

Joint NGO position based on the Revision of EU rules on ivory trade

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Summary

- The proposed revision of the EU rules on ivory trade falls far short of what is needed to close the EU ivory market and lacks the ambition called for in the Council Conclusion on the EU Biodiversity Strategy.
- The proposed changes, particularly concerning intra-EU trade of worked ivory, which envisage different rules for ivory in three different age classes, are complex, poorly drafted, lacking in clarity, and will place considerable burden on enforcement officials and Management Authorities.
- Only intra-EU trade of 1975-1990 items, which is currently possible with a certificate, will be prohibited. Intra-EU trade of any pre-1975 item will be allowed with a certificate, and a significant proportion of pre-1947 items could still be traded without a certificate under proposed new *de minimis* rules. This could mean that the intra-EU trade in pre-1975 items is likely to remain very significant.
- The *de minimis* exemption is far too lenient and will facilitate the laundering of illegal ivory items. It includes any items made 100% of ivory weighing less than 200g (e.g. items of jewellery), and items containing less than 20% ivory by volume, purporting to be pre-1947. These items will be “below the radar”, but could be exactly the type of item carved from poached ivory intended for the EU market under the guise of being pre-1947, or intended to be smuggled out of the EU to the Asian market.
- Pre-1947 worked items containing ivory that do not satisfy the *de minimis* requirements could still be traded within the EU with a certificate. This would render the EU restrictions far less stringent than those in other jurisdictions that have introduced or are introducing bans on internal trade in ivory that does not meet *de minimis* or other exemption criteria.
- Re-export of pre-1975 worked specimens is to be allowed if they are considered “valuable items”. In its attempt to defend this position, the Commission argues that there were culturally or artistically valuable objects made between 1947 and 1975 (although no examples are provided). In the draft revised Guidance itself, however, the Commission quotes previous commitments to ensure that “only legal ancient ivory items are traded in the EU.” Items from after 1947 and into the mid-1970s cannot reasonably be described as “ancient.”

Introduction

We, the signatory organizations, are writing to provide input ahead of the fourth EU stakeholder meeting on elephant ivory trade in the EU, due to be held on Wednesday 28th October 2020. We are concerned that the latest proposals to restrict such trade are inadequate and do not go far enough to address key concerns relating to the potential impact of the EU ivory market on elephant poaching and ivory trafficking.

We contend that the current proposal falls well short of the EU Council Conclusions on [‘Biodiversity - the need for urgent action’](#) adopted on 23rd October 2020, which “*asks the Commission to submit an ambitious proposal to close ivory trade from the EU market.*” The current proposal’s *de minimis*

exemptions are far too lenient, as it would allow trade in small worked ivory items, (which is closely linked to illegal trade and poaching =) to continue without certificates.

The proposal places no further restrictions on trade in items with elephant ivory acquired between 1947 and 1975, and continues to allow exports of “valuable” worked items, perpetuating the perception of ivory as a desirable commodity, undermining initiatives for reducing demand for ivory (including those funded by the EU and its Member States), and placing an additional burden on enforcement authorities.

Ivory trade within and from the EU continues at a significant level, and we are concerned that without further strengthening, the current proposals will continue to stimulate interest in and demand for ivory products within the EU, and potentially facilitate the laundering of illegal ivory from recently killed elephants. According to the reports on significant seizures by TRAFFIC, ivory is consistently among the principal products seized in the EU.

The EU and Japan are among the last largest legal domestic ivory markets, while other major markets in the USA, China and the UK are now closed or in the process of closing. There is wide support in the EU for the closure of domestic elephant ivory markets, from the EU Council to the European Parliament, and among EU citizens and civil society. The European Commission therefore has the mandate to introduce comprehensive measures aimed at closing the EU domestic ivory market, thereby showing global leadership. Only by so doing will the EU remove any financial value from ivory, reduce the opportunity for new ivory to be laundered through legal markets, and send a clear message to the rest of the world that the EU no longer considers ivory a commodity.

Article 191(2) of the Treaty on the Functioning of the European Union provides that Union environmental policy is to be based on the precautionary principle. Pursuant to that principle, if an action or policy has a suspected risk of causing harm to the public or to the environment, in the absence of scientific consensus that the action or policy is harmful, the burden of proof that it is not harmful falls on those taking the action. Thus, in case of uncertainty around whether the EU’s ivory market is contributing to the poaching of elephants and the illegal trade in ivory, the precautionary principle requires the Commission to take action.

Our main concerns in relation to the draft revised guidance document are detailed below.

1) *De minimis* exemption for pre-1947 items

Our position

The current proposed *de minimis* exemption facilitates the laundering of illegal ivory items. The draft revised Guidance document, at page 12, recommends “that Member States consider “*de minimis*” items as a low priority for enforcement authorities, unless there are strong indications in specific cases that indicate an abuse of the derogation.” That is a concern since the *de minimis* exemption would allow a vast volume of unregulated trade in ivory including any items made 100% of ivory weighing less than 200g (e.g. items of jewellery and trinkets), and items containing less than 20% ivory by volume, purporting to be pre-1947. They will be “below the radar” yet could be exactly the type of item carved from poached/illegal ivory intended for the EU market under the guise of being pre-1947, or intended to be smuggled out of the EU to the Asian market.

