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The Right of Pre-Emption Under the Legislation of North Macedonia

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Abstract
The right of pre-emption represents the authorization that a person has, based on the law or the contract, to request from another person to acquire the right to emption the item in the case of the sale of a certain item. The object of the right of pre-emption can be all movable and immovable possessions. When the right of pre-emption is created by agreement for the real estate, the same must be registered in the public register as a temporary registration. The fact of registration also creates effects on third parties. The legal right of pre-emption comes directly from the law or from any by-law act. The legal right of pre-emption appears in co-ownership, joint ownership, floor ownership, agricultural land, construction land, right of pledge, and other similar possessions. The legal right of pre-emption is provided by the provisions of the Law on ownership and other real rights; by the Law on agricultural land; by the Law on enforcement; and by the Law on the sale of agricultural land owned by the state. The contractual right of pre-emption is established by agreement between the parties which is mainly foreseen in the sales contract or with a special contract that consists of the right of pre-emption as its' creation object. Unlike the legal right of pre-emption, which is permanent, the contractual right of pre-emption has a deadline depending on the will of the parties. This right can last for a maximum of five years from the moment of concluding the contract.
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1. Introduction

The right of pre-emption represents the authorization that a person has, based on the law or the contract to ask the other person in case of the sale of a certain item, to offer the same to him first (Zivkovska 2005, pp.95-96). Regardless of the legal basis on which the holder of the right of pre-emption acquires this right, his right remains the same from a substantive point of view. According to the right of pre-emption, the holder of this right has the privilege of having the authorization to buy the item or right before others for the same price and conditions that the owner intends to sell to third parties (Grgić 2009, pp.373). The legal relationship for the right of pre-emption creation is based on the law and the agreement between the parties through the contract. The person who has authorization according to the civil legal theory is called the holder of the right of pre-emption, while the person who has this obligation to offer the item for sale to a certain person is called the holder of the obligation of the right of pre-emption. According to the right of pre-emption, the owner who intends to sell his item is obliged to first make the offer for sale to the designated person who has the right of pre-emption. The object of the right of pre-emption can be movable objects, as well as immovable properties. When the right of pre-emption is created through the agreement for immovable things, the same must be registered in the public register as a temporary registration. The fact of registration also generates effects on third parties. As such, the right of pre-emption is of a property nature but yet plays an important role in economic circulation.

2. Right of pre-emption as a legal right

In order to protect the general interest, the positive law has foreseen a special regime on real estate, through which we come to the narrowing of the authorizations of the owner. The legal right of pre-emption mainly refers to immovable things. In legal theory, there are dilemmas regarding the legal nature of the right of pre-emption whether this right is of real or mandatory legal nature. When this right is defined by the law the subject has a legal right that is mainly dealt with in the framework of real-legal relations. When this right is determined by contract at that point, the nature of the relationship between the parties is regulated by the rules of the obligations relationship. In this case, the effect of the contract for the parties of the right of pre-emption affects only the subjects of the contract.

Through the legal right of pre-emption as a legal institution, the general interest of society is protected. So special importance is given to a certain category of movable and immovable objects. According to the constitution of the Republic of North Macedonia, a special regime with special legal protection is also recognized for items that serve the general interest.

The legislation of North Macedonia, through legal provisions, has foreseen the right of pre-emption as an obligation arising from the law. The main law that regulates the legal right of pre-emption is the Law on

ownership and other real rights. The provisions of this law also regulate the legal regime on things, especially immovable things. In addition to this law, the legal right of pre-emption can also be found in the provisions of other laws such as the law on construction land; the law on agricultural lands; the Enforcement Law; and the Law on the sale of agricultural land owned by the state.

The right of pre-emption can be established only in favor of certain persons and based on the nature of the item. Thus, in the Republic of North Macedonia, there are the following forms of the legal right of pre-emption: 1. The right of pre-emption of the part of the co-ownership; 2. The right of pre-emption of the part of the co-inheritance; 3.The right of pre-emption of the residential building or apartment; 4.The right of pre-emption of the garage; 5.The right of pre-emption of the business building and business space; 6.Right of pre-emption of agricultural and forest land; 7. The right of pre-emption of real estate in case of the issuance of citizenship; 8.The right of pre-emption of the cultural monument; 9. The right of pre-emption of museum material; 10.The right of pre-emption of archival material; 11. The right of pre-emption of library material; 12. The right of pre-emption of stocks in public companies or privately held companies and 13. The right of pre-emption of joint property of the spouses (Zivkovska 1998). In addition to the above-mentioned cases, the legal right of pre-emption is also applied to floor ownership, enforcement proceedings, and in bankruptcy proceedings. According to the Law on ownership and other real rights, the legal right of pre-emption is treated as a real-legal relationship. This right is linked by the object and in case of an owner change, this right continues to exist with the same content and volume. Despite this limitation, the right of pre-emption can be transferred to the new owner through inheritance, gift contract, or a contract of support for a lifetime.

