



# 监管执法全球化

## Global enforcers

中国反腐败执法将在国际舞台上扮演重要角色。而随着对外投资的增长，中国公司也面对着西方监管机构愈发积极且严格的监查。作者：Tony Woodcock 和 Alan Ward

*Anti-corruption enforcement in China is set to play a major role on the international regulatory landscape just as foreign investment grows and Chinese companies face increasing scrutiny from proactive regulators in the West, write Tony Woodcock and Alan Ward*

**在**中国，反腐败执法一直是 2013 年的热门话题。诸多报道指出，国家主席习近平已将处理腐败问题作为其执政第一年的重点之一。

近几个月以来，随着高官身陷调查的案例日益增多，反腐工作的效果变得日益显著。

然而，中国的反腐败努力并非仅仅是国内政治的必然需要，亦非纯粹的对内现象。无论中国突然掀起的这场反腐败执法浪潮原因为何，都已不可否认地在西方引起三个方面的反响。

**E**nforcement against corruption in China was rarely far from the headlines in 2013. It was widely reported that President Xi Jinping has made tackling corruption one of the main themes of his first year in office. In recent months, the effects of this crackdown have been plain for the world to see, with a number of increasingly senior officials falling subject to investigation.

However, the Chinese anti-corruption effort is not exclusively a symptom of domestic political imperatives, or an exclusively inward-facing phenomenon. Whatever the cause of the sudden upsurge in corruption enforcement in China, it has had undeni-



过去的一年见证了一系列跨国公司在中国陷入监管调查。在7月，英国制药公司葛兰素史克 (GlaxoSmithKline) 遭到调查，被控支付了4亿9千万美金的贿赂给医生。随后一连串西方医药公司也遭到中国的调查，包括诺华 (Novartis) 及其子公司爱尔康 (Alcon)、法国企业赛诺菲 (Sanofi)、美国百优解制造商礼来制药 (Eli Lilly) 等。

中国监管活动并不仅局限于制药行业。有报道称，超过24家西方公司，包括通用电气 (General Electric)、IBM、甲骨文公司 (Oracle) 和西门子 (Siemens) 均接到中国监管机构通告，要求就其在中国的反竞争行为进行全面披露，否则将面临罚款。另外，据说也有外国汽车制造商因潜在反垄断违规行为而成为了紧急调查对象。

## 西方关注

在中国监管机构不断加大努力调查外国公司违规、腐败指控及其他被控在中国发生的经济犯罪的同时，西方调查机构对相关事件的关注程度也日益增加。

英国航空引擎制造商罗尔斯·罗伊斯 (Rolls Royce) 正在接受英国严重欺诈办公室 (SFO) 有关该公司贿赂中国高管指控的调查，其行贿目的包括：从中国国际航空取得价值20亿美元的发动机订单，以及2010年从中国东方航空获得某合同的签订权。曾在这两家公司任职的高管陈新，因涉嫌从西方公司的中介机构处接受贿赂，于2011年4月被中国当局逮捕。

在美国，商品期货交易委员会 (CFTC) 已开展一项针对 JP Morgan Chase 投资银行在香港的招聘行为的调查 (代号为“儿女”项目)。

近期报道暗示，CFTC 调查将向整个东南亚铺开，并将扩展至其他华尔街银行。

ably caused reverberations in the West, in three key regards.

The past year has seen a series of multinational companies becoming subject to regulatory investigation in China. In July, British pharmaceutical company GlaxoSmithKline came under investigation, accused of paying US\$490 million in bribes to foreign doctors. Subsequently, a succession of Western drug companies have become the subject of Chinese probes, including Novartis (and its subsidiary Alcon), French firm Sanofi and Eli Lilly, the American manufacturer of Prozac.

Chinese regulatory activism has not been limited to the pharmaceuticals sector. There have been reports that more than two dozen Western companies, including General Electric, IBM, Oracle and Siemens, have been told by Chinese regulators to make full disclosure of anti-competitive practices in China, or face fines.

