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Post Office Ltd. (POL) – Liabilities Funding Concept Paper

Purpose

This is a concept paper drafted by UK Government Investment (UKGI) setting out two broad options to resolve the issues faced by the POL management regarding historical liabilities following the *Alan Bates & Other vs. Post Office Ltd.* Group Litigation Order (GLO).

Background

1. Following the settlement and the Horizon Issues Judgment (HIJ) in December 2019, POL and its legal representatives have been working to deliver the commitments and resolve the outstanding issues from the settlement, and have been reviewing historical prosecutions undertaken by POL against subpostmasters.
2. The HIJ in particular calls into question the reliability of evidence derived from Horizon which was used to support prosecutions against subpostmasters, and increases the risk of historical prosecutions being considered unsafe and potentially being overturned.
3. To that end, the Criminal Cases Review Commission has been reviewing 61 cases from subpostmasters who applied to have their convictions overturned by the Court of Appeal. On 26 March the CCRC announced its decision to refer for appeal 39 cases. On 3 June it announced the referral of a further 8 cases (bringing the total to 47) and that it has decided not to refer 7 other cases. The CCRC is still considering the remaining 7 cases. The referral is on the basis of the "abuse of process" argument. We understand more subpostmasters have applied to have their cases reviewed but as yet the number is uncertain.
4. On 29 April, Tim Parker wrote to Minister Scully stating that POL had identified a total of **959 cases** which POL believe is the most accurate figure at this time and significantly increases the potential financial exposure of POL if successful appeals result in civil claims being brought. This number includes the cases under review by the CCRC.
5. If all 959 convictions are overturned, POL could be exposed to significant further civil liability. **Legal Privilege**
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Rationale for Intervention

7. Given the above there has been a number of active workstreams and it is becoming clear from our discussions with POL that as it stands it is not set up appropriately as a business to manage the level of workload or the potential financial impact.
8. Whilst the CCRC has decided to refer a number of cases, the actual referrals have not yet been made but are expected in the coming weeks. Once made, POL will have either 28 days (for high court cases) or 21 days (for lower court cases) to respond with their position regarding each case and in, any case, will seek extensions given the number and complexity of the cases. Once with the Court of Appeal, POL are subject to the courts already pressured timetable which likely means it will be at least a year before any of these cases are resolved, and even longer before compensation payments flow out.
9. Given the long lead time, we are therefore proposing to open a dialogue with HMT and BES officials now in order to find a holistic solution to the following issues faced by POL:

10. Funding: Although POL has managed the financial costs of the GLO to date, POL will not be able to fund further significant civil liability at this sort of level and would require funding from government. There is currently no funding model in place for this. There is however a significant amount of uncertainty in these figures and further work is needed to refine cost estimates following the CCRC's rationale for the referrals which was provided to POL on 3 June.
11. Increased Workload: Since the settlement workload in this area has increased significantly, not only in its volume but also its complexity. POL have stated that teams across the business are at capacity and given the high priority of the liabilities issue, and the media attention it attracts, work in this area often takes priority at the detriment of other important workstreams to the business.
12. Senior Resource: The GLO has taken up a lot of Board and Group Executive (GE) discussion, particularly for the new CEO, Nick Read, who has stated that he spends circa. 40% of his time on this and related issues. Whilst it is an incredibly important issue, POL is a complex business and there are a number of other issues that need senior focus; Nick is looking to streamline and set a new strategy for the business, the franchising programme needs completing and the culture within the organisation requires a complete overhaul to name a few, all at a time of significant change to the branch network and in the market as a result of the Covid-19 health crisis.
13. Legal Resource: The complexity of the historical liabilities' issues faced by POL is not to be underestimated. To that end, POL has recruited several (expensive) external legal advisors and QCs to fill capacity and capability gaps. It is clear from this exercise that further dedicated resource is required to successfully resolve the issues brought forward by historical liability claims that are likely to be brought to POL in the future.
14. Therefore, we believe it is prudent to explore the opportunity to separate the historical liabilities from the Business As Usual (BaU) commercial part of the organisation. This would enable the Board and GE to focus on the important strategic and operational issues faced by POL and deliver on wider Government objectives, whilst in parallel having dedicated resource to resolve historical liability claims.

