THE LEGAL POSITION OF THE CONSUMER IN THE PLANNED REFORM OF THE SWISS CONSUMER CREDIT LAW

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On September 14, 1978, the Swiss Federal Council published the draft of a consumer credit law and the related message to Parliament. The planned revision of the law concerns a subject on which the interest of consumer organizations and business is centered. The law governing installment contracts (Article 226, a-m, of the Swiss Federal Code of Obligations) dating from the year 1962 — an attempt to find a compromise between social protection and the freedom of contract — and today applying to one area of consumer credit, namely the installment purchase, has already been


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discussed intensively since it was adopted. The advocates of a comprehensive net of appropriate safeguards on behalf of the weaker party to the contract felt that its protective features did not go far enough. The uncompromising defenders of the freedom of contract, on their part, looked upon it as an intrusion into Swiss private law with its freedom-oriented spirit. The representatives of the legal profession and the legislative branch agreed, however, that the ruling law suffered from structural defects and that it urgently required a revision.

The Federal Council therefore deserves praise and appreciation that it has tackled the difficult task of revising consumer credit legislation. The legal profession welcomes this initiative without exception. However, the result of the Federal Council's efforts, the draft for a consumer credit law, is assessed differently by its various members. Whereas Stauder, for


2 In regard to the initiative on the political level, see in particular: Einzelinitiative Deonna vom 2. Juni 1971, Botschaft 22ff; GIGER, Systematische Darstellung 204ff.

3 GIGER, Systematische Darstellung 194; GIGER, Protection sociale renforcée 45ff.

4 See Einzelinitiative Deonna zum Bundesgesetz über die Abzahlungs- und Vorauszahlungsverträge vom 2. Juni 1971, also Botschaft 23.


6 See the collective volume in the series of publications on the Swiss consumer credit legislation "Entwicklungstendenzen im schweizerischen Konsumkreditrecht"
example, in a recently published article described the advantages of the draft somewhat one-sidedly in view to the establishment of a real net of interlocking protective measures he considers desirable, I consider a more differentiated evaluation to be appropriate.

A. The Economic Importance of Consumer Credit

Consumer credit — supplying goods or money either temporarily or permanently on credit or in return for the obligation to make periodic repayments — forms today a firm and fixed component of our economic order. By anticipating future purchasing power, installment purchases and consumer loan institutions afford broad segments of the population the possibility to obtain goods or services at once without having to pay the full consideration at the same time. Access to the market is thus granted to the financially weak consumer, a market which would remain closed to him if his existing financial situation were to be used as the only criterion.

But consumer credit is also coupled with considerable financial risks. Granting loans or credits and allowing the recipient to repay them in "easy" installments generate the effect of "belittling" or minimizing the extent of the debt, which reduces the resistance borderline of many consumer for the purchase of expensive consumer goods. The possibility of consuming more than the existing purchasing power permits can tempt the borrower to burden himself with new debts over and over again and thereby become dependent on funds which are not his own. Consumer credit promotes the overestimation of one's own financial capabilities and thus spells the danger of a whole chain of indebtedness. In such a case consumer credit is anything but cheap, whatever form it may take.

In view of the insufficient financial resources of the consumer, the lender must cover himself against possible losses by charging the corresponding risk supplements, which serves to increase the credit costs.

It can be seen that the positive aspects of consumer credit compare with substantial negative ones. It is therefore an important task of the

(Zürich 1979) with articles by Giger, Hausler, Holliger, Nordmann, Sager, Schüpp, Schönhle, Stauber und Terzier.

7 SJZ 75 (1979) 289ff.

8 The following comments represent a critical assessment of the draft and not a comprehensive presentation.

9 See the similar definition by Schäfer 9.

10 Giger, Systematische Darstellung 27; similar to Botschaft 4.

11 See Gühr/Merz/Kümmer 805; Giger, Systematische Darstellung 28; Giger, Verstärkter Sozialschutz 6; Giger, Protection sociale renforcée 18; Botschaft 5.

12 The credit costs range as a rule from 12 to 18% p.a.

13 Consumer or personal loan, instalment purchase, lease contract.
legislator to reduce to a minimum the disadvantages threatening the interests of the borrower by incorporating into legislation effective protection and safeguards without constraining the borrower excessively or discarding the social advantages of consumer credit.

B. Critical Analysis of the Present Legal Position

The current law satisfied these requirements only conditionally. On the one hand, the legislation of 1962 subjected, in addition to the advance payment contract, only the installment credit to a set of detailed legal provisions, out of a multitude of situations which can be dangerous for the consumer. An equally important field of consumer goods financing, namely the area of personal loans, was not included under ordinary Federal law. The credit decree of December 20, 1972 and the ordinance regulating personal loan and installment purchasing transactions based thereon were only of a temporary nature and moreover contained many gaps. The Intercantonal Concordate on measures to combat misuses in the interest sector dated October 8, 1957, the analogous ordinance of the Canton of Zurich affecting lenders, loan and credit brokers of December 10, 1942 and the Zurich supplementary law for the Swiss Civil Code deal only with part aspects of consumer loans. However, the principal shortcoming of the installment credit law of 1962 is structural: Articles 226 ff. of the Swiss Federal Code of Obligations suffer mainly from the fact that they are not based on a uniform and all-embracing concept. Instead of regulating the installment contract as a general heading for all installment transactions, they proceed from the installment purchase as prototype of the installment business and broaden the base of legal applicability through

