

Switzerland

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1. LEGAL FRAMEWORK

A) DESIGNATION AND LEGAL DEFINITION OF THE STATE MEDIA REGULATORY BODY

In Switzerland, the state media regulatory authority is the Federal Office of Communication (OFCOM).¹ OFCOM is part of the Federal Department of the Environment, Transport, Energy and Communications (DETEC)² and performs tasks both for the DETEC and for the Federal Communications Commission (ComCom)³. OFCOM's mandate derives from the Law on Telecommunications (LTC) as well as from the Federal Law on Radio and Television (LRTV).

At the time of its creation in 1992, OFCOM was assigned two major tasks, namely to establish the conditions needed to open up the telecommunications market and to regulate the public and commercial radio and television sectors. In 2012, it was charged with a new task, to support the Federal Department of the Environment, Transport, Energy and Communications (DETEC) with regard to postal policy. Situated within DETEC, OFCOM attends to these matters on behalf of the Federal Council and the Federal Communications Commission (ComCom), while fulfilling an advisory and co-ordinating function for the public and policymakers.

¹ In German: BAKOM – Bundesamt für Kommunikation; in French: L'OFCOM – Office fédéral de la communication.

² In German UVEK – Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation; in French: DETEC – Département fédéral de l'environnement, des transports, de l'énergie et de la communication. Holder of the department is the Federal Council Doris Leuthard.

³ In German: Eidgenössische Kommunikationskommission (ComCom); in French: commission fédérale de la communication (ComCom).

OFCOM has to pursue the following objectives in order to fulfill its mission:

- In the area of telecommunications, OFCOM has to guarantee that the population and the economy are provided with reasonably priced and high quality offerings. To this end, OFCOM promotes effective and sustainable competition. Where necessary, it ensures a nationwide and affordable universal service. Moreover, OFCOM has to establish appropriate conditions for the development, deployment and utilisation of innovative, high quality and competitive technologies and service.
- In the area of broadcasting, OFCOM has to ensure that Switzerland is provided nationwide with a wide range of radio and television programming at the level of the different language regions as well as at regional and international level.

OFCOM prepares the decisions of the Swiss government (the Federal Council) and develops important international activities.⁴ Both, OFCOM and DETEC are in charge of supervising the performance of Swiss radio and television broadcasting: “OFCOM steps in when the sponsoring codes contained in the Federal Radio and Television Act are infringed. It supervises radio and TV stations in Switzerland not just in terms of product placement, but also decides on frequency allocations and ensures that the Swiss Broadcasting Corporation fulfills its duty to provide programming for all parts of the country.”⁵

However, OFCOM has no decision making powers. It is solely a supervisory and administrative agency of the Department for the Environment, Transport, Energy and Communications (DETEC) and the Swiss Federal Communications Commission (ComCom).

Since ComCom is not subject to any Federal Council or Department directives, it is considered to be an independent authority for the telecommunications market. However, the Commission is independent of the administrative authorities and has its own secretariat. It informs the public of its activities and produces a report each year for the attention of the Federal Council. The president convokes the Commission as required or upon a request put forward by a member. The Commission may also take its decisions by way of circulation. Established by the Law on Telecommunications (LTC) of 30 April 1997, it consists of 7 members – who must be independent specialists – nominated by the government (Federal Council). As provided for in law, the Commission instructs the Federal Office of Communications (OFCOM) to prepare its business and implement its decisions. The Commission has moreover delegated some of its tasks to OFCOM.

The main activities and competencies of the ComCom are:

- Granting licenses for the use of radio frequencies
- Awarding of universal service licenses
- Laying down the access conditions (unbundling, interconnection, leased lines, etc.) when service providers fail to reach an agreement
- Approval of national numbering plans
- Fixing the terms of application of number portability and carrier selection
- Decisions about supervisory measures and administrative sanctions

⁴ <http://www.bakom.admin.ch/index.html?lang=en>

⁵ <http://www.uvek.admin.ch/org/00469/00473/index.html?lang=en>

Where are the boundaries between OFCOM and ComCom? OFCOM prepares the commercial transactions of ComCom, makes the necessary applications and implements its decisions. In the telecommunications sector, OFCOM grants inter alia those radio licences which do not involve any telecommunications services, e.g. company radio and amateur radio licences. In addition, OFCOM licenses all providers of fixed network services (without a tender procedure). ComCom, for its part, awards the basic provision licence and licences for the provision of mobile telephone and other radio services where the licence is awarded on the basis of an invitation to tender. It also rules on interconnection disputes. ComCom additionally approves frequency and numbering plans.

COMCO⁶ is an independent federal authority. It should combat harmful cartels, monitor dominant companies for signs of anti-competitive conduct, enforce merger control legislation and prevent the imposition of restraints on competition by the state.⁷

Concerning advertising, OFCOM is also involved in a supervisory capacity. Advertising is regulated in the Federal Law on Radio and Television (LRTV)⁸ (paragraphs 9 – 14) of 2006. Amongst other matters, the law specifies the duration of advertising, products and fields that may or may not be advertised (tobacco, alcohol, political parties and religious groups are prohibited), as well as specific limitations concerning children's programs (no advertising breaks) and Public Service (no advertising on public radio).⁹ Thus, OFCOM monitors compliance with advertising law. The federal state i.e. the federal government and the federal parliament are responsible for legislation on radio and television.

B) THE POWERFUL STAKEHOLDERS BEHIND THE OFCOM: THE FEDERAL PARLIAMENT AND THE FEDERAL COUNCIL

OFCom is solely an implementation and supervisory authority and is part of the administration that has to put into practice the politics of the Federal Council and the Federal Parliament. For these reasons it is important to look at the power structures of Swiss media politics and Swiss media regulation.

As in other countries, there is a clear hierarchy in Switzerland. The starting point is the Federal Constitution that is compatible with other existing international contracts in the field of media politics (e.g. EMRK, notably article 10, as well as the European contract on transnational television). The constitution and any amendment to it must be accepted by parliament and by vote from the popular majority as well as from the majority of the cantons (mandatory referendum). Crucial for media politics are articles 16, 17 and 93 of the Federal Constitution.

Article 16 guarantees freedom of speech and freedom of information. Every person has the right to freely form, articulate and spread his or her opinion. Every person has the right to receive information freely from accessible common sources.

Article 17 guarantees freedom of the press, radio and TV as well as other forms of

⁶ In German: WEKO – Wettbewerbskommission; in French: COMCO – commission de la concurrence.

⁷ <http://www.weko.admin.ch/index.html?lang=en>

⁸ In German: RTVG - Bundesgesetz über Radio und Fernsehen; in French: LRTV – loi fédérale sur la radio et la télévision

⁹ <http://www.admin.ch/ch/d/sr/7/784.40.de.pdf>

public broadcasting of presentation and information. Censorship is prohibited; newsroom secrecy is guaranteed.

Article 93 paragraph 1 states that the Federal Government is the regulatory authority. In paragraph 2 the law specifies the specific legal position of radio and television – in contrast to that of the press. The law does allow the same freedom for the press, radio and TV. Thus, it demands from radio and TV a programming mandate. Due to tight codifications, the Government has no direct means of influencing programs; at most it can influence them indirectly via the regulation of licences.

The government is bound to be considerate of the press when it comes to legal actions in favour of radio and TV. For this reason, not only do radio and TV enjoy some sort of protection but also the press.

Subsequent to the constitution there are the federal acts (e.g. Federal Act on Radio and Television – RTVA) which were decided upon by both houses and which were subject to the facultative referendum.

Regulations, which follow the acts, put flesh on the paragraphs of the single acts. Regulations are formulated not only by the parliament but also by the government and administration. The more open the parliament formulates the act, the stronger the parliament can unfold and take influence and vice versa. The parliament decides on what level certain matters of fact will be regulated.

The government also plays a dominant role when it comes to licencing of radio and television. The Federal Council assigns the licences, which the OFCOM and DETEC have suggested. The Federal Council also formulates the performance and acts in accordance with the Federal Act on Radio and Television and the Radio and Television Decree.

Furthermore, along with the acts and decrees there are professional norms and rules as well as ethical rules which are generally congruent with the legal norms or even norm binding in cases where the constitution and the acts fail to capture the elements of an offence. Professional rules may be stronger or weaker than legal norms.

The federal government as well as the parliament are the crucial institutions when it comes to formulating and accomplishing media policy, notably for radio and TV. The parliament underlines its influence in the reform of the Federal Law of Radio and Television. On the other hand, the federal government shows its power with the corresponding regulations and by awarding and renewing licences. Since the establishment of the first Federal Law on Radio and Television in 1991 there have been revisions of the statute on a regular basis. Taking into account that the parliamentary process is laborious, it takes six to seven years to accomplish a revision. Currently a partial revision of the Federal Act on Radio and Television (RTVA) is under way: DETEC started the consultation procedure in spring 2012 and is at present about to evaluate the reactions of the cantons, political parties, corporations, associations and NGOs. The consultative phase gives the government the opportunity to react to the results by changing or stating more precisely its suggestions before giving it to parliament for discussion. In the present case, the revision focuses on the financing of radio and TV and on the subsequent question as to whether to introduce a reception fee bound to households rather than to devices.

2. FUNCTIONS OF OFCOM

OFCOM was founded in 1992. OFCOM's mandate derives from the Law on Telecommunications (LTC) and the Federal Law on Radio and Television (LRTV). OFCOM is involved in the following tasks:

- a) Telecommunication: regulation and supervision of markets and competition
- b) Radio and television: binding mandate: supervision and control of content according to the Swiss Federal Constitution article 93/2: "Radio and television shall contribute to education and cultural development, to the free shaping of opinion and to entertainment. They shall take account of the particularities of the country and the needs of the Cantons. They shall present events accurately and allow a diversity of opinions to be expressed appropriately".¹⁰
- c) IT-Technologies: technical regulation to ensure its functioning and its security
- d) Internet: spam, domain names, internet crime, electronic signatures
- e) Information society (digital literacy): implementation of the strategy of the Federal Council through the information Society Business Office of the OFCOM.
- f) Frequencies and antennas: allocation and control of radio frequencies
- g) Equipment and installation.

OFCOM is not responsible for the regulation of the press. Freedom of the press is guaranteed in the Swiss Federation Constitution (art 16)¹¹: "Art. 16. Freedom of expression and of information: Freedom of expression and of information is guaranteed. Everyone has the right to freely form, express, and impart their opinions. Everyone has the right to freely receive information and to gather it from generally accessible sources and to disseminate it."¹² Furthermore, article 93/4 calls for the protection of the press by stressing the fact that the state is responsible for legislation on radio and television and guaranteeing at the same time to respect the roles and duties of other media, in particular the press. There is no legal obligation for the Swiss press to fulfil a public service mandate. Newspapers – as private enterprise are subject to free entrepreneurial decisions and the market. One acts on the assumption that the press is self-regulated.

OFCOM is also involved in the field of digital literacy, media education and information society. The commitment of the Federal Council to the information society shows its awareness of the potential of ICTs and the importance of digital literacy. The "Information Society Strategies", for the first time formulated in 1998 and updated in 2006 and 2012, are being implemented by the newly created "Information Society Steering Committee" with the support of the "Information Society Business Office", based within the Federal Office of Communications (OFCOM).¹³ According to the Federal Councillor, Doris Leuthard, the follow-

