



Department  
for Environment  
Food & Rural Affairs

# Implementing the Ivory Act Consultation

March 2021



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# 1. Introduction

## The Ivory Act 2018

1.1 Following public consultation on the proposal, in 2018 the government decided to introduce 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. When commenced, the Act will ban dealing in items made of or containing elephant ivory, regardless of their age, unless they fall within one of the exemptions. 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),<sup>1</sup> which covers elephant ivory.

1.2 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 320cm<sup>2</sup>.
- 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.

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<sup>1</sup> 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.

- 1.3 Items falling under these exemptions (hereafter the “standard exemptions”) will need first to be registered via a declaration-based process, in order to be traded lawfully. However, the requirement for registration does not apply to sales or hire agreements made between two or more qualifying museums.
- 1.4 There is also an exemption under the Act for pre-1918 items of outstandingly high artistic, cultural or historical value (hereafter the “rare and most important exemption”). For such an item to be traded lawfully, an exemption certificate must have been issued. The government’s decision on 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.
- 1.5 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 regulatory regime (by means of secondary legislation), and in particular the arrangements for registration or certification of exempt items. It will also be necessary to publish statutory guidance on the use of civil sanctions and non-statutory guidance to assist individuals with understanding the requirements of the Act.
- 1.7 The purpose of this consultation is to seek the views of interested parties on our proposals for the implementation of the Act, prior to legislating. Section 2 covers the commencement of the Act, including the prohibition on dealing in ivory. Section 3 covers proposals for implementing the standard exemptions. Section 4 covers proposals for implementing the rare and most important exemption. The civil sanctions and statutory guidance will be consulted on separately. 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 the devolved administrations, with their consent. Where a regulation-making power is devolved, this is indicated in footnotes.

1.8 The scope of this consultation is solely the implementation of the ban on elephant ivory and connected provisions, as established by the Act. In parallel to this consultation the government is considering evidence submitted in response to a call for evidence on non-ivory trade with a view to informing a decision as to what, if any, additional action needs to be taken in respect of non-ivory trade<sup>2</sup>.

## Responding to this consultation

1.9 This consultation will run for eight weeks. This is in line with the Cabinet Office's 'Consultation Principles' which advises government departments to adopt proportionate consultation procedures. The consultation opens on 9 March 2021 and closes on 4 May 2021.

1.10 Please respond to this consultation:

- Via the Citizen Space consultation hub, at:  
<https://consult.defra.gov.uk/communications/implementing-the-ivory-act>;
- By email, to [Ivoryconsultation@defra.gov.uk](mailto:Ivoryconsultation@defra.gov.uk); or
- In writing to Consultation Coordinator, 2<sup>nd</sup> Floor, Foss House, Kings Pool, 1-2, Peasholme Green, York, YO1 7PX.

**Question 1: Would you like your response to be confidential? A) Yes/No B) If Yes please give your reason**

## After the consultation

1.11 A summary of responses to this consultation will be published on the government website at: [www.gov.uk/defra](http://www.gov.uk/defra). An annex to the consultation summary will list all organisations that responded but will not include personal names, addresses or other contact details.

1.12 Defra may publish the content of your response to this consultation to make it available to the public without your personal name and private contact details (e.g. home address, email address, etc).

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<sup>2</sup> <https://www.gov.uk/government/consultations/non-ivory-trade-call-for-evidence>

- 1.13 If you click on ‘Yes’ in response to the question asking if you would like anything in your response to be kept confidential, you are asked to state clearly what information you would like to be kept as confidential and explain your reasons for confidentiality. The reason for this is that information in responses to this consultation may be subject to release to the public or other parties in accordance with the access to information law (these are primarily the Environmental Information Regulations 2004 (EIRs), the Freedom of Information Act 2000 (FOIA) 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. In view of this, your explanation of your reasons for requesting confidentiality for all or part of your response would help us balance these obligations for disclosure against any obligation of confidentiality. If we receive a request for the information that you have provided in your response to this consultation, we will take full account of your reasons for requesting confidentiality of your response, but we cannot guarantee that confidentiality can be maintained in all circumstances.
- 1.14 If you click on ‘No’ in response to the question asking if you would like anything in your response to be kept confidential, we will be able to release the content of your response to the public, but we won’t make your personal name and private contact details publicly available.
- 1.15 Defra may share your response, where appropriate, with the Devolved Administrations.
- 1.16 There may be occasions when Defra will share the information you provide in response to the consultation, including any personal data, with external analysts. This is for the purposes of consultation response analysis and provision of a report of the summary of responses only.
- 1.17 This consultation is being conducted in line with the Cabinet Office “Consultation Principles” and be found at:  
<https://www.gov.uk/government/publications/consultation-principles-guidance>.
- 1.18 If you have any comments or complaints about the consultation process, please address them to: Consultation Coordinator, Defra, 2nd Floor, Foss House, Kings Pool, 1-2 Peasholme Green, York, YO1 7PX Or email:  
[consultation.coordinator@defra.gov.uk](mailto:consultation.coordinator@defra.gov.uk)

