

Budapest, 28 March 2012

Conventions on the avoidance of double charging of bank levies

European-Asian Law Congress, 6th Session, Ekaterinburg, 7 - 9 June 2012, II. Seminar on practical issues of tax treaty case-law

Regulatory framework

- ex ante versus ex post measures (financing a rescue fund or recouping the costs of past bail-outs, e.g., through a tax on bonuses)
- destination of proceeds: stability fund versus general budget
- personal scope: in particular, credit institutions, or all financial enterprises, even including insurers, inter-bank transactions may be excluded
- scope of taxation: inter-banking business and primary market transactions may be excluded
- tax base: balance sheet total (all assets), risk-weighted assets (including claims), liabilities, excluding tier 1 and tier 2 capital and long term deposits + derivatives (off balance sheet items), turnover (transactions) or profit (if any)
- flat or progressive rates, application of ceilings
- prohibition of deduction for corporate tax purposes (disregarding losses?)
- double charging: taxation of foreign branches and the domestically operating branches of foreign enterprises

	UK	France	Germany
Current status of legislation	Legislation included in the UK Finance Bill published on March 31, 2011 and due to pass into law in the summer of 2011, but legislation is effective from January 1, 2011.	Enacted on December 15, 2010 together with the Finance Act for 2011. Effective as of January 1, 2011.	Relevant legislation introducing the bank levy was resolved on December 9, 2010 and became effective on December 31, 2010.

- Agreement signed on 29 November 2010 between the UK and France (but not ratified), reflected in 2011 No. The Bank Levy (Double Taxation Relief) Draft Regulations

- 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, Done at London on 7 December 2011, ratified, but not yet promulgated, implemented by 2012 No. 459 The Bank Levy (Double Taxation Arrangements) (Federal Republic of Germany) Regulations

Source: SULLIVAN & CROMWELL , London, Bank Levies in the UK, France and Germany, Memorandum of May 6, 2011

	UK	France	Germany
Entities subject to the bank levy	UK-headed banking groups and building society groups, and non-UK-headed banking groups with operations in the UK. A “bank” is determined by reference to UK Financial Services Authority rules. Broadly, an entity will be a “bank” if it is a deposit-taker or its activities consist wholly or mainly of specified regulated activities. Asset management companies and insurance companies should be excluded.	French and non-French banks that are under the supervision of the French Regulatory Control Authority, including “établissements de crédit” and “prestataires de services d’investissement”. Asset management companies and insurance companies are excluded.	Credit institutions (Kreditinstitute) within the meaning of Section 1 para. 1 of the German Banking Act, holding a German banking licence that are subject to the German regulation regarding credit institution accounting. The German Federal Bank and certain German public development banks that are exempt from corporate tax are exempt from the bank levy.

UK, French and German branches and subsidiaries of a foreign entity	UK	France	Germany
Branches	UK branches of non-UK banking groups and UK bank branches of non-UK non-banking groups are taxable. No preference is given to UK branches of non-UK EEA groups.	French branches of EEA banks are exempted. French branches of non-EEA banks are taxable on the non-EEA bank's minimum regulatory capital.	German branches of an EEA bank are not subject to the levy as they are not required to hold a German banking licence (if qualifying for EU passporting) and are not subject to the German regulation regarding credit institution accounting. German branches of a non-EEA bank are likely subject to the levy as they are required to hold a German banking licence and are subject to credit institution accounting.
Subsidiaries	UK subsidiaries of non-UK banking groups are taxable where they are included in the aggregated UK subsidiary, UK subgroup and UK branch balance sheets. UK subsidiaries of non-UK non-banking entities are taxable if they are themselves a UK bank, a UK bank branch, or part of a UK banking subgroup.	French subsidiaries of non-French entities are taxable. Not explicitly specified.	German subsidiaries of a non-German entity are likely subject to the levy if the subsidiary itself holds a German banking licence.

