

# The Definition of the Pre-Emption Right and the Meaning of the Pre-Emption Notion in the Romanian Law

CONSTANTIN IOAN GLIGA; ADINA IULIA FOLTIȘ

Law Department  
Transilvania University  
25 Eroilor Street, Brașov  
ROMANIA

[gliga.ioan@gmail.com](mailto:gliga.ioan@gmail.com); [adina.foltis@yahoo.com](mailto:adina.foltis@yahoo.com); <http://www.unitbv.ro>

*Abstract:* - Pre-emption right is a right that has had an amazing evolution in Romania after 1989. The definition of this law evolved in the different regulation laws, the New Civil Code will make this determination once and for all and establish the significance of this notion. This article presents the definitions given to this right, the modalities in which the notion of pre-emption evolved in terms of doctrinal opinions, as well it is presented the vision that the New civil code has in connection with it.

*Key-Words:* - pre-emption, right, definition, doctrine, law, notion

## 1 Legal and doctrinary definitions of pre-emption right

The pre-emption right, under the denomination of *protimisis*, is an institution known in the ancient Romanian Law and which in the period of the communist regime disappeared following the termination of the individual property.

In the year 1991, following the passing of the Land Law no. 18/1991, which instituted in art. 48-49 a pre-emption right at the buying of the agricultural terrains situated outside the built-up areas, the interest of the doctrine in what concerns the analysis of this institution is revived.

Initially the definitions and the analysis of this right were made starting from the specific characters of the pre-emption right regulated by the Law no. 18/1991.

In this manner, it was shown that “pre-emption represents a subjective right that is recognized only for certain holders in order to have priority at buying of a agricultural terrain from outside the built-up area, with the observance also of the other provisions related to this matter” [1].

Subsequently, taking over the definition given to the pre-emption right in the French doctrine according to which “the pre-emption right is the faculty acknowledged to a person or an administrative entity, in the virtue of a contract or a legal disposition, to purchase the property of a good, in the case of its alienation, preferential toward any other buyer”, in the speciality literature it has been shown that “the pre-emption right is contractual or legal” [2]

The quoted author shows that “the pre-emption right is contractual when it revives from the will of the parties, which conclude for this purpose a preferential pact. The pre-emption right can flow from the law, two modalities of regulation being known.

In this manner, the classical regulation manner broaches the pre-emption right as a faculty conferred to a person to purchase a good preferentially toward other person, which is exercised *ante rem venditio*, which makes this right a pre-contractual institution.

We mention that this approach of the pre-emption right was singular in the doctrine, the majority of the authors appreciating that the institution of the pre-emption right through an imperative norm is of the essence of the pre-emption right, through this being different of the preferential right instituted through the convention of the parties known under the denomination of preferential pact.

So, starting from this approach in the doctrine, the pre-emption right received the following definition: “pre-emption is a right of legal origin that, at equal price, offers preference to certain persons toward others at the purchase of a good when its owner decides to sell it” [3]

The regretted professor Francisc Deak, was showing in a study appeared in 1992, after the apparition of the Land Law no. 18/1990 [4] that regulated the pre-emption right at the purchase of the agricultural terrains from outside the built-up area, that: “Differently of the preference right that

has the contractual nature, because the priority right at the purchase of the pact's beneficiary is revived on the basis of the parties' consent – the pre-emption right has a legal nature, being instituted through a imperative norm; the will of the owner-seller has no role in the birth and exercise of the right by its holder. In the measure he has decided to sell the terrain, under the sanction provided by the Law, he must observe the pre-emption right.” [5]

We can not sustain that the Romanian lawgiver has totally embraced this optic that was strongly shaped in the speciality literature, because in 1997, through the Government Ordinance no. 52/1997 concerning the judicial regime of the franchise [6] precisely through a judicial dispositional norm with auxiliary character included in art. 6, suggested to the parties the institution of a pre-emption right in the franchise contract, *if the interest of maintenance or the franchise network development needs the acknowledgement of this right.*

With another words, the lawgiver admits that the pre-emption right can flow also from the convention of the parties and, in this manner, the distinction made on the subject of the legal nature of the pre-emption right and the conventional one of the preference right becomes insufficient to contour the aspects that characterises this rights.

