

CONSUMER CREDIT IN SWISS LAW

By Bernd STAUDER

Professor at the Faculty of Law, University of Geneva

Introduction

Swiss consumer credit legislation is of recent date. A first law of 1962¹ which is still in force applies only to sales credit, i.e. installment sales and the modalities of financing them. It is about to be superseded by a consumer credit law embodying a more general approach which was submitted to the two chambers of parliament in 1978² and is still under study.

The 1962 legislator intended "primarily to enhance the special protection of the consumer by shielding the purchaser from sharp practices when concluding the contract, to make sure that both parties benefitted from economically fair clauses and, in addition, to protect the purchaser from an excessive use of the freedom of contract".³ The project of revision of the 1962 law is likewise based on this objective of affording "social protection" to the economically, intellectually and psychologically weaker party; its aim is to "improve, strengthen and extend the social protection in matters of consumer credit".⁴

Less than two years after the 1962 law on installment sales came into force in January, 1963, demands were made for a revision.⁵ Work on a revision began in parliament in 1971,⁶ and the debates will enter into a

¹ Federal act of 23rd March, 1962, concerning instalment and prepaid sales, added to the Code of Obligations as Art. 226 a-228, with the Message of the Federal Council (government) of 26th January, 1960 I 553 et seq.

² Consumer Credit bill of 12th June, 1978, with Message of the Federal Council, FF 1978 II 481 et seq.

³ Message FF 1960 I 553.

⁴ Message FF 1978 II 482.

⁵ GIGER, "Formulargestaltung und Umgehungsgeschäfte beim Mietkaufvertrag", SJZ 1963, 193 et seq.; also "Anwendungs—und Umgehungs—probleme der neuen Bestimmungen über den Abzahlungs—und Vorauszahlungsvertrag", SJZ 1964, 317 et seq., 333 et seq.

⁶ Private Bill of National Counselor DEONNA of 2nd June, 1971 (Stenographic Bulletin of the National Council 1971. no. 10951). As to the prior history of the revision, see Message FF 1978 II 503 et seq.

decisive phase in 1984. The time intervals — very short for the need for a reform of a law to become apparent and very long to accomplish a revision — seem to me to be characteristic of the difficulties one encounters when formulating special consumer protection legislation.

The past legislative approach dealing with only a part of the problem, i.e. sales credit and ways of financing it by third parties, has proven a failure. The law was circumvented on a very large scale both legally and illegally.⁷ After the act of 1962 entered into force the regulated types of consumer credit lost ground steadily while those escaping regulation flourished greatly: within 15 years the volume of small loans increased tenfold.⁸ Even so the debt load carried by consumers in Switzerland has not yet reached catastrophic levels compared with that in other countries. At the end of 1982 — these are the most recent available figures — the total amount of small loans (and only of these to the exclusion of other forms of consumer credit), was 4 billion Swiss francs which is equivalent to a debt of about sFr. 730 per head of population. However, according to reports of certain social institutions the statistical averages mask individual situation of very high and dramatic over-indebtedness.⁹

In order to fully understand the impact of the current legislative project it is necessary to refer briefly to the content of the present act and in particular to its gaps and weaknesses.

A. *The Installment Sales Act of 23rd March, 1962*¹⁰

Installment sales and the various ways of financing them had expanded greatly in the 1950s. High-powered publicity encouraged consumers to enjoy immediately the possession of a desired article and to pay for it later in "easy" monthly installments. Many consumers ceased to save prior to purchase and bought on credit instead; future purchasing power was thereby jeopardised. At the same time, in view of unequal status of the parties, "the freedom of contract did not have the same value for the average consumer as it had for his contract partner. The latter is expe-

⁷ Report of the Commission of experts for the revision of instalment sales credit, June 1974.

⁸ Cf. the figures in Message FF 1978 II 500 et seq.

⁹ Study by Caritas Switzerland of 25 th August, 1981.

