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## **Exercising The State's Right of Preemption to The Alienation of Historical Monuments**

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**Abstract.** Known since ancient times, the legal regime of the right of preemption has undergone a surprising evolution. This right will be recognized among the institutions that enjoy a general legislative consecration and the modernized Civil Code. Thus, the legal provisions regarding the institution of the right of preemption have been essentially reformed, taking into account the deficiencies found in the special legislation, or at the current stage, we encounter different species of the right of preemption in the most varied fields, such as cultural, commercial, privatization, intellectual property, etc.

In this regard, we set out to analyze the right of preemption in the cultural field through this scientific approach. Due to the importance of the goods to be alienated, it was felt necessary to clarify specific regulations, taking into account the exercise of this right, showing the reason for which it was instituted; the procedure or conditions under which it is exercised; the sanction that intervenes in case of non-compliance, as well as the consequences of applying this sanction.

**Keywords.** public property, private property, historical monument, real estate, preemption right.

### **1. Introduction**

The topicality of the theme lies in the interest shown in the legal doctrine for prospecting the evolutionary tendencies of this right and, implicitly, for the identification of the subtleties and facets of the state's preemption right, which is manifested in the purchase of cultural goods. The continuous reconfiguration of social reality generates this interest; regarding the protection of these goods, which also involves the re-evaluation of some legal concepts, which are appreciated in the doctrine as insufficiently or incompletely regulated.

Thus, the scientific novelty of the researched topic results, first of all, from the lack of complex studies, which address the theoretical problem of the right of preemption, in the light of the new regulations in the civil legislation in the field of movable and immovable property. Secondly, the protection of culture, regardless of the property of which it is a subject of law, must be the concern of any state because cultural goods ensure the preservation of a nation's identity through their particular value.

In this sense, we can mention that some categories of goods, which are part of the cultural heritage of our state, are goods subject to a special regime of circulation, which, even though they are in the civil circuit, still have a particular regime, in other words, have limited

traffic. Limited assets in the civil circuit may be acquired, owned, used, and disposed of only under the conditions provided by law.

The legal right of preemption is the instrument of the legislator by which he establishes measures for the protection of specific categories of persons or goods, expressly regulated by the rules of common law, as well as by other normative acts of a unique nature. The legal right of the beneficiary of the right to purchase a good as a matter of priority is, in principle, established by the mandatory texts, in which case the holders cannot give up in advance the exercise of their right, its disregard by concluding the act without giving effect to the legal provision, involving sanctions such as the nullity of the contract.

In this respect, the protection, rehabilitation, and enhancement of cultural property must receive increased attention from the local legislature and his constant concern, given the legislative changes made to the institution of the right of preemption.

## 2. The methodological basis of the study

The methods of researching the concept of the right of preemption are the classical ones, intended to achieve complex research objectives. Thus, the following basic methods were used: interpreting the existing doctrines, both national and international; the method of analysis and synthesis; the logical method; the historical method; the systematic method; the comparative method, etc.

## 3. The results obtained and discussions

Etymologically "*preemption*" comes from the Latin "*pre*" (prior) and "*emptio*" (purchase); therefore, before a foreigner buys the good, the holder of the right of preemption ("the preemptor") has the right to buy the same good [1].

From the outset, we would like to mention that the regulatory framework on the right of preemption is a broad one, this right is currently provided both by the provisions of the modernized Civil Code and by the provisions of special laws, which seek to protect certain assets of public, historical or cultural interest.

Thus, regulated in general by common law rules, the right of preemption is defined by the provisions of art. 1143 para. (1) of the Modernized Civil Code provides that "*if the owner of a property (obligated person) has granted a right of preemption by contract or is obliged by law to respect a right of preemption of another person (the holder of the right of preemption) and wants to sell or has sold that good to a third party, the holder of the preemption right is entitled to buy the good with priority in the conditions of sale offered to the third party.*"

This legal framework is supplemented by special laws designed to determine the legal regime for applying special preemption rights applicable to certain goods. In this sense, **Law no. 1530 from June 22, 1993, on protecting monuments** [2] under art. 9, para. (1) stipulates that "*monuments that are on private property may be sold, donated or alienated with the obligatory notification of the state bodies for the protection of the monuments. When buying and selling monuments, the state has the right of preemption*" and (2) "*the transactions regarding monuments concluded in violation of the provisions established in paragraph 1 are considered null and void and entail the liability provided by the Civil Code*".

