UK/EU: Working through uncertainty

Practical considerations for Financial Institutions
The British people have voted for the UK to Leave the European Union (EU). This is a momentous decision which will have significant implications for both the UK and Continental Europe. Whilst a second referendum in the wake of a period of intense negotiations between London and Brussels cannot be entirely ruled out, Financial Institutions should commence reassessing their strategic, business and operational models on the assumptions that the UK will leave the EU definitively within the next three years.

In this document, we discuss the implications for Financial Institutions and explore the immediate practical options facing their Boards. It is an updated version of our paper of May 2016 ‘Preparing for the EU Referendum’. Whilst this paper focuses on the implications for UK based Financial Institutions, a British departure from the EU will also have significant consequences for all Financial Institutions based in or dealing with European markets.

For the moment, the Referendum outcome technically changes nothing, in that the UK still remains a member of the EU and is bound by its legal and treaty obligations until such time as the country definitively exits. However, in practice much will potentially change and much – including the applicability of future EU Regulations and Directives – will remain uncertain during the two to three year period of negotiations between London and Brussels upon which we are now embarked.

We may well see a period of market volatility particularly in foreign exchange and equity markets although Central Bank intervention and the exhaustion of immediate profit opportunities will likely ensure this period is relatively short lived. On the political front, in the UK there will be tension within the Government in the wake of the referendum campaign and probable changes of Ministerial portfolios. A general election before the end of the year should not be ruled out. There will be renewed calls in Scotland for a second independence referendum.

Against the background of political and economic uncertainty, Financial Institutions will pay close attention to future negotiations surrounding the UK’s future access to the Single Market and in particular to Passporting and Equivalence rights for UK based institutions.

Although there is no call for precipitate action, all Boards will need to launch a comprehensive programme to assess from multiple perspectives the likely consequences of the referendum decision, its implications for strategic, business, operational and governance models, and the options available. We hope this paper will serve as a short and useful introduction to some of the principal issues involved.
The Referendum on the UK’s membership of the EU was held on Thursday 23 June 2016, with the result of a ‘Leave’ vote declared the following morning. The vote came after a period of political, economic, and financial uncertainty, and given the outcome, will result in a variety of short and medium term political scenarios being played out, all with varying degrees of instability for Financial Institutions.

**Treaty of Lisbon (2009), Article 50**

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the EU. It shall be concluded on behalf of the EU by the European Council, acting by a qualified majority, after obtaining the consent of the European Parliament

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph two, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period

4. For the purposes of paragraphs two and three, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council in decisions concerning it

The victory of the ‘Leave’ campaign now requires consideration of the various short and medium term political scenarios that may play out as a result of Britain withdrawing from the EU, which shall be covered in this paper.
As the UK public has voted to leave the EU, the government must consider the following options of legal withdrawal from the EU.

**Negotiated withdrawal under Article 50 of the Treaty of Lisbon**

- The government has stated its intention that the UK will immediately give two years' notice of its intention to leave the EU, during which the terms of an exit would be negotiated. The decision to leave does not require agreement of the other member states, which cannot block or delay beyond the two year period.

- The EU Treaties will cease to apply to the UK on the entry into force of a withdrawal agreement; or, if no new agreement is concluded, after two years (unless there is mutual agreement to extend the negotiating period).

**Negotiate before withdrawal**

- The UK government could use the result of the Referendum as a mandate to negotiate an exit with the EU, with the legal status of the negotiations left undetermined. The UK may then trigger Article 50 once talks have concluded to validate the agreement. This may lead to demands for a second UK Referendum on the negotiated deal.

Under both these scenarios, negotiations may be complicated by the fact that the UK is due to hold the rotating six month Presidency of the Council of the European Union during the second half of 2017. It is likely that the UK will not be permitted to hold this role as this position has responsibility in setting laws and EU foreign policy.

**Unilateral withdrawal**

- The UK could repeal domestic legislation, the 1972 European Communities Act, which provides the Parliamentary consent for the primacy of EU law in the UK, and ratifies the framework for UK-EU relations. This could lead to a period of legal uncertainty and in all likelihood this option would have to be accompanied by a portmanteau Bill providing a legal framework to cover the interim period for the repeal, revision, or retention of laws emanating from the UK's 40 year membership of the EU.

