Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 15(64) Special Issue – 2022
https://doi.org/10.31926/but.ssl.2022.15.64.3.17

THE RIGHT OF FIRST OFFER IN EUROPEAN LAW

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Abstract: *The present study aims to offer an integrated vision on the origin, legal nature and the effects which occur in the field of specific relations of civil law, from the perspective of comparative law by valorizing the specific research methods which define the institution of the right of first offer. Theoretical approaches with practical implications of continental law and Anglo-Saxon law were considered.*

Key words: *real right, right of claim, suppletive regulation, positive law*

The origin of the right of first offer in the **French system of law** must be researched in the Middle Ages, a time when the institution of „feudal withdrawal" was popular. The feudal withdrawal entails that certain mechanism by which the leader *(Seigneur Suzerain)* was able to annul the effects of a sale by acquiring property over the good, straight from the buyer, immediately after the transfer of the property right. The institution of feudal withdrawal would be applied to the extent to which the seller was the vassal and he would sell one of his own goods to a third party.

The mechanism of feudal withdrawal was abolished at the time of the Revolution (1789-1799), and until 1958 (when the political system of the fifth republic was implemented) it remained a mere right of first offer mechanism used for financial purposes. Once the regime of the fifth republic was instituted, France underwent a remarkable extension of the purposes and material as well as geographical area of the right of first offer. Even though there was no general background to regulate the right of first offer in the French system of law (as there were just practical enforcements of this right in certain areas), the authors of this state studied this institution, by defining this right as the ability of a person or a company to replace the buyer of an immovable good sold by the owner of that good.

Another phrasing states that the right of first offer is „the ability, as provided by law or any other convention, of a certain person to acquire a good with priority*" (*Capitant H., 1930, p.211) *("faculte conferee par la loi ou par la convention des parties a une personne determinee d'acquerir un bien par preference a toute autre") or as "the ability of a person or a company to replace the buyer of a good sold by the owner of that good"(* www.notaires.fr).

In the French system of law, the right of first offer can take different forms, depending on the extent of the prerogative of its holder and it follows certain

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procedures regulated by law; however, the most important classification of the right of first offer is the one which distinguishes depending on its holder.

In this context, we note that, in France, most rights of first offer are regulated in favor of public authorities to allow them to perform actions or operations of general interest. It is even stated that city planning is a privileged domain of the right of first offer (Conseil d-etat , 2008, p.5). We believe that, as opposed to the current regulation of the right of first offer in the French system of law, it has become a key instrument in all legal relations which occur in the public system (administrative-public).

The right of first offer of public authorities represents all the prerogatives of preferential acquiring stated and regulated by the City Planning Code, whether it concerns simple urban first rights for areas of delayed development or first rights for departments of sensitive protected areas, societies or companies of land works and rural communities (SAFER) in agricultural areas. An important stage in the regulation of the right of first offer in France is the passing of Law no 85-729 of July 18th, 1985. Thus, by this law, the French lawmaker strengthened the rights of first offer of public authorities and created the general background for the urban right of first offer (DPU).

In the light of this new regulation, the right of first offer of public local authorities in certain regulated areas was crystalized, a right which is seen, at this time, as a common tool used for actions of development of public communities (Conseil d-etat , 2008, p.5). In present times, in the matter of rights of first offer of public authorities, we have the urban rights of first offer (DPU), the rights of first offer in areas of postponed development (ZAD), the rights of first offer of companies tasked with land works and rural areas (SAFER) and the rights of first offer in the matter of sensitive natural areas (ENS).

We must also mention that, along with these rights of first offer regulated in favor of public authorities, the French lawmaker regulates other rights of first offer in other areas, but also in favor of public authorities (as is, for example, in case of historic monuments). Although, in French law, the right of first offer is an aspect specific to urban law, we can find regulations of rights of first offer in areas which concern private people.

Thus, we must point out that the only category of private rights of first offer regulated in the French system of law is represented by those which concern tenants in regard to the houses they occupy, thus ensuring increased protection for tenants (Foltiș A., 2011, p.52). There are four types of right of first offer regulated for tenants: in case of the first sale of the residence because of compartmentalizing a building in several apartments, in case the good is sold freely, in case the building is sold in its entirety – this applies for buildings with more than 5 housing units or in case the object of sale is more than 10 housing units (collective contracts).

On the other hand, from the perspective of the German system of law, the oldest writings referencing the right of first offer *(Das Vorkaufsrecht),* as is known today, are closely connected with the notion of collective property. Subsequently, this early form of the right of first offer was defined as *Das Näherrecht,* a term used to define the same legal operation, namely that in which if a certain good was sold by its owner and

reached the patrimony of a third party, the entitled persons (relatives, members of the collective group, villagers and so on) are granted the right to buy back the good.

