Legal Restrictions on the Sale of Forest Land in Romania. Comparative Analysis with French Law

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Abstract

At European level, there is a general tendency of forestry policies to extend and strengthen the individual rights of land owners. Member States, especially those in Central and Eastern Europe, retain some legislative levers, especially regarding the sale of forest land, forest management, exclusion and withdrawal rights. All these measures that some Member States apply with regard to privately owned forests are aimed at avoiding the accentuated fragmentation of forest lands and the excessive exploitation of forests, in order to ensure sustainable development. The right of pre-emption represents one of the measures that Romania keeps in order to be able to achieve these objectives, having a regulation comparable to other Member States, which considered that a control is still required in terms of forest land sales. In France, changes to the Forestry Code in 2012 introduced a right of preemption in favor of the state or nearest neighbors, whereas previously, the owner was free to decide to whom to sell the forest land. The French legislation regarding the right of pre-emption is closest to the Romanian one in this matter. Considering that there is no common EU forestry policy, it is appropriate that in the next period legal professionals analyze all the difficulties that will appear in the application process of different national and regional jurisdictions, as well as the practical way in which their application is likely to lead to achieving the objectives assumed by the legislator. Surely, sooner or later, the Member States will have to agree on a common policy in forestry matters, and the research undertaken during this period will be used for the correct evaluation of the normative framework to be adopted at the Union level.

Keywords: *legal conditions for acquiring forest land, right of preemption, legal preemptors, sustainable development, restrictions, exclusion and withdrawal rights.*

JEL Classification*:* K11, K12, K15

1. Preliminary

At European level, there is a pronounced increase in the number of private forests ownership and in the area of private forests. Such a trend was generated, on the one hand, by the policy of the countries of Eastern and South-Eastern Europe for the retrocession of forest lands or the privatization of forestry companies, and on the other hand, by the increasingly frequent association between family agriculture and small forestry holdings.

Currently, almost half of European forests are privately owned. The increasing diversity of private forest owners in Europe has also been recognized by decision makers and by the forest sector in general. The behavior of private forest owners led, in some situations, to an excessive fragmentation of forest properties. Also, the sale of forest land was caused by a lack of involvement of the new land owners in terms of implementing an adequate management of the forests on the background of lack of specialized knowledge and lack of funds necessary for investments in the forestry field.

Such situations have generated concerns at the public level regarding the way of managing the forestry domain which must be oriented towards concepts of sustainable forest management, biodiversity conservation, impact on climate change and bioeconomy. Society's expectations of forests and their owners to maintain the provision of services other than timber, e.g. recreation, tourism, health and wellness, carbon sequestration have also increased.

Under these conditions, a complex system of political, social and scientific interactions inside and outside the forest sector is increasingly influencing forest policy and this is reflected in country-specific governance frameworks with different combinations of binding or voluntary, public or private policy instruments. As the European Union treaties do not mention forests expressly, the Union does not have a common forestry policy. Therefore, forestry policy remains primarily a national competence. However, many European actions have an impact on forests in the EU and in third countries. EU actions in favor of forests aim at investments in the development of the forest area

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and the creation of the viability of forests, afforestation and the creation of forested areas, the creation of agroforestry systems, the prevention and repair of the damages caused to forests by fires, natural disasters and catastrophic events, investments to increase resilience and ecological value of forest ecosystems, investments in forestry techniques in processing and sale of forest products, financing of forestry, environmental and climate services and forest conservation. However, it is up to the Member States to choose the forestry measures to implement, as well as the related financial resources, as part of the rural development program.

National or regional legal regulations of property rights significantly influence the economic and procedural aspects of the forest management. The diversity of national, legal, cultural and historical contexts has led to different levels of restrictions on the management of private forest land, establishing the duties and responsibilities that govern forest managers, owners and users.

Each nation has developed its own system of regulation regarding the ownership, use and sale of forest land to ensure the most beneficial use of forests, but all these regulations must take into account the fact that the forest does not belong to a person or a state but is an asset that must be preserved and exploited in accordance with the general interest of humanity as a whole.

2. Legal circulation of forest land - regulations in Romanian law

2.1. Terminological clarifications

In order to be able to analyze the legal circulation of forest land, it is necessary to clarify the notions of forest and forest land (for forestry purpose) or national forest fund. These notions are regulated separately by each Member State.

Law no. 46/2008 – The Forestry Code, republished, defines the national forest fund as the totality of forests, lands intended for afforestation, those that serve the needs of cultivation, production or forestry administration, ponds, stream channels, other lands with a forestry purpose, also the non-productive ones, included in forestry facilities on January 1, 1990, or included in such facilities at a later date, according to the law, regardless of the form of ownership.

The national forest fund includes: a) forests; b) lands undergoing regeneration and plantations established for forestry purposes; c) lands intended for afforestation: degraded lands and non-forested lands, established under the conditions of the law to be afforested; d) lands that serve the needs of cultivation: nurseries, solariums, plantations and mother plant cultivated areas; e) lands that serve the needs of forestry production: wicker crops, Christmas trees, ornamental and fruit-bearing trees and shrubs; f) lands that serve the needs of forestry administration: lands intended for the provision of game food and fodder production, lands given for temporary use by forestry personnel; g) lands occupied by constructions and their related yards: administrative premises, cottages, phasaneries, trout farms, livestock farms of hunting interest, forestry roads and railways of transport, industrial premises, other technical facilities specific to the forestry sector, temporarily occupied land and those affected by tasks and/or disputes, as well as the forest lands within the border corridor and the state border protection strip and those intended to achieve some objectives within the Integrated State Border Security System; h) ponds, riverbeds streams, as well as non-productive land included in forestry. All lands included in the national forest fund are lands for forestry purposes.[2]