Foreign car manufacturers are also said to be the subject of an imminent investigation regarding potential antitrust violations.

At the same time as Chinese regulators have escalated efforts to identify regulatory infringements by foreign companies, allegations of corruption and other economic crimes alleged to have taken place in China have increasingly proved of interest to investigative agencies in the West.

British engineering company Rolls-Royce is currently being investigated in the UK by the Serious Fraud Office (SFO) in relation to alleged bribes made to a Chinese executive in order to secure engine orders worth a total of US\$2 billion from Air China, and also in relation to the award of a contract by China Eastern Airlines in 2010. Chen Xin, an executive who worked for both airlines, was arrested by Chinese authorities in April 2011 on suspicion of accepting payments from intermediaries acting for Western companies.

In the US, the Commodity Futures Trading Commission (CFTC) has opened an investigation into the hiring practices of investment bank JP Morgan Chase in Hong Kong (dubbed the “sons and daughters” programme). Recent reports have suggested the CFTC investigation will extend across Southeast Asia, and to other Wall Street banks.

## Chinese investment in the West

With ever greater Chinese investment overseas and the emergence across developed economies of increasingly onerous regulatory requirements and standards, it seems inevitable that Chinese investors and companies will face greater scrutiny.

Recent allegations of corruption involving PetroChina have focused attention on the degree to which regulators in the UK and US may take an interest or become involved in Chinese corruption enforcement. PetroChina's New York Stock Exchange listing, and British subsidiary, could conceivably expose the company to investigation under US and UK bribery laws, which are capable of extra-territorial effect.



“**但是在看到中国投资近期大幅增加的同时，必须注意到英国监管者对外国公司正在开展的大量调查**”

## 在西方的中国投资

随着中国海外投资的增加，以及各发达经济体日益繁重的监管要求和标准，中国投资者及公司似乎将不可避免地面临日益增多的监察。

最近涉及中国石油 (PetroChina) 的腐败指控，引起业界对英美监管者是否有意参与中国反腐败执法及参与程度的关注。中国石油在纽约证交所的上市公司及其英国子公司预计将使该公司遭到美国及英国的反贿赂调查。

关于中国成为企业行为全球监管者的问题在很多方面与国际关系、国际政治及外交退让等紧密联系在一起。评论家曾推测，全球监管正成为一项外交工具；美国对英国银行处以罚金，被英国政治家描述为“保护主义”的一种形式。伴随着全球监管执行的不断演变和发展，评论家毫无疑问将对这类国际关系及政治问题进行深入探讨。

本文考虑了中国投资者和公司在西方扩张业务时的处境，他们会发现自己将不得不与日益积极主动的监管机构和日益复杂的监管体制打交道。

有关国际监管合作、潜在责任以及监管风险管理的问题，将成为任何拥有海外业务的高管的兴趣所在。不过，首先值得考虑的是近期英国监管机构针对外国公司及投资者展开的一些监管调查和执行案例。

## 近期英国监管行动

在几个近期备受瞩目的案例中，外国投资者在英国遭遇监管机构设置的难关：

- 2012年8月，SFO的新任监事对 Qatar Holding 公司2008年对巴克莱银行的投资展开了调查，并从政府获得特别资金支持此项审查的进行；
- 2013年1月，矢崎公司 (Yazaki) 及其他日本制造商因参与影响丰田汽车、日产汽车、本田和雷诺 (Renault) 零部件支付价格的垄断联盟，被处以共计1.418亿欧元 (1.93亿美元) 的罚金；
- 2013年4月，在伦敦证交所上市的印度尼西亚矿业公司 Bumi、欧亚自然资源公司 (ENRC) 的股东致函英国政府，要求对两家公司一直以来受到的腐败指控开展调查。SFO 随后即对 ENRC 及其子公司在哈萨克斯坦和非洲的有关活动涉及的欺诈、贿赂及腐败指控展开了调查；
- 2013年9月，SFO 宣布将就收购 Gyrus Group 的交易，起诉日本制造商奥林巴斯 (Olympus) 违反英国公司法。

