

Annex XV restriction report of FFFs by ECHA (Version 1, 14 January 2022)

Comments by DG GROW

We were surprised by reading the restriction report when in the “Summary” section the Agency proposed that “the preferred restriction option would ban the placing on the market, use and **export** of PFASs in firefighting foams after use/sector-specific transitional periods”.

We note to ECHA that this is the first time in a proposal that a RO is to ban the export of a group of substances (all PFAS) for a specific use, which is the production of FFFs.

As a justification the following is used “In addition, this approach is in line with the EU Chemicals Strategy for Sustainability which states that “*The EU will [...] lead by example, and, in line with international commitments, ensure that hazardous chemicals banned in the European Union are not produced for export, including by amending relevant legislation if and as needed*”¹. This approach is particularly relevant for PFAS considering their persistence and their potential for long range transport”.

First, we would like to recall that the REACH Regulation does not provide a legal basis for restricting exports. Article 3(31) defines a restriction as “any condition for or prohibition of the manufacture, use² or placing on the market³”. Article 67(1) provides that “(a) substance on its own, in a mixture or in an article, for which Annex XVII contains a restriction, shall not be manufactured, placed on the market or used unless it complies with the conditions of that restriction”. Article 68(1) provides that “when there is an unacceptable risk to human health or the environment, arising from the manufacture, use or placing on the market of substances, which needs to be addressed on a Community-wide basis, Annex XVII shall be amended ... by adopting new restrictions, or amending current restrictions in Annex XVII, for the manufacture, use or placing on the market of substances on their own, in mixtures or in articles ...”. In sum, it is not possible, from a legal perspective, to restrict exports under REACH.

In addition, the CSS is a “Communication”, not a piece of legislation, and therefore does not include an additional legal basis into the REACH Regulation for banning exports, nor provide a legal basis for banning exports itself. The specific point that refers to banning the export of hazardous chemicals includes also the phrase “in line with international commitments” and this has not been analysed in the context of your preferred option. The Commission has not yet decided whether or how to convert this part of the CSS into legal provisions. Discussions are currently starting and ECHA’s proposal preempts any outcomes of the internal Commission discussions. I would like also to inform you that in the EU law in chemicals there are only a few prohibitions on export of substances that are banned at an international level and in accordance with the international agreements (eg. Mercury Convention). There is no such an agreement in the case of FFFs yet.

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Chemicals Strategy for Sustainability - Towards a Toxic-Free Environment - COM(2020) 667 final, 2020, available at https://eur-lex.europa.eu/resource.html?uri=cellar:f815479a-0f01-11eb-bc07-01aa75ed71a1.0003.02/DOC_1&format=PDF

² To note that the definition of « use » in Article 3(24) REACH does not cover exports.

³ To note that placing on the market under REACH only relates to the internal market, cf judgment of the Court of Justice of 27 April 2017 in Case C-535/15.

Your proposal also clearly refers to the ban on export of all PFAS substances as substances on their own for uses in FFFs. (1st condition of the proposal). It is difficult to understand how this can be practicable in a third country, if the third country does not have any agreement or is not bound by an international convention, especially since EU cannot control the uses in the third country since PFAS have any other uses except in FFFs.

Furthermore, it would be a very bad precedent for the Scientific Committees to form an opinion to the third restriction option that has never been used so far except in international agreements, if this cannot be taken up in EU law due to a lack of legal basis. Thus, the opinion should be formed on the second restriction option and ECHA should withdraw the third option. It would be a really bad precedent if the opinions support this option and then the Commission cannot introduce it into the restriction for lack of legal basis and this could cause the restriction to be significantly delayed and thus causing more emissions to the environment. In other words, your option preempts very important political discussions to be held in the context of the REACH revision.

Finally, it is clear that this restriction proposal is a "mirror" restriction to the upcoming Universal PFAS restriction proposal. Logically speaking, the option of an exports ban, therefore, would risk to be reflected in the Universal PFAS restriction proposal without considering the legality of this addition under REACH Regulation.

PS. More comments may come later on other parts of the proposal.

ECHA's reply

Hi [REDACTED]

Sorry for not coming back to you before on this. The timing of the Easter holidays and then preparation for the RAC REST WG next week became all consuming.

