



Department
for Environment
Food & Rural Affairs



Department for
Business, Energy
& Industrial Strategy

Consultation on the proposed Control of Mercury (Enforcement) Regulations 2017

Summary of responses and government response

December 2017



The Scottish
Government
Riaghaltas na h-Alba



Llywodraeth Cymru
Welsh Government



Department of
Health

An Roinn Sláinte
Mánnystrie O Poustie

Department of
**Agriculture, Environment
and Rural Affairs**



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1. Introduction

This document provides a summary of responses to a Defra-led consultation on the proposed secondary legislation, the Control of Mercury (Enforcement) Regulations 2017.

This consultation ran for four weeks from 23 October to 21 November 2017.

1.1 Purpose of the consultation

The purpose of the consultation was to seek stakeholders' views on government's proposed approach to the implementation of EU Regulation 2017/852 on Mercury. It was not a consultation on the provisions in the EU Regulation.

Given the above, and also that this consultation was seen as being of interest primarily to a specific group of stakeholders (listed on the consultation webpage), Defra felt that a four week consultation period was proportionate.

1.2 EU Regulation 2017/852 on Mercury

[EU Regulation 2017/852](#) was adopted by Member States on 17 May 2017 to enable ratification of the United Nations' Minamata Convention on Mercury. As an EU Regulation, its provisions will be directly applicable in UK law. The provisions will therefore fully come into force within the UK from the date on which they apply.

What the EU Regulation does

EU Regulation 2017/852 provides a legislative framework with provisions concerning:

- exports of mercury, mercury compounds and specified mixtures of mercury,
- imports of mercury and specified mixtures of mercury,
- export, import and manufacture of specified mercury-added products,
- the production of new mercury-added products,
- the development of new manufacturing processes using mercury,
- the use and interim storage of mercury,
- the use of mercury in artisanal and small-scale gold mining,
- the use of mercury in dentistry,
- the designation of mercury from specified sources as waste,

- the temporary and permanent storage of mercury waste, and
- reporting on the movement, temporary and permanent storage of mercury waste.

The EU Regulation also repeals a previous mercury regulation (Regulation (EC) No. 1102/2008), which bans exports of metallic mercury and certain mercury compounds and requires the safe storage of metallic mercury.

When it will apply from

Most of the provisions in EU Regulation 2017/852 will apply from 1 January 2018 but certain provisions will only do so from a later date. In particular, dental provisions listed under Article 10 of the EU Regulation start to apply from the 1 July 2018.

1.3 Proposed UK Control of Mercury (Enforcement) Regulations 2017

Defra ministers, in agreement with ministers in the devolved administrations, decided to introduce a single set of UK-wide regulations that would enable enforcement by the relevant authorities in each administration. This approach is intended to make UK implementation of EU Regulation 2017/852 as effective, simple to understand and easy to comply with, as possible. The proposed UK Regulations would also repeal the UK, Mercury Export and Data (Enforcement) Regulations 2010.

Further details of the proposed UK approach to implementing EU Regulation 2017/852 were outlined in Part III of the consultation document.

1.4 Who responded

In total, 34 responses were received to the consultation.

27 responses were received to the consultation questionnaire;

- 5 were from industry (4 responses from individual businesses and 1 from a trade association);
- 1 was from a heritage organisation;
- 8 were from dental professionals;
- 3 were from dental advocacy groups, with two responses from the same group being pooled;
- 2 were from dental associations, with 1 representing the dental industry; and
- 8 were from individuals.

We also received 7 emails in response to the consultation, which we have included where possible in the summary and analysis below. A list of the organisations that responded to the consultation is included as Annex A.

2. Summary of responses

2.1 Questionnaire responses

The following section gives a summary of the responses given to each of the questions.

Q2. Do you have any comments on the proposed enforcement authorities for the provisions detailed in Section 3.2.1?

Of the 22 responses to this question, 9 (41%) responded **'yes'** and 13 (59%) responded **'no'**.

Six of the comments received, which were from dental professionals, advocacy groups and an individual, related to provisions within EU Regulation 2017/852 on the use of mercury amalgam in dentistry. None of these comments addressed the proposed UK enforcement authorities for the provisions detailed in Section 3.2.1.

Two comments were received from individual businesses, with the main points being:

- That the enforcement authorities proposed were appropriate and it was logical to continue with and expand the current enforcement regime.
- That the environmental regulators should engage with the waste management sector to obtain relevant intelligence.

An individual also commented that enforcement authorities would need sufficient funding to ensure they can carry out their functions under the Regulations.

