

UK RESTRICTIONS ON PFAS IN A QUICKLY EVOLVING INTERNATIONAL CONTEXT

Aug 14, 2024

SUMMARY

- The UK position on PFAS is developing post-Brexit via UK REACH and a regulatory management options analysis.
- The EU position on PFAS is developing via EU REACH (with several significant restriction processes underway).
- The US position on PFAS is developing via extensive and ongoing regulation in the US at both the state and federal levels.

Per- and polyfluoroalkyl substances (PFAS) are a group of several thousand synthetic chemicals whose structure gives properties that make them useful in a wide variety of industrial and consumer uses. Some of these ‘forever chemicals’ are ‘persistent’, meaning that they do not break down readily in the natural environment. While this property is useful in its commercial applications, it also means that PFAS accumulate in nature and in our bodies. As a result, PFAS are now the subject of a number of regulatory initiatives to impose restrictions on their use and emissions.

This article discusses the current state of play relating to PFAS regulation, in light of the Health and Safety Executive’s (HSE) recent call for evidence on the use of PFAS within firefighting foams (FFFs). We look first at the current proposals for restrictions in the UK. However, because the use of these chemicals is globally ubiquitous, as well as considering domestic regulation, we also consider how these chemicals are being regulated in other jurisdictions. Our colleagues in the EU and US offer commentary on their respective current regulatory landscapes.

UK POSITION ON PFAS

CURRENT PROPOSALS AROUND CALL FOR EVIDENCE ON PFAS IN FIREFIGHTING FOAMS

On 24 June 2024, the HSE concluded a call for evidence on FFFs containing PFAS. Stakeholders with relevant information, including professional users, consumers, and organisations including trade, consumer and environmental groups, were requested to provide information on the manufacture, import, use, hazards, environmental fate, waste, standards, and alternatives in relation to PFAS in FFFs.

The information gathered in the call for evidence will be used to inform a restriction report on the 'risks to human health and the environment' posed by PFAS in FFFs^[1] and examining the suitability of a restriction on 'the use and disposal of [FFFs] where non-PFAS alternatives are available'. This report was officially requested on 5 March 2024 by the Secretary of State for Defra under the UK regulation on the registration, evaluation, authorisation and restriction of chemicals (UK REACH), which regulates chemicals placed on the market in Great Britain. The HSE, jointly with the Environment Agency, is required to publish the report, known as an Annex 15 restriction dossier, within 12 months of the request.

This call for evidence and preparation of the dossier is in line with the UK REACH 2023/24 Work Programme, published on 4 February 2024, which indicates that the work to be carried out in relation to this restriction in 2023/24 is to complete 'evidence gathering, stakeholder engagement and preparatory work' and to 'propose and start Annex 15 dossier'^[2].

WIDER REGULATORY POSITION ON PFAS IN THE UK

PFAS has long been on the radar of regulators, with a 2021 consultation / call for evidence being carried out to inform a regulatory management options analysis (RMOA) on PFAS, published April 2023^[3]. The RMOA offered recommendations to manage the risk posed by PFAS to human health and the environment, including the restriction on PFAS in FFFs. This restriction would not be GB's first restriction on PFAS under UK REACH - two are already in place (one on perfluorooctanoic acid (PFOA) and its salts and the other on certain perfluorinated silane substances) - and would likely not be the last PFAS-related restriction, either.

In addition to the restriction on use of PFAS in FFFs, the UK REACH regime also has in its sights other restrictions around use of PFAS in its various consumer, professional and industrial applications. Alongside preparing the restriction dossier on the use of PFAS in FFFs, the UK REACH Work Programme 2023/24 also includes as deliverables for 2023/24 that the process of 'evidence gathering and stakeholder engagement' should begin in relation to further PFAS restrictions on 'other wide dispersive uses such as the application of coatings or use of cleaning agents' and 'the manufacture and placing on the market of consumer articles from which PFAS are likely to be released into air, water or soil, or directly transferred to humans'.

Regulators acknowledge that the work around PFAS restrictions is expected to be an ongoing process requiring significant regulatory effort in the short to medium term. In its policy paper providing the rationale for the 2023/24 UK REACH Work Programme, Defra stated that 'we

anticipate that much of HSE's capacity to develop restrictions over the next five years will be devoted to PFAS^[4].

The UK's regulatory interest in PFAS hasn't occurred in a vacuum, however, and the HSE indicated in its Rolling Action Plan for UK REACH 2023-2025^[5] that in its 'approach to substance selection [the HSE] has sought to complement rather than replicate evaluation work that has been or will be performed by other regulatory regimes (such as via EU REACH), and at the same time avoid other unnecessary duplication of work where testing is indicated at the outcome of evaluation'.

