

en2x-POSITION towards „**PROPOSAL FOR A RESTRICTION** of Per- and polyfluoroalkyl substances (PFASs)“ published 23.03.2023

Avoid overlapping regulations

The proposal for a restriction of Per- and polyfluoroalkyl substances (PFAS) is formulating „universal“ restriction of this substance group. This needs clear and unambiguous differentiation from other legislative acts on PFAS – such as the restriction of PFAS in fire fighting foams. Without legal clarity, this restriction could potentially lead to an unintended short-termed ban of fire-fighting foams.

1. Restriction proposal

Our comments are on the „PROPOSAL FOR A RESTRICTION of Per- and polyfluoroalkyl substances (PFASs)“ as published on March 23rd 2023, hereafter referred to as „universal restriction“). With its table „Proposed restriction - Annex XVII entry PFASs“, this proposal aims at banning all substances containing at least one structural element of the chemical formula CF_2 on their own or as constituent 18 months after entry into force (column 2, par. 1 to 3). Uses exempt from this „early“ ban are explicitly listed (column 2, par 4 ff.). This list does not explicitly contain use or appearance as unintended contamination in firefighting foams.

Same time, in several places of the document(s) it is reported that fire-fighting foams are not covered, since dealt with in another restriction. Examples are summary (chapter scope) and explanatory notes (chapter 5 „paragraph 9“) therein, it is explicitly documented that this restriction proposal is meant not to interfere with the restriction for uses of PFAS in firefighting foams but act complementary.

Nevertheless, wording of paragraph 9 reads „9. Paragraphs 1 and 2 shall apply without prejudice to the application of any restrictions set out in this Annex or to other applicable Union legislation.“ This wording can easily be interpreted as „this restriction takes effect even if other restrictions / legislation defines other details“. This is just the opposite of the statements cited above.

2. Restriction in firefighting foams

The „PROPOSAL FOR A RESTRICTION of Per- and polyfluoroalkyl substances (PFAS) in firefighting foams“ (hereafter referred to as „FFF restriction“) was published Jan. 14th 2022. This proposal contains restriction of the same substance group as above cited universal restriction. Conditions of restriction in column 2 list uses in firefighting foam with connected dates of application. Especially use in firefighting foam concentrates is restricted as from 10 years after entry into force (par. 1)

3. Combined effect

Should both restriction proposals be implemented as proposed, we believe that an immediate ban of PFAS in firefighting foams would result 18 months after entry into force of the universal restriction, since use in firefighting foams is not listed as a derogation in column 2 of the universal restriction and paragraph 9 defines appliance non-regarding other restriction or legislation.

paragraph 9 is in line with ECHA's statement in their webinar „Restriction of per- and polyfluoroalkyl substances (PFASs) in firefighting foams“, held on April 5th 2022. Webinar questions and their answers are documented - see document on the FFF restriction website (https://echa.europa.eu/documents/10162/11869254/220405_pfas_fff_webinar_qa_en.pdf/b28c7be4-01d2-dd78-835e-0e14f9b35895?t=1657544158816).

Therein No. 2 „Links to other legislation or REACH processes“ states „In general, in the event of an overlap between restrictions (i.e. where a substance is within the scope of two or more restrictions) these would apply without prejudice and the strictest measure would apply.“

4. Conclusion

Our evaluation has shown that the derogation as granted in the FFF with good reasons would be overruled by the universal restriction if enacted as proposed. This is apparently not intended by the authors.

We therefore urgently ask for re-wording of Paragraph 9.

Example could be:

9. Paragraphs 1 and 2 shall apply as long as no other restrictions are set out in this Annex or in other applicable Union legislation.“

Alternatively, the effect as intended by the restriction's authors can be achieved by an additional paragraph with an explicit derogation of all uses as defined in the restriction of PFHxA and in the restriction of PFAS in firefighting foams.