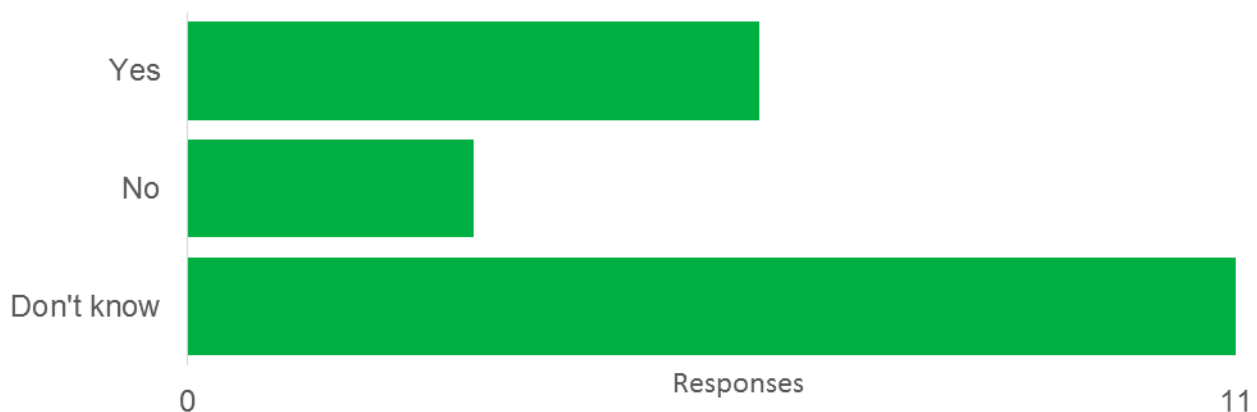
Q3. Do you have any specific views or comments on the enforcement in Northern Ireland of the requirement for an amalgam separator and the provisions restricting the import of mercury and mixtures of mercury?

Of the 21 responses to this question, 2 (10%) responded **'yes'** and 19 (90%) responded **'no'**.

Both of the comments received were from dental advocacy groups and the main points were:

- That there was a need to ensure that mercury amalgam from extracted dental fillings do not enter the water supply.
- That the requirement for an amalgam separator in Northern Ireland should be enforced by the Health and Safety Executive.

Q4. Do you consider that the powers detailed in Section 3.2.3 would provide the environmental regulators with appropriate powers to effectively enforce the UK Regulations?



Out of 20 responses to this question, 6 (30%) responded 'yes', 3 (15%) responded 'no' and 11 (55%) responded 'don't know'.

Of the 6 that responded '**yes**', 3 were individual businesses and 3 were dental professionals. Further explanation was given by three of these respondents:

- A dental professional was of the understanding that the environmental regulators already had the enforcement powers proposed in the consultation as outlined in section 3.2.3.

From the individual businesses, the main points were:

- That the enforcement powers detailed in section 3.2.3, including the use of civil penalties, were consistent with other areas of environmental regulation.
- Civil monetary penalties for non-compliance as set out in section 3.2.3 should not be lower than the cost of legally complying with the Regulation to avoid non-compliance being viewed as a less costly option.

Of the 'no' responses, 2 were from individuals and the other was from an advocacy group. Further explanation was given by two respondents:

- From the advocacy group, the comments provided related to the extent of the dental provisions within the EU Regulation, rather than whether the enforcement powers outlined in section 3.2.3 were appropriate.

From one of the individual respondents, the main points were:

- The approach of having both criminal and civil penalties available was sensible.
- It was not clear whether the civil penalties for England and Wales detailed in section 3.2.3 would be within the Regulatory and Enforcement Sanctions (RES) Act framework.
- That Enforcement Undertakings should be considered in the civil penalties proposed for England and Wales.

For the 11 responses of 'don't know', further explanation was given by 1 of the advocacy groups. They felt that the appropriateness of the enforcement powers detailed in 3.2.3 would depend on their interpretation by the regulators.

Q5. Do you consider that the powers detailed in Section 3.2.4 would provide Border Force with appropriate powers to assist the environmental regulators in the enforcement of the UK Regulations?



Out of 20 responses to this question, 4 (20%) responded 'yes', 1 (5%) responded 'no' and 15 (75%) responded 'don't know'.

Of the 4 that responded **'yes'**, 3 were individual businesses and the other was a dental professional. Further explanation was given by 3 of these respondents:

- A dental professional had the understanding that Border Force already had the powers we proposed to provide them in section 3.2.4.

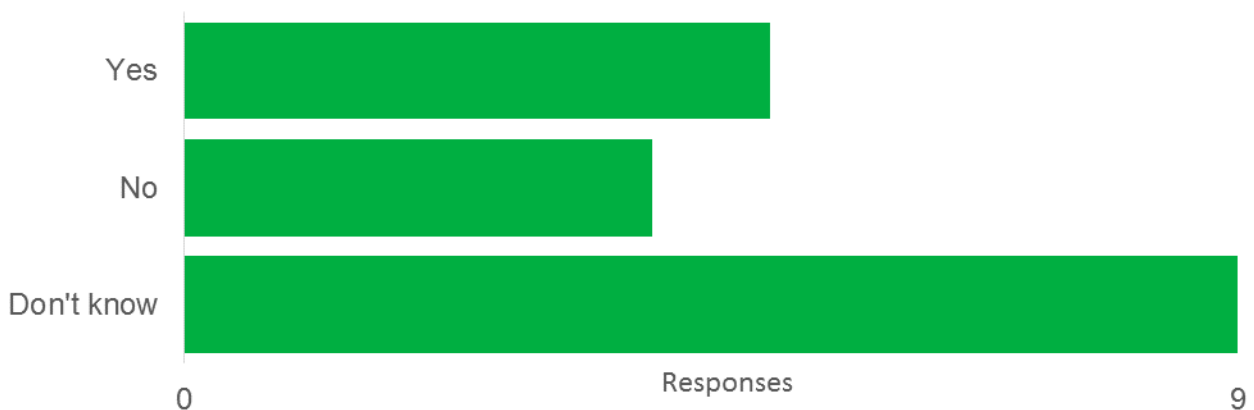
From the individual businesses, the main points were:

- The powers and approach detailed in section 3.2.4 were consistent with other areas of environmental regulation.
- It was important that action in relation to imports and exports is prompt and that there would also be a need for Border Force to be trained and equipped to do this.

