

AIM contribution to the European Commission  
consultation on

**GEO-BLOCKING AND OTHER  
GEOGRAPHICALLY-BASED  
RESTRICTIONS WHEN SHOPPING AND  
ACCESSING INFORMATION IN THE EU**

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# AIM Contribution to the Consultation on geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU

## Background

The European Commission placed the completion of the Digital Single Market (DSM) at the centre of its strategy to restore growth and jobs in Europe. On 6 May 2015, the European Commission published its DSM strategy setting out 16 key actions, including tackling geo-blocking.

This open consultation on geo-blocking will inform the Commission for its ongoing work on legislative proposals due to be published in 2016. In the introduction to the questionnaire the Commission sets out its expectations from its efforts to eliminate unjustified geo-blocking:

- Unleashing the internet's potential for driving growth and jobs
- Improving economic efficiency
- Lowering prices
- Increasing the range of products and services accessible to consumers wherever they are
- Fostering trust in the Single Market.

## Position of AIM

AIM's membership comprises corporate members and national associations that have a similar but more local constituency. Altogether, AIM ([link](#) to our website) represents directly or indirectly some 1,800 companies ranging from SMEs to multinationals, accounting for some 450 billion euro in sales and two million jobs in Europe alone. Branded products manufacturers are united in their purpose to build strong, evocative brands and as such place the consumer at the heart of what they do.

AIM has been an enthusiastic advocate of the Single Market since its inception and therefore wholeheartedly supports the objective of the DSM to give better access to goods and services online by removing unjustified barriers and improving the confidence of consumers and businesses to buy and sell cross-border. AIM has been actively taking part in the DSM discussion<sup>1</sup>.

In our contribution to the geo-blocking consultation we will:

- Offer a classification of geo-blocking and other forms of geographically based restrictions.
- Clarify how the economics of branding relate to the Commission's objectives. We are grateful for the Commission's call to economic operators to explain how possible solutions may affect their business models so as to avoid unintended negative effects.
- Look at the implications for solutions and offer AIM's recommendations.

## Geo-blocking

The consultation on geo-blocking and other forms of geographically-based restrictions is intended to gather opinions on unjustified commercial barriers which prevent from buying and selling products and services within the EU. It covers, for example, customers who are charged different prices or offered a different range of goods depending on where they live.

AIM believes it will contribute clarity to the debate to classify those restrictions in categories that may merit different treatment and a case by case approach. We can think of five different categories of restrictions.

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<sup>1</sup> See AIM Memorandum "[Consumer Brands for a Trusted Digital Market Place](#)", April 2015

- *Geo-blocking that is contrary to competition law*: this will be mainly the “agreement-based geo-blocking” between a supplier and its retailers that is considered a hard core restriction under the vertical guidelines. These restrictions are dealt with in the ongoing e-commerce sector inquiry.
- *Geo-blocking that results from legal and regulatory barriers that companies themselves would like to see disappear*. Removal of those barriers would lead to a pro-competitive result, increase cross-border sales and generally enhance consumer welfare.
- *Geographically-based restrictions by companies that have economic and/or consumer welfare enhancing effects*.
- *Geographically-based restrictions that a company enforces as part of its entrepreneurial freedom*. A company is normally free to choose its markets so as to avoid excessive costs or other business detriments, for example to ensure legitimate protection of its assets, such as its intellectual property. This will be particularly true for SMEs but there seems no reason to discriminate according to company size.
- *Geo-blocking and other geographically-based restrictions that fall under none of the above categories*.

## How the Commission’s objectives relate to the economics of branding

### **1. Unleashing the internet’s potential for driving growth and jobs**

Recent reports from the Office on the Harmonisation of the Internal Market and the World Intellectual Property Organisation have amply documented the role of brand-intensive industries in the generation of growth, jobs and exports. Through their diverse offer of innovative products, services and communication in the digital environment, brands are already a major digital stakeholder and content provider<sup>2</sup>.