## 2. Commencing the ban

- 2.1 The government intends the ban on dealing in ivory to come into force as soon as practicable and we therefore plan to lay the implementing secondary legislation before Parliament, and to issue guidance as soon as possible after appropriate consideration of responses to this consultation.

- 2.2 An assessment has been undertaken of the impacts of the secondary legislation. We do not expect additional costs to business on top of those scored in the Impact Assessment<sup>3</sup> undertaken for the Ivory Act.
- 2.3 When the ban comes into force all forms of dealing in ivory, including export and import (for sale or hire), sales and hire agreements, advertising or keeping an ivory item for any of these purposes, will be prohibited. This means that all elements relating to contracts involving the dealing in ivory will need to have been concluded (executed) before the date on which the ban comes into force. For example, in the case of sales, the money and the goods will need to have been exchanged before that date.
- 2.4 We are planning awareness-raising measures about the Act among both commercial dealers and members of the public in advance of commencement. Owing to the publicity in advance of and during the passage of the Bill through Parliament, many commercial dealers will already have a good awareness of the prohibition and some may already have chosen to adapt their business practices accordingly. We intend that the provisions in the Act will be commenced in such a way as to enable those dealing in exempted items to register or, as the case may be, apply for certification of their items, before the ban comes into force.

**Question 2: Do you agree with the proposed approach to commencing the Act? A) Yes/No B) If no, please state your reasons**

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<sup>3</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/710369/ivory-bill-ia.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710369/ivory-bill-ia.pdf)



### 3. Implementing the standard exemptions

- 3.1 This section covers proposals relevant to the standard exemptions: pre-1947 items containing less than 10% ivory by volume (the “de minimis” exemption); pre-1975 musical instruments containing less than 20% ivory by volume; pre-1918 portrait miniatures with a surface area of no more than 320cm<sup>2</sup>; and sales to, and hire contracts with, qualifying museums.<sup>4</sup>
- 3.2 An owner intending to deal in an item falling under one of these exemptions will need to register their item in advance, unless the sale or hire agreement is made only between qualifying museums. A ‘set’ of objects, for example an original tea set or drawing instruments set, may be considered a single item and registered as such. The set should be original: all of the parts of the set, including any box or container, having been produced with the intention of them being kept and used together.
- 3.3 Three or more items up to a maximum of twenty items may be registered as a group rather than as separate individual items. This group registration is only permitted when:
- The subsequent dealing of these items is as a single group and in a single transaction e.g. all items are being sold to a single person in one transaction.
  - Each item in the group individually meets the same exemption e.g. a group of pre 1918 portrait miniatures.

**Question 3: Do you agree with the proposed approach to the group registration process? A) Yes/No B) If no, please state your reasons and provide any suggested additions or alternatives including any supporting evidence.**

- 3.4 In order to register an item(s), an owner will be required to declare that the item(s) meets one of the exemptions and to explain how it does so. The owner making the registration will be responsible for this judgement. It should be noted that this declaration-based registration will not in itself provide assurance that an item(s) meets the exemption conditions. In this context, it should be noted that if later it is found that an item(s) does not meet the exemption conditions, a person charged with unlawful dealing in ivory may have a defence if they have taken all reasonable precautions and exercised due diligence to avoid committing the offence.

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<sup>4</sup> See sections 6 to 9 of the Act for the full text of these exemptions.