The 1 **'no'** response was received from the same advocacy group as question 4. The explanation given was again in relation to the extent of the dental provisions within the EU Regulation, rather than whether the powers outlined in section 3.2.4 were appropriate to allow Border Force to assist in enforcement.

For the 15 responses of **'don't know'**, no further explanation was given.

Q6. Do you think the proposed approach to criminal enforcement is appropriate and proportionate?



Out of 19 responses to this question, 6 (32%) responded **'yes'**, 4 (21%) responded **'no'** and 9 (47%) responded **'don't know'**.

Of the 6 that responded **'yes'**, 2 were individual businesses, 2 were from dental professionals, 1 was from an advocacy group and the other was from an individual. Further explanation was given by 4 of these respondents:

- A dental professional and advocacy group explained that their response was in light of the seriousness of the issue and that there was a continuing problem with removed amalgam entering the drainage system.

- The individual business viewed the proposed approach to criminal enforcement as being broadly consistent with other areas of environmental regulation.
- The individual respondent stated that the proposed approach to criminal enforcement was appropriate and proportionate, provided civil penalties would be used as an alternative when suitable.

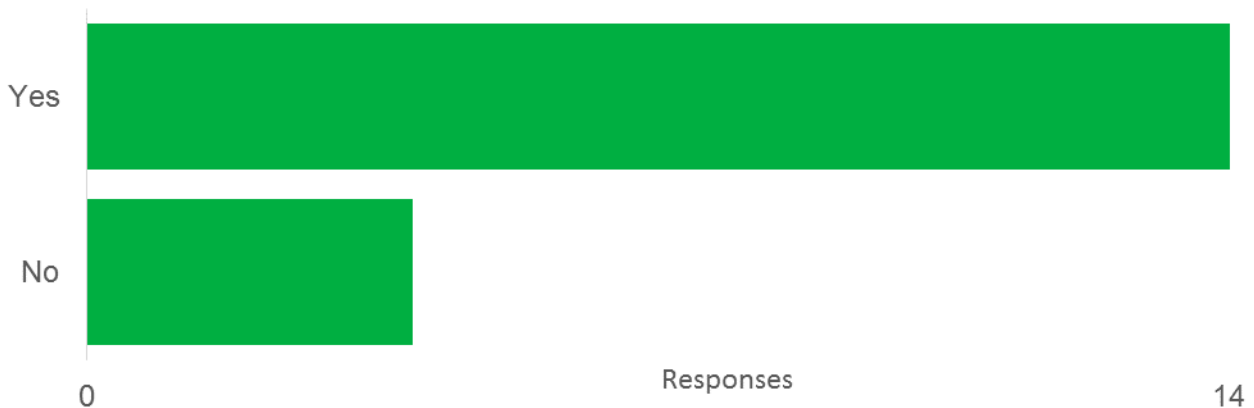
Of the 4 that responded ‘no’, 2 were dental professionals, 1 was an advocacy group and the other was an individual business.

They all gave further explanation:

- Dental professionals felt the criminal offences proposed in section 3.2.5 did not represent a proportionate response, suggesting fines and education would be more appropriate in the first instance.
- The individual business was concerned that a failure to provide information could result in a criminal conviction rather than a civil sanction, such as a monetary penalty.
- The advocacy group felt that the proposed approach to criminal enforcement did not appropriately reflect the serious and persistent nature of mercury pollution.

For the 9 responses of ‘don’t know’, no further explanation was given.

Q7. Do you consider that the proposed approach to monetary penalties is appropriate? If not, what do you consider to be more appropriate and why?



Out of 18 responses to this question, 14 (78%) responded ‘yes’ and 4 (22%) responded ‘no’.

Of the 14 that responded ‘yes’, 4 were dental professionals, 4 were individual businesses, 2 were from advocacy groups, 2 were from individuals, 1 was from a heritage organisation and the other was a trade association.

Of the 4 that responded **'no'**, 2 were dental professionals, 1 was an advocacy group and the other was an individual. They all gave further explanation:

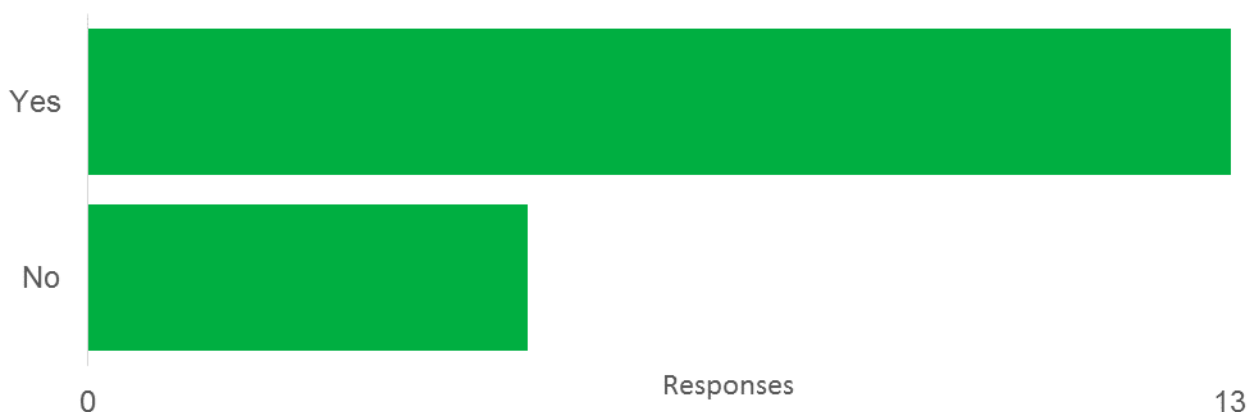
From the dental professionals and advocacy group, the main comments were:

- That the monetary penalties proposed in section 3.2.5 did not appropriately reflect the seriousness of the issue.
- The use of monetary penalties may not be a sufficient disincentive for companies.

From the individual, the main comments were:

- Would the proposed monetary penalties be applied to small businesses?
- That the standard of proof to be applied when civil sanctions are imposed was not clear.
- If the Regulatory Enforcement and Sanctions (RES) Act framework for civil penalties is not being used, it should be stated that any income from civil penalties would be paid into the Consolidated Fund.

Q8. Do you consider that the proposed approach on appeals is appropriate and proportionate?



Out of 18 responses to this question, 13 (72%) responded 'yes' and 5 (28%) responded 'no'.

Of the 5 that responded **'no'**, 2 were dental professionals, 2 were individuals and the other was an advocacy group. Further explanation was given by 3 of these respondents:

From a dental professional and advocacy group, the main comments were:

- On the appropriateness of the right to appeal rather than the appeals approach outlined in section 3.2.7.
- That there was not enough detail in the consultation to make a judgement. From the individual, the main comments were:
- That the proposed approach of appeals going to the First Tier Tribunal was sensible and that the grounds provided in the consultation document follow those contained in the RES Act framework. However, if an appellant challenges whether there was a breach under the Regulations, it should be clearer that the burden to provide proof of any non-compliance would sit with the regulator.

Q9. Do you have any views or comments on the appropriate UK enforcement authorities for imports of mercury?

Out of 18 responses to this question, 4 (22%) responded 'yes' and 14 (78%) responded 'no'.

All of the additional comments received, of which 2 were from dental professionals, 1 was from an advocacy group and the other was from a heritage organisation, did not address whether the proposed UK enforcement authorities for handling import applications as outlined in section 3.2.8 were appropriate. The views expressed focussed on the import provisions within the EU Regulation, and in one case requested further clarification on the provision within the EU Regulation.

Q10. Are you involved in the import of mercury or mixtures of mercury?



Out of 19 responses to this question, 2 (11%) responded 'yes' and 17 (89%) responded 'no'.

Of the 2 that responded **'yes'**, 1 was a heritage organisation and the other was an individual business.

Q11. Do you agree with our assessment that there are relatively few UK imports of mercury and mixtures of mercury?



Out of 18 responses to this question, 7 (39%) responded 'yes', 2 (11%) responded 'no' and 9 (50%) responded 'don't know'.

Of the 7 that responded **'yes'**, 4 were dental professionals, 1 was an individual business, 1 was a heritage organisation and the other was a trade association. Further information was given by 1 respondent:

- The heritage organisation noted that museums occasionally seek to acquire mercury-containing historic objects from outside of the EU.

For the 2 respondents that answered 'yes' when asked whether they were involved in the import of mercury or mixtures of mercury (Q10), 1 agreed with the assessment that there are relatively few UK imports of mercury and mercury mixtures and the other 'didn't know'.

Of the 2 that responded **'no'**, 1 was an advocacy group and the other was an individual business. They both gave further information:

- The advocacy group believed that relatively large quantities of mercury amalgam were imported for dentistry.
- The individual business speculated that if mercury and mercury-contaminated waste treatment facilities were built in the UK then it would be appropriate to allow import of mercury and mercury-containing wastes for these facilities.

For the 9 responses of **'don't know'**, no further information was given.

Q12. Do you have any views on what would be a reasonable fee to charge for determining an application to import mercury or mixtures of mercury?

Of the 18 responses to this question, 4 (22%) answered 'yes' and 14 (78%) responded 'no'.

Of the 4 that responded 'yes', 2 were individual businesses, 1 was a heritage organisation and the other was a dental professional. Views on what a reasonable fee would be were given by all of these respondents:

- The dental professional proposed the fee be equivalent to two hours salary.
- The heritage organisation suggested that museums be exempt from paying any fee.

From the individual businesses, the main views were:

- That the fee for determining an application for import should be considered under the same process and charging scheme as the Transfrontier Shipments of Waste Regulations.
- That a fee similar to that charged for a minor technical variation to an Environmental Permit, i.e. around £1,300, would be reasonable.

Q13. Are you aware of any new products or new manufacturing processes under development that use mercury?