Regarding the term forest, there is no common definition for all Member States for this seemingly simple notion. However, in order to collect international forestry statistics, Eurostat follows a classification scheme established by the Food and Agriculture Organization of the United Nations (FAO) and applies the following definition: "forest" means land covered with tree crowns (or with a density of equivalent coverage) in a proportion of more than 10 % and with an area of more than 0.5 hectares. Trees should reach a minimum height of 5 meters at maturity under normal growing conditions.[3]

[2] Article 1 of Law no. 46/2008, Romanian Forestry Code.
[3] The European Union and forests, https://www.europarl.europa.eu/factsheets/en/sheet/105/The%20European%20Union%20and%20forests, consulted on 1.10.2022.

According to the Romanian Forestry Code, lands with an area of at least 0.25 ha, covered with trees, are considered forests and are included in the national forest fund; trees must reach a minimum height of 5 m at maturity under normal vegetation conditions. The term forest includes: a) the lands with forest included in forestry facilities on January 1, 1990, or included in such facilities at a later date, according to the law; b) the protective forest curtains; c) the lands on which junipers are installed; d) lands covered with wooded pastures with a consistency greater than or equal to 0.4, calculated only for the area actually occupied by forest vegetation; e) plantations with forest species in the areas of protection of hydrotechnical facilities and land improvements carried out on the publicly owned lands of the state, as well as plantations with forest species on the lands administered by the State Domains Agency, which meet the conditions to be considered forests[4].

The national forest fund can be either public or private property and constitutes *an asset of national interest. The right of ownership over the lands that constitute the national forest fund is exercised in accordance with the provisions of the Romanian Forestry Code.*

2.2. The right of preemption of the state and of the administrative-territorial units regulated by the Forestry Code

The Romanian Forestry Code established measures to regulate the sale of forest land in such a way that the rights and procedure implemented to ensure compliance with the principles and objectives that are the basis of the sustainable management of forests, respectively: a) the promotion of practices that ensure the sustainable management of forests; b) ensuring the integrity of the forest fund and the permanence of the forest; c) increasing the area of land occupied by forests; d) long-term stable forestry policies; e) ensuring the appropriate level of legal, institutional and operational continuity in forest management; f) the primacy of the ecological objectives of forestry; g) increasing the role of forestry in rural development; h) promoting the fundamental natural type of forest and ensuring the biological diversity of the forest; i) harmonizing relations between forestry and other fields of activity; j) supporting forest owners and stimulating their association; k) preventing the irreversible degradation of forests, as a result of human actions and destabilizing environmental factors; l) forest management based on the principle of territoriality; m) mitigating the consequences of climate change on forests, as well as adapting forests to climate change; n) the promotion and protection of the sanogenic, educational, touristic, sportive and recreational role of the forest and its accessibility for such purposes for the population, in a non-motorized way.

In its initial form from 2008, the Forestry Code of Romania provided in art. 45 paragraph 5 the fact that the state has the right of preemption to purchase forests, which constitute enclaves in the state's public property forest fund or are adjacent to it, at the same price and under equal conditions. Thus, only one preemptor was recognized, this being the Romanian state, and only with regard to the lands adjacent to the publicly owned forest fund or the lands enclaved in the publicly owned forest fund. Therefore, the only holder of the right of preemption was the state, but in its capacity as a subject of civil law, a legal person and not in its capacity as a subject of public law as the holder of sovereign power. The birth of the right of pre-emption was conditioned by the manifestation of the owner's intention to sell his land, and the exercise of this right had to be carried out within 30 days of the notification with the conclusion of the sale-purchase contract at the same price and under conditions equal to any other applicant. The right of preemption was recognized to the state in its capacity as the holder of the public property forest fund, part of its public domain, which gives this right the character of being inalienable, but, at the same time, the character of being temporary, being exercised within thirty days.

Specialized literature[5] qualified the right of preemption regulated by art. 45 of the Forestry Code as a subjective civil, legal, patrimonial, inalienable and temporary right, recognized by the state in its capacity as a legal person - subject of civil law, under which it can acquire the forests that

[4] Article 2 of Law no. 46/2008, Romanian Forestry Code.
[5] Titus Ionascu, *The Forestry Code and the right of preemption*, „Journal of Romanian Law Studies", no. 3-4/2008, p. 347.

constitute enclaves in the forest fund the public property of the state or are adjacent to it, in the case of sales with preference over any buyer at the same price and under equal conditions.

In 2012, the Forestry Code was modified and new categories of preemptors were introduced, in fact, a harmonization of the Forestry Code with the Civil Code, which had just entered into force. Thus, according to the legislative amendments, the co-owners and neighbouring owners of the forest fund, natural or legal persons, under public or private law, acquired a right of preemption, when buying land from the forest fund in private ownership, at the same price and under equal conditions, in the order provided in art. 1,746 of the Civil Code and under the terms of the Forestry Code.

However, in addition to the Civil Code, the Forestry Code establishes an additional priority rank in favor of the state and administrative-territorial units, when the forest lands to be sold are adjacent to the publicly owned forest fund.

According to art. 45 para. 9 of the current Forestry Code, in the situation when the land to be sold is adjacent to the forest fund public property of the state or administrative-territorial units, the exercise of the right of preemption of the state or administrative-territorial units within the term provided for in paragraph 8, prevails in relation to the neighbours' right of preemption.

