

Acta
Universitatis
Danubius

JURIDICA

The Limits of Applying the Right of Preemption. The Subtle Delimitation Between the use of Legal Exceptions (*Datio in Solutum*/Payment in Kind) and Fraud Against the Law Through Contractual Disguise

Gabriela Teodoru¹

Abstract: The right of preemption is a legal or conventional limitation on the owner's right of disposition, aimed at protecting legitimate interests (agricultural, cultural, co-ownership). According to Article 1730 of the Civil Code, it applies exclusively in case of sale. Its scope of application, although clearly defined by law, raises major issues at the intersection with other mechanisms of patrimonial transfer, as well as in the face of fraudulent intentions of the parties. This article aims to analyze two categories of situations that seem to circumvent preemption but require an essential distinction: on the one hand, legal exceptions (acts that are not sales by their nature, such as *datio in solutum*/payment in kind) and, on the other hand, fraud against the law (acts disguised as other legal operations, but which conceal a sale).'

Keywords: right of preemption; legal/conventional limitation; right of disposition; sale; patrimonial transfer; legal acts; legitimate interests; fraud against the law; disguised acts; legal exceptions; *datio in solutum* (payment in kind)

JEL Classification: K11; K12; K15

¹ PhD Candidate, Academy of Economic Studies, Address: Piața Romană 6, 010374 Bucharest, Romania, E-mail: avocat_dimofte@yahoo.com.



Copyright: © 2025 by the authors.
Open access publication under the terms and conditions of the
Creative Commons Attribution-NonCommercial (CC BY NC) license
(<https://creativecommons.org/licenses/by-nc/4.0/>)

1. Applicability of the Right of Preemption to the Conclusion of Sale Contracts

Regulated under general law, the right of preemption, as defined by the provisions of Article 1730 para. (1) of the Civil Code, represents the faculty of the entitled party, called the preemptor, to buy a certain asset with priority. The general legal framework is supplemented by special laws that determine the legal regime for the application of special preemption rights, which apply to specific assets.

The regulation in the Civil Code regarding the right of preemption refers to this legal institution in general. However, special preemption rights, applicable to specific assets, are dispersed through various normative acts regulating the sale of agricultural land, forest land, historical monuments, expropriated real estate where the works for which the expropriation was made have not been completed, restituted nationalised real estate, etc.

In accordance with the provisions of the Civil Code, the right of preemption is a right that grants the holder priority over third parties only in the situation of concluding a sale contract, and other types of contracts are not included in the notion of preemption.

Furthermore, legal literature is unanimous in understanding sale only as those legal acts that transfer ownership, and not its dismemberments (e.g. usufruct) or the use of the land or lease/tenancy (Deak, Mihai & Popescu, 2021, p. 70). Respecting the right of preemption even in the case of establishing dismemberments of the right of ownership over agricultural land located outside the city limits, for example, would not serve the purposes pursued by the legislator in establishing it.

The situation of alienating bare ownership (*nuda proprietas*) over agricultural land located outside the city limits, however, may raise controversy. In French legal literature, two arguments have been raised against exercising the right of preemption in this case. On the one hand, it was stated that real estate is not the same as the bare ownership of real estate, and if the law intends to subject the dismemberments of the right of ownership to the right of preemption, it must state it clearly. On the other hand, it was argued that the right of preemption is a technique whose sole foundation resides in the possibility of acceding to the full ownership of an asset; the usufruct, encumbering the asset sold, constitutes an obstacle to achieving the objectives that must motivate the decision of preemption, at least when it comes to the preemption right of collectivity (Chelaru, 1993, p. 170).

However, the Civil Code does not analyze bare ownership as a dismemberment of the right of ownership. Consequently, in this situation, it is not about the cession of a real right, a dismemberment of the right of ownership, but about the sale of land encumbered by a real right of usufruct.

Therefore, the right of preemption must be respected, even if only the bare ownership is transferred, and regardless of the person holding the usufruct right. Evidently, if the holder of the right of preemption chooses to exercise it, they will be obliged to respect the real rights, just like any acquirer of the dismembered (or encumbered) right of ownership (Deak, 1999, p. 30).

The right of preemption is provided by law only if alienation is made through a sale, and this express provision implies that in the case of other transfers through acts other than sale, the legal provisions regarding the right of preemption are not applicable.

Sale is a contract for consideration (*onerous*) and commutative; one of its essential elements is the price, in addition to the other elements provided by Article 1179 of the Civil Code, and only when these conditions are met are the legal provisions related to the right of preemption applicable. Since the law expressly provides the legal act when the right of preemption is exercised, it follows that in the case of other forms of alienation, such as the maintenance contract (life annuity contract), exchange, or donation, the legal provisions regarding the right of preemption are not applicable.

The right of preemption can only be exercised when individually determined real estate is alienated, and not when their alienation is carried out through the sale of the universality of assets that also include assets for the sale of which the law provides a right of preemption.

