

THE PREEMPTIVE RIGHT REGULATED BY LAW NO. 17/2014

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Abstract: *The alienation by sale, of the agricultural land located outside the city limits is subject to the preemptive rights of co-owners, lessees, owners in the neighborhood as well as of the Romanian state, through the State Property Agency, in this order, at the same price and on equal terms. If no one wants to buy, only then the owner can sell the land to someone else, including foreign citizens or foreign legal entities falling in the conditions imposed by art. 2 of Law no.17/2014.*

Key words: *pre-emption, co-owners, vendor, the right of first refusal.*

1. Regulating the right of pre-emption

In art. 4 of Law no. 17/2014[1], a **right of first refusal is settled in favour** of the co-owners, lessees, owners, neighbors and the Romanian state, as follows: *"(1) Alienation through sale of agricultural land located in the city limits shall conform to the content and form conditions required by Law. 287/2009 of the Civil Code, republished, subsequently amended, and the right of pre-emption of the co-owners, lessees, neighbors and the Romanian state, the State Property Agency, in this order, at the same price and in equal conditions.*

(2) Notwithstanding the provisions of paragraph. (1), the alienation by sale of agricultural land located outside the city on which ranked archaeological sites are located is done according to Law no. 422/2001 on the protection of historical monuments, republished, with subsequent amendments. "

This right of first refusal is exercised with respect to the substantive and formal requirements, according to the general rules for exercising the right of first refusal in the matter of sale contained in articles 1730 - 1739 of the New Civil Code.

In case of alienation by sale of agricultural land located outside the city on which archaeological sites are located, the provisions of art. 4 of Law no. 422/2001 on the protection of historical monuments should be taken into consideration.

1.1. Considerations on the previous regulations of the pre-emption right regarding agricultural land located outside the city limits

The provisions of art. 48 and art. 49 of the Land Law no.18/1991 [9] were considered common law regarding the right of first refusal exercised during the sale of agricultural land located outside the city limits. [3]

These legal texts stipulated the following:

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"Art 48: (1) *The alienation of agricultural land located in unincorporated areas, by sale, can be made by exercising the right of pre-emption.*

(2) *The right of first refusal of any agricultural land in unincorporated areas falls on co-owners, if any, and then the neighbors and is exercised by the Agency for Rural Development and Planning.*

(3) *The owner of the land to be sold is obliged to inform the Agency for Rural Development and Planning, and the latter shall communicate in writing its intention to the people referred to in para. 2 within 15 days from the date they were notified.*

(4) *The holders of the right of first refusal are obliged to rule on its exercise within 30 days from receiving the communication.*

(5) *Upon reaching this limit, the right of first refusal for co-owners or neighbours is considered to be extinguished.*

(6) *The right of first refusal when alienating land devolves on the state through the Agency for Rural Planning and Development, which is bound to react within the time limit provided in par.4.*

(7) *If the agency has not acted within this period, the land is sold freely.*

Article 49: (1) *The act of alienation concluded in breach of the pre-emption right referred to in art. 48 is voidable. "*

Lease Law no. 16/1994 [10], established a right of first refusal of the lessee on selling the agricultural land outside the city which s/he held on lease.

In accordance with Art. 9 of the Lease Law no.16/1994: *"(1) The lessee, a natural person has the right of first refusal before the state in case of alienation through sale of leased land within the city limits.*

(2) *The right of first refusal is exercised according to the law. "*

The law referred to in art. 9 para. (2) of Law no.16/1994 was the Land Law no. 18/1991.

Thereafter, the provisions of art. 48 and 49 of the Land Law no. 18/1991 were repealed by Law no.54/1998 on the legal circulation of land [11], the right of first refusal when purchasing land outside the city having a new regulation through this last law in art. 5-11 and art. 14.

The legal status of the right of first refusal when purchasing land outside the city, in the light of Law no. 54/1998, was as follows:

" Article 5: *Alienation by sale of agricultural land located in the city limits is done in compliance with the pre-emption rights of co-owners, neighbours or leaseholders.*

Article 6: (1) *The seller shall register the offer for sale of the agricultural land located outside the city at the local council in whose area the land is situated.*

(2) *On the same day, the secretary of the administrative-territorial unit will post the offer under signature and stamp at the town hall. The offer will include the name and surname of the seller, the area and category of use, as well as the place where the land is situated.*

Article 7: *The owners of the first refusal right provisioned in art. 5 must express in writing on exercising it within 45 days from the date of posting the offer to sell, which will show the price offered; the offer to purchase being registered at the town hall.*

Article 8: *In case that, within the period provided for in art. 7, more holders from the category provided in art. 5 exercise their pre-emptive right, the seller has the right to choose one of the bidders.*

Article 9: *If the price offered to holders of the pre-emption right in the categories*

set out in art. 5 is not fair to the seller, s/he can sell the land to any other person.

