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AVOIDANCE OF THE LAW IN GERMAN LEGAL THEORY AND PRACTICE

ABSTRACT. Within the last two decades, the European legislators (especially the German one) have identified problem regarding to avoiding of legislation and have expended their anti-avoidance legislation in many legal areas, especially in the areas of labour, inheritance, corporate, competition, tax, corporate and banking law. Nevertheless, the problem has not been solved in most of the South and Eastern European countries, so further research and development of this legal approach is highly recommended.

This is an example when an individual conduct of contracting parties is viewed as a legal (lawful), but illegitimate (unjustified, unduly) dodging (i.e. avoidance) of provisions of the law in the previous mentioned laws. Consequently, the fight against illicit practices is not carried out through the provisions of the Criminal Code (since it is not case of an illegal act), but through anti-avoidance (anti-abuse) provisions that have the impact on preventing the legal effects of so-called avoidance transactions *(Umgehungsgeschäfte)*.

Avoidance (abuse) of the law (fraus legis) is defined as behaviour that is not directed against the strict sense (i.e. a letter) of the law, but violates its meaning. Fraus legis embodies in reality implemented transaction, but in a manner, which is contrary to the spirit of the law. In practice, an increasing number of cases in which persons, crossing (otherwise blurred) boundaries of lawful conduct, are using the (modified and misleading shapes of) transactions in order to achieve the economic benefits for one or both the parties in the transaction and on the other hand deceiving (and causing harm) to the counterparty or a third party. Defining the problem of the avoidance (and also sham) transaction is not a peripheral area of civil (and tax) law, but its very heart, which is reflected in destroying the essence of the transaction (i.e. the errors of the will) and unauthorized circumvention of the principle of party autonomy and the mandatory legal norms.

The purpose of the research is reviewing and streamlining of the definition of avoidance of the law *(fraus legis)*, especially in relation to the simulation, in order to develop a holistic view of how to understand this notion and its classification, as well as presenting its own vision of an optimal methodological basis for defining the civil concept of the avoidance of the law. This theoretical starting point is followed by the use of a practical demonstration of the avoidance of the law in various legal disciplines.

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The author aims at raising the awareness about the existing problem of abuse of law against which the responsible state authorities (state administration, inspections and police) and the judiciary (prosecutors and judges) are obliged to act in the event of violations of individual legal areas. It often happens that the competent institutions refer to a flat interpretation that they have not acted because there is no any explicitly prescribed measure or sanction in the law. It has to be stressed that there is no need to follow a strict formalism and to interpret the law literally (i.e. only by the letter of the law) but to follow the basic content of individual law and the intention of the legislature when writing this exact law. Although the legislator may have expressed itself linguistic incompletely when writing an individual law, that does not mean that there is a green light for contracting parties to exploit that defective expression of the legislator and to avoid the ban that the legislator wanted to impose. And awareness of this problem is already part of its solution.

Fraus legis is a Roman legal concept that was shaped through centuries. In early middle ages the institut od avoidance of the law lost its momentum. Only in recent 100-150 years, fraus legis was introduced again first in civil law codifications and later in specific legal areas. It just shows how history comes around when searching for solutions that had already been solved.

An optimal methodological basis for defining the concept of avoidance of the law will be its integrative legal model based on the protection of the rights and interests of the state (as a legislator) when the contracting parties show a different state of affairs, as is the case (which is especially the case in the fields of tax, labor and competition law). Avoidance of the law as a civil law concept points out that the contracting parties are breaking the spirit of material and procedural law, although it seems (at least the contracting parties claim so) that the law has not been violated in its text. The material and procedural aspects of the individual law have to take into account when judging whether the contracting parties bypassed (avoided) the content of the law (sententia) and the legislature will (voluntas).

It is needed to stress that not only further development of legislation is needed but also open-minded way of thinking when tackling the problem of avoidance of the law, especially so-called professional courage of authorized personel of state administration and the judiciary.

Keywords: *fraus legis; agere in fraudem legis;* avoidance of the law; abuse of the law; avoidance transaction; chain labour contracts; tax avoidance.

Introduction.

Within the last two decades, the European legislators (especially the German one) have identified problem regarding to avoiding of legislation and have expended their anti-avoidance legislation in many legal areas, especially in the areas of labour, inheritance, corporate, competition, tax, corporate and banking law. Nevertheless, the problem has not been solved in most of the South and Eastern European countries, so further research and development of this legal approach is highly recommended.

This is an example when an individual conduct of contracting parties is viewed as a legal (lawful), but illegitimate (unjustified, unduly) dodging (i.e. avoidance) of provisions of the law in the previous mentioned laws. Consequently, the

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fight against illicit practices is not carried out through the provisions of the Criminal Code (since it is not case of an illegal act), but through anti-avoidance (anti-abuse) provisions that have the impact on preventing the legal effects of so-called avoidance transactions *(Umgehungsgeschäfte)*. Avoidance of the law *(Gesetzesumgehung)* is defined as behaviour that is not directed against the strict sense of the law, but violates its meaning. A transaction therefore does not violate the law by virtue of the specified literal interpretation of the statutory prohibition, but it is constituted in a way to achieve success, which is contrary to the purpose of prohibitive norms of the law.

