Negative Option Marketing

A Discussion Paper

Prepared by
Karen Ellis, Anne Pigeon and Kernaghan Webb
Office of Consumer Affairs, Industry Canada

Many thanks to: Lynda Cassels, Dwight Duthie, Derek Ireland, Pierre Pitre and David Waite for their invaluable assistance.

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Executive Summary

When new cable television services were introduced to consumers through negative option marketing in January 1995, the reaction of Canadians was swift. Although the marketing technique itself was not new - negative option selling has been used successfully by book clubs and similar enterprises for some time - the combination of monopoly power, the high value placed on cable television services, and the perception that consumers were being deprived of choice angered many cable subscribers. The incident also raised serious questions about how negative option marketing will be used in the future, particularly in light of ongoing advances in technology, and the implications that may have for consumers, business, and government.

In general terms, negative option marketing, or NOM, reverses the traditional buyer/seller relationship. Under a NOM scheme, customers are offered new products or services and are required to reject expressly those new offerings to avoid being charged for them. Although it is not legally defined, the term is often applied to situations where some kind of a contractual or similar relationship already exists between the buyer and the seller. This definition differentiates NOM from the conventional marketing of unsolicited goods where customers are sent products "out of the blue." Having said that, we have applied a broad definition of NOM in this analysis because of definitional differences depending on the market situation, province or statute.

Negative option marketing takes many forms, and in some circumstances may benefit consumers as well as industry. Bundling, the technique of packaging a number of goods and/or services and selling them as a whole, can effectively involve NOM when the bundle is changed or the goods unbundled, as happened in the cable situation. In the U.S., use of NOM by cable companies has led to substantial legal action. Contracts which include an automatic renewal clause may also be perceived as using a negative option technique, and may be considered unfair - particularly in a market where the consumer has little choice. In contrast, NOM appears to work well in competitive markets where the rights and obligations of buyer and seller are clearly understood, as in book and video clubs. In the end, the impact NOM has on consumers, and its effectiveness and fairness as a marketing tool, depend largely on the context in which it is used. Market structure, the availability of clear and accurate information to consumers, and consumer choice are all important factors.

At present, the legal context surrounding NOM is complex and not entirely clear. Analysis suggests that both the federal and provincial governments have some authority to legislate in this area and that clear, consistent rules that apply across the country may be desirable. Through their general powers over contractual matters, provinces typically have the lead role. Provisions restricting the marketing of unsolicited goods already exist in the consumer protection legislation of most provinces, and the pre-arranged offering of unsolicited goods (through book clubs, for example) is usually permitted. Recently, there has been a move afoot in at least two jurisdictions to regulate the marketing of unsolicited services as well. On the federal end, Parliament has legislative jurisdiction over regulated sectors including banking, broadcasting, telecommunications and transportation, and provisions pertaining to NOM could conceivably be developed in these areas. The federal trade and commerce power may give Parliament authority to develop broad,

national framework standards in this area.

A private member's bill has been introduced in the House of Commons seeking to amend the Broadcasting Act in order to ban the use of negative option marketing by cable companies. The bill has passed third reading and is now before the Senate.

In the absence of explicit legislative provisions, the common law rules of contract apply (except in Quebec, where the Civil Code operates) . The general rule is that a recipient of unrequested goods or services is not obligated to pay for them unless she or he consented to having the goods or services supplied. Consent may be inferred from the circumstances, and consequently a contract found to be valid between one buyer and seller may not be valid if a different buyer is involved. In addition, existing misleading advertising laws at both the provincial and federal levels may have a limited role to play where the terms and conditions of a negative option arrangement are not clearly presented to consumers.

In light of the jurisdictional overlap, a cooperative federal-provincial approach would appear to offer the greatest potential for developing clear rules and principles governing NOM. This does not necessarily mean new legislation is required. At the federal level, there appears to be sufficient room for controlling negative option practices within existing regulatory regimes. Our research suggests that the greater need is for developing a harmonized, consistent approach and for ensuring that accurate information about NOM is readily accessible to consumers, industry and government. The United States' Federal Trade Commission provides a good model with its consumer fact sheet regarding unordered merchandise.

It is recommended that this paper be tabled at the CMC for review, comments and possible follow-up along with any other documents pertaining to NOM brought forward by the provinces It is also recommended that this paper be circulated to colleagues in federal departments which deal with NOM in some way or other (eg. Canadian Heritage). Regulatory bodies such as the CRTC would likely have an interest in this discussion as well.

