

## **INTERNATIONAL EXPANSION OF AIM – AN OFFSHORE PERSPECTIVE**

**By Daniel Mackelden, Cains**

### **Where from?**

The AIM market has been of great interest to overseas businesses. In excess of 300 companies have taken this route. Growing companies are often choosing to come to London to raise capital rather than looking at their domestic exchanges. For example, in excess of 100 companies from China, India and the CIS are listed here. A wide variety of sectors are represented.

The reasons for choosing London vary - better valuations, access to institutional investors, analyst coverage. There may be regulatory reasons preventing raising money in the home jurisdiction, for example, a lack of trading history or a lengthy queue to join domestic markets.

Where the figures are not that clear is how these international companies are getting here. By way of example - the LSE has identified 20 companies with Chinese operations - however the vast majority of these are not PRC companies. The same goes for India. There are actually only 2 Indian companies listed here. The remainder - in excess of 20 now - do indeed have Indian business interests but have invariably used offshore centres to route to AIM.

The prevalence of offshore companies on AIM is something which is not easily evidenced by the LSE figures. One of the main reasons for this is for the purposes of the official statistics both the Channel Islands and the Isle of Man have been deemed to be part of the United Kingdom. Although they are Crown Dependencies they are not legally part of the UK. The reality is that the Isle of Man and the Channel Islands account for in excess of 150 companies on AIM. Add in the Caribbean offshore jurisdictions and we are looking at something in the region of 230 international companies that have routed to AIM via offshore incorporation. Indeed of the AIM 100 over half of these companies are not UK entities and nearly 40% of the AIM 100 have routed to London using the offshore route.

These figures demonstrate the unsung impact of the offshore world on international companies coming to AIM. The usual suspects are the Isle of Man, the Channel Islands, Bermuda, Cayman and the BVI.

The reason why these centres are used is of course primarily driven by tax. Corporate entities based in these jurisdictions will be subject to low or no tax. Similarly stamp duty and withholding tax do not generally exist. The ability to tap capital markets but to keep the holding company and its profits in a tax efficient jurisdiction is a powerful business driver. Also these holding companies can be used to embark on tax efficient M&A activity elsewhere around the globe. It generally is non-sensical for an international company coming to the market with little or no other connection with the UK to seek to raise these funds by establishing a UK holding company.

### **Mechanics**

The role of the offshore lawyer is essentially to set up a company which has the look and feel of a UK plc. Questions to be answered include whether the company will be subject to an extra tier of regulation? In some offshore jurisdictions you may need to have the admission document reviewed or filed with the domestic authorities. Will the Takeover Code apply? It will for an Isle of Man or Channel Islands company where the central

management and control of the company is located in the Isle of Man, the Channel Islands or the UK. Even where the Takeover Code does not apply then some companies choose to incorporate it by reference into their constitutional documents. The same consideration applies to the Combined Code which is not applicable to AIM companies but most of the larger international clients seek to include structures which replicate it such as audit and remuneration committees/separation of senior roles.

It should be remembered that the role of an offshore director is essentially no different to being a director of a UK company. You are a fiduciary - you owe duties to the company as well as your fellow directors. There are sanctions and penalties which can apply if you abuse this position. Many of the offshore jurisdictions are common law based and invariably decisions of the UK courts are persuasive. However pretty much all of the offshore jurisdictions have not replicated the detailed provisions of UK legislation dealing with directors and their proceedings e.g. loans, interests etc. There is no reason however why such prohibitions cannot be replicated in the Articles.

The Memorandum and Articles are therefore the key instrument to ensure the company retains any required UK concepts, for example, pre-emption rights – again, often not a part of offshore legislation (or opt in at best) Likewise authorities to allot may be included here or covered at General Meetings or AGMs. Often allotment in offshore companies is left to the sole discretion of directors and hence this intervention in order to allay the concerns of institutional investors. Certain shareholder rights and obligations can also be addressed in the Memorandum and Articles. EU directives on transparency as adopted in the UK do not apply in offshore territories. In addition, most offshore territories do not have equivalent provisions dealing with shareholder notifications as to material shareholding amounts or giving companies the power to interrogate members as to shares they hold themselves or in concert with other parties. Again - areas to be discussed with the advisors and provisions included accordingly.

Ongoing administration is often different. The concept of the AGM is not necessarily something which exists in offshore territories. Indeed the idea has often been dispensed with in favour of written resolutions or sometimes no shareholder meetings are held unless deemed appropriate by the directors. The annual meeting concept therefore needs to be enshrined in the Memorandum and Articles - notice periods, proxies, conduct of meetings. Voting percentages may need to be looked at. Some territories don't necessarily have the concept of special or extraordinary resolutions. Also who can amend the Memorandum and Articles? In some jurisdictions this power can be exercised by the directors alone.

A major factor which needs to be examined is how investors can hold their interests. Some offshore territories do not have regulations dealing with uncertificated securities. As the shares themselves cannot be traded or held through electronic settlement then in such cases it may be necessary to set up depositary interests which are traded through CREST.

In terms of financial reporting - again standards vary. Offshore companies are required to prepare accounts but these may not need to be audited or publicly filed in its home jurisdiction. The basis of account preparation as well can also cause issues where companies need to move to international accounting standards. The maintenance of accounts and dissemination of financial information is of course an ongoing AIM requirement so quite often guidance will be needed to ensure the offshore company has the necessary procedures in place to ensure compliance.

It is important to note that although offshore companies may be considered to be more flexible than onshore entities they will be subject to the AIM rules if listed here. Compliance with these rules requires ongoing input from NOMADs and UK lawyers and accountants. To the extent that these professionals tell the company what is required then the offshore advisors need to ensure that the AIM regime is superimposed on the offshore side of things. Similarly sanctions and liabilities can attach in the UK if malfeasance occurs here notwithstanding incorporation elsewhere - importantly - Insider dealing, market abuse and preparation of false or misleading financial information.

## **Themes**

An interesting feature of offshore listings work is that the deals have generally been getting larger. Towards the back end of 2007 there were numerous listings of companies with market caps of in excess of 200 million pounds. Although historically AIM was viewed as the appropriate market for small and mid-cap clients - some of the entrants last year were borderline on whether they should have been on AIM or the Official List. Some may not have had a choice - in that they did not have a sufficient track record. Others may have seen the AIM market as a better place to start off and with their internal processes and procedures developed and improved on AIM then they would seek to migrate to the Official List in due course.

Although the recent uncertainty in the markets has definitely slowed the international AIM pipeline one would hope that these deals will continue to flow in 2008. Keen interest still exists from India and also various CIS countries. The PRC market - although widely talked about - remains a slight enigma as the current stance of the Chinese government has effectively curtailed London listings at the current time - witness the recent senior UK delegations aiming to progress matters. Keen interest in African mining and natural resource companies is also an area to watch.

To conclude - the initial target market for AIM is therefore very different from where things stand today. One would hope that the continued internationalisation of AIM will bring further business to both London and the offshore jurisdictions thereby strengthening the symbiotic relationship which exists between the on and offshore worlds.