If the consideration for the alienation of an asset involves the granting of maintenance (*întreținere*) but also the payment of a sum of money (price), the legal nature of the contract will be determined by the principal obligation of the acquirer. If the principal obligation is the payment of a sum of money, that is, a price, then alienation must be carried out with respect for the right of preemption.

In one opinion (Adam, 1996, p. 79), it was considered that if the acquirer offers a quantity of fungible goods instead of a sum of money, there is no substantial difference from the typical sale contract, so this case also falls within the scope of the right of preemption, and the respective goods must be evaluated to establish the

price amount. This is, however, an exchange contract, and therefore the right of preemption is not incidental to it.

Also, by Decision no. 58 of October 3, 2022, on the issuance of a preliminary ruling, the High Court of Cassation and Justice ruled that “In the interpretation and application of the provisions of Art. 4 para. (1) of Law no. 17/2014 regarding certain measures for the regulation of the sale of agricultural land located outside the city limits and for the amendment of Law no. 268/2001 regarding the privatisation of companies holding public and private state-owned land with an agricultural purpose and the establishment of the State Domains Agency, with subsequent amendments and additions, and of Art. 13 para. (5) of the Land Registry and Real Estate Publicity Law no. 7/1996, republished, with subsequent amendments and additions, it is not necessary to respect the right of preemption provided by Art. 4 para. (1) of Law no. 17/2014 upon the conclusion of an agreement whose object is the alienation of the possession over agricultural land outside the city limits.”

Furthermore, due to the fact that they are not capable of leading to the transfer of ownership, even preliminary sale-purchase agreements (*antecontracte*) having as their object agricultural land located outside the city limits are not subject to preemption (Adam, 1996, p. 67). However, the authentic sale contract cannot be perfected unless the preemption procedure has been respected and none of the preemptors of a higher rank, or none of the preemptors (in the case of sales to third parties), have accepted the offer of sale at the same price as the one established in the preliminary sale agreement.

Regarding the exercise of the right of preemption at the date of issuing a judgment that replaces the sale-purchase contract in the situation where a preliminary agreement was concluded, the Constitutional Court Decision no. 755 (M.O, 2015) of December 16, 2014, explicitly showed that the court invested with issuing such a judgment must verify the fulfilment of all validity conditions at the date of issuing this judgment, represented, in this case, by the legal norms regarding the exercise of the right of preemption, in force at the date of issuing the court judgment, when the transfer of the right of ownership occurs, according to the principle *tempus regit actum* (paragraph 20).

Moreover, Law no. 17/2014 (Law No. 17/2014) provides that, in all cases where a court judgment replacing the sale contract is sought, the action is admissible only if the preliminary agreement is concluded according to the provisions of the Civil Code, if the preemption procedure has been completed, and if the legally provided

approvals have been obtained, and the real estate subject to the preliminary agreement is registered in the fiscal roll and the land book.

2. Limits of Applying the Right of Preemption

2.1. In-Kind Contribution to the Share Capital of a Commercial Company, Mergers, and Divisions of Commercial Companies

Therefore, the right of preemption is a legal limitation on the right of disposition, applicable exclusively in the case of a sale-purchase contract. Any operation that transfers ownership but does not take on the legal nature of a sale constitutes *de plano* an exception to the applicability of this right. Among these exceptions are complex corporate operations, such as in-kind contributions to share capital and corporate restructurings (mergers and divisions).

The right of preemption will not be in question if agricultural land located outside the city limits is constituted by a partner as an in-kind contribution to a commercial company. The solution is justified because, in exchange for the contributed asset, the partner will not receive a price, but social parts, interests, or shares, depending on the legal form of the respective commercial company. The right of preemption, being an exception to the principle of contractual freedom, must be interpreted restrictively. Thus, it means that there must be a contract for consideration and commutative, with the payment of a sum of money as a price being essential (Gheorghincă, 2019, pp. 36–37). The legal cause of the contribution is not obtaining a sum of money, but acquiring the status of a partner and participating in the company's profits and losses.

Since there is no price expressed in money that the preemptor can offer, according to the requirements of Article 1732 of the Civil Code, the preemptor cannot be substituted for the partner who receives shares/social parts, as the former cannot take over the partner's social rights. The purpose of the capital contribution operation is to structure an economic entity, not just a simple patrimonial transfer. Preemption would change the internal structure of the company itself.

Therefore, the transfer of an asset through an in-kind contribution to the share capital legally bypasses the right of preemption.

The only situation in which the in-kind contribution of an asset, for which the law establishes a right of preemption, could be challenged in court is if it is proven that the in-kind contribution was a simulated operation or a fraud against the law. This

presupposes that the parties were actually aiming for a sale purchase, but used the legal form of the in-kind contribution exclusively to circumvent the application of the right of preemption and the procedure imposed by Law 17/2014. If the fraud is proven, the act can be annulled.

Other situations where the right of preemption does not apply are mergers or divisions of commercial companies because these operations involve universal transfers of assets (*transmission universals*) or fractions of assets (Sage, 2019).