Consequently avoidance of the law must be strictly distinguished from the violation of the law *(agere contra legem)*, although both the practices released the same effects. In case of avoidance of the law there is no violation of the law in its text, but it is certainly by-passed (avoided) its contents *(sententia)* and intention of the legislature *(voluntas)*. Moreover, in that, avoidance of the law differentiate itself from simulation (sham), which represents violation of law. In the case of simulation, the transaction is oriented only on the bare legal appearance and not on actual (economic) success. In contrast to the sham transaction is *fraus legis* is not based on "lies". *Fraus legis* embodies in reality implemented transaction, but in a manner which is contrary to the spirit of the law.

The most prominent authors regarding avoidance of the law in recent years have been Heinrich Honsell[1], Martina Benecke[2], Susanne Sieker[3], Heinrich Weber-Grellet[4], Ulrich Baeck[5], Dieter Birk[6], Christian Böing[7], Georg Crezelius[8], Alexander Linn[9], Peter Fischer[10], Helmut Rüßmann[11], Dieter Medicus[12] and Sabine Trüter[13].

The purpose of the research is reviewing and streamlining of the definition of avoidance of the law (fraus legis), especially in relation to the simulation,

1 Heinrich Honsell, *Römisches Recht* (7th edn, Springer 2010).
2 Martina Benecke, *Gesetzesumgehung im Zivilrecht: Lehre und praktischer Fall im allgemeinen und Internationalen Privatrecht* (Mohr Siebeck 2004).
3 Susanne Sieker, *Umgehungsgeschäfte, typische Strukturen und Mechanismen ihrer Bekämpfung* (Mohr Siebeck 2001).
4 Heinrich Weber-Grellet, *Steuern im modernen Verfassungsstaat, Funktionen, Prinzipien und Strukturen des Steuerstaats und des Steuerrechts* (Dr Otto Schmidt 2001).
5 Ulrich Baeck, 'Das Scheingeschäft, ein fehlerhaftes Rechtsgeschäft' (DPhil thesis, Universität Würzburg 1988).
6 Dieter Birk, *Steuerrecht* (12th edn, C F Müller Verlag 2009).
7 Christian Böing, *Steuerlicher Gestaltungsmissbrauch in Europa* (Dr Kovač 2006).
8 Georg Crezelius, 'Scheingeschäfte und Strohmannsgeschäfte, insbesondere im Steuerrecht' in Wolfgang Baumann, Hans-Jürgen von Dickhuth-Harrach, Wolfgang Marotzke (eds), *Gesetz – Recht – Rechtsgeschäfte* (Selliers European Law Publishers 2005).
9 Alexander Linn, *Missbrauchvermeidungsnormern und Standortwahl* (Deutscher Universitäts 2007).
10 Peter Fischer, 'Die Umgehung des Steuergesetzes – Zu den Bedindungen einer gewährung der Steuerrechtsordnung "aus eigener Kraft"' (1996) 13 Der Betrieb 644.
11 Helmut Rüßmann, *Bürgerliches Vermögensrecht* (Universität des Saarlandes 2006).
12 Dieter Medicus, *Allgemeiner Teil des BGB* (9th edn, C F Müller Verlagsgruppe 2006).
13 Sabine Trüter, 'Steuerlich motivierte Scheingeschäfte, Ihre Behandlung in Zivilrecht' (DPhil thesis, Rechtswissenschaftliche Fakultät der Universität Hamburg 1987).

in order to develop a holistic view of how to understand this notion and its classification, as well as presenting its own vision of an optimal methodological basis for defining the civil concept of the avoidance of the law.

2. Avoidance of the Law in the German Law System.

In the German legal practice, the contracting parties can freely create legal transactions, but must follow legal restrictions within a given framework of the provisions of § 134 and § 138 BGB. The given autonomy *(Privatautonomie)* enables very extensive substantive freedom when entering into contracts. Limits are drawn where the individual transaction are in breach of the statutory prohibition (§ 134 BGB with title "*gesetzliches Verbot*") or morality (§ 138 BGB with title "gute Sitten"; the analysis of last mentioned article of BGB is not presented in this article). The provisions of § 134 BGB and § 138 BGB are therefore listed among so-called barriers to efficiency *(Wirksamkeitshindernisse)*.

The German BGB in its Article 134 states: A legal transaction, which violates a statutory prohibition, is null, unless something else is apparent from the law. Article 134 BGB – in spite of a given discourse in its title "statutory prohibition" – is not limited to prohibitive norms, defined in other articles of the same law, or even in other laws, but it finds through the historical development of the German civil code (*Bürgerliches Gesetzbuch* – BGB) its applicability also in the case of avoidance of the law *(Gesetzesumgehung)*. And therefore, also in the case of so-called avoidance transaction *(Umgehungsgeschäft)* as a "means" of avoidance of the law.

In finding a satisfactory definition of German definition of avoidance of the law, it is necessary to explore the essence of its concept and purpose. *Gesetzesumgehung* is the case when the participants through a series of selected forms of the legal transaction circumvent (avoid, by-pass) legal or business rules. Transaction is by its very nature truly desired. The participants really want implementation of the transaction and therefore the transaction is not considered as a simulation (sham transaction)[14]. The issue of the distinction between avoidance and sham transactions in the Roman and German legal systems is addressed in the third section of the article.

