

COMMISSION NOTICE
Revised GUIDANCE DOCUMENT
EU regime governing trade in ivory

(2021/C 528/03)

Table of contents

1. Introduction and glossary of terms	20
2. Background	20
a) International and EU legal framework governing ivory trade	20
b) EU initiatives against wildlife trafficking that affect internal EU ivory trade and re-export of ivory	22
3. Status of this document	22
4. Justification for and summary of recommendations	23
a) Re-exporting from the EU	23
b) Internal EU trade in ivory	24
c) Imports into the EU	24
5. How to interpret EU rules on re-exporting ivory	24
a) Re-exporting raw ivory	25
b) Re-exporting worked ivory	25
6. How to interpret EU rules on internal EU trade in ivory	27
a) Specific guidance on internal EU trade in raw ivory	27
b) Specific guidance on internal EU trade in worked ivory	28
7. How to interpret EU rules on importing ivory	29
8. Coordination within and between EU Member States as well as with non-EU countries	30
9. Summary of the EU regime governing commercial trade in ivory	30
Annex I - Evidence to demonstrate legal acquisition	32
Annex II - Marking, registration and other requirements for issuing certificates	34

1. Introduction and glossary of terms

The purpose of this guidance document is to interpret Council Regulation (EC) No 338/97 ⁽¹⁾ (the 'Basic Regulation') and Commission Regulation (EC) No 865/2006 ⁽²⁾, and recommending that EU Member States:

- a) suspend the (re-)export and import of raw ivory items;
- b) suspend internal EU trade in raw ivory, except for repairs of pre-1975 musical instruments and pre-1947 antiques of high cultural, artistic or historical importance;
- c) suspend internal EU trade in post-1947 worked specimens with the exception of pre-1975 musical instruments;
- d) restrict authorisation for import and (re-)export of worked ivory to pre-1975 musical instruments and sales of pre-1947 antiques of high cultural, artistic or historical importance to museums, and
- e) ensure a strict interpretation of EU law on the remaining authorised trade.

This guidance document should be read in conjunction with Commission Regulation (EU) No 2021/2280 amending Commission Regulation (EC) No 865/2006 ⁽³⁾.

The following terms are used with a particular meaning for the purpose of this guidance document:

- ivory: refers only to ivory from elephants;
- pre-1975 musical instrument: a musical instrument containing legally acquired pre-1975 ivory which is, or has been until recently, used by a performing artist and is thus not merely a decorative object. The CITES Convention has been applicable to African elephants since 26 February 1976, and to Asian elephants since 1 July 1975. For the sake of simplicity, this guidance document uses only the earlier date (1975) as a reference.
- pre-1947 antique: an item containing ivory which is covered by the definition of 'worked specimens that were acquired more than 50 years previously' in Article 2 (w) of the Basic Regulation;
- museum: 'non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment' ⁽⁴⁾.

2. Background

a) *International and EU legal framework governing ivory trade*

Both the African Elephant *Loxodonta africana* and the Asian Elephant *Elephas maximus* are included in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which has 183 signatories (Parties), including the EU and all EU Member States.

Under the current CITES regime, international trade in ivory ⁽⁵⁾ is banned, with strictly limited exemptions (for items acquired before CITES started to apply to ivory). However, CITES does *not* regulate domestic trade in ivory.

The EU implements CITES through the Basic Regulation and associated Commission Regulations ('EU wildlife trade regulations'). For elephant ivory (as for other species listed in Annex A of the Basic Regulation), the EU has adopted additional measures that are stricter than CITES.

As a result, the EU strictly regulates trade in ivory through the EU wildlife trade regulations. Trading ivory to, within or from the EU for commercial purposes is generally banned.

⁽¹⁾ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61, 3.3.1997, p. 1).

⁽²⁾ Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 166, 19.6.2006, p. 1).

⁽³⁾ OJ L 473, 22.12.2021, p. 1.

⁽⁴⁾ <http://uis.unesco.org/en/glossary-term/museum#:~:text=Definition,of%20education%2C%20study%20and%20enjoyment>

⁽⁵⁾ The reference to ivory in this guidance document relates only to ivory from elephants.

However, national authorities can authorise ivory trade for commercial purposes under the following conditions:

- re-export can be authorised for ivory specimens acquired before the date on which CITES became applicable to them, i. e. 26 February 1976 for African elephants and 1 July 1975 for Asian elephants;
- trade within the EU can be authorised for ivory items imported into the EU before the elephant species was listed in Appendix I of CITES (18 January 1990 for African elephants and 1 July 1975 for Asian elephants) ⁽⁶⁾, if a certificate has been issued to this effect by the EU Member State in which the item is offered for sale for the first time;
- imports of pre-1947 items can be authorised as well as imports of legally acquired pre-1975 items that had been legally imported to the EU already before.

Elephant poaching and ivory trafficking, driven by demand from Asia, remain at dangerously high levels

Elephant poaching has reached unprecedented levels in the recent past, which has led to a widespread decline in African Elephant populations ⁽⁷⁾.

According to the CITES programme for Monitoring the Illegal Killing of Elephants (MIKE) ⁽⁸⁾, the Proportion of Illegally Killed Elephants (PIKE) level shows a steady increase starting in 2006, peaking in 2011, and thereafter a downward trend from 2011 to 2019. This suggests poaching levels are beginning to drop, but whether this will be sustained needs to be carefully examined. It also needs to be recognised that any decline in illegal ivory trade is occurring in conjunction with an overall decline in elephant populations in Africa ⁽⁹⁾. While the PIKE estimates suggest an overall decline in elephant poaching in Africa since 2011, there are significant regional differences, and overall poaching levels for African elephants remain a concern.

