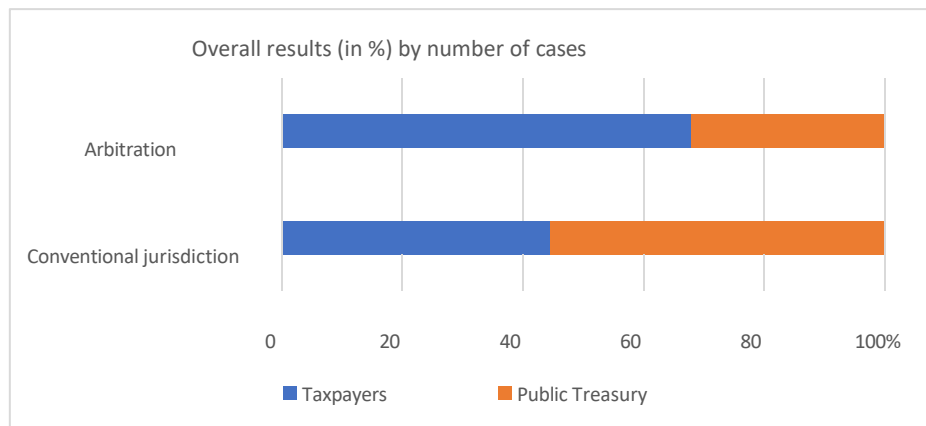
- However, if we look at the distribution of successful cases by subject (tax) in each year – considering the number of cases in one direction or another or their respective economic expression – the results will be slightly more diverse, with occasional situations in which the higher number of favourable decisions (or their economic expression) over the four-year reference period masks a variation in the amount due for each tax in different years.

2.3. Comparative relationship

Systematising and comparing the results obtained in the state jurisdiction and in the arbitration jurisdiction:

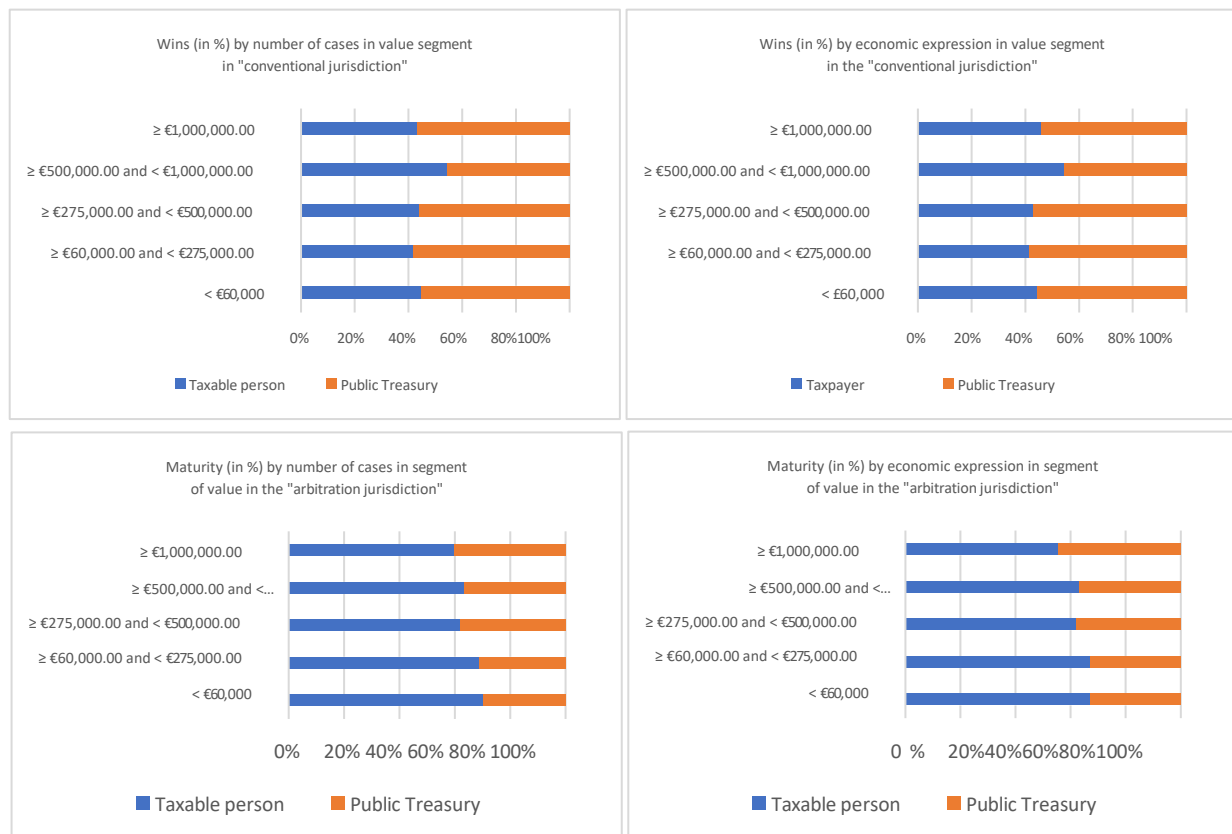
- Overall – therefore, during the reference period (2019-2022) – it can be seen that in the “state jurisdiction” the distribution of successful cases is more balanced, favouring the Public Treasury, while in the “arbitration jurisdiction” the results are more asymmetrical, with a greater preponderance of wins for taxpayers.
- In “state jurisdiction”, the percentage of cases won by the Public Treasury was 55.5% (corresponding to 1606 decisions), against 44.5% for taxpayers (1606); and, according to the criteria of the economic expression, the winning percentage was of 54.0% (€285,261,835.80), compared to 46.0% of taxpayers (€242,641,340.38);

- In the "arbitration jurisdiction", the percentage of taxable persons' claims was 67.9% (2030.5 decisions), compared to 32.1% (959.5 decisions); and, according to the economic expression criterion, 58.9% (€594,084,861.2), compared to 41.1% of taxpayers (€413,769,739.1).



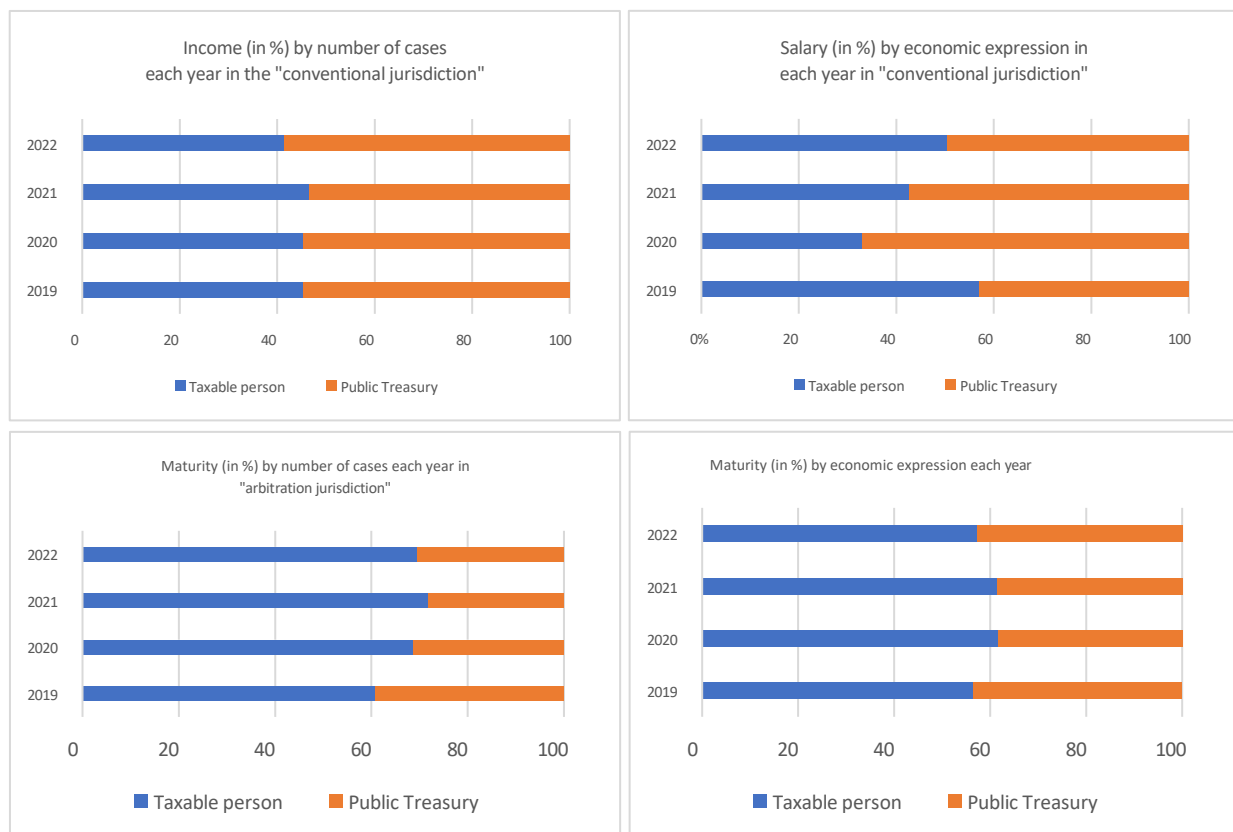
- It should be noted that in “state jurisdiction”, an individual analysis of the results obtained in each court shows that in some of them there is no tendency for the Public Treasury to win – in fact, according to the criterion of number of cases, taxpayers won more in the TAF of Braga; and, according to the criterion of economic expression, they won more in the TAF of Beja.

- Analysing the distribution of successful cases in different value ranges, it can be seen that (regardless of the criterion used) in "state jurisdiction" the distribution of successful cases mostly favours the Public Treasury, with relatively stable percentages; while in "arbitration jurisdiction" taxpayers win in all of them, with the percentage difference being more significant in lower-value cases, gradually decreasing as the value of the cases increases.



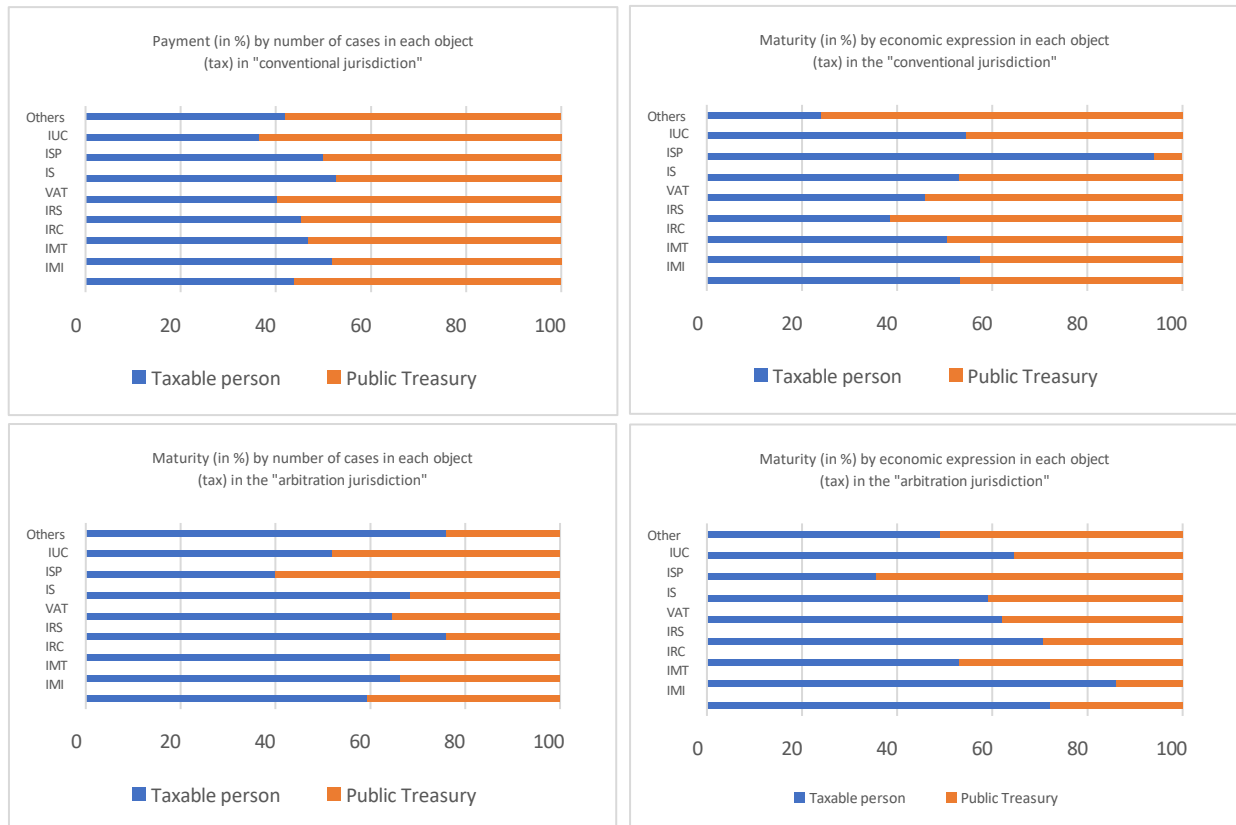
- When the analysis takes as a reference the results calculated for each year of the reference period (2019-2022), it can be seen that in the "state jurisdiction" the distribution of successful cases varies significantly depending on the criterion used: considering the number of favourable cases, the Public Treasury wins in all years, with relatively balanced results; on the other hand, considering the economic expression of the victories, it can be seen a greater imbalance in results (especially in 2020 and 2021), with taxpayers winning more in two of them (2019 and 2020) and the Public Treasury in the other two (2020 and 2021).

- In "arbitration jurisdiction", on the other hand, taxpayers win more cases in all years of the reference period (2019-2022), although the criterion used is not irrelevant, given the variation in results recorded: according to the criterion of the number of actions, the amount owed by taxpayers is more significant (although in 2019 it stands at 60.8%, in the following years it rises to 68.8%, 71.9% and 69.5%, respectively); according to the criterion of economic expression, the maturity of taxable persons is more modest (56.5%, 61.7%, 61.4% and 57.2%).



- Segregating the decisions handed down during the reference period (2019-2022) according to the subject matter (tax) to which they relate, in "state jurisdiction" there is a clear trend towards the Public Treasury winning Public Treasury (IMI, IRC, IRS, VAT, IUC and in the "Others" category) when the criterion of the number of lawsuits is assumed; however, according to the criterion of economic expression, in addition to greater asymmetry in the distribution of successful cases, the winning trend is reversed, with taxpayers coming out on top in cases relating to IMI, IMT, IRC, IS, ISP and IUC.

- In turn, in “arbitration jurisdiction”, there is a clear trend for taxpayers to win in the different taxes (regardless of the criterion used), which is only reversed in ISP and in the “Others” category (although, in the latter case, only when considering the criterion of economic expression of the outcome).



- However, if we look at the distribution of successful cases by subject (tax) in each year – considering the number of cases in one direction or another or their respective economic expression – the results are very diverse in “state jurisdiction”, noting that the

highest number of favourable decisions (or respective economic expression) of the Public Treasury in the four years of the reference period hides a variation in the outcome in different courts and in different years.

- This trend is less pronounced in "arbitration jurisdiction", although there are isolated situations in which the higher number of favourable decisions (or their economic expression) over the four-year reference period hides a variation in the amount due for each tax in different years.

98. As we have had occasion to point out, we are operating in the context of a mass (tax) procedure, which is largely based on the practice of acts (mainly settlement) whose grounds and characteristics are repeated, either because they correspond to computerised and standardised acts (and are therefore pre-programmed in a certain way), or because the terms of their practice are vertically defined through generic guidelines, which the decision-making bodies cannot deviate from.

Consequently, the illegalities committed also tend to be repeated.

99. As can be understood, once a given understanding is consolidated, the aforementioned repetition of illegality tends to be projected at the jurisdictional level – whether in state or arbitration jurisdiction – through the repetition of grounds and decision-making meanings that are relatively similar to those of previous decisions; and the exercise of the power to revoke illegal acts by the Tax Administration during the jurisdictional discussion itself (with the consequent dismissal of the case).

Relatively frequently, certain "issues" become the focus of litigation, giving rise to strong demand for tax arbitration by taxpayers, in view of the assessment of relatively homogeneous settlement acts with the same grounds for illegality.

The consolidation of a certain decision-making approach to these issues – especially following the intervention of decision-making bodies such as the Central Administrative Courts, the STA or the CJEU – ultimately leads to a concerted decision-making approach, characterised by the unidirectional reproduction of the approach previously established in pending cases.

100. The effects of this ‘massification of judgments’ on the distribution of revenue between taxpayers and the Public Treasury will (certainly) not be negligible, especially in the context of a decision-making body characterised by particularly swift decision-making, as is the case with tax arbitration.

Consider, for example, cases relating to discussions on: the environmental component of the ISV (Vehicle Tax); the VPT (Taxable Value) of land for construction, in the IMI (Municipal Property Tax); the taxation of non-residents’ property gains in the IRS (Personal Income Tax); the taxation of dividends paid to collective investment undertakings based in another Member State in the IRC (Corporate Income Tax); the IMT and Stamp Duty exemptions provided for in the special regime for real estate investment funds and companies for residential rentals; or the IMT exemption for real estate investment funds (Decree-Law No. 1/87 of 3 January). In all these cases, the consolidated decision determined that the actions of the Tax Administration were unlawful – and, therefore, the contested assessment notices were also unlawful.

101. During the reference period, the CAAD’s intervention in such disputes consisted essentially of monitoring and reproducing the prevailing case law. In this regard, it should be borne in mind that:

- a. A significant portion of arbitral decisions ultimately consist of verifying the existence of factual and legal similarities with cases previously decided by certain courts, following the respective decisions unfavourable to the Public Treasury.
- b. In other cases, arbitral decisions are based on the ‘approval’ of administrative revocation (annulment) decisions by the Tax and Customs Authority, after the court has been constituted.

According to information obtained from the CAAD, this type of decision accounted for approximately 23.4% (i.e., approximately $\frac{1}{4}$) of the total decisions handed down in the reference period (2019-2022). It is therefore clear that the impact of such decisions on the distribution of successful cases is not negligible.

Once again, based on information collected from the CAAD, it appears that if the decisions falling into the two above-mentioned categories were excluded, the distribution of successful claims in arbitral decisions would be more balanced: according to the criterion of the number of actions, 61.9% would be favourable to the

Looking at the information obtained from the CAAD, it appears that if the decisions confirming the understandings of state jurisdictions and "ratify" the meaning of annulment decisions issued by the AT, the distribution of successful outcomes in arbitral decisions would be more balanced: according to the criterion of the number of actions, 61.9% would be favourable to taxpayers and 38.1% to the Treasury ; and according to the criterion of economic expression, 56.3% in favour of taxpayers and 43.7% in favour of the Treasury.

subjects taxpayers and 38.1% to the Public Treasury; and according to the criterion of economic expression, 56.3% in favour of taxpayers and 43.7% in favour of the Public Treasury.

Although moving outside the reference period, it is interesting to note that the (partial) data provided by CAAD regarding the distribution of decisions in tax arbitration in 2023 point to a greater balance in the distribution of decisions. Specifically: according to the criterion of the number of decisions, 62.5% are favourable to taxpayers and 37.5% to the Public Treasury; and according to the criterion of economic expression, 49.5% are favourable to taxpayers and 50.5% to the Public Treasury.

It is acknowledged that this may be the consequence of the fact that the aforementioned "issues" are no longer under discussion in the arbitration courts, considering, in particular, the correctness of the Tax Administration's actions in such situations; and that they have not been "renewed" with the emergence of others of a similar nature.

3. Conclusions

102. The above data allow us to draw the following main conclusions:

- (i) A study comparing the decisions handed down by tax arbitration tribunals under the CAAD in tax matters with those of the administrative and tax courts should focus on the decisions handed down by the latter at first instance, because this is also the nature of the CAAD's intervention.
- (ii) Furthermore, it should only cover actions which, although submitted to the 'state jurisdiction', could (alternatively) have been brought before the arbitration tribunals.
- (iii) The greater number of cases won is not necessarily reflected proportionally in the economic expression of the outcome, so the criterion of victory adopted ultimately has a significant influence on the analysis.
- (iv) Overall, the Public Treasury wins more in "state jurisdiction" and taxpayers win more in "arbitration jurisdiction".

In "state jurisdiction", there is a certain balance in the distribution of wins, with an advantage for the Public Treasury (both in terms of the number of cases and their economic expression), even though taxpayers have won more cases in the Braga Administrative Court (without this determining a greater economic expression of the outcome) and in terms of economic expression in the TAF of Beja (although not supported by a greater number of cases won).

- (v) In "arbitration jurisdiction", the distribution of wins is generally more asymmetrical, with an advantage for taxpayers, although more significant in terms of the number of cases than in terms of their economic value.
- (vi) Breaking down the amount by different value ranges, in "state jurisdiction" its distribution is relatively constant, with a prevalence of the Public Treasury in the different ranges, only reversed in cases with a value $\geq 500,000.00$ € and $< 1,000,000.00$ €.
- (vii) In "arbitration jurisdiction", taxpayers prevail in all value segments, with the percentage difference being more significant in lower value cases, gradually decreasing as the value of the cases increases.
- (viii) In cases with a value greater than €1,000,000.00, the distribution of wins between the Public Treasury and taxpayers is balanced (with a slight advantage for the former), especially when considering the respective economic expression.
- (ix) Considering the distribution of the amount due each year in the "state jurisdiction", it can be seen that the balance of results that emerge in favour of the Public Treasury according to the criterion of the number of cases is counteracted by the asymmetry in the distribution of their economic expression - in 2020 and 2021, the Public Treasury wins more; in 2019 and 2020, taxpayers win more.
- (x) In "arbitration jurisdiction", taxpayers win more cases in all years of the reference period, which is more significant in terms of the number of cases and more modest in terms of their economic expression.

