



Department
for Environment
Food & Rural Affairs

Enforcement of the Ivory Act 2018 and guidance on the use of civil sanctions

Consultation

23 August 2021



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1. Introduction

The Ivory Act 2018

- 1.1 In 2018 the Government introduced legislation that would ban commercial dealing in elephant ivory in the UK. The resulting Ivory Act 2018 (hereafter “the Act”) received Royal Assent on 20 December 2018. It supports the Government’s objective of protecting elephants for future generations by banning sales of ivory that could contribute either directly or indirectly to poaching. Establishing one of the toughest ivory bans in the world will send a clear message globally that UK does not consider commercial trade in elephant ivory to be acceptable.
- 1.2 When commenced, the Act will ban dealing of items made of or containing elephant ivory, regardless of their age. Dealing means sale, purchase or hire (including keeping an item for any of these purposes), and offering to sell, purchase or hire. The ban will apply to dealings taking place within the UK and to exports from and imports into the UK for commercial purposes. It will sit alongside the existing regulatory regime for the trade in endangered species (CITES)¹, which covers elephant ivory.
- 1.3 There are exemptions under the Act for:
 - Pre-1947 items containing less than 10% ivory by volume.
 - Pre-1975 musical instruments containing less than 20% ivory by volume.
 - Pre-1918 portrait miniatures with a surface area of no more than 320cm².
 - Sales to and hire agreements with qualifying museums. This applies to museums accredited by Arts Council England, the Welsh Government, the Scottish Government or the Northern Ireland Museums Council in the UK, or, for museums outside the UK, the International Council of Museums.
 - There is also an exemption under the Act for pre-1918 items of outstandingly high artistic, cultural or historical value. For such an item to be traded lawfully, an exemption certificate must have been issued. The Government’s decision on

¹ The Convention on International Trade in Endangered Species (CITES) is currently implemented in Great Britain through a suite of regulations known collectively as the UK Wildlife Trade Regulations (WTR) which are retained EU legislation. As a result of the Northern Ireland Protocol, Northern Ireland continues to operate under the EU WTR.

whether to issue an exemption certificate will be based on expert advice from a selection of institutions deemed to have the necessary knowledge and expertise.

- 1.4 The Government previously consulted on these exemptions from 9 March 2021 to 4 May 2021 and will publish its response to the consultation shortly.
- 1.5 The Act establishes an enforcement framework for the ban, putting in place both criminal and civil sanctions.

Purpose and scope of this consultation

- 1.6 Before the Act can be commenced it is necessary to establish the detailed legislative provisions for the operation of the civil sanctions regime (by means of secondary legislation), and to publish statutory guidance on enforcement and the use of civil sanctions.
- 1.7 The purpose of this consultation is to seek the views of interested parties on our proposals regarding the operation of the sanctions regime prior to legislating and issuing the statutory guidance. Section 2 covers enforcement provisions in the Act in relation to civil sanctions. Annex A contains the draft statutory guidance on the use of civil sanctions.
- 1.8 Certain powers in the Act are to be exercised by the appropriate national authority in the Welsh, Scottish and Northern Irish devolved administrations. Where this is the case, Defra is consulting on behalf of the devolved administrations, with their agreement, with a view to establishing a single UK-wide implementation of the Act. As such, the consultation covers the whole of the UK. Subsequently it may be possible for the UK Government to legislate for Wales, Scotland and Northern Ireland with the consent of the respective Ministers. Where a regulation-making power is devolved, this is indicated in footnotes.
- 1.9 The scope of this consultation is solely the civil sanctions of the Act. The Government published its consultation on proposals for extending the ban to non-elephant ivory trade on 17 July 2021². We anticipate that the sanctions regime will apply in the

² www.consult.defra.gov.uk/communications/extending-the-ivory-act-to-other-species

same way to ivory from other species as to elephant ivory and therefore we do not intend to run a further consultation on sanctions unless changes are proposed.

Responding to this consultation

1.10 This consultation will run for four weeks. This is in line with the Cabinet Office's 'Consultation Principles' which advises government departments to adopt proportionate consultation procedures. The consultation opens at 11:00 on 23 August 2021 and closes at 23:45 19 September 2021.

1.11 Please respond to this consultation:

- Via the Citizen Space consultation hub, at:
<https://consult.defra.gov.uk/communications/enforcement-of-the-ivory-act-2018>;
- By email, to consultation.coordinator@defra.gov.uk; or
- In writing to Consultation Coordinator, 2nd Floor, Foss House, Kings Pool, 1-2 Peasholme Green, York, YO1 7PX.

After the consultation

1.12 After the consultation closes, a summary of the responses to this consultation will be published and placed on the government website at www.gov.uk/defra.

1.13 Information provided in response to this consultation, including personal data, may be published or disclosed in accordance with the access to information regimes; these are primarily the Environmental Information Regulations 2004 (EIRs), the Freedom of Information Act 2000 (FOIA), the UK General Data Protection Regulation 2016/679 and the Data Protection Act 2018 (DPA). We have obligations, mainly under the EIRs, FOIA and DPA, to disclose information to particular recipients or to the public in certain circumstances.

1.14 If you want the information that you provide to be treated as confidential, please be aware that, as a public authority, the Department is bound by the Freedom of Information Act and may therefore be obliged to disclose all or some of the information you provide. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

- 1.15 The Department for Environment Food and Rural Affairs will process your personal data in accordance with the law and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.
- 1.16 This consultation is being conducted in line with the “Consultation Principles” as set out in the Cabinet Office guidance which can be found at <https://www.gov.uk/government/publications/consultation-principles-guidance>.
- 1.17 If you have any comments or complaints about the consultation process, please address them to: By e-mail: consultation.coordinator@defra.gov.uk, or in writing to: Consultation Coordinator, 2nd Floor, Foss House, Kings Pool, 1-2 Peasholme Green, York, YO1 7PX.

2. Enforcement provisions: civil sanctions

- 2.1 The Government intends for the ban on dealing in ivory to come into force as soon as practicable. Following this consultation on the enforcement and civil sanctions regime and related statutory guidance, we plan to lay the implementing secondary legislation before Parliament, and to issue statutory guidance as soon as possible after appropriate consideration of responses to this consultation.
- 2.2 The Act establishes both civil and criminal sanctions for breaches of the Act. The Animal and Plant Health Agency (APHA) is part of the Department for Environment Food and Rural Affairs. The Department of Agriculture, Environment and Rural Affairs (DAERA) is a government department in the Northern Ireland Executive. For civil sanctions under the Act, APHA and DAERA may act on behalf of the Secretary of State in Great Britain and Northern Ireland, respectively. The Act provides for a mechanism by which a person may appeal against the imposition of certain civil sanctions to the First-tier Tribunal. Relevant enforcement bodies, such as the police, may also pursue criminal sanctions and prosecutions, where appropriate. Prosecutions may also be conducted by the Counsel General in Wales.
- 2.3 Schedule 1 to the Act sets out details of the Secretary of State's civil enforcement powers and also contains powers for the appropriate national authority to make supplementary provision in secondary legislation. The remainder of this section sets out how we propose to make use of these powers.
- 2.4 Schedule 1 also requires the Secretary of State to prepare and publish guidance on the sanctions which may be imposed on a person committing an offence under section 12 of the Act, and on the manner that the Secretary of State intends to use those sanctions. The planned use of civil sanctions and appeals under the Act, is set out in draft statutory guidance at Annex A. The statutory guidance reflects the intended use of the civil sanctions powers provided by the Act, in the context of the enforcement powers set out in Schedule 1 and in the following proposed supplementary regulations.

Application of civil sanctions under the Act

- 2.5 The Act establishes a number of civil sanctions that may be made use of in response to breaches of the Act, namely the imposition of monetary penalties, stop notices, the entering into of enforcement undertakings and enforcement cost recovery notices. Under each of these headings below we set out how we propose to use these powers, in addition to our proposed supplementary regulations to support the efficient and effective operation of the civil sanctions regime.

Monetary penalties

2.6 A monetary penalty under the Act is a requirement to pay a specified amount, which may be up to £250,000, to the Secretary of State. Following service of a notice of the intended penalty, a person may discharge their liability by making payment of the sum specified in the notice. If the person does not discharge their liability in this way, they can make representations in relation to the proposed imposition of the monetary penalty.

2.7 The Act covers certain circumstances where a monetary penalty may not be imposed:

- where the Secretary of State, having taken account (in particular) of representations or any matter raised by the person in response to a proposal notice for the monetary penalty, is no longer satisfied beyond reasonable doubt that the person has committed an offence under s.12 of the Act;
- in relation to any act or omission in relation to which a person has been served with a stop notice;
- once an enforcement undertaking has been agreed and during the period in which it is being complied with.