In other words, in the category of neighbouring preemptors, the state and administrative-territorial units have priority over neighbouring natural or legal persons under private law. It should be emphasized that the right of preemption of the state and the administrative-territorial units can only be exercised under the conditions in which the forest land being sold is adjacent to the *publicly owned* forest fund. If the forest land to be sold adjoins the *privately owned* forest fund of the administrative-territorial units, the right of preemption of the co-owners or neighbors will be respected, in this order, according to the provisions of art. 1746 of the Civil Code. The forest fund owned by the state is only in the public property of the state and cannot be in the private property of the state.

The lands over which the right of preemption of the state and the administrative-territorial units is exercised are the lands with forests adjacent to the publicly owned forest fund, i.e. those that are directly adjacent to the publicly owned forest fund included as such in forestry arrangements and which is defined in art. 1 of the Forestry Code. *Per a contrario*, the right of preemption does not exist if another land belonging to another owner or from another category of use is interposed between the forest that is alienated and the forest fund. The right of preemption of the state and administrative-territorial units will arise regardless of the person of the seller, whether he is a natural person, whether he is a legal person under private law or even a territorial administrative unit that sales a forest belonging to its private property.

The right of pre-emption arises only in the case of a sale. If the alienation is made gratuitously such as a donation or a contract transferring property under the condition of taking care of the owner until his death or even a land exchange contract, whether with or without price difference, the right of preemption does not arise and cannot be exercised. The right of pre-emption can only operate at equal price, the price being the specific element of the sales contract.

The right of preemption of the state and administrative-territorial units will operate even in the case of forced sales. The text of art. 770 Code of Civil Procedure regulates the situation of the holder of the right of preemption on the auctioned immovable property who does not participate in the auction. Thus, the owner of such a right is deprived of the right to invoke it later if he did not take part in the auction. However, simple non-participation in the public auction does not automatically lead to the forfeiture of the right of pre-emption, because, in order to participate, it is necessary to know that the asset is being auctioned. In other words, forfeiture does not operate if he did not know the date, place, and time of the auction. In this case, he could file an action in court to establish the nullity of the adjudication act according to art. 45 para. 11, in reference to art. 7 of the Forestry Code.

On the other hand, the sales must include individually determined forest lands and not universalities of goods that would include such lands, so the sales of inheritances escape the domain of the right of preemption (art. 1747-1754 Civil Code). The scope of the right of preemption includes both the sale purchase contract through which the right of ownership over the forests is transferred, but also those through which only the bare property is transferred, regardless of the holder of the

usufruct right.[6]

We encounter a special situation regarding the birth and exercise of the right of preemption of the state and the administrative-territorial units in the case of competition between preemptors. According to art. 1734 paragraph 1b Civil Code, if several holders have exercised their pre-emption on the same good, the sales contract is considered concluded with the holder of the legal right of pre-emption chosen by the seller, when he is in competition with other holders of legal rights of pre-emption.

Corroborating the provisions from the Civil Code and the Forestry Code, it results that the order of preference for the exercise of the right of preemption is that of the co-owners category and then of the neighbours. If there are no co-owners or they do not exercise their right of pre-emption, then it can be exercised by the neighbors. According to art. 123^1 of Law no. 71/2011 for the implementation of the Civil Code, in order to apply the provisions of art. 1746 of the Civil Code, only neighbours who own forest land benefit from the right of preemption. As an example, neighbours who own agricultural land cannot exercise the right of pre-emption in the case of the sale of a neighboring forest. If there are several neighbors, including natural or legal persons under private law and the state or administrative-territorial units, the Forestry Code establishes a priority rank in exercising the right of pre-emption in favor of the state and administrative-territorial units. In the situation, however, in which both the state and a territorial administrative unit are neighbours with the land to be sold, the law no longer establishes an order of priority, giving the seller the opportunity to choose who he will sell to among the two holders of equal rank, of the right of pre-emption. Likewise, if a territorial administrative unit owns forest land that borders the state's public forest fund and wants to sell it, then it will have to respect the state's right of preemption.

Regarding the effective exercise of the right of preemption, it must be clarified who are the administrators of the public property forest fund who must be notified in order to exercise the purchase option. Thus, in the case of the state-owned forestry fund, it is administered by the National Forestry Authority - Romsilva, an autonomous authority of national interest, under the authority of the state, through the central public authority responsible for forestry. The state-owned forestry fund is also administered by public research institutes or state educational institutions with a forestry profile. The publicly owned forestry fund of the administrative-territorial units is administered by private forestry offices that function as autonomous local interest companies with exclusive forestry specifics or by forestry offices within the National Forestry Authority - Romsilva based on contracts.

The procedure for the purchase of land by the state is regulated by the Methodology of purchase, exchange or donation by the state, through the National Forestry Authority - Romsilva and the other administrators, of the land that can be included in the state's public property forestry fund, approved by Government Decision no. 118/2010 (hereinafter the Methodology).

According to it, the owner of the forest land that directly adjoins the publicly owned forest fund of the state and who wants to sell it, notifies in writing the state forestry office within whose administration the forest land is located about the intention to sell and the requested price. The exercise of the right of pre-emption is done by administrators, within 30 days from the date of receipt of this notice.

