



Silence is consent
Opting out in the Digital Age
RESEARCH REPORT

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Office of Consumer Affairs

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Option consommateurs

MISSION

Option consommateurs is a non-profit organization whose mission is to promote and defend the rights and interests of consumers and ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familiale movement, more specifically, the Montreal ACEF. In 1999, it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

PRINCIPAL ACTIVITIES

Option consommateurs helps consumers experiencing difficulties, by offering them budget consultation and information sessions on budgeting, debt, consumer law and the protection of privacy.

Each year we produce research reports on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. When necessary, we institute class action suits against merchants.

MEMBERSHIP

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs www.option-consommateurs.org

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Summary

Good Food, FabFitFun, Netflix, Spotify ... Increasingly, online companies are changing their business model: they no longer sell products directly, they sell subscriptions to a service that supplies products or provides access to a virtual library. These companies attract customers by procuring their subscription by means of a negative option contract: after profiting from a free trial or discount, consumers are automatically subscribed to the service.

This type of contract has been the target of some criticism, and in this report, we wanted to learn more about it. Does being automatically subscribed following a free trial or discount pose problems for consumers, and if so, what are the consequences for them? Can consumers easily terminate such contracts and how do they go about it? Is the practice of automatically applying a subscription following a free trial period or a discount regulated by the laws of Canada and other jurisdictions? And in such cases, are consumers well protected or could they be better protected?

Our study of the legislation revealed that this particular practice is prohibited in Québec and Manitoba, but is not regulated elsewhere in Canada. In the European Union and the United States, rather than banning the practice, the authorities impose precise disclosure requirements on merchants, some of which we found interesting. These include sending notification of the end of the trial period, providing information on the content of the trial period, giving consumers easy-to-understand instructions on how to cancel, or “opt out” and obtaining clear consent prior to sending them an invoice.

Our analysis of the contracts revealed that automatic subscription to a service often involves significant expense for consumers in the medium term: over \$100 per year. We also found that there was a great lack of uniformity in the contracts we analyzed: they are given various names, but are never called a “contract”; they all contain various clauses and the cancellation clause is incomplete, making it difficult for consumers to understand their options. When it comes to terminating these contracts, we observed that the companies demonstrated little flexibility, often offering only one termination mode. Facts such as these led us to wonder whether consumers who wish to cancel their subscriptions before the end of the trial period would in fact be able to do so.

Finally, we carried out a consultation with fifty Canadian consumers from Québec, Ontario and British Columbia.¹ The majority of these consumers had been automatically subscribed following a free trial period or a discount. They claimed that they were aware that these trial periods were temporary and would be followed by a subscription. They said they did not feel that they had been trapped by this practice and were satisfied with their subscriptions.

¹ It should be noted that the sample is small because, in order to answer the questions, participants had to have already entered into the contract being studied, which only a very small proportion of Canadians had the opportunity to do.

On the other hand, the participants said they did not like providing their payment information prior to receiving a free trial or discount. They would have preferred to give this information only at the end of the trial period. During our consultation, we also found that the participants almost never read the subscription contracts because they found them too long.

This report presents valuable information on the regulation of subscription contracts that come into force automatically following a free trial period or a discount. We found that the consumers we interviewed appreciated having free trial periods and discounts prior to automatic subscription. However, we believe that the procedures employed, particularly with regard to the information provided to consumers, need to be improved. Through lack of attention, some consumers could end up having to spend a large sum of money for a service they do not want. Fortunately, solutions exist and can be implemented.

“The only wrong choice is no choice.”

– Amélie Nothomb

Introduction

The Internet has introduced some novel modes of consumption. Consumers can now get their music, movies or TV series through an online library such as Spotify or Netflix.² And if they want to get the latest beauty products, receive a personalized selection of candy or fresh food for a meal and the recipe to prepare it, they just have to subscribe to an Internet service that will deliver these goods to them regularly by mail.³ If they feel like changing their wardrobe, sunglasses or even their jewelry every month, they can choose to rent these products online rather than buy them.⁴

Increasingly, online companies are changing their business models: instead of a specific product, they now offer a subscription that gives the consumer access to a service that will supply them with goods (e.g. clothing) or give them access to virtual libraries (e.g. music).⁵ This phenomenon, which has been dubbed the Subscription Economy,⁶ is expanding at a remarkable rate. A recent U.S. study reports that the online subscription market has grown by more than 100% a year in the last five years.⁷ And Canada is not immune to the new trend.⁸

² Kyle Hutzler, “The Rise of the Subscription Economy”, *The Huffington Post*, March 10, 2014, online: https://www.huffingtonpost.com/entry/rise-of-the-subscription-economy_b_4548866.html .

³ See these companies: Ipsy: <https://www.ipsy.com>; The Candy Box: <https://en.laboiteabonbons.ca/> and Good Food: <https://www.makegoodfood.ca> .

⁴ See these companies: Chic Marie: <https://chicmarie.com>; Shades Monthly: <https://www.shadesmonthly.com> and GemHaul: <https://gemhaul.com> .

⁵ Michal Lev-Ram, “Welcome to the Subscription Economy,” *Fortune*, June 6, 2014, online: <http://fortune.com/2014/06/06/welcome-to-the-subscription-economy/> .

⁶ This term was popularized by the American company Zuora; see <https://www.zuora.com/> .

⁷ Survey conducted by McKinsey & Company in November 2017; for more information: <https://www.mckinsey.com/industries/high-tech/our-insights/thinking-inside-the-subscription-box-new-research-on-ecommerce-consumers> .

⁸ All the companies we named in the text and in previous notes offer their subscription services in Canada; some of them are Canadian. Netflix, which also employs this business model, had over five million Canadian subscribers in the spring of 2016:

<http://www.nationalpost.com/netflix+lands+over+million+canadian+subscribers+less+than+year+report/11986099/story.html> .

For the companies, the main attraction of this business model seems to be the possibility of obtaining recurring revenue⁹ by getting consumers to subscribe to a more or less long-term contractual relationship. In their bid to attract customers, many companies that offer Internet subscriptions have adopted the negative option contract formula.¹⁰ This type of contract makes it possible to offer consumers access to goods or services for a free trial period or at a discount, and when these expire, they are automatically subscribed at the regular price.¹¹

This practice of automatically subscribing customers following a free trial period or a discount has been the subject of criticism: companies that use it are being accused of taking advantage of consumer inertia.¹² Companies are relying on lack of initiative among consumers to ensure they remain subscribed to the service due to forgetfulness or simply because they fail to make the effort to terminate their contracts. They feel confident they can cancel the subscription at the end of the trial period, but their inertia plays tricks on them. Critics also claim that this type of negative option contract imposes a heavy burden on consumers: they are no longer buying a good in exchange for a single payment; merchants can charge for future transactions without the consumers actually having consented to them.¹³

⁹ Erin Bury, "Need recurring revenue? Think subscription boxes": *Financial Post*, February 3, 2014, online: <http://business.financialpost.com/entrepreneur/fp-startups/need-recurring-revenue-think-subscription-boxes> .

¹⁰ According to the Federal Trade Commission, there are four types of negative option: pre-notification plans, continuity plans, automatic renewals and free trial periods or discounts. These four types of options are called negative because they all have implied consent: if a consumer fails to refuse an offer or cancel a contract, they will have to pay for the goods or services referred to in the offer or contract. For details, see: <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>.

¹¹ In this report, the term "opt-out" will be used in reference to this specific type of negative option.

¹² Consumer Markets Expert Group: *Misleading "free" trials and subscription traps for Consumers in the EU*, Enforcement and European Consumer Centres, 2016, pp. 15-16; Mitja Kovak, Ann-Sophie Vandenberghe, "Regulation of Automatic Renewal Clauses: A Behavioral Law and Economics Approach" (2015) 3 *Journal of Consumer Policy*, p.305; Will Stancil, "A Better Way to Cancel Your Gym Membership (and Avoid Other Hazards of Autopayment)" (2015) 1 *Illinois JLTP*, p. 117.

¹³ Will Stancil, "A Better Way to Cancel Your Gym Membership (and Avoid Other Hazards of Autopayment)" (2015) 1 *Illinois JLTP*, p. 106.

The practice was the subject of an application for a class action suit in the Superior Court of Québec in the summer of 2016.¹⁴ That application accused 25 defendant companies¹⁵ of contravening Section 230c) of Québec’s *Consumer Protection Act*, which forbids merchants to “require that a consumer to whom he has provided services or goods free of charge or at a reduced price for a fixed period send a notice at the end of that period indicating that the consumer does not wish to obtain the services or goods at the regular price.” This class action specifically targeted the negative option practice described above.

Following this class action, we wondered whether automatic subscription contracts that come into effect upon expiry of a free trial period or a discount were truly as undesirable as was claimed, and what the consequences of these contracts are for consumers. We also wondered whether consumers can easily terminate such contracts and how they can inform themselves. Finally, we wanted to find out how this practice is governed by legislation in Canada and other jurisdictions.

Methodology

In attempting to answer these questions, we began by conducting a literature review in order to find out how negative option contracts had originated,¹⁶ to determine the areas in which they are most popular, and to determine the issues they raise.

We then carried out an analysis of the legal framework for this type of contract in every Canadian province and at the federal level in order to identify the laws that govern them and

¹⁴ See in the Québec Superior Court’s Class Action Register, request for authorization of class action *Benabu v. Videotron S.E.N.C. et al.*:

https://services12.justice.gouv.qc.ca/RRC/RRC_Public/Demande/DemandeRecherche.aspx.

¹⁵ The applicant withdrew their complaint against 10 of the 25 defendants, on 17 July 2017 and settlements were reached with five other defendants. See: <http://lpclex.com/settlements/>. Following these settlements, Netflix and Spotify have stopped offering free trial periods to Québec residents.

¹⁶ Initially, the purpose of the literature review was to obtain data on consumers bound to companies by this type of contract in Canada and in other countries. Unfortunately, this data is lacking. The only data that we found came from a survey conducted in the U.S. in 2017 on 5093 U.S. participants. See: <https://www.mckinsey.com/industries/high-tech/our-insights/thinking-inside-the-subscription-box-new-research-on-ecommerce-consumers>.

whether there is a disparity between provinces. We also studied the legislation in the European Union¹⁷ and the U.S.¹⁸ in order to identify different practices.

In addition, we analyzed the contracts of 11 companies that propose contracts to Canadian consumers that automatically come into force upon the expiry of a free trial period or a discount. The aim of the analysis was to determine the types of such contracts that Canadians subscribe to, what contractual information is readily available to them, and how this is presented. In our analysis, we focused on the termination procedure because we wanted to know if all the information on this procedure was easily accessible and if there were any limitations that had to be respected.

We conducted an online consultation with consumers¹⁹ from three Canadian provinces. We wanted to learn about their experiences with automatic subscription contracts and also obtain feedback from them. This results of this consultation will be presented in this report.

Finally, we contacted the merchants whose contracts we studied, to find out why they use automatic subscription and what the benefits are for them. Unfortunately, the vast majority of our requests went unanswered. In fact, only one merchant granted us an interview, which did not yield anything relevant to this research.

1. The context

1.1 The origins of the negative option contract

The negative option contract²⁰ originated in the United States during the 1940s. To be more exact, it was in 1947 that Maxwell Sackheim and Harry Scherman used the negative option

¹⁷ This was the most relevant for the purposes of this research.

¹⁸ We reviewed the federal laws and those of the State of California, this being the only state to have adopted legislation on automatic subscription following a free trial or discount.

¹⁹ We also wanted to conduct interviews with merchants whose contracts we studied, to find out why they use automatic subscription and what the benefits are. Unfortunately, our requests remained unanswered, except for one merchant with whom we conducted a telephone interview. Although he requested his name not be mentioned, what he said enlightened us on some points and advanced our thinking.

²⁰ More commonly known as “negative option marketing.”

model for the first time in their “Book-of-the-Month Club”.²¹ Previously, the club had sent its members a new book every month and paid for the return of unwanted books. The company’s postal costs quickly skyrocketed. Messrs. Sackheim and Scherman then decided to trade the book for a postcard that members could return if they were not interested in receiving the book of the month.²² If the card was not returned before the date the book was sent, the member received it in the mail²³ and had to pay for it.²⁴

1.2 The 80s and 90s

Noting the success of this business model, several companies took it up in the following decades.²⁵ For example, during the second half of the 1980s in the U.S., Bell used the negative option for some of its residential phone contracts. The company systematically made its Rocky Mountain Region subscribers pay for telephone cable maintenance and repair services.²⁶ Another company, Columbia House,²⁷ used this model in the late 1980s and the first half of the 1990s. The company faithfully followed the pattern used by the “Book-of-the-Month Club” to sell music on tapes and CDs and movies on VHS cassettes.

1.3 Model 2.0 or the Internet subscription economy

The term subscription economy was popularized by the American company Zuora.²⁸ In 2016, in an interview with *Forbes*, President and company founder Mr. Tien Tzuo described the subscription economy as a new business model by means of which companies would no longer

²¹ Peter Bowal, “Commentary: Reluctance to Regulate: The Case of Negative Option Marketing” (1999) 36 *American Business Law Journal*, p. 378-379; Larry A. DiMatteo, Anita and Rene Sacasas CAVA, “Marketing and the Law” (1999) 27 *Journal of the Academy of Marketing Science*, p. 385.

²² Peter Bowal, “Commentary: Reluctance to Regulate: The Case of Negative Option Marketing” (1999) 36 *American Business Law Journal*, pp. 378-379; Owen R. Phillips, “Negative Option Contracts and Consumer Switching Costs” (1993) 60.2 *Southern Economic Journal*, p.304.