Until the German Civil Code came into force, the right of first offer was regulated distinctively by several laws of certain regions. Subsequently, because of the coming into force of the Civil Code, the German lawmaker synthetized all civil regulations, including those regarding the right of first offer; therefore, presently, there is a general background which regulates this right.

As there are many rights of first offers and diverse species of this right, the attempts to define and interpret this right are numerous. A first definition provided by the specialty literature is the following: the right of first offer is the right of the entitled person to buy a good before any other person, under the conditions provided by the third-party buyer (Schuring K., 1975, p.20). The right of first offer was also defined as the right of a person to conclude a sale contract, as a buyer, by filing a unilateral declaration of intent to the seller (Kobler U., 2010, p.411). However, in the context of the numerous species of the right of first offer, German specialty literature states several theories regarding the functioning, legal nature and traits of this right.

In present times, as shown above, the general background for the right of first offer in Germany is found within the Civil Code. It regulates the right of first offer in case of debt and the real right of first offer.

In analyzing the right of first offer in case of debt, as regulated by the German lawmaker, we must start from the basic form of the right of first offer, in the view of the Civil Code. The right of first offer is regulated in article 463 and the following of the Civil Code; the German lawmaker defined the debt right of first offer as follows: *„The individual who is entitled to a right of first offer regarding a certain object can exercise this right as soon as the seller concluded a sale contract with a third party."*

The specifics of the debt right of first offer is that it generates a legal relation which creates obligations between the holder and the seller, a legal relation which is not opposable to third party buyers. From this point of view, in case the seller does not fulfill his obligations arising from this right of first offer, the holder can't make demands regarding the good; at most, he can file a claim for damages (Schuring K., 1975, p.55). The real right of first offer is regulated in the Civil Code, articles 1.094 – 1.104 titled *Vorkaufsrecht,* namely the right of first offer.

Unlike the debt right of first offer, the real right of first offer concerns immovable goods – plots of land. It is shown that such land can hold a right of first offer in favor of an individual (whether it is an individual with no connection to the land or an individual who owns a neighboring plot of land). Also, the right of first offer could be held regarding a certain part of the land if the holder of the right is one of the co-owners. The object of the real right of first offer can be extended to the accessories of the land, which is the main object of the right and which is sold at the same time. In case there is doubt regarding the accessories, the extension of the right of first offer must be expressly stated. In case of the functionalities of this right, we must show that the German lawmaker mentions the provisions which apply to the debt right of first offer by regulating the derogative situations. Unlike the debt right of first offer in which case the third-party buyer can't be held by the legal relation which arises from the exercise of the

right of first offer (the holder of the right, in case the seller fails to respect his right, is entitled to file a claim against the seller), in case of the real right of first offer, the exercise of the right influences the buyer.

Specifically, in case of the real right of first offer, to the extent to which the seller fails to respect the right of first offer, the holder of the right can follow the good, thus acquiring property from the third-party buyer.

Along with the debt right of first offer and the real right of first offer, the German lawmaker regulates, in certain laws, specific practical enforcements of this type of right (for example, the right of first offer of the tenant, also found in the German Civil Code or the special right of first offer regulated in case of the sale of a certain part of an inheritance). Much like the French system of law, German law regulates a specific right of first offer in favor of public authorities.

In the **Italian system of law,** the origin of the right of first offer must be researched in the Roman system of law; thus, we must note that *Pactum prelationis* or *jus protimiseos* was known from the oldest times and the reference to the institution of first offer (the conventional one) is widely found in the writings of classical legal advisers. In certain provinces, the rule of preferential buying would apply to co-owners of an inheritance in case the goods of the estate were sold. Subsequently, this rule of preferential buy of the heirs was transformed into a type of right of first offer at first in favor of family members and later extended to all individuals who could invoke such a right.

The institution of the right of first offer, as it was known in the Romanian classic system of law, was consolidated during the early Middle Ages and classical age. It is shown that this time was the golden age of the rights of first offer and the retraction rights (Vincentini M., 2011, p.23).

In the context of the development of other forms of the rights of first offer and by considering the real efficiency of retractions, the commerce of lands suffered from significant blockage and, in the light of this deficiency, for a considerable amount of time, the few regulated rights of first offer, were quite rarely used in practice. The 19th century brought about a historical minimum in the use of this right; subsequently, the institution of the right of first offer gained significant importance, thus it was regulated in the Italian system of law for both individuals and regarding public interest, especially in case of the transfer of immovable goods.