Of the 18 responses to this question, all (100%) responded 'no'. Further information was provided by 2 of those that responded.

- An individual business that has historically manufactured products that use mercury, confirmed that they would not be developing any new products that use mercury after 1 January 2018.
- An advocacy group suggested that if there were no other alternatives to using mercury its use in a device should be considered acceptable, provided that there is no exposure to the public.

Q14. Do you have any views on what would be a reasonable fee to charge for assessing whether a notification for a new mercury-added product or a new manufacturing process using mercury meets the required criteria?

Out of the 18 responses to this question, 6 (33%) answered 'yes' and 12 (67%) responded 'no'.

Of the 6 that responded 'yes', 3 were individual businesses, 2 were dental professionals and the other was an advocacy group.

From the individual businesses, the main views expressed were:

- That both the fee charged and the assessment procedure should mirror those for the Industrial Emissions Directive (IED), as a similar technical impact assessment would be needed. It was also suggested that if a process did fall under both the proposed Regulations and the IED, that charging for both should be avoided.
- That no new mercury-added products or processes were perceived as being developed and therefore a fee for assessing these would not be required.
- That the fee should be similar to that charged for a minor technical variation to an Environmental Permit, i.e. around £1,300.

From the dental professionals, the main views expressed were:

- That the fee should be the equivalent of four hours salary.
- Any fee should be sufficiently high to act as a deterrent for producing new mercury-added products and processes. This view was echoed by the advocacy group.

Q15. Do you have any views on whether the environmental regulators have the appropriate skills to assess whether a notification for a new mercury-added product or a new manufacturing process using mercury meets the assessment criteria?

Out of the 18 responses to this question, 6 (33%) answered 'yes' and 12 (67%) responded 'no'.

Of the 6 that responded 'yes', 3 were individual businesses, 2 were dental professionals and the other was an individual.

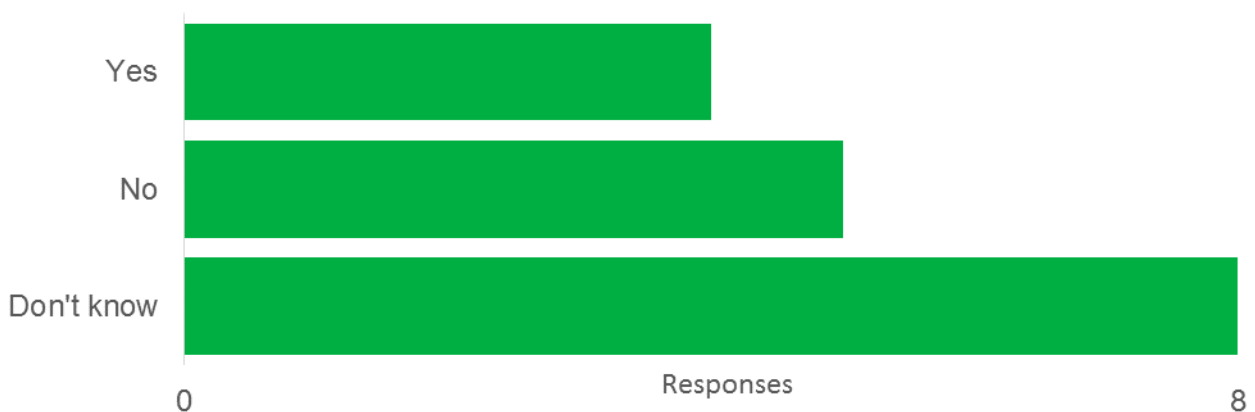
From the individual businesses and dental professionals the main views were:

- That the environmental regulators should be carrying out the assessment.
- The environmental regulators would need to ensure they had the required level of expertise to conduct the assessments.

From the individual, the main view expressed was:

- That the environmental regulators need to have an unbiased perspective along with the necessary expertise.

Q16. Do you consider that a report from an independent expert would be a more effective and efficient method of assessing notifications?



Out of 17 responses to this question, 4 (24%) responded 'yes', 5 (29%) responded 'no' and 8 (47%) responded 'don't know'.

Of the 4 that responded 'yes', 1 was an individual business, 1 was a dental professional, 1 was an advocacy group and the other was an individual.

Views were provided by one respondent that answered 'yes':

- An advocacy group mentioned the need for any independent expert to be unbiased.

Of the 5 'no' responses received, 2 were individual businesses, 2 were dental professionals and the other was an individual.

Views were provided by 3 of the respondents that answered 'no':

The main views expressed were:

- That the environmental regulators should have training and expertise to allow the assessments to be carried out in-house.
- There may be conflicts of interest for external independent experts.

Q17. Do you have any comments on the proposed approach to the dental provisions in the EU Regulation?

Out of 26 responses to this question, 18 (69%) responded 'yes' and 8 (31%) responded 'no'

Of the 18 that responded 'yes', 7 were dental professionals, 3 were advocacy groups, 2 were dental associations and the other 6 were individuals.

Six of the comments received, from an advocacy group and individuals, contained broadly similar content, the key points of which have been included below.

From a number of the dental professionals, the main comments were:

- Mercury amalgam can be the best treatment option for many, either based on the circumstances or the alternatives available.
- That the dental provisions within the EU Regulation were already covered, either in the Minamata Convention or elsewhere.
- The EU Regulation doesn't go far enough to address the environmental impact of dental amalgam.

