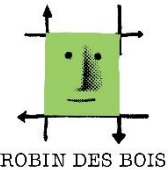




HUMANE SOCIETY  
INTERNATIONAL  
EUROPE

WILDAID

EUROGROUP  
FOR ANIMALS



Tuesday, October 15, 2019

The undersigned NGOs would like to thank the European Commission for organizing the third stakeholder consultation on the ivory trade in the EU on Friday 4th of October.

We are very pleased to see that the European Commission is taking important steps to align the EU's stance on internal ivory trade with the global shift towards closure of domestic ivory markets, and has suggested pragmatic measures to achieve this in a way that simplifies the current regime and closes major loopholes, particularly in relation to antique ivory.

We welcome in particular that EU policy formulation in this area is no longer based on the conviction that the EU ivory market does not contribute to ivory poaching and trafficking in Africa. We also welcome the fact that much of the feedback and recommendations that we have provided over the duration of the consultation have been reflected in the draft circulated by the Commission.

The proposed EU ivory trade restrictions should be formulated in a robust way that will enable the EU to report to the CITES Standing Committee<sup>1</sup> that it has met its international commitments by largely closing its domestic ivory market, and demonstrating that the EU market does not contribute to elephant poaching or ivory trafficking, by permitting only very limited exemptions through a rigorous system of certification and verification.

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<sup>1</sup> as required by changes to Resolution Conf. 10.10 agreed at the recent 18th CITES Conference of the Parties

Stringent regulations by the EU will also help to maintain the international momentum to end the commercial ivory trade globally, ensuring a level playing field among countries or jurisdictions that have prohibited domestic ivory trade and further prompting those who have not closed their markets to follow suit.

We would like to add some specific comments on the proposal:

### **Ensuring the enforceability of the new rules**

For the new regime to be effective and enforceable, we consider it of the utmost priority that there is an adequate legal basis for monitoring the implementation and enforcement of the rules by Member States.

**We therefore strongly recommend that the new regime be incorporated into Commission Regulation (EC) No 865/2006 (as mentioned in paragraph 4.1.a), explaining the basis under which new certificates can be issued (i.e. the very limited exemptions), rather than outlining the new regime in guidance.**

It will also be key to ensure that the revised regime, once adopted, is widely publicised and clearly explained.

### **Criteria for determining artistic, cultural, historic value**

We agree with the statement from the Commission that the cultural heritage of the European Union is a rich and diverse mosaic of cultural and creative expressions, our inheritance from previous generations of Europeans and our legacy for those to come. **Nevertheless, any exemption for ivory items considered to be of particular artistic, cultural and historic value must be sufficiently limited, clearly defined, and robust to ensure that it is narrowly restricted to trade in exceptional items and cannot become a loophole for the commercial trade in bulk items or recently poached or otherwise illegal items.** The proposal mentions the need to develop "criteria" to help determine what items are "particularly valuable from an artistic, cultural or historical perspective." We see this element as the cornerstone of the new regime and the criteria will need to be developed at the EU level to ensure consistent implementation and in a manner that emphasises that exemptions should be strictly limited in number to items that are truly exceptional and unique.

A potential starting point for this exercise is Council Regulation (EC) No 116/2009 on the export of cultural goods. Though it does not define the terms, it relies on an annex which categorises items (including antiques) according to a series of age thresholds (between 50 and 100 years of age, over 100 years of age, etc.) and financial thresholds.

It would be a consistent approach to develop criteria for determining particularly valuable worked ivory items of high historical, artistic and/or cultural importance using similar tranches of age and value, with a floor of a minimum age and value. Given that it may be possible for a newly worked item to command a considerable market value, it would be prudent for the new rules to ensure that it is not the ivory but other factors that represent the majority of the value of the item for it to genuinely qualify as being of historical, artistic or cultural significance.

The recently adopted UK Ivory Act defines exemptions in the following manner: pre-1918 items of **outstandingly high artistic, historical or cultural value**; pre-1918 portrait miniatures; pre-1947 items where ivory is "less than 10% of the total volume of the material"; pre-1975 musical instruments where ivory is less than 20% of the total volume; and acquisitions by qualifying museums. These criteria are reasonable restrictions and seem to us to represent the spirit, the intention and the letter of the law seeking to effectively close domestic ivory markets.

## Identifying experts

The requirements and guidance as to what constitutes an “expert” should be clear and consistent to ensure their independence and guard against conflicts of interest. Our view is that **experts should be those affiliated with public institutions, such as museums or directly the International Council of Museums<sup>2</sup>** rather than the private sector (as dealers have a direct financial interest in maximising the number of items that can still be traded).

We acknowledge the views expressed during the October 4<sup>th</sup> meeting that such a specialised activity may benefit from the expertise of specialists from the private sector, provided adequate measures with appropriate sanctions are put in place to prevent conflicts of interest, be they real or apparent.

We therefore suggest the **establishment of an EU-wide directory of registered experts** who are considered adequately qualified to determine the (historic, cultural and/or artistic) value of worked ivory items, and support the recommendation that Member State authorities should be responsible for consulting these registered experts in their evaluation of applications, rather than the applicants themselves. We once more emphasise the importance of adequate measures to guard against conflicts of interest, and suggest that the public sector experts be mandated to operate the system, with the facility to consult private sector experts on specific items as necessary. We also recommend that the cost of such consultations needs to be covered by the applicant, which would ensure that only pieces that genuinely meet the criteria are included in the process.