A case of avoidance of the law is present if someone, by selecting a particular form of transaction, wants to achieve an illicit success and by doing that, is being careful not to come into conflict with a literal meaning of the norm, which does not allow such a success. If the transaction does not violate a literal interpretation of a statutory prohibition, but it is so constituted that achieves success, which is contrary to the purpose of legal norm, in this case we are talking about the avoidance transaction *(Umgehungsgeschäft)*. Avoidance of the

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[14] Werner Flume, *Allgemeiner Teil des bürgerlichen Rechts: das Rechtsgeschäft*, vol 2 (4th edn, Springer 1992) 408.

law is therefore defined as a conduct that is not directed against the strict sense of the law, but violates its meaning. German legal theory[15] gives to avoidance transactions the names "disguised transactions" *(verkleidete Geschäfte)*, "veiled (hidden) transactions" *(verschleierte Geschäfte)* and "hidden paths of life" *(Schleichwege des Lebens)*.

With § 134 BGB the legislature wanted to decide on the controversial issue whether a certain transaction, which was concluded contrary to the statutory prohibition, is null *(nichtig)*, even if a prohibitive norm does not determine nullity as its sanction[16]. Thus the provision of § 134 BGB presupposes a statutory prohibition, without determing which laws are prohibitive norms. Moreover, such a prohibition may be contained especially in so-called non-civil laws. In that case, it is the task of civil law to decide on the civil consequences of violation. § 134 BGB fulfils this task as a general (empty) norm *(Blankettnorm)* for any legal prohibitions, related to an individual legal transaction[*]. Article 134 BGB is a gate (a border) to private autonomy. In this context the discretion right, how to perform a transaction, is not made available to the parties[17]. Decision-making in the context of the principle of autonomy cannot be performed limitless, but within the limits, written in the law[18]. Article 134 BGB applies to all types of transactions, unilateral transactions, contracts and decisions, but has meaning mainly for contracts[19].

When replying the question of the origin and meaning of avoidance of the law in the German civil law, it is first necessary to explaine origin of in the Roman law found definitions of *fraus legis.* At the beginning, the application of the laws in early Roman period was followed in terms of strict formalism. The laws were exclusively interpreted literally (i.e. by the letter of the law) and any link with the spirit and purpose was excluded[20]. The avoidance transactions then achieved their peak. However, already in the late republican and later imperial periods the comprehension of the Roman legal science changed from purely literal interpretation to the interpretation of the meaning of legal norms[21]. Thus, *agere in fraudem legis* (i.e. avoidance of the law) became equal with *agere contra legem* (i.e. violation of the law) only in the classical Roman

[15] Sieker (n 3) 104; Benecke (n 2) 134; Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen siner Entwicklung*, Teil 3, Bd 1 (Breitkopf und Härtel 1865) 247.
[16] Fridrich Carl von Savigny, *System des heutigen Römischen Rechts* (Veit 1840) 210.
* The application of § 134 BGB is connected with three questions: Whether there is a statutory prohibition? Is this broken? And what are the consequences? (Burkhard Boemke and Bernhard Ulrici, *BGB Allgemeiner Teil* (Springer 2009) 184).
[17] Helmut Heinrichs, 'Willenserklärung' in Peter Bassenge and others (eds), *Palandt, Bürgerliches Gesetzbuch,* vol 7 (60th edn, C H Beck 2001) 111.
[18] Karl Larenz and Manfred Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (9th edn, C H Beck 2004) 723.
[19] Ibid.
[20] Gustav Römer, *Gesetzesumgehung im deutschen Internationalen Privatrecht* (Walter de Gruyter 1955) 10; Christian Armbrüster, '§ 134 Gesetzliches Verbot' in Franz Jürgen Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (5th edn, C H Beck 2006) 1572.
[21] Benecke (n 2) 11; Böing (n 7) 30.

period, but not in its general meaning. The existence of avoidance of the law was identified when the transaction did not violate the letter of the law, but the spirit of the law and (in addition to this) the avoidance itself was intended (i.e. planned). General equalization of violations of the law and avoidance of the law succeeded through the Theodosian Code *(Codex Theodosianus)* in the year 439, which banned the implementation of all transactions that violate the legal prohibition[22]. The Eastern Roman codification of Corpus Iuris Civilis contained two references in the Digest (definitions of Ulpian D. 1, 3, 30 and Paul D. 1, 3, 29), while the further definition was added later in Codex (C. I, 14, 5) [23].

Given definitions are bounded to the view when the interpretation of the law is strictly bound to the literal structure of some norm[24]. Therefore, if the transaction does not violate the literal meaning of the law, but its spirit and purpose, then there is an example of *agere in fraudem legis* present[25]. In doing so, the participants in the transaction benefit from the lack of verbal expression of the legislature and therefore the letter of the law is not being violated, although in fact they try to achieve what the legislature has wanted to prohibit. Thus, there is an avoidance transaction in the case if the participants have achieved success from (by the law) prohibited transaction with use of other legal forms, which is not explicitly prohibited.

3. Difference to a Sham Transaction (Simulation).

The literature gives the position that the avoidance transaction is certainly not simulated transaction. Like the fiduciary transaction (*Treuhandgeschäft or Fiduziargeschäft)* and straw transaction *(Strohmanngeschäft)* is also the avoidance transaction truly desired, as this is the only way to reach the intended consequences[26]. In any case, the participants are not bound, in order to achieve their goals, to choose the shortest and the least complicated path. However, even when choosing (and practicing) a time consuming and of many steps created legal structure, the validity of this transaction cannot be denied, unless

[22] Franz Dorn, '§§ 134–137 Nichtichkeit I' in Mathias Schmoeckel and others (eds), *Historisch-kritischer Kommentar zum BGB, Allgemeiner Teil und §§ 1–240* (Mohr Siebeck 2003) 663; Wolfgang Engert, 'Umgehungsgeschäfte im Grundstückverkehrsrecht' (DPhil thesis, Hohe Rechtswissenschaftliche Fakultät der Universität zu Köln 1966) 675-6; Reinhard Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 702.