The exemption for small solid antique ivory pieces is not “low risk”

- According to the CITES trade database, between 2009-18, more than 10,000 items described as ivory carvings, ivory pieces or ivory jewellery were imported into current EU Member States, with a further 165kg of such items declared by weight, suggesting that the EU is a significant market for worked ivory pieces, many of which may be under 200g. Furthermore, ivory carvings were the principal product seized in the EU between 2014 and 2016.
- EU seizure data also show cases of ivory shipments being intercepted at EU border points or in end markets in Asia, which contained items purchased in the EU and then exported without the required permits. In addition, online platforms are often used for obtaining ivory – both legally and new items being sold as antiques, many of which are small solid carvings. These are then shipped out of the EU via the postal service without export documents.
- Past surveys of EU antique ivory trade show that small carved ivory pieces represent a massive proportion of antiques in trade and that compliance with the requirement to demonstrate legal acquisition on demand is far from guaranteed.
- In addition, illegal ivory continues to be sold within the EU: For example, in 2020, 355 ivory figurines were seized in Spain and Portugal from online sales and auctions with support from Europol.

We therefore believe that the proposed *de minimis* exemption represents an additional burden for enforcement authorities, will facilitate the laundering of items manufactured using new ivory into the lucrative EU market, and perpetuate the demand for such ivory items.

How other countries have dealt with *de minimis* exemptions

California and other US states have a combined antique and *de minimis* exemption. The California *de minimis* percentage threshold is 5% which we propose the EU should match. The UK Ivory Act has a percentage threshold of 10%. Neither jurisdiction offers an exemption for items containing a maximum weight of ivory. The purpose of these exemptions is to capture items that contain only a small amount of ivory (consistent with the meaning of *de minimis*), where the value of the item is considerably higher than the value of the ivory it contains (and that the value of the item itself is not due to its ivory content). On the contrary, by allowing trade in items made entirely of ivory, the draft revised Guidance could encourage trade in mass-produced cheap ivory trinkets, which can be easily laundered and smuggled across borders.

Our proposal

Based on existing models (i.e. California and the UK), we recommend that a piece of ivory would fall within the *de minimis* exemption only if it satisfies **all** of the following criteria:

- less than 5% of the item's volume is ivory;
- the ivory content weighs less than 200g;
- the ivory is a fixed or integral component of a larger worked item (e.g. furniture);
- the item contains no raw/unworked ivory; and
- the item was manufactured or handcrafted before a fixed date (1947) and has not been reworked or repaired with ivory since that date.

Items that meet these criteria could then be traded with the appropriate certification. In this regard, we note that the UK Ivory Act was subject to a judicial review challenge in the UK courts and both the UK High Court and the Court of Appeals upheld the legality of the Act, with the Supreme Court dismissing the need

for an appeal of the lower court decisions. During the proceedings, the courts noted that they were persuaded by the need for the UK to show global leadership on this issue by taking ambitious action and concluded that the precautionary principle applied in this case justifying trade restrictions.

2) Pre-Convention worked items with ivory acquired between 1947-1975

Our position

The current proposal constitutes no change to the intra-EU trade in worked specimens that date from between 1947 and 1975: trade will still be possible with a certificate. Re-export of pre-1975 worked specimens is to be allowed if they are considered “valuable items”. In its attempt to defend this position, the Commission argues that there were culturally or artistically valuable objects made between 1947 and 1975 (although no examples are provided). Yet, in the draft revised Guidance document, the Commission quotes previous commitments to ensure that “*only legal ancient ivory items are traded in the EU.*” Items from after 1947 and into the mid-1970s cannot reasonably be described as “ancient.”

The assessment of whether an item is “valuable” can be made in several ways, such as by reference to catalogues and through expert opinion. There is no explanation in the draft proposals of how or by whom these deliberations are to be made, or how the independence of such decisions will be ensured. We also question whether “valuable” refers to economic, cultural, artistic, historical or educational value, and how Member States are to determine that consistently.

With this provision the EU would be allowing continued intra-EU trade of any worked ivory item from before 1975, provided it has a certificate. The rules for obtaining a certificate focus on the seller proving the age and legal acquisition of the item. This could mean that the intra-EU trade in such items is likely to remain very significant, and of enforcement concern.

During hearings for the 2018 Ivory Act in the UK, the UK CITES Management Authority stated that “The UK Border Force has seized multiple ivory items which have been subject to artificial stains or ageing techniques, which are clearly destined for the antique market. Studies have shown that where outlets [are] offering legal and illegal ivory side-by-side, revenue and profits become intermingled and difficult to separate.”