The illegal ivory trade also remains at high levels, although ivory prices are steadily declining, according to the 2020 World Wildlife Crime Report ⁽¹⁰⁾. According to a report from the Elephant Trade Information System (ETIS) ⁽¹¹⁾, some 280 tonnes of elephant ivory were reported in around 8 000 ivory seizure cases between 2012 and 2017 worldwide. ETIS data also show an increase in Chinese-owned ivory processing operations within Africa, for exporting products to Asian markets ⁽¹²⁾ - with at least 24 cases from four African countries representing 1,11 tonnes of worked ivory moving from Africa to Asia in 2017 ⁽¹³⁾. The movement of such significant quantities of ivory indicates increasing involvement by transnational organised criminal networks.

The international response

In response to the challenges posed by elephant poaching and ivory trafficking, the international community has adopted numerous commitments, through Resolutions by the UN General Assembly and the UN Environment Assembly, as well as at several high-level Conferences.

The 17th Conference of the Parties to CITES (CoP17) in October 2016 adopted a series of measures to improve the enforcement of the rules against elephant poaching and ivory trafficking, reduce the demand for illegal ivory, and reinforce scrutiny of the legality of ivory on domestic markets. CITES Resolution 10.10 (Rev. CoP18) on trade in elephant specimens

⁽⁶⁾ Pursuant to Article 8(3)(a) of the Basic Regulation.

⁽⁷⁾ Nellemann, C., Henriksen, R., Raxter, P., Ash, N., Mrema, E. (Eds). (2014). The Environmental Crime Crisis — Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources. A UNEP Rapid Response Assessment. United Nations Environment Programme and GRID-Arendal, Nairobi and Arendal.

⁽⁸⁾ https://cites.org/eng/MIKE_PIKE_Trends_report_elephants_CITES_16112020

⁽⁹⁾ Thouless, C.R., Dublin, H.T., Blanc, J.J., Skinner, D.P., Daniel, T.E., Taylor, R.D., Maisels, F., Frederick H. L., Bouché, P. (2016). African Elephant Status Report 2016: an update from the African Elephant Database. Occasional Paper Series of the IUCN Species Survival Commission, No. 60 IUCN / SSC Africa Elephant Specialist Group. IUCN, Gland, Switzerland.

⁽¹⁰⁾ https://cites.org/eng/UNODC_releases_WorldWildlifeCrimeReport2020_CITES_10072020

⁽¹¹⁾ The Elephant Trade Information System (ETIS) was set up by CITES Resolution Conf. 10.10 (Rev. CoP17) on Trade in elephant specimens. One of its objectives is 'i) measuring and recording levels and trends, and changes in levels and trends, of illegal elephant killing and trade in ivory'. ETIS produces a comprehensive report on worldwide ivory seizures before each CITES Conference of Parties. The latest report is available here: <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-069-03-R1.pdf>

⁽¹²⁾ <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-069-02.pdf>

⁽¹³⁾ <https://cites.org/sites/default/files/eng/com/sc/70/E-SC70-49-01x-A1.pdf>

urges Parties to put in place comprehensive internal legislative, regulatory, enforcement and other measures for ivory trade/domestic markets. This Resolution also 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’* and recognises that *‘narrow exemptions to this closure for some items may be warranted; any exemptions should not contribute to poaching or illegal trade’*.

The EU, like other Parties, is also requested to report to the Standing Committee and the Conference of the Parties on the measures taken to ensure its domestic market does not contribute to the current levels of poaching and trafficking.

Legal trade in ivory from the EU has been reduced

Commercial re-exports of both raw and worked ivory from the EU carried out in line with the Basic Regulation (‘legal re-exports’) increased considerably up to 2015.

Since the adoption of the previous version of this guidance document ⁽¹⁴⁾ in July 2017, re-export of raw ivory has been suspended, which led to a decrease in re-exported ivory tusks even before the ban entered into force (420 tusks re-exported in 2016, 101 in 2017).

Commercial re-exports of legal worked ivory also fell since 2016. The average number of re-export certificates per year issued by EU Member States has gone down from around 470 in the 2012-2015 period to 280 in the 2016-2018 period.

b) EU initiatives against wildlife trafficking that affect internal EU ivory trade and re-export of ivory

The Communication on an EU Action Plan against wildlife trafficking ⁽¹⁵⁾ invited the EU and its Member States to implement a comprehensive strategy against wildlife trafficking ⁽¹⁶⁾. This Communication notably envisaged (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. In its June 2016 conclusions on this Communication, the Council of the European Union urged ‘Member States not to issue export or re-export documents for raw pre-Convention ivory from elephants on the basis of EU guidelines and to consider further measures to put a halt to commercial trade in ivory from elephants’.

The Commission adopted a guidance document in May 2017 in response to these calls. The present guidance document updates and replaces the version of 2017 and responds to the Commission’s commitment in the EU Biodiversity Strategy for 2030 to further tighten the rules on EU ivory trade ⁽¹⁷⁾.

3. Status of this document

This guidance document was discussed and developed in cooperation with Member States’ representatives, sitting as the Group of Experts of the Competent CITES management authorities (the ‘Expert Group’).

It is intended to help citizens, businesses and national authorities apply the Basic Regulation and related Commission Regulations. It does not replace, add to or amend the rules in the Basic Regulation and its implementing Regulations; furthermore it should not be considered in isolation but used in conjunction with this legislation. Only the Court of Justice of the European Union is competent to authoritatively interpret EU law.

An electronic version of this guidance is also published by the Commission, and possibly by EU Member States.

The recommendations contained in this document are addressed to the Member States and remain valid in line with the precautionary principle, and unless new conclusive scientific evidence comes to light which would justify the revision of this guidance in consultation with the Expert Group.

⁽¹⁴⁾ Commission Notice 2017/C 154/06

⁽¹⁵⁾ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0087&from=EN>

⁽¹⁶⁾ The Wildlife Action Plan is being evaluated in 2020 and 2021; a revised version is due to be adopted on the basis of the evaluation – cf. *EU Biodiversity Strategy for 2030*, COM(2020) 380 final of 20 May 2020.

⁽¹⁷⁾ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590574123338&uri=CELEX:52020DC0380>

4. Justification for and summary of recommendations

The continuously high demand for ivory from Asia is one of the most important drivers for the current high levels of elephant poaching and ivory trafficking. The most recent analyses (MIKE and ETIS, see Section 2 a)) have shown a small reduction in poaching levels. Nevertheless, the numbers of poached elephants continue to be unsustainable for many populations in Africa.