- 3.5 The Animal and Plant Health Agency (APHA) will administer the registration process on behalf of the Secretary of State. An online service will be set up to enable such registrations to be made as efficiently as possible, including the ability to pay by card online. Further support will be put in place for users with additional accessibility requirements, including the provision of a non-digital option. In addition, it will be possible for an application to be made by a third-party on behalf of an item's owner.
- 3.6 It should also be noted that buyers of exempt items will need to assure themselves: 1) that the item(s) they are buying has been registered (by the seller); and 2) that each item meets the exemption conditions.
- 3.7 It should be noted that for items falling under the de minimis exemption all of the ivory must be 'integral' to the item. 'Integral' means that it cannot be removed from the item without difficulty or without damaging the item. 'Integral ivory' would include components that are designed to be detachable from the item if, without that component, the item as a whole could no longer function as intended. For example, this could include a detachable ivory knob from a measuring instrument. However, it would not include for example an ivory statue which has been temporarily mounted on a plinth.

## **Guidance on assessing age, percentage volume and surface area**

- 3.8 Please note that while we are here seeking stakeholder views on several specific matters to be included in guidance, the government will also provide guidance on a number of other matters to assist with compliance with the Act. For example, there will be guidance on the scope of the ban and on the practical arrangements for registering exempt items.

### **Assessing age**

- 3.9 The age of the item is relevant to the exemptions for de minimis items (the relevant date is 3 March 1947), musical instruments (1 January 1975) and portrait miniatures (1 January 1918). It is also relevant for the rare and most important exemption, covered in the next section. In addition, if any ivory has been added to the item on or after the relevant date, that ivory must have been taken from its elephant source before the 1 January 1975 and that ivory must have been added for the purpose of restoring the item. It should be noted that under our existing CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) regime on the control of the trade in endangered species, people dealing in items containing ivory are already required to consider the age of the ivory.

3.10 Stakeholder feedback to date has indicated the need for guidance to assist in the determination of the age of an item. Below is an outline of the matters that we propose to include in guidance on assessing the age of items.

### **Proposed guidance on assessing age of items**

We would expect the owners of items to base their declaration that the item meets the relevant exemption criteria on objective evidence indicating the age of an item (and, in addition, appropriate evidence to indicate the date of any addition of ivory for the purpose of restoration). The evidence the owner relied upon in assessing the age of the ivory should be indicated when registering the item. Some examples of evidence which the owner might rely on in making a declaration are set out below.

Owners should ensure that any evidence relied upon for the purposes of the declaration is retained, both because it is likely to be needed for future registrations (on sale) and, in particular, because section 12(3) provides a defence to an offence of breaching the prohibition where the person charged has taken all reasonable precautions and exercised due diligence to avoid committing the offence.

#### *1. Evidence of provenance*

Evidence that shows the item was made or was in existence before the relevant date. This evidence could take a wide range of forms, for example, it could be:

- an original dated receipt or bill, for example to show it was manufactured, sold or repaired prior to the date in question;
- a catalogue, newspaper article or published article dated prior to the date in question and containing photographs or detailed descriptions of the item;
- a date mark on the item which shows it was made prior to the date in question; or
- information within the personal knowledge of the owner or another person, for example, that the owner inherited the item prior to the relevant date.

#### *2. Verification by an expert*

Written verification from an expert that the item was made or in existence prior to the relevant date. In this instance:

- the expert could be a person with expertise or qualifications, for example an antiques specialist, museum curator or arts specialist, and to demonstrate this expertise they could be recognised by a relevant trade association, representative body or similar organisation; or
- the expert may be involved in the associated commercial use of the item concerned if the person has the relevant expertise.

#### *3. Radiocarbon dating*

Evidence from a radiocarbon dating test on the item indicating that the item was in existence before the relevant date. (For the avoidance of doubt, there is no

requirement under the Act to have an item radiocarbon dated.)

**Question 4: Do you agree with the proposed approach to guidance on assessing the age of items? A) Yes/No B) If no, please state your reasons and provide any suggested additions or alternatives.**

## Assessing volume

3.11 Stakeholder feedback to date has also indicated the need for guidance on determining the percentage volume of ivory in an item. This is relevant to the exemptions for de minimis items (percentage volume must be less than 10%) and musical instruments (percentage volume must be less than 20%). We are consulting on the matters which we propose to include in guidance on assessing the percentage volume of ivory in items, with a view in particular to identifying any useful additions.