[23] Böing (n 7) 29, 30; Heinrich Honsell and Theo Mayer-Maly and Walter Selb, *Römisches Recht – Enzyklopädie der Rechts- und Staatswissenschaft, Abteilung Rechtswissenschaft* (4th edn, Springer-Verlag, 1987) 118; Honsell (n 1) 11-2; Medicus (n 12) 257; Zimmerman (n 22) 702; Rüßmann (n 11) 223; Flume (n 14) 350; Römer (n 20) 10; Klaus Schurig, 'Die Gesetzesumgehung im Privatrecht' in Andreas Heldrich and Hans Jürgen Sonnenberg (eds), *Festschrift für Murad Ferid zum 80 Geburtstag am 11 April 1988* (Verlag für Standesamtswesen 1988) 377.

[24] Medicus (n 12) 257.

[25] Honsell and Mayer-Maly and Selb (n 23) 118.

[26] Trüter (n 13) 74; Ernst A Kramer, '§ 117 Scheingeschäft' in Franz Jürgen Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (5th edn, C H Beck 2006) 1319; Römer (n 8) 22-3.

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there is a breach of the statutory provisions[27]. The assumption of identifying the existence of the avoidance transaction is that this complicated transaction was actually implemented. However, if opposite to that the parties use some written, but unusual form of the contract, while parallel outside the written contract they agree something different, it is a case of a sham transaction *(Scheingeschäft)* and behind it masked transaction *(verdecktes Geschäft)*. In this case, the agreement on the actual (i.e. intended) conduct is concealed behind the written contract (§ 117/2 BGB)[28].

The difference between the avoidance and sham transactions is that: in the first case the participants want to – under any conditions (i.e. against the spirit of the law) – achieve the purpose which is prohibited by the law, while in the case of simulation they don't want the realization of the transaction[29]. In the case of avoidance transaction they conclude (instead of forbidden one) such a contract, which is based on a different legal route, which would lead as close as possible to the contractual form that the law approves[30]. On the contrary, the case of a sham transaction is presented when the parties agree about from the law derogated conduct or its consequences[31].

Avoidance of the law is present only if there is a case of misguided purpose of the legislation, which happens in two cases. The first is a situation when the participants, by choosing an unconventional way of the conduct of a particular transaction, do not meet legal consequences, which should be provided by the norm if it has not been targeted by the avoidance transaction. The second situation is a case when the participants achieve legal consequences which should not be achieved. In the first case, the German authors are using a term *Tatbestandsvermeidung* for describing a way of the avoidance conduct, while in the second case a term *Tatbestandserschleichung*[32]. Also, the *(German)* literature and the Court practice occasionally differentiate between "prohibition of the intention" *(Zweckverbot)*, "target prohibition" *(Zielverbot)* and "prohibition of the path" *(Wegverbot)*[33].

4. Avoidance of the Law in Legal Practice.

By defining the avoidance of the law (and its difference from simulation), it is easier to understand the practical cases (from areas of labour, administrative and tax law) which are presented below.

[27] Trüter (n 13) 74.
[28] Ibid 74-5.
[29] Arzu Oguz, 'Probleme der Simulation in rechtshistorischer und rechtsvergleichender Sicht' (DPhil thesis, Hohe Juristische Fakultät der Ludwig-Maximilians-Universität München 1996) 107.
[30] Ibid 106.
[31] Trüter (n 13) 77.
[32] Eckart Ratschow, 'Missbrauch von rechtlichen Gestaltungsmöglichkeiten' in Franz Klein and others (eds), *Abgabenordnung Kommentar* (10th edn, C H Beck 2009) 275; Weber-Grellet (n 4) 222; Fischer (n 10) 33-4.
[33] Benecke (n 2) 96-7; Schurig (n 23) 380, 400.

4.1. Avoidance of the Law by Concluding Chain Employment Contracts.

The German legal literature gives an interesting example in the field of labour law: If the employer concludes with the same worker through a series of years without good reason always new employment contracts for a limited period (*Kettenarbeitsverträge*; chain employment contracts) in order to avoid the labour law provisions, it is certainly a case of avoidance of the law. Its disclosure by competent authority (labour inspection or the court) leads to the implementation of full protection under labour law[34]. However, if on the contrary the employer verbally promised (guaranteed) to this employee unlimited job, then a written contract of employment is considered to be a simulation. In this case the protection provisions for the employee refers to the concealed agreement (§ 117/2 BGB). However, in both the cases the disclosure and sanctioning of avoidance of the law (first case) and simulation (second case) lead to the same effect and that is compulsory use of protective labour legislation.

4.2. Avoidance of the Law by Agreeing on the Distribution of Earnings in Order to Escape Creditors.

Example of the avoidance transaction which covers not only the scope of labour but also tax law, is when the employer and employee agree that the salary will be paid within the amount which is considered as guaranteed income and protected with social regulations against intervention (seizure) of creditors on the received income, while the above amount of the salary will be transferred to the third party, which is his wife. Flume[35] considered this case as a “school case” of the avoidance transaction, which is based on the judgment of *Reichsgericht* (RG 81, 41). The Court recognized transaction as seriously intended (i.e. avoidance) transaction (to escape creditors) and not as sham transaction. The tax law provisions do not treat earned salary as two separate amounts but consider the salary, which was transferred to the third party, as a constitute part of original tax base, from which income tax is to be levied. Flume also indicated that this case constitutes a case where legal provisions on the taxation of gifts could be implemented[36]. In this case of “a contract on the transfer of wages” *(Lohnschiebungsvertrag)*, Flume even interpreted that the income tax law was not only avoided, but that the transactions was intended to conceal a part of tax base and therefore it could be presented as a case of tax evasion[37].

