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Llywodraeth Cymru
Welsh Government

Welsh Government
Consultation Document

Proposals for implementing and enforcing a ban in
Wales on the manufacture and sale of cosmetics and
personal care products containing plastic microbeads

Date of issue: 16 October 2017
Action required: Responses by 08 January 2018

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Overview	The purpose of this consultation is to seek your views on our proposals on how to implement and enforce a ban on plastic microbeads in cosmetics and personal care products in Wales.
How to respond	Please complete the questionnaire at the end of the document. Responses can be submitted by email or post to the address below by 31 December 2017.
Further information and related documents	<p>Large print, Braille and alternative language versions of this document are available on request.</p> <p>Please see link to UK consultation which closed 28 February 2017 and Government Response: Microbeads Ban- UK Consultation</p>
Contact details	<p>Marine and Fisheries Division Welsh Government Suite 3, Cedar Court Haven's Head Business Park Milford Haven Pembrokeshire SA73 3LS</p> <p>Email: Marine@gov.wales</p>
Data protection	<p>How the views and information you give us will be used</p> <p>Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.</p> <p>The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We</p>

will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

Foreword by the Cabinet Secretary

I am pleased to launch this consultation to seek your views on our proposals for implementing and enforcing a ban in Wales on the manufacture and sale of cosmetics and personal care products which contain plastic microbeads.

The four UK administrations have agreed to introduce this ban, following the overwhelming support shown in the UK-wide consultation which closed on 28 February this year. I have already decided such a ban should take place in Wales and the purpose of this consultation is to seek your views on how the ban should be implemented and enforced.

Litter is a major issue for our seas and oceans. I am pleased we, along with the rest of the UK, are taking positive action to reduce the amount of plastic which ends up in our oceans.

The Welsh Government is already doing a lot to tackle marine litter through its 'Towards Zero Waste' strategy. Wales leads the UK in recycling and according to an independent study, is ranked second in Europe and third in the world. We recycle 75% of plastic bottles, compared with the UK as a whole which recycles 57%. I have also commissioned a study to address further ways to increase recycling and reduce littering. Recently we formed a Marine Litter Task and Finish group where stakeholders are currently working in partnership, to develop a marine litter action plan.

I am committed to implement an integrated policy-making approach which provides a framework for clean, healthy, safe, productive and biologically diverse coast and seas. This will help us to realise our ambition to improve the health and well-being of the people of Wales as set out in 'Prosperity for All', whilst ensuring more sustainable use of our seas.

Taking positive action to reduce the harmful discharge of microbeads into the sea supports the aims of the Marine Strategy Framework Directive (MSFD). MSFD sets the framework for how our seas are managed sustainably and contributes towards meeting our goal of achieving Good Environmental Status for our seas. I believe this ban will make a positive contribution to protect the marine environment and it is timely we plan to introduce this in 2018, which is Wales' Year of the Sea.

This consultation seeks your views on eight key questions. I very much value your opinion and I look forward to hearing what you have to say on this important matter.

Lesley Griffiths AM, Cabinet Secretary for Environment and Rural Affairs

Table of Contents

What is this consultation about?	6
Where are we now?	6
What does this ban mean for the business sector?.....	7
Preparing for compliance.....	7
Enforcement.....	8
Why is enforcement necessary?	8
Who will be the regulator?	8
Enforcement regime and powers for the regulator	9
Range of enforcement tools	9
Appeals	14
Next steps	15
Consultation Response Form	16

What is this consultation about?

Microbeads (small particles of plastic) are a common ingredient in many cosmetics and personal care products such as face scrubs and toothpastes, and may be used in other products, such as hand cleansers. They are washed down the drain but are too small to be completely filtered out in sewage treatment systems so a proportion is washed out into the marine environment.

In August 2017 the Cabinet Secretary for Environment and Rural Affairs took the decision to ban products containing plastic microbeads in cosmetics and personal care products in Wales. This decision followed a joint consultation by all four UK administrations (Wales, England, Scotland and Northern Ireland), which closed on 28 February 2017. The joint-UK consultation set out the scope for the microbeads ban, which was welcomed by the majority of respondents. Click [here](#) to read the summary of responses to the consultation.

All four UK administrations have now agreed to ban all rinse-off cosmetics and personal care products containing plastic microbeads by 2018.