¹⁰ See GIGER, "Systematische Darstellung des Abzahlungsrechts", Zurich 1972; STOFER, "Kommentar zum Schweizerischen Bundesgesetz über den Abzahlungs- und Vorauszahlungsvertrag", 2nd ed., Basel-Stuttgart 1972; STAUDER (1), "La vente à tempérament et son financement", in: *Recueil des travaux suisses présentés au IXe Congrès international de droit comparé*, Basel 1976, p. 81 et seq.; also (2) "La protection du consommateur en cas d'acquisition de biens contre paiement ultérieur de la rémunération", in: PETITPIERRE/STAUDER, "La protection du consommateur en droit privé suisse", Travaux de l'Association Henri Capitant, vol. XXIV, Paris, 1975, p. 221 et seq.

rienced in business; he is in a position to practically dictate the terms and conditions of the contract".¹¹

The act set out only to remedy this situation considered to be fraught with dangers for the consumer. There was no question of prohibiting installment sales which can have their utility in certain circumstances. But equilibrium had to be reestablished between the supplier and the consumer with regard to such transactions.

The devices employed in the 1962 act to ensure the social protection of the consumer are part of the traditional arsenal of measures found in consumer protection legislations.

I. The scope of the act

The 1962 act deals above all with traditional installments sales¹² and assimilates to them "all acts or combinations of acts by means of which he parties pursue the same economic objectives as with installment sales regardless of the legal forms employed".¹³ This general clauses lets the act apply to certain forms of transfer for use such as hire-purchase, the leasing of consumer goods and also, as the act stresses expressly, the financing of such operations by the banks.¹⁴ In contrast, small loans, i.e. the cash credit not connected to an installment sale, escaped all legal regulation at the federal level.¹⁵ Thus the act only affected some of the various types of consumer credit.

II. The substantive law

Within this limited scope that act intends to protect the consumer above all at the time of concluding the contract, but also during the phase of execution. There are specific rules counteracting the consumer's propensity of assuming excessive debt loads too easily. In what follows the principal substantive rules that deviate considerably from the classic principle of freedom of contract are briefly summarised.¹⁶

¹¹ Message FF 1978 II 513.

¹² "In an instalment sale the seller undertakes to transfer to the buyer a movable thing prior to payment of the purchase price, and the purchaser undertakes to pay the purchase price in instalments." (Art. 226 a para. 1 CO).

¹³ Art. 226 m para. 1 CO.

¹⁴ For an overview of court decisions see JANPRÊTRE, "L'article 226 m CO. Le champ d'application des dispositions sur la vente par acomptes: état de la jurisprudence", SJZ 1978, 269 et seq.

¹⁵ Although the Federal Council had proposed to extend the act to apply also to small loans (FF 1960 I 559 et seq.). There exist partial cantonal rules, as the "Concordat intercantonal régissant les abus en matière d'intérêt conventionnel", of 8th october, 1957; "Verordnung über die Darleiher, Darlehens- und Kreditvermittler", of 10th December, 1942, (Canton, Zurich).

¹⁶ For a detailed discussion see STAUDER (2) (note 10), p. 233 et seq.

I. *Conclusion of the contract*

By means of adequate information the consumer must be put in a position to be fully aware of the terms and conditions of the contract and of the price so as to be able to estimate his financial ability to meet his repayment commitments.

The precontractual phase, even though it is an important element in the formation of the consumer's decisions making, has been the object of regulation to only a very limited extent. Advertising still only falls under the general law of unfair competition.¹⁷

By contrast the phase of conclusion of the contract properly speaking has attracted the particular attention of the legislator: he has formalised it and has, at least in theory, breached the obligatory force of contract.

Not only are installment sales contracts — and assimilated contracts — valid only if they are in writing¹⁸ but the act even, and more particularly, intervenes with respect to the contract. It lays down the minimum of information to be supplied concerning above all the cost of the purchase, the consumer's commitments by way of periodic payments, and the securities to be furnished (for example, liens on property, assignment of salary etc.).¹⁹ It also prohibits purely and simply certain contractual terms contrary to the consumer's interests such as, for instance, those waiving the right of his natural forum and his right of off-set against the seller's claims.²⁰

It also grants the consumer a right of cancellation of the contract for a period of five days regardless of whether the contract was concluded at the supplier's place of business or elsewhere.²¹

Thus the tendency of these rules is to ensure for the consumer at least his freedom to contract or not contract even though he may not have been able to participate in determining the complete content of the contract.

