

## **MEMORANDUM**

### **Opinion on the Draft revised Guidance Document – EU regime governing trade in ivory – and the Commission Regulation amending Council Regulation (EC) No 338/97 and Commission Regulation (EC) No 865/2006**

**This opinion is limited to the trade in pre-1947 worked items made of or containing ivory.**

The drafts published at the end of January are a big step backwards for the art trade compared to the previous drafts, although the previous drafts already contained drastic measures. Import and export of antiques (pre-1947 worked items) shall no longer be possible, trade only with explicit permission. These measures are not only disproportionate, they also prevent the exchange of cultural goods that the EU has been urging elsewhere.

**1. The measures on import, export and trade of antiques are disproportionate.**

**1.1 Pre-1947 worked items pose no threat to the current elephant population.** All trade, import and export regulations require proof that the items are pre-1947 worked items as defined in Article 2 (w) Regulation (EC) No 338/97. Further proof beyond age is not required to protect the current elephant population. The ivory was taken from the wild long before 1947. Objects that are more than 70 years old have no impact on the current population.

The only theoretical effect discussed is the possibility that trade could fuel the demand for ivory, and in turn incentivise poaching of elephants to meet this demand. Pre-1947 worked items, however, cannot produce this effect. Collectors, who buy antiques, are not interested in modern items. They buy antiques because they are old.

Forgeries of new ivory are hardly in circulation because they require great expertise and skill and are at the same time easy to unmask.

**1.2** So far, no illegal trade in pre-1947 worked items has been detected in the EU. The measures now taken are purely precautionary. However, they will bring the trade in antiques to a halt.

The Guidance Document states on page 5:

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 ivory antiques.

and on page 6:

It is highly unlikely that internal EU trade of ivory antiques or pre-1975 musical instruments would contribute to illegal trade of ivory or demand for illegal ivory.

The trade of antiques within the EU therefore does not pose a risk.

**The trade of pre-1947 worked items must remain possible without permission.**

**1.3** Already from 1997 to 2006 there was in Germany an obligation to obtain a permit for each object to be traded. This obligation was lifted on authority's initiative because they were overwhelmed by the flood of applications while the risk to the elephant population was extremely low. We do not want to return to this point.

**1.4** In order to reduce the effects of a general certificate obligation on trade in pre-1947 worked items the previous draft provided for a de minimis rule in Article 8(3)(b) of Regulation (EC) No 338/97, Article 62 of Implementing Regulation (EC) No 865/2006. According to this rule, trade in "worked specimens that were acquired more than 50 years previously, containing less than 20% or 200 grams of elephant ivory" continued to be allowed without a permit. If a permit requirement is to be introduced, it is the least to allow the trade in de minimis items without permit.

**1.5** If it is, as the Guidance document states, highly unlikely that the internal EU trade of ivory antiques contributes to illegal trade or demand for illegal ivory, then the import of antiques into the EU for trading purposes is also not a risk.

**Import of pre-1947 worked items must still be allowed.**

**1.6** The export of antiques cannot fuel the demand for ivory. Antique and modern objects appeal to completely different groups of buyers. Buyers of antiques are not interested in modern ivory items or forgeries.

**Export of pre-1947 worked items must still be allowed.**

**1.7** There is no reason to treat pre-1975 musical instruments differently than pre-1947 worked items. The Guidance Document states on page 5 that pre-1975 instruments have an intrinsic value, that the fact that they contain ivory is secondary when determining the value and that the trade in musical instruments has never been reported as contributing to current poaching or illegal trade in ivory. All this is also true for antiques. Pre-1947 worked items are even older than pre-1975 instruments and their ivory parts are much harder to forge.

**The purely preventive character of trade permit, import and export ban is disproportionate to the severity of the interference with the cultural and professional freedom.**

**2.** The general import and export ban contradicts the objectives of cultural property protection set by the EU. According to this, cultural goods are to be preserved for their countries of origin.

The EU export regulation for cultural goods (Regulation (EC) No 116/2009) keeps important European cultural goods in Europe. The EU import regulation (Regulation (EC) No 2019/880) ensures that cultural goods from outside the EU remain in their countries of origin, if they are significant for their countries of origin. The protection of national cultural property is thus a top priority in the EU.

The import regulation does not apply to cultural goods that were created in Europe (Article 1 (2) Regulation (EC) No 2019/880), because their re-import into Europe shall be possible at any time.

**2.1** The planned import ban on antiques containing ivory now prevents the return of European cultural goods to Europe. Yet ivory has been incorporated into artefacts in Europe for centuries.

It is the least that an exception is inserted here for the re-import of European cultural property into the EU. Member States must not be excluded from their own cultural property.

This is particularly important because England, as the most important art trade location in Europe, is no longer a member of the EU after Brexit.

**2.2** The export ban on antiques containing ivory prevents the return of cultural property to its countries of origin. Many objects from non-EU countries circulate in Europe. When the export ban comes into force these countries are cut off from objects that contribute to their national identity. The objects remain in Europe forever. It must still be allowed to export pre-1947 objects.

**3.** The most important criterion for trade, import and export of worked items must be the proof that the objects were acquired before 1947. Article 2 (w) Regulation (EC) No 338/97 defines which evidence must be provided for this. It must be proven that they were carved before 1947. This can be done by expertise.

Further proof cannot be provided in practice. Import, purchase, etc. lie many decades back for objects that date from before 1947. Documents exist only in exceptional cases, especially since the objects have changed owners several times in the meantime. The proof of age by expert opinion is and remains therefore the central point with trade, import and export.

Only a few highly specialised art dealers and auction houses have such expertise. Unlike experts outside the trade, they examine such objects very frequently. At the same time, they are liable for misjudgements through warranty claims. A written confirmation of age by them has therefore great weight.

**Examples of objects with ivory**



A carved ivory figure of Hercules fighting the Hydra, South German or Austrian, before 1650



A metal-mounted ivory tankard with putti, presumably German, 3rd quarter 19th century



A Vizagapatam sandalwood and ivory casket  
Ca. 1920/1930



Imperial presentation box from German  
Emperor Wilhelm II  
Hanau, Weishaupt & Söhne, ca. 1897



Tabatière à Miniature royale, Paris, Cathérine-Adelaide Duponnois, ca. 1830, the miniature portait by Daniel Saint (Saint Lô 1778 - 1847)



Netsuke of a Daruma. Boxwood and ivory Signed Schumin. 2nd half 19th century



A small bar cabinet by Jacques-Émile Ruhlmann Paris, ca. 1925



A Nuremberg renaissance travel instrument Paulus Reinman, 1608



A fine ivory Okimono-Netsuke of Hotei and Daikoku as sumô-wrestlers. Early 19th century