From the advocacy group and other dental professionals, the main comments were:

- The exception in Article 10(2) of the Regulation relies on arbitrary judgement and is difficult to enforce.
- It was not clear where future UK guidance regarding Article 10(2) would come from.
- That mercury amalgam should not be used in children and there should be greater control over its use.

- Better training around the alternative materials available should be provided.

From the dental associations, the main comments were:

- That dental amalgam remains a safe and effective dental restorative material with properties such as cost effectiveness, ease of use and durability in a range of clinical situations.
- That under Article 10(2) of the EU Regulation there is sufficient freedom for dentists to exercise their clinical judgement and act in the best interests of each patient.
- Any national plan for the phase-down of dental amalgam should recognise the role of alternative materials and there was concern that this has not been considered in the proposals. It was also felt that no coherent national plan for England had been developed.
- It was unclear how the phase down of amalgam would be measured in the UK.
- As the use of amalgam restorations is to be restricted in children under 15 years, funding for the provision of fissure sealants should be extended up to this age across the UK.

Q18. Do you have any views on the best approach to gathering intelligence on non-compliance with the amalgam separator requirement in England?

Out of 20 responses to this question, 6 (30%) responded 'yes' and 14 (70%) responded 'no'.

Of the 6 that responded 'yes', 2 were dental professionals, 1 was an advocacy group, 1 was a dental association, 1 was a private individual and the other was an individual business.

From the 2 dental professionals and the advocacy group, the main views expressed were:

- The Care Quality Commission (CQC) are best placed to provide this intelligence following practice inspections.
- Their understanding was that checking for amalgam separators in dental practices within England was already part of the current practice inspections undertaken by the CQC.

From the individual business, the main view expressed was:

- That intelligence on the presence of amalgam separators in practices across England could be collected through engagement with the healthcare waste management sector.

From the dental association, the main view expressed was:

- As an environmental issue, the Environment Agency should have responsibility for ensuring that dental practices comply with the requirement to have an amalgam separator in England.

Q19. Do you have any views on the body or bodies that are best placed to enforce and inspect the amalgam separator requirement in Northern Ireland and the best approach to gathering intelligence on non-compliance?

Out of 19 responses to this question, 3 (16%) responded 'yes' and 16 (84%) responded 'no'.

Of the 3 that responded 'yes', 1 was an advocacy group, 1 was a dental association and the other was an individual business.

From the advocacy group, the main view was:

- That local authority health and safety teams were best placed to enforce the amalgam separator requirements within Northern Ireland.

From the dental association, the main view was:

- That their counterparts in Northern Ireland were currently exploring options with the Department of Health and the Health and Social Care Board.

From the individual business, the main view was:

- Intelligence on the presence of amalgam separators in practices across Northern Ireland could be collected through engagement with the healthcare waste management sector.

2.2 Email responses

We received a number of contributions by email, which addressed both the questions asked within the consultation and the provisions within the EU Regulation.

Two individual business involved in the restoration of mercury-containing instruments raised the following points:

- They wanted to clarify that the listing of non-electronic measuring devices in Annex II of the EU Regulation would not prevent the repair of antique mercury-containing instruments, as these would be exempt if 50 years old on 3 October 2007, similar to the restrictions on mercury in Annex XVII of the EU Registration, Evaluation, Authorisation & restriction of CHemicals (REACH) Regulation
- That licensing the use of mercury rather than directly regulating mercury import and export might present a better approach for controlling mercury.

An advisory service for schools outlined their understanding of how the supply and use of mercury for schools would be affected by the EU Regulation.

A trade association representing the offshore oil and gas industry sought further clarification on the duties and scope of BEIS / OPRED Inspectors in terms of gathering evidence at offshore installations of operator compliance with the EU Regulation's obligations, for the purpose of providing additional information to the environmental regulators to support their respective enforcement functions (under the Control of Mercury (Enforcement) Regulations 2017) in relation to the relevant marine areas.

A dental faculty commented that they were broadly supportive of the proposals within the consultation document but that further clarification on the development of new mercury containing materials would be useful.

The General Dental Council (GDC) requested further detail on what was proposed for section 3.3.1 of the consultation document, in particular enforcement of Articles 10(1) and 10(2) in England.

The Care Quality Commission (CQC) commented that:

- They are pleased to see pragmatic proposals that recognise the impact regulatory activity can have on individual professionals.
- The EU Regulation will be added to the list of legislation in their dental specific guidance for providers and they welcomed the commitment by the Department of Health to ensure guidance is made available in England.
- They also outlined the implication of their regulatory and inspection framework in respect to Articles 10(1), (2) and (4).

A Health and Social Care Trust for the South East of Northern Ireland responded that they had considered the consultation and had no further comments.

3. Government response

We received a number of contributions which related directly to the substance of the provisions in EU Regulation 2017/852 rather than the proposed UK approach to implementation of the EU Regulation. As the provisions within the EU Regulation will be directly applicable in UK law, our consultation sought views on government's proposed approach to implementing the EU Regulation and not the provisions within the EU Regulation.