It is also worth noting that although the UK remains formally and legally a member of the EU until it has fully completed its withdrawal, the real applicability of EU legislation passed in the period between a 'leave' vote and actual formal withdrawal, would be equivocal.
Conclusions

► Boards should finalise their necessary communications to staff, clients, and the public in the aftermath of the Referendum

► A second Referendum, following a period of detailed negotiations, should not be entirely discounted

► For Financial Institutions (FIs), a ‘Brexit’ may not imply significant relaxation in regulations. Whilst some technical elements of some regulations (for example on MiFID II regarding positions; transparency; liquidity) might be tweaked, there will most likely be no wholesale or significant relaxation of rules affecting FIs because:

  ► The UK is signed up to G20 standards, the Financial Stability Board, the Basel Committee on Banking Supervision and is likely to continue driving reform through these bodies now a leave vote is confirmed

  ► EU legislation forms much of the legal basis upon which the City of London now operates and is unlikely to be repealed wholesale

► If the City wishes to continue to enjoy access to the Single Market, the UK will be likely to need to demonstrate equivalence to the EU regulatory environment which implies the status quo at the very least

► UK regulators have indicated they will not significantly reduce regulation: “there would in no way be a bonfire of red tape or a more permissive regulatory environment in the event of a ‘leave’ vote” – Andrew Bailey, Deputy Governor of the Bank of England and CEO designate of the Financial Conduct Authority

► The UK Government’s priority now is unlikely to be relaxing the regulatory environment for Financial Institutions especially since there will be little pressure for change from the wider electorate
On the assumption that the majority of regulations governing Financial Institutions will remain largely unchanged under any option, the key questions for many FIs will revolve around the ease of future access to the EU Single Market. This will be dependent upon the outcome of treaty negotiations, and crucially upon passporting rules, and the degree of reciprocal recognition of regulatory equivalence. Circumstances will be different for each individual Financial Institution but as a rough rule of thumb, UK domiciled institutions trading wholly or predominantly within the UK will be least affected, whereas institutions using the UK as a hub for operating within the entire EU will be most affected.

Passporting

UK-based FIs benefit from a treaty right facilitating their access to the EEA: ‘passporting’ allows FIs authorised in an EEA member state to carry out an activity covered by one of the EU Single Market directives across the area without needing separate authorisation in each country. Such an FI can either (i) set up a branch in another EEA state (an ‘establishment’ or ‘branch’ passport), or (ii) provide cross-border services or advice (a ‘services’ passport) by way of post, telephone or internet from its home EEA state.

As detailed in Appendix D the scope of services covered is very wide, impacting most financial services sub-sectors including retail banking, investment banking, insurance, asset management and market infrastructure. Passporting can take place in relation to the following nine current Single Market directives:

- Capital Requirements Directive (2013/36/EU)
- Undertaking Collective Investment Scheme Directive (85/611/EEC)
- Payment Services Directive (2007/64/EC)

EU passporting mechanism

- Allows for firms that are authorised to provide financial services in one jurisdiction to provide them in another, without the need for authorisation in this second jurisdiction. A firm authorised in an EEA state has the right of establishment of a presence (branch and/or agents), or in providing cross-border services

- Possibly require **domestic authorisation** in the EEA state in question for services provided that are outside a passport’s remit

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1Source: http://www.bankofengland.co.uk/pra/Pages/authorisations/passporting/default.aspx
Firms looking to export products and services which do not benefit from passporting rights under EU Single Market directives are required to obtain specific authorisations in each individual EEA member state.

Many FIs established in the UK currently rely heavily on passporting rights to operate in the EU. This includes FIs headquartered in the UK, but also the numerous non-EEA FIs which have chosen the UK as a base for EU operations. Major UK international banks have outward passporting rights in place with most EEA member states in relation to a large number of their activities.