### Proposed guidance on assessing percentage volume of ivory in an item

1. The assessment should relate to the amount of ivory as a percentage of the total volume of the material from which the item is made. For example, in the case of a piece of furniture this would be the ivory, wood and any other material from which the item is made.
2. A 'set' of objects can be considered a single item, including for the purposes of the assessment of percentage volume. The set should be original: all of the parts of the set, including any box or container, having been produced with the intention of them being kept and used together.
3. The assessment should not include empty spaces or voids. For some items it may not be possible to determine the presence of potential voids without damaging the item. In that case the assessment could be informed by knowledge of the construction of similar items.
4. It is not expected that items should be damaged in order for the assessment of percentage volume to be carried out.
5. The following would be acceptable methods to assess the percentage volume (however other methods may also be available and suitable):
  - If it is very clear and easily established that the ivory content of the item is less than the relevant percentage threshold, the ivory percentage volume could be assessed by eye.  
  
For example, this could apply to a large piece of wooden furniture with a single small ivory plate around a keyhole (an escutcheon).
  - If it is more challenging to determine if the ivory content is above or below the relevant percentage threshold, then it would probably be more appropriate to attempt to assess the ivory content of the item by taking measurements and consulting volume formulae.

- In particular for items with ivory inlay (thin pieces of ivory on the surface of an object), it may be challenging to establish the depth of the ivory in some cases. In which case a useful approach may be to measure the surface area of the ivory inlays in relation to the overall surface area of the object. However, even where a surface area measurement exceeds 10%, the item may still be below the 10% volume threshold, since the inlay is shallower than the object which is inlaid.
6. Examples (including photos) will also be provided of standard items that would likely qualify and would likely not qualify under the exemptions. This will include:
- A standard piano with ivory keys would likely meet the 20% volume criteria for the musical instrument exemption. However, if the piano has any other ivory parts, other than the keys, it may not qualify and the person registering it should carry out further assessments.
  - A piece of ivory-handled cutlery is unlikely to meet the 10% ivory volume condition of the de minimis exemption.
  - A chess set containing ivory chess pieces is unlikely to meet the 10% ivory volume condition of the de minimis exemption.
  - A piece of furniture with a small amount of ivory inlay would likely meet the 10% ivory volume condition of the de minimis exemption.
7. It is recognised that it may not always be possible to determine exact percentage volume, for example if the item is of irregular shape or where the depth of inlay is difficult to determine. It will remain the responsibility of the owner to assess the item and to take reasonable care in reaching a conclusion as to its percentage ivory volume.

**Question 5: Do you agree with the proposed approach to guidance on assessing percentage volume of ivory of an item? A) Yes/No B) If no, please state your reasons and provide any suggested additions or alternatives.**

## Assessing surface area

3.12 Under the exemption for portrait miniatures, in addition to the age requirement (pre-1918), the surface area must not exceed 320cm<sup>2</sup>. The Act specifies that the surface area, for the purposes of this calculation, does not include the frame or any area covered by the frame. We propose that guidance on this exemption will include the following matters.

### Proposed guidance on portrait miniatures

1. A frame that contains ivory can be considered part of the portrait miniature, provided that it is integral to the portrait miniature and is also pre-1918, or if any ivory was added later, that this was taken from its animal source before 1975 and was added only for the purposes of restoration. However, the relevant surface area of the portrait miniature does not include the frame or the

part covered by the frame.

2. Formulae for calculating the area of different shapes (squares, circles etc) are widely available and may be helpful for owners to consult when calculating the surface area of their portrait miniature.
3. If the area is calculated in square inches, this can be converted to square centimetres by multiplying by 6.45.

**Question 6: Do you agree with the proposed approach to guidance on assessing surface area of portrait miniatures? A) Yes/No B) If no, please state your reasons and provide any suggested additions or alternatives.**

## Information to be provided upon registration of exempt items

3.13 For item(s) to be registered, the Act requires the owner of the item(s) upon application to provide:

- The owner's name and address (which if the owner is a business is the business name and address);
- A description of the item(s) and of any distinguishing features that it has;
- A photograph (or photographs) of the item(s) showing any such distinguishing features;
- Information about any dealing in the item(s) that is expected to take place (for example, the intention to offer it for sale.);
- In the case of an item(s) falling under the de minimis, musical instruments or portrait miniatures exemptions, a declaration that the item(s) satisfies the relevant exemption conditions and an explanation of how it does so.

3.14 There is the power for the appropriate national authority to specify in secondary legislation additional items of information that must be provided. We propose to specify the following:

- The photograph(s) provided under the existing requirement in the Act (see above), must additionally show the entire item.
- In the case of an application being made on the owner's behalf, the name and address of the person making the application.

3.15 The purpose of the registration process is to enable the government to establish a clear picture of ivory being traded under the exemptions contained in the Act, and to

facilitate compliance with the Act. We consider that the mandatory provision of these additional items of information will support the overall functioning of the registration process.