²³ Peter Bowal, “Commentary: Reluctance to Regulate: The Case of Negative Option Marketing,,” *supra*, note 22, pp. 378-379.

²⁴ This company still exists but has changed to an Internet business model. See:

<https://www.bookofthemoth.com/>.

²⁵ Sophia Wang, “One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation” (2016) 26 *Cornell Journal of Law and Public Policy*, p. 4.

²⁶ O.R. Phillips “Negative Option Contracts and Consumer Switching Costs,” *supra*, note 21, p. 305.

²⁷ A search on Google using the term “Columbia House” allowed us to trace the history of this famous company.

²⁸ Zuora is a California company that sells software allowing companies to sell subscriptions to services or goods See: <https://www.zuora.com/>.

offer a good or service in exchange for a single payment, but would provide continuous access to goods or services in exchange for recurring payments.²⁹ This phenomenon is far from marginal: Netflix is using this model with more than 117 million users worldwide.³⁰

Fifteen percent of respondents to a recent survey of 5093 Americans³¹ (80% of whom shopped online) subscribed to a service that sent them boxes of goods every month. Some observers argue that the subscription economy is beneficial for merchants, as it allows them to get recurring revenues by establishing medium- to-long-term business relationships with their customers.³² In order to establish this relationship, many companies resort to the negative option model: they begin by offering a free trial or discount, and when this expires, those who take no action find themselves subscribed automatically, and for an indefinite period.

²⁹ Kimberley A. Whitler, "How The Subscription Economy Is Disrupting The Traditional Business Model," *Forbes*, January 17, 2016, online: <https://www.forbes.com/sites/kimberlywhitler/2016/01/17/a-new-business-trend-shifting-from-a-service-model-to-a-subscription-based-model/#740fdd104a5f>.

³⁰ <https://media.netflix.com/about-netflix>.

³¹ Survey conducted by McKinsey & Company in November 2017.

See: <http://fortune.com/2014/06/06/welcome-to-the-subscription-economy/>.

³² E. Bury, *supra*, note 9.

2. The legislative framework in Canada

On July 4, 2016, as previously mentioned, an application for authorization for a class action³³ was filed at the Montreal Court House against 25 defendants accused of contravening Section 230c) of the *Consumer Protection Act*,³⁴ which governs subscriptions ensuing from the expiry of a free trial period or a discount.

This experience prompted us to inquire whether there existed similar legislation to the Québec Act in the other Canadian provinces and in Canadian federal legislation. We will begin the presentation of the results of our research by explaining the Québec legislation with regard to automatic subscription following a free trial period or a discount, and we will later study any relevant provisions in the legislation of each of the nine other provinces.³⁵ We will conclude with an overview of the federal legislation.

2.1 Québec

Section 230c) of the *Consumer Protection Act*³⁶ came into force in 2010.³⁷ It was included among a series of legislative amendments that, according to Kathleen Weil,³⁸ were intended:

[...] to ensure adequate consumer protection, particularly against sequential performance contracts for services that are provided at a distance. This term primarily includes cellular and home phones services, pay TV and Internet.³⁹
[TRANSLATION]

³³ For more details, consult the Québec Superior Court Class Action Register, request for authorization of class action *Benabu v. Videotron S.E.N.C. et al.*, case no. 500-06-000798-161 https://services12.justice.gouv.qc.ca/RRC/RRC_Public/Demande/DemandeRecherche.aspx.

³⁴ CQLR c P-40.1.

³⁵ We chose not to include the three Territories, as our search did not turn up any relevant legislation.

³⁶ CQLR c. P-40.1 (hereinafter CPA).

³⁷ Bill No. 60: *An Act to amend the Consumer Protection Act and other legislative provisions* (Assented – December 4, 2009), 1st Sess., 39th Parl. (Qc), s. 35.

³⁸ At the time, Ms. Weil was Minister of Justice of Québec, Attorney General of Québec and Minister responsible for the Office de la protection du consommateur. She held the post from December 18, 2008 to August 10, 2010: <http://www.assnat.qc.ca/en/deputes/weil-kathleen-33/index.html>.

³⁹ Québec National Assembly, *Hansard of the Citizen Relations Commission*, 1st Sess., 39th Parl., October 20, 2009, “Special consultations on *An Act to amend the Consumer Protection Act and other legislative provisions*.” In this quote, we used the term «sequential performance contracts for services that are provided at a distance» since it is the official translation used the CPA.

Paragraph c) of Section 230 is found under Title II⁴⁰ of the CPA (Business Practices) and reads as follows:

230. No merchant, manufacturer or advertiser may, by any means whatsoever:
[...]
c) require that a consumer to whom he has provided services or goods free of charge or at a reduced price for a fixed period send a notice at the end of that period indicating that the consumer does not wish to obtain the services or goods at the regular price.

The effect of this measure is that merchants “can no longer presume that the consumer is willing to continue to benefit from the good or service and to pay”⁴¹ beyond the period in which it had been provided free or at a discount. The CPA considers the method to be an unfair commercial practice that has the effect of “unduly encouraging the consumer to make a purchase.”⁴²

The simple fact of a merchant making such an offer to consumers, even if no agreement is reached, constitutes a violation of the Act.⁴³ In the event of such a violation, the consumer is directly granted recourse under Section 272 of the Act, and may then request, at his option, that his obligations be reduced and that the contract be rescinded or nullified⁴⁴ in addition to claiming punitive damages.⁴⁵

We searched Québec case law for applications of para. c) of Section 230 CPA, but without success. We must therefore wait for the Québec Superior Court to rule in the context of *Benabu v. Videotron S.E.N.C. et al.*⁴⁶ to know the interpretation that the courts will give to this

⁴⁰ Title II of the CPA includes ss. 215-251, which list a series of prohibited practices. “Encadrement des pratiques commerciales,” in *JurisClasseur Québec, Droit de la consommation et de la concurrence*, fasc. 7, Montréal, LexisNexis Canada, para. 2.

⁴¹ Pierre-Claude Lafond, *Law of Consumer Protection: Theory and Practice*, Cowansville, Yvon Blais, 2015, para. 199.

⁴² Émilie Conway, “Encadrement des pratiques commerciales,” in *JurisClasseur Québec, Droit de la consommation et de la concurrence*, fasc. 7, Montréal, LexisNexis Canada, para. 9.

⁴³ S. 217 CPA.

⁴⁴ These are the remedies provided in paragraphs c), d) and f) of s. 272 of the CPA. We have not mentioned the remedies provided in paragraphs a), b) and e) because they are not applicable to situations involving automatic subscription.

⁴⁵ S. 272 para. 2 CPA.

⁴⁶ For more details, consult Québec Superior Court Class Action Register, request for authorization of class action *Benabu v. Videotron S.E.N.C. et al.*, case no. 500-06-000798-161:

https://services12.justice.gouv.qc.ca/RRC/RRC_Public/Demande/DemandeRecherche.aspx.

paragraph. Based on our understanding of the section, however, we believe that a merchant who, on the Internet, invites consumers to subscribe to a service or receive a range of goods free of charge or at a discount for a period of one month or more, and thereafter, continues to provide the service or goods for the “regular” price, contravenes Québec law. It is important to note that even if the merchant with whom the consumer does business is located outside Québec, as is often the case in the context of contracts concluded online, it should be obliged to respect Québec’s consumer legislation.⁴⁷

2.2 Manitoba

In 1988, Manitoba passed a law⁴⁸ whose aim was to “provide protection in consumer-related transactions only.”⁴⁹ In 2010,⁵⁰ a new section (Part XXI) called “negative option marketing” was added to the Act.

The website of Manitoba’s Consumer Protection Office⁵¹ gives examples of negative option marketing practices as defined under Part XXI of Manitoba’s *Consumer Protection Act*, including the following:

“Example 2: A consumer, at the end of a free or introductory trial offer, continues to receive goods or services, and:

[...]

- the supplier debits their credit card or bank account for the goods or services [...]”⁵²

As we will see later, this example is typical of the practice of automatic subscription after a trial period.

Section 174 (1) b) of the Manitoba CPA, which defines negative option marketing, also specifies that it is a “[...] practice in which a supplier [...] b) requires the consumer to pay for goods or services unless the consumer informs the supplier that the consumer does not want them.

⁴⁷ See Art. 3117 of the *Civil Code of Québec*, SQ 1991, c.64 and p.-C. Lafond, *supra*, note 42, para.174.

⁴⁸ *Consumer Protection Act* c C200 (hereinafter CPA Manitoba).

⁴⁹ <http://www.gov.mb.ca/cca/cpo/acts/cpa.html> .

⁵⁰ S.M. 2010, c. 31, s. 5.

⁵¹ http://www.gov.mb.ca/justice/cp/cpo/info/negative_opt.html .

⁵² http://www.gov.mb.ca/justice/cp/cpo/info/negative_opt.html .

So according to the criteria of the Manitoba Act, negative option marketing occurs when a merchant provides free services or goods to a consumer for a specified period, at the end of which the merchant automatically deducts an amount from the consumer's credit card or bank account, unless the latter gives him a notice informing him that he no longer wishes to obtain the services or goods. We can therefore conclude that the Manitoba Act partially regulates the type of practice now before us. In fact, the law seems to apply if the services or goods are provided free for a specified period, but not if they are provided at a discount.

Under Section 175 of the Manitoba CPA, the practice just described is prohibited. Moreover, Section 177 of the same Act provides that consumers who paid for a good or service when the merchant violated the law may request that the amounts paid be refunded. Consumers can make this request within a period of one year from the date of payment, and merchants have 30 days to make the refund from the time they receive the request. Also under Section 177 of the same law, any merchant who engages in the practice of negative option marketing is open to investigation by Manitoba's Consumer Protection Office and may be ordered to pay a fine of up to \$300,000.⁵³

As in Québec, the Manitoba legislature has intervened with regard to negative option marketing, but only in the case of a free trial period. Also, as in Québec, the intervention resulted in the practice being banned. Our research into the case law as well as the Manitoba Consumer Protection Office website did not permit us to determine whether Part XXI of the Manitoba CPA has ever been applied, but we believe it may be applicable in the case of Internet contracts that include automatic subscription following a free trial period.

2.3 Ontario

Like other Canadian provinces, Ontario has adopted a law to protect consumers: the *Consumer Protection Act, 2002*.⁵⁴ Under Part II of this Act, "Consumer Rights and Warranties" is Section 13,

⁵³ See: http://www.gov.mb.ca/cca/cpo/faq_negative_opt.html; "Negative Billing" (2010) 30 *The Lawyers' Weekly*, No. 23.

⁵⁴ S.O. 2002, c. 30, Schedule A (hereinafter the 2002 Act).

subtitled “Unsolicited goods or services: relief from legal obligations.” This section concerns goods or services that were not solicited by the consumer,⁵⁵ as is the case with free samples (see section on EU legislation p.25).

Of particular interest is paragraph 4 of Section 13, which states:

If a consumer is receiving goods or services on an ongoing or periodic basis and there is a material change in such goods or services, the goods or services shall be deemed to be unsolicited from the time of the material change forward unless the supplier is able to establish that the consumer consented to the material change.

The question arises as to whether this paragraph could be applied in the context of negative option marketing, since there is a “material change” when goods or services that are provided free or at a discount must suddenly be paid for at the regular price. A “material change” is defined in Section 20 of the *Regulations*⁵⁶ accompanying the 2002 Act, which states that there is a material change “if it is of such nature or quality that it could reasonably be expected to influence a reasonable person’s decision as to whether to enter into the agreement for the supply of the goods or services.” In the situation just mentioned, one might conclude that there is a material change, since, for example, a customer who receives a service free of charge may not want to continue receiving it if he has to pay the regular price. If he had known this, he could have chosen not to enter into the contract.

There is a problem, however. One of the criteria ensuring the applicability of paragraph 4 of Section 13 of the 2002 Act is that when there is a material change, the consumer must be receiving the goods or services “on a continuous or periodic basis.” When the negative option comes into play, consumers are at the beginning of the contractual relationship with the merchant, and are therefore not receiving the goods or services on a continuous or periodic basis; they have received them only once. It is therefore difficult to conclude that Section 13 could apply in this case.

⁵⁵ Bradley J. Freedman, Rosemary John, “Ontario consumer protection law will soon be in force,” (2004) 23 *The Lawyer Weekly*, No. 48.

⁵⁶ *O. Reg. 17/05 under CPA 2002, c. 30, Sched. A* (hereinafter the Regulation).

A search for an interpretation of Section 13 in doctrine and jurisprudence proved fruitless. We therefore cannot say that Ontario law regulates the practice of automatic subscription following a free trial or discount.

2.4 Alberta

This province also has a law intended to “improve consumer rights and level the playing field in the marketplace”⁵⁷ : the *Consumer Protection Act*.⁵⁸ Part II, Division 3⁵⁹ of this document contains provisions to prohibit negative option marketing in two specific contexts.

The Alberta CPA defines a negative option as a transaction in which a supplier provides services or goods that a merchant provides to a consumer without the latter having requested them and for which the merchant requires the consumer to pay, unless the latter expressly informs the supplier that he does not want them.⁶⁰ As in Ontario, transactions involving services that a consumer is already receiving but to which the merchant has added an improvement without being requested to do so, are also considered a negative option.⁶¹

Once more, we could find no interpretation of the provisions of the Alberta CPA, either in doctrine or in jurisprudence, that leads us to believe that they apply to automatic subscription following a free trial period or discount.