2.1 Right of pre-emption in co-ownership. - The law on property and other real rights has foreseen the situations when the parties are in a certain real legal relationship. Therefore, to them arises the obligation in the case of the sale of the item or a part of the item that they have as an object of co-ownership, joint ownership, or floor ownership, to offer this item or this part of the item to the co-owners, respectively other owners of the common property. Thus, Article 33 of the LOORR foresees the case when the co-owner who intends to sell his co-ownership part is obliged to make an offer for the sale of it to the other co-owners through a notary, informing them of the conditions and the price. In this case, the co-owners who have been notified by the notary must declare themselves within 30 days. If the same refuse, does not declare at all or appears uninterested in buying the co-owner's share, then the co-owner is free to sell this share to any other person. The co-owner who intends to sell his part in the offer can also determine the method of payment. Moreover, it can be foreseen if the payment should be completely or partially paid within the time frame. The offer to buy out the co-ownership part will be considered accepted only if they agree to simultaneously make the payment based on the conditions set in the offer, otherwise, the offer will be considered rejected. If multiple co-owners under the same conditions want to buy the ideal part of the item, then it will be handed over to that co-owner which the seller determines *Law on ownership and other real rights 2001* (RNM), s.33. The right of pre-emption for the co-owners, in this case, is connected with a preclusive term, which means that missing the deadline results in the loss of the right of pre-emption for the co-owners. According to the Civil Code of Albania, in article 204 it is foreseen that the co-owner, before selling his part of the immovable property to a person who is not a co-owner, is obliged to send a written offer to the other co-owners, offering them to buy his part under the same conditions that he is willing to sell to the third party. If they do not respond within three months that they accept the offer, the co-owner is free to sell his part to third parties. He must make the new co-owner known to the other co-owners.

If the co-owner, at the time of the sale of his property, does not submit an offer for the item or part of the indivisible item he intends to sell, to other co-owners, then these co-owners can request the annulment of the agreement for the sale in court. The lawsuit for violation of the right of pre-emption can be submitted within 30 days from the day when each of the co-owners had been notified of the sale and the terms of the sale *Law on ownership and other real rights 2001* (RNM), s.34. In addition to the subjective term, the law has also connected the realization of this right to an objective term. According to the objective term, the right of the co-owners to realize the right of pre-emption is bound to a term of six months from the day of registration in public registers. After this period, the co-owners lose the right to file a lawsuit. While in cases where an object is a movable thing, this period is calculated from the date when the contract is signed. In special cases when the co-owner will offer his share to the other co-owners at a higher price than what he will sell to the third party, or the very fact of the sale will be camouflaged with another contract of exchange, gift contract, or any other form, then the deadline for filing a lawsuit is one year from the date of registration of the immovable property in the public registers.

When the co-owners decide to divide the item that is the object of co-ownership, but it is impossible due to the nature of the item or the eventual division would damage and reduce the real value of the item, the court will make the sale through public auction. According to Article 56 of the LOORR, the co-owner of the item that is the object of division, through the public auction, has the right of pre-emption against the most favorable bidder if, immediately after the closing of the public auction, he declares that he buys the item under the same conditions.

The same rules of pre-emption as in co-ownership apply to the joint property in the marital community,

extramarital community, co-inheritance, and large families. During the sale of a certain part of the joint property belonging to one of the co-owners, the rules for the right of pre-emption of the co-owners are applied in a similar way *Law on ownership and other real rights 2001* (RNM), s.70.

2.2 The right of pre-emption of floor ownership. - floor ownership represents a sub-form of ownership that includes apartments, business facilities, basements, garages, and other separate parts of apartments and business buildings that have two or more apartments owned by different people. According to paragraph 2 of article 95 of LOORR, over separate parts of the building, there can be co-ownership of ideal parts of separate apartments and other separate parts of the building. During the sale of the garage that is located within the building or the construction land which serves the building as an integral part or just some parts of the building, when the alienation is carried out separately from the alienation of the apartment, the owners of the apartments have the right of pre-emption as a separate part of the building, followed by the tenants of the apartments of the same building *Law on ownership and other real rights 2001* (RNM), s.100. This right does not include the tenant of the business facilities of the building. If the owner sells the garage in violation of the provisions with which the right of pre-emption is provided, then the bearer of the right of pre-emption has the right to request through a court procedure for the contract of sale to be annulled and the garage to be offered to him under the same conditions (Ristov 2020, pp.193). The subjective term is 30 days and is calculated from the day when the bearer of the right of pre-emption is notified about the sale, while the objective term is six months and is calculated from the transfer of ownership and the registration of the new owner in the public registers.