Foreign branches and subsidiaries of a UK, French or German entity	UK	France	Germany
Branches	Non-UK branches of UK-headed banking groups or building society groups are taxable by reference to the group's global consolidated balance sheet.	Minimum regulatory capital allocated to non-French branches of a French bank is taxable in France.	Not explicitly specified. Non-German branches of a German credit institution are part of the balance sheet of the single entity and therefore their business volume is taken into account.
Subsidiaries	Non-UK subsidiaries of UK-headed banking groups or building society groups are taxable by reference to the group's global consolidated balance sheet. Non-UK subsidiaries of non-UK banking groups are taxable where they are included in the aggregated UK subsidiary, UK subgroup and UK branch balance sheets.	Minimum regulatory capital allocated to consolidated non-French subsidiaries of a French bank is taxable in France.	Not explicitly specified. Non-German subsidiaries of a German credit institution are likely not subject to the levy as the bank levy is computed on a single entity and not on a group basis, and domestic and non-German subsidiaries of a German credit institution are not taken into account, even if they are consolidated for regulatory or accounting purposes.

Computation of the bank levy	UK	France	Germany
Tax base	Total equity and liabilities shown on a relevant balancesheet, except for Tier 1 capital (not Tier 2 capital) and other items such as insured deposits, certain tax and pension fund liabilities, sovereign repos and sovereign stock-lending liabilities.	Minimum regulatory capital as determined based on risk-weighted assets by the French Regulatory Control Authority. If the French Regulatory Control Authority modifies the minimum regulatory capital rules within three years after the date of payment of the bank levy due in respect of a given tax year, the bank levy for such tax year will be retroactively increased or decreased accordingly.	Two bases including (i) relevant liabilities and (ii) relevant derivatives: (i) Relevant liabilities equal total liabilities (Passiva), less liabilities to customers, less profit participation right capital (Genussrechtskapital), less funds for general banking risks (Fonds für allgemeine Bankrisiken), less equity (Eigenkapital). (ii) Relevant derivatives equal value of all off-balance sheet derivatives.

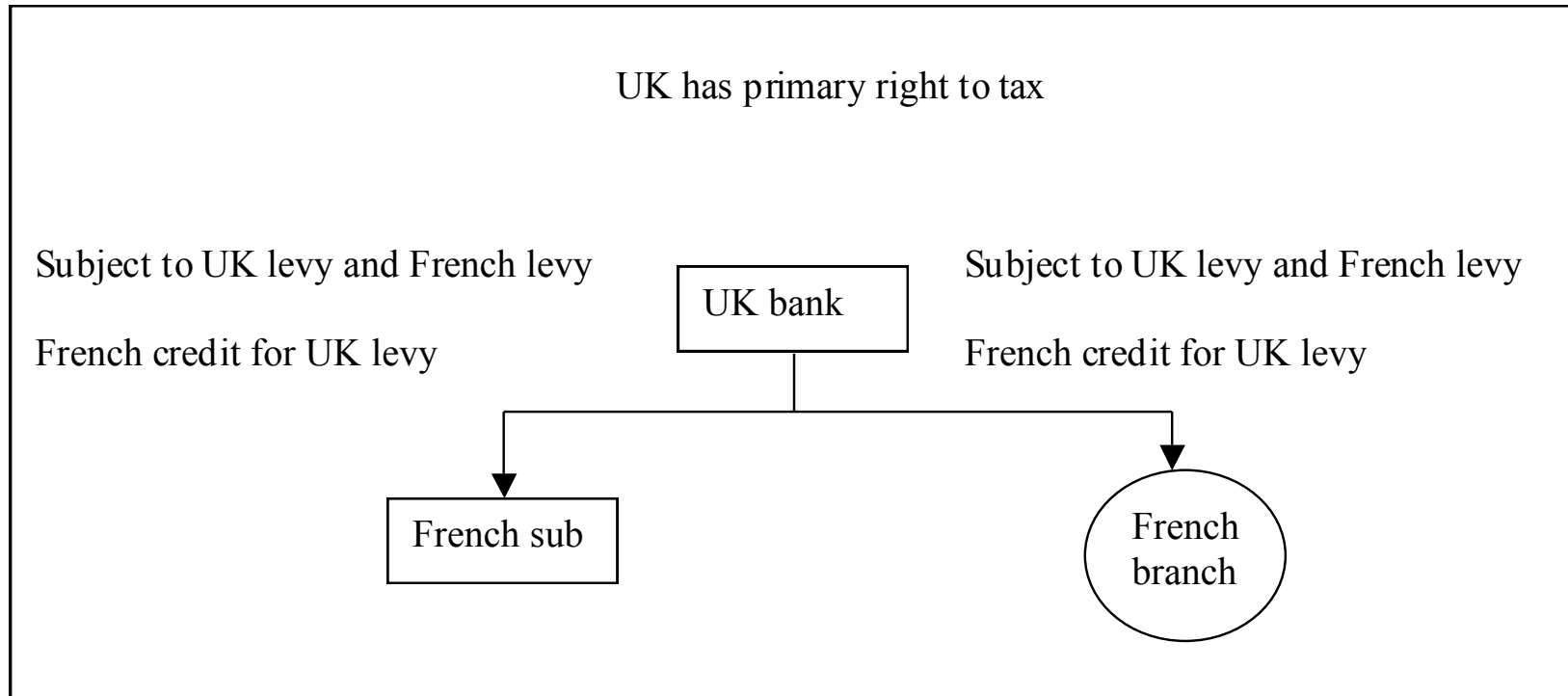
Computation of the bank levy	UK	France	Germany
Tax rates	0.075% for 2011, rising to 0.078% from 1 January 2012. Funding liabilities of greater than one-year maturity and certain other liabilities will be charged at half the rate otherwise applicable.	0.25%.	Standard annual contribution equals the sum of (i) and (ii) below: (i) Rate for relevant liabilities is progressive and cumulative. Relevant liabilities of up to €10 billion are chargeable at 0.02% annually, relevant liabilities of €10 billion or more up to €100 billion are chargeable at 0.03% annually, and relevant liabilities in excess of €100 billion are chargeable at 0.04%. (ii) Relevant derivatives are chargeable at 0.00015% on the nominal value of the derivatives. Additional contributions can be requested from credit institutions under certain circumstances, e.g., where the assets of the restructuring fund are insufficient to cover measures proposed to be taken to stabilise financial market.