SFO 和金融行为准则局 (FCA) 的主管认为，更多更好的监管

Questions relating to China's emergence as a global regulator of corporate conduct are in many ways inextricably tied up with questions of international relations, politics and comity. Commentators have speculated about global regulation becoming a tool of diplomacy; American fines levied on British banks have been described as a form of “protectionism” by British politicians. Such issues of international relations and politics will no doubt be explored in detail by commentators as global regulatory enforcement continues to evolve and grow.

This article considers the position of Chinese investors and companies, which may find themselves having to engage with increasingly proactive regulators and increasingly complex regulatory frameworks as they expand their business interests in the West.

Issues around international regulatory co-operation, potential liability and managing regulatory risk will be of interest to any executive with interests overseas. However, it is first useful to consider some recent examples of regulatory investigation and enforcement against foreign companies and investors undertaken by regulators in the UK.

## Recent actions

In several recent, high-profile cases foreign investors have run into difficulties with regulators in the UK:

- In August 2012 the new director of the SFO opened an investigation into the investment made by Qatar Holdings in Barclays Bank in 2008, and received special funding from government to undertake this enquiry;
- In January 2013, Yazaki Corp and other Japanese manufacturers were fined a total of €141.8 million (US\$193 million) for taking part in cartels that affected prices paid for components by Toyota, Nissan, Honda and Renault;
- In April 2013, shareholders in Bumi, an Indonesian mining company, and Eurasian Natural Resources Corporation (ENRC), both of which have listings on the London Stock Exchange (LSE), wrote to the British government asking that investigations be commenced into persistent public allegations of corruption. The SFO subsequently opened an investigation into ENRC in relation to allegations of fraud, bribery and corruption relating to the activities of the company or its subsidiaries in Kazakhstan and Africa;
- In September 2013, the SFO announced that Japanese manufacturer Olympus Corporation would be prosecuted for offences under the UK Companies Act in relation to the acquisition of Gyrus Group.

The new heads of both the SFO and the Financial Conduct Authority (FCA) hold the view that more and better regulation makes the UK a more attractive place to do business. It is arguable that the increasingly effective enforcement action that state agencies are taking in the UK against those who transgress regulatory requirements or the criminal law makes

“**The recent spike in Chinese investment must be viewed alongside the large number of investigations into foreign companies**”

将使英国成为一个更具吸引力的经营之地。言之成理的是，英国国家机关针对违反监管要求乃至刑法者开展的日益有效的执法行为，将使遵守规则的公司更易在英国市场展开竞争。

然而，随着中国在美国的投资快速增长——例如，希思罗和曼彻斯特机场、核电、高铁和泰晤士水务已经成为或即将成为中国近期的投资目标——尽早认识并管理潜在的监管风险，将对中国投资者更加有益。

### 潜在监管风险

尽管英国政府近来大力鼓励中国对英投资，但是在看到中国投资近期大幅增加的同时，必须注意到英国监管者对外国公司正在开展的大量调查。这些调查的事实及数量足以警示外国投资者不应该在监管事宜上指望特殊优待或特别处理。

在收到有关 Bumi 和 ENRC 的不当行为指控，以及被质疑对两家公司治理情况的监管是否足够之后，FCA 在 2013 年 11 月宣称英国上市规则将从 2014 年中期进一步改进和收紧。未来，寻求在伦敦证交所高级板上市且单个股东拥有超过 30% 股权的公司将被要求证明其拥有适当的经营独立程度。