2. *The indebtedness*

The legislator considers insufficient the information provided for consumers with respect to the cost of credit. The current practice of long term contracts with consequently modest monthly payments diminishes considerably the value of such information.²²

¹⁷ However, Art. 13 lit. h LCD concerns exclusively the publicity for installment and equivalent sales.

¹⁸ Art. 226 a para. 2, 1st sentence CO.

¹⁹ Art. 226 a para. 2, 2nd sentence CO.

²⁰ Art. 226 1; 226 f CO.

²¹ Art. 226 c CO; for a detailed discussion see STAUDER (1) (note 10), p. 91 et seq., and, more generally, STAUDER, "Pacta sunt servanda et le droit de repentir des consommateurs", SJ 1982, 481 et seq.

²² GUHL/MERZ/KUMMER, "Das Schweizerische Obligationenrecht", 7th ed., Zurich 1980, p. 311.

For that reason the act requires the consumer, first of all, to make a down payment, currently 30% of the purchase price, no later than on delivery, and subsequently to pay off the balance within a fixed maximum period which to-day is 24 months.²³ The combination of a prior effort to save and repayment within a relatively short period of time, i.e. by relatively high monthly payments, may have a certain deterrent effect against assuming debts rashly and without due consideration.²⁴

3. *Execution of the contract*

Prior to 1962 it was common practice to include in installment sales contracts a clause according to which the entire balance became payable immediately if the purchaser fell behind with his payments by one monthly installment: hence the legislator has established a special régime for the conditions and the effects of the consumer's default which takes the place of the general rules of the law of obligations: cancellation of the contract by the seller is made more difficult.²⁵ In addition the modalities of liquidating the contract subsequent to cancellation are restricted to the turn of the goods tendered, compensation for their use, and recovery of the sums paid, to the exclusion of any other claims of the seller.²⁶

III. *Evaluation*

At first glance the act of 1962 appears to establish a régime favouring the consumer/installment buyer, and that in spite of certain gaps which could be pointed out.²⁷ However, it must be admitted that the law has rarely been enforced and that certain rules have simply remained dead letter.

There are two main reasons for this:²⁸

(1) The scope of the act was too limited since it was restricted to sales credit and ways of financing it. The spectacular success of loan credit (i.e. credit not connected to a purchase) subsequent to the promulgation of the act is largely due to the desire of the "professionals" (i.e. the consumers' partners to the contract) to handle their consumer credit business in a manner not regulated by the law. The development of Swiss practice

²³ Art. 226 d para. 1 CO dans Ordonnance of the Federal Council of 23rd April, 1975, concerning the down payment and the maximum duration of the contract in matters of instalment sales.

²⁴ Message, 1978 II 491.

²⁵ Art. 226 h CO.

²⁶ Art. 226 i CO; see STAUDER (I) (note 10), p. 94 et seq.

²⁷ Such as the lack of an obligation to indicate the effective annual rate of interest.

²⁸ See in this respect the Report of the Commission of experts (note 7) and Message FF 1978 II 482.

shows clearly that the different forms of consumer credit are easily interchangeable since the objective, i.e. to supply immediately usable purchasing power in exchange for future forced savings in the shape of installments, can be attained by several different legal means.

(2) Where mandatory rules had been violated almost the only sanction was the classic one of the civil law, i.e. invalidity of the contract. But this sanction has hardly ever been applied. Hire-purchase transactions, simple rentals, leasing contracts for consumer goods, although often subject to the act as "acts by means of which the parties pursue the same economic objectives as with an installment sale" are nevertheless regularly executed like completely valid transactions despite being invalid under the act.²⁹

Apart from the fact that the consumer is generally not aware of his rights there is a specific reason which explains this legislative failure and which is related to the "social protection" intent of the law: the consumer wishing to buy on the spot feels that his immediate interests are being hurt by the legal obligation to make a down payment and by the limitation by law of the length of time the contract is allowed to run. Neither do these rules favour the seller's wish to sell his goods under the best possible conditions.³⁰ "In this manner there arises a sort of understanding between the contracting parties, an understanding which no doubt flows from a common purpose even though it may not be openly expressed and may more often than not exist only in the subconscious mind. It seeks to attain the common objective in spite of the divergence of interests, at the limit of the law or even in violation of it". "Because of this kind of complicity even mandatory rules remain practically ineffective".³¹

