

## TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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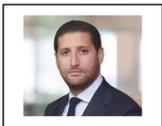
*PFAS-related regulation and litigation have been developing for some years in the United States. Sylvie Gallage-Alwis and Elias Boukachabine report on what is going on in the European Union, explaining the current push for more stringent regulations, prohibition of thousands of PFAS and the new litigation trend that is starting.*

## The PFAS-Concern is Reaching the EU

### 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](http://www.iadclaw.org). To contribute a newsletter article, contact:



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On 13 January 2023, the European Chemicals Agency (“ECHA”) received a new proposal from the national authorities of Denmark, Germany, the Netherlands, Norway and Sweden in order to restrict the manufacture, the placement on the market and the use of 10,000 per- and polyfluoroalkyl substances (“PFASs”) under the European Union’s Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (“REACH”). This proposal, which was published and detailed on 7 February 2023, appears to be one of the broadest in the EU’s history.

A few days following the filing of this broad restriction proposal, on 17 January 2023, the French Government unveiled its new Action Plan on PFASs. The French Government’s new Action plan notably follows the report of the French Agency for Food, Environmental and Occupational Health & Safety (“ANSES”) of 2015 in which it had alerted the Government on the urgent need to take further action.

Whether at national, European, or international levels, PFASs are set to be increasingly regulated notably because the annual health-related costs to society arising from PFAS exposure are estimated to be between 52 and 84 billion Euros just across Europe.

Based on the current context, there is little doubt that these new and updated regulations will soon be followed by a number of new lawsuits and legal actions against states and companies in Europe and throughout the world. The real question is: who will take responsibility for what is thought to be the next “asbestos crisis”?

### **Global International Context**

According to the ECHA, PFASs constitute “*a large class of thousands of synthetic chemicals that are used throughout society.*” The United States Environmental Protection Agency (“EPA”) explains that PFASs “*have been used in industry and consumer products since the 1940s because of their useful properties.*” The most common types of PFASs are the perfluorooctanoic acids (“PFOAs”) and the perfluorooctanesulfonic acids (“PFOSs”).

Among their various properties, PFASs are used in many industries for their ability to repel water, oil, grease, and dirt. PFASs have notably been used for the manufacture and production of plastic, rubber, textile, cosmetics, food, pharmaceuticals, firefighting foam, leather, paints, pesticides, cleaning products, glass, electronic devices, flame retardants etc. Due to their widespread use, PFASs can be found almost everywhere, including in the soils and in the air, as well as in daily products such as personal care products, food packaging, fish or drinking water. Solely in Europe, 100,000

different sites are considered to be potentially emitting PFASs.

The particularity of PFASs is that these chemicals are highly persistent as they almost do not break down in the environment. According to studies, certain types of PFASs could take up to 1,000 years to degrade in the environment. This explains why PFASs have been renamed as “forever chemicals”. The US Agency for Toxic Substances and Disease Registry (“ATSDR”) submits that PFASs are so persistent that they *“are found in the blood of people and animals all over the world and are present at low levels in a variety of food products and in the environment.”* If their presence was not toxic, this would not be a substantial issue *per se*.

However, a number of scientific studies have found that the presence of PFASs in the environment could have harmful effects on humans and animals. The results of certain research involving humans further suggest that a high level of exposure to certain PFASs may notably lead to increased cholesterol levels, changes in liver enzymes, decrease in infant birth weights, or increased risk of kidney or testicular cancers, just to name a few consequences.

The combination of the widespread use of PFASs, their persistence in the environment, as well as their potential dangers for humans, animals, and the environment, is the reason why a number of scientists, regulators and journalists have recently declared that these substances could trigger the next “asbestos crisis”.

Certain recent events and discoveries throughout the world have also shine a light on the extent of the potential dangers of these chemicals, such as the fire of the Lubrizol factory in France in 2019, during which 9,500 tons of chemical products would have burnt. Moreover, in 2013, it was discovered that the people living in 21 municipalities in the south-west of the Veneto Region, Italy, had been drinking tap water that would contain important quantities of PFASs. More recently in October 2022, a new study conducted by the non-profit organization Water Alliance found that more than 80% of the US waterways would be contaminated by PFASs.

In view of these recent events, governments, regulators, and European and international organizations have been urged to take additional immediate action against PFASs.

### **A Fast-Changing Regulatory Framework**

Back on 22 May 2001, more than 150 countries had signed the Stockholm Convention on Persistent Organic Pollutants upon which they committed to prohibit, eliminate, restrict, or reduce the production and use of certain substances, including a number of PFASs. Since the Convention’s entry into force on 17 May 2004, this Convention has been revised on no less than six occasions, the most recent being in 2019 when the Convention was amended in order to extend its scope by regulating certain PFOAs and PFOSs.

At the European Union level, a new regulation (the Regulation (EU) 2019/1021 on persistent organic pollutants) had been passed on 20 June 2019 in order to protect human health and the environment from persistent organic pollutants by prohibiting, phasing out as soon as possible, or restricting the manufacturing, placing on the market and use of substances notably subject to the Stockholm Convention on Persistent Organic Pollutants.

In May 2022, the European Union had also announced a new Partnership for the Assessment of Risks from Chemicals (“PARC”) which goal is to *“support EU and national chemical risk assessment and risk management bodies with new data, knowledge, methods, networks and skills to address current, emerging and novel chemical safety challenges.”*

Moreover, as above-mentioned, the national authorities of five countries requested on 13 January 2023 that the European Union update its REACH regulation in order to restrict the manufacture and use of 10,000 PFASs. These countries’ proposal came after three years of investigations on the use and risks of different PFASs for people and the environment. They estimate that around 4.4 million tonnes of PFASs could be released in the environment within the next 30 years if a ban of these substances is not decided. The ECHA considers that the proposed restriction is one of the broadest ever proposed in the history of the European Union. The new proposal has been made available on 7 February 2023. The following next steps were announced by the ECHA:



Depending on the duration of this process, as well as of the timeline of the decision process of the European Commission and the EU member states, the 10,000 PFASs identified in the restriction proposal could end up being banned as soon as 2026 or 2027, although companies could be given between 18 months and 12 years to find alternatives in certain cases.

REACH had originally been passed on 18 December 2006 in order to regulate the registration, the evaluation, the authorisation and the restriction of certain chemicals and to create the European Chemicals Agency. Back in 2006, the REACH regulation had operated a change of strategy by placing the responsibility on industry (manufacturer, importer, downstream users etc.) to manage all the risks of certain chemicals and to gather and provide safety information on these substances. As the ECHA states, *“REACH places the burden of proof on companies”* which must *“identify and manage the risks linked to the substances they manufacture and market in the UE.”* The general rule is that if the identified risks cannot be managed, then the use of these substances shall be restricted. Furthermore, on 17 January 2023, the French Government also unveiled its new Action Plan on PFASs. France’s Action Plan,

which will be conducted between 2023 and 2027, is based on six different lines of actions:

- Line of Action n° 1: Get standards on releases and natural environments to guide public action. The French Government is of the view that there are not enough standards on the acceptable amount of PFASs that could be released or contained in naturel environments. This first step will allegedly allow the Government to prioritize and adjust its actions;
- Line of Action n° 2: Introduce a wide ban of PFASs at EU level to remove the risks associated with using or placing PFASs on the market. The French Government announced that it fully supports the proposal shared by the five European countries in that respect on 13 January 2023. France also insisted on the fact that its priority is to forbid PFASs at the European level in order to remove the risks linked with these chemicals;
- Line of Action n° 3: Improve our knowledge on releases and on the impregnation of the environments, in particular the aquatic environments, in order to reduce the exposure of populations. It is notably the French Government's goal to reinforce the surveillance of the exposition to PFASs with the help of the French Regional Health Agencies ("ARS");
- Line of Action n° 4: Significantly reduce the releases from industrial sources. As part of this line of action, the French Government will first identify the main industrial sites releasing substantive quantities of PFASs and then work towards a significant reduction of these releases.
- Line of Action n° 5: State transparency on the available information. The French Government announced that it will transparently report on the results of the analysis and actions that will be conducted; and
- Line of Action n° 6: A medium-term integration in the micro-pollutant plan. All the above-described actions will eventually be integrated in the upcoming micro-pollutant plan.

During the announcement of this Action Plan, the French Minister of Ecological Transition insisted on the fact that this Action Plan has been introduced in the broader context of the current work being conducted at the European level which aimed at eventually forbidding the use of PFASs. The French Government notably regretted that the current European and national regulations are insufficient as they only target certain substances.

Likewise, in the United States, the EPA Administrator announced on 8 October 2021 a new PFAS Strategy Roadmap setting a number of timelines by which this

organization plans to *“take specific actions and commits to bolder new policies to safeguard public health, protect the environment, and hold polluters accountable.”* The EPA explained that its approach will be centred on the following principles:

- Consider the lifecycle of PFASs;
- Get upstream of the problem;
- Hold polluters accountable;
- Ensure science-based decision-making; and
- Prioritize protection of disadvantaged communities.

In this context, the EPA regularly proposes new regulations in order to better address the risks linked to the manufacture and use of PFASs. For example, on 5 December 2022, the EPA proposed a new rule that would improve reporting PFASs to the Toxic Release Inventory. In May 2022, the EPA also proposed to add five different PFASs in the list of risk-based values for site clean-ups. The EPA has also proposed a number of actions in 2022 in relation with the protection of clean water.

### **An Increasing Burden for the Industrial Sector**

At the European level, the fact that PFASs are now set to be included in the REACH regulation – and even some forbidden – constitutes an important risk for the companies active in the industrial sector as they could eventually have the burden of first identifying all the risks related to PFASs and then of proving that the risks associated

with these substances can be effectively managed.

However, it is worth noting that even the US EPA acknowledges the fact that *“We Don’t Fully Understand”* PFASs and that further research is needed in order to answer critical questions about PFASs such as how harmful PFASs are to people and the environment, how to manage and dispose of PFASs and how much people are exposed to PFASs. In its Action Plan, the French Government also recognized that it is necessary to improve the knowledge on releases of PFASs and on their impregnation in the environment.

Nevertheless, despite the lack of sufficient knowledge about PFASs, most authorities agree to place on the industrial sector the burden of proving that PFASs are not dangerous or that their danger can be managed, failing with these authorities intend to hold the industrial sector accountable for the potential consequences of PFASs, which are still yet to be fully apprehended. This is in line with the position previously adopted by most countries in relation to asbestos, and should be a matter of great concern notably for manufacturers and importers.

In the EU, should PFASs be covered by the REACH regulation, their use could therefore be restricted for lack of information about their risks and/or for lack of effective means to manage the risks associated with them.

### **The Lack of Effective Alternatives to PFAS**

The main concern for the industrial sector is that there is often no alternative to the use of certain PFASs. While the five countries which made the restriction proposal at the European level confirmed that in many cases, no alternatives to PFASs currently exist and in some cases, no alternatives will ever exist, their proposal nonetheless states that after the ban of PFASs is in force, companies will have between 18 months and 12 years to introduce alternatives to the 10,000 different PFASs targeted by their restriction proposal.

Thus, the prohibition of PFASs currently considered by the European Union and by a number of other countries internationally could prevent certain companies from doing business and manufacture certain products that are used by consumers should these companies be unable to find alternatives within the set deadlines.

The Organisation for Economic Co-operation and Development (“OECD”) acknowledges that there is a need to *“enhance understanding on available alternatives and to widen the debate regarding the replacement of certain fluorinated compounds, where possible, by non-fluorinated alternatives and different technologies.”* While the industrial sector should and will take its share of the work, it is certain that states, governments, regulatory agencies and international organizations should lead the debates and research in order to find alternatives to the production and use of the PFASs that they

intend to fully prohibit or significantly restrict.

An important number of studies have already been conducted on the potential alternatives to PFASs, including studies related to the replacement of PFAS in textiles and food packaging. However, so far, this research appears to be insufficient to properly address the need to replace the PFASs currently used worldwide. Moreover, certain alternative chemicals such as the perfluoroalkyl ether carboxylic acids (“PFECAs”) have apparently been detected in the environment and could potentially present health risk through the consumption of polluted seafoods.

### **Potential Litigations & Liabilities for Companies**

As explained above, new and updated regulations are currently under discussions and will shortly be implemented at national and international levels. That being said, everyone agrees with the fact that regulating and forbidding PFASs will not be sufficient to resolve the PFAS crisis in view of the fact that these substances persist in the environment for a very long time (up to 1,000 years)..

Just like any health crisis, the PFAS crisis is already and will continue to be accompanied by its share of lawsuits and legal proceedings against companies. Although a number of lawsuits have been filed by individuals or groups of individuals, certain lawsuits have also been initiated by municipalities and local states. In most of these lawsuits, individuals and group of individuals have

requested money compensation for their damages.

In view of the potential financial exposure of companies in relation with PFAS-related litigations, a group of 47 institutional investors with \$8 trillion in combined assets recently demanded to 54 chemical companies that they completely phase out “forever chemicals”.

According to Bloomberg Law, more than 6,400 PFAS-related lawsuits have been filed only in the United States between July 2005 and March 2022. An important number of the lawsuits initiated during this period were related to the contamination at DuPont’s Washington Works facility in Parkersburg, West Virginia, now owned by the company Chemours, which was depicted in the movie *Dark Waters*. Individuals are said to have received billions in settlement funds from the DuPont litigations.

Most recently in November 2022, California’s Attorney General announced that the state had filed a lawsuit against 18 companies including 3M and DuPont for endangering public health and the environment due to the manufacture and use of PFASs. California’s Director of Government for the Environmental Working Group explained that “*PFAS polluters must pay for contaminating our state and our bodies with these insidious chemicals.*”

Moreover, in December 2022, a group of plaintiffs initiated legal proceedings in the United States against the Houston-based company Inhance which produces plastic

containers used in the food industry, arguing that this company has failed to follow the EPA rules regarding the use of PFASs, and demanding that this company’s production be halted.

Outside of the United States, PFAS-related litigations have also recently emerged. Indeed, the company 3M recent settled a claim made by the Belgian Government against it for an amount of 571 million Euros. The Belgium Government had alleged that 3M had violated Belgium’s Environmental Act as well as international laws by releasing PFASs in the environment from its factory of Zwijndrecht, Belgium. 3M had previously signed a \$850 million settlement with the State of Minnesota in 2018 in order to resolve a PFAS contamination case. Hundreds of civil claims are now expected to be filed against 3M in Belgium.

The more information the population learns about PFASs, the more PFAS-related cases will be filed in Europe. Therefore, it is very likely that the new proposed regulation to restrict and/or prohibit almost all PFASs in Europe will give rise to a number of new cases. In this respect, one can anticipate that claims on the ground of the anxiety to develop a disease in the future due to the exposure to PFAS may appear – as they did in the asbestos-related context in France.

### **Mitigation of Risks for Companies**

While the global PFAS crisis is only beginning, it is almost certain that most if not all PFASs suspected to be hazardous will eventually be prohibited. In that context,

certain companies have already stopped using and manufacturing the most controversial PFASs.

financial exposure of companies using PFASs.

For example, the company 3M, targeted by the Belgium Government, voluntarily decided in December 2022 that it will exit PFAS manufacturing by the end of 2025. 3M notably explained that its decision was justified by the *“accelerating regulatory trends focused on reducing or eliminating the presence of PFAS in the environment and changing stakeholder expectations.”*

In order to mitigate the above-described risks, other companies have also improved their filtration systems in order to lower the amount of PFASs that are released in the environment. Although this solution does not fully solve the issue of PFASs, it may help demonstrating that a company is taking active steps to address this issue.

Furthermore, where alternative products are available, companies should consider replacing the use of PFASs by these alternative products, as long as these products are not also harmful for health and the environment. As explained above, certain alternative products to PFASs were found to be potentially dangerous as well.

In any event, all companies which have used or are still using PFASs should assess their current and historical use of these substances as well as their potential liability exposure. The amounts that had to be disbursed by companies such as DuPont and 3M are good examples of the potential

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