2.5 British Columbia, Newfoundland and Labrador

As in other provinces, British Columbia and Newfoundland and Labrador have their own laws to protect consumers.

⁵⁷ <https://www.alberta.ca/consumer-protection-changes.aspx>.

⁵⁸ RSA 2000, c. C-26.3 (hereinafter Alberta CPA).

⁵⁹ Ss. 20 to 23 of the Alberta CPA.

⁶⁰ S. 20 of Alberta CPA.

⁶¹ S. 20a) of the Alberta CPA.

Part II, Division 3 of British Columbia's *Business Practices and Consumer Protection Act*⁶² contains provisions concerning unsolicited goods or services.⁶³ These provisions are intended to protect consumers who receive a service or a good they have not requested⁶⁴ as well as consumers who already receive a service or goods on an ongoing basis and whose contract has been changed without their having consented to the change.⁶⁵

Part IV of Newfoundland and Labrador's *Consumer Protection and Business Practices Act*⁶⁶ contains⁶⁷ almost identical legislation⁶⁸ to the British Columbia Act with regard to these two situations.

In neither province did we find anything, either in the doctrine or in case law, implying that these provisions are applicable to regulating the practice of automatic subscription following a free trial or discount.

2.6 Saskatchewan, Nova Scotia, New Brunswick and Prince Edward Island

For each of these four provinces, we verified the laws relating to consumer protection, contracts concluded by Internet, and marketing practices.⁶⁹ None of the laws contains provisions that might be applicable to automatic subscription following a free trial or discount.

⁶² SBC 2004 c.3 (hereinafter BPCPA).

⁶³ Ss. 11 to 14 of BPCPA

⁶⁴ S. 11 (1) BPCPA

⁶⁵ S. 13 (2) BPCPA

⁶⁶SNL 2009, c. C-31-1 (hereinafter CpBpa Newfoundland).

⁶⁷ Ss. 18 to 22 of CpBpa Newfoundland.

⁶⁸ Ss. 18 and 20 (1) of CpBpa Newfoundland.

⁶⁹ We went through the following laws: *The Consumer Protection and Business Practices Regulations* C. C-30.2 Reg 1 (Saskatchewan), *Consumer Protection Act*, RSNS 1989, c. 92 (Newfoundland and Labrador) and *The Internet Sales Contract Regulations* RSNS 1989, c. 92 (Nova Scotia) *The Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1 (New Brunswick), *The Consumer Protection Act*, RSPEI 1988, c. C-19 and *The Business Practices Act*, RSPEI 1988, c B-7 (Prince Edward Island).

2.7 Federal laws

At the level of Canadian federal legislation, we went through the *Competition Act*⁷⁰ one of whose purposes is to “provide consumers with competitive prices and product choices.”⁷¹ We found no provisions that could apply to automatic subscription.

We also consulted the *Negative Option Billing Regulations*,⁷² but this applies only to products and services offered by financial institutions.⁷³

2.8 In summary

We found that the laws of provinces other than Québec and Manitoba do not regulate automatic subscriptions following a free trial or discount. Four provinces have no legislation respecting negative option contracts and four other provinces have legislation that targets unsolicited goods and unsolicited changes to contracts. Québec, however, is the only province that prohibits automatic subscription following a free trial period or a trial period at a discount. The Manitoba legislation applies only to automatic subscription following a free trial period. The federal legislation also does not address the type of negative option under consideration.

Hence, automatic subscription is unregulated by the laws of 8 out of 10 provinces. By contrast, Québec and Manitoba have chosen a strict legislative framework that prohibits the practice and provides remedies to consumers for violations of the law. So there is a wide discrepancy between the protections afforded to Canadian consumers.

⁷⁰ RSC 1985, c. C-34 (hereinafter CA)

⁷¹ S. 1.1 CA

⁷² SOR/2012-23 (hereinafter *Negative Option Regulation*).

⁷³ S. 2 of the *Negative Option Regulation*. The term “institution” is defined in s. 1 of the *Negative Option Regulation*.

3. Study of the foreign legislation

In our attempt to discover whether similar legislation exists in Europe and the U.S.,⁷⁴ we first studied the applicable laws in the European Union, and focused on the particular case of England, where we found a relevant legislative initiative. We then turned our attention to U.S. laws, especially recent legislative amendments in California.

3.1 The European Union

A few years ago, various European agencies began to express concern about free trials offered on the Internet as well as the subscriptions that resulted from them.⁷⁵ The phenomenon had become so widespread that the European Commission commissioned a study that compiled the experience of some 24,500 European consumers.⁷⁶ Many of the problems identified resulted from free samples offered online,⁷⁷ which is not the object of our study. On the other hand, of the three business models that were studied there, the one relating to streaming video and music services is most similar to what we have seen so far. We can therefore see whether our model complies with the laws applicable in Europe or if it contravenes them⁷⁸ and whether the EU legislation contains provisions comparable to those of Québec with regard to negative option billing.

⁷⁴ In order to facilitate understanding and not to complicate the text, we have not included the full text of the sections of the laws we cite. However, the reader will find all references to sections of laws in the footnotes.

⁷⁵ See among others Citizens Advice, “Locked in: Consumer issues with subscriptions traps”, UK, 2016, online: [https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Finaldraft-LockedInConsumerIssuesWithSubscriptionTraps%20\(1\).pdf](https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Finaldraft-LockedInConsumerIssuesWithSubscriptionTraps%20(1).pdf) and The European Consumer Centres Network, *Too good to be true? It probably is! Unfair Commercial Practices year Unsolicited Goods*, Sweden, 2013, online: https://forbrukereuropa.no/wpcontent/uploads/2017/02/Too_good_to_be_true_It_probably_is_Unfair_Commercial_Practices_and_Unsolicited_Goods.pdf.

⁷⁶ Consumer Markets Expert Group: *Misleading “free” trials and subscription traps for Consumers in the EU*, Enforcement and European Consumer Centres, 2016, *supra*, Note 12.

⁷⁷ Free samples of various products are made available to consumers online and in exchange, they are asked to provide their payment information in order to cover shipping costs of said samples. Later, consumers find themselves subscribing to delivery services for very expensive products. For more details, see *Little Black Book of Scams*, 2nd edition, published by the Competition Bureau of Canada, pp. 10-11, online: [http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapi/Little-Black-Book-Scams-2-f.pdf/\\$file/Little-Black-Book-Scams-2-f.pdf](http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapi/Little-Black-Book-Scams-2-f.pdf/$file/Little-Black-Book-Scams-2-f.pdf).

⁷⁸ The next part of the report is largely based on the report, *Misleading “free” trials and subscription traps for consumers in the EU*, *supra* note 76.

3.1.1 The European Directives

The European Union was instituted by its member States in order to achieve common objectives.⁷⁹ Toward this end, the EU adopted a “secondary legislation,” which comprises three binding legal instruments: regulations, directives and decisions.⁸⁰

One of the EU's objectives is the protection of consumers.⁸¹ With this aim in view, the European Parliament adopted a number of directives.⁸² A directive can be described as “indirect legislation” that is binding on the Member States of the European Union that obliges them to integrate the rights and obligations it provides into their national legislation⁸³ within a prescribed time limit. The choice of applying sanctions for individual failure to respect the rights and obligations stipulated under the directive is usually left to the discretion of Member States; each is free to impose the sanctions it deems appropriate.⁸⁴ This rule is not absolute, however, and there are some cases in which the sanction for the violation is specified in the Directive and the member States will have no choice but to implement it in their laws.⁸⁵ No one residing on EU territory can directly invoke a directive against another individual in the event of a violation, except when a member State has failed to integrate it within its national laws within the prescribed time.⁸⁶

We chose to study the European Directives because they constitute the legislative standards for the 28 member countries of the European Union. Even though they do not give consumers the right of direct appeal, they impose a set of rules with which merchants must comply in order not to be in violation of the laws of the various member States of the European Union.⁸⁷

⁷⁹ Art. 1 para. 1 of *Article 288 Treaty on the Functioning of the EU*, 2012/C 326/EU (hereinafter TFEU).

⁸⁰ Art. 288 TFEU.

⁸¹ Art. 169 TFEU states that the Union shall promote consumer interests and ensure a high level of protection.

⁸² Elise Poillot, *Droit européen de la consommation et uniformisation du droit des contrats*, Bibliothèque de droit privé, t. 463, Paris, L.G.D.J., 2006, p.37.

⁸³ Robert Schütze, *European Union Law*, Cambridge (UK), Cambridge University Press, 2015, p. 96.

⁸⁴ S. 288 para. 3 TFEU.

⁸⁵ This is the case, for example, with the *Directive concernant les services de paiement dans le marché intérieur* that we will study in this section.

⁸⁶ In this case, an individual may invoke the Directive directly only against a State that has failed to incorporate its provisions within its national law. See, in this regard, R. Schütze, *supra*, note 83, p. 96-97.

⁸⁷ Our study of European legislation is aimed at identifying best practices and verifying whether certain laws are similar to those of Québec. To avoid repetition and in the interests of simplicity, but also because

Within the context of negative option subscription upon the expiry of a free trial period or a discount, we identified the following five directives that could govern this practice:

- *Unfair Contract Terms Directive*⁸⁸
- *Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*⁸⁹
- *Directive on unfair business-to-consumer commercial practices in the internal market*⁹⁰
- *Directive on payment services in the internal market*⁹¹
- *Consumer Rights Directive*⁹²

These directives can be applied at different stages of the contractual process: during the pre-contractual phase, at the start of the trial period, and also when the contract is in force.⁹³

3.1.1.1 Unfair Contract Terms Directive

As stated in the first section (paragraph 1), this Directive covers contracts between a merchant and a consumer. Article 3 states that in order to be regarded as unfair, a clause must fulfil two criteria: it has to create a “significant imbalance” between the rights of the consumer and those of the merchant, and the contract in which it is located must not have been the subject of negotiation. Article 5 states that to avoid unfair terms, clauses should “always be drafted in plain, intelligible language.” For example, if an automatic subscription contract is hard or impossible to obtain or hard to understand,⁹⁴ it may be regarded as contravening the Directive.

this could in itself constitute the subject of a separate study, we chose not to include a study of the integration of the directives in the laws of each of the Member States of the European Union.

⁸⁸ 93/13/EEC (hereinafter the *Unfair Contract Terms Directive*). This directive was amended by *The Consumer Rights Directive*, 2011/83/EU. Art. 32 of the 2011 Directive resulted in Art. 8a being inserted within the 1993 directive, which does not relate to the topic under consideration in this report. The 1993 Directive remains in force to this day. See: <https://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX%3A31993L0013> .

⁸⁹ 2000/31/EC (hereinafter the *E-commerce Directive*)

⁹⁰ 2005/29/EC (hereinafter the *Unfair Commercial Practices Directive*).

⁹¹ 2015/2366/EU (hereinafter the *Payment Services Directive*).

⁹² 2011/83/EU (hereinafter the *Consumer Rights Directive*).

⁹³ Consumer Markets Expert Group: *Misleading “free” trials and subscription traps for consumers in the EU*, *supra*, note 12, p. 18.

⁹⁴ Consumer Markets Expert Group: *Misleading “free” trials and subscription traps for consumers in the EU*, *supra*, note 12, p. 23.

3.1.1.2 The E-Commerce Directive

Article 1, paragraph 2 states that this Directive covers contracts concluded by electronic means, that is to say, contracts concluded over the Internet within the European Union. Article 5, paragraph 2 states that if companies on the Internet refer to prices, these must “be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of taxes and delivery costs.” Moreover, Article 6c stipulates that promotions such as gifts and discounts must be clearly identified and that “the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously.”

To comply with what is stipulated within the Directive, companies offering free trial periods must clearly indicate if any delivery charges and/or taxes are required. They must also state the length of time that the service is free or at a discount as well as the conditions for the free trial or discount to apply⁹⁵ (membership service that automatically renews, or subscription to the company’s newsletter, for example).

Article 10, paragraph 3, adds the obligation for the merchant to provide the consumer with a contract containing all the relevant conditions and to do so in such a way as to ensure that the consumer is able to retain a copy.

3.1.1.3 Directive on Unfair Commercial Practices

Article 3, paragraph 1 of this Directive covers “unfair business-to-consumer commercial practices [...] before, during, and after a commercial transaction [...].” According to Article 5, paragraph 2, a practice is unfair on two conditions: that it is contrary to the requirements of “professional diligence” and that “it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer [...].” According to this Directive, an unfair practice may take the form of a misleading action as described in Article 6 or a misleading omission as described in Article 7. Several practices related to automatic

⁹⁵ Consumer Markets Expert Group: *Misleading “free” trials and subscription traps for consumers in the EU, supra*, note 12, p. 20.

subscription following a free trial or discount may contravene Articles 6 and 7 of the Directive. This will happen if the content of the free trial is not clearly disclosed, if there are charges to the consumer's credit cards that are not clearly mentioned or are not mentioned at all, if fees are charged to the consumer during the trial period, if consumers are not reminded during the trial period about the fees that will be required at the end, and finally, if it is not clear when and how they can unsubscribe before the end of the trial period, or how to do so once the trial period has ended.

To facilitate interpretation of the Directive, Appendix I provides a list of practices that are considered unfair in every circumstance, with no need for a case-by-case assessment.⁹⁶ Paragraph 20 could relate to situations in which a company offers a product for free, and the consumer has to pay charges other than those requested for delivery. This would apply in a case when the consumer has to pay the costs of the second month's subscription before the end of the free period.