Article 10 *If within the period referred to in art. 7, none of the holders of the right of pre-emption has shown willingness to buy the land, this will be sold unrationed.*

Article 11 *I In front of a notary public, the evidence of the publicity provided in art. 6 is made with the document issued by the Secretary of the administrative-territorial unit, after the expiry of the 45 day term referred to in art.7.*

Article 14 *(1) Non-compliance with the provisions of art. 2 para. (1) and of article 12 para. (1) and (2) entails the absolute nullity of the contract of sale or, if applicable, of the exchange contract, and the non-compliance with the provisions of art. 5 and 6 entails the relative nullity of the contract.*

(2) The action of finding the nullity may be brought by the parties, the prosecutor, the mayor or by any interested person. "

In 2005, any right of first refusal on the sale of agricultural land outside the municipalities ceases to exist since Law no. 247/2005 on the reform in property and justice field, as well as some additional measures repeal both art. 9 of the Lease Law no.16/1994 as well as Law no. 54/1998 on the legal circulation of land, without establishing a right of first refusal in this field .

Both art. 9 of the Lease Law no.16/1994, as well as Law no.54/1998 on the legal circulation of land were repealed by art.8, Title X. Legal circulation of Land, of Law no. 247/2005.

In practice, since 2005 and until October 1, 2011 (date of entry into force of the New Civil Code), agricultural lands outside the municipalities could be sold freely without their owners having to give preference to any category of people.

By establishing the right of first refusal in favour of the lessee, art. 1849 of the New Civil Code returns to the idea that in

this area, however, a pre-emptive right should established, but in the new regulation, the only holder of this right is the lessee.

2. The lands subject to the pre-emption right

In accordance with art. 4 of Law no.17/2014[12], the right of first refusal may be exercised only on land located outside the city.

Article 2, paragraph (1) of Law no. 17/2014 expressly provides that *agricultural land located inside the city is not covered by this regulation.*

To trigger the right of first refusal, it is necessary to achieve the expected alienation by sale, any other legal act being excluded.

As noted in the doctrine [3] : *"Since the sale is made for consideration and is commutative, for a sum of money paid as price, the right of pre-emption cannot be ascertained if the alienation is done either free of charge (e.g. donation), or at random nature (e.g. maintenance or annuity contract) or exchange contract, even consults. With no equivalent price of the land to be alienated, the right of pre-emption cannot be recognized, it can work only at the same price"*

But it is necessary that the sale refer only to individually determined lands and not to assets in general which include land.

It does not fall in the scope of the right of pre-emption the case of mergers or divisions of companies, because through them, universal transmissions of heritage or heritage factions take place. [6]

For the same reasons, it will not be applicable to the sale of a legacy.

The assignment of rights of succession concerning a legal universality or on an aliquot of it, gives the transferee the quality of trustee with the universal title of the transferor who has the right to come to

the inheritance and therefore has a random nature, incompatible with the notion of pre-emption.

Only sale-purchase agreements transmitting the ownership right for the land fall under the pre-emption law, and not those that transmit dismemberments of this right.

The alienation of only a share of the ownership on the land is also covered by the pre-emptive right, because otherwise it would easily result in defrauding preemptors' rights, in case of the alienation of land pertaining to more co-owners.

It will be possible to exercise the right of first refusal both in case the sale would be a direct one, and when it is done by public auction.

Forced sales are done only by public auction in case of forced execution of real estate or in case of winding-up a company.

According to art. 2 of Law no. 17/2014, the following can buy agricultural land located outside the city in our country:

- Romanian citizens
- citizens of EU countries,
- citizens of the states belonging to the European Economic Area Agreement (EEAA; including Norway, Liechtenstein and Iceland) or the Swiss Confederation
- stateless people residing in Romania, an EU member state, a state in ASEE or the Swiss Confederation,
- Romanian legal entities having Romanian nationality,
- legal entities having the nationality of an EU Member State, the States which pertain to the EEAA or the Swiss Confederation.

In addition, citizens and legal entities belonging to an EU Member State or States which are part of the EEAA or the Swiss Confederation can purchase agricultural land in Romania on the basis of *reciprocity*.