Key Parameters

15. There are a number of key considerations that should be taken into account when considering these options:

    i) Separation from BaU: There must be a true separation between liabilities and BaU commercial activities. Not only to prevent conflicts regarding priority of work arising but also to enable resources to be focused and used most efficiently;
    ii) Legal Liability: Liabilities will always sit with Post Office Ltd;
    iii) Accountability: Accountability and oversight must sit at the appropriate level;
    iv) Funding: Given the level of financial exposure, government funding is likely to be required. An appropriate delivery mechanism for this funding and associated governance needs to be considered;
    v) Capability: Existing expertise and resource is not currently available within POL. It is expected that this would need to be built up internally, or a further level of out-sourcing would be required in order to provide sufficient capability and capacity to resolve the liability issues.
    vi) State Aid: Assuming there is a state-aid regime in place following the next round of Brexit negotiations, any proposal in relation to providing public funding must be State Aid compliant.

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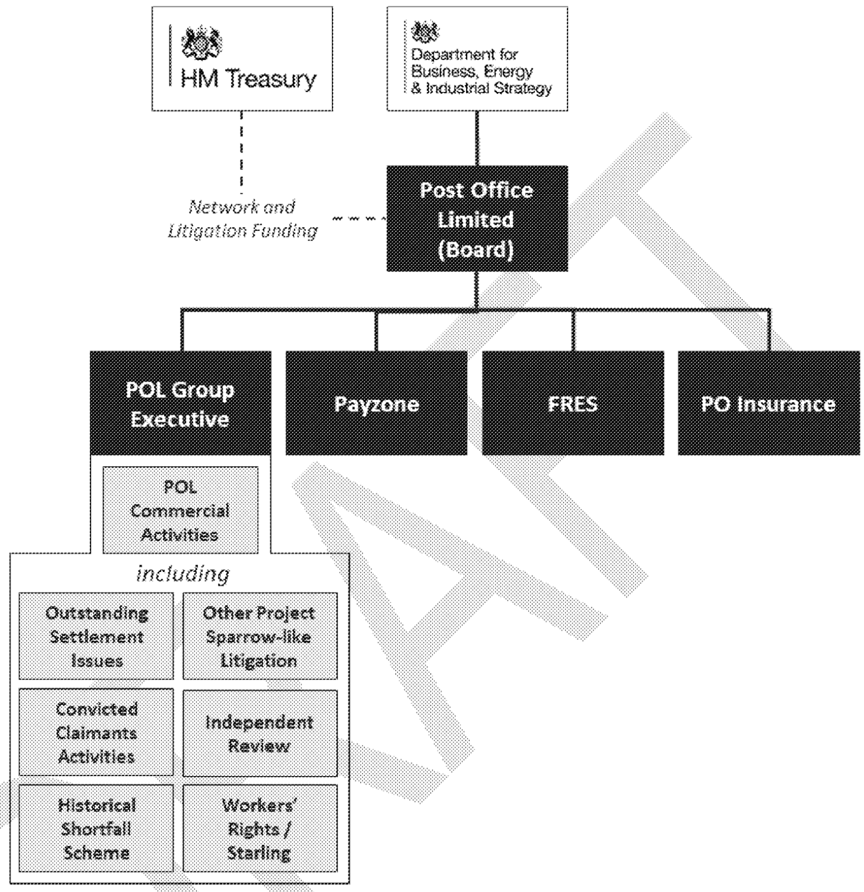
Options

16. **Do Nothing**: POL remain with the current arrangement whereby all litigation and commercial activities are considered and progressed underneath the leadership of the POL Group Executive. The legal workstreams are led specifically by the POL General Counsel with the support of external lawyers however the resource in his team is split between BaU commercial activities and the litigation/historical liabilities workstreams.



