ANNEX C CONSULTATION QUESTIONNAIRE

1. Do you agree that the rules should not define 'prohibitively expensive'?

I agree that rules should define 'prohibitively expensive'. The principle of compatible interpretation can be relied upon to ensure that the Rules of Court are interpreted in a manner compatible with EU law.

2. Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?

I agree that the rules should not appear to imply that the question of prospects of success is distinct from the question of whether or not the proceedings are prohibitively expensive. I, therefore, agree that the para. (5) of the current rule 58A.2B should be deleted.

3. Do you have any comments on draft rule 58A.6 for the determination of an application?

I note that the draft rule does not contain a list of factors that the court must take into account in the manner of current rule 58A.5. I do not agree with that. This means that the parties will have to refer to case law in order to find out the factors which the court must take into account in deciding the application.

In the interests of transparency, it is preferable that the rules of court should in general be clear and comprehensive and give litigants as much guidance as possible. Whilst some reliance on case law is inevitable, the aim should be to create a set of rules of procedure which is, so far as possible, self-contained and does not require extensive resort to case law. I would, therefore, recommend including in the new rule 58.A6 a list of factors that the court should take into account along the lines of current rule 58A.5.

I agree with the proposal to create a presumption against there being any hearing to consider the application so that most cases are considered on the papers. However, I would also suggest that where an order is refused without an oral hearing, there should be a right to request to review of that decision as is the case with the procedure for seeking permission for judicial review.

4. Do you have any comments on draft rule 58A.9 for the expenses of the application?

I agree with the proposal to restrict the applicant's liability in expenses in the event that the application is unsuccessful to £500.

5. Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?

I agree with both of the proposals given effect by draft rule 58A.8. Extending the cap on expenses to include the appeal where a PEO has been granted at first instance and the applicant's opponent appeals. This furthers the public interest underlying the chapter 58A.

6. Do you have any comments on the draft amendment to rule 38.16?

I agree with the proposal.

7. Do you have any other comments on the proposals contained in this paper?

I will take the opportunity of this consultation to raise a broader issue about PEOs.

The current position whereby there are two different regimes for the making of PEOs, one for environmental PEOs covered by the Aarhus convention and another for common law PEOs is unsatisfactory. Such differences are certainly not required by or supported by rationale for limiting the expenses covered by public interest litigants which is the preservation of the rule of law (AXA General Insurance v Lord Advocate [2011] UKSC 46, [2012] SC (UKSC) 122; Walton v Scottish Ministers [2012] UKSC 44; 2013 S.C. (UKSC) 67) and are to the disadvantage of public interest litigants in non-environmental cases. For fuller statements of this argument, see:

Mullen, T. (2015) Protective expenses orders and public interest litigation. Edinburgh Law Review, 19(1), pp. 36-65. (doi:10.3366/elr.2015.0250)

Mullen, T. (2015) Public interest litigation in Scotland. Juridical Review, 2015, pp. 363-383.

I recommend that the Council should in the near future conduct a broader review of PEOs with a view to creating a single procedural regime.