Mergers and divisions are operations regulated by Law no. 31/1990 (Art. 238 et seq.) and represent modes of transformation of companies, not sale contracts. A merger is the operation by which the assets of two or more companies are transferred to a single one, in exchange for the allocation of shares or social parts to the partners of the companies that cease to exist. In the case of merger by absorption, the transfer of the absorbed/merged company's assets is done *cum titulo universale* (universally), to the absorbing/newly established company, as a consequence of the reorganisation. The absorbing company takes over the rights and obligations of the other company integrally. The partner of the absorbed company becomes a partner of the absorbing one. In the case of merger by consolidation, two or more companies (the merging companies) cease to exist (are dissolved without liquidation) and transfer their assets integrally to a new company they form together. The partners of the initial companies become partners of the newly established company.

Since the transfer of assets does not occur in exchange for a price, but is the effect of the dissolution without liquidation of the company, preemption does not apply.

Division is the operation by which the assets of a company are split and transferred to two or more existing or newly established companies. Similar to a merger, the transfer of assets and liabilities is done *cum titulo universale*, proportional to the partner's participation in the divided company. The purpose of the operation is the division of the company's assets among the partners, not a sale. Therefore, assets subject to preemption that are the object of the division are transferred *ope legis* (by operation of law), without the right of preemption can be exercised.

Although these corporate operations are legal exceptions, they can be sanctioned if it is proven that they were used exclusively as fraudulent mechanisms to circumvent the right of preemption of a third party. The operation (contribution, merger, or division) could be declared unenforceable (*inopozabil*) against the preemptor if it is proven that an *ad hoc* company was created or a restructuring was carried out strictly for the purpose of transferring the targeted asset, or the operation was immediately

followed by the sale of the shares/social parts received by the contributor or partner, thus indirectly realising the transfer of the asset against a price.

In the absence of proof of fraud (Article 15 Civil Code), the operations of contribution, merger, and division remain valid exceptions to the applicability of the right of preemption, being governed by special laws.

2.2. The Opening or Sale of a Succession

A fundamental case of exception to the application of preemption is the transfer of assets following the opening of the succession (*mortis causa*). The opening of the succession (inheritance) is the way in which the assets of a deceased natural person are transferred to one or more living persons. The transfer of ownership through succession is not a bilateral act governed by the will of the parties, as a sale is, but is a legal transfer (*ope legis*). The right of ownership is transferred at the time of death, by operation of law, to the heirs (legal or testamentary), subject to the condition of accepting the succession. Regardless of whether the heirs acquire the entire patrimony (universal title) or a share of it (universal title), the transfer does not meet the essential conditions of a sale contract. No sum of money is paid for acquiring the ownership, and the transfer of ownership is the result of a legal fact (death), not an agreement of wills for alienation. Therefore, the transfer of ownership occurring at the opening of the succession cannot be subject to the right of preemption.

The issue of the applicability of the right of preemption becomes more nuanced in the phase following the succession: partition (*partajul* – division of the inheritance). The succession partition is the act by which the state of indivision (forced co-ownership) is ended and individual assets are allocated to each heir in exclusive ownership. According to Article 680 of the Civil Code, partition is an act with a declarative effect. This means that the heir is considered the exclusive owner of the assets allocated to them from the moment the succession opened, and not from the moment of partition. If an asset subject to preemption (for example, agricultural land) is allocated to an heir through partition, this act is not a sale between co-heirs. Therefore, the right of preemption does not apply to the asset allocated. Partition may involve the payment of a balancing payment (*sulta*) (a sum of money paid by one heir to another to compensate for the inequality of the lots). Although the balancing payments create a resemblance to a price, they do not transform the partition into a sale. The balancing payment is intended to complete the heir's lot, not to represent the countervalue of the asset. The principal legal act remains the

partition, which, by its declarative nature, excludes the application of the right of preemption.

In conclusion, property transfers occurring as a result of death (succession) or as a subsequent stage (succession partition) are legal acts with a cause distinct from sale. These operations are not governed by the contractual principles of onerous alienation and, therefore, constitute definitive legal exceptions to the scope of the right of preemption.

Furthermore, the right of preemption will also not be applicable to the sale of an inheritance, regulated by Articles 1747–1754 of the Civil Code. The cession of hereditary rights concerns a legal universality or a share of it (Civil Code, Art. 1747); it confers on the cessionary the status of successor *cum titulo universale* of the cedent and, consequently, the right to participate in the partition; it therefore has a speculative nature (*caracter aleatoriu*), incompatible with the notion of preemption. If the contrary solution were allowed, it would create the premise that, at the partition, the buyer could be allocated assets other than agricultural land because no legal provision obliges to proceed otherwise, which is alien to the purposes pursued by the legislator by establishing the right of preemption. Since the sale refers to a complex of rights and obligations (sometimes uncertain and unidentified at the time of sale), it cannot be established with certainty whether a certain asset within the universality is the one that generates the right of preemption (Weinstein, 2025). On the other hand, the preemptor cannot be substituted for the buyer of the inheritance by paying only the price for the individual asset subject to preemption because the total sale price was established for the entire succession mass, including liabilities and obligations. Partial application would distort the contract and seriously affect the patrimonial balance of the selling heir.