For the evaluation of the lands that are the subject of acquisition by the state through administrators, evaluation commissions consisting of 5 members are established at the county level, whose composition is approved by the decision of the head of the specialized territorial structure subordinate to the central public authority responsible for forestry, for each county. The commission must include a representative of the forestry territorial structure within the central public authority responsible for forestry, with the capacity of president, and an economist, a lawyer and 2 engineers with specialized studies, who work in the unit of the National Forestry Authority - Romsilva. These evaluation commissions have the following attributions: a) analyze the opportunity to buy the land that is of interest to the public forestry sector; b) evaluate the land offered in the case of purchase and

[6] Ibid, p. 348.

establish the value equivalence in the case of exchange, in accordance with the evaluation procedure provided in annex 1 of the Methodology, starting from the value of the land established according to annex no. 2 of the Methodology; c) establish the price offered in the case of purchase; d) submit for approval to the management of the administrator the evaluation documentation in order to purchase, to exchange land, as well as to accept donations of land to the state.[7]

Within 5 days from the date of registration of the notification submitted by the owner to the local forest office, the administrator notifies in writing the president of the commission in order to convene the evaluation commission. Within 15 days from the date of the convocation, the commission prepares a documentation according to annex no. 3 of Methodology. The size of the land area that is the subject of the purchase is established based on the cadastral information for the listed buildings or, if not listed, based on direct measurements carried out by authorized experts. Regarding the maximum value of the land with forest vegetation, this is calculated as a sum between the value of the land (depending on the size and area of the land, the characteristics of the land, coefficients for assessing the chance of establishing forest vegetation and assessing the risk of ensuring forest vegetation) and the value of the forest vegetation existing on the land that is the object of the evaluation for purchase (calculated according to the consistency of the forest vegetation, the composition of the forest vegetation, the quality of the trees, specific characteristics by age category, etc.). The price offered to the selling owner is the one resulting from the evaluation, reduced by the expenses related to the topographical measurements carried out during the evaluation. The evaluation commission prepares a report establishing the opportunity of the purchase and the price resulting from the evaluation. The forest office transmits the entire documentation to the administrator, within a maximum of 5 days of the expiration of the previously mentioned 15-day period, for analysis and approval. The price offered or the non-acceptance of the offer is communicated in writing by the administrator to the selling owner, within 30 days from the date of registration of the notification. The selling owner can accept the price offered by the administrator, a situation in which a sale-purchase contract is concluded, or he can send the administrator a notice of non-acceptance of the proposal. The selling owner has no right to sell the land to another person at a equal or lower price than that communicated by the administrator.

The seller's failure to comply with the obligation to notify in writing the administrator of the public forests owned by the state about the intention to sell, thus violating the state's right of pre-emption, results in the relative nullity of the sale purchase contract concluded with another co-contractor. The penalty of contract annulment operates not only when the sale purchase contract was terminated without the notification provided for by the Forestry Code, but also when it was concluded before the expiration of the thirty-day option period. The same sanction will also operate when the sale is made to a third party under more advantageous conditions than those in the notification, even after the state has expressed its intention to buy or not to buy according to the conditions in the offer. The effect of the sanction is the retroactive cancellation of the act and the return of the good to the seller's patrimony regardless of the good or bad faith of the buyer.

This Methodology for exercising the state's right of preemption was developed in 2010 and is still valid today. Also in 2010, land values by forest formation groups were determined, and since then these values have not been updated or even indexed. The use in the evaluation of land values greatly reduced compared to the market value as well as the budgetary constraints, respectively the allocation to the administrators of the public forest fund of reduced budgets for the special purpose of acquisition of forest land, have as a consequence, the purchase of a very small number of forests by the Romanian state. Under these conditions, the exercise of the right of pre-emption by the state becomes, most of the time, a formal procedure with a known outcome in advance. The Romanian State, although, from a legislative point of view, has retained a priority right to purchase forests, from a financial point of view, it does not invest enough to achieve this objective, which mainly aims at the elimination of enclaves from the state's public forest fund, the merging of lands and correcting

[7] Article 7 of *Methodology of purchase, exchange or donation by the state, through the National Forestry Authority - Romsilva and the other administrators, of the land that can be included in the state's public property forestry fund*.

the perimeter of the state-owned forest fund. Such an objective needs to be met all the more since, following the restitution of forests by the Romanian state, there is currently a strong fragmentation of the national forest fund. According to Romsilva's Activity Reports published in May 2022, Romsilva manages 3.13 million hectares for the Romanian State, which represents 48%. Romsilva also manages or provides forestry services for a total area of 1,15 million hectares of forest lands belonging to owners other than the state.

In the last 5 years, the acquisition by the state, through Romsilva, of forest lands that can be included in the state's public property forestry fund was very low, respectively: in 2017, 557 hectares were purchased, in 2018, 1,445 hectares were purchased, in 2019, 890 hectares were purchased, and in 2020 and 2021 no forest lands were purchased, as no funds were allocated for this purpose.

As a consequence, the exercise of the state's right of preemption remains only a mandatory procedure to be fulfilled, but which rarely materializes with the conclusion of the sales contract between the seller, the private owner of the forests, and the buyer, the Romanian State, through the administrators of the public forest fund.

If, in the case of the state, there is a methodology approved by Government Decision that regulates the land evaluation method and the procedure for exercising the right of pre-emption, in the case of administrative-territorial units, they can develop their own procedures for land evaluation and for exercising the right of pre-emption in accordance with the provisions of the Civil Code.

2.3. The right of pre-emption of co-owners or neighbours

In accordance with Art. 45 para. 6 of the Forestry Code, co-owners and neighbouring owners of forest land, natural or legal persons, under public or private law, have a right of preemption, in the order provided in art. 1,746 of the Civil Code and under the terms of this law, when purchasing privately owned forest land at a same price and under equal conditions.

It should be emphasized that only the order of preemptors is the one provided by the Civil Code. The procedure for exercising the right of pre-emption is the one provided by the Forestry Code.

