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## THE PRE-EMPTION RIGHT ON REAL ESTATE DURING PUBLIC SALES IN THE MACEDONIAN AND SERBIAN LEGAL SYSTEMS

In this paper, the authors examine the right of pre-emption established on real estate (land parcels, building units, and other types of real estate). The authors analyze both contractual and legal rights of pre-emption since they lead to different legal consequences. When analyzing the right of pre-emption, the authors focus on the exercise of these rights in enforcement proceedings, highlighting the problems that individuals face when exercising their rights during these proceedings. The given analysis of the pre-emption right in this paper is a comparative one and includes the Macedonian and Serbian legal systems. By giving a comparative analysis of the exercise of the right of pre-emption in enforcement proceedings, the authors aim to underline the problems and offer legal solutions on how such issues can be resolved in the Macedonian and Serbian legal systems. The authors call for the adoption of a more efficient and contemporary regulation on the issue from which both legal systems can benefit.

**Keywords:** *civil law, property law, pre-emption right, real estate, enforcement.*

### I. Introduction

The pre-emption right is defined as a right that entitles a person, in case of a sale of a particular thing, to receive an offer for sale by the owner before all other potential buyers. If the owner fails to comply with this duty, the person entitled to the pre-emption right has the power to demand that the sales contract concluded with the third party be dissolved and for the thing to be sold to him under the same contractual conditions. This right can be encountered in all contemporary legal systems introduced for certain legal and political reasons<sup>1</sup>.

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<sup>1</sup> About the definition of the pre-emption right, see: R. Zhivkovska, *Predkupna pravica v R. Makedoniji*, doktorska dizertacija, Univerza v Ljubljani, Pravna fakulteta v Ljubljani, 1996, 21. A similar definition of the pre-emption right can be found in: O. Stankovic, M. Orlic, *Stvarno pravo*, Naučna knjiga Beograd, 1993, 292. Also see: Г. Станковић, „Право прече куповине у поступку извршења“, “Правно - информациона систем Републике Србије, Литература, <https://www.slglasnik.com>, p. 1.

The legal basis for the establishment of the right that grants power to one person and imposes an obligation to another person, known as the pre-emption right<sup>2</sup>, is usually a law statute or an agreement between two parties reached in the process of transfer of ownership<sup>3</sup>. Considering the basis for the establishment of pre-emption rights, contemporary legal systems recognize two types of this right - legal pre-emption right and contractual pre-emption right. Regardless of whether a legal or a contractual pre-emption right is established, the parties involved in the legal relationship are defined as the “*holder of the pre-emption right*,”<sup>4</sup> and the “*debtor of the pre-emption right*.” The first is entitled to demand to be offered, and the latter is obligated to make the offer.

The definition of the pre-emption right is derived from its content. The content of the pre-emption right is complex and consists of two powers of the holder of the pre-emption right, which correlate with two obligations of the debtor of the pre-emption right. The first power of the holder of the pre-emption right is the power to demand to “*be given a sale offer*” by the debtor of the pre-emption right, who is also the owner of a thing that is being sold. This power comes into play when there is an intention on the part of the owner to sell the thing he or she owns, but a sales contract has not yet been concluded. The “*power to purchase*” is the second power belonging to the holder of the pre-emption right. This power enables the holder of the pre-emption right to get a first chance at acquiring ownership of the thing being sold. Correlated to the first power of the holder of the pre-emption right (to be offered<sup>5</sup>) is the obligation of the debtor of the pre-emption right to make a sale offer to the holder of the pre-emption right<sup>6</sup>. The second power of the holder of the pre-emption right (to purchase the sold thing) is correlative to the obligation of the debtor of the pre-emption right, as well as the buyer, to transfer the sold thing to him, under the same price and conditions<sup>7</sup> as those of the concluded contract<sup>8</sup>.

The existence of correlative rights and duties between the holder of the pre-emption right and the debtor of the pre-emption right makes it evident that this civil

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<sup>2</sup> About the types of pre-emption right, see: P. Цветић, *Право прече куповине*, докторска дисертација, Правни факултет, Универзитета у Нишу, 1998.

<sup>3</sup> See: Л. Марковић, *Облигационо право*, едиција Класици југословенског права, НИУ Службени лист СРЈ, Београд, 1997, 490. Also see: С. Перовић, *Коментар Закона о облигационим односима*, ред. С. Перовић, Д. Стојановић, друга књига, Културни центар – Г. Милановац, Правни факултет- Крагујевац, 1978, 169.

<sup>4</sup> Some legal scholars use “preemtor” as a concept that refers to the holder of a pre-emption right. See: O. Stankovic, M. Orlic, *op. cit.*, 292; Л. Марковић, *op. cit.*, 493.

<sup>5</sup> See: С. Перовић, *op. cit.*, 169.

<sup>6</sup> See: A. Finzhgar *Predkupna pravica*, Zbornik znanstvenih razprav, Univerza Edvarda Kardelja v Ljubljani, Pravna fakulteta, CLII, letnik, 13.

<sup>7</sup> More about this, see: Л. Марковић, *op. cit.*, 493.

<sup>8</sup> A. Finzhgar, *op. cit.*, 13.

law right<sup>9</sup> is, by nature, an obligation<sup>10</sup>. Concerning the legal nature of the pre-emption right, it is important to point out that many legal scholars do not consider the pre-emption right to be an obligation. They believe that the legal pre-emption right is a right *in rem*,<sup>11</sup> and the contractual pre-emption right is an obligation<sup>12</sup>. Among scholars, there are also those who believe that the pre-emption right is not an actual right but a possibility or a right in progress or a legal instrument<sup>13</sup>.

Even though scholars predominantly treat the pre-emption right as an obligation, it should be noted that from the standpoint of its legal nature, i.e., the content of this right, indicates that there are differences between this right and other obligations. Obligations have an inter partes effect, while the pre-emption right has an *erga omnes* effect. Unlike other obligations, the pre-emption right has an *erga omnes* effect, which is not characteristic of other obligations. The absolute effect (*erga omnes* effect) of the pre-emption right derives from the priority of purchase before all third parties. The absolute effect of the pre-emption right brings it closer to property rights, which typically have absolute effects<sup>14</sup>.

As this paper demonstrates, and scholars confirm, the pre-emption right is linked to the holder<sup>15</sup>, and as such, it becomes inheritable and untransferable<sup>16</sup>.

Regarding the contractual pre-emption right, both Macedonian and Serbian laws clearly prescribe the non-transferability of the pre-emption right in relation to movable things<sup>17</sup>. However, the provisions do not address the transferability of the contractual pre-emption right for immovable things, leading to a dilemma whether

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<sup>9</sup> The following authors considered the pre-emption right an obligation: A. Finzhgar, *op. cit.*, 13; С. Перовић, *op. cit.*, 170; М. Мијачић-Цветановић, *Право прече куповине*, Гласник, АКВ, Нови Сад, no. 1/84, 11-14; В. Loza, *Da li u našem pozitivnom pravu postoji pravo preche kupovine zemljišta u korist suvlasnika?*, Godishnjak PF u Sarajevu, 1964, 82; Also see: Г. Станковић, *Право прече куповине у поступку извршења*, 1.

<sup>10</sup> In Roman law, the pre-emption right was contractual by its nature. See: Л. Марковић, *op. cit.*, 490.

<sup>11</sup> See: Л. Марковић, *op. cit.*, 491.

<sup>12</sup> According to М. Toroman, the legal pre-emption right is a right *in rem*, but the contractual pre-emption right, by its nature, is an obligation. See: М. Toroman, *Vrste i modaliteti ugovora o kupovini i prodaji*, Institut za uporedno pravo, Beograd, 1975, 24.