It is worth mentioning that even when the Directive establishes that a practice is unfair, whenever European consumers adhere to a contract containing such practices, the Directive states that they are not exempted from the obligations set forth in the contract.⁹⁷ This Directive only gives the authorities in member States the power to order the cessation of unfair commercial practices.⁹⁸

3.1.1.4 Payment Services Directive

The scope of this Directive is more limited than the Directives we have discussed until now. As the title of this Directive suggests, it applies only to payment services within the European

⁹⁶ The European Consumer Centres Network, *Too Good To Be True? It Probably Is! Unfair Commercial Practices and Unsolicited Goods*, *supra*, note 76, p. 26.

⁹⁷ The European Consumer Centres Network, *Too Good To Be True? It Probably Is! Unfair Commercial Practices and Unsolicited Goods*, *supra*, note 76, p. 27.

⁹⁸ The European Consumer Centres Network, *Too Good To Be True? It Probably Is! Unfair Commercial Practices and Unsolicited Goods*, *supra*, note 76, p. 27.

Union.⁹⁹ In fact, the purpose of this Directive is to protect consumers in the event of an unauthorized transaction in their bank or credit card account.¹⁰⁰

Article 64 of the Directive states how to obtain the consent of the consumer and makes it very clear that in the absence of such consent, the payment “[...] is deemed unauthorized [...].” Articles 73 and 76 state respectively that if there has been an unauthorized payment, the consumer has the right to request an immediate refund from his bank or the issuer of his credit card within thirteen months from the time the charges appeared on his account.¹⁰¹

In the context of automatic subscription, this Directive may be pertinent if the consumer is left with ambiguous charges or charges that were not clearly mentioned previously.

3.1.1.5 Consumer Rights Directive

The aim of this Directive could not be clearer: the first Article states that its purpose is to provide consumers with a high level of protection. In this context, this of course means that the Directive covers contracts concluded between a consumer and a merchant.¹⁰² The Directive incorporates several elements of the directives already introduced.

Article 6, paragraph 1 concerns the merchant’s obligation to inform the consumer prior to the conclusion of any contract reached at a distance (contracted by phone or Internet). The paragraph states that the merchant is obliged to disclose the price to the consumer, and more specifically, in the case of a contract involving a subscription, to disclose the total price including the total charges per billing period. In the event of an automatic subscription with a trial period, the merchant must, in order to comply with the Directive, clearly disclose the monthly fee that will be charged to the consumer upon expiry of the trial period. Article 6, paragraph 1 also states that the merchant must disclose, before concluding the contract, the conditions, the time, and the terms for withdrawing from the contract. Merchants practicing automatic subscription will

⁹⁹ Art. 1, para 1 of the *Payment Services Directive*.

¹⁰⁰ The European Consumer Centres Network, *Too Good To Be True? It Probably Is! Unfair Commercial Practices and Unsolicited Goods*, *supra*, Note 76, p. 28.

¹⁰¹ The European Consumer Centres Network, *Too Good To Be True? It Probably Is! Unfair Commercial Practices and Unsolicited Goods*, *supra*, note 76, p. 28.

¹⁰² Art. 3, para. 1 of the *Consumer Rights Directive*.

have to clearly disclose the procedure for withdrawal and the related time limits and conditions, and whether withdrawal must take place before or after the end of the trial period.¹⁰³

Article 8 complements the disclosure obligations stated in Article 6. It states that the merchant must provide the information referred to in Article 6 in a form that is legible, and it must be communicated in plain, intelligible language on a durable medium. Failure on the part of a merchant to comply with the requirements of Articles 6 and 8 may result in the consumer no longer being bound by the contract, which would then become inapplicable.¹⁰⁴

Finally, Article 22 of the Directive concerns payments made by the consumer. This Article states that prior to the conclusion of the contract, the merchant must obtain the express consent of the consumer for any payment other than what was initially agreed upon. This Article may be applicable to automatic subscription if the merchant offering a free trial period or a discount does not mention to the consumer that at the end of this period, he will be automatically subscribed and will have payments (or additional payments) to make. Article 22 is intended to prevent consumers becoming subscribers without their consent upon the expiry of a trial period.¹⁰⁵ In the event of such a situation occurring, Article 22 gives the consumer the right to seek reimbursement of any amounts paid without his consent.

3.1.2 An attempt at legislation in the UK

In March 2016, the UK organization Citizens Advice published the results of a survey of British consumers in a study entitled *Locked In: Consumer issues with subscription traps*.¹⁰⁶ In this study, the consumer rights organization attempted to understand the problems of consumers faced with subscriptions following a free trial or a discount.¹⁰⁷ They discovered that 16.8 million British consumers had concluded a subscription contract in 2014-2015 and that 2 million of these had

¹⁰³ Consumer Markets Expert Group: *Misleading “free” trials and subscription traps for Consumers in the EU*, Enforcement and European Consumer Centres, 2016 *supra*, note 76, p. 24.

¹⁰⁴ The European Consumer Centres Network, *Too good to be true? It probably is! Unfair Commercial Practices on Unsolicited Goods*, *supra*, note 76, p. 19.

¹⁰⁵ The European Consumer Centres Network, *Too good to be true? It probably is! Unfair Commercial Practices on Unsolicited Goods*, *supra*, note 76, p. 22.

¹⁰⁶ Citizens Advice, “Locked in: Consumer issues with subscriptions traps”, *supra*, note 76.

¹⁰⁷ Citizens Advice, “Locked in: Consumer issues with subscriptions traps”, *supra*, note 76, p. 2.

tried unsuccessfully to cancel their subscription.¹⁰⁸ One of the most alarming findings of the study was that 84% of consumers surveyed did not realize that by obtaining a service or a product for a trial period, they had also agreed to a long-term subscription contract.¹⁰⁹

About a year after the release of the Citizens Advice report, in March 2017, British Chancellor of the Exchequer Philip Hammond announced that measures to protect consumers from subscription traps¹¹⁰ were to be included in the 2017 spring budget. Among the measures announced was a prohibition on merchants requiring consumers to provide payment information when registering for a free trial period.¹¹¹ The media reported that the British government was concerned that millions of consumers would spend money on subscriptions they did not want.¹¹²

Regarding the announcement by Chancellor Hammond, we were able to locate only one article in an English daily, dated October, 2017, which reported that the British government had not followed up on the announcement made in the spring of 2017.¹¹³

¹⁰⁸ Citizens Advice, “Locked in: Consumer issues with subscriptions traps”, *supra*, note 76, p. 2.

¹⁰⁹ Citizens Advice, “Locked in: Consumer issues with subscriptions traps”, *supra*, note 76, p. 3.

¹¹⁰ Steven Swinford, Katie Morley, “Budget 2017: Chancellor Philip Hammond to announce ban is baffling small print in consumer rip-off crackdown” (2017) *The Telegraph*, online: <https://www.telegraph.co.uk/news/2017/03/04/budget-2017-chancellor-philip-hammond-announce-ban-baffling/>; Moira O'Neill, “Budget 2017: Plans to end subscription traps and overhaul small print” (2017) Money Wise, online: <https://www.moneywise.co.uk/news/2017-03-08/budget-2017-plans-to-end-subscription-traps-and-overhaul-small-print>; “Spring budget 2017: Crackdown on 'subscription traps' planned” (2017) *BBC*, online: <http://www.bbc.com/news/uk-39167860>; Emma Mundbodh “Finally! The 'subscription traps' costing Brits million under attack - what's changing,” (2017) *The Mirror* online: <https://www.mirror.co.uk/money/finally-subscription-traps-costing-brits-9959164>.

¹¹¹ Steven Swinford, Katie Morley, “Budget 2017: Chancellor Philip Hammond to announce ban is baffling small print in consumer rip-off crackdown” *supra*, note 111; “Spring Budget 2017: Crackdown on 'subscription traps' planned”, *supra*, Note 111.

¹¹² Steven Swinford, Katie Morley, “Budget 2017: Chancellor Philip Hammond to announce ban is baffling small print in consumer rip-off crackdown” *supra*, note 111; “Spring Budget 2017: Crackdown on 'subscription traps' planned”, *supra*, note 111.

¹¹³ Janice Clee “Subscription traps: beware the lure of 'free samples'” (2017) *The Telegraph*, online: <https://www.telegraph.co.uk/money/consumer-affairs/subscription-traps-beware-lure-free-samples/>.

So, to date, Britain has not adopted any special measures to regulate automatic subscriptions following a free trial period or discount. However, despite Brexit,¹¹⁴ “For the time being, the United Kingdom remains a full member of the EU and rights and obligations continue to fully apply in and to the UK,¹¹⁵” meaning that the measures specified in the European Directives cited previously apply in the UK.

3.1.3 In summary

The EU has adopted several legislative standards aimed at ensuring consumer rights are protected. As noted earlier, these rules are applied through the national law of the member States of the Union, which are duty-bound to integrate them within their own laws. Nevertheless, the Directives we have just seen lay down the minimum rights granted to consumers and the minimum obligations that merchants will have to assume with regard to Internet contracts associated with a free trial or discount followed by automatic subscription.

Thanks to the Directives, consumers will have the following rights:

- The right to request a refund from the credit card issuer or financial institution if they did not clearly consent to the charges they were billed;
- The right not to be bound by a subscription contract if the merchant did not provide a copy of his contract and if did not fulfil his disclosure obligations.

The merchant, meanwhile, will have the following obligations:

- To provide the consumer with clear contracts written in understandable language;
- Provide consumers with easy access to contracts that they can keep;
- If there is a free trial period:
 - explain to the consumer the conditions related to obtaining the trial;
 - clearly explain the content of the free trial period or discount;
 - state whether a fee will be charged during the free trial period;

¹¹⁴ On June 23, 2016, the citizens of the United Kingdom voted in favour of leaving the European Union. For details, see: https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en#brexit.

¹¹⁵ Official website of the European Union, online: <https://europa.eu/european-union/about-eu/countries>.

- Clearly inform the consumer, before concluding the contract, of the price that will be charged per billing period;
- When quoting prices, include references to all applicable charges, including taxes;
- Before sending an invoice to consumers:
 - send them prior notification;
 - clearly obtain their consent;
- Provide consumers with clear information on cancellation (procedure, deadlines, applicable charges, etc.).

3.2 United States

Several jurisdictions in the U.S. have introduced legislation aimed at protecting consumers in their dealings with merchants. In addition to the relevant federal laws, all 50 states have some form of consumer legislation,¹¹⁶ which can vary greatly from one state to another.¹¹⁷

3.2.1 Federal legislation

The Federal Trade Commission¹¹⁸ (FTC) is a federal agency with the dual mission of protecting consumers and promoting competition.¹¹⁹ All the Commission's powers derive from the *Federal Trade Commission Act*.¹²⁰ Section 5¹²¹ of the *FTC ACT* states that "unfair methods of competition (...) and unfair or deceptive acts" may be declared illegal.

A report by FTC staff in 2009¹²² states that negative option billing practices are governed by Section 5 of the *FTC ACT*. To ensure that merchants do not act in violation of the law, the FTC

¹¹⁶ Mitja Kovac, Ann-Sophie Vandenberghe, "Regulation of Automatic Renewal Clauses: A Behavioral Law and Economics Approach," *supra*, note 12, p. 294.

¹¹⁷ Mitja Kovac, Ann-Sophie Vandenberghe, "Regulation of Automatic Renewal Clauses: A Behavioral Law and Economics Approach," *supra*, note 12, p. 294.

¹¹⁸ Hereinafter FTC.

¹¹⁹ For details on the mission and functions of the FTC, please visit: <https://www.ftc.gov/about-ftc/what-we-do>.

¹²⁰ 1938 15 USC §§ 41-58 (hereinafter *FTC ACT*).

¹²¹ 1938 15 USC §§ 45.

¹²² A Report by the Staff of The FTC's Division of Enforcement, *Negative Options*, Washington, Federal Trade Commission, 2009, p.26.

has developed, based on recent case law, five guiding principles to assist merchants in achieving compliance.

The first principle is that the material terms of the offer must be disclosed in an understandable manner.¹²³ This implies that when merchants offer consumers a free trial period or discount followed by automatic subscription, they should at least mention that the automatic subscription will occur at the end of the trial period and indicate what the cost of the subscription (including all charges) will be upon billing. They must also mention the opt-out procedure or how to cancel the offer before the end of the trial period.¹²⁴

The second principle is that merchants must make sure that the information is disclosed in a “clear and conspicuous”¹²⁵ manner. This means that the information must be situated in a place on the webpage, along with the offer, that consumers will easily see.¹²⁶ The merchant should avoid placing this information at the bottom of the web page together with other conditions, or displaying it in very small print or in any other form that would make it unreadable.¹²⁷ The merchant may not replace the warning about automatic subscription with another statement that might lead the consumer into error.¹²⁸

The third principle requires the dealer to disclose the details regarding automatic subscription before the consumer adheres to the services and has incurred any financial obligation.¹²⁹

The fourth principle states that the merchant must obtain the consumer’s consent at the time of accepting the offer,¹³⁰ which can be ascertained by asking the consumer to click the “submit” button.¹³¹

¹²³ *Ibid.* p.26.

¹²⁴ *Ibid.* p.26

¹²⁵ *Ibid.* p.27.

¹²⁶ *Ibid.* p. 27.

¹²⁷ *Ibid.* p. 27.

¹²⁸ *Ibid.* p. 27.

¹²⁹ *Ibid.* p. 27.

¹³⁰ *Ibid.* p. 27.

¹³¹ *Ibid.* p. 28.