The CMC could explore the potential for creating a working group to develop options and a plan of action. The group could conduct further policy analysis on related key issues. Once its work completed, the working group would return to the CMC for approval and implementation of its plan of action Depending on the outcome of that discussion, there may be scope for engaging consumer and industry groups, and briefing the Consumer Policy Working Group at the OECD, when and as appropriate.

1. Introduction

In general terms, negative option marketing reverses the traditional buyer/seller relationship. It r[illegible]s consumers to reject expressly new offerings to avoid being charged for the product or s[illegible]. The issue attracted wide public attention in January 1995 when Canadian consumers reacted swiftly to the introduction of new cable services packages using the negative option approach. Although there has been extensive media coverage of cable controversies in both Canada and the United States, and while half a dozen countries have some form of relevant general legislation to address NOM or unsolicited merchandise, a search of the literature reveals a dearth of research on the subject. The purpose of this paper is to examine the practice of negative option marketing as a generic issue and develop a core analytical piece for informal consideration of the issue by: the Minister, Industry Canada's senior management, other government departments (federal and provincial) including the Consumer Measures Commit tee (CMC) under the Internal Trade Agreement (ITA) which is currently studying the issue, and, ultimately by industry and consumer groups. The first challenge is to define the concept with more precision, differentiating NOM from related practices, and to provide illustrations of how NOM is applied in various sectors.

The analysis that follows is based on a comprehensive review of available literature, legislation, and discussions with departmental experts. The specific objectives of this paper are:

- To explore and define the concept of negative option marketing as fully as possible;
- To document the experience of other jurisdictions (federal/provincial/international) with NOM;
- To identify and analyse the issues surrounding NOM, and,
- To explore possible approaches to the appropriate use of NOM in the market

2. Definition

The terms "negative option marketing", "unsolicited marketing", and "marketing by inertia" are sometimes used interchangeably. Related concepts are bundling, tied selling, automatic renewal contracts, and misleading advertising/deceptive marketing. An attempt is made, in Table 1, to order NOM related practices on a continuum in terms of the potential benefit and detriment to the consumer.

Negative Option Marketing

Although there is no strict definition of the phrase negative option marketing, (also called marketing by inertia and inertia selling), it is usually understood, in the context of this paper, to refer to a practice that requires consumers to expressly reject new offerings; otherwise they are charged for the product or service. Negative option plans describe an arrangement in which the consumer receives goods and services on a regular basis until he or she cancels, and failure to reply constitutes acceptance.

Unsolicited Merchandise

As opposed to negative option marketing, where there exists a previous relationship between the seller and the consumer, the practice of sending unsolicited merchandise is one of sending goods to the consumer "out of the blue". There is no contractual relationship between the two parties; the seller simply hopes that the consumer will keep the item and forward payment. As explained later, there are some jurisdictions that make a distinction between this practice and negative option marketing but most make no mention of NOM.

Bundling

Bundling is a technique used by sellers in the marketplace that consists of packaging goods or services and selling them as a single package. While this constitutes a separate issue from NOM, it is worthy of discussion since changes in bundles, or unbundling are often introduced to consumers by way of NOM.

While bundling can reduce search, information, purchase and negotiation costs, it can also limit consumer choice and therefore its net benefit to the customer can be questioned, particularly under conditions of monopoly or oligopoly, and in regulated industries.

Automatic Contract Renewal (ACR)

ACR is a technique, implemented through a clause in a contract, where a contract, which would otherwise expire, will continue for a specified period of time, unless either party provides notice of objection within that specified period. Similar clauses regarding price increases are also found

in some contracts in which it is agreed that price increases during the life of the contract will take effect as long as those price increases are undertaken in an agreed upon manner, and unless there is notice of objection to that arrangement made by either party in a specified time period, or in a specific way.

ACRs are fairly common in commercial circles and are a type of negative option marketing in the sense that parties to a contract agree that a particular obligation will be imposed on them unless that party does something to signify lack of agreement with the imposition of the new obligation. In circumstances where the seller has significantly more bargaining power than the buyer, ACRs may be considered an unacceptable form of NOM, since the buyer has little or no option but to accept what terms and conditions are imposed by the seller.

3. Legal Environment

The purpose of this section is twofold: to explore the legal environment surrounding NOM and to examine instances in which NOM has been used in Canada in recent years. With regards to the legal analysis, both federal and provincial laws are considered.