According to art. 2 section (3) of the Law no. 17/2014: *"A citizen of a third state and the stateless person residing in a third state and the legal entities having the nationality of a third country may acquire ownership of agricultural land located in the city limits as regulated by international treaties on the basis of reciprocity, under this law."*

The consequence of this regulation is that, if there is an international treaty with a country outside Europe, the citizens and legal entities in that country are allowed to buy agricultural land in the country.

According to Article 3 of Law no.17/2014: *"(1) agricultural land located outside the city up to a distance of 30 km from the state border and the Black Sea shore, to the interior, and that is located outside the city at a distance of 2,400 m from the special objectives may be alienated by sale and purchase only with the specific approval of the Ministry of National Defence, issued in consultation with state agencies with responsibilities in the field of national security through specialized internal structures mentioned in art. 6 para. 1 of Law no. 51/1991 on the national security of Romania, with subsequent amendments.*

(2) Paragraph. (1) does not apply to the preemptors.

(3) The notifications provided in par. (1) shall be submitted within 20 days from filing the request to the seller ...

(4) Agricultural land outside the city, where there are archaeological sites in which certain areas with identified archeological heritage or areas with archaeological potential made obvious by chance were appointed, may be alienated by sale only with the specific approval of the

Ministry of Culture, i.e., respectively of decentralized public services, as appropriate, issued within 20 days from filing the request of the seller. "

3. Owners of pre-emption right

Article 4 paragraph 1 of Law no. 17/2014 establishes that the pre-emption right holders are, in this order, the co-owners, lessees, neighbors and the Romanian state, through the State Property Agency.

According to art. 4 2nd clause of Law no. 17/2014, the alienation, through sale of agricultural land located outside the city that is located on archaeological sites is done according to Law no. 422/2001 on the protection of historical monuments.

3.1. Order of preference

Article 4 paragraph 1 of Law no. 17/2014 establishes an order of preference between co-owners, lessees, neighbours and the Romanian state.

By this, a waiver from the principle laid down in art. 1734 par. 1 section b of the New Civil Code occurs, which states that in a situation where there are several holders of the statutory pre-emption rights, the contract of sale is concluded with the holder of the pre-emption right chosen by the vendor.

This basic rule established in art. 1734 par. 1 section b of the New Civil Code will find its application when several holders of the right of first refusal from the same category intend to exercise the pre-emption rights recognized by law.

This rule is established expressly by the provisions of art. 6 of Law no.17/2014.

Thus, if there are two or more co-owners of the same agricultural land who want to buy the share to be alienated by the co-owner seller, the sale-purchase contract will be concluded with that co-owner particularly preferred by the vendor.

The same rule applies to the other preemptors in the same category, the preemptor chosen by the owner who sells having priority to purchase.

Having seen the holders of the right of first refusal on the sale of agricultural land outside the city, it can be concluded that the establishment of the right of first refusal in favour of these holders also aims at merging the agricultural land.

3.2. The co-owners

The first class of preemptors preferred by the provisions of Law no. 17/2014 to purchase farmland outside the city is that of co-owners.

If there are more co-owners of the same land, all of them are to the same extent the holders of the right of first refusal, this solution being imposed by the plural wording in the legal text.

As noted above, in the event that more co-owners desire to exercise the right of pre-emption, the contract of sale-purchase will be concluded with the co-owner chosen by the seller (art.1734 para 1 letter B the New Civil Code).

It is irrelevant how the preemptor and the seller acquired the agricultural land under common ownership: legal act, succession etc. What is important is that the two jointly own the farmland itself.

Therefore, the person who is a co-owner in relation with the seller will not have the right of first refusal, but not on the agricultural land, but over another asset [1].

This solution results from the logical interpretation of the text, and the teleological interpretation : since through the exercise of the pre-emptive right by the co-owner, two favourable legal effects are achieved, i.e., it reaches the termination of co-ownership between the seller and the buyer, avoiding division and preventing land fragmentation [1] .

Professor Gh Beleiu raises in the cited study the question whether the legislature, stating that the holder of the right of first refusal is the co-owner, referred also to the joint holder.

In his opinion, the joint holder is not under the right of first refusal because the joint holder does not have an ideal share of the land that is the subject of the right of pre-emption, but on a mass of goods.

It is possible that after the termination of joint tenancy, the land - object of first refusal right becomes the exclusive property of the joint holder, exercising the pre-emption right in such a situation becoming impossible.

Also, alienating a share of the assets held in joint tenancy, he did not alienate a certain piece of land, or a mathematical fraction, an ideal one of a common ownership, the buyer taking his place in the joint tenancy, with no warranty, we add, that the buyer will even become the owner of the land.