Computation of the bank levy	UK	France	Germany
Consolidated / standalone	UK banking groups and building society groups: global consolidated basis. Non-UK banking groups: by reference to the aggregated balance sheets of each UK subsidiary, UK subgroup and UK branch. Relevant entities in a non-banking group: by reference to the balance sheets of UK banks, UK bank branches and UK banking subgroups.	Tax basis is computed on a global consolidated basis if the French taxable entity is the head of a consolidated group for accounting purposes.	Computed on a single entity and not on a group basis; only the entity holding a German banking licence is subject to the bank levy.
Worldwide / territorial	Worldwide basis for UK banking groups and building society groups, and UK subgroups of non-UK banking groups.	Worldwide basis, but only for the French heads of a consolidated group for accounting purposes.	Computed on a single entity and not on a group basis; domestic and non-German branches of a German bank are taken into account, whereas domestic and non-German subsidiaries are not, unless they hold a separate German banking licence.

Double taxation measures	UK	France	Germany
Relief available	Domestic law will provide for relief in two ways: (1) giving effect to treaties or agreements with other states that provide relief from double taxation; and (2) enacting regulations that provide for relief from double taxation.	Domestic law provides for double taxation relief through a tax credit.	As the bank levy is structured as a levy and not as a tax, no double taxation relief may be available.
Conditions	(1) To qualify for relief, the relevant non-UK levy should (i) follow the proposals made by the IMF in June 2010, (ii) be based on the balance sheet (rather than income, profits or gains); and (iii) be “similar in intent” to the UK bank levy. (2) Reciprocity condition: the other jurisdiction should have also made appropriate provision for avoidance of double taxation in relation to the UK levy.	(1) The relevant non-French levy should have “an objective of reduction of systemic risk”. (2) Reciprocity condition: the other jurisdiction should have also made appropriate provision for avoidance of double taxation in relation to the French levy.	--
Method of relief	Although details are not yet known, likely to be by way of tax credit.	Non-French banks having a taxable French branch or subsidiary shall get a tax credit equal to the portion of the non-French bank levy paid in respect of such French branch/subsidiary.	--

Administration	UK	France	Germany
Deductibility	Not deductible for corporation tax purposes. Intra-group payments relating to meeting or reimbursing the cost of the Bank Levy are to be disregarded for corporation tax.	Should be deductible for corporation tax purposes.	Not deductible for corporation tax and trade tax purposes.

