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立方反垄断与合规团队

Antitrust & Compliance Team

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1、国家市场监管总局发布《关于制止滥用行政权力排除、限制竞争行为的规定（征求意见稿）》

为适应党和国家机构改革后的新形势、新任务，规范和保障市场监管部门依法行使职权，加快推进反垄断统一执法，保护市场公平竞争，市场监管总局起草了《关于制止滥用行政权力排除、限制竞争行为的规定（征求意见稿）》，并向社会公开征求意见。【1】

SAMR Promulgated Provisions on Curbing of the Abuse of Administrative Powers to Eliminate and Restrict Competition (Exposure Draft)

In order to adapt to the new situation and new tasks after the reform of the party and state institutions, to standardize and facilitate the market supervision departments to exercise their functions and powers according to law, accelerating the unified enforcement of the Anti-Monopoly Law (“AML”), and to safeguard market fair competition, SAMR drafted the “Provisions on Curbing of the Abuse of Administrative Powers to Eliminate and Restrict Competition (Exposure Drafts)” and solicited public comments.

2、市场监管总局发布扑尔敏原料药垄断案行政处罚决定书

根据2019年1月18日公告，国家市场监督管理总局对扑尔敏原料药供应企业（湖南尔康医药经营有限公司、河南九势制药股份有限公司）滥用市场支配地位违法行为作出行政处罚决定，分别处以2017年度销售额8%、4%的罚款，合计1243.14万元人民币。

国家市场监督管理总局于2018年7月起，对两家涉案企业进行立案调查。根据调查掌握的事实和证据，两家涉案企业具有市场支配地位，并实施了以下滥用市场支配地位行为：以不公平高价销售商品，没有正当理由拒绝与交易相对人进行交易，没有正当理由搭售商品。

国家市场监督管理总局认为两家涉案企业实施上述滥用市场支配地位行为，性质严重、危害程度较深，一是助推扑尔敏原料药价格上涨；二是严重破坏市场公平竞争；三是社会影响恶劣。国家市场监督管理总局认定涉案企业的上述行为违反《中华人民共和国反垄断法》第十七条第一款第（一）、（三）、（五）项规定，构成滥用市场支配地位行为，最终处以罚款合计1243.14万元人民币。【2】

SAMR Publishes Administrative Sanction Decisions against Chlorpheniramine Companies for Abuse of Dominance

SAMR has imposed CNY 12,431,400 in cumulative fines on two chlorpheniramine companies (i.e. Hunan Erkang Pharmaceutical Management Co., Ltd. and Henan Jiushi Pharmaceutical Co., Ltd.) for their abuse of dominant market position, amounting to separately 8% and 4% of their revenue in 2017, according to an SAMR announcement issued on 18 January 2019.

【1】 http://samr.saic.gov.cn/gg/201901/t20190114_280278.html

【2】 http://samr.saic.gov.cn/gg/201901/t20190118_280436.html

SAMR launched the investigation against the two companies involved in the case in July 2018. According to the facts and evidences, the two companies have market dominance and have implemented the following acts that abuse the market dominance: selling goods at unfairly high prices, refusing to trade with trading counterparts without justifications, tying without justifications.

SAMR held that the above-mentioned abuse of market dominance by two companies were serious and had harmful impacts. Firstly, they boosted the price of chlorpheniramine drugs; secondly, they severely undermined the fair competition in the market; thirdly, they had bad impacts on our society. SAMR determined that the above-mentioned conducts of the companies had violated the provisions of Items (1), (3) and (5) of the Article 17 of the *AML*, which constituted an abuse of market dominance and ultimately SAMR imposed a fine of CNY 12.431 million yuan on them.

3、国家市场监督管理总局对高济医药未依法申报行为罚款40万元

2018年12月21日，国家市场监督管理总局对高济医药收购河南好一生股权未依法申报案作出行政处罚决定。2019年1月7日，国家市场监督管理总局将行政处罚决定书予以公告。

2017年9月13日，高济医药与史铁军、惠红宾、刘芹签署《股权购买协议》，以（略）收购史铁军、惠红宾、刘芹持有的河南好一生100%的股权；交易后，高济医药取得河南好一生单独控制权。2017年9月29日，完成相应工商变更登记。