The lands over which the pre-emption right of the co-owners or neighbours is exercised are the lands from the forest fund in private ownership. According to the Forestry Code, taking into consideration the form of ownership, the national forest fund can be: a) forest fund public property of the state; b) forest fund public property of administrative-territorial units; c) forest fund private property of natural and legal persons; d) forest fund private property of administrative-territorial units. The forest fund privately owned by the administrative-territorial units includes the forested pastures that are part of the private domain of the administrative-territorial units, which were included in the national forest fund by the effect of the law, respectively the Forestry Code.

Consequently, the lands over which the co-owners' or neighbours' right of preemption is exercised are the lands from the forest fund in the private property of natural and legal persons or in the private property of administrative-territorial units. In the situation when the land to be sold is adjacent to the forest fund public property of the state or of the administrative-territorial units, the exercise of the right of pre-emption of the state or of the administrative-territorial units prevails in relation to the right of pre-emption of the other neighbours.

The categories of preemptors established by law are co-owners and neighbours. In order to be holders of the right of preemption, the neighbours themselves must have a property right over a forest land, which has a common border with the land object of the sale. In this sense, art. 123^1 of Law no. 71/2011, establishes that, in order to apply the provisions of art. 1746 Civil Code, only neighbours who are owners of forest land benefit from the right of preemption.

The seller has the obligation to notify all the preemptors in writing, through the bailiff or the public notary, about the intention to sell, showing the requested price for the land to be sold. If the co-owners or neighbours of the fund, other than the administrator of the state-owned forests, do not have a known domicile or headquarters, the notification of the offer for sale is registered at the town hall or, as the case may be, the town halls within which the land is located, and is displayed, in the same day, at the town hall, by the secretary of the local council.

Holders of the right of pre-emption must express in writing their intention to buy and communicate their acceptance of the sale offer or, as the case may be, register it at the town hall office where it was displayed, within 30 days of the sale offer communication or its display at the town hall headquarters. The preemptor can exercise the right by communicating to the seller his agreement to conclude the sales contract, accompanied by the recording of the price at the seller's disposal.

Regarding the order of preference between the two categories - co-owners and neighbours - the exercise of the right of pre-emption by the co-owners leaves without effect the exercise of the right by the neighbours. This text has a derogation from the regulation provided by art. 1734 paragraph 1.b of the Civil Code, which regulates the fact that in the situation where there are several holders of legal rights of pre-emption, the sales contract is concluded with the holder of the right of pre-emption chosen by the seller. This principle remains valid when several co-owners, respectively, neighbours agree to exercise their right of pre-emption, the sales contract being concluded with the person chosen by the seller.

The law does not regulate what happens in the situation where one or more pre-emptors offer a higher price than the price requested by the seller through the offer to sell. For comparison, in the case of agricultural land located outside the village, for which the pre-emption right regulated by Law no. 17/2014, it is provided that if a lower ranking preemptor offers a more advantageous price than a higher ranking preemptor, the seller can resume the sale offer procedure with the higher price only once and only within 10 days from the 45 working days from the display of the initial offer for sale. It is very important to provide for the resumption of proceedings only once because otherwise we could end up in situations where pre-emptors make repeated superior offers just to block the sale.

In the absence of an express regulation regarding the procedure to be followed in the above case, we consider that the owner of forest land can conclude the contract of sale and purchase at the price requested by the sale offer, respecting the order of preference according to the law, regardless of the higher price offered by a certain preemptor, or he can resume the procedure of notification of the intention to sell by modifying the sale offer according to the higher purchase price, in order to give the opportunity to the other preemptors to express their purchase option to buy or not at a higher price. The owner of the forest land cannot conclude the sale purchase contract with the pre-emptor who offers a price higher than the one requested by the sale offer without giving opportunities to the other preemptors to exercise their right of preemption. Otherwise, it would be in violation of the law and would be a way for a lower ranked preemptor to buy the land bypassing the higher ranked preemptors who accepted the price in the sale offer.

The holder of the right of preemption who rejected the sale offer cannot still exercise this right with regard to the contract that was proposed to him. If none of the preemptors manifests the intention to buy, the sale of the land is free. In front of the public notary, the proof of the notification of the preemptors is made with a copy of the communications made or, if applicable, with the certificate issued by the town hall, after the expiration of the 30-day period in which the intention to purchase had to be expressed.

Failure by the seller to notify the preemptors or the sale of the land at a lower price or under more advantageous conditions than those presented in the sale offer leads to the relative nullity of the sale.

According to art. 45 paragraph 12 of the Forestry Code, the provisions of this code regarding the exercise of the right of pre-emption are supplemented by the provisions of common law.

Common law in the matter of the right of preemption is constituted by the provisions of art. 1730 – 1740 Civil Code. However, the provisions of the Civil Code will apply only to the extent that they do not contravene the provisions of the Forestry Code. Thus, the legal framework regarding the exercise of the right of preemption in the Civil Code establishes two modes of regulation:

• *ante rem venditio,* which represents the classic method, with a pre-contractual nature, by which the right of pre-emption can be made effective by the seller granting the pre-emptor the benefit of buying a good, with preference over any other person, by simply exercising the option; the modality is practiced, mainly, in the sphere of legal pre-emption, given that the special normative acts establishing the benefit of the right of pre-emption regulate in detail both the procedure - *ante rem*

venditam - that must be followed in order for these pre-emption rights to be respected, as well as the sanction applied in case of its violation.