Even though none of the EU Member States have been identified in the ETIS reports as countries that are implicated in the illicit ivory trade, the EU should continue to reduce the risk of contributing to the demand for ivory.

This guidance document aims to further limit the trade in potential higher-risk items and certain types of trade, while continuing to allow a limited and well-controlled trade in low-risk items. The document is based on a precautionary approach to implementing the rules on domestic ivory trading in the EU. They apply restrictions where a higher risk of trade contributing to the demand for ivory and illicit ivory trade is likely. Therefore, internal EU trade for certain limited types of items where the risk of contributing to ivory demand or illegal poaching of elephants is low or inexistent, can continue to take place subject to authorisations. The document also aims to help citizens and businesses better understand and follow the rules and enable more effective enforcement.

The following sections address re-exports of ivory from the EU (Section 5), internal EU trade in ivory (Section 6) and imports from outside the EU (Section 7) as well as issues of coordination (Section 8).

The rest of this section presents additional justifications for the need to act on each of these trade flows and provides a summary of recommendations to Member States. A more condensed summary in table format is provided in the concluding Section 9).

a) *Re-exporting from the EU*

Raw ivory ⁽¹⁸⁾ 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.

Raw ivory mainly consists of tusks, which are difficult to differentiate from one another. The risks that legal re-exports of raw ivory are used as cover for trading in illegal raw ivory are bigger than for worked ivory, despite the fact that legal tusks can only be traded if they marked.

Suspending the re-export of raw ivory from the EU ensures that tusks of legal origin are not mixed with illegal ivory and help destination countries implement their measures to reduce demand for ivory, which constitute an important step in addressing illegal trade in ivory and elephant poaching. This is the rationale for the de-facto ban on commercial re-export of raw ivory, in place since July 2017 (see Section 5 a)).

As there have been indications that worked items are also becoming increasingly involved in the international illegal ivory trade ⁽¹⁹⁾, there is a need to apply further restrictions to re-exports of worked ivory. Although there is no sign of legal activities in the EU contributing to poaching and illegal trafficking, the EU is committed to minimise the risk that any international trade coming from the EU would fuel the demand for ivory, and in turn incentivise poaching of elephants to meet this demand.

Therefore, the Commission's recommendation is to also suspend the issuance of re-export certificates for worked ivory specimens, except for pre-1975 musical instruments and pre-1947 antiques of high cultural, artistic or historical importance sold to museums (see Section 5 b) for details on those exceptions). These exceptions apply to items whose to

⁽¹⁸⁾ It is recommended that EU Member States use the definition of 'raw ivory' contained in CITES Resolution Conf. 10.10 (Rev. CoP 18), according to which:

'a) the term "raw ivory" shall include all whole elephant tusks, polished or unpolished and in any form whatsoever, and all elephant ivory in cut pieces, polished or unpolished and howsoever changed from its original form, except for "worked ivory"; and
b) "worked ivory" shall be interpreted to mean ivory that has been carved, shaped or processed, either fully or partially, but shall not include whole tusks in any form, except where the whole surface has been carved'.

⁽¹⁹⁾ Cf. Status of elephant populations, levels of illegal killing and the trade in ivory: A report to the CITES Standing Committee, at <https://cites.org/sites/default/files/eng/com/sc/70/E-SC70-49-01x-A1.pdf>

the ivory they contain. Moreover, with the controls recommended, these exceptions are highly unlikely to contribute to elephant poaching or illegal trade in ivory, while contributing to the preservation of important artistic, cultural or historical values.

b) **Internal EU trade in ivory**

The EU has a responsibility to ensure commercial use of ivory in the EU is strictly controlled and regulated, as per CITES Resolution 10.10 (Rev. CoP18) and the Basic Regulation.

Since the CITES decision to ban international ivory trade in 1989, demand for ivory in Europe has fallen considerably. EU Member States have not been identified under CITES as important destination markets nor as transit countries for illegal ivory. Most internal EU trade consists of pre-1947 antiques.

However, there have been some instances of illegal trade in ivory items in the EU. The trade in raw ivory involves a higher risk for illegal ivory trade than the trade in worked ivory specimens. This justifies a suspension of issuing certificates for trading in raw ivory within the EU, except for the purpose of repairing pre-1975 musical instruments or pre-1947 antiques of high cultural, artistic or historical importance held by a museum or public institution.

Furthermore, the Commission's recommendation is to suspend issuing certificates for worked specimens acquired after 1947 except for pre-1975 musical instruments. This will limit the internal trade in worked items to pre-1947 antiques and pre-1975 musical instruments.

The different regime applicable to worked items is justified by the fact that a lower risk for illegal ivory trade has been identified in relation to internal EU trade of such items compared to trade in raw ivory and external EU trade in general, in particular when the items constitute pre-1947 antiques or pre-1975 musical instruments. It is highly unlikely that internal EU trade of pre-1947 antiques or pre-1975 musical instruments would contribute to illegal trade of ivory or demand for illegal ivory, given also that such remaining trade will be strictly controlled. Therefore, pre-1947 antiques and pre-1975 musical instruments can continue to be traded within the EU but will require the issuance of a certificate.

c) **Imports into the EU**

Importing ivory from outside the EU is strictly regulated. Commercial import is prohibited, except for pre-1947 antiques or re-imports of pre-Convention items previously imported legally into the EU (see Section 7).

Levels of commercial imports into the EU in recent years have been very low.

While some risk of fuelling the demand for ivory or contributing to poaching or illegal trade in general remains with regard to imports of worked specimens, pre-1975 musical instruments and pre-1947 antiques of high cultural, artistic or historical importance sold to museums are highly unlikely to present such risks.