<sup>13</sup> S. Mišić believes that the pre-emption right is only an “instrument of legislative technique”. See: S. Mišić, *Pravo prece kupovine*, Pravni fakultet, Beograd, Zakljucna razmatranja, Maj 1965; Professor А. Групче considers the pre-emption right as “a right in progress”. See: А. Групче, *Имотно (граѓанско), Стварно право*, Култура, Скопје, 1985, 23; N. Pavkovic considers the pre-emption right as a “possibility” or “expectancy” that exists as a “permanent right”. See: N. Pavkovic, *Pravo prece kupovine u obicajnom pravu Srba i Hrvata (studija iz pravne etnologije)*, Institut za uporedno pravo, Beograd, 1972, 93.

<sup>14</sup> See: Р. Живковска, *Стварно право*, Европа 92, Скопје, 2005, 26.

<sup>15</sup> This theoretical opinion is dominant in several contemporary legal systems, including those of Macedonia, Serbia, Austria, Poland, and Hungary.

<sup>16</sup> More about this, see: Ch. Cardahi, *La vente en droit compare occidental et oriental*, Paris, 1966, 391. Also: А. Collin, H. Capitant, *op. cit.*, 314-315.

<sup>17</sup> In the Republic of Serbia, during the unsuccessful attempt to adopt the Civil Code in 2015, the Commission for the Civil Law Codification explicitly stated in the draft version of the text that the contractual pre-emption right can be passed on to heirs and also transferred.

the legislator intends to leave open the possibility for a different solution to be prescribed by another law<sup>18</sup> or he intended for a conclusion to be reached throughout interpretation.

We also note that there is no provision regarding the transferability and inheritability of the legal pre-emption right on real estate. If the principle of analogy were to be applied, it would be concluded that what applies to movable things also applies to real estate unless otherwise prescribed by law. Thus, the rules relating to the contractual pre-emption right apply *mutatis mutandis* to the legal pre-emption right. However, according to the *argumentum a contrario* principle, it could be concluded that this rule on the non-transferability and non-heritability of the pre-emption right does not apply to the legal pre-emption right.

In this regard, Professor Mihajlo Konstatinović considered that the legal pre-emption right can be transferred to other persons and can be inherited as well<sup>19</sup>.

Concerning the contractual pre-emption right, the authors of this paper believe that the intention of the contracting parties should be respected, but not to the detriment of the legal certainty of the legal transaction. Regarding this point, German law is quite interesting because it connects transferability to the contractual deadline of the contractual pre-emption right<sup>20</sup>. On the other hand, the legal pre-emption right is also linked to the person. A new person becomes the holder of the pre-emption right by acquiring it, neither by transfer nor by inheritance; it is acquired by law when the legal conditions are met.

The obligation emerging from the pre-emption right consists of two acts (*facere*): 1. making an offer for sale to the holder of the pre-emption right and 2. the acceptance of to offer, i.e., the purchase by the holder of the pre-emption right. Both acts are causally linked due to their different temporal occurrence. The first one occurs when there is no contract between the debtor of the pre-emption right and a third party (new buyer). The right of purchase occurs later, if the pre-emption right is violated, and a contract is concluded between the debtor of the pre-emption right and a third party<sup>21</sup>. Thus, if the pre-emption right is exercised because the offer was made only to the debtor of this right, the right of purchase is lost. The violation of the pre-emption right leads to exercising the right of purchase, which is directed at the new buyer who possesses the thing. Therefore, legal scholars have maintained, since ancient times, that “the right of purchase is a sanction of the debtor of the pre-emption right for violating the pre-emption right of the holder.”<sup>22</sup>

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<sup>18</sup> See: С. Перовић, *op. cit.*, 172.

<sup>19</sup> See: М. Konstantinovic, *Obligacije i ugovori*, Skica za zakonik o obligacijama i ugovorima, Beograd, 141.

<sup>20</sup> §1094, German Civil Code (BGB).

<sup>21</sup> When the pre-emption right is violated, the holder of the legal pre-emption right can oppose the buyer as a third party, regardless of the buyer’s good faith, since this right is established by law and must be considered by everyone.

<sup>22</sup> F. J. Spevec, *Pravo blizhe rodbine glede odsvoja nekretnine po staro- germanskom i po staro-slovenskom pravu*, Tiskom dionicčarske tiskare, Zagreb, 1983, 52; See: O. Stankovic, M. Orlic, *op. cit.*, 287. Also see: М. Мијачић - Цветановић, *op. cit.*, 3.

Both acts can relate to movable<sup>23</sup> or immovable things<sup>24</sup>. Contemporary legal solutions<sup>25</sup> demonstrate that the pre-emption right is established primarily for immovable things<sup>26</sup>, as well as for movable things with cultural and historical significance, such as archival materials or library materials.

As the paper will demonstrate, the aim of the pre-emption right is not to purchase the thing but to exercise the pre-emption right prescribed by the law or contract.

Out of many different legal and political reasons, the legislator has been motivated to regulate pre-emption rights in the contemporary legal systems<sup>27</sup>. The analyzed provisions regarding the pre-emption right in contemporary law show that nearly all legal systems strive to protect private ownership. As a result, they established the pre-emption right in co-ownership (for both movable and immovable things) to consolidate co-owned shares<sup>28</sup>, as well as in land ownership, to consolidate existing neighboring land parcels<sup>29</sup>. In certain legal systems where tradition is “deeply rooted” in society, the co-heir’s pre-emption right is also established to preserve that tradition<sup>30</sup>.

The regulation of the pre-emption right in contemporary legal systems reaffirms the conclusion that this right does not limit private ownership; rather, it limits the autonomy of the contracting parties’ will regarding the choice of contracting parties<sup>31</sup>. This means that if the holder of the pre-emption right rejects the offer, the seller is free to choose any buyer he prefers, as long as the conditions and price remain the same as those offered to the holder of the pre-emption right.

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<sup>23</sup> About the concept of movable things in Macedonian property law, see: Art. 13, (2), Ownership and Other Real Rights Act, *Official Gazette of the Republic of Macedonia*, number. 18/01. About the concept in Serbian law, see: Art. 1, Ownership and Real Property Relations Act, *Official Gazette of SFRJ*, number. 6/80. Also: Art. 2, (4), Ownership and Other Real Rights Act, *Official Gazette of the Republic of Croatia*, number. 91/96; Also: Art. 812, Italian Civil Code (*Codice Civile Italiano*); Art. 528, French Civil Code (*Code Civile*).

<sup>24</sup> С. Перовић, *op. cit.*, 169.

<sup>25</sup> Д. Стојановић, Д. Поп Георгијев, *Коментар Закона о основним својинско-правним односима*, Службени лист, Београд, 1980, 56.

<sup>26</sup> More about this, see: О. Станковић, М. Орлић, *Стварно право, десето издање*, Номос, Београд, 1999, 146. See: А. Гамс, *Основни стварног права*, Београд, 1968, 88; В. Спаић, *Грађанско право*, Сарајево, 1967, 386; Б. Лоза, *Облигационо право, Посебни део*, Сарајево, 1974, 46. Also, see in the paper: Р. Ђуровић, *Pravo преће куповине сувласника некретнина*, *Jugoslovenska advokatura*, br. 6, 16.

<sup>27</sup> More about this, see: Р. Живковска, *Право на првенствена купувачка во Македонија меѓу обичајното и државното право*, Прилози за обичајно право, Здружение на правниците, Правник, Том 1, 397-413.

<sup>28</sup> Art. 34-35, Ownership and Other Real Rights Act; Art. 1 (2), and Art. 5, Real Estate Trade Act, *Official Gazette of the Republic of Serbia*, number. 93/14; § 682, Swiss Civil Code; Art. 250, Civil Code of the Russian Federation; Art. 815, French Civil Code.

<sup>29</sup> Art. 15, Agricultural Land Act, *Official Gazette, the Republic of Macedonia*, number. 135/07.

<sup>30</sup> Art. 732, Italian Civil Code.

<sup>31</sup> See: D. Stojanović, *Stvarno право, sedmo izmenjeno i dopunjeno izdanje*, NIU Sl. List SFRJ, Београд, 1987, 12.