**Law no. 280 from December 27, 2011, on protecting the movable national cultural heritage** [3] at art. 19 para. (3) stipulates that "*the movable cultural property owned by private individuals or legal entities classified in the "Treasury" category may be subject to public sales only under the conditions of exercising the right of preemption by the State of Moldova, through the Ministry of Culture, following the legislation in force,*" para. (4), "*the term for exercising*

*the preemption right of the state is maximum 30 days, calculated from the date of the registration of the offer" and para. (5), non-compliance with the provisions of para. (3) entails the absolute nullity of the sale".*

The process of our state's accession to the European Union highlighted the need to adjust the internal legislative framework to effectively enshrine in internal practice the international conventions already assumed by the Republic of Moldova, and in addition, because Law 1530 from 22.06.1993 is not already in force. To truly protect the interests of the owners of historical monuments, the communities in which they are located, or of the state in general, the Ministry of Culture has elaborated and introduced in the approval circuit a new law in the field of cultural heritage, namely: **The law on historical monument protection** [4].

The legislative proposal comes with a more complex organization of legal information on historical monuments, starting from establishing principles generally applicable to the administrative practices concerning heritage establishing a set of rules common to all species of national cultural heritage. For a better understanding of the concepts, a glossary of terms is proposed in this draft law, which, together with the fundamental principles, will allow a uniform interpretation of the law. Other proposals aim at clarifying some aspects related to the property right over historical monuments, especially the law comes with some clarifications in the procedure of exercising the preemption right of the state. Thus, art. 9 of the draft Law on protecting historical monuments at para. (3), (4), (5), and (6) it is provided that "*Historical monuments belonging to the private domain may be subject to the civil circuit under the conditions established by this law. Historical monuments owned by private individuals or legal entities may be sold only under the conditions of exercising the right of preemption of the state through the Ministry of Education, Culture, and Research. The state's right of preemption is exercised within 90 days from the communication of the intention to sell by the private owner. The decision of the competent public authority may be postponed for another 90 days whenever there is a serious intention to raise funds to make a purchase offer. The contracts concluded in breach of the above-mentioned preemption rights shall be considered null and void.*"

If we analyze the norms mentioned above, we notice that neither the general norm provided in the Civil Code nor the special laws define the right of preemption. However, since this paper aims to identify the nature and the legal regime of the right of preemption, it is necessary to approach this concept, first of all, in the light of the definitions given by legal doctrine; at least to understand how this concept influences the interpretation and application of the rules on the exercise of this right in various fields, including in the area of alienation of goods, which have a special regime of movement. In other words, the research will focus on a body of rules, which are common denominators of remedies for the exercise of the right of preemption and, consequently, can be considered part of the general theory of the practice of this right under the rules of the Civil Code.

Consequently, we will continue to limit ourselves to a selective outline of those notions, which we consider strictly necessary for the formulation, about the institution under review, of conclusions of legal analysis, intended to understand the involvement of the use of this right of the State in the procurement of goods that are part of the cultural heritage.

Starting with the analysis, we mention that such a definition is the one given in the Dictionary of Civil Law and Civil Procedures, according to which, "*the right of preemption is the right of the holder named preemptor, to be able to buy a good with priority. The right of preemption may arise from law or convention*" [5, p. 411].