In conclusion, the Sale of an Inheritance (of hereditary rights) constitutes an exception to the right of preemption, being a direct consequence of its legal nature as a contract whose object is a universality of rights. The block alienation of hereditary patrimony (or a share of it) is incompatible with the preemption mechanism, which is designed to operate on individual and determined assets whose transfer is made against a price.

2.3. Expropriation for Cause of Public Utility

Expropriation is a public law procedure by which the state or a territorial administrative unit, under a special law (in Romania, Law no. 33/1994, republished,

and Law no. 255/2010), forcibly transfers the ownership of an asset from a private individual to the public domain, for the purpose of carrying out a public utility project (e.g. highways, hospitals, schools). Unlike sale, which is a bilateral legal act based on the consent of the parties (seller and buyer), expropriation is an act of public authority, characterised by unilaterality and coercive force. The owner does not have the freedom to choose to sell or to whom to sell; they are obliged to yield the property in exchange for just and prior compensation (according to Art. 44 of the Romanian Constitution).

Although it involves a sum of money (compensation), this sum does not represent a price in the civil sense of the term. The compensation represents the full repair of the damage suffered by the owner as a result of the loss of the asset, being imposed by the necessity of respecting the constitutional principle of private property, and not the contractually established countervalue.

The inapplicability of the right of preemption in the case of expropriation is a natural consequence of its legal nature as a public law act. The essential condition of preemption – the existence of an intention to sell – is absent. The owner does not sell, but forcibly yields the right of ownership. The right of preemption would allow the third-party preemptor to be substituted for the buyer. In the case of expropriation, the ‘buyer’ is always the state (or public entity), acting under the prerogatives of public power. It is inconceivable that a private individual could be substituted for the state to carry out a public utility project. Expropriation is governed by the principle of supremacy of public interest. Preemption, even if it protects a legitimate interest, is a private law instrument. The major public interest of the state (building vital infrastructure) always prevails over the particular interest of the preemptor to acquire an asset.

Therefore, the transfer of ownership occurring as a result of expropriation is an absolute legal exception to the applicability of the right of preemption.

2.4. Public Auction Sale

The public auction sale within the forced execution procedure (Art. 835 et seq. of the Civil Procedure Code) is a forced transfer of ownership, carried out through the intervention of the judicial authority and not through the free will of the debtor owner. The right of preemption is unanimously considered inapplicable in forced sales.

Forced sale at public auction is a form of forced execution on the debtor's assets, at the initiative of a pursuing creditor and with the concurrence of the state's coercive force, consisting in the alienation of these assets against the will of their owner, with a punitive purpose, namely to obtain the execution of a civil obligation having as its object the payment of a sum of money resulting from the obligatory legal relationship or from the accessory forced execution procedure (Barnes et al., 2025, p. 760) .

In contrast, in the case of voluntary public auction sales, the legal mechanism of preemption is applicable, making it possible for the preemptor to be substituted for the successful bidder, at the price proposed by the latter, taking over all their rights and obligations, according to the tender specifications or the sales catalogue. The Romanian legislator opted for the variant of following a mandatory procedure for exercising the right of preemption only after the conclusion of the contract with a third party. According to Art. 1732 Civil Code, 'The seller is obliged to immediately notify the preemptor of the content of the contract concluded with a third party.' It follows that, according to general law, the seller is not obliged to communicate a notification to the preemptor before concluding the contract with the third party, but only afterward, and the deadlines for the exercise run from this latter moment.

The seller may try to avoid the *a posteriori* procedure of exercising the right of preemption and offer the contract to the preemptor even before concluding it with a chosen buyer. According to Art. 1730 para. 3 Civil Code, the holder of the right of preemption, who has rejected a sales offer, can no longer exercise this right regarding the contract that was proposed to him. The offer is considered rejected if it has not been accepted within a maximum of 10 days, in the case of the sale of movable goods, or a maximum of 30 days, in the case of the sale of real estate. "In both cases, the deadline runs from the communication of the offer to the preemptor."

In conclusion, in the case of voluntary public auction sale, the right of preemption must be respected, and in the case of forced public auction sale, the right of preemption must not be respected.

The sale at public auction, whether voluntary or forced, produces legal effects like any legal act, intended to execute the interests of the parties. Since the sale at public auction is translatiue of rights, its valid conclusion gives rise to an obligation to give and obligations to do. Depending on whether they occur directly from the contract (by law) or are incumbent upon the parties, the effects of the contract are divided into: legal effects (obligation to give) and personal effects (obligations to do). Consequently, the sale contract has a dual effect: the transfer of the right of ownership from the seller to the buyer and the creation of obligations (incumbent

upon the parties). Until the sale is perfected, public auctions involve numerous people in their realisation. This plurality of participants is specific to public auctions. After the successful bid (*adjudecare*), the people involved are much fewer: the public and the bidders disappear, except for the last one of them. Primarily, the seller and the buyer remain in the case of a voluntary auction sale, and in the case of a forced sale, the pursuing creditor, the other creditors, the debtor, and the successful bidder.