To improve consistency with the rules proposed for internal EU trade and re-export, the Commission's recommendation is to suspend:

- issuance of import and re-import permits for raw ivory;
- issuance of import and re-import permits for worked ivory specimens, except for pre-1975 musical instruments and pre-1947 antiques of high cultural, artistic or historical importance sold to museums (see Section 7 for more on the conditions for applying the exceptions).

5. **How to interpret EU rules on re-exporting ivory**

The rules governing re-export of ivory specimens acquired before the date on which CITES became applicable to them are laid down in Article 5 of the Basic Regulation.

Under Article 5(2)(d), when assessing applications for re-exporting Annex A species, management authorities need to be '*satisfied, following consultation with the competent Scientific Authority, that there are no other factors relating to the conservation of the species which militate against issuance of the export permit*'.

This requirement needs to be interpreted in light of the circumstances described in Section 2, as well as in view of the specific features relating to international trade in ivory, for both raw and worked items.

a) **Re-exporting raw ivory**

The Commission recommends that Member States should consider that there are serious factors relating to the conservation of elephant species that militate against issuing re-export certificates for raw ivory.

Consequently, in line with the Basic Regulation, the Commission recommends that Member States should, as has been the case since 1 July 2017, not issue re-export certificates for raw ivory, except in exceptional cases, where the management authority in the Member State concerned is satisfied that the item:

1. is part of a genuine exchange of cultural goods between reputable institutions (i.e. museums); or
2. is an heirloom moving as part of a family relocation; or
3. is being moved for enforcement, scientific or educational purposes.

In any such exceptional cases, it is recommended that management authorities follow the guidance in this document in relation to acquiring suitable evidence of the specimen's legal origin (Annex I of this document), marking (Annex II) and, where relevant, coordination with other Member States and non-EU countries (Section 8).

b) **Re-exporting worked ivory**

Unlike raw ivory, worked ivory encompasses many different types of specimens. This includes items that have been in trade legally for decades (for example musical instruments or antiques).

The Commission recommends that Member States should, from the date this guidance is published, not issue re-export certificates for commercial trade in worked specimens.

Exceptionally, commercial trade can be authorised where the management authority in the Member State concerned is satisfied that:

- the item is a pre-1975 musical instrument; or
- the item is a pre-1947 antique sold to a museum, and a relevant authority responsible for cultural heritage (such as the responsible ministry) confirms its high cultural, artistic or historical importance and supports the transaction.

It is imperative that EU Member States exercise a high level of scrutiny in relation to applications to re-export such items, to make sure they only deliver the relevant documents if the conditions set in EU law are met to guarantee that the ivory is of legal origin.

In addition to the exemption on commercial re-export described above, Management Authorities can also issue a re-export certificate if they are satisfied that the item is:

1. part of a genuine exchange of cultural goods between reputable institutions (e.g. museums); or
2. an heirloom moving as part of a family relocation; or
3. being moved for enforcement, scientific or educational purposes.

It is recommended that the conditions for issuing re-export certificates for the above exceptions are strictly interpreted.

More specifically, when evaluating an application for re-export, be it commercial or for other purposes, Member States should consider the following:

- When evaluating if the specimen fulfils the definition of 'pre-1975 musical instrument', the owner should demonstrate that the item is, or has until recently been, used as an instrument by a performing artist and is thus not merely a decorative object containing ivory.
- When evaluating if the destination for a pre-1947 antique item can be considered to be a museum, it can be taken into account if the institution is a member of the International Council of Museums (ICOM) or a similar organisation.

- If the item is described as a pre-1947 antique of high cultural, artistic or historical importance, it should be demonstrated that the item fulfils the conditions of a 'worked item acquired more than 50 years ago'. The 'Guidance on worked specimens under the EU Wildlife Trade Regulations' ⁽²⁰⁾ provides clear instructions in this regard. A public authority competent for cultural heritage (such as the responsible ministry) should explicitly confirm the high cultural, artistic or historical importance of the item and support the transaction as a prerequisite for authorising the sale to a museum. Considerations such as repatriation of important cultural items to their country of origin can be taken into account.
- Evidence such as an invoice - or another document such as an expert valuation, detailing the age and price - and a detailed description and pictures of the item are required to demonstrate that the value of the item is intrinsic and not related to the ivory it contains.
- The identity of the seller and the buyer should both be part of the evaluation. The identity of the seller can, in some cases, provide additional information about the object. The country of destination, as well as the specific identity of the buyer, also need to be taken into consideration.
- Applications to re-export to a destination country identified by ETIS as a country involved in the illegal ivory trade require a higher level of scrutiny than other destination countries. Re-exports to Parties under the National Ivory Action Plan process ⁽²¹⁾ should be avoided.
- In general, the identity of the buyer can provide additional reassurance that the transaction is taking place for the intrinsic value of the specimen (e.g. museums, reputable collectors, musicians, or similar buyers).

It is for the applicant to provide evidence that the item falls under the exemptions described above. If the applicant cannot provide sufficient evidence to the satisfaction of the Member State authority, and reasons for doubt remain, no certificate should be delivered.

If issued, the certificate should describe the pre 1975-musical instrument or the pre-1947 antique item concerned with sufficient detail so that the certificate can be used only for the specimen concerned. In addition, and where legislation allows, Member States may consider collating, verifying and recording the identities of the applicant and, where possible, the purchaser.

It is particularly important for the applicant for a re-export certificate to demonstrate either that the musical instrument was made using legal pre-1975 ivory or that it is a pre-1947 antique, and that it has been legally acquired. The applicant can do this by submitting an intra-EU certificate for the item, which proves the legal acquisition and will normally also provide details about the age of the specimen. It is also possible that the applicant does not have a certificate: they may never have applied for one, or the item was previously covered by the exemption from the certificate requirement for 'worked items acquired more than 50 years ago'. In such cases, the applicant needs to demonstrate general compliance with the requirements of Article 5 of the Basic Regulation.

Certificates expired by virtue of Article 11(4a) of Commission Regulation 865/2006 are no longer valid for commercial transactions. It is nonetheless recommended that the holder keeps a copy of such a certificate to use it as a proof of legal acquisition in any future applications or in case of inspections.

