The Committee will meet at 2.15 pm in Committee Room 4.

1. **Draft instruments subject to approval:** The Committee will consider the following—

   The Pharmacy Order 2010 (SI 2010/draft).

2. **Instruments subject to annulment:** The Committee will consider the following—

   the Common Agricultural Policy (Single Farm Payment and Support Schemes and Cross-Compliance) (Scotland) Amendment Regulations 2009 (SSI 2009/391);
   the Justice of the Peace Courts (Sheriffdom of North Strathclyde) etc. Amendment Order 2009 (SSI 2009/409).

3. **Instruments not laid before the Parliament:** The Committee will consider the following—

   Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment 2009 (SSI 2009/403);

4. **Interpretation and Legislative Reform (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.
The papers for this meeting are as follows—

**Agenda items 1-3**

- Legal Brief  
  SL/S3/09/32/1 (P)
- Summary of Recommendations  
  SL/S3/09/32/2
- Instrument Responses  
  SL/S3/09/32/3

**Agenda item 4**

- Draft Report  
  SL/S3/09/32/4 (P)
SUBORDINATE LEGISLATION COMMITTEE

32nd Meeting, 2009 (Session 3)

Tuesday 1 December 2009

Summary of Recommendations

The Committee will be invited to consider the following recommendations under consideration at the meeting. Decisions are a matter for the Committee.

Agenda Item 1  Draft instruments subject to approval

The Pharmacy Order 2010 (SI 2010/draft)

The Committee may wish to report this draft instrument as follows:

- This instrument contains errors, acknowledged by the Scottish Government, in the preamble and article 11, the latter being of substance which could significantly affect the proper operation of the instrument if not corrected;

- The Committee’s preference would be for a corrected instrument to be put before the Parliament for approval;

- Given the complex procedure involving approval by both Parliaments and submission to the Privy Council which applies to this instrument this course of action does not appear to be practicable in this particular case;

- The Committee has considered the Scottish Government’s proposal for remedying the error and considers that in the circumstances a full explanation of the errors and the intention to correct them should be provided to the whole Parliament prior to seeking its approval of the instrument.

The Committee notes that any risk of challenge to the instrument lies with the Scottish Government and the Department of Health.
Agenda Item 2  Instruments subject to annulment

The Common Agricultural Policy (Single Farm Payment and Support Schemes and Cross-Compliance) (Scotland) Amendment Regulations 2009 (SSI 2009/391)

The Committee may wish to find the explanation provided by the Scottish Government for not complying with the 21 day rule in bringing the Regulations into force satisfactory.

The Committee may wish to draw to the attention of the lead committee that it would have been useful to the Committee if the explanation for the breach of the 21 day rule had offered a fuller explanation of the Commission Regulation referred to, and of the circumstances in which the delay in publication of that Regulation led to the instrument being laid on 11 November 2009 so as to breach the rule.

The Committee may wish to report that there are various drafting errors, namely—

- in regulation 7, the Government has explained that this should propose an amendment to regulation 6 of the principal Regulations rather than to regulation 9;

- in regulation 8(2)(a), the amendment at the end of regulation 19(2)(d) of the 2005 Regulations should be to substitute “and” for “;” rather than the other way round;

- in regulation 12(2), the reference to the definition of “specified record” being substituted incorrectly refers to that provision as contained in paragraph 2(1) of schedule 5, rather than in schedule 4;

- in regulation 16(c), inserting the definition of “Council Regulation 73/2009”, the title of “Commission Regulation” is an error;

- in regulation 16(c), the definition of “abstraction” should be a definition of “abstracting”, because the latter word is used in regulation 18.

The Government has indicated that it will correct these errors by amendment, and it may do so in December 2009. Given the number of drafting errors, the Committee agrees that an amendment should be effected as soon as possible.

The Committee may wish to consider that in relation to the first bullet point above, the error may affect the operation of the provisions because it is not clear which regulation is being amended, but that otherwise the errors may not be likely to affect the validity or operation of the instrument.
The Committee may wish to report that in regulation 17, the meaning and effect of the words inserted in the Schedule, Part IV, paragraph 18(2) of the principal Regulations could be clearer. This may affect the operation of the provisions, and the Government has also indicated that it will correct this to make the meaning and effect clearer.