The variety closest in the legal regime to the general law sale is the voluntary public auction sale. The situation of the parties is essentially the same as that of those who conclude a sale contract by agreement. The specific nature is given by the formalities accompanying the conclusion of the contract. In contrast, the effects of forced sales at public auction emphasise their particularity by reference to the rules of the Civil Code governing the sale contract. This dissociation of the effects of different types of sales is justified by the fact that the common element, the auction itself, is determinant in reality only for the formation of the civil legal relationship. Otherwise, different rules apply to voluntary and forced public auction sales.

In doctrine, the opinion was expressed (Militaru, 2013, p. 112) that a special regulation of the right of preemption is necessary for the variety of voluntary public auction sales, in the sense of exercising it, as a rule, within the public auction, whose duration should respect the acceptance period provided in favour of the preemptor, provided that the sales offer, tender specifications, and sales regulations are effectively communicated to the latter. The procedure should be identical to the one applicable in the case of forced public auction sales.

Currently, such a procedure is provided only in the case of forced public auction sales. For acceptance, the preemptor will be obliged to participate in the auction, and in case of parity of price offers with another bidder, to use the right of preemption to be declared the successful bidder. The holder of a right of preemption who did not participate in the auction will no longer be able to exercise their right after the asset has been awarded. The rationale for this change is that the existence of the right of preemption should not become a form of challenging its holder to conclude a contract under the terms offered by the seller (without knowing if the acquisition of the asset by a third party is truly imminent), but will only constitute a remedy for the situation where the imminence of a third party being declared the successful bidder is evident. By way of exception, the procedure for exercising the right of preemption *a posteriori* must be followed only in case of non-fulfilment by the seller of the obligations of valid communication of the offer to the preemptor or violation of the acceptance period. In this case, there would already be a civil legal act – the award

(*adjudecare*) – which would produce the translative effect of ownership in case of non-exercise of the right of preemption (negative suspensive condition). Exercising the right of preemption by way of retraction (at the final bid price, not the starting price) would constitute a legal remedy for the non-fulfilment by the debtor of the preemption right of the legal and contractual obligations. The sale of the asset regarding which a right of preemption exists to a third party is valid only under the suspensive condition of the non-exercise of the right of preemption by the preemptor (Art. 1731 Civil Code), which is why, in the case of a voluntary public auction sale, the obligation to insert an express clause to this effect in the tender specifications or the sales catalogue should be provided.

3. Fraud Against the Law to Circumvent the Right of Preemption

The High Court of Cassation and Justice (HCCJ, Civil Section I, Decision No. 1386/2014) has ruled that fraud against the law represents that operation through which, when drafting a legal act, in order to circumvent mandatory legal norms, other legal norms are used by diverting the latter from the purpose for which they were enacted by the legislator. In this sense, by defrauding the law, the letter of the public order law is not violated, but its spirit is disregarded. The High Court specified that, structurally, fraud against the law contains two elements: an objective (external) element, consisting of the apparently legal means that are used, and a subjective element, consisting of the intention to circumvent or evade the applicable legal norm. Therefore, the simple violation of legal provisions does not constitute fraud against the law; it is necessary to prove that the parties acted in collusion to circumvent the legal provisions, as well as to prove the use of a fraudulent means/mechanism by which mandatory provisions of the law were evaded. The High Court also mentioned that, since the burden of proof regarding the existence of fraud against the law belongs to the claimant, they cannot rely on mere assertions, but must prove both the defendant's intention to defraud the law and the fraudulent procedure by which mandatory provisions of the law were evaded (Decision no. 1386/04.04.2014 ICCJ).

3.1. Disguised Donation

Donation represents a fundamental and unequivocal exception to the applicability of the right of preemption, being a direct consequence of its distinct legal nature from that of sale.

Donation is defined by Art. 985 Civil Code as the contract by which one party, called the donor, irrevocably and with liberal intent (*animus donandi*) transfers the ownership of an asset to another party, called the donee, without receiving a counter-performance in return. Even if, in the case of a donation contract, we are in the presence of a transfer of the right of ownership, the right of preemption does not apply because the price in money is absent. The sale is a synallagmatic and onerous contract, in which the cause of the seller's obligation is receipt of the price in money from the buyer. In contrast, the cause of the donation is the liberal intent (*animus donandi*). Donation is a legal act for free (*with gratuitous title*). The transfer of ownership is carried out of the donor's generosity, without the latter seeking to obtain an equivalent patrimonial advantage.