This paper aims to demonstrate the exercise of the pre-emption right on real estate during a forced public sale due to the settlement of a creditor's claim, as per Macedonian and Serbian laws. By demonstrating the exercise of this right, the authors highlight the shortcomings in the laws regarding enforcement proceedings and the issues individuals face in practice. Additionally, the authors aim to propose new legal solutions that facilitate a more efficient implementation of public sales.

## II. Exercising the pre-emption right on real estate in the forced public sale in Macedonian law

Macedonian law recognizes both the legal pre-emption right and the contractual pre-emption right. Regarding the legal pre-emption rights, we noted that special laws regulate various types of legal pre-emption rights. The Macedonian Obligations Act<sup>32</sup> regulates the contractual pre-emption right as a type of pre-emption right.

The Ownership and Other Real Rights Act regulates the pre-emption right of a co-owned share in favor of the other co-owners. This is applicable to both movable and immovable things<sup>33</sup>. If a subject-specific law contains provisions regulating the pre-emption right of a co-owned share of a thing, then, according to the principle of *lex specialis derogat legi generali*, those special provisions shall apply. The Ownership and Other Real Rights Act also recognizes the following three types of legal pre-emption rights: the pre-emption right of a co-owned building unit in favor of the co-owners<sup>34</sup>, the pre-emption right of a co-heir to the co-heir's share while the community of heirs lasts<sup>35</sup>, and the pre-emption right of a garage as an integral part of a building or as an integral part of construction land serving that building<sup>36</sup>.

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<sup>32</sup>Art. 516-521, Obligations Act. More about the contractual pre-emption right, see: P. Живковска, *Договоротното право на првенствено купување во правниот систем на РМ*, Здружение на правниците, Правник, бр. 60, Скопје, 1997, 2-4; About the contractual pre-emption right in the enforcement proceedings, see: P. Живковска, *Договоротното право на првенствено купување во случај на принудна јавна продажба*, Здружение на правниците, Правник, бр. 66, Скопје, 1997, 5-6. Also see: P. Живковска, *Траење на договорното право на првенствено купување и можност за негово наследување (пренесување) и отуѓување*, Здружение на правниците, Правник, Здружение, бр. 62, Скопје, 1997, 9-11; P. Живковска, *Рокови за вршење на договорно право на првенствено купување и за исплата на цената*, Здружение на правниците, Правник, бр. 61, Скопје, 1997, 2-6.

<sup>33</sup> See: Art. 33-34, Ownership and Other Real Rights Act. About the pre-emption right on a co-owned share, see: P. Живковска, *Право на првенствено купување на сопственички дел*, Здружение на правниците, Правник, бр. 70, Скопје, 1998, 9-11.

<sup>34</sup> See: Art. 97, Ownership and Other Real Rights Act.

<sup>35</sup> Art. 86, Ownership and Other Real Rights Act. About the pre-emption right on a co-heir's share, see: P. Живковска, *Право на првенствено купување на сонаследнички дел*, Здружение на правниците, Правник, бр. 71, Скопје, 1998, 9-11.

<sup>36</sup> Art. 100, Ownership and Other Real Rights Act.

It is important to note that the Real Estate Cadastre Act requires the registration of the contractual pre-emption right on real estate in the cadastre to inform third parties of the existence of the holder of the contractual pre-emption right<sup>37</sup>.

Macedonian law regulates the pre-emption right on immovable things, such as privately owned agricultural land<sup>38</sup>, state-owned construction land<sup>39</sup>, garages<sup>40</sup>, co-owned building units<sup>41</sup>, and things with cultural and historical significance<sup>42</sup>.

In the Macedonian legal system, the legal pre-emption right and contractual pre-emption right are defined as one institute. This conclusion is derived from paragraph 4 of Article 521 of the Obligations Act, which prescribes that the rules on sale with the pre-emption right shall apply accordingly to the legal pre-emption right.

Provisions that regulate pre-emption right also refer to the right of priority and the right of first purchase, which, as we indicated in the introduction, are the content of the pre-emption right. However, the connection between these two powers is often interrupted. Thus, the right of priority is not exercised through an offer by the debtor of the pre-emption right. Instead, the exercise of the right occurs under special conditions, i.e., through a forced public sale. In both the Macedonian and Serbian legal systems, this forced public sale is carried out by enforcement agents, i.e., public enforcement agents<sup>43</sup> authorized to act in the enforcement proceedings.

The Macedonian Enforcement Act recognizes two types of forced sale of real estate: 1. “a public auction” and 2. sale with a direct agreement. It is indisputable that in sales based on the autonomy of the seller’s will, as the debtor of the pre-emption right (voluntary sale), the seller dictates the price and the conditions under which the sale should occur. However, in the circumstances of enforcement through the sale of real estate by public auction<sup>44</sup>, the price and conditions of sale are dictated by the enforcement agent, who has the authority to undertake actions in the enforcement proceedings, as established by law<sup>45</sup>. An

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<sup>37</sup> See: Art 137, (1), Real Estate Cadastre Act, *Official Gazette of the Republic of Macedonia*, number: 55/13.

<sup>38</sup> See: Art. 15, Agricultural Land Act. For more information on the pre-emption right for agricultural land, see: Р. Живковска, *Зошто во Република Македонија не се применува законско право на првенствено купување на земјоделско земјиште?*, Здружение на правниците, Правник, 1993, 14-15. Unfortunately, in the Macedonian legal system, the pre-emption right is not regulated for forest and forest land, despite being prescribed as things of public interest. See: Р. Живковска, *Правниот режим на шумите и шумско земјиште*, Здружение на правниците, Правник, Година прва, бр. 12, 1993, 2.

<sup>39</sup> Art. 48, Construction Land Act, *Official Gazette of the Republic of Macedonia*, number: 15/15.

<sup>40</sup> Art. 100, Ownership and Other Real Rights Act.

<sup>41</sup> Art. 97, Ownership and Other Real Rights Act.

<sup>42</sup> Art. 140-141, Protection of Cultural Heritage Act, *Official Gazette of the Republic of Macedonia*, number: 20/04.

<sup>43</sup> See: Г. Станковиќ, *„Приватизација судске функције у домену извршења“*, “Правна ријеч“, Бања Лука, 2012.

<sup>44</sup> Art: 181, (1), Enforcement Act, *Official Gazette of the Republic of Macedonia*, number: 72/16.

<sup>45</sup> Art. 40, Enforcement Act.

enforcement agent is not a party to the proceedings but a non-state authority that performs the enforcement by selling the real estate and converting it into money, with the aim of settling the creditor's claim established in court proceedings<sup>46</sup>.

By analyzing the Macedonian Enforcement Act, we noted that it contains two provisions - Article 179 and Article 180, which regulate the actions that an enforcement agent has to take in the case of the sale of real estate on which a pre-emption right is established. In addition to these two articles, the Law also contains Article 164, which regulates the exercise of the pre-emption right over the seized shares of the company's shareholders. Enforcement can be exercised through a "public auction" or a "direct agreement," and the enforcement agent concludes the sale contract in the name of the debtor.

Article 179 of the Macedonian Enforcement Act requires the enforcement agent to deliver a Conclusion, which determines the conditions, time, and place of the sale by "public auction", to the holders of the legal pre-emption right and to the holder of the registered contractual pre-emption rights. Delivery is considered done by an enforcement agent with a one-time announcement in the daily newspaper. However, this one-time announcement in the daily newspaper is not taken into account in a case where the State is a holder of the pre-emption right<sup>47</sup>.

Although Article 179 of the Law refers to notification of the holders of the legal pre-emption right and also to the holders of the registered contractual pre-emption right, it is evident that paragraph 1 of this Article states that only holders of the legal pre-emption right on real estate that is subject to sale, have priority over the most favorable buyer, but only if they make a statement immediately after the end of the auction that they are buying the real estate under the same conditions. The deficiency of the Law is that it does not implicitly include **the holders of the contractual pre-emption right**, which has been registered in the real estate cadastre, as required by paragraph 1 of Article 173 of the Real Estate Cadastre Act<sup>48</sup>.