- (xi) Segregating the decisions handed down in "state jurisdiction" according to their respective object (tax), it can be seen that the Public Treasury wins more if the criterion is the number of cases (IMI, IRC, IRS, VAT, IUC and in the "Others" category), but that this trend is reversed in favour of taxpayers if the criterion of economic expression is considered (IMI, IMT, IRC, IS, ISP and IUC).
- (xii) In "arbitration jurisdiction", there is a clear trend for taxpayers to win in the different taxes (regardless of the criterion used).
- (xiii) If we look at the distribution of successful cases by subject (tax) in each year, the results are very diverse in "state jurisdiction", noting that the higher number of favourable decisions (or respective economic expression) of the Public Treasury in the 4 years of the reference period hides a variation in the outcome in different courts and in different years, a trend that is also observed, albeit less pronounced, in "arbitration jurisdiction".
- (xiv) It is important to consider that a study that seeks to compare the decisions of the tax courts of first instance and tax arbitration will always be conditioned by various circumstances arising from the characteristics and circumstances of each of these dispute resolution channels.
- (xv) The results obtained from the objective analysis should therefore be properly contextualised and understood, particularly in light of various circumstances, such as: (i) the different areas of application of these dispute resolution channels.
 (ii) the "screening" effect resulting from the greater speed of arbitral decisions and the fact that they are public knowledge (encouraging and discouraging litigation in matters that may be decided in favour of or against the parties concerned);
 (iii) the "screening" effect resulting from the existence and activation of administrative appeals; and (iv) the mass nature of the production of tax acts and, thus, of the illegalities committed.

- (xvi) With regard to this last point – the occurrence of situations of repetition (massification) of illegal acts, and thus of the judgements of legal (non)compliance that end up being produced on them – it should be noted that a large part of tax arbitration decisions (23.4% in the reference period) consist of: (i) verification of the existence of factual and legal similarities with cases previously decided by certain courts, following the respective decisions unfavourable to the Public Treasury; and (ii) the "approval" of administrative revocation (annulment) decisions by the AT, after the court has been constituted.
- (xvii) If decisions falling into these two categories are excluded, there is a greater balance in the distribution of payments between taxpayers and the Public Treasury.
- (xviii) This balance could be even greater if we consider the data collected by the OECD (Tax Administration) on the final decisions of state tax courts in 2021, which point to a success rate for the Public Treasury of only 43.6%.
- (xix) For an entity that benefits from a presumption of legality in its actions, the Treasury's success rate is modest, both in "state jurisdiction" and in "arbitration jurisdiction" (in fact, more pronounced in the latter), an aspect that will certainly legitimise the discussion about its mode of operation, without prejudice to the adaptations that have been made in terms of internal guidelines in line with jurisdictional decisions, as already mentioned.

V. QUALITATIVE ASSESSMENT OF TAX ARBITRATION



1. Background

103. With regard to *the qualitative assessment of tax arbitration*, there are several aspects that contribute to an assessment of the relevance of tax arbitration – whether in *terms of the national legal system* and its relationship with the democratic legislator, with state jurisdiction and with the tax administration; or in *terms of the legal order of the European Union*, particularly in its relationship with the CJEU and with the projection of the interpretation (or validity) of European Union law in the national legal order.

104. Within the national legal system, the CAAD's activities have been particularly relevant at three main levels: (i) contribution to changes in legislation as a result of decisions by tax arbitration tribunals within the CAAD; (ii) changes to the legal basis for the AT's activities and the impact on its activities; (iii) impact on future decisions by administrative and tax courts.

105. At the level of the European Union legal order, the activity of the CAAD, in its tax arbitration aspect, has been particularly relevant at three main levels: (i) promoting the Court of Justice's clarification of the concept of national court for the purposes of applying (current) Article 267 TFEU with regard to arbitration tribunals; (ii) regular recourse to the preliminary ruling procedure and consequent contribution to promoting the interpretation of Union law by the CJEU in the substantive areas covered by the Union's powers and relevant to the resolution of tax disputes falling within the jurisdiction of the CAAD; (iii) Consequently, facilitating the indirect disclosure of the non-conformity between Union law and national law and its projection in the national legal system by virtue of the principle of primacy, namely in the amendment of national law whose non-conformity with Union law implicitly results from a preliminary ruling handed down by the CJEU.

106. It is important to highlight, prior to the subsequent analysis of the aforementioned analysis plans, seven *points* regarding the relevance of tax arbitration case law within the scope of the CAAD in the areas indicated:

- (i) Firstly, given the overlap of jurisdiction *ratione materiae* between tax arbitration tribunals within the scope of the CAAD and the competent state jurisdiction, as defined in the RJAT, any analysis of tax arbitration case law must bear in mind, as mentioned *above*, that this represents only one part of a more comprehensive system of (administrative and/or judicial) dispute resolution system in tax matters, in which the competent state jurisdiction (administrative and tax jurisdiction) also participates – and also the Tax Administration itself, namely by adapting its internal actions in light of the jurisdictional (arbitral and/or judicial) decisions handed down, by acting as a party in contentious proceedings, or by promoting legislative changes with the legislature.
- (ii) Secondly, in matters that can be heard indiscriminately by the competent state jurisdiction and by the tax arbitration jurisdiction within the scope of the CAAD, it is not possible to determine, from the outset, the exact reasons underlying the plaintiff/challenger's choice of one or the other. It is admitted that these reasons will not be unrelated to considerations relating to the meaning of previous case law on a specific issue in dispute, combined with economic considerations that determine a choice between a faster resolution of the dispute in the arbitral jurisdiction (namely a new issue arising from a new law or its amendment) or a slower resolution (due to the average duration of proceedings in the state courts and the various levels of appeal in the state courts) but where there is a strong expectation of a favourable decision. Such motivations, if disregarded, may lead to a biased interpretation of the relevance of tax arbitration case law in comparison with the case law of the competent state courts, to the extent that such a comparison is possible.

- (iii) Thirdly, in the context of the appealability of tax arbitration decisions within the CAAD, the relevance of the legislative amendment introduced in the RJAT in 2019 to extend the appealability of these decisions to the STA – which, it is admitted, may have contributed to some loss of relevance of the constitutionality appeal.
- (iv) Fourthly, it is not only the quantitative aspect of the relevance of tax arbitration case law that is important, but also its qualitative aspect – admitting that there may be an evolution in the nature of the issues submitted to it: an evolution towards the diversification of controversial legal issues to the detriment of repeated or repetitive issues.
- (v) Fifthly, and taking into account the first of the points mentioned above, with regard to the importance that tax arbitration case law may have in terms of the legislator amending the law, this importance does not detract from the relevance that the case law of the State courts (administrative and tax courts or tax courts) – and also that of the Constitutional Court – may also have in this regard; this means that it is not possible to assert, without further ado, that tax arbitration case law is the sole *conditio sine qua non* for legislative changes carried out by the Republic's legislature.
- (vi) Sixthly, with regard to the importance of tax arbitration case law, particularly with regard to the referral of preliminary questions and the identification of constitutionality issues, as well as new issues concerning the interpretation and application of legislation in the tax field, one cannot fail to consider the implicit relevance of the principle of the request and the delimitation of the subject matter of the proceedings by the parties.

- (vii) Seventh, the average time for a decision in tax arbitration within the scope of the CAAD – necessarily shorter than the corresponding average time for a decision in state courts, as seen above, IV – may contribute, it is admitted, to the relevance of this jurisdiction in deciding new legal issues arising from the introduction of new legislation or its modification in tax matters, with the corresponding translation in its statistics in shorter time periods.

2. Analysis

2.1. At the level of the European Union legal order

107. As mentioned above, one of the relevant aspects of assessing the relevance of tax arbitration within the scope of the CAAD was to enable the Court of Justice, when assessing admissibility, to clarify *the concept of a national court or tribunal* for the purposes of applying (current) Article 267 TFEU with regard to tax arbitration tribunals.

In fact, although the CJ had previously dealt with the concept of a national court or tribunal for the purposes of using the litigation procedure provided for in Article 267 TFEU in relation to the Portuguese tax arbitration tribunal ⁽⁸³⁾ – it was a pioneering move for a tax arbitration tribunal within the scope of the CAAD to refer a question for a preliminary ruling on the interpretation (of directive provisions), prompting the Court of Justice to rule on whether the tax arbitration tribunal in question should be considered a national court for the purposes of Article 267 ⁽⁸⁴⁾.

⁸³ Order of the CJ of 13.2.2014, *Merck Canada*, C- 555/13, ECLI:EU:C:2014:92, cit., paras. 15-25 (*supra*, III).

⁸⁴ Judgment of the CJEU of 12.6.2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, ECLI:EU:C:2014:1754, cit., paragraphs 22 to 34.

In its judgment, the CJEU concluded that the Tax Arbitration Court, within the scope of the CAAD, which referred the question for a preliminary ruling, ‘has all the elements necessary to be classified as a court or tribunal of a Member State for the purposes of Article 267 TFEU’. ⁽⁸⁵⁾ In particular the elements relating to its permanence as part of the system for the resolution of disputes in the field of taxation and the binding nature of its jurisdiction, which, once the dispute has been submitted to tax arbitration by the taxpayer, is binding on the tax and customs authorities ⁽⁸⁶⁾.

108. With regard to the regular use of preliminary rulings by tax arbitration tribunals within the scope of the CAAD and the consequent contribution to the promotion of the interpretation of Union law by the CJEU in the material areas covered by the Union’s powers and relevant to the resolution of tax disputes falling within the jurisdiction of the CAAD, it is worth highlighting the following aspects. Firstly, as can be seen from the preliminary ruling proceedings brought by national courts in the Portuguese case ⁽⁸⁷⁾, as well as from the CAA statistical data ⁽⁸⁸⁾ mentioned (in part) in the 2021 and 2022 Annual Reports on the Functioning of Tax Arbitration ⁽⁸⁹⁾ it appears that in the period between 2011 (the year the RJAT came into force) and 2023 ⁽⁹⁰⁾ the tax arbitration tribunals within the CAAD raised a total of 39 preliminary questions to the CJEU under Article 267 TFEU ⁽⁹¹⁾ It should be

⁸⁵ *Ibid.*, para. 34.

⁸⁶ *Ibid.*, paragraphs 25-26 and 27-29.

⁸⁷ Data available at www.curia.europa.eu.

⁸⁸ Document ‘CAAD-Preliminary ruling, Statistical data 2011-2023’, dated 12 July 2023.

⁸⁹ Respectively, V. Preliminary rulings referred to the Court of Justice (CJ) of the European Union, pp. 45-47 and IV. Preliminary rulings referred to the Court of Justice (CJ) of the European Union, pp. 44-47.

⁹⁰ Reported on 12 July 2023.

⁹¹ Of the cases arising from the 39 preliminary questions referred by tax arbitration tribunals under the CAAD, *four* were cancelled from the Court of Justice’s register after the tax arbitration tribunals informed the CJ that they did not wish to maintain their requests for preliminary rulings in view of the decisions handed down by the CJ, either in the context of preliminary questions or in the context of infringement proceedings. This was the case in the following proceedings: C-196/18 (order of the President of the CJ of 1 June 2018, following the delivery of the CJ order of 17 April 2018, *Dos Santos*, C-640/17, EU:C:2018:275 – preliminary ruling requested by the Coimbra Administrative Court); C-751/18 (order of the President of the CJEU of 29 August 2019, following the delivery of the order of the CJEU of 15 July 2019, *Galeria Parque Nascente*, C-438/18, EU:C:2019:619 – case brought by a tax arbitration tribunal); C-103/20 (order of the President of the CJEU of 3 June 2021, following the delivery of the CJEU judgment of 18 March 2021, *Autoridade*

noted, therefore, that of the total of (276) preliminary questions referred by courts in Portugal between 2011 and July 2023 ⁽⁹²⁾, 39 (around 14%) were referred by tax arbitration tribunals within the scope of the CAAD ⁽⁹³⁾.

These questions raised – concerning the interpretation of EU law – relate, in substantive terms, to tax provisions – mainly Value Added Tax (VAT [18]), but also Stamp Duty (6), Personal Income Tax (IRS [5]), Corporate Income Tax (IRC [3]), Excise Duties (ISC [3]), other taxes (CSR [1] and ASSB [1] and, more recently, Vehicle Tax [ISV (2)]) – with the CJ having responded, as of 31.7.23, after deducting the (4) cancelled cases, to 28 of these questions ⁽⁹⁴⁾.

109. In terms of general assessment, the following aspects are noteworthy:

- (i) In first place, the preliminary prejudicial of interpretation raised, some of which ⁽⁹⁵⁾, focused mainly on secondary Union law but also, in some cases, on primary law;

Tax and Customs (Tax on capital gains on immovable property), C-388/19, EU:C:2021:212 – case brought by a tax arbitration court); and C-314/20 (order of the President of the CJ of 13 October 2021, following the delivery of the CJ judgment of 2 September 2021, *Commission v Portugal (Vehicle tax)*, C-169/20, EU:C:2021:679). See, regarding the latter, Press Release No. 146/2021 of the Court of Justice, concerning the judgment of 2 September 2021 delivered in the infringement proceedings against Portugal, C-169/20.

⁹² According to the data available on 31 July 2023 (www.curia.europa.eu, according to the criterion 'Origin of a preliminary ruling = Portugal').

⁹³ It should also be noted that decisions handed down within the scope of the CAAD may indirectly lead to preliminary questions being referred by state courts. This was the case in the appeal to the STA against the arbitral award of 3 November 2020 (case 279/2020-T), due to a contradiction with the arbitral award of 6 October 2020 (case 277/2020-T), in which the STA referred a question for a preliminary ruling to the CJEU (case C-420/23, *Faurécia*), regarding the interpretation of Article 7(2) of the CIS (worded as follows: "The rule laid down in Article 7(2) of the Stamp Duty Code, according to which the Stamp Duty exemption provided for short-term treasury operations is applicable when two entities resident in Portugal are involved or when the borrower is resident here (with the creditor being resident in the European Union), but is no longer applicable when the borrower (debtor) is resident in a Member State of the European Union and the lender (creditor) is resident in Portugal, is in accordance with the principles of non-discrimination and free movement of capital, as laid down in Articles 18, 63 and 65(3) of the TFEU?") - this concerns the issue of *cash pooling*. It should be noted that Article 292 of Law No. 12/2022 of 27 June (LOE for 2022) amended Article 7(2) of the CIS (see *below*, 3.3.1).

⁹⁴ The latest of which were decided by orders of the CJEU of 19 July 2023 (C-335/22 and C-416/22). Thus, as of 31 July 2023, the CJ had not yet delivered a preliminary ruling in seven cases (C-207/22, C-267/22, C-340/22, C-349/22, C-472/22, C-505/22 and C-399/22) – despite the fact that the Advocate General has already delivered his Opinion in the first two joined cases (C-207/22 and C-267/22 [and C-290/22, which corresponds to the preliminary question referred by the STA] Opinion of 19.6.2023) and in case C-340/22 (Opinion of the Advocate General of 13.7.2022). The CJEU subsequently delivered its judgment on 5 October 2023 in Case C-505/22, ECLI: EU:C:2023: 731.

⁹⁵ These repeated questions may even lead to the CJEU issuing decisions by order (Article 99 of the RPTJ). This is the case, in particular, in cases C-335/22, (order of the CJ of 19.7.2023, A. S.A./AT, ECLI:EU:C:2023:603) and C-416/22 (order of the CJ of 19.7.23, *EDP-Energias de Portugal*, ECLI:EU:C:2023:604).

- (ii) Secondly, some of the preliminary questions referred and the respective responses from the CJEU are particularly relevant from the perspective of the actions of national tax authorities;
- (iii) Thirdly, some of the preliminary questions raised indirectly revealed the non-compliance of national law with EU law – with consequences, in certain cases, in terms of the adoption of legislative amendments at the domestic level;
- (iv) Fourthly, some of the decisions handed down by the tax arbitration tribunals within the scope of the CAAD following preliminary rulings by the CJEU were challenged before the TCA – South ⁽⁹⁶⁾ or appealed to the Constitutional Court ⁽⁹⁷⁾.
- (v) Fifthly, one of the preliminary ruling proceedings initiated by a tax arbitration tribunal ⁹⁸ on VAT and the resulting preliminary ruling did influence national case law in the higher courts, leading to its amendment on the right to deduct tax and the conditions for exercising that right ⁽⁹⁹⁾.

⁹⁶ Cases Nos 282/2016-T, 425/2018-T and 564/2020-T.

⁹⁷ Cases Nos 93/2019-T, 777/2019-T and 88/2021-T.

⁹⁸ Case 3/2014-T, which gave rise to the CJEU judgment of 15 September 2016, *Barlis 06*, C-516/14 (ECLI:EU:C:2016:690), in which it ruled that: 'Article 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that invoices which only contain the words 'legal services provided from a given date to the present', such as those at issue in the main proceedings, do not, in principle, comply with the requirements laid down in paragraph 6 of that article and that invoices which only contain the words 'legal services provided to date' do not, in principle, comply with the requirements laid down in that paragraph 6 or with those laid down in paragraph 7 of that article, which is, however, for the referring court to verify. Article 178(a) of Directive 2006/112 must be interpreted as precluding national tax authorities from refusing the right to deduct value added tax on the sole ground that the taxable person has an invoice that does not meet the requirements of Article 226(6) and 7 of that directive, where those authorities have all the information necessary to verify that the substantive requirements for the exercise of that right are satisfied. See also, on the subject of tax deduction, Case 772/2015-T, which gave rise to the CJEU judgment of 7 August 2018, *TGE – Gas Engineering GmbH – Sucursal em Portugal*, Case C-16/17 (ECLI:EU:C:2018:647).

⁹⁹ In addition to these aspects, it should be noted that, with regard to the common VAT system, the preliminary ruling raised in Case 282/2016-T, which gave rise to the CJEU judgment of 22 November 2018, *MEO*, Case C-295/17 (ECLI:EU:C:2018:942), without actually revealing any non-compliance of national law with EU law, was particularly relevant for companies operating in the internal market, since the CJ interpreted Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 '(...) that the predetermined amount received by an economic operator in the event of early termination of a service contract by its customer, or for a reason attributable to the customer, which provides for a minimum period of commitment to the contract, which corresponds to the amount that that operator would have received for the remainder of that period if the contract had not been terminated, which is for the referring court to verify, is remuneration for services provided for consideration and, as such, subject to that tax.' (paragraph 57). See also, on the right to deduct tax, Case 772/2015-T, which gave rise to the CJEU judgment of 7 August 2018, C-16/17 (ECLI:EU:C:2018:647).

110. Of the preliminary questions referred to the CJEU, four concerned primary law (Article 63, alone [C-545/19] and in conjunction with Article 65, both of the TFEU [C-388/19, C-224/21 and C-647/20] – some of which are relevant in revealing the aforementioned non-compliance of national law with Union law.

111. Some of the preliminary questions raised resulted in interpretations of EU law that expressly call for action by the ‘national tax authorities’ or the ‘tax administration’ in a certain sense, positive or negative, in accordance with EU law – as was the case, respectively, in cases C-516/14 (2nd question), C-21/16 (1st question), C-21/16, C-16/17, C-211/18, C-661/18 (2nd question) and C-460/21 – an interpretation which, once incorporated into the subsequent decision of the tax arbitration tribunal that referred the question for a preliminary ruling, and which is bound by it, will also bind those state authorities, under the principle of primacy and the principle of loyal cooperation.

112. With regard to cases that explicitly revealed the non-compliance of national law with EU law, mention should be made of cases C-26/16, C-661/18 and C-756/19 (common VAT system, with reference to the provisions of Council Directive 2006/112/EC of 28 November 2006), C-388/19, C-224/21 and C-647/20 (IRS – with reference to Articles 63 and 65 TFEU), C-545/19 (IRC – with reference to Article 63 TFEU⁽¹⁰⁰⁾), C-656/21, C-335/22 and C-416/22 (IS - indirect taxes levied on the raising of capital, with reference to Directive 2008/7/EC of 12.2.2008)⁽¹⁰¹⁻¹⁰²⁾.

¹⁰⁰ Proc. 93/2019-T, concerning the issue of withholding tax on the payment of dividends to non-resident collective investment undertakings (OIC) (resident in Germany) and the free movement of capital (arbitration decisions of 9 July 2019, which raised the preliminary question, and of 17 June 2022, which decided the case after the preliminary ruling on interpretation by the CJEU of 17 March 2022 in Case 545/2019). In case 99/2029-T, on the same issue, the arbitral award rendered on 22 July 2022 already took that preliminary ruling into account.

¹⁰¹ Conversely, in some cases, the interpretation of EU law has been that it does not preclude the national legislation in question – as was the case in cases C-672/17, C-438/18, C-661/18 (1st question), C-211/18 (2nd question), C-630/19, C-837/19, C-459/21.

¹⁰² It should be noted that the non-compliance in question may also result from a preliminary ruling requested by administrative and tax courts (TAF), with implications for legislative changes. This is the case of the preliminary ruling requested by the TAF of Coimbra, which gave rise to the CJ ruling of 17 April 2018 (case C-640/2017, ECLI:EU:C:2018:275), in which the CJ stated that: ‘Article 110 TFEU must be interpreted as precluding legislation of a Member State under which the single circulation tax it establishes is levied on light passenger motor vehicles registered or recorded in that Member State without taking into account the date of the vehicle’s first registration, where that registration took place in another Member State, with the result that vehicles imported from another Member State are taxed more heavily than similar non-imported vehicles. Following the preliminary ruling by the CJEU, Article 2 of the CIUC was amended by Law No 119/2019 of 18 September (see Article 12). Moreover, on the same issue (the taxation of used cars imported from other Member States and the relevance of the date of registration of the vehicle in another Member State), in case 591/2019-T, the AT brought its understanding into line with the case law of the CJEU (under the terms then provided for in Article 68-A of the General Tax Law) – cf. arbitration decision of 20.4.2020 (cf. II, 15-19), which resulted in the partial annulment of the tax assessment challenged before the CAAD and the refund of the unduly paid tax. Although the grounds for the AT’s decision, according to the documents attached to the case file, refer to the amendment of the rules in Article 2(1)(a) and (b) of the IUC (objective incidence of the tax) by Law No 119/2019, this amendment was motivated by the aforementioned case law of the CJEU.

