



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

February 2021

### Summary

We broadly support the European Commission's proposed amendments to Commission Regulation 865/2006 and the draft revised guidance document on the EU regime governing trade in ivory, particularly:

- the proposal to suspend imports and re-exports both in raw and worked ivory (with an exception for pre-1975 musical instruments for worked ivory);
- the proposal to suspend intra-EU trade in raw and post-1947 worked ivory (with the exception of pre-1975 musical instruments); and
- the proposal to require certificates for intra-EU trade in worked ivory antiques (pre-1947 worked ivory).

We also welcome the recommendations to enhance coordination within and between EU Member States as well as with non-EU countries regarding the issuance of re-export and/or intra-EU certificates for ivory.

However, some gaps remain, and we recommend the following:

- The trade restrictions on worked ivory are only partially addressed in Commission Regulation 865/2006 (with the rest being in the guidance document), and those on raw ivory are currently only included in the guidance document. We strongly recommend that Commission Regulation 865/2006 be amended to ensure consistency and enforceability of the rules.

- The use of the term ‘suspend’ (vs ‘prohibit’ or ‘ban’) may create the expectation that the suspension will someday be lifted, which could lead individuals to retain or stockpile ivory. We recommend the use of the terms ‘prohibit’ or ‘ban’.
- The requirement that antique ivory can be traded with a certificate is still too broad. A *de minimis* provision further restricting the issuance of certificates for antique ivory is needed to avoid a flood of applications for certificates that will likely overwhelm authorities, thus increasing the risk of ivory from poached elephants or otherwise obtained illegally being laundered through the system and sold as antique.
- Exceptions regarding pre-1975 musical instruments should only apply when the volume of ivory in the instrument is less than 20% of the total volume of the material of which the instrument is made.
- A witness statement/affidavit or signed declaration from an applicant for a certificate to trade antique worked ivory should not be accepted as a satisfactory proof of legal acquisition. Declarations in support of legal acquisition / origin should be provided by independent approved/recognised experts only.

## Introduction

We, the signatory organisations, are writing to provide our input to the revised proposal on the EU’s domestic regime for ivory trade. This includes the proposed revisions to Commission Regulation 865/2006<sup>1</sup> and its associated guidance.<sup>2</sup>

As highlighted by the Commission during the latest meeting of the EU Member States’ CITES Management Authorities,<sup>3</sup> the further tightening of the rules on EU ivory trade are “among the deliverables of the EU Biodiversity Strategy for 2030.”<sup>4</sup> In addition to fulfilling its commitment under CITES Resolution 10.10 (Rev. CoP18) on trade in elephant specimens,<sup>5</sup> strong measures must be taken to reflect the outcome of the 2017 public consultation carried out by the European Commission on ivory trade and ivory trafficking within the EU.<sup>6</sup> The results of the public consultation, which received approximately 90,000 responses, showed overwhelming support for tightening the current EU rules on ivory trade (83.5% of respondents).<sup>7</sup>

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006R0865>

<sup>2</sup> [https://ec.europa.eu/environment/cites/pdf/draft\\_revised\\_guidance\\_doc\\_ivory\\_trade.pdf](https://ec.europa.eu/environment/cites/pdf/draft_revised_guidance_doc_ivory_trade.pdf)

<sup>3</sup> 20th MEETING OF THE GROUP OF EXPERTS OF THE COMPETENT CITES MANAGEMENT AUTHORITIES Friday 4th December 2020 Minutes [https://circabc.europa.eu/sd/a/fe7c7894-84eb-4903-b665-e71ab29ee9f0/CITES%20ExGr%2020\\_summary.pdf](https://circabc.europa.eu/sd/a/fe7c7894-84eb-4903-b665-e71ab29ee9f0/CITES%20ExGr%2020_summary.pdf)

<sup>4</sup> Ibid paragraph 6.1

<sup>5</sup> Which recommends “that all Parties and non-Parties in whose jurisdiction there is a legal domestic market for ivory that is contributing to poaching or illegal trade, take all necessary legislative, regulatory and enforcement measures to close their domestic markets for commercial trade in raw and worked ivory as a matter of urgency” paragraph 3 <https://cites.org/sites/default/files/document/E-Res-10-10-R18.pdf>

<sup>6</sup> Carried out between 15 September and 8 December 2017 [https://ec.europa.eu/info/consultations/public-consultation-ivory-trade-eu\\_en](https://ec.europa.eu/info/consultations/public-consultation-ivory-trade-eu_en)

<sup>7</sup> [https://ec.europa.eu/info/sites/info/files/detailed\\_report\\_public\\_consultation\\_ivory\\_trade\\_eu.pdf](https://ec.europa.eu/info/sites/info/files/detailed_report_public_consultation_ivory_trade_eu.pdf) at page 48

Our organisations have been actively involved in consultations with the Commission on how best to amend the current regime, which, as highlighted in the September 2019 European Commission non-paper,<sup>8</sup> is “complex”<sup>9</sup> and creates “significant enforcement challenges”. The Commission also recognises in the non-paper the lack of *ex-ante* control in intra-EU trade in pre-1947 worked ivory items (the so-called antiques exemption) as a major loophole.<sup>10</sup>

We broadly support the European Commission’s proposed amendments to Commission Regulation 865/2006 and the draft revised guidance document on the EU regime governing trade in ivory, and we appreciate the significant progress it represents. However, a number of gaps remain. The following sections provide an analysis of the European Commission’s proposed changes to the EU ivory trade regime and our recommendations to address the identified gaps, which we believe will strengthen and clarify the implementation and effectiveness of the final rule.