Germany later introduced the provision on shared liability (of a third party and debtor to the creditor) which in such cases enabled the seizure request towards a third party (§ 850h ZPO – *Zivilprocessordnung*).

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[34] Trüter (n 13) 74-5; Schurig (n 23) 381.
[35] Flume (n 14) 408.
[36] Ibid.
[37] Ibid 409.

4.3. Avoidance of the Law in the Field of Tax Law.

A particularly interesting case (from the German literature) is connected with theoretical debate about tax avoidance on capital gains. Anyone who sells a certain thing from his/her assets (e.g. property) must pay a capital gain tax on the difference between its book value and the sale price. The participants sometimes try to prevent levying of the tax in the way that, instead of signing a sales contract, they sign a long-term lease contract with additional clause of lessee**'s** pre-emptive right to buy the property. Other case is establishing of a company, in which one shareholder invests his money (to gain a share) while the other shareholder files his immovable property in the company. Later, as both shareholders in the process of closing the company decide to divide the property, the first person retains immovable property, while the second one keeps money[38].

As an illustrative example of the avoidance transaction, which interferes in different areas of law, is also a contract for the purchase of limited company *(GmbH-Mantel)*. From the point of view of tax law, it represents an attempt to use so-called tax losses from the past company's activities, which is then used by the purchaser of that "shell" to cover his "active" profits[39]. The German judiciary named this transaction "coat-purchase" *(Mantelkauf)* and declared it as improper use of provisions regarding the establishment of companies. Thus, the Courts had equated "coat-purchase" with the establishment of new companies, while not recognizing the deduction of previous accumulated tax losses from (new) operating profits (by reference to § 42 AO)[40]. With the change of jurisprudence in 1987, BGH *(Bundesgesetzhof)* specified that the fact that civil law recognises *Mantelkauf* as avoidance transaction does not allow an immediate decision on the application of § 6 StAnpG (the precursor to § 42 AO). In accordance with the changed judicial practice, it was for the purchaser only required to prove a legal identity (the old one) for deduction of tax losses from new profits, which led to the extensive use of *Mantelkauf* transactions. The German legislature reacted with (for the first time regulated) limitation of application of tax losses in so-called *Mantelkauf* transactions (§ 8/4 KStG).

4.4. Avoidance of the Law in the Field of Administrative Law

To understand the avoidance transaction, there is also one instructive theoretical case from the field of administrative law: Owner of the restaurant (person A) lost, due to drunkenness, his license for restaurant business. Because he didn't want to give up his business, he sold his restaurant to his friend

[38] Flume (n 14).
[39] Trüter (n 13) 73.
[40] Ibid 78.

(person B), who initially had no interest in dealing with the restaurant business. Therefore, they agreed that B would obtain the license for restaurant business, while A would stay active in restaurant as its manager. The question was given whether such an arrangement is valid. Basically the provision of the German restaurant law (§ 15 *Gaststättengesetz*, in connection with § 4/1 and § 2/1) states that A cannot run the restaurant without compulsory license. Moreover, this legal prohibition has been avoided when A (in agreement with B) came in a situation, where he was able to keep a restaurant business. Therefore is the agreement, that A is going to conduct his restaurant business as an employed manager, null in accordance with the (above mentioned) statutory provisions of conducting a restaurant business and the general provision of § 134 BGB. Out of that, the question arises, whether the restaurant sales transaction is also included in the nullity of the agreement. That would be the case when the sales agreement and the agreement of conducting the restaurant business represent a single (unitary) transaction and if it is assumed that A and B would not have entered into the purchase contract without previously concluding agreement about restaurant management. In this case, the purchase agreement and the agreement on the management do not represent separate (independent) transactions, as A and B signed a restaurant sales contract, knowing that this agreement will be followed by an additional agreement. In accordance with the will of the parties (within the meaning of § 139 BGB, which represents a provision of partial nullity) there is only one transaction. The sales contract, which is not covered by § 134 BGB, would not have been concluded if the parties were aware of the nullity of (through the provision of § 134 BGB covered) part of the overall transaction (i.e. agreement on management of restaurant business). Thus, person A merely wanted to perform the avoidance transaction, while B had no personal interest in restaurant business. Consequently, both parts of the unitary transaction are null[41].

5. Types of Performance of Avoidance of the Law.

Customers often do not apply by the law available legal form to actualise their business. The reason is that the legislation, regarding the use of typical legal forms, contains rules, which are for the parties infeasible or (merely) annoying. A further reason for the use of unusual types of transactions may be prohibitive norms, which prohibit certain forms of legal transactions or (just) achieving certain legal effects, which are given by the law when using certain legal forms. With the use of unusual types of transactions, however, parties are eager to avoid those legal barriers[42].

[41] Rüßmann (n 11) 224; Reinhard Bork, *Allgemeiner Teil des bürgerlichen Gesetzbuchs* (2nd edn, Mohr Siebeck 2006) 304.
[42] Baeck (n 5) 92-3.