Such non-compliance, explicitly revealed (through interpretation of Union law to the effect that it precludes certain national legislation or regulations with specific provisions applicable to the case in question), has two main consequences by virtue of the principle of primacy: (i) the obligation to comply with the preliminary ruling on interpretation in the specific case in which the preliminary question was raised; (ii) compliance with the interpretation established by the CJEU, which is incorporated into the interpreted rule, by the State – and all State powers – in accordance with the principle of loyal cooperation, under penalty of non-compliance by the State. Without prejudice to the application of the 'sanction' of primacy – inapplicability in the contrary national rule – the amendment of national legislation is also required as a result of the positive aspect of the principle of loyal cooperation.

113. With regard to cases that revealed a discrepancy between national law and EU law, within the scope of the latter's application, and which are related to the adoption of legislative amendments in the internal order, mention should be made of the group of cases concerning the IRS (taxation of capital gains on real estate in the IRS of taxpayers not resident in national territory).

This group of cases (cases C-388/19 [case 598/2018-T], C-224/21 [case 620/2019-T] and C-647/20 [case 822/2019-T]) concerns the calculation of capital gains for IRS purposes on the sale of a property located in Portugal by a taxpayer not resident in Portugal, i.e. the taxation of non-residents (residents of a third country or another Member State of the Union, as the case may be) on capital gains on immovable property for IRS purposes – under the amendments introduced to the CIRS by Law No. 67-A/2007 of 31 December (State Budget Law [LOE] for 2018) – which added the then paragraphs 7 and 8 to Article 72 of the CIRS.

Despite this legislative amendment and the optional regime applicable to residents of another Member State of the Union or the European Economic Area, which was intended to adapt the tax rules to the case law of the courts (in the sense that non-residents could opt for taxation of capital gains on real estate under the same conditions as those applicable to residents), including by means of a preliminary ruling⁽¹⁰³⁾ it did not apply to residents in third countries.

114. Although the three preliminary questions referred did not concern an entirely new issue in the legal system, they had the merit of giving rise to preliminary rulings on interpretation which revealed non-compliance with Union law, due to a violation of Articles 63 and 65(1) ⁽¹⁰⁴⁾ of the optional scheme applicable to taxable persons resident in another Member State of the Union, introduced in 2007 (cases C-388/19, C-224/21), on the one hand; and the different regime applicable to taxable persons resident in a third country in relation to the Union to which the optional regime did not apply (case C-647/20 – Portuguese national resident in a third country), on the other.

¹⁰³ Judgment of the CJEU of 11 October 2007, *Hollmann*, C-443/06 and subsequent judgment of the STA of 16 January 2018, case 0439/06 (see the tax arbitration decision of 6 June 2020 handed down in case 846/2019-T, Point of law, no. 5 and internal case law and CJEU case law cited therein, in particular the tax arbitration decision of 16 October 2019, case 208/2019-T).

¹⁰⁴ An identical conclusion, implicit, of non-compliance between national law (CIRC) and Article 63 TFEU results from the interpretation of this article by the CJ in the *AllianzGI-Fonds AEVN* case (C-545/19).

Notwithstanding the fact that on 9 December 2020 the STA handed down a judgment standardising case law, in an appeal lodged against a decision of an arbitral tribunal within the scope of the CAAD handed down on 9 June 2020 (case 846/2019-T), pursuant to Article 25(2) of the RJAT ⁽¹⁰⁵⁾ – in the sense that national legislation constitutes a restriction on the movement of capital prohibited by Article 63 TFEU, not rectified by the amendments introduced by Law No. 67-A/2007, of 31 December ^(106_107) –, the first of the three preliminary questions was submitted to the TJ on 6 May 2019 (i.e., prior to the decision of the arbitral tribunal that gave rise to the appeal for uniformity of jurisprudence), even though the TJ's decision was handed down on 18 March 2021, after the aforementioned STA ruling.

In any case, this preliminary ruling by the CJ, as well as the other two handed down on 13 December 2021, also at the initiative of arbitral tribunals within the scope of the CAAD, had the merit of revealing the inconsistency between Union law and national law, with the force of the principle of primacy. To that extent, they contributed, albeit in part, to the legislative amendment introduced in Article 22(3) of the CIRS by Law No. 24-D/2022 of 30 December (LOE for 2023, Article 218), with effect from 1 January 2023 (Article 218) – and, previously, by Law No. 12/2022 of 27 June (LOE for 2022, Article 278).

¹⁰⁵ Proc. 075/20.6BALSB, Full Bench of the Tax Litigation Section.

¹⁰⁶ The STA ruled: “III - The provision of Article 43(2) of the CIRS, in its applicable wording, insofar as it provides for a limitation of taxation to 50% of capital gains realised only for residents in Portugal, not extending to non-residents, constitutes a restriction on capital movements, prohibited by Article 63 of the TFEU, to which the Portuguese State is bound. IV – This incompatibility of the rule with European law cannot be remedied by the optional regime introduced in Article 72 of the CIRS by Law No. 67-A/2007 of 31 December, which, moreover, is only intended for residents of another Member State of the European Union or the EEA and not for residents of third countries.” (cf. 2.2.4 Conclusions).

¹⁰⁷ See also the understanding of the Tax and Customs Authority (Binding Information, Case: 4 216/2017, with concurring order of the Deputy Director-General of the IR, dated 7 January 2019).

With these changes, non-resident taxpayers now benefit, like residents, from taxation on half of the capital gains balance. However, they are now subject to the progressive rates of Article 68 of the CIRS (and no longer benefiting from the application of the autonomous rate of 28%, the provision for which has been revoked, as has the provision allowing non-residents to opt for autonomous taxation of such income) and the obligation to declare all income obtained abroad for the purposes of determining the applicable progressive rate ⁽¹⁰⁸⁾ .

115. Still on the relationship between the preliminary questions raised in tax arbitration courts under the CAAD and legislative changes due to the non-conformity between national law and Union law, it is also worth mentioning the relevance of the most recent questions raised (C-349/22 [P700/2021-T] ⁽¹⁰⁹⁾ and P383/2022-T ⁽¹¹⁰⁾ . These may result in a (new) disclosure of non-compliance between Union law (Article 110 TFEU) and national law resulting from legislative amendments introduced in the Vehicle Tax Code motor vehicles (ISV), specifically Article 8(1)(d) as amended by Law No 75-B/2020 of 31 December, which entered into force on January 1st of 2021 ⁽¹¹¹⁾ – as follows from the wording of the preliminary ruling submitted by the tax arbitration court within the scope of the CAAD in preliminary ruling C-349/22.

¹⁰⁸ It should be noted that, in a constitutional appeal lodged under Article 70(i) of the LTC against a tax arbitration decision handed down on 19 November 2020, the Plenary Session of the Constitutional Court, in Judgment No 198/2023 (case no. 1095/2020), concluded that European Union law does not constitute an *international convention* for the purposes of the aforementioned Article 70(1)(i) of the LTC and, consequently, decided not to hear the appeal (see II. Grounds, no. 6 et seq.). As regards the projection of the guidance provided in this Judgment on appeals lodged against tax arbitration decisions relating to Article 11 of the CISV in the wording applicable at the time, see footnote (117) *below*.

¹⁰⁹ Article 110 TFEU precludes a rule of national law – contained in Article 8(1)(d) of the CISV

Article 8 of the CISV – which grants a 25% reduction in the tax levied on the introduction into consumption of motor vehicles (ISV) for light passenger vehicles that meet certain environmental criteria, remains in force and is applied, in the wording that came into force on 1 January 2021, which is more restrictive than the one previously in force, both to new national vehicles and to used vehicles from other Member States of the European Union, registered for the first time in Portugal from that date onwards, granting equal tax treatment between such vehicles, but resulting in a situation that could be considered unequal between used vehicles with the same length of use that comply with the less stringent environmental criteria previously in force but do not comply with those of the new law, depending on whether (a) they were originally sold and registered in Portugal before the date of entry into force of the new wording, in which case they will have been reduced to 25% of the tax value, which can be understood to tend to be reflected in their transaction price as used vehicles, or (b) were registered in another Member State on a date when the previous wording was in force and are introduced into consumption in Portugal after that same date, in which case they bear 100% of the tax value? (C-349/22);

¹¹⁰ Preliminary ruling referred to the CJ by arbitration decision of 23 June 2023 (corresponding to case C-399/2023, which, however, as of 30 October 2023, is not yet included in the list of preliminary rulings by Member States on the CJEU website:

¹¹¹ On the importance of tax arbitration case law within the scope of the CAAD for the legislative amendment that came into force on 1 January 2021, see 5.3 *below*.

116. Fourthly, some of the decisions handed down by the tax arbitration courts within the scope of the CAAD following preliminary rulings by the CJ were either challenged before the TCA Sul (Cases No. 282/2016-T, No. 425/2018-T and No. 564/2020-T) or appealed to the Constitutional Court (Cases No. 777/2019-T and No. 88/2021-T).

Such challenges to the TCA (Article 27 of the RJAT), on the one hand, and appeals to the TC (Article 70(1)(a) and (b), as applicable, of Law No. 28/82 of 15 November [LTC], and Article 25(1) of the RJAT), on the other hand, neither detracts from the aforementioned relevance of tax arbitration case law with regard to the initiative to refer questions for a preliminary ruling, nor does it prejudice the effect of the preliminary ruling handed down by the CJ, either in terms of the inapplicability of contrary national law or in terms of (positive and negative) of the principle of loyal cooperation – with the limitation, as far as the Constitutional Court is concerned, arising from the second part of Article 8(4) of the Constitution, as interpreted by the Constitutional Court in Judgment No. 422/20, handed down in plenary session.

The relevance of tax arbitration case law for identifying issues of constitutional non-compliance – with or without a preliminary ruling being referred to the CJEU – will be addressed in a separate point.

117. Fifthly, in the case of the interpretation of the common VAT system and the consequent preliminary ruling handed down on 15 September 2016 (*Barlis 06* case) following a request made by a tax arbitration court (case 3/2014-T), these did not fail to influence the change in national case law in the higher courts on the right to deduct tax and the conditions for its exercise, in view of the formal requirements listed in the VAT Code ^(112_113).

¹¹² Prior to the judgment of the Court of Justice in the *Barlis 06* case, the judgment of the STA of 15 April 2009 (case no. 0951/08) and the judgments of the TCA Sul of 16 December 2015 (case no. 07027/13), of 10 July 2014 (case no. 07282/14), 28 May 2013 (case no. 05786/12) and 19 May 2009 (case no. 03026/09). Subsequently, that judgment of the CJ of 15 September 2016, among others, and with express reference to it, the judgments of the TCA Sul of 13 July 2023 (case no. 553/11.BELRA) and of 1 June 2023 (case no. 455/13.3BEALM).

¹¹³ Finally, still on the subject of the common VAT system (exemption), in case 504/2018-T, which gave rise to the CJ ruling of 4 March 2021, *Frenetikexito* C-581/2019 (ECLI:EU:C:2021:167), the Court interpreted Directive 2006/112/EC (42 arbitration decisions) '(...) as meaning that, subject to verification by the referring court, a nutritional monitoring service provided by a certified and qualified professional in sports institutions, and possibly as part of plans that also include fitness and physical well-being services, constitutes a separate and independent service and is not likely to be covered by the exemption provided for in Article 132(1)(c) of that Directive.'

2.2. At the level of the national legal system

2.2.1. Constitutional case law

118. Prior to referring to the three aspects identified *above*, it is important to highlight the relevance of the case law handed down by tax arbitration tribunals in their relationship with constitutional justice – whether, in general, from the perspective of the relevance of tax arbitration case law for identifying issues of constitutional non-compliance in the context of the specific review of the constitutionality of rules carried out by arbitration tribunals; or, in particular, from the perspective of appeals for the specific review of constitutionality filed against arbitral decisions in tax matters and the consequent dismissal of such appeals and confirmation of the ruling of unconstitutionality by the Constitutional Court.

119. It should be noted, with regard to constitutionality appeals, that, from the appellants' perspective, the opening of the possibility of appealing tax arbitration decisions to the STA also due to a conflict between the appealed decision and another arbitration decision on the same fundamental issue of law (resulting from the amendment introduced by Law No. 119/2019, of 18 September), may have contributed to removing some of the practical relevance of the constitutional appeal.

Until that amendment, the latter would have been the only procedural means available to serve the purpose (at least indirectly and for the future) of resolving contradictions between arbitral decisions, albeit only with regard to issues of normative constitutionality, namely between positive and negative arbitral decisions of unconstitutionality on the same issue of normative unconstitutionality.

It should also be noted that this relevance will go hand in hand with the role of state courts, specifically administrative and tax courts, in assessing constitutionality issues in the context of concrete diffuse constitutionality review.

From the perspective of constitutionality appeals filed against arbitral decisions in tax matters within the scope of the CAAD ⁽¹¹⁴⁾, it is worth highlighting the cases of appeal and their subsequent dismissal and confirmation of the judgment of (non) unconstitutionality by the TC. In fact, there are several cases that illustrate the importance of identifying constitutionality issues in the context of tax arbitration case law and corresponding judgments of unconstitutionality - confirmed by constitutional case law, before and after the amendment of the RJAT in 2019.

Five groups of cases are worth mentioning (out of a total of 18 appeals against tax arbitration decisions within the scope of the CAAD).

120. With regard to Corporate Income Tax, reference should be made to the cases that focused on the unconstitutionality of Article 135 of Law No. 7-A/2016 of 30 March, insofar as, due to its purely interpretative nature, it determines that the rule Article 88(21), second part, of the IRC Code – a number added by Article 133 of the aforementioned Law – according to which, to the total amount resulting from autonomous taxation settled in a given year under IRC, the amounts paid as special payments on account in that same year cannot be deducted, applies to tax years prior to 2016 (Constitutional Court Ruling No. 267/2017 [(proc. 466/16) 744/2015-T]).

¹¹⁴The 2021 and 2022 Annual Reports on the Functioning of Tax Arbitration (mentioned *above*) contain statistical data on the appeals to the Constitutional Court communicated to the CAAD in those years – a total of 173 and 72, respectively – lodged by the parties and/or the Public Prosecutor's Office (respectively, 6. Appeals and challenges communicated to the CAAD, in particular 6.2). As can be seen in the aforementioned reports, these high numbers, especially in 2021, are due to the high number of appeals related to Union law, filed by the Public Prosecutor's Office and/or the parties, in relation to ISV (61 in 2021 and 34 in 2022) and, in 2022, also IRC (18 in 2022) – cf. 2021 Report 2021, 6.2.1, and Report of 2022, 6.2.1 and 6.2.2, *in fine*).

Reference should also be made to the cases that focused on the unconstitutionality of that rule insofar as it "determines that no deductions (namely, special payments on account) may be made from the amounts of autonomous taxation that are part of the IRC collection." (Summary Decision No. 11/2018 [(proc. 41430/17) 381/2017-T]).

In both cases, the Constitutional Court ruled that the provision was unconstitutional and dismissed the appeal ⁽¹¹⁵⁾.

121. With regard to the General Stamp Duty Table (TGIS) annexed to the Stamp Duty Code (CIS), it is important to note the cases that focused on the (un)constitutionality of provision 28.1 of the TGIS, approved by Law No. 55-A/2012 of 29 October and amended by Law No. 83-C/2013, of 31 December, in the part that imposes annual taxation on the ownership of land for construction whose building, authorised or planned, is for housing, whose taxable value is equal to or greater than €1,000,000.00.

The Constitutional Court, in Judgment No. 378/2018, handed down in plenary session, ruling on an appeal lodged against Judgment No. 250/2017 of the 1st Section (Case No. 156/2016), overturned this judgment, which, in an appeal lodged against an arbitration court decision under the CAAD, had ruled that it was unconstitutional.

Following this ruling by the Plenary, the Constitutional Court, in Ruling No. 139/2019 (1st Section) [(case no. 569/16) case no. 11/2016-T] no ruled a norm unconstitutional and dismissed the appeal, confirming the contested decision that had ruled that it was not unconstitutional ⁽¹¹⁸⁾, as was the case in Judgment No. 463/2018 (3rd Section, case 142/16 brought against an arbitration decision of 20 January 2016).

¹¹⁵ Conversely, in a ruling on the unconstitutionality of a rule and the admissibility of a constitutional appeal – but without disregarding the importance of arbitral case law with regard to the assessment of issues of normative unconstitutionality in the context of specific oversight – Constitutional Court ruling no. 395/17, which (unlike the tax arbitration court within the scope of the CAAD) ruled that the provision of Article 135 of Law no. 7-A/2016 of 30 March was unconstitutional, in the normative segment that attributes an interpretative nature to Article 133 of the same law, in the part that establishes the meaning of Article 88(14) of the CIRC, under the terms of paragraph 20 of that article.

122. Also with regard to the General Stamp Duty Table annexed to the Stamp Duty Code, mention should be made of the cases that focused on the unconstitutionality of Article 154 of Law No. 7-A/2016 of 30 March, insofar as it attributes an interpretative character to the wording given by that Law to item 17.3.4 of the TGIS (Constitutional Court Judgment No. 196/2021 [(proc. 1077/19) proc. 362/2019-T]), Constitutional Court Summary Decision No. 330/2021 [(proc. 929/20) 101/2021-T] and Summary Decision of the Constitutional Court No. 331/2021 [(proc. 161/21) or in the part in which, attributing an interpretative character to the wording given by that Law to item 17.3.4 of the TGIS, it determines that the amounts charged between banking entities, prior to the entry into force of the aforementioned Law, for transactions with cards at ATMs and as a multilateral interchange fee, are covered by this item” (TC Judgment No. 869/2021 [(proc. 208/21) 127/2020-T] and Summary Decision of the TC No. 54/22 [(proc. 1310/21) 150/2020-T].

The Constitutional Court ruled that the provision was unconstitutional and dismissed the appeals, confirming the ruling of unconstitutionality.

123. Also, in relation to Stamp Duty, the following cases are worth mentioning:

i) the unconstitutionality of the provision of Article 154 of Law No. 7-A/2016, of 30 March, in the section which, attributing a purely interpretative nature to Article 7(7) of the Stamp Duty Code, added by Article 152 of the same Law, determines the applicability, in tax years prior to 2016, of the provision of the same Article 7(7), in conjunction with subparagraph e) of Article 7(1) of the aforementioned Code, as amended by Law No. 107-B/2003 of 31 December, leading to (or with the meaning that) the stamp duty exemption does not cover management fees charged by management companies to the pension funds they manage (Constitutional Court Judgment No. 92/2018 [(proc. 449/17) proc. 348/2016-T] and Constitutional Court Summary Decisions No. 53/2019 [(proc. 735/17) 667/2016-T]) and No. 161/2019 [(proc. 74/19) 224/2018-T]);

¹¹⁶ This is despite the fact that the legislator revoked the rule in Item 28.1 of the TGIS in the State Budget Law for 2017 (Law No. 42/2016, of 28 December), as will be mentioned below (*infra*, 128). Previously, with regard to the (first) version of Law No. 55-A/2012 of 29 October, Constitutional Court ruling No. 590/2015 (case 542/14) found that it was not unconstitutional – cited, incidentally, by a tax arbitration decision handed down in case 507/2015-T, which, however, decided otherwise on the constitutionality of the (second) version resulting from the amendment introduced by Law No. 83-C/2013 of 31 December – and, as regards the subsequent version, also ruling No. 568/2016 (case no. 522/16)

ii) the unconstitutionality of that rule, in the sense that the exemption covered by

those provisions does not cover the multilateral interchange fee and interbank commissions for ATM card transactions (Summary Decision of the Constitutional Court No. 665/2018 [(proc. 739/18) 496/2017-T]);

iii) The unconstitutionality of the rule contained in Articles 7(1)(e) and (7) of the CIS and Article 154 of Law No. 7-A/2016 of 30 March, in the interpretation according to which the exemption provided for in subparagraph (e) of paragraph applies only to guarantees and financial transactions directly intended for the granting of credit, within the scope of the activity carried out by the institutions and entities referred to therein, with this normative interpretation applying to tax years prior to 2016 (Summary Decision of the Constitutional Court No. 62/2019 [(proc. 1/2019) 218/2018-T] – in which the Constitutional Court ruled that the rule was unconstitutional and, consequently, dismissed the constitutional appeals.

124. Finally, with regard to exemptions from Municipal Tax on Onerous Transfer of Real Estate (IMT) and IS, mention should be made of the cases that focused on the rule arising from Article 236(2) of Law No. 83-C/2013 of 31 December, in conjunction with Article 8(16) of the legal regime applicable to real estate investment funds for residential rental (FIIAH) and real estate investment companies for residential rental (SIIAH), enshrined in Article 104 of Law No. 64-A/2008 of 31 December, as amended by the aforementioned Law No. 83-C/2013.

The Constitutional Court assessed that rule, according to which the exemptions from IMT and Stamp Duty provided for in paragraphs 7(a) and 8 of that article expire if the property acquired is sold within three years, counted from 1 January 2014 (Constitutional Court Judgment No. 175/2018 [(procs. 175/17 and 246/17) proc. 275/2016-T], Constitutional Court Judgment No. 622/2019 [(proc. 915/18) proc. 40/2018-T], Summary Decision of the Constitutional Court No. 485/2018 [(case 865/17) case 48/2017-T] and Summary Decision of the Constitutional Court No. 307/2022 [(case 403/22) 482/2020-T ⁽¹¹⁷⁾]; or, furthermore, that rule to the effect that IMT and IS are payable (due to the expiry of the respective exemptions provided for in paragraphs 7(a) and 8 of that Article 8) in relation to properties which, having been acquired by real estate investment funds for residential rental, prior to 1/1/2014, are sold before the expiry of the 3-year period (provided for in that first provision) counted from 1/1/2014, without having been the subject of a residential lease agreement (Judgment of the Constitutional Court No. 489/2018 [(proc. 1014/16) proc. 64/2016 -T].

