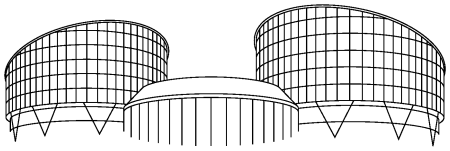

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF G.S.B. v. SWITZERLAND

(Application no. 28601/11)

JUDGMENT
(Extract)

STRASBOURG

22 December 2015

FINAL

22/03/2016

This judgment is final pursuant to Article 44 § 2 of the Convention, but it may be subject to editorial revision.

In the case of G.S.B. v. Switzerland,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President,*
George Nicolaou,
Helen Keller,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 1 December 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28601/11) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Saudi Arabian and American binational, Mr G.S.B. ("the applicant"), on 4 May 2011. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr Y. Bonnard and Mr G. Grisel, a lawyer practising in Lausanne. The Swiss Government ("the Government") were represented by their Agent, Mr Frank Schürmann.

3. The applicant alleged, in particular, that the transmission of banking data concerning him in the framework of a mutual assistance agreement between Switzerland and the United State of America had infringed his rights as secured under Articles 8 and 14.

4. On 18 December 2013 the complaints concerning Articles 8 and 14 were communicated to the Government and the remainder of the application was declared inadmissible.

5. On 9 June 2015 the Chamber rejected a request from the applicant for a suspension of the examination of the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Miami.

A. Origin of the complaints against UBS SA

7. The facts of the case as submitted by the parties can be summarised as follows.

8. In 2008 the US tax authorities (the Internal Revenue Service [IRS] in Washington) discovered – primarily from a complaint lodged by a former employee of the UBS SA bank in Geneva responsible for asset management for the bank's private North American customers – that thousands of US taxpayers held UBS bank accounts which had not been declared to their national authorities or else held economic rights in respect of such accounts.

Owing to the role which it had apparently played in that connection, the bank faced a risk of criminal prosecution.

9. On 18 February 2009 a deferred prosecution agreement (DPA) was concluded between UBS SA and the US Department of Justice (DOJ). In this document the bank acknowledged that it had, in particular, allowed US taxpayers to use off-shore accounts to conceal their assets and income from the US tax authorities and had met with and provided on-the-spot advice, in the United States, to customers who had not declared their accounts to the IRS. It was agreed that proceedings could be dropped in return for a settlement amount of 780 million US dollars (USD).

10. On 19 February 2009 the IRS brought a civil action (a so-called "John Doe summons" [JDS]) requesting a formal order to UBS SA to reveal the identities of its 52,000 American customers and to communicate data on their bank accounts.

11. Switzerland was concerned that the dispute between the US authorities and UBS SA 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.

12. On 19 August 2009, with a view to identifying the taxpayers in question, the Federal Council (Government) of the Swiss Confederation and the United States of America ("the United States") concluded an "Agreement concerning the request by the Internal Revenue Service of the United States relating to the Swiss company UBS SA" ("Agreement 09") ...

Under the first Article of Agreement 09 Switzerland undertook to deal with the US request for mutual assistance concerning UBS SA's American customers in accordance with the criteria laid down in the Appendix to that Agreement and, moreover, in conformity with the Convention of 2 October

1996 between Switzerland and the United States on double taxation (CDI-US 96) ...

Drawing on those criteria, the parties to Agreement 09 considered that the request for mutual assistance concerned "some 4,450 open or closed accounts".

Switzerland further undertook to set up a "special task force" enabling the Swiss Federal Tax Authority (AFC) to reach its final decisions in the framework of the mutual assistance request within a specific timescale.

In return, the Agreement provided that the United States and UBS SA would submit to the US District Court for the Southern District of Florida a joint request for the discontinuance of the request for enforcement of the "John Doe Summons" (see Article 3 of Agreement 09) ...

13. On 31 August 2009 the IRS submitted a mutual assistance request to the AFC with a view to obtaining information on US taxpayers who, between 1 January 2001 and 31 December 2008, had had "authority to sign or other access rights to" bank accounts "held, supervised or maintained by a section of UBS SA or by one of its branches or subsidiaries in Switzerland".

14. On 1 September 2009 the AFC ordered UBS SA to provide information for the purposes of the 15 June 1998 Order concerning the US-Swiss Convention of 2 October 1996 on double taxation (CDI-US 96) ... The AFC decided to instigate a mutual assistance procedure and requested that UBS SA provide, in particular, complete files on the customers mentioned in the Appendix to Agreement 09.