2.8 A regulation-making power allows for additional circumstances to be prescribed where the Secretary of State may not impose a monetary penalty on a person. We propose to add provision for the Secretary of State to propose a different monetary penalty of a higher or lower amount in certain circumstances, and will not serve the original penalty, but instead issue a new proposal notice. We consider that this will provide beneficial additional flexibility to the regime.

2.9 Once the period for making representations and objections has expired, the Secretary of State will consider any matter raised by the person, alongside any relevant and reliable information that they have received from any other source (for example as a result of an investigation), and will make their decision as to whether to impose the proposed monetary penalty. We propose to additionally specify that:

- where the Secretary of State decides that it is appropriate to impose a monetary penalty but in the light of new information, is no longer satisfied that the amount of the proposed penalty appropriately reflects the amount of financial benefit arising as a result of the offence, they may decide not to impose the monetary penalty. Instead they may propose a monetary penalty of a different amount. In such circumstances, the person on whom the proposal notice is served is again entitled to make representations and objections in the same manner as before;

- where circumstances such as illness or force majeure may result in relevant information not being made available to the Secretary of State prior to the serving of a proposal notice, the Secretary of State may decide to serve a new proposal notice and the person will be notified in writing. The person on whom the proposal notice is served, or any other person acting on their behalf, must explain the reason why the information was not previously available and send this in writing; and
- where appropriate evidence is provided, the Secretary of State, taking into account the circumstances of the individual on the evidence provided, may consider allowing an extended period of time for payment or allowing payment by instalments.

We consider this provides flexibility for the monetary penalty amount to be reconsidered in light of new information and flexibility to take account of particular circumstances.

2.10 The Act provides for the potential payment of interest or other financial penalties for late payment of a monetary penalty. We do not intend to exercise this power at this stage but will keep this policy under review.

2.11 We propose to put in place provision for the Secretary of State to recover a monetary penalty as a civil debt and for it to be recoverable, on the order of a court, as if payable under a court order. This means that where a person is taken to court, a court order will be made. This judgement will say whether the person needs to pay the money they owe. It will also say how much is owed, how to pay, the deadline for paying and to whom the payment must be made. This will help ensure the integrity of the monetary penalty regime and maximise efficiency for the enforcement body.

Stop notices

2.12 Under the Act, stop notices are notices issued by the Secretary of State prohibiting a person from continuing a particular activity (sometimes, but not always, until they have carried out specified actions).

Enforcement undertakings

2.13 Under the Act, where the Secretary of State has reasonable grounds to suspect that a person has committed an offence, the person may offer an undertaking to take specified action, within a specified time period, and the Secretary of State may accept this as an “enforcement undertaking”.

2.14 The specified action under the Act is the action to secure that the offence does not continue or recur. There is the power to prescribe additional types of action. We propose additionally to specify action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed. The

specified period of the undertaking should ensure that the offence stops at the earliest opportunity.

2.15 In addition, to add further clarity to the use of enforcement undertakings, we propose to include the following provisions in regulations:

- The offer of an enforcement undertaking must be made in writing to the Secretary of State. If the Secretary of State accepts such an offer, the person will be notified of the acceptance in writing.
- The action specified in the enforcement undertaking and the period within which the action must be completed may be varied, if both parties agree in writing.
- Where the undertaking involves the return of a payment made in respect of an ivory item, the period within which payment is to be paid, the person to whom it is to be made and the manner in which the repayment is to be made, must be specified in the agreement. Where the undertaking involves the person stopping an activity which is prohibited or activities which are prohibited, the agreement must specify the timing of the steps the person must take to comply and any steps they must take before they can continue with the activity specified.
- Where circumstances arise, such as illness, which means the person is unable to comply in the specified time, the period for the undertaking may be extended.
- Where circumstance, for example force majeure, renders the compliance impossible, the person, or any other person acting on their behalf, must explain the reason and send this in writing to the Secretary of State.
- If the Secretary of State is satisfied that a person has provided sufficient reasoning and information upon which to make a decision, and concludes that in their view it is impossible for the person to comply fully with the terms of the undertaking, that person may be regarded as having complied with the undertaking. In those circumstances the Secretary of State must issue a certificate of compliance.
- If the Secretary of State is satisfied (in light of information received from the person or from the person and any other source) that a person has complied with the terms of an enforcement undertaking, he must issue a certificate of compliance to that effect.
- The person from whom the undertaking is accepted may at any time apply in writing for a certificate of compliance. The person, or any other person, must provide sufficient information to determine that all actions specified in the enforcement undertaking have been completed within the specified period. The Secretary of State must decide whether to issue such a certificate, and give written notice of the decision to the applicant, within 14 days of such an application. If the Secretary of

State is satisfied (in light of information received from the person or from any other source) that a person has complied with the terms of the enforcement undertaking, they must issue a certificate of compliance to that effect.

- The Secretary of State may require the person who has given the undertaking or any other person to provide sufficient information to determine that the undertaking has been complied with.
- The Secretary of State may monitor the actions of the undertaking and require the person, or the person and any other person, to provide information to ensure that the requirements of the undertaking are being complied with.
- The Secretary of State may require access to premises for the purposes of inspection of those premises in relation to monitoring compliance with the enforcement undertaking.
- The Secretary of State may also, for the purposes of monitoring compliance with the enforcement undertaking:
 - a) monitor any advertising of relevant items by the person;
 - b) carry out any examination or measurement of anything on the premises that the Secretary of State thinks is or may be relevant;
 - c) require the person on the premises to produce any document or record in the person's possession or control that the Secretary of State thinks is or is likely to be relevant;
 - d) seize, detain or remove any [relevant] item found on the premises;
 - e) take copies of or extracts from any document or record found on the premises, or where necessary seize, detain or remove the document or record; and,
 - f) require any person on the premises to provide any help or facilities, with respect to matters under the person's control, that the Secretary of State considers would facilitate monitoring compliance with the undertaking.
- A person who has given inaccurate, misleading or incomplete information in relation to an enforcement undertaking is regarded as not having complied with it. In addition the Secretary of State may by notice in writing revoke a certificate of compliance if it was issued on the basis of inaccurate, incomplete or misleading information, in which case the enforcement undertaking is regarded as not having been complied with.

- Where a person has complied partly but not fully with an enforcement undertaking, that part-compliance may be taken into account in the imposition of any civil sanction on that person.

Enforcement cost recovery notices

2.16 The Act provides for the potential use of enforcement cost recovery notices (ECRNs). We do not intend to exercise the power to use ECRNs in the initial period after the Act is commenced, but will keep this policy under review.

Question 1: Do you agree with our proposed approach to the application of civil sanctions and enforcement cost recovery notices? A) Yes/No. B) If no, please state your reasons.

Appeals relating to monetary penalties and stop notices

2.17 The Act establishes an appeal mechanism in relation to certain decisions related to civil sanctions requirements and notices imposed under the Act. These decisions are: the decision to impose a monetary penalty; the decision to impose or to not issue a completion certificate in relation to a stop notice; and, the decision to serve an enforcement cost recovery notice (as explained above we do not intend to make use of ECRNs at this stage). Appeals against civil sanctions imposed under the Act are to the First-tier Tribunal.

2.18 The use of civil sanctions under the Act, including the detail of arrangements in respect of appeals, have been set out in statutory guidance at Annex A. There is no fee on making an appeal to the First-tier Tribunal, in line with similar approaches for other regulatory regimes.

Grounds for appeal

2.19 The Act specifies grounds for appeal (for example that the decision was based on an error of fact) of relevance to each of the types of decision eligible for appeal in relation to civil sanctions. It also provides the power for additional grounds (for each type of decision) to be specified in regulations. We consider the existing grounds for appeal set out in the Act to be comprehensive and do not propose therefore to make use of this power in respect of any of the types of decision eligible for appeal.

Question 2: Do you agree with our proposed approach to further grounds for appeal? A) Yes/No. B) If no, please state your reasons.

Question 3: If you identify a further ground for appeal that does not already fall within the other grounds included in the Act, we would welcome a detailed

description of this ground and an explanation as to why it would not fall under one of the grounds already included.

Further provision relating to appeals

2.20 Cases under the Act will be dealt with by a Tribunal in the General Regulatory Chamber. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) as amended set out many aspects of Tribunal procedure. For example, these rules state (except in specified cases) that an application for appeal to the First-tier Tribunal must be made within 28 days of sending the notice of a decision to impose a civil sanction under this Schedule. They also state how an application to appeal should be lodged with the Tribunal; that affected parties will be notified of the appeal; and, specify the documents required by the Tribunal. The Tribunal only deals with appeals against civil sanctions and not criminal offences.

2.21 We propose that the following provisions are set out in regulations in relation to the appeals process against relevant decisions in relation to civil sanctions.

