

## **Pre-emption – A Discussion Vector regarding the Role and Importance of the Legal Professions in the Romanian Legal Background**

**Assoc. Professor Manuela TABARAS, PhD.**

Titu Maiorescu University of Bucharest, Faculty of Law, Romania  
*manuela\_tabaras@yahoo.com*

### **Abstract**

*Under the EU Accession Treaty, Romania pledged to liberalize the land market as of 1 January 2014, so that foreign citizens, natural persons from the European Community can unrestrictedly purchase farming land outside residential areas. With the provisions of Law no. 17/07.03.2014 (effective within 30 days of the publication in the Official Gazette of Romania, Part I, that is as of 12.03.2014, and within 7 days of the effective date of the law, methodological norms of application were to be issued), Romania proved it kept its promises assumed in this field, regulating the procedures necessary to the sale-purchase of the farming land located outside residential areas [1].*

*Nevertheless, the Constitutional Court, under Decision no.755/2014, published in the Official Gazette, Part I, no.101 of 9 February 2015, ruled that the provisions of art. 20, paragraph (1) of Law no.17/2014 regarding various measures of regulating the sale-purchase of farming land located outside residential areas were unconstitutional as they allow for the application of a different legal regime between the beneficiaries of the pre-contracts signed prior to the publication of the normative document, according to the way in which they had concluded the pre-contract either in an authenticated form or under private signature, exempting those that had concluded a pre-contract in an authenticated form from the procedure of exerting pre-emption.*

*Therefore, based on this decision, the possible privileges are cancelled and the holders of any pre-contracts concluded prior to the issuing are to be exempted from the prior procedure necessary to the sale-purchase of farming land located outside residential areas in respect of the exertion of the pre-emption right.*

**Keywords:** *pre-emption, lawyer, notary public, unconstitutionality, promise*

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Law no. 17/07.03.2014 regarding various measures regulating the sale-purchase of the farming land located outside residential areas and amending Law no. 268/2001 regarding the privatization of the commercial companies that administer land from the public and private property of the state for farming purposes and the setting up of the

Agency of the State Domains – as revised, is the special law applicable in the field of selling the farming land located outside the residential areas.

### **Concept**

According to DEX (Romanian Explanatory Dictionary) (1998), pre-emption right is “the privilege someone has under a contract or a law, in a sale-purchase, to be, under equal conditions, the preferred one of the several buyers”, its etymology being French, “préemption”, which in its turn comes from a Latin compound noun *prae* – beforehand, *emptio*–purchase [2].

### **Concept delimitations**

Pre-emption right undoubtedly differs from the option pact which represents a variety of the unilateral promise to sell, namely a contract under which the offering party irrevocably allocates a term for the option’s beneficiary, within which the latter is entitled to accept or to refuse the promisor’s offer of concluding a future contract.

Pre-emption right also differs from the unilateral sale offer and from the unilateral sale promise, by the fact that the latter arise exclusively from a contract, not from the law, as the promisor undertakes conventionally to conclude a certain legal act in the future, within a definite or determinable timeframe, any failure to comply with the promise triggering not at all the nullity of the sale to a third party, which is a penalty specific to disregarding the pre-emption right, but the co-contractor’s right to damages or to have a court ruling in lieu of a consent to sell.

Also, pre-emption right is different from a sale required by the law [3], pre-emption representing a way by means of which the seller, who in principle may freely dispose of their asset, is bound to follow, the pre-emption consisting only in a limit to their absolute contractual freedom, limit applicable only if the owner decides to alienate the asset by means of sale! and only in respect of the contractor’s person, determined in abstract by the law and not at all in respect of the conditions of sale (except for the pre-emption in the field of expropriation, where the price of the sale is legally pre-determined – see below).

Pre-emption right represents a subjective right, consisting in an either legal or conventional privilege, granted to the holder of such right called pre-emptor, of buying a

movable or immovable asset or an assignable dismemberment of the ownership right with priority against other persons.

### **The legal sources of pre-emption**

Therefore, pre-emption right may have as source the law or the will of the parties who, conventionally, have instated in favour of one contractor/some of the contractors a right of pre-emption/priority/preference.

From the perspective of the hierarchy of the legal norms and as a consequence of the applicability of the same, the provisions of the civil code regarding the pre-emption right represent the common norm in the field to be applied only if under a special law or the parties' convention, it is not established otherwise.