EU POSITION ON PFAS

The European Commission has adopted an ambitious policy on PFAS. It undertakes to phase out all PFAS as a group in every use, allowing their use only where they are essential for society. At the same time, the EU plans to increase funding for research and innovation to substitute PFAS under the Horizon Europe funding program. These commitments are a key part of the Commission's Chemicals Strategy for Sustainability.

To date, EU policy has focused on specific types of PFAS. The EU first took action by implementing the international Stockholm Convention on persistent organic pollutants (POPs) under the POPs Regulation.^[6] Perfluorooctane sulfonic acid and its derivatives (PFOS) have been severely restricted since 2010.^[7] Two other PFAS, their salts and related compounds must be eliminated (PFOA and Perfluorohexanesulfonic acid (PFHxS)).^[8]

For PFAS not covered by the Stockholm Convention, the EU (alongside Member States) utilises EU REACH, which regulates the manufacture, placing on the market and use of chemicals in the EU.^[9] A Member State, or the European Chemicals Agency (ECHA), at the request of the European Commission, can i) start the restriction procedure, or ii) propose to identify certain PFAS as substances of very high concern (SVHCs) to be included in the Candidate List for authorisation.

Since 2023, certain C9-C14 PFCA-related substances, including their salts and any combinations thereof are restricted under EU REACH.^[10] This means that these PFAS are banned, unless the substances comply with specific conditions such as thresholds, technical measures or specific labels.

Three other types of PFAS have been classified as SVHCs and consequently included in the Candidate List for authorisation (2,3,3,3-tetrafluoro-2-(heptafluoropropoxy)propionic acid (HFPO-DA) in 2019, perfluorobutane sulfonic acid (PFBS) in 2020 and perfluoroheptanoic acid (PFHpA) in 2023).^[11] This results in various obligations for suppliers (e.g. safety data sheets; notifying ECHA; communicating on safe use). ECHA will regularly assess these PFAS to determine whether they should be prioritised and included in the Authorisation List (which requires companies to apply for an authorisation to continue or start using and placing on the market).

Looking forward, several restriction processes under EU REACH are underway and will likely come into force in the coming years. For example:

- Regarding FFFs specifically, ECHA submitted a restriction proposal on all PFAS in FFFs, which will be shortly examined by the Commission and Member States.^[12] ECHA took into account the existence of available fluorine-free alternatives in firefighting foams highlighted by a scientific report. More generally, after a call for evidence in 2020, Germany, Denmark, the Netherlands, Norway and Sweden submitted a universal PFAS restriction proposal in January 2023.^[13] The restriction would broadly apply to any substance that contains at least one fully fluorinated methyl (CF₃-) or methylene (-CF₂) carbon atom (without any H/Cl/Br/I attached to it). ECHA's scientific committees are now evaluating this proposal, which, if enacted, is however not likely to enter into force before 2027.

Germany is a driving force: another proposal aiming to restrict undecafluorohexanoic acid (PFHxA) was recently voted in by Member States in February 2024 and will be examined by the European Parliament and the Council before it can be adopted by the Commission.^[14]

US POSITION ON PFAS

As a result of a variety of factors – perhaps the largest being the significant quantities of PFAS manufactured in the US – PFAS have been the subject of extensive and ongoing regulation in the US at both the state and federal levels.

With respect to FFFs, the Department of Defense phased out the purchase and use of FFFs at military facilities in 2023, and has been very active in developing alternatives. Individual states have also been actively regulating the use of FFFs that contains PFAS. Over thirty states have enacted or proposed laws that regulate FFFs, typically in one of three ways: (1) use and discharge restrictions; (2) notification or reporting procedures; and (3) disposal, storage, or “take back” provisions. Some states have also prohibited the use of PFAS in firefighter personal protective equipment. See BCLP's guide to [state-by-state regulations for PFAS in firefighting foam and equipment](#) for additional information.

The United States has also seen a flurry of regulation of PFAS outside of FFF. On the federal level, EPA has been methodically implementing its [national PFAS Action Plan](#) since October of 2021, including but not limited to: [designating PFOA and PFOS as Hazardous Substances](#) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); [establishing drinking water limits for six PFAS substances](#) at the parts per trillion level; and [enacting an extensive reporting rule under the Toxic Control Substances Act](#) which requires reporting back to 2011.