¹¹⁷ This Summary Decision only concerns the exemption provided for in the aforementioned Article 8(7)(a).

In these rulings, the Constitutional Court deemed the rule unconstitutional and, consequently, dismissed the appeals (although, in the case of ruling no. 489/2018, based on a different parameter).

2.2.2. Legislative changes

125. With regard, first, to the first aspect identified of legislative changes due to the direct and/or indirect effect of arbitral awards in tax arbitration within the scope of the CAAD (alone or in conjunction with the effect of judicial decisions of the same meaning), mention should be made, first of all, the cases of the Single Circulation Tax (IUC) and Item 28 of the General Stamp Duty Table ⁽¹¹⁸⁾. More recently, the cases of the Vehicle Tax (ISV) are also worth mentioning, also in relation to the preliminary ruling process and its use by tax arbitration tribunals.

126. In the case of the Single Tax on Vehicle Circulation, is an example of repetitive proceedings within the scope of CAAD ⁽¹¹⁹⁾, it constitutes the dominant theme of the arbitration cases filed with the CAAD in 2014 was the issue related to the presumption of registration, and another relevant theme was the issue of the subjective incidence of the tax ⁽¹²⁰⁾.

¹¹⁸ According to statistical data provided by the CAAD, 827 arbitration cases were filed with the CAAD, with some of the decisions handed down in this context ruling that Item 28 of the TGIS was unconstitutional.

¹¹⁹ According to data provided by the CAAD, the number of arbitration cases filed exceeded four hundred, totalling 411.

¹²⁰ In addition to the above issues, in case 507/2017-T, a preliminary question was referred to the CJEU (case C-196/18), which, however, did not proceed (order of the President of the CJEU of 1 June 2018, ECLI:EU:C:2018:435), following the order issued by the CJ on 17.4.2018 in the context of a preliminary ruling referred by the Coimbra Administrative Court (case C-640/17, *Dos Santos*, EU:C:2018:275, already mentioned) – see arbitration decision of 6.6.2018, IV, b) (CAAD 'European Union law, in particular Article 110 TFEU, precludes a tax rule such as Article 2(1)(a) and (b) of the IUC Code from imposing a higher tax on vehicles of the same make, model, combustion mode and age on the ground that they have been registered in other Member States?'). See also Press Release No 146/2021 of the CJEU concerning the judgment of 2 September 2021 delivered in the infringement proceedings against Portugal, C-169/20.

The legal controversy arose from the presumption of registration under Article 7 of the Land Registry Code (approved by Decree-Law No. 224/84 of 6 July), *ex vi* Article 29 of the Vehicle Registration Code (approved by Decree-Law No. 54/75 of 12 February), according to which vehicle registration constituted a presumption that the owner of the property right (over the vehicle) is the natural or legal person in whose name the vehicle is registered.

It was on the basis of this presumption of registration that the legislator defined the taxpayer liable for the payment of the tax, and it was the responsibility of the purchaser of the vehicle to register it in their name. If the purchaser failed to do so, the AT would charge the tax to the previous owner (and seller), in whose name the vehicle was still registered, obliging the latter to rebut the legal presumption of ownership of the vehicle by proving the transfer of ownership of the vehicle. Thus, only when the arbitral tribunal considered that such proof had been provided would it proceed with the claimant's (vehicle seller's) claim.

This repeated controversy was not unrelated to the legislative amendment introduced into the Vehicle Registration Code by Decree-Law No. 177/2014 of 15 December, which created a special procedure for the registration of ownership of vehicles acquired by verbal purchase and sale agreement, with a view to regularising ownership, according to which the application for registration of the new ownership of the vehicle (acquired by verbal purchase and sale agreement) may be made by the seller after the expiry of the period legally established to carry out the mandatory registration (Articles 1(1) and 2(1)).

This law, which entered into force on 19 December 2014, amended Article 25(1) (new subparagraph e)) of the Motor Vehicle Registration Regulation approved by Decree No 55/75 of 12 February (Articles 1(2) and 12(1)).

With regard to the issue of the subjective incidence of the single circulation tax, the controversy centred on whether the subjective incidence was sufficient with the mere registration of the right of ownership in the name of the taxpayer and its purely declaratory or constitutive nature – in this context, the question of the constitutionality of Article 3(1) of the Code of Single Tax on Vehicle Circulation (CIUC) (121), as contingent liability of the lessee under a financial lease agreement ⁽¹²²⁾.

Arbitration case law (cases 333/2018-T, 236/2019-T and 740/2016-T) has ruled that the registration of ownership of a vehicle has a purely declaratory effect (and does not constitute any registered property right), constituting a rebuttable presumption of the existence of the right (and respective ownership), under the terms in which it is registered (presumption *juris tantum*), thus admitting evidence to the contrary (cf. case 333/2018-T, 2.10 et seq., in particular 6.21 et seq. and case law cited) ^(123_124).

127. In the case of TGIS Item 28.1 - another example of repetitive proceedings within the scope of the CAAD ⁽¹²⁵⁾ - there were several decisions by tax arbitration tribunals within the scope of the CAAD that ruled on the rule (normative dimension) of item 28.1 of the TGIS ^(126_127) and ruled it to be non-compliant with the Constitution.

¹²¹ According to data provided by CAAD, 203 arbitration decisions on the matter have been published (on its website) – requests for arbitration decisions continue to be submitted, as in the case of the recent case 55/2023-T with a decision dated 2 June 2023.

¹²² Decree-Law No. 41/2016 of 1 August (see Article 3) amended the wording of Article 3 of the CIUC (in the sense upheld by the AT): "1 - Natural or legal persons, under public or private law, in whose name the ownership of vehicles is registered, are liable for the tax. 2 - Financial lessees, purchasers with reservation of title, as well as other holders of purchase options under the lease agreement, are treated as taxable persons."

¹²³ Position upheld by the STJ – see judgments of 19 February 2004, case no. 03B4369, and 29 January 2008, case no. 07B4528 (respectively, Summary, IV and Summary, 2).

¹²⁴ The question of the constitutionality of the rule (normative dimension) of Article 3 of the CIUC was raised by the AT in case 740/2016-T, and the TCA Sul, by decision of 31 October 2019 (in case 95/17.8BCLSB) handed down in a judicial challenge to the arbitral award, considered that the arbitral award - which endorsed the interpretation of the provision as unconstitutional - was null and void due to failure to rule on the matter, as it had not expressly considered this issue (cf. Summary IV -Legal grounds) and annulled it, with the consequent referral of the case to the CAAD for consideration. In the subsequent arbitral decision of 27 January 2020, IV, 13, b), and 15., ruling that the interpretation of Article 3 of the CIUC as a rebuttable presumption was not unconstitutional.

¹²⁵ According to data provided by the CAAD, the number of arbitration cases filed stood at 827 (exceeding eight hundred), 608 of which were filed before the date of revocation of the rule (between 2011 and 30 December 2016).

¹²⁶ Item 28.1 of the TGIS was added by Article 4 of Law No. 55-A/2012 of 20 October, with the following wording: "28 - Ownership, usufruct or surface rights of urban buildings whose taxable value, as recorded in the register, under the terms of the Municipal Property Tax Code (CIMI), is equal to or greater than (euro) 1,000,000 - on the taxable value used for IMI purposes: 28.1 - For buildings used for residential purposes - 1 %; 28.2 - (...)"

¹²⁷ The wording of which was amended by Article 194 of Law No. 83-C/2013 of 31 December (LOE for 2014): "28.1 - For residential buildings or land for construction whose building, authorised or planned, is for housing, under the terms of the IMI Code - 1 %,".

The legislative amendment did not fail to take into account the jurisprudential controversy regarding the interpretation and application of that Item 28.1, as well as the decisive meaning of several arbitration decisions within the scope of the CAAD that ruled that Item 28.1 was unconstitutional.

It should be noted that this controversy, in the constitutional sphere, was also dealt with by the Constitutional Court (*supra*, 122), also by way of appeal against tax arbitration decisions.

In Judgment No. 250/2017, of the 1st Section (case 156/2016), the Constitutional Court ruled that Item 28.1 of the TGIS, approved by Law No. 55-A/2012 of 29 October and amended by Law No. 83-C/2013 of 31 December, was unconstitutional insofar as it imposes annual taxation on the ownership of land for construction whose building, authorised or planned, is for housing, whose taxable value is equal to or greater than €1,000,000.00.

This ruling was subsequently revoked by Ruling No. 378/18, handed down in plenary session, which, ruling on a divergence of judgments between sections (Judgment No. 250/2017 and Judgment No. 568/2016, of the 2nd Section [Article 79-D of the LTC]), did not rule that provision unconstitutional. This ruling of non-unconstitutionality was reiterated in Judgment No. 139/2019 handed down in an appeal against a decision within the scope of the CAAD (case no. 569/2016 [11/2016-T]).

Previously, Constitutional Court Judgment No. 590/2015 (case no. 542/2014), also handed down on appeal against an arbitration decision in a tax matter within the scope of the CAAD did not rule unconstitutional the provision contained in Item 28.1 of the TGIS (in its original version), "insofar as it imposes annual taxation on the ownership of urban buildings used for housing, whose taxable value is equal to or greater than €1,000,000.00" – and, as a result, dismissed the appeal lodged under b) of Article 70(1) of the LTC.

Despite the evolution of constitutional case law in the direction indicated, the legislator had already repealed the rules contained in Item 28 of the TGIS (including 28.1), through Article 210(2) of Law No. 42/2016 of 28 December (LOE for 2017) – effectively replacing the resulting taxation with taxation in the form of a surcharge on the Municipal Property Tax (IMI), created by Article 219 of the LOE for 2017 by way of an amendment to the respective Code (new Articles 135-A to 135-K of the CIMI).

It should also be noted that the controversial issue in question, in addition to generating the aforementioned legislative amendment, also led (as regards the first version of Item 28) to a change in the AT's practice and its actions in two ways:

- i) First, the AT determined that an order should be issued under Article 13 of the RJAT in favour of the taxpayer in administrative proceedings pending decision or, if that were the case, that an ex officio review should be carried out of the assessment pending before the courts and that no appeal should be lodged in the judicial proceedings decided at first instance ⁽¹²⁸⁾;
- ii) Second, the filing of a request to withdraw appeals challenging tax arbitration decisions with the TCA Sul (examples of which are cases no. 09741/16 and no. 8994/15) ⁽¹²⁹⁾.

¹²⁸ Thus, NUNO VILLA-LOBOS/TÂNIA CARVALHAIS PEREIRA, "Redução da litigância na área tributária: uma reflexão alternativa" [Reducing litigation in the tax area: an alternative reflection] in *Uma reforma fiscal para o século XXI [A tax reform for the 21st century]*, PSD/CEN (available at https://www.psd.pt/sites/default/files/2021-11/Reforma%20Fiscal%202021_v3.pdf and at https://www.psd.pt/sites/default/files/2021-11/Reforma%20Fiscal%202021_PARTE%205_CAP%205_v2.pdf – accessed on 1.10.2023) p. 337, note (40) and the orders cited therein – Orders of the Secretary of State for Tax Affairs No. 6/2017-XXI, of 13 January [transcribed in the judgment of the TCA Sul of 28 November 2019, case no. 1106/14.4BELRS], and No. 14/2017-XXI, of 26 January (which amended point II of Circular No. 10/2015).

¹²⁹ *Idem*. According to AT data cited therein – see the speech by Dr. Cristina Bicho, Deputy Director-General of the Tax and Customs Justice area, at the conference "Pact for Tax Justice" promoted by CAAD and Nova Direito (available at <https://www.youtube.com/watch?v=tTZYe91FdTI>) – 240 cases were withdrawn from the courts (based on the above-mentioned orders).

128. In the case of Vehicle Tax – another, more recent example of repetitive cases within the scope of the CAAD ⁽¹³⁰⁾ – it should first be noted that the issue in question is relevant from the perspective of the relationship between the legal order of the European Union and the national legal order, as well as, in terms of jurisdiction *ratione materiae*, from the perspective of the intervention of the arbitral jurisdiction, the state jurisdiction, the TC and the CJEU (*supra*, 116) – having given rise, in an appeal on constitutionality lodged against a tax arbitration decision within the scope of the CAAD, to the first preliminary question referred by the Constitutional Court of Portugal to the CJEU ⁽¹³¹⁾.

In fact, in addition to the above regarding preliminary rulings, according to statistics provided by the CAAD (calculated on 2/9/2021), of the cases filed up to 23/12/2020, 24 were concluded (and 34 were pending a decision) – of which the decisions, were twenty appeals lodged with the Constitutional Court and two decisions were challenged before the Southern Administrative Court of Appeal (all by the AT party).

¹³⁰ See the Annual Reports on the Functioning of Tax Arbitration for 2021 and 2022, 4.5. According to data provided by CAAD, as of 2 September 2021, the number of arbitration cases filed stood at 168 (110 of which were filed after 23 December 2020) – of which 49 have been decided.

¹³¹ Judgment No. 711/2020 (case 173/2020 and CJ, case C-136/21) – although, following the CJ's judgment in the case *Commission v. Portugal*, the case was cancelled since, following communication from the CJ regarding its decision in Case C-169/20 *Commission v Portugal*, judgment of 2 September 2021 (ECLI:EU:C:2021:679), the President of the Constitutional Court informed the CJ that the preliminary ruling question had become irrelevant and did not pursue the matter. In the same case 173/2020, Judgment No. 418/23 was then handed down which, following the clarification by the CJ, making the incompatibility between Article 11 of the CISV (in the wording applied *in casu*) and Article 110 of the TFEU unequivocal, withdrew the consequences of that clarification on the merits of the appeal, within the strict scope provided for in Article 70(1)(i) of the LTC, as defined in Judgment No. 711/2020, exclusively for the procedural reasons stated in the grounds, which led to the confirmation of the contested CAAD decision [which refused to apply the provisions of Article 11 of the CISV, as amended by Law No. 42/2016 of 28 December, for violation of the provisions of Article 110 TFEU] and dismissed the appeal (see II – Grounds, 2.4 and III – Decision). It should be noted that the guidance of the Plenary Session of the Constitutional Court set out in Judgment No. 198/2023 would later be applied in several judgments handed down in appeals lodged under Article 70(1)(i) of the LTC against decisions of the CAAD in matters relating to ISV, leading to the dismissal of the appeals (e.g., without concern for exhaustion, Judgments No. 341/2023 [case 46/2022 – appeal against arbitration decision of 20 December 2021], 292/2023 [case 116/2020 – appeal against arbitration decision of 15 June 2021], 293/2023 [case 159/2021 – appeal against arbitration decision of 11 January 2021], 294/2023 2023 [case no. 358/2021 – appeal against arbitration award of 15.6.21], 423/2023 [case no. 871/2020 – appeal against arbitration award of 14.09.2020], 290/2023, [case no. 870/2020 – appeal against arbitration decision of 14.9.20], 337/2023 [proc. 1046/2021 – appeal against arbitration decision of 5.10.21], 385/2023 [proc. 315/2021 – appeal against arbitration decision of 22.2.21]).

The controversy regarding the rule in the ISV Code refers to the issue of tax assessment ⁽¹³²⁾, pursuant to Article 11 thereof Code ^(133_134), without taking into account, in ⁽¹³⁵⁾ the calculation of the tax, any deduction relating to the environmental component for depreciation purposes. In other words, the wording of Article 11 of the CISV, as amended by Law No. 42/2016 of 28 December, and the settlement of the tax under that article, continued to disregard the issue of depreciation affecting the environmental component of the ISV. In view of this wording – and omission – arbitral case law continued to assess the issue of compliance between national law and Union law, with the consequent ruling of (partial) illegality of the tax assessment acts, their annulment and the refund of unduly paid amounts.

Although it cannot be stated without further ado that tax arbitration case law and its decision-making – in the sense of the non-compliance of the tax criteria in question with the provisions of Article 110 TFEU [insofar as the calculation of the tax does not take full account of the depreciation of the vehicle, with the effect that the admission of a vehicle from another Member State is subject to a higher charge than that incorporated (and depreciated) in the value of vehicles previously registered in Portugal] – with the consequent projection of the illegality of the assessment and its annulment – being the sole cause of the amendment to Article 11 of the CISV introduced by Article 391 of Law No 75-B/2020 of 31 December (LOE for 2021) – as a judgment was handed down on the matter by breach in proceedings brought by the Commission against Portugal ⁽¹³⁶⁾ – its relevance and contribution to that outcome should not be underestimated.

¹³² For example, case 498/2019-T or the subsequent case 331/2021-T.

¹³³ In the wording resulting from the legislative amendment promoted by Law No. 42/2016 of 28 December, (LOE for 2017, Article 217), which, however, did not put an end to the issue of compliance between domestic law and Union law Regarding the previous controversy over the taxation of vehicles imported from other Member States, which culminated in the amendment resulting from Law No. 42/2016, see the content of the arbitration decision handed down in case 572/18-T, taken up in the legal reasoning of the decision handed down in case 331/2021-T (cf. 5.3.1).

¹³⁴ The wording of the previous Article 11 (prior to Law No. 42/2016 of 28 December) resulted from the amendment already introduced by Article 113 of Law No. 55-A/2010 of 31 December (LOE for 2011), following infringement proceedings against Portugal.

¹³⁵ This is the case in proceedings 331/2021-T and the proceedings indicated, among many others, in the grounds for the same decision (see 5.3.1).

¹³⁶ Judgment of the CJ of 2/9/2021, *Commission v Portugal*, case C-169/20 (ECLI:EU:C:2021:679, cit.), according to which "by not devaluing the environmental component in the calculation of the value applicable to used vehicles put into circulation in Portuguese territory and acquired in another Member State, in the context of calculating the tax in question provided for in the Vehicle Tax Code, the Portuguese Republic has failed to fulfil its obligations under Article 110 TFEU" (see paragraph 51). The legislative amendment that culminated in the amendment introduced by the LOE for 2021 is, in fact, mentioned in paragraph 50 of the judgment, but is irrelevant for the purposes of assessing the State's non-compliance. Previously, the judgment of the CJEU of 16 June 2016, *Commission v Portugal*, C-200/15, EU:C:2016:453).

In fact, it appears that the controversial issue has not been resolved by the amendment introduced by the LOE for 2021, and arbitral case law has already been called upon to assess the non-compliance of the new wording with Union law (Article 110 TFEU) ⁽¹³⁷⁾. In this context, a preliminary question has already been referred to the CJEU regarding the wording of Article 11 resulting from the LOE for 2021, by arbitral decision of 23 June 2023 (case 383/2022-T); and an appeal for uniformity of case law was lodged with the STA (by the AT, as stated in the arbitration decision of 24 April 2023 handed down in case 384/2022-T) against the decision handed down in case 607/2021-T.

2.2.3. Change in the legal basis of the AT

129. With regard to the relevance of tax arbitration case law for the change in the legal basis for the Tax Administration's actions (impact on the AT's actions), two aspects should be noted that appear to be relevant to this analysis from the outset.

On the one hand, the AT is bound by the jurisdiction of the arbitral tribunals within the scope of the CAAD and, on the other hand, representation is centralised within the scope of the CAAD.

Although, in principle, the procedural position of the TA tends to be, within the legal framework in force at any given time, that of maximising tax revenue, taking into account the speed of the arbitral decision and also the resolution of new issues (if settled in case law, with or without intervention by the STA, TC or TJ), the fact is that the AT can internally adapt its actions based on previous arbitration decisions – accommodating the decision of new specific cases to the meaning of the arbitration decisions handed down or even the procedural position in pending cases.

¹³⁷ In a non-coincidental sense, the arbitration decisions of 28 November 2022 (case 481/2022-T) and 21 February 2023 (case 571/2022-T) and of 25 October 2022 (case 349/2022-T), on the one hand; and of 3 May 2023 (case 388/2022-T), of 24 April 2023 (case 384/2022-T), 24 July 2023 (case 551/2022-T), 30 January 2023 (case 343/2022-T) or 28 March 2022 (case no. 372/2021-T)

Furthermore, in certain cases, the AT may incorporate this new form of action, downstream of tax arbitration decisions – in particular with the intervention of the STA to standardise case law, into internal rules, as is the case with Circulars (or even internal instructions that are not publicly disclosed or even instructions contained in guides or tax return forms), as well as promoting, together with the legislator, the modification of the law in order to accommodate case law.

130. A first relevant example that led to the adoption of a new Circular by the AT following an appeal to the STA against a CAAD decision (Circular No. 4/2017) should be mentioned. With regard to the projection of dispute resolution with the intervention of the CAAD in the text of AT Circulars, a relevant case concerns the exemption from municipal tax on the transfer of real estate (IMT) and the interpretation of Article 270(2) of the Insolvency and Corporate Recovery Code (CIRE).

Following an appeal against a tax arbitration court decision within the scope of the CAAD (of 21 October 2015, case no. 200/2015-T), in opposition to the judgment handed down by the Tax Litigation Section of the STA on 20 May 2012 (0949/11), the STA handed down a ruling to standardise case law in the following terms: *"the IMT exemption provided for in Article 270(2) of the CIRE applies not only to sales or exchanges of companies or establishments as a whole, but also to sales and exchanges of real estate, as elements of their assets, provided that they fall within the scope of an insolvency or payment plan, or are carried out in the context of the liquidation of the insolvent estate."* (with the consequent granting of the appeal and annulment of the appealed arbitration decision).

Following this higher court ruling – originating from an appeal against a tax arbitration decision – it was incorporated into Circular No. 4/2017 of the AT (of 2 October 2017), which amended point III of the annex to the previous Circular No. 10/2015 of 9 September (point III of the Guide to compliance with tax obligations of legal persons in insolvency) ⁽¹³⁸⁾.