In the Republic of North Macedonia, the proceedings of the "public auction" on real estate to settle the monetary claim typically occur when enforcement concerns agricultural land, a building unit, or a family residential building, or, in some cases, it can be a garage, but that is very rare. In all these cases, there are no issues in enforcement proceedings if the real estate has just one holder of the pre-emption right. Since Article 33 of the Ownership and Other Real Rights Act, following the example of contemporary European legal systems, prescribes such a right for all co-owners, this right in favor of co-owners is also respected in public sales. If a special law that regulates the legal regime of that real estate prescribes another person (before the co-owner) to be a holder of the first row of priority, then that person will be offered first, and after that, the co-owner. This is the case with agricultural land, where, according to the provisions of the Agricultural Land Act, the joint owner is declared to be the holder of the first row of priority before the co-owner, who is in the second row of priority. In practice, there are no issues when there is only one co-owner, the holder of the pre-emption

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<sup>46</sup> Г. Станковић, *op. cit.*, 3.

<sup>47</sup> *Ibid.*

<sup>48</sup> Art. 180, (2), Enforcement Act.

right from the same row of priority. However, if there are more, then evident problems arise in the “public auction” proceedings.

If the agricultural land is enforced, the enforcement agent, according to paragraph 1 of Article 180 of the Macedonian Enforcement Act and Article 15 of the Agricultural Land Act, requires all holders of the pre-emption right to be notified about the public sale of land. The law prescribed three legal rows of priority: 1. joint owner, 2. co-owner, and 3. neighbors whose land borders the land being sold (enforcement creditors). All holders of any rows can participate in the public auction. So, if two persons from different row of priority, for example, there is no joint owner among them, and the co-owner and the neighbor accept the highest offered price in auction, then the enforcement agent should choose the co-owner as buyer because he is in the second row of priority and the neighbor is in the third row of priority. However, the problem arises when more co-owners or neighbors from the same row of priority accept the highest offered price in the auction. The Macedonian Enforcement Act (unlike Serbian law) does not contain precise provisions that prescribe the standards which an enforcement agent should follow in determining the buyer (the holder of the pre-emption right) of the share in the agricultural land being sold.

We believe that regarding the method of selecting the most favorable buyer (the most favorable holder of the pre-emption right), the legislator should introduce precise provisions to fulfill the existing legal gaps that causes delays in enforcement proceedings. According to one opinion, a lawsuit should be filed to resolve this issue, as the enforcement agent lacks the power to choose between two buyers. According to the second opinion, the enforcement debtor should choose which of the holders of the pre-emption right will buy the share in agricultural land being sold at the public auction. We believe that the second option is the most suitable for this situation. This is consistent with the Ownership and Other Real Rights Act, which stipulates that, when multiple holders of the pre-emption right have accepted the offer for sale, then the seller, i.e., the debtor of the pre-emption right, has the right to choose the buyer. In the Macedonian legal system, a practice has been established among enforcement agents to fill the legal gap. According to **their practice, they demand a statement from each holder of the pre-emption right in which they will state whether they renounce their pre-emption right**<sup>49</sup>.

According to Article 48 of the Construction Land Act<sup>50</sup>, the subject to forced public sale cannot be state-owned construction land. The same applies if the State co-owns a share in a construction land of at least 70 percent. If a co-owned share is voluntarily sold, then the co-owner of the construction land is obliged to offer it to the other owners or co-owners, who are, in this case, holders of the pre-emption

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<sup>49</sup> The provision that requires the enforcement agent to notify the holder of the pre-emption right about the forced public sale does not give him the power to demand the holder of the pre-emption right to declare whether he or she is willing to exercise his or her right before the forced public sale proceeding and until the conclusion of the auction. According to the provisions, the holder of the pre-emption right must declare the intent to purchase the real estate under the same conditions and price as the most favorable offer after the public auction. The failure of the holder of the pre-emption right to declare whether he or she is willing to exercise his or her right after the auction concludes results in the termination of his right due to non-exercise.

<sup>50</sup> See: Art. 48, Construction Land Act.

right related to the land being sold. When one of the co-owners is the State, a prior approval by the Government is needed for the sale to proceed. It is also necessary that the sale price be determined by an authorized appraiser according to the established Methodology for Real Estate Valuation<sup>51</sup>. If the holders of the pre-emption right are interested in the sale, they conclude an agreement with the mayor of the municipality where that land is located<sup>52</sup>. The agreement needs a positive opinion from the State Attorney's Office.

As an exception to the previous provisions, the construction land owned by the Republic of North Macedonia can be sold through public auction. According to the provisions of the Construction Land Act, the holder's declaration of the pre-emption right is required if they decide to renounce that right<sup>53</sup>. Such a negative statement by the owners or co-owners as holders of the pre-emption right indicates that, in the Macedonian legal system, a forced public sale of construction land owned by the Republic of North Macedonia cannot be conducted in the future.

The requirement for a statement from the enforcement agents in the case of a "public auction" of agricultural land is not explicitly outlined in the Agricultural Land Act. However, we concluded that enforcement agents use the same practice on agricultural land, following the example of declarations regarding construction land owned by the State.

The requirement for a statement from the holders of the pre-emption right also applies in the case of a forced public sale of a building unit or a garage.

In the case of a voluntary sale of a building unit (such as an apartment), the Ownership and Other Real Rights Act prescribes a pre-emption right to the co-owners of the unit of the building, i.e., the apartment. In practice, when a notary public notarizes the sale contract of an apartment in a building, they often request statements from the co-owner<sup>54</sup> (the holder of a pre-emption right), in which the co-owner renounces the purchase of the share in the apartment. If several co-owners are willing to purchase the co-owned share in the apartment, then the provision in Article 33, paragraph 4, of the Ownership and Other Real Rights Act applies - meaning that the seller has the power to make the final decision, in line with the principle of autonomy of will<sup>55</sup>.

In the proceedings of a forced public sale of a building unit (the apartment), if besides the enforcement creditor, there are also holders of the pre-emption right (co-owners), practice shows that enforcement agents request statements of renouncing the right to participate in the proceedings of forced public sale, of which they are notified according to the Article 180 of the Macedonian Enforcement Act.

The holders of the pre-emption right who will not make a negative statement have the right to participate in the forced public sale ("public auction"), during which they are obliged, like other potential buyers, to provide a guarantee<sup>56</sup>. If the

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<sup>51</sup> See: Art. 48, (1), Methodology for Real Estate Valuation, *Official Gazette of the Republic of Macedonia*, number. 54/12.

<sup>52</sup> Art. 63, Construction Land Act.

<sup>53</sup> Art. 45, (4), Construction Land Act.

<sup>54</sup> Art. 33, (2), Ownership and Other Real Rights Act.

<sup>55</sup> See: P. Живковска, Т. Пржеска, *Граѓанско право, опит дел*, Европа 92, 2021, 20.

<sup>56</sup> Art. 183, (1) and (5), Enforcement Act.

holders of the pre-emption right do not participate in the forced public sale, they still have the option to declare that they will buy the real estate immediately after the conclusion of the auction, i.e., three minutes after placing the most favorable offer under the same conditions<sup>57</sup>. If the holder of the pre-emption right (the buyer) does not place the price within the deadline, the enforcement agent determines the sale as invalid<sup>58</sup> and sets a new sale. Additionally, the paid guarantee is not refunded to the holder of the pre-emption right, because the same rules for the forced public sale apply to the holder and also to all other participants<sup>59</sup>.

The legal regulation of the pre-emption right of a garage is crucial for the everyday living and functioning of citizens in the Republic of North Macedonia today, given the enormous number of vehicles and the fact that most of them are parked on public streets.

The voluntary pre-emption right of a garage is regulated in Article 100 of the Ownership and Other Real Rights Act. It applies to cases where the garage is part of a building or on construction land that serves the building, and the owner of the apartment sells the garage separately from the apartment in that building.