Devolution offers each administration different legislative powers and an opportunity to embed implementation and enforcement into existing practices which align with established arrangements. For these reasons, we are consulting on how this ban will be carried out in Wales.

The purpose of this consultation is to seek your views on our proposals for implementing and enforcing this ban.

Where are we now?

We have been developing proposals for how the ban in Wales will be implemented and we will need to introduce Welsh secondary legislation to bring the ban into effect. Our ambition is to introduce the ban as quickly as possible in 2018 subject to scrutiny by the National Assembly for Wales and the wider legislative process. We are aiming to introduce a ban on manufacture and a ban on sale on the same date, on 30 June 2018.

The UK-wide consultation was accompanied by an Impact Assessment¹. We have further considered the potential impacts on businesses in Wales and our evidence suggests we have no manufacturers in Wales who will be affected by the ban. We understand the majority of Welsh manufacturers tend to focus on boutique, artisanal and organic products and do not use microbeads in their products.

Given the absence of Welsh manufacturers we propose to bring in a ban on manufacture and a ban on sale at the same time.

¹ An Impact Assessment on the anticipated impacts the microbeads ban will have on businesses is available at www.gov.uk/defra.

This ban is being rolled out across the whole of the UK and we have been working with the other UK Governments to maintain a consistency of approach where possible.

All four UK administrations (Wales, England, Scotland and Northern Ireland) aim to have the microbeads ban in place by the end of June 2018. Whilst England is intending to have a ban on manufacture commencing in January 2018, and the ban on sale commencing 30 June; Wales, Scotland and Northern Ireland are intending to implement the ban on both manufacture and sale at the same time on the 30 June. These timings may be subject to change pending outcomes of consultations, EU notification processes and legislative procedures.

Question 1. Do you agree with our understanding of potential impacts on businesses in Wales? If not, why?

What does this ban mean for the business sector?

Once the ban is in place, it will be a criminal offence for anyone to manufacture, sell or offer to supply any rinse-off cosmetic or personal care products which contain plastic microbeads in Wales. Products include, but are not limited to, exfoliating scrubs, industrial hand cleansers, shower gels and toothpastes.

The ban will apply to any manufacturer, retailer, wholesaler or distributor, supplying rinse-off cosmetics and personal care products which contain plastic microbeads. This ban will apply to any such product in Wales, regardless of whether it has been manufactured in the UK or imported from outside the UK.

It is our intention to include a due diligence defence in the event all reasonable steps had been taken to avoid the offence being committed.

Preparing for compliance

There has already been widespread voluntary action from the cosmetic industry to phase out microbeads in the UK, however, we understand there may be wholesalers and retailers who supply and stock such products. Our advice to manufacturers and retailers is to prepare for compliance now and plan ahead to hold minimal stocks of products which will be affected by this ban.

The ban on microbeads has received significant media attention and we are confident retailers will be aware of the ban coming into effect. However, we want to ensure the ban is well known and understood by all those affected and we intend to run a programme of education and awareness in advance of the ban being implemented.

Enforcement

Why is enforcement necessary?

The Welsh Government acknowledges many businesses comply with environmental regulations, and most strive to do so. However, those who disregard the law put at risk or actually harm the environment, spoil our quality of life, and undermine law-abiding businesses. Non-compliance can also give an unfair advantage over those who do comply.

The primary aims of our enforcement proposals are to bring people into compliance with the law and prevent harm being caused to the marine environment.

Once the ban is in place, it will be a criminal offence for anyone to manufacture, sell or offer to supply any rinse-off cosmetic or personal care products which contain plastic microbeads in Wales.

Alongside guidance and information for those affected, an enforcement regime will be introduced.

Who will be the regulator?

Local authorities have a range of regulatory functions including those under environmental and consumer legislation.

Trading Standards Services within local authorities are responsible for enforcing a wide range of laws governing products and services bought by consumers. Trading Standards officers give advice to businesses, investigate complaints, undertake inspections and test and sample products and services.

Trading Standards currently receive reports of non-compliance through the Citizens Advice Consumer Service. They then follow up with enforcement action where appropriate. This mechanism is already in place and would be used to receive any reports of non-compliance with the microbeads ban.

Given the existing mechanisms in place and their expertise in delivering similar enforcement regimes the Welsh Government considers Trading Standards are best placed to enforce the microbeads ban.

Question 2. Do you agree Trading Standards are the most appropriate body to enforce a ban on microbeads? If not, why?