In this sense, another definition, provided by the doctrine, refers to the right of preemption as "*a person's or an administrative entity's recognized power, under a contract or*

*a legal provision, to acquire ownership of a property, in case of alienation, priority over any other buyer [6, p. 29]*". Another definition treats this right through the prism of the subject of this right, so the right of preemption is seen as *"that subjective civil right, recognized by law to certain holders, by which they enjoy priority when buying an agricultural land outside the built-up area, in the order and the other conditions provided by law [7, p. 34]."*

The author Dan Chirică [8, p. 100] mentions that *"preemption is a right of legal origin, which, at an equal price, gives preference to certain persons over others when acquiring a good when its owner decides to sell it."*

A different interpretation, from those mentioned above, is offered by the author Pop Liviu, who suggests that *"the so-called right of preemption is only a mandatory procedure for publicity of the sale decision; being a restriction by the law of the quality of a legal disposition on agricultural land outside the built-up area and, at the same time, a restriction on freedom of contract. The sale-purchase contract that the landowner is obliged to conclude with the holder of the preemption right, who has accepted the price proposed by the bidder or offered a reasonable price to him, may be included in the category of forced contracts [9, p. 112]."*

After assessing how this right is perceived by the legal doctrine, as well as the consequences regarding the role that this right plays, we can draw **the first conclusion** regarding the fact that *the right of preemption gives a person the right to be preferred to any other person when buying a particular good*. The right of preemption may be established by law or by the *parties' agreement*, in favor of a natural or legal person, or in favor of the State. In this situation, the property owner is not obliged by contract to sell the property but only undertakes to give preference (priority) to the other party (beneficiary) if he decides to sell it. In this sense, we consider that the right of preemption does not turn the sale into a forced one because it does not undermine the seller's will to alienate but only restricts his freedom to choose the person by the buyer.

**A second conclusion**, made as a result of the analysis of the doctrine, is that there is no unitary point of view on the legal nature of the right of preemption in the doctrine. Some authors consider that preemption is a real right, whereas others believe that preemption is a right of claim. Finally, a third opinion shows that the right of preemption must be included in the category of optional rights.

We will present the arguments used to support each qualification in the following. Still, from the beginning, it should be mentioned that in general, the doctrine analyzed the legal nature of the right of preemption, starting from the legal regulation of this right, existing at the time of researching its legal nature.

Thus, a part of the doctrine thought that the right of preemption is part of the category of real rights because the right of preemption gives the holder a right to pursue the property subject to preemption (by cancellation), and this prerogative defines only the real rights [10, p. 290-291; 11, p. 28-29]. This current has been widely criticized, and the opponents said that *"what best characterizes the real right, namely the power of the holder over the work by which he exercises directly and immediately, the possession, use, and disposition, without anyone's assistance and it does not characterize the right of preemption. As long as the owner does not express his will to conclude the contract for which there is a right of preemption, the preemptor is completely deprived of any legal power over the preemptive good. The law gives the pre-emptary a temporary and limited power when the owner expresses his will. Only after the contract between the owners and the pre-emptary has been concluded, the latter acquires the full power over the preemptable good [12, p. 29-30]."*

By another current, the doctrine reaffirmed the opinion that the right of preemption must be included in the category of the rights of claim. Thus, in this author's view, the right of preemption is personal, not a real one. Based on the right of preemption, the holder can claim the owner to prefer him in competition with potential buyers, at a price, and on equal terms. In this sense, the author of the cited study shows that the action by which the right of preemption is protected is not natural because it does not pursue the good, but only the abolition of the deed of sale, the consequence not being the entry of the good in the owner's heritage [13, p. 34-64]. Finally, the third current position is the right of preemption in optional rights. In the doctrine [14, p. 55], the optional rights are defined as "*powers by which their holder can unilaterally and arbitrarily influence pre-existing legal situations, modifying them or giving rise, instead, to new legal situations.*"

Octavian Cazac [1], the adherent to the current right of preemption - the optional right, mentions that "*the right of preemption, whether of legal or contractual origin, has the nature of an optional right, so the preemptor has the right, not the obligation, to exercise it. If a contract establishes an obligation to exercise the preemption, the clause could be reclassified as a purchase option, applying art. 1001 and the following.*"

From the analysis of the definition given to the optional rights, we deduce that essential for this category of rights is the power of their holder to intervene, by his unilateral will, in pre-existing legal situations in which the interests of persons, other than the holder of these rights are present. For this reason, a specific link is created between the holder of such a right, called the active or potential subject, and the sensitive subject, who bears the consequences of exercising the optional right.