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The judge in the German legal system is not bound by the indications (type) of the transaction, selected by the contractors. Contrary to legal systems where the use of certain wording is closely connected with the occurrence of certain legal consequences, in German legal system the judge is given a free arbitrary choice, based on a comprehensive assessment *(Gesamtbetrachtung)*, to be able to recognise a certain transaction as some other type of transaction. Based on this allocation to another type of transaction, the judge uses regulations, which are relevant for that (newly found) type of transaction[43].

Number of forms of the avoidance transaction, which are particularly perceived in the areas of tax, inheritance, labour and corporate law, gives out repeated variants of design strategies of avoidance of the law. Thus, there are four typical strategies of avoidance conduct[44]:

a) this is a case when the contract is wrongly classified by signing parties. It is a way of putting (marking) of a certain legal transaction in the dress of another legal transaction. One of the characteristic forms of the avoidance transaction is reflected in the fact that the parties agree to hide true legal basis through falsely classified form of the contract. In the German language, it is marked as *Verschleierung der causa.*

b) another form of avoidance strategy, where legal consequences are bound to achieve certain numerical limits, refers to the breakdown of the single transaction into several partial transactions just to achieve that those limits are not exceeded. A result is this strategy is to avoid a use of legal norm which effect depends on the achievement of certain numerical limits. In the literature, this form of the avoidance strategy is characterised as a "breakdown of a single legal transaction" *(Aufspaltung eines einheitlichen Rechtsgeschäfts).*

c) an additional form of avoidance transaction is a regular combination of multiple transactions, which are, as part of a common concept, arranged sequentially so that the effects of first contract are later partially or completely reversed through the next transaction or transactions. Thus, the common viewpoint of that comprehensive transaction is that it is without any intention to change anything in relation to the starting position. Thus, in the intention to achieve favourable legal consequence or prevent a certain negative legal consequence, the participants first complete actual legal status, which is in compliance with abstract legal norm, and then, by carrying out (fully or partially) opposite transactions, reimburse it to the starting point. This strategy of avoidance transaction is referred to as an example of "conflicting transactions" *(gegenläufige Gestaltung).*

[43] Trüter (n 13) 79.
[44] Sieker (n 3) 4, 214-8.

d) in order to avoid the certain legal norms, which are based on the performance or the characteristics of the persons or their legal status, a certain additional person (whether a natural or legal person) is included in transaction. And the activity of this included person is guided by the man in the background *(Hintermann)*. In the literature it is a case of "the inclusion of other person" *(Zwischenschaltung einer Person)*.

6. Legal Effects of the Avoidance Transaction under the German Law.

In its definition, § 134 BGB presents objection of the legal order against the principle of (unlimited) freedom of choice. It corresponds to the consideration that the law cannot (only) prohibit a certain conduct and – on the other hand – let a business transaction (i.e. an agreement to execute such a conduct) to remain valid. This is, for example, a case that the legal order that imposes sanction for a murder (according to the German Criminal Code, written in § 211 StGB) cannot let with impunity a legal transaction which binds someone to the implementation of a murder[45].

According to § 134 BGB, a legal transaction which violates a statutory prohibition is null, unless the specific legal provision determines something else. The reason for an annulment (nullity) is an exception from the amenities of (general) freedom of contract. Therefore this provision should not to be understood in a way that every transaction, that violates the law, leads to the nullity. Firstly, it is necessary to check whether a case of violating of § 134 BGB even exists. If this is confirmed, then the question arises whether the objective (goal) and purpose of the forbidden norm require nullity of the transaction. That this is not always the case, indicates the second half of the sentence of § 134 BGB[46].

Article 134 BGB is generally empty norm (i.e. with no content), as it commands that a prohibited transaction is only then null if something else is not defined by the prohibitive norm. Whether a certain legal transaction is valid or null is not decided by § 134 BGB, but from the side of the specific prohibitive norm. Thus, § 134 BGB limits itself only on mandatory legal norms which result in annulment of the transaction. But on the other hand, § 134 BGB does not specify how to identify (recognize) them. Therefore, this is submitted with a goal to find the meaning and purpose of injunctive norms[47]. The provision of § 134 BGB connects the exclusion of nullity of a certain legal transaction with reservation that some other sanction can be determined or it can even remain without sanction. However, this does not mean that § 134 BGB imposes (commands) civil penalties, as in this case, when being bound

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[45] Rüßmann (n 11) 218.
[46] Kurt Schellhammer, *Schuldrecht nach Anspruchsgrundlagen – samt BGB Allgemeiner Teil* (7th edn, C F Müller Verlagsgruppe 2008) 1068; Rüßmann (n 11) 218.
[47] Schellhammer (n 46) 1070.

to the specific provisions, the use of § 134 BGB does not even occur. On the contrary, the use of definition "something else" (second part of the definition of § 134 BGB) defines that the exemption of nullity follows out of the meaning and purpose of each prohibitive norm[48]. According to Kramer it is possible to concretise the provision of § 134 BGB in accordance with reference to other legislative frameworks in following definition: 'A legal transaction which violates a statutory prohibition is null, unless the object (goal) and purpose of injunctive norms mean that the prohibited transaction should remain valid or be null only limited'[49].

A transaction is not already null, if the critics of its mode arrives from the law, but only when the law wants to prevent the legal consequences of this transaction. The protection purpose of prohibitive norm must be done by its interpretation. In this process, it is also important to observe whether the statutory prohibition only refers to one or both the parties. In the first case, a transaction commonly remains in force, while in the second case becomes null. Nevertheless, this is only a rough division. Even in the event of a legal unilateral prohibition of conducting transaction, its nullity can be applied if the statutory prohibition provides protection to another business partner, which can only be achieved through the nullity of the legal transaction. Even the threat of punishment or other means to ensure the order is only additional mark for achieving nullity of the transaction[50].

