

# Enforcing the Novel Food regime - Part 1: Overview and Rationale

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## A. Introduction

1. This short series of bitesize articles will take a deeper look into the enforcement of the Novel Food regime and seek to identify and breakdown the powers made available to those agencies (typically local authorities), who are tasked with securing compliance.
2. The National Food Crime Agency has been noted as making a growing number of referrals to Local Authority enforcement teams, and, with the burgeoning use of both SARNS and Cannabis based products, reliance on the [Novel Food \(England\) Regulations 2018](#) 'NF(E)R 2018' are only likely to increase moving forward.
3. Following on from the excellent general overview provided by Matthew Wyard as to the Novel Food Regime, this article will not deal with defining the concept of a Novel Food in great depth, however the aforementioned article is highly recommended in that regard and can be found [here](#).

## B. Back to Basics

4. Food Safety law in the United Kingdom is generally based upon the [Food Safety Act 1990](#) ('FSA 1990'), which amongst other things contains the legal definition of "food":

*1 Meaning of "food" and other basic expressions.*

*In this Act "food" has the same meaning as it has in Regulation ( EC ) No. 178/2002*

5. When one considers Regulation ( EC ) No. 178/2002 one sees that food is defined as:

**Article 2 Definition of 'food'**

*For the purposes of this Regulation, 'food' (or 'foodstuff') means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.*

*'Food' includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. It includes water after the point of compliance as defined in Article 6 of Directive 98/83/EC and without prejudice to the requirements of Directives 80/778/EEC and 98/83/EC.*

*'Food' shall not include:*

*(a) feed;*

*(b) live animals unless they are prepared for placing on the market for human consumption;*

*(c) plants prior to harvesting;*

*(d) medicinal products within the meaning of Council Directives 65/65/EEC and 92/73/EEC;*

*(e) cosmetics within the meaning of Council Directive 76/768/EEC(3);*

*(f) tobacco and tobacco products within the meaning of Council Directive 89/622/EEC(4);*

*(g) narcotic or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971;*

*(h) residues and contaminants.*

6. Novel foods are foods, or food ingredients, that do not have a significant history of consumption within the European Union ('EU') before 15 May 1997.

### C. Enforcement Rationale

7. Under EU law, in the interests of safeguarding public health, novel foods must undergo a safety assessment before they can be authorised for placing on the market. Regulation (EU) No. 2015/2283 sets down legal requirements that apply to novel foods placed on the market in the EU.
8. The NF(E)R 2018 was enacted in the UK in order to enact the enforce Regulation (EU) 2015/2283.
9. Prior to the implementation of NF(E)R 2018, the enforcement approach on novel foods had been reliant on the Novel Food and Novel Food Ingredients Regulations (1997 SI No. 1335), which in turn relied on provisions of the FSA 1990 and related EU General Food law provisions in Regulation (EC) No 178/2002 to take action in relation to non-compliant novel foods.

10. That reliance made it necessary to carry out a safety assessment to clearly demonstrate a risk to human health before enforcement action could be taken. This was often found to be difficult where there is insufficient information or little scientific data on the suspected novel food; such safety assessments were and remain costly, resource intensive and time consuming.
11. Consequently, unauthorised novel foods had remained on the market due to the lack of conclusive evidence that they pose a risk to human health with authorised officers only able to encourage food business operators to withdraw the products from the market rather than compel them to do so.
12. The NF(E)R 2018 employs a broadly three-pronged approach to achieving its stated enforcement aims:
  - a. The imported s9 Regime (Seizure and Condemnation),
  - b. Civil Sanctions (Fixed Penalties, Stop and Compliance Notices),
  - c. Criminal Sanctions.

### ***C.1. Imported Section 9 FSA Regime***

13. The first will be familiar to those who deal with food health and hygiene matters on a regular basis.
14. The NF(E)R 2018 section 7(2) applies Section 9 of the FSA 1990 ('Inspection and seizure of suspect food') to enable officers to seize and inspect suspected unauthorised novel foods:

*(2) Section 9 of the Act (inspection and seizure of suspected food) applies for the purposes of these Regulations as if it read as follows—*

*"9.—(1) An authorised officer of a food authority may at all reasonable times inspect any novel food which has been placed on the market.*

*(2) Where, on inspection, it appears to the authorised officer that a specified Union provision is being, or has been, contravened in relation to any such novel food, the authorised officer may either—*

*(a) give notice to the person in charge of the novel food that, until the notice is withdrawn, the novel food—*

*(i) is not to be used for human consumption; and*

(ii) either is not to be removed or is not to be removed except to some place specified in the notice; or

(b) seize the novel food and remove it in order to have it dealt with by a justice of the peace; and any person who knowingly contravenes the requirements of a notice under paragraph (a) above is guilty of an offence.