Deceptive/Misleading Marketing Legislation

Both federal and provincial governments have legislation prohibiting deceptive marketing practices. At the federal level, the primary provisions are located in the Competition Act. Similar provisions are typically found in provincial consumer or trade practices legislation.

Under section 52 of the Competition Act anyone who promotes a product or business interest through a representation to the public that is false or misleading in any material respect is guilty of an offence punishable by fine or imprisonment. Subsection 52(4) specifically states that the general impression conveyed by a representation--not just the literal meaning--shall be taken into account in determining whether or not the representation is false or misleading.

In relation to NOM, it is conceivable that if a consumer is reasonably led to believe a product or service is forthcoming without additional payment or action on his or her part, then the negative option strategy used by the seller could be considered misleading. For example, billing mail-outs advising a seller's existing customers that a new service will be charged to them unless they take some overt action to reject that service could potentially be construed as misleading, unless the information in the mail-out is reasonably clear and conspicuous. The authors could not locate any cases of NOM practices alleged to be misleading in this way. The Laidlaw case, discussed later in the paper, refers to certain practices concerning contract renewals as possibly misleading.

In summary, it appears that if there is transparent and adequate notice of the additional cost of receiving the services or products in question, misleading advertising provisions will not apply to most NOM situations.

Provincial NOM Legislation

Most provinces have legislative provisions pertaining to NOM practices, although the form and content of these provisions vary considerably. The table below provides a summary of these provisions. Provincial legislation in this area typically deals with unsolicited goods and credit cards. There is considerable variation from one province to another; however, in most cases the provincial laws either prohibit the delivery of unsolicited goods (or the issuing of unsolicited credit cards) or absolve the recipient of any legal obligation with respect to the goods or credit cards. In those provinces where a prohibition approach has been adopted (e.g., Prince Edward Island and Quebec), there are fines provided for violation of the provision. Where the province has promulgated legislation absolving the consumer/recipient of any legal obligation vis-à-vis

unsolicited goods or services (e.g., B.C., Newfoundland), it is up to private parties to bring actions to uphold their rights. In some cases, legisl ation explicitly relieves the recipient of any duty to pay and protects them from legal action should they use, misuse, or damage the goods. Pre-arranged negative option schemes are frequently exempt from these provisions; in four provinces, arrangements such as book clubs are specifically allowed.

All but two provinces currently restrict or prohibit the issuing of credit cards without the express request or acceptance of the card holder. Only Nova Scotia and B.C. mention unsolicited services. These are the only cases where the "negative option" terminology is expressly used. Both jurisdictions allow pre-arranged negative option schemes for the sale of services · some circumstances. The B.C. amendments, proposed following the cable controversy (See Table 2 below), stipulate that consent to receive the services must be explicit and cannot be inferred from use or payment.

Table 2: Current provincial legislation relevant to negative option marketing

Province	Unsolicited Goods	Unsolicited Services	Unsolicited Credit Cards
Alberta	no mention	no mention	prohibits issuing of unsolicited credit cards
British Columbia	no obligation on recipient (unless pre-arranged contract, or written acknowledgement of an intent to accept)	no obligation on recipient (unless prior informed consent) --	no obligation on person named in card (unless written acknowledgement of intent to accept)
Manitoba	no mention	no mention	prohibits issuing of unsolicited credit cards
New Brunswick	no mention	no mention	prohibits issuing of unsolicited credit cards
Newfoundland	no obligation on recipient (unless pre-arranged Contract)	no mention	no obligation on person named in card (unless written acceptance, or use of card)

Nova Scotia	no obligation on recipient (unless pre-arranged contract)	prohibits in certain circumstances	no obligation on person named in card (unless written request or acceptance)
Ontario	no obligation on recipient (unless pre-arranged contract)	no mention	no obligation on person named in card (unless written acceptance or request, or use of card)
Prince Edward Island	prohibits delivery (unless requested by recipient)	no mention	prohibits issuing of unsolicited credit cards
Quebec	prohibits charging for unsolicited goods	no mention	prohibits issuing of unsolicited credit cards
Saskatchewan	no obligation on recipient (unless written acknowledgement of intent to accept)	no mention	no obligation on person named in card (unless written acknowledgement of intent to accept)

As the table demonstrates in summary form, there is considerable variation both in scope and content in provincial NOM legislation. Particularly in light of the prevalence of cross-border negative option marketing practices (be it by mail or telephone), there would appear to be considerable merit in exploring the feasibility of developing a harmonized, coordinated approach across jurisdictions.