131. A second example of cases in which the treatment of an issue in CAAD case law subsequently led to a change in the AT's understanding relates to item 2.6 of List I annexed to the VAT Code.

In a set of 23 arbitration decisions handed down between November 2014 and January 2017, it was discussed whether the separate transaction of components of dental prostheses (e.g., implants, crowns and abutments) would be subject to the reduced rate of 6%, under item 2.6 of List I attached to the VAT Code, applicable to *"devices, artefacts and other prosthetic or compensatory material intended to replace, in whole or in part, any limb or organ of the human body"* ⁽¹³⁹⁾. Contrary to the AT's position that this transaction should not be referred to that item separately, all these arbitration decisions ruled in the affirmative, with the STA refused to hear an appeal for uniformity of jurisprudence on this matter, on the grounds that there was no conflict between the fundamental legal issue decided by the arbitration courts, on the one hand, and that previously decided by the STA regarding the prohibition of broad interpretation of the items on that List, on the other ⁽¹⁴⁰⁾.

¹³⁸ It should also be noted that the adoption of Circulars by the AT may also result from the issuance of case law by a higher court (STA) following an appeal or appeals lodged against a decision handed down by the TAF. This is the case with Circular No. 2/2021, of 3 March 2021 (which revoked the previous Circular No. 8/2013, of 4 October 2013) on the tax concept of buildings with regard to wind turbines (wind towers) as constituent elements of a wind farm, for the purposes of assessment and taxation under the Municipal Property Tax (IMI). Following the controversy resulting from the guidelines contained in Circular No. 8/2013 of the AT, the case law handed down by the STA understood that, taking into account the requirements set out in Article

2 of the CIMI, these structures do not constitute a building for the purposes of IMI taxation. In fact, the Circular in question took into account the STA ruling of 20 April 2020 (case no. 01443/16.3BELRS) which, in line with its previous case law (see point 3.1 of the ruling [STA rulings of 15 March 2017 (case 140/15), of 7 June 2017 (case 1417/16), of 11 October 2017 (case 360/17), of 15 November 2017 (case

1105/17), of 15 November 2017 (case no. 1074/17) and of 22 November 2017 (case no. 661/17)]), considered that "Wind turbines, as constituent elements of a wind farm, do not fall under the tax concept of 'building' as defined in Articles 2, 3, 4 and 6 of the Municipal Property Tax Code" (see 4. Conclusion). This case law led to the adoption of Circular No. 2/2021 (which repealed the previous Circular No. 8/2013 of 4 October 2013), which established general guidelines on the matter, stating that wind and solar power plants should be classified as industrial urban buildings in terms of construction licensing (cf. no. 4). Law no. 2/2020, of 31 March (LOE for 2020, cf. art. 352.) would amend Article 79(2) of the CIMI ("If the building is rural or urban and not fenced, it shall be registered in the parish where the largest area or the largest number of buildings is located, respectively). This case law led to the adoption of Circular No. 2/2021 (which repealed the previous Circular No. 8/2013 of 4 October 2013), which established general guidelines on the matter, stating that wind and solar power plants should be classified as urban industrial buildings for the purposes of building permits (see no. 4).

¹³⁹ See the 23 decisions at

https://caad.org.pt/tributario/decisooes/index.php?s_iva=1&s_processo=&s_data_ini=&s_data_fim=&s_re_sumo=&s_artigos=&s_texto=pr%C3%B3teses+dent%C3%A1rias.

¹⁴⁰ See the STA Judgment of 15 April 2015 (01563/14).

However, "in order to clarify doubts about the classification of transmissions of implants and other connecting or fixing parts for dental prostheses", on 28 October 2016, the AT approved Circular Letter No. 30183/2016, through which it clarified, in line with the aforementioned CAAD case law, that the aforementioned item should be interpreted as covering those goods, even if traded separately — thus establishing the understanding that "the transfer of implants and other connecting or fixing parts for dental prostheses, at any stage of the commercial circuit, including importation, is subject to VAT at the reduced rate, pursuant to item 2.6 of List I annexed to the CIVA".

132. With regard to promoting the alignment of the AT's understanding with the case law of the CJEU — also triggered by a tax arbitration court — reference should be made to the case of the single circulation tax and the taxation of used cars imported from other Member States of the Union (already mentioned — see 113).

Finally, as mentioned above, the AT may internally adapt its actions in line with previous arbitration decisions – accommodating the decision of new specific cases to the meaning of the arbitration decisions handed down or even the procedural position in pending cases.

Admitting that this accommodation may take place through internal investigation – albeit not public in nature – it is worth mentioning, however, some examples of accommodation and change of position by the AR through the revocation of an act performed by the AT after the initiation of arbitration proceedings, with the consequent extinction of the proceedings.

This was the case in proceedings 89/2022-T (decision of 29 August 2022, 1. – IRS, category F, reporting of losses from previous years) and 356/2020-T (decision of 15 December 2020, 1. – IRS, classification under the simplified or organised accounting regime).

133. Finally, it is also accepted that the AT may also accept (by internal instruction) the position upheld by the STA, in an appeal lodged against a tax arbitration decision under the terms of the RJAT, in the sense of standardising case law. This standardisation of case law occurred, in particular (in addition to the aforementioned case 846/2019-T), in the following cases:

- case 421/2019-T (arbitration decision of 29 October 2019 - IRS, simplified regime with regard to income obtained in the exercise of the activity of football referee) and judgment of the Plenary Session of the Tax Litigation Section of the STA of 9 December 2020 (case 092/19.9BALSB);

- case 744/2019-T (arbitration decision of 9 December 2020, IRC, withholding tax on capital income obtained in Portuguese territory by a non-resident entity) and judgment of the Plenary Session of the Tax Litigation Section of the STA of 29 June 2020 (case no. 08/21.2BALSB);

- case 470/2017-T (decision of 16 March 2018 - IRS, SGPS tax benefit provided for in Article 13 of the EBF - method to be used in allocating financial charges incurred in the acquisition of shares in share capital) and judgment of the Plenary Session of the Tax Litigation Section of the STA of 29 June 2020 (case no. 0406/18.BALSB).

2.2.4. Impact on the case law of state tax courts

134. With regard to the impact of tax arbitration case law on future decisions of administrative and tax courts, the following aspects are noteworthy, the following aspects, in particular with regard to the inevitable interaction between the case law of the various courts involved.

Firstly, it should be noted that, from a systemic perspective, this impact may not be read only in a unidirectional (or direct) sense between tax arbitration courts and administrative and tax courts, taking into account the system of appeals (to the STA and the TC) of tax arbitration decisions, as well as the preliminary ruling procedure, when used by tax arbitration courts within the scope of the CAAD. In fact, this impact may be bidirectional, also covering the effect of decisions by the STA, the TC (and, naturally, the CJEU) on decisions by tax arbitration tribunals and state courts, on the one hand, and between decisions by the tax arbitration tribunals themselves, on the other.

Firstly, and taking into account the legal provision for appeal to the STA due to contradiction between an arbitral decision and a state court decision and, since the legislative amendment of 2019, also between tax arbitral decisions themselves (which follows the form of an appeal for uniformity of jurisprudence), once the STA has handed down a ruling in this regard and, in particular, when it confirms an understanding previously held by an arbitral tribunal (sometimes innovative with regard to the controversial issue), which is then the subject of that appeal, that understanding will be adopted by both state and arbitral courts in pending or future proceedings.

Thus, by means of a ruling on the uniformity of case law handed down prior to a decision (or decisions, as the case may be) by a tax arbitration tribunal, the meaning of a tax arbitration decision may indirectly be relevant to future decisions. Given the greater speed of tax arbitration, it is expected that taxpayers will resort to this form of dispute resolution to have the understanding already standardised by the STA (or the interpretation of the CJEU) accepted in their case.

In fact, the same impact, *mutatis mutandis*, may result from tax arbitration decisions tax arbitration decisions handed down after a preliminary question has been referred to the CJEU and the latter has ruled with *inter partes* effect – and, as a rule, *erga omnes* by virtue of the principles of primacy and loyal cooperation (as well as decisions of the CJ in infringement proceedings).

Secondly, the decisive meaning of tax arbitration decisions, even when there is a constitutional appeal and it is considered by the Constitutional Court (and the appeal is dismissed and the arbitration decision confirmed), still has a direct and indirect impact on future decisions of the administrative and tax courts, as well as on the tax arbitration jurisdiction itself.

In fact, when there is a ruling of unconstitutionality by the Constitutional Court – and, in particular, when it assesses the question of constitutionality in the sense of understanding the appealed arbitration decision and dismisses the appeal – the meaning of the arbitral award in the specific case will certainly be relevant in subsequent judicial decisions (and, a fortiori, if the unconstitutionality of the rule is declared with general binding force under the procedure provided for in Article 79-D of the LTC, as mentioned above). Given the greater speed of tax arbitration, it is to be expected that taxpayers will resort to this form of dispute resolution in order to have their case upheld (or because they expect it to be upheld), in their case, the understanding of the constitutionality of a rule established by the Constitutional Court following a tax arbitration decision.

If it is accepted that, given the speed of the decision in arbitration tribunals, the decisions of these tribunals, especially if repeated, may influence subsequent actions by administrative and tax courts (in the context of overlapping jurisdiction *ratione materiae*), i.e., favouring the replication of arbitral decisions in state courts if such a decision appears to be uncontroversial, one must not forget the aforementioned effect of STA and TC (as well as TJ) decisions on the decisions of state courts.

Thirdly, if the consolidation of STA and TJUE case law necessarily affects the downstream decisions of arbitral tribunals and administrative and tax courts, it must also be admitted that, by majority reasoning, it negatively affects the number of challenges and appeals against such decisions.

135. From the perspective of appeals filed against arbitral decisions in tax matters within the scope of the CAAD to the STA ⁽¹⁴¹⁾, particular attention should be paid to cases of appeal and their subsequent dismissal, confirmation of the arbitral award, and standardisation of case law.

In fact, there are several cases (before and after the 2019 amendment to the RJAT) that illustrate the importance of identifying controversial legal issues in the context of tax arbitration case law and corresponding judgments - and their confirmation by STA case law.

The following cases should be mentioned in which the STA upheld the appeal against a tax arbitration decision within the scope of the CAAD and standardised case law, starting with those that deal with matters which, within the scope of its own jurisdiction, were also the subject of intervention by the TC or the CJEU and have already been mentioned above.

136. With regard to the IRS taxation regime for capital gains obtained by non-residents, in an appeal lodged with the Plenary of the Tax Litigation Section of the STA, lodged under Articles 25(2) of the RJAT and 152 of the CPTA, of the arbitration decision of 9 June 2020 (case no. 846/2019-T) on the basis of opposition, on the same fundamental question of law, to the arbitral award of 22 April 2019 (case no. 539/2018-T), the STA, in its judgment of 9 November 2020 ⁽¹⁴²⁾ upheld the alleged opposition of arbitral awards and dismissed the appeal, standardising case law in accordance with point 2.2.3 of the grounds for the judgment: "

(...) Article 43(2) of the CIRS, in its applicable wording, by providing for a limitation of taxation to 50% of capital gains realised only for residents in Portugal, and not for non-residents, constitutes a restriction on the movement of capital, incompatible with Article 63 of the TFEU, and this negative discrimination against non-residents has not been overcome by the optional regime introduced in Article 72 of the CIRS by Law No. 67-A/2007 of 31 December, which is only available to residents of another EU Member State or the EEA and not to residents of third countries.

¹⁴¹The Annual Reports on the Functioning of Tax Arbitration for 2021 and 2022 (mentioned *above*) contain statistical data on appeals to the STA reported to the CAAD in those years – a total of 102 and 110, respectively – lodged by the parties and/or the Public Prosecutor's Office (respectively, 6. Appeals and challenges communicated to the CAAD, in particular 6.3).

¹⁴² STA judgment of 9 December 2020, Case 075/20.6BALS (Case 846/2019-T).

137. With regard to the legal regime of FIIAHs, in an appeal for uniformity of case law, lodged under Articles 25 of the RJAT and 152 of the CPTA, of the arbitral award of 5 January 2021 (case no. 56/2020-T) on the grounds in opposition with to decision arbitral of 22 May 2020 (case no. 583/2019-T), the STA, in a judgment of 24.11.2021 ⁽¹⁴³⁾, upheld the appeal and kept the decision in the arbitration award, establishing the following case law: "The tax exemptions in paragraphs 6 (IMI), 7 (IMT) and 8 (IS) of Article 8 of the legal regime for FIIAHs, in their original wording, derived from Law 64-A/2008 of 31/12 (LOE 2009), must be interpreted as being subject to the condition that the property is actually used for permanent residential rental, with those tax benefits becoming void if the property is sold without having been rented or without the Minister of Finance authorising its sale".

138. In addition to the cases mentioned above, four further cases in other areas of taxation should also be mentioned:

With regard to IMI and taxable asset value, the Full Bench of the Tax Litigation Section of the STA, in an appeal lodged under Articles 25(2) to (4) of the RJAT, of the arbitral award rendered in case 652/2021-T based on the opposition, on the same fundamental question of law, with the arbitral award rendered in case 835/2021-T, the STA, in a judgment of 23 February 2023 ⁽¹⁴⁴⁾, dismissed the appeal and standardised case law with the following meaning: "(...) by allowing the taxpayer to preclude the possibility of challenging the taxable value under the terms of Articles 76 and 77 of the IMI Code, he cannot argue the illegality of the assessment on the basis of the illegality underlying the calculation of the taxable value that served as the taxable matter."

¹⁴³ STA Judgment No. 3/2023, of 24.11.2021, Proc. 23/21.6BALSB (proc. 56/2020-T).

¹⁴⁴ STA Judgment of 23 February 2023. Case 0102/22.2BALSB (case 652/2021-T).

With regard to the VAT exemption regime, in an appeal lodged with the Plenary Session of the Tax Litigation Section of the STA, lodged under Articles 25(2) of the RJAT and 152 of the CPTA, against the arbitral award of 29 May 2020 (case no. 264/2019-T) on the grounds of contradiction with the arbitral award rendered in case no. 373/2018-T), the STA, in judgment of 20 October 2021 ⁽¹⁴⁵⁾, dismissed the appeal, upheld the contested arbitration decision and standardised case law in accordance with the terms set out in point 4 of the grounds:

“4. Nutritional monitoring services provided by a certified professional, qualified and hired for this purpose by an entity whose main activity is the provision of sports monitoring services in gyms and as a complementary way of providing its users with better physical performance and, in general, maximising the benefits pursued through the practice of sport itself, do not have a therapeutic purpose and, therefore, do not benefit from the exemption referred to in Article 9(1) of the VAT Code.”

With regard to corporate income tax and the autonomous taxation regime, the Plenary Session of the Tax Litigation Section of the STA, in an appeal lodged under Articles 25(2) to (4) of the RJAT, of the arbitral award of 17 January 2020 (case no. 323/2019-T) on the grounds of contradiction with the arbitral award rendered in case no. 628/2014-T, the STA, in a judgment of 24 March 2021 ⁽¹⁴⁶⁾ dismissed the appeal, upheld the contested arbitration decision and standardised case law in the following terms: "the legal provisions establishing the autonomous taxation referred to in paragraphs 3 and 9 of Article 88 of the IRC Code constitute tax incidence rules that do not establish any presumption that can be rebutted."

¹⁴⁵ STA Judgment No. 1/2022, of 20 October 2021. Case 77/20.2BALSB (case 264/2019-T).

¹⁴⁶ STA Judgment of 24 May 2021, Case 021/20.7BALSB (case 323/2019-T).

Previously, in the field of personal income tax, the Full Bench of the Tax Litigation Section of the STA, in an appeal lodged under Article 25(2) of the RJAT, of the arbitral award of 16 March 2018 (case no. 505/2017-T) on the grounds of contradiction with the judgment of the TCA Sul of 21 September 2020 (case no. 03748/10), in a judgment of 8 May 2019 ⁽¹⁴⁷⁾ dismissed the appeal and standardised case law with the following meaning: "The seniority referred to in Article 2(4)(b) of the CIRS refers solely to the seniority of the employee in the entity liable for compensation/indemnity for the termination of the employment contract."

3. Conclusive summary

- i) The qualitative assessment of tax arbitration has two aspects: the *national legal system and the European Union legal system*.
- ii) At the level of *the European Union legal order*, tax arbitration is relevant on three levels: *i)* it promotes the consolidation of the concept of national courts with regard to arbitral tribunals; *ii)* it promotes the regular use of preliminary rulings, encouraging the interpretation of EU law by the CJEU; *iii)* facilitating the disclosure of inconsistencies between EU law and national law.
- iii) The referral of a preliminary question to the CJEU by a tax arbitration tribunal was a pioneering move, confirming that the tax arbitration tribunal within the scope of the CAAD has all the necessary elements to be classified as a national court for the purposes of Article 267 TFEU.

¹⁴⁷ Judgment of the STA of 8 May 2019, Case 0407/18.7BALSB (Case 505/2017-T).

iv) Arbitration tribunals within the scope of the CAAD frequently resort to the preliminary ruling procedure, having submitted a total of 39 preliminary questions on the interpretation of Union law, whether primary or secondary, in the period 2011-2023, most of which related to tax provisions (VAT, IS, IRS, IRC, ISC and ISV).

v) Some of these cases explicitly revealed the non-compliance of national tax law with EU law, with the CJ interpreting EU law as opposing a given national rule, with the consequent observance of the primacy of EU law and even giving rise to legislative changes in the domestic legal order (as was the case, for example, with the taxation of capital gains in the context of personal income tax for taxpayers not resident in national territory).

vi) At the level of *the national legal system*, the case law of the tax arbitration courts is important in its relationship with *constitutional justice*: not only does this case law contribute to the identification of issues of constitutional non-compliance in the context of the specific review of constitutionality carried out by those courts; but also through constitutional appeals lodged against tax arbitration decisions and the consequent dismissal of those appeals and confirmation of the ruling of (non-)unconstitutionality by the Constitutional Court. A total of 18 constitutional appeals against tax arbitration decisions have been lodged, concerning rules on corporate income tax, TGIS or IMT.

vii) Also at the national legal level, the case law of tax arbitration courts is relevant in matters of legislative changes due to the direct and/or indirect effect of arbitration decisions. Relevant examples are the cases of the IUC and Verba 28 of the TGIS or, more recently, the ISV.

viii) Also at the national level, with regard to the relevance of arbitral case law for changes to the legal basis of the AT, the latter may internally adapt its actions in line with past arbitral decisions:

- accommodating the decision of new specific cases downstream to the decision-making sense of the arbitral awards rendered or even the procedural position in pending proceedings;
- translating this new form of action downstream of tax arbitration decisions – in particular with the intervention of the STA to standardise case law in internal rules, as is the case with Circulars.

ix) Examples of this relevance and adoption of new Circulars by the AT include: the case concerning the exemption from IMT and the interpretation of Article 270(2) of the CIRE (Circular No. 4/2017 of 2 October 2017); the case concerning item 2.6 of List I annexed to the VAT Code (Circular Letter No. 30183/2016, of 18 October 2016); or, furthermore, the case concerning the IUC and taxation of used cars imported from other Member States of the European Union (alignment of the AT's understanding with the case law of the CJEU, also triggered by a tax arbitration court).

x) It is also accepted that the AT may accept in its actions the position upheld by the STA, in an appeal against a tax arbitration decision under the RJAT, in the sense of standardising case law, which has already occurred in several cases.

xi) Finally, with regard to the impact of arbitral case law on future decisions by state courts, this may result, from the outset, from the inevitable two-way interaction between the case law of the various courts involved. Contributing factors include: the legal provision for appeal to the STA in the event of a contradiction between an arbitral award and a state court decision and, since 2019, also between tax arbitral awards; the standardisation of case law by the STA in appeals against arbitral awards; the decisions handed down by the TC in appeals on constitutionality filed against tax arbitration decisions; the consolidation of the jurisprudence of the STA and the TJUE.

**VI. TAX
ARBITRATION AND
INVESTMENT IN STATE TAX
COURTS
REASON OF ORDER**



1. Reason

139. This chapter is devoted to the question of whether and to what extent the functioning of a tax arbitration system in Portugal has led to a *disinvestment* in state tax justice — that is, in the set of courts which, as part of the administrative and tax jurisdiction ⁽¹⁴⁸⁾ are primarily responsible for fulfilling the constitutional mandates of resolving disputes arising from tax legal relations and, in this context, guaranteeing the judicial and effective protection of the legally protected rights and interests of citizens ⁽¹⁴⁹⁾.

Thus stated, the question could possibly be interpreted as postulating a diachronic analysis through which, by reference to the date of establishment of that alternative system for resolving non-state disputes (2011) ⁽¹⁵⁰⁾, if they compared, from the point of view of investment in state tax justice two periods could be compared from the point of view of *investment in* state tax justice: the period *up to* 2011, on the one hand, and the period *after* 2011, on the other. Of course, in order to do so, it would be necessary to define, in relation to the period *up to* 2011, a significant starting date that would make that period objectively comparable with the following one. It is believed that it would not be difficult to set this term in the "Administrative Litigation Reform," whose regulatory framework was approved in 2002 and 2003 and came into force in 2004 — and this is because it was from then on, mainly due to the new ETAF, that administrative and tax jurisdiction as a whole, including the tax area, took on the organisational and institutional structure that it retained in the following years and still retains today ⁽¹⁵¹⁾.

¹⁴⁸ As will be clear from the text, it should be noted from the outset that the following analysis is limited to the 'tax area' of administrative and fiscal jurisdiction, even though some of the data referred to relate to the jurisdiction as a whole (including the 'administrative area').

¹⁴⁹ See Articles 212(3) and 268(4) of the Constitution. Replicating and expanding on these constitutional provisions in terms of principles, Articles 9 and 95 to 100 of the LGT.

¹⁵⁰ Tax arbitration has been legislatively established since the first quarter of 2011, and it was at the end of that year that the first two arbitration decisions on tax matters were handed down by courts established under the CAAD, specifically in cases 3/2011-T (9.11.2011) and 2/2011-T (10.11.2011).