¹⁰ <http://www.admin.ch/ch/e/rs/1/101.en.pdf>

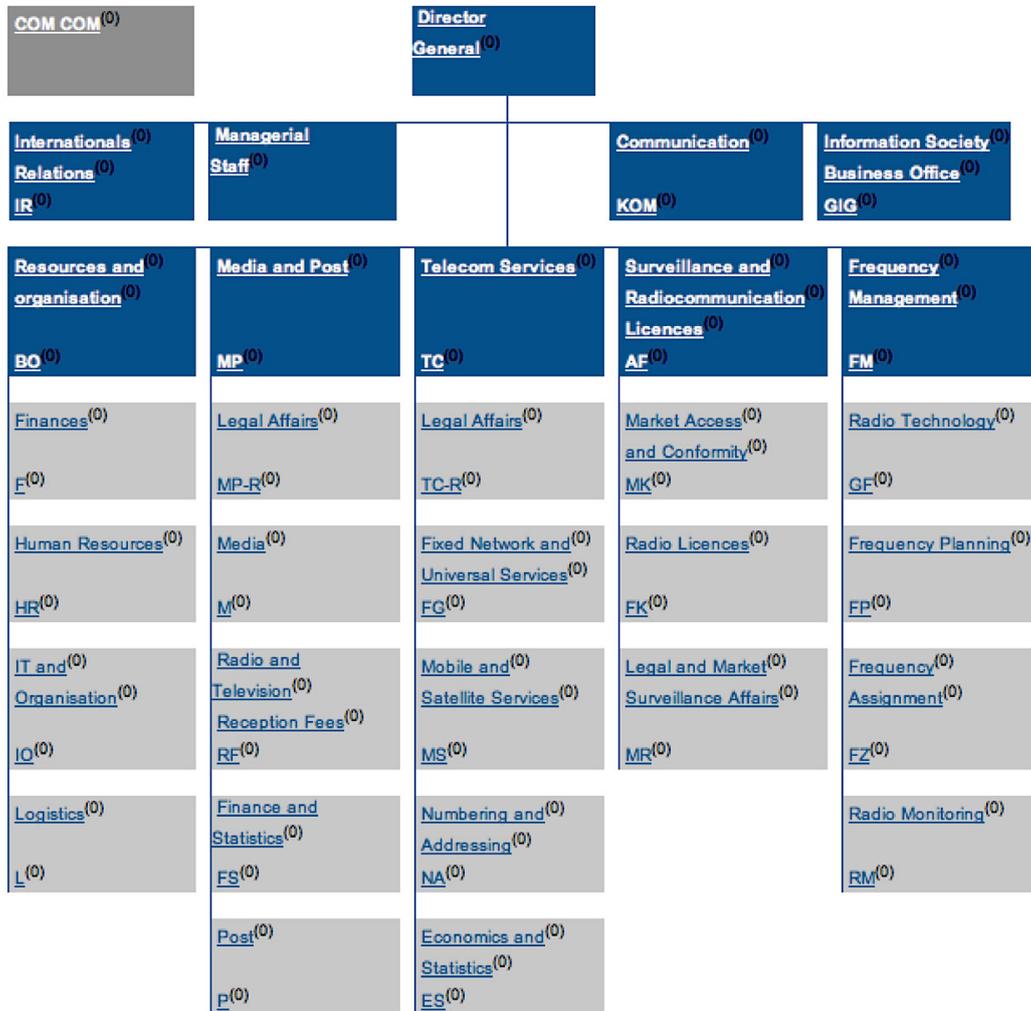
¹¹ In German: Bundesverfassung: Artikel 16: Meinungs- und Informationsfreiheit; in French: Constitution fédérale de la Confédération suisse: Libertés d'opinion et d'information.

¹² <http://www.admin.ch/ch/e/rs/1/101.en.pdf>

¹³ See: Federal Department for the Environment, transport, Energy and Communication DETEC (2012): Strategy of the Federal Council for an Information Society in Switzerland. Bern.

ing areas of activities are vital: infrastructure, security and trust, economy, e-Democracy and e-Government, education, research and innovation, culture, health and health care system, energy and resource efficiency.

OFCOM: Organisation:



OFCOM is headed by the director general Martin Dumermuth, a doctor of law. Dumermuth has been working for OFCOM since 1994 and became its director general in 2005.

OFCOM is divided into nine divisions each with three to five sections:

1. International Relations
2. Managerial Staff
3. Communication
4. Information Society Business Office
5. Resources and organisation
6. Media and postal services
7. Telecom Services
8. Surveillance and Radiocommunication Licences
9. Frequency Management

3. LEGITIMIZING OFCOM AND ITS UNDERLYING VALUES

The presence of OFCOM can be legitimized by posing the questions that followed the liberalization and deregulation of markets and the subsequent so called free play of competition in telecommunications, radio, TV and postal services: Who supervises the big players? Who makes the rules? Who guarantees that the rivalry will be truly competitive?

OFCOM, the Federal Office for Communications, sees itself as a neutral referee on the playing field who has to ensure that everyone has access to the complex market in order to compete. In relation to the fulfillment of its mission, OFCOM bases itself on the following values (Mission statement):

Acceptance of responsibility: “As OFCOM employees, we accept responsibility for our performance and results. We apply ourselves critically and constructively, both within and beyond our narrow area of responsibility. As a result we work better and avoid mistakes. Externally, we argue loyally for decisions.”