Member States will need to check if the item actually falls under any of the cases mentioned above, i.e. that there is a valid reason for the absence of a certificate.

To further assess the conditions under which such trade can be authorised, it is recommended that EU Member States also apply the guidance on:

- 'Worked Specimens under the EU Wildlife Trade Regulations';
- 'Evidence to demonstrate legal acquisition' in *Annex I of this document*;
- 'Marking, registration and other requirements for issuing certificates' in *Annex II of this document*.

⁽²⁰⁾ OJ C 154, 17.5.2017, p. 15.

⁽²¹⁾ <https://cites.org/eng/niaps>

6. How to interpret EU rules on internal EU trade in ivory

Trade within the EU of Annex A specimens is generally prohibited under Article 8(1) of the Basic Regulation. Article 8(3) authorises Member States to derogate from this prohibition if at least one of the conditions listed in subparagraphs (a) to (h) is met.

However, the use of the term 'may' in Article 8(3) makes it clear that Member States are not obliged to grant a certificate for internal EU trade when those conditions are met (except if otherwise required by EU law, such as to apply the principle of proportionality). When deciding about granting or not granting a certificate, the authority should use its discretionary powers in an appropriate manner.

The consequence is that Article 8(3) cannot be considered as conferring an absolute right to a certificate for internal EU trade to any applicant, even when one of the relevant conditions is met. Moreover, Article 8(3) is subject to the precautionary principle - so (as discussed above) the burden of proof for demonstrating a transaction is legitimate and consistent with the objectives of the Basic Regulation lies with the applicant.

When receiving an application for commercial use of ivory within the EU under Article 8(3), a Member State is entitled under EU law to refuse to grant a certificate, even when one of the conditions is met, provided the refusal is compatible with the principle of proportionality (i.e. the refusal is appropriate to protect the species and does not go beyond that which is necessary to achieve that aim). The Commission and the Expert Group believe this will be the case where the legitimacy of a transaction and its consistency with the objectives of the Basic Regulation have not been conclusively demonstrated by the applicant.

Member States have a responsibility to avoid issuing certificates which could facilitate any illegal activities and should therefore handle those applications for internal EU trade in a way that minimises this risk as much as possible. The issuance of certificates should be considered only for certain types of internal EU transactions that present no or very low risk of contributing to illegal ivory activities or demand for illegal ivory. Member States are recommended to ensure maximum scrutiny in handling applications for intra-EU certificates and strictly interpret the conditions for issuing such certificates.

To this end, it is recommended that EU Member States apply the guidance on the 'evidence to demonstrate legal acquisition' contained in Annex I of this document and on 'marking, registration and other requirements for issuing certificates' contained in Annex II.

If delivered, the certificate should describe the item concerned with sufficient detail so that it is clear that the certificate can only be used for the specimen concerned - this is especially important for raw ivory which is likely to have fewer identifying features. In addition, and where legislation ⁽²²⁾ allows, it is recommended that Member States collate, verify and record identities of the seller and of the buyer. Member States may lay down a condition specific to internal EU trade in raw ivory obliging the seller to inform the authorities of the buyer's identity.

When applications for internal EU trade of ivory are made under Article 8(3)(c), i.e. 'for purposes which are not detrimental to the survival of the species', Member States are reminded that, because the import of ivory (as personal effects, notably hunting trophies) is only possible for non-commercial reasons, there is no possibility for their owners to be granted a certificate for a commercial purpose within the EU under this provision.

It is recommended that EU Member States follow the guidance outlined below when assessing applications for certificates for internal EU trade in raw ivory as well as worked specimens containing ivory.

a) *Specific guidance on internal EU trade in raw ivory*

It should be recalled that Article 11(4a) of Commission Regulation (EC) No 865/2006 (as amended) sets an expiry date for certificates for raw ivory that were issued before 19 January 2022. The Commission recommends that, as of that date, Member States should no longer issue certificates for commercial trade in raw ivory within the EU.

⁽²²⁾ Especially laws on protection of personal data.

However, where the management authority in the Member State concerned is satisfied that ivory is necessary for repairs of a particular item and a substitute cannot be used, a certificate allowing the sale of raw ivory can be granted exclusively for repairing the following items:

- pre-1975 musical instruments;
- pre-1947 antiques held by a museum or public institution for which a relevant authority responsible for cultural heritage (such as the responsible ministry) confirms its high cultural, artistic or historical importance and supports the need for its repair with ivory.

These cases are considered rare and very exceptional.

The certificate should be issued only if the management authority has no doubts that the raw ivory will be used for repairing such items and it is able to control and verify, if necessary, that this will be the case and that the raw ivory will not be used for any other purpose.

Member States are recommended to consider setting up their own national system for controlling the stock of raw ivory in the hands of workshops for repairs.

The management authorities should make it clear that using raw ivory for such repairs is a last resort, and urge professional restorers to instead use non-ivory substitutes whenever possible. In the rare cases where this is not possible, they can issue a transaction-specific certificate for raw ivory.

A certificate issued for the use of raw ivory for repairs should, as a minimum, include the following language in box 20:

For pre-1975 musical instruments: 'This certificate is only valid for a single sale to a professional workshop for the exclusive use to repair legally acquired pre-1975 musical instruments'.

For pre-1947 antiques of high cultural, artistic or historical importance held by a museum or public institution: 'This certificate is only valid for a single sale to a professional workshop, exclusively to repair [insert here the description of the item to be repaired]'.

If deemed appropriate, Member states can include the name of the professional restorer in the transaction-specific certificate.

A certificate should only be issued if the Member State is satisfied that the ivory was legally obtained before the Convention became applicable to elephants (see above, footnote 2).

The Commission also recommends that Member State mark raw ivory tusks according to Resolution Conf. 10.10 (Rev. CoP18) and include the reference of the marking in the description box of the certificate (see also Annex II).

b) *Specific guidance on internal EU trade in worked ivory*

As an exception to the general prohibition to commercialise Annex A specimens, contained in Article 8(1) of the Basic Regulation, commercial internal EU trade in all worked items containing ivory is allowed only if a certificate for this purpose has been granted by Member State authorities on a case-by-case basis (Article 8(3)(a) and (b) of the Basic Regulation).