Another important aspect because of the apparition of this normative document is related to the fact that the lawgiver accepts the existence of the pre-emption right not only at the conclusion of a sale-purchase contract, but also at the conclusion of a franchise contract, from where we deduce, that nor the definition of pre-emption as generating priority at the purchase of a good can't be allowed without reserves.

In the doctrine existed an author which, starting from the regulation of the pre-emption right from the same Law no. 18/1991, didn't recognize the civil subjective law character to the one which he denominated “the so called pre-emption right”[7].

So, in the opinion of this author “the so called pre-emption right is just a mandatory procedure of advertising of the sale decision, being a constraint through law of the judicial disposition attribute over the agricultural terrains from outside the built-up area and, in the same time, a limitation of the contractual freedom. The sale-purchase contract which the owner of the terrain is obliged to conclude with the holder of the pre-emption right, that accepted the price proposed by the bidder or offered a convenient price to him, can be included in the category of the forced contracts.”

We mention that in the recent doctrine, although the idea of the legal nature of the pre-emption right wasn't alienated, it was appreciated that the pre-emption right can be exercised not only as a priority at sale, this right could generate to the holder priority to other contract categories like lease, franchise etc [8]

The quoted authors exemplify a series of normative documents that institute pre-emption rights in the most diverse domains in order to indicate the large field of action of this right and the rapidity with which it has extended after the year 1989.

Although we don't agree that all the normative documents exemplified by the quoted authors would institute pre-emption rights, we appreciate that every time the normative act institutes a priority right of the holder in rapport with third parties at the conclusion of a contract can be analysed, in the nowadays context, as a pre-emption right no matter which is the nature of the contract.

For exemplification, the quoted authors appreciate that art. 9 from the Law no. 112/1995 concerning the regulation of the judicial situation of some buildings with the destination of dwelling house that were passed in the property of the state [9] would institute a pre-emption right at the buying of the house in the favour of the tenants.

We can't agree with such an opinion because the right to opt for the buying of the houses is given by this normative act only exclusively to the tenants, without them entering into competition with other persons in order to need priority.

## **2.Principles that can be basis of pre-emption right**

In a recent study, one of the quoted authors [10] appreciates that at the basis of the pre-emption right there are three important principles that we can find in all the pre-emption right types.

It is about the priority principle, the pre-emptor's intervention principle at the price and in equal condition with the third parties, and the third principle refers at the fact that the pre-emptor's intervention in the contract between the owner and the third party can't be imposed.

If in what concerns the first and the last principle exposed by the author we agree that these characters can be imposed with a value of principle in the case of all of the pre-emption types regulated by the Law, we don't agree with the second principle because there are situations unforeseen by

the Law in which beside the priority, the lawgiver offers favourable conditions to the pre-emptor in what concerns the price of the contract.

In this manner, we mention that concerning the pre-emption right regulated by art. 4 from the Law no. 422/2001 concerning the protection of the historical monuments, the lawgiver imposes even to the Ministry of Culture, a representative of the State, to negotiate the sale of the historic monument with the seller or with the authorised economic agent that intermediates the sale.

Also, in the case of the pre-emption rights at the buying of shares regulated by art.14 from the law no. 268/2001 concerning the privatization of the trade companies that hold in administration terrains that are public and private property of the State with agricultural destination, the pre-emptors along the priority at the buying toward third parties, benefit also of conditions privileged at the price, having the possibility to buy shares at a reduced price with 30-40% toward the price offered by third parties.

In the case of the pre-emption right instituted by art.5 from the Law no. 64/1991 the invention patent act, in the situation in which the inventor and the unity don't agree over the price, the Court is the one that established the price.

Passing over these observations, we agree with the quoted author's opinion that the priority represents the fundamental element of the pre-emption right, through it expressing that the holder of the pre-emption right has the possibility to obtain with priority the contract in rapport with others eventual bidders.

Also, we also appreciate that an element that characterises all the types of the pre-emption right refers to the fact that the intervention of the pre-emptor in the contract between the owner and the third party is facultative, in the sense that once born the pre-emption right, this can be used or not, the pre-emptor can't be held responsible for his decision.

From the analysis of the normative acts that regulate different types of pre-emption rights, we notice an inconsistency of the lawgiver in what concerns the use of the pre-emption, preference, priority notion.

As we have seen above, in the Government Ordinance no. 52/1997 concerning the judicial regime of the franchise, the lawgiver uses the pre-emption notion referring to a priority right in what concerns the conclusion of a franchise contract that may be instituted through the convention of the parties.