Should the UK exit the EEA, FIs established in the UK would lose their passporting rights unless an alternative trade arrangement for access is negotiated. UK FIs would, in this case, be treated in the same way as firms based in a non-EEA state wishing to operate in the EU market, such as the US or Switzerland.

As a non-EEA state, the UK could seek to establish an equivalence agreement with the EU to rely on their supervision framework: Single Market access would then be simplified and apply at sub-sector level. Failing this, individual UK-based FIs would have to apply directly to the financial regulators in each territory for permission to conduct business there (and may be require to establish branches in each country), or establish an authorised presence in an EEA member state from which they can then apply for passporting.

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**EU equivalence**

- EU recognises non-EU financial regulatory and/or supervisory regime — making it possible for the EU regulators to rely on supervised entities’ compliance with the equivalent foreign framework

- Based on detailed criteria of third country framework: prudential and business conduct, cooperative agreements on EOI, sufficient capital available to branch, adherence to investor-protection scheme, signatory to OECD Model Tax Convention, market transparency, etc.

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**Equivalence**

By recognising a non-EU financial regulatory and supervisory regime, EU regulators can rely on supervised entities’ compliance with the ‘equivalent’ foreign framework. This assessment is based on detailed criteria and looks to confirm that it achieves the same objectives as the EU legislation.
Switzerland’s provision of financial services in the EU is an interesting illustration due to its geographical proximity to the EU and the importance of its financial services sector. Around twenty equivalence agreements have been struck between the EU and Switzerland, due to the specificities of each financial services sub-sector covered. In order to reach these agreements Switzerland has had to largely adopt EU frameworks in its national regulation, and must adapt them in line with changing EU regulations so as to maintain their validity.

In the absence of an equivalence agreement, UK FIs would need to either (a) be established as an authorised entity in individual member states in relation to the relevant directive(s), or (b) establish an authorised subsidiary in a Member State and rely on passporting rights across the EU.

In the first case UK-based FIs would need to apply for authorisation in each EEA member state individually. The EU branches of non-EEA FIs do not have passporting rights.  

In the second case, it is unlikely that UK FIs could establish brass plate subsidiaries in the EU to carry out business from the UK. Indications are that a transaction booked, negotiated or arranged in a non-EEA entity in the EEA should be treated as a transaction of that entity, even though parts of the transaction are carried out in other jurisdictions within the group. A bank subsidiary is legally a separate legal entity, authorised by the regulator of the country where it is established, with its own financial resources and governance arrangements. Subsidiaries deal at arm’s length with the rest of the group to which they belong. In consequence, if they choose this option, it may be that UK-based FIs (including the non-EEA banks which have chosen London as their EU foothold to gain passporting rights) will need to transfer a portion of the operations for which they will seek passporting to an EEA member state.

**Harmonised regime under MiFID II**

MiFID II creates a harmonised regime for access to the EU Single Market for non-EEA investment firms. An equivalence agreement is required for the regime to apply. Qualifying non-EEA firms would then be able to service eligible counterparties including professional clients (but not retail clients) without having to establish a branch in each EEA member state. There are concerns that it will in practice require non-EEA firms to establish subsidiaries in the EEA to benefit from passporting, implying capital requirements, host state supervision as distinct from home state oversight and home state deposit insurance guarantees, but this may not be the case.

Although there is no common third country regime under MiFID, access to the Single Market for non-EEA investment firms may be improved under MiFID II. MiFID II may enter into force from January 2018, if it is not further delayed: considering that the earliest time the UK would exit the EU if it actioned Article 50, it is possible that UK firms could rely on it.

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2The CRD states that branches of credit institutions authorised in third countries should not enjoy the freedom to provide services or the freedom of establishment in Member States other than those in which they are established.
Switzerland: EU financial services trade model

As Switzerland sits outside the EU and there is no formal sectoral agreement for financial services, Swiss FIs have to consider other alternatives to gain access to EU markets. They are obliged to gain access on a jurisdiction-by-jurisdiction basis, always under prevailing national rules or bi-lateral treaties.