14 For the concretization of the term "social protection" see Giger, Verstärkter Sozialschutz 9; Giger, Protection sociale renforcée 18ff.
15 Treated in Giger, Der Sparkaufkaufvertrag, 1ff; Jeanprêtre, La vente à temporalement et la vente-épargne de lege ferenda, 361 a ff. The savings purchase has lost most of its importance today.
16 AS, 1972, 9068ff.
18 These regulations primarily restricted the maximum length of consumer loans and forbade the granting of a new loan before a previous one was repaid. In BGE 102 II 401 ff the Federal Court has declared null and void a consumer loan agreement which violated this provision and, based on Article 66 of the Federal Code of Obligations, debarred the consumer loan bank involved from reclaiming the amount of the loan (see critical comment Schöenle, 189, 204).
19 SR, 221.121. Members are Bern, Zug, Fribourg, Schaffhausen, Vaud, Valais, Neuchâtel, Geneva.
20 Art. 212 f.
21 Limitation of the credit costs to 18 percent a year, reglamentation of advertising and customer acquisition methods, etc.
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**analogism**: according to Article 226 m, paragraph 1 of the Federal Code of Obligations, the provisions governing installment buying are also applicable to "all legal transactions and combinations thereof, ... insofar as the parties pursue the same economic purposes as with a purchase with subsequent payment in installments, without regard to the legal form that is used by the parties." However, the inclusion of contracts with the same economic purpose suffers from considerable uncertainties: does the installment transaction to be investigated really serve the same economic purpose as an installment purchase? Does it refer to an installment or a purchase character? Furthermore, how should the safeguards designed specifically to fit the installment purchase be transferred to the loan for use and service contracts typical of installment transactions? As a result, judicature was at first heavily influenced by the fixation on the installment purchase and took the risk only hesitantly of subjecting other transactions of an installment nature, such as instruction or correspondence courses, to the provisions of the law on installment purchases through analogism. The material application of installment law began to extend increasingly beyond the installment purchase to other installment transactions only gradually, for example when the author of this article had repeatedly criticized the restraint then ruling in doctrine and practice. The swing of the pendulum from an interpretation of the law which had been anxiously tied to the installment purchase concept to a wider interpretation has led to occasional excesses in recent times, however. One can nevertheless conclude that the analogism provided by the legislator in Article 226 m, paragraph 1 of the Federal Code of Obligations harbors considerable uncertainties and thus also unacceptable risks of lawsuits. The principle

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22 See also Art. 226 i, Federal Code of Obligations, paragraph 1 applying to the case when the seller withdraws from an installment purchase: "If the seller withdraws from the contract after the delivery of the object of the purchase, each party is obligated to return any performance received" (i.e., effect ex tunc). In the case of a contract for the use of the object this is not possible; as a permanent debt relationship it may be terminated only ex nunc (by giving notice). "The seller, moreover, has a claim for an appropriate rental payment and compensation for extraordinary wear and tear of the object of the purchase" (Art. 226 i, paragraph 1, Federal Code of Obligations). This is an inconsistent legal effect. The content of the contract for the use and delivery of the object is the permission to use the object; for this the customer owes the "interest for the permission to use the object" which has been contractually agreed. If he is in default with regard to this interest, the damages incurred by the other party to the contract can certainly not be compensated by stipulating that the latter has a claim for "an appropriate rental payment." The transformation of the purchase price obligation into a rental payment obligation as a result of default applies exclusively to the installment purchase. See also in detail Giger, Leasingvertrag, 30 ff.

23 Burkhardt, 44 ff; Giger, Systematische Darstellung, 104 ff.


25 See also Giger, Systematische Darstellung, 53 ff.
of consumer protection requires an unequivocal law, however, which reduces the risks and costs coupled with a lawsuit to a minimum.

C. Critical Evaluation of the Draft for a New Consumer Credit Law

I. Fundamental Criticism: Inappropriate Concept

The Federal Council draft rests on a careful analysis of the economic factors determining the use of consumer credit and of the solutions possible under the law. The draft further impresses the reader by the clarity of its train of thought and the consistent pursuit of its objectives. But the authors of the draft have significantly overshot the mark of devising legislation restricted to the prevention of misuse. Instead they openly advocate protective legislation in the social sphere which is not only intended to protect the consumer against any misuses of power on the part of the lender but, above and beyond this, restricts the freedom of contract for the benefit of dictating to the consumer what he can do and what he cannot do. Moreover, the draft removes the conceptional and structural shortcomings of prevailing law only in part. It is a positive factor that the planned amendment of the law aims at achieving a uniform solution for the field of consumer credit and is no longer satisfied with merely standardizing the installment purchase. However, the opportunity to draw up a new concept of the installment law which was logically required and served the postulate of security under the law was allowed to slip by. The installment purchase is once more regulated as prototype and the law’s material area of applicability is analogously extended to cover transactions which are similar in nature to installment purchases. It must be admitted that this matter has found a better solution as far as the technical aspects of the law are concerned and the content is more clearly formulated than in the installment law presently applicable. But according to the definition of the concept, in the draft, installment law remains captured within the confining context of purchase contract law and the analogism made necessary by Article 266a of the Consumer Credit Law continues to impair the protection afforded by law.