Furthermore, result of nullity includes (also) the avoidance transactions which want to achieve a deformed success out of certain prohibitive norms in the way that transaction are not directly covered by prohibitive norms. Here is required special vigilance because they have no mistakes, if being observed merely isolated. Only when we take into account the interpretation of the prohibitive norms, which in general seek to prevent the success of the transaction, the use of § 134 BGB is allowed[51]. The norm also must contain a prohibition, which is transmitted through its interpretation. It is necessary that the law seeks to prohibit certain conduct and therefore to prevent it. In other words, it is a question whether the transaction is in accordance with the spirit (sense) and purpose of the legal norm[52].

Although in case if the prohibition of a legal transaction is not explicit legally normed, nevertheless it may lead to nullity of such an avoidance transaction when the parties want to avoid the object (goal) and purpose of

[48] Armbrüster (n 20) 1567-8.
[49] Rainer Kramer, 'Der Verstoß gegen ein gesetzliches Verbot und die Nichtichkeit von Rechtsgeschäften (§ 134 BGB)' (DPhil thesis, Rechts- und Wissenschaftliche Fakultät der Johannes Gutenberg-Universität Mainz 1976) 117.
[50] Schellhammer (n 46) 1070-1.
[51] Bernd Rüthers and Astrid Stadler, *Allgemeiner Teil des BGB* (15th edn, C H Beck 2007) 405.
[52] Burkhard Boemke and Bernhard Ulrici, *BGB Allgemeiner Teil* (Springer 2009) 184-5.

the prohibitive norm by using some other chosen legal form. This is a case when a norm prohibits not only the transaction through a specific form, but wants to prevent a legal or economic success of this transaction[53]. Therefore, a transaction that does not directly violate the text of the prohibitive law may also be a null. The assumption is that the law completely prohibits the desired success of transaction[54]. If, by contrast, the law refers only to the specific way of conducting transaction (that is solely the use of certain means to achieve otherwise permitted success), then it is not a case of the avoidance of the law, but a case of allowed use of contract freedom with designing the transaction in a way which is not covered with the text of the law[55].

On the other hand, the German theorists and German court practice show that there is no longer any place for specific teachings of avoidance of the law *(Gesetzesumgehung)*. Since the new methods of studying the rules put in the foreground the internal significance and economic purpose of the norm, the independent doctrine of a busy business may be omitted. By acknowledging the teleological interpretation and the admissibility of the judicial design of law *(Rechtsfortbildung)*, the need for a self-contained doctrine of the avoidance was abandoned.

However, the legal concept of the avoidance of the law is widely used today, at least as an argument. German Federal Court of Justice (*Bundesgerichtshof* – BGH) in its practice did not explicitly abandon the theory of avoidance of the law as an independent legal institute, but does not consider it as a stand-alone reason for nullification. The legislative practice therefore confirms the conclusion that the German legislator gives to the concept of avoidance of the law *(Gesetzesumgehung)* significantly more importance than German legal theorists do. This is particularly evident in a wide range of special anti-avoidance measures in individual areas of German law[*].

7. Conclusions.

The aim of the article is to raise awareness of the existence of a problem of circumvention of the law against which the responsible state authorities (state administration, inspections and police) and the judiciary (prosecutors and judges) are obliged to act in the event of violations of individual legal areas. It often happens that the competent institutions refer to a flat interpretation that they have not acted because there is no any explicitly prescribed measure or sanction in the law. It has to be stressed that there is no need to follow a

[53] Rüßmann (n 11) 224.
[54] Dorn (n 22) 674-5.
[55] Ibid 675.
[*] Examples of anti-avoidance rules in German legal system are: § 42 AO; § 7 AGBG, § 5/1 HausTWG, § 18(2) VerbrKrG, § 75d HGB, § 8 FernUSG, § 5/1 and § 22/2(2) GüKG, § 4/2(2,3) SubvG, § 6 PBefG; § 38/1(11) GWB, § 306a BGB, § 312k/1 BGB and § 475/1(2) BGB.

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strict formalism and to interpret the law literally (i.e. only by the letter of the law) but to follow the basic content of individual law and the intention of the legislature when writing this exact law. Although the legislator may have expressed itself linguistic incompletely when writing an individual law, that does not mean that there is a green light for contracting parties to exploit that defective expression of the legislator and to avoid the ban that the legislator wanted to impose. And awareness of this problem is already part of its solution.

Defining the problem of the avoidance transaction is not a peripheral area of the civil (and tax) law, but its very heart, which is reflected in distorting the essence of the transaction (i.e. the errors of the will) and abuse of the principle of party autonomy with a goal to circumvent (avoid) the mandatory legal norms. In practice, an increasing number of cases in which persons, crossing (otherwise blurred) boundaries of lawful conduct, are using the (modified and misleading shapes of) transactions in order to achieve the economic benefits for one or both the parties in the transaction and on the other hand deceiving (and causing harm) to the counterparty or a third party.

Although the German theorists and (in most cases) German courts show that there is no longer any place for independent teleological teachings of avoidance of the law *(Gesetzesumgehung)*, which is based on new methods of studying the rules which put in the foreground the internal significance and economic purpose of an individual norm, but nevertherless it is persistently being used in German legislator*'s* attempt to fight agressive ways of avoidance of the law. Avoidance of the law *(Gesetzesumgehung)* plays in the modern German legal system plays an important role in the fight against the deliberate circumvention (avoidance) of implementation of law (practically) in all legal areas.