- i. Where an appellant has made an appeal to the First-tier Tribunal against the imposition of a monetary penalty and the Tribunal is considering that appeal, the appellant may apply for a stay of the requirement to pay the penalty, until the Tribunal has come to a decision on the appeal. This is to ensure an individual or business is not financially disadvantaged pending consideration of the lawfulness or reasonableness of the penalty or amount. It will also avoid potentially unnecessary enforcement costs or administrative costs including those relating to reimbursement.
- ii. Where an appellant has appealed against a stop notice, or appealed a decision not to issue a completion certificate in relation to a stop notice, that stop notice will remain in effect – and the appellant under a legal duty to comply with it – until the Tribunal has come to a decision on the appeal. That is, unless, on application, the Tribunal suspends the stop notice pending consideration. This is to ensure the potentially unlawful activity set out in the stop notice does not continue until such time as the Tribunal decides on the lawfulness or reasonableness of the stop notice itself or the decision regarding the completion certificate.
- iii. That the following powers are given to the Tribunal when it is considering appeals on civil sanctions under the Act. The Tribunal may:
 - Withdraw the requirement or notice: for monetary penalties this would mean the appellant is no longer liable to pay it; and for stop notices this would mean the appellant is no longer prevented from doing the activity set out in the notice.

- Confirm the requirement or notice: for monetary penalties this would mean that the appellant's liability to pay is no longer suspended and payment is now due in accordance with the monetary penalty; for stop notices this means the appellant continues to be prohibited from carrying out the activities set out in the stop notice.
 - Vary the requirement or notice: for monetary penalties this means varying the amount of the penalty or varying the terms for making the payment, such as extending the timeframe to make payment or varying the terms for paying by instalments; for stop notices this means varying the prohibited activity or the steps required under the notice.
 - Take any actions that the Secretary of State could take under the Act in relation to the act or omission giving rise to the requirement or notice;
 - Remit the decision whether to confirm the requirement or notice, or any matter relating to that decision, to the Secretary of State. For example, refer the decision on whether to confirm the requirement to pay a monetary penalty or impose a stop notice back to the Secretary of State. The Secretary of State would be required to reconsider its decision but would be entitled to come to the same decision or a different decision.
- iv. With regard to appeals in relation to a decision not to issue a completion certificate in relation to a stop notice, the following powers are given to the Tribunal when it is considering those appeals. The Tribunal may:
- Require the Secretary of State to issue a completion certificate. This would mean that the stop notice to which the completion certificate relates ceases to have effect.
 - Confirm the Secretary of State's decision not to issue a completion certificate. This would mean that the appellant continues to be prohibited from carrying out the activities set out in the stop notice and may reapply for a completion certificate.
 - Remit the decision whether to issue a completion certificate for a stop notice, or any matter relating to those decisions, to the Secretary of State. The Secretary of State would be required to reconsider his decision but would be entitled to come to the same decision or a different decision.

Appeals relating to enforcement undertakings

2.22 As set out above, we propose to set out provisions to add clarity to the use of enforcement undertakings. We propose in addition to establish an appeal

mechanism, such that there is an option to appeal against a decision not to issue a certificate of compliance in relation to an enforcement undertaking.

2.23 We propose that this mechanism should align to the existing arrangements in the Act in relation to appeals. Specifically, we propose that:

- An appeal against a decision by the Secretary of State not to issue a certificate of compliance is to the First-tier Tribunal.

And the grounds for appeal are:

- That the decision was based on an error of fact;
- That the decision was wrong in law; or
- That the decision was unfair or unreasonable.

2.24 The following powers are given to the Tribunal when it is considering these appeals. The Tribunal may:

- Require the Secretary of State to issue a certificate of compliance. The enforcement undertaking would be treated as if it had been complied with.
- Confirm the Secretary of State's decision not to issue a certificate of compliance, in which case the person must comply with the requirements set out in the enforcement undertaking and may reapply for a certificate of compliance.
- Remit the decision whether to issue a certificate of compliance, or any matter relating to that decision, to the Secretary of State. The Secretary of State would be required to reconsider his decision but would be entitled to come to the same decision or a different decision.

2.25 Where an appellant has appealed in relation to a decision not to issue a certificate of compliance in relation to an enforcement undertaking, the undertaking will remain in effect – and the appellant under a legal duty to comply with it - until the Tribunal has come to a decision on the appeal, unless, on an application, the Tribunal decides to suspend the operation of the notice. This is to ensure that any requirements set out in the undertaking continue until such time as the Tribunal decides on the lawfulness or reasonableness of the decision regarding the certificate of compliance.

Question 4: Do you agree with our proposed approach to supplementary regulations in respect of appeals against certain decisions relating to civil sanctions? A) Yes/No. B) If no, please state your reasons.

Question 5: If you have any comments about the statutory guidance at Annex A in relation to either its factual accuracy, clarity or intelligibility, we would welcome a

detailed description. Please indicate the paragraph and page reference where applicable.

Annex A:



Department
for Environment
Food & Rural Affairs

Enforcement of the Ivory Act 2018

Guidance on the use of civil sanctions

Date: 23 August 2021

Version: 1.0

We are the Department for Environment, Food and Rural Affairs. We're responsible for improving and protecting the environment, growing the green economy and supporting our world-class food, farming and fishing industries.

We work closely with our 33 agencies and arm's length bodies on our ambition to make our air purer, our water cleaner, our land greener and our food more sustainable. Our mission is to restore and enhance the environment for the next generation, and to leave the environment in a better state than we found it.



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8. Publication44

1. Introduction

- 1.1** The Ivory Act 2018 (the “Act”) prohibits dealing in ivory. Dealing means: buying, selling, hiring; offering or arranging to buy, sell or hire ivory; exporting ivory from the United Kingdom (the “UK”) for sale or hire; or, importing ivory into the UK for sale or hire. For the purposes of the Act, ivory means ivory from the tusk or tooth of an elephant but the definition may be amended by regulations to include other species. For items containing ivory, it is presumed the ivory is from an elephant unless it is proven otherwise.
- 1.2** There are 5 categories of items of ivory which may be exempt from the prohibition if they meet specific criteria: pre-1918 items of outstanding artistic, cultural or historical value and importance; pre-1918 portrait miniatures; pre-1947 items with low ivory content; pre-1975 musical instruments; and acquisitions made by qualifying museums. If the owner of such items deems them eligible for exemption from the prohibition, they may apply to the Animal and Plant Health Agency (“APHA”) for an exemption certificate (in the case of pre-1918 items of outstanding artistic, cultural or historical value and importance) or for registration in the case of other exempt items.
- 1.3** The Act, any regulations made under the Act³, and this statutory guidance establish an enforcement framework for breaches of the prohibition on dealing in ivory by any person. This guidance is supplementary to the overarching principles laid out in legislation and is fully consistent with Defra’s general enforcement policy⁴.
- 1.4** A ‘person’ is used throughout this guidance to mean a body of any type, or a natural person, including partners of a partnership. The Act also provides for enforcement action in respect of an officer⁵ of a body corporate or Scottish partnership in respect of a breach or failure by the body that took place with the consent or connivance of the officer.
- 1.5** It is an offence under section 12 of the Act, to breach the prohibition on dealing or to cause or facilitate a breach. A person commits an offence in relation to an item only if the person knows or suspects (or ought to have known or suspected) that the item

³ [details of regulations made under paragraph 14(1) of schedule 1 to the Act will be added once these are available]

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470454/defra-enforcement-policy-statement-2015.pdf

⁵ An ‘officer’ means:

- in relation to a body corporate, a director, manager, secretary or other similar officer of the body or a person purporting to act in any such capacity; or
- in relation to a Scottish partnership, a partner or a person purporting to act as a partner.
- in the case of a body corporate whose affairs are managed by its members, a member with functions of management is treated as if the member were an officer of the body.

is ivory, is made of ivory or has ivory in it. A person who commits an offence under section 12 may be liable to civil sanctions (under section 13) or criminal sanctions.

1.6 The civil sanctions that may be imposed on a person who commits an offence under section 12 are set out in Schedule 1 to the Act:

- entering into enforcement undertakings;
- stop notices;
- the imposition of monetary penalties up to a value of £250,000; and,
- enforcement cost recovery notices.

1.7 Civil sanctions are intended as a proportionate and cost-effective alternative to criminal sanctions. The primary concern is to ensure that adequate steps are taken to address the non-compliance in a timely manner, minimise the likelihood of future non-compliance and reduce any harm associated with the non-compliance. The aim is to respond to non-compliance in a manner that is proportionate, enabling escalating enforcement action to secure compliance, with consideration being given to selecting actions that are in the public interest. Where a minor breach is found that can be easily rectified, advice may be given either orally or in writing, reminding the person of the need to obey the law without prejudice to civil sanctions or criminal proceedings.

