

2012 No. 432

BANK LEVY

**The Double Taxation Relief (Bank Levy) (Federal Republic of
Germany) Order 2012**

Made - - - - - *21st February 2012*

Laid before the House of Commons *22nd February 2012*

Coming into force - - - *14th March 2012*

The Treasury make the following Order in exercise of the powers conferred by paragraph 66(1) of Schedule 19 to the Finance Act 2011(a).

Citation, commencement and effect

1. This Order may be cited as the Double Taxation Relief (Bank Levy) (Federal Republic of Germany) Order 2012 and comes into force on 14th March 2012.

Double taxation arrangements to have effect

2. It is declared that—

- (a) the arrangements specified in the Convention set out in Part 1 of the Schedule to this Order and the Protocol set out in Part 2 of that Schedule have been made with the Federal Republic of Germany;
- (b) the arrangements have been made with a view to affording relief from double taxation in relation to the bank levy and an equivalent foreign levy imposed by the laws of the Federal Republic of Germany; and
- (c) it is expedient that those arrangements should have effect.

*Angela Watkinson
Michael Fabricant*

21st February 2012

Two of the Lords Commissioners of Her Majesty's Treasury

SCHEDULE

Article 2

PART 1 CONVENTION BETWEEN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE OF DOUBLE CHARGING OF BANK LEVIES

The United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany,

Having regard to the introduction of bank levies in both Contracting States, such levies being for the enhancement of financial stability; and

Desiring to conclude a Convention for the avoidance of double charging of bank levies, mutual agreement in relation to cases of difficulty involving bank levies, and the exchange of information relating to bank levies;

Have agreed as follows:

ARTICLE 1

Banks Covered

This Convention shall apply to banks which are chargeable to bank levy in one or both of the Contracting States.

ARTICLE 2

Bank Levies Covered

(1) This Convention shall apply to bank levies imposed on behalf of a Contracting State, irrespective of the nature of the levies and of the manner in which they are levied.

(2) The bank levies which are the subject of this Convention are in particular:

a) in the Federal Republic of Germany:

contributions (“Beiträge”) to the Restructuring Fund (Restrukturierungsfonds) according to the Restructuring Fund Act (Restrukturierungsfondsgesetz) (Federal Law Gazette (Bundesgesetzblatt) 2010 Part I, page 1921 et seqq.)

(hereinafter referred to as “German bank levy”);

b) in the United Kingdom:

the bank levy set out in Schedule 19 of the Finance Act 2011

(hereinafter referred to as “United Kingdom bank levy”).

(3) This Convention shall also apply to any identical or substantially similar levies that are imposed after the date of signature of the Convention in addition to, or in place of, the existing bank levies. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their laws relating to bank levies.

ARTICLE 3

General Definitions

- (1) For the purposes of this Convention, unless the context otherwise requires:
- a) the terms “a Contracting State” and “the other Contracting State” mean the Federal Republic of Germany or the United Kingdom, as the context requires;
 - b) the term “Federal Republic of Germany” means when used in a geographical sense the territory of the Federal Republic of Germany, as well as the area of the sea-bed, its subsoil and the superjacent water column adjacent to the territorial sea, wherein the Federal Republic of Germany exercises sovereign rights and jurisdiction in conformity with international law and its national legislation for the purpose of exploring, exploiting, conserving and managing the living and non-living natural resources;
 - c) the term “United Kingdom” means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom designated under its laws concerning the Continental Shelf and in accordance with international law as an area within which the rights of the United Kingdom with respect to the sea-bed and subsoil and their natural resources may be exercised;
 - d) the term “bank” means:
 - aa) in the case of the Federal Republic of Germany any institution subject to the German bank levy according to the Restructuring Fund Act;
 - bb) in the case of the United Kingdom the “relevant group” under paragraph 4(1)(b) or the “relevant entity” under paragraph 5(1) of Schedule 19 of the Finance Act 2011;
 - e) the term “entity” means any member of a relevant group;
 - f) the term “competent authority” means:
 - aa) in the case of the Federal Republic of Germany the Federal Ministry of Finance (Bundesministerium der Finanzen) or the agency to which it has delegated its powers;
 - bb) in the case of the United Kingdom the Commissioners for Her Majesty’s Revenue and Customs or their authorised representative.
- (2) As regards the application of the Convention at any time by a Contracting State any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Contracting State for the purposes of the bank levies to which the Convention applies, any meaning under the applicable laws of that State relating to bank levies prevailing over a meaning given to the term under other laws of that State.

