

The UBS case

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The decisive blow came from the United States. In 2007, Bradley Birkenfeld, an American private banker who had worked for UBS in Geneva, approached the American authorities and revealed that UBS had systematically helped wealthy American clients to evade taxes. UBS bankers had travelled to the United States to meet clients, had advised them on how to structure their accounts to avoid detection, and had used offshore companies to hide their ownership. The practices violated the Qualified Intermediary Agreement that UBS had concluded with the American Internal Revenue Service in 2001, under which it had undertaken to report American clients or withhold taxes on their American securities.¹

The American authorities opened a criminal investigation against UBS and its employees. In 2008, while the Senate Permanent Subcommittee on Investigations held hearings, the Department of Justice indicted a senior UBS banker. In February 2009, UBS entered into a deferred prosecution agreement with the Department of Justice, under which it admitted its conduct, paid seven hundred and eighty million dollars and agreed to disclose the identities of certain American clients.²

The disclosure of the client data created a constitutional crisis in Switzerland. Banking secrecy prohibited UBS from disclosing the data, whereas the double taxation convention with the United States allowed assistance only in cases of tax fraud. The American authorities threatened to bring criminal charges against UBS, which could have destroyed the bank, already weakened by its losses in the financial crisis and dependent on a public rescue. On 18 February 2009, FINMA ordered UBS to transfer the data of about two hundred and fifty clients directly to the American authorities, invoking its power to take protective measures to prevent the insolvency of a bank.³

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The next day, the American authorities filed a civil action to enforce a summons, known as a John Doe summons, requiring UBS to disclose the identities of some fifty-two thousand American clients. The Swiss government negotiated with the American government and concluded an agreement in August 2009, under which Switzerland undertook to process an administrative assistance request concerning about four thousand four hundred and fifty UBS accounts. When the Federal Administrative Court ruled in January 2010 that the agreement could not override the double taxation convention, the Federal Council submitted the agreement to Parliament, which approved it in June 2010 with the force of a treaty.⁴

The UBS case showed that banking secrecy could not protect a bank that depended on access to the American market. The threat of criminal prosecution in the United States, which would have deprived UBS of its American licences and its access to the dollar, was stronger than the protection of Swiss law. Forced to choose between banking secrecy and the survival of the largest Swiss bank, the Swiss authorities chose the bank.

1 Notes

1. On the revelations of Bradley Birkenfeld (2007/2008), the US investigation of UBS and the Qualified Intermediary Agreement of 2001, see the documents of the US Department of Justice and the US Senate Permanent Subcommittee on Investigations (report of July 2008). To be verified. ↩
2. On the deferred prosecution agreement between UBS and the US Department of Justice of 18 February 2009 (payment of USD 780 million, disclosure of client data), see the documents of the US Department of Justice. To be verified. ↩
3. On the order of FINMA of 18 February 2009 requiring UBS to transfer the data of about 255 US clients to the US authorities, and the judgment of the Federal Administrative Court of 5 January 2010 holding the transfer unlawful, later reversed in part by the Federal Supreme Court (judgment of 15 July 2011), see the published decisions. To be verified. ↩

4. On the agreement between Switzerland and the United States of 19 August 2009 concerning the request for information from the IRS regarding UBS (about 4,450 accounts), the judgment of the Federal Administrative Court of 21 January 2010 and the approval of the agreement by Parliament in June 2010, see the published documents. To be verified. ↩

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