Switzerland has defined three different national objectives for the financial sector:

► Short-term: Secure opening of markets in key partner states
► Medium-term: Secure market access to the wider European domestic market
► Long-term: Initiate exploratory discussions regarding a sectoral agreement for financial services (FSA) with the EU Commission

There are limited passporting opportunities for Swiss FIs since it generally requires a subsidiary domiciled in the EU/EEA with its own legal structure. To overcome some of the hurdles Swiss FIs use a variety of approaches including establishing subsidiaries with full operating capabilities within EU/EEA countries or securing authorisation to serve clients within the EU/EEA from a physical presence in Switzerland. The key element in all of this is that Swiss FIs require explicit permission/authorisation from the competent authorities to trade within the EEA/EU on a country by country basis.

In a wider political and economic context, Switzerland remains reluctant to envisage EU membership. Reasons cited include perceived fundamental challenges to the principles of neutrality, and direct democracy, as well as concerns about disadvantages for the agricultural sector, higher VAT, and the potential and highly symbolic loss of the Swiss Franc.

EU Association Agreements

In mid-April, the Leave Campaign suggested that in the future the UK could gain access to the Single Market by entering into a trade pact with a series of non-EU countries such as Albania and the Ukraine, who have been granted preferential access to the Single Market (via Stabilisation and Association Agreements), or by entering into a similar arrangement with the EU. It should be noted that these treaties do not have specific current provision for financial services. An EU Commission spokesman observed that these Agreements, specifically designed for small, underdeveloped economies with the potential for possible future accession to the EU, were as much political as concerned with trade per se, and are unlikely to be on offer to a large economy such as the UK.
The Canadian example: access under a bilateral trade agreement

The EU’s Comprehensive Economic and Trade Agreement (CETA) has been advocated by some as a potential model for a British deal with the EU. The structure of the CETA deal is:

► Tariffs, customs duties and obstacles for business will be eliminated on 99% of goods
► There is an expected €12bn increase for Europe’s GDP
► Canadian public procurement, foodstuffs, and services-based opportunities will be opened up for European firms (and vice versa)
► Streamlining trade in services and regulatory convergence would see the voluntary harmonisation of European and Canadian rules where possible
► The attraction of Canada for the EU is that many of its markets are currently inaccessible to EU firms; this deal opens up potential opportunities for EU companies to expand into Canada

However opponents of this pact as a model for a future UK-EU relationship observe:

► This still not ‘genuine’ free trade; Canadian exports will need to comply with EU rules over which Canada has no influence
► Canada will not get full, unrestricted access to the as yet incomplete Single Market for services, in particular financial services
► Regulatory convergence is a key feature of the EU-Canada deal; with this model, the UK would therefore continue to align its regulations with those of the EU
► CETA is a possible template for Brexit, but a UK-EU version may not be as comprehensive as current access to EU, nor have as much free trade
► CETA took nine years to negotiate and is still to be formally signed and sealed
Conclusions

► A UK exit from the EU may have a greater impact on the financial services sector than for any other area of the economy

► Curtailment of access to the EU/EEA Single Market for some products and services might oblige some FIs to rethink their legal and operational structures

Passporting considerations for FI sub-sectors

| Retail banks and investment banks | ► Passporting largely covered by the CRD and MiFID  
| | ► Credit institutions that have passport rights under the Capital Requirements Directive (CRD) do not have passport rights under the Markets in Financial Instruments Directive (although credit institutions can passport investment services under the CRD)  
| | ► Eligible deposits of an EEA branch will be covered by the home rather than host country deposit guarantee scheme. However, eligible deposits placed in UK branches from outside the EEA are covered by the host deposit guarantee scheme |
| Asset management | ► Passporting largely covered by MiFID, UCITS, AIFM, and the Insurance Mediation Directive (for advice on insurance-based products)  
| | ► The AIFMD requires hedge funds to locate significant management functions in the EU |
| Insurance | ► Passporting largely covered by Solvency II and the Insurance Mediation Directive  
| | ► Firms passporting under the Solvency II Directive are automatically able to passport mediation business and therefore do not require a separate passport under the Insurance Mediation Directive |
It is problematic to attempt to describe and model the implications of the numerous possible scenarios which would flow from a British departure from the EU. (A series of economic impact analyses is cited in Appendix A.) These will have general implications for all Financial Institutions but will also vary greatly depending on the individual Firm’s particular business model, governance and organisation structures, as well as its degree of exposure to EU markets outside the UK.