17. We do not believe the current arrangement is sustainable in the medium to long term. This would be particularly true should POL be found culpable of malicious prosecutions and/or a separate Group Litigation Order be made from other similar cases which would put further pressure on already stretched resources. Furthermore, under this arrangement if eventual claims from the litigation surpass whatever funds are provided from government, POL will be forced to divert funding away from activities required to restructure the business (of which there is still a significant amount to do).
18. Over the current period, thanks mainly to unexpected revenue from Banking Framework 2 and cutting investment in the business, POL has absorbed circa. £120m of litigation cost that wasn't in the original funding plan (including FY20/21, litigation spend is £129m vs. £9m in the 3 Year Plan). The company does not have the financial capacity to do this again, particularly in the face of a significantly bigger cost.

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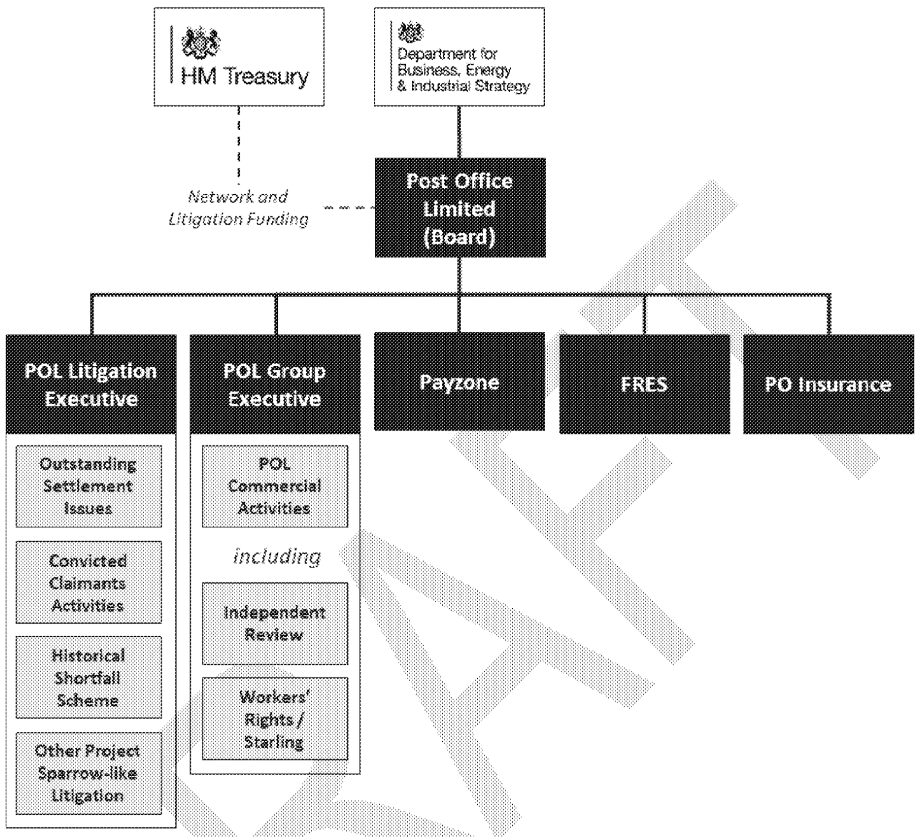
19. **Internal Restructure**: An internal governance restructure takes place where a new 'Post Office Litigation' GE is set up and reports directly into the POL Board. The PO Litigation GE could be staffed by external recruits with the specific task of handling and managing costs associated with the litigation and historical liabilities.



20. This option proposes a simple internal reorganisation below the POL Board which, in theory, should be relatively straight forward to implement and devise appropriate governance arrangements for. The POL Board, on which UKGI sits as shareholder representative, would maintain visibility of costs and there could be a single funding route through POL using current governance arrangements for HMT funding. There could however be challenges in relation to providing clear and transparent separation between the POL GE and the new PO Litigation GE, and potential issues surrounding appropriate knowledge transfer and the recruitment of the required personnel (i.e would they be on secondment, fixed-term contracts etc.). The Articles state that BEIS Ministers would be required to approve this change.