If we return to the regulations of the right of preemption provided in art. 1143 of the Civil Code, this article regulates both the legal preemption right and the conventional preemption right. Thus, the legal right of preemption is a priority right to purchase a good, is expressly provided by law in favor of certain natural or legal persons or even of the state, which satisfies a general interest. The conventional right of preemption results from a contract. The owner of the good undertakes to another person, called the preemptor, who, if he decides to sell the good, prefer him as a buyer at the same price and conditions. In this situation, we specify that the owner of the good does not undertake to sell the good but only undertakes to give preference, in case of a sale, to the one with whom he concluded the contract—the conventional right of preemption concerns only a particular interest.

Another finding, following the analysis of legislation and doctrine, is that the right of preemption is triggered only in the case of alienation by sale, excluding the exercise of the right of preemption in case of alienation by exchange, capital contribution, liquidation of the legal entity, donation or inheritance [15].

A final finding is that the modernized Civil Code limits the preemption only to the sale-purchase contract without distinguishing between the goods that may be the subject of this contract.

From the legal regulations of the right of preemption, the legal characteristics of the right of preemption can also be deduced:

- it is an optional right (the preemptor having unilateral prerogatives of control over the legal situation represented by the sale of the good);
- the exercise of preemption cannot be blocked or restricted by the agreement between the seller and a third party [16, art. 1149];

- it is a right in principle *because of its strictly personal nature* [16, art. 1144 para. (3)];
- it is an indivisible right [16, art. 1144 para. (2)];
- the non-transferability is evident in the case of legal preemption, but also in the case of contractual preference resulting from a preferential agreement, its strictly personal character prevents the assignment of the right (without the consent of the promising seller).

I. Negru [17, p. 69-72], the Romanian author, considers that the right of preemption is based on three essential principles, which we can find in all species of preemption: the principle of priority, the principle of intervention of the preemptor at a price and in similar conditions with third parties, and the intervention of the preemptor in the contract between the owner and the third party is optional. As far as we are concerned, we agree that the first and last characteristic exposed by the author can be imposed with principle value in the case of all preemption species, regulated by the legislation of the Republic of Moldova. Concerning the second principle, we consider that there are situations provided by law in which, in addition to priority, the legislator gives favorable conditions to the preemptor and in terms of the contract price.

As we analyze the right of preemption exercised by the state when purchasing goods that are part of the cultural heritage, we mention the general norms that regulate the pre-emption by art. 1143-1150 of the Civil Code must be applied in collaboration with those provided in art. 9 of *Law no. 1530 from June 22, 1993, on protecting monuments* [2] and art. 19 of *Law no. 280 from December 27, 2011, on protecting the movable national cultural heritage*, at art. 19 para. (3). In this regard, some findings need to be made.

Thus, we mention that the legal preemption right of the state is established by imperative legal norms, which gives this right a strong **public order character**. This public order character generates inevitable legal consequences because the parties may not derogate by conventions or unilateral legal acts from the provisions governing the preemption rights. Although the provisions of art. 1143 para. (2) provide for the possibility of the right of preemption to waive this right. We consider that this legal provision refers to the conventional preemption, or the legal preemptor cannot waive his right of preemption. In the case of the right of preemption established, the legislator seeks to *achieve a general interest*, which requires the preemptor to exercise the right of preemption following this purpose.

We also consider that in the case of the legal preemption right, this right is still perceived as a limitation of the property right, given that the attribute of lawful provision cannot be manifested in its fullness, or the law is the one that expressly imposes on the owner whom to choose as a buyer. Finally, the imposition of the contractual partner by law makes the right of preemption be perceived as a limitation of the contract freedom and, implicitly, of the principle of the autonomy of will.