Following the close of our consultation on 21 November, we have considered the responses received and have outlined below how these will be taken forward. A number of questions about our proposed approach were also raised during the consultation and these have also been addressed.

We have forwarded the responses received by Defra to other relevant departments, the Devolved Administrations and the regulators, and Defra will also be responding separately to specific queries raised during the consultation.

3.1 Enforcement of environmental provisions (Sections 3.2.1 – 3.2.4)

The comments received on the proposed enforcement authorities outlined in section 3.2.1 (Q2.) were supportive of the proposed approach. On the enforcement of the requirement for an amalgam separator (Article 10(4)) and the provisions restricting the import (Articles 4 and 5) in Northern Ireland (Q3.), we received one comment that the Health and Safety Executive would be best placed to enforce these.

Whilst consideration was given to designating the Health and Safety Executive for Northern Ireland as the competent authority for the import provisions, government considers that the environmental regulators are the most appropriate bodies for fulfilling this role. The rationale for this are outlined in section 3.2.2 of the consultation document. Government, therefore, proposes that, in keeping with the approach throughout the rest of the UK, in Northern Ireland, any breaches of the EU requirement on amalgam separators would be reported to the Northern Ireland Environment Agency, who would then take the necessary enforcement action. The inspection of the amalgam separators in Northern Ireland are covered by Section 3.6 of this response.

The majority of respondents did not know if the powers detailed in Section 3.2.3 would be appropriate for allowing the environmental regulators to effectively enforce the UK Regulations (Q4.). However, we received more positive responses to this question than negative.

The enforcement powers proposed in Section 3.2.3 were arrived at following thorough discussion with the environmental regulators. They are also consistent with existing enforcement powers for similar environmental legislation relating to hazardous substances.

Comments on both the framework in which these powers would sit and the level at which the civil penalties would be set were also raised in response to these questions but have been addressed in Section 2.4 of this response.

Clarification was sought by one respondent on how OPRED would assist the environmental regulators' respective enforcement functions in relation to offshore hydrocarbon installations in the relevant marine areas, what data would be gathered by OPRED and whether guidance would be provided. OPRED will have a supporting role under the Control of Mercury (Enforcement) Regulations 2017 which would align with the 'investigation and evidence gathering' role that OPRED currently performs under the Transfrontier Shipment of Waste Regulations. In essence, OPRED would:

(i) Forward to the environmental regulators for assessment purposes data that OPRED acquires annually from offshore operators on the quantities of mercury waste generated on their installations plus details of the onshore facilities to where the waste was sent for storage / disposal. This would basically be the same type of data which OPRED has previously obtained from operators under the 2010 Mercury Regulations. However, to fully meet the reporting requirements of the 2017 Mercury Regulations, future data supplied by operators would, where appropriate, need to additionally include 'a copy of the certificate provided by the mercury waste reception facility' as stipulated in Article 12 of the EU Regulation 2017/852.

(ii) At the request of the regulators, deploy OPRED Inspectors to visit / board offshore installations to assess compliance by operators with the 2017 Mercury Regulations' requirements and supply extra evidence to the regulators to further support their enforcement functions. In this context, and if requested to do so, OPRED Inspectors would perform their duties under the 2017 Mercury Regulations during planned (i.e. routine) inspections at offshore installations that are undertaken to a pre-determined schedule to check operator compliance with the various obligations of other environmental regulations which apply to the offshore hydrocarbons sector and are enforced by OPRED.

When the proposed UK Regulations enter into force on 1 January 2018, OPRED intends to revise an existing offshore sector guidance document to reflect the provisions in the UK Regulations.

For the question in Section 3.2.4 on whether the powers proposed by government would enable Border Force to assist the environmental regulators in enforcing the UK Regulations (Q5.), the majority of respondents did not know. However, more positive responses, supporting government's proposed approach, were received than negative responses.

3.2 Criminal offences, monetary penalties and appeals (Sections 3.2.5 – 3.2.7)

A majority of respondents supported government's proposed approach to criminal enforcement in Section 3.2.5 (Q6.) and monetary penalties in Section 3.2.6 (Q7.).

A number of respondents commented that monetary penalties would be more appropriate for certain breaches of the legislation and failing to comply with an information notice was cited as an example.

Government supports a proportionate response by regulators to breaches of the proposed UK Regulations. To support this, government would provide the environmental regulators with a range of criminal and civil sanctions.

Government believes that it is for the regulators to consider all of the circumstances in an alleged breach and provide an appropriate enforcement response.

The majority of respondents also supported the proposed approach to appeals as being appropriate and proportionate (Q7.).

We received detailed comments from one individual on government's proposed approach to civil penalties in England and Wales.

The respondent queried:

- Why the civil penalty regime provided in Part III of the Regulatory Enforcement and Sanctions (RES) Act 2008 had not been adopted for the proposed UK Regulations,
- Whether the proposed civil penalties provided would apply to Small to Medium Sized Enterprises (SMEs),
- The standard of proof to be applied when civil penalties are imposed,
- The burden and standard of proof required of the regulator where there is an appeal against a civil penalty,
- Why Enforcement Undertakings had not been included in the list of proposed civil penalties for England and Wales, and
- Whether income from civil penalties would be paid into the Consolidated Fund.