**Question 7: Do you agree with the proposed information requirements to be required? A) Yes/No B) If no, please state your reasons**

## Registration fee

- 3.16 The Act provides for a fee to be prescribed for registration of items falling under the standard exemptions. For the avoidance of doubt, as established by the Act each such exempt item(s) will require its own registration and payment of the fee each time that ownership of the item(s) changes and further dealing in relation to that item(s) is planned. For example, an item owned and offered for sale by an antique dealer will need to have been registered by that dealer; if the buyer then wants to resell the item, they will first need to register the item again. There is no requirement to register the item if the buyer does not plan any further dealing in relation to that item. The government will incur costs of building and maintaining the registration process, which is essential for delivering the objectives of the Act. We consider it appropriate that this cost be borne by users rather than the taxpayer in general. It will be a choice for owners as to whether they wish to deal in exempt ivory items, and therefore to apply for registration. We will design the process to be as cost-effective as possible, in order to minimise the resulting fee for the user.
- 3.17 Based on these principles, we propose a registration fee of £20 per item for individual item registrations. We also propose a registration fee of £50 for a group of 3 or more items up to a maximum of 20 items. Both fee levels will be specified in secondary legislation. We consider these fees to be sufficiently low to not deter compliance with the obligation to register items.
- 3.18 We propose to keep the fees under close review after the Act is commenced. Depending on numbers of registrations being made, the fee may subsequently be adjusted in order to maintain the cost-recovery principle outlined here. Any subsequent changes would be subject to consultation and require further secondary legislation.

**Question 8: Do you agree with the rationale for establishing the fees at these levels? A) Yes/No B) If no, please state your reasons**

- 3.19 The Act enables us to put in place exemptions from the registration fees. We do not propose to establish any exemptions from the registration fees. We consider it appropriate that the costs are spread across all owners and in proportion to the number of registrations those owners make.

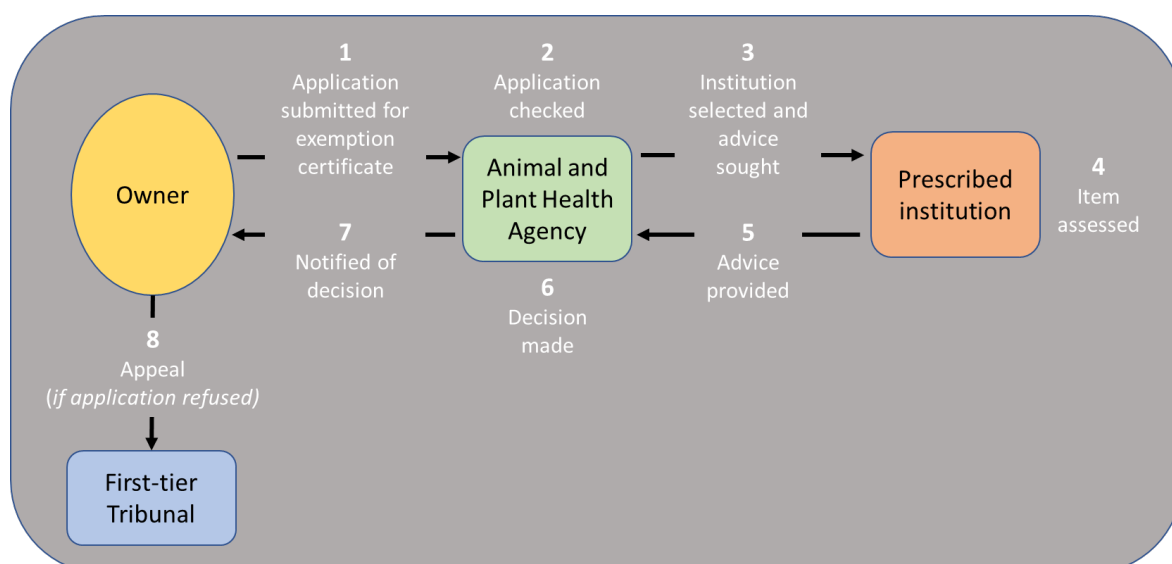
**Question 9: Do you agree with the rationale for not providing exemptions from fees?  
A) Yes/No B) If no, please state your reasons**