该交易系股权收购。交易后高济医药取得河南好一生单独控制权，属于《反垄断法》第二十条规定的经营者集中。高济医药2016年度全球营业额为（略），中国境内营业额为（略）；河南好一生2016年度全球和中国境内营业额均为（略），达到《国务院关于经营者集中申报标准的规定》第三条规定的申报标准，属于应当申报的情形。2017年9月29日，完成相应工商变更登记，此前未依法申报，违反《反垄断法》第二十一条，构成未依法申报的经营者集中。

本机关就高济医药收购河南好一生100%股权对市场竞争的影响进行了评估。评估认为，该项经营者集中不会产生排除、限制竞争的效果。

根据上述调查情况和评估结论,本机关根据《反垄断法》第四十八条、第四十九条和《暂行办法》第十三条规定, 对高济医药处以40万元人民币罚款的行政处罚。【3】

【3】 http://samr.saic.gov.cn/gg/201901/t20190107_279794.html

SAMR Imposed a Fine of CNY 400,000 on Gaoji Medicine for its Failure to Notify for Concentration of Undertakings

On December 21, 2018, SAMR issued a sanction decision against Gaoji Medicine for its failure to notify for the equity acquisition. On January 7, 2019, SAMR published the sanction decision on its official website.

On September 13, 2017, Gaoji Medicine signed a “Equity Purchase Agreement” with Shi Tiejun, Hui Hongbin and Liu Qin to acquire 100% of the equity of Henan Haoyisheng held by Shi Tiejun, Hui Hongbin and Liu Qin. After the transaction, Gaoji Medicine obtained sole control of Henan Haoyisheng. On September 29, 2017, they completed the corresponding industrial and commercial change registration.

The transaction is an equity acquisition, through which, Gaoji Medicine acquired the sole control of Henan Haoyisheng. The deal constituted a concentration of undertakings, as defined in Article 20 (3) of the AML. The global turnover of Gaoji Medicine in 2016 is (X), and its turnover in China is (X); the global turnover of Henan Haoyisheng in 2016 and China is respectively (X) and (X). The parties are obliged to notify the regulator of the deal under Article 3 of the ‘*Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings*’. On September 29, 2017, the corresponding industrial and commercial change registration was completed. It was not legally notified to and approved by SAMR before closing, and was against Article 21 of the AML which constitutes a concentration of undertakings without proper notification in accordance with the laws.

Upon assessment of the impact of Gaoji Medicine’s acquisition of 100% equity of Henan Haoyisheng on market competition, SARM concluded that the concentration had no anticompetitive impact.

Citing Articles 48 and 49 of the AML and Article 13 of the ‘Provisional Measures on Investigation and Punishments on Undertakings that Failed to Notify the Concentration of Undertakings as Required by Law’, SAMR imposed a fine of CNY 400,000 on the company.

4、浏览器视频广告过滤功能构成不正当竞争 腾讯二审获赔189万

腾讯公司与世界星辉公司不正当竞争纠纷一案尘埃落定。北京知识产权法院终审认定“世界之窗浏览器”过滤广告功能构成不正当竞争，判决世界星辉公司赔偿腾讯公司经济损失及合理支出189万余元。

北京知识产权法院经二审审理后认定，被诉行为是否违反《中华人民共和国反不正当竞争法》第二条规定，应以该行为是否违反公认的商业道德为标准。同时，因反不正当竞争法保护的是健康的社会经济秩序，因此，可通过分析被诉行为对社会总福利的影响从而对其是否违反公认的商业道德进行验证。

本案中，《互联网广告管理暂行办法》明确禁止被诉行为，说明主管机关已将此类行为认定为违反公认的商业道德。同时，反不正当竞争法考虑的社会公共利益既包括消费者利益，也包括经营者利益。而其中的经营者，不仅包括本案双方当事人，也包括其他同业或相关经营者。被诉行为虽看似有利于消费者，但其将对视频网站的商业模式及生存空间造成严重影响，最终成本仍需消费者承担。综上，北京知识产权法院作出上述判决。【4】

Browser's Filtering Video Advertising Function Constituted Unfair Competition. Tencent Won A Compensation of 1.89 Million in the Second Instance.

The case of the unfair competition dispute between Tencent and Shijie Xinghui was settled. The Beijing Intellectual Property Court concluded that the “the World Browser” filtering advertising function constituted unfair competition, and sentenced Shijie Xinghui Company to compensate Tencent's economic losses and reasonable expenses of RMB 1.89 million yuan.