Therefore, the provisions regarding the pre-emption right comprised by the special laws or conventions made after 1 October 2011 are complete with the provisions of art. 1.730 -1.740 of the Civil Code.

It is exactly in respect of this finding that the Constitutional Court has recently played an important part in the interpretation of the hierarchy of the legal norms as against the provisions of this special law, which therefore limiting the free circulation of goods, the principle of autonomy of will of the owner in the free sale of the owner's goods and by derogation from these fundamental civil liberties, should be analysed by a restrictive interpretation of the imperative legal texts in the field.

In respect of the way of exertion, the Romanian lawmaker has traditionally provided for the exertion of the pre-emption right prior to the conclusion of the sale contract. However, this traditional approach has been enriched with the perspective of exerting the pre-emption right subsequently to the conclusion of the sale contract, a modernist vision, grounded, maybe, on the celerity of the legal rapports required by the market and justified by mechanisms of saving imperfect legal rapports under this way of exerting the pre-emption right subsequently.

### **Common law**

In accordance with common law, namely articles 1370-1340 of the Civil Code, the exertion of the pre-emption right will take place: either further to a sale offer (art. 1730, paragraph 3 of the Civil Code) sent by the seller, prior to the conclusion of the sale, or further to a notice (art. 1732 paragraph 1 of the Civil Code) sent by the seller or

the conditioned third party buyer of the asset, that is subsequently to the conclusion of the sale to all pre-emptors, irrespective of their rank.

Both documents, irrespective of their legal form shall include the surname and name of the seller, the description of the asset, the underlying liens, the terms and conditions of the sale and the location of the asset.

The doctrine has raised the question whether the offer [4] or notice coming from one of the selling spouses of the common asset, or from one of the third party buyers has valid effects, or, in order to ensure that the offer or the notice is validly formulated such instruments should be signed by both spouses. In our opinion, we appreciate that these two instruments represent procedural means necessary to exerting the pre-emption right and not ways of transferring the right and, as such, the acceptance of the other spouse is presumed, as per art. 345 paragraph 2 of the Civil Code, each spouse may conclude by themselves acts of preservation, acts of administration regarding any of the common goods, rights and obligations, as well as acts of acquiring common goods.

The offer, as well as its acceptance shall be notified according to the procedures provided for by art. 1200 of the Civil Code, corroborated with art. 1326 of the Civil Code and the notices, including by means of court executors, securing the proof of sending the content.

Mention must also be made that, according to art. 1187 of the Civil Code, the offer and its acceptance must be issued in the form required by the law in order for the contract to be validly concluded. Thus, if we deal with the notice served by the seller or by the third party buyer under the suspension condition or not exerting the pre-emption right of the immovable asset [5], therefore, subsequently to the sale, based on which the pre-emptor may exert their pre-emption right by notifying the seller of the pre-emptor's consent regarding the purchase of the asset, accompanied by the payment of the price to the seller's account or putting the amount at the seller's disposal, it would be recommendable that both the initial notice and the notice of acceptance should be made in authenticated form with the verification of the capacity, liens, liabilities and parts that cannot be alienated and after obtaining the energy certificate required by the law (implicitly, the land book excerpt for authentication and tax clearance certificate), which

should allow the conclusion of the contract further to the legal communication of the pre-emption in a valid manner.[6]

In both cases, the pre-emption right is exerted in case of sale of movable assets within 10 days of notifying the offer to the pre-emptor and within 30 days in case of sale of immovable assets.

Therefore, in respect of the procedure of instating conventional pre-emption, the lawmaker leaves to the parties the choice of the conventional way of instating it, but regulates a common manner, subsequent to the party's will in respect of the exertion of the pre-emption right and the consequences of exerting or not exerting such right.

As we have pointed out above, the lawmaker has felt the need to expressly penalize the holder of the pre-emption right who has rejected a sale offer, by the fact that the latter can no longer exert this right regarding the contract proposed to them [7]. Therefore, in case of the sale of immovable assets, the offer is considered rejected if it has not been accepted within 30 days of its being notified to the pre-emptor, a term reduced by the lawmaker to no more than 10 days, in case of a sale of movable assets. Nothing prevents the parties, however, to set a conventional term different from the one instated by the lawmaker that should ensure a better exertion of the offer by the pre-emptor.