The preemptor cannot be substituted for the donee because they cannot take over the donor's 'liberal intent'. If the preemptor were to offer a sum of money (price) for the donated asset, the act would become a sale, completely distorting the donor's initial intention to gratify a specific person.

The right of preemption is a sanction against the freedom to choose the buyer. In the case of donation, the freedom to choose the beneficiary is protected by law.

The donor's interest in gratifying a specific person (son, nephew, foundation, etc.) is a subjective, but legal, motive that cannot be annulled by the right of preemption of a third party. This subjectivity will place the donation outside the scope of preemption.

Similar to other exceptions, even if the donation is legally excluded from preemption, it can be sanctioned if it is used as a simple instrument of fraud against the law – the disguised donation. Fraud exists when the parties apparently conclude a donation contract (with gratuitous title), but in reality conceal a sale (with onerous title), the price being paid under the guise of a "charge" or through a secret act. In this case, there is a public, apparent act, a donation contract (authentic, in solemn form, according to Art. 1011 Civil Code), concluded between the donor (owner) and the donee (the third-party buyer), which does not mention any price. This act is the one that deceives third parties, including the preemptor. Also, there is a secret, real act, another contract or a secret understanding between the parties, by which it is established that the transfer of ownership is, in fact, made in exchange for a sum of money (price), paid to the donor by the donee.

In this situation, the secret contract reveals that the real will of the parties is to carry out a sale purchase, and the donation is merely a mask used to create the appearance

of a gratuitous transfer and, implicitly, to remove the operation from the incidence of preemption.

The burden of proving fraud against the law belongs to the preemptor (the injured third party). Because the real act (the sale) is secret, the preemptor cannot use written evidence against the public contract. The court will allow the preemptor to prove the disguise by any means of evidence, including presumptions (for example, the existence of a small-time difference between the date of the donation and the moment a large sum of money was wired by the donee to the donor), witnesses, or persons who are aware of the secret agreement regarding the payment of the price.

The key element is the demonstration of the simulation and its fraudulent purpose: the circumvention of the preemptor's mandatory right.

If the fraud against the law is proven, the sanction applied is the relative unenforceability of the donation contract towards the preemptor. The contract remains valid between the signing parties (donor and donee). However, towards the preemptor, it is considered a sale contract. Once the disguise is proven, the preemptor can exercise their right of preemption at the real price (established in the secret act) or at the price set by the court, thus substituting the donee (the real buyer).

A clear distinction must be made between the fraudulent disguised donation and a donation subject to charges (*donatio sub modo*). The donation with charges is valid, and the right of preemption does not apply, except in the situation where the charge is so large that it transforms the donation into a disproportionate onerous act (thus qualifying as a disguised onerous act).

In the absence of proof of fraud, the donation remains a valid legal exception to the applicability of the right of preemption.

3.2. Payment in Kind (*Datio in Solutum*)

Payment in Kind (*Datio in solutum*) is regulated as a direct method of extinguishing obligations, encountered especially in the case of mortgage loans or loans guaranteed by a mortgage. Essentially, the debtor transfers the mortgaged real estate to the creditor, and the debt is considered extinguished. Payment in kind is understood as that legal operation whereby the debtor performs a performance other than the one that formed the object of the obligation to their creditor; for example, instead of a sum of money, an object of equivalent value is handed over. Payment in kind can only be made with the consent of the creditor, as they cannot be forced to receive a

performance other than the one that forms the object of the obligation. The countervalue of the transfer is represented by the extinguishment of the pre-existing debt, not by a price in money established *pro causa*. The preemptor cannot be substituted for the creditor to extinguish the debtor's obligation because the debt is personal. They cannot offer the equivalent performance – the extinguishment of the debt – but only a sum of money.

In a specific decision (HCCJ, Civil Section I, Decision No. 780/2024), where the promising buyer in a promise of sale requested the declaration of absolute nullity of a payment in kind contract concluded with a third party within a forced execution procedure, the High Court of Cassation and Justice stated that Art. 16 para. (1) of Law no. 17/2014 does not sanction with absolute nullity every civil act, but only those acts through which alienation is carried out by the sale of agricultural land located outside the city limits. The act of payment in kind, concluded for the extinguishment of a debt within the forced execution procedure, does not operate such an alienation by sale based on contractual freedom between sellers and buyers, but a forced sale:

Payment in Kind (*datio in solutum*) (Art. 1492 Civil Code) is, by its legal nature (a way of extinguishing an obligation, not a sale), a legal exception. However, when this contract is used to mask a real sale, it becomes a form of fraud against the law intended to circumvent the right of preemption. Payment in kind becomes fraudulent when it is used to create an appearance of debt extinguishment, while the real intention of the parties is to realise a sale and conceal it from the preemptor's eyes.

Fraud against the law presupposes the existence of a simulation through disguise, for example, the creation of a fictitious debt. The parties can simulate the existence of a large debt (through a simulated loan contract) between the owner of the asset (debtor) and the third-party buyer (creditor). Through the public act, the parties conclude a payment in kind contract, by which the debtor transfers the asset subject to preemption to the creditor, as payment for the fictitious debt. The reality is that the transfer of the asset was made in exchange for a sum of money offered by the 'creditor' (the real buyer) to the "debtor" (the real seller), and the sole purpose of the operation was to avoid the preemptor being able to pay the price.