In the first priority row are the apartment owners, who are the holders of the pre-emption right. After them, in the second priority row, are the lease holders of those apartments in that building. It is necessary to emphasize that at the time of drafting the Ownership and Other Real Rights Act, the lease holders were given a pre-emption right “in the spirit of the resemblances of the socialist era.” This legal solution, however, does not correspond with contemporary conditions in the real estate market, where leases on real estate are short and changing rapidly. On the other hand, it is completely justifiable for co-owners of building units to have a pre-emption right not just over the co-owned share in the apartment but also to the garage, which is part of the building unit. It needs to be pointed out that the exercise of the pre-emption right of co-owners cannot be strictly done according to Article 100 of the Ownership and Other Real Rights Act, because contemporary building management is not left to house councils but to managers or a community of tenants<sup>60</sup>.

The Ownership and Other Real Rights Act obliges the seller to submit the offer through the house council, and potential buyers to personally provide the seller with a statement of acceptance of the offer. However, this provision is modulated in practice. When notarizing these contracts, notaries require a statement from the manager or the chairman of the community of tenants that no one, or someone, prefers or does not prefer to buy the garage. If multiple owners have an interest in the announcement, according to the Law, the seller has the power to choose which apartment owner to sell the garage to.

Based on discussions with enforcement agents and how the forced public sale of garages functions in practice, it is concluded that there have been no reported cases of forced public sales involving garages. This is because the primary subject to enforcement is the debtor’s apartment, which is more valuable than garages.

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<sup>57</sup> Art. 181, (1) and art. 186, (2), Enforcement Act.

<sup>58</sup> Art. 188, (2), Enforcement Act.

<sup>59</sup> Art. 188, (3), Enforcement Act.

<sup>60</sup> Art. 10, Housing Act, *Official Gazette of the Republic of Macedonia*, number. 99/09.

Regarding the cases of forced public sales of real estate, as well as the practice of enforcement over agricultural land and apartments, it is concluded that the Macedonian legislation, specifically the Enforcement Act, should prescribe additional provisions for the sale of real estate through forced public auctions. We urge that these regulations will empower enforcement agents to perform their duties in enforcement proceedings and refrain from creating their own regulations, but instead perform the actions prescribed by the Law.

### **III. Exercising the pre-emption right on real estate in the enforcement proceedings in Serbian law**

The pre-emption right in Serbian law can be either legal or contractual<sup>61</sup>, depending on its origin<sup>62</sup>. The legal pre-emption right is based on the law that defines the holders of this right and the types of things to which the pre-emption right applies<sup>63</sup>. The contractual (voluntary) pre-emption right arises from the autonomy of the will of the subjects of civil law, resulting from the consent of the contracting parties<sup>64</sup>. Unlike the legal pre-emption right, the provisions in the Obligations Act<sup>65</sup> prescribe that the contractual pre-emption right on movable things cannot be transferred or inherited<sup>66</sup>.

The legal pre-emption right is prescribed in the Obligations Act (1978) and in several other laws where this right is either mentioned<sup>67</sup> or only partially regulated<sup>68</sup>. According to the law, the rules governing the contractual pre-emption right also apply to the legal pre-emption right, unless specific provisions state otherwise.

According to the provisions in the Real Estate Trade Act (2014), the holders of the legal pre-emption right are co-owners<sup>69</sup> and neighbors of the agricultural land<sup>70</sup> that is the subject for a sale. The provisions of the Companies Act (2011) stipulate that the holders of the legal pre-emption right are the members of a limited liability company<sup>71</sup>.

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<sup>61</sup> See: Р. Цветић, *Право прече куповине*, докторска дисертација, Правни факултет Универзитета у Нишу, 1998.

<sup>62</sup> See: Obligations Act, *Official Gazette of the SFRJ*, number. 29/78.

<sup>63</sup> See: Real Estate Trade Act, *Official Gazette of the Republic of Serbia*, number. 93/14.

<sup>64</sup> There is no right of pre-emption on real estate that refers to construction land.

<sup>65</sup> In practice, the testamentary pre-emption right is less common and has the same effect as the contractual pre-emption right.

<sup>66</sup> See: С. Перовић, *op. cit.*, 172.

<sup>67</sup> Ibid.

<sup>68</sup> Art. 14, Ownership and Real Property Relations Act.

<sup>69</sup> See: Real Estate Trade Act, *Official Gazette of the Republic of Serbia*, number. 93/14; Company Act, *Official Gazette of the Republic of Serbia*, number. 36/11; Cultural Heritage Act, *Official Gazette of the Republic of Serbia*, number. 129/21; Also see: Art. 13, Housing and Building Maintenance Act, *Official Gazette of the Republic of Serbia*, number. 104/16 and 9/20.

<sup>70</sup> The co-owner has the pre-emption right on a building or an apartment.

<sup>71</sup> The agricultural land refers to land that can be used for agricultural production.

<sup>72</sup> See: И. Бабић, *Право прече куповине удела члана друштва с ограниченом одговорношћу*, *Право и привреда*, 3/20, 254.

The provisions of the Inheritance Act (1995)<sup>72</sup> state that at the time of delation, when a community of heirs occurs and lasts until the division of the property<sup>73</sup>. Before the division, the heir may transfer his or her share of the inheritance to another co-heir by a contract concluded in the form of a public deed. Through this step, the co-heirs have the pre-emption right over the share of the inheritance that is being sold as long as the community of heirs lasts<sup>74</sup>.

According to the provisions of the Housing and Building Maintenance Act (2016), the pre-emption right is prescribed in favor of the owners of building units<sup>75</sup> and on the common part of a building<sup>76</sup>.

According to the provisions of the Cultural Heritage Act (2021), the holder of the pre-emption right is the Republic of Serbia when privately owned cultural heritage is being sold. In the name of the state, the pre-emption right is exercised by an authorized public cultural protection institution, depending on the type of cultural heritage<sup>77</sup>.

The legal pre-emption right applies to real estate, as well as to a building unit, to movable things, and to a share in a company. However, the legal pre-emption right does not exist if the real estate is a construction land<sup>78</sup>.

The legal pre-emption right on real estate, including the real estate declared a cultural heritage of significance, is regulated by the provisions of the Real Estate Trade Act (2014), which prescribes the procedure for exercising this right.

The legal pre-emption right can also be established on movable things. When movable things are declared as cultural heritage of significance, they are also subject to the legal pre-emption right, which clearly indicates the transferability of this right.

The legal pre-emption right of the holder, which exists as long as the real estate it relates to exists, may cease over time, regardless of the holder's will<sup>79</sup>. First of all, as a right related to the person, it ceases in the event of the death of the holder of the pre-emption right. The pre-emption right of the owner of neighboring agricultural land registered in the real estate cadastre also ceases if, by adopting a zoning act by the municipality, the purpose of agricultural land has been changed to construction land. According to the Planning and Construction Act (2009)<sup>80</sup>, the owner of agricultural land being repurposed into construction land is no longer obliged to offer the land to the owner of the neighboring agricultural land before

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<sup>72</sup> See: Inheritance Act, *Official Gazette of the Republic of Serbia*, number: 46/95, 101/03 and 6/15.

<sup>73</sup> More about this, see: Д. Ђурђевић, *Институције наследног права*, Службени гласник, Београд, 2010, 342.

<sup>74</sup> Ibid.

<sup>75</sup> See: Р. Цветић, *Право етажних власника на заједничким деловима зграде*, Зборник радова Правног факултета у Новом Саду.

<sup>76</sup> Art. 19, Ownership and Real Property Relations Act.

<sup>77</sup> Things of cultural significance are creations of material culture, valued and determined by the law, and form an integral part of the material cultural heritage. Such things can be either immovable or movable.

<sup>78</sup> Construction land refers to land established by law or a zoning act, as well as land on which buildings have been constructed in accordance with the law.

<sup>79</sup> This occurs based on a decision by a state authority in the case of expropriation.