In the current regulation, the term of first offer can't be defined in a unified manner, as it involves the analysis of at least two distinctive meanings. A first meaning states that the concept of first offer is used in the Italian system of law to show the preferred position legally granted to a certain individual, in comparison with another subject of law. This general meaning considers the rights of first offer but also the mortgage rights or other such rights which place a subject of law on a preferential position as opposed to another subject of law. From another perspective, in a more restricted meaning, the notion of first offer states the right of a subject of law to be preferred to other individuals when acquiring a certain good, in case the owner wants to sell under the same conditions offered by the third party. In the same meaning, the right of first offer expresses the priority granted to a subject of law to acquire property over certain goods

with priority as opposed to other subject of law, but under equal conditions (Vincentini M., 2011, p.24).

In the context of the current regulation, the Italian lawmaker acknowledges two types of rights of first offer, namely a conventional one and a legal one. The institution of the conventional right of first offer, although well known, is not expressly regulated by the Italian Civil Code. This law contains a version of this right, in the matter of the management contract. Thus, article 1566 of the Italian Civil Code named „Pact of preference" states that „*The agreement by which the person entitled to management is obliged to grant preference to the manager when concluding a subsequent contract for the same object if the duration does not exceed the term of five years, is considered valid. If it is agreed upon a longer term, the term is then reduced to five years*."

Starting form this regulation and considering the principle of contractual freedom, the Italian system of law acknowledges that the first offer covenant can be inserted into a contract (thus creating an accessory binding obligation), it can be the object of an autonomous contract, or it can reside from an act with a death clause.

In all cases, the conditions for the function of this right must be stated in the content of the act which generates the covenant of first offer.

Unlike conventional rights of first offer, the rights of first offer regulated by law are accompanied by a **real** „guarantee". Thus, in case of a violation of the right of first offer, the holder of the right can **file an action of withdrawal concerning the third-party buyer** (this right can be exercised in the form of a **unilateral statement**, which is likely to *ex tunc* produce the replacement of the third party with the holder of the right). In other words, as a result of this declaration, the withdrawer assumes the place of the buyer, while the buyer is entitled to damages as a result of the loss of the good he acquired. Legal right of first offer can take one of the two forms: **inherent** – when it entails the protection of individuals and **public** – when it protects a public interest and states different conditions, generally more favorable, for the right of first offer to be exercised.

The Italian lawmaker regulates several types of legal first offer right and one of these is, by excellence, the so-called right of hereditary first offer, regulated in favor of coheirs.

Unlike all other systems of law that we have analyzed, in **Anglo-Saxon law** (common-law) the origin of the right of first offer (preemptive right) is not entirely clear. It is obvious that this circumstance is owed to the specifics of this system of law which, as it is known, is largely based on jurisprudence. However, it is shown that (Ross EM, 201, p.261) the origin of the term refusal (in the context of the *first refusal,* meaning the right of first refusal, a right which forms, as we are about to explain, along with the right of first offer, the concept of preemptive rights) must be searched in the old French and vulgar Latin. The preemptive rights developed once the condominium form of housing appeared; at the same time, doctrine began to analyze this right. It is shown that this type of housing resulted in numerous issues caused by living in a housing community and the need to maintain harmony in a multifamily housing unit led to the elaboration of several rules regarding the use of condominium housing units.

In the Anglo-Saxon system of law, we must start from the circumstance according to which the basic term of rights of first offer or, more precisely, preemptive rights,

contains two distinctive categories of rights: on the one hand, we must consider the right of first refusal (ROFR) and, on the other hand, the right of first offer (ROFO).

The right of first refusal, also known as the first right of refusal, is a contractual right which entails the possibility to conclude a transaction with an individual or a company before any other person. In case the party who holds this right refuses to enter the transaction, the seller is free to accept another offer (Walker DI., 2010, p.31). On the other hand, in case of the right of first offer (ROFO), also known as the right of first negotiation, we note that, according to specialty literature, it is defined as that specific right which allows its holder to purchase a good before the owner attempts to sell it to someone else. If the holder of the right is not interested in the good, then the seller can sell it to a third party (Anderson, S., 2022, p.20).

At first sight, ROFR and ROFO seem to be identical, but their mechanism of functioning is different. Thus, it is shown that ROFO requires that the owner of the good negotiates the sale with the holder of ROFO before offering the good for sale to a third party. Basically, ROFO offers its holder the right of „first look" in regard to acquiring the good, before its owner can negotiate with other buyers. If the parties can't reach an agreement regarding the conditions of sale (or if the ROFO holder fails to exercise ROFO in the established time) than the owner has no obligations towards the holder of ROFO and, therefore, is free to sell the good to a third party (Reby W., 2002, p.14).

In considering the practical enforcement of preemptive rights, it is shown that they represent a "fancy name" for a few contractual clauses. As a result, the enforcement and variation of this right seems to be infinite.

Although, in essence, the preemptive rights entail a contract of sale, they can be used to provide priority for a lease contract, an employment contract or other such contracts which are compatible with preemptive rights.

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