Another clarification that is required, from the analysis of the norms as mentioned above, is that, from the perspective of the categories of persons whose protection is ensured by the legal norm, regarding the alienation of historical monuments, only The Republic of Moldova has the quality of the protected subject and the right of preemption. Analyzing the right of preemption, under all the provisions conferred by the modernized Civil Code and the provisions of special laws, we can see the determination of the legislator to provide protection and value corresponding to the property right over specific categories of goods, giving preemption benefit from the right means to make this right effective and efficient.

From the point of view of the goods intended for legal protection, the norm legislates the general legal regime of historical monuments, these being defined according to art. 1 of Law 1530/1993 as representing *those objects or sets of objects of historical, artistic, or scientific value, which represent testimonies of the evolution of civilizations on the territory of the republic, as well as of spiritual, political, economic and social development, and which are included in the Register of monuments of the Republic of Moldova protected by the state.*

Thus, according to the legal norms, no historical monument owned by a natural person or a legal person under private law can be sold, except in the circumstances of exercising Moldova's right of preemption, under *the sanction of absolute nullity the sale*. What is required here to be concretized is that the law of Law 1530/1993 does not provide through which authorities the state is entitled to exercise its right of preemption. However, this fact is provided in the draft of the new law, which states that the right of preemption will be exercised through the Ministry of Education, Culture, and Research. However, a clarification and a possible modification of the draft law is required here, too, because, at the current stage, this ministry has been reorganized, separating into the Ministry of Education and Research and the Ministry of Culture.

We consider that the right of preemption should be exercised in the state's interest by the Ministry of Culture. This particularity finds its explanation in those acquiring goods that are part of the national cultural heritage requires a correct assessment of historical, scientific value, etc. A specialized institution can only make this assessment.

Another fact that caught our attention is that the general rules governing the right of preemption reveal the prioritization only if the holder accepts the price proposed by the seller. This right can be exercised at equal prices to those granted to third parties, or these rules are not and cannot be applied in all situations, especially in the case of the alienation of some historical monuments, goods of a colossal value for the national heritage. Thus, we mention that regarding the preemption right, regulated by the new law on the protection of historical monuments, the legislator should require **the Ministry of Culture, as a state representative, to negotiate the sale price of the historical monument**. And in this context, to avoid the delay of the sale of the good or even the blocking of the transaction, we consider that in the new law, it would be beneficial to establish **a fixed time interval in which the beneficiary of the preemption right can negotiate the sale price**. If no agreement is reached by the expiry of this period, the right of preemption shall be deemed not to have been exercised.

Another issue that needs to be addressed carefully is the procedure for exercising the right of preemption by the state. Although the provisions of art widely regulate this procedure. 1146, however, speaking of the public interest in cultural property, this procedure must be completed in the new law on protecting historical monuments. For example, the general legal provisions provide for two ways of exercising the right of preemption:

- exercising the right of preemption before the sale - if the obligated person makes him an offer to sell the good, thus giving him the possibility for the state to negotiate the purchase value with the seller;
- exercise of the right of preemption after the sale - if the obligated person has already concluded with a third party a sale-purchase contract regarding that good.

Here, a subject on which attention must be drawn in the new law is what would happen if the state did not exercise its right of preemption within the term provided by law. Thus, we consider that this right, **in case of alienation of some monuments of local importance, to be transferred to the local public authorities**, which can also exercise it within a specific term, or also the local public authorities have their budget, which could be used in this regard.



A special issue, which must be analyzed in this matter, is also related to the sanction for non-compliance with the right of preemption. Or, the general norms in the preemption issue do not grant the preemptor the remedy of the nullity of the contract, but the law Law no. 1530 from June 22, 1993, on the protection of monuments under art. 9 para. (2) expressly provides (2) "*Transactions in respect of monuments concluded in violation of the provisions outlined in paragraph 1 shall be considered null and void and entail liability under the Civil Code.*" As in the draft law on protecting historical monuments in art. 9 para. (6) provides that "*Contracts concluded in breach of the above-mentioned preemption rights shall be considered null and void* [18]."