UK banking group with French subsidiary or French branch



Source: SULLIVAN & CROMWELL , London, Bank Levies in the UK, France and Germany, Memorandum of 21 December 2011

French banking group with UK subsidiary or UK branch

France has primary right to tax

Subject to UK levy and French levy

UK credit for French levy

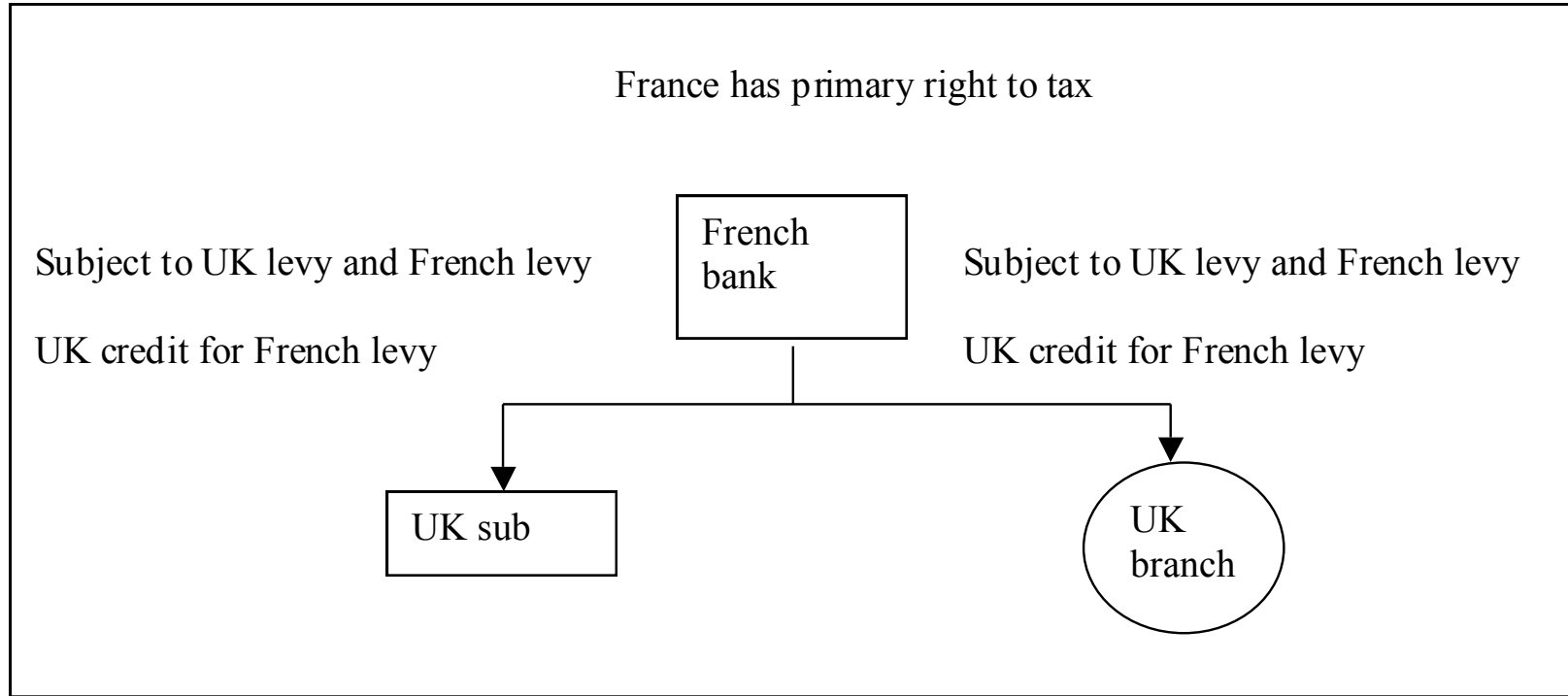
French
bank

Subject to UK levy and French levy

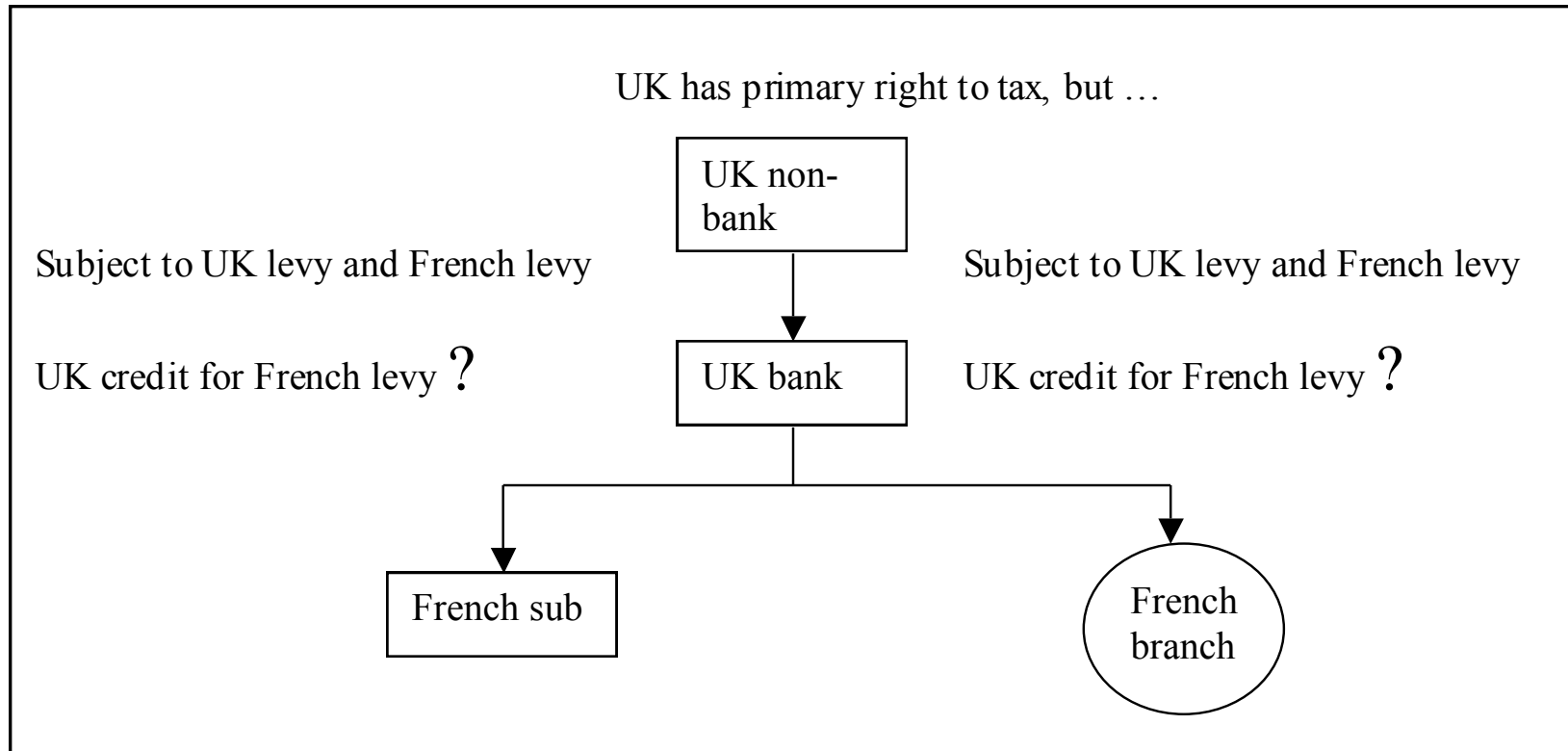
UK credit for French levy

UK sub

UK
branch



UK non-banking group with French subsidiary or French branch of UK subsidiary



UK banking group with German subsidiary or German branch

UK has primary right to tax