Consumers also benefit from brand investment in digital business on another level. Indeed most online services are accessible free of charge because they are funded by advertising spend. A recent study shows that advertising finances a consumer surplus of some €100 billion annually<sup>3</sup>.

### **2. Promoting economic efficiency**

A policy brief of the European Centre for International Political Economy (ECIPE) published in November 2015 concludes that “*investment in brands drives the allocation of resources in our economy. It increases competition, pushes firms to innovate, and decreases asymmetries in the market leading to a higher level of economic development*”<sup>4</sup>.

### **3. Lowering prices**

During our discussions with the relevant Commission services this year we have been concerned about the focus on price rather than consumer value. AIM joined with national brands associations to commission a major study into people’s trust in brands, what drives it and what impact it has. In addition to a wealth of data on consumer attitudes to a wide range of consumer brands and on purchasing data, it develops a Brand Trust Model. This research showed that drivers of consumer trust in brands, which are closely related to perceived

<sup>2</sup> According to the website [Social Bakers](#), 25 brands, belonging to AIM’s corporate members, cumulate more than 550.000.000 fans on Facebook (total amount of “likes”). In addition, videos posted on YouTube by 15 brands, belonging to AIM’s corporate members, cumulate more than 2.200.000.000 views.

<sup>3</sup> ‘Consumers driving the digital uptake – the economic value of online advertising-based services for consumers’, IAB Europe – September 2010

<sup>4</sup> “Building value: the role of trademarks for economic development”, European Centre for International Political Economy, November 2015

value, include the perception of brands as innovative, current and of consistently good quality.<sup>5</sup>

Because of this, AIM very much supports Commissioner Vestager's perspective on competition: *"[Competition] is not only about keeping prices low. Competition is also about ensuring that there is an incentive to innovate, so companies can come up with new and better products for consumers"*<sup>6</sup>.

In an article by competition economists RBB commenting on DG GROW's (then DG MARKT) thinking on territorial supply constraints, they concluded: *"Given the fact that efficient price levels will often differ between countries, it is certainly not valid to characterise suppliers' use of different prices in different countries, as well as any steps taken by suppliers to preserve these differences, as being harmful to economic efficiency, consumer welfare, or even market integration. On the contrary, simplistic measures to prohibit price differentials might well have unintended and opposite effects. Doing away with territorial supply constraints might appear to be an attractive response, but appearances can be deceptive, and in this case it would certainly mean entering uncharted territory"*<sup>7</sup>.

Inadvertently fostering the commoditization of the products of some of Europe's most successful industries would not be the road to growth and prosperity.

#### **4. Increasing the range of products and services accessible to consumers wherever they are**

Brand innovation and differentiation are a source of product diversity. Increasingly, products are customised to consumers' preferences and cultural references. Consumers have never in history had access to so many different products at different price points in different categories. At the same time, brand manufacturers may justifiably not be willing to make certain products available in markets where they will appeal less to customers, will not generate the same good will for the brand or may not suit local tastes and preferences. There can also be solid legal reasons why the brand owners are not entitled to sell in other countries, for instance if they own the trade mark rights only in some markets. The potential impact can especially be severe on SMEs who may own trade mark rights in only one country and find their market flooded by a competitor's product from another market. The risk to the incomer may be a legal action for infringement but the risk to the infringed SME is much greater as, without the resources to defend its legal rights against a potential onslaught of infringing products, its business may not survive.

#### **5. Fostering trust in the Single Market**

Brands are in a unique position to use the latest technologies and bring alive online the consistent quality associated with branded consumer goods. They enable the essential trust that is required for the digital economy to thrive, simply because consumers feel more confident trading online and cross-border when they recognize what they buy. They reduce consumers' search costs by enabling them to rely upon the signals provided by brand names and imagery. The Brand Trust Model referred to earlier shows how differences in cultural norms and values impact the ways in which consumers develop trust<sup>8</sup>.