B. *The draft of the consumer credit law of 12th June, 1978*³²

The proposed consumer credit law may be analysed following four guide lines:

²⁹ Report of the Commission of experts (note 7): "In fact these rules are not followed. The form laid down is not observed. By a strict interpretation of the law such contracts would be void. But in reality such contracts are made by the hundreds and thousands as though they were valid. The law has remained dead letter".

³⁰ Regarding this *de facto* complicity of the grantor of the credit and the consumer, see HAUSHEER, "Der Entwurf zu einem neuen Konsumkreditgesetz aus gesetzespolitischer Sicht", in: *Entwicklungstendenzen im schweizerischen Konsumkreditrecht*, Schriftenreihe zum Konsumentenschutzrecht, vol. 1, Zurich 1979, p. 95.

³¹ Message FF 1978 II 513.

³² Message FF 1978 II 482 et seq.; see especially the contributions in: "Entwicklungstendenzen in schweizerischen Konsumentenkreditrecht", Schriftenreihe zum Konsumentenschutzrecht, vol. 1, Zurich 1979; GIGER, "Kommentar zum geplanten Konsumkreditgesetz", Schriftenreihe zum Konsumentenschutzrecht, vol. 2, Zurich 1980; STAUDER, "Grundfragen einer Reform des Konsumentenkreditrechts", SJZ 1979, 289 et seq.; also "Die geplante Neuordnung des Konsumentenkreditrechts in der Schweiz", *Journal of Consumer Policy* 1979, 281 et seq.

(1) The current act's objective of social protection is maintained while improving, strengthening and extending such protection.

(2) Consumer credit is an economic phenomenon: Its regulation must not be restricted to a narrow field but must address it in all its manifestations.

(3) Substantive rules to protect the consumer are essential from the time when the advertising has its effect up to the final fulfillment of the contract in order to guarantee the consumer a certain measure of freedom to contract.

(4) Sanctions must be adapted to the specific character of a law seeking to provide social protection for the consumer.

*I. The objective*³³

The act should remain within the ambit of civil law. The government should not be able to use it to influence market conditions. The only objective of the act is the improvement of the position of the consumer who wishes to avail himself of a consumer credit facility. All things considered he should be in the same position as he would be if he could negotiate the contract on even terms with the lender.

*II. The scope*³⁴

The draft tends to include in its scope all the forms of credit in connection with which typically a need to consumer protection is likely to appear. It is with good reason that future purchasing power is used to justify — disregarding all the known or imaginable legal constructions — the intervention of the legislator.³⁵ As for its legislative technique, the draft does not define the concept of consumer credit. It tries to accomplish its global approach to the credit phenomenon by a "dual concept", i.e. by regulating sales credit as well as loan credit.³⁶

The scope of the draft is essentially the same as that of the current act.³⁷ The installment sale, prototype of this form of credit, is regulated in detail. Assimilated to it are "acts by which similar economic objective may

³³ Message FF 1978 II 527.

³⁴ Detailed critical analysis of the draft in STAUDER, "Rechtsvergleichende Betrachtung zum Anwendungsbereich einer gesetzlichen Regelung des Konsumentenkreditrechts", in: *Entwicklungstendenzen...* (note 32), p. 99 et seq.

³⁵ Message FF 1978 II 488.

³⁶ Message FF 1978 II 564; by revising Art. 226 a-228 CO (instalment sales and related transactions) and by inserting a new section "Small loans" (Art. 318 a-318 v CO) immediately following the rules for loans, in the CO. This legislative concept means that the idea of a special, separate act outside the CO (as formulated by DEONNA, note 6) has been abandoned in favour of the principle of unity of the civil law (Message FF 1978 II 528).