Given that the outcome of the Referendum is now confirmed as a vote to leave the EU, all organisations should, at the very least, consider carefully the immediate impact this vote will have on their business. Depending on the business model, for some the first order effects may be relatively inconsequential; for others they could be more profound. At the very least, a Firm needs to consider the potential impacts, and build in sufficient optionality and flexibility to its plans to confirm it is not caught at a disadvantage now that the government is undertaking steps to leave the EU.

As the Referendum has conclusively determined the UK’s wish to leave the EU, we consider the following areas of single most importance:

1. **Business structure**

Financial Institutions with entities situated in the UK and other EU jurisdictions rely on passporting rights and the right of establishment to operate across borders. These rights could be called into question if the UK leaves the EEA and no equivalent arrangement is put in place. These rights now face uncertainty as a new agreement is discussed and membership to the EEA considered.

**Preparatory steps**

- Consider the location of major trading, booking, distribution and back office activities in light of a number of considerations (e.g., tax and labour cost, consumer protection laws, client proximity)
- Review the configuration of branch, subsidiary and HQ presence within the UK, EU, and elsewhere
- Explore the implications of creating a new corporate structure, for example by establishing a new business/holding company within the Eurozone, and optimising legal entity relationships
- Bear in mind that creating new subsidiaries, transferring staff and activities between locations may be a lengthy process

**Specific considerations**

- Tax implications of restructuring
- Ring-fenced bank issues
- Capital restrictions
- Potential changes in identity and activities of lead and subsidiary supervisors/regulators
- Nationality and location of customers
2. Employment legislation

► The principle of free movement of labour and the benefits open to non-national residents may be challenged. Any EU citizens working in the UK may no longer have this automatic right, likewise for any UK citizens based in the EU.

► When a Brexit occurs, it is likely that there would be refinements to the frameworks surrounding workplace law rather than wholesale changes. The government does not appear to be seeking to implement wholesale change in workplace legislation.

► EU laws around the pay and caps to bankers bonuses may be modified.

► The mutual recognition of UK/EU professional qualifications may not be automatic.

► Pension laws will come under scrutiny.

► TUPE (the automatic novation of employee contracts following business transfers) may be subject to change.

► Collective consultation and discrimination legislation may be reviewed.

► Working Time and Agency Workers

Preparatory steps

► Review the group’s growth strategy until the vote (e.g., hiring entity in the UK vs. EU).

► Plan internal communication to group staff on their employment situation.

3. Taxation

► The UK will no longer be subject to the VAT Directive, which may lead to changes in the UK VAT regime, and create some frictional costs of complying with EU VAT rules going forward.

► Operation of direct tax directives for payments between UK and EU entities will fall away, with taxpayers needing to rely on tax treaties, which may not altogether remove frictional tax costs (e.g., withholding tax on dividends and interest).

► Tax implications of groups having to set up new entities and/or transfer business to access EU market, and needing to consider new holding and/or financing structures for EU-based/UK business.

► Possibility of inversions: UK HQ groups (or groups with UK-headed regional hub structure) moving to new EU based parent entity.

► UK tax policy: greater freedom for UK in setting tax policy (not subject to e.g., EU state aid rules, or ECJ case law on fundamental freedoms, etc.), but removing the powerful ‘brake’ of UK voice could make EU corporate tax initiatives coming to fruition more likely with FTT being the most obvious possible example.
Preparatory steps

► Assess current tax profile of the group’s current European holding and financing structures, as well as location of principal operating entities and places of business

► Consider potential impact of changes to holding and financing structures, especially in relation to tax losses and other tax attributes, tax groupings, existing transfer pricing models (including capital attribution to branches)