## Transition period for existing intra-EU certificates for ivory items

The document proposes a yet undefined transition period, after which all existing certificates for intra-EU trade of worked ivory would expire. **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 that such a transition period no longer than 6 months, ideally 3. We note that the US ivory ban came into effect in 30 days (81 Fed. Reg. 36,388, June 6, 2016) and that India’s ivory ban included a 6-month transition period. Although the transition period was challenged, the Indian Supreme court upheld it as reasonable.

## Cut off dates

The Commission document proposes that, in the context of intra-EU trade, raw ivory is to be used in repairs of musical instruments and worked ivory exceptions should be for items acquired prior to 1990 for African elephant ivory and 1975 for Asian elephant ivory, based on the date of their inclusion in CITES Appendix I.

We strongly urge to use the first listing of Asian and African elephants into the CITES Appendices, as envisaged by CITES requirements for pre-Convention items, as the relevant cut-off date. The 1980s saw the highest levels of poaching in recent history as elephant populations in Africa were reduced by 50% from c1.2 million to c600, 000 in only ten years. It would be wrong to allow continued trade in raw ivory from African Elephants acquired in the 1980s that may well have come from elephants that were killed during that slaughter. **We therefore suggest an earlier cut-off date of 1975 when Asian elephants were first protected.**

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<sup>2</sup> [ICOM](#) already advises individuals, organisations and authorities, such as police or customs officials, to identify objects at risk and prevent them from being illegally sold or exported

## **Musical instruments**

We recommend that the suggested exemption for musical instruments that contain ivory should only apply to **musical instruments manufactured before 1975 and the percentage of ivory in the musical instrument should be no higher than 20% by volume**. If weight limits are included in any legislation Customs and enforcement agencies will be required to take apart instruments to weigh the total amount of ivory which could destroy the item. Therefore, it is highly recommended that any percentage of ivory within any item be measured as a percentage by volume, rather than by weight.

The 20% limit is important because otherwise, a musical instrument made wholly or mainly of ivory could be traded (such as a flute). Exceptions for those items are more likely to be used as a means of laundering newly-acquired illegal ivory into trade.

### **Regulatory system of "passports" for items containing ivory.**

Essentially any proposed "passport" system for registering ivory items within the European Union would be open to abuse and has the potential to be used as an illegal ivory laundering mechanism, thereby increasing the burden on enforcement authorities throughout the EU. An ivory trade regulatory system was unsuccessfully tried in China, precipitating the move to a comprehensive ban in 2017. China's failed system of 'Collection cards' has been documented by several independent sources to be open to abuse by ivory traders. 'Collection cards' were found to be habitually counterfeited or kept apart from the ivory items to which they were to be assigned. This led to severe regulatory and enforcement difficulties. 'Collection cards' were also found to be easily reused for other items similar in appearance. Under such a misguided proposed system, illegal ivory items not recorded by an EU Member State could potentially be sold using an old "passport" that was produced for a legal item that had been previously sold. We therefore do not recommend the adoption of such a scheme.

### **Date of acquisition vs age of the item**

Both the current rules and proposed new rules refer to date of acquisition of an ivory item rather than the age of the item as the basis for determining its status as an acceptable exception. We have concerns regarding this emphasis for several reasons:

- False documents could be produced to show date of acquisition for an illegal or new item. It may be difficult to prove they are false.
- Carbon dating and expert appraisal can be used to assess the age of an item, but not whether it has been legally acquired.

The recently adopted UK Ivory Act for instance, focuses on the age of the item, rather than the date of acquisition. The Act limits the exemption for items of outstanding artistic, cultural or historic value to items produced prior to 1918. The rationale for choosing 1918 is that it was 100 years before the Act was passed. An item being 100 years' old is often what defines it as an antique. For example, by the antiques trade in the UK<sup>3</sup> and in UK law (eg HMRC use it for assessing Customs Duty, Excise Duty and VAT on imports) and also at the Federal level in the US Endangered Species Act and in several US States' legislation.

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<sup>3</sup> the byelaws of the British Antiques Dealers Association define an antique as an item that was manufactured more than 100 years ago

We recommend that if the emphasis needs to remain on the date of acquisition for determining the exceptions, then the **criteria for determining exceptional historical/cultural/artistic value take into account the age of the item and the definitions of antique as reflected in UK and US legislation.**

Finally, we would also urge the Commission to consider the need to include additional ivory-bearing species in ivory trade restrictions, in order to avoid potential perverse consequences for species such as hippopotamus and other ivory bearing species and would urge the Commission to hold a call for evidence to examine if any additional species meet the requirements to be added to any future regulation.

We will welcome any information and updates from the Commission on progress and we are available to further assist and advise as appropriate, in our common efforts regarding the EU's domestic ivory market in the following months, leading up to the EU's report to CITES SC73 on this issue which is likely to take place towards the end of 2020.

Yours faithfully,

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