Enforcement regime and powers for the regulator

We propose to introduce an enforcement regime which includes civil (non-criminal) sanctions. Civil sanctions will allow the regulator to distinguish between those who are striving to comply and those who disregard the law. This flexibility will enable the regulator to impose a range of sanctions depending on the circumstances of the offence.

The sanctions will include a mix of undertakings, enforcement notices and monetary penalties without having to go to court.

We believe our proposed enforcement regime is flexible and proportionate and will ensure the environment and human health are protected, when tackling non-compliance.

Our proposals would provide the regulator with the following range of tools to enforce the ban:

Powers of Entry

In carrying out their enforcement role it may be necessary for the regulator to enter premises. It is proposed the powers of entry shall include, but shall not be limited to, powers:

- to enter premises at any reasonable time with or without equipment and materials;
- to carry out examinations and investigations upon entry to the premises as necessary. This may include taking measurements and photographs;
- to require the production of documents or computer records to assist with the investigation;
- to take samples for analysis or testing. These samples may be used as evidence in any proceedings for an offence;
- to direct that the premises, or anything in them, remain undisturbed.

Range of enforcement tools

The enforcement tools are available under the Regulatory Enforcement and Sanctions Act 2008 (RES) which provides for a well tested and reasonable enforcement regime.

Table 1 – Range of enforcement tools

<p>Enforcement undertakings: These enable a person, which a regulator reasonably suspects of having committed an offence, to give an undertaking (a promise) to a regulator to take one or more corrective actions set out in the undertaking.</p> <p>Third party undertaking: These enable a person who has received a regulator's notice of intent to impose a variable monetary penalty, for example, to give a commitment to take action to benefit a third party affected by the non-compliance.</p> <p>Variable monetary penalty (VMP): A requirement to pay a monetary penalty of an amount determined by the regulator reflecting the circumstances of the offence.</p> <p>Compliance notice: A requirement to take specified steps within a stated period to ensure an offence does not continue or happen again.</p> <p>Notice of intent: A notice of what action is proposed; is issued before imposing a variable monetary penalty or compliance notice.</p> <p>Final notice: A final notice of what action is proposed.</p> <p>Non-compliance penalty: Failure to comply with an undertaking or a compliance notice will result in a non-compliance penalty.</p> <p>Stop notice: A requirement for a person to stop carrying on an activity described in the notice until it has taken steps to come back into compliance.</p> <p>Criminal proceedings: Failure to comply with a final notice or stop notice may result in the case going to court.</p> <p>Enforcement costs recovery notice: A notice detailing what costs the regulator seeks as reimbursement for investigation and administration.</p>

Enforcement undertakings

Where an offence has been committed one option will be for the offender to offer to put things right, knowing failure to do so will mean prosecution. The promise must be accepted by the regulator to have legal effect. This kind of promise is known as an undertaking.

In the case of an enforcement undertaking the offender can agree to take action to ensure an offence does not occur or recur. This action may include paying a sum of money or taking action which will secure benefit to the environment to redress damage caused by the offence.

Where a notice of intent has been served a person may offer to carry out actions or pay a sum of money by way of compensation to benefit a third party affected by the offence.

When the regulator is satisfied an enforcement undertaking has been complied with they will issue a completion certificate.

If an undertaking is not complied with the regulator may serve a variable monetary penalty notice, compliance notice, non-compliance penalty, stop notice or bring criminal proceedings.

Variable Monetary Penalties

Where an offence has been committed the regulator will be able to impose a monetary penalty. Imposing a penalty removes the benefit of breaking the rules and deters future non-compliance. Only one penalty can be imposed for the same issue at the same time. The level of the monetary penalty will be determined by the regulator, up to a maximum amount of £5000 for non-compliance with the ban, and a higher penalty, given the nature of the offence, of £20,000 for providing false or misleading information, or obstructing or failing to assist an enforcement officer.

Table 2 – maximum variable monetary penalties

Issue	Maximum Penalty Amount
Manufacture, supply or sale of rinse-off cosmetic or personal care product containing plastic microbeads.	£5,000
Failing to supply records relating to the manufacture, supply or sale of rinse-off cosmetic or personal care product containing plastic microbeads	£5,000
Giving false or misleading information to an enforcement officer	£20,000
Obstructing or failing to assist an enforcement officer.	£20,000

The aim of the microbeads ban is ultimately to protect the marine environment and we have determined the level of monetary penalties to be appropriate and sufficient to serve as a deterrent to manufacturing or selling products containing plastic microbeads.