## 4. Implementing the Rare and Most Important Exemption

- 4.1 This exemption applies to pre-1918 items of outstandingly high artistic, cultural or historical value. In contrast to the standard exemptions, which will be registered if the owner has declared that the item meets the registration conditions and has provided the required items of information, items considered under this exemption will need to be officially certified as meeting the relevant conditions.
- 4.2 Applicants for an exemption certificate for an item considered under this exemption will apply to APHA in a similar way to the process for registration of items falling under the standard exemptions. Provided that the application is complete, and the item does not clearly fail to meet the two criteria, APHA will refer the application for expert advice before making a decision on whether to grant an exemption certificate. The Act requires that the application be referred to a “prescribed institution”, which is an institution deemed to have the necessary expertise and knowledge to provide the government with the advice required. APHA, acting on behalf of the Secretary of State, will make a decision using this advice. The “prescribed institutions” must be specified in secondary legislation by the appropriate national authority. The Act establishes an appeals process in respect of the decisions made on exemptions certificates. The exemption process is summarised in the figure below and is as follows:

1. An application for an exemption certificate is submitted
2. The application is checked by the Animal and Plant Health Agency (APHA)
3. APHA select a prescribed institution and seek advice
4. The selected institution assess the item
5. The selected institution provide advice to APHA
6. APHA make a decision on the application
7. The applicant is notified of the decision
8. If the application is refused the applicant may appeal to the First Tier Tribunal



4.3 This section sets out our specific proposals in respect of implementing this exemption, in particular the arrangements for the certification process, including the application fee, to be established in secondary legislation.

## Guidance on Rare and Most Important Exemption

- 4.4 For an item to fall under this exemption, it must both be 1) pre-1918 and 2) of outstandingly high artistic, cultural or historical value. The Act provides further detail on the matters to be taken into account when considering the second criterion. These matters are an item's rarity and its importance relative to other examples of its type.
- 4.5 Applicants for exemption certificates for these items will be required to declare that in their opinion the item meets the conditions of the exemption, and to explain why (including by providing supporting evidence). Examples of the kind of considerations which may be taken into account in assessing whether an item meets the exemptions will be set out in guidance, but this will not preclude other matters from being considered.

### **Proposed guidance on interpretation of the rare and most important exemption**

#### *Condition 1: pre-1918*

(See the wider proposed guidance in respect of assessing age in the preceding section.)

#### *Condition 2: outstandingly high artistic, cultural or historical value*

This exemption is designed to be narrow and apply only to those items which have significance to wider society, beyond any personal, sentimental or financial value which may be attached to them.

In judging whether an item meets this criterion, the following two matters will be taken into account:

a) the rarity of the item

and/or

b) the extent to which the item is an important example of its type

In respect of the rarity of the item, the following matters are likely to be relevant:

- Estimated numbers of similar items in existence, including how many are in the UK.
- How unique the item is, which may include distinctive or unusual features or historical adaptations.

In respect of the extent to which the item is an important example of its type, the following are potentially relevant considerations which could be taken into account. Applicants should support their applications with an explanation as to why they

believe that the item is an important example of its type.

- Artistic or aesthetic quality – Is the item of particularly high quality or by a named artist, school or studio?
- Craftsmanship – Is the item particularly well-crafted or does it show a specific, notable form of craftsmanship?
- Condition of the item – Is the item in pristine or much better condition than similar items of its type?
- Significance as part of a collection – Is the item significant because it's an integral part of a noteworthy collection, for example an artistic collection put together by a well-known individual?
- Noteworthy provenance – Is the item closely associated with a specific individual or event, for example previous ownership by a well-known historical figure?
- Significant historical context – Is the item significant because of its historical context? This could be through its close association with a specific historical, artistic, social, cultural, religious, scientific or technological development.
- Significant geographic context – Is the item significant because of its close association with a specific place or region?
- Previously recognised status - Has the status of the item been recognised before? This could be through receipt of a prestigious award; recognition as a National Treasure (by meeting the Waverly Criteria<sup>5</sup>); or being part of a noteworthy exhibition.

**Question 10: Do you agree that the proposed approach to guidance on this exemption adequately captures and explains it? A) Yes/No B) If no, please state your reasons and provide any suggested additions or alternatives.**

4.6 The Act provides the power for the appropriate national authority to prescribe in secondary legislation other matters (in addition to rarity and importance), which are to be taken into account in consideration of whether an item meets Condition 2. However, we do not consider that there is a compelling case for prescribing any additional matters. This is because Condition 2 is capable of a wide interpretation (as explained by the proposed guidance on it, above), encompassing a number of different matters.

