

# Ivory Act 2018 (c.30) - A fresh start or the elephant in the room?

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The United Kingdom's Ivory Act 2018 (the "Ivory Act") completed its entry into force on 6 June 2022. This was after three and a half years of delay since the Act received Royal Assent. Despite the delay, the introduction of the Ivory Act has been praised by conservationists and wildlife welfare advocates. Lord Zac Goldsmith (then Animal Welfare minister) even went as far as trumpeting the Ivory Act as being "world leading"<sup>1</sup>.

Whilst no doubt positive in its intentions, the Ivory Act has already come under legal challenge and questions have arisen as to whether it will, in practice, be capable of eliminating the ivory trade in the UK.

## Summary

This article will provide an overview of the substantive provisions of the Act, before analysing and explaining how robustly the legislation combats the trade of ivory in the UK.

This article:

- reviews the unsatisfactory position of UK law prior to the introduction of the Ivory Act 2018;
- explains how the Ivory Act restricts the commercial trade of elephant ivory within the UK, whilst questioning the exemptions introduced; and
- highlights problems created by the restriction of the provisions to elephant ivory only, instead of all ivory, and encourages the government to resolve these by expanding the definition of ivory to cover ivory taken from any species.

<sup>1</sup> "UK's world-leading ivory ban moves step closer" DEFRA and Rt Hon Lord Goldsmith, 9 March 2021

## Background of the Act and Provisions

Prior to the introduction of the Ivory Act, the United Kingdom's regulation of the international trade in ivory was principally achieved through its implementation of the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (more widely known as "CITES")<sup>2</sup>. CITES lists elephants as "Appendix I" species, meaning all state signatories to CITES (including the UK) are obliged to effectively ban the commercial international trade of elephant ivory, with any international movement of ivory being subject to strict limitations.

These CITES restrictions did not absolutely ban the ivory trade however. Under CITES the UK did not restrict the domestic trade of ivory once it had been introduced into the country. This created a cognitive dissonance, as whilst commercial importation and exportation of ivory was prohibited, internal trade was permitted. CITES also remains subject to an exemption for hunting trophies as "personal effects" meaning persons could reimport ivory taken from Asian and African forest elephants they had killed as part of game hunting trips<sup>3</sup>. These shortcomings undermined the principled basis of the ban and were worsened by the decision of the states who were parties to CITES to allow certain African countries to undertake limited international trade of raw and refined ivory products in 1997 and again in 2002, resulting in new ivory entering into commercial markets.

The UK decided it wanted to go further than the limitations of CITES. When introducing the bill of what would become the Ivory Act to its second

<sup>2</sup> Post Brexit, CITES is implemented through the retention in UK law of the EU Wildlife Trade Regulation (Regulation 338/97)<sup>1</sup> (the "WTR"). The UK has also enacted the Control of Trade in Endangered Species (Enforcement) Regulations 2018 ("COTES") which makes certain contraventions of the WTR subject to criminal penalties.

<sup>3</sup> Article 57 Commission Regulation No 865/2006

reading in Parliament, Michael Gove MP (then the Secretary of State for Environment, Food and Rural Affairs) stated “Unless action is taken to interdict the poachers and reduce the demand for ivory, it is possible that, on our watch—on the watch of our generation—the African elephant will meet extinction... the Bill gives us in the United Kingdom an opportunity to play our part and to show leadership”<sup>4</sup>. 6 months later the Ivory Act received royal assent yet would only enter into legal force in the summer of 2022.

The fault for such delay was attributed by the government to several factors. The first was a failed judicial review brought by the Friends of Antique Cultural Treasures (“FACT”), a body formed to represent the interests of antique dealers and collectors<sup>5</sup>. Through this judicial review, FACT protested the legality of the Ivory Act on the grounds that it was contrary to the way UK implemented CITES, which permitted the trade in ivory, and that it would amount to a severe interference with fundamental rights and freedoms of those FACT represented.

The Court of Appeal eventually upheld the Ivory Act and dismissed the challenge, clearing the way for the Ivory Act to come into force. The Court of Appeal’s decision was handed down in May of 2020, explaining 18 months of the delay behind the legislation coming into effect. This article will not discuss the judicial case further, given the challenge’s failure and the focus on the current effectiveness of the legislation, however those who wish to read a more depth analysis are advised to read Cox’s superb analysis of the decision<sup>6</sup>.

The second reason for the delay before the Ivory Act came into force was time taken by the Department for Environment, Food and Rural Affairs (“DEFRA”) to consult on and resolve a manner of implementation and impact issues. These included: (1) seeking responses from antique

dealers and collectors who work with ivory as to the registration and certification system established to permit some items containing ivory to continue to be traded; (2) resolving technical issues with this system; and (3) allowing dealers and collectors a four-month grace period during which to register and certificate their permitted items.