高级板上市自 2009 年引入英国，以便在越来越多的外国公司寻求在伦敦上市的同时，保持公司治理水准。在当前规则下，公司必须满足英国在监管及公司治理方面的“超级等同”规则，原因是其股票可以自动被主要指数追踪基金和养老基金购买。

为了使伦敦成为中国各家银行的主要海外中心，2013 年 10 月英国政府宣布将允许中国银行在伦敦通过“分行”经营批发性业务，这些“分行”将被视为中国银行的延伸并主要受中国监管，有别于受英国严格的资本和流动性标准监管的子公司。

然而，即使在上述方面针对中国银行的监管要求有所放松，英国复杂且不断变化的金融服务监管仍将继续为海外金融服务专业人士在英国或针对英国市场开展的经营带来监管挑战及风险。



the UK market easier to compete in for companies that abide by the rules.

However, with Chinese investment in the UK increasing exponentially – with Heathrow and Manchester airports, nuclear power, high-speed rail and Thames Water being the targets of recent or imminent Chinese investment – it will increasingly be in the interests of such investors to recognise and manage potential regulatory risk at the earliest possible opportunity.

### Potential risk

Despite recent efforts by the UK government to encourage Chinese foreign investment, the recent spike in Chinese investment must be viewed alongside the large number of investigations into foreign companies currently being undertaken by UK regulators. The fact and number of these investigations should act as a strong indication that foreign investors should not expect particular leniency or special treatment with regard to regulatory matters.

Following allegations of impropriety in respect of the affairs of Bumi and ENRC, and questions as to the adequacy of regulatory scrutiny of the two companies' corporate governance, the FCA announced in November 2013 that the UK listing rules will be reformed and tightened from mid-2014. In the future, a company seeking a “premium” listing on the LSE will be required to demonstrate an adequate degree of operational independence, where a single shareholder owns more than 30% of the company's shares.

The premium listing was introduced in the UK in 2009 with a view to upholding governance standards at a time when foreign companies were increasingly seeking to list in London. Under the existing rules, companies already have to meet the UK's “super equivalent” rules on regulation and corporate governance, on account of their shares being automatically bought by major index tracker and pension funds.

In October 2013, as part of a bid to make London the major offshore centre for Chinese banking, the UK government announced that Chinese banks will be permitted to operate wholesale business in London through “branches” – treated as an extension of the Chinese bank, and being largely subject to Chinese regulation – as opposed to subsidiaries, which are subject to tight regulatory standards in the UK on capital and liquidity.

However, even if regulatory requirements are relaxed for Chinese banks in this regard, the complex and continually evolving nature of financial services regulation in the UK will continue to pose regulatory challenges and risks for overseas financial services professionals carrying on business in the UK, or in UK markets.

Any individual carrying on financial services activity in the UK, which is “regulated activity”, is required to obtain regulatory approval. Individuals who are based overseas are

根据要求,任何在英国开展金融服务业务(受监管活动)的个人都必须取得监管批准。常驻海外的个人只能在12个月的期间内在英国开展30天受监管的特定活动。如果违反上述规定,相关个人或企业将承担严重的监管责任甚至是刑事责任。

## 权力扩大

中国金融服务企业和从业者还应该保持警惕的是,英国监管当局的管辖权已扩展至基于或与英国市场有关的海外行为。近年来总部设于海外的企业或常驻海外的个人,包括加拿大交易平台 Swift Trade、美国对冲基金 Greenlight Capital 和来自迪拜的投资者 Rameshkumar Goenka 都曾面对金融服务监管机构依照《2000年金融服务及市场法》的市场滥用规定提起的诉讼。

在金融服务监管之外,据各大媒体报道,英国最近刚通过反贿赂法,允许在英国调查和起诉于海外发生的腐败行为。与在英国的中国投资企业尤其相关的是欧盟及英国国内的竞争法,该法为商业机构之间的反竞争安排设置了刑事责任。