Future-oriented: “We recognize social, political, technical and economic developments at an early stage. From this we derive any need for action or change and indicate possible actions to the relevant decision-makers.”

Employee development: “All OFCOM employees have a responsibility to develop themselves. OFCOM promotes the development of its employees and supports targeted measures which contribute to ensuring that their tasks can continue to be carried out successfully in the future.

Respect: “For us, respect means more than politeness when dealing with other people. We take the concerns of our counterparts seriously and take time to listen and explain our positions and decisions fully and comprehensibly.”

Cost consciousness: “We use our resources so that they have the maximum effect on the fulfillment of our mission. To this end, we always ask ourselves whether an objective can be achieved with fewer resources. In our actions, we also consider the financial consequences on third parties.

Interdisciplinarity: We work together across technical specialisms, professional groups and the Office. This requires openness towards other people, approaches and perceptions, but also an interest in the content of relevant specialist areas outside our own area of activity.¹⁴

Admittedly, it remains unclear how the mission statement can be implemented in practice.

4. PERFORMANCE

OFCOM sees itself as having six different roles. According to their website OFCOM tries to complete the following tasks and activities:

a) OFCOM as the regulatory body

OFCOM steps in as a regulatory body when something goes wrong. For example, non-conforming telecom installations can substantially disturb the traffic. Thus, OFCOM's

¹⁴ <http://www.bakom.admin.ch/org/strategie/index.html?lang=en>

role is to guarantee the population access to a high-quality universal service in relation to telecommunications, radio & television and the postal services and to provide unlimited access to communication for everyone.

OFCOM prepares most tasks about which the Federal Council and the Federal Communications Commission need to make policy decisions. In the postal sector for instance, since July 2012 OFCOM has been responsible for reviewing the support measures targeted at the print media. Such decisions are politically and economically important for Switzerland. OFCOM would like to be a partner of local radio stations, national television stations, telephone companies, manufacturers, retailers, users and operators of telecommunications installations, internet service providers and postal service providers. OFCOM takes part at large events to ensure the functionality and security of wireless communications, for example at major sporting events such as World Cup skiing, horse races and cycle races. On these occasions, the OFCOM specialists ensure that the equipment is operating on the appropriate frequencies; that any sources of interference are identified, and that those affected by interference are informed about suitable measures to overcome this.

b) Creating a common platform

OFCOM helps in the creation of a common basis, meaning a common language, common standards, as well as common channels. Thus, OFCOM promotes technical standards, assigns frequencies, and participates in awarding licenses.

c) OFCOM as an assistant

In order to make radio and television more attractive, OFCOM serves as an advisor to the commercially and publically operated radio and television stations (Swiss Broadcasting Corporation) in the procedures for granting licenses or in the application of the obligations set out in the license.

But rules also have to be complied with. And this needs oversight. In the interests of providers, as well as of the viewing and listening public, Switzerland levies radio and TV reception fees in order to ensure that rural and mountainous regions can also enjoy a high level of public and commercial broadcasting stations. OFCOM makes sure that the fees are collected and, as the Federal Council's representative, that they are set correctly and allocated as intended to the public and private stations.

d) OFCOM as a co-ordinating body

The divisions between computers, television and telecommunications are becoming increasingly blurred. New opportunities and new questions also arise within the framework of the so called information society like flexible working arrangements, broader access to education and knowledge, new forms of political participation and e-commerce. However, the consequences of these developments are far-reaching. For this reason, the Federal Council regularly adopts basic guidelines for the information society, taking into consideration among other things the preparatory work done by the Information Society Business Office (ISBO), a department within OFCOM which closely monitors the global evolution of

the situation and which attempts to forecast what the future will bring. ISBO respectively OFCOM sees itself as a center of competence and collects information, develops strategies and encourages decision-making under the heading of equal opportunities. OFCOM promotes the use of new technologies and helps to ensure that no-one is excluded from the information society.

e) OFCOM as a negotiating partner

Globalization has become an everyday reality in the world of media and telecommunications. Here, OFCOM is Switzerland's ambassador and advocate, in dozens of organizations. Some technical standards will have to be applied on a worldwide basis; especially frequencies have to be allocated internationally. This sometimes requires meetings that extend over weeks and involve several hundred delegates from different countries.

f) OFCOM as a pioneer

The boundaries previously set by the law between mass and individual communications are tending to disappear. In fact, nowadays, we can watch TV over telecommunications connections and make phone calls using television networks. In this fast changing world, the role of the printed press or the traditional postal services in the future is rather unknown. OFCOM has to have to answer these questions by proposing measures and preparing draft legislation for the Federal Council. In the Eyes of OFCOM, new developments represent new opportunities and the future can be shaped. OFCOM does not want to prohibit, but to develop a framework that enables innovation to take place and that enables the requirements of the universal service and the public service to be met.

g) OFCOM in the service of customers

The desire to serve customers and provide them with optimal services is one of the main priorities for OFCOM's teams. Their members have to be prepared, when radiocommunications do not function smoothly or when interference has to be eliminated. In general, The Office has to provide information and advice on all aspects of the electronic media, telecommunications, frequency management, press support measures and the surveillance of specific postal activities - at several locations in Switzerland. Since 1 January 1999, OFCOM has been run according to the principles of new public management. This provides for open information, transparency for the Federal Council, Parliament, customers and the general public. In accordance with the principle that the user pays, customers are only charged for the services they use.¹⁵

5. ENFORCEMENT MECHANISMS AND ACCOUNTABILITY

OFCOM is responsible for the enforcement of resolutions from government and parliament by telecommunication companies and radio and broadcasting stations. OFCOM, however, is neither willing nor capable of checking if licenced commercial as well as public broadcasters

¹⁵ <http://www.bakom.admin.ch/org/00598/index.html?lang=en>

fulfil their obligations concerning law, acts and concessions. That is the responsibility of social science research (legal basis: article 77, Federal Law on Radio and Television (LRTV)). Scientific research provides insights into program contents, behaviour of the public, market trends and chances of innovation. Furthermore, the continuous support through research activities ensures the availability of specific professional competence (cf. Dumermuth 2012: 9). OFCOM has an annual budget for research of approximately 1 million Euros.

OFCEM places orders for research in accordance with two aims: Firstly, need results from basic research is needed in order to be able to prepare strategic decisions and concepts for the government and the administration. Secondly, scientific supervision and monitoring is needed as a basis for the discussion of the fulfilment of the performance related mandates of radio and TV providers. Knowing well that the scientific results cannot be simply adapted by the regulators, politicians and journalists, the OFCEM regards the research findings primarily as the basis for the discourse. Only secondarily are the findings used to give basic principles for decisions concerning media policy or business strategies in media corporations.

6. INSTITUTIONAL ORGANIZATION AND COMPOSITION

OFCEM has its head office in Biel, a bilingual city some 40 kilometres away from the capital Berne. It has some additional support points throughout Switzerland. At the end of 2011 OFCEM had 273 employees of which 35% were women.

7. FUNDING

The income and expenditure statement for 2011 shows a total expenditure of CHF 85.1 million (71 million Euro). Of this, 69% was attributed to operating expenses and 31% to transfer costs.

The operating expenditure includes OFCEM's financial outlay on human resources and administration, the service charges of other federal agencies and the non-financially effective depreciation of fixed assets. The transfer costs include subsidies in the radio and television sector and contributions to international organisations.

The revenue which can be allocated to the 2011 accounting year amounts to CHF 54.3 million (45 million Euro). Of this, 44% was attributed to operating revenue and 56% to revenue outside the global budget. The operating revenue corresponds to OFCEM's administrative fees. The revenue outside the global budget includes radio licence fees - which constitute the major part at CHF 27 million (22.5 million Euro) (89%) - the licence fees of the licensed radio and television stations for special financing in the radio and television sector and the revenue from violations of the law (fines and confiscated profits).

Total expenditure in 2011 was CHF 30.8 million (26 million Euro) (34%) higher than total revenue. A revenue surplus was reported in the transfer area, with expenditure of CHF 26.6 million and revenue of CHF 30.4 million (25.5 million Euro). In the operating sphere, operating expenditure (CHF 58.3 million (49 million Euro)) exceeded operating revenue

(administrative fees: CHF 24.0 million (20 million Euro)) by CHF 34.3 million (29 million Euro) (59%).¹⁶

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¹⁶ <http://www.bakom.admin.ch/org/jahresberichte/03962/03971/04003/index.html?lang=en>