In making The Control of Mercury (Enforcement) Regulations 2017, the Secretary of State is exercising powers conferred on him under section 2(2) of the European Communities Act 1972 (ECA). The RES Act only provides for civil penalties to be used for existing domestic offences. The power to make Regulations under ECA is considered wide enough to allow for creation of both civil penalties and criminal offences.

Accordingly, in the proposed UK Regulations government has incorporated elements of the RES Act model for civil penalties in England and Wales and we have worked closely with the Environment Agency and Natural Resources Wales in developing our approach to enforcement of the EU Regulation.

For England and Wales there are a number of similarities between the enforcement options government proposes to adopt in the UK Regulations and those in the RES Act, including stop notices (enforcement notices in the UK Regulations), variable monetary penalties at the discretion of the regulators, provision to appeal to the First Tier Tribunal against an enforcement notice, civil penalty or a costs recovery notice and a provision for the recovery of costs incurred by the regulator. SMEs will not be exempted from the proposed civil penalties as an exemption was not considered appropriate for the proposed UK Regulations.

Although not mentioned in the consultation document, government proposes to provide for a civil standard of proof for civil penalties and the standard of proof on appeal will be the same, this follows the approach that has been taken under The Energy Savings Opportunity Scheme Regulations 2014, The Climate Change Agreements (Administration) Regulations 2012, the Greenhouse Gas Emissions Trading Scheme Regulations 2012 and The Emissions Performance Standard Regulations 2015.

Provision for enforcement undertakings in England and Wales were not included in government's approach to civil penalties in the proposed UK Regulations because government considered that the RES Act model would have required considerable adaptation to suit the proposed UK Regulations.

Government wished to avoid complexity, and the proposed UK Regulations contain a comprehensive suite of powers that should enable effective and proportionate regulation, as they stand. Government will keep this matter under review. Finally any income derived from civil penalties will be paid into the Consolidated Fund - this will be made clear in the legislation.

3.3 Imports of mercury and new uses of mercury (Sections 3.2.8 – 3.2.9)

The majority of respondents agreed with government's assessment that there are relatively few imports of mercury and mixtures of mercury (Q11.) and none were aware of any new products or new manufacturing processes under development that use mercury (Q13.). This supports the approach proposed by government in the consultation document of allowing the environmental regulators to set an appropriate fee to determine applications to import mercury and assess notifications relating to new products or processes that use mercury. Experience gained by the regulators in implementing these provisions will enable the regulators to set fees in line with their own charging policies.

The views provided by respondents on what would constitute an appropriate fee for applications to import mercury or mixtures of mercury (Q12.) and to assess a new mercury-added product or new manufacturing process using mercury (Q14.) will be provided to the environmental regulators for their consideration.

For assessment of new mercury-added products or new manufacturing processing using mercury, the comments received supported these assessments being carried out by the environmental regulators (Q15.) rather than independent experts (Q16.).

3.4 Inspection and enforcement of dental provision (Sections 3.3.1 – 3.3.4)

The first of the dental provisions will apply from 1 July 2018 onwards. DEFRA, as the Department consulting and responding on behalf of government, will make sure comments received in response to the consultation will be passed in full to officials in the Department of Health and the Devolved Administrations so that they can consider these in their work to implement the dental provisions within the EU Regulation.

3.5 Final approach

Government intends to proceed with the approach to implementation proposed in the consultation document. We believe that this approach will meet the policy aim of making UK implementation of EU Regulation 2017/852 on Mercury as effective, simple to understand and easy to comply with, as possible.

4. Timetable and next steps

4.1 Laying the Control of Mercury (Enforcement) Regulations 2017

We plan to lay the Control of Mercury (Enforcement) Regulations 2017 in parliament in December 2017 to allow for parliamentary scrutiny. This will ensure that the UK implementing legislation can enter into force on 1 January 2018 and align with the date from which the majority of provisions within the EU Regulation apply.

4.2 UK ratification of the Minamata Convention on Mercury

Introducing the proposed domestic legislation will also enable the UK to ratify the Minamata Convention in early 2018.

Annex A – List of respondents

Consultation questionnaire responses:

Dental professionals

Bamboo Dental Practice

Edwards Dental Health Centre

Smiles Better Dental Practice

Three Counties Therapy

Dental advocacy groups

Bundersverband der Beratungstellen Fur Umweltgifte (BBFU) e.V¹

Dentists against mercury in fillings

World Alliance for Mercury free dentistry

Dental associations

British Dental Association

British Dental Industry Association

Heritage organisation

Science Museum Group

Individual businesses

INOVYN Chlorvinyls Ltd

Mercury Recycling Ltd

Russell Scientific Instruments Ltd

Stericycle Ltd

Trade association

British Sign and Graphics Association

¹ Federal Association of Counselling Centres for Environmental Toxins

Email responses:

Advisory service

Consortium of Local Education Authorities for the Provision of Science Services (CLEAPSS)

Dental regulators

Care Quality Commission (CQC)

General Dental Council (GDC)

Dental faculty

Dental Faculty of the Royal College of Physicians and Surgeons of Glasgow

Health Trust

South Eastern Health and Social Care in Northern Ireland (HSCNI)

Individual businesses

Barometer World Ltd

Russell Scientific Instruments Ltd

Trade association

Oil & Gas UK