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УХИЛЕННЯ ВІД ВИКОНАННЯ ЗАКОНУ В ТЕОРІЇ І ПРАКТИЦІ ПРАВА НІМЕЧЧИНИ

Анотація. За останні два десятиліття законодавцями європейських країн (особливо Німеччини) виявлена проблема ухилення від виконання законодавства. З огляду на це було розширено сферу дії законів, спрямованих на недопущення такого ухилення, у багатьох галузях права, зокрема трудового, спадкового, господарського, антимонопольного, податкового, корпоративного та банківського. Однак окреслену проблему так і не вирішено у більшості країн Південної та Східної Європи, а отже, зазначене питання є актуальним і потребує подальшого дослідження.

Так, можна навести ситуацію, за якої конкретна поведінка сторін певної угоди розглядається як правомірна (законна), і при цьому має місце незаконне (необґрунтоване, неналежне) уникнення (тобто ухилення) від виконання положень законодавства у вказаних галузях. Як наслідок, боротьба з протиправною практикою не здійснюється із використанням положень Кримінального кодексу (оскільки в такому випадку не йдеться про незаконні дії), а ведеться із використанням положень, спрямованих на боротьбу з ухиленням від виконання закону (зі зловживанням законом), які здатні запобігти правовим наслідкам так званих удаваних угод *(Umgehungsgeschäfte).*

Ухилення від виконання закону (зловживання законом) *(fraus legis)* визначається як поведінка, не спрямована проти формального змісту закону (букви закону), але порушує його зміст. *Fraus legis* стосується угод, здійснених реально, але у спосіб, що суперечить духу закону. У практичному вимірі зростає кількість справ, у яких суб'єкти, переходячи межі (розмиті) правомірної поведінки, вдаються до використання угод (що мають змінені форми і є такими, які вводять в оману) задля досягнення економічної вигоди для однієї чи обох сторін такої угоди, які спричиняють шкоду іншій стороні або третій особі. Не можна недооцінювати значення проблеми ухилення від виконання закону (а також фіктивних угод) у цивільному (і податковому) праві, що є одним із основних питань права та проявляється у руйнуванні суті угоди (наприклад, помилки в заповіті) й несанкціонованому порушенні принципу автономії сторін та обов'язкових правових норм.

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Мета статті – проаналізувати та систематизувати визначення поняття ухилення від виконання закону *(fraus legis)*, особливо щодо випадків фіктивних дій, задля розроблення цілісного уявлення про те, як розуміти і класифікувати це поняття. Пропонується також авторський погляд на оптимальні методологічні основи для визначення цивільно-правової концепції ухилення від виконання закону. За такою теоретичною точкою відліку – подальший практичний розгляд випадків ухилення від виконання закону в різних галузях права.

Автор прагне підвищити рівень поінформованості про існування проблеми ухилення від виконання закону, щодо якої відповідальні органи державної влади (державна адміністрація, управління, поліція) та судові органи (прокуратура і суд) зобов'язані вживати заходів у разі наявності порушень в окремих правових сферах. Достатньо часто компетентні органи вдаються до поверхневого тлумачення і не вчиняють жодних дій, тому що нібито законом чітко не передбачено відповідного заходу чи санкції. Варто наголосити, що немає потреби у суворому формалізмі й буквальному тлумаченні положень закону (тобто тільки за буквою закону), натомість треба враховувати основний зміст конкретного закону і намір законодавця, згідно з яким такий закон було написано. Хоча існує імовірність нечіткого з лінгвістичної точки зору формулювання певного закону законодавцем, сторони угоди не мають сприймати це як "зелене світло" для використання недоліків формулювання закону з метою уникнення тієї заборони, яку законодавець мав намір ним упровадити. Усвідомлення зазначеної проблеми – уже частина її розв'язання.

Fraus legis – це поняття римського права, що формувалося протягом століть. У часи раннього Середньовіччя концепція ухилення від виконання закону втратила актуальність. Тільки в останні 100–150 років *fraus legis* знову впроваджено спочатку в цивільно-правових кодифікаціях, а згодом – в окремих галузях права. Це свідчить про те, що історія рухається по колу, і певні питання свого часу вже було вирішено.

Оптимальною методологічною основою для визначення поняття "ухилення від виконання закону" буде відповідна інтегративна правова модель, яка ґрунтується на захисті прав та інтересів держави (законодавця), у випадках, коли сторони угоди демонструють інший спосіб дій залежно від обставин (що особливо характерно для галузей податкового, трудового й антимонопольного права). "Ухилення від виконання закону" як поняття цивільного права означає, що сторони угоди порушують дух матеріального та процесуального права, хоча при цьому може здаватися (принаймні сторони угоди це стверджують), що закон не був порушений із точки зору букви закону. Доцільно враховувати матеріальні та процесуальні аспекти окремого закону при визначенні, чи має місце обхід (уникнення) сторонами угоди змісту закону *(sententia)* і наміру законодавця *(voluntas)*.

Потрібно наголосити, що для вирішення проблеми ухилення від виконання закону існує потреба не тільки у подальшому розвитку законодавства, а й у відкритому способі мислення, зокрема, у так званій "професійній мужності" уповноважених посадовців органів державного управління та судових органів.

Ключові слова: *fraus legis; agere in fraudem legis;* ухилення від виконання закону; зловживання законом; угоди "в обхід" закону; "ланцюгові" трудові договори; ухилення від сплати податків.