The reservation which the message expresses in regard to the install-

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25 Treated in detail in Giger, Erweiterter Sozialschutz, 52 ff, or Giger, Protection sociale renforcée, 48 ff.
26 Critically Giger, Freiheit und Zwang im Konsumkreditehen, Neue Zürcher Zeitung, No. 232 (Oct. 6, 1978), 35; Giger, Protection sociale renforcée, 35 ff, 72; Giger, Verstärkter Sozialschutz, 21 ff, 52; see also Schluef, 185 ff.
27 Botschaft, 47.
ment contract construction" presented by me are unfounded. The objection that the body of the installment contract "does not do justice to its own claim insofar as on the one hand it was impossible to deduce regulations valid for the entire area of consumer credit owing to its abstract description and that, on the other hand, it would also include contracts which do not fall under the law governing installment payments" does not hold water. There can be no doubt that the dangers associated with buying on the installment plan and the regulations as well as safeguards necessitated thereby apply to the entire consumer loan sector. By decreeing specific individual standards and safeguards — unless the Special Part of the Federal Law of Obligations already clarified the matter — it would be feasible to duly account for the subdivisions of the installment contract which are characterized by the rendering of specific services or the delivery of personal property.

II. Comments on the Individual Points of the Draft

I. Applicability of the Installment Law Regulations

In connection with the welcome endeavor to effectively prevent transactions aimed at circumventing the regulations, the draft extends — as was just mentioned — the scope of the safeguards in the installment law to transactions which pursue purposes which are similar in nature to installment purchases (Article 226a, paragraph 1 of the Consumer Credit Law). This applies in particular to rental, rental-purchase and leasing contracts to the extent they can be terminated by notice at the earliest after paying 25% of the "cash purchase price" (Article 226a, paragraph 1, sentence 2 of the Consumer Credit Law). Safeguards tailor-made to fit

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"Installment contract as type of contract which can be characterized by the agreed repayment of the credited performance in installments. The subgenus of the installment contract depending on the good or service provided by the seller must be taken into consideration by employing specific regulations. See in detail Giger, Geldleistung, 63 ff; Giger, Systematische Darstellung, 50 ff.

Not correct also Stauder, Rechtsvergleichende Betrachtung, 130 f, note 174.

Botschaft, 47.

For example, comprehensive and clear information on the credit costs which will arise; restrictions on wage assignments, place of jurisdiction and court of arbitration agreements which could endanger the installment purchaser; reasonable arrangements regarding the consequences of default, etc.

Installment purchase, installment delivery for use contract, installment order, etc.

Present law restricts itself in Art. 226 m paragraph 1 of the Federal Code of Obligations to lease-purchase contracts and transactions of a similar nature.

Like claims are already being made in newer doctrine and jurisprudence for the prevailing installment law; that it would also apply to contracts for the delivery and use of objects insofar as they can not be terminated by giving notice.
the installment purchase would, according to the draft, be applicable in principle in the case of the pure, long-term contract of relinquishment for use, although the elements typical of the installment purchase — the transfer of the possession and ownership of a property against the payment of the price in installments — are missing. This is problematical. It is true that many installment contracts are camouflaged as “rental contract” or “lease contract.” However, the long duration of the contract alone will not turn a rental transaction into an installment contract. Applying installment law is particularly inappropriate in those cases where the parties, in an economic point of view, depending on the circumstances of the actual event, merely intend a long-term relinquishment for use but not the transfer of the beneficial ownership in the rented object and the contract obligations are essentially equal to the dispositive lease law. The fact should also be considered that commercial transactions as regulated before one sixth (STOFLR, 143) or one fifth (BGE 105 IV 98 ff.) of the value of the rented or leased object has been paid. Critical Comment GIGER, Verstärkter Sozialschutz, 32 ff; GIGER, Protection sociale renforcée, 47 ff. 36 Art. 226 a paragraph 1, section 2 of the Consumer Credit Law is formulated as a rebuttable assumption. The burden of proof that a concrete long-term rental contract is not an installment contract lies with the lessor. 37 STAUBER in particular fails to recognize this in SJZ 75 (1979), 291 ff. 38 A long-term delivery for use serves the parties better in certain cases than the definitive transfer of ownership. Investment policy or tax considerations could be decisive for this, for example. For the difference between rental payments and installment rates, see GIGER, Systematische Darstellung, 182 ff and N 41 in back. 39 In an economic point of view, the beneficial ownership to the rented or leased object is transferred to the lessor if the relinquishment for use is to last until the “complete depreciation” of the leased object according to the intention of the parties (Botschaft, 1960, 568). See GIGER, Leasingvertrag, 35. 40 Art. 253 ff, Federal Code of Obligations. It is essential, for example, that the risk of the accidental destruction of the rented object remains with the lessor (as owner). See also GIGER, Leasingvertrag, 100 ff. 41 I have already pointed out the fundamental difference between the installment rate and the rental payment at an earlier occasion (see GIGER, Systematische Darstellung 192 ff): the installment contract obligates the parties to exchange performance of objects or services and to credit the value of the object against periodic installments. The lessee, in contrast, wants to be allowed the use of an object specified in the contract limited in time and nature in exchange for periodic payments during a specified period. The individual rental payments have a direct value relationship to the transfer of the object and the permission to use it. The conditions relating to an installment contract are different: the synallagma refers here only to the total performance: the periodic exchange of acts for partial fulfillment of contract is not conditional. This means that the most important criterion for the difference is the fact that in the case of the rental contract — in contrast to the installment contract — there exists a permanent performance equilibrium or equality between a periodically payable rent and the permitted use of an object “exchanged” for this during a specified period.
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under today's law do not lie entirely outside the “protective zone”, although one can hardly speak here of the necessity for social protection.