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<sup>5</sup> When deciding if a cultural object is a national treasure and if its departure from the UK would be a misfortune, the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest assess it against a set of criteria known as the Waverley Criteria. For more information see:

<https://www.artscouncil.org.uk/supporting-collections-and-cultural-property/reviewing-committee>

## Prescribed institutions

- 4.7 We have taken advice from Arts Council England (which supports activities across the arts, museums and libraries) in identifying institutions which possess the necessary knowledge and expertise to provide advice on applications for exemption certificates.
- 4.8 These institutions are all accredited museums with significant experience of working with ivory as part of their collections. They represent a range of specialisms consistent with the range of ivory items likely to be put forward under this exemption. APHA will, when it receives an application, determine which institution it should be referred to for advice, based on the type of item and the specialism of the institutions. This may include considerations around the item's period, function, style and geographic region of origin.

### **Question 11: Do you agree with the rationale for identifying “prescribed institutions”? A) Yes/No B) If no, please state your reasons**

- 4.9 Subject to formal agreement with them, we propose to specify the following institutions as “prescribed institutions”:
- Ashmolean Museum of Art and Archaeology
  - British Museum
  - Glasgow Museums
  - Manchester Art Gallery
  - Manchester Museum
  - National Museums Scotland
  - Royal Armouries
  - Royal Museums Greenwich
  - University of Cambridge Museums - Department of Archaeology
  - University of Cambridge Museums - Department of the History and Philosophy of Science
  - University of Cambridge Museums - Scott Polar Research Institute
  - University of Cambridge Museums - The Fitzwilliam Museum
  - Victoria and Albert Museum

### **Question 12: Do you agree that the proposed list of ‘prescribed institutions’ will be sufficient to provide advice for this exemption? A) Yes/No B) If no, please state your reasons**

## Provision of information for applications

- 4.10 Upon application for an exemption certificate, the Act requires the applicant to provide:

- the name and address of the owner of the item (which if the owner is a business is the business name and address);
- a description of the item and of any distinguishing features that it has;
- a photograph (or photographs) of the item showing any such distinguishing features;
- information about any dealing in the item that is expected to take place; and
- a declaration that in the applicant's opinion the item satisfies the relevant exemption conditions and an explanation of why he or she is of that opinion.

4.11 There is the power for the appropriate national authority to specify in secondary legislation additional items of information that must be provided upon application. We propose to specify the following items:

- the photograph(s) provided under the requirement in the Act (see above) must additionally show the entire item;
- in the case of an application being made on the owner's behalf, the name and address of the person making the application; and
- to the applicant's knowledge, whether a previous application has been made for an exemption certificate for the item (and was refused), and if so the reference number of that application.

4.12 The rationale for the first two additional items of information is the same as set out in the preceding section (paragraph 3.14) in the context of applications for registration of items falling under the standard exemptions. In addition, the provision of a photograph of the entire item is particularly important here, since it will be a key information source from which the assessor is required to inform their judgement about the item.

4.13 While any fresh application (following a refusal) will be considered on its own merits and resubmitted for expert assessment (provided that the information requirements are met), we consider that it would be desirable to enable applications related to the same item to be linked. For example, the second application could be cross-referenced with correspondence with the applicant about the first application. This is the rationale for the third proposed additional item of information.

**Question 13: Do you agree with the proposed approach to information requirements for applications for exemption certificates? A) Yes/No B) If no, please state your reasons**

## Application fee

4.14 The Act provides for a fee to be prescribed for applications for exemption certificates. In line with the principles applied to the setting of a fee for registration of items under the standard exemptions, we propose that this fee should be set in order to enable the government to cover its costs.

4.15 As such the fee will be made up of two elements:

- The cost of building and maintaining the exemption certification process, which is essential for delivering the objectives of the Act. This will be integrated with the process for registration of items under the standard exemptions (as discussed in the previous section). Therefore, for the same reasons as set out above in the context of registration, we consider that £20 is a reasonable amount to cover these costs.
- The reasonable costs of a prescribed institution in providing advice on the item.

4.16 This second element is necessary because, as set out above, APHA is required to seek the advice of experts in order to make an informed decision on whether an item meets the criteria for this exemption and can therefore be granted an exemption certificate. Following discussion with the proposed prescribed institutions, we have concluded that a reasonable cost for them to be reimbursed for offering advice is £230 per item. This will cover the expert assessor's time to assess the item and complete their written report, and the institution's administrative overheads.