The fifth and final principle states that the merchant must not impede the cancellation process.¹³² If consumers want to opt out, they must be able to do so easily. The merchant must not make false representations regarding this process or make it burdensome to perform.¹³³

As mentioned, by following these five guiding principles, merchants will be able to comply with Section 5 of the *FTC ACT*¹³⁴ regarding negative option billing practices. On the other hand, if a merchant fails to respect one of these principles, the FTC could then find him in violation of Section 5 of the *FTC ACT*.¹³⁵ By itself, the Act does not provide any direct recourse for consumers. It provides only that the FTC will investigate and lay charges against a company if it finds that there has indeed been a breach of the law.¹³⁶ The FTC could then order the merchant to cease the practice, but there is no way in which a consumer can instigate direct action against a merchant under this legislation.

At an 2014 conference,¹³⁷ an FTC lawyer mentioned that other federal legislation exists that applies to negative option contracts. These laws are the *Electronic Fund Transfer Act*,¹³⁸ *The Negative Option Rule*,¹³⁹ *The Telemarketing Sales Rules*,¹⁴⁰ and the *Restore Online Shoppers Confidence Act*.¹⁴¹

Our examination of these laws brought us to the conclusion that they do not apply to the type of negative option contracts we are considering in this report.

¹³² *Ibid.* p. 28.

¹³³ *Ibid.* p. 28.

¹³⁴ *Ibid.* p. 28.

¹³⁵ *Ibid.* p. 28.

¹³⁶ §§ 45 (a) (2) *FTC ACT*.

¹³⁷ Sarah C. Depaul *When Silence Is not Consent: Negative Option Marketing* Conference Section of Antitrust Law, Federal Trade Commission, Washington, 2014, online: https://www.americanbar.org/content/dam/aba/publications/antitrust_law/20140624_at140624_materials.authcheckdam.pdf.

¹³⁸ 15 USC § 1693.

¹³⁹ 16 CFR Part 425.

¹⁴⁰ 16 CFR Part 310.

¹⁴¹ 15 USC § 8401.

The *Electronic Fund Transfer Act* applies only to pre-authorized payments from bank accounts¹⁴² and excludes payments by credit cards, which are not governed by U.S. federal law; here, credit card companies make their own rules.¹⁴³ The primary intent in this law is that before a merchant can debit an amount from a consumer's bank account, the merchant must obtain written consent from the latter, which is usually the case when the customer accepts the contract online.

*The Negative Option Rule*¹⁴⁴ creates disclosure obligations for merchants, regarding, for example, shipping costs or the time allowed to refuse the selection of the month after receiving pre-notification.

The Restore Online Shoppers' Confidence Act,¹⁴⁵ which is applied in conjunction with the *Telemarketing Sales Rules*,¹⁴⁶ is primarily intended to prevent online merchants selling information submitted by a consumer for billing purposes to third parties.¹⁴⁷

3.2.2 State legislation

As explained previously,¹⁴⁸ negative option contracts appeared in the U.S. in the 1940s. U.S. states passed a range of legislation in the 1970s in an attempt to regulate them.¹⁴⁹ This legislation covers only two types of negative option contracts: those with pre-notification and those relating to unsolicited goods¹⁵⁰ it contains nothing with regard to automatic subscription following a free trial period or discount.

¹⁴² W. Stancil, "A Better Way to Cancel Your Gym Membership (and Avoid Other Hazards of Autopayment)" *supra*, note 12, p. 131.

¹⁴³ *Ibid.*, p. 133.

¹⁴⁴ 16 CFR Part 425.

¹⁴⁵ 15 USC § 8401.

¹⁴⁶ 16 CFR Part 310. This law is being cited to provide a definition for "negative option."

¹⁴⁷ <https://www.ftc.gov/enforcement/statutes/restore-online-shoppers-confidence-act>

¹⁴⁸ See the section on contextualization p. 49.

¹⁴⁹ Sophia Wang, "One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation" *supra*, Note 25, p.206.

¹⁵⁰ Sophia Wang, "One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation" *supra*, Note 25, p.206.

Since 2000, legislators from various U.S. states have continued to adopt legislation aimed at negative option contracts. States that have done so include Illinois,¹⁵¹ Florida, Arkansas, Connecticut, New Mexico, North Carolina, New York, Pennsylvania, Tennessee and Utah.¹⁵² The legislation contains obligations of disclosure towards consumers.¹⁵³ For example, merchants must make clear to consumers that the contract will be renewed automatically upon expiration by sending them a notice within the prescribed period; they must also state that, if the consumer does not respond, their contract will be automatically renewed.¹⁵⁴

3.2.3 Pending California legislation

In 2017, Bill 313¹⁵⁵ was presented to the California Senate. This bill is intended to address numerous complaints from California consumers against companies that offer products or services over the Internet free of charge or at a discount, followed by automatic subscription and charges deducted from their credit cards or bank accounts.¹⁵⁶

Specifically, the Bill requires that merchants who offer a free trial period or a discount must include in their offer a clear, conspicuous explanation of the price they will later require the consumer to pay.¹⁵⁷ It also requires that before asking consumers to pay any charges whatsoever, the merchant must obtain their consent¹⁵⁸ and explain the cancellation policy.¹⁵⁹ Finally, it requires that the merchant who supplied the consumer with the free trial period or discount over the Internet must provide access to an “easy-to-use mechanism for cancellation”¹⁶⁰; this procedure must be carried out exclusively on the Internet.¹⁶¹

¹⁵¹ Mr. Kovac, A.-S. Vandenberghe, “Regulation of Automatic Renewal Clauses: A Behavioral Law and Economics Approach,” *supra*, note 12, p. 294.

¹⁵² *Ibid.*, p. 295.

¹⁵³ S. WANG, “One Size Does Not Fit All: The shortcoming of Current Legislation Negative Option” *supra*, note 25, p.206-207.

¹⁵⁴ *Ibid.* p. 294.

¹⁵⁵ Senate Bill No. 313, ch. 356, *An act to amend, repeal, and add Section 17502 of the Business and Professions Code, relating to advertising* (hereinafter Bill No. 313). Online: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB313 .

¹⁵⁶ Consumer federation of California, *California Senate Oks CFC sponsored SB 313 to make it easy to cancel automatic renewals*, 2017. Online: <https://consumercal.org/sb313/> .

¹⁵⁷ Bill No. 313, s. 2, 17602 (a) (1).

¹⁵⁸ Bill No. 313, s. 2, 17602 (a) (2).

¹⁵⁹ Bill No. 313, s. 2, 17602 (a) (3)

¹⁶⁰ Bill No. 313, s. 2, 17602 (b).

¹⁶¹ *Ibid.*

The Bill was approved by the Governor of California on September 28, 2017 and is planned to come into force on July 1, 2018¹⁶². These new legislative provisions will not result in preventing consumers from being automatically subscribed to a service or compelled to purchase goods following a free trial period or discount. Rather, they create obligations for the merchant with regard to disclosure and obtaining consent. Also, they give consumers the right to unsubscribe more easily.

3.2.4 In summary

U.S. legislation on negative option contracts has been the object of a great deal of criticism. One of the claims is that the laws do not provide adequate solutions to the problems caused¹⁶³ by negative option contracts, mainly because they were created to address only the most serious problems and ignore other, smaller ones.¹⁶⁴ Critics also deplore the excessive disparity between the laws of one state and another,¹⁶⁵ which means that not all U.S. consumers are afforded equal protection.

¹⁶² Bill No. 313, s. 2, 17602 (f).

¹⁶³ W. Stancil "A Better Way to Cancel Your Gym Membership (and Avoid Other Hazards of Autopayment)" *supra*, note 12, p. 129; S. Wang "One Size Does Not Fit All: The Shortcoming of Current Negative Option Legislation" *supra*, Note 25, p. 106.

¹⁶⁴ W. Stancil "A Better Way to Cancel Your Gym Membership (and Avoid Other Hazards of Autopayment)" *supra*, note 12, pp. 106-107.

¹⁶⁵ *Ibid.*, p. 106.

4. Contract analysis

Our study would not have been complete without an analysis of the contracts related to automatic subscriptions following a free trial period or a discount concluded between a company and a consumer. The purpose of this analysis is not to determine whether or not merchants are in compliance with their legal obligations, but rather to know what types of contracts consumers subscribe to, what contractual information is easily accessible, and how this is presented.

We chose to focus on the cancellation procedure because, as we have seen, many consumers subscribe to this type of contract with the intention of unsubscribing at the end of the trial period.¹⁶⁶ We wanted to know if it was easy to access all the information related to opting-out and whether there are any related constraints.

For the purposes of our analysis, we collected the contracts of 11 companies¹⁶⁷ that provide goods or services to Canadian consumers over the Internet.¹⁶⁸ We also included contracts of companies that offer product rental services. Although these firms represent only a small proportion of companies offering automatic subscriptions following a free trial period or a discount, we felt it was important to look at their contracts.

¹⁶⁶ See p.10 Introduction.

¹⁶⁷ We began selecting the contracts online in July and August 2017. We found all the relevant information on the companies' websites, so we did not have to take out a subscription to access more information.

¹⁶⁸ We started our selection of contracts by consulting newspaper articles as well as blogs about companies offering Internet subscriptions following a free trial period or a discount in order to determine the names of companies most often associated with such contracts. This allowed us to establish a preliminary list of companies, which we subsequently edited in order to retain only those offering goods or services in Canada. We divided the firms into three categories: those selling goods, those providing services and those offering product rentals. For companies selling goods, we chose those that offer various types of goods and, when several companies offered the same type of product, we selected those that seemed most popular with consumers. For companies offering services, we selected only those offering streaming services. Here again, we chose those that seemed to be the most popular in Canada. For product rentals, we used the same selection method as for those selling products.

4.1 Characteristics of the company: type of contract, service and product offerings and discounts

The companies whose contracts we collected are FabFitFun, My Tea Box, Good Food, The Candy Box, Netflix, CraveTV, Spotify Premium, Tou.tv Extra, Chic Marie, Shades Monthly, and Gem Haul.¹⁶⁹ Of these 11 companies, 7 offer goods by mail¹⁷⁰ and 4 offer online streaming of music, movies or TV series.

In our selection, there were fewer companies offering free trial periods¹⁷¹ than discounted trial periods¹⁷² (4 vs. 6). All the free trials were for the first month of service while the discount, which usually amounted to 10 or 15%, came in different forms: as a percentage or as a predetermined amount deducted from the regular price or a discount on the first order, the first month or as a special type of subscription.

4.2 Billing: frequency, price and payment methods

We wanted to know how often consumers had to pay, how much they had to pay each time and how the payment should be made. We also wanted to know how much a subscription cost, both short-term and long-term.

Most of the companies we studied (9) sent subscribers a monthly bill. Others adopted different billing intervals: more than once a month, quarterly, twice a year, or once a year.¹⁷³

¹⁶⁹ These companies will not be named later because we do not want to associate a company with one specific fact. The aim of our study is not to denounce the practices of some companies by name, but to obtain an overall view of the situation.

¹⁷⁰ The products offered were diverse: cosmetics, clothing or jewellery for women, leisure accessories, physical training accessories, leaf tea, candy, and sunglasses. Three of these companies offered their products for rent. In this case, the rented assets were mailed to the consumer who, at the end of the month, had either to return them to the company or buy them.

¹⁷¹ These were companies offering a streaming service.

¹⁷² These were mostly businesses offering products.

¹⁷³ Two of the companies that offered an option other than monthly billing also offered more than one type of billing.

The amounts billed often depended on the service or product offered.¹⁷⁴ The four companies offering streaming services requested \$6.99 to \$13.99 per month¹⁷⁵ and only one of these offered different prices depending on the options chosen. The prices of the three companies offering product rentals¹⁷⁶ ranged from \$25.82 to \$95 per month.¹⁷⁷ So these are the kinds of prices that a consumer who forgets to discontinue the service following a free trial period or discount will have to pay.

Companies offering products for sale charged various prices. For example, for boxes of accessories, beauty products and jewelry, the monthly price was \$21.14,¹⁷⁸ for tea, it was \$24.99, while for candy boxes, it was \$27.¹⁷⁹ A company offering fresh food boxes had packages costing \$260, \$300 and \$312.¹⁸⁰ The wide variation in price is largely explained by the very different nature of the goods offered from one company to another.

As for the payment method used for automatic subscription, all 11 companies included in our selection asked for pre-authorized payment. Consumers supply their payment information at the time they sign the contract (just before the start of the trial period) and, if nothing is done to cancel it, the company automatically deducts periodic payments once the trial period is over.¹⁸¹ All these companies accept payment by credit card and, for 8 of them, this was the only method

¹⁷⁴ Of the 11 companies, 10 billed in Canadian dollars and one billed in U.S. dollars. In order to get a more accurate picture of the situation, we decided to convert the amount of \$49.99 USD into Canadian dollars, which gave us a total of \$63.43 CAD, based on the average conversion rate for July 2017, as posted on the Bank of Canada's website. For details, see: <https://bit.ly/2lwhE9B>.

¹⁷⁵ The amounts requested were \$6.99, \$7.99, \$8.99, \$9.99, \$10.99 and \$13.99. Note that one streaming services company proposed three billing options, which justifies our quoting six different prices here, rather than four.

¹⁷⁶ These three companies also offered other so-called "prepaid" packages. We excluded these from our evaluation because they did not include a free trial or discount.

¹⁷⁷ The three amounts requested were \$25.82, \$25.82 and \$95.

¹⁷⁸ This amount was originally in U.S. dollars; we made the conversion.