## 1. Regulation vs Guidance

An overarching concern is that the amendments made to the *EU regime governing the trade in ivory* are disproportionately made to the guidance document as opposed to the Commission Regulation. The issue of worked ivory is only partially addressed in the Regulation; the Regulation provides that worked elephant ivory that was acquired pre-1947 (antiques) may only be traded within the EU with a certificate, but doesn’t cover rules for Pre Convention and Pre Appendix I worked ivory, which are included in the guidance.

Furthermore, raw ivory is only dealt with in the guidance, despite the guidance document recognising that ‘*[r]aw ivory represents the largest share of ivory entering international illegal trade worldwide. This is evidenced by the data reported by CITES Parties to ETIS, which show that seizures of illegal raw ivory represent the great majority of ivory seized worldwide*’. Such inconsistencies create confusion as to which aspects of the EU ivory trade regime are legally binding and will cause problems for enforcement authorities, as well as the public. Without consistent and legally binding rules, we are concerned that the Commission’s proposed changes, albeit with the best intentions, will not be enough to address key concerns relating to the potential impact of the EU ivory market on elephant poaching and ivory trafficking.

We strongly recommend that the proposed changes to the EU guidance document, in particular the additional trade restrictions on raw ivory, be integrated into the EU Commission Regulation. We believe that this is an opportune moment to enhance the consistency and enforceability of the EU’s ivory trade regime in this way, as the Commission Regulation is already being opened up for amendment.

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<sup>8</sup> Prepared for the October 4<sup>th</sup> 2019 stakeholder meeting on ivory trade entitled: “Closing the gaps in EU rules for ivory trade”

<sup>9</sup> “as they create different regimes for different time periods and apply different criteria to intra-EU trade and to import/export” *ibid* p.1

<sup>10</sup> *Ibid* page 2 and 5

## **2. Suspend vs prohibit**

We are also concerned that the use of the term ‘suspend’ (vs ‘prohibit’ or ‘ban’) may create the expectation that the suspension will someday be lifted, which could lead individuals to retain or stockpile ivory. We recommend the use of the terms ‘prohibit’ or ‘ban’.

## **3. Monitoring and evaluation**

We also recommend the introduction of a monitoring scheme to regularly evaluate the extent to which the new rules have been implemented by Member States. This could be done through regular reporting by Member States every 6-12 months to the meetings of the Group of Experts of the Competent CITES Management Authorities. An additional benefit of this would be to provide data for the EU to collate and submit to the CITES Secretariat to inform on how Resolution Conference 10.10 (Rev. CoP18) is being implemented by the EU and its Member States.

## **4. Imports**

We support the proposal in the guidance to suspend imports of raw ivory into the EU - though we recommend to use terms such as “prohibit”.

We support the proposal in the guidance to suspend imports of worked ivory subject to the exemptions for pre 1975 musical instruments with a permit.

## **5. Intra-EU trade**

### **a. Raw ivory**

We support the proposal in the guidance to suspend the intra-EU trade in raw ivory, though we prefer terms such as “prohibit”. However, the proposal to allow exceptions to repair legally acquired pre 1975 musical instruments needs to be applied strictly (see below for comments on demonstrating legal acquisition).

### **b. Worked ivory**

We support the proposed revisions to Commission Regulation 865/2006, which provide that elephant ivory that was acquired pre-1947 may only be traded within the EU with a certificate.

In addition, we recommend that certificates are only granted to items that contain less than a specified weight of ivory, and less than a specified proportion of ivory by volume (so-called *de minimis* provision) and that no certificates be granted to solid worked ivory pieces. These conditions for the issuance of certificates should be explicitly described in the Regulation and referred to in the associated guidance.

Based on existing models (e.g. California and the UK<sup>11</sup>), we recommend that a piece of ivory should only fall within the *de minimis* exemption 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.

## **6. Re-export**

We support the proposal in the guidance to suspend (though we prefer terms such as “end the issuance of”) certificates for all re-exports of worked ivory from the EU for commercial purposes with the exception of musical instruments made prior to 1975, subject to the issuance of a certificate (see below for comments on demonstrating legal acquisition). We recommend that this suspension includes the re-export of hunting trophies containing elephant ivory.

## **7. Pre-1975 musical instruments**

We recommend that all the aforementioned exemptions regarding pre-1975 musical instruments only apply when the volume of ivory in the instrument is less than 20% of the total volume of the material of which the instrument is made.

## **8. Demonstrating legal acquisition**

With respect to Annex I of the guidance (Evidence to demonstrate legal acquisition), we strongly recommend that a witness statement/affidavit or signed declaration from the owner should not be accepted as a satisfactory proof of legal acquisition. Even when supported by other evidence (such as photographs), self-declarations do not constitute an acceptable proof of origin. Declarations in support of legal acquisition / origin should be provided by independent approved/recognised experts only. As highlighted in Annex I, expert opinion from auctioneers could lead to potential conflicts of interest, and should therefore be avoided. We therefore request changes to Annex I to reflect these concerns.

## **Conclusion**

To conclude, while we greatly appreciate that the European Commission's proposed amendments to Commission Regulation 865/2006 and the draft revised guidance document on the EU regime governing trade in ivory are a step in the right direction, we are concerned that, unless the aforementioned loopholes are addressed, the new proposed measures and their good intentions could be significantly undermined. We again call on the European Commission

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<sup>11</sup> 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%.

to further revise and strengthen the proposal currently on the table to deliver on the longstanding request of the European Parliament and EU citizens, and respond to the new EU Council Conclusions asking for **the closure of the EU domestic ivory market**.