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### **Title of presentation:** The Portuguese Tax Arbitration Regime

Arbitration is well known as a means of resolving international and domestic disputes. Still, tax matters were traditionally excluded from arbitration, as in Portugal until 2011. The Portuguese experiment with arbitration tribunals in the tax law field resulted from the need to address the delays in the procedures pending in the State courts, which undermined the right of citizens to effective judicial protection.

The Portuguese Constitution grants taxpayers the fundamental right to effective protection of justice and includes arbitration tribunals among the expressly recognized categories of courts. Under this framework, it was possible to set up an arbitration system for tax cases established with the authorization of the Parliament. Arbitration in tax matters was introduced into the Portuguese tax system in January 2011 through a Decree Law and entered into force in July of the same year. The regime establishes the jurisdiction, appointment procedures, rules for arbitration tribunals, the effects, and remedies for their decisions.

According to its introductory note, tax arbitration was adopted to pursue three main goals, the first of which is to reinforce the effective protection of taxpayers. Speeding up the resolution of disputes between tax authorities and taxpayers and reducing the number of cases pending in State courts are, therefore, subordinate to the main objective of ensuring effective judicial protection of taxpayers' rights and to reduce the levels of litigation that have been suppressed. Over the years, the length of court cases may have contributed to many taxpayers giving up their legitimate arguments when the amounts are relatively low, or the litigation costs are too high. A percentage of these cases can now be referred to arbitration. From 2011 to 2022, about 22% of the cases submitted to tax arbitration were related to personal income tax, and about 58% did not exceed sixty thousand euros.

The recourse to tax arbitration has been provided as the taxpayer's right to ensure a quick and effective response. Therefore, tax authorities are bound to tax arbitration and cannot refuse to litigate in tax arbitration courts or opt for State court. This option remains with the taxpayer only. The legislator also enforced a legal deadline to render the arbitral award. Cases submitted to tax arbitration must be decided within 6 months, with the possibility of an extension, which should not exceed an additional 6-month period. On average, matters submitted to tax arbitration are decided within 4 months and 22 days. The arbitral tribunal's award is binding on both parties

involved and has full binding effects, with the same legal validity and result as awards issued by State courts. Additionally, all the decisions of the tax arbitration tribunals are publicized immediately on the CAAD's website. In this context, publicity shows that tax arbitration pays due respect to the principle of legality, ensures equality between taxpayers, and protects the rights and interests of the parties involved. The early publication of the award can also have a significant preventive effect on the outbreak of litigation, allowing the taxpayer to anticipate the tax administration's position and adjust its behavior to avoid the cost or risk of litigation. The cost of litigation is similar in both arbitral and State courts, granting generalized access to arbitration by all citizens. Nevertheless, since the arbitration procedure is faster and the payment of the procedural fees is due in a shorter period, the financial effort may be heavier.

The specific feature of the Portuguese tax arbitration regime lies in that the Portuguese legislature decided to give taxpayers the possibility of referring their disputes with the tax authorities to a court which operates in a less formalized, swifter, and cheaper manner than ordinary judicial courts. A goal that has been compromised due to the limitation of the jurisdiction of tax arbitration tribunals to about 20% of the typical jurisdiction of State courts on the grounds of the case and its value. As a result, the tax arbitration tribunals only have jurisdiction regarding the illegality of national tax assessments that do not exceed 10 million euros. However, certain acts have been specified as being beyond the scope of the tax arbitration tribunals, such as customs duties and VAT due on importation. Despite these limitations, for the last 11 years, taxpayers opted to litigate more than 8032 tax disputes under the arbitration mechanism, representing nearly 23% of the new tax proceeding on a claim for the declaration of the illegality of tax assessments presented before a court in Portugal.

The most sensitive topic in the legal design of the Portuguese tax arbitration system is the selection and appointment of arbitrators, which has been subject to changes and improvements over the years. Arbitrators are chosen through a public procedure from among people of proven technical ability, moral character, and sense of public interest. They must have a law degree with at least 10 years of proven professional experience in tax law. In matters requiring specialized knowledge of other areas, a person with a degree in economics or management may also be appointed arbitrator (not presiding). Tax arbitration tribunals may operate with a single arbitrator or a panel of three arbitrators. Provided the disputed amount exceeds sixty thousand euros, or when the taxpayer chooses to appoint an arbitrator, a tax arbitration tribunal is formed by a panel of three arbitrators. When taxpayers exercise the option to choose an arbitrator, the tribunal must always consist of three arbitrators. The second arbitrator is chosen by the tax authorities, and the third by the agreement of the two appointed arbitrators. On the other hand, when the taxpayer does not appoint an arbitrator, which has been the case 94% of the time, arbitrators are appointed by the Ethics Committee from CAAD, from a specific and public list available on CAAD's website. The list of arbitrators is prepared following the expertise of the arbitrators and the order

being generated on an aleatory basis by a computer system. The arbitrators are appointed for each case by an electronic selection, which can be followed live by anyone who requires it via email.

As a rule, the decision adopted by a tax arbitration tribunal is not subject to appeal except for the cases expressly provided for in the law. Based on figures published by CAAD in its 2022 Activity Report, most appeals filed by the parties are not admitted by the higher courts due to a lack of grounds for appeal. Limitation of grounds of appeal ensures a faster and more definite resolution of litigation, but it can also limit taxpayers' rights of defense. In the last few years, broadening the grounds for appeal has been necessary, sacrificing speed for legal certainty. This was the case with the extension of the possibility of appeal to the Supreme Court when contradictory arbitration awards are at issue. The contradictory rulings were endangering equal treatment and legal certainty.

Another key feature of the regime is direct access to the European Court of Justice (ECJ). Since arbitration tribunals decide, as a rule, as last instance, the ECJ admitted the preliminary ruling reference submitted by a tax arbitration tribunal in *Ascendi Judgment (C-377/13)*. Direct access to the ECJ makes tax arbitration attractive if the taxpayer seeks a quick and final decision, especially on harmonized taxes such as internal and intra-EU VAT or excise duties.

Eleven years after the approval of its Legal Regime, tax arbitration is neither a miracle nor a risk experiment. It is a reality and, in many aspects, an example of success due to its celerity. The speed of a procedure and the idea of transparency make it easier to perceive the tax system's fairness and ultimately lead to a greater belief in tax arbitration. Thus, the dialectic arising from arbitration and the greater proximity between the taxpayer involved in tax litigation and the litigation itself may be a huge step forward in securing the taxpayers' rights. Tax arbitration is part of a new way of considering the tax justice system that combines State courts with a wider network of mechanisms for settling disputes that complement those courts rather than replace them. Nevertheless, as with any new regime, the Portuguese tax arbitration regime faces growing pains. The technicality of the regime makes it difficult for citizens without legal training to access it, and the limitation of the scope of the application has no valid reason other than a political option. The pandemic also posed new challenges regarding the dematerialization of court diligence and the need for decentralization.

In conclusion, as the advocate general Szpunar said in his opinion on *Ascendi's judgment*, “the Tax Arbitration Tribunal is (...) a manifestation of a trend not encountered only in Portugal to deformalize and simplify the judicial procedure by using techniques and instruments characteristic of private dispute resolution mechanisms. It is also an element of the specialization of courts and judges, which is necessary in the context of the increasing complexity of socio-economic relations and, thus also, disputes submitted to the courts”. This post-modern approach to justice, although welcome, should not sacrifice the general principles of legality, equality, and the adversarial process, which are inherent to a democratic rule of law.