<sup>80</sup> See: Planning and Construction Act, *Official Gazette of the Republic of Serbia*, number: 72/09.

selling it to a third party. This is because the legal pre-emption right is considered to be terminated once the repurposing has been put into effect<sup>81</sup>.

Unlike the legal pre-emption right, the contractual pre-emption right results from the autonomy of the will of the contracting parties and does not represent a limitation of the owner's right established by law<sup>82</sup>.

In legal regulations, a sale with a pre-emption right is typically regulated as either a special type of sale or as a modality of sale<sup>83</sup>. Consent among contracting parties concerning the pre-emption right is attained in the same form as the contract is concluded. The contractual pre-emption right takes effect upon the conclusion of the contract, which moment has a constitutive effect, meaning that no further action is required for the pre-emption right to occur.

The effect of the contractual pre-emption right can be reinforced by registration in the real estate cadastre, which is a public register of rights over real estate. The registration of the pre-emption right in the real estate cadastre affords it publicity. As a result, the contractual pre-emption right gains an *erga omnes* effect. The registration of contractual pre-emption rights is declarative by nature and only serves for the purpose of publishing the existence of these rights. The fact that the contractual pre-emption right is registered in the public register provides a legal status to the holder of this right in enforcement proceedings during the forced public sale of real estate.

Depending on the base from which it originated, the pre-emption right has an effect in enforcement proceedings where enforcement is performed to settle monetary claims on real estate<sup>84</sup>. Recognizing that in the enforcement proceedings, the real estate is being sold to convert it into money to settle the claims of the enforcement creditor, the pre-emption right is actualized<sup>85</sup>. The existence of a pre-emption right on real estate subjected to enforcement proceedings gives the holders of these rights the status of a participant in the proceedings<sup>86</sup>. It also obligates the enforcement agent to undertake certain procedural actions during the enforcement proceeding in order to enable the holder of the pre-emption right to exercise his or

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<sup>81</sup> See: The sentence of the Supreme Court of the Republic of Serbia, 495/19 of March 30, 2021, and the sentence of the Supreme Court of the Republic of Serbia, 1196/22 of March 27, 2024.

<sup>82</sup> Regarding movable privately owned things that have cultural significance, the pre-emption right also applies.

<sup>83</sup> The sale with a pre-emption right is regulated by the provisions in the Obligations Act.

<sup>84</sup> Art. 170, Enforcement and Security Act, *Official Gazette of the Republic of Serbia*, number: 106/15.

<sup>85</sup> According to the Serbian Obligations Act (1978), the owner of real estate that is the subject to enforcement cannot invoke his contractual pre-emption right in the proceedings because the contract of sale is not the result of his free will. In the enforcement proceeding, the real estate is being sold according to the rules of the enforcement proceedings. In the case where the owner's pre-emption right was registered in the real estate cadastre, the question is whether he or she, whose real estate is being sold for the sake of the enforcement creditor, could exercise his or she right in the enforcement proceedings, especially because he is a party to the enforcement procedure.

<sup>86</sup> More about these, see: *Коментар Закона о вршењу и обезбеђењу*, треће издање, Службени гласник, Београд, 2022, 732; Г. Станковић, В. Боранијашевић, *Право извршења и право обезбеђења*, Косовска Митровица, 2017, 191; Г. Станковић, В. Боранијашевић, *Грађанско процесно право*, Ниш, 2020, 773.

her pre-emption right. It needs to be noted that the regulation on the enforcement proceedings concerning this right favors the holders of the legal pre-emption right and holders of the registered contractual pre-emption right due to the publicity.

The holder of the pre-emption right has the procedural status of a participant in the enforcement proceedings. Even though the holder is not a party, as a participant in the proceedings under the conditions prescribed by the laws, he exercises his pre-emption right. During the enforcement proceedings, the holder has the right to participate in the sale of real estate if he chooses to exercise the right. In that case, the holder stands on equal footing with all participants in the public sale and buyers of real estate in depositing “guarantees”<sup>87</sup>, paying the sale price, and acquiring ownership in a forced sale proceeding.

Article 170 of the Enforcement and Security Act (2015) establishes the rights of the holder of the pre-emption right in the sale of real estate at an electronic public auction or a sale through direct agreement<sup>88</sup>. To exercise their rights, the holder of the legal pre-emption right and the holder of the contractual pre-emption right must be informed about the enforcement proceedings. Consequently, the rules that regulate delivery to the enforcement debtor<sup>89</sup> also apply analogously to the delivery to holders of the pre-emption right as participants in the proceedings. Article 174, paragraph 4, clearly prescribes that the conclusion act of the public sale of the real estate should be delivered to the holder of a legal pre-emption right and the holder of a contractual pre-emption right registered in the real estate cadastre. The conclusion is also published on the e-board of the Chamber of Public Enforcement Agents, on the electronic sales portal, etc<sup>90</sup>. However, electronic advertising is not available in those rural areas of the country not covered by an electronic signal<sup>91</sup>. This is due to the fact that there is no optical network or mobile signal, which questions the principles of equality and the legal security of citizens.

The holder of the legal pre-emption right and the holder of the contractual pre-emption right retain their status as preferred buyers also in the enforcement proceedings, where the manner of the sale is not important due to their protected pre-emption right in acquiring the thing being enforced. A person who has the pre-emption right in a public electronic sale proceeding may be treated the same as other participants<sup>92</sup>, but has priority over the most favorable bidder if, after the

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<sup>87</sup> See: Г. Станковић, Д. Палачковић, А. Трешњев, *op. cit.*, 194.

<sup>88</sup> See: Г. Станковић, В. Боранијашевић, *Извршно процесно право*, Косовска Митровица, 2014, 189; Г. Станковић, В. Боранијашевић, *Право извршења и обезбеђења*, Косовска Митровица, 2017, 188; Г. Станковић, М. Трговчевић Прокић, *Поступак извршења и обезбеђења у Републици Србији*, Службени гласник, Београд, 2020, 223. Also see: Г. Станковић, Д. Палачковић, А. Трешњев, *op. cit.*, 736; Г. Станковић, В. Боранијашевић, *Грађанско процесно право*, 785; Г. Станковић, Предговор, *Закон о извршењу и обезбеђењу, са одабраним подзаконским актима*, Службени гласник, Београд, осмо издање, 2023.

<sup>89</sup> Art. 36, Enforcement and Security Act.

<sup>90</sup> More about the electronic auction sale, see: [www.eaukcija.gov.rs](http://www.eaukcija.gov.rs)

<sup>91</sup> In some rural areas, there are cases where elderly people do not live in their residences throughout the year.

<sup>92</sup> It is unrealistic for the holder of the pre-emption right to compete with other buyers, as it is in their best interest to acquire the real estate at a favorable price.

announcement of the most favorable bidder, he declares that he will purchase the real estate under the same conditions.

The enforcement creditor can participate as a buyer in the public sale proceedings. However, according to the provisions of the Enforcement and Security Act (2015), the enforcement creditor cannot be a holder of a pre-emption right. In the Serbian Enforcement Procedure Act (2004)<sup>93</sup>, the pre-emption right of the enforcement creditor was established, whereby, in exercising this right, he was in row after the holder of the legal pre-emption right, i.e., the holder of the contractual pre-emption right registered in the real estate cadastre<sup>94</sup>. If the holders of pre-emption rights do not exercise their right, the enforcement creditor acquires it. It is noted that the provision in the Enforcement and Security Act (2011)<sup>95</sup> no longer regulates the pre-emption right of the enforcement creditor, as well as the Enforcement and Security Act (2015).

In the enforcement proceedings, a protected status is prescribed for the holder of the legal pre-emption right and for the holder of the contractual pre-emption right registered in the real estate cadastre. This type of protection is prescribed if there is no legal pre-emption right or if its holder has not used it in the sale proceedings. The holder of the contractual pre-emption right registered in the real estate cadastre has the same legal status and powers as the holder of the legal pre-emption right; however, the priority belongs to the holder of the legal pre-emption right due to the stronger legal basis for the right.