Subject to UK levy and German levy

German credit for UK levy

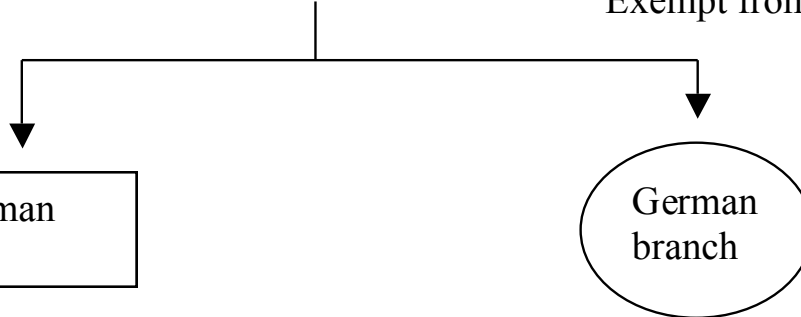
UK bank

Subject to UK levy

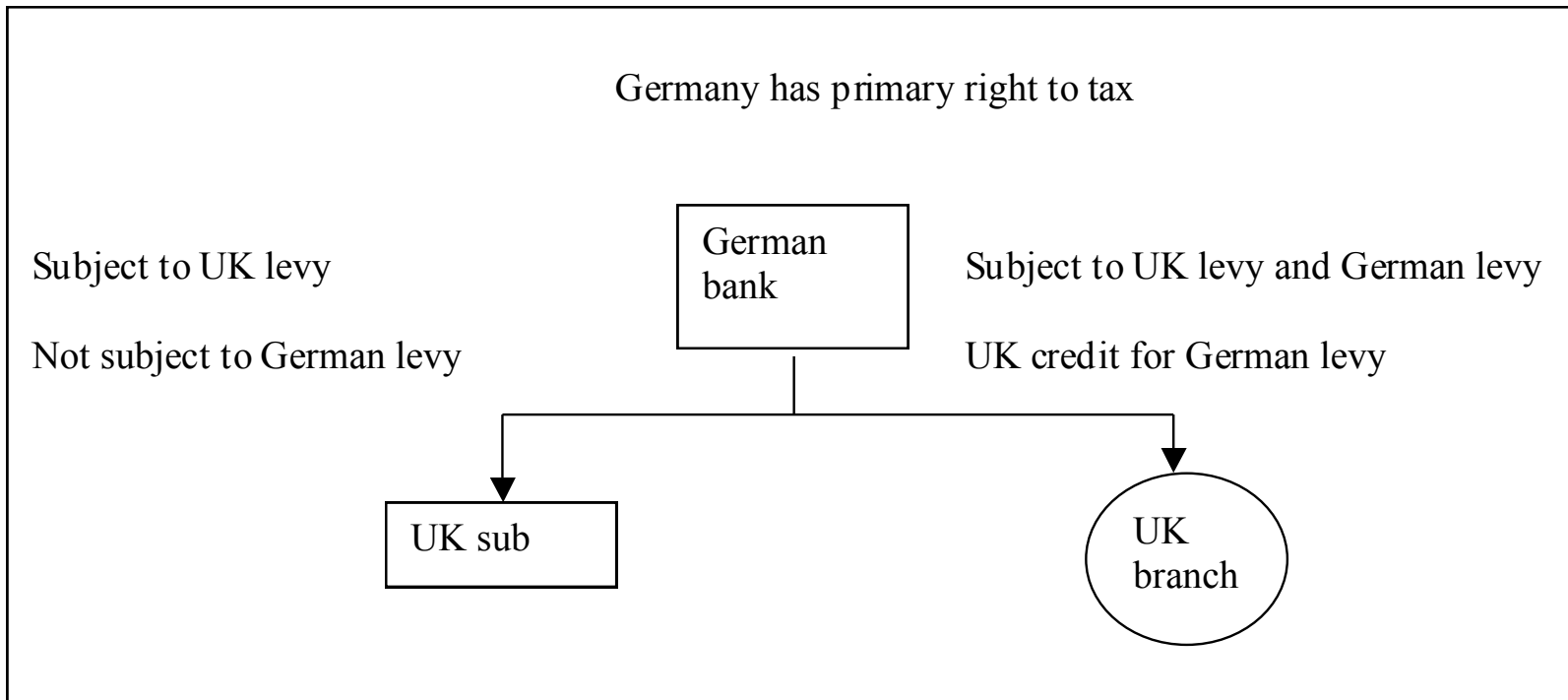
Exempt from German levy

German
sub

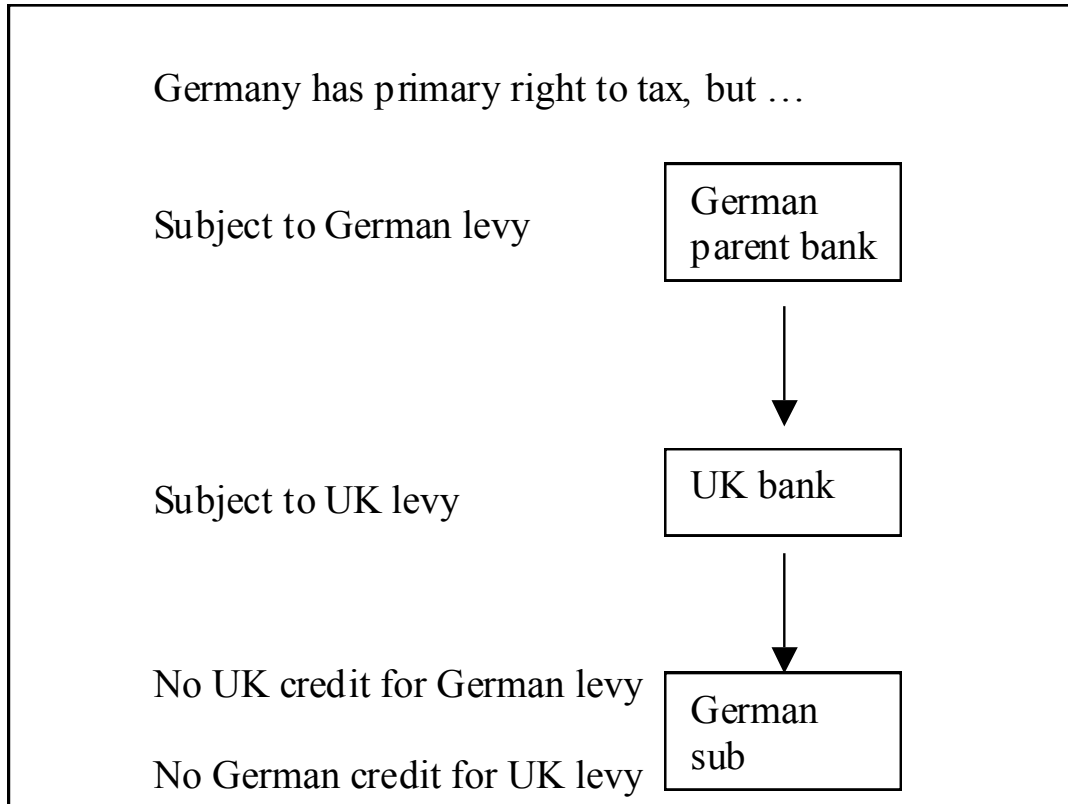
German
branch



German bank with UK subsidiary or UK branch



UK banking group with German subsidiary, and ultimate German parent: double taxation?



UK – Germany convention on the avoidance of double charging of bank levies	OECD model income tax treaty
Art. 1 on banks covered	Art. 1 on the personal scope
Art. 2 on bank levies covered	Art. 2 on the taxes covered
Art. 3 on definitions	Art. 3 on definitions
Art. 4 on residence	Art. 4 on residence
Art. 5 on permanent establishments	Art. 5 on permanent establishments
Art. 6 on charging rights on permanent establishments: the primary taxation power rests with the state of residence, even on a consolidated basis	Art. 7 on business profit: the primary taxation power rests with the state of source

UK – Germany convention on the avoidance of double charging of bank levies	OECD model income tax treaty
<p>Art. 7 on the elimination of double charging:</p> <ul style="list-style-type: none"> - the UK levy is credited against the German levy in respect of the German operating subsidiary of a UK parent in a banking group - the German operating PE of a UK bank is exempt from the German levy - the German levy is to be credited against the UK levy in respect of a UK operating subsidiary of a German parent in a banking group (under German national law, no German levy on the UK operating subsidiary of a German bank) - the German levy is credited against the UK levy in respect of a UK operating PE of a German bank 	Art. 23A and 23 B on the elimination of double taxation
--	Art. 24 on non-discrimination
Art. 8 on MAP	Art. 25 on MAP
Art. 9 on the exchange of information	Art. 26 on the exchange of information

It can be seen that there is no German levy

- on the German operating PE of a UK bank; and
- on the UK sub of a German bank