ARTICLE 4

Resident

The residence of an institution or entity will be determined by the domestic laws of the Contracting States. Where an institution or entity is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

ARTICLE 5

Permanent Establishment

- (1) For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of a bank is wholly or partly carried on.
- (2) The term “permanent establishment” includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office.
- (3) Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
 - a) the maintenance of a fixed place of business solely for the purpose of collecting information for the bank;
 - b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the bank, any other activity of a preparatory or auxiliary character;
 - c) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs a) and b), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
- (4) Notwithstanding the provisions of paragraphs 1 and 2, where an agent (other than an agent of an independent status to whom paragraph 5 applies) is acting on behalf of a bank and has, and habitually exercises, in a Contracting State an authority to conclude contracts on behalf of the bank, that bank shall be deemed to have a permanent establishment in that State in respect of any activities which that agent undertakes for the bank, unless the activities of such agent are limited to those mentioned in paragraph 3 which, if exercised through a fixed place, would not make this fixed place a permanent establishment under the provisions of that paragraph.
- (5) A bank shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such agents are acting in the ordinary course of their business.
- (6) The fact that a bank which is a resident of a Contracting State controls or is controlled by a bank which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either bank a permanent establishment of the other.

ARTICLE 6

Charging Rights on Permanent Establishments

- (1) A bank of a Contracting State shall be subject to the bank levy only of that State unless the bank carries on business in the other Contracting State through a permanent establishment situated therein. If the bank carries on business as aforesaid, the bank may also be charged in the other Contracting State in respect of that permanent establishment.
- (2) Paragraph 1 shall not be construed as preventing the application of a bank levy where such levy is charged in relation to a relevant group.

ARTICLE 7

Elimination of Double Charging

- (1) Bank levy shall be determined in the case of the Federal Republic of Germany as follows:
 - a) The United Kingdom bank levy on an institution resident in the Federal Republic of Germany that is a subsidiary of a United Kingdom resident member of a relevant group shall, unless the parent of the relevant group is resident in the Federal Republic of Germany, be allowed as a credit against the German bank levy;
 - b) A United Kingdom bank with a permanent establishment situated in the Federal Republic of Germany shall be exempted from the German bank levy.
- (2) Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against the United Kingdom bank levy of a bank levy payable in a territory outside the United Kingdom (which shall not affect the general principle hereof):
 - a) The German bank levy on an entity resident in the United Kingdom that is a subsidiary of a German resident member of a group shall, unless the parent of the group is resident in the United Kingdom, be allowed as a credit against the United Kingdom bank levy;
 - b) For an institution which is a resident of the Federal Republic of Germany with a permanent establishment situated in the United Kingdom, the credit shall take into account the German bank levy to be determined by reference to the relevant liabilities and derivatives attributable to the permanent establishment.

ARTICLE 8

Mutual Agreement Procedure

- (1) Where a bank considers that the actions of one or both of the Contracting States result or will result for it in a charge of a bank levy not in accordance with the provisions of this Convention, it may, irrespective of the remedies provided by the domestic law of those States, present its case to either competent authority. The case must be presented within three years from the first notification of the action resulting in charging not in accordance with the provisions of the Convention, or, if later, within six years from the end of the year the bank levy has been charged or the chargeable period in respect of which that bank levy is imposed or proposed.
- (2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of a charge of a bank levy which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States, except such limitations as apply for the purposes of giving effect to such an agreement.
- (3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double charging in cases not provided for in the Convention.
- (4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.
- (5) Where,
 - a) under paragraph 1, a bank has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States

have resulted for that bank in a levy not in accordance with the provisions of this Convention, and

- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the bank so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a bank directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

ARTICLE 9

Exchange of Information

(1) Subject to the provisions of the domestic law of the Contracting States, the competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning bank levies, in particular, to prevent fraud and to facilitate the administration of statutory provisions against legal avoidance.

(2) Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to banks or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the bank levies or the oversight of the above. Such authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing provisions, the information may be used for other purposes, if under the law of both States it may be used for these other purposes and the competent authority of the supplying State has agreed to this use.

(3) In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

(4) If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own bank levy purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

(5) In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a bank.

ARTICLE 10

Protocol

The attached Protocol shall be an integral part of this Convention.

ARTICLE 11

Entry into Force

(1) This Convention shall be ratified; instruments of ratification shall be exchanged as soon as possible.

(2) The Convention shall enter into force on the day of the exchange of instruments of ratification and shall have effect from 1 January 2011.

ARTICLE 12

Termination

This Convention shall remain in force until terminated by one of the Contracting States. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year beginning after the expiry of five years from the date of entry into force of the Convention. In such event, the Convention shall cease to have effect from 1 January of the calendar year next following that in which the notice is given.

