

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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The US-litigation saga around PFAS is starting in the European Union. What is going on in France is a good example with new Regulation, criminal investigations launched, tests carried out by NGOs, and local authorities to prepare for upcoming civil and mass claims. It is time for companies to get organized and remind themselves the lessons learnt from other mass toxic tort claims.

PFAS Ban: France is Showing the Way to the European Union

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Community page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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On May 30, 2024, the French Senate passed a bill to ban the use of PFAS in clothing, cosmetics, and ski waxes as from January 1, 2026, which had previously been passed at first reading by the French National Assembly on April 4, 2024. This Bill is part of the ministerial action plan on PFAS announced by France on January 17, 2023, only a few days after the proposal made by Denmark, Germany, the Netherlands, Norway, and Sweden on January 13, 2023, to globally restrict and ban the manufacture, marketing and use of PFAS in the European Union.

Background

The French Government had announced that it would not wait for the proposal for a global restriction and ban of PFAS at European Union level to succeed before starting to regulate PFAS in France. It was in this context that the French Government entrusted Cyrille Isaac-Sibille, French Member of Parliament, with the drafting of a report on PFAS, which was submitted to the French Prime Minister on January 4, 2024.

In his report, the Member of Parliament recommended to urgently cease the industrial release of PFAS, to list all polluted sites in France, to monitor PFAS in all fields, to destroy any stock of PFAS, to support initiatives for a European regulation banning PFAS, to “detoxify” from PFAS addiction and to deal with historical pollution.

While the Bill passed by the French National Assembly does not include all the proposals in Cyrille Isaac-Sibille’s report, when it comes

to kitchen utensils, it is clear that the Bill will have major consequences for clothing, cosmetics, and ski wax manufacturers, and that the Bill seems to be just the beginning of restrictions and bans on PFAS for manufacturers.

The first reading passing of this Bill on January 4, 2024, was also followed by the French Government’s announcement of a new interministerial plan to limit the risks associated with PFAS on January 5, 2024, which is further proof that the restrictions and bans have only just begun.

Content of the Bill

The Bill aiming to protect the population from the risks associated with PFAS, in the version passed by the French National Assembly on April 4, 2024, provides for a ban as of January 1, 2026 on:

- Any cosmetic product containing PFAS;
- Any ski wax product containing PFAS; and
- Any clothing textile product containing PFAS, except for clothing textiles designed for personal protection, in particular in the carrying out of national defence or public safety missions.

Furthermore, the Bill also provides for a ban as January 1, 2030 on the manufacture, import, export and marketing, whether in return for payment or free of charge, of any textile products containing PFAS substances.

Moreover, a 'polluter pays' fee has been introduced into the Bill, under which companies operating classified facilities for environmental protection (ICPE) subject to authorization will have to pay a fee based on the rate of PFAS release, the rate of which has been set at 100 Euros per 100 grams.

Lastly, in accordance with the French Government's various ministerial and interministerial action plans and the recommendations made in the report by the French Member of Parliament, Cyrille Isaac-Sibille, the Bill provides for measures to monitor PFAS in drinking water and in the environment, as well as measures to better inform the public about the presence and risks of PFAS.

While this Bill represents an important evolution of the French legislative framework for the regulation of PFAS, it has been followed by a number of independent investigations into the use, presence, and dangers of PFAS, as well as a growing number of legal actions before the French Courts.

PFAS-Related Investigations and Disputes in France

In France, even before the evolution of the legislative framework, disputes related to PFAS had already started to appear and should continue to do so.

For instance, in the Spring of 2023, a group of associations and individuals brought criminal urgent proceedings regarding environmental issues against Arkema, near

Lyon, to shed light on the alleged PFAS pollution in the Chemical Valley. The aim of the NGO "*Notre Affaire à tous*", which initiated the proceedings, was to seek Arkema's liability in connection with alleged PFAS discharges in the South of Lyon.

In the scope of the first instance proceedings, the Judge responsible for matters relating to liberty and detention of the Lyon Civil Court, who had been referred the case by the French Public Prosecutor in October 2023, dismissed the criminal urgent action regarding environmental issues in a ruling handed down on November 16, 2023. Following this dismissal, the group lodged an appeal. In January 2024, the Lyon Court of Appeal dismissed the claim, ruling it inadmissible.

Following these judicial failures, since April 2024, the Prefecture of Rhône has been working on two new Orders regarding Arkema's site in the Chemical Valley, in order to accelerate the decrease in the use and release of PFAS by December 31, 2024 as initially brought out in an Order dated September 23, 2022.

This shows that beyond the evolution of the French legislative framework, the French authorities seem determined to regulate the use and release of PFAS into the environment, surely out of fear of becoming the next targets of legal actions.

The example of the Salindres chemical platform also illustrates the current context. Indeed, in a report dated November 2023, the French association "*Génération Futures*"

would have revealed the existence of significant PFAS pollution near the Salindres chemical platform in the Gard Department.

However, in a new joint investigation report with France 3 and RTBF (Belgium) published on February 6, 2024, this association warned of exceptionally high levels of trifluoroacetic acid (TFA) and triflic acid contamination in surface water and drinking water in neighbouring municipalities.

In view of this situation, the association is considering referring the matter to ANSES (the French Agency for Food, Environmental and Occupational Health & Safety) to assess the impact of these substances on Health and on the Environment, and to take legal action before the French Courts, including a criminal complaint for causing harm to fish and aggravated water pollution. Additionally, other public health actions and offences, based on surveillance obligations and drinking water quality requirements, are reportedly under review.

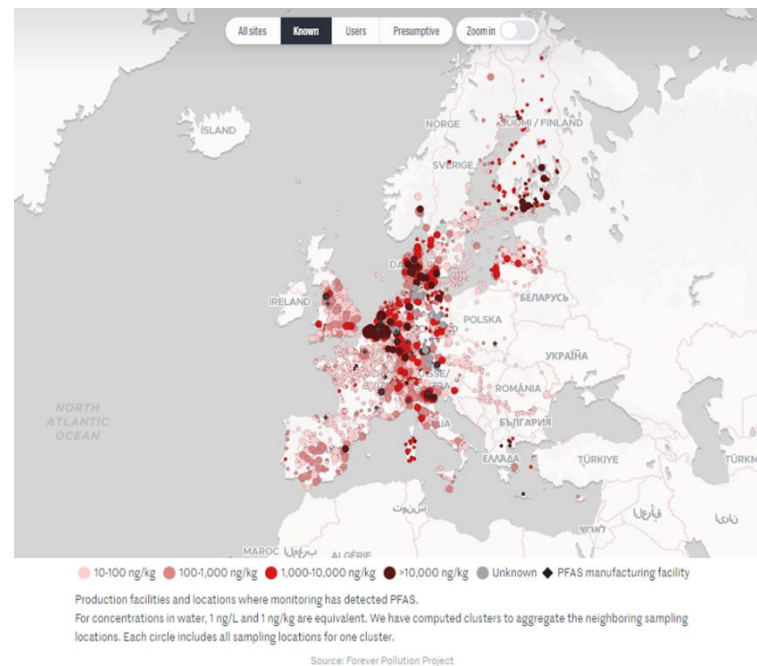
These examples in France are not the only ones, since the same investigations and legal disputes are also occurring throughout Europe.

PFAS-Related Investigations and Disputes in Europe

An investigation conducted over several months by the RTBF public television program 'Investigation', which aired on Wednesday, November 8, 2023, has shed light on the presence of PFAS in Wallonia's waters.

In addition, a "map of forever pollution" was created by the French newspaper "*Le Monde*" and its seventeen partners in the international collaborative survey "Forever Pollution Project".

According to the survey, there are almost 21,500 sites suspected of being contaminated and more than 2,305 "hot spots" in Europe – i.e., concentrations of PFAS on a site reaching a level that the experts surveyed consider dangerous to health (100 ng/l) -, all of which are likely to generate disputes, and which will necessarily be subject to investigations:



On May 27, 2024, the association of NGOs known as Pesticide Action Network Europe (PAN Europe) revealed the results of a test campaign carried out in the waterways of ten countries of the European Union.

On the eve of the Olympic Games in Paris, the results of this test campaign would reveal that PFAS would be present in the Seine, Aisne, Oise, and Somme rivers, as in the rivers of the other countries where tests were carried out.

According to PAN Europe, the substantial presence of PFAS in these rivers could have a significant impact on the quality of tap water, which will be the subject of a future survey.

Furthermore, on April 4, 2024, ANSES published a paper stating that many natural mineral waters produced by Nestlé Group would contain significant quantities of PFAS, which, according to ANSES, would reveal that beyond tap water, natural mineral water could also be targeted by restrictions.

Companies Using PFAS are Fighting Back

Given the growing number of investigations and the various proposals for regulations on a French and European level, companies that use PFAS, some of which are dependent on these substances due to the lack of alternatives, are coming together.

The first battle is against misinformation. The generic term 'PFAS' is not always properly understood and suggests that the thousands of substances it covers should be treated the same way, and that they are all subject to the same regulatory requirements. However, this is not the case. The second battle is preventing generalization. Experience has shown that when a particular type of litigation leads to

large fines or settlement agreements in the United States, many attempts are made to replicate it within the European Union. Once again, companies need to educate and explain how they differ from these high-profile cases.

The generalization of the use of PFAS, their multiplicity and the occasional lack of alternatives are a reality that certain restrictions will not be able to immediately contain.

That is probably why, on May 13, 2024, the President of the European Commission tried to reassure manufacturers by explaining that the global ban of PFAS would have exceptions to protect the investments of these companies in strategic fields.

However, the European elections, to be held in June 2024, could have an impact on the extent of the ban on PFAS, depending on the outcome of these elections.

Conclusion

The designation of PFAS as a "*concerning public health matter*" on a French and European level has initiated a media, regulatory and legal chain already experienced by companies that used asbestos, for instance.

However, the outcome of this initiated process is hardly ever favorable to companies. They are being criticized for using legal substances on the grounds that the regulatory framework was not suitable, they are being stigmatized by the media and

NGOs, and are subject to multiple actions (administrative, criminal, civil, regulatory investigations).

Nevertheless, as confirmed by the French Government's Interministerial Action Plan on PFAS, published in April 2024, there is not enough scientific information and knowledge regarding PFAS, which is why Axis no. 1 of this action plan focuses on acquiring knowledge on emission measurement methods and on dissemination and exposure, and Axis no. 2 on improving and strengthening data monitoring and mobilisation.

In the absence of clear scientific information and knowledge about PFAS and their potential dangers, logic would have it that these substances should not be banned or regulated, particularly in the absence of replacement substances that would enable manufacturers to produce differently.

However, the population's concerns are once again rushing French and European politicians to state their position faster than science.

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