The UK Ivory Act includes an exemption for pre-1918 items of outstandingly high artistic, cultural, or historic value. The Act goes on to say that the rarity of the item and the extent to which the item is an important example of its type should be taken into account, and the UK authorities have indicated that the exemption should apply only to the rarest and most important items of their type. While the responsibility for the issuing of certificates in relation to this exemption rests with the Secretary of State, the Act indicates that institutions that, in the authority’s opinion, possess the necessary knowledge and expertise can provide the Secretary of State with advice on applications for exemption certificates.

The current EU proposals to exempt “valuable” items from any restrictions on trade are weak, and could provide a loophole through which high volume trade in ivory items could continue virtually unabated, which in turn could perpetuate demand and provide mechanisms by which new and therefore illegal ivory would be easily laundered into trade.

Our proposal

We call for a prohibition of all re-exports from the EU and intra-EU trade for commercial purposes, including to any countries listed as a country of concern under any of the three categories of the CITES NIAP framework, with ONLY the following limited exemptions:

- Musical instruments made prior to 1975, containing less than 20% ivory by volume, and which should be accompanied by documentation establishing an uninterrupted chain of custody.
- Sales to and between officially accredited museums.

We note that the above restrictions would not apply to non-commercial inheritance, transfer, legacy, gifting, or donations.

These rules would make regulations far less complicated for both the public and enforcement officials. They would also ease the burden on management and enforcement authorities responsible for implementing the new rules.

3) Outstanding points to be clarified

- **The proposal lacks mention to the cyber component:** Online ivory trade is still rife in the EU, as evidenced by a 2018 study of online wildlife trade carried out by the International Fund for Animal Welfare (IFAW), which found more than 5,000 adverts offering to sell almost 12,000 items, 11% of the adverts were for ivory. The UK has noted that online platforms are often used for obtaining ivory – both legally and new items being sold as antiques, which are then shipped out of the EU via the postal service without export documents. In 2019 and 2020, IFAW carried out the Wildlife Cyber Spotter Programs, the main results are summarized below:
298 illicit adverts offering ivory flagged (e.g. figurines, netsukes, knives, hunting weapons, pianos, tusks) for a **limited time dedicated to ivory**, as part of the wildlife cyber spotter programs in France (1 round) and Germany (2 round), respectively in 2020 and 2019-2020 where **a total of 6 companies were surveyed**.
- **“Date of acquisition vs age of the item”:** The EC still considers the date of acquisition as their point of reference which provides an opportunity for falsifying claims of legality / age of the item and enables laundering.
- **“Transition period for existing intra-EU certificates for ivory items”:** The proposal proposes a yet undefined transition period before the expiration of such certificates. **“Any transition period prior to entry into effect of the new regime should be short and clearly defined to avoid dumping ivory of illegal or unknown origin into the existing marketplace before new rules take effect” -> We recommend a transition period no longer than 6 months (e.g. India and US ivory bans had shorter transition periods).**
- **“Volume vs Weight”:** There is a need to apply a volume limit (easier for enforcement agencies) instead of a weight limit which requires enforcement agencies to take apart the object (and hence

sometimes may lead to the destruction of the object/instrument itself).

- **“Identifying experts”**: It is crucial to require independent experts in particular to assess whether an item is considered as valuable or not in order to avoid conflict of interests.
- **The current and future regimes are a combination of Regulation and Guidance.** For example, re-export of raw ivory items acquired after 1975/1976 is prohibited, but only “suspended” for older items. Similarly, the fact that pre-1947 items now need a certificate (except for *de minimis* items) is a change to the Regulations themselves, but when and whether to issue certificates allowing trade is a matter of Guidance. Therefore, for a consistent and coherent policy approach, the new rules need to be included into the regulations rather than as a temporary suspension or Guidance.

Conclusions

We recommend once again that EU rules are harmonised with stricter domestic measures than those developed to date. We recognize that some limited exemptions may be prudent and as a compromise, we have highlighted certain exemptions that we could support above.

We call for a prohibition of all re-exports from the EU and intra-EU trade for commercial purposes, with ONLY the following limited exemptions:

- Musical instruments made prior to 1975, containing less than 20% ivory by volume, and which should be accompanied by documentation establishing an uninterrupted chain of custody.
- "*De minimis*" items made prior to 1947, containing less than 5% ivory by volume.
- Sales to and between officially accredited museums.

We note that the above restrictions would not apply to non-commercial inheritance, transfer, legacy, gifting, or donations. These rules would make regulations far less complicated for both the public and enforcement officials. They would also ease the burden on Management Authorities responsible for implementing the new rules.

References

- Page 7 of the draft revised Guidance document.
- The EU's draft revised Guidance document, at the top of page 4, says: “The Communication on an EU Action Plan against wildlife trafficking invited the EU and its Member States to implement a comprehensive strategy against wildlife trafficking. This Communication notably foresaw (under Action 2 “further limit trade in ivory within and from the EU”) that the European Commission would issue guidelines “to ensure uniform interpretation of EU rules with the aim to suspend the export of raw pre-Convention ivory and guarantee that only legal ancient ivory items are traded in the EU” by the end of 2016.”
- TRAFFIC (2019) Examining options for possible restrictions on ivory trade in and from the EU – Summary of EU Member States responses to the European Commission questionnaire
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