The Justice of the Peace Courts (Sheriffdom of North Strathclyde) etc. Amendment Order 2009 (SSI 2009/409)

The Committee may wish to consider if it is content with this instrument.

Agenda Item 3 Instruments not laid before the Parliament

Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment 2009 (SSI 2009/403)

The Public Health etc. (Scotland) Act 2008 (Commencement No. 3, Consequential Provisions and Revocation) Order 2009 (SSI 2009/404)

The Committee may wish to consider if it is content with these instruments.
The Pharmacy Order 2010 (SI 2010/draft)

On Friday 20 November 2009 the Scottish Government was asked:

1. Does the Scottish Government consider that the preamble correctly records the fulfilment of the condition required by paragraph 1A of Schedule 2 to the European Communities Act 1972 that it must appear to the person making the legislation that it be necessary or expedient to make the ambulatory reference in question, given that the instrument states that it appears to be so necessary to the Secretary of State and to the Scottish Ministers, whereas the instrument is made by Her Majesty in Council? What is considered to be the effect of any incorrect reference to the Secretary of State and the Scottish Ministers?

2. Article 11(2) and (3) provides further explanation of the powers exercisable by virtue of paragraph (1)(g) of that article. There is no paragraph (1)(g). The Scottish Government is asked to which paragraph the additional powers in paragraphs (2) and (3) are considered to apply and whether this is considered sufficiently clear, particularly since obstruction of, or failure to, assist an inspector exercising the functions under article 11 is a criminal offence.

The Scottish Government responds as follows:

1. We are grateful to the Committee for drawing this matter to our attention. The Scottish Government agrees that the reference in the preamble to “and it appears to the Secretary of State and the Scottish Ministers that it is necessary” is incorrect and should be “and it appears to Her Majesty, with the advice of Her Privy Council, that it is necessary”. It is our view, however, that because the preamble is not part of the Order, it will be sufficient to amend the preamble prior to the instrument being made. The Pharmacy Order requires to be laid before the Scottish Parliament and the UK Parliaments. The Department of Health has advised that they will be making the same amendments to the Order.

2. We are grateful to the Committee for noting this and can confirm that these are typographical errors. The references to paragraph (1)(g) in Article 11(2) and (3) should in fact be references to paragraph (1)(f). We consider that these typographical errors can be amended prior to the Order being made. Again, the Department of Health has advised that they will be making the same amendments to the Order.

3. The Department of Health has advised that they will make the amendments by making a brief mention of the corrections required in the speeches to Parliament and then, when the draft Order has been approved, they will ensure that the version emailed
to the Privy Council is corrected. We understand that they have informed the JCSI + Merits Committee clerks about this.

4. We appreciate that normally the draft Order should be withdrawn and re-laid, but we do not consider that this is necessary or appropriate in the exceptional circumstances which prevail in this case in that the draft Order is subject to procedure in the Westminster Parliament as well as in the Scottish Parliament.

The Common Agricultural Policy (Single Farm Payment and Support Schemes and Cross-Compliance) (Scotland) Amendment Regulations 2009 (SSI 2009/391)

On 20th November the Scottish Government was asked:

(a) In regulation 7, whether the reference to “Article 44(3) of Council Regulation 1782/2003” is correct (rather than Article 25(3) of Commission Regulation 795/2004)? If not, what is the effect of this?

(b) In regulation 8(2)(a), whether the amendment at the end of regulation 19(2)(d) of the 2005 Regulations should be to substitute “and” for “;” rather than the other way round? If so, what is the effect of this?

(c) In regulation 12(2), whether the reference to the definition of “specified record” being substituted correctly refers to that provision as contained in paragraph 2(1) of schedule 5 (rather than in schedule 4)? If not, what is the effect of this?