¹⁷⁹ One such price was requested for a period of 3 months. In order to make a comparison and because the other prices were valid for a period of one month, we have divided this by three.

¹⁸⁰ This company asked for weekly payments that varied depending on the number of meals and portions chosen. To be as faithful as possible to a consumer's experience of shopping with the company, we decided to take the 3 prices posted on the company's website regardless of the number of meals and portions.

¹⁸¹ See Payments Canada website, for more information on paying by pre-authorized debit and applicable rules: <https://www.paiements.ca/ressources/guides-de-paiement/consommateurs/paiement-par-débit-préautorisé-débit>. Note: pre-authorized payments are made on a credit card account in the same way as a bank account, but only in the latter case are they governed by Payments Canada.

of payment that could be used. The other three companies accepted pre-authorized payment either through a bank account or the PayPal payment service.¹⁸² Two companies¹⁸³ offered gift cards that could be used as a payment method.

In summary, we noted that the majority of companies we studied use monthly billing, and the prices they charge can vary greatly depending on the good or service consumers order and the type of contract (sale or rental) they subscribe to. It should be mentioned that consumers have no real choice regarding the method of payment; every company requires pre-authorized payment and, in most cases, this is charged to the consumer's credit card.

4.3 Access to contracts: availability, language and length

The contract is the document that allows consumers to know the extent of their obligations and how these are related. This is why it is important that they can access it easily. We tested whether this was the case. It is also important for consumers to be able to peruse the contract, or even read it thoroughly, in order to understand all its ins and outs. We therefore checked to see if it was possible to obtain the contracts in both official languages¹⁸⁴ and also if it contained many pages. As we shall see later, consumers will probably not read a contract that is too bulky, which would consequently take too long to read.

To locate the contracts, we went to the website of each of the 11 companies selected. We first scrutinized the home page, looking for any link that could lead us to the document in question. As we did so, we were on the lookout for terms such as contract conditions, terms of service, or terms and conditions.¹⁸⁵

¹⁸² For more details: <https://www.paypal.com/ca/home> .

¹⁸³ Netflix and CraveTV.

¹⁸⁴ French and English are the two official languages of Canada under section 16 (1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 [Schedule B of the 1982 Canada Act, 1982, c. 11 (UK)].

¹⁸⁵ When a company offered only English version of its website, our search was restricted to English terms such as “contract,” “terms of use,” and “terms and conditions.”

We successfully accessed the contract on each of the 11 companies' websites by clicking on a link that was situated either at the bottom or the top of the home page. On the other hand, it was not always clear, based on title of the link, know that it led to a contract. These titles were:

Frequently Asked Questions or FAQ	2
Terms of use	2
Terms and Conditions	2
Terms of Service	1
Terms of subscription	1
How it works	1
Box Membership Terms	1

We also found the form of these contracts to be unusual;¹⁸⁶ they have no titles, there are no actual clauses, and the names of the parties are not stated. They are made up of a series of statements that seem to be intended to inform consumers about the subscription and to answer the most common questions. It is by searching among statements like these that consumers can find the essential elements of the contract.¹⁸⁷

Note that only 7 of 11 companies offer contracts in both French and English. The others are only in English. They all, however, do business in Canada and Québec. Though our selection is far from exhaustive, we find this a matter for concern: if francophone Canadian consumers cannot have access to contracts they subscribe to in a language they understand, how can they know what they are getting into? Or, more simply, how do they know they are engaging in a contractual relationship?

¹⁸⁶ None of them resembled the model contracts in Schedules 3, 4 and 5 of the *Consumer Protection Act*, CQLR c. P- 40.1.

¹⁸⁷ The key features of automatic subscription are the nature, frequency, price, and date of delivery of the services or goods supplied, and the terms for terminating the contract.

As we mentioned, the number of pages in a contract may affect whether a consumer reads it or not. A long contract will have a deterrent effect, since consumers may be afraid they will not understand it, or will simply not want to invest the time needed to read it. We therefore printed out the contracts to determine how many pages were included in each. These are the results:

1 page	1
3-5 pages	7
6-10 pages	1
More than 20 pages	2

Most contracts were 3 to 5 pages in length. Although this is not very long, it may still be enough to deter many consumers.¹⁸⁸ Even more alarming was that two of the contracts in our selection contained over 20 pages. We believe that it is unreasonable that a document of this length should be provided to consumers, especially for a monthly subscription of \$10 or less.¹⁸⁹ In such cases, the burden on consumers in terms of determining the terms of their contractual obligations is disproportionate to the service provided and the related financial obligations.

4.4 Cancellation clauses

We felt it was essential to verify that the contracts of the companies we studied were equipped with a cancellation clause and take a look at it. This clause has the effect of restoring the contractual balance between the parties by allowing consumers to avoid being bound by a contract they do not want. It constitutes a kind of insurance policy for consumers: before they agree to the contract, they know that if they are not satisfied with the product or service, they can cancel. For this to be possible, there has to be a cancellation clause inside the contract, and it has to be comprehensible and not have too many constraints on its implementation.

The contract of each of the 11 companies studied contained a cancellation, termination or opt-out clause. The vast majority of the time, this clause was relatively easy to identify – in 10 of the

¹⁸⁸ See subsection 5.5 “Reading contracts/terms of use” of Section 5 “Consultation with consumers.”

¹⁸⁹ Contracts over 20 pages in length related to streaming services that cost less than \$10 per month.

11 contracts, the title contained a term related to termination: cancellation, cancel, opting-out, opt-out, or termination of service. In only one contract was it hard to find; it had been placed under the heading “Invoicing, ordering and information on the credit card.” It was therefore impossible to find the cancellation procedure quickly; we had to read through the content of every clause.

We then looked at where the cancellation clause was to be found. In two contracts it was on the very first page, which is ideal - when consumers start reading the contract, they see it right away. In seven contracts, it was on the 2nd, 3rd or 5th page. Since 6 of these contracts were 3 to 5 pages long, the clause was relatively far away. In the other two contracts, the cancellation clause was on page 15 and page 23, which is unacceptable. Consumers overwhelmed with so much information are unlikely to find the termination procedure.

The clarity and length of the cancellation clause can also influence whether consumers are likely to read it. At first sight, the results seemed positive, because without actually conducting a readability analysis, we found that in the majority of contracts this clause was relatively easy to read. In addition, it was usually quite short.

Unfortunately, several of the cancellation clauses did not include all the relevant information. For instance, one said it was possible to unsubscribe but did not specify the procedure,¹⁹⁰ and another presented an incomplete cancellation procedure.¹⁹¹ Yet another failed to mention the conditions or deadlines.¹⁹² Moreover, there was one that was difficult to read because the contract in which it was located was printed in white on a black background.

¹⁹⁰ For example: “Customers may cancel at any time, subject to the time frame below.” Monthly Rebillable Subscriptions can be cancelled at any time. Subscribers may opt out of auto-renewal at any time.”

¹⁹¹ For example: “You can cancel your subscription by contacting our team [...] or through our live chat, email [...] or telephone [...] (Mon-Fri 8:00 am.-8:00 pm, Sat-Sun 9:00 am – 5 pm).”

¹⁹² For example: “Cancellation is easy-easy. Simply login to your account to cancel or make a change to your subscription.”

One might think that relatively long clauses are more detailed and comprehensive, but this was not the case. They included little more information about the termination procedure or about related conditions and deadlines; in some cases the information given was irrelevant.¹⁹³

As we have seen, the problems observed with termination or cancellation clauses were mainly ascribable to the fact that they were incomplete with regard to the procedure or applicable constraints.

We wanted to know what steps to take to terminate an automatic subscription contract, if there was more than one way of doing so, and what conditions and constraints were involved.¹⁹⁴

For the majority of companies surveyed (or 9 out of 11), there was only one step involved in unsubscribing: simply signal your intention to do so to the company. This could be done by email, telephone or online (by choosing the unsubscribe option on the company's website).¹⁹⁵ Eight of the 11 companies offered consumers only one option. Only 3 companies offered all three options.

Only one company asked consumers to contact it by e-mail to request the termination procedure; we considered that in this case unsubscribing included more than one step. After creating a dummy user account on the website of the company, we found that there was an unsubscribe option in the client's account.¹⁹⁶

¹⁹³ One of the clauses states that the company itself may terminate the contract itself, and why. Such statements have the effect of making the clause long and confusing. Information about termination by the company should have been in a separate clause. In another case, the clause states what the opt-out procedure is if a third party is involved in paying. The explanation was incomplete and it is difficult to know what situations are covered by this measure.

¹⁹⁴ The information in this section comes mainly from opt-out clauses contained in the contracts. For the 4 companies whose opt-out procedure was not fully explained or not explained at all, we had to create fictitious profiles on company websites in order to gain access to information. In no case did we go directly from subscribing to unsubscribing.

¹⁹⁵ Five companies offered opt-out by email, 3 by telephone, and 9 online.

¹⁹⁶ This procedure was not explained clearly in the contract.

Generally, cancellation is not complicated. Consumers can do it themselves, without contacting the company. However, 7 companies impose certain conditions,¹⁹⁷ the most common¹⁹⁸ being that the contract must be terminated before the start of the next billing period.¹⁹⁹ This constraint has the potential effect of creating financial consequences for consumers. If they do not cancel their contract on time, they will be forced to pay for another month.

When the cancellation was conducted by phone, we were asked to call at certain specific times. Also, as mentioned above, in one case, consumers were asked to contact the company to find out what the procedure was.

4.5 In summary

The companies studied most often offer a free or discounted trial period, the latter being generally offered by companies offering streaming services. Billing usually occurs on a monthly basis. The asking price varies greatly depending on the good or service in question, but also depends on the type of contract offered (sale or rental). The amounts involved in these contracts can take up a considerable part of a consumer's budget; on average, even by paying the lowest price, a consumer who subscribes to one of these companies will spend more than \$100 per year.²⁰⁰

All 11 companies asked for a pre-authorized payment, mostly by credit card. Since they have to issue approval for this type of payment, consumers risk having billing problems. If such problems occur, it is up to them to take steps to get a refund, since they cannot oppose the billing before the amount due is paid.

The contract for each of the 11 companies studied was available online and could be accessed by clicking on a link on the home page of the company's website. However, the contract was not always easy to spot. Often, the contract terms were listed under "Frequently Asked Questions,"

¹⁹⁷ In contrast, 4 companies did not impose any conditions on terminating their contracts.

¹⁹⁸ Five of 7 companies imposed limitations.

¹⁹⁹ The time involved depends on the company. It could be 3 days, 14 days or a month and a day.

²⁰⁰ This sum was obtained by taking the lowest average amounts requested by companies. The lowest average was \$9.82/month for companies providing services.

“Subscription Conditions” or “Terms and Conditions.” The contracts neither had the same form from one company to another, nor did they contain the same information. Sometimes there was no French version. The contracts contained an average of 3 to 5 pages, which is relatively short.

All the contracts contained a cancellation clause, but it was often necessary to look for this, because it was rarely presented early on. Generally, the clause was relatively short and did not always contain all the necessary information. The problem was the same in the longer clauses.

The majority of companies have adopted a simple cancellation procedure. On the other hand, few offer more than one way of proceeding. Most often, consumers have to go through their customer account, which is on the company's website. This is an advantage for them, since they can do it themselves. On the other hand, to avoid being charged for an additional period, certain requirements must be met, mainly with regard to the time required to act.

5. Consultation with consumers

By means of an online questionnaire, we conducted a consultation²⁰¹ with Canadian consumers who had done business with companies whose contracts involve a negative option. Participants must have shopped online in the past year or subscribed to services or been sent goods periodically while benefitting from a free trial or discount. We wanted to learn about their experiences, as well as get feedback on this type of contract.

A total of 54 people from three provinces took part in our consultation.²⁰² This sample is restricted and is not intended in any way to constitute a representative picture of the Canadian population as a whole. Although the data presented in this study is qualitative, rather than statistical, it provides hitherto non-existent data on automatic subscription following a free trial period or discount. It also provides an interesting glimpse into the experiences and opinions of consumers on the topic. The results obtained from the consultation are presented below.²⁰³

5.1 Profile of respondents

The 54 participants in the online consultation were from three provinces.²⁰⁴ British Columbia, Ontario, and Québec.²⁰⁵ Thirty-three of the participants (61.1%) were women and 21 (38.9%) were men.

In terms of age, 42 participants (77.7%) were between 25 and 45 (see Table 1.1 for more information on this).

²⁰¹ The consultation was conducted in the winter of 2018.

²⁰² The questionnaire consisted of twenty-nine questions, all multiple choice, and the consumers were contacted on the Internet. See the questionnaire in Appendix I.

²⁰³ In order to make it easier to illustrate the data, we present it inside table in the form of a percentage. The exact figures are in also included in the text.

²⁰⁴ There were 18 participants per province.

²⁰⁵ We chose these three provinces because of their different consumer legislation, which may have an influence on the consumers' experience.

Table 1.1 Age (Question B)

18 to 24	5.6%
25 to 34	44.4%
35 to 44	33.3%
45 to 54	5.6%
55 to 64	9.3%
65 to 74	1.9%

As for level of education, 45 participants (83.3%) had at least a college degree and of these, 27 participants (50%) had a university degree (see Table 1.2).

Table 1.2 Highest level of education (Question C)

Secondary	16.7%
College	33.3%
University	50.0%

5.2 Types of contracts and payment methods

Most of the participants had subscribed to a contract providing a service (75.9%; i.e. 41 participants) (see Table 1.3 for distribution). Very few had subscribed to a product rental contract.