1.8 Civil sanctions will be flexibly deployed depending on the seriousness, circumstances, nature (type, intent and scale) and impact of the breach and the desired outcome of the intervention. Factors which may be used in determining the type of civil penalty imposed are:

- the sale value of the ivory item traded;
- the status of the person (an individual or corporate officer);
- culpability of the person;
- frequency of offending;
- intention to deceive;
- how to ensure the breach does not continue;
- how to ensure future compliance; and,
- deterring breaches.

1.9 Factors which would exacerbate the seriousness of the offence might include, but are not limited to:

- large scale offending;
- multiple offences;

- offences continuing over a period of time;
- corporate offending; and,
- concealment of activity.

1.10 Factors which may be associated with less serious offending might include, but are not limited to:

- one off offence;
- small scale;
- low value;
- no intent to deceive;
- individual private seller;
- a vulnerable person; and,
- reliance on professional advice.

1.11 The Secretary of State may consider who has been affected by the breach, the quantity and value of ivory items involved in the breach(es), and the harm that it might have caused, or which could have been caused. Low level offending, first time offending, or an offence which is not motivated by a deliberate intention to deceive are offences that are more likely to lead to civil as opposed to criminal sanctions.

1.12 Where a breach of the prohibition involves the committing of offences by two or more persons, the Secretary of State will consider the action that should be taken in respect of each of these persons separately and may determine that different actions are appropriate. E.g. sale of a single ivory item may involve offences by the buyer; the seller; and possibly others who facilitated the sale. Different actions might be appropriate in respect of each.

1.13 If an investigation concludes that an offence has been committed, in some circumstances a criminal prosecution will be appropriate. A prosecution may be appropriate where the matter is considered to be too serious for a civil sanction or where a person disputes an offence and/or their part in it. Following conviction for an offence under the Act, the criminal sanctions that may be imposed by a criminal court include a fine, a custodial sentence (or both), or any other sanctions at the courts' disposal⁶.

⁶ See the Act section 12(4), section 28(4) and Schedule 1, paragraph 9(2)

1.14 The purpose of prosecution is to secure a conviction and ensure the defendant may be punished by a court and act as a deterrent to the defendant and others. The factors that may be considered in determining whether criminal proceedings are appropriate are:

- the impact or potential impact of the offence on the environment, people or animals;
- the alleged offender's response to previous advice and guidance; and,
- the benefit, financial or otherwise, to the offender by avoidance of regulatory requirements.

1.15 Prosecutions on behalf of the Secretary of State are conducted by the Crown Prosecution Service (CPS) in England and Wales, the Crown Office and Procurator Fiscal Service in Scotland, and the Public Prosecution Service for Northern Ireland. Prosecutions may also be conducted by the Counsel General in Wales. When deciding whether to report a case to the aforementioned prosecuting authorities, the Secretary of State will have regard to the provisions of the relevant Prosecution Codes⁷ and whether they are satisfied that the case meets the principles for prosecution set out in those Codes.

1.16 Criminal proceedings may be initiated:

- in respect of more serious or recurrent breaches;
- where other enforcement actions have failed to secure compliance;
- in respect of failure to comply with a stop notice (see section 4);
- in respect of an offence under section 12 where there has been a failure to comply with a monetary penalty in relation to that offence (see section 5); or,
- in relation to offences of obstruction (a person may be liable to imprisonment, a fine or both).

1.17 Where potential criminal activity could be investigated and prosecuted by more than one investigative or prosecuting authority, the Secretary of State will seek to ensure that matters are co-ordinated from the earliest possible stage, so that only one

⁷ The Code for Crown Prosecutors (Crown Prosecution Service): www.cps.gov.uk/publication/code-crown-prosecutors

The Prosecution Code (Crown Office and Procurator Fiscal Service): www.copfs.gov.uk/publications/prosecution-policy-and-guidance

The Code for Prosecutors (Public Prosecution Service for Northern Ireland): www.ppsni.gov.uk/publications/code-prosecutors

investigation and prosecution takes place. Or if this is not possible, to ensure that proper co-ordination takes place to ensure that the public can have confidence in the outcome of each case and that the law is enforced in a fair and effective way.

- 1.18** The Act provides certain powers⁸ for the police, customs officers and accredited civilian officers⁹ (“ACOs”) to act in the case of non-compliance or suspected non-compliance. The police and customs officers have powers to: stop and search persons or vehicles; board and search vessels or aircraft; apply for a search warrant; powers of examination and seizure; and, to require the production of documents. ACOs are appointed by the Secretary of State and have powers, on giving notice to: enter premises for the purpose of assessing compliance or where there are reasonable grounds to suspect there is relevant evidence; carry out examination and require production of documents; and seize and detain items.
- 1.19** On finding relevant evidence of non-compliance the Secretary of State will consider whether prosecution is appropriate, or whether the matter is suitable to be dealt with by the imposition of civil sanctions. Where neither prosecution nor the imposition of a civil sanction is appropriate the Secretary of State may decide to issue an advisory warning, where there is evidence that an offence has been committed. An advisory warning may be issued without prejudice to criminal or civil sanctions. This guidance relates to the intended use of the civil sanctions that are available to the Secretary of State under the Act.
- 1.20** The examples provided in this guidance are for illustrative purposes only; they illustrate the way in which the Secretary of State might use the powers available, but each case will turn on its own facts and the surrounding circumstances.

2. Use of civil enforcement actions

- 2.1** The Secretary of State may, where a person has committed an offence, make use of a range of civil regulatory actions including:
- Agreeing an enforcement undertaking (see section 3);
 - Imposing a stop notice (see section 4); and,
 - Imposing a monetary penalty (see section 5).
- 2.2** Where a stop notice or monetary penalty is imposed the Secretary of State is also able to serve an enforcement cost recovery notice, requiring payment of the costs

⁸ See the Act sections (14) to (27)

⁹ “Accredited civilian officer” means an officer of the Secretary of State who is authorised by the Secretary of State for the purposes of the Act.

incurred by the Secretary of State in relation to the stop notice or monetary penalty.¹⁰

- 2.3** It is not currently intended that enforcement cost recovery notices (ECRNs) will be made use of in the initial period after commencement of the Act. This position will be kept under review. Should a decision be taken in the future to make use of them then further guidance on their use will be provided.

3. Enforcement undertakings

- 3.1** Where the Secretary of State has reasonable grounds to suspect that a person has committed a relevant offence, they may indicate to that person that they would consider an enforcement undertaking, and/or that person may offer an undertaking to take specified action within a specified period. The Secretary of State has discretion to either accept or reject such “enforcement undertaking”.¹¹ The specified action a person may offer to undertake within a specified period must secure that the offence does not continue or recur. In addition, the specified action should have the effect of securing that the position is, so far as possible, restored to what it would have been if the offence had not been committed. The specified period for the undertaking should ensure that the offence stops at the earliest opportunity.
- 3.2** Unless the person making an undertaking fails to comply with the terms of that undertaking:
- the person may not at any time be convicted of an offence under section 12 in respect of the act or omission to which the undertaking relates;
 - the Secretary of State may not impose on the person any monetary penalty in respect of the act or omission to which the undertaking relates that they would otherwise have power to impose under the Act.
- 3.3** The Secretary of State may accept a proposed enforcement undertaking only where they had reasonable grounds to suspect that the person making the proposal has committed an offence under section 12 (see 1.5).
- 3.4** Enforcement undertakings are more likely to be acceptable where, in appropriate circumstances, the person has indicated a willingness to undo the transaction (e.g. where ivory items have been sold, repaying any sums paid), or cease any continuing action, which had led to the offence.

¹⁰ Ivory Act Schedule 1 Part 4 (11-13)

¹¹ Ivory Act Schedule 1 Part 3 (10) and Part 5 (17)

- 3.5** Where the undertaking involves the return of a payment made in respect of an ivory item, the period within which payment is to be paid, the person to whom it is to be made and the manner in which the repayment is to be made, must be specified in the agreement. Where the undertaking involves the person stopping an activity which is prohibited or activities which are prohibited, the agreement must specify the timing of the steps the person must take to comply and any steps they must take before they can continue with the activity specified.