Federal Law which Could Be Used to Impose Negative Options Restrictions

As has already been discussed, one area of federal jurisdiction where the issue of negative options arose has been with respect to provision of cable television programming and services. Under section 7 of the Broadcasting Act, the Governor-in-Council may issue directions to further the objectives of broadcasting or regulatory policy. Since the Act stipulates that distribution undertakings should provide efficient delivery of programming at affordable rates, and provide reasonable terms for the carriage, packaging and retailing of these services (s.3), these provisions could be used to set out rules regarding NOM practices in this sector.

In March 1996, a private member's bill (Bill C-216: A Bill to Amend the Broadcasting Act) was introduced in the House of Commons seeking to amend the Broadcasting Act in order to ban the use of negative option marketing by cable companies. The bill has passed third reading and is now before the Senate.

Pursuant to section 67(1) of the Telecommunications Act (SC 1993, c.38), the Commission may make regulations "for carrying out the purposes.....of this Act....". By section 7 of the Act, the objectives are stated to include responding "to the economic and social requirements of users of telecommunications services". Conceivably, regulations pertaining to NOM could be considered as responding to the needs of telecommunications users, although no such regulations have been put in place to date.

In a similar manner, the Governor-in-Council has regulation-making powers under section 410 of the Bank Act (RSC, c. B-1) which could conceivably be used to control or prohibit NOM practices as they apply to the provision of banking services.

Thus, in these regulated sectors, the federal government could establish regulations which restrict or control NOM practices. There would appear to be value in the federal government exploring the feasibility of adopting rules regarding NOM which are harmonized and coordinated with provincial regimes. On the other hand, there may be other policy objectives (e.g., cultural) which might override any desire for national uniformity. It should be noted that no assessment is being made here concerning the wisdom of promulgating such special provisions, as this is not simply a legal question.

Contract Law

In those circumstances where there are no federal or provincial legislative or regulatory provisions specifically applying to a NOM practice, the common law rules of contract appear to apply, except in Quebec where the Civil Code operates. The general rule under common law is that a recipient of unrequested goods or services is not obligated to pay unless she or he consented to having the goods or services supplied. Consent may be inferred in certain circumstances, such as an on-going customer relationship (1). The Quebec Civil Code appears to operate in a similar manner to the common law rules of contract. Under the Quebec Civil Code, no contract exists unless the buyer consents and that consent is given in a "free and enlightened" manner. Again, consent may be implied in some circumstances, such as a prior customer relationship (2).

Discussion / Summary

In this section of the paper the federal and provincial laws which apply or could apply to NOM practices were discussed. It was noted that federal and provincial misleading or deceptive advertising laws could be used to address NOM practices where the seller was not clear as to the buyer's obligations vis-à-vis a negative option marketing venture, and so could objectively be interpreted as having misled or deceived the buyer. Many of the provinces have adopted legislative provisions which restrict or prohibit certain NOM practices, some using a penal model, and others a private law approach. There is considerable variation concerning which goods and services are the subject of restrictions, and how those restrictions operate. In light of the prevalence of cross-border negative option marketing, there may be merit to exploring the feasibility of adopting a more consistent, harmonized, and/or coordinated provincial approach to

negative options.

For certain regulated sectors (most notably banking, telecommunications and broadcasting), the federal government has legislation in place which could be used to authorize or restrict use of negative option marketing practices. In the interests of promoting a consistent, uniform national approach to NOM the federal government could explore the feasibility of better harmonizing and coordinating federal legislation with the provinces.

Where there is neither federal nor provincial legislative or regulatory provisions in place pertaining to NOM, common law contract rules would appear to apply. They stipulate that a recipient of unrequested goods or services is not obligated to pay unless she or he consented to having the goods or services supplied. In Quebec, the Civil Code applies in a similar manner to the common law rules of contract.

The foregoing discussion suggests that there might be considerable value in exploring the feasibility of developing a harmonized, coordinated approach to NOM, particularly in view of the prevalence of cross-jurisdictional negative option marketing practices.

(1) Per Canadian Encyclopaedic Digest, Contracts (Ontario and Western) @117.

(2) Civil Code of Quebec, S.Q. 1991, c. 64, art. 1385 - 1399.

4. Experience in Canada

Cable

In 1994, a CRTC decision added seven new speciality channels to cable services in Canada. That ruling stipulated that existing US based speciality channels could continue to be offered only if paired with a Canadian speciality channel. Cable companies bundled several channels into new packages and then chose to use NOM to bring the packages into consumers' homes. Specifically, some cable companies automatically provided all of their subscribers with a new level of service that exceeded the price of basic service, and then required consumers to reject new services explicitly.