The Commission recommends that Member States should, from the date this guidance is published, not issue certificates for commercial trade in worked ivory specimens, unless they are satisfied that the item is:

1. a pre-1975 musical instrument; or
2. a pre-1947 antique.

When evaluating an application for a pre-1947 antique, the age of the specimen and the other aspects related to the definition of 'worked specimen' are the main consideration ⁽²³⁾, and Member States should only consider investigating further if there are indications that the item was illegally obtained.

For pre-1975 musical instruments, both the age and the legal acquisition should generally be scrutinised, and the management authority should only issue a certificate if it is satisfied that sufficient proof of both conditions has been provided. In addition, the owner should demonstrate that the item is, or has until recently been, used as an instrument by a performing artist and is thus not merely a decorative object containing ivory.

7. How to interpret EU rules on importing ivory

The rules governing imports of ivory specimens are laid down in Article 4 of the Basic Regulation. Pursuant to Article 4(1)(d), when assessing applications for import of Annex A species, management authorities need to be 'satisfied that the specimen is not to be used for primarily commercial purposes', which effectively prohibits commercial imports of ivory into the EU Member States.

An exception to this general prohibition on commercial import is possible in two specific cases:

- The specimen has previously been legally introduced into or acquired in the EU and is, modified or not, being reintroduced into the EU (Article 4.5(a) of the Basic Regulation), or
- The specimen is a worked specimen that was acquired more than 50 years previously (Article 4.5(b) of the Basic Regulation).

However, even if one of the two conditions for such an exception is fulfilled, the management authority can still refuse the application if, in consultation with the competent scientific authority, it considers that there are other factors relating to the conservation of the species which militate against issuing an import permit (Article 4.1(e)).

The Commission recommends that Member States should, from the date this guidance is published, not issue permits for commercial imports of raw ivory.

The Commission also recommends that Member States should, from the same date, not issue import permits for worked specimens.

Two exceptions for commercial trade will remain possible where the management authority in the Member State concerned is satisfied that:

- the item is a pre-1975 musical instrument; or
- the item is a pre-1947 antique sold to a museum, and a relevant authority responsible for cultural heritage (such as the responsible ministry) confirms its high cultural, artistic or historical importance and supports the transaction.

The evaluation of import applications is equivalent to re-export applications and therefore the criteria listed in Section 5 b) for issuing permits should also be applied.

Import permits allowing import of raw ivory or worked ivory specimens for non-commercial purposes can be issued in accordance with Article 4(1) of the Basic Regulation. Any such imports require the highest level of scrutiny and permits should, as a rule, only be issued if the management authority is convinced there is no risk these items could find their way into commercial trade. Based on recent trade data (imports from Africa into the EU between 2016 and 2018) it is clear that in practice, such imports are either for personal purposes, or hunting trophies, which do not allow for further commercialisation after the import took place. It is recommended to explicitly mention on the import permit the limitation that such items are only intended for personal use. The following notice can be used: *'Import of this specimen is for personal use only. The item must remain in the property of the holder of this permit. It must be presented to competent authorities on request'. This is also relevant for importing hunting trophies, as they are items for personal use.*

⁽²³⁾ The definition of worked specimen includes four elements, all of which need to be assessed: the item has been manufactured/worked prior to 3 March 1947; the item has been significantly altered from its natural state; the item clearly falls into one of the categories — jewellery, adornment, art, utility or musical instrument, and requires no further carving, crafting or manufacture to effect its purpose; the management authority in the Member State concerned is satisfied that the item has been acquired in such conditions. See Guidance on Worked Specimens under the EU Wildlife Trade Regulations (OJ C 154, 17.5.2017, p. 15).

When evaluating applications for importing hunting trophies, management authorities are reminded to consider the most recent scientific advice ('non-detriment finding' or lack thereof), as provided by the Scientific Review Group.

Commercial use of elephant hunting trophies following import into the EU is prohibited, regardless of the origin of the elephant ⁽²⁴⁾. These trophies have to remain in the hunter's possession.

In addition to the exemption on commercial imports described above, management authorities may also issue an import permit if they are satisfied that the item:

1. is part of a genuine exchange of cultural goods between reputable institutions (e.g. museums); or
2. is an heirloom moving as part of a family relocation; or
3. is being moved for enforcement, scientific or educational purposes.

To further assess the conditions under which such trade can be authorised, it is recommended that EU Member States apply the guidance on 'Evidence to demonstrate legal acquisition' in Annex I of this document, and on 'Marking, registration and other requirements for issuing certificates' in Annex II.

8. Coordination within and between EU Member States as well as with non-EU countries

Where regional or local CITES management authorities are responsible for issuing CITES documentation, it is recommended that Member States ensure that these authorities report to the central CITES management authority regarding all submitted applications for re-export certificates and intra-EU certificates. This would ensure both coordinated verification of legal acquisition and consistency in assessing applications. This could be supported by setting up national databases to store the relevant information.

Furthermore, additional restrictions/controls may apply to re-exports to certain countries/territories that have introduced stricter domestic measures for trade in ivory, such as China, Hong Kong SAR and the United States of America. Before issuing a re-export certificate for ivory, the Member States concerned are strongly advised to make applicants aware of the possibility that stricter domestic measures are in force in the destination country. It is the responsibility of the applicant to check the conditions for importing ivory into the destination country.

If desired, a Member State can also inform the CITES authorities in the destination country, so they can check that the import of that specimen is in line with existing regulations.

Where an intra-EU certificate issued by an EU Member State is presented as evidence of legal acquisition, for the purposes of a re-export certificate (for pre-1975 musical instruments only) or an application for an intra-EU certificate, the Member State treating the application is encouraged to check the validity of the internal EU trade certificate with the Member State who issued it.