The level of variable monetary penalty will be determined by the regulator.

The parameters they will consider when setting a proportionate level of penalty are:

- the size of the business;
- scale of the offence;
- the impact on the environment;
- the level of financial benefit gained from the offence; and
- any other relevant matters.

Before imposing a variable monetary penalty the regulator may require the person to provide information to establish the amount of any financial benefit arising as a result of the offence.

Guidance will be published establishing guidelines for the regulator when determining the level of penalty to be applied, within the maximum penalty amount. Furthermore, we propose a variable monetary penalty will not exceed 10% of the annual turnover of the business, to avoid disproportionate effects.

The maximum level of penalties is consistent with those of the single-use carrier bag charge in Wales, introduced in October 2011. We consider it is appropriate to apply the same amount because the microbeads ban will apply to a similar range of businesses of different sizes. The amount of penalty is considered to be set high enough to deter small to medium size businesses and we consider larger businesses to be deterred by the combination of a monetary penalty and published enforcement notices which might impact on the reputation of their business. Having variable penalties as opposed to fixed penalties will ensure smaller businesses are protected and penalties are proportionate.

We are keen to hear your views on whether the level of monetary penalties is appropriate, in the context of the wider enforcement tools available.

Compliance notice

Where an offence is being or has been committed we would encourage businesses, in the first instance, to discuss with the regulator how they can correct the issue and become compliant. If these discussions cannot resolve the issue or the regulator may serve a compliance notice.

A compliance notice is intended to correct a specific issue and tells a business the steps it must take to fix it. It may set out a specified time frame in which these steps need to be taken to achieve compliance and ensure the offence does not continue or re-occur.

It is intended where a compliance notice is issued, it may also be issued with a variable monetary penalty at the same time, if considered necessary by the regulator

Notice of Intent

Before imposing a compliance notice or variable monetary penalty, the regulator will serve a notice of what action they propose – this is a notice of intent.

A notice of intent must include grounds for the compliance notice or variable monetary penalty, requirements of the compliance notice and if applicable the amount of penalty to be paid.

The notice will also give information as to the right to make representations and objections to the regulator within 28 days.

Final Notice

Following expiry of the 28 day period for making representations and objections in relation to the notice of intent, the regulator will decide whether to impose the requirements as detailed in the notice of intent. If the regulator decides to proceed then this will be detailed in the final notice.

A compliance final notice will include grounds for the notice, what steps are necessary and timescale in which they should be completed, rights of appeal and consequences of failing to comply with the notice.

A final notice for a variable monetary penalty will include the grounds for the penalty, the amount to be paid and how to make a payment, the period in which the payment must be made, rights of appeal and consequences of failing to comply with the notice.

Non-compliance penalty

If a person fails to comply with a compliance notice or an undertaking, the regulator may serve a notice imposing a monetary penalty (non compliance penalty).

The amount of the penalty will be determined by the regulator, and will be a percentage of the costs of fulfilling the remaining requirements of the compliance notice or third party undertaking and may, if appropriate, be 100%.

If the requirements of the compliance notice are complied with or a third party undertaking is fulfilled before the time set for payment of the non-compliance penalty, the penalty would not be payable.

Stop Notice

A stop notice is a notice prohibiting a person from carrying on an activity specified in the notice, until the person has taken the necessary steps specified in the notice.

The regulator may be able to serve a stop notice if a person's activity presents (or is likely to present) a significant risk of causing harm to the environment and commits an offence under the regulations or is likely to commit an offence under the regulations.

A stop notice will include information as to the grounds for serving the notice, steps the person must take to comply, rights of appeal and consequences of non-compliance.

When the regulator is satisfied a person has taken the steps specified in a stop notice they will issue a completion certificate. Once the completion certificate has been issued the stop notice ceases.

Should a stop notice be subsequently withdrawn, or an appeal against the stop notice or non-issue of a completion certificate is successful, then the regulator will be liable to pay compensation costs to the person for loss suffered as a result of the stop notice.

Criminal Proceedings

The civil sanctions regime outlined above is to encourage compliance with the microbeads ban. If a person fails to comply with a final notice or stop notice criminal proceedings may be brought in.