15. By judgment of 21 January 2010 (A-7789/2009) the Federal Administrative Court (TAF) accepted an appeal against a decision taken by the AFC which concerned, in the framework of the Appendix to Agreement 09, a challenge falling within the category defined in paragraph 2/A/b. In its reasoning, the TAF held that:

– Agreement 09 was a mutual agreement which should remain within the framework set out by the convention on which it depended, CDI-US 96;

– under the terms of the aforementioned convention, mutual assistance was granted in cases of tax fraud, but not in cases of tax evasion (that is to say the mere failure to declare a bank account to the tax authorities; regarding this distinction under Swiss tax law ...;

– accordingly CDI-US 96 only facilitated exchange of information in cases of "fraud or a similar offence" for the purposes of Swiss law, that is to say tax swindle (tax evasion by dint of "creative accountancy") or document forgery;

– having regard to the obligations which it imposed on Switzerland, that agreement should have taken the form of an international treaty ratified by the Swiss Federal Parliament and been put to an "optional referendum";

– accordingly, the form of a mere friendly agreement concluded by the Federal Council on its own had been insufficient.

Consequently, the Federal Administrative Court voided the decisions given by the AFC on the basis of Agreement 09.

16. The entry into force of that TAF judgment of 21 January 2010 called into question the application of Agreement 09.

Indeed, out of the approximately 4,450 individual cases covered by that agreement some 4,200 concerned situations of long-term tax evasion of enormous proportions. The Swiss Government considered that an inability to provide mutual aid in such cases could create major difficulties for Switzerland in its bilateral relations with the United States. The Federal Council deemed likely that the United States would impose compensatory measures, and that the minimum they could expect was that the US would reactivate the enforcement procedure in respect of the UBS customers through mutual assistance channels. The Federal Council were concerned that an American court might then order UBS SA to provide the IRS with the data in question and force the judgment through by dint of extremely high coercive fines.

On 31 March 2010, in order to prevent such a development, after fresh negotiations with the United States, the Federal Council concluded a "Protocol amending the Agreement between Switzerland and the United States concerning the IRS's request for information on the Swiss company UBS SA, signed in Washington on 19 August 2009", referred to as "Protocol 10".

The provisions of that protocol were incorporated into Agreement 09. They became provisionally applicable on the date of its signature by the parties.

17. By Federal Decree of 17 June 2010 "approving the Agreement between Switzerland and the United States concerning the request for information regarding UBS SA, as well as the Protocol amending that Agreement", the Federal Assembly (the Swiss Parliament) approved Agreement 09 and Protocol 10, and gave the Federal Council leave to ratify them.

The consolidated version of Agreement 09 as amended under Protocol 10 is sometimes referred to as "Convention 10" ...

The aforementioned Federal Decree stated that the optional referendum mentioned in Article 141 of the Federal Constitution in respect of certain international treaties concluded by Switzerland ... was not available in the present case.

18. On 15 July 2010 the Federal Administrative Court delivered judgment in a pilot case (A-4013/2010) concerning the validity of Convention 10. In that judgment the TAF ruled that:

– Convention 10 was fully binding on it within the meaning of Article 190 of the Constitution ...;

– there was no substantive hierarchy in international law (apart from the pre-eminence of *jus cogens*); accordingly, Convention 10 held the same status as CDI-US 96;

– as CDI-US 96, like the Convention (for the Protection of Human Rights and Fundamental Freedoms) and the International Covenant on Civils and Political Rights ("UN Covenant II"), had been adopted prior to Convention 10, its provisions were only applicable insofar as they were compatible with the rules of the latter 96, because Convention 10 took precedence by virtue of its posteriority.

B. Proceedings concerning the applicant

1. Origin of the case

19. UBS SA transmitted the applicant's file to the AFC on 19 January 2010.

In its final decision of 7 June 2010, the AFC ruled that all the conditions had been met for granting mutual assistance to the IRS and ordering the communication to it of the documents published by UBS SA.

20. On 7 July 2010 the applicant appealed to the Federal Administrative Court against that decision.

By judgment of 21 September 2010, without assessing the actual lawfulness of the decision of 7 June 2010, the court set it aside, noting that the applicant's right to a hearing had been flouted. Consequently, it referred the case back to the AFC, inviting it to allow the applicant to submit his observations and to give a fresh decision on affording the US authorities mutual assistance in his case.

21. By letter of 28 September 2010 the AFC notified a deadline of 29 October 2010 for the applicant to forward any observations before the issuing of a fresh decision.

On 13 October 2010 the applicant submitted a statement of his position on the matter.

In its final decision of 4 November 2010 the AFC once again held that all the requisite conditions were fulfilled for granting the IRS mutual assistance and ordering UBS SA to communicate the requested documents to the US authorities.

22. On 8 December 2010 the applicant appealed to the Federal Administrative Court against the decision of 4 November 2010. He complained, in substance, of a lack of any legal basis for the decisions of 1 September 2009 and 4 November 2010, as well as of the violation of the Convention and other international treaties, owing, in particular, to non-compliance with the prohibition of the retroactivity of laws and non-respect for his right to respect for his private life, the presumption of

innocence, the principle of equality and non-discrimination, and his right to remain silent.

2. Judgment of the Federal Administrative Court (TAF) of 2 March 2011

23. Determining as the final domestic instance, the Federal Administrative Court delivered judgment on 2 March 2011.

It first of all held, in substance, that Convention 10 was binding on the Swiss authorities, considering that they did not have to verify its conformity with Federal law and previous conventions.

Secondly, with reference to the pilot case A-4013/2010 of 15 July 2010 (see paragraph 18 above), the Federal Administrative Court set out the following reasoning:

> "3.2. The AFC's decision of 1 September 2009 concerning UBS SA does not relate to the grant of mutual assistance. It is merely a decision whereby the lower-level authority requested information from UBS SA for the purposes of Article 20c (3) of CDI-US 96. Therefore, it may be accepted that Agreement 09, in relation with the aforementioned provision, constituted a sufficient legal basis for the AFC to take a decision against UBS SA, requiring, in particular, the handover of the complete files of customers covered by the Appendix to Agreement 09. That being the case, the appellant's complaint is ill-founded.
>
> 4.1.1. In the pilot case A-4013/2010 of 15 July 2010 this court found that Convention 10 was binding on the Swiss authorities. No derogation to it was possible under domestic law or in the authorities' domestic practice. It was stated that Article 190 [of the Constitution] required the authorities to apply international law, which includes Convention 10, and that – in any event – the conformity of international law with the Federal Constitution and Federal legislation could not be assessed where the international law in question was more recent. The Federal Administrative Court thus accepted that Convention 10 should be applied, even if it was contrary to the Federal Constitution or Federal legislation (see Federal Administrative Court judgment A-4013/2010 of 15 July 2010, point 3 and the references therein; see also Federal Administrative Court judgments A-7014/2010 of 3 February 2011, point 4.1.1 and the references therein, A-4835/2010 of 11 January 2011, point 5.1.1, and A-6053/2010 of 10 January 2011, point 2.1).
>
> 4.1.2 With particular regard to the relationship between the different conventions (Convention 10, CDI-US 96 [in particular Article 26 thereof], the ECHR [in particular Article 8 thereof] and UN Covenant II [in particular Article 17 thereof]), the court pointed out that that relationship was established pursuant solely to the rules set out in Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT) and that there was no substantive hierarchy in international law (apart from the pre-eminence of *jus cogens*). This court therefore considered that the rules of Convention 10 took precedence over the other provisions of international law, including Article 8 ECHR and Article 17 UN Covenant II, as the latter two provisions did not comprise *jus cogens*. It did, however, find that even if Article 8 (1) ECHR were applicable, the conditions set out in Article 8 (2) ECHR, which permits restrictions on the right to respect for private and family life, were fulfilled. Convention 10 was indeed a sufficient legal basis under the case-law of the European Court of Human Rights. Furthermore, Switzerland's major interests and

the interest of being able to honour the country's international commitments took precedence over the individual interests of the persons concerned by the mutual assistance agreement to keep their pecuniary situation secret ...

4.1.3 This court also stated, in judgment A-4013/2010 cited above, that Article 7 (1) ECHR (no punishment without law) was not relevant to mutual assistance procedures. That provision was, exceptionally, applicable in the framework of Swiss mutual assistance procedure if the person concerned by the assistance was threatened, in the requesting State, with proceedings in breach of Article 7 ECHR ... That was not the situation in the present case ...

4.1.5 This court has also held that the parties to an international agreement are free to provide expressly or implicitly for the retroactive application of such agreement ... Moreover, procedural rules could be applied retroactively to previous events, because the prohibition of non-retroactivity only applied to substantive criminal law, not to procedural law, which included provisions on mutual assistance ... Furthermore, the parties to Convention 10 had wished to characterise differently the facts which had occurred prior to the signature of Agreement 09, which was commonly referred to as 'retroactive effect'. That wish to apply Agreement 09 – which had become Convention 10 – with retroactive effect transpired clearly from the criteria for granting mutual assistance as set out in the Appendix to Convention 10. Even though the parties had specified, in Article 8 of Convention 10, that that instrument would come into force on the date of its signature, they had wished that retroactive effect to prevail ...

4.1.7. In the present case it should be noted, in the light of the aforementioned judgments, that the following objections as to the validity and applicability of Convention 10 can be discarded without further ado: incompatibility with the ECHR and other international treaties, violation of the principle of the prohibition of the retroactivity of laws (see Article 7 ECHR and Article 15 UN Covenant II), and violation of the right to respect for private life (see Article 8 ECHR). Furthermore, contrary to the appellant's opinion, Convention 10 is in fact a sufficient legal basis for granting mutual assistance, notwithstanding the failure to put it to a referendum (which is optional). Finally, even though Switzerland was unable – in this specific case – to obtain the same information under its own legislation, it is still bound by its international commitments and must grant mutual assistance where the requisite conditions have been met.

4.2. The appellant further submitted that Convention 10 breached the principles of equality and non-discrimination by solely penalising one specific category of persons, that is to say UBS SA customers. He claimed that Convention 10 only applied to UBS SA customers and not to those of other banks. The appellant relied on Article 8 of the Constitution, Article 14 ECHR, Article 2 paragraph 2 of the International Covenant of 16 December 1966 on Economic, Social and Cultural Rights (UN Covenant I; RS 0.103.1) and Article 2 paragraphs 1 and 26 of UN Covenant II.

As stated above, this court cannot verify the conformity of Convention 10 with the Federal Constitution and Federal legislation. That legislation, moreover, overrides any previous international agreements to the contrary (see point 4.1.2 above). Therefore, Convention 10 must be applied even if it establishes different legal regulations for UBS SA customers as compared with the customers of other banks (see Federal Administrative Court judgment A-7156/2010 of 17 January 2011, paragraph 5.2.1).

..."

24. On those grounds, the Federal Administrative Court dismissed the applicant's appeal.

3. Subsequent developments

25. On 24 March 2011 the applicant lodged a public-law appeal with the Federal Court, submitting that the considerations set out in the judgment challenged solely concerned mutual assistance in criminal matters and were not relevant to administrative mutual assistance.

By judgment of 11 April 2011 that court declared the appeal inadmissible, mainly with reference to a judgment of 20 December 2010 (ATF 137 II 128), which had found that appeals against AFC decisions given pursuant to the Convention on Double Taxation and subsequent agreements concluded with the United States fell within the scope of administrative mutual assistance.

26. On 14 December 2012 the banking data concerning the applicant were transmitted to the US tax authorities.

27. By letter of 14 June 2013, the Court invited the applicant to inform it of the subsequent developments in the case, and, in particular, to give a brief summary of any consequences or any criminal penalties imposed personally and effectively on him in the United States following the disclosure of his banking data as ordered by the Swiss Federal Tax Authority (AFC).

28. By letter of 7 August 2013 the applicant stated that he was not currently in a position to respond to the Court's request.

By letter of 30 June 2014 the applicant pointed out that the US authorities were still conducting their tax inspection and that he had not yet been charged with any criminal offence.

...

THE LAW

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicant complained that his banking data had been disclosed in breach of his right to respect for privacy as provided in Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

45. The Government contested that argument.

...

B. Merits

1. Existence of an interference

48. The applicant submitted that the decision of the Swiss Federal Tax Authority (AFC) ordering UBS SA to transmit to it all the files meeting the criteria set out in the Appendix and the decision to accede to the request submitted by the IRS (US Internal Revenue Service) amounted to interferences in his private life and correspondence.

49. The Government did not dispute that the impugned measure constituted an interference in the applicant's right to respect for his private life within the meaning of Article 8.

50. The Court sees no reason to doubt the opinions expressed by the parties. Accordingly, it should be accepted that the applicant sustained an interference in his right to respect for his private life at the latest on 14 December 2012, when his banking data were actually transmitted to the US tax authorities (see paragraph 26 above).

51. Nor is there any doubt that the information relating to the bank accounts are to be considered as personal data protected by Article 8 of the Convention (see *M.N. and Others v. San Marino*, no. 28005/12, § 51, 7 July 2015, with the references contained therein).

2. Justification of the interference

52. Such an interference breaches Article 8, unless it meets the requirements of the second paragraph of that article. It therefore remains to be seen whether the interference was "in accordance with the law", based on one or more of the legitimate aims set out in the same paragraph, and "necessary in a democratic society" to attain those aims.

a) "In accordance with the law"

i. The parties' submissions

α) The applicant

53. As regards the legal basis for the interference, the applicant set out three lines of reasoning.

Firstly, he pointed out that Agreement 09 and Protocol 10 had not been put to an "optional referendum" as provided in Swiss law for treaties containing important legislative provisions, which he considered had been the situation in the present case.

The applicant did not agree with the Federal Administrative Court (TAF) that because Switzerland was bound by the agreement at the international

level, the Swiss authorities were obliged to apply it pursuant to Article 190 of the Federal Constitution (see above), irrespective of any infringement of the formalities applicable to its adoption.

54. Secondly, the applicant submitted that the foreseeability criterion had not been met, arguing that Agreement 09 and Protocol 10 were applicable retroactively.

The applicant took the view that the requirement of a legal basis for any interference with private life was founded on the "certainty of the law" imperative, which was one of the fundamental elements of the rule of law.

He explained that from 2001 to 2008 international mutual assistance between Switzerland and the United States in tax matters had been governed by CDI-US 96, which precluded information exchange in straightforward cases of tax "evasion". The applicant therefore considered that at that time US taxpayers who had held an undeclared account with USB SA might have expected Switzerland to refuse any request from the United States for administrative mutual assistance. The fact of extending Agreement 09 to cover straightforward cases of tax evasion under Protocol 10 had, in the applicant's view, radically transformed the criteria for granting international administrative mutual assistance.

55. Thirdly, the applicant submitted that on the date of the AFC's decision against UBS SA concerning the handover of customers' files fulfilling the criteria of Agreement 09, that is to say 1 September 2009, that instrument had not yet been approved by the Federal Parliament.

56. From all the foregoing considerations the applicant concluded that the impugned measures had not had a sufficient legal basis.

β) The Government

57. As regards the first point raised by the applicant, the Gouvernement submitted that contrary to his affirmations, Agreement 09 had not fallen within the scope of the "optional referendum". Under the terms of Article 141 (d) (3) of the Federal Constitution ... the right to request a referendum on an international treaty only concerned those treaties which contained important legislative provisions or whose implementation required the enactment of federal legislation.

Since the concept of "important legislative provisions" had never been defined, the Government considered, in the first place, that Parliament had a certain margin of appreciation in applying that provision.

58. In support of that option, the Government emphasised that the Federal Council had expressed the view, which was shared by the Federal Parliament, that Agreement 09 and Protocol 10, as a whole, contained no important legislative provisions within the meaning of Article 141 of the Federal Constitution and therefore was not exposed to the possibility of a referendum on request.

59. The Government affirmed that a further argument in support of the existence of a sufficient legal basis was to be found in the 1969 Vienna Convention on the Law of Treaties. Under the terms of Article 46 of that convention, a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was "manifest" (that is to say – according to paragraph 2 of the same article - objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith) and concerned a rule of its internal law of fundamental importance.

In the present case, with reference to the foregoing considerations, the Government considered that it could not be claimed that the failure to put Agreement 09 and Protocol 10 to an optional referendum had amounted to an "objectively evident" violation of Article 141 of the Federal Constitution.

60. As regards the second point raised by the applicant – the allegation that Agreement 09 did not fulfil the foreseeability criterion owing to its retroactive application – the Government reiterated (citing the example of the case of *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 35, *Reports of Judgments and Decisions* 1997-VIII) that it was a generally recognised principle that, save where expressly provided to the contrary, procedural rules applied immediately to proceedings that were under way.

61. The Government added that in Article 28 of the Vienna Convention cited above, the statement of the principle that the provisions of a treaty did not bind a party in relation to any act or fact which had taken place or any situation which had ceased to exist before the date of the entry into force of the treaty with respect to that party, was accompanied by the phrase "unless a different intention appears from the treaty or is otherwise established" ... They therefore deduced that the parties to an international treaty were free to decide on the retroactive application of its provisions.

62. The Government also submitted that according to established Swiss case-law, provisions on administrative and criminal mutual assistance applied, in principle, to all live and forthcoming proceedings, including proceedings which related to tax years preceding their adoption (see Federal Court (ATF) judgments 2A.551.20001, 12 April 2002, cons. 2 ; 2A.250/2001, 6 February 2002, cons. 3 ... Consequently, they took the view that there was nothing unusual about the fact that Agreement 09, which had been concluded on 19 August 2009, had been used to provide administrative mutual assistance in recovering tax on assets held between 2001 and 2008: given that administrative mutual assistance came under procedural law according to the relevant case-law, the prohibition of retroactivity had been inapplicable.

63. The Government set out several reasons which they considered as justifying the retroactive application of the agreement in question.

They explained, first of all, that the legal consequences facing the applicant following the transmission of data on his accounts with UBS SA were a matter for US substantive law in force at the material time, that is to say the period from 2001 to 2008.

Secondly, with reference to the cases of *Cantoni v. France* (15 November 1996, § 35, *Reports* 1996-V) and *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, § 784, 25 July 2013), the Government submitted that like all taxpayers, particularly business operators such as himself, the applicant should have been aware of his tax obligations and of the risks involved in evading them.

64. The Government took the view that the applicant could not reasonably exclude, by seeking wide-ranging legal advice, the eventual application of the principle of the "retroactivity" of the procedural rules to the provisions on administrative mutual assistance in tax matters between Switzerland and the United States of America; especially since it was common knowledge that the US and the Organisation on Economic Cooperation and Development (OECD) had long been exerting pressure to that end.

65. The Government also reiterated the aim of the prohibition of retroactivity: they considered that that principle was intended to enable those concerned to foresee the potential substantive-law consequences of any breach, rather than to protect actions deliberately geared to circumventing substantive law by means of subterfuges based on the applicable procedural law.

66. Finally, as regards the third point raised by the applicant – the fact that the Agreement had not yet been approved by parliament when the AFC had given its decision on 1 September 2009 – the Government objected that that decision had not concerned the grant of administrative mutual assistance but had been the result of a prior examination of the request submitted by the AFC, designed to enable the latter to consider whether the preconditions for granting mutual assistance had been fulfilled.

At any event, the Government argued that the provisional application of the Agreement before approval by parliament had been ratified by the latter on the occasion of the approval of Agreement 09 and Protocol 10.

67. Having regard to the foregoing considerations, the Government were convinced that Agreement 09, in conjunction with CDI-US, provided a legal basis for the impugned measure in accordance with Article 8 § 2.

ii. The Court's assessment

α) The relevant principles

68. The Court reiterates its well-established case-law to the effect that the phrase "in accordance with the law" means that the impugned measure must have a basis in domestic law and be compatible with the rule of law,

which is expressly mentioned in the Preamble to the Convention and is inherent in the subject-matter and aim of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct. If it is to be deemed consonant with those requirements, the law must indicate the scope of any powers conferred on the competent authorities and the manner of their exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Malone v. the United Kingdom*, 2 August 1984, §§ 66-68, Series A no. 82; *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; and *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II).

69. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI, and references therein).

70. Furthermore, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Kopp v. Switzerland*, 25 March 1998, *Reports* 1998-II, § 59, and *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A).

β) Application of the above-mentioned principles

71. The applicant essentially complained about two aspects: firstly, the formal shortcomings of the legal basis for the impugned measure; and secondly, the non-foreseeability of the measure owing to the retroactive application of the instruments in question.

– Absence of an "optional referendum" and lack of prior parliamentary approval in respect of the legal basis of the measure

72. As regards the first aspect, the Court notes that the parties' opinions diverge considerably on whether, from the constitutional point of view, those instruments should have been put to a possible "optional referendum".

However, the Court holds that it is not incumbent on it to decide that matter given that, as it transpires from its case-law reiterated above, it largely disregards the kind of procedure leading to the enactment of a specific law relined on in support of an interference with a right secured under the Convention, the only limit being arbitrariness.

73. In that regard the Court reiterates that Agreement 09 and Protocol 10 were negotiated and concluded by the Federal Council, approved by the Federal Parliament and then ratified by the Government, in accordance with the procedure for the conclusion of treaties set out in constitutional law. Even supposing that Agreement 09 and Protocol 10 had been put to an

"optional referendum", on which question the parties disagree, the legal bases for the impugned measure would nonetheless have remained extant.

74. Finally, inasmuch as the applicant submitted that the decision given by the AFC on 1 September 2009 had also lacked a legal basis owing to the fact that Parliament had not yet approved Agreement 09 on that date, the Court agrees with the Government that that decision did not concern the grant of administrative mutual assistance but had merely been designed to enable the AFC to consider whether the preconditions for granting mutual assistance had been fulfilled. In any event the immediate application of Agreement 09 on a provisional basis had been upheld by the Government on approving it, and that of Protocol 10 was confirmed by the Federal Parliament on 17 June 2010.

– Alleged non-foreseeability arising from the retroactive application of the treaties at issue

75. The Court reiterates that its task is to verify the quality of the legal basis for the interference, and in particular its accessibility and the adequate foreseeability of its application. In the present case the applicant did not submit that the two instruments in question had been inaccessible to him. On the other hand, he complained that their implementation had not been foreseeable.

76. As regards the foreseeability of the impugned measure, the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see, for example, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 131, ECHR 2010, with the references therein).

In the present case the Court does not consider nugatory the argument put forward by the Federal Court and the Government to the effect that Article 28 of the Vienne Convention itself grants the parties to an international treaty the option of departing from the principle of non-retroactivity and deciding to take account of an act or fact which occurred before the parties adhered to that treaty.

Nevertheless, as regards the convention of greatest interest to the Court, namely the Convention for the Protection of Human Rights and Fundamental Freedoms, which instrument has immediate legal effect *vis-à-vis* individuals, the possible retroactive application of another international treaty must be assessed with regard to the requirements of its own provisions, that is to say, in the present case, Article 8.

77. The Court reiterates that in its judgment *Brualla Gómez de la Torre* (cited above, § 35), cited by the Government, it accepted the "generally

recognised principle" that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are under way (see also *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 148, ECHR 2000-VII). However, as the Government emphasised, no express exception of that nature was present in the instant case. The Court observes that the applicant also did not contest the fact that administrative mutual assistance in tax matters comes under procedural law.

78. In the present case the Federal Court has constant case-law to the effect that the provisions on administrative and criminal mutual assistance requiring third parties to provide specific types of information are of a procedural nature and therefore apply, in principle, to all proceedings that are under way or are forthcoming, even where they concern tax years preceding their enactment ...

The applicant, who was duly represented by a lawyer before the domestic authorities, could not realistically have been unaware of that judicial practice. Consequently, he cannot argue before the Court that the interference took place in a manner which was unforeseeable to him.

79. Nor can it be claimed that the formerly restrictive practice of the Swiss authorities in matters of administrative mutual assistance in the tax field might have prompted the applicant to expect to be able to continue to invest his assets in Switzerland shielded from scrutiny by the competent US authorities, or even merely from the possibility of retroactive scrutiny (see, conversely, *Bigaeva v. Greece*, no. 26713/05, § 32, 28 May 2009).

80. Having regard to all the foregoing considerations, the impugned measure must be deemed to have been "in accordance with the law" within the meaning of Article 8 § 2 of the Convention.

b) Legitimate aim

i. The parties' submissions

81. The applicant submitted that the impugned measures had no legitimate aim within the meaning of Article 8 § 2.

He took the view that the "economic well-being of the country" argument was invalid in the present case: Agreement 09 and Protocol 10, as well as the decisions taken on the basis of those instruments, had solely served the interests of UBS SA rather than those of Switzerland.

Furthermore, the applicant also considered the "prevention of crime" plea irrelevant on the grounds that under Swiss law tax evasion was a minor offence rather than a crime.

82. The Government argued that the applicant's bank details had been transmitted to the IRS in the framework of administrative mutual assistance in the tax field, which had therefore helped to prevent disorder and certain criminal offences.

Moreover, the Government considered that there was a specific context to the present case. They submitted that the issue at stake was to reconcile three different concerns: to settle the conflict which had emerged when the IRS brought proceedings in the United States of America; to ensure that those concerned benefited from a procedure consistent with the requirements of the rule of law; and to prevent major economic risks not only for UBS SA but for Switzerland as a whole. They explained that those aims could not have been achieved through full implementation of the provisions of Agreement 09.

The Government added that the impugned measures had also helped maintain national security and the economic well-being of the country.

ii. The Court's assessment

83. Given that the banking sector is an economic branch of great importance to Switzerland, the Court considers that the impugned measure, which 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 SA, a major player in the Swiss economy employing a large number of persons, which explained Switzerland's interest in finding an effective legal solution in cooperation with the USA.

84. Having regard to the foregoing consideration, the Court finds that the impugned measure pursued a legitimate aim within the meaning of Article 8 § 2.

c) "Necessary in a democratic society"

i. The parties' submissions

85. The applicant made no pleas in that regard. He generally submitted that the impugned decisions and the texts underpinning them did not protect the ideals and values of a democratic society but rather infringed and undermined them.

86. The Government observed that when Agreement 09 had been concluded, Switzerland had been facing a difficult situation of a conflict of law and of sovereignty with the United States of America. In that specific context, if Switzerland had not implemented the provisions of the agreement the proceedings commenced in the US would probably have been reactivated, with all the attendant consequences. The Government mentioned in that regard the message issued by the Federal Council concerning the approval of Agreement 09 and Protocol 10, stating that in view of the systemic importance of UBS SA, its collapse would have caused

considerable damage to the rest of the Swiss banking sector and to the national economy as a whole ...

87. In that context the Government added that one of the main objectives of Agreement 09 and the mutual assistance procedures implemented had been to incorporate those procedures into the legal framework of CDI-US 96. Otherwise the American authorities would most likely have done their utmost to obtain the data in question by acting directly against the bank. Therefore, according to the Government, Agreement 09 had afforded to the persons concerned – including the applicant – guarantees on a normal administrative mutual assistance procedure to which appeals lay.

As regards the applicant, given the practices recognised by UBS SA in the framework of its settlement agreement with the prosecuting authorities (the DPA), the Government argued that there was every reason to suppose that he had taken advantage of the specific services offered by the bank to conceal certain assets from the US tax authorities.

Even if that were not the case, the Government noted that the applicant's only interest in opposing the transmission to the United States of America of his banking data was to circumvent a tax procedure concerning the assets in question, that is to say quite simply to evade his fiscal obligations under American law.

88. Having regard to all the foregoing considerations, the Government concluded that the measure had been necessary in a democratic society.

ii. The Court's assessment

α) The applicable principles

89. The organs of the Convention have had occasion to establish certain principles governing the disclosure of sensitive data, including medical information (see *Z. v. Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I, and *M.S. v. Sweden*, 27 August 1997, *Report of Judgments and Decisions* 1997-IV), data concerning a politician's financial situation (see *Wypych v. Poland* (dec.), no. 2428/05, 25 October 2005) and tax data (see *Lundvall v. Sweden*, no. 10473/83, Commission decision of 1 December 1985, Decisions and Reports (DR) 45, p. 121).