Proposal and acceptance

- 3.6** An enforcement undertaking may be proposed to the Secretary of State. The decision as to whether to accept an enforcement undertaking rests with the Secretary of State. Any such proposal will be considered on a case by case basis on its own merits, having regard to the following criteria:
- a) Whether the proposal includes sufficient detail - in relation to both the offence(s) and any proposed specified action(s) - to enable the Secretary of State to make an informed decision;
 - b) Whether the specified time period provided in the proposal is appropriate and achievable having regard to the nature, seriousness and circumstances of the relevant offence;
 - c) Whether the person making the undertaking is willing to accept any counter-proposal made by the Secretary of State as to the nature of the undertaking and the specified time period; or the person may themselves make one counter-proposal to the Secretary of State's proposal. The time period and decision to stop the process of counter-proposals rests with the Secretary of State;
 - d) Whether the proposal has been made as an early and proactive response to the offence by the person making the proposal;
 - e) Whether the Secretary of State is satisfied that the acceptance of the proposed enforcement undertaking is a proportionate response to the relevant offence taking account seriousness, circumstances and impact of the offence;
 - f) Whether there is evidence of a positive commitment to the proposed actions and, in the case of a business, whether this commitment is evident at an appropriate level of the business;
 - g) Whether the Secretary of State is satisfied, taking account of information provided in the proposal and from any other source, that the person making the proposal is likely to meet that commitment;
 - h) Whether any actions that are proposed in order to address the breach appear adequate to secure that the offence does not continue;
 - i) Whether any actions that are proposed in order to prevent future offending appear adequate to secure that the offence does not recur;

- j) Whether any actions that are proposed in order to restore the position to what it would have been if the offence had not been committed appear adequate to restore the position in so far as it is possible to do so.

Example 1

A person is advertising for sale an unregistered pre-1975 musical instrument that contains less than 20% ivory. The person ought to have known that the item contains ivory and of the need to register it under section 10 of the Act. The person proposes an enforcement undertaking to the Secretary of State, which involves immediate removal of the item for sale until it is properly registered.

The Secretary of State considers the enforcement undertaking proposal to be a proactive response and is satisfied that it is a proportionate response to this first-time offence. A letter accepting the proposal is sent to the person.

Example 2

A business has registered and is advertising for sale an ivory item under the exemption for pre-1947 items with low ivory content under section 7 of the Act (percentage volume of ivory must be less than 10%). On examination, the item clearly does not meet the less than 10% ivory exemption, or any other exemption. A business representative proposes an enforcement undertaking to the Secretary of State.

The Secretary of State feels it is necessary to gather further information to inform their decision. Further information reveals that this is a repeat offence under the Act for this business. The Secretary of State rejects the offer on the basis that the actions proposed in order to prevent future offending appear inadequate to secure that the offence does not recur. The Secretary of State imposes a monetary penalty on the business which may be up to the maximum value of £250,000.

- 3.7** The Secretary of State will usually make their decision as to whether to accept an enforcement undertaking within 28 days of receiving a proposal. However, the decision may be delayed where the Secretary of State feels it necessary to gather further information to inform their decision. In such circumstances, the Secretary of State will aim to keep the person proposing the enforcement undertaking informed of progress.
- 3.8** The Secretary of State is unlikely to consider it appropriate to accept a proposed enforcement undertaking:
- a) in respect of an offence that involved intent or the falsification of information or documentation;
 - b) that includes a clause denying liability;

- c) that includes any clause that sets up defences for possible breach of the enforcement undertaking;
- d) _____ that purports to restrict the Secretary of State's ability to publish details of the undertaking;
- e) _____ in respect of an offence in relation to which they have already served notice of an intention to impose a monetary penalty.
- f) in respect of non-compliance in relation to which it has been proposed or determined it is in the public interest that a criminal prosecution is appropriate; or,
- g) in respect of non-compliance in relation to which the Secretary of State is aware that another enforcement body has commenced legal proceedings or has already determined that a prosecution is appropriate in the public interest.

3.9 Any person wishing to propose an enforcement undertaking must make the proposal in writing to the Secretary of State using the *Enforcement Undertaking Proposal Form* made available:

- on the website: *[These details will be added after the consultation]*
- by phone: *[These details will be added after the consultation]*

This form may be updated from time to time and a person wishing to propose an enforcement undertaking should ensure that the most recent version of the form is used.

3.10 The completed form must be sent:

- By post to: *[These details will be added after the consultation]*
- By email to: *[These details will be added after the consultation]*

3.11 If the Secretary of State accepts such an offer, the person will be notified of the acceptance in writing. A counterproposal by the person should be made using the above form.

Variation

3.12 The action(s) specified in the enforcement undertaking and the period(s) within which the action(s) must be completed may be varied, by agreement between the person who entered the enforcement undertaking and the Secretary of State. As with the original undertaking: the Secretary of State will have discretion as to whether the varied form of undertaking is accepted; and for counterproposals, the time period and decision to stop the process rests with the Secretary of State.

3.13 Where circumstances arise such as illness which means the person is unable to comply in the specified time, the period for the undertaking may be extended. Where circumstance, for example force majeure, renders the compliance

impossible, the person, or any other person acting on their behalf, must explain the reason and send this in writing (to the contact details below).

3.14 If the Secretary of State is satisfied that a person has provided sufficient reasoning and information upon which to make a decision, and concludes that in their view it is impossible for the person to comply fully with the terms of the undertaking, that person may be regarded as having complied with the undertaking. In those circumstances the Secretary of State must issue a *certificate of compliance*.

3.15 Any person wishing to vary the actions or period specified in an enforcement undertaking, or in cases where compliance is impossible, must set out their request in writing, using the *Enforcement Undertaking Proposal Form*, made available:

- on the website: *[These details will be added after the consultation]*
- by phone: *[These details will be added after the consultation]*

They must explain the reason(s) for the variation and send the request:

- By post to: *[These details will be added after the consultation]*
- By email to: *[These details will be added after the consultation]*

3.16 If the Secretary of State accepts such a variation, the person will be notified of the acceptance in writing.

Monitoring compliance with an undertaking

3.17 The Secretary of State may require the person who has given the undertaking or any other person to provide sufficient information to determine that the undertaking has been complied with.

3.18 The Secretary of State may monitor the actions related to the undertaking and require the person, or the person and any other person, to provide information to ensure that the requirements of the undertaking are being complied with. The Secretary of State may require access to premises¹² for the purposes of inspection of those premises in relation to monitoring compliance with the enforcement undertaking.

3.19 The Secretary of State may also, for the purposes of monitoring compliance with the enforcement undertaking¹³:

¹² “Premises” excludes those premises used wholly or mainly as a dwelling. Entry must be at a reasonable time.

¹³ This does not confer power to search a person and does not confer power to seize an item that is an “excluded item” under the Act.

- a) monitor any advertising of relevant items by the person;
- b) carry out any examination or measurement of anything on the premises that they think is or may be relevant;
- c) require any person on the premises to produce any document or record in the person's possession or control that the Secretary of State thinks is or is likely to be relevant;
- d) seize, detain or remove any [relevant] item found on the premises;
- e) take copies of or extracts from any document or record found on the premises or where necessary seize, detain or remove the document or record; and,
- f) require any person on the premises to provide any help or facilities, with respect to matters under the person's control, that the Secretary of State considers would facilitate the monitoring compliance with the undertaking.

Certificate of compliance

- 3.20** The person from whom the undertaking is accepted may at any time apply for a *certificate of compliance* with the undertaking. The person, or any other person, must provide sufficient information to determine that all actions specified in the enforcement undertaking have been completed within the specified period. They must apply in writing using the *Enforcement Undertaking Compliance Certificate Form* made available:
- on the website: *[These details will be added after the consultation]*
 - by phone: *[These details will be added after the consultation]*
- 3.21** This form may be updated from time to time and a person should ensure that the most recent version of the form is used.
- 3.22** The completed form must be sent along with the notification of acceptance of the enforcement undertaking:
- By post to: *[These details will be added after the consultation]*
 - By email to: *[These details will be added after the consultation]*
- 3.23** The Secretary of State must decide whether to issue a certificate of compliance and give written notice of the decision to the person with whom the undertaking was agreed within 14 days of the Secretary of State receiving the application. If the Secretary of State is satisfied (in light of information received from the person or from any other source, such as from monitoring) that a person has complied with the terms of the enforcement undertaking, they must issue a *certificate of compliance* to that effect.
- 3.24** Where the Secretary of State decides not to issue a *certificate of compliance* the person with whom the undertaking was agreed is entitled to appeal (see section 7). The Secretary of State will set out the person's right to appeal alongside the notification of the decision not to issue a certificate of compliance.

- 3.25** Where all the actions specified in the enforcement undertaking are completed, no monetary penalty may be imposed or criminal prosecution brought in respect of the act or omission to which the undertaking relates. However, any failure to complete the actions set out in an enforcement undertaking may result in further enforcement action. This may involve civil sanctions or criminal proceedings.
- 3.26** Where a person has complied partly but not fully with an enforcement undertaking, civil sanctions may be imposed or criminal proceedings may be brought in respect of the act or omission to which the undertaking relates or otherwise. However, part-compliance with an undertaking may be taken into account in the imposition of any civil sanction on that person.
- 3.27** A person who has given inaccurate, misleading or incomplete information in relation to an enforcement undertaking is to be regarded as not having complied with it. The Secretary of State may by notice in writing revoke a *certificate of compliance* if it was issued on the basis of inaccurate, incomplete or misleading information, in which case the enforcement undertaking is regarded as not having been complied with.