The doctrine has appreciated [8], given the terms for exertion of the pre-emption right, that the sale offer is irrevocable, by corroboration with the provisions of art. 1191 of the Civil Code, which stipulates the irrevocable character of the offer, as soon as its author undertakes to maintain a certain deadline. However, in our opinion, the term is defined by the law and is not subject to the offering party's choice, being stated as a statute of limitation for the pre-emptor, such as, at any time, the owner may withdraw their offer or amend it, the sale being their option, their absolute faculty, whereas the pre-emption is a mere limit to such faculty, which does not change the contract into a forced one.

In case where the offered asset, which is governed by the legal or conventional pre-emption, is sold within the term of exerting the option by the pre-emptor to a third party, in order to save the sale, the lawmaker has stated that the sale made within this term is under the suspension condition of not exerting the pre-emption right by the pre-

emptor. Therefore, the pre-emptor may exert their pre-emption right by notifying the seller of the former's consent of purchasing the asset, as the case may be, accompanied by the payment of the price to the seller's account or by making the amount available to the latter, or may refuse the sale offer, but expressly and tacitly by not accepting the offer within 10 days of the date of notification of the offer to the pre-emptor, in case of sale of movable assets, or within 30 days in case of sale of immovable assets.

### **Special derogatory norms**

In respect of the special right expressed under the provisions of Law no. 17/07.03.2014 regarding various measures of regulating the sale purchase of farming land located outside residential areas and amending Law no. 268/2001 regarding the privatization of the commercial companies that administer land in the public and private property of the state for farming purposes and the setting up of the Romanian Agency of State Domains (law becoming effective within 30 days of the date of publication in the Official Gazette of Romania, Part I, that is as of 12.03.2014 and the methodological norms of application were to be issued within 7 days of the effective date of the law), Romania has proven that it kept its promises assumed in this field, regulating the procedures necessary to the sale purchase of the farming land located outside the residential areas, instating, however, a pre-emption right distinct from the common law, in favour of the co-owners, lessees, neighbouring owners, as well as of the Romanian State, through the Agency of the State Domains, in this order, at the same price and under the same conditions.

From the point of view of the object [9] of pre-emption Law no. 17/2014 implements measures regarding the regulation of the sale-purchase of the farming land located outside the residential areas. From the point of view of the legal acts involved, Law no.17/2014 regulates in principle the alienation by sale, of the farming land located outside the residential areas.

However, according to the law, the provisions of Law no. 17/2014 are not applicable to pre-contracts and option pacts that were authenticated prior to 12.04.2014, and if the immovable asset contemplated by the pre-contract is registered with the tax roll and land book.

Mention must be made that this requirement has been introduced by Law no. 68/2014 amending Law no. 17/2014, amending art. 5 of the Law in the sense that the land for which an authenticated pre-contract has been concluded is registered with the tax roll and land book.

The lawmaker has excluded only these two types of legal documents from the scope of the law, justified by the circumstance that the solemn notarial act, besides the essential quality of having a certain date, also enjoys the presumption of legality, thus the choice of such titles of legal acts subject to authentication remove the possibility of faking a date prior to the effective date of the law, for promises/pre-contracts/option pacts, which should artificially and illegally remove from the scope of the law an important category of immovable assets.

Nevertheless, in practice there is a diverse series of issues triggered by this dichotomy of legal reason and criticism, based on various arguments: the law give preference to a legal form of decision regarding a legal act, a preference not known to the recipients of the legal norm as at the time of concluding the legal act, which change the legal norm in an unconstitutional one, the non-retroactivity principle in civil matter being a fundamental one, guarantor under the provisions of art. 15 paragraph (2) of the Constitution for any legal form, citizen or law order, this theory being also supported by the provisions of art. 16, paragraph (1) of the same Constitution, regarding equality of rights.

Justifications have gone so far that there have been compared the legal effects of the acts instrumented by various forms of organization of the legal professions, considering almost similar the form of the sale pre-contracts concluded as a document under private signature with the pre-contract attested by a lawyer, although the latter has also lesser power than the one authenticated by a notary public and although such parallelism was forced, as the reason of the lawmaker was only interested in the proving power, validity and authenticity of the legal rapport and not at all in the executant of the legal procedures.