When a management authority receives an application for raw ivory where the identity of the professional restorer is known but they are located in another Member State, the issuing Member State is encouraged to contact the destination Member State to check if there are any considerations that would militate against issuing the certificate.

9. Summary of the EU regime governing commercial trade in ivory

The following table compares the 'old' and 'current' EU regime on commercial ivory trade:

- *old regime* - that in force before this guidance document and Commission Regulation (EU) No 2021/2280 were published;
- *current regime* - the rules in force since then ⁽²⁵⁾.

⁽²⁴⁾ This prohibition applies to populations of elephants listed in both Annex A and B, as trade in Annex B hunting trophies is only possible for non-commercial purposes (see annotation to the Annex B listing of elephant populations of Botswana, Namibia, South Africa and Zimbabwe in the Basic Regulation).

⁽²⁵⁾ The term 'suspended' is used in this table where the measure has been introduced through this guidance or its predecessor. The term 'prohibited' refers to obligations included in the Basic Regulation and/or CITES.

For details, consult the wildlife trade regulations and relevant sections of this guidance.

	Internal EU trade for commercial purposes		Re-export from the EU for commercial purposes		Import to the EU for commercial purposes	
	Old regime	Current regime	Old regime	Current regime	Old regime	Current regime
Raw ivory	Case-by-case authorisation possible for pre-1990/pre-1975 items - certificate required	Suspended, case-by-case authorisation possible for the purpose of repairing musical instruments or pre-1947 antiques of high cultural, artistic or historical importance ⁽²⁶⁾ - single transaction-specific certificate required	Suspended	Suspended (no change)	Case-by-case authorisation possible for pre-1947 antiques or reimported pre-1975 items - permit required	Suspended
Worked ivory: Items with ivory acquired between 1975 and 1990 - 'pre-Appendix I'	Case-by-case authorisation possible - certificate required	Suspended	Prohibited	Prohibited (no change)	Prohibited	Prohibited (no change)
Worked ivory: Items with ivory acquired between 1947 and 1975 - 'pre-Convention'		Suspended, case-by-case authorisation possible for musical instruments - certificate required	Case-by-case Authorisation possible - certificate required	Suspended, case-by-case authorisation possible for musical instruments - certificate required	Case-by-case authorisation possible for re-imports only - permit required	Suspended, case-by-case authorisation possible for musical instruments - permit required
Pre-1947 worked items (antiques)	Authorised - no need for certificate	Case-by-case authorisation possible - certificate required		Suspended, case-by-case authorisation possible for musical instruments and antiques sold to museums - certificate required	Case-by-case Authorisation possible - permit required	Suspended, case-by-case authorisation possible for musical instruments and antiques sold to museums - permit required

⁽²⁶⁾ Pre-1947 antique of high cultural, artistic or historical importance held by a museum or public institution for which a relevant authority responsible for cultural heritage (i.e. responsible ministry) confirms its high cultural, artistic or historical importance and supports the need for its repair with ivory.

ANNEX I

Evidence to demonstrate legal acquisition*General considerations*

For both re-export and intra-EU certificates, it is the responsibility of the applicant to demonstrate to the satisfaction of the CITES authority in the EU Member State concerned that the conditions for issuing the documents are met, and especially that the ivory specimens were legally acquired²³.

Member States will need to assess the evidence furnished by the applicant on a case-by-case basis.

While it is clear that legal acquisition needs to be demonstrated in all cases, Member States should consider taking a risk-based approach when assessing applications for import, re-export or internal EU trade in ivory.

Transactions may give rise to varying degrees of scrutiny depending on various aspects of the ivory to be imported/re-exported/traded:

- the quantity;
- its form (e.g. antique, worked or raw);
- the circumstances in which it was originally acquired (e.g. part of a commercial transaction or as a gift/inheritance); and
- the date it was originally acquired.

Member States will be required to use their judgment when determining, based on the nature of the transaction, the type/quantity of evidence required in support of the application.

It is important to note that the type of proof of legal origin will depend on the manner of acquisition. For example:

- If the ivory item was imported by the applicant themselves before the Convention entered into force, the applicant:
 - a) may be required to prove that they lived or worked in the country of export.

Proof of this can include old photographs, contracts, extracts from a birth certificate, extracts from the population register or a declaration by them and/or other family members.
 - b) will need to prove that the ivory item was legally acquired/imported into the EU (see *Types of evidence* below).
- If the ivory item was (legally) purchased in the EU, the applicant must demonstrate that this happened before 1975, or that the piece was acquired under the previous derogation for pre-1947 worked specimens (see *Types of evidence* below).

Types of evidence

The following evidence should generally be preferred to support applications for re-export and intra-EU certificates:

- Intra-EU trade certificate. In such a case, the issuing EU Member State should be consulted to verify the validity of the certificate concerned.

If the information provided on the intra-EU certificate is unclear, or there are doubts/concerns about the validity of the certificate/legality of the ivory, additional information should be requested from the applicant and/or issuing authority.

Additional evidence might be requested, for example, if the certificate lacks identification markers (e.g. photographs, descriptive details, information on the weight/length of the tusks) or is especially old.

Member States may request any evidence providing additional details of the item and its background that is not already noted on the intra-EU certificate. A receipt or a deed of transfer could also be requested - especially if the certificate is transaction specific - to show that the current owner acquired the specimen directly from the certificate holder.

- Results of radiocarbon dating/isotope analysis to determine age (and origin) of the specimen ⁽¹⁾, bearing in mind that determining the age is not sufficient in itself to prove legal acquisition.
- Expert opinion, in the form of a substantiated determination of age by a recognised, independent expert, for example, an individual affiliated to a university/research institution, a consultant to court/approved by judicial process, or an approved/recognised expert ⁽²⁾.

Expert opinions may be considered as satisfactory evidence for both worked and unworked ivory (e.g. if forensic analysis cannot be used). For antique worked ivory, the age determination may be made based on the style of carving and crafting techniques. The experts' opinions need to be duly substantiated, and give explanations about the elements of style, crafting etc. that have been considered and were decisive for the conclusion.