3. The right of pre-emption as a contractual right

The right of pre-emption, except by legal provisions as a right and duty provided by law, can also be established by agreement between the parties. For certain persons, the right of pre-emption can also be established by law *The Law on Obligations 2001* (RNM), s.521. With the contractual disposition for the right of pre-emption, the buyer is obliged to notify the seller of the intention of selling the item to a certain person, as well as of the terms of such a sale and to offer to buy the object for the same price *The Law on Obligations 2001* (RNM), s.515. So, when the seller decides to sell the item under his conditions, he must first offer the same to a certain buyer to buy it at the same price. The agreement on the right of pre-emption as a relationship of obligations can only be reached through the sales contract. It cannot be established through the gift contract or any other legal work. If in practice it happens that the seller instead of the sales contract concludes a gift contract, to avoid the transfer of the item to the buyer who has the right of pre-emption. We are dealing with a simulated contract since the real purpose of the parties is hidden. In this case, if the person who has the right of pre-emption, finds out this fact, can request the annulment of the gift contract. He can also request the item to be offered to him for purchase. Exceptionally, the right of pre-emption can also be applied in cases where the seller transfers the item to the person who has the right of pre-emption in the name of the previous debt.

The right of pre-emption according to the Law on Obligations can be specified in the sales contract or other special contract. In the sales contract, it can be provided with a special provision where the seller of the item requests from the buyer that if he later decides to sell the same item, then the buyer should offer the same item at the market price and under the same conditions to the previous seller. In this case, the previous buyer who decides to sell the item is not bound by the price the item had at the time of purchase, as the price of the item will be determined based on the market value of the item at the time of sale. Likewise, the seller of the item, with a contract, can request from the buyer that in case of the sale of the item, he should offer it to another certain person.

In addition to a special provision in the same contract, the right of pre-emption can also be stipulated by another special contract. The contract for the right of pre-emption can be concluded by all legal subjects, both physical and legal persons. It is not necessary to exist any prior legal relationship between the parties that enter the contract for the right of pre-emption as a relationship of obligations. In practice, the reasons why the parties foresee such a right by agreement can be of different natures. This may happen due to the closeness of the family relationship that may exist between the parties, due to the affective nature of the item, due to the position of the item, etc.

The right of preemption by agreement can be achieved when the contracting parties make an agreement narrowing their right and renouncing the basic contractual principle that is the freedom of contracting and the free regulation of contractual relations, according to which the parties are also free to select the future contracting party. The agreement on the right of pre-emption does not represent an absolute restriction of the freedom of contract, but the parties limit themselves only to the selection of the potential buyer, in which case, the seller before offering the item to the third person, must offer the same to a certain buyer. Although this limitation for the obligated party narrows the right to select the contracting party, does not affect his interests in terms of the conditions and the price of the item. Even, in terms of ownership authorizations, the owner enjoys all the rights of use, possession, usufruct, or dispose of the item. Only if the bearer of the right will refuse to buy the item under the dictated conditions and price or will not be declared within the deadline, then the seller has the

right to choose the person to whom he will sell the item. When it comes to the right of pre-emption by agreement, it does not matter whether the thing is movable or immovable.

Unlike the legal right of pre-emption, which is unlimited in terms of time, the right of pre-emption by agreement between the parties is limited. The right of pre-emption ends after five years from the moment of entering the contract if it has not been contracted to end earlier *The Law on Obligations 2001* (RNM), s.519. According to this provision, if the buyer sells the item within the contracted period or at the latest up to five years from entering the contract, then the seller has the right of pre-emption. The right of the previous seller is connected with a preclusion term since after the expiration of the contracted term or after the period of five years, the seller completely loses the right to claim for pre-emption. According to this provision, the right of pre-emption between the parties is not permanent. Even when the parties do not determine the term of validity of this right, it expires after the passage of the period of five years. If the parties by agreement foresee a term longer than five years, this period will again be reduced to five years. This right applies in the same way for movable things, as well as for immovable things. In comparative law, if there are more authorized persons who have the right of pre-emption, they can realize this right only simultaneously (Çavdar and Çavdar, 2008). Except, if this right is lost by any of the bearers of the right of pre-emption, then the other persons can realize this right in full.