The limitation of the action autonomy of the individual has the aim, after all, of protecting the “little man” against the lender of the installment credit who has a financial advantage over him and is more familiar with the law — a need which does not exist in respect to transactions between experienced businessmen. Nor does the definition of “commercial transactions” selected by the draft appear satisfactory. Article 226b, paragraph 3 of the Consumer Credit Law is governed by the schematic criterion if the person owing the installments under a purchase contract is self-employed in his regular occupation or is entered as a business firm in the Commercial Register, whereas elsewhere in Swiss law the definition of the term “commercial transactions” depends on the answer to the question if the legal transaction involved has a sales oriented character or not. The law valid today (Article 226m, paragraph 4 of the Federal Code of Obligations) also makes the entry in the Commercial Register the decisive criterion as far as the stipulation of the exception from the provision of this Article is concerned, but exempts also the acquisition of objects “which, according to their nature, are primarily destined for a commercial enter-

42 Applicable in particular is the restriction on the legal position of the seller under the installment law if the buyer (debtor) is in default (Art. 226m, 226q of the Consumer Credit Law).

43 In the case of prevailing law I have proved, however, that the financing leasing contract is not subject to the installment law (see Giger, Leasingvertrag, 32 ff). A different opinion is held, among others, by Hauser, ZJBV, 106 (1970) 228, Stauder, Le contrat de “finance equipment-leasing”, 31 ff, and Stöfer, 154 ff, whose views are criticized in detail by Giger, Leasingvertrag, 55 ff. See also the verdict of the Zurich Commercial Court of June 1, 1977 in SJZ 73 (1977), 320 ff.

44 For definition of the term see Giger, Verstärker Sozialschutz, 9 ff. Giger, Protection sociale renforcée, 18 ff.

45 See Giger, Verstärker Sozialschutz, 21 ff, 52 f. Giger, Protection sociale renforcée, 23 ff, 32 ff, 51 ff, 72, Schaff, 166 ff, 169 ff.

46 See Botschafter, 1976, 546.

47 It is not logical that persons who while they may not be entered as owners of the firm in the Commercial Register, nevertheless, perform the function of a manager (entered as authorized to sign on behalf of the firm) are not also excluded from the protective zone of the installment law regulations. Art. 226b of the Consumer Credit Law has the result that a small vegetable dealer is deprived of the protection of installment law safeguards whereas the General Manager of a large bank enjoys social protection. This is criticized also in Giger, Verstärker Sozialschutz, 44, or Giger, Protection sociale renforcée, 62 ff.

48 The question must be answered in the affirmative within the framework of purchase contract law if the purchase concerned was concluded with the intention of a resale. For details see Giger, or 190 N17.

49 According to Art. 226m, paragraph 4, Federal Code of Obligations, not only the owners of firms, but also the persons with signature authority of a single proprietorship or a commercial company are relieved of the applicability of the provisions under installment law.
prise or for professional purposes” from the applicability of the law provisions governing installment purchases or sales. There can be little doubt that these regulations harbor considerable factors of uncertainty. It is a mistake, however, that Article 226b, paragraph 3 of the Consumer Credit Law refrains from including any related exemptions in regard to the acquisition of producer goods. In other respects it is hardly convincing from the viewpoint of logic and objectives that the far-reaching exclusion of the protective effect of safeguards in the law on installment purchases is not also established in respect to “private” contractual obligations assumed by businessmen. A businessman should, as a rule, be capable of utilizing the knowledge of the market and of the law which he may be presumed to possess for his private purchases as well, or at least of knowing where the necessary information can be obtained. But in principle this simply means the departure from purely objective exclusion criteria. The mere assumption of dexterity in legal matters sufficed. The step to an objectivated rule of exclusion, namely the criterion of an “average measure of experience,” would then no longer be a distant one. Even if with this principle, and even more so with a purely subjective criterion, the applicability to the specific case would be realized more effectively, this progress would also be coupled with a disadvantage the disproportionally larger uncertainty under the law. In my opinion this would be too high a price to pay.

2. Scope of Application of the Consumer Loan Standards

Perhaps most important from the material aspect are the planned standards and safeguards for consumer loans which as to their content largely conform with the installment law model. It is intended to incor-

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50 Art. 226m, paragraph 4, Federal Code of Obligations makes a difference between the “nature” of the objects and the purpose actually pursued by the buyer; namely, if the object is destined for commercial or for professional purposes. See GIGER, Systematische Darstellung 681, STOER, 166 ff.

51 There are doubts if the protection of the installment law should be granted to a student who became tempted to purchase a pinball machine (see BGE 103, II, 114 ff). On the other hand it would be wrong to apply installment law to an obviously commercially-oriented purchase only because the object (in a concrete case furniture for the furnishing of a building complex valued at Sfr. 500,000—see Rep. 107 “1974” 1 ff) was by its “nature” not primarily for a commercial enterprise or primarily for professional purposes (see GIGER, Rep. 107 “1974”, 1 ff).

52 A speculator who as a sideline realizes a building complex would therefore enjoy the protection of installment law if he pays for the needed capital goods, which may cost millions, in installments. This does not sound convincing.

53 As to the other vital problems—the restriction of freedom, the possibility to bring action, etc.—see the related comments by GIGER, HAUSHEER, HOLLIGER, JAGGI, NORDMANN, SAGER, SCHOULF, SCHÖNF, STAUFER and TUCHER in the Publica-
porate them as Articles 318 a-v in the Special Part of the Federal Code of Obligations, which is devoted to loans. This makes sense since the consumer or personal loan forms a subdivision of the loan as such. At the same time it should be pointed out that placing the provisions designed to protect the installment buyer under different Titles of the Federal Code of Obligations breaks up the "unity of the subject" at the cost of transparency. A specific law for the protection of consumers which would combine these standards and safeguards, would be preferable but would also involve certain disadvantages.