4.17 Therefore, the fee for an application for an exemption certificate is proposed to be set at £250 (i.e. £20 plus £230).

**Question 14: Do you agree with the rationale for establishing the fee at this level? A) Yes/No B) If no, please state your reasons**

## Notifying of subsequent dealing in a certified item

4.18 An exemption certificate for a rare and most important item will "accompany" an item when ownership of that item is transferred and remains valid in respect of any subsequent dealing in that item.

4.19 Where subsequent dealing takes place in a certified item by a person who did not make the original application for the exemption certificate, the Act requires that person to have taken possession of the exemption certificate (or a replacement). The Act requires that if any information relating to the item becomes inaccurate or incomplete (for example, if the ownership of the item changes), the owner should notify the Secretary of State, providing details of the changed information. The Act

also provides the power to require that person to pay a fee to accompany the new information.

4.20 We propose that this requirement should be established in order broadly to mirror the registration process for items falling under the standard exemptions. We consider this appropriate in order to retain visibility of any subsequent commercial dealing in these items, after the exemption certificate is issued. Specifically, we propose that prior to subsequently dealing in a certified item, if the owner of the item is not the original applicant for the exemption certificate, the owner must notify to the relevant authority (APHA):

- the name and address of the owner of the item;
- in the case of a notification being made on the owner's behalf, the name and address of the person making the notification;
- the unique number of the exemption certificate issued for the item; and
- information about any dealing in the item that is expected to take place.

**Question 15: Do you agree with our proposed approach to requirements in the case of subsequent dealing in certified items? A) Yes/No B) If no, please state your reasons**

4.21 This process will require owners to interact with APHA's administrative process. By the same logic therefore as set out in paragraph 3.16 above, the fee is proposed to be set at £20 per item notified.

**Question 16: Do you agree with the rationale for establishing the fee at this level? A) Yes/No B) If no, please state your reasons**

## **Appeals against decisions on certificates**

4.22 The Act provides that where an application for an exemption certificate is refused or an exemption certificate is revoked, the owner of the item concerned:

- (a) may make a fresh application for an exemption certificate;
- (b) may appeal to the First-tier Tribunal against the refusal or revocation.

4.23 The Act sets out details in respect of the appeals process and enables us to prescribe in secondary legislation further such details. These details would be in addition to and not seek to alter the existing Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended)<sup>6</sup>, which provide a basis for how the Tribunal operates. For the avoidance of doubt, these Rules are not within the scope of this consultation.

## Grounds for appeal

4.24 The owner of the item may make an appeal to the First-tier Tribunal on the following grounds:

- a) That the decision was based on an error of fact;
- b) That the decision was wrong in law;
- c) That the decision was unreasonable.

4.25 These grounds allow an owner to appeal against a refusal to issue an exemption certificate, or the revocation of an exemption certificate if, for example:

- the owner believes that not all the information they provided in the application was taken into account, causing the Secretary of State to make an error of fact; or
- the owner disagrees with the rationale for the decision and believes it to be unreasonable.

4.26 The Act provides the power for the appropriate national authority to specify any further grounds under which an appeal could be made to the First-tier Tribunal. We do not propose to prescribe further grounds for appeal, as we consider the existing grounds to be suitable for the intended purpose.

**Question 17: Do you agree with our proposed approach to further grounds for appeal? A) Yes/No B) If no, please state your reasons.**

**Question 18: 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.**

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<sup>6</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/926546/consolidated-fft-grc-rules-20200721.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926546/consolidated-fft-grc-rules-20200721.pdf)



## Any further provision about appeals

- 4.27 The Act provides the power for the appropriate national authority to make further provision in secondary legislation about appeals against the refusal or revocation of an exemption certificate.
- 4.28 The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) provide a clear outline for how the Tribunal operates. We do not seek to amend these Rules and these Rules are not within the scope of this consultation.
- 4.29 These Rules set out (except in specified cases) the application process for an appeal to be made to the First-tier Tribunal. The existing rules state that an application for appeal to the First-tier Tribunal must be made within 28 days of the Secretary of State sending the decision to revoke or refuse a certificate to the applicant. 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. When sending a notice of appeal to the Tribunal the appellant must provide the following information:
- the name and address of the appellant;
  - the name and address of the appellant's representative (if any);
  - an address where documents for the appellant may be sent or delivered;
  - the name and address of any respondent;
  - details of the decision or act, or failure to decide or act