Unlike the right of pre-emption by agreement, the legal right of pre-emption is not related to a deadline but it is permanent. This is because the effect of the legal right of pre-emption extends to all persons regardless of their status, as co-owner, joint property owners, or co-heirs. This right is related to the item and the eventual transfer of this right also carries the right of pre-emption to the new winner.

The procedure for the realization of the right of pre-emption must be developed in such a way that the seller in a reliable way in writing, by telegram, by e-mail, or by mail must inform the buyer of the purpose of selling the item. The buyer must decide if he is interested in exercising the right of pre-emption. This right is foreseen in article 516 of the LO, according to which the buyer must declare within a month. It does not matter whether the object of the right of pre-emption is movable or immovable.

The LO has not provided provisions regarding the form of the right of pre-emption. When the object of the right of pre-emption by agreement is immovable, the agreement of the parties must necessarily be made in written form through the contract. This is because the same must be registered in the cadaster in the public register of real estate as a temporary registration. When the object of the right of pre-emption is movable, the agreement for the right of pre-emption can be made verbally. But in order to avoid ambiguities and possible misunderstandings and due to the security of the parties, it is preferable that the same is done in written form.

If the buyer sells the item and transfers the right of ownership to a third party without notifying the seller, and when the third party knew or could not have known that the seller has the right of pre-emption, the seller may within the term of six months, counting from the day when he was notified of this transfer, to request the annulment of the transfer. He can also request for the item to be given to him under the same conditions *The Law on Obligations 2001* (RNM), s.520. The right to annul the legal work will always apply when the third party in this relationship is not in good faith. If the same has been in good faith and due to the circumstances of the case he did not know and had no opportunity to know that someone had the right of pre-emption on the thing constituting the right of ownership, then the person who had the right of pre-emption cannot invoke this right and request the annulment of the contract. In this case, the damaged party has the right to request compensation for the damage caused by the contracting party, which had the obligation to notify the other contracting party of all relevant facts, as well as the right of pre-emption.

According to Article 518 of the LO, in case of a compulsory public auction, the seller cannot plead his right of pre-emption. According to this provision, the thing that is owned by the person is put up for sale against his will and desire. The person who has the right of pre-emption cannot prevent this sale or demand the annulment of it. The only exception, in this case, is when the right of the seller who has the right of pre-emption is registered in the public registers, i.e. when the object of sale is an immovable thing, then the person has the right to demand the cancellation of the compulsory public auction if he was not explicitly invited to attend. According to Article 168 of the Law on enforcement, the person who has the legal right of pre-emption of the real estate that is the subject of enforcement by sale has the right of pre-emption against the best bidder if, immediately after the closing of the auction, he declares that he buys the real estate under the same conditions. According to this provision, it is clearly seen that the person who has the right of pre-emption can only acquire the item under the same conditions. Even in cases where the sale is made by direct agreement, the court has the duty to invite the person who has the right of pre-emption to give a statement about this purchase.

In contrast to the right of pre-emption by agreement, which is foreseen by the provisions of the LO, in our legislation "sale with the right of repurchase" and "purchase with the right of resale" are not foreseen.

The sale with the right of the repurchase is the type of sale in which the seller reserves the right to repurchase the item he has sold to the buyer within a certain period and return the price to the buyer, and in this case, the decision to repurchase depends on the seller. Whereas, purchase with right of resale is that type of sale, in which the buyer expresses the will to sell the purchased item back to the seller, in which case the decision to

resell depends on the will of the buyer, while the seller is obliged to repurchase the item and refund the price to the buyer *The Law on Obligations 2001* (RNM), s.754.

Unlike the legal right of pre-emption, the right of pre-emption by agreement is of a personal nature, which means that its effects extend only to the contracting parties. When it comes to movable things, they cannot be transferred to other persons and cannot be inherited by legal or testamentary heirs. This is provided for by Article 517 of the LO, according to which the right of pre-emption in movables can neither be alienated nor inherited unless otherwise provided by law. According to this provision, the will of the parties is limited and they cannot change it by agreement. Unlike movable objects, when the right of pre-emption by agreement is exercised over immovable objects, the regime of the right of pre-emption changes because this right is registered in public registers and as such is considered to be related to the object. In this case, the party that has the right of pre-emption can alienate or inherit his right, for as long as the right of pre-emption lasts.