The scope of application of the regulations proposed in the draft is determined by the definition of the term "consumer loan". As the message observes quite correctly, there exists today no clearly delimited definition of this legal transaction from its banking, economic or legal aspects. If the enumeration method is applied for the purpose of defining this term — adding all characteristics typical of its nature — the customary consumer loan can be described as a loan contract in which a relatively

ions on the Law of Consumer Protection, vol. 1: Entwicklungstendenzen im Schweizerischen Konsumentenkreditrecht (Zurich, 1979); also Giger, Protection sociale renforcée, 18 ff; Giger, Kommentar zum geplanten Konsumkreditgesetz, 54 ff, 94 ff, 123 ff.

Placement of the regulations governing installment purchases in the purchase contract law on the one hand and the regulations for consumer credit in the loan law on the other.

The difficulties start with the attempt to find a reasonable delimitation of the terms "consumer transactions" and "consumer." Moreover, the danger of legal and technical overlapping and repetitions would be difficult to avoid. Nor should one disregard the danger of an "inflation" of laws. See Giger, Der Sparkaufvertrag, 165, 183; Giger, Systematische Darstellung, 194 ff, esp. 196 ff; Giger, Verstärkter Sozialschutz, 12 ff, esp. 17 ff, 53 ff; Giger, Protection sociale renforcée, 18 ff, 28 ff, 74 ff; also Giger, Kommentar zum geplanten Konsumkreditgesetz, 89 ff, esp. 82.

See Giger, Verstärkter Sozialschutz, 48 ff; Giger, Protection sociale renforcée, 68 ff, also critical comments by Giger, Kommentar zum geplanten Konsumkreditgesetz, 116 ff.

It is extremely difficult to agree on a satisfactory definition; the decision depends on the answer to the question if one aims to find a logically impeccable or only a useful definition of the term. While the author initially tended to prefer a solution which directly thwarted any possible intention to circumvent the law (Giger, Verstärkter Sozialschutz, 48 ff, und Giger, Protection sociale renforcée 68 ff), he tends today for fundamental concerns towards the view that the optimization of the purpose (opportunity principle), i.e., the prevention of evasion attempts, should not be allowed at the expense of logical term definition. Giger, Kommentar zum geplanten Konsumkreditgesetz, 117: "Ist es aber richtig, die Begriffsmarkale der Rückzahlung in Raten und des Konsumzwecks — Merkmale des Konsumkreditgeschäfts, die bei den übrigen Varianten (Abzahlungs- und Sparkaufvertrag) als selbstverständlich gelten — zu vernachlässigen? Sicher werden so Umgehungsversuche erschwert. Ob man das unter der Leitidee der Zweck heilt die Mittel billigen soll oder aber der logischen Folgerichtigkeit des Vorzug geben will, ist ein rechtspolitisches Problem." But attempts at evasion — it should be remembered, can also be covered by Art. 2 of the Swiss Civil Code, although not with the same efficiency.
small loan amount \(59\) is granted for consumption purposes against relatively high credit costs \(60\) without the collateral security customary in the banking business and where the repayment takes place in installments. \(61\) The need for social protection can certainly be more effectively satisfied if the safeguards not only cover the central part, or core of the consumer (personal) loan, but also include transactions which are in the nature of consumer loans but do not display all of the features of the typical consumer loan. This facilitates the fight against attempts at circumvention as compared to defenses according to Article 2 of the Swiss Civil Code. Given this viewpoint it is therefore appropriate that the draft, in Article 318a of the Consumer Credit Law, selects a legal definition of the consumer loan which contains only the two most important of the aforementioned definitions of the term: the relative insignificance of the loan amount and the relatively high credit costs. Waiving the criterion of the absence of "collateral security customary in the banking business" is obvious for the reason that this absence is reflected \(62\) in the high credit costs included in the legal definition. Omitting the characteristics "repayment in installments" and "purposes of consumption" may make attempts at circumvention \(63\) more difficult but destroys the logical unity of the formed definition \(64\) and the structural principle of consumer credit transactions (among them the installment contract and the savings purchase contract). \(65\) A certain relativization of the differences in regard to the establishment of the definition arises from the tendency, which is becoming increasingly noticeable in doctrine and practice, of recognizing the "power of actual practice." Applied to the requirement of "installment payments" this means that the acceptance of the installment criterion by no means requires a formal agreement but that the factual constraint or need to divide the debt into installments is sufficient. \(66\) But the draft clearly goes too far in Article 318a of the proposed

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\(59\) Amounts up to Sfr. 90,000 — at most are customary today.

\(60\) As a rule, interest rates range from 12 to 18 percent annually.

\(61\) Similar Botschaft, 76.

\(62\) Refers to Botschaft, 77. Express mentioning promotes clarity.

\(63\) As stipulated in the Credit Decree, the Federal Department of Finance and Customs, for example, had to form an opinion in regard to so-called "time deposits" which had been granted to the borrower without an express obligation to repay them in installments but with the request to make periodic payments "without obligation and voluntarily" into a savings account opened with the same bank. They were rightfully defined as personal loans in nature. See also Botschaft, 22.

\(64\) See the comments of N 53.

\(65\) Earlier in N 53; also Giger, Kommentar zum geplanten Konsumkreditgesetz, 117.

\(66\) In its decision of March 29, 1976, the Superior Court of the Canton Appenzell AR subjected a cash purchase to the protective regulations of installment law because it was obvious for the parties and especially the seller "that the buyer due to his lack of funds could not pay in cash and is therefore forced to pay the price in installments." (SJZ 73, 1977, 108, No. 59). The legal relevance of the factual case become problematical only where there is no longer any relation to
Consumer Credit Law where it stipulates a lower limit for the “relatively high credit costs.” The Federal Council is authorized to subject those loans to the Consumer Credit Law which are equipped with an interest rate that exceeds the gross rate usually agreed for unsecured loans by 25 percent. This gross rate comes presently to 6%. This implies that loans with an interest rate % of 7.5% or higher must already be treated as consumer or personal loans, although the message itself points out that consumer credit rates amount to between 12 and 18 percent annually according to usual practice. The application of the stringent consumer loan legislation to lendings without a consumer loan character is inappropriate. The same holds true for the generous limitation placed on the loan amount.