4. Stop notices

- 4.1** A *stop notice* is a written notice, issued by the Secretary of State, which aims to put an end to a continuing offence or to prevent future offending. The Secretary of State may impose a *stop notice* where a person is carrying on a particular activity or is likely to carry on such an activity which the Secretary of State reasonably believes involves or is likely to involve that person committing an offence under section 12 (see 1.5 for relevant offences under the Act)¹⁴.
- 4.2** A *stop notice* prohibits a person from carrying on a particular activity or activities. Sometimes, but not always, an activity is prohibited only until the person has carried out specific action(s), in which case such specified action must be an action that has the effect of ending ongoing non-compliance and/ or preventing future non-compliance.¹⁵

Example 1

A person is advertising for sale an ivory item that is a pre-1918 portrait miniature with a surface area of no more than 320cm². The item has not been registered

¹⁴ Ivory Act Schedule 1 Part 2, para 5(2)

¹⁵ Ivory Act Schedule 1 Part 2, para 5(4)

under section 10 of the Act.

The Secretary of State may impose a stop notice prohibiting the person from continuing to advertise the item or from concluding a sale until the item has been registered under section 10 of the Act.

Once the action in the stop notice has been completed the person may apply for a completion certificate.

Example 2

A person is advertising for sale an ivory item that is prohibited. The item is not capable of meeting any of the exemption criteria.

The Secretary of State may impose a stop notice prohibiting the person from trading the item.

- 4.3** The Secretary of State may not serve a *stop notice* in relation to any act or omission for which they have already imposed a monetary penalty, or where the person's liability for a monetary penalty has been discharged.¹⁶ If the offence is a continuing one the Secretary of State may serve a stop notice in relation to the continuation of the offence after the imposition of a monetary penalty.
- 4.4** The Secretary of State is unlikely to consider it appropriate to impose a *stop notice* in relation to non-compliance where they have information indicating that the person has already taken appropriate steps to address the non-compliance.

Failure to comply

- 4.5** The Act establishes an offence for any person served with a *stop notice* who does not comply with it.¹⁷ Any failure to comply with a *stop notice* is taken seriously and the institution of criminal proceedings will be considered. Conviction for an offence of failing to comply with a stop notice:
- in England and Wales may result in imprisonment for a term not exceeding 6 months or a fine, or both; and,
 - in Scotland or Northern Ireland may result in imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale (or both).

¹⁶ Ivory Act Schedule 1 Part 6, para 19(2)

¹⁷ Ivory Act Schedule 1 Part 2, para 9

Process

4.6 A *stop notice* will set out¹⁸:

- a) the grounds for serving the notice;
- b) the activity which is prohibited or activities which are prohibited;
- c) any steps the person must take to comply with the notice and any steps they must take before they can continue with the activity specified in the notice;
- d) the consequences of non-compliance with the stop notice; and
- e) rights to appeal.

Completion certificates

4.7 When the Secretary of State is satisfied (in light of information received from the person or from monitoring carried out by the Secretary of State) that a person has complied with a *stop notice* which requires the person to take steps specified in that notice, the Secretary of State must issue a *completion certificate*¹⁹ to that effect. Once the *completion certificate* has been issued by the Secretary of State, the *stop notice* to which it relates will cease to have effect. In certain circumstances where a completion certificate is not applicable the stop notice will remain in force on an ongoing basis.

4.8 A *stop notice* remains in force until any action(s) required by the notice are completed. If the person, having initially complied with the *stop notice* and obtained a *completion certificate* then recommences the illegal activity, further civil sanctions or criminal prosecution would be considered.

4.9 A person subject to a *stop notice* may, once the action(s) specified in the stop notice has been completed, apply for a *completion certificate* at any time. We would normally expect the person served with the stop notice to apply for a completion certificate within 28 days of completing the actions required or by the date specified in the stop notice, if later. The application should be made in writing using the Stop Notice Completion Certificate Application form provided. The completed application form along with the original stop notice must be sent:

- By post to: *[These details will be added after the consultation]*
- By email to: *[These details will be added after the consultation]*

4.10 On receipt of an application for a completion certificate, the Secretary of State must decide within 14 days starting with the day on which they receive an application

¹⁸ Ivory Act Schedule 1 Part 2, para 6

¹⁹ Ivory Act Schedule 1 Part 2, para 7

whether or not to issue such a *completion certificate* and will give written notice of their decision to the applicant. Where a *completion certificate* is issued, the *stop notice* to which it relates ceases to have effect. If the person made a false representation in order to obtain a *completion certificate*, this would constitute an offence. Where the Secretary of State decides not to issue a *completion certificate* the applicant is entitled to appeal (see section 7). The Secretary of State will set out the applicant's right to appeal alongside the notification of their decision.

5. Monetary penalties

Consideration of a monetary penalty

5.1 A monetary penalty is a requirement to pay the Secretary of State a specified amount up to £250,000, as determined by the Secretary of State, following a notice period during which a person can make representations in relation to the intended monetary penalty.²⁰ The Secretary of State may impose a monetary penalty on a person where they are satisfied:

5.1.1 beyond reasonable doubt that the person has committed a relevant offence (see 1.5)²¹;

5.1.2 that this is a proportionate response to the relevant offence; and,

5.1.3 that the amount of the proposed penalty appropriately reflects the amount of financial benefit arising as a result of the offence.

5.2 The Secretary of State is not able to impose a monetary penalty:

a) once an enforcement undertaking has been agreed and complied with²²;

b) in relation to a relevant offence for which the Secretary of State has already served a stop notice²³;

c) where, having taken account (in particular) any matter raised by the person in response to a *proposal notice* for the monetary penalty, the Secretary of

²⁰ All revenue from monetary penalties is paid into the Government's main bank account (known as the Consolidated Fund). It is not retained by the Secretary of State.

²¹ Ivory Act Schedule 1 Part 1, para 1

²² Ivory Act Schedule 1, Part 3, para 10(2)(b)

²³ Ivory Act Schedule 1, Part 6, para 19(1)

State is no longer satisfied beyond reasonable doubt that the person has committed a relevant offence²⁴;

d) where, having considered the amount of the penalty proposed in a *proposal notice* in the light of matters raised by the person or having received new information from the person or any other source, the Secretary of State considers that the amount of the proposed penalty does not appropriately reflect the amount of financial benefit arising as a result of the offence. In such circumstances, the Secretary of State may decide not to impose the monetary penalty, but to serve a fresh proposal notice proposing a different monetary penalty of a higher or lower amount (see 5.17).

- 5.3** The Secretary of State will not generally impose a series of monetary penalties where a single, continuing offence has occurred over several days and where a single penalty is appropriate.
- 5.4** A *monetary penalty* may be more appropriate where previous civil sanctions have failed to secure compliance.
- 5.5** A *monetary penalty* that is payable by an unincorporated association must be paid out of the funds of the association.
- 5.6** The Secretary of State may be less likely to impose a *monetary penalty* where they are satisfied that the person has already taken appropriate steps to:
- ensure that the offence does not continue or recur; or,
 - ensure that the position is, so far as possible, restored to what it would have been if the offence had not been committed.
- 5.7** The Secretary of State may be less likely to impose a monetary penalty where they have evidence to show that one party is innocent or has been deliberately defrauded. For example, where a buyer has ensured that they undertook due diligence before buying and has been defrauded by the seller. In this case the Secretary of State may consider prosecution, which would allow a compensation order to be made to the victim.
- 5.8** Once the period for making representations and objections has expired, the Secretary of State will consider any matter raised by the person, alongside any relevant and reliable information that they have received from any other source (for example as a result of an investigation), and will make their decision as to whether to impose the proposed monetary penalty as follows:

²⁴ Ivory Act Schedule 1, Part 2, para 2(5)(a)

- a) Where the Secretary of State decides that it is appropriate to impose a monetary penalty of the amount proposed in the proposal notice, they will serve a *monetary penalty notice* on the person specifying that amount.
- b) Where the Secretary of State decides that it is not appropriate to impose a monetary penalty on the person, they will notify the person in writing of their decision.

5.9 Where the Secretary of State decides that it is appropriate to impose a monetary penalty but in the light of new information, either from representations and objections, or where circumstances such as illness or force majeure may result in relevant information not being made available to the Secretary of State prior to them serving a proposal notice, the Secretary of State may, under these circumstances, decide to withdraw the original proposal notice and serve a new proposal notice. In such circumstances, the person on whom the proposal notice is served is again entitled to make representation and objections in the same manner as before. The person on whom the proposal notice is served, or any other person acting on their behalf, must explain the reason why the information was not previously available and send this in writing:

- By post to: [These details will be added after the consultation]
- By email to: [These details will be added after the consultation]

5.10 If the Secretary of State accepts the representations, objections or explanation, the person will be notified in writing and issued with a new proposal notice.