Here we want to mention a few legal terms: *null* and *void*. Thus, art. 327 of the Civil Code provides para. (1), "*The legal act is null and void if the nullity sanctions the violation of a legal provision that protects a general interest (absolute nullity),*" para. (2) "*The legal act may be voidable if the nullity penalizes the violation of a legal provision protecting a particular interest (relative nullity).*"

According to art. 328 para. (1) (3) of the Civil Code, "*the absolute nullity of the legal act can be invoked by any person who has a born and current interest. The court invokes it ex officio*".

Suppose we analyze the provisions of the Civil Code in line with the provisions of art. 9 para. (2) of Law 1530/1993 and art. 9 para. (6) of the draft Law on the protection of historical monuments, we conclude that the contracts for the alienation of historical monuments produce legal effects only if the legal provisions regarding the exercise of the right of preemption have been observed under the sanction of *absolute nullity*. Also, in the light of the cited norms, we consider that the norm refers to the absolute nullity, or in the case of alienation of historical monuments, it is about the protection of some general interests of the society. The imperative norm expressly prescribes compulsory conduct, an obligation the subject may or may not evade. Moreover, since these rules meant that the legislator has to protect a general interest of society, not a private one, it is inconceivable that an agreement of intent concluded in breach of that legal provision would continue to produce legal effects.

In conclusion, we consider that the term "null and void" in the draft Law on the Protection of Historic Monuments is useless and must be excluded from the legal provision because of the sanction in case of concluding the act of alienation of the historical monument, in violation of the state's right of preemption absolute nature of the legal act.

If we refer to the general provisions governing the right of preemption, art. 1146 of the Civil Code grants the preemptor the remedy of concluding a parallel sale-purchase contract between the seller and the preemptor under identical conditions with the agreement between the seller and the third party and the right to recover from the third-party buyer in bad faith. Likewise, the new regulation definitively denies the legal remedy of "judicial substitution" of the preemptor in the contract between the seller and a third party [1].

Analyzing all legal provisions, both general and unique, we consider that in the case of exercising the state's right of preemption to purchase historical monuments, it would be most appropriate for the new law to expressly allow the state **to choose** between the nullity of the contract between the seller and the third party or the conclusion of a parallel sale-purchase contract between the state and the seller under identical conditions to the agreement between the seller and the third party, with the right to recover the good from the third party in bad faith.

Thus, it is preferable that in the matter of the preemption right of the state, the latter should benefit from the mechanism of taking over the sale-purchase contract, as this mechanism is sometimes more effective than applying the sanction of nullity the contract.

## Conclusions

The right of preemption is not a new institution. Still, on the contrary, it has been known since ancient times, declining during the communist period with the decline of private property. However, after gaining independence, amid the reaffirmation of personal property, and the significant elaboration of mandatory laws, we are witnessing a rapid expansion of the right of preemption in the most varied fields, including the cultural area.

The state must ensure itself, by all possible means, including a complex normative framework, which can contribute to the consolidation of this heritage; given that the destruction or degradation of the cultural heritage means the disappearance of the memory and cultural identity of the citizens of the Republic of Moldova and, consequently, the inability to pass this heritage on to future generations. In this sense, at the normative level, there is a need to review the procedures involved in protecting historical monuments, including exercising the right of preemption. So, it could be said that the Republic of Moldova has an acute lack of legislation to cover the specific needs of the cultural heritage and that it should be a modern one or the essential law in this field is older than 25 years.

Here it is required to specify that, although the draft Law on the Protection of Monuments already exists for public debates, which theoretically covers the spectrum of cultural heritage issues, this project also has gaps, which we have exposed in the content of the approach. The provisions of the new law, in terms of exercising the right of preemption of the state in the field of cultural heritage, require a careful resumption to clarify and complete them to place them in a form that is focused on the purposes for which it was established, namely on heritage protection. Given the purpose of selecting the right of preemption and the goods that tend to be protected, it is correct that national rules establish this minimum of guarantees, designed to ensure a balance between the protected interest and the rights of individuals who own these goods.

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