The injured preemptor must prove to the court that the payment in kind conceals a sale and that its purpose was the circumvention of their mandatory rights. Proof can be made by any legal means (witnesses, presumptions) indicating the absence or artificial nature of the debt extinguished, the major disproportion between the value

of the debt and the real value of the asset transferred, or the secret understanding regarding the payment of a price in money.

If it is proven that the payment in kind was a disguised act intended to defraud the right of preemption, the court will apply the sanction of relative unenforceability of the contract towards the preemptor. The payment in kind contract remains valid between the parties, but towards the preemptor, it is considered a sale. The preemptor can exercise their right at the real price (the sum of money paid under the pretext of extinguishing the debt), thus substituting the party who acquired the asset.

In conclusion, although payment in kind is an exception to preemption, its abusive use as a tool of disguise transforms it into fraud against the law, restoring the preemptor's rights.

4. *Lege Ferenda* Proposals for Limiting the Fraudulent Circumvention of the Right of Preemption

The right of preemption is a vital legal institution for protecting legitimate interests (agricultural, cultural, co-ownership), but its exclusive application to the sale contract (Art. 1730 Civil Code) makes it vulnerable to circumvention through the fraudulent use of other mechanisms of patrimonial transfer (donation, payment in kind, exchange, etc.). To consolidate the effectiveness of this right, legislative interventions (*lege ferenda*) are necessary to discourage fraud against the law.

4.1. Extending the Scope to Equivalent Onerous Acts

The greatest vulnerability stems from limiting preemption to the sale contract. A solution would be to extend applicability to all onerous acts transferring ownership where a monetary equivalent of counter-performance can be determined. The right of preemption should apply expressly also to payment in kind and exchange, with a special condition regarding the manner of exercise: in the case of exchange, the preemptor could choose to take over the asset by offering a sum of money equal to the market value of the asset given in exchange (established through a mandatory appraisal), thus replacing the counter-performance in kind with one in money; and in the case of payment in kind, the preemptor could pay the value of the debt extinguished, substituting the buyer/creditor.

To avoid difficulties in determining the price in non-sale acts, a norm should be introduced, obliging the parties to declare the estimated market value of the asset in question, a value which would constitute the reference basis for the exercise of preemption.

4.2. Procedural Measures to Discourage Contractual Disguise

Fraud against the law through disguised donation or payment in kind is difficult for the preemptor to prove, as the proof of the secret act is difficult, which is why the reversal of the burden of proof in case of suspicious disguise would be necessary. Currently, the preemptor must prove the fraud. It is proposed that, if the transfer of ownership is made through a gratuitous act (donation) or an act extinguishing obligations (payment in kind) between parties without close family ties or without a solid economic justification (in the case of payment in kind), the burden of proof should be reversed. The contracting parties (donor/debtor and donee/creditor) should be obliged to justify the soundness and non-fraudulent purpose of the operation, proving *animus donandi* or, respectively, the existence and liquidity of the debt extinguished.

Another procedural measure to combat fraud through donation/contribution followed by the sale of shares/social parts could consider that the subsequent alienation of the shares or social parts acquired through an in-kind contribution, or of the donated asset, within a short period (e.g. one year from the initial transfer), should trigger a relative presumption of fraud against the law, obliging the parties to justify the purpose of the transaction.

4.3. Consolidation of Sanctions and the Right of Action

Although jurisprudence applies to the sanction of relative unenforceability in case of fraud, the Civil Code should expressly regulate that the act proven to be fraudulent is unenforceable against the holder of the right of preemption.

Also, to protect the preemptor, a special, but sufficiently long, forfeiture period (e.g. 3–6 months from the date the preemptor learned or should have learned about the fraudulent transfer) should be established, even if the transfer was disguised.

Through these *lege ferenda* proposals, the aim is not to annul the legal exceptions (donation, payment in kind), but to ensure that they do not become a simple means

of circumventing a mandatory right, thus consolidating the force and protective purpose of the right of preemption (Ionaş & Salcă Rotaru, 2025, pp. 30–31).

5. Conclusions: Consolidating the Right of Preemption in the Face of Circumvention

The article analysed the limits of applying the right of preemption, highlighting the crucial distinction between the legal use of alternative acts of patrimonial transfer and fraud against the law through contractual disguise (Peráček & Kaššaj, 2025).

We established that the right of preemption is, according to Art. 1730 Civil Code, attached exclusively to the sale contract. This limitation creates two categories of transfers that require a nuanced analysis:

- a) Legal Exceptions: Acts that, by their nature, are not sales, such as payment in kind (*datio in solutum*), donation, in-kind contribution to the share capital, or transfer through succession. In these cases, the right of preemption does not apply because the specific cause of the sale (the price) is missing, and the structure of the operation (e.g. debt extinguishment) is incompatible with the preemptor's substitution.
- b) Fraud Against the Law: The situation where a legal act (such as payment in kind or donation) is used as a disguised act to conceal a real sale, having as its sole purpose the circumvention of the preemptor's mandatory right (Art. 15 Civil Code).