It is understandable that the proper implementation of a blanket trading ban requires a degree of time, and that DEFRA did not wish to not capriciously criminalise those ignorant of the change. It is nevertheless regrettable that it took over three years for the Ivory Act to come into force, as during that time the UK continued as a stakeholder in the trade of a product taken from a severely persecuted species. The International Fund for Animal Welfare (“IFAW”) estimates that approximately 20,000 elephants of all kinds of species are poached for ivory each year<sup>7</sup>. Whilst it is impossible to quantify how much of such ivory enters the UK market, it is unsatisfactory that the UK continued to play a role in an industry dependant on the hunting of such a majestic yet threatened species for so long.

## Substance of the Act

The main substantial provision of the Ivory Act is relatively straight forward and section 1 provides that “dealing in ivory is prohibited”<sup>8</sup>. What amounts to “dealing” is given a wide definition and includes where a person: (a) buys; (b) sells; (c) hires; (d) brokers; (e) keeps for sale; (f) exports; or (g) imports ivory<sup>9</sup>. It is later clarified that advertising ivory also amounts to “dealing” which is prohibited<sup>10</sup>. Where a person breaches the prohibition or causes or facilitates someone else to breach this, the maximum penalty they can face is up to five years in prison or a fine of up to £250,000<sup>11</sup>.

The starting breadth of the prohibition is positive in that it covers the principal ways in which ivory could enter the market into the UK. Includ-

4 Ivory Bill, Hansard, Volume 642, debated Monday 4 June 2018,

5 Friends of Antique Cultural Treasures Ltd v DEFRA [2020] EWCA Civ 649

6 The Elephant in the Courtroom: An Analysis of the United Kingdom’s Ivory Act 2018, Its Path to Enactment, and Its Potential Impact on the Illegal Trade in Ivory” C. Cox, *Journal of International Wildlife Law & Policy*, Volume 24, 2021, Issue 2

7 “More delays to the Ivory Act 2018 cost elephants’ lives” 1 February 2022, IFAW

8 S.1(1) Ivory Act

9 S.1(2) Ivory Act

10 S.1(3)(c) Ivory Act

11 Section 12(4) Ivory Act

ing advertising and brokering of ivory deals is another positive, as occasionally legislation focused on improving animal welfare does not go as far as to prohibit the advertisement of articles which cause animal suffering<sup>12</sup>.

Even if the prohibition is wide, it does not restrict all activity regarding ivory. One lacuna in the prohibition results from s.1(4)(a) of the Ivory Act which means that persons operating from the United Kingdom who broker the purchase of ivory for sales which are entirely outside of the United Kingdom are not caught by the prohibition. This seems bizarre and frustrates the stated purpose of the ban to reduce the trade and therefore demand in ivory in order to protect elephants as an endangered species because it permits ivory trading businesses to operate within the United Kingdom as long as they only broker deals internationally. The Explanatory Notes to the Ivory Act does not explain why this exception has been made.

A further carve out from the prohibition is that it does not cover people receiving or parting with ivory as part of a gift or under a will<sup>13</sup>. Even if the motivation of not wanting to criminalise non-commercial activity that could see persons inadvertently commit a criminal offence by receiving ivory in cases through inheritance and other family situations is understandable, the exclusion still presents issues. It is regrettable that the government are not proposing to make a scheme available for people coming into possession of ivory to give this up for destruction as this would allow ivory to be securely taken off the market despite organisations such as IFAW demonstrating there is demand for this<sup>14</sup>. Moreover allowing for gifts of ivory potentially provides a smokescreen behind which commercial operators could disguise trade. It is therefore important that such risk is properly nullified by proper monitoring and enforcement of the legislation.

## Exemptions

The Ivory Act then makes several important exemptions from the broad prohibition against

12 Cf. Glue Traps (Offences) Act 2022.

13 S1(3)(a)-(b) Ivory Act confirms that buying and selling means acquiring and disposing for valuable consideration, which would not capture gifts.

14 Above n.7

trading to create situations in which ivory can be traded and forms of ivory which can be traded, when certain conditions are met, without risk of penalty.

Pre-1918 items of outstanding artistic value and importance

Section 2 of the Ivory Act means that the Animal and Plant Health Agency ("APHA")<sup>15</sup> can issue "exemption certifications" for items made of ivory if the item: (a) is pre-1918; and (b) is of "outstandingly high artistic, cultural or historical value"<sup>16</sup>.

These exemption certifications are not automatically issued and persons holding ivory have to apply for a certificate by sending off an application to APHA containing detailed information as to why the item should be exempt and paying a fee of £250<sup>17</sup>. APHA then decides whether the item should receive an exemption certification, considering factors including the rarity of the item and whether it is an "important example" of a type of artefacts or antiques<sup>18</sup>. If an exemption certificate is granted for an item, the ivory item and the certificate should be traded together.