¹⁵¹ It should be noted that, in the period immediately prior to the approval of the ETAF (Law No. 13/2002 of 31 December, amended even before its entry into force by Law No. 4-A/2003 of 19 February and Law No. 107-D/2003 of 31 December) and the implementing legal and regulatory acts at the level of the judiciary (Decree-Law No. 325/2003 of 29 December and Ordinance No. 1418/2003 of 30 December), Portuguese tax justice, which had only been unified a few years earlier (through the integration of the former tax and customs courts into the tax courts of first instance, pursuant to Decree-Law No. 301-A/99 of 5 August) and then organically integrated into the Ministry of Justice (pursuant to Law No. 15/2001 of 5 June), served: (i) in theory, 18 district tax courts (although, in practice, only 11 were in operation, some of which had a common judge), to which were added the — aggregated — administrative and tax courts of Funchal and Ponta Delgada; (ii) at an intermediate level, the Tax Litigation Section of the Central Administrative Court; and (iii) at the top, the Tax Litigation Section of the Supreme Administrative Court. On the pre-2004 tax jurisdiction scenario, see A. C. OLIVEIRA, *Organização Judiciária Administrativa (e Tributária) [Administrative (and Tax) Judicial Organisation]*, Coimbra: Coimbra Editora, 2003, pp. 180-183 and 192-202.

140. Although theoretically feasible, this is not the analysis presented in the following sections, for three reasons. Firstly, because it would require the collection and processing of data that is already relatively outdated with regard to the early years after 2004. Secondly, because, on its own, such a comparative exercise, referring to periods with significant differences in terms of the quantity and type of litigation before the state tax courts, would allow little or no conclusion to be drawn as to the putative contribution of the existence of a tax arbitration system to any variations in state investment in the tax courts that occurred *before and after* 2011. Finally, because, as can be quickly concluded from the data collected below, such a comparative exercise would always and inevitably lead to the conclusion that the level of state investment in tax justice before 2011 was, by all parameters, lower than that which occurred thereafter.

141. Thus, instead, the following analysis: (i) on the one hand, and from a temporal point of view, focuses essentially on the years of tax arbitration in Portugal — that is, from 2011 to the present — without prejudice to some references to *the status quo ante* that allow us to identify the 'state of the art' until the beginning of those years; (ii) on the other hand, rather than comparative, it is fundamentally descriptive, as it seeks to account for the evolution of what, during those years of coincidence, was *invested* by the State in the tax area of administrative and fiscal jurisdiction. Thus defined, it should be noted that the following analysis does not in any way seek to provide a *qualitative* assessment. In other words, it does not seek to determine whether the investment made by the State in the structure and human and regulatory resources supporting the activity of the tax courts since 2011 has been *too much* or *too little*, *sufficient* or *insufficient* — as this would imply the prior definition of some ideal investment standard, which is considered to be non-existent in objective terms; it would also imply cross-referencing the size of this investment with the evolution (at least in quantitative terms) of tax litigation over the years, which is beyond the scope of this chapter. Furthermore, on another level, no attempt is made to *quantify* this investment *financially* — an exercise for which there is a lack of public data that can be collected, on the one hand, and which would ultimately prove of little use in the present context, on the other.

142. In summary, the elements systematised below serve exclusively to answer the questions of *whether* and *how*, since establishing an alternative tax arbitration system and entrusting it exclusively to the CAAD, the State has invested in ‘its’ tax courts.

To this end, and taking into account, above all, the publicly available information — referred to, but not exclusively, in the legislative and regulatory sources approved by the Assembly of the Republic and the Government, as well as in the data compiled by the CSTAF —, the following sections, beginning where relevant with the *status quo* reported at the end of 2010, then collect the developments recorded in subsequent years in the three parameters that are understood to objectively reflect the degree of public *investment* in this segment of the Portuguese state justice system: (i) first, at the level of the organic-institutional structure of the existing tax courts (*infra*, 2.1.); (ii) second, in terms of the human resources — magistrates, court officials and advisers — of these courts (*infra*, 2.2.); (iii) third, in terms of legislative reforms of the procedural regimes on which the activity of the tax courts is based (*infra*, 2.3.).

143. Even with the limitations pointed out, the analysis presented here serves mainly to contribute to determining whether and to what extent it is possible to observe, in the Portuguese case, a ‘*fast lane* effect’, which in certain economic analysis literature has been pointed out as an externality derived from the use of arbitration and, in particular, to arbitration in public disputes, including tax disputes. That is, the potential effect whereby, through the establishment and operation of an arbitration system for the resolution of tax disputes, the quality of the public justice system would be negatively impacted due to a lack of investment in the state judicial system and a lack of legislative reforms ⁽¹⁵²⁾. A response to this hypothesis is reserved for the conclusions of the chapter (*below*, 3.).

¹⁵² Cf. N. GAROUPA, ‘Domestic Tax Arbitration: Some Economic Considerations’, *Intertax* 47/8 & 9 (2019), pp. 760-765; putting this premise into practice in the Portuguese case, it has already been suggested among us that ‘the smooth functioning of tax arbitration may have a negative impact on public justice and the necessary reforms’, because, it is argued, ‘the fact that arbitration works quickly promotes disinvestment in public justice’ (see A. P. DOURADO, ‘Tax Arbitration and the Delay in Public Justice Reforms’, *Expresso* [2.11.2021]).

2. Analysis

2.1. Courts

2.1.1. Organisation

144. Corresponding, with only slight adjustments, to the institutional structure resulting from the "Administrative Litigation Reform" ⁽¹⁵³⁾, there were 19 state tax authorities in Portugal in 2010, divided into three categories:

- (i) 16 tax courts, 15 of which operate in conjunction with the corresponding district administrative courts under the designation of administrative and tax courts ⁽¹⁵⁴⁾ TAFs of Almada, Aveiro, Beja, Braga, Castelo Branco, Coimbra, Funchal, Leiria, Loulé, Mirandela, Penafiel, Ponta Delgada, Porto, Sintra and Viseu) and 1 operating autonomously as a tax court (Lisbon TT) ⁽¹⁵⁵⁾;

¹⁵³ The creation and establishment of the current administrative and tax courts (except for the STA, which already existed) took place with Decree-Law No. 325/2003 of 29 December and Ordinance No. 1418/2003 of 30 December. The refinements to the framework originally resulting from the 2004 Reform resulted, by 2010, in: (i) the merger of the Loures TAF with the Lisbon TAF; (ii) the separation of the latter into the TAC and TT; and (iii) the creation and establishment of the Aveiro TAF. See Decree-Law No. 182/2007, of 9 May, Ordinance No. 1214/2007, of 20 September, Article 3 of Ordinance No. 874/2008, of 14 August, and Ministerial Order No. 1553-B/2008 of 31 December.

⁽¹⁵⁴⁾ *Ex vi* of Article 9(3) (= current Article 9(2)) of the ETAF.

¹⁵⁵ The territorial areas of jurisdiction of each of these tax courts are defined in the Map Annexed to Decree-Law No. 325/2003, of 29 December. Their material and hierarchical jurisdiction is fundamentally derived from the provisions of Article 49 of the ETAF, which results — in its current wording, which has undergone changes since 2004 — they are responsible for the bulk of first instance tax litigation, including, among others: (i) actions challenging tax assessment notices and other tax-related acts; (ii) challenging decisions to impose fines and additional penalties in tax matters; (iii) incidents and all other issues raised in tax enforcement proceedings; (iv) declarations of illegality of administrative rules issued in tax matters.

- (ii) 2 sections Tax Litigation Sections in the Central Administrative Courts (North, based in Porto, and South, based in Lisbon) ⁽¹⁵⁶⁾;
and
- (iii) 1 Tax Litigation at the Supreme Administrative Court (based in Lisbon) ⁽¹⁵⁷⁾;

145. Still with reference to the period immediately preceding the establishment of the tax arbitration system, two facts are worth noting:

- (i) ~~Sintra~~ The establishment, on 1 September 2008, in five of the first instance tax courts, of *liquidation judges* "specially dedicated to the recovery of tax cases", reflecting at the time a government commitment to "resolving tax disputes in order to avoid the statute of limitations on these cases, ensuring the effective collection of taxes by the State or the resolution of disputes between the State and taxpayers" ⁽¹⁵⁸⁾. With an initially projected duration of two years, then partially extended for another year ⁽¹⁵⁹⁾, these liquidation courts operated until 1 September 2010 (at the Leiria TAF and the Lisbon TT) and 1 September 2011 (at the Coimbra, Porto and Sintra ⁽¹⁶⁰⁾).

¹⁵⁶ The territorial areas of jurisdiction of each of these Central Administrative Courts are defined in Article 2(1) and (2) of Decree-Law No. 325/2003 of 29 December. The material and hierarchical jurisdiction of the respective Tax Litigation Sections is derived primarily from the provisions of Article 38 of the ETAF, which states — in its current wording, also amended since 2004 — that they are essentially responsible for ruling on: (i) appeals against decisions of the tax courts, except those concerning decisions on the merits and based exclusively on matters of law; and (ii) appeals against administrative acts relating to tax matters carried out by members of the Government. In addition, under Article 27(1) of the RJAT, they have jurisdiction to rule on challenges to arbitration decisions in tax matters.

¹⁵⁷ And jurisdiction over the entire national territory, pursuant to Article 11(2) of the ETAF. Its material and hierarchical jurisdiction is derived primarily from the provisions of Articles 26 and 27, which, in their current wording, also amended since 2004, give it jurisdiction to rule: (i) in section, essentially: (i.1) appeals against judgments of the Tax Litigation Section of the TCA; (i.2) appeals against decisions on the merits of tax courts based exclusively on matters of law; and (iii) appeals against administrative acts of the Council of Ministers concerning tax matters; (ii) in plenary session: (ii.1) appeals against judgments handed down by the Section at first instance; (ii) appeals for the standardisation of case law; and (iii) requests for preliminary rulings made by tax courts, *pursuant* to Articles 122-A of the CPPT and 93 of the CPTA. In addition, under Article 25(2) of the RJAT, it has jurisdiction to rule on appeals against tax arbitration decisions that conflict with another arbitration decision or with a ruling handed down by a TCA or the STA on the same fundamental legal issue.

¹⁵⁸ See the preamble to Decree-Law No. 182/2007 of 9 May, Article 4 of which created six liquidation courts, "exclusively for the processing of tax cases", at the TT of Lisbon and the TAFs of Porto, Coimbra, Leiria, Sintra and Viseu (the latter, however, was not actually established by Ministerial Order No. 874/2008 of 14 August). The measure was part of the then 'Action Programme for the Modernisation of Tax Justice' and had already been announced in Council of Ministers Resolution No. 59/2007 (No. 2, a)), recognising that the judicial reorganisation resulting from the 2004 Reform "soon proved to be very insufficient due to the high number of pending cases in the tax area". The staff of judges for these liquidation courts was established by Ordinance No. 1634/2007 of 31 December.

¹⁵⁹ See Ordinance No. 816/2010 of 30 August and Ordinance No. 320/2011 of 30 December.

¹⁶⁰ On the qualitative assessment of the impact of these liquidation courts, with testimonies from magistrates of the jurisdiction, see *Justiça e eficiência. O caso dos Tribunais Administrativos e Fiscais [Justice and efficiency. The case of the Administrative and Tax Courts]*, Coimbra: CES, 2017, pp. 53-57.

- (ii) On the contrary, and despite such possibilities being provided for in legislation since 2009 and in force since 1 January 2010, the following did not come to fruition: (i) neither the creation of *courts with specialised tax jurisdiction*, by splitting the existing basic tax courts, essentially according to the value of the case, into small, medium and large tax courts; (ii) nor the creation, in the higher tax courts, of *sections specialised* according to the subject matter or value of the actions ⁽¹⁶²⁾.

146. The structure and organisation of the state tax courts described above has remained essentially unchanged since the establishment of a tax arbitration system in Portugal. However, in addition to the maintenance of those 19 tax courts, organised in a tripartite manner, the following five aspects should be added, with reference to the period between 2011 and 2023, always and only in terms of the organisational overview of the tax area of administrative and fiscal jurisdiction:

- (i) The first, relating to 2011, concerns the creation of two *extraordinary teams of tax judges*, at the Lisbon Tax Court and the Porto Administrative Court, composed of judges "exclusively assigned to the tax area and with the mission of handling tax cases worth more than one million euros" pending in these and other courts of jurisdiction ⁽¹⁶³⁾. The respective judges having taken up their duties on 4 January 2012 ⁽¹⁶⁴⁾, these teams, although with variations in composition, remained in office until 31 January 2016 ⁽¹⁶⁵⁾, without prejudice to the monitoring that, since then, the CSTAF has maintained of the progress of these processes ⁽¹⁶⁶⁾.

¹⁶¹ Pursuant to Decree-Law No. 166/2009, of 31 July, approved under the authorisation rule contained in Article 125 of Law No. 64-A/2008, of 31 December, which added Articles 9-A and 49-A to the ETAF.

¹⁶² On these provisions, which were never implemented, see D. NETO/F. ESTEVES, 'A jurisdição fiscal — questões de processo, organização e funcionamento dos tribunais tributários' [Tax jurisdiction — issues of procedure, organisation and functioning of tax courts], *Julgar* 36 (2018), pp. 18 and 22-23; F. ESTEVES, 'Specialisation of Administrative and Tax Courts', *Themis* XIX/34 (2018), pp. 259-266.

¹⁶³ See Law No. 59/2011 of 28 November. The measure was already provided for in *the Memorandum of Understanding on Economic Policy Conditionality* of 17 May 2011 (see point 3.35, v.).

¹⁶⁴ See CSTAF Resolution of 14 December 2011.

¹⁶⁵ See the CSTAF Resolution of 19 January 2016.

¹⁶⁶ See the latest data available in the CSTAF *Annual Report* (2021), pp. 46-48.

- (ii) The second, reported in 2018, refers to the creation of four *teams to clear backlogs* (Central Zone, Lisbon and Islands Zone, North Zone and South Zone), with the power to process cases (administrative and tax) pending final decision that had been submitted by 31 December 2012 ⁽¹⁶⁷⁾ —in a politically designed measure to contravene the observed "tendency towards an accumulation of pending cases" in the jurisdiction, exacerbated by the "existence of long-standing lawsuits, which, due to various factors, are highly complex, and whose resolution has been delayed." ⁽¹⁶⁸⁾. Also, with successive variations in their composition, these teams operated between 1 January 2019, and 31 December 2022 ⁽¹⁶⁹⁾.
- (iii) The third, reported for 2019 and 2020 ¹⁷⁰, refers to the creation and subsequent effective installation, with entry into operation on 1 September 2020, in seven of the first instance tax courts (TT of Lisbon and TAFs of Almada, Aveiro, Braga, Leiria, Porto and Sintra), of *courts with specialised tax jurisdiction*, specifically, tax enforcement and administrative offence appeals courts, with jurisdiction to hear all cases relating to disputes arising from tax enforcement and tax offences, which now coexist in these courts with ordinary tax courts, with jurisdiction to hear all other tax cases ⁽¹⁷¹⁾ — this division of powers seeks to "combat the exponential increase in pending cases in these areas and to ensure a more adequate and efficient judicial service where it is most needed" ⁽¹⁷²⁾.

¹⁶⁷ See Articles 2 to 8 of Decree-Law No. 81/2018 of 15 October.

¹⁶⁸ See the preamble to Decree-Law No. 81/2018 of 15 October. The measure was already provided for in *the Report of the Working Groups for the Reform of Administrative and Tax Jurisdiction* of 16 May 2017 (see p. 7).

⁽¹⁶⁹⁾ See the CSTAF Deliberations of 17 December 2018 (establishment), 10 November 2020 (extension for a further two years) and 14 December 2022 (termination). For the balance of the work of these teams, with reference to the end of 2021, see the CSTAF *Annual Report* (2021), pp. 42-45. It shows that, out of a total of 6,848 tax cases prior to 2012 pending on 1 January 2019, the backlog had been reduced to 1,084 cases pending on 31 December 2021.

¹⁷⁰ Also in 2020, but less relevant in the present context, it should be noted that the area of jurisdiction of the TAFs of Viseu and Castelo Branco was changed, with the former now covering some of the municipalities previously covered by the latter. Promoted by Decree-Law No. 58/2020 of 13 August, "with a view to a more equitable and balanced distribution of the territorial coverage of these courts (...), as well as facilitating access to administrative and tax justice" (see the respective preamble), this amendment led to an extension of the jurisdiction of the Northern Administrative Court (which covers the area covered by the Administrative Court of Viseu) and a reduction in the jurisdiction of the Southern Administrative Court (which covers the area covered by the Administrative Court of Castelo Branco).

¹⁷¹ See Articles 9-A and 49-A of the ETAF, as amended by Law No. 114/2019 of 12 September, Decree-Law No. 174/2019 of 13 December, and Ordinance No. 121/2020 of 22 May.

¹⁷² See the preamble to Decree-Law No. 174/2019 of 13 December. The measure was already provided for in *the Report of the Working Groups for the Reform of Administrative and Tax Jurisdiction* of 16 May 2017 (see pp. 8-10). On the *specialisation* of administrative and tax jurisdiction, albeit from an administrative perspective, see J. D. COIMBRA, 'A competência dos juízos administrativos de competência especializada' [The jurisdiction of administrative courts with specialised competence], *Revista do CEJ* 1/1.º (2022), pp. 189-225.

- (iv) The fourth, reported for 2023, refers to the planned creation of specialised sub-sections, also in the area of tax enforcement and administrative appeals, in the Tax Litigation Sections of the TCA ⁽¹⁷³⁾ — a measure presented politically as serving the purpose of "keeping pace with the growing technical and legal complexity of certain disputes, which require the application of a very specific set of principles and rules" and thus "offering a more qualified judicial response at the second instance level to this type of litigation" ⁽¹⁷⁴⁾ .
- (v) The fifth and final one, also scheduled for 2023, refers to the creation, not yet implemented, of a third Regional Federal Court (Central), headquartered in Castelo Branco, also composed of a Tax Litigation section and respective specialized subsections ⁽¹⁷⁵⁾ — planned with the aim of "contributing to the decongestion of the North Central Administrative Court and the South Central Administrative Court, where the most significant situations of inadequate decision times and backlog of administrative and tax jurisdictional cases currently exist." ⁽¹⁷⁶⁾ .

¹⁷³ See Articles 32(3) and 38(2) of the ETAF, as amended by Decree-Law No. 74-B/2023 of 28 August.

¹⁷⁴ See the Explanatory Memorandum to Draft Law No. 75/XV/1.

¹⁷⁵ See Article 31/1 of the ETAF, as amended by Decree-Law No. 74-B/2023 of 28 August.

¹⁷⁶ See the Explanatory Memorandum to Draft Law No. 75/XV/1.

2.1.2. Management

147. Still with reference to the post-2011 period, it is possible to note several interventions in *the management* of state tax courts, of which the following three stand out:

- (i) The legislative redefinition, in 2019, of the model for the presidency of tax courts, grouped together with the administrative district courts through the division of jurisdiction into four geographical zones (North, Center, Lisbon and Islands, South)⁽¹⁷⁷⁾ — which was followed consecutively by the opening of the 1st Training Course specifically for the exercise of functions of president in administrative and tax courts⁽¹⁷⁸⁾, the opening and processing of the procedure for the appointment of such presidents⁽¹⁷⁹⁾, and finally, their effective appointment by the CSTAF⁽¹⁸⁰⁾.
- (ii) The legislative redefinition, also in 2019, of the tax court administration model, providing for the existence of a judicial administrator, a management board and an advisory board in each of the four geographical areas⁽¹⁸¹⁾ — the procedures for appointing judicial administrators for these zones have now been initiated and completed⁽¹⁸²⁾.

¹⁷⁷ See Articles 39(4), 43 and 43-A of the ETAF, as amended by Law No. 114/2019 of 12 September, and Ordinance No. 366/2019 of 10 October.

¹⁷⁸ See Order No. 11550/2019 of the Minister of Justice and Notice No. 11263/2019 of the CSTAF.

¹⁷⁹ See CSTAF Resolution of 12 January 2021 and CSTAF Circular No. 02/2021.

¹⁸⁰ See CSTAF Resolution of 26 April 2021.

¹⁸¹ See Article 56(1) and (2) of the ETAF, as amended by Law No. 114/2019 of 12 September.

¹⁸² See the Orders of the Director-General of Justice Administration of 28 October 2020 and 26 January 2021.

- (iii) The approval, in 2023, of the first legislative act enshrining the administrative and financial autonomy of the CSTAF, under which, among other things, a centre for monitoring the management of the courts of jurisdiction, a general administration department and a technical-legal office will operate ⁽¹⁸³⁾.

2.1.3. Facilities

148. In terms of the infrastructure housing the state tax courts, the data collected annually by the CSTAF show successive interventions or, in some cases, relocations; but with reference to the year 2021, 12 courts still have deficiencies, shortcomings or inadequacies of various kinds; specifically ⁽¹⁸⁴⁾:

	Infrastructure deficiencies
TCAN	"the building is too small (...) there is a need to consider installing the TCAN in another space that provides a new dimension, appropriate to the court's own functions (...) it does not have a courtroom"
TAF Braga	"the adaptation works were not able to fully address the deficiencies typical of residential buildings of that era, particularly with regard to common access for magistrates, court officials and users"
TAF Mirandela	"Although the size of the premises is satisfactory, the configuration of the structure and the difficulties inherent in adapting it to a court make it unfit for purpose (...) the building shows signs of deterioration and is in need of maintenance and conservation."
TAF Penafiel	"The facilities are satisfactory in terms of size, but not very functional, given the configuration of the building and the difficulties inherent in adapting it for use as a court."
TAF Porto	"their adaptation does not allow us to say that these are ideal facilities, as they are lacking in size."

¹⁸³ See Decree-Law No. 31/2023 of 5 May.