The enforcement agent responsible for the enforcement over the real estate is obligated to ensure that the legal pre-emption right or the registered contractual pre-emption right is respected in the proceedings. Above all, the enforcement agent is obligated to notify the holders of the pre-emption right about the sale of the real estate and also to deliver a confirmation act for its sale through an electronic public sale. When real estate is sold by direct agreement, the enforcement agent submits a conclusion regarding the real estate to the holder of the pre-emption right to determine whether he or she is willing or not to exercise the pre-emption right.

Before the electronic public sale, a holder of the pre-emption right does not have the power to declare whether he is willing or not to exercise the right, because – first, it would discourage potential buyers to participate in the public sale, and – second, it would not be in the interest of the parties in the enforcement proceedings. As a result, the holder of the pre-emption right is enabled to exercise the right once the electronic public sale has ended and the most favorable offer and selling price have been achieved. According to the Article 170, paragraph 5, in the Enforcement and Security Act (2015), the holder of the pre-emption right has the power within three days from the date of delivery of the report on electronic sales to declare whether he is willing to exercise his right under the same conditions as the most favorable bidder.

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<sup>93</sup> See: Art. 118, Enforcement Procedure Act, *Official Gazette, the Republic of Serbia, number* 125/04. Also see: Б. Старовић, *Коментар Закона о извршном поступку*, Intermex, Београд, 2007, 414.

<sup>94</sup> A holder of a contractual pre-emption right could exercise this right only if there was no legal pre-emption right on the real estate or if the holder of that right did not exercise it in the enforcement proceedings.

<sup>95</sup> See: Enforcement and Security Act, *Official Gazette of the Republic of Serbia, number* 31/11.

If electronic public sale is not used as a method to sell real estate because the parties, according to the provisions of Article 171, paragraph 3 in Enforcement and Security Act, decide to sell the real estate by a direct agreement, then the holder of the pre-emption right does not have the right to declare (whether he will use his right or not) until the sale by direct agreement is not finalized. The finalization of the sale by the direct agreement includes determining the buyer and the conditions under which the real estate will be sold, including the deadline for concluding the contract, the sale price, and the payment deadline.

After the electronic public sale is completed, the enforcement agent must deliver the report from the sale to the holder of the pre-emption right, who will then declare whether he will exercise the right or not. Before the declaration of the holder of the pre-emption right, the enforcement agent cannot conclude a sale of real estate. A holder of the pre-emption right must declare his decision to exercise the right by submitting a declaration within the preclusive period.

By declaring that the holder of the pre-emption right is willing to purchase the real estate under the same conditions as the most favorable bidder, the holder exercises privileged status and acquires the status of a buyer of the real estate.

Furthermore, after the holder of the pre-emption right declares, the enforcement agent can conclude the sale of the real estate. The conclusion act includes the statement given by the holder of the pre-emption right, indicating that he has decided to purchase the real estate as the most favorable bidder. The content of the conclusion is important because the method of implementation depends on it. If the holder of the pre-emption right declares that he will purchase real estate at the auctioned sales price, then he can exercise his right only if he pays the set amount.

If the holder of the pre-emption right fails to pay the corresponding amount within the specified deadline<sup>96</sup>, he or she loses the pre-emption right. This entitles the enforcement agent to conclude the sale by inviting the most favorable bidder to purchase the real estate for a determined price. If the most favorable bidder does not pay the determined price, the enforcement agent will no longer contact the holder of the pre-emption right.

Even when a sale is made by direct agreement, the enforcement agent must invite the holder of the pre-emption right to declare in written form whether he wants to purchase the real estate under the conditions determined by the direct agreement. The enforcement agent is not allowed to make the sale by direct agreement until the holder of the pre-emption right has not given his or her written declaration within the determined timeline.

When the holders of pre-emption rights are co-owners or neighbors, specific situations occur<sup>97</sup>.

A co-owner is treated as the holder of the pre-emption right in order to protect his justified interest in being favored as the acquirer of a certain thing and a privileged legal status due to the legal and political reasons. The reason for favoring

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<sup>96</sup> A holder of the pre-emption right participating in the electronic public auction was required, like other participants, to provide a guarantee for participating in the auction. If the holder of the pre-emption right fails to pay the sales price by the deadline, the guarantee will not be refunded.

<sup>97</sup> The Housing and Building Maintenance Act (2016) regulates the method of exercising the pre-emption right and possible competition among holders.

a co-owner as the buyer of a co-owned share is due to the legislator's intention to terminate the co-owned community, given the fact that it is often a source of conflict. Whether the co-owner, as the holder of this right, can exercise this right depends on whether the co-owner intends to sell his co-owned share or whether the co-owned share is subject to enforcement.

It is undeniable that the Enforcement and Security Act (2015) regulates the protection of the economic interests of the enforcement debtor, whose co-owned share is subjected to enforcement by preventing these advantages in enforcement proceedings in cases where a holder of the pre-emption right appears as the buyer. The concept of exercising the legal pre-emption right on real estate in enforcement proceedings is in the interest of the enforcement debtor and the enforcement creditor, as well as the holder of the pre-emption right. Regardless of the method used to convert the real estate into money, the holder of the pre-emption right enjoys an advantage over the most favorable bidder, which also serves the interests of the parties.

It is often difficult to get favorable conditions in the enforcement proceedings when a co-owned share is subjected to an enforcement proceeding. This is because such a purchase tends to be unattractive to a wider circle of potential buyers who are uninterested in entering a co-owned community, and therefore, an adequate sales price cannot be achieved. However, co-owners and neighbors of the real estate, as holders of the legal right of pre-emption, may be interested in purchasing not only because they have that right but also for economic reasons.

When one of several co-owners does not intend to exercise the pre-emption right during the enforcement proceedings, the other co-owners have the power to exercise the pre-emption right as a whole. In this context, interested co-owners who want to exercise the pre-emption right must make a statement that they intend to exercise the pre-emption right. Hence, a co-owner who exercises the pre-emption right is obliged to purchase the share of the real estate subjected to the forced sale as a whole.

Assuming that all co-owners are willing to exercise the pre-emption right during the enforcement proceedings, the question is whether this right belongs to all co-owners together (so that they can only exercise it jointly), or whether each co-owner, as holder of the right, can exercise it independently of the others (not interested in exercising the right). The Serbian law prescribes the principle of individual exercise of the pre-emption right since it belongs to the holder of the pre-emption right.

A complication that might occur in the enforcement proceedings if all co-owners opt to exercise their pre-emption right. As a result, this leads to competition among co-owners in exercising their pre-emption rights, raising the question of how their priority should be determined in this case.

The Real Estate Trade Act (2014) eliminates the possibility of mutual competition in exercising the legal pre-emption right by preventing multiple co-owners from exercising this right simultaneously. Consequently, it prescribes the individual exercise of the pre-emption right and establishes criteria for determining priority.

When multiple co-owners intend to exercise the pre-emption right, the Real Estate Trade Act (2014) states that the co-owner with a larger co-owned share has priority in purchasing the real estate. Furthermore, when the priority row cannot be

established by the size of the co-owned share, the co-owner who is selling his share decides to whom he will sell it. In such a case, the right of choice can be both a burden and a source of inconvenience for the co-owner since he has to choose the buyer.

The Real Estate Trade Act (2014) also regulates the pre-emption right of the owner of neighboring agricultural land, in situations where the agricultural land, subjected to the sale, borders his land. To eliminate conflicts that often arise among co-owners, the co-owner of the land being sold has priority over the owner of the neighboring land. When multiple owners of neighboring land are holders of the legal pre-emption right, the priority row is determined by the Real Estate Trade Act (2014). A criterion for determining the priority of the holder of the pre-emption right when purchasing agricultural land is the length of the boundary line of the owner of the neighboring land whose agricultural land borders the agricultural land of the enforcement debtor, which is the subject to enforcement. Therefore, the priority in exercising the pre-emption right belongs to the owner of the neighboring land, whose agricultural land borders the land of the enforcement debtor. If there are several owners of neighboring land whose agricultural land borders the enforcement debtor's land, but the boundary lines are equal, the priority among them belongs to the owner of the neighboring land with the largest land area. This criterion, which considers the land area of neighboring land when determining priority in exercising the pre-emption right, aims to consolidate agricultural land.