Article 381c, paragraph 1 of the Consumer Credit Law specifies that the consumer loan regulations also apply to “credit cards”, among others. This would be quite acceptable if it could be expected without doubt that actual practice would apply this rule — according to the concepts of the message — only to “credit cards in the true sense of the word” but not to “letter of credit cards”. It would be to the benefit of legal safety and therefore also in the interest of the consumers if the text of the draft law would draw a clear distinction on this point.

The regulations governing consumer loans do not, as in the case of installment purchases for commercial transactions, apply in principle to Article 318c, paragraph 2 of the proposed Consumer Credit Law. As far as the legal definition of the exemptions are concerned, the same reservations apply which have already been mentioned in connection with Article 226b, paragraph 3 of the Consumer Credit Law.

the intention of the parties. To what extent the intention may be derived from the circumstances surrounding the negotiations for the contract touches on the basic question of reasonable boundaries in the area of the legal significance of the hypothetical intention of the parties. See also concerning rental purchase contract BGE 101, IV, 98ff; also critical views in Giger, Verstärkter Sozial Schutz, 40ff, and Giger, Protection sociale renforcée, 58ff.

67 Botschaft, 17.
68 I feel it should not exceed Sfr. 30,000—. Already mentioned in Giger, Verstärkter Sozial Schutz, 48ff, or Giger, Protection sociale renforcée, 68ff.
69 However, only if the restriction on the running period (Article 318p of the Consumer Credit Law) criticized later on would be eliminated.
70 Botschaft, 79.
71 “Credit cards in the true sense of the word “are cards where the holder is granted a (usually revolving) credit for an extended... period against compensation or—with principally normal (as a rule one-month) payment terms being set—he is at least granted the opportunity to obtain an extension of the payment term against payment of a relevant interest supplement” (Botschaft, 79). Example: the credit cards issued by the Zurich department stores.
72 Here the holder is obligated to repay at short term the monthly balance which has accrued (example: American Express).
3. Review of the Planned Protective Regulations

The consumer credit field is characterized by a typical imbalance in the strength of the contract partners: borrowers of personal or consumer loans who are usually inexperienced in business and legal matters deal with specialized credit institutions and major lenders. They conduct their business transactions generally only on the basis of General Conditions formulated and printed in advance which the borrower — if he does not wish to place any obstacles in the way of the desired pecuniary or merchandise credit — cannot discuss but merely accept. The danger of the misuse of this difference in negotiating strength is obvious.  

It therefore appears sensible that the draft, in Article 226c or 318d of the Consumer Credit Law, prescribes that the consumer loan contract must be in writing and stipulates certain requirements as to the content and mutual agreement. The consumer is thus assured of comprehensive information about the terms and conditions of the loan and their consequences. The right of the borrower to withdraw from the contract without indemnity within a certain time for review (Article 226g and 318i of the Consumer Credit Law) already contained in the present law on installment payments aims at achieving the same objective.

In the interest of the consumer, the draft restricts the freedom to formulate the content of the contract by prohibiting the inclusion of potentially dangerous clauses, or by specifying that certain conditions must be met before they become valid. The convenant of a retention of title, wage assignments or wage pledges may be incorporated into the contract only by express written agreement (Articles 226c, paragraph 4).

However, in the consumer loan sector unfair business practices are effectively limited by the fact that the large commercial banks predominate in this market segment.

The decisive factor is especially Art. 226c, paragraph 4 or 318d, paragraph 4 of the Consumer Credit Law: the lenders are obligated to list the additional credit cost, or the maximum credit cost, in Swiss francs and annual percentages; moreover, installment transactions and loans repayable in installments as well as loans where the drawable limit is reduced periodically must be related to the average maturity. This finally puts an end to the unfair practice of naming only the amount of the loan, the installment surcharge and the maximum amount which may become payable. The inexperienced consumer was frequently misled because he calculated the interest rate — if he did so at all — as a rule not degressively to the average due date but purely linearly (i.e., without taking into account the successive repayments).

According to the draft of the Law, the time for thinking over the acceptance of the loan amounts to 7 days (according to present installment purchase law it is 5 days, see Art. 226c of the Federal Code of Obligations). The right of withdrawal is newly formulated as a condition subsequent.

It can be questioned, however, if this does not go beyond the aim of containing specific dangers associated with the installment crediting. After all, the inducement of being able to repay in installments is effective only until the con-
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11; 226f, paragraph 1; 318d, paragraph 1, section 10; 318h, paragraph 1 of the Consumer Credit Law). Other clauses often disadvantageous for the installment borrower — such as waivers of offset, implementation in the event of defenses raised in assignments, arbitration or place of jurisdiction clauses should be generally null and void. Of central importance for the installment contract is the requirement to make a downpay-

tract is signed. If the installment buyer is subsequently confronted with the demands of the installment lender, such as agreeing to a retention of title, he is not more and not less in need of protection than the party to any other contract without installment features.