States have also begun regulating PFAS in drinking water and groundwater, but there has been more focus on PFAS in consumer products. So far 13 states have enacted laws restricting the use

of intentionally added PFAS in a wide range of consumer products including juvenile products, food packaging, textiles and apparel, cookware, cosmetics, cleaning products, dental floss, and many others. The specific requirements and compliance dates in the laws vary, all of which creates significant challenges for businesses that manufacture, distribute, or sell products that fall within the regulated categories. An up-to-date overview of state laws regulating PFAS in consumer products can be found at [BCLP's client alert](#).

All of this regulatory activity could foreshadow what may happen regarding PFAS substances in the UK, and what product categories may be regulated.

UK HORIZON SCANNING

Noting Brexit and the UK REACH / EU REACH split, there has been discussion for some time about a divergent regulatory approach in the UK / GB relative to the EU regarding PFAS. Although the UK / GB approach may be different to the EU's, uncertainty remains – such that the complexities of the UK REACH / EU REACH split will need to be monitored regarding PFAS (including in the context of complicated supply chain considerations).

Broadly speaking, from a regulatory perspective and in terms of awareness, the US is ahead of the UK regarding PFAS. So, looking ahead, certain aspects of the US position may well prove to be a helpful 'crystal ball' for future developments in the UK in the PFAS arena.

This article was authored jointly by Nick Harding (Senior Associate, London), Sam Levy (Senior Associate, London), Madeleine Lofchy (Associate, London), Tom Lee (Office Managing Partner and PFAS Team Leader, San Francisco), John Kindschuh (Knowledge Lawyer, St Louis), Maryne Gouhier (Senior Associate, Paris) and Jean-Pierre Delvigne (Partner, Paris).

This article was first published by the United Kingdom Environmental Law Association in its 8 August 2024 [elaw publication](#).

FOOTNOTES

[1] The Health and Safety Executive, '[UK REACH – PFAS firefighting foams – Call for evidence](#)' (HSE Consultations Hub, 4 April 2024), accessed 17 June 2024.

[2] The Health and Safety Executive, '[UK REACH Work Programme 2023/24](#)', (Health and Safety Executive, 4 February 2024), accessed 17 June 2024

[3] The Health and Safety Executive and the Environment Agency, '[Analysis of the most appropriate regulatory management options \(RMOA\)](#)', (Health and Safety Executive, 4 April 2023), accessed 17 June 2024.

- [4] Department for Environment Food & Rural Affairs, [‘Rationale for prioritising substances in the UK REACH work programme: 2023 to 2024’](#) (Defra, 15 February 2024), access 17 June 2024.
- [5] The Health and Safety Executive, ‘Rolling Action Plan (RAP) for UK REACH 2023-2025’
- [6] Stockholm Convention, 22 May 2001, as amended. Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast).
- [7] Regulation (EU) No 757/2010 of 24 August 2010 amending Regulation (EC) No 850/2004 of the European Parliament and of the Council on persistent organic pollutants as regards Annexes I and III; Annex I, part A: Delegated Regulation (EU) 2020/1203 of 9 June 2020 and Annex IV: Regulation (EU) 1342/2014.
- [8] Annex I, part A: Delegated Regulation (EU) 2020/784 of 8 April 2020 and Annex IV: Regulation (EU) 2022/2400; Annex I, part A: Delegated Regulation (EU) 2023/1608 of 30 May 2023 and Annex IV: Regulation (EU) 2022/2400.
- [9] 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).
- [10] Regulation (EU) 2021/1297 of 4 August 2021.
- [11] Decisions ED/71/2019, ECHA/01/2020 and D(2022)9120-DC.
- [12] ECHA, [‘Proposal to ban ‘forever chemicals’ in firefighting foams throughout the EU’](#), accessed 5 July 2024.
- [13] ECHA, [‘Next steps for PFAS restriction proposal’](#), accessed 5 July 2024.
- [14] European Commission, [Comitology Register](#), accessed 5 July 2024.

RELATED PRACTICE AREAS

- Environment
- PFAS Team
- ESG Governance, Compliance & Reporting

MEET THE TEAM



Nick Harding

London

nick.harding@bclplaw.com

[+44 \(0\) 20 3400 4136](tel:+442034004136)



Madeleine Lofchy

London

madeleine.lofchy@bclplaw.com

[+44 \(0\) 20 3400 4772](tel:+442034004772)



Thomas S. Lee

San Francisco

tom.lee@bclplaw.com

[+1 415 675 3447](tel:+14156753447)



Maryne Gouhier

Paris

maryne.gouhier@bclplaw.com

+33 (0) 1 44 17 77 59

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.