## Pre-1918 portrait miniatures

Section 6 provides that "portrait miniatures" which meet certain requirements can be traded without penalty. The portrait miniature needs to be made before 1918 and have a surface area of no more than 320cm<sup>2</sup>.

Whilst even the government recognises that there is not a universal definition of a "portrait miniature"<sup>19</sup> these are most commonly tiny portraits painted on a thin sheet of ivory in the 18th and 19th centuries. Readers of this article can search online to find examples of such miniatures.

15 As the delegated national authority on behalf of the Secretary of State.

16 S.2(2) Ivory Act

17 Section 3(1) Ivory Act. The information includes the details of the owner, description and photos of the item and declarations and explanations why it is pre-1918 and of outstandingly high value.

18 Section 2(3) Ivory Act.

19 Ivory Bill, Explanatory Note, 23 May 2018, page 14, paragraphs 53-56

## Pre-1947 items with low ivory content

Under Section 7 there is a wider trading exemption for items with “low ivory content”, which again must satisfy certain conditions. These items must have been made before 1947 and have a volume of ivory which is less than 10% of the entire item's material and this ivory needs to be integral to the item. Integral means that the ivory could not be removed without difficulty or damaging that item<sup>20</sup>.

## Pre-1975 musical instruments

Section 8 means that some musical instruments including ivory can be traded<sup>21</sup>. The instruments need to have been crafted before 1975, have a volume of less than 20% ivory and to be properly registered. Qualifying instruments can also include bows for violins and plectrums for guitars<sup>22</sup>.

## Acquisitions by museums

Section 9 is the final major exemption and allows for museums to acquire ivory and to transfer ivory between museums<sup>23</sup>. The museums need to be recognised as accredited by the relevant governing body in the four nations of the United Kingdom and the items need to be properly registered.

## Registration

For any items containing ivory to be traded under the exemptions discussed above they need to be properly registered with APHA. Persons desiring to register their items need to provide information to APHA, including certifying that it complies with the intended exemption along with paying a fee of £20<sup>24</sup>. If APHA agrees then the item will be registered.

## Analysis of the exemptions

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20 Section 7(2) Ivory Act

21 Section 7(2) Ivory Act

22 Section 8(2)(b) Ivory Act

23 Section 8(2)(b) Ivory Act

24 Other information provided includes a description and photo of the item and the owner's personal details.

Any exemption to a prohibition of trading of any item, including ivory, makes it more difficult for the relevant authorities to enforce the ban. A blanket prohibition removes the need for enforcing authorities to consider whether items satisfy the requirements of any exemptions, which requires training and both time and cost resources. The Wildlife and Countryside Link (“WCL”) have been consistent in highlighting that lack of specialist police training, resource and procedure is harming the detection of wildlife trade crime through contravention of CITES<sup>25</sup>, and this is almost certain to also be the case under the Ivory Act and is worsened by the fact that many items are “covertly” sold online. Covert selling means describing ivory items without using the word ivory, instead describing them falsely under the guise of being made from legitimate material. Work by Born Free has shown that around 15% of online sales of Ivory are covert meaning a significant amount of ivory is already not being detected by online sales platforms<sup>26</sup>.

For the exemptions specific to the Ivory Act, practical questions quickly come to mind. How should a person prove that an item was definitely made pre-1918 or that a musical instrument was crafted before 1974, for example? Certification of provenance or a date stamp may not always be available, in which case DEFRA and APHA guidance suggests verification from an expert<sup>27</sup>.

The Ivory Act contains no required qualifications to be an “expert” however and the guidance worryingly suggests that this might include “...antiques specialists, museum curators or arts specialists...”. Such persons operate with the professions who may want the trade in ivory to continue and who formed FACT to challenge the legality of the ban. There is also nothing explicit preventing such persons designating themselves as their own experts, removing another layer of independent scrutiny. It is therefore concerning that part of the approval of exemptions to the ban is entrusted to professions who are

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25 “Wildlife Crime in 2020: A report on the scale of wildlife crime in England and Wales”, WCL, November 2021, pages 26-29

26 “Are Ivory Sellers Lying through Their Teeth?” Born Free, 5 June 2022, page 9, paragraph 3.4

27 <https://www.gov.uk/guidance/dealing-in-items-containing-ivory-or-made-of-ivory>



themselves potentially self-interested in proliferating the trade.

Other parts of the exemption also rely on subjective assessments, for example whether an item is of "outstanding artistic value and importance". Whilst DEFRA and APHA have produced guidance on the criteria used for assessment<sup>28</sup> including referral to accredited museums, only time will prove how many of such items are granted exempted certificates and can therefore be traded, however if this is more than a low number than the impact of the ban will be watered down.