Calculation of penalty

5.11 The amount of a monetary penalty is determined by the Secretary of State, up to the maximum of £250,000.

5.12 The Secretary of State will determine a level of penalty that is clearly and consistently related to their view of the impact of the case and the value of the offending (which may be estimated where insufficient information is available) to determine the value of the illicit ivory traded. The Secretary of State will request evidence to determine the amount of financial benefit of the offence as part of the investigation process. If the Secretary of State considers that there is insufficient information to calculate the financial benefit to the offender, the Secretary of State could ask the offender to produce further documents to allow a more accurate estimate. If the offender cannot or will not assist, then the Secretary of State may base the calculation of the amount of the penalty on the information already available.

5.13 Where the Secretary of State is considering imposing monetary penalties on two or more persons in relation to the same breach of the prohibition (see 1.12), the Secretary of State will consider the level of monetary penalty separately in respect of each person. Similarly, where the Secretary of State is considering imposing monetary penalties on a body corporate and an officer of that body (see 1.4), the

Secretary of State will consider separately the level of monetary penalty in respect of each.

5.14 The Secretary of State will determine what level of monetary penalty is reasonable and proportionate, based on their view of the nature, seriousness and circumstances of the case. This could be the permitted maximum if that is reasonable and proportionate, and could be any amount between the maximum and zero.

- ‘reasonable’ means an ordinary reasonable person would regard the proposed level of the monetary penalty as appropriate to the offence;
- ‘proportionate’ means there is a clear relationship between the level of the proposed monetary penalty and both the value of the offending (if known) and how seriously the offence undermined the Act’s stated aims.

5.15 In determining the level of the monetary penalty, the Secretary of State may consider the following matters:

- a) any early action to remedy the non-compliance or its effects;
- b) prompt and complete voluntary disclosure in relation to the non-compliance;
- c) culpability (blame) and harm factors, when determining the seriousness of the offence;
- d) intent to deceive;
- e) scale of offending;
- f) multiple offences;
- g) concealment of activity;
- h) the compliance history of the person;
- i) individual or corporate offending;
- j) the length of time during which the offending behaviour has occurred;
- k) any financial benefit unlawfully gained by the offender (which may include the value of the item(s) and/or transaction(s) related to the offence);
- l) the fees that would have been due had they followed the statutory requirement to register an exempt item (where applicable);
- m) any available information concerning the financial position of an individual and/or an organisation and its ability to pay the penalty; and,
- n) whether the total monetary penalty is proportionate to the offending behaviour.

5.16 Where appropriate evidence is provided, the Secretary of State, taking into account the circumstances of the individual on the evidence provided, may consider allowing an extended period of time for payment or allowing payment by instalments.

Proposal notice for a monetary penalty

- 5.17** Before imposing a monetary penalty, the Secretary of State will serve a *proposal notice* on the person detailing the proposed monetary penalty.
- 5.18** Prior to serving such a notice, the Secretary of State may request that the person provide further information to them in order to decide whether the imposition of a *monetary penalty* is appropriate and if so, the amount of the *monetary penalty*.
- 5.19** The proposal notice²⁵ will set out:
- a) The grounds for the proposed monetary penalty;
 - b) The amount of the proposed monetary penalty;
 - c) An explanation of the decision-making process for the amount to be paid;
 - d) The option of paying a specified amount (referred to as a ‘discharge payment’) on receipt of the proposal notice; the period within which a discharge payment must be made; and the effect of such a payment (see 5.21);
 - e) Information as to the person’s right to make written representations and objections in relation to the proposed monetary penalty and the period within which they may be made (see 5.23); and,
 - f) The circumstances in which the Secretary of State may not impose the monetary penalty (see 5.2)
- 5.20** Where a proposal notice is served on a person no monetary penalty in respect of an offence under section 12 of the Act may be imposed on the person in respect of the act or omission to which the notice relates before the end of the period within which the person’s liability may be discharged. If, during that period, the liability for the monetary penalty specified in the proposal notice is discharged by payment of the sum specified in the notice, the monetary penalty will not be imposed and the person may not at any time be convicted of an offence under section 12 in respect of the act or omission giving rise to the penalty.

Opportunity to discharge liability

- 5.21** The Secretary of State is required to offer the person on whom a *proposal notice* is served, the opportunity to make a discharge payment in order to discharge the person's liability for the monetary penalty by payment of a sum specified in the *proposal notice* (which must be less than or equal to the amount of the proposed penalty). If the person chooses to make a *discharge payment* it must be made

²⁵ Ivory Act Schedule 1, Part 1, paras 2 and 3

within the period specified in the notice of intent, which will be a maximum of 28 days²⁶ beginning with the day on which the notice was received.

Example 1.

A person is found to have sold an ivory item that is prohibited and is falsely registered as compliant with one of the exemption categories. The item is not capable of meeting any of the exemption criteria. As part of the investigations the Secretary of State requests evidence to determine the amount of financial benefit of the offence. Evidence may include the value of the sold item.

The Secretary of State serves a *proposal notice* on the person detailing the proposed monetary penalty and the option of paying a discharge payment. A monetary penalty can be imposed up to the maximum value of £250,000. The discharge payment must be less than or equal to the amount of the proposed monetary penalty.

5.22 Where a person chooses to make a *discharge payment* this has the effect of discharging their liability for the *monetary penalty*, which will not then be imposed. Once a discharge payment has been made, as noted above, the person may not at any time be convicted of a relevant offence in relation to that act or omission.

Additionally:

- the Secretary of State may not serve a *stop notice* on the person in relation to the same offence; and
- the Secretary of State will include details of the offence and the amount of the discharge payment in their publication of details of civil sanctions under the Act (see section 8).

Example 2.

On inspecting a business premises an Accredited Civilian Officer finds several items of ivory for sale that have not been registered. All the items meet one of the exemptions under section 10 of the Act. The business representative proactively removes the items from sale and proposes to undertake the necessary action to register them.

The Secretary of State may decide to impose a monetary penalty on the person up to the maximum value of £250,000.

The Secretary of State serves a proposal notice on the person detailing the

²⁶ Ivory Act Schedule 1 paragraph 3(2)

proposed monetary penalty and the option of paying a discharge payment, providing the person with the opportunity to discharge their liability. The business wants to discharge its liability and does so by making a discharge payment within the specified period. This has the effect of discharging liability for the monetary penalty, which will not then be imposed.

Right to make representations

- 5.23** The person on whom a *proposal notice* is served is entitled – unless they have chosen to make a *discharge payment* - to make *written representations and objections* to the Secretary of State in relation to the proposed monetary penalty. These representations and objections may relate to anything the person considers is relevant to the alleged offence.
- 5.24** If the person has not discharged their liability for the monetary penalty by payment of the sum specified in the proposal notice, and chooses to make representations and objections, they must do so within the period specified in the notice of intent, which will be a maximum of 28 days beginning with the day on which the notice was received. Having considered, any representations and objections, the Secretary of State must decide whether or not to impose the monetary penalty.

Imposition of a monetary penalty

- 5.25** If the Secretary of State decides to impose a monetary penalty they must serve a notice on the person imposing a monetary penalty. A *monetary penalty notice* will set out:
- a) The grounds for imposing the monetary penalty;
 - b) The amount of the monetary penalty;
 - c) How payment may be made;
 - d) The period within which payment may be made;
 - e) The person's right to appeal (see section 7); and,
 - f) The consequences of failing to pay the monetary penalty (see 5.29).
- 5.26** The period within which payment is to be paid must be at least 28 days from the date of receipt of the notice but may be longer having regard to the particular circumstances.
- 5.27** A person on whom a monetary penalty is imposed may not at any time be convicted of an offence under section 12 of the Act in respect of the act or omission giving rise to the penalty.

Example 3.

A person is found to have sold an ivory item that is prohibited. The item is not capable of meeting any of the exemption criteria. The person does not discharge their liability. The Secretary of State may decide to impose the penalty and serve on the person a monetary penalty notice or notify the person in writing of their decision not to impose the penalty. If the monetary penalty notice is served, the person has at least 28 days from the date of receipt of the notice to make the payment.

Payment of a monetary penalty

- 5.28** The person on whom the monetary penalty notice is served must pay the amount in the *monetary penalty notice* within the period specified, which will be a minimum of 28 days, beginning with the day on which the notice was received. The Secretary of State may specify a period of longer than 28 days where they believe that it is appropriate to do so, having regard to the particular circumstances.
- 5.29** The Secretary of State may recover a monetary penalty as a civil debt, which is recoverable, on the order of a court, as if payable under a court order.
- 5.30** A person who has paid a monetary penalty imposed by the Secretary of State in relation to a relevant offence (see 1.5), or who has discharged liability for a monetary penalty following receipt of a *proposal notice*, cannot be convicted of a relevant offence in relation to the act or omission to which the notice of intent or monetary penalty notice related.²⁷ Any failure to pay a monetary penalty is taken seriously and would normally result in court proceedings to recover the debt and associated costs.