In the context of the majority opinion existent in the doctrine, this right can't be qualified as being a pre-emption right, having in view the contractual nature of it.

In art. 37 from the Law no. 33/1997 concerning the expropriation for public use utility, it is used the terminology of priority at the buying of the expropriated premise, this fact generating discussions concerning the judicial nature of the right instituted by this legal text, the regretted Fr. Deak [11] having the opinion that this right can't be qualified as being a pre-emption right, but other authors [12], not less authorised, appreciate that we have a case of pre-emption right.

In the trade domain, the lawgiver uses preferentially the terminology concerning the right offered by the Law to some holders' categories in what concerns the possibility to buy with priority shares [13], but also when it is about the buying of patrimonial solvency [14].

We observed that the authors of the commercial law use the preferential terminology, preventing the qualification of this right as being a pre-emption right.

In the domain of the intellectual property right, the lawgiver uses or the preferential notion, or the priority one when he wishes to offer priority at the conclusion of the contracts through which the invention could be exploited, in the domain of invention patent acts [15] or at the conclusion of a new editing contract, in the domain of the copyright.

#### **4. The notion of pre-emption in the New Civil Code**

In the nowadays context, having in view the inconsistency of the lawgiver, but also the opinions expressed in the doctrine, we appreciate that the pre-emption right must be as being that right that offers the holder priority at the conclusion of a contract in rapport with third parties.

Together with the entering into force of the new Civil Code, the pre-emption right shall receive a whole new configuration, having in view that the vision of the new Civil Code is fundamentally different of the existent vision until this moment, in the doctrine.

In this manner, art. 1730 from the new Civil Code provides that: *“(1)In the conditions established by the law or through contract, the holder of the pre-emption right, denominated pre-emptor, can buy with priority a good (2) The dispositions of the herein code concerning the pre-*

*emption right are applicable only if through Law or contract it is established so.”*

From the analysis of the quoted legal dispositions it can be understood that the pre-emption right can have as spring the Law, but also the contract.

That is why in the following articles it is made the distinction between the legal right of pre-emption and the conventional right of pre-emption.

This means that the doctrinarian approach according to which the pre-emption right can have only legal origin must be abandoned, as the one referring to the fact that the priority at purchase instituted through contract offers to the holder a preferential right.

The new Civil Code limits the pre-emption only at the sale-purchase contract, without making the distinction between the goods that can constitute the object of this contract .

We notice that when it offers priority at the conclusion of another contract than the sale-purchase one, the New Civil Code uses the preferential terminology.

In this manner, according to art. 1828 from the new Civil Code: *“(1)At the conclusion of a new contract of lease, the tender has in equal conditions preferential right. But he doesn’t have this right when he hasn’t executed the obligations had on the basis of the previous lease.*

*(2)The dispositions concerning the exercising of the pre-emption right in what concerns the sale are applicable correspondingly.”*

In what concerns the judicial regime applicable to the preferential right, we observe that it is applicable to the pre-emption right concerning the sale, with the mention that this is applied correspondingly, what means that in the situation in which exists dispositions that don’t find their application in the matter of lease or if this dispositions must be nuanced through the specific characters of the lease contract, their application mustn’t be done *ad literam*.

A very easy to notice example for the exemplification of the way in which this dispositions must be adapted, refers to the fact that in the lease contract there is no price, but rent, due to the contract character with successive execution of the lease contract.

This fact generates a series of consequences under the aspect of the manner in which the legal dispositions concerning the exercising of the pre-emption right must be adapted to the lease contract.

What it is important to notice is the fact that in the vision of the new Civil Code, the

exercitation mechanism of the pre-emption right and of the preferential right de is the same, with the specific modifications of the contract over which it is exercised the latter right.

#### 4. Conclusion

As a conclusion, the idea that the two categories of rights should be included in a superior category emerges, and our proposal is the one to include them in the category of the priority rights.

The notion of priority right would include all the rights that offers to the holder priority at the conclusion of a contract in rapport with third parties, no matter if the property is offered by the Law or by contract and no matter of the nature if the contract over which this priority is offered.

Leaving from the vision of the New Civil Code, the pre-emption right could be defined as being that priority right that offers to the holder precedence/priority at the conclusion of a sale-purchase contract in rapport with the third parties

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