From our point of view, regarding the co-owner, the purpose of the legislature in establishing the right of first refusal cannot be achieved with certainty, that is, in support of the arguments of the cited author [8], we consider that he does not have the right of first refusal on the sale of the agricultural land outside the city.

The reference books showed that not even the spouses who have joint ownership on the forest land benefit from the right of first refusal acknowledged to the proprietor.

In support of this assertion two arguments were brought: in case of joint ownership, it is impossible to alienate a share of the joint property, as in the case of joint property ownership, the spouses no longer have a fixed share of the ownership right, and the Civil Code prohibits sales between spouses.

From our point of view, it is possible that former spouses benefit from the legal provisions regarding the right of first refusal of the co-owners, being commonplace that by divorce, the condition of joint ownership ceases, the former spouses having the quality of co-owners of shares in commons [7] .

However, if after the divorce, the object of common property is a mass of goods, they will not benefit from the right of first refusal for the reasons stated above.

In what concerns the joint owner, the only situation in which the pre-emption right will function is the one in which the object in common ownership is an agricultural land outside the city regarded as *ut singuli*.

3.3. The lessees

If the person who sells the agricultural land outside the city is the sole owner or all the joint owners show their willingness to sell the land or if none of the co-owners exercise the right of first refusal, the possibility arises that the right of first refusal be exercised effectively by the lessees.

As stated in the case of co-owners, if there are several co-owners who wish to exercise their right of first refusal established by law, the owner seller is the one who chooses what lessee will conclude the contract of sale in accordance with article 1734 para 1 letter b of the New Civil Code.

By leasing we imply the contract between the owner, usufructuary or another legal holder of agricultural goods, called the lessor and lessee, on the exploitation of agricultural goods for a specified period and at a price determined by the parties.

According to art. 11 of Law no. 17/2014[12]: *"The lessee who wants to buy agricultural land located outside the city must have this quality for the respective land, determined by a valid lease contract signed and registered according to the law at the time the offer of sale is displayed at the City Hall. "*

For enforceability, the lease contract must be registered with the local council in whose jurisdiction the property is, in order to be recorded in a special register kept by the secretary of the local council (Article 6 para. 1 of Lease Law no.16/1994 and art. 1838 para. 1 of the New Civil Code).

When the leased assets are located within the jurisdiction of several local councils, a copy of the contract shall be submitted to each local council in whose jurisdiction the leased assets are located (article 6 para. 2 of Lease Law no.16/1994 and of art.1838 para. 3 of the New Civil Code).

3.4. Owners in the neighborhood

As shown [5] neighbors are proprietors of pieces of land, which are separated by a boundary line from the land to be sold.

We would add to this statement that the boundary line may be visible through external signs, the essential thing being that in accordance with the cadastral documentation, the two pieces of land should appear as being located next to each other.

It has been considered in the doctrine [8] that taking into account the purpose of the legislature, respectively the concentration

of agricultural property, it is obvious that the neighbors themselves, as holders of the right of pre-emption must have a right of ownership over a piece of land that has a common border with the land to be sold.

3.5. The Romanian State

According to art. 4. 1 of Law no. 17/2014[12], the Romanian state will exercise, as a rule, the right of first refusal through the State Property Agency.

Law no. 422/2001 on the protection of historical monuments, to which art. 4. paragraph 2 of Law no. 17/2014 refers, establishes that for historical monuments classified in group A, respectively monuments of national and universal value, the State exercises its right of first refusal through the Ministry of Culture.

For historical monuments in group B, respectively monuments representative for the local cultural heritage, the State exercises its right of first refusal through the Department of Culture, Cults and National Cultural Heritage, respectively of Bucharest municipality.

The administrative-territorial units have a right of first refusal on historical monuments only if the State does not wish to exercise its right of first refusal.

This becomes clear from reading the provisions of art. 4. paragraph (4) and article 4. paragraph (7) of Law no. 422/2001.

Thus, according to article 4 paragraph (4) of the law, the right of first refusal may be exercised by the State or the territorial administrative units, as appropriate.

While art. 4. paragraph (7) of Law no. 422/2001 provides that *in case the Ministry of Culture and Cults or the decentralized public services of the Ministry of Culture and Cults do not exercise their right of first*

refusal within the period specified in par. (7), this right is transferred to the local authorities.

Since the law does not distinguish, we consider that the right of first refusal of the administrative territorial unit may be exercised both when purchasing monuments from group A and from group B.