► Identify current VAT treatment of cross border supplies and other areas of potential cross border VAT change (especially if changes from branch structure to subsidiary structure)

4. Operations

► Most of the UK’s financial market infrastructure legislation originates at an EU level. Departing from the EU would require the UK to renegotiate, replicate, or amend this legislation

► Identify key legislation that impacts your business and understand how it is implemented in your business

► Review operations to identify where increased legislation or non-EU regulations might impact your business

5. Data retention and transmission

► FIs hosting and processing UK data in an EU country may need to repatriate this data and vice versa. Data transmission may also be impacted

► UK rights from agreements and frameworks derived from EU Data Protection law would potentially be at risk if equivalent arrangements could not be agreed

► The status of ‘offshore activities’ (i.e., outside the EU and UK) providing services to clients in the EU may be subject to restriction

Preparatory steps

► Review the data archiving infrastructure of the group

► Review contracts in relation to the group’s ability to retain/transfer personal information across borders

► Consider any large IT investment or decision in light of the upcoming Brexit

There may well be impacts in other areas including:

► Competition Law including M&A activities and State Aid considerations

► Commercial contracts

► Relevance of past judgments of the ECJ

► Consumer protection
It is worth bearing in mind that nothing has legally changed since the Referendum result was announced on the morning of 24 June, and that none of the changes discussed may occur. However, Boards would be well advised to identify those areas it believes to be most crucial and to prepare contingency plans and lobbying activities accordingly.

### Conclusions
- The precise configuration of laws and regulations will be dependent on the outcomes of series of negotiations with EU and others and definitive forecasting is impossible at this juncture.
- Most likely outcome is that bulk of existing EU legislation currently incorporated in UK law – including that relating specifically to FIs – will remain substantially unchanged.
- Key dependent variables for FIs will be positions on passporting and equivalence.
- Potential ramifications starting to become clearer.
- Detailed planning is now required.
Appendix A: Key documents

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Appendix B: List of services and products covered by passporting under selected directives

### CRD IV

- Taking deposits and other repayable funds from the public
- Lending
- Financial leasing
- Money transmission services
- Issuing and administering means of payment (e.g., credit cards)
- Guarantees and commitments
- Trading for own account or for account of customers in:
  1. Money market instruments
  2. Foreign exchange
  3. Financial futures and options
  4. Exchange and interest rate instruments
  5. Transferable securities
- Participation in share issues and the provision of services relating to such issues
- Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to M&A
- Money broking
- Portfolio management and advice

### MiFID II

- Reception and transmission of orders in relation to financial instruments
- Execution of orders on behalf of clients
- Dealing on own account
- Portfolio management
- Investment advice
- Safekeeping and administration of financial instruments for the account of clients (including custody, cash/collateral management)
- Granting credits or loans to an investor to allow him to carry out a transaction in one or more of the relevant instruments where the firm granting the credit or loan is involved
- Operation of Multilateral Trading Facilities
- Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis
- Placing of financial instruments without a firm commitment basis
- Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to M&A
AIFMD

► Management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement
► Investment advice
► Safe-keeping and administration in relation to shares or UCI undertakings
► Reception and transmission or orders in relation to financial instruments

UCITS V Directive

► Management of UCITS (including investment management, administration and marketing)
► Investment advice concerning instruments listed in Section C of Annex I to MiFID
► Safekeeping and administration services in relation to UCI undertakings
► Managing portfolios of investments, including those owned by pension funds, which include instruments listed in Section C of Annex I to MiFID

Insurance Distribution Directive

► Introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance
► Concluding contracts of insurance
► Assisting in the administration and performance of contracts of insurance, in particular in the event of a claim

Solvency II

► Taking up and carrying on direct life and non-life business as defined in the Directive, and reinsurance business
► Classes 1 to 18 of non-life insurance business in Point A of Annex I to the Solvency II Directive
► Classes I to IX of direct life insurance business in Annex II to the Solvency II Directive
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Notes:
EY's position in respect of the EU referendum on 23 June 2016 is neutral. Nothing in this document is intended to or should be read as promoting a particular outcome in the EU referendum.