6. Enforcement cost recovery notices

- 6.1** As per 2.3, it is not currently intended that enforcement cost recovery notices (ECRNs) will be made use of in the immediate period after commencement of the Act. This position will be kept under review. Should a decision be taken in the future to make use of them then full guidance will be provided.

²⁷ Ivory Act Schedule 1, Part 1, para 4

7. Challenges and appeals

- 7.1** Where action or a decision is taken by the Secretary of State, the person will be provided with details in writing of any rights to challenge or appeal, including any statutory rights to appeal. Statutory rights to appeal in relation to the enforcement provisions in the Act are provided in respect of:
- a) The imposition of a stop notice (see section 4)
 - b) The imposition of a monetary penalty, including in relation to the amount of the penalty (see section 5)
 - c) A decision not to issue a certificate of compliance for an *enforcement undertaking* (see 3.23)
 - d) A decision not to issue a completion certificate for a *stop notice* that specified steps that must be taken (see 4.10)
 - e) A decision regarding forfeiture of seized items.
- 7.2** The appeal process in relation to a refusal or revocation of an exemption certificate for a pre-1918 item purported to be of outstandingly high artistic, cultural or historical value is not covered in this guidance.
- 7.3** The appeal process for a decision regarding forfeiture of seized items is not covered in this guidance as full details are available under Section 31 of the Act.
- 7.4** Appeal cases against civil sanctions imposed under the Act will be dealt with by the General Regulatory Chamber of the First-tier Tribunal. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules (2009) (SI 2009/1976) set out many aspects of Tribunal procedure. For example, these rules state (except in specified cases) that an application for appeal to the First-tier Tribunal must be made within 28 days of sending the notice of a decision to impose a civil sanction under this Schedule. They also state how an application to appeal should be lodged with the Tribunal; that affected parties will be notified of the appeal and specify the documents required by the Tribunal. The Tribunal only deals with appeals against civil sanctions and not criminal offences.

Stop notices

- 7.5** The recipient of a stop notice has a right of appeal²⁸ against the decision to impose the notice on the basis:
- a) That it was based on an error of fact,
 - b) That it was wrong in law,

²⁸ Ivory Act Schedule 1 Part 2, para 8 (1)

- c) That it was unreasonable,
- d) That any step specified in the notice is unreasonable, or,
- e) That the recipient of the notice has not committed a relevant offence or would not have committed such an offence even if the stop notice not been served.

7.6 Where the person makes an appeal against the imposition of a stop notice, the stop notice remains in effect, and the person is under a legal duty to comply with it, unless, on application, the Tribunal suspends the stop notice pending consideration, or until such time as the Tribunal has come to a decision on the appeal and if the notice is overturned on appeal.

Completion certificates in respect of stop notices

7.7 Where an application for a completion certificate is made and a decision is taken by the Secretary of State not to issue a completion certificate in respect of a stop notice that specified steps which must be taken (see 4.6(c)), the person that made an application for the completion certificate may appeal against the decision on the basis:

- a) That it was based on an error of fact,
- b) That it was wrong in law, or,
- c) That it was unfair or unreasonable.²⁹

7.8 Where the person makes an appeal against the decision not to issue a completion certificate, unless the Tribunal orders an interim suspension of the stop notice, it remains in effect, and the person is under a legal duty to comply with it, until such time as the First-tier Tribunal has come to a decision on the appeal.

Monetary penalties

7.9 The recipient of a notice imposing a monetary penalty has a right of appeal against the decision to impose the penalty on the basis:

- a) That it was based on an error of fact,
- b) That it was wrong in law,
- c) That the amount of the penalty is unreasonable, or,
- d) That the decision is unreasonable for any other reason.

7.10 Where the person makes an appeal against the imposition of a monetary penalty, and the Tribunal is considering that appeal, the appellant may apply for a stay of the requirement to pay the penalty, until the Tribunal has come to a decision on the appeal.

²⁹ Ivory Act Schedule 1 Part 2, para 8 (2) and [to add ref to SI]

Certificate of compliance in respect of enforcement undertakings

- 7.11** Where an application for a certificate of compliance is made and a decision is taken by the Secretary of State not to issue a certificate, the individual that made an application for the certificate may appeal to the First-tier Tribunal against the decision on the basis:
- a) That it was based on an error of fact,
 - b) That it was wrong in law; or,
 - c) That it was unfair or unreasonable.
- 7.12** Where the person makes an appeal against the decision not to issue a certificate of compliance, the enforcement undertaking remains in effect – and the person is under a legal duty to comply with it - until such time as the Tribunal has come to a decision on the appeal.

Process for appeal and powers of the Tribunal

- 7.13** A notice of appeal must be sent to the to the General Regulatory Chamber of the First Tier Tribunal³⁰ within 28 days of the date that notice of the civil sanction being imposed or the decision not to issue a completion certificate or certificate of compliance was sent to the applicant. The Tribunal is independent and will listen to both the person making the appeal and the Secretary of State before it reaches a decision.
- 7.14** For appeals relating to discharge certificates for enforcement undertakings and completion certificates for stop notices, the Tribunal may:
- a) Require the Secretary of State to issue a certificate of compliance or completion certificate;
 - b) Confirm the Secretary of State’s decision not to issue a certificate of compliance or completion certificate; or,
 - c) Remit the decision as to whether to issue a certificate of compliance or completion certificate, or any matter relating to those decisions, to the Secretary of State. The Secretary of State would be required to reconsider their decision but would be entitled to come to the same decision or a different decision.
- 7.15** Where a person has appealed in relation to a decision not to issue a certificate of compliance in relation to an enforcement undertaking or completion certificate in relation to a stop notice, the undertaking or stop notice will remain in effect – and

³⁰ Ivory Act Schedule 1, Part 1, para 2(7) and Part 2, para 8(3) and [to add ref to SI]

the person under a legal duty to comply with it - until the Tribunal has come to a decision on the appeal, unless, on an application, the Tribunal decides to suspend the operation of the notice.

- 7.16** For appeals relating to stop notices and monetary penalties the Tribunal may:
- a) Withdraw a stop notice or withdraw the imposition of a monetary penalty;
 - b) Confirm a stop notice or the imposition of a monetary penalty;
 - c) Vary the prohibited activity or activities specified in a stop notice, or vary any steps required under the notice;
 - d) Vary the amount of a monetary penalty vary the terms for making the payment, such as extending the timeframe to make payment or varying the terms for paying by instalments;
 - e) Take any actions that the Secretary of State could take under the Act in relation to the relevant offence;
 - f) Remit the decision whether to confirm a stop notice or the imposition of a monetary penalty, or any matter relating to that decision, to the Secretary of State. The Secretary of State would be required to reconsider their decision but would be entitled to come to the same decision or a different decision.

8. Publication

- 8.1** The Act requires the Secretary of State to publish a report about the use of their powers to impose civil sanctions.³¹ The report must include the following:
- a) the cases in which a monetary penalty was imposed, or a stop notice or enforcement costs recovery notice was served, during the period to which the report relates
 - b) the cases in which liability for a monetary penalty was discharged;
 - c) the cases in which an enforcement undertaking was accepted.
- 8.2** The Secretary of State is not required to include in the report any information that, in their opinion, it would be inappropriate to include on the ground that to do so would or might be unlawful, or might adversely affect any current investigation or proceedings.
- 8.3** Information held by or on behalf of the police or customs officer, the Crown Prosecution Service, a Procurator Fiscal or the Public Prosecution Service for Northern Ireland may be disclosed to the Secretary of State for the purpose of the

³¹ Ivory Act Schedule 1, Part 6, para 23

exercise by the Secretary of State of any powers conferred on them under or by virtue of Schedule 1 of the Act.

- 8.4** The Secretary of State will publish such details as well as details of prosecutions under the Act.³² These details will be included with details of other enforcement action taken by the Secretary of State under other legislation in a list that is updated on a periodic basis, at least annually.³³
- 8.5** Where details of an enforcement undertaking agreed under the Act are published, these details will note whether a compliance certificate has subsequently been issued. Where a compliance certificate is issued following publication of the details of an enforcement undertaking, details of the issue of the certificate will be added when the published list is next updated.
- 8.6** Where details of a stop notice imposed under the Act are published, these details will note whether a completion certificate has or has not subsequently been issued (see 4.7). Where a completion certificate is issued following publication of the details of a stop notice, details of the issue of the completion certificate will be added when the published list is next updated.

END

[Statutory Guidance]

ENDS

³² Details of prosecutions by other enforcement bodies will not be published.

³³ The list of statutory enforcement actions is available at: *[to be completed after the consultation]*