90. Pursuant to the principles arising from those cases, the Court has regard, in this sphere, to the essential role played by personal data protection in safeguarding the right to respect for private life as guaranteed by Article 8. Domestic law must therefore afford appropriate guarantees to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8. Moreover, the Court accepts that the protection of the confidentiality of certain types of personal data may be outweighed by the interest in the investigation and prosecution of crime and in the publicity of court proceedings. Finally, the Court recognises that a margin of appreciation should be left to the competent

national authorities in striking a fair balance between the interest of the publicity of court proceedings, on the one hand, and the interests of a party or of a third person in maintaining the confidentiality of such data, on the other hand (see, *inter alia, Z. v. Finland*, cited above, §§ 94, 95 and 97-99).

91. Those principles concerning the disclosure of certain types of information have been extensively confirmed and developed by the Court in cases concerning the storage of personal information (see, in particular, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, ECHR 2008; and *Khelili v. Switzerland*, no. 16188/07, §§ 61 et seq., 18 October 2011). That is the framework in which the Court will assess the impugned interference with the applicant's right to respect for his private life.

β) Application of the above-mentioned principles

92. The Court first of all notes that the applicant has advanced no substantiated arguments in support of the disproportionality of the impugned measure, merely stating that that measure had not pursued a legitimate aim.

On the other hand, it observes that the Federal Administrative Court held that the conditions set out in Article 8 § 2 of the Convention for any interference with private or family life were met in the instant case, considering that the important economic interests at stake for the country and Switzerland's interest in being able to honour its international commitments outweighed the individual interest of the persons concerned by the mutual assistance in keeping their financial situation secret (paragraph 4.1.2 of the judgment: see paragraph 23 above). The Government broadly followed that line of reasoning in their observations before the Court.

93. As regards the applicant's private interests, it transpires from the aforementioned case-law that the protection afforded to personal data depends on a number of factors, including the nature of the relevant Convention right, its importance to the person in question, and the nature and purpose of the interference. According to the *S. and Marper* judgment (cited above, § 102), a State's margin of appreciation will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted.

As regards the applicant's situation, it should be noted that the impugned disclosure only concerned his bank data, that is to say purely financial information; it therefore in no way involved the transmission of intimate details or data closely linked to his identity, which would have merited enhanced protection. It follows that Switzerland had a broad margin of appreciation in his case.

94. With reference to its observations on the pursuit of a legitimate aim (see paragraphs 83 and 84 above), the Court accepts that Switzerland had an important interest in acceding to the American request for administrative mutual assistance so that the US could track down any assets concealed in Switzerland. By concluding Agreement 09 and Protocol 10, it succeeded in averting a major conflict with the United States of America.

95. As regards the effect of the impugned measure on the applicant, the Court once again observes that the measure was implemented in the framework of a mutual assistance procedure, not as part of any criminal proceedings conducted in the USA, which were, and still are, purely hypothetical, and that that procedure represents at most a mere preliminary phase to criminal proceedings.

In other words, the bank details in question were transmitted to the competent US authorities to enable them to assess, using their standard procedures, whether the applicant had indeed honoured his tax obligations, and if not, to take the requisite legal action.

96. The Court also observes that the applicant benefited from certain procedural safeguards against the transfer of his data to the US tax authorities (see, conversely, *M.N. and Others v. San Marino*, cited above, §§ 82 et seq.). Firstly, he was able to appeal to the Federal Administrative Court against the AFC's decision of 7 June 2010 (see paragraph 20 above). That court subsequently set aside the said decision owing to a breach of the applicant's right to a hearing. The AFC consequently invited the applicant to transmit any observations he might have within a specified time-limit. The applicant availed himself of that right. On 4 November 2010 the AFC gave a fresh decision, which was properly reasoned, reaching the conclusion that all the preconditions were present for affording administrative mutual assistance. Subsequently, the applicant lodged a second appeal with the Federal Administrative Court, which dismissed that appeal by judgment of 2 March 2011 (see paragraphs 21 and 22 above). It follows that the applicant had several effective and real procedural safeguards at his disposal to challenge the surrender of his bank details, thereby protecting him against arbitrary implementation of the agreements concluded by Switzerland and the United States of America.

97. Having regard to all the circumstances of the case, and particularly in the light of the non-personal nature of the data disclosed, it was not unreasonable for Switzerland to prioritise the general interest of an effective and satisfactory settlement with the United States of America over the private interest of the applicant. That being the case, Switzerland did not overstep its margin of appreciation.

98. It follows that there was no violation of Article 8 of the Convention.

...

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

...

3. *Holds* that there has been no violation of Article 8of the Convention;

...

Done in French, and notified in writing on 22 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Luis López Guerra President