4. The procedure for exercising the right of first refusal

According to art. 6 paragraph 1 of Law no. 17/2014[12]: *"Notwithstanding the art.1730 and the following of Law. 287/2009, republished, with subsequent amendments, the seller files an application to the City Hall in the range of the administrative-territorial unit where the land is, requesting the display of the offer for sale of agricultural land located outside the city, in order to bring it to the attention of the preemptors. The application is accompanied by the offer of sale of agricultural land and the supporting documents provided by the implementing rules of the present law. "*

In accordance with art. 6 para. 2 of Law no. 17/2014[12], within one business day from the date of filing the application, the City is compelled to display for 30 days the offer for sale at its headquarters and, where appropriate, on its website.

The City Hall is required to send to the central authorities' structure in the Ministry of Agriculture and Rural Development, respectively to its territorial structures, as appropriate, a file comprising the preemptors' list, respectively the copy of the request application, the offer for sale and the documentary evidence within three working days from the date of filing.

In view of a larger transparency, within 3 working days from the registration of the file, the central structure, respectively the territorial structures, as applicable, are required to display on their sites the offer for sale for 15 days.

The pre-emption right holder shall, within the 30 days stipulated in art. 6 para. (2) of Law no. 17/2014[12], express his/her purchase intention in writing, to communicate the acceptance of the seller's offer and to register it at the City Hall where it was displayed.

The City Hall will display, within 24 hours from registering the acceptance of the offer of sale, the data provided in the rules for the application of Law no.17/2014[12], which will send them for display on the site to the central structure, respectively to the territorial structures, as appropriate.

If within the 30 days stipulated in art. 6 paragraph 2 of Law no.17/2014[12], more preemptors of a different rank manifest in writing their intention to buy at the same price and under the same conditions, the seller will choose, in compliance with art. 4 of the same law, the preemptor, a potential buyer, and will communicate his/her name to the City Hall.

If within the 30 days stipulated in art. 6 paragraph 2 of Law no.17/2014[12], more preemptors of a different rank manifest in writing their intention to buy at the same price and no other preemptor of a higher rank accepted the offer, at the same price and under the same conditions, the seller will choose between them and will communicate his/her name to the City Hall.

If within the 30 days stipulated in art. 6 paragraph 2 of Law no. 17/2014, a low rank preemptor offers a higher price

than the offer of sale or the one offered by the other preemptors of a higher rank accepting the offer, the seller may resume the procedure, registering the offer for sale at this price, with the higher rank preemptors.

The procedure provided for in Art. 6 para. 4 of Law no. 17/2014 will run only once, within 10 days of the expiry of the 30 day term stipulated in art. 6 para. 2 of Law no.17/2014. On expiry of the 10 days, the seller will communicate the preemptor's name to the City Hall.

Within 3 working days from the notification referred to in art. 6 paragraphs 2, 3 and 5 of Law no.17/2014, the City Hall is compelled to transmit the central structure, respectively the territorial units, as appropriate, the identification details of the chosen preemptor, potential buyer, in order to verify whether the legal conditions are met.

If within the 30 days stipulated in art. 6 para. 2 of Law no.17/2014 [12], none of the holders of the right of pre-emption expresses his/her intention to buy the land, the selling of the land is free and the seller will notify the City Hall about it in writing.

The free sale of land at a lower price than the one required in the offer of sale stipulated in art. 6 para. 1 of Law no. 17/2014[12] or in more favorable terms than those shown in it, results in absolute nullity.

If within the 30 days stipulated in art. 6 paragraph 2 of Law no. 17/2014, i.e. the period of 10 days referred to in art. 7 paragraph. 5 of Law no.17/2014, the seller changes the data included in the offer for sale, she/ he resumes the application filing procedure set forth in art. 6 of Law no.17/2014[12].

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9. *** Law no.18/1991 was published in the Official Gazette. No. 37 of 20 February 1991 and republished in the Official Gazette No. 1 of 5 January 1998.
 10. *** Law no. 16/1994 published in the Official Gazette No. 91 of 7 April 1994, was repealed by art. 230 letter r) of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, according to which '*Upon entry into force of the Civil Code the following is repealed: (...) letter. r) Lease Law no. 16/1994, published in the Official Gazette of Romania, Part I, no. 91 of April 7, 1994, as amended and supplemented.*'
 11. *** Law no.54/1998 on the legal circulation of land was published in the Official Gazette. No. 102 of 4 March 1998.
 12. *** Law. 17/2014 regarding some measures regulating the sale and purchase of agricultural land located in unincorporated areas and amending Law no. 268/2001 regarding the privatization of the companies administrating land in public and private ownership of the state for agricultural purposes and setting up the State property Agency was published in the Official Gazette, Part I, no. 178 of 12 March 2014.