Enforcement cost recovery notices

The regulator may serve a notice requiring a person to pay costs incurred as part of an investigation and administration costs, which may include costs of obtaining expert advice (including legal advice).

The enforcement cost recovery notice will specify the grounds for imposing the notice, the amount to be paid, how payment must be made and period in which it must be made, rights of appeal and consequences of failure to comply.

We believe this enforcement toolkit and level of monetary penalties is sufficient to act as a deterrent and is appropriate and reasonable for this ban. The enforcement regime including the level of penalties will be kept under review.

Question 3. Do you agree this enforcement regime and the approach is reasonable and proportionate? If not, why?

Question 4. Do you agree with the level of monetary penalties? If not, why?

Appeals

To ensure the enforcement regime will be used fairly and in accordance with good enforcement principles, and the enforcement authority is accountable for its decisions, an appeals mechanism will be established.

It is proposed appeals will be made to the First-tier Tribunal (FTT). The General Regulatory Chamber of the FTT is the most appropriate as this covers the environment jurisdiction.

If a person disagrees with the content within a notice of intent they will have 28 days to make representations and objections to the regulator.

If following the notice of intent, a final notice or monetary penalty is issued, any appeal would need to be done in writing to the FTT.

Appeals would be made to the FTT in relation to the imposition of:

- Final notice (compliance or variable monetary penalty)
- Stop notice;
- Non-compliance penalty

The appeals mechanism would also allow for appeals to be made for the following reason:

- non-issue of completion certificate in relation to stop notices;
- non-issue of certificates in relation to enforcement undertaking;
- compensation decision;
- or
- enforcement cost recovery.

We intend for appeals to follow the rules and procedures of the FTT General Regulatory Chamber. The FTT rules and procedures² provide a 28 day window from the time the civil sanction is received for an appeal to be lodged with it. It is normal practice for the burden of proof in an appeal hearing to lie with the regulator – they will have to prove to the panel their decision was reasonable.

Grounds for appeal will include, but may not be limited to:

- decision based on error of fact or wrong in law
- decision is unreasonable or unfair
- amount of penalty is unreasonable
- steps specified in notice are unreasonable or unfair
- person has not committed an offence.

The First-tier Tribunal may withdraw, confirm or vary the requirement or notice and provide the enforcement body with their final decision.

Question 5. Do you agree with the proposals for the appeals mechanism? If not, why?

Next steps

Following this consultation we will consider responses and take these into account when making the Statutory Instrument (the legislation). Once all responses have been considered a Government Response will be published on our website.

In line with legislative processes, the European Union and World Trade Organisation will be notified of our intention to make this legislation. These notifications will give other Member States and third Countries the opportunity to comment on our proposals.

The draft Statutory Instrument will be published for two weeks giving further opportunity to comment on draft legislation in 2018. This will be published in the London Gazette and the Western Mail.

Our intention is to lay legislation to bring the ban into effect on 30 June. This date may be subject to change depending on the outcome of the consultation and required notification and legislative processes detailed in this consultation document.

² <https://www.gov.uk/guidance/environmental-fines-or-notices-appeal-against-a-regulator>

Consultation Response Form

Your name:

Organisation (if applicable):

email / telephone number:

Your address:

General Questions

1. Please choose which of these best represent you: (tick one only)

- Cosmetics / personal care product manufacturer
- Cosmetics / personal care products retailer
- Cosmetics / personal care products consumer
- Environmental non Government Organisation
- Local authority/council
- Legal organisation
- Other

Question 1. Do you agree with our understanding of potential impacts on businesses in Wales? If not, why?

Question 2. Do you agree Trading Standards are the most appropriate body to enforce a ban on microbeads? If not, why?

Question 3. Do you agree this enforcement regime and the approach is reasonable and proportionate? If not, why?

Question 4. Do you agree with the level of variable monetary penalties? If not, why?

Question 5. Do you agree with the proposals for the appeals mechanism? If not, why?

Further questions

Question 6: We would like to know your views on the effects banning rinse-off

products containing plastic microbeads would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

Question 7: Please also explain how you believe the proposed policy could be formulated or changed so as to:

- have positive effects or increased positive effects on opportunities for people to use the Welsh language and to treat the Welsh language no less favourably than the English language;
- offer no adverse effects on opportunities for people to use the Welsh language and to treat the Welsh language no less favourably than the English language.

Question 8: We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them:

Please enter here:

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: