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***Modelli previdenziali e scelte impositive***

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**ABSTRACT**

**Pension fund models and tax choices**

The constant and progressive development of supplementary pension funds is due to the increasing difficulties met by the basic social security to satisfy all the social needs typical of the Welfare State pension model.

Also the Government has become aware of such phenomenon and, through Legislative Decree No. 252/2005, issued the announced reform of the "second pillar", implementing the provisions of the delegated law no. 243/2004 regarding the pension system reform and repealed Legislative Decree No. 124/1993.

Inspired by Decree 252/2005, this note aims at analyzing the principles which inspired the reform of social security, by verifying whether the model currently adopted by the Government will somehow be incompatible with the Constitutional principles, in particular through the joint comparison of the principles regarding the ability to pay (article 53 of the Constitution) and equality (art. 3 of the Constitution).

Although the law reforming public social security and supplementary pension funds (law dated 23 August 2004, no. 243) had provided punctual indications regarding the implementation of a pure EET model (through the total or partial shift of the taxation of investment income from the accumulation phase to the disbursement phase), the delegate implementation Decree (Leg. Dec. dated December 5, 2005, no. 252) appears to be aimed at progressively abandon that model.

As well known, in fact, the qualifying feature of the supplementary social security reform implemented by the abovementioned Decree is the elimination of the ordinary IRPEF taxation on pension income and the taxation

of the same under an alternative system with extremely low rates (15 percent, which may be reduced up to 9 percent).

Such choice, while theoretically respecting the choice of postponing the taxation of any income set aside for retirement purposes, gives rise to a manifest taxation gap to the extent that any income not subject to personal and progressive taxation at the time of contribution will only be partially taxed upon disbursement.

As a consequence, the model outlined by Legislative Decree No. 252 of 2005, does not seem to correspond, in principle, to any of the taxation models of pension savings, since it follows a pattern in which the limited deduction of contributions and the substitute taxation of any investment income generated during the accumulation, are opposed to the extremely low substitute taxation rates (15 percent that can be reduced up to 9 per cent) of the pension benefits payable, net of the financial component already subject to taxation.

If we wanted to represent such model on the basis of known schemas used by the economic doctrine, it seems that the same has outlined a scheme E(1) T(s) E(t), where:

E(1) represents a limited deduction of contributions;

T(s) essentially indicates the ordinary taxation of income produced during the accumulation phase (application of the same substitute tax envisaged for investment trusts to pension funds, with an insignificant reduction of the tax rate from 12.5% to 11%);

E (t) means that a part of the pension is exempt, corresponding to the investment income already taxed, and the remainder is taxed, not at the ordinary rates, but rather by applying an extremely low substitute tax rate (15 percent that can be reduced up to 9 percent).

The model shown above grants a particularly favorable taxation regime, definitely not in line with the treatment generally provided for retirement income and not responding to any logic, nor legal or economic, if not for the eminently political purpose of facilitating, in terms of taxation, the supplementary pension funds.

Thus, the choices made by the Government in Legislative Decree No. 252/2005 represent a break with the principles of our tax system.

This not only means abandoning the principle of correlation between the amounts deducted during the contribution and the amounts to be taxed at the time of disbursement, but also the idea of a unified configuration of the different phases of the social security system (that of the provision, accrual and disbursement).

The decree in question meets the only intent to increase the facilitation and draws a system, sometimes irrational, that seems to conflict with the constitutional principle of progressiveness referred to in art. 53, paragraph 2 of the Constitution.

Therefore, it is impossible not to acknowledge that such a system, especially if prolonged *sine die* in time, may be subject to constitutional legitimacy challenges; in fact, amongst other, it also appears unique that compulsory pension is subject to full taxation through personal and progressive tax rates, while the supplementary one – whose accession, as already observed, is voluntary – are subject to substitute tax, *de facto* "regressing".

The third and fourth chapters have been dedicated to the exploration of issues concerning european and international profiles of the taxation of supplementary pension funds and pension components, highlighting the many obstacles to the functioning of the taxation of supplementary pension plans from a "transnational" perspective, mainly attributable to the existence of tax asymmetries in the international scenario.

In fact, despite the need to develop supplementary pension funds, almost all EU countries are characterized by the absence of a legal framework governing the same funds.

In a cross-border scenario, in fact, it is undeniable that functional anomalies arise when a subject, after having deducted the payments in a State, transfers his residence in another tax jurisdiction upon retirement.

Under a Community law point of view, the ambition of a State to restore the broken symmetries, threatens to violate the fundamental freedoms enshrined in the Treaty on European Union.

As rightly emphasized by the European Commission, *"the diversity, complexity and specificity of the national systems that have developed in recent years are regarded as the greatest obstacle to the freedom of movement for persons and freedom to provide services in the field of supplementary pension funds and life insurances"*.

Therefore, the consequence is a particularly complex framework that we tried to analyze also in the light of the case law of the Court of Justice, deriving from the non-implementation in the Member States of the principle of mutual acknowledgement of supplementary pension systems and of the tax rules characterizing the same.

The large number of rulings issued by the Court of Justice has boosted the changes to the internal provisions amending the tax systems of the individual Member States incompatible with the Treaty; this is slowly contributing to unhinge the resistance of the Member States which is the greatest obstacle to the completion of the harmonization process.

Nevertheless, are still evident the disparities between the Community's will to build a unified European market for pension funds and, on the other hand, the existence of certain fiscal particularities still surviving within each country.

Finally, at extra-EU-level, there has been the exam of the issues concerning the different taxation schemes of retirement income which can cause double international taxation issues and the rules used for the allocation of taxing rights between the State of source and that of residence, as resulting from the OECD model, as well as the question of legal subjectivity of pension funds in the international arena, having regard to the concept of the Pension Fund as "resident subject" for the purposes of the Treaty.

In the international relations, in fact, despite the many efforts, especially within the Community, it is still to be affirmed the "tax symmetry" principle, under which, a taxable service corresponds to a deducted contribution and, vice versa, a non-taxable service corresponds to a non deductible contribution.

In the case of payment of the pension from a fund to a person residing in a Member State other than that in which the fund is located, there is a problem of distribution of the taxing rights between the State of residence of the fund and the State of residence of the recipient. The State of residence of the fund could claim the right to tax any amount paid as the State of source of income, always keeping in mind that the State of residence of the beneficiary is entitled to tax any amount received by their residents in application of the worldwide income taxation principle.

It is therefore clear, that the discrepancy and the different provisions on the taxation moments within the single domestic legislations may lead to different taxation schemes of pension income in the various countries and, consequently, to emerging phenomena of double taxation, or, conversely, of lack of taxation.

Ultimately, the biggest obstacle to cross-border mobility of workers is the lack of openness and the "myopia" of States too careful to regulate only certain aspects and forgetting the general picture. The solutions offered until now seem to be too sectorial; instead, it would be appropriate to prepare coordination legislation at Community level to allow mutual acknowledgement of the supplementary pension funds of all Member States, providing rules to prevent double taxation.