In this instance, the industry used negative option marketing and bundling simultaneously. NOM was used to offer new channels to subscribers, while the old channels were repackaged into different bundles, forcing consumers to pay more to retain the same channel selection. Consumers reacted swiftly in condemning the practice. Media coverage of this case may have distorted the issue by presenting it almost exclusively as a rejection of negative option marketing. Other issues may have contributed to the widespread consumer dissatisfaction

Changes in the bundles of channels, forcing consumers to move to a higher tier of service to retain the same channel selection

- Lack of consultation with customers;
- Lack of choice; cable companies enjoy a monopoly in their market and consumers have no choice but to buy cable service from them;
- Government involvement, cable is a federally regulated industry and consumers may have felt that the government had not adequately defended their interests

The reaction of consumers in this situation surprised the industry. Consumer groups went so far as to ask the federal government to amend the Broadcasting Act to ban the use of NOM in the cable industry, a course of action which was not pursued and, ultimately, not necessary at the time, since the issue was resolved through consumer pressures on cable suppliers. The cable industry claimed that NOM is a cost efficient and consumer friendly way of introducing Canadian television services to the market, and has used this method of marketing successfully since the mid-80s to introduce new services (e.g. TSN, MuchMusic). While recent polls indicate that Canadians approve of government intervention in support of a distinct Canadian presence in the broadcasting system, this recent experience indicates that consumers can react negatively to NOM being used to achieve that objective.

Financial Services

Negative option marketing has the potential to be an important marketing tool in the financial

services sector. Examples include the sending of unsolicited credit cards and changes in account structure made without consumers' consent. The industry is seeking new sources of revenue, offering new services and changing old ones. Ever increasingly powerful computers make it easier and cheaper than in the past for the industry to effect these changes. From a negative perspective, the new technologies could allow industry to profit by slipping new charges and services past unsuspecting customers. However, the use of NOM by responsible service providers operating in competitive markets can enable financial institutions to offer better service more easily and with greater efficiency.

Book, Record and Video Clubs

This is one area where NOM appears to work reasonably well, probably because of competitive market structures, significant consumer choice, and well established marketing practices. In such arrangements, the rights and obligations of both parties are laid out clearly for the consumer before he or she enters into a contract with a given company. A full description of this type of plan follows in the US section; the same basic rules apply in Canada. Another contributing factor to the relative success of NOM as a marketing tool in this sector may be the ease and convenience of this type of transaction for consumers.

Typically, an ad for a book, audio or video club offers merchandise at a very reduced price (eg. five selections for $1.00). If the buyer agrees to the special offer, he/she is also agreeing to buy additional regular priced selections within a prescribed period of time, usually a few years. Under such a plan, the seller periodically sends announcements that describe the current selection and the newest offerings from the seller's inventory. Once the subscriber has received an announcement, he/she can decide whether they wish to receive it or not. If the subscriber wants the selection, he/she simply waits for the seller to send the item; if not, the seller must be notified by a certain date (usually done by returning the announcement card).

Automatic Contract Renewal (Laidlaw Case)

Laidlaw is a Canadian company that deals, among other things, in solid waste collection and disposal services. In 1991, the Director of Investigation and Research (Competition Act) laid charges against the company relating to its acquisition of competitors and its contracting practices for these services on Vancouver Island.

Laidlaw interpreted the customer's payment of a bill, to which a price increase had been added, as an action implying agreement. During the proceedings, an expert witness stated that automatic price rise clauses, often called negative option price clauses, can eliminate costly renegotiation of contracts whenever there is a price increase, and that, in a negotiated contract, when there is more or less equal bargaining power, one can assume that there will be benefits to both sides.

The negative option price clause in the contracts gave Laidlaw the power to adjust prices to monopoly level as long as there were no other suitable competitors in the market. There is no

credible explanation for many of the provisions of these contracts other than to create barriers to entry for would-be competitors by making customer purchase decisions inflexible. It was the view of the Competition Tribunal that the negative option price clauses could lead to monopoly pricing even when competitors were present in the market. That part of the Tribunal's decision pertaining to NOM prohibited the respondent from entering into an agreement which contains automatic renewal provisions and notice of termination requirements that go beyond one payment period. The decision governed future contracts and also forced Laidlaw to amend existing contracts.