¹⁸⁴ See the CSTAF *Annual Report* (2021), pp. 23, 26-27, 30, 34-35, 36-37, 39 and 41.

TAF Aveiro	“the building (...) has structural problems that are difficult to solve and which have been getting worse”
TAF C. Branco	“The court does not currently have a witness room.”
TAF Leiria	“The residential building does not have the functionality and dignity required for the functioning of a court.”
TAF Funchal	“There is a lack of investment in furniture and equipment.”
TAF Almada	“lack of space and functional deficiencies”
TAF Beja	“The building, not having been designed for this purpose, is unsuitable for use as a court, as it is clearly too small.”
TAF Sintra	“the spaces made available and in use are insufficient, and the problems arising from the construction of the building remain”

2.2. Human resources

2.2.1. Magistrates

a) Entrance examinations

149. From 2004 to 2010 ⁽¹⁸⁵⁾, only three competitions were held for admission to the judicial ranks of the administrative and tax courts ⁽¹⁸⁶⁾: (i) the first was held exceptionally and under its own legal framework, allowing only judges (judicial or public prosecutors) from the ordinary courts to compete ⁽¹⁸⁷⁾; (ii) the following two were held under the general regime for admission to the judiciary ⁽¹⁸⁸⁾. The number of vacancies in these three competitions and the corresponding training courses at the Center for Judicial Studies (CEJ), covering both areas (administrative and tax) of the jurisdiction, without discrimination, was as follows:

	Vacancies
(2008) Extraordinary Course ⁽¹⁸⁹⁾	30
(2009) 1st Course TAF ⁽¹⁹⁰⁾	25
(2010) 2nd Course TAF ⁽¹⁹¹⁾	45
TOTAL (2004-2010)	100

¹⁸⁵ Previously, and at the time of the 2004 'Reform', Article 7 of Law No. 13/2002 of 19 February, which approved the ETAF, provided for the opening of a competition for the recruitment of judges for the administrative courts and tax courts. The regulations for this competition were approved by Order No. 386/2002 of 11 April, and the competition was opened by Notice No. 4902/2002, setting the number of candidates to be admitted at 93.

¹⁸⁶ The following data are limited to the admission of judicial magistrates. As regards public prosecutors, the fact that they are recruited en bloc for the entire Portuguese judiciary makes it impossible to separate, at the level of admission competitions, vacancies specifically intended for administrative and tax jurisdiction and, within this, for the tax area.

¹⁸⁷ See Law No. 1/2008 of 14 January, which also stipulated that successful magistrates would then attend a specialisation course organised by the CEJ, lasting a maximum of three months.

¹⁸⁸ See Law No. 2/2008 of 14 January. Until then, Articles 71 and 73 of the ETAF, in their original version, provided for a specific competition and initial training regime for magistrates in the administrative and tax jurisdiction, to be defined in a separate law, but this was never approved.

¹⁸⁹ See Article 1/1 of Law No. 1/2008 and Notice No. 4315/2008 of the CEJ.

¹⁹⁰ See the Order of 29 October 2008 of the Minister of Justice and Notice No. 27124/2008 of the CEJ.

¹⁹¹ See the Order of 26 January 2010 of the Minister of Justice and Notice No. 4879/2010 of the CEJ.

150. From 2011 to 2023, eight competitions were held for the admission of judges to the administrative and tax courts, starting in 2018 on an annual basis, with the following number of vacancies:

	Vacancies
(2014) 3rd Course TAF ¹⁹²	40
(2016) 4th Course TAF ¹⁹³	42
(2018) 5th Course TAF ¹⁹⁴	40
(2019) 6th Course TAF ¹⁹⁵	25
(2020) 7th Course TAF ¹⁹⁶	30
(2021) 8th Course TAF ¹⁹⁷	30
(2022) 9th Course TAF ¹⁹⁸	20
(2023) 10th Course TAF ¹⁹⁹	31
TOTAL (2011-2023)	258

b) Legal frameworks

151. The legal frameworks for magistrates — judges and public prosecutors — in the tax courts of the administrative and fiscal jurisdiction in force at the end of 2010 resulted, for the STA and the TCAs, from defined in 2004 ⁽²⁰⁰⁾; for the tax courts of first instance, they were resized in 2008 ⁽²⁰¹⁾. They were as follows ⁽²⁰²⁾:

¹⁹² See Order No. 1973/2014 of the Minister of Justice and Notice No. 2141/2014 of the CEJ.

¹⁹³ See Order No. 1513/2016 of the Minister of Justice and Notice No. 1756-A/2016 of the CEJ.

¹⁹⁴ See Order No. 27/2018 of the Minister of Justice, Notice No. 15619/2017 of the CEJ, and Order No. 7418/2018 of the Secretary of State for Justice.

¹⁹⁵ See Order No. 11624/2018 of the Minister of Justice and Notice No. 19402/2018 of the CEJ.

¹⁹⁶ See Order No. 410/2020 of the Minister of Justice and Notice No. 20808/2019 of the CEJ.

¹⁹⁷ See Order No. 11673/2020 of the Minister of Justice and Notice No. 21116/2020 of the CEJ.

¹⁹⁸ See Order No. 7384/2021 of the Minister of Justice and Notice No. 15553/2021 of the CEJ.

¹⁹⁹ See Order No. 13779/2022 of the Minister of Justice and Notice No. 224/2023 of the CEJ.

	Judges Counsellors	Deputy Attorneys General
STA Tax Litigation Section	9	n/a ²⁰³

	Appellate Judges	Deputy Attorneys General
TCA North Tax Litigation Section	6	3
TCA South Tax Litigation Section	8	4
TOTAL	14	7

	Judges (Tax Litigation)	Judges (Administrative and Tax Litigation)	Federal Prosecutors (Tax Litigation)	Federal Prosecutors (Administrative and Tax Litigation)
TAF Almada	4	-	-	4
TAF Aveiro	3	1	-	3
TAF Beja	1	1	-	2
TAF Braga	5	-	-	5
TAF C. White	2	-	-	2

²⁰⁰ See Articles 1 and 2 and Tables I, II and III of Ordinance No. 2-A/2004 of 5 January.

²⁰¹ See Article 1 and Table I of Ordinance No. 874/2008, of 14 August.

²⁰² This does not include positions to be abolished when they become vacant.

²⁰³ Pursuant to Articles 13(2) and 125 of the Statute of the Public Prosecutor's Office/1986 (Law No. 47/86 of 15 October), the Deputy Attorneys-General serving in the STA, replacing the Attorney-General, were appointed by the Superior Council of the Public Prosecutor's Office from a list established for all supreme courts (Constitutional Court, STJ, STA, Court of Auditors). According to Ordinance No. 265/99, of 12 April, this joint framework consisted of 30 Deputy Attorneys-General, with no fixed framework defined solely for the STA.

TAF Coimbra	3	1	-	3
TAF Funchal	-	2	-	1
TAF Leiria	4	-	-	5
TT Lisbon	11	-	5	-
TAF Loulé	2	-	-	2
TAF Mirandela	-	2	-	1
TAF Penafiel	2	-	-	2
TAF P. Delgada	-	2	-	1
TAF Porto	9	-	-	6
TAF Sintra	4	1	-	6
TAF Viseu	2	-	-	2
TOTAL	62		50	

152. The legal frameworks for magistrates in the administrative and tax jurisdictions were only changed for the three levels of the judicial hierarchy in 2017 and have remained unchanged since then ⁽²⁰⁴⁾. They are currently as follows, specifically with regard to tax courts ⁽²⁰⁵⁾:

	Judges Counsellors	Deputy Attorneys General
STA Tax Litigation Section	12	n/a ²⁰⁶

²⁰⁴ See Ordinance No. 211/2017, of 17 July, and Ordinance No. 290/2017, of 28 September.

²⁰⁵ This does not include positions to be abolished when they become vacant.

²⁰⁶ Pursuant to Articles 20(2) and 172 of the Statute of the Public Prosecutor's Office/2019 (Law No. 68/2019, of 27 August), Deputy Attorneys-General serving in the STA, replacing the Attorney-General, are appointed by the Superior Council of the Public Prosecutor's Office from a list established for all supreme courts (Constitutional Court, STJ, STA, Court of Auditors). According to Ordinance No. 330/2019, of 24 September, this joint framework consists of 30 to 36 Deputy Attorneys General, with no fixed framework defined solely for the STA.

	Appellate Judges	Deputy Attorneys General
TCA North Tax Litigation Section	14 to 20	7
TCA South Tax Litigation Section	14 to 20	7 to 10
TOTAL (maximum limits)	40	20

	Judges (Tax Litigation)	Judges (Administrative and Tax Litigation)	Federal Prosecutors (Tax Litigation)	Federal Prosecutors (Administrative and Tax Litigation)
TAF Almada	5	2	-	4
TAF Aveiro	5	1	-	4
TAF Beja	2	1	-	2
TAF Braga	8	2	-	7
TAF C. White	3	1	-	2
TAF Coimbra	3	1	-	3
TAF Funchal	2	1	-	2
TAF Leiria	7	2	-	5
TT Lisbon	28	-	9	-
TAF Loulé	2	1	-	4
TAF Mirandela	2	1	-	2
TAF Penafiel	4	1	-	3
TAF P. Delgada	1	1	-	1
TAF Porto	17	2	-	13
TAF Sintra	11	2	-	7

TAF Viseu	3	1	-	2
TOTAL	123		70	

153. Still with regard to the administrative courts of first instance and the tax courts of first instance, consideration should finally be given to the supplementary tables of judges for the four geographical areas of jurisdiction ⁽²⁰⁷⁾, also established in 2017 ⁽²⁰⁸⁾, which are as follows:

	Judges
North Zone	2 to 5
Central Zone	2 to 5
Lisbon and Islands Zone	2 to 7
South Zone	2 to 5
TOTAL (maximum limits)	22

154. A comparison of these legal frameworks shows that, between the period immediately prior to the establishment of the tax arbitration system and the present day, there has been the following positive change in the number of positions available in the state tax courts:

	Judges (2010 vs. 2023)	Prosecutors (2010 vs. 2023)
STA Tax Litigation Section	+3	n/a
TCA's Litigation Sections	+26	+13

²⁰⁷ Under Article 63 of the ETAF, these tables are used for the secondment of judges to district administrative courts and tax courts where there is a shortage or impediment of incumbents, a vacancy, or where the number or complexity of existing cases so warrants.

²⁰⁸ See Ordinance No. 288/2017 of 28 September.

Tax (maximum limits)		
TAFs and TTs + supplementary staff	+83	+20
TOTAL	+112	+33

c) Permanent staff

155. With regard to permanent judicial magistrates working in the tax courts of the administrative and fiscal jurisdiction, the data available for the end of 2010 show the following ⁽²⁰⁹⁾:

	Judges (2010)
STA Tax Litigation Section	8

	Appellate Judges (2010)
TCA North Tax Litigation Section	4
TCA South Tax Litigation Section	7
TOTAL	11

	Judges (2010)
TT Lisbon	11
Remaining TAFs	49
TOTAL	60

²⁰⁹ The data was provided by CSTAF.

156. From 2011 onwards, these figures evolved as follows ⁽²¹⁰⁾:

STA Tax Litigation Section	Judges
(2011)	8
(2012)	9
(2013)	6
(2014)	9
(2015)	9
(2016)	9
(2017)	9
(2018)	6
(2019)	10
(2020)	12
(2021)	11
(2022)	11

TCA North Tax Litigation Section	Advisory Judges
(2011)	6
(2012)	8
(2013)	7
(2014)	9
(2015)	9
(2016)	9
(2017)	12
(2018)	10
(2019)	14

²¹⁰ Until 2016, the data was provided by CSTAF. From then on, it comes from *the Annual Reports* (2017, 2018, 2019, 2020 and 2021) and the *Seniority Lists* (2018, 2019, 2020, 2021 and 2022) of CSTAF, available at www.cstaf.pt

(2020)	16
(2021)	15
(2022)	16

TCA South Tax Litigation Section	Appellate Judges
(2011)	8
(2012)	8
(2013)	6
(2014)	10
(2015)	10
(2016)	11
(2017)	10
(2018)	8
(2019)	15
(2020)	16
(2021)	13
(2022)	13

TAFs (TT Lisbon + tax vacancies + mixed vacancies)	Judges
(2011)	52
(2012)	72
(2013)	94
(2014)	82
(2015)	79
(2016)	77

		Judges (Tax Litigation)	Judges (Administrative and Tax Litigation)
TAF Almada	(2017)	5	1
	(2018)	5	1
	(2019)	3	1
	(2020)	3	-
	(2021)	5	-
	(2022)	6	-
TAF Aveiro	(2017)	5	1
	(2018)	4	1
	(2019)	2	1
	(2020)	4	-
	(2021)	6	-
	(2022)	7	-
TAF Beja	(2017)	1	1
	(2018)	1	1
	(2019)	1	1
	(2020)	1	1
	(2021)	1	1
	(2022)	1	1
TAF Braga	(2017)	7	1
	(2018)	7	1
	(2019)	9	1
	(2020)	8	-
	(2021)	10	-
	(2022)	11	-
TAF C. Branco	(2017)	2	1
	(2018)	2	1
	(2019)	2	1
	(2020)	2	1
	(2021)	3	-
	(2022)	2	2

TAF Coimbra	(2017)	3	1
	(2018)	3	1
	(2019)	1	1
	(2020)	2	1
	(2021)	3	-
	(2022)	2	2
TAF Funchal	(2017)	1	1
	(2018)	1	1
	(2019)	1	1
	(2020)	1	2
	(2021)	1	1
	(2022)	1	2
TAF Leiria	(2017)	6	1
	(2018)	6	1
	(2019)	4	1
	(2020)	4	-
	(2021)	8	-
	(2022)	9	-
TT Lisbon	(2017)	17	-
	(2018)	21	-
	(2019)	12	-
	(2020)	18	-
	(2021)	25	-
	(2022)	29	
TAF Loulé	(2017)	2	1
	(2018)	2	1
	(2019)	1	1
	(2020)	2	1
	(2021)	3	-
	(2022)	2	2
TAF Mirandela	(2017)	1	1
	(2018)	2	1
	(2019)	1	-

	(2020)	1	1
	(2021)	1	-
	(2022)	1	1
TAF Penafiel	(2017)	2	1
	(2018)	2	1
	(2019)	3	-
	(2020)	2	1
	(2021)	3	-
	(2022)	3	1
TAF P. Delgada	(2017)	-	1
	(2018)	-	1
	(2019)	-	-
	(2020)	-	1
	(2021)	-	1
	(2022)	-	1
TAF Porto	(2017)	15	1
	(2018)	15	1
	(2019)	10	-
	(2020)	11	-
	(2021)	15	-
	(2022)	16	-
TAF Sintra	(2017)	9	1
	(2018)	10	1
	(2019)	6	1
	(2020)	6	-
	(2021)	8	-
	(2022)	10	-
TAF Viseu	(2017)	3	1
	(2018)	3	1
	(2019)	3	1
	(2020)	1	1
	(2021)	2	-
	(2022)	2	2

Supplementary table	(2022)	-	12
TOTAL (2022)		128	

157. In other words, comparing the scenarios observed at the end of 2010 and 2022, the following positive developments can be seen in terms of the number of judicial magistrates working in the tax courts of the administrative and fiscal jurisdiction:

	Counsellors	Appellate judges	Judges	TOTAL
(2010)	8	11	60	79
(2022)	11	29	128	168
Variation	+3	+18	+68	+89

2.2.2. Court officers

a) Legal staff

158. From the point of view of the legal staff of bailiffs in the administrative and tax jurisdiction, it should be noted that those of the STA and the two Central Administrative Courts have not changed since 2011 ⁽²¹¹⁾. With regard to district administrative courts and first instance tax courts, the following changes have been made between the legal frameworks in force at the end of 2010 ⁽²¹²⁾ and the current ones ⁽²¹³⁾:

²¹¹ In the case of STA and TCAS, these maps are those still included in the annex to Ordinance No. 721-A/2000 of 5 September. In the case of TCAN, the map is included in Map IV annexed to Ordinance No. 1634/2007 of 31 December.

²¹² Resulting from Map III annexed to Ordinance No. 874/2008, of 14 August.

²¹³ Resulting from the annex to Ordinance No. 84/2018, of 27 March.

	(2010)	(2023)	Variation
TAF Almada	14	19	+5
TAF Aveiro	14	16	+2
TAF Beja	9	9	=
TAF Braga	20	29	+9
TAF C. White	11	11	=
TAF Coimbra	15	14	-1
TAF Funchal	5	9	+4
TAF Leiria	18	21	+3
TT Lisbon	20	39	+19
TAF Loulé	10	11	+1
TAF Mirandela	5	11	+6
TAF Penafiel	11	14	+3
TAF P. Delgada	5	7	+2
TAF Porto	32	45	+13
TAF Sintra	20	29	+9
TAF Viseu	11	10	-1
TOTAL	220	294	+74

b) Permanent staff

159. In terms of permanent staff, data from the DGPJ reported for 2010 showed a total of 251 court officials (clerks and court secretaries) working in all district's administrative courts and tax courts ⁽²¹⁴⁾. Data from the DGAJ reported in March 2022 show that, except in two cases, all courts of first instance courts still had a shortage of court officials in relation to the legal framework ⁽²¹⁵⁾:

²¹⁴ Cf. *Justice and efficiency. The case of the Administrative and Tax Courts*, Coimbra: CES, 2017, p. 123.

²¹⁵ See <https://dgaj.justica.gov.pt/Tribunais/Funcionarios-de-Justica/Mapas-de-pessoal-oficiais-de-justica>

	Legal framework	Actual staffing levels (2022)
TAF Almada	19	16
TAF Aveiro	16	16
TAF Beja	9	7
TAF Braga	29	25
TAF C. White	11	9
TAF Coimbra	14	13
TAF Funchal	9	8
TAF Leiria	21	20
TT Lisbon	39	29
TAF Loulé	11	10
TAF Mirandela	11	8
TAF Penafiel	14	10
TAF P. Delgada	7	6
TAF Porto	45	38
TAF Sintra	29	23
TAF Viseu	10	12
TOTAL	294	250

2.2.3. Advisers

160. Since 2004, the law has stipulated that judges in administrative and tax jurisdictions "have advisors who assist judicial magistrates." ⁽²¹⁶⁾ This general command would be reinforced in 2009, with the dual provision for the creation of a "support office for magistrates of the administrative and tax courts", operating within the CSTAF, and the possibility of district administrative courts and tax courts, as well as central administrative courts, being equipped with "support offices to provide technical advice and consultancy to judges, the president of the respective court, and magistrates of the Public Prosecutor's Office" ⁽²¹⁷⁾.

161. To date, however, none of these offices have been effectively created ⁽²¹⁸⁾, nor have any procedures for recruiting advisors been implemented, at least in the lower courts ⁽²¹⁹⁾ — a scenario that contrasts with what occurs in the ordinary courts ⁽²²⁰⁾. The lack of implementation of judicial advisory services is, moreover, a frequent and negatively highlighted topic in studies being produced on the state of the courts ⁽²²¹⁾. And, from within the jurisdiction, there is no hesitation in recognizing that it is essential to "provide the jurisdiction with structure and effective means, resources and instruments, including the level of technical advice and consultancy, and judges with advice and support secretariat", and that, "in addition to and beyond the amendment of the respective regulatory framework, [it is important] that they are implemented and put into practice, giving them effective and full existence" ⁽²²²⁾.

²¹⁶ See Article 56(4) of the original version of the ETAF (= current Article 56(5)).

²¹⁷ See Article 56-A(1) and (2) of the ETAF, introduced by Decree-Law No. 166/2009 of 31 July and amended by Law No. 114/2019 of 12 September.

²¹⁸ Even with the approval of the CSTAF organic law in 2023, has the situation changed, at least for the time being, because the technical-legal office provided for in Article 13 of Decree-Law No. 31/2023 of 5 May, to assist the Council, does not correspond to the office envisaged in Article 56-A/1 of the ETAF.

²¹⁹ In the case of the STA and the TCAs, the permanent staff lists publicly available on their respective institutional websites show the existence of staff assigned to magistrate support units. And in the case of the STA, Article 13 of Decree-Law No. 73/2002 of 26 March provides for and regulates the functioning of a 'Support Office for Judges and Public Prosecutors', composed of advisers whose role is to 'assist the respective judges and public prosecutors in the exercise of their functions, performing the tasks assigned to them'.

²²⁰ Since 2020, several recruitment procedures have been opened for advisers to the Support Offices for Judicial Magistrates of the ordinary courts: see, *for example*, Notice No. 20974/2020 of the CSM.

²²¹ See *Mudar a Justiça Administrativa e Fiscal* [Changing Administrative and Tax Justice], Coimbra: Almedina, 2013, pp. 27-29; *Justiça e eficiência. O caso dos Tribunais Administrativos e Fiscais* [Justice and efficiency. The case of the Administrative and Tax Courts], Coimbra: CES, 2017, pp. 127-132; *Interim Report* of the 'Working Group for Administrative and Tax Justice' (2021), pp. 19-20; *Second Interim Report* of the same 'Group' (2022), pp. 18-22.

²²² See C. CARVALHO, 'Debate on the reform of the organisation and functioning of administrative and tax jurisdiction: specialisation and advisory services', in *Proceedings of the Conference on Legislative Initiatives for the Reform of Administrative and Tax Procedure*, Lisbon: ICJP, 2019, p. 36.

2.3. Legislative reforms

2.3.1. Procedural regimes

162. Since 2011, the CPPT has undergone more than twenty amendments, which coexist with dozens of modifications to other laws affecting tax litigation (e.g., LGT, RGIT, Complementary Regime for Tax and Customs Inspection Procedures).

