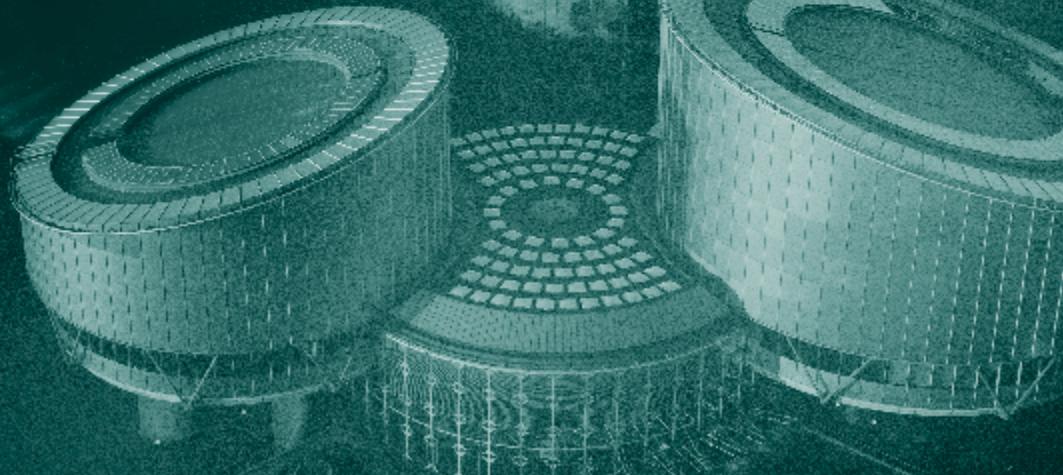


# THE EUROPEAN COURT OF HUMAN RIGHTS PROTECTING BUSINESSES



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# THE CONVENTION PROTECTS BUSINESSES

**The legal precedent established by the European Court of Human Rights ('ECHR') allows businesses to invoke key rights laid down in the European Convention on Human Rights (the 'Convention'). The Strasbourg-based ECHR has thus also strengthened protections under human rights law for companies in Switzerland.**

The ECHR has ruled that the Convention also applies to businesses that do not act as governmental organisations, and insofar as the rights concerned are by their nature applicable to legal entities.

Private-sector businesses may thus invoke rights such as freedom of expression, freedom of ownership, right to privacy and right to a fair trial. Furthermore, the ECHR regards statements of a promotional nature as subject to freedom of expression, while the Swiss Federal Supreme Court applies the narrower guarantees attached to the principle of economic freedom.

The right to life and the prohibition of torture and inhuman treatment do not apply to businesses, however.

All in all, the legal precedent set by the ECHR sets out a uniform minimum standard of human rights for companies' activities in states that are party to the Convention.



Private-sector businesses may invoke  
key Convention rights before the ECHR  
in Strasbourg.

# LEGAL FOUNDATIONS

A variety of provisions in the Federal Constitution of Switzerland (FC) and the European Convention on Human Rights are relevant to Swiss businesses.

The Federal Constitution enshrines economic freedom in Article 27. As a fundamental right, it expressly protects economic activity, as well as the right to promote that activity. Freedom of expression (Art. 16 FC) protects businesses' non-commercial communications, among others. The rulings of the ECHR have expanded the human rights protections afforded to businesses. This includes Article 10 of the Convention on freedom of expression, which the ECHR has ruled to also cover business communications and advertising.

## THE FC GUARANTEES:

- economic freedom (Art. 27 FC),
- freedom of expression (Art. 16 FC),
- protection of property (Art. 26 FC),
- right to privacy (Art. 13 FC), and
- important procedural guarantees (Art. 29 FC).

## THE CONVENTION GUARANTEES:

- freedom of expression (Art. 10 Convention),
- protection of property (Art. 1 of Protocol 1 to the Convention; does not apply to Switzerland, which has not ratified Protocol 1),
- right to respect for private and family life (Art. 8 Convention), and
- important procedural rights (Art. 6 Convention).

The ECHR has also ruled that business premises and business records are covered by the right to privacy under Article 8 of the Convention. The Swiss Federal Supreme Court has adopted this ruling in its interpretation of Article 13 FC.

In addition, businesses benefit from the guarantees of the rule of law afforded under the Convention. The ECHR applies these consistently to legal entities. The procedural rights laid down in Article 29 FC are heavily influenced by the legal precedent of the ECHR with regard to Article 6 of the Convention.

## PROTOCOL 1 TO THE CONVENTION

Protocol 1 to the Convention protects businesses' property. Unlike all other states parties to the Convention, neither Switzerland nor Monaco has ratified Protocol 1. Businesses operating in Switzerland can thus only invoke Article 26 FC.

Swiss businesses may nonetheless appeal to the ECHR in the event of a breach of property rights, if they operate in a state that has ratified Protocol 1. In such cases, they can invoke against such states the protection of property which Protocol 1 contains.

This might be relevant, for example, if no investment protection agreement has been signed between Switzerland and the third state, and an asset seizure violates property rights.

# LAUSANNE OR STRASBOURG?

**A case must pass through the national courts before an appeal can be lodged with the ECHR in Strasbourg.**

Individuals or businesses claiming breaches of human rights must have appealed unsuccessfully to all of the competent courts within the member state concerned before they can lodge an appeal with the ECHR. The notice of appeal must set out in sufficient detail how the Convention has been infringed.

ECHR rulings often have a wide-ranging impact, effecting change in other member states. Authorities adjust their practices, and national courts refer to decisions made in Strasbourg.

## CASE STUDIES

Year	Case	ECHR ruling to protect business	Convention guarantee	See page
2011	<u>AO Neftyanaya Kompaniya Yukos v. Russia</u>	<b>Partially upheld</b> – appeal against the sale of a subsidiary	Procedural rights & property protections	12
2009	<u>Dubus SA v. France</u>	<b>Upheld</b> – appeal against sanctions imposed on a bank	Procedural rights	16
2009	<u>Sud Fondi Srl et al. v. Italy</u>	<b>Upheld</b> – appeal against the seizure of land and buildings	Procedural rights	
2007	<u>AnheuserBusch Inc. v. Portugal</u>	<b>Rejected</b> – appeal against the revocation of brand registration (decision of the Grand Chamber)	Property protections	15
2005	<u>Capital Bank AD v. Bulgaria</u>	<b>Upheld</b> – appeal against the finding that the bank was insolvent, and the subsequent withdrawal of its banking licence	Procedural rights	
2002	<u>Société Colas Est et al. v. France</u>	<b>Upheld</b> – appeal against the search of business premises and the seizure of business records	Right to privacy	11
2000	<u>Comingersoll SA v. Portugal</u>	<b>Upheld</b> – appeal on the basis of the excessive length of civil proceedings	Procedural rights	
1990	<u>Autronic AG v. Switzerland</u>	<b>Upheld</b> – appeal against the rejection of a reception licence	Freedom of expression	8

# BLOCKED ADVERTISING


**According to the legal precedent of the ECHR, advertising for the purpose of sales promotion is protected by the rules on freedom of expression.**

In 1982, Autronic AG was planning to broadcast a television programme received directly from a Soviet communications satellite at a trade fair in Zurich. As a satellite dish distributor, Autronic wanted to boost sales of its own receivers. It therefore submitted an application to the relevant department of what was then the PTT (now Swiss Post and Swisscom), to allow the Russian signal to be received without a specific licence.


The application was rejected on the grounds that the necessary consent of the broadcasting state had not been given. Indeed, the Soviet authorities had not responded to Switzerland's enquiries. The general management of the PTT also rejected an appeal against the decision, stating that freedom of expression protected the reception of information from publicly accessible sources only – a group to which communications satellites did not belong.

In its ruling, the ECHR determined a breach of freedom of expression, as laid down in Article 10 of the Convention. It also upheld a previous ruling, stating that, as a legal entity, Autronic AG is able to invoke freedom of expression. According to the ECHR, this protection is afforded not only to the content of information, but also to its means of broadcast and reception, as was the case with a television programme viewed via a satellite dish. Whether a business invokes freedom of expression on ideological or on business grounds is seen by the ECHR as irrelevant.



A photograph of a satellite dish mounted on a rooftop, viewed from a low angle. The dish is white and metallic, with a mounting arm extending from the left. The background shows the structure of the building and some cables. The entire image is covered with a semi-transparent teal overlay.

The ECHR has ruled that commercial statements are subject to freedom of expression. It thus offers businesses greater protection than the legal precedent of the Federal Supreme Court.



The ruling extends the protection that  
is afforded to business premises, and  
thus strengthens businesses' human  
rights position.

# BUSINESS PREMISES SEARCH

**Business premises are afforded the same protection as individual homes. Any entry and search by the authorities must have the proper basis in law.**

In 1985, French authorities began enquiries into Société Colas Est and other road-laying companies as part of a nationwide fraud investigation. Subsequently, investigating officers forced their way unannounced, and without a warrant, into the business premises of Colas Est, and seized a large number of documents.

Further to an analysis of these documents, fines of millions of euros were imposed on Colas Est and other companies.

In its ruling, the ECHR concluded that the point had come to extend the protection that Article 8 of the Convention affords to private homes to business premises. As such, entry into the Colas Est business premises without a search warrant constituted unlawful entry into the ‘home’ of a business.

The ECHR continued that this could not be justified by the fact that the relevant legal foundations did not offer sufficient protections against abuse. It found that, by entering and searching the business premises, French authorities were in breach of the right to respect for the home, as laid down in Article 8 of the Convention.

# EXCESSIVE SANCTIONS FOR TAX FRAUD

**According to the ECHR, tax fraud cases must always have a legal foundation, and any sanctions imposed as part of legal proceedings must be reasonable.**


In 2002, the Russian authorities convicted Yukos, one of Russia's biggest companies, of tax fraud. They ordered the oil conglomerate to pay all outstanding taxes immediately, as well as a high fine. Yukos was unable to make this payment within the short deadline that was set. This resulted, in the subsequent enforcement proceedings, in the company's Russian-based assets being

encumbered with debt notices, and in some of its bank accounts being frozen.

In 2004, the Russian Ministry of Justice ordered that a production plant of vital importance to Yukos be auctioned off, so that the proceeds could be used to meet its tax debts. Yukos was ultimately declared insolvent in 2006, and liquidated a year later.

The ECHR ruled that Russia had infringed Yukos' right to a fair trial under Article 6 of the Convention, because the company had not been given sufficient time to respond to the allegations made in the domestic proceedings, or to prepare its appeal to the court of next instance. Furthermore, the ECHR ruled that the protection of property laid down in Article 1 of Protocol 1 had been infringed because Russia had failed to weigh government interests fairly against the impact of the action taken.

Sanctions must be reasonable,  
even in serious cases of tax fraud.  
Alternatives must be considered if  
such action places a company under  
threat of liquidation.



Through the principle of protection  
of property, the ECHR safeguards  
intellectual property rights in all the  
states that have ratified Protocol 1.

# UNLAWFUL REGISTRATION OF A BRAND

**Businesses can invoke the principle of protection of property to defend their brand names.**

US brewery Anheuser-Busch Inc. produces a beer that it sells under the ‘Budweiser’ name. Anheuser-Busch Inc. had the brand name registered in Portugal in 1981. It was challenged by a Czech company, which had registered the ‘Budweiser Bier’ name as early as 1968. Following a long-running legal dispute, the Portuguese court of highest instance ruled in 2001 that the ‘Budweiser Bier’ entry should prevail. It thus determined that

the petition from Anheuser-Busch Inc. should be denied, and that its unlawful brand name entry should be deleted.

In a landmark ruling, the Grand Chamber of the ECHR found that both the registration of a brand name and the related registration application fall within the protection of property provision set out in Article 1 of Protocol 1 to the Convention. The ECHR judged that the conditions for a restriction of ownership were fulfilled, and rejected the Anheuser-Busch Inc. appeal.

Although the ECHR’s landmark decision is not materially more wide-ranging than Federal Supreme Court’s precedent on the protection of property, the ruling has meant that, ever since, businesses have been able to invoke property protections to defend intellectual property rights in all the states that have ratified Protocol 1.

# LACK OF IMPARTIALITY

**Administrative supervision, and the punishment of infringements of the rules, must be the subject of separate processes conducted by separate bodies.**

In 2000, the French banking supervisory authority reprimanded Dubus SA on the grounds of various breaches of banking regulations. It decided to instigate disciplinary proceedings against the French investment company.

Dubus SA subsequently countered that the banking commission could not act simultaneously as an investigative, supervisory and decision-making authority, as this would be in breach of the need for an independent tribunal, as laid down in

Article 6 of the Convention. The banking commission nonetheless took action against Dubus SA. As the court of final instance, the Constitutional Council of France rejected the company's appeal.

The ECHR concluded that investigatory and decision-making powers within the commission were not sufficiently separate. It ruled that the commission's supervisory activities, and the associated sanctions, were measures of a criminal law nature. According to Article 6 of the Convention, such sanctions must be imposed by an independent and impartial tribunal. The French banking supervisory commission had not met these conditions, resulting in a breach of Article 6 of the Convention.



An authority able to impose sanctions of a criminal law nature is not permitted to act simultaneously as an investigating body.

# WHAT HAPPENS WHEN THE ECHR UPHOLDS A COM- PANY'S APPEAL?

**Judgments passed by the ECHR must be enforced by national authorities.**

The decisions of the ECHR in Strasbourg are legally binding. However, the ECHR may simply establish that a breach of the Convention has been committed, and award damages to the appellant. The ECHR is not able to order the repeal of national laws that violate human rights, or the restitution of ownership, for example. Rather, the authorities in the state party concerned are responsible for enforcing its rulings.

# FURTHER READING

The present publication forms part of our series of brochures on the importance of human rights to selected professional groups and areas of life.

Further information, as well as the digital versions of these brochures, can be found on our website.

[www.skmr.ch](http://www.skmr.ch)

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