Summary Comment

From the Canadian experience, one notices that NOM is often used in industries where there prevails either a monopoly or oligopoly situation. In these instances, consumers have little choice but to accept the practice; information then becomes crucial to avoid bad choices and unnecessary expenses. Book clubs (and related variations) are the notable exception. They operate in a market where there exists several alternative suppliers: record stores, bookstores, mail order catalogues, etc. Their success, even survival, can perhaps be attributed to the transparency of their dealings. Consumers know what is expected of them when they join and if the process does not suit them, they can take their business to any of the alternative sellers that provide the same goods.

Experience In Other Jurisdictions

Negative option marketing and rules to discipline its use have also been issues in other jurisdictions, often involving similar industries and circumstances as in Canada. In the United States, several cases have been brought before the courts involving cable companies (Time Warner, Comcast, TCI/Encore). Companies either unbundled channel packages or introduced new channels using NOM. Most were prosecuted using a provision of the federal Cable Television Consumer Protection Act of 1992 which was amended in 1994 to ban the practice of charging a subscriber for any service that the consumer has not affirmatively asked for by name.

With regards to book clubs, the Federal Trade Commission published, in October 1992, information for consumers about NOM plans for books, records and videos. Under the FTC Practice Regulation - Use of Negative Option Plans by Sellers in Commerce, sellers must clearly and conspicuously provide certain information about their plans in any promotional materials. The seller must tell the buyer:

- how many selections the customer must buy, if any;
- how and when the customer can cancel membership;
- how to notify the seller when the customer does not want the selection,
- when to return the negative option form to cancel shipment of a selection,
- when the customer can get credit for the return of the selection;
- how postage and handling costs are charged;
- how often the customer will receive announcements and forms; and,
- if the seller offers bonus merchandise.

Other jurisdictions such as the European Community, Australia and New Zealand also have legislation curbing the use of negative option marketing and limiting consumers' obligations with regards to unsolicited merchandise.

5. Issues For Possible Government Response

The foregoing discussion of negative option marketing and related issues laid out definitions with some precision and documented experience in Canada and other countries with this practice. Based on that information, an analysis of the issues and public policy implications surrounding NOM follows.

Transparency and Accuracy of Information

In the final analysis information emerges as one of the key issues in matters of NOM. Clear, accurate, comprehensible information, presented in plain language, is required for consumers to make informed decisions and choices and to understand the terms and conditions of contracts, and the past record of sellers.

The extent to which government should be involved in providing information about NOM to consumers, and whether this would vary by sector, is a key policy issue. If legal information and transparency requirements have been met by sellers, are consumers accountable for their own failure to take appropriate action? The claim of ignorance or deception with regard to NOM may not always be defensible, but arguably, there should be safeguards or redress for consumers who legitimately do not understand what they are signing.

Privacy Concerns

NOM has been used in the financial services sector, which in some cases raises the question of using personal financial information for questionable marketing purposes. The issue of how to manage NOM, including privacy implications, in this and other sectors, needs to be addressed through voluntary codes, revisions to the Bank Act, perhaps a framework law on privacy (as proposed by the Canadian Direct Marketers Association), or other means. This is the subject of a separate project in Industry Canada.

Market Power

NOM has worked long and well for book, record, and video clubs, in a competitive market, where a relationship is voluntarily established by the customer and the law and/or marketing practices require that all terms and conditions of the buyer/seller relationship are explicitly laid out and acknowledged up front. NOM can be advantageous to both parties when transparency and tangible benefit to the consumer are evident, e.g. convenience and better value for money, and when the respective administrative burdens or costs to both parties are reduced.

Another potential positive use of NOM involves automatic contract renewal clauses. Under existing contracts, automatic price rise clauses (negative option price clauses) can eliminate costly renegotiation of contracts whenever there is a price increase. Moreover, in a negotiated contract

when there is more or less equal bargaining power, one can assume that there will be benefits to both parties.

Regulated Industries and Canadian Cultural Policy

NOM has been a strong tool for sellers when used in the context of regulated industries, as seen in the Rogers Cable matter. However, NOM can backfire when consumers are taken by surprise and perceive that they are being ignored and disadvantaged; i.e. when accurate, complete and timely information is not provided, and when NOM is combined with other techniques, like bundling, that can limit consumer choice or put them at some other disadvantage. In the eyes of the public, the government or the regulator is often seen as the source of consumer discontent as much as the seller. Government does need to examine its role in influencing and promoting this type of market behaviour in view of users/taxpayers' expectations.

