

# BULLETIN

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## Stockholders' Pre-emptive Rights

The right of Pre-emptive (pre-emption) is defined as the right of the right holder to request the transfer of shares first in case the immovable property subject to shared ownership or the company shares are sold to a third party. The share subject to sale with the use of the right can be transferred to another stakeholder and thus the immovable or company shares subject to shared ownership will remain in a certain surroundings and be prevented from being transferred to third parties. As can be below, first of all, the pre-emption right will be discussed in general terms and then the use of the pre-emption right in the transfer of company shares.

### 1. Pre-emption Right in General Terms

The right to pre-emption is regulated in clause 732 and the following of the Turkish Civil Code. Within the framework of these provisions, the legal characteristic and procedures of the pre-emption right will be briefly mentioned.

The right of pre-emption, in other words pre-emptive right, has been granted with the aim of ensuring that the immovable remains in the hands of the existing shareholders in the immovables subject to shared ownership, and it is a right that allows other stakeholders to purchase the immovable subject to sale, in case any stakeholder wishes to sell their share to third parties.

The right of pre-emption can only be exercised in immovables subject to shared ownership and in cases of transfer of company shares, which will be explained below. Apart from that, it is not possible to use the right of pre-emption on immovables with condominium servitude and condominium ownership.

The pre-emption right can only be used by the shareholders, other than that it cannot be used by the limited real rights holders. Nevertheless, if one of the shareholders sells its share to another shareholder, it will not be possible to exercise the right of pre-emption. The pre-emption right can only be exercised if the share is sold to third parties.

Although there is no stipulated condition in the law for the use of the right of pre-emption, according to the settled Supreme Court case law, the real estate has not been actually divided, in other words it should not be already determined among the shareholders who will use the parts of it. In cases where the immovable is actually divided, it is not possible to use the pre-emption right.

The shareholder who sells her/his share to a third party must notify other shareholders of this issue through a notary public.

The use of the pre-emption right is used in the form of filing a lawsuit against the third party who bought the share. In the proceeding; the defendant party will be the third person who bought the share, and the plaintiff will be the shareholder who wants to use the right of pre-emption. The competent court is the court of the place where the real estate is located, and the authorized court is the civil courts of first instance. The lawsuit must be filed within three months and in any case two years from the date of notification through the notary public. If the notification is not made through a notary public, the shareholders can file a lawsuit within the two-year period of prescription.

## 2. The Pre-emption Right in Transfer of Shares of Companies

There is no pre-emption right arising from the law on company shares, such as the pre-emption right, which has been mentioned above and is regulated regarding the immovables subject to shared ownership. However, it is possible to grant the right of pre-emption to the shareholders, with the shareholders' agreement to be made by keeping the circle of shareholders under control and considering the interests of the shareholders.

In case the shareholder transfers his shares to a third party in violation of the pre-emption right stipulated in the shareholders' agreement, the transfer is valid and the shareholder cannot demand the return of the shares from the third party. In such a case; the shareholder will not be able to fulfill his debt arising from the sales contract established as a result of the exercise of the pre-emption right, and the liability for compensation may come to the fore.

The pre-emption right stipulated in the articles of partnership; It is considered that the "single debt principle" envisaged in capital companies, that is, the sole debt of the partners to the partnership is the capital and the pre-emption right to the shareholders is considered to be invalid because it brings an additional obligation. (*Poroy, Tekinalp and Camoglu*)

In other words, if the shareholder is obliged to transfer his share to the pre-emption right holder, instead of a third party, by exercising the pre-emption right, and in case of breach of this obligation, he/she is obliged to pay compensation to the party to which he/she has not transferred his/her shares, will constitute a violation of the single debt principle. For this reason, the pre-emption right cannot be regulated in the articles of partnership in a way that binds all shareholders, and such a provision is considered as an unreal provision of the articles of partnership (*Bahtiyar*).

In this context; according to the views contained in the doctrine, the purpose of granting the right of pre-emption is to be determined as "invitation to deal" in the articles of partnership and the shareholder who wants to sell his shares proposes the sale of the shares to other shareholders first, and it is accepted that this situation will not violate the single debt principle. (*Tekinalp*)

## 3. Exception to the Single Debt Principle

The exception to the single debt principle is stipulated in article 493 of the Turkish Commercial Code. The provision of the article: *"The company may reject the request for approval by citing an important reason stipulated in the articles of partnership or by suggesting to the transferor to buy the shares at the actual value at the time of application, on behalf of its own or other shareholders or third parties. (2) If the articles of partnership provisions regarding the composition of the circle of shareholders justify the refusal of approval*

*in terms of the company's scope of operation or the economic independence of the business, it constitutes an important reason."*

According to this; In case of existence of an important reason stipulated in the articles of partnership of the company, it is possible to reject the approval of the share transfer and to acquire the shares subject to sale by the company. The important reasons are not specified in a limited number in the law. However, it is not possible to consider every factor specified as "major reason" in the articles of partnership. There is an opinion that the provisions of the articles of partnership, which allow the transfer of partnership shares to be significantly restricted and to be transferred in a limited environment, do not comply with the joint stock company structure. (Uzel) According to an opinion in the Doctrine, if the specialization of the shareholders of the joint stock company to a closed surrounding will provide some gains in terms of the scope of operation of the partnership and will help in the protection of the partnership, a share transfer limitation may be introduced in closed joint stock companies. (Tekinalp)

The reasons such as professional competence, not transferring shares to competitors of the company, preventing change in control can be considered as important reasons and for such reasons; it is possible for the share to be acquired by the company by rejecting the share transfer transaction.

## Result

As said above; The right of pre-emption ensures that the immovable property remains in the hands of the existing shareholders in the immovables subject to shared ownership, and in companies, it is a right that ensures that the shareholder circle is kept under control and that the share subject to the share transfer is taken over by the other shareholders, considering the interests of the partners.

In the transfer of company shares; Even if there is a provision in the articles of partnership, it will not be valid and it will not be possible to use the pre-emption right, since it is in violation of the single debt principle in capital companies.

The exception to this situation is article 493 of the Turkish Commercial Code. According to this; The company may not approve the share transfer in the presence of an important reason stipulated in the articles of partnership and it is possible for the company to acquire the shares on its own behalf.

The pre-emption right in the transfer of company shares can be exercised with the shareholders' agreement to be concluded between the shareholders. This contract will only bind the contracting parties. Therefore, if the shareholder transfers shares in violation of the contract, the validity of the share transfer will not be affected, and the share transfer will only be liable for compensation arising from the contract.