(d) In regulation 16 (c), inserting the definition of “Council Regulation 73/2009” into the 2004 “Cross Compliance Regulations”, given that the title of “Commission Regulation” appears not to be correct (and inconsistent with the reference in regulation 3(g)), what is the effect of this?

(e) In regulation 17, to explain the meaning and effect of the words inserted in the Schedule, Part IV, paragraph 18(2), as they relate to the following sub-paragraphs (a) and (b) in that paragraph?

Could the meaning and effect be made clearer, as to whether the inserted reference to “land managed under an agri-environmental scheme……” means that the requirement in paragraph 18(1) does not apply to each of that land, and the circumstances set out in sub-paragraphs (a) and (b); or alternatively that the requirement does not apply to such land, and the circumstances of (a) and (b) are further circumstances or conditions for the requirement not to apply?

(f) In regulation 16 (c), whether the definition of “Abstraction” should instead be a definition of “abstracting”, given the latter word is used in regulation 18 (it appears once only), and if so, what is the effect of this?

(g) why is the definition of “Commission Regulation 1655/2004” added in regulation 3(g), or is it superfluous to the 2005 Regulations as now amended?
The Scottish Government responds as follows:

(a) The reference is incorrect. This reference should propose an amendment to regulation 6 of the principal regulations rather than to regulation 9. The Scottish Government is grateful to the Committee for pointing this matter out and it will be corrected at the next appropriate legislative opportunity.

(b) The reference is incorrect. This does not, however alter the full sense of the regulation for the reader. The Scottish Government is grateful to the Committee for pointing this matter out and it will be corrected at the next appropriate legislative opportunity.

(c) The reference is incorrect. The reference to "contained in paragraph 2(1) of Schedule 5" is incorrect, however regulation 12 is correctly head noted as referring to Schedule 4 and regulation 12(1) again correctly refers to Schedule 4. As there is no definition of "specified record" in Schedule 5 it will be clear to the reader that the reference is erroneous and will have no effect on the overall sense of regulation 12. The Scottish Government is grateful to the Committee for pointing this matter out and it will be corrected at the next appropriate legislative opportunity.

(d) The reference is incorrect. The reference to "Council Regulation 73/2009" is correct and places the regulation correctly in the alphabetical list of definitions. This instrument is well known throughout the farming industry as it introduces the CAP Health Check proposals. The reference to this as a "Commission" rather than a "Council" Regulation should not affect the reader's understanding of this regulation. The Scottish Government is grateful to the Committee for pointing this matter out and it will be corrected at the next appropriate legislative opportunity.

(e) The text could be made clearer. The intention of the amendment is to make clear that the exception only applies to land managed under agri-environmental schemes and only to the extent as set out in sub-paragraphs (a) and (b) i.e. the first interpretation proposed in the Committee's note. The Scottish Government is grateful to the Committee for pointing this matter out and it will be corrected at the next appropriate legislative opportunity.

(f) The term "Abstraction" is considered appropriate in regulation 16(c) as this is the defined term used in the Water Environment and Water Services (Scotland) Act 2003. In our view it is appropriate to define such a widely known term to avoid uncertainty. Although the term "abstracting" is used only once in our view this will be read in context. The Scottish Government is grateful to the Committee for pointing this matter out and it will be corrected at the next appropriate legislative opportunity.

(g) The definition of Commission Regulation 1655/2004 is added by this instrument to make good an omission from the interpretation section. This is a technical Regulation in the sense that it was to address a particular set of circumstances in some Member States. Prior to 2005, modulation was optional but the 2005 regulations brought in a compulsory element to replace the previous optional arrangements. There would have been no difficulty if the same percentage reductions were applied but the compulsory rate was lower than the previous optional rates and this created a funding deficit. Regulation 1655/2004 was intended to give affected Member States the powers to levy the difference in order to meet their funding requirements. The addition to the
interpretation section is intended to leave the reader in no doubt as to the applicable Regulation.

In the case of the proposed corrections mentioned above, it may be possible for the Scottish Government to attend to these in an amending instrument to be made in December 2009 when Commission approval is given to an amending EC Regulation.