In general, profits or convenience would appear to be the motivation behind negative option marketing and/or bundling; however there may be cases when Canadian cultural policy justifies the practice to create a large enough market to achieve the critical mass to support Canadian content. Arguably, regulation created Canadian music and television production industries that are now world competitive, but whether that success can be attributed exclusively to Canadian content regulations has yet to be determined. The recent cable case demonstrated the potential negative impact of limiting and arbitrating consumer choice. Even when such action is driven by the objective of supporting an important public interest goal, it may defeat its own purpose resulting in consumer resentment and a rejection of the Canadian content that it was intended to promote. Other methods of promoting Canadian cultural products bear exploration.

New Technologies

The potential impact of new technologies on the use and abuse of NOM is a major issue (we noted earlier the case of a bank using credit rating information for marketing purposes; there is clearly potential for abuse in this general direction). In its study of privacy and security issues, the Information Highway Advisory Council notes that the interconnection of networks will increase the amount of information - such as electronic transactions, credit ratings, financial accounts, educational, medical and driving records - that can be assembled and collated into comprehensive profiles of individuals or companies. These records can be sold across borders, resold or reused, or integrated with other databases without consent or remuneration, for purposes unrelated to those for which the data were originally collected. This makes NOM a very appealing marketing tool. The implications for guarding and managing personal information on the information highway as it relates to NOM should be reviewed in the gover nment's general response to electronic privacy issues.

As well, technological advances can make the use of NOM less attractive. New technologies such as Direct-to-Home (DTH) satellite broadcasting will introduce competition into the cable industry, traditionally a monopoly. Competition would be expected to discourage, or at least

discipline, the practice of NOM in the cable industry.

Transborder Concerns

As discussed in section 4, a number of laws, both federal and provincial, oversee the use of NOM. Unfortunately, these tend to vary between jurisdictions; a good case can be made for the harmonization of these rules and thus ensuring a level playing field for both consumers and sellers across jurisdictions.

An appropriate role for the federal government working closely with our provincial, consumer and industry partners might be to set general marketplace rules and conditions for the supply of standard comprehensive information to the consumer when NOM is used by industry, regardless of sector or the extent of competition in the market. Sector specific approaches are less attractive given the trend towards convergence across a number of technologies and industries, e.g. financial services (banks into securities and insurance), and cable and telecommunications companies. Provinces, working with the federal government through the Consumer Measures Committee (CMC), might use it as a venue for negotiating the harmonization and coordination of provincial approaches to the issue. In this regard, the CMC is exploring approaches to enforcement cooperation across the full range of consumer laws.

Industry and consumers want clear, accurate information on transactions involving NOM. Even though the legal and regulatory instruments to compel such action lie generally with the federal government, and more specifically with the provinces, the development and implementation of industry led voluntary codes, standards and best practices may be a viable alternative or a complementary option to traditional government action.

6. Policy Options

The issues and policy implications discussed in the previous section can be captured in three policy options which could be subjected to further analysis, debate and consultation with other federal departments, the provinces through the CMC, and business and consumer groups. The pros and cons of each policy option are provided in the following paragraphs. The options are listed from least to most ambitious.

Maintain the status quo and handle problematic NOM issues on a case by case basis under existing regulatory structures

This would be an information role. The advantage of this approach is that it would minimize government intervention, including development of new regulations, in keeping with regulatory reform objectives. It would also allow competitive forces in the marketplace to resolve these issues wherever possible. Some federal leadership under this option, with respect to consumer information, might be well received. The federal government has responsibility and jurisdiction over certain regulated areas; these include banking, telecommunications, interjurisdictional transportation and broadcasting. As well, the Competition Act is available for cases involving deceptive marketing and market dominance. Moreover, in terms of improving the statutory framework, the federal government could demonstrate leadership by ensuring that legislation governing sectors within its responsibility is harmonized with provincial legislation.

The disadvantage of maintaining a piecemeal approach would be that it may be interpreted as inefficient crisis management rather than a strategic, principles-based approach to an issue that crosses sectoral and jurisdictional boundaries. There is a case to be made for an across-the-board strategy on NOM given that its practice is not always visible and transparent in all sectors, given the unrelenting pace of technological development and its impact on transactions in the marketplace, and in order to level the playing field to some degree given the different market structures within which various industries operate.

Promote a voluntary approach to NOM

This approach could take several forms, the first, being the use of codes of practice established by industry, perhaps with consumer groups, and based on jointly endorsed principles. The benefits of this approach are that it may preclude the creation of new law and regulation, and may allow industry to take a visible leadership role in an initiative that makes good business sense. The failing might be the absence of a mechanism for enforcement.