Table 1.3 Type of services subscribed to (Question 1)

Services	75.9%
Sale of products	22.2%
Product rental	1.9%

The participants told us what company they had procured services or goods from. Netflix was the company most frequently named (25 participants, or 46.3%), followed by Amazon Prime (8 participants, or 14.8%) and Spotify (7 participants, or 13%). A total of 40 consumers (74.1%) subscribed to one of these services (see Table 1.4).

Table 1.4 (Question 1.1)

Tout.tv	1.9%
Other	7.4%
Netflix	46.3%
Amazon Prime	14.8%
Spotify	13.0%
FabFitFun	7.4%
GoodFood	5.6%
The Candy Box	1.9%
My Tea Box	1.9%

Most participants had obtained a free trial (41 participants representing 75.9%) rather than a trial period with discount or other promotion (see Table 1.5).

Table 1.5 (Question 2)

Free Trial Period	75.9%
Trial period with discount	22.2%
Other	1.9%

The credit card was the payment instrument most preferred by businesses; the vast majority of consumers (52 participants) had to provide their credit card number when subscribing (see Table 1.6).

Table 1.6 (Question 3)

Credit card	96.3%
PayPal or other payment application	3.7%
Bank account	1.9%
Other	1.9%
I don't remember	1.9%

5.3 Consumer perception regarding payments

When companies offer free trial periods or discounts followed by an automatic subscription, they ask those who want to accept the offer to provide their payment information (credit card number, bank account number, etc.) at the start of the trial period. We wanted to know what the participants thought of that. How did they react when asked for their payment information? Were they comfortable about providing such information as part of signing up for a trial period?²⁰⁶

A total of 22 respondents (40.7%) agreed totally that providing payment information facilitates the subscription process (see Table 2.1), and these respondents had no fears with regard to billing (see Table 2.2). Out of all the respondents, 14 (26%) were concerned that there might be billing problems or fraud (see Tables 2.2 and 2.3), but this in no way influenced their perceptions about “facilitating” the transaction.

Table 2.1 - Providing payment information facilitates subscription (Question 5a)

Disagree totally	5.6%
Disagree	5.6%
Neither disagree nor agree	13.0%
Agree	35.2%
Agree totally	40.7%

Table 2.2 – Afraid of billing problems (Question 5c)

Disagree totally	16.7%
Disagree	37.0%
Neither disagree nor agree	20.4%
Agree	24.1%
Agree totally	1.9%

²⁰⁶ Since almost all the consumers used their credit card as payment method (as can be seen in Table 1.6), it is possible to assert that the consumers’ perceptions are particularly focused on this payment method.

Table 2.3 – Afraid of payment information being used to commit fraud (Question 5d)

Disagree totally	20.4%
Disagree	31.5%
Neither disagree nor agree	22.2%
Agree	22.2%
Agree totally	3.7%

In general, the participants did not anticipate any billing problems after providing their payment information, even though they found that it facilitated subscription. However, the vast majority (29 participants, or 53, 7%) did not like giving out this information for a free trial period (see Table 2.4). Of these participants, those who were afraid of having billing problems and those who were not are equally divided. It is therefore not surprising to note that 38 participants (70.4%) (see Table 2.5) agreed with the proposal to request payment information only after the free trial period.

Table 2.4 - Do not like to give payment information for a free trial period (Question 6a)

Disagree totally	7.4%
Disagree	16.7%
Neither disagree nor agree	22.2%
Agree	31.5%
Agree totally	22.2%

Table 2.5 - Better if companies require payment information at the end of the free trial period (Question 6b)

Disagree totally	3.7%
Disagree	9.3%
Neither disagree nor agree	16.7%
Agree	31.5%
Agree totally	38.9%

5.4 Consumer perception of the free trial period or discount

For 51 participants (94.4%) (see Table 3.1), it was clear that once the trial period was over, they would have to pay the regular price for their subscription. So, the vast majority of participants did not consider the automatic subscription to be a trap.

Table 3.1 – Know they will pay the regular price after the trial period (Question 7a)

Disagree totally	3.7%
Neither disagree nor agree	1.9%
Agree	48.1%
Agree totally	46.3%

In addition, 51 consumers (88.8%) were aware that action on their part would be necessary if they wanted to opt out at the end of the trial period. They knew that a long-term subscription would be applied automatically.

Table 3.2 - Know they must unsubscribe if they do not want to receive the goods or services after the trial period (Question 7b)

Disagree totally	1.9%
Disagree	3.7%
Neither disagree nor agree	5.6%
Agree	46.3%
Agree totally	42.6%

5.5 Reading the contracts/terms of use

Few participants said they read the contracts (21 participants, or 38.9%)²⁰⁷ before subscribing to a contract with a free trial or discount (see Table 4) and an even smaller number of participants (7 participants, or 13%) said they read them after subscribing (see Table 5).²⁰⁸

**Table 4 – Read the terms of use/contract before subscribing
(Question 8)**

Yes	38.9%
No	46.3%
I don't remember	14.8%

**Table 5 - Read the terms of use / contract after subscribing
(Question 12)**

Yes	13.0%
No	75.9%
I don't remember	11.1%

**Table 6.1 - The terms of use take a long time to read (read before subscribing)
(Question 10a)²⁰⁹**

Disagree	4.8%
Neither disagree nor agree	9.5%
Agree	81%
Agree totally	4.8%

²⁰⁷The contracts used a variety of names, including “Conditions of Use.” For these names, see the previous section on the analysis of contracts p.46.

²⁰⁸ The answers to questions 8 and 12 were not linked, so a participant could answer yes to both questions.

²⁰⁹ Only 21 of the 54 participants answered this question. The percentages given are therefore based on these 21 respondents.

Table 6.2 - The terms of use take a long time to read (read after subscribing)

(Question 14a)²¹⁰

Disagree	14.3%
Neither disagree nor agree	14.3%
Agree	71.4%

Table 7.1 - The terms of use are difficult to understand (before subscribing)

(Question 10.b)²¹¹

Disagree totally	4.8%
Disagree	33.3%
Neither disagree nor agree	28.6%
Agree	28.6%
Agree totally	4.8%

Table 7.2 The terms of use are difficult to understand (read after subscribing)

(Question 14b)²¹²

Disagree totally	4.8%
Disagree	14.3%
Neither disagree nor agree	4.8%
Agree	9.5%

We wanted to obtain more information from the 33 participants who said they did not read the subscription terms or do not remember having read them before subscribing (see Table 4). We therefore presented them with a series of statements. The 33 participants agreed or strongly agreed with the statement that the contracts took too long to read (33 participants, or 100%; see Table 8); or were too difficult to understand (23, participants, or 69.7%; see Table 9).

²¹⁰ Only 7 of the 54 respondents answered this question. The percentages given are therefore based on these 7 respondents.

²¹¹ Only 21 of the 54 respondents answered this question. The percentages given are therefore based on these 21 respondents.

²¹² Only 7 of the 54 respondents answered this question. The percentages given are therefore based on these 7 respondents.

Many of the participants (23 out of 33, i.e. 69.7%) also agreed with the statement that they never read the contracts/terms of use of contracts they concluded on the Internet (see Table 10).

Moreover, it will also be observed that all the participants in the consultation – both those who read the terms of use/ contracts and those who did not - consider that the contracts are too long (see Table 6.1 and Table 8).

Table 8 - Online contracts take too long to read (Question 11b)²¹³

Agree	39.4%
Agree totally	60.6%

Table 9 – Online contracts are too difficult to understand (Question 11c)²¹⁴

Disagree	9.1%
Neither disagree nor agree	21.2%
Agree	39.4%
Agree totally	30.3%

Table 10 - I never read the terms of use before concluding to a contract on the Internet (Question 11a)²¹⁵

Disagree	18.2%
Neither disagree nor agree	12.1%
Agree	51.5%
Agree totally	18.2%

²¹³ Only 33 of the 54 respondents answered this question. The percentages are therefore based on these 33 respondents.

²¹⁴ Only 33 of the 54 respondents answered this question. The percentages are therefore based on these 33 respondents.

²¹⁵ Only 33 of the 54 respondents answered this question. The percentages are therefore based on these 33 respondents.

5.6 Cancellation

We have seen in the above results that participants did not consider automatic subscription after a trial period to be a “trap,” since almost all of them knew they would have to pay the regular price at that point (see Table 3.1) or that they themselves would take the initiative to unsubscribe to exempt themselves from paying (see Table 3.2). On the other hand, to be able to do this, consumers still needed to know the cancellation procedure.

We therefore tested whether consumers knew about the cancellation procedure, when they found out about it, if it was easily accessible, if it was clearly explained, and if it seemed easy to follow.

With regard to reading the opt-out procedure, respondents were divided into two groups: 29 of them (53.7%) had done so, while 24 had not (44.4%) (see Table 11). Just over half who read the procedure, 16 of 29 participants, or 55.2%, had done so even before subscribing (See Table 12).

Table 11 – I read the cancellation procedure (Question 15)

Yes	53.7%
No	44.4%
I don't remember	1.9%

Table 12 – When the cancellation procedure was read (Question 16)²¹⁶

Before subscribing	55.2%
When I subscribed	34.5%
I don't remember	10.3%

We asked the 29 who had read the cancellation procedure (see Table 11) if they had easily located it and what they thought about it. The vast majority of these respondents were able to locate it easily (20 participants, or 68.9%; see Table 13.1). They found that it was clearly

²¹⁶ Only 29 of the 54 respondents to this question. The percentages are therefore established based on these 29 respondents.

explained (79.3%; see Table 13.2) and that it seemed easy to follow (29 participants, or 86.2%; see Table 13.3).

Table 13.1 - Difficulty finding the cancellation procedure (Question 17a)²¹⁷

Disagree totally	17.2%
Disagree	51.7%
Neither disagree nor agree	20.7%
Agree	10.3%

Table - 13.2 - The cancellation procedure was clearly explained (Question 17b)²¹⁸

Disagree	6.9%
Neither disagree nor agree	13.8%
Agree	58.6%
Agree totally	20.7%

Table - 13.3 The cancellation procedure seemed easy to follow (Question 17c)²¹⁹

Disagree	6.9%
Neither disagree nor agree	6.9%
Agree	65.5%
Agree totally	20.7%

While 29 respondents (53.7%) had read the cancellation procedure, only 15 respondents (27.8%) said they had terminated their subscription. The vast majority of these respondents (12 out of 15 participants, or 80%), said unsubscribing was easy (see Table 15.1) and took effect immediately (see Table 15.2). Moreover, 3 of the respondents (20%) who unsubscribed said they had billing problems after unsubscribing.

²¹⁷ Only 29 of the 54 respondents to this question. The percentages are therefore established based on these 29 respondents.

²¹⁸ Only 29 of the 54 respondents to this question. The percentages are therefore established based on these 29 respondents.

²¹⁹ Only 29 of the 54 respondents answered this question. The percentages are therefore based on these 29 respondents.

Table 14 – Opted out from services? (Question 18)

Yes	27.8%
No	72.2%

Table 15.1 – The opt-out procedure was easy (Question 19b)²²⁰

Disagree	6.7%
Neither disagree nor agree	13.3%
Agree	46.7%
Agree totally	33.3%

Table 15.2 – Cancellation took effect immediately (Question 19c)²²¹

Disagree	6.7%
Agree	53.3%
Agree totally	40.0%

At the other end of the spectrum, a large number of respondents (39, i.e. 72.2%) said they did not cancel (see Table 14). Of these respondents, 37 (94.9%) said they were satisfied with their subscription and did not intend to cancel it (see Table 16). Among those who did not cancel, 3 respondents would have liked to, but did not go through with it. One did not respect the time limit, the second found the cancellation procedure too complex, and the third did not know how to go about it.

Table 16 - Satisfied with subscription. Don't plan to end it (Question 22a)²²²

Neither disagree nor agree	5.1%
Agree	46.2%
Agree totally	48.7%

²²⁰ Only 15 of the 54 respondents answered this question. The percentages are therefore based on these 15 respondents.

²²¹ Only 15 of the 54 respondents answered this question. The percentages are therefore based on these 15 respondents.

²²² Only 39 of the 54 respondents answered this question. The percentages are therefore based on these 39 respondents..

5.7 Subscription incentives, billing notification and preferred payment methods

For 15 participants (27.8%), the offer of a trial period was an incentive for subscribing (see Table 17). In addition, 16 respondents (29.6%) would not have subscribed when they did if these offers had not existed.

Table 17 - Would you have subscribed if there had been no free trial or discount?

(Question 23)

Yes, because I already intended to subscribe	37.0%
Yes, but I might have waited longer to do so	29.6%
No; it was only because there was a free trial or discount	27.8%
No, because I find the service too expensive at the regular price	3.7%
No, for another reason	1.9%

Thirty-six consumers (33.3%) intended to opt out at the end of the free trial period (see Table 18). Of these,²²³ 14 (77.8%) were able to unsubscribe before the company they were dealing with started to charge them (see Table 19). Only 24 consumers (44.4%) received a notice indicating that the free period was about to expire. Note that it is possible that consumers overlooked the notice or forgot they had received it.

Table 18 - Subscribed with the intention of unsubscribing at the end of the trial period

(Question 24)

Yes	33.3%
No	66.7%

²²³ We are referring here to the 18 participants who answered “no” in Table 18.