17 Article 226f of the Consumer Credit Law gives the buyer the "peremptory right" to "offset his claims arising from the installment purchase against his debts to the seller." In other words, he cannot waive his right in advance, as stipulated in Art. 126 of the Federal Code of Obligations. Privileging the consumer credit borrower in this manner undoubtedly protects him more effectively against disadvantages (Botschaft, 62) but promotes, on the other hand, the already existing tendency towards the deterioration of paying habits. The person unwilling to pay without reasons can for a long time frustrate the enforcement of a legitimate claim by raising unjustified, even fictitious counterclaims. See also GIGER, Kommentar zum geplanten Konsumkreditgesetzes.

78 The new provisional of the Federal Council draft (Art. 226f) declares the right of the consumer credit borrower to assert pleas and objections in the case of assignments to be "peremptory." This means that he cannot waive this right in advance, in contrast to Art. 169 of the Federal Code of Obligations. This is meant to eliminate the dangers of excluding pleas and objections. The barring of the waiver for objections becomes important primarily in the area of customer financing. Similar protective regulations can be found in the newer foreign drafts or decrees on the subject of consumer credit law (see Botschaft, 62). This conforms with the principle that one party should not be able to worsen the contractual position of the other party by unilateral action. See also GIGER, Kommentar zum geplanten Konsumkreditgesetz, 71f.

79 The ban on a waiver declared in advance of the ordinary jurisdiction (court at place of residence and government jurisdiction) according to Art. 226r of the Consumer Credit Law privileges the consumer credit borrower. But the preference shown for the borrower becomes problematical if he obviously misuses this protective safeguard. A considerable deterioration in payment habits and ethics has been noted more recently, also by the debt execution and bankruptcy authorities. It therefore becomes necessary to review this matter. The nonpayment of debt by borrowers who are unwilling to pay in principle must be prevented by all means. It is a fair and justified demand which, in the final analysis, is in the interest of the consumer acting in good faith. Furthermore, the road via the court of arbitration does not always prove to be the less favorable one. A somewhat more speedy adjustment of conflicts by courts of arbitration is to the advantage of the consumer. The negative experience made with unsuitable arbitration procedures should not be taken as a guide for fundamental considerations. See GIGER, Kommentar zum geplanten Konsumkreditgesetz, 79f.

80 See Art. 226f, 226m, 226r, 318r, 318s, 318t, 318v of the Consumer Credit Law.

81 Here and in regard to the other privileges of the consumer credit borrower the question arises if the restriction of special protective regulations to specific consumer categories does not infringe upon the principle of equal treatment under the law which also determines legal practice. See GIGER, Kommentar zum geplanten Konsumkreditgesetz, 80.
ment modelled on current law (226h, Consumer Credit Law) as well as the restrictions planned to be imposed on the duration of consumer loans as well (Article 226i and 318p of the Consumer Credit Loan). These regulations will undoubtedly keep the consumer from rashly concluding consumer credit contracts which place an excessive burden on his financial capability. On the other hand, the regulations and safeguards will lead to an unjustified restriction of his eligibility to obtain loans and thereby to a certain extent dictate his behavior in a manner which is not desirable from a legal viewpoint. While the prevailing law still exhibits a certain flexibility in that Article 226d, paragraph 3 of the Federal Code of Obligations declares agreements for respite and the related extensions of the contract's duration to be admissible if they are made “because the economic situation of the buyer has substantially deteriorated since the conclusion of the contract”, Articles 226i, paragraph 3 and 318 p, paragraph 3 of the Consumer Credit Law testify to uncompromising rigidity: the installment creditor loses the claim to that part of the remaining purchase price or the loan debt “which upon the expiration of the maximum term of the contract has not been paid in cash”. This truly unusual regulation produces the result that the particularly tardy debtor is released of his payment obligation — a legalized encouragement of lax payment ethics. Whereas today the parties are at liberty to take payment difficulties of the buyer under installment plans into account by means of agreements on a moratorium or an appropriate extension in the duration of the contract, the draft holds that only the court will be authorized to grant such payment relief. This means that the borrower struggling with payment difficulties will be forced to appear in court where he must disclose his financial circumstances.

This manifests the trend, which is to be rejected in the interest of the autonomy of the individual, of allowing justice to act not merely as the organ of jurisprudence, but rather to employ it for the corrective restructuring of legal relationships, which is also coupled with unnecessary expenses. Article 226i, paragraph 3 or 318p, paragraph 3 of the Consumer Credit Law forces the creditor of installment loans who does not wish to forego his claim to proceed rigorously against the debtor even before the term of the contract has expired. Not even the immediate initiation

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82 Art. 318p of the Consumer Credit Law would have disastrous effects especially for the credit card business: in the case of loans operated like current accounts, part of the admissible maximum running period would in most instances pass unused. Only short repayment periods would be available for amounts granted towards the end of the loan’s maturity. The system employed today by the Zurich department stores, for example, a system which is very popular with its customers, namely to allow the buyers to determine the amount of the monthly payment themselves in consideration of the available amount, would then come to end.

83 Critical comments also in ESCHMANN, 198ff.

84 GIGER, ZBJV, 105 (1969), 509ff.

85 The draft fails to mention if the installment buyer or seller has to pay the court expenses.
of debt enforcement proceedings after the expiry of the maximum duration of the contract would enable the creditor to defend his rights.\textsuperscript{85} A clearly absurd situation arises in the case of installment transactions or personal loan contracts whose agreed duration coincides with the maximum term stipulated by law. The debtor who does pay the last installment on time is released of his payment obligation, while the creditor is unable to do anything about it.\textsuperscript{87,88}

The draft of the law makes it impossible moreover to obtain “second loans”. The draft says that “no enforceable claim for repayment and credit costs arises from a personal loan contract concluded while the borrower or his or her spouse have not fully repaid a consumer loan obtained earlier”. Although this regulation may put an effective stop to a chain of indebtedness, the question arises if the recipient of an installment loan who has always paid on time but has not yet repaid the final installments of a loan should be barred from the possibility of taking up a second loan in the event of a sudden financial predicament or similar emergency. Too little consideration is also given to the financial situation of those families in which both husband and wife earn money.