However, if the sale of a real estate in co-ownership is exercised in an enforcement proceeding, the co-owner who appears as the buyer (and as the holder of the legal pre-emption right) has priority over other buyers, but he must purchase the share in the real estate at the highest auction sale price. When multiple co-owners intend to exercise their rights in an enforcement proceeding, the question arises as to whether they can exercise these rights jointly or individually.

If, during the enforcement proceedings, co-owners with different co-owned shares compete for the exercise of the pre-emption right, the enforcement agent will apply the priority rules determined in the Real Estate Trade Act (2014). According to the Law, the co-owner with the larger share has priority and will be able to exercise his pre-emption right in the enforcement proceedings. However, if co-owners with equal shares are willing to exercise the pre-emption right and appear as buyers, then the rule on the competition among co-owners with equal shares cannot be applied in the enforcement proceedings. This is due to the fact that the enforcement debtor does not have the power to choose the co-owner (the buyer) since a forced sale is being conducted.

This crisis has posed a challenge for enforcement agents. Namely, the legal rule regarding the buyer's choice based on the seller's intention cannot be applied by an enforcement agent<sup>98</sup>. This is because the enforcement agent is not a contracting party to choose, and if he were to make the choice, the principles of objectivity and equity would be violated. In this situation, an enforcement agent cannot apply the solution prescribed by law, which favors the individual exercise of the pre-emption right when selling real estate. This solution in the law, as we

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<sup>98</sup> See: М. Николић, Н. Шаркић, *Коментар Закона о извршењу и обезбеђењу*, друго издање, Службени гласник, Београд, 2020, 370.

noted earlier, is acceptable for liquidating the co-ownership relation and, for this reason, it does not prescribe the jointly exercised pre-emption right.

Assuming that the holder of the pre-emption right should have protection as a participant in the enforcement procedure, the enforcement agent strives to find a solution to this crisis situation.

There is an opinion, based on comparative law solutions, that co-owners can jointly exercise their pre-emption right in enforcement proceedings if they have reached an agreement on this matter. It is considered that such a solution does not contradict the aim of the enforcement proceedings because it enables both the exercise of the pre-emption right and the settlement of the enforcement creditor after the sale of the real estate. If the co-owners choose to jointly exercise the pre-emption right, they should make a joint statement declaring their intention to exercise the right of pre-emption together. The statement regarding the joint exercise of the pre-emption right should also include information indicating that, due to the equal co-owned shares, the purchase price will be divided equally between each party upon payment of the sale price. When the co-owners consent to jointly exercise the pre-emption right, they must conclude an agreement on how to divide the sale price and the shares of the real estate that is subjected to the enforcement. Since their co-owned shares are equal, they will divide the sale price equally and acquire an equal share in the purchased real estate. The co-owners must pay the full sale price, or they will forfeit their pre-emption right.

Considering the principle of the individual exercise of the pre-emption rights of co-owners with equal shares, and considering there is a legal gap regarding their priority, if in the enforcement proceedings co-owners intend to exercise the pre-emption right, the enforcement agent must enable the exercise of their right and could eventually decide to give a priority to the co-owner who will pay the full sales price first to the enforcement agent's account or deposit the sales price according to the principle *prior tempore, potior iure*.

3.20. Where the real estate is subjected to an enforcement proceeding, additional issues may emerge if the holder of the legal pre-emption right, who was informed by an enforcement agent about the public sale of the real estate, dies during the enforcement proceedings.

It is undeniable that the legal pre-emption right lasts as long as the real estate exists, during which the holders of this right may change over time. However, the change of holder of the legal pre-emption right does not occur either through transfer or inheritance of that right because it is linked to a person and arises from the law when the legal assumptions for acquiring this right are fulfilled. For example, if the holder of the legal pre-emption right dies, the right does not pass to his heirs by universal succession. A new holder of the legal pre-emption right becomes when he can legitimize himself as a co-owner or as the owner of the neighboring real estate subjected to the sale. In other words, this is the moment when he inherits ownership rights. By obtaining ownership of the real estate, he becomes the holder of the legal pre-emption right.

As we demonstrate, the holder of the pre-emption right in the enforcement proceeding has the right to purchase real estate subjected to the public sale before the most favorable bidder if, within three days of submitting the electronic sale report, he declares his intention to purchase the real estate under the same conditions as the most favorable bidder. However, the dilemma is who should

declare the intention to exercise the pre-emption right, considering that the previously notified holder of this right has died and the right has been terminated at the moment of death, while the future legal holders of this right on the real estate remain unknown.

For complications that occur in the practice, some enforcement agents find the solution in terminating the enforcement proceedings due to the death of a participant. Namely, the halt lasts until the probate proceedings are completed. Potential legal heirs are notified about the halt in the enforcement proceedings that will last until the probate proceedings are finished or until the heirs make a statement whether they will exercise the pre-emption right.

Considering that the probate proceedings take a certain amount of time, and its length sometimes depends on whether the heirs are known or their residence is unknown, the question is whether the practice established by certain public enforcement agents is justified - taking into account that the legal pre-emption right is linked to the person, the enforcement proceeding is urgent and the pre-emption right can be exercised within the limitation period.

An enforcement proceeding may be terminated by law, i.e., for reasons prescribed in the Serbian Civil Procedure Act (2011). One of these reasons for termination is the death of a party – the enforcement creditor or the enforcement debtor. A linguistic interpretation of Article 29 of the Enforcement and Security Act (2015) leads to the conclusion that the death of the holder of the pre-emption right, as a participant in the procedure but not a party to the enforcement proceedings, does not constitute a reason for terminating the procedure. Instead, the halting of the proceedings in order to await the result of the probate procedure does not align with the rule of the preclusive deadline that runs continuously and leads to the loss of rights.

Failure to exercise the pre-emption right within the preclusive period, as there is no holder of the pre-emption right at that time, is irrelevant whether the right was not exercised or whether it will be acquired by law. The death of the holder of the pre-emption right during the enforcement proceedings results in the termination of the right. By acquiring ownership of the real estate by inheritance, the person who acquired the right of ownership becomes the new holder of the legal pre-emption right, in the case of a voluntary sale as well as in the enforcement proceedings if the real estate on which the right of pre-emption exists is subjected to a sale in the future. This means that he can exercise the pre-emption right at some later moment if the real estate is going to be sold.

#### **IV. Summary**

The analysis of Macedonian and Serbian law determines that the provisions of the contractual right of pre-emption on real estate protects the private interests of the holder of this right. According to the Law, a holder can protect his right during the voluntary sale of real estate. Also, the holder of the contractual pre-emption right can protect his rights in the enforcement proceedings if he is registered in the real estate cadastre, if the holder of the legal pre-emption right does not exercise his right and is interested in acquiring the ownership of the real estate. The provisions of the legal pre-emption right enable - not only the holder of this right to realize his private interests by purchasing the real estate in enforcement

proceedings, but also to realize the public interest that aligns with legal and political standards.

The legal framework regulating the pre-emption right in Macedonian and Serbian law, especially the legal pre-emption right, does not contain comprehensive legal solutions. This is due to the fact that the drafters of the legal texts did not always consider the implications of certain legal solutions in the procedural field. This highlights the existence of legal gaps that are differently interpreted in practice, affecting legality, equality, and legal certainty. Particularly, it is influenced by the fact that in both legal systems, the legal protection in the enforcement proceedings is afforded by non-state judicial authorities to which judicial functions have been transferred, as well as the fact that there is no institutional framework for the unification of enforcement practice.

It has also been observed that in practice, certain legal solutions are incorrectly applied or misinterpreted, which leads not only to unequal legal protection in the enforcement proceedings but also to a violation of the right to a fair trial.

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