



Implementing a mutual assistance agreement in tax matters between Switzerland and the United States did not breach the Convention

In today's **Chamber** judgment¹ in the case of [G.S.B. v. Switzerland](#) (application no. 28601/11) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights;

no violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 of the Convention.

The case concerned the transmission to the US tax authorities of the applicant's bank account details in connection with an administrative cooperation agreement between Switzerland and the USA.

In 2008 the US tax authorities had discovered that the bank UBS SA had allowed US taxpayers to conceal their assets and income from them and had advised customers who had not declared their accounts to those authorities.

Following an agreement which, in its consolidated form with a protocol, was entitled "Convention 10", the Swiss federal tax authority had ordered UBS to transmit the applicant's file in the context of that authority's cooperation with the US Internal Revenue Service.

The applicant had appealed against that measure, arguing that it had no basis in law and that it breached the European Convention on Human Rights and other international treaties. The Federal Administrative Court had dismissed his appeals, finding that "Convention 10" was binding on the Swiss authorities, which did not need to verify its conformity with Federal law or prior conventions. It declared that the economic interests at stake had been important for the country and emphasised that Switzerland's interest in fulfilling its international commitments prevailed over the individual interest of those concerned by the measure.

The Court accepted that Switzerland had had a major interest in acceding to the US request for administrative cooperation in order to enable the US authorities to identify any assets which might have been concealed in Switzerland. At the procedural level, the Court noted that the applicant had had access to several effective and genuine procedural safeguards in order to contest the transmission of his bank details and to secure protection against arbitrary implementation of agreements concluded between Switzerland and the US.

Principal facts

The applicant, G.S.B., is a Saudi and US national who was born in 1960 and lives in Miami (United States of America).

In 2008 the US tax authorities (Internal Revenue Service - IRS) had discovered that thousands of US taxpayers held bank accounts in the Swiss bank UBS SA which had not been declared to their national authorities. Being exposed to a risk of criminal proceedings, UBS concluded an "agreement

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

to suspend criminal prosecution” with the US Justice Department. Proceedings were discontinued in return for the payment of a transaction amount of 780 million US dollars.

On 19 February 2009 the IRS brought civil proceedings to order UBS to hand over the identities of its 52,000 US customers and a number of data on the accounts held by the latter. Switzerland was concerned that the dispute between the US authorities and UBS might give rise to a conflict between Swiss and US law should the IRS obtain that information, and the civil proceedings were therefore suspended pending extra-judicial reconciliation.

With a view to identifying the taxpayers in question, the Government of the Swiss Confederation and the United States concluded an agreement entitled “Agreement 09”.

On 31 August 2009 the IRS sent the Federal tax authority (AFC) a request for administrative cooperation with a view to obtaining information on the US taxpayers who had been authorised to open bank accounts with UBS.

On 1 September 2009 the AFC decided to instigate an administrative cooperation procedure and invited the bank UBS to supply detailed files on the customers mentioned in the appendix to Convention 09.

By judgment of 21 January 2010 the Federal Administrative Court allowed an appeal against an AFC decision, resulting in the invalidation of all decisions issued by the AFC on the basis of Convention 09. The entry into force of that judgment called into question the implementation of Convention 09.

In order to avoid such a situation, on 31 March 2010, following fresh negotiations with the United States, the Federal Council concluded a “Protocol modifying the Agreement between Switzerland and the United States” known as “Protocol 10”. The provisions of that Protocol were incorporated into Agreement 09, and the consolidated version of Agreement 09 as amended by the Protocol 10 is referred to as “Convention 10”.

On 19 January 2010 UBS transmitted the applicant’s file to the AFC. In its final decision of 7 June 2010 the AFC stated that all the conditions had been met for affording administrative cooperation to the IRS and for ordering the requested documents to be handed over to the latter. On 8 December 2010 the applicant appealed to the Federal Administrative Court against that decision. The latter Court set aside the 7 June 2010 decision, finding that the applicant’s right to be heard had not been respected. It referred the case back to the AFC. In its final decision of 4 November 2010 the AFC held that all the conditions had been met for affording administrative cooperation to the IRS and for ordering UBS to forward the requested documents. The applicant appealed to the Federal Administrative Court, which, adjudicating at last instance, found that Convention 10 was binding upon the Swiss authorities, which did not have to verify the conformity of that text to Federal law or previous conventions. The Federal Administrative Court dismissed the applicant’s appeal.

On 24 March 2011 the applicant lodged a public-law appeal with the Federal Court on the ground that the considerations set out in the impugned judgment were relevant to criminal-law cooperation but not to administrative cooperation. The Federal Court declared that appeal inadmissible, with reference to a previous judgment to the effect that appeals against decisions which the AFC had given in pursuance of agreements concluded with the US did indeed relate to administrative cooperation.

On 14 December 2012 the applicant’s bank account details were transmitted to the US tax authorities.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant complained that the disclosure of his bank details had amounted to a violation of his right to respect for his private life.

Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8, he considered himself a victim of discrimination as an UBS customer with US taxpayer status, as compared with the customers of other banks who had not, at the relevant time, been covered by administrative cooperation in tax matters

The application was lodged with the European Court of Human Rights on 4 May 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Luis **López Guerra** (Spain), *President*,
George **Nicolaou** (Cyprus),
Helen **Keller** (Switzerland),
Johannes **Silvis** (the Netherlands),
Dmitry **Dedov** (Russia),
Branko **Lubarda** (Serbia),
Pere **Pastor Vilanova** (Andorra),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 8

As regards the legal basis for the measure, the Court reiterated that Agreement 09 and Protocol 10 had been negotiated and concluded by the Federal Council, approved by the Federal Parliament and then ratified by the Government in accordance with the procedure for concluding treaties set out in constitutional law. Inasmuch as the applicant submitted that the AFC's decision of 1 September 2009 lacked any basis in law because Parliament had not yet approved Agreement 09 at the time, the Court agreed with the Government that the AFC had only taken the decision so that it could assess whether the conditions for affording cooperation had been met. At all events, the immediate implementation of Agreement 09 on a provisional basis had been confirmed by the Government at the time of its approval, and that of Protocol 10 had been confirmed by the Federal Parliament on 17 June 2010.

As regards the foreseeability of the impugned measure, the Court reiterated that the European Convention of Human Rights should be interpreted in line with the general principles of international law. Indeed, under the 1969 Vienna Convention on the Law of Treaties regard should be had to "any relevant rules of international law applicable in the relations between the parties". In the present case the Court considered relevant the Federal Court's and the Government's argument that Article 28 of the Vienna Convention allows the parties to an international treaty to go against the principle of non-retroactivity and provide for the consideration of acts or facts which occurred before the treaty in question entered into force.

In the present case the Federal Court had settled case-law to the effect that provisions on administrative and criminal-law cooperation requiring third parties to provide specific information were procedural in nature and consequently applied, in principle, to all present or future proceedings, including those relating to tax periods predating their adoption. The applicant, assisted by a lawyer, could not reasonably have been unaware of that judicial practice. He therefore could not validly submit to the Court that the interference had occurred in a manner which he could not have foreseen. The impugned measure could therefore be regarded as being "prescribed by law".

As regards the legitimacy of the aim pursued by the measure, in the knowledge that the banking sector is an economic branch of great importance to Switzerland, the Court held that the impugned measure formed part of an all-out effort by the Swiss Government to settle the conflict between the bank UBS and the US tax authorities. The measure might validly be considered as conducive to

protecting the country's economic well-being. The Court accepted the Government's argument that the US tax authorities' allegations against Swiss banks were liable to jeopardise the very survival of UBS, a major player in the Swiss economy employing a large number of persons. Therefore, given Switzerland's interest in finding an effective legal solution in cooperation with the US, it had pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

As regards whether the measure had been "necessary in a democratic society", the Court noted that the Federal Administrative Court had ruled that the conditions set out in Article 8 for any interference with private or family life had been met in the instant case. The major economic interests at stake for the country and the Swiss interest in being able to honour its international undertakings had taken precedence over the individual interests of the persons concerned by the measure.

With particular regard to the applicant's situation, it should be noted that only his bank account details, that is to say purely financial information, had been disclosed. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted. His bank details had been forwarded to the relevant US authorities so that they could use standard procedures to ascertain whether the applicant had in fact honoured his tax obligations, and if not, to take the requisite legal action.

Finally, the Court observed that the applicant had benefited from various procedural safeguards. He had been able to lodge an appeal with the Federal Administrative Court against the AFC's 7 June 2010 decision. The latter court had subsequently set aside the said decision on the grounds of violation of the applicant's right to a hearing. The AFC had invited the applicant to transmit any comments he might have, of which right the applicant had availed himself. On 4 November 2010 the AFC had given a fresh decision finding that all the conditions had been met for affording administrative cooperation. The applicant had subsequently lodged a second appeal with the Federal Administrative Court, which dismissed it. The applicant had consequently benefited from several effective and genuine procedural guarantees to challenge the disclosure of his bank details and obtain protection against the arbitrary implementation of agreements concluded between Switzerland and the United States.

It follows that there had been no violation of Article 8 of the Convention.

[Article 14 in conjunction with Article 8](#)

The Court found, essentially on the same grounds as those mentioned above in support of the absence of violation of Article 8, that the applicant had not suffered discriminatory treatment for the purposes of Article 14 in conjunction with Article 8. It added that the applicant had provided no evidence to permit an assessment of whether his treatment would have been any different in another Swiss bank.

Therefore, there had been no violation of Article 14 in conjunction with Article 8 of the Convention.

The judgment is available only in French.

This press release is a document produced by the Registry. It does not bind the Court. Decisions, judgments and further information about the Court can be found on www.echr.coe.int. To receive the Court's press releases, please subscribe here: www.echr.coe.int/RSS/en or follow us on Twitter [@ECHRpress](https://twitter.com/ECHRpress).

Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Nina Salomon (tel: + 33 3 90 21 49 79)

Inci Ertekin (tel: + 33 3 90 21 55 30)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.