Table 19 - Was able to unsubscribe before the company asked for payment (Question 25)²²⁴

Yes	77.8%
No	21.1%

Table 20 - Received a notice announcing the end of the free trial or discount (Question 26)

Yes	44.4%
No	55.6%

We mentioned earlier that the primary payment method used by companies was by credit card (see Table 1.6). This payment method is also the one preferred by consumers (30 participants, or 55.6%). This is followed by pre-authorized withdrawals from bank accounts (11 participants, or 20.4%) and monthly bills that companies send to consumers to be paid before a specified date (10 participants, or 18.5%) (see Table 21).

Table 21 - Preferred payment methods (Question 27)

Pre-authorized payment by credit card	55.6%
Pre-authorized withdrawal from bank account	20.4%
Pre-authorized payments by PayPal or other payment application	5.6%
Monthly bill sent by the company that you pay yourself	18.5%

²²⁴ Only 18 of the 54 respondents answered this question. The percentages are therefore based on these 18 respondents.

5.8 Perception of contracts with automatic subscription following a free trial or discount

What do the participants think of this type of contract?²²⁵ They seem generally favourable.²²⁶

In fact, the participants like this type of contract (32 participants, or 59.3%), one reason being that it allows them to subscribe to a service or receive products during the trial period and continue later as a member (see Table 22.1). This did not pose any problems for the participants because almost everyone knew that they would be subscribed automatically at the end of the trial period (see Table 3.2). On the other hand, they were almost unanimous in declaring (50 participants, or 92.6%) that in order to make the practice acceptable, the company should clearly state that it will charge the regular price at the end of the trial period (see Table 22.2).

Table 22.1 – I like this type of contract because I will be automatically subscribed without interruption at the end of the trial period (Question 28a)

Disagree totally	3.7%
Disagree	16.7%
Neither disagree nor agree	20.4%
Agree	38, 9%
Agree totally	20.4%

Table 22.2. - For this type of contract to be acceptable, it must be made clear that the regular price will be charged after the trial period (Question28f)

Disagree	1.9%
Neither disagree nor agree	5.6%
Agree	46.3%
Agree totally	46.3%

²²⁵ These are questions 28a) to 28h) in the questionnaire in Appendix I.

²²⁶ For this section, the answers were scored 1 to 5 according to the Likert scale. To make it easier to read these responses, we grouped them into two categories, with “Disagree totally” and “Disagree” combined, and “Agree” and “Agree totally” combined.

Consumers also responded (30 participants, or 55.6%) that this type of contract is acceptable provided that it is easy to cancel (see Table 22.3). In the previous responses, this did not seem to be a problem, since the majority of respondents who claimed to have unsubscribed (see Table 14) said that the procedure was easy (see Table 15.1).

Table 22.3 - I don't like this type of contract, but it would be acceptable if it was easy to cancel (Question 28)

Disagree totally	3.7%
Disagree	18.5%
Neither disagree nor agree	22.2%
Agree	51.9%
Agree totally	3.7%

They also stated that for this type of subscription to be acceptable (46 participants, or 85.2%), the companies should be obliged to notify consumers before the end of the trial period, reminding them that they will soon be charged the regular price (see Table 22.4.). Less than half of the participants who already had a subscription of the same type as the one studied here reported having received such a notice (see Table 20).

Table 22.4 - For this type of contract to be acceptable, the company needs to send a notice to consumers before the end of the trial period advising them that they will soon charge the regular price (Question 28g)

Disagree	3.7%
Neither disagree nor agree	11.1%
Agree	31.5%
Agree totally	53.7%

Respondents also stated (45 participants, or 83.3%) that this kind of contract allowed them to try out free or discounted goods or services they would not otherwise have procured (see Table 22.5). This confirms the data in Table 17; the trial period acted as an incentive for the consumers surveyed. According to them (44 participants or 81.5%), this type of contract is also beneficial

for companies, because it allows them to attract customers who would not have subscribed if there had been no free trial period or discount (see Table 22.6).

Table 22.5 - This type of contract allows me to try free or discounted services or goods that I would not have bought otherwise (Question 28b)

Disagree	5.6%
Neither disagree nor agree	11.1%
Agree	63.0%
Agree totally	20.4%

Table 22.6 - This type of contract is beneficial for businesses because it allows them to attract customers who would not have subscribed otherwise (Question 28h)

Disagree	3.7%
Neither disagree nor agree	14.8%
Agree	51.9%
Agree totally	29.6%

5.9 Legal considerations

As the final question, we asked them whether they believed that automatic subscription contracts following a free trial period or discount was a legal practice. None of them considered that the practice was illegal (see Table 23), even the 18 participants who came from Québec, where it is prohibited.²²⁷

Table 23. - Do you think this is legal? (Question 29)

Yes, it's so common that it can't be illegal	40.7%
Yes, I think this type of subscription is legal, but that companies have specific procedures to follow that they don't always respect	42.6%
No, this can't be legal	0.0%
Don't know	16.7%

5.10 In summary

Most of the consumers interviewed during our consultation had signed up for contracts that included a free trial period followed by automatic subscription to the services.

The preferred payment method for the companies from which the consumers received services was by credit card. Many of the participants believed that giving their payment information at the beginning of the trial period facilitated the subscription, although they did not like doing so. Participants noted that a better practice would be to request payment information once the free trial period ended. However, pre-authorized payment via credit card was the preferred method of payment for most participants.

They did not consider free trial periods or discounts followed by an automatic subscription to be a “trap.” They knew that the subscription would continue beyond the trial period and that it would be up to them to opt out later if they wished to continue the contractual relationship.

²²⁷ See the section on the legal framework in Québec on p.17.

They were in agreement, however, that companies should clearly state that they will charge the regular price after the trial period in order to make the practice acceptable.

With regard to terms of use/contracts, the vast majority of respondents believed that these are too long to read (according to 85.8% of those who read them before subscribing and the 71.5% who read them afterwards and all those who did not read them at all).

While many participants said they had not read their contracts, an even greater number asserted that they had read the cancellation procedure. Half of those who read the procedure appear to have done so preventively, before the subscription. Those that read the procedure told us that it was easy to locate, was clearly explained and seemed easy to follow. In practice, however, few consumers were able to try it out; only a small number of them told us they had actually terminated their contract.

A little over half of the respondents considered the free trial or discount an incentive for them to subscribe to the services; few of them had signed up with the intention of terminating their contract after the trial period. On the other hand, less than half of the participants said they received a notice announcing the end of the trial period and that they would have preferred the companies to send them such notification.

In short, what emerges from the results of the consultation is that the participants surveyed are favourable to the practice of automatic subscription at the end of a free trial period or a discount, and do not seem to have encountered any major problems with this formula. They noted that there were two aspects that the companies could improve upon to optimize the consumer experience: provide shorter, clearer contracts that are easy to read, and send an automatic reminder to customers notifying them of the end of the trial period and the beginning of billing at the regular price – the information they give should be clear, especially the explanation of the cancellation procedure. These two measures should allow companies to demonstrate greater transparency toward consumers.

Conclusions and recommendations

We inquired into what consumers thought about subscription contracts that automatically come into effect following a free trial period or discount. We focused our analysis on the cancellation procedure because we wanted to know if it was easy to access all the information related to this procedure and if there were any related constraints. Finally, we looked into how this practice was regulated by legislation in Canada and other jurisdictions.

We saw that the various legislations we studied respecting negative option subscription are very diverse. The European Union and the United States have mostly chosen to focus on disclosure obligations for merchants, the most important being the obligation to notify consumers of the end of the trial period by sending a notice, the obligation to provide consumers with information on the content of trial periods and the obligation to provide clear information on the cancellation procedure.

The European Directives and California state law require merchants to obtain clear consent from the consumer prior to billing. California is the only jurisdiction that has included in its legislation the requirement to provide a simple cancellation procedure. We feel the obligation to send a notice at the end of the trial period to be particularly important because, during the consultation we conducted with consumers, less than half of respondents said that they had received such a notice. We believe, and our consultation supports this view, that such a notice would give consumers who have forgotten that their trial period or discount is coming to an end time to opt out. The notice could even contain a direct Internet link to the cancellation procedure so that consumers would not have to search for instructions on how to unsubscribe.

On the Canadian side, only Québec and Manitoba have established a framework for regulating automatic subscription: in both cases, the practice has been banned. Other provinces could find inspiration in the obligations and rights contained in the American and European legislation to implement protective measures for their own citizens. In this way, all Canadians would enjoy rights with regard to automatic subscription following a free trial or discount.

Our analysis of the contracts revealed that, in the medium term, subscription to such services often represents a major expense for consumers. Indeed, people who deal with one of the companies whose contract we studied could easily pay over \$100 for a year's subscription. Our main finding is that there is a great lack of uniformity among contracts: they are given various names, but are never called a "contract." They all contain different clauses and the cancellation clause is incomplete. For example, it either does not mention the procedure or it fails to mention the limitations that must be complied with. Also, we noticed that companies often offer only one way of unsubscribing.

Faced with these facts, it is worth asking how a consumer who wants to terminate a service before the end of the trial period can be certain of doing so. To ensure that consumers have complete information, we suggest that there be a uniform contract for automatic subscription following a free trial or discount. A model contract could be created by the industry or imposed by law; it would contain the mandatory details such as those required by some American and European laws, and would also contain also a clear, accurate cancellation procedure including an explanation of any relevant limitations. We also suggest that each company should offer at least two ways of unsubscribing, such as by Internet and by telephone, to make the procedure available to all consumers.

Most of the participants in the consultation we conducted had subscribed to a service granting a free trial period. They also said that when they agree to receive a service with a free trial period or a discount, they know that the free trial or discount is only temporary. They do not believe that there is a catch involved. They knew they would be encouraged to subscribe after the trial period expired, which is what most of them did because they were satisfied with their subscription. However, the participants said they did not like having to give out their payment information – usually their credit card number – in order to receive a free trial or discount. They would have preferred to give this information only at the end of the trial period.

Another finding is that, in general, consumers do not read the automatic subscription contracts because they find them too long. We therefore suggest that the previously mentioned model contract should contain a maximum of 2 pages, thus permitting consumers to read it quickly and easily locate relevant information. We also suggest that companies use what has been called an

“opt-in” formula. In the case of a free trial period, payment information would be requested only at the end of this period, whereas for a discounted trial period, the information would be required initially, but would be valid only during the trial period. In order for the service to be continued at the regular price, the merchant would have to ask the consumer to authorize payment a second time.

In order to improve the automatic subscription process, we have one final suggestion that comes from the doctrine,²²⁸ which we did not raise in the report. It would be interesting for online financial institutions to provide their clients with an online list²²⁹ of companies that deduct pre-authorized payments from their credit card or bank accounts. This would also list the amounts paid periodically and the total amount paid over the last year. This list would also include a link that the consumer could click to cancel his subscription. Such a list would allow consumers to know the true cost of all their subscriptions and serve as a useful reminder.

We are aware that this report is limited in scope. It nevertheless contains valuable information on the regulation of automatic subscription contracts following a free trial period or discount. For instance, we established that the consumers we interviewed appreciate being able to benefit from such a trial period and often use it as a preamble to a long-term contractual relationship. For this reason, we believe that this type of contract is destined to remain.²³⁰ On the other hand, we believe that the procedures employed, particularly as regards to the information provided to consumers, must be improved. A simple act of forgetfulness could result in consumers having to spend large sums for a service they do not want. Fortunately, solutions exist and can be implemented; all that is needed is the willingness to do so.

²²⁸ See W. Stancil “A Better Way to Cancel Your Gym Membership (and Avoid Other Hazards of Autopayment)” *supra*, note 12, p.137 and following. The author proposes that the list should be related to withdrawals from credit card accounts only; we propose that it also be related to withdrawals from bank accounts.

²²⁹ Similar to a bank statement.

²³⁰ We should mention, however, that as a result of *Bénabu c. Videotron GP et al* referred to earlier, the companies have stopped offering free trial periods to Québec residents.

Option consommateurs recommends:

To companies

- That they ensure that whenever they offer a free trial or discount, the consumer is provided with all the relevant information, including cost, the date on which the trial period ends, the price to be paid later and the cancellation procedure.
- That they make their contracts available on their websites in a way that it is easy to locate and recognize. The contract must be relatively short and easy to understand.
- That they make their cancellation procedure available on their website in a way that is easy to find and recognize. The cancellation procedure should include all the information the consumer needs, be easy to perform, and offer more than one way of doing so (online, by email or phone).
- That in the case of a free trial period, they should require the consumer's payment information only at the end of the trial period, which will prevent any billing errors.
- That they send a notice to customers benefitting from a free trial or discount, clearly indicating when the trial period will end and how much the service will cost thereafter. This notice must be clearly identified and sent a few days before the end of the trial period. It must also contain a link leading directly to the cancellation procedure.

To business associations

- That they create a model contract for the use of companies.
- That they apply pressure on firms to adopt best practice (see above).

To Provincial Governments

- That they ensure that companies observe best practices (see above).

- That in the event of abuse, they legislate to ensure that companies adopt best practices (see above).

To consumers

- That if they choose to benefit from a free trial or discount, they take note of the date of the end of that period and make sure not to forget it.
- That they take note of the regular price they will have to pay before making the decision to continue their subscription beyond the trial period.
- That they do not hesitate to unsubscribe if they wish or if the service no longer suits them.

Finally, in order to improve the automatic subscription process, **Option consommateurs** recommends that **financial institutions**:

- Provide their customers, online, a list of companies that deduct pre-authorized payments from customers' credit card or bank accounts.
- Clearly indicate on this list the amounts deducted periodically from their account and the total amount deducted over the past year.
- Include with the list a link that consumers can click to cancel their subscription.