The draft of the Consumer Credit Law penalizes infringements of the

\textsuperscript{85} According to the text of Art. 226, paragraph 3 or 318, paragraph 2 of the Consumer Credit Law, the seller under an installment purchase (the creditor) will lose his claim even if he has initiated execution procedures in time during the life of the contract but if the execution proceedings did not prove successful—for example due to delaying tactics of the buyer (borrower)— prior to the expiry of the legally prescribed maximum duration of the installment contract: the timely payment in cash is impossible in this case! Art. 226, paragraph 3 and 318, paragraph 3 of the Consumer Credit Law were also criticized by Statutar, SJZ, 75 (1979), 295, comment 51.

\textsuperscript{87} The maximum legal duration of the contract ends even before the seller in an installment purchase can notice that the buyer is entering into default. See Giger, Freiheit und Zwang im Konsumkreditrecht, Neue Zürcher Zeitung No. 212 (Oct. 6, 1978), 35.

\textsuperscript{88} In the message (p. 59) Articles 226, paragraph 3 and 318, paragraph 3 of the Consumer Credit Law—without reference to the just mentioned undesirable effects—are substantiated as follows: the present ruling of Art. 226, paragraph 3 of the Federal Code of Obligations had not proved effective “because the buyer hardly ever invokes the nullity of inadmissible respite agreements stipulated for his protection and instead—even in the presence of interest conditions bordering on usury—looked upon them as the welcome accommodation of the creditor. This means that the editors of the Law are not satisfied with strengthening the position” of the consumer in respect of the seller but aim at actually controlling the behavior of the consumer. This demonstrates a tendency towards acting as a kind of “guardian” of the consumer dictating his actions, which does not correspond with the modern viewpoint of state authority, which operates on the basis of a mature reasonable citizen.
law and attempts to evade its provisions. This undoubtedly offers certain advantages: the implementation and enforcement of social protection designed strictly along the lines of private law depends on the initiative of the installment loan borrowers, who frequently shy away for various reasons from engaging in a legal battle or lawsuit with the mighty opponent. Nevertheless, the planned regulations are not without danger: the tendency to move forward the boundary between civil law and criminal law offenses could lead to unwelcome side effects (such as denouncements, especially in business competition). Owing to the fact that the interest of borrowers and lenders to evade the protective regulations and safeguards of consumer credit legislation run parallel at times, it can be expected that a considerable number of offenses will remain unreported and will not be prosecuted. But if the penalties are not strictly enforced, the respect for law and order will be lowered accordingly. For this reason one cannot threaten any reprehensible behavior with penal law consequences. A creditable penal law must restrict itself to the safeguards of the "ethical minimum" without which society would be unable to function.

III. Conclusion

Even those who take a close interest in the protection of the consumer feel uncomfortable about the very extensive encroachment of the Federal Council draft into the Swiss legal system dominated by the concept of personal autonomy. Some of the planned protective regulations violate the principle of proportionality. Inroads into the freedom of contract are justified only if a real need for social protection exists, in other respects they should be satisfied with the necessary. The draft, on the other hand, is not only tailored to provide protection for the "little man", but also grants privileges to the financially irresponsible consumer. This leads to an unjustified impairment of the credit eligibility of borrowers who are

89 See also Giger, Kommentar zum geplanten Konsumkreditgesetz, 146ff. Schluess (p. 182), welcomes the planned changes in principle.

90 This was already pointed out by Giger, Neue Zurich Zeitung No. 232 (Oct. 6, 1978), 33; also Giger, Verstaerkter Sozialschutz, 50ff; Giger, Protection social renforcee, 71; Giger, Kommentar zum geplanten Konsumkreditgesetz, 140ff.

91 See the analysis of the term "Social Protection" by Giger, Verstaerkter Sozialschutz, 9ff; Giger, Protection sociale renforcee, 18ff. Indirect references also in Schluess, 169ff. It is strange to find under this aspect that the relevant literature in the article by Staeub in SJZ, 75 (1979), 299ff, esp. 301ff, which deals only with "press information," has obviously overlooked.

92 Rejection of interfering regulations with a "guardianship" nature: see Giger, Verstaerkter Sozialschutz, 52; Giger, Protection sociale renforcee, 72. On the same subject see also Schluess, 182ff, esp. 183: "Korrektoren sind dann erforderlich, wenn aus ausserrechtlichen Grundon personale oder funktionale Schutzbekraftigkeitslagen entstehen."
both willing and able to pay their debts. One may ask furthermore if it is right to regulate consumer credit so strictly whereas other, equally risky long-term relationships (guarantees, insurance contracts and others) must do without equivalent protection. More appropriate and fairer, if legislative measures are to be advocated at all, would be the creation of an effective consumer protection law. One could without hesitation support the more effectual strengthening of the legal position occupied by the consumer (the right to comprehensive information, protection against the abuse of power, etc.) but not the dictated reduction of his sovereignty. An excess of protective measures could easily prove a boomerang for the interests of the consumer.

93 In the affirmative for responsible social protection Gear, Verstärker Sozialschutz. 53; Gear, Protection sociale renforcée, 74f.

94 See also Schilke, 186: "Richtig verstandenes Sozialrecht will Abhängigkeiten beseitigen, um die Privatautonomie funktionsfähig zu erhalten; nicht aber darf es diese durch verwaltungsähnliche Strukturen verdrängen."