If the evidence described above is not available, applicants should be required to present a combination of other forms of evidence to demonstrate they acquired the ivory legally (see other forms of evidence below). Member States should ask the applicant to furnish as many different types of evidence as possible in support of their application.

Other forms of evidence that may constitute satisfactory proof of legal acquisition include (preferably a combination of) the following:

- For 'worked specimens' containing ivory, a document from an approved/recognised expert.
- A receipt or invoice, a deed of gift or inheritance documents, such as a will.
- Old photographs of the ivory item (with a date, recognisable person, or at the place of origin), an old hunting permit (or other documents relating to a hunt), insurance documents, letters, or old public documents (such as newspaper articles or other original reports/publications that provide evidence of the origin of the specimens).
- Other ancillary evidence to support the claim of legal acquisition, such as proof that the person who acquired the specimen had worked or served in the location where the ivory was acquired (e.g. in Africa) or copies of passport stamps.
- A witness statement/affidavit or signed declaration from the owner. Member States may consider requesting the applicant to provide an affidavit in support of the certificate issued, stating that they are aware of the consequences of a false declaration. A witness statement/affidavit should still be supported by other evidence, such as photographs or receipts/invoices.
- For worked specimens or music instruments manufactured in the EU, a confirmation by the manufacturer or an expert that the instrument was produced on the territory of an EU Member State before the date of the relevant CITES listing

If, having seen the evidence furnished by an applicant in support of their application for re-export or for and intra-EU certificate, there are still doubts the ivory was legally acquired, Member States should consider consulting an independent expert or requiring forensic analysis to verify the age of the specimen. In this case, the cost should be borne by the applicant.

⁽¹⁾ UNODC guidelines provide an overview of laboratory test options available, as well as guidelines on taking samples for testing, including a list of equipment and materials needed to sample ivory (see UNODC. (2014) *Guidelines on Methods and Procedures for Ivory Sampling and Laboratory Analysis*. United Nations, New York, especially 14.2.2 *Isotopes* (page 30 et seq. and 46); available at [https://www.unodc.org/documents/Wildlife/Guidelines Ivory.pdf](https://www.unodc.org/documents/Wildlife/Guidelines%20Ivory.pdf)).

Cf. as well the Internet: www.ivoryid.org

⁽²⁾ If using expert opinion from auctioneers, potential conflicts of interest may arise. This needs to be carefully considered.

ANNEX II

Marking, registration and other requirements for issuing certificates

Permanent marking of ivory products is not mandatory under EU law before an intra-EU certificate is granted, but this is required by some Member States. In addition, import permits and re-export certificates will only be issued by EU Member States for some ivory products if they are marked. See Articles 64(1)(d) and 65(1) of Commission Regulation 865/2006 and CITES Resolution 10.10 (Rev. CoP 17), which also encourages the marking of *'whole tusks of any size, and cut pieces of ivory that are both 20 cm or more in length and one kilogram or more in weight'*.

In that context, it is recommended that Member States consider permanently marking:

- (i) whole tusks of any size, and
- (ii) cut pieces of ivory that are both 20 cm or more in length and one kilogram or more in weight.

Marking allows a certificate to be connected to the ivory items concerned and improves traceability in the system.

It is recommended that this marking be carried out in accordance with CITES Resolution 10.10 (Rev. CoP 17): *'whole tusks of any size, and cut pieces of ivory that are both 20 cm or more in length and one kilogram or more in weight, be marked by means of punch-dies, indelible ink, or other form of permanent marking, using the following formula: country-of-origin two-letter ISO code, the last two digits of the year / the serial number for the year / and the weight in kilograms (e.g. KE 00/127/14). It is recognized that different Parties have different systems for marking and may apply different practices for specifying the serial number and the year (which may be the year of registration or recovery, for example), but that all systems must result in a unique number for each piece of marked ivory. This number should be placed at the "lip mark", in the case of whole tusks, and highlighted with a flash of colour.'*

The Resolution mentions that marking should indicate the country of origin; if this country is not known when an EU Member State marks the ivory, the ISO code indicated should be the one of the country carrying out the marking. Member States may consider it appropriate to stipulate that the ivory holder/owner covers the costs of permanent marking.

Once the item has been permanently marked, the code should be entered into an electronic database, to facilitate future verification, together with the certificate number and all relevant information such as length, weight and pre-Convention status.

Information should be recorded at national level, where possible. If information is recorded at regional/local level, there should be some mechanism for information sharing with/oversight by the central (national) CITES authority. After marking, it is also advised that the items be photo-documented and the records and photographs maintained together.

Member States have reported problems verifying the validity of intra-EU certificates, which make it difficult to confirm the identity of the specimen concerned (for raw tusks). To address these issues, Member States are advised to:

- Require photo documentation of the ivory specimens (especially raw whole tusks) and, where permitted by national systems, to ensure that the photographs are affixed/append

to the intra-EU certificate concerned. The photographs should be scanned and kept with the records of the certificate issued.

Features that could be documented (and which would assist in identification) include:

- characteristic colouration
- cracks or other damage
- curvature of the tusk
- the base (e.g. cleanly cut or frayed).

Photographs of the entire tusk and of the base would be useful. If the tusk contains an engraving, a photograph that shows details and its position on the tusk should also be included. Photographs of the ivory for which a certificate is issued are particularly important where the ivory has not been marked.

- Include details on the certificate of how the weight and length of the ivory item were measured, as well as the circumference at the base.

Regarding the *weight*, relevant information includes when the weight was determined (was the item weighed at the time the certificate was issued, or has older information on weight been used?) and whether the weight includes any attachments to the tusk (such as a cap over the base or an attachment to fix the tusk to a wall) which may have been removed for subsequent weighing.

Regarding the *length*, relevant information includes whether the length specified is the outer or inner length, and whether this is from tip to base (or some other measurement).

- Record both the number of items concerned and the quantity in weight (kg) (as sizes of items vary considerably).
-