It was also appreciated that this prevalence runs counter to constitutional norms which provide for guaranteeing and protecting in an equal manner the private property right.

Undoubtedly, irrespective of the form chosen, the parties to the authenticated act under private signature called pre-contract, promise, as well as the parties of the authentic act bearing the same name pursued the same thing: to obtain the synallagmatic promise of the other contracting party that the latter will conclude in the future a sale act, respectively, of purchase of arable land located outside residential areas, the legal nature of the act, as the legal effects are regulated by the lawmaker at the time of concluding the legal act, the same, irrespective of the legal form of the act concluded.

With regard to the relevance of art. 16 paragraph (1) of the Constitution, the Court noted that “according to its jurisprudence, the principle of equality in rights involves an equal treatment for cases that, according to the goal pursued, are not different (Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no. 69 of 16 March 1994)”.

Also, the Constitutional Court pointed out that “the cases in which certain categories of persons are must be different in essence, in order to justify the difference of legal treatment and this difference must be based on an objective and rational criterion (see in this respect, as a matter of example, Decision no. 86 of 27 February 2003, published in the Official Gazette of Romania, Part I, no. 207 of 31 March 2003)”. However, in our opinion, the Court’s conclusions fundamentally depart from the lawmaker’s vision reaching the tennis court dedicated to the match between the competing legal professions, the Court finding that “disregarding the principle of equality in rights has as consequence the unconstitutionality of the privilege or of the discrimination which has determined, from a normative point of view, the violation of the principle”.

Thus, the Court appreciated that the solution of Law 17 which gave legitimacy only to the contracts with certain date given by the procedure of notarial authentication is based on the discrimination of excluding somebody from a right [11]. It has also been proposed for the annihilation of this situation “granting or access to the benefit of the right” [12]

Based on the immediate effect of the promise represented by the occurrence of the receivable right, the Court eventually based its theory and decision on the provisions



of art. 16 paragraph (01) of the Constitution regarding the banning of privileges, corroborated with the provisions of art. 44 paragraph (2) of the Constitution, regarding the guaranteeing and equal protection of all natural and legal persons of private law stating that as the effects of the legal documents irrespective of name or instrumenting agent ( lawyer or notary public ) must generally be the same, there was no justification for the different legal treatment given by the provisions of Law 17/2014.

In our opinion, the different treatment of the pre-contracts according to the form of concluding the legal act has an important legal utility, as it is exactly for the legal application of the legal norms and for the prevention of unorthodox methods of bypassing the restrictive provisions of the normative act, so it allows for the application of the normative act and not for its being deprived of effects and, furthermore, such a consideration of the treatment on “subjective and random criteria” in the Court’s opinion will not prevent “a different legal treatment between persons that have concluded pre-contracts of sale regarding farming land located outside residential areas”, as long as the law does not qualify the competences of the natural or legal persons, does not confer legal treatment, but makes sure that the third parties entitled to the purchase of land outside residential areas are not impeded on in their rights by fake legal documents – an aspect disregarded by the concerns of the magistrates of the Constitutional Court.

The goal of the law is not at all to confer the receivable right arisen from the promise “a distinct, differentiated and more advantageous position than that of the persons who have concluded a pre-contract under private signature”, but to avoid the privileges of the counterfeit acts, which the lack of legal rigour and monthly publicity of the acts recorded may cause.

### **Conclusions**

The decision of the Constitutional Court is final and generally mandatory, however, mention must be made that according to the Constitution, the normative provisions in force found unconstitutional, such as 20 paragraph 1 of Law 17/2014 lose their legal effects after 45 days of the publication of the decision of the Constitutional Court, if in this timeframe, the Parliament or the Government, as the case may be, do not put in agreement the unconstitutional provisions with the provisions of the Constitution.

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Foltis A. – "Dreptul de preemțiune (Pre-emption Right)", Ed. Hamangiu, 2011, p 67.

Constitutional Court Decision no.62 of 21 October 1993, published in the Official Gazette of Romania, Part I, no. 49 of 25 February 1994

Decision no.681 of 13 November 2014, published in the Official Gazette of Romania, Part I, no. 889 of 8 December 2014.