• *post rem vendition* - according to the provisions of art. 1.731 Civil Code, the sale of the property in respect of which there is a legal or conventional right of pre-emption can be made to a third party only under the suspensive condition of the non-exercise of the right of pre-emption by the pre-emptor, an aspect that does not contravene the character of public order of legal preemption right.

The text of the law grants the possibility of concluding the sale with the third party buyer before the offer is sent to the pre-emptor in view of the exercise of the right of pre-emption, but the sale-purchase contract will be concluded under the suspensive condition of not exercising the right of pre-emption by the pre-emptor, case in which the suspensive condition is of the essence of the contract, being considered by law as implied even in the event that the parties omit to expressly provide it.

The *post rem venditio* modality thus operates as an automatic legal remedy with the consequence of blocking the possibility of the seller (in complicity or not with the third party) to circumvent the interests of the preemptor.[8]

The provisions of art. 1,731 of the Civil Code have generated several different opinions in doctrine, but, overall, the criticism of the legal text would be that it centers on the assumption - less practical - of the exercise of preemption post rem venditio, a fact confirmed by the modalities provided by the legislator in art. 1.732 para. 1 which imposes on the seller the obligation to notify the pre-emptor regarding the contents of the contract concluded with the third party, granting the possibility of notifying the pre-emptor also by the third party.

The notification of the sale offer to the preemptor (containing exactly the same conditions as those offered to the third party) allows the holder of the preemption to analyze the possibility of purchase, with the consequence of accepting it or not within the legal term.

Regarding the effects of exercising preemption *post rem venditio* - art. 1.733 para. 1 Civil Code:

- acceptance of the offer by the pre-emptor (followed by the actual remittance of the price at the disposal of the seller) leads to the conclusion of the sale between the pre-emptor and the seller,

- as a consequence, as a result of the non-fulfillment of the suspensive condition of not exercising pre-emption, the sales contract concluded with the third party is retroactively terminated,

- the seller is liable to the bona fide third party for the eviction resulting from the exercise of pre-emption.

So, in the situation where the suspensive condition is considered by law as implied even if the parties did not expressly provide it, in the hypothesis that the seller, although he knew of the existence of the right of preemption, did not understand to bring it to knowledge of the third party, the latter may invoke against the seller the guarantee for eviction, provided for in art. 1.733 para. 1 of the Civil Code, requesting, through the courts, the remittance of the price and interest damages granted by law to the buyer in good faith evinced by the seller in bad faith.

In our opinion, in the case of the sale of forest land, only the *ante rem venditio* modality can be applied, considering the express provision of the Forestry Code according to which the failure of the seller to notify all the preemptors in writing, through the bailiff or the notary public, about the intention to sell attracts the voidability of the sale. Moreover, the public notary cannot authenticate a sale purchase contract with forest land as its object, under the suspensive condition of non-exercise of the right of preemption by the preemptors, considering the express provision of the Forestry Code according to which, before the notary public, the proof of the notification of the preemptors is made with copy of the communications made or, if applicable, with the certificate issued by the town hall, after the expiration of the 30-day period in which the intention to purchase had to be expressed.

However, there are legal provisions in the Civil Code that are fully compatible with the regulations established in the Forestry Code, such as those regarding the plurality of goods sold or the exercise of the right of pre-emption in the context of forced execution. It is true that the right of

[8] Ruxandra Badoiu, *The legal right of preemption*, „Bulletin of public notaries", no. 1, 2020.

pre-emption must be applied to the purchase of privately owned forest land. But the forest fund also includes the lands occupied by constructions and their related yards: administrative offices, cabins, pheasants, trout farms, breeders of animals of hunting interest, forest transport roads and railways, industrial premises, other technical equipment specific to the forestry sector. In the case of the sale of such lands occupied by privately owned constructions, the provisions of art. 1735 of the Civil Code according to which, in the event that goods, other than those subject to pre-emption are sold, but which cannot be separated from it without damaging the seller, the exercise of the right of pre-emption can only be done if the pre-emptor records the price set for all the goods sold (land with constructions).

In conclusion, in Romanian law, the only legal restriction regarding the movement of land is the right of pre-emption established in favor of certain categories of pre-emptors with the obvious aim of ensuring compaction of forests and their efficient exploitation, taking into account the preservation of biodiversity necessary for sustainable development.

3. Legal circulation of forest land - regulation in French law

3.1. Forests and their ownership in the European Union – overview

As we showed in the previous chapter, the Food and Agriculture Organization of the United Nations (FAO) defined the forest as a land covered with tree crowns (or with an equivalent density of cover) in proportion to more than 10% and with an area of more than 0.5 hectares. Trees should reach a minimum height of 5 meters at maturity under normal growing conditions. According to this definition, in 2020 the forests in the EU covered 182 million hectares. In total, forests cover 43% of the EU's land area, and the six Member States with the largest forest areas (Sweden, Finland, Spain, France, Germany and Poland) account for two thirds of the EU's forested areas. At national level, forested area varies greatly: Finland, Sweden and Slovenia are almost 60% covered by forests, while in the Netherlands the proportion is only 8.9%. Furthermore, unlike many regions of the world where deforestation remains a major problem, the EU's forest area is increasing as a result of both its natural expansion and afforestation efforts.[9]

The many types of forests in the EU reflect its geoclimatic diversity (boreal forests, alpine coniferous forests, etc.) and their distribution mainly depends on climate, soil, altitude and relief. Only 4% of the forests have not been modified by man, 8% are plantations, and the rest belong to the category of "semi-natural" forests, i.e. shaped by man. It should be noted that European forests are mostly owned by private owners (about 60% of land, compared to 40% of public forests).[10]

A strategy for forests and the forest sector is necessary because there is no common EU forest policy. However, the EU, through the measures and programs carried out, tries to create a reference framework for aspects related to forests. As a growing number of EU policies provide increasing demands on forests, there is a need to coordinate sectoral policies. There is also a need to reach a global strategic vision on forestry issues and to take full account of related EU policies within national forestry policies. Thus, the capacity of forests and the forestry sector to deal with developments in different policy areas will be strengthened. Strengthening efforts for sustainable forest management is also at the heart of the UN's 2030 Agenda for Sustainable Development, as forests play a multifunctional role that supports the achievement of most of the Sustainable Development Goals.

