

Briefing note: Impact of the CJEU judgement on the novel food status of edible insects in the EU

Before the entry into force of Regulation No 2015/2283 of 25 November 2015 on novel foods (hereinafter referred to as "**NFR 2015**"), there was a lack of legal clarity as to whether or not whole insects should be considered as included in the scope of Regulation No 258/97 of 27 January 1997 concerning novel foods and novel food ingredients (hereinafter referred to as "**NFR 1997**"). Even after the entry into force of NFR 2015, this question remained relevant, notably in light of the applicability of the transitional regime provided by NFR 2015.

For example, several countries have considered that whole insects fell within the scope of application of NFR 1997 and have taken measures suspending or prohibiting the making available of foods made of whole insects on their national market. In some countries, such as Italy, Sweden or Portugal, national authorities considered that whole insects and their derived products shall be classified as 'novel food' under Regulation 258/97 and, accordingly, refuse to apply the transitional measures provided in the NFR 2015.

The ruling of the Court of Justice of the European Union in case C-526/19, issued on 1 October 2020, clarifies the scope of NFR 1997. It stems from the CJEU ruling that the terms "foods ingredients isolated from animals", identified in the scope of the NFR 1997, do not include foods intended to be consumed in by itself, but rather substances or products to be added to other substances to create a food. Based on the reasoning of the Court, we may reasonably consider that both whole insects and foods made of whole insects (such as powders made of insects) do not fall within the scope of the NFR 1997.

This ruling is fundamental as it puts an end to the abovementioned uncertainty regarding the material scope of application of NFR 1997. It could also have great impact with regard to the possibilities of placing whole insect products on the market of certain Member States under the transitional provisions of NFR 2015. Indeed, for as long as the inclusion of whole insects in the scope of NFR 1997 remained controversial, markets of certain Member States were closed to operators active in this field. At first sight, the Court's ruling could help waiving this major legal barrier and opens the whole EU market to food products consisting of whole insects, possibly under the benefit of the transitional provisions set out under NFR 2015.

That being said, the consequences of this ruling vary depending on the concrete situation of each operator.

This judgment has no specific consequences for operators whose business activities started after 1 January 2018, unless these activities are performed to products that already benefit from the transitional regime provided for by NFR 2015.

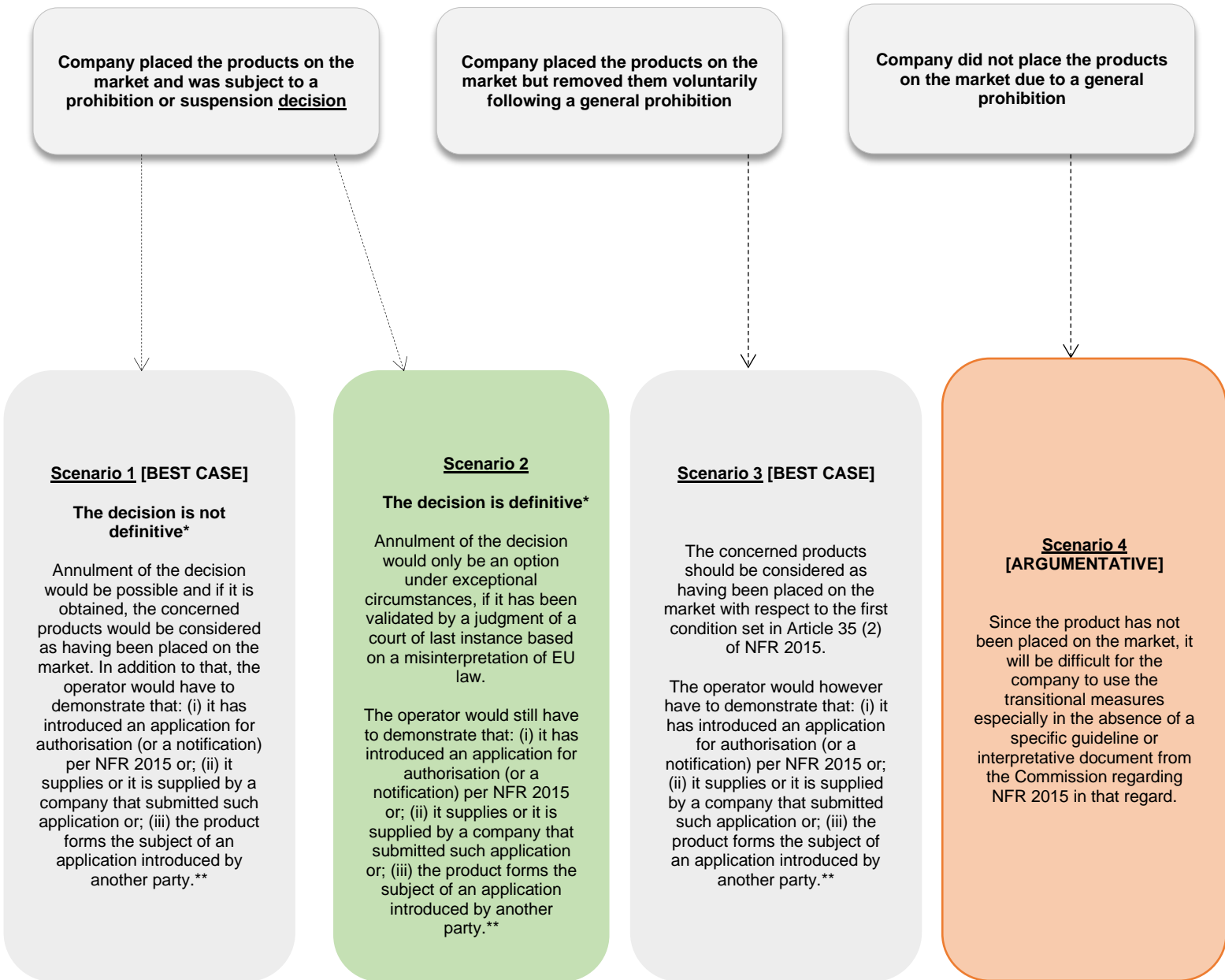
For operators that were already active on the EU market before 1 January 2018 and were prevented from pursuing their activities due to a national interpretation that was contrary to the CJEU's interpretation as it is now known (an interpretation which is binding on all national and Community authorities), this ruling potentially presents opportunities depending on the situation in which the operator is -certain aspects of which have to be investigated from a national law perspective. The diagram below identifies different scenarios in that regard.

Of note, it is not possible to infer from the ruling of the Court of Justice of the European Union a clear-cut answer as to whether a powder made of whole insects falls within or outside the scope of the NFR 1997.

In any case, a cautious and concerted approach with the authorities is advisable, given the difficulties of application and the divergent approaches of national authorities vis-à-vis insect-based products before the NFR 2015 came into force.

(Please refer to page 3 on the possible Scenarios for edible insect food business operators)

DIAGRAM WITH THE SCENARIOS



* The decision should be considered as not definitive if it is still possible to use legal remedies in order to obtain its annulment or withdrawal under national law.

** As far as the hypothesis (iii) is concerned, the operators will have to be able to demonstrate that both products are the result of a same production process and have the same detailed composition/meet the same specifications.