³⁷ Art. 226 CO of the project.

be attained,"³⁸ that is, mainly transfers for use which have habitually served as ways to elude the rules of the present act.³⁹ The government can also make statutory orders to bring under the act services (package holidays, correspondence courses, repairs) to be rendered on credit.⁴⁰

Most importantly, the draft innovates by regulating loan credit which has been "free" of all legal restraints until now.⁴¹ This all close an important gap in the protection of the consumer. Loan credit, called "small loans" (*petit crédit*), is defined as "a contract by which the grantor of the credit undertakes to hand over to the borrower a sum of money or to hold it at his disposal, and the borrower undertakes to repay the amount withdrawn together with interest at a rate exceeding a certain minimum rate"⁴² to be fixed by the government.

Thus it is the relatively high cost of the loan which has been used as the criterion for fixing the scope⁴³ and neither the usual modalities of repayment, i.e. by installments⁴⁴ nor the furnishing of securities usual in dealing with banks.

This approach has been chosen in order to avoid having the new act circumvented by others types of credit such as overdrafts, since whatever the modalities of repayments, the dangers stalking consumers in matters of consumers credit are the same.⁴⁵

In concrete terms it follows from this definition of the small loan that bank loans fall under the act whatever might be the manner of repayment, be it by installments, on a due date, or by retocking the account. This formula also permits the inclusion of credit cards issued by specialized organizations or by the big stores at least if they go beyond their primary function of serving as a means of payment but are used as a way of obtaining credit.⁴⁶ It should be noted that the draft grants protection only to the consumer whereas business and industrial loans will continue to be governed by the general terms and conditions of the banks.⁴⁷

³⁸ Art. 226 a para. 1 CO of the project.

³⁹ Message FF 1978 II 491 et seq.; 532 et seq.; STAUDER (note 34), p. 132 et seq.

⁴⁰ Art. 226 a para. 3 CO of the project.

⁴¹ Subject to cantonal rules, references note 15.

⁴² Art. 318 a para. 1 CO of the project.

⁴³ Detailed critics of this criterion STAUDER (note 34), p. 135 et seq.

⁴⁴ But so GIGER, in continuation of his "Abzahlungsvertragstheorie", first developed in: "Geldleistung als vertragstypenbestimmender Faktor", in: Festgabe Karl Oftinger, Zurich 1969, p. 63 et seq., and, most recently, in: "Ratenkredit als legislatorisches Problem. Ein Alternativentwurf", Schriftenreihe zum Konsumentenschutzrecht, vol. 9, Zurich 1982; contra, clearly, Message FF 1978 II 530 et seq.

⁴⁵ Message FF 1978 II 562.

⁴⁶ Art. 318 c para. 1 CO of the project; Message FF 1982 II 564 et seq.

⁴⁷ A partial exception applies to the finance equipment leasing where the rules concerning payment delays are applied (Art. 226 b para. 3 CO of the project). See the critics of STAUDER (note 34), p. 143 et seq.

III. *The substantive law*

The substantive rules of protection are largely identical with those of the current act but are broadened to include loan credit. As far as possible the legislator tends to formulate rules applying to all types of consumer credit or at least to formulate equivalent ones so as to avoid the spilling over of one kind of consumer credit into another.

I. *Conclusion of the contract*⁴⁸

The legislator has once again paid special attention to the phase of conclusion of the contract. The techniques employed by the current act (formalized contracts, compulsory declarations in the contract document, prohibition of certain unfair or dangerous contract terms, right of cancellation) have again been adopted and have to a certain extent been clarified and extended.

Thus the contract formula must include compulsory declarations "in an easily read form",⁴⁹ hence comprehensible and in the logical order laid down by the act; it must show the annual percentage rate of interest calculated on the basis of the average duration of the contract. An indication of the latter is not required under the current act. Since despite the availability of all this information the consumer will normally not have an occasion to read the contract until after he has signed it, the right of cancellation is maintained and has even been extended to a period of one week so as to make sure that the matter can be discussed "en famille" at the week-end.⁵⁰ Note that these measures apply—and this is new—to all types of consumer credit that will fall under the act.

2. *The indebtedness*

The present rules tending to counteract the danger of excessive debt loads have been maintained (for the installment credit, the compulsory down payment and the limitation of the duration of the contract.⁵¹ A maximum duration is also fixed for the loan credit, and it should be even shorter than that of a sale credit since a barrier corresponding to the down

⁴⁸ In detail STAUDER (note 32), SJZ 1979, 294 et seq.; Message FF 1978 II 536 et seq.; 570 et seq.