At European level, the legislative framework regarding the transfer of ownership of forest land differs depending on several factors, among which the proportion of privately owned forests is of particular importance. It is observed that the countries of Northern and Western Europe have a much more permissive legislative framework, without a major intervention from the state. Moreover, in these countries the forests belong to private owners in variable proportions of over 60%. On the other hand, the countries of Central and Eastern Europe, especially the former socialist countries, own most

[9] https://www.europarl.europa.eu/factsheets/en/sheet/105/The%20European%20Union%20and%20forests, consulted on 1.10.2022.
[10] Ibid.

of the forests in state property, and maintain a tendency to control this resource.[11]

In all national jurisdictions, the owner has the right to sell forest land and forest products. However, full alienation rights for forest land are only allowed in nine European jurisdictions: Belgium (Wallonia region), Czech Republic, Denmark, Ireland, Latvia, Netherlands, Poland, Portugal, Switzerland (canton of Aargau). In other countries/regions the owner can decide to whom to sell the forest land under certain restrictions without informing the authorities in: Croatia, Estonia, Slovakia and Great Britain (Scotland only). We also come across jurisdictions where the owner must inform the authorities, which accept the buyer under special conditions, e.g. in case of sale in the countryside, by observing a right of pre-emption in favor of the municipality/local community: Germany (Bavaria region), Finland, Norway, Sweden. In 13 European countries/jurisdictions a right of pre-emption always applies and the owner must inform the national or local authorities and/or neighbours of the intention to sell and pre-emptors have the right to buy with priority on equal terms. We find such a situation in Austria, Bosnia and Herzegovina, Bulgaria, Germany (Baden-Württemberg), France, Greece, Hungary, Italy (Venice region), Lithuania, Romania, Serbia, Slovenia, Spain (Catalonia region). The most restrictive legislation is found in North Macedonia, where the owner can only sell forest land to the state, which exclusively decides how to exploit or alienate the land.[12]

3.2. Right of preference and the right of preemption in French law

In France, changes to the Forestry Code in 2012 introduced a right of preemption in favor of the state or nearest neighbours, whereas previously the owner was free to decide to whom to sell the forest. The French legislation regarding the right of pre-emption is closest to the Romanian one in this matter. The purpose of introducing the institution of the right of preemption in French legislation was to mitigate the fragmentation of forests, to group parcels for more efficient exploitation and to protect the environment, landscapes and natural resources. Also, various public or private entities have been granted certain preferential rights by law as means of harmonizing forest plots and the surrounding environment.

The French Forestry Code provides both the right of pre-emption and the right of preference for some categories of potential buyers.

Article L331 - 19 of the French Forestry Code provides that in the case of the sale of forest land with a total area of less than 4 hectares, the neighbours, owners of an adjacent wooded land, as noted in the cadastral documents, benefit from a *right of preference* to purchase. The same provisions are applicable in the case of the transfer of undivided rights or dismemberments of the property right. The seller is obliged to notify the owners of the neighbouring wooded plots of the price and conditions of the sale, by registered letter with confirmation of receipt, sent to the address mentioned in the cadastre or by a notification delivered under signature. When the number of neighbours is equal to or greater than ten, the seller can make the sale offer public by displaying it at the town hall for one month at the same time publishing an announcement through official means of information authorized to publish such announcements.

Neighbours have at their disposal a period of two months, from the date of posting at the town hall or from receiving the notice, to inform the seller, by registered letter with confirmation of receipt, or by a notification delivered under signature, that they exercise their right of preference on the price and the conditions set out in the sales offer. When several owners of neighbouring parcels exercise their right of preference, the seller freely chooses the one to whom he wishes to transfer the property. The right of preference is no longer opposable to the seller in the absence of concluding of the sale as a result of the buyer's non-fulfillment obligations within four months of receiving the declaration of exercise of this right. This right of preference is exercised subject to the right of preemption, and

[11] Liviu Nichiforel, *Private forest ownership –Policy instruments and legislation,* Seminar on State of Forest Ownership in the UNECE Region trends – opportunities – challenges, 14 December 2018 Brussels, European Forestry House.
[12] Liviu Nichiforel ș.a, *How private are Europe's private forests? A comparative property rights analysis*, „Land Use Policy", Volume 76, July 2018, pp. 535-552.

subsequent retrocession, provided for the benefit of legal entities under public law in the rural and maritime fishing code or in the urban planning code. The sanction for non-compliance with the right of preference is sanctioned with the relative nullity of the sale purchase contract. The annulment action can be introduced in court within 5 years by the neighbours or by their successors.

French legislation also provides for a series of exceptions to the application of the neighbour's right of preference, such as, for example, when the sale is made to the spouse, to the partner with whom a civil solidarity agreement has been concluded, to the cohabitant, parents or relatives of the seller up to and including the fourth degree.