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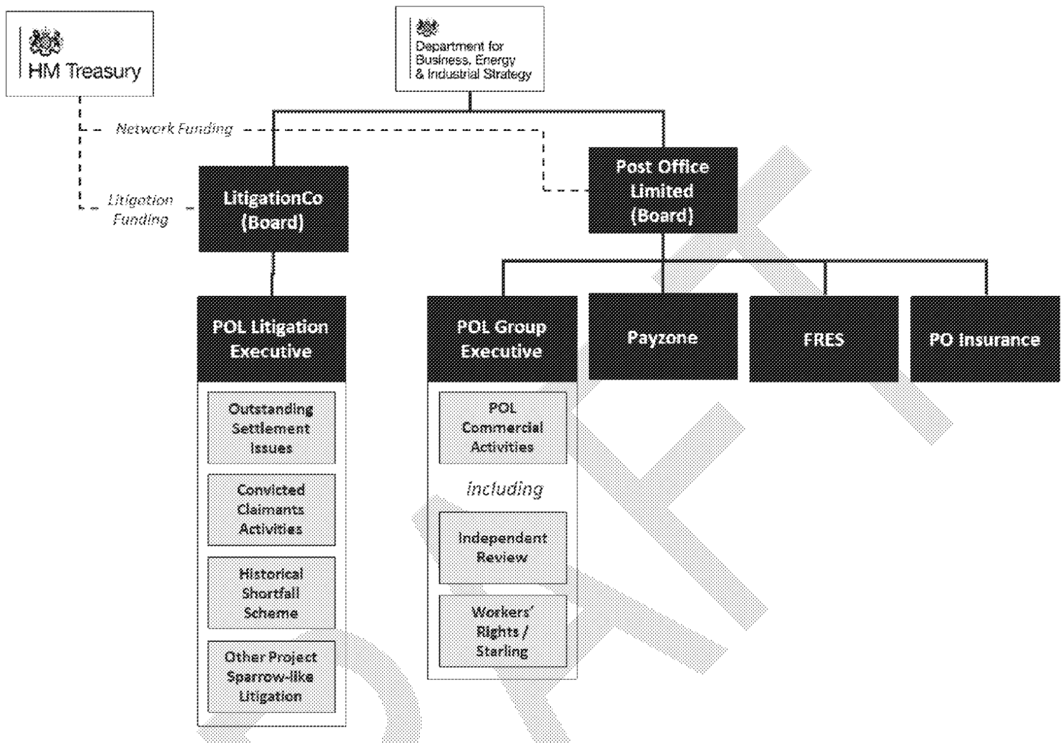
21. **Separate Legal Entity**: A separate legal entity ('LitCo') is set up with Associated Articles of Association, Board Terms of Reference etc. and with BEIS as sole shareholder. The LitCo would have its own PO Litigation Board, on which we would expect UKGI to sit on as the shareholder representative. HMT funding would go through normal spending procedures between HMT and BEIS.



22. A more complicated option, this would allow for a "true" separation between the activities of the POL GE and the new PO Litigation GE, and potentially a greater level of control for Government on the set up and governance arrangement in the new company. However, it does not come without its own challenges; setting up an entirely new company will take longer with notably more complicated approvals required and the recruitment and knowledge transfer challenge remains.
23. We propose that the LitCo indemnify POL so that the LitCo reimburses POL for any claims paid out. The LitCo and POL would also have a claims management agreement that would give the LitCo the right to manage the claims on POL's behalf. These are all agreements for which there are many precedents.

Next Steps

i) UKGI to engage with relevant HMT and BEIS (Finance, Legal, Policy) colleagues to gauge appetite and bounding conditions for the above options.
ii) POL (with the support of external consultants) to consider the practical implications of both models surrounding implementation of these options and to report back to Government.