Another forum would be the establishment of a general set of principles, along the same lines of the framework-based approaches which could be explored by governments through the CMC, or perhaps by industry and consumer groups as a joint project. The principles could set minimum "standards" that could subsequently be tailored to specific sectors as appropriate. However, the

general approach of using principles could be criticized as ineffective and largely unenforceable.

The following could constitute a general set of principles guiding any proposed strategy to deal with negative option marketing:

- promotion of greater transparency of consumer information;
- harmonization/consistency across Canadian jurisdictions;
- lowering of internal trade barriers;
- creation a more level playing field among goods and services; and,
- promotion of the consumer interest in the marketplace.

Another avenue for implementing voluntary methods would be to create a framework- and principles-based approaches to consumer transactions in the marketplace. These would be designed to facilitate harmonization and streamline federal-provincial marketplace rules, to increase certainty, and reduce transaction and compliance costs for all market participants. These approaches could be adopted as voluntary codes or adopted by the CMC to promote voluntary harmonization by member governments.

Establish a new broadly based national legislative framework

A national legislative framework dealing with consumer transactions to set out the marketplace rules and conditions for supplying information to consumers, including comparatibility of information, would be a third option. In much the same way that product labelling must provide standard information on its contents, consumers would have the benefit of similar rules for goods and services that are marketed by use of negative option. The preferred approach might be a general statutory framework, rather than sector specific rules, given the trend towards convergence (e.g. telecommunications companies and cable companies, insurance and banking). The rules should cover goods, services and the use of technology; require plain, comprehensible language and visibility of information and the full explanation of all rights and obligations for seller and buyers, as a minimum. Provincial governments would obviously be responsible for implementing and harmonizing their own specific legislation or codes of conduct as appropriate. The Consumer Measures Committee would be a useful venue for such a future negotiation.

The down side of this alternative is that it introduces new regulation and legislation and could be misconstrued, by some, as a challenge to provincial jurisdiction. A cost-benefit analysis would be required before advancing this as a recommended approach, and at this juncture, the case for a new law of general application does not appear to be compelling.

7. Conclusions/Implications

The evidence to date does not support broader based federal law and/or regulations to ban or seriously circumscribe the use of NOM and related marketing practices. Instead, there is a need for accurate, accessible information and greater understanding on the part of consumers, business and government. The evidence contained in this report suggest that for the most part NOM can work to the benefit of both consumers and producers when:

- there is sufficient competition, consumer choice and information in the marketplace,
- the goods, services, technologies and information needs of consumers are well known, and the marketing practices of,
- suppliers are well established; and/or,
- federal and provincial governments are prepared to exercise their authorities and obligations under current laws and,
- regulations, and to cooperate when cross-border problems arise.

In addition, based on their constitutional responsibilities and proximity to customers, suppliers and markets, provinces are better positioned to address the broad range of contractual and property rights issues raised by NOM.

Accordingly, in light of the foregoing research and analysis, it is suggested that the federal government, in partnership with the provincial governments and our other partners through the Consumer Measures Committee of the ITA, should consider developing a one or more informational guidelines similar to those of the U.S. Federal Trade Commission as listed in section 3.

The CMC could develop similar guidelines keeping in mind the Canadian environment as well as difference across provincial statues and between federal and provincial responsibilities with respect to NOM. Whether these rules take the form of core principles to be endorsed by industry and consumer groups or are simply to be guidelines that could be adopted by each province remains to be determined.

There is also a need to promote greater harmonization in rules and approaches across provinces, to close gaps in the provincial regulatory regimes related to NOM and to provide federal and provincial leadership through the CMC.

8. Next Steps

It is suggested that, at an appropriate time, this paper be tabled at the CMC for review, comments and possible follow-up along with any other documents pertaining to NOM brought forward by the provinces. It is also recommended that this paper be circulated simultaneously to colleagues in federal departments which deal with NOM in some way or other (eg. Canadian Heritage). Regulatory bodies such as the CRTC would likely have an interest in this discussion as well.

The CMC could explore the potential for creating a working group to develop options and a plan of action. The group could conduct further policy analysis on related key issues. Once its work completed, the working group would return to the CMC for approval and implementation of its plan of action.

Depending on the outcome of that discussion, there may be scope for engaging consumer and industry groups, and briefing the Consumer Policy Working Group at the OECD, when and as appropriate.

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