A *right of preference* to purchase is also recognized in favor of the administrative-territorial units according to article L331 - 24 of the French Forestry Code. In the case of the sale of a forest land with a total area of less than 4 hectares, the *administrative-territorial unit*, on the territory of which this land is located, benefits from a right of preference to purchase. The same provisions are applicable in the case of the transfer of undivided or property dismemberments.

The seller is obliged to communicate the price and conditions of the sale offer to the mayor by registered letter with confirmation of receiving. The mayor has a period of two months from the notification to inform the seller if he exercises the right of preference of the administrative-territorial units at the price and under the indicated conditions. When one or more owners of parcels adjacent to properties exercise simultaneously with the administrative-territorial unit the right of preference provided for in article L 331-19, the seller freely chooses to whom he wishes to transfer his property. Exceptions to the application of the right of preference of neighbours are the same in the case of the right of preference of territorial administrative units. The right of preference is no longer opposable to the seller if the sale is not completed within two months of the first declaration of exercising this right.

Non-compliance with the right of preference is sanctioned with the relative nullity of the purchase contract. The action for annulment is time-barred within five years.

The French Forestry Code provides for the *right of preemption* in favor of the state and administrative-territorial units. Thus, article L331 - 23 of the French Forestry Code provides a right of preemption for the benefit of the state in the case of sales of forest land, with an area of less than 4 hectares, when the property adjoins a forest land owned by the state. In this situation, the notary who is going to finalize the sale of the forest land is obliged to notify the representative of the government in the territory (the prefect) about the conditions of the sale. The term for exercising the right of pre-emption by the state is 3 months from the date of notification. If, within the 3-month period, the state does not express its option to purchase the forest land, it is understood that the state waives its own right. The exercise of the right of preemption by the state prevailes to the preemption rights instituted in favor of other preemptors as well as to the legal rights of preference.

Also, in the case of the sale of land with forests and with a total area of less than four hectares when the seller is a public entity whose forest falls under the forestry regime, the administrative-territorial unit on whose territory this property is located and which owns an adjacent woodland subject to a management plan, such as a development plan or Standard Management Regulation, benefits from a right of pre-emption.

The seller is obliged to communicate the price and conditions of the sale offer to the mayor by registered letter with confirmation of receiving. The mayor has a period of two months from the notification to inform the seller if he exercises the municipality's right of pre-emption according to the price and conditions requested in the sale offer.

The right of preference in favor of neighbours provided for in article L. 331-19 is not applicable in this situation.

In addition to the provisions of the Forestry Code, in French legislation there are certain legal restrictions regarding the legal circulation of forest lands regulated by other normative acts.

Thus, the Rural and Maritime Fishing Code provides certain situations in which S.A.F.E.R.-type organizations (organizations for rural development and development of agricultural and forestry land, non-profit, of public interest, under the supervision of the Ministry of Agriculture and the Ministry of Finance) have the right of preemption for the properties included in the land register as

forests (article L143-4 of the Rural and Maritime Code), respectively: a) if the wooded lands are put up for sale together with other non-wooded plots belonging to the same agricultural holding; b) in the case of land with tree saplings or tree plantations for which the municipal commission issued a decision to abolish, or land with tree saplings for which the sowing or planting was carried out in violation of the legal provisions; c) in the case of forest lands for which a tree removal authorization has been issued; d) in the case of forest lands located within an agricultural and forestry land development perimeter established according to the provisions of the Code.

The rural and maritime fishing code recognizes a right of preemption in favor of lessees. If the forest property includes agricultural land leased in a rural lease, subject to the terms of the lease, verbal or written, the lessee of the land has the right of preemption pursuant to article L412-1.

Also, in the case of sensitive natural spaces, if the forest property to be sold is located in such an area, the departments can exercise a right of preemption, in accordance with article L113-14 of the Urban Planning Code.

4. Conclusions

Although our analysis concerned the national legislations of Romania and France only, conceptual similarities can be observed between these jurisdictions but also differences resulting especially from the objective pursued by the legislator. If, in the case of France, the right of pre-emption concerns forest lands with a total area of less than 4 hectares that adjoin forest lands owned by the state or administrative-territorial units, with regard to Romanian legislation, the right of pre-emption is exercised for neighbouring forest lands regardless of their surface.

The historical, political and economic context in which this legislation was implemented must also be taken into account. As we stated in the content of this article, until 2012 in France, forest land could be sold without any restrictions. The legislative changes that introduce the right of pre-emption represent a lever through which the state/communities can purchase small plots of forests to integrate them into the already existing properties for the purpose of more efficient exploitation but also for reasons of preserving biodiversity and sustainable development.

As far as Romania is concerned, the retrocession of the forests to the rightful owners along with the change of the political system led to a strong fragmentation of the forest lands. If the first Forestry Code, which appeared in 1996 after the fall of communism, provided for a right of preemption only in favor of the state, demonstrating the legislator's option for centralization and control in the forestry field, subsequent legislative amendments broaden the categories of preemptors, showing that the legislator aims to consolidate forest lands , to create large forest properties, regardless of whether we are talking about a public or private owner.

Regardless of the manner chosen by Member States to ensure proper forest management under the pressure of biodiversity and climate change policies, national governance frameworks must pursue common goals with various policy instruments. The path traveled by the Member States in this direction will have to materialize in the next ten, twenty years in a common forestry policy and in a unitary legal framework, as the differences between the states will diminish more and more. For this reason, the study of the current national and regional jurisdictions must be deepened, their practical effects understood, the shortcomings or errors of legislation or of its enforcement identified, so that the Union regulations in the matter to be the result of the best legislative options in what concerns forestry policy.

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