The right of pre-emption is also applied to the right of pledge in the enforcement procedure, according to which the person who has the legal right of pre-emption of the immovable thing which is the object of enforcement through sale, has priority over the most favorable bidder if immediately after the closing of the auction, he declares that he buys the item under the same conditions *The Law on enforcement 2016* (RNM), s.180. The order of creditors who have the right of pre-emption based on the right of pledge is determined according to the time of registration of the request for enforcement at the executor. In the execution procedure, the sale of the item can be done through a public auction and by direct agreement. In cases where the sale of the item will be done directly, then the executor must call the creditor who has the right of pre-emption to declare whether he will use this right or not. This fact must be recorded by the executor on record.

Based on the practice that is applied in cases where the right of pre-emption belongs to the state, respectively the Republic of North Macedonia to construction land owned by physical and legal persons, according to the legal provisions provided in the act of the Ministry of Transport and Communications, this may apply if these two bases are presented: 1) when the state appears as co-owner and 2) when construction of public interest facilities is planned (Çavdar and Çavdar, 2012). In such a case, the notary is obliged to address the Government of the RNM with a written offer. According to the aforementioned provisions, the procedure and conditions for the sale of construction land when the state is the co-owner has also been regulated. Thus, when construction land owned by physical and legal persons, with an urban plan or documentation for an urban plan, is planned for the construction of buildings of general interest for the Republic, the Republic of North Macedonia has the right of pre-emption, in the manner determined by law *The Law on Construction Land 2013* (RNM), s.9.

According to the "Law of the sale of agricultural land owned by the state", the right of pre-emption by the tenant is foreseen. Thus, in the case where the agricultural land is the object of sale according to the annual Program for the sale of agricultural land, the physical person or legal entity who has a lease contract of the agricultural land, before the decision to sell the same is brought. The Ministry of Agriculture, forestry, and Waters in writing calls the tenant to express his will for the purchase of agricultural land by giving a written statement *The Law on Sale of State – Owned Agricultural Land 2013* (RNM), s.9. According to this provision, the tenant has the right of pre-emption in relation to other interested parties. In cases where the tenant on the leased land owned by the state has planted perennial plants, upon the sale of the land, the state, through the Ministry of Agriculture, Forestry and Waters, calls the same for the joint sale of the land. Such a procedure takes place in written form through a notary. In order to acquire the land through the right of pre-emption, the tenant must participate and apply in the public auction.

The right of pre-emption also applies to agricultural land. This is done in order to prevent the fragmentation of agricultural plots, and in the function of the more rational use of agricultural land and the implementation of agrotechnical, agromeliorative, and hydromeliorative measures, and in case of a sale, the joint owners, co-owners, and neighbors of the land which adjoins the land being sold have the right of pre-emption *The Law on Agricultural Land 2017* (RNM), s.15.

In comparative law, the General Civil Code of Austria regulates the right of pre-emption with the agreement "Das Vorkaufsrecht", through the contract of sale *Allgemeines bürgerliches Gesetzbuch 1811* (AUS), s.1072-1079 provisions which are additionally applied to the legal right of pre-emption. In the German Civil Code, the right of pre-emption is regulated in articles 463-473. The person who has the right of pre-emption on an item can exercise the right against the person who is charged with this obligation as soon as he realizes that he has reached an agreement on the alienation of the item with a third person *German Civil Code 1900* (GER), s.463. These provisions also apply to the real right of pre-emption (dingliche Vorkaufrecht) provided by articles §1094-1103 of the GCC and the legal right of pre-emption (gesetzliche Vorkaufsrechte) of the GCC or other laws. The Italian Civil Code does not contain provisions on the right of pre-emption by agreement (although the parties freely contract the “patto di prelazione” that applies in this case (Grgić 2009, pp.373). The French Civil Code contains provisions regarding the legal right of pre-emption, in the event that one of the co-owners decides to sell his share, then the other co-owner has the right of pre-emption (§815 and 1873).

4. Conclusion

The right of pre-emption is foreseen in order to create suitable situations during the legal circulation of objects, especially immovable ones, and with the aim of increasing the usefulness during the use of objects, avoiding the introduction of foreign or undesirable persons as co-owners, neighbors, shareholders, or similar. The right of pre-emption can be created by law and by contract. Unlike the legal right of pre-emption, which does not have a deadline and applies to everyone, the right of pre-emption by contract between the parties is limited in time and acts only between the subjects of the contract. Regardless of the legal basis of establishing the right of pre-emption, be it legal or contractual, from a substantive point of view for the parties, are created with the same rights. The right of pre-emption is not absolute, as it does not oblige the owner to sell the thing he owns or to sell the same under the terms and price of the market. If the owner decides to sell it, then it is limited to offer it under the same conditions to the person who has the right of pre-emption.

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