Let me clarify the intention of the DS assessment of restriction options in this proposal. As with other recent ECHA restriction proposals our objective when undertaking the analysis (and when RAC and SEAC evaluate them) to give decision makers relevant information on the impacts of a diverse, but relevant, range of policy options to address the identified risk. We do not seek to constrain the options available to decision makers. Whilst there is always a preferred restriction option (indeed this was a request from the Commission in the past) it is always possible for the Commission to deviate where necessary to another restriction option or to a further option that was not assessed. The preferred option is the one which we conclude to be the least burdensome to address the identified risk. As the CSS export ban is in the public domain it seemed prudent to assess the impacts of its implementation for this restriction.

However, please note that RO2 and RO3 are identical, with the exception of the 'export' element. At the decision making stage, should the Commission and MS not be willing (or able) to implement a ban on the export of firefighting foams containing PFASs then the relative impacts of this decision (on EU actors) can be readily appreciated.

Commented [LS(1): We do not consider that the RO3 option that has in addition ban on exports is a relevant solution. It is not a legal option so it should not be a risk option studied

Commented [LS(2): It would be a really bad precedent if the opinions support this option and then the Commission cannot introduce it into the restriction for lack of legal basis and this could cause the restriction to be significantly delayed and thus causing more emissions to the environment. In other words, your option preempts very important political discussions to be held in the context of the REACH revision.

Commented [LS(3): Yes, but as you know this creates complications as we have to explain why Commission has deviated from the opinion. However, this option is not a possible legal option in REACH so it should be withdrawn

Commented [LS(4): In our comments sent, we have mentioned the two reasons: In addition, the CSS is a "Communication", not a piece of legislation, and therefore does not include an additional legal basis into the REACH Regulation for banning exports, nor provide a legal basis for banning exports itself. The specific point that refers to banning the export of hazardous chemicals includes also the phrase "in line with international commitments" and this has not been analysed in the context of your preferred option. The Commission has not yet decided whether or how to convert this part of the CSS into legal provisions.

Commented [LS(5): We have explained to you why in REACH, it is not possible to introduce the banning of the exports, fourth paragraph in our comments

Although we write a version of the legal (i.e. REACH Annex XVII) text in restriction proposals we acknowledge that this is typically redrafted at the decision making stage and therefore we tend to treat this in a quasi-legal sense to ensure that the implications of the restriction are readily understandable to stakeholders. We know that it is not possible to restrict 'export' under REACH, but use of PFASs (i.e. formulation with) into firefighting foams can be restricted and if it is not allowed to formulate a PFAS containing firefighting foam then it cannot be exported. This is different to a restriction on the placing on the market (of a firefighting foam) where formulation for export could legally continue. It is the formulation of the foams that would need to be restricted in order to realise a ban on export.

Please note that the intention of the restriction is focussed on either the formulation or the placing on the market of the firefighting foams themselves, not the use of PFAS 'ingredients' that could be used in firefighting foams as well as different types of products. Therefore, any unintended consequences for other products should not occur as a results of this restriction. However, based on feedback from stakeholders and also from RAC we acknowledge that the proposed restriction text can be misinterpreted in this regard to include a restriction on PFAS 'substances as such'. We will revise the wording (and supporting text) in subsequent cycles of the opinion to clarify this.

I hope that this helps. Please let me know if you'd like to discuss further.

Yours,

[Redacted]

PS. Please note that we also assessed a restriction option on 'export' in the recent PAHs in clay targets restriction.

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Commented [LS(6): If it is not allowed to formulate a PFAS containing FFFs, then it cannot be exported. We understand this argument; that it is why it is not needed to ban the exports

In addition, we refer to our comments "Your proposal also clearly refers to the ban on export of all PFAS substances as substances on their own for uses in FFFs. (1st condition of the proposal). It is difficult to understand how this can be practicable in a third country, if the third country does not have any agreement or is not bound by an international convention, especially since EU cannot control the uses in the third country since PFAS have any other uses except in FFFs."

Commented [LS(7): We would like to withdraw the additional risk option of banning the exports and keep only the RO2, as this option is not a legal option. Only legal options should be considered in your ROs (In addition, it is not in line with international agreements either, so your justification from the CSS is not accurate).

I can accept that you may wanted to study that option RO3 but it should be clear why you study it; however in that case you should have proposed the RO2 option, which is legal under current REACH

Commented [LS(8): However, you did not proposed any ban on the exports only ban on the placing on the market. There are only four options ROs that have to do with the PAHs threshold, if I am not mistaken

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