Among all these legislative interventions, the most relevant are the revisions that the CPPT underwent in 2019 (223) and in 2021 (224), both not only but largely marked by *procedural simplification*. As recognised in relation to the first of these revisions, "although the CPPT has been subject to annual legislative amendments and interventions since its creation [in 2001], this essential legal instrument had not been the subject of a thorough and structured intervention", with the legislator proposing, at that time, "in line with the objectives of procedural streamlining and efficiency in the administration of tax justice", to move forward with "a set of significant amendments to the CPPT which, despite their scope, do not alter the essence of its procedural process, embodying measures for improvement or simplification" — specifically changing, among other things, the rules on written pleadings, jurisdiction, enforcement of judgments, precautionary measures, and appeals ⁽²²⁵⁾. Overall, it has already been noted that this set of amendments was fundamentally aimed at "reducing litigation on issues whose solution is already established in case law, but which had never been positive and which therefore continue to generate litigation" and, likewise, "to include in the CPPT procedural rules and instruments contained in the CPTA that are likely to enhance the rationalisation of the activity of the tax courts and their capacity and quality of response" ⁽²²⁶⁾.

²²³ See Law No. 118/2019, of 17 September.

²²⁴ See Law No. 7/2021, of 26 February.

²²⁵ See Draft Law No. 165/XIII.

163. The specialist literature points out, however, that true *reform* of the Tax Procedure remains to be done, insofar as "tax litigation continues to be limited to a panoply of scattered procedural means, whose fields of application, in relation to different types of acts, are defined ambiguously, posing multiple difficulties that require case law, with obvious prejudice to taxpayers' right to effective judicial protection, an effort far greater than that which is required of it and which should, in fact, be required of it if the necessary reform were to be carried out, based on the principle of effective procedural simplification" ⁽²²⁷⁾ . Some even suggest that "the CPPT contributes greatly to the success of tax arbitration and to the undue devaluation, in a state governed by the rule of law, of the role of the courts as sovereign and independent bodies", because "the difference in complexity between the CPPT and the tax arbitration procedure works in favour of the latter, in a logic of *forum shopping*, in which taxpayers and lawyers choose the fastest and most effective means" ⁽²²⁸⁾ .

2.3.2. Computer system

164. In any case, the 2019 reform also implemented the full and complete computerization of the tax judicial process, requiring all procedural acts of the parties, including those of the Federal Revenue Service, to be carried out electronically, and also allowing for electronic consultation of proceedings ⁽²²⁹⁾. This decision necessitated the creation of a specific portal for intervention and consultation of proceedings by the Federal Revenue Service: the Portal of Public Entities in the Scope of the Tax Judicial Process, active since 2021 ⁽²³⁰⁾.

²²⁷ See M. AROSO DE ALMEIDA/S. SOARES, 'The problem of the scope of judicial review in the context of the lack of tax justice reform', in *Comments on Tax Procedural Legislation*, Lisbon: AAFDL, 2019, p. 39; also on the structural deficiencies that still plague the current model of Tax Procedure, cf. A. P. DOURADO, 'Portuguese tax litigation: a call for reform', *CJT* 22 (2018), pp. 3-13; J. LOPES DE SOUSA, 'The difficult and tortuous paths of tax litigation reform', *CJA* 71 (2008), pp. 23-30.

²²⁸ See A. P. DOURADO, 'Litigation', pp. 3 and 9.

²²⁹ See Article 24 of the CPTA, as amended by Law No. 118/2019 of 17 September, as well as Ordinance No. 4/2020 of 13 January and Ordinance No. 100/2020 of 22 April.

²³⁰ See pro.tribunais.org.pt

3. Conclusions

165. The above analysis allows us to draw the following conclusions regarding investment in state tax justice since the establishment of a tax arbitration system in Portugal (2011):

- (i) From the point of view of the structure and organisation of the tax courts, which have essentially retained the architecture of previous years, it should be noted that, alongside temporary interventions, but motivated by the declared intention to resolve the backlog of cases that had been accumulating, particularly in the tax area of jurisdiction (with the creation of *extraordinary teams* in 2011 and *recovery teams* in 2018), definitive steps have been taken towards the *specialisation* of the courts of first instance (2019/2020), which has since been extended to the — in future three — Central Administrative Courts (2023);
- (ii) From the point of view of tax court management, it was also after 2011 that, on a more *micro* level, the new model for the presidency and administration of first instance tax courts (2019), and, on a more *macro* level, the administrative and financial autonomy of the CSTAF (2023) was definitively established;
- (iii) From the point of view of tax court facilities, most of them still suffer from shortcomings, many of which are infrastructural;

- (iv) As for magistrates, compared to *the status quo* at the end of 2010, there has been an increase of more than 200% in the number of vacancies in competitive examinations for judicial magistrates for the entire administrative and tax jurisdiction (100 until 2010 vs. 258 after 2011), an increase of +112 positions in the legal staff of judicial magistrates at the three levels of the tax courts, as well as an increase of +89 judicial magistrates in active service in these courts (89 in 2010 vs. 168 in 2022);
- (v) As for bailiffs, also in comparison with *the status quo* at the end of 2010, there has been a substantial increase in the legal staff (+74, only in relation to the tax courts of first instance), but there is still a deficit in terms of effective staff in most of the tax courts of first instance;
- (v) As for advisers, it should be noted that, despite the legislative *update* of the provisions establishing the advisory role of judges in administrative and tax jurisdiction, this has yet to be implemented, which is an omission that has been repeatedly highlighted as detrimental to the effective and swift adjudication of cases;
- (vi) With regard to the basic procedural regime applied by the tax courts, as set out in the CPPT, it should be noted that, despite improvements, mainly in terms of procedural simplification, particularly due to the 2019 revision, it has yet to comply with the call, made by legal scholars, for an effective *reform* of the Portuguese model of tax litigation;
- (vii) With regard to the computer system supporting the tax courts, since 2019, tax proceedings have been fully computerised, accompanied by the creation of a portal specifically aimed at the participation of the Tax Authority.

166. In short, it cannot be said that the establishment and operation of a tax arbitration system in Portugal has led to a *disinvestment* in state tax justice. It is estimated that the years of coexistence of the state tax courts with this alternative system of dispute resolution in the tax area demonstrate, as a whole, a progressive strengthening, even if in some aspects still imperfect, in the organisation, resources and normative and material means of supporting the activity of the tax courts.

VII. CONCLUSIONS AND RECOMMENDATIONS



A)

Framework for tax arbitration

- I. The scope of tax arbitration comprises disputes arising from tax legal relationships that: (i) subjectively, involve the AT on the passive side; (ii) objectively, concern tax matters, relate to assessment acts, equivalent acts or definitive assessment acts, and do not refer to acts subject to necessary administrative reaction when this has been overlooked, indirect assessment acts and acts relating to customs duties on imports; (iii) quantitatively, do not exceed the value of €10,000,000.00.
- II. From 2011 until the end of 2022, 77,119 requests for the establishment of an arbitral tribunal in tax matters were filed with the CAAD — a number that, while not automatically convertible into the number of cases *not filed* with state tax courts, has certainly had an impact on reducing pending cases in the tax area of administrative and fiscal jurisdiction, which has been effective in recent years.
- III. The legal provisions enabling the *migration* of cases pending before state tax courts in 2011 and 2018, which the legislature plans to replicate for 2024 in broader terms, have had little effective application.

B)

Independence and impartiality of arbitrators

- IV. Compared to other voluntary arbitration centres, the CAAD has a reinforced and more demanding regime of impediments, due to the subject matter and its institutional nature as the only tax arbitration centre, given that it involves public interests and public funds.
- V. Similarly, the system for appointing arbitrators and its practical application constitute a random model, inspired by the procedural distribution

of judges in the Administrative Courts, which limits the parties' choice and reinforces the independence and distance of arbitrators from them.

- VI. Nevertheless, the use of artificial intelligence in this selection process (whether as an aid to procedural processing for statistical purposes, but above all in the context of possible future predictive analyses of the individual behaviour of arbitrators), although not the subject of this report, should be considered with caution in order to avoid undue pressure on the arbitrator and the exercise of judicial functions.
- VII. An examination of the IBA guidelines reveals that the CAAD largely incorporates or integrates their meaning, with emphasis on the so-called red list guidelines.
- VIII. The dispersion of CAAD rules on impediments across various regulatory instruments does not favour objectivity and certainty (the clear identification of the corresponding criteria being a central issue when choosing, disclosing conflicts of interest, and accepting or rejecting arbitrators), so it is recommended that all current grounds for disqualification be consolidated either in the law (RJAT) or in the CAAD Code of Ethics.
- IX. The decisions of the Ethics Council involve the need to incorporate into the consolidation referred to in the previous paragraph some criteria underlying this case law that express a degree of novelty in the final decision.
- X. In the consolidation process described, it would be appropriate to adjust a small number of the Council's guidelines to the IBA guidelines, ensuring even greater rigour in the area of incompatibilities, namely:
 - (i) The representation of the AT by an arbitrator with a long-term contract (two consecutive years) relating to legal representation or expert opinion should, unless there is a better opinion, be equated with a form of relationship justifying a duty of disclosure and, possibly, of impediment, if the other party objects to the appointment;

- (ii) In view of the guidance of the courts of appeal on voluntary arbitration and the IBA guidelines, the following could be established: (a) a duty of disclosure in the event that an arbitrator is appointed more than 5 times in 2 years by the same party and (b) disqualification if such appointment concerns matters of the same legal nature as the subject matter of the dispute, as well as (c) disqualification in the event that, within a period of 3 to 5 years, the same arbitrator has been appointed by the Party more than 15 times, regardless of the subject matter of the dispute, seeking to promote the diversification of arbitrators to be appointed (this measure would certainly have a particular impact on the AT, as there are a significant number of cases in which it appoints the same arbitrator);
- (iii) For this reason, it would also be relevant to consider the periodic and public disclosure of the number of cases in which each Party has appointed a particular arbitrator, in an easily understandable form (tables and/or graphs), without incurring the risk of personalisation;
- (iv) In particular, with regard to the presiding arbitrator, it would be relevant to consider introducing a *numerus clausus* (maximum 15/18 names), limiting the appointment of presiding arbitrators to a list previously validated by the CSTAF and reviewed every four years;
Both the RJAT (see Article 8(3)) and the CAAD CA (see Article 2(10), Article 5 and Article 8) ⁽²³¹⁾ provide grounds for the termination of an arbitrator's mandate in specific cases. However, in the case of an arbitrator who repeatedly and/or seriously violates objective performance criteria – such as compliance with decision deadlines, availability to perform duties and the number of unfounded requests for recusal and refusal or removal – it seems relevant to apply a generic mechanism that allows for their exclusion from the lists of arbitrators.

²³¹ It is incumbent upon the Ethics Council of the Administrative Arbitration Centre to dismiss the arbitrator or arbitrators in the event of non-compliance with the requirements set out in the preceding paragraphs.

- (v) Thus, it is considered that the procedure for verifying the maintenance of the conditions for inclusion in the CAAD lists of arbitrators referred to in Article 7 of the RSDAMT, to which the provisions of Article 7 of the Code of Ethics apply, would be appropriate, with the necessary adaptations.
 - (vi) It would be incumbent upon the Ethics Council to periodically review the lists of arbitrators every four years and, based on a decision grounded in the applicable legal and regulatory rules, propose the exclusion of an arbitrator from the CAAD's list of arbitrators in tax matters, with the CAAD's Management being responsible for making the final decision on the matter. The CAAD Board of Directors, after consulting the Council, could reinstate arbitrators previously excluded within four years of their exclusion, if they have again expressed an interest in joining the lists and meet the objective conditions for doing so.
 - (vii) It also seems pertinent to consider a maximum age for serving as presiding arbitrator.
- XI. In the event of an amendment to the Code of Ethics, it should be established that, once an arbitrator has been appointed and objections have been raised, the arbitrator's resignation may only take place if there are objective reasons inherent in the Code and not other reasons that are not based on them and that are rooted only in an excess of zeal for impartiality or in the mere subjective discomfort of the arbitrator in the face of refusals by a party that have no objective basis.

C)

Comparative analysis between decisions of state tax courts and decisions of tax arbitration courts

- XII. A study comparing the decisions handed down by tax arbitration courts within the scope of the CAAD in tax matters with those of the tax courts of the administrative and fiscal jurisdiction should focus on the decisions handed down by the latter in the first instance, because this is also the nature of the CAAD's intervention and should, in addition, cover only actions which, although submitted to state jurisdiction, could (alternatively) have been brought before the arbitration courts.
- XIII. The outcome of a greater number of actions is not necessarily reflected proportionally in the economic expression of the outcome of the case, so the outcome criterion adopted ultimately has a significant influence on the analysis.
- XIV. Overall, the Public Treasury wins more in state courts and taxpayers win more in arbitration courts.
- XV. In state courts, there is a certain balance in the distribution of wins, with an advantage for the Public Treasury (both in terms of the number of cases and their economic value), although taxpayers have won more cases in terms of number of cases in the Administrative Court of Braga (without this determining a greater economic expression of the outcome) and in terms of economic expression in the Administrative Court of Beja (although not supported by a greater number of cases won).
- XVI. In arbitration jurisdiction, the distribution of wins is generally more asymmetrical, with an advantage for taxpayers, although more significant in terms of the number of cases than in terms of their economic value.
- XVII. Breaking down the amount awarded by different value ranges, in state jurisdiction its distribution is relatively constant, with a prevalence of the Public Treasury in the different intervals, only reversed in cases with a value $\geq \text{€}500,000.00$ and $< \text{€}1,000,000.00$.

- XVIII. In arbitration jurisdiction, taxpayers prevail in all value segments, with the percentage difference being more significant in lower value cases, gradually decreasing as the value of the cases increases.
- XIX. In cases with a value greater than €1,000,000.00, the distribution of wins between the Public Treasury and taxpayers is balanced (with a slight advantage for the former), especially when considering the respective economic expression.
- XX. Considering the distribution of the amount due each year in the state jurisdiction, it can be seen that the balance of results that emerge in favour of the Public Treasury according to the criterion of the number of cases is counteracted by the asymmetry in the distribution of their economic expression – in 2020 and 2021, the Public Treasury wins more; in 2019 and 2020, taxpayers win more.
- XXI. In arbitration jurisdiction, taxpayers win more cases in all years of the reference period, which is more significant in terms of the number of cases and more modest in terms of their economic expression.
- XXII. Segregating the decisions handed down in state jurisdiction according to their respective subject matter (tax), it can be seen that the Public Treasury wins more if the criterion is the number of cases (IMI, IRC, IRS, VAT, IUC and in the "Others" category), but that this trend is reversed in favour of taxpayers if the criterion of economic expression is considered (IMI, IMT, IRC, IS, ISP and IUC).
- XXIII. In arbitration jurisdiction, there is a clear trend for taxpayers to win in the different taxes (regardless of the criterion used).

- XXIV. If we look at the distribution of successful cases by subject (tax) in each year, the results are very diverse in state jurisdiction, noting that the higher number of favourable decisions (or respective economic expression) for the Public Treasury over the four years of the reference period hides a variation in wins in different courts and in different years, a trend that is also observed, albeit less pronounced, in arbitration jurisdiction.
- XXV. It is important to consider that a study that seeks to compare the decisions of the tax courts of first instance and tax arbitration will always be conditioned by various circumstances arising from the characteristics and circumstances of each of these dispute resolution channels.
- XXVI. The results obtained from the objective analysis should therefore be properly contextualised and understood, particularly in light of various circumstances, such as: (i) the different areas of application of these dispute resolution channels; (ii) the “screening” effect resulting from the greater speed of arbitral decisions and the fact that they are public knowledge (encouraging and discouraging litigation in matters that may be decided in favour of or against taxpayers); (iii) the “screening” effect resulting from the existence and activation of administrative appeals; and (iv) the mass nature of the production of tax acts and, thus, of the illegalities committed.
- XXVII. With regard to this last point – the occurrence of situations of repetition (massification) of illegal acts, and thus of the judgements of legal (non)compliance that end up being produced on them – it should be noted that a very significant part of tax arbitration decisions (23.4% in the reference period) consist of: (i) verification of the existence of factual and legal similarities with cases previously decided by certain courts, following the respective rulings unfavourable to the Public Treasury; and (ii) the “approval” of administrative revocation (annulment) decisions by the AT, after the court has been constituted.

- XXVIII. If the decisions that fall into these two categories are expunged, there is a greater balance in the distribution of income between taxpayers and the Public Treasury.
- XXIX. For an entity that benefits from a presumption of legality in its actions, the Public Treasury's gains are modest, both in "state jurisdiction" and in "arbitration jurisdiction" (in fact, more pronounced in the latter), an aspect that will certainly legitimise the discussion about its mode of operation, without prejudice to the adaptations that have been made in terms of internal guidelines in line with jurisdictional decisions, as already mentioned.

D)

Qualitative assessment of tax arbitration

- XXX. The qualitative assessment of tax arbitration in terms of the relevance of its provision has two aspects: the *national legal system and the European Union legal system*.
- XXXI. At the level of *the European Union legal order*, tax arbitration is relevant on three levels: *i) it promotes the densification of the concept of national courts with regard to arbitral tribunals; ii) it promotes the regular use of preliminary rulings, promoting the interpretation of Union law by the CJEU; iii) facilitating the disclosure of inconsistencies between EU law and national law.*
- XXXII. The referral of a preliminary question to the CJEU by a tax arbitration tribunal was a pioneering move, confirming that the tax arbitration tribunal within the CAAD has all the necessary elements to be classified as a national court for the purposes of Article 267 TFEU.
- XXXIII. Arbitration tribunals within the scope of the CAAD frequently resort to the preliminary ruling procedure, having referred a total of 39 preliminary questions on the interpretation of Union law, whether primary or secondary to the CJEU between 2011 and 2023, a total of 39 preliminary questions on the interpretation of primary and secondary EU law, most of which related to tax provisions (VAT, corporate income tax, personal income tax, corporate income tax, special consumption tax and vehicle tax).

- XXXIV. Some of these cases explicitly revealed the non-compliance of national tax law with Union law, with the CJ interpreting Union law as opposing a given national rule, with the consequent observance of the primacy of Union law and even giving rise to legislative changes in the domestic legal order (as was the case, for example, with regard to the taxation of capital gains in the context of personal income tax for taxpayers not resident in national territory).
- XXXV. At the level of *the national legal system*, the case law of the is significant in its relationship with *constitutional justice*: not only does this case law contribute to the identification of issues of constitutional non-compliance in the context of the specific review of constitutionality carried out by those courts; but also through constitutional appeals lodged against tax arbitration decisions and the consequent dismissal of those appeals and confirmation of the ruling of (non-)unconstitutionality by the Constitutional Court. A total of 18 constitutional appeals against tax arbitration decisions, concerning rules on corporate income tax, property transfer tax or municipal property tax.
- XXXVI. Still at the national legal level, the case law of tax arbitration courts is relevant in matters of legislative changes due to the direct and/or indirect effect of arbitration decisions. Relevant examples are the cases of the IUC and Verba 28 of the TGIS or, more recently, the ISV.
- XXXVII. Still at the national level, with regard to the relevance of arbitral case law for changing the legal basis of the AT, the latter may internally adapt its actions in line with past arbitral decisions – accommodating the decision of new specific cases downstream to the meaning of the arbitral decisions handed down or even the procedural position in pending cases; it may also translate this new form of action downstream of tax arbitration decisions – in particular with the intervention of the STA to standardise case law in internal rules, as is the case with Circulars.

- XXXVIII. Examples of this relevance and adoption by the AT of new Circulars include: the case concerning the exemption from IMT and the interpretation of Article 270(2) of the CIRE (Circular No. 4/2017 of 2 October 2017); the case concerning item 2.6 of List I annexed to the VAT Code (Circular Letter No. 30183/2016, of 18 October 2016); or, furthermore, the case concerning the IUC and taxation of used cars imported from other Member States of the European Union (alignment of the AT's understanding with the case law of the CJEU, also triggered by a tax arbitration court).
- XXXIX. It is also accepted that the AT may accept in its actions the position upheld by the STA, in an appeal against a tax arbitration decision under the RJAT, in the sense of standardising case law, which has already occurred in several cases.
- XL. Finally, with regard to the impact of arbitral case law on future decisions of state courts, this may result, first of all, from the inevitable two-way interaction between the case law of the various courts involved. Contributing factors include: the legal provision for appeal to the STA in the event of a contradiction between an arbitral award and a state court decision and, since 2019, also between tax arbitral awards; the standardisation of case law by the STA in appeals filed against arbitral awards; the decisions handed down by the TC in constitutional appeals filed against tax arbitration decisions; the consolidation of the case law of the STA and the TJUE.

E)

Tax arbitration and investment in state tax courts

- XLI. The establishment and operation of a tax arbitration system in Portugal since 2011 has not led to a *disinvestment* in state tax justice: on the contrary, the years of coexistence of state tax courts with this alternative system of dispute resolution in the tax area demonstrate, as a whole, a continued and progressive strengthening, even if in some aspects still imperfect, of the resources and normative and material means supporting the activity of the tax courts.

XLII. This reinforcement is evident:

- (i) In terms of the organisation and management of tax courts, in addition to some temporary measures (extraordinary teams and teams to clear backlogs), the *specialisation* within tax courts and the approval and implementation of a new management model for administrative and tax courts, given the enshrinement of the administrative and financial autonomy of the CSTAF.
- (ii) In terms of human resources, there has been a substantial increase in the number of vacancies in competitions for magistrates to enter the administrative and tax jurisdiction, a substantial expansion of the legal staff, and a significant increase in the number of judges and court officials working in the tax courts.
- (iii) In terms of the IT system supporting the tax courts, which has been successively improved since then, 2019 saw the complete and full computerisation of tax proceedings, accompanied by the creation of a portal specifically aimed at the participation of the Tax Authority.

XLIII. The imperfections of this reinforcement lie, in turn, in the infrastructure of the courts, many of which have been pointed out as deficient, and above all in the lack of an effective reform of the current tax procedure model — which, despite successive legislative interventions aimed at increasing procedural flexibility, is still largely indebted to the past.

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