⁴⁹ Art. 226 c para 1; 318 d para 1 CO of the project, as completed by the National Council.

⁵⁰ Art. 226 g; 381 i CO of the project.

⁵¹ Art. 226 h; 226 i CO of the project.

payment would not be imaginable for a loan credit.⁵² This parallelism is necessary to make sure that certain kinds of consumer credit are not supplanted by others.⁵³ But the draft goes even further:

The current rules do not restrain the consumer from assuming an excessive debt load by obtaining multiple and pyramided loans. Despite the information contained in the compulsory declarations included in the contract the consumer could either obtain a loan from a different bank or could "consolidate" his debts by obtaining a further loan from his bank to pay the previous one. Experience shows that frequently private charities or public bodies have had to intervene to salvage almost hopeless situations caused by such multiple and pyramid loans.⁵⁴

The proposals of the draft to remedy this situations constitute the "corner stone" and are an acid test of the credibility of a social protection legislation.⁵⁵

The government project is clear on this point: prohibition of a second loan⁵⁶ as long a prior small loan has not been repaid entirely. The first chamber (the Conseil National) has in some way "liberalised" this rule: "no-one may be a debtor under two small loan contracts at a time", and "a married couple living in a common household is considered to be a single debtor".⁵⁷ But—and here is where the liberalisation is tempered—the second loan must not be used to liquidate the balance of a prior small loan.⁵⁸

To make sure that this rule is observed the banks must check with the central credit control service⁵⁹ which exists already on a private and voluntary basis.^{60,61}

For the time being it would be difficult to predict what will happen in parliament to these rules intended to protect the consumer to some extent

⁵² Art. 318 p CO of the project; Message FF 1978 II 582 et seq.

⁵³ However, the National Council has fixed a uniform maximum duration for all consumer credit contracts which will have an unfavourable effect on instalment sales.

⁵⁴ Study by Caritas Switzerland of 25 th August, 1981.

⁵⁵ Message FF 1978 II 515 et seq.; 577 et seq.

⁵⁶ Art. 318 m CO of the project.

⁵⁷ Art. 318 l bis CO (version of the National Council, decision of 27th January, 1982).

⁵⁸ Art. 318 m CO (version of the National Council, decision of 27 January 1982).

⁵⁹ Art. 318 v bis; 318 l bis para. 2 CO (version of the National Council, decision of 27 January, 1982).

⁶⁰ Centrale d'information pour le crédit (ZEK) (Central Credit Information Office).

⁶¹ Problems of the protection of privacy arising from the compulsory disclosure of personal data relating to the consumer will be dealt with by a more general act—still in preparation—on the protection of privacy in connection with computerised recording of information (Message 1978 II 479 and Message of the Federal Council concerning the revision of the Swiss Civil Code [protection of privacy] of 5th May, 1982, p. 17).

from his own carelessness in financial matters.⁶² The Conseil National has already weakened them compared with the government draft. The more conservative second chamber (the Conseil des Etats) may restrict this aspect of the social protection of the consumer even further.

3. *Execution of the contract*⁶³

Here the current rules are maintained⁶⁴ an extended, *mutatis mutandis*, to the loan credit: further conditions must be satisfied before the grantor of credit can cancel the contract and demand repayment of the balance.⁶⁵ The consumer who "finds himself in difficulties as a result of circumstances which could not be foreseen at the time of conclusion of the contract" has the right, after a breakdown of negotiations with the bank with respect to a new and revised payment plan, to appeal to the court which will be empowered to establish a new payment schedule if it appears that the borrower will be willing and able to meet his obligation. The discretionary power of the court is however limited: it cannot, extend the loan period by more than 12 months.⁶⁶

IV. *The sanctions*

The consumer credit act is to be a part of the civil law. Nevertheless, as a result of unfavourable experiences with the 1962 installment sales act, the legislator deviates substantially from the régime of sanctions contained in the latter.⁶⁷ Four remarks may be made:

(1) The classic sanction of invalidity of any clause violating a mandatory rule only applies in case of a very serious violation (disregard of the rule requiring the contract to be in writing, for instance).⁶⁸ Furthermore,

⁶² Hence the vehement critical comments by the banks (SAGER, "Reform des Konsumkreditrechts aus der Sicht der Banken", in: *Entwicklungstendenzen...* [note 32], p. 271 et seq., more particularly, p. 290 et seq.) and by GIGER, "Verstärkter Sozialschutz als Leitbild des Gesetzgebers im neuen Konsumkreditrecht", in: *Entwicklungstendenzen* (note 32), p. 3 et seq. who wants to limit—for ideological reasons—all legislative intervention strictly to combating manifestly unfair practices.

⁶³ In detail SCHÖNLE, "Konsumentenschutz bei nicht ordnungsgemässer Abwicklung der Konsumkreditverträge", in: *Entwicklungstendenzen...* (note 32), p. 187 et seq.

⁶⁴ Art. 226 n, 226 o, 226 p, 226 q CO of the project.

⁶⁵ Art. 318 u CO of the project.

⁶⁶ Art. 318 p CO (version of the National Council, decision of 27th January, 1982). The government draft only provided for the establishment of a new schedule of payments by the judge (see Message 1978 II 543 et seq.; and 585), in order to prevent turning the rule laying down the maximum duration of consumer credit contracts.

⁶⁷ In this respect see HAUSHEER (note 30), p. 94 et seq.

⁶⁸ Art. 226 e; 318 f CO of the project.

this sanction which often works to the consumer's disadvantage, has been replaced by a more graduated régime of sanctions.

(2) The legislator has thus considered it important to formulate rules tending by means of a "preventive effect" to make suppliers and lenders observe the law: ⁶⁹ either the effects of invalidity of the contract are modified, or the contract is maintained in force and must be executed. But the seller and the lender — who are in a position to watch the law is observed but have failed to do so — face the loss of a part of their claims or of all of them, or they will suffer other kinds of monetary loss. For instance:

(a) If an installment sales contract is void, the seller can only demand the restitution of the article tendered but has no claim for compensation for the use of the article by the consumer. Moreover he must refund the amounts already paid with interest at 12% p.a. ⁷⁰

(b) The seller who delivers the goods before receiving the down payment forfeits his claim to it; he therefore runs the risk of losing 30% of the purchase price. ⁷¹

(c) If the small loan contract has not been made in writing or if certain compulsory declarations are lacking, the contract is void. The consumer will repay the amount he has received by installments but he will owe interest at only 5% p.a. ⁷² This is equivalent to executing the contract as though it were valid but with a lower rate of interest.

(d) A bank which grants a second loan and knows or ought to know that the purpose of the loan is to repay a prior small loan forfeits all its claims to reimbursement and payment of interest. The legal liability of the consumer is changed by dint of the law to an "obligatio naturalis". ⁷³

Thus the sanctions all contain an important penalty element. The legislator — and this must be stressed once again — relies on the preventive effect of these rules. In their own interest the seller and the lender had better observed the law.

(3) But "the main weakness of a system of social protection rooted entirely in the civil law ("droit privé") lies in the fact that it depends on the individual consumer to whose initiative it is left to seek redress from the civil law judge". ⁷⁴ But since in the area of consumer credit the social dimension is decisive there exists an overriding public interest to see justice

⁶⁹ HAUSHEER (note 30), p. 95 et seq.

⁷⁰ Art. 226 e para. 1 in fine CO (version of the National Council, decision of 27th January, 1982). The government project proposed only 10%.

⁷¹ Art. 226 d para. 3 CO. Art. 226 h para. 3 CO of the project is identical to this rule which is in force since 1963.

⁷² Art. 318 g CO (version of the National Council, decision of 27th January, 1982, which applies the general legal rate of interest of 5%). The government draft did not provide for an obligation to pay any interest.

⁷³ Art. 318 m CO of the project.