## 反洗钱

英国的反洗钱法明确具有域外效力,对于无论是在英国境内还是在其他地区涉嫌犯罪所得的资金,都规定处理这类资金属犯罪行为——例如,可能会被海外母公司转移至或投资于英国的资金。在航空、铁路和建设行业,繁重的健康及安全法规可能会导致未遵守严格安全标准的公司及其高级管理层承担刑事责任。

最后,我们有理由相信,英国监管机构在英国境内开展任何触及中国或中国经营活动的调查时,会毫不犹豫地寻求与中国相关机构的合作。英国的监管机构非常熟悉如何从海外监管当局取得协助及证据。另外,英国和中国刚刚签订了一项新的资产共享协议,规定任何联合调查产生的收入将在中英两国监管机构之间分享。

## 降低监管风险

全球监管执法无论是被视为全球化的必然结果还是国际外交工具,抑或是保护主义的一种新形式,都将继续成为开展国际业务的一项重大风险。

随着中国投资和经营的日益全球化并扩张至诸如英国等西方经济体,了解海外经营牵涉的监管风险以及如何降低这些风险,将对中国经营者及其专业顾问变得越来越重要。

监管风险可以通过尽早获得适当的建议予以评估、管理和降低。通过发展风险管控系统,且在适当时与相关监管当局接洽,中国投资者能更有把握地在英国经营业务,并确保他们不会成为全球监管执法快速发展过程中的新闻或案例焦点。■

permitted to carry out certain regulated activity in the UK for 30 days in a 12-month period. Any transgression of this rule could give rise to serious regulatory liability for the relevant individual or their firm – or even criminal liability.

Chinese financial services companies and practitioners should also be alert to the fact that the jurisdiction of UK regulators extends to activities overseas that take place on, or in relation to, UK markets. In recent years both companies and individuals based overseas – including Swift Trade, a Canadian trading platform, Greenlight Capital, an American hedge fund, and Rameshkumar Goenka, a Dubai-based investor – have faced proceedings by the financial services regulator under the market abuse provisions of the Financial Services and Markets Act 2000.

Beyond the scope of financial services regulation, it has been widely reported that the UK has recently passed bribery legislation that allows for overseas corruption to be investigated and prosecuted in the UK. Of particular relevance to any Chinese business investing in the UK is EU and domestic UK competition law, which creates criminal liability where anti-competitive arrangements are agreed between commercial entities.

The UK law on money laundering is expressly extra-territorial in effect and criminalises any dealing with funds – for example, which may be transferred or invested in the UK by an overseas parent company – where those funds are suspected to represent the proceeds of crime, whether in the UK or elsewhere. In the aviation, rail and construction industries, onerous health and safety laws give rise to potential criminal liability for companies and their senior executives where strict safety standards are not adhered to.

Finally, there is every reason to believe that UK regulators will not hesitate to seek co-operation from their Chinese counterparts in the context of any investigation in the UK that touches upon China or Chinese business activity. Regulators in the UK are very familiar with seeking assistance and evidence from overseas regulators. In addition, the UK and China have recently agreed to a new asset sharing agreement, providing for the proceeds of any joint investigation to be shared between Chinese and UK regulators.

## Mitigating regulatory risk

Whether viewed as an inevitable consequence of an increasingly globalised world, or as a tool of international diplomacy, or even as a new form of protectionism, globalised regulatory enforcement looks set to continue to represent a significant risk to international business.

As Chinese investment and business becomes increasingly global in scope, and expands into Western economies such as the UK, gaining an appreciation of the regulatory risk of operating overseas – and how to mitigate it – will be of increasing importance to Chinese businesses and their professional advisers.

Regulatory risk can be assessed, managed and mitigated by taking appropriate advice at the earliest opportunity. By developing risk-appropriate systems and controls and, where appropriate, engaging with relevant regulators, Chinese investors can operate with a greater degree of assurance that they will not become the next news story or case study on the rapid growth of globalised regulatory enforcement. ■

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