Considering that the exemptions to the ivory ban threaten the achievement of the stated goal of the legislation to combat and hopefully eliminate the ivory trade, such exemptions require strong justification. The rationale provided by the Government is that these exemptions "[do]

not contribute directly or indirectly to the ongoing poaching of elephants"<sup>29</sup>. The Government further elaborates that this is the case where "sales of certain categories of items would not contribute either directly or indirectly to ivory poaching, and the intrinsic value of that item is not due to its ivory content"<sup>30</sup>. The government intends to secure this by the date restrictions of items preventing more modern ivory from being traded. Whether or not this reflects reality, it is questionable why the trade, instead of just the possession, of such items needs to be legitimised. Exemptions tied to item age implicitly legitimise the previous trade in ivory, which is a leading factor in why elephants around the world were persecuted to the extent that they are so endangered today.

### Limitation to elephant ivory

Currently the Ivory Act defines Ivory as coming

<sup>28</sup> <https://www.gov.uk/guidance/ivory-apply-for-an-exemption-certificate-to-deal-in-pre-1918-outstandingly-high-artistic-cultural-or-historical-value-items>

<sup>29</sup> Above n.19 paragraph 16, page 5

<sup>30</sup> Ibid

from the “tusk or tooth of an elephant”<sup>31</sup>. This is despite ivory also coming from other wildlife including hippopotamus, warthogs, orcas and narwhals. It is uncertain why the Government restricted the definition of ivory to that coming from elephants only, especially when the Explanatory Notes to the Ivory Act’s expressly acknowledge not only that ivory can come from other species, but that certain of these species (namely hippopotamus, walrus, killer whale, sperm whale and narwhal) are at risk of exploitation through commercial trade<sup>32</sup>.

Failing to include these species within the definition also implicitly legitimises the trade of ivory from such species and therefore the persecution required to take ivory from them. This is concerning considering many of these species are listed as vulnerable on the IUCN Red list. It also contradicts the government’s more recent commitment to have regard to all animals as sentient beings when formulating policy through the Animal Welfare (Sentience) Act 2022<sup>33</sup> by permitting persons to continue to trade parts of such species killed as part of blood sports.

Even with this restriction, the Ivory Act includes provisions allowing the Secretary of State for the Environment to make additional regulations to widen the definition of what counts as ivory<sup>34</sup>. Exploring the option to expand the definition, DEFRA launched two initiatives, the first being a call for evidence in 2019 for experts in conservation, the ivory trade and antiques industry on the trade of “non-elephant ivory”<sup>35</sup>. The second was a public consultation in 2021 seeking wider views on expanding the Ivory Act to cover certain non-elephant species<sup>36</sup>.

As of the date of this article, DEFRA are disappointingly yet to publish the results of either the call for evidence or the public consultation, over three years and one year after these initiatives closed respectively. The result of such delay

means that the Ivory Act still only applies to elephant ivory. This creates an issue of enforcement agencies determining whether ivory items come from elephants and therefore whether they are prohibited or not. This presents a major issue as detailed reports from Born Free shows that of 66.9% ivory items listed for sale could not be confidently attributed to a particular species of origin and therefore could not be said to come from an elephant<sup>37</sup>. For the remaining 33.1% of discernible items, 19% of these came from non-elephant species<sup>38</sup>.

The above demonstrates that there is a significant trade in non-elephant ivory that can be determined and the inability of experts to clearly identify the species from which any ivory originates presents a real risk of elephant ivory being illicitly traded in contravention of the prohibition whilst being described as coming from another species. DEFRA’s call for evidence presented respondents with three options in addressing this issue, namely to (1) retain the status quo; (2) expand the definition to cover ivory from hippopotamus; or (3) expand the term to cover ivory from hippopotamus along with narwhals, killer and sperm whales and walruses. It is disappointing that DEFRA did not include an option to expand the ban to ivory from any species, as options (2) and (3) still create the problem of enforcement agencies determining between prohibited and permitted ivory, as well as failing to reflect the recognition of all animal’s sentience. Such options also create the risk that species not covered by the ban suffer more poaching for their ivory because ivory from other species is banned, hence only shifting the problems between species.

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31 S.37(1) Ivory Act

32 Above n.19, page 31, paragraph 135

33 Section 2(2) Animal Welfare Sentience Act 2022

34 S. 37(2) Ivory Act

35 “Call for evidence: Non-elephant ivory trade” DEFRA, May 2019

36 “Consultation on extending the Ivory Act to other species” DEFRA, July 2021

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37 Above n.26, page 8 paragraph 3.3

38 Ibid