Notice of termination shall be regarded as having been given by a Contracting State on the date of receipt of such notice by the other Contracting State.

Done in duplicate at London on 7 December 2011 in the German and English languages, both texts being equally authoritative.

**For the United Kingdom of Great
Britain and Northern Ireland:**

Mark Hoban MP

**For the Federal Republic of
Germany:**

Georg Boomgaarden

PART 2
**PROTOCOL TO THE CONVENTION BETWEEN THE UNITED
KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND
THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE
OF DOUBLE CHARGING OF BANK LEVIES SIGNED AT LONDON
ON 7 DECEMBER 2011**

The United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany have in addition to the Convention for the Avoidance of Double Charging of Bank Levies signed at London on 7 December 2011 agreed on the following provisions, which shall form an integral part of the said Convention:

1. With reference to Article 7:
 - a) It is understood that each Contracting State will apply the principles of the 2008 OECD report entitled “Attribution of Profits to Permanent Establishments” when attributing equity, liabilities and derivatives to a permanent establishment.
 - b) In the case of Article 7 paragraph 2 b), the portion of the German bank levy to be allowed as a credit against the United Kingdom bank levy shall be determined as the sum of:
 - aa) the relevant liabilities (according to section 12 paragraph 10 of the Restructuring Fund Act) attributable to this permanent establishment multiplied by the levy rate applicable to the relevant liabilities;
 - bb) the relevant derivatives (according to section 12 paragraph 10 of the Restructuring Fund Act) attributable to this permanent establishment multiplied by the levy rate applicable to the relevant derivatives; and
 - cc) if applicable, the portion of any special contribution (“Sonderbeitrag”) to be paid by the relevant bank in the respective calendar year (according to section 12 paragraph 4 of the Restructuring Fund Act) and attributable to the permanent establishment.

2. With reference to Article 9:

If data are exchanged under the Convention, the following additional provisions shall apply:

- a) A competent authority which receives information under the provisions of Article 9 shall, on request, inform the competent authority of the other Contracting State about the way in which that information was used and the results which were achieved.
- b) A competent authority which supplies information under the provisions of Article 9 shall take all steps to ensure that the information is accurate, and that it is necessary for and commensurate with the purposes for which it is supplied. If a competent authority discovers that it has supplied inaccurate information, or information which should not have been supplied under the provisions of Article 9, it shall inform the competent authority of the other Contracting State of this without delay. The competent authority shall correct or delete that information, as appropriate.
- c) Upon application the bank concerned shall be informed of the exchanged information in respect of it and of the use to which such information is to be put. There shall be no obligation to furnish this information if on balance it turns out that there is an overriding public interest in withholding it. In all other respects, the right of the bank concerned to be

informed of the existing data relating to it shall be governed by the domestic law of the Contracting State in whose sovereign territory the application for the information is made.

- d) Information exchanged under the provisions of Article 9 shall in any case be deleted as soon as it is no longer required for the purposes for which it was supplied.
- e) The competent authorities shall keep records of the supply and receipt of information exchanged under the provisions of Article 9.
- f) The Contracting States shall protect information exchanged under the provisions of Article 9 against unauthorized access, alteration or disclosure.

3. Review:

It is understood that the Contracting States shall consult each other at intervals of not more than five years regarding the terms, operation and application of the Convention with a view to ensuring that it continues to serve the purposes of avoiding double charging. The first such consultation shall take place no later than the end of the fifth year after the entry into force of the Convention.

Done in duplicate at London on 7 December 2011 in the German and English languages, both texts being equally authoritative.

**For the United Kingdom of Great
Britain and Northern Ireland:**

Mark Hoban MP

**For the Federal Republic of
Germany:**

Georg Boomgaarden

EXPLANATORY NOTE

(This note is not part of the Order)

The Schedule to this Order contains a convention and a protocol (“the arrangements”) made between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for the avoidance of double taxation in relation to the bank levy and the equivalent German levy. This Order brings the arrangements into effect.

The arrangements aim to eliminate double taxation where a bank is chargeable to the bank levy and the equivalent levy in the Federal Republic of Germany. This is done by allocating the taxing rights that each country has under its domestic law over the same bank or by providing relief from double taxation by way of credit for the other country’s levy.

Article 1 provides for citation and commencement.

Article 2 makes a declaration as to the effect and content of the arrangements.

The arrangements will enter into force on the day of the exchange of the instruments of ratification. They will take effect from 1st January 2011.

The date of entry into force of the arrangements will, in due course, be published in the *London, Edinburgh and Belfast Gazettes*.

In line with government commitments, a Tax Information and Impact Note has not been prepared for this Order as it gives effect to a previously announced policy to enact a double taxation agreement.