⁷⁴ Message FF 1978 II 591.

done and legislation effectively enforced. This is what justifies considering to be criminal offences any failures to observe certain rules of the draft.⁷⁵

"The public interest here is concerned with the protection of the freedom of decision of the weaker contracting party and of the consumer as a person".⁷⁶

By incorporating criminal offences in the draft⁷⁷ the government wanted on the one hand to avoid the need for excessively cumbersome administrative controls, and on the other hand to supplement and back up civil law sanctions counting primarily on the preventive effect of criminal sanctions. The first chamber has however struck out all criminal sanctions, holding that civil law sanctions accompanied by a penalty element would suffice.^{78,79}

(4) Lastly, consumer associations will have standing to bring suit against sellers and lenders employing advertising methods that are at variance with the unfair competition law when canvassing for consumer credit transactions.⁸⁰

CONCLUSIONS

The draft consumer credit act may be considered a modern attempt to impose an effective legal order on a multi-faceted economic phenomenon. In its main aspects it agrees with the recommendations of the OECD.⁸¹ It demonstrates clearly the difficulties of a legislation for the social protection of consumers. Strengthening the consumers' position during the phase preceding the signing of the contract is still in fair agreement with the liberal model of the Swiss Code of Obligations. The consumer shall be able to arrive at a wellconsidered decision on the basis of ample information. But by laying down certain requirements for the content of the contract and by outlawing certain "dangerous" clauses the legislator also exercises a direct influence on the contract itself. Such "compensatory" or "levelling"

⁷⁵ Message FF 1978 II 590.

⁷⁶ Message FF 1978 II 590; HAUSHEER (note 30), p. 95 et seq.; STAUDER (note 34), SJZ 1979, 297 et seq.

⁷⁷ Art. 332 bis to septies of the Criminal Code revision project.

⁷⁸ Proposed in the Report of the Commission of experts (note 7) for small loans; see Message FF 1978 II 590.

⁷⁹ With that it is practically certain that the act will not include criminal law sanctions.

⁸⁰ Art. 2 para. 4 LCD project. For details see TERCIER, "Die Verbandsklage der Konsumentenorganisationen im Entwurf zum neuen Konsumkreditgesetz", in: Entwicklungstendenzen... (note 32), p. 215 et seq. The right of consumer organisations to seek redress through the courts has been constitutionally guaranteed in Art. 31 sexies para. 2 of the Swiss federal constitution since the 14th June, 1981. See STAUDER, "Consumer protection in the Swiss Federal Constitution", BEUC Legal News 2, 1982, 7 et seq.

⁸¹ UECD, "Protection des consommateurs dans le domaine du crédit à la consommation", Rapport du Comité de la Politique à l'égard des Consommateurs, Paris, 1977.

rules would be a "foreign body" in any conventional codification. The same may be said of sanctions embodying a penalty element.

Still — and this question must be asked — could the legislator pass up and opportunity of using these novel mechanisms, could he abandon the search for novel methods when setting out to protect the weaker of the contracting parties?

Once the draft of the consumer credit act is adopted⁸² it may well become the starting point for a more general consumer protection legislation, one which would in many respects differ from the conventional civil law.⁸³ In view of the novelty of its mechanisms and methods one could then talk in Switzerland, too, of a "consumer law".⁸⁴

I am very grateful to Mr. John Perry T. licencié in droit and assistant at the Faculty of Law of Geneva, for the translation of this paper.

ABBREVIATIONS:

CO	Code des Obligations = Swiss Federal Code of Obligations
FF	Feuille fédérale = Federal Sheet
LCD	Loi fédérale sur la concurrence déloyale = Federal Unfair Competition Act
SJ	Semaine Judiciaire (Geneva)
SJZ	Schweizerische Juristen-Zeitung (Zurich)
SBJV	Zeitschrift des Bernischen Juristenvereins (Bern)

⁸² The discussions in the Conseil des Etats (the second chamber) are continuing. As far as the principal innovations proposed by the Federal Council in the draft law are concerned, the legislative outcome remains uncertain.

⁸³ In order to satisfy the constitutional obligation to legislate in the matter (art. 31 sexies para. 1 Federal Constitution), a commission of experts is about to draft a Consumer protection law.

⁸⁴ STAUDER, "*Verbraucherrecht — eine neue Rechtsmaterie?*", ZBJV 1984 (to be published).