(3) Where the authorised officer exercises the powers conferred by subsection (2)(a) above, the authorised officer shall, as soon as is reasonably practicable and in any event within 21 days, determine whether or not they are satisfied that the food complies with the specified Union provision and—

(a) if so satisfied, immediately withdraw the notice;

(b) if not so satisfied, seize the novel food and remove it in order to have it dealt with by a justice of the peace.

(4) Where an authorised officer exercises the powers conferred by subsection (2)(b) or (3)(b) above, the authorised officer shall inform the person in charge of the novel food that it is to be dealt with by a justice of the peace and—

(a) any person who might be liable to a prosecution in respect of the novel food shall, if attending before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses; and

(b) that justice of the peace may, but need not, be a member of the court before which any person is charged with an offence in relation to that novel food.

(5) If it appears to a justice of the peace, on the basis of such evidence as the justice of the peace considers appropriate in the circumstances, that any novel food falling to be dealt with under this section fails to comply with the specified Union provision, the justice of the peace shall condemn the novel food and order—

(a) the novel food to be destroyed or to be so disposed of as to prevent it from being used for human consumption; and

(b) any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the novel food.

(6) If a notice under subsection (2)(a) above is withdrawn, or the justice of the peace by whom any novel food falls to be dealt with under this section refuses to condemn it, the food authority shall compensate the owner of the novel food for any depreciation in its value resulting from the action taken by the authorised officer.

(7) Any disputed question as to the right to or the amount of any compensation payable under subsection (6) above shall be determined by arbitration.”

15. In effect this applies the already extant seizure and condemnation regime within the FSA to those items which can be considered as being “Novel Foods” for the purpose of the [NF\(E\)R 2018](#) and [Regulation \(EU\) 2015/2283](#) on novel foods.

16. Authorised novel foods must be:

- a. safe
- b. not misleading for the consumer
- c. not replace other foods in a way that would put consumers at a nutritional disadvantage.

17. The same basic principles apply in terms of notice periods, timetables, policy requirements and susceptibility to challenge as apply to “standard” seizure and condemnation procedures. It will surprise no-one that the requirements in terms of the public analyst’s assessment, as well as any subsequent challenge mounted against those findings, remain the same. A more detailed breakdown of the use of s9 in this context will be the subject of Part 2 of this series.

### ***C.2. Civil Sanctions***

18. Regulation 5 of NF(E)R 2018 allows for civil sanctions - up to and including fixed penalty notices – as well as the imposition of both Stop Notices and Compliance Notices. Specific details are contained within Schedule 2 and 3 of NF(E)R 2018 and will be the subject of Part 3 in this series.

### ***C.3. Criminal Sanctions***

19. Regulation 4 of NF(E)R 2018 creates a criminal offence for failing to comply with Regulation (EU) No. 2015/2283. Part 4 of the series will examine the criminal offence created, as well as the interaction between the commencement of criminal prosecution and the Civil Sanctions as described above.

## **D. A word on Brexit...**

20. However much we may wish to avoid discussing it (whichever side of the divide one sits) it cannot but be noted that the NF(E)R 2018 are predicated on the basic aim of maintaining and enforcing the European Union regime when it comes to food safety, hygiene and the interests of the consumer.

21. This position will not remain come December of 2020 if there is no extension to the transitional arrangements in which the country currently finds itself.

22. The Novel Food Amendment (EU Exit) Regulations 2019/702 came into being as a result of the Secretary of State exercising the powers conferred by section 8(1) of the European Union (Withdrawal) Act 2018 and were laid before Parliament and given

approval on 26<sup>th</sup> March 2020. They are due to come into force on “exit day” as per Regulation 1.

23. Anyone hoping for a wholesale re-consideration of the regime, or for the UK to take an opportunity to radically redesign the enforcement provisions or requirements will be disappointed.

24. The regulations as currently drafted do little more than substitute “Union” for “United Kingdom”, alongside similar semantic tweaking. The obligation and principles look to be remaining the same. This is, of course, a moveable feast and only time will tell us the extent to which the newly “independent” United Kingdom will wish to remain aligned with the regimes of its European partner, and how close that alignment will be.

21 July 2020



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