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<sup>5</sup> ["Brands and Consumer Trust"](#), Commissioned by national brand associations in Europe and AIM, the European Brands Association. October 2015

<sup>6</sup> ["My competition philosophy"](#), Politico, July 2015

<sup>7</sup> ["Entering Uncharted Territory: the Commission's thinking on territorial supply constraints"](#), RBB Economics, May 2013

<sup>8</sup> ["Brands and Consumer Trust"](#), October 2015

## The Implications for solutions and AIM's recommendations for the EU policy on geo-blocking

### **1. Prohibiting unjustified geo-blocking**

AIM strongly supports the objective to prohibit manifestly unjustified geo-blocking. Geo-blocking is indeed already a legally prohibited practice, for example geo-blocking on grounds of a person's nationality, or "agreement based" geo-blocking between a supplier and its retailers which is a prohibited practice under competition law. The Commission refers to difficulties in enforcing this prohibition and the e-commerce sector inquiry will no doubt highlight areas of concern and clarify the situation for all operators at a time when different national courts and enforcement agencies may adopt different interpretations of the rules.

### **2. Addressing public barriers to cross-border trade**

AIM also strongly supports the Commission's efforts to break down the significant remaining regulatory and de facto non-tariff barriers to the single market as a whole and the DSM in particular. The two are intimately related. The nature of those barriers is well-known. Some, such as different VAT rates or divergent national product legislations, including consumer protection and safety regulations, will not be easily resolved but should be addressed with renewed vigour as a priority. Other barriers, such as the role of languages in labelling rules, are a result of Europe's cultural diversity and will require imaginative solutions making use of deep consumer understanding and new technologies. Brand manufacturers are well placed to play a useful role in the search for such solutions.

As long as these regulatory barriers remain in place, geo-blocking will in certain circumstances be a necessary tool for companies to remain compliant with product rules, trade mark law or labelling regulations. They run a legal risk if e-tailers sell certain products in markets for which they are not intended. As mentioned before, this is in addition to the risk of a negative impact on consumers' good will towards the brand if they are dissatisfied with the product or the after-sales service. Some recent court decisions which broadened the concept of active sales have made it difficult for companies to justify such reasonable geo-differentiation on the basis of passive sales.

*Examples of regulatory barriers:*

- There are different national restrictions on how brewers or spirit manufacturers can present, market and sell their products, such as different legal drinking ages or different advertising restrictions. To remain compliant with local laws and responsible drinking commitments, access to some brand websites or campaigns must be differentiated.
- The EU's Classification, Labelling and Packaging legislation requires companies to label a product in the language of the Member State where it is sold. In the case of products that contain toxic substances, the consequences of a breach of this rule can be serious for consumers' health and companies' liability.

### **3. For the rest, a case by case approach is required**

Article 20 of the 2006 Services Directive on non-discrimination and the guidance for its application published in 2012 offer a good basis to address remaining questions of potential geo-blocking. Within the strict framework of competition law, companies need the freedom to choose the distribution and pricing models that are appropriate to their products and the markets in which they operate. Forcing companies to supply and, in the process, making the regulatory framework more complex in areas where geo-blocking may be justified will not

attain the objectives of the Commission. In other words companies need the flexibility to geo-differentiate both for legal and for commercial reasons.

Although this may not have been intended, AIM sees a real risk of introducing discrimination in favour of online commerce to the detriment of sales in physical outlets. Both have their value in terms of jobs and have complementary roles in serving communities and individual consumer needs as in the successful model of selective distribution.

The trend to online commerce and to the cross-border component of it is already strong and will go from strength to strength as could be seen again during this year's end-of-year shopping season. The data used by the Commission to measure cross-border trade is based on consumer perceptions, while consumers are not always aware that a transaction may have a cross-border dimension.

In conclusion AIM recommends a combination of strict enforcement of existing competition rules against manifestly unjustified geo-blocking and a case-by-case approach in the grey area where geo-blocking may be justified or not as the one most likely to enable the Commission to reach its important objectives.