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[1] In respect of this procedure, the recent doctrine is rather rich, the author herself having published an article on this topic entitled "Pre-emption Right in the Romanian Legislation between Restriction and Liberalization" - Curierul Judiciar (The Judicial Courier) no 6/2014, Editura C.H.Beck, 2014 București, ISSN 1582-7526, pg. 314- 328;

[2] The institution should not be regarded as being a new one, as it has been known, according to historians, from a Byzantium document from mid XV-th century, under the name of protimis, respectively a real right to be preferred in acquiring the master's wealth by paying the alienation price. In respect of the definition of the institution, this has various and non-unitary approaches in the doctrine, which may be justified by the evolution of the institution, the evolution of the effects of this right, its extent and scope of application. Thus, there are authors who deny the pre-emption right the quality of being subjective law, appreciating that "it is a mere mandatory procedure regarding the publication of the decision to sell", and the sale contract thus made can be included in the category of forced contracts; in this respect, see: Pop L. - "Dreptul de proprietate și dezmembrămintele sale (Ownership Right and Its Dismemberments) ", Ed. Lumina Lex, București, p. 112. In respect of the asset subject to the pre-emption right, mention must be made that there are opinions according to which only the purchase of an asset may fall under the scope of pre-emption and not at all the purchase of a share of the asset, but there are also contrary opinions, grounded on the circumstance that a share of an asset represents also a right, for details see Moise M. – "Dreptul de preemțiune reglementat de Codul civil, din perspectiva practicii notariale (Pre-emption Right as Regulated by the Civil Code, from a Notarial Perspective)", Buletinul Notarilor Publici nr. 2/2012, p. 13.

[3] It has been appreciated in the doctrine that a sale that the owner of the land has to conclude with the holder of the pre-emption right, for the price proposed by the offering party may be included in the category of forced contracts: Pop L. - "Dreptul de proprietate și dezmembrămintele sale", Ed. Lumina Lex, București, p. 112.

[4] In this respect, see Foltis A., op cit. p. 93

[5] We appreciate that the *expressis verbis* stipulation in the sale contract of the suspension condition is not necessary, as the mechanism described by the lawmaker in case of the notice served by the seller to the pre-emptor *post rem venditam* involves *sine qua non* the existence of such a condition. As a contrary opinion, advocating the stipulation of the suspension condition, which has the legal nature of a validity condition of the convention, see Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei – "Noul Cod civil (The New Civil Code)", Editura C.H.Beck, București, 2012, p. 1782. Also, it is appreciated in the doctrine that the mechanism of substitution has a penalizing character in case of a mere sale to the third party buyer, followed by the exertion of the procedures necessary to exerting the pre-emptor's right, so that such contract will be annulled retroactively, in this regard see Foltis A. – "Dreptul de preemțiune (Pre-emption Right)", Ed. Hamangiu, 2011, p 67.

[6] In this regard, for supplementary details and suggestions in the field of the notarial procedure, see Moise M. – "Dreptul de preemțiune reglementat de Codul civil, din perspectiva practicii notariale (The Pre-emption Right Regulated by the Civil Code, from a Notarial Perspective)", Buletinul Notarilor Publici nr. 2/2012, p. 15.

[7] The terms of 30 days and of 10 days, respectively, are both the terms indicated by the lawmaker for the mandatory maintaining of the offer by the seller and terms set as statute of limitation for the exertion of the pre-emption by the pre-emptor, statute of limitation terms, which, as different from the old regulation, may be suspended in case of force majeure, as well as in case of a lawsuit, a case where the term is suspended as of the date of filing the request with the court. Mention must also be made that in this field it operates the institution of waiving by the owner of the benefit of the term set as statute of limitation, which translates into the possibility of the owner to nevertheless conclude, subsequently to the expiry of this term, the document of alienation regarding the immovable asset free of any liens and encumbrances of pre-emption to the very pre-emptor, who has legally lost their pre-emption right.

[8] Moise M. – “Dreptul de preemtiune reglementat de Codul civil, din perspectiva practicii notariale”, Buletinul Notarilor Publici nr. 2/2012, p. 14.

[9] In the broad sense lato sensu.

[10] In this respect (The Decision of the Constitutional Court no. 62 of 21 October 1993, published in the Official Gazette of Romania, Part I, no. 49 of 25 February 1994)

[11] The Court indicated in this respect Decision no. 681 of 13 November 2014, published in the Official Gazette of Romania, Part I, no. 889 of 8 December 2014).