After the trial of the second instance, the Beijing Intellectual Property Court found that whether the conducts violated Article 2 of the Anti-Unfair Competition Law of the People's Republic of China, should be determined based on whether the conducts violated the accepted business ethics. At the same time, as the Anti-Unfair Competition Law protects a healthy social and economic order, whether the alleged behavior had violated the accepted business ethics can be determined by assessing the impact on the welfare of the public.

In this case, the *Interim Measures for Administration of Internet Advertising* clearly prohibits the alleged behaviors, which can be seen that the competent authority has identified such conduct as a violation of recognized business ethics. At the same time, the social public interests considered by the *Anti-Unfair Competition Law* includes both the interests of consumers and the interests of undertakings. The undertakings include not only the parties in this case, but also other peers or related undertakings. Although the alleged behaviors seem to be beneficial to consumers, it will have a serious impact on the business model and living space of the video website, with the final cost being borne by the consumers. Therefore, the Beijing Intellectual Property Court made the above judgment.

【4】 <http://bjzcfy.chinacourt.org/article/detail/2019/01/id/3644704.shtml>

5、华为与IDC标准必要专利许可使用费纠纷进展

2018年12月，最高人民法院就华为技术有限公司（简称“华为”）诉交互数字通信有限公司(InterDigital Communications, INC) 等（简称“IDC”）标准必要专利使用费纠纷案做出再审裁定。【5】再审期间，根据双方已达成的和解，并基于双方的共同申请，最高人民法院进一步做出民事调解书。至此，双方之间自2011年开始持续7年之久的专利许可费纠纷正式终结。【6】

由于广东高院的二审判决决定的费率仅适用于IDC在中国的许可，华为和IDC均认为有必要解决中国以外的许可纠纷。于是，双方向国际商会申请仲裁并根据仲裁达成的和解协议签署了全球专利许可协议。

广东高等法院的二审判决仅适用于IDC中国许可。华为和IDC认为有必要解决中国境外的许可纠纷。因此，双方根据仲裁达成的和解协议，向国际商会提交仲裁，并签署了全球专利许可协议。

然而，据非官方消息，在达成全球和解协议后，两家公司希望利用和解协议中确定的费率取代深圳市中级人民法院确定的费率。但，广东省高级人民法院的二审判决为终审判决，并已生效，因此在程序上不允许使用和解协议来取代终审判决。经过几年各方听证收集意见，在重审过程中，最高人民法院最终接受了双方达成的和解协议，以此作为最终审判结果取代广东省高级人民法院的判决。因此，深圳市中级人民法院确定的0.019%FRAND费率将不再适用。最高人民法院作出的重审调解书赋予和解协议以法律效力，并取代中国法院判决和国际商会的仲裁裁决。此外，华为和IDC两三年前达成的覆盖3G和4G产品的和解协议将需要适应5G时代的发展。

此外，根据IDC公司2019年1月7日的公告，【7】IDC于1月3日收到起诉状，华为技术有限公司及其子公司于1月2日向深圳市中级人民法院提起诉讼请求法院：

【5】该裁定书尚未公开，目前无法由公开途径检索到。

【6】方达微信公众号，最高人民法院最终裁定再审并终审中国第一起标准必要专利使用费纠纷案件，

网址：https://mp.weixin.qq.com/s/QwFNv_xy2avpP5pBLq4hw。目前尚未发现其他媒体关于该案提审的报道。

- 认定IDC及其子公司违反了在公平、合理与非歧视原则下，对3G、4G和5G无线通信标准至关重要的专利技术进行授权的义务；
- 确认IDC及其子公司持有的全部3G、4G和5G中国标准必要专利向华为及其子公司2019年至2023年在中国生产和/或销售的无线终端产品许可的许可条件。

关于许可费诉讼（II），IDC还表示，其与华为的专利许可协议已于2018年底到期。IDC公司总裁Bill Merritt在接受采访时表示，“IDC希望通过仲裁程序解决最近与华为的纠纷，IDC支持仲裁，是因为有些人会利用诉讼达到选择管辖和拖延的目的。”【8】

The Development of the Royalty Lawsuit between Huawei and IDC

In December of 2018, the Supreme People's Court of China (SPC) granted a petition for retrial of the SEP royalty disputes between Huawei Technologies (Huawei) and InterDigital Communications (IDC)【9】. During the retrial, the SPC further made a civil conciliation statement based on the settlement agreement reached by the parties and the joint applications filed by the parties. Thus, the seven years royalty disputes between two parties since 2011 have officially ended.【10】

The Guangdong High Court's second instance judgment was only applicable to IDC's China licensing. Huawei and IDC felt it is necessary to resolve the licensing disputes outside China. Thus, the two parties initiated an arbitration with ICC and signed global patent licensing agreement according to the settlement agreement reached in arbitration.

However, according to the unofficial sources, after reaching the global settlement agreement, the two companies hoped to use the rate determined in the settlement agreement to replace the rate determined by the Shenzhen Intermediate People's Court. However, Guangdong High People's Court's second instance judgment was final and had taken effect. It was not procedurally allowed to use settlement agreement to replace judgment. After several hearings to gather opinions from all parties over several years, during the procedure of retrial, the SPC finally accepted the settlement agreement reached by two parties as the result of retrial to replace the Guangdong High People's Court's judgment. Thus, the 0.019% FRAND rate determined by the Shenzhen Intermediate People's Court is no longer applicable. The retrial conciliation statement made by the SPC empowers the settlement agreement reached by two parties with legality and replaces Chinese court's judgment and ICC's arbitration. In addition, the settlement agreement reached by Huawei and IDC two or three years ago to cover 3G and 4G products will need adaptation to cater to the 5G age.

【8】 InterDigital's CEO Wants to Arbitrate Patent Licensing Dispute With China's Huawei,

<https://www.law.com/corpcounsel/2019/01/08/interdigitals-ceo-wants-to-arbitrate-patent-licensing-dispute-with-chinas-huawei/?slreturn=20190009033909>.

【9】 The ruling is still not opened to public and cannot be searched by public sources.

【10】 Fangda Wechat's post, the SPC decides retrial Chinese first dispute on SEP royalty. Website: https://mp.weixin.qq.com/s/QwFNv_xy2avpP5pBLqq4hw.

No other reports relating to this case has been founded on other medias.

According to the report of IDC on January 7, 2019, 【11】 on January 3, 2019, IDC received a civil complaint filed by Huawei and its subsidiaries against IDC in the Shenzhen Intermediate People's Court on January 2, 2019. This civil complaint seeks:

- Ruling that the IDC and its subsidiaries have violated an obligation to license their patents that are essential to 3G, 4G and 5G wireless telecommunication standards on fair, reasonable and non-discriminatory terms and conditions.
- Determining the terms for licensing all the 3G, 4G and 5G Chinese SEPs of IDC and its subsidiaries to Huawei and its subsidiaries' wireless terminal products made and/or sold in China from 2019 to 2023.

According to Royalty Lawsuit (II), IDC also says that the patent license agreement with Huawei has expired by the end of 2018. Bill Merritt, the president of IDC, says in an interview that "IDC hopes to resolve the recent disputes with Huawei through arbitration progress. IDC endorses arbitration because some people will achieve the purpose of selecting jurisdiction and delay through lawsuit." 【12】

6、高通CEO：苹果要价10亿美元，才有机会成为苹果iPhone芯片的独家供应商

据路透社报道，在美国当地时间周五，高通CEO表示，高通想要成为苹果iPhone调制解调器芯片的独家供应商，就需要向苹果支付10亿美元的“激励款项”，而不是阻止竞争对手进入市场。

这10亿美元是2011年苹果与高通之间交易的一部分，旨在部分补偿iPhone将当时使用的英飞凌芯片替换成高通芯片产品的技术成本。

根据2011年的协议，高通公司成为了苹果独家的调制解调器芯片供应商，该芯片能使手机设备连接至无线数据网络。作为交换，高通同意向苹果提供折扣（确切数额未公布）。

反垄断机构认为，与苹果的交易，是高通公司为保持在调制解调器芯片中的主导地位、排除英特尔等竞争对手的反竞争行为模式的一部分。

【11】 IDC's 8-K Filing Announcement: <https://www.snl.com/Cache/c396287719.html>.

【12】 InterDigital's CEO Wants to Arbitrate Patent Licensing Dispute With China's Huawei, <https://www.law.com/corpounsel/2019/01/08/interdigitals-ceo-wants-to-arbitrate-patent-licensing-dispute-with-chinas-huawei/?sreturn=20190009033909>.

Qualcomm CEO: Apple Demanded \$1 Billion for Chance to be A Sole Chipset Supplier of iPhone

(Reuters) - Qualcomm sought to become the sole supplier of modem chips for Apple's iPhone to recoup a \$1-billion "incentive payment" that Apple insisted on, not to block rivals from the market, Qualcomm's chief executive testified on Friday.

The payment from Qualcomm to Apple - part of a 2011 deal between Apple and Qualcomm - was meant to ease the technical costs of swapping out the iPhone's then-current Infineon chip with Qualcomm's.

Under the 2011 deal, Qualcomm was named Apple's sole supplier of modem chips, which help mobile phones connect to wireless data networks, in exchange for which Qualcomm agreed to give Apple a rebate - the exact nature of which has not been disclosed.

Antitrust regulators have argued the deal with Apple was part of a pattern of anticompetitive conduct by Qualcomm to preserve its dominance in modem chips and exclude players like Intel. 【13】

7、德国反垄断监管机构对Facebook采取行动

路透社消息，德国反垄断监管机构计划勒令Facebook停止收集部分用户数据。

联邦卡特尔办公室 (Federal Cartel Office) 自2015年以来一直在调查Facebook。该机构发现，这家社交媒体巨头滥用其市场支配地位，在未经用户知情或同意的情况下收集用户的数据。

德国《图片报》说，监管机构将向这家美国公司作出有关未来几周需要采取何种行动的裁决。Facebook的一名女发言人说，该公司对监管机构的调查结果持有异议，并将继续捍卫这一立场。这项调查受到密切关注，因为人们越来越担心数千万Facebook用户的数据泄露，以及外国势力利用社交媒体影响美国选举。

德国监管机构尤其反对Facebook如何从第三方应用程序（包括它自己旗下的WhatsApp、Instagram以及游戏和网站）获取关于用户的数据，以及对非用户的跟踪。该报称，尚不清楚Facebook将在多大程度上严格遵守德国的命令，并指出监管机构似乎可能会设定一个合规的最后期限，而不是坚持要求立即采取行动。

【13】 <https://www.reuters.com/article/us-apple-qualcomm-mollenkopf/apple-demanded-1-billion-for-chance-to-win-iphone-qualcomm-ceo-idUSKCN1P600H>

German Antitrust Watchdog to Act against Facebook

BERLIN (Reuters) - Germany's antitrust watchdog plans to order Facebook to stop gathering some user data, a newspaper reported on Sunday.

The Federal Cartel Office, which has been investigating Facebook since 2015, has already found that the social media giant abused its market dominance to gather data on people without their knowledge or consent.

The Bild am Sonntag newspaper said the watchdog will present the U.S. company with its ruling on what action it needs to take in the next few weeks.

A Facebook spokeswoman said the company disputes the watchdog's findings and will continue to defend this position.

The investigation is being closely watched amid mounting concerns over leaks of data on tens of millions of Facebook users, as well as the use of social media by foreign powers seeking to influence elections in the United States.

The German watchdog objects in particular to how Facebook acquires data on people from third-party apps - including its own WhatsApp and Instagram services as well as games and websites - and its tracking of people who are not members.

The paper said it is still not clear how strictly Facebook will have to comply with the German order, noting that the watchdog looks likely to set a deadline for compliance rather than insisting on immediate action. 【14】

8、谷歌土耳其遭反垄断调查是否违反公平竞争法

2019年1月7日，土耳其反垄断监管机构“竞争事务委员会（Turkish Competition Authority）”宣布，已对谷歌展开反垄断调查，以评估其搜索算法和精准广告服务算法的行为是否违反土耳其的公平竞争法。

土耳其竞争事务委员会称，在展开此次调查之前，该委员会接到了谷歌竞争对手的投诉，指控谷歌滥用其主导地位，让竞争对手很难开展业务。

土耳其竞争事务委员会表示，此次调查的对象包括Google Reklamcilik ve Pazarlama、Google International LLC、Google LLC、Google Ireland Limited和Alphabet Inc。

早在去年9月，土耳其竞争事务委员会曾宣布，由于谷歌移动软件销售违反土耳其竞争法，已决定对谷歌罚款9300万土耳其里拉(约合1738万美元)。

【14】 <https://www.reuters.com/article/us-facebook-germany-antitrust/german-antitrust-watchdog-to-act-against-facebook-report-idUSKCN1P70KO>

Turkey to Investigate Whether Google Violated Competition Law

Turkey's Competition Authority said on January 7, 2019 it had launched an investigation into whether Google broke competition law with algorithms it uses for searches and to target advertisements.

The Competition Authority said that the probe follows a complaint from Google's competitors that Alphabet's Google unit had abused its dominant position and made the efforts of other companies difficult.

The investigation will include companies Google Reklamcılık ve Pazarlama, Google International LLC, Google LLC, Google Ireland Limited and Alphabet, it said.

In September, the authority fined Google some TRY 93 million (\$17.38 million) for violating competition law with its mobile software sales. 【15】

9、谷歌几周内将面对欧盟委员会开出的第三张罚单

据外媒最新消息，欧盟(EU)对谷歌反垄断罚款三部曲可能很快就要落下帷幕。据国外媒体1月18日引述不愿透露姓名的知情人士称，欧盟竞争事务专员玛格丽特·维斯特格(Margrethe Vestager)将在未来几周宣布对谷歌AdSense网络广告服务实施垄断行为的处罚。之前，欧盟监管机构已经调查谷歌的广告合同是否不公平地限制了竞争对手。知情人士说，正式惩罚的时间只是暂定的，仍有可能被推迟。

这一处罚将标志着欧盟对这家美国科技巨头进行八年多的反垄断调查将迎来一个高潮。就目前而言。该公司已经累积遭到了欧盟委员会一共67亿欧元(76亿美元)的罚款，如果它不服从欧盟的命令改变其行为，就可能面临更多的惩罚。

欧盟委员会在2016年表示，谷歌公司阻碍了在线广告的竞争，谷歌的AdSense搜索产品（即根据外部网站的网页内容匹配广告）在包括零售商、电信运营商和媒体在内的网站上投放广告。尽管AdSense在欧洲的市场份额超过80%，但它在谷歌2015年广告总收入中所占的份额不到20%，这一比例自2010年以来一直在稳步下降。

【15】 <https://cio.economictimes.indiatimes.com/news/corporate-news/turkey-to-investigate-whether-google-violated-competition-law/67449968>

Google Faces Third EU Antitrust Fine Within Weeks

The curtain could soon fall on the last in a trilogy of European Union antitrust fines for Alphabet Inc.'s Google. Competition Commissioner Margrethe Vestager is set to announce a penalty targeting the AdSense advertising service in the coming weeks, according to people familiar with the probe who spoke on condition of anonymity. Regulators were probing whether Google's advertising contracts unfairly restricted rivals. The timing is tentative and could still be pushed back, the people said.

The penalty will mark the culmination--for now--of more than eight years of active antitrust investigation into the U.S. tech giant. The company has already racked up 6.7 billion euros (\$7.6 billion) in fines and faces a potential threat of more if it doesn't obey EU orders to change its behavior.

The EU said in 2016 that Google hindered competition for online ads with its AdSense for Search product which places advertising on websites, including retailers, telecommunications operators and newspapers. While its European market share is more than 80 percent, AdSense contributed less than 20 percent of Google's total ad revenue in 2015, a percentage which has declined steadily since 2010. 【16】

【16】 <https://www.bloomberg.com/news/articles/2019-01-17/google-s-woes-pile-up-as-eu-said-to-ready-third-antitrust-fine?snd=technology-vp>

IMPORTANT INFORMATION

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For more information, please visit our website at www.lifanglaw.com. If you have any questions, please contact us at info@lifanglaw.com or

Beijing Office

Address: 11th Floor, Tower A, Nanxincang Business BuildingA22, Dongsishitiao Street, Dongcheng District, Beijing P.R.China 100007

Telephone: (8610) 64096099

Fax: (8610) 64096260,64096261

Shanghai Office

Address: 2805, China Insurance Building No.166 Lujiazui East Road, Pudong New Area, Shanghai P.R.China

Telephone: (8621) 58501696

Fax: (8621) 68380006

Guangzhou Office

Address: Room 3806, Building G, G.T.Land Plaza, No. 16, Zhujiang East Road, Zhujiang New Town, Tianhe District, Guangzhou P. R. China

Telephone: (8620) 85561566, 85561660, 38898535

Fax: (8620) 38690070

Shenzhen Office

Address: 22B03, Anlian Building No.4018, Jintian Road, Futian District, Shenzhen Guang Dong P. R. China 518067

Telephone: (86755) 86568007, 86568070

Fax: (86755) 86568072

Wuhan Office

Address: 2505, Building A, Tanhualin Fanyue Center, No.202 Tanhualin Road, Wuchang District, Wuhan, Hubei P. R. China 430060

Telephone: (8627) 87301677

Fax: (8627) 86652877

Seoul Office

Address: 5F, ILJIN Building, 45, Mapo-daero, Mapo-gu, Seoul, South Korea

Telephone: (0082) 02 69590780

Fax: (0082) 02 21799332