The key element in resolving the conflict is the real will of the parties. If the will is to extinguish an obligation or to gratify (specific cause), the act is valid, and preemption is excluded. If the will is to sell (exchange of asset for price), and the act is disguised, the sanction of relative unenforceability of the fraudulent act against the preemptor applies. This sanction allows the preemptor to substitute the real buyer, at the price established (or disguised).

To diminish the vulnerability of the right of preemption, legislative interventions are necessary, such as extending the applicability of preemption to certain onerous acts equivalent to selling (e.g. exchange, payment in kind), with clear mechanisms for determining the monetary countervalue, to allow the exercise of the right, as well as facilitating the proof of fraud through the introduction of procedural norms that reverse the burden of proof or create relative presumptions of fraud in cases of suspicious transfers (e.g. donations or payments in kind between unrelated persons).

The consolidation of the right of preemption essentially depends on the legal system's capacity to discern and sanction fraudulent intent, ensuring that the provisions of the Civil Code do not become mere tools for circumventing the law, but functional mechanisms for protecting public and private interests.

Bibliography

- Adam, I. (1996). *Regimul juridic al dobândirii și înstrăinării imobilelor* [The legal regime of acquiring and alienating real estate]. Europa Nova.
- Barnes, V., Chay, D., Dickinson, M., Mordi, T., & Wheeler, S. (2025). Contextualising the teaching of English contract law. *The Law Teacher*, 59(4), 755–768. <https://doi.org/10.1080/03069400.2025.2511382>
- Chelaru, E. (1993). *Circulația juridică a terenurilor* [The legal circulation of land]. All Beck.
- Chelaru, E. (2009). *Drept civil. Drepturile reale principale* [Civil law. Principal real rights] (3rd ed.). C. H. Beck.
- Deak, F., Lucian, M., & Popescu, R. (2021). *Tratat de drept civil. Contracte speciale* (Vol. 1, 5th ed.) [Treatise on civil law. Special contracts]. Universul Juridic.
- Foltiș, A. (2011). *Dreptul de preempțiune* [The right of preemption]. Hamangiu.
- Gheorghincă, A.-M. (2019). Eterna strălucire a dreptului de preempțiune: Scurte considerații privind dreptul de preempțiune. *Revista Themis*, (1).
- High Court of Cassation and Justice – Civil Section I. (2014). *Decision no. 1386/2014* (April 4, 2014). <https://www.scj.ro>
- High Court of Cassation and Justice – Civil Section I. (2022). *Decision no. 58/2022* (October 3, 2022). <https://www.scj.ro>
- High Court of Cassation and Justice – Civil Section I. (2024). *Decision no. 780/2024* (March 20, 2024). <https://www.scj.ro>
- Ionaș, D. G., & Salcă Rotaru, C. (2025). The pact of preference – A comparative analysis. *Juridical Tribune – Review of Comparative and International Law*, 15(1), 24–43. <https://doi.org/10.62768/TBJ/2025/15/1/02>
- Ionescu-Lupeanu, M.-B. (2025). *Considerații cu privire la reflectarea dreptului de preempțiune în literatura de specialitate. Aspecte ale dreptului de preempțiune*. Universul Juridic Premium. <https://lege5.ro/App/Document/ge3domrtgi3tg/>
- Micheler, E. (2024). Separate legal personality – An explanation and a defence. *Journal of Corporate Law Studies*, 24(1), 301–329. <https://doi.org/10.1080/14735970.2024.2365170>
- Militaru, I. (2013). *Vânzarea la licitație publică. Studiu comparativ de doctrină și jurisprudență* [Sale by public auction: Comparative study of doctrine and jurisprudence] (Doctoral thesis). București. https://www.univnt.ro/wp-content/uploads/doctorat/rezumat_doctorat/Militaru_Ionut.pdf

Negru, I. (2010). *Teoria generală a dreptului de preempțiune* [The general theory of the right of preemption]. Universul Juridic.

Peráček, T., & Kaššaj, M. (2025). The impact on investors of legislative restrictions on the activities of securities traders: The case of the Slovak Republic. *International Investment Law Journal*, 5(2), 185–205. <https://doi.org/10.62768/IILJ/2025/5/2/05>

Sage, N. (2019). Contractual liability and the theory of contract law. *King's Law Journal*, 30(3), 459–488. <https://doi.org/10.1080/09615768.2019.1686224>

Weinstein, S. (2025). Preventive legal technology for micro-entities: Improving access to justice in commercial contract analysis. *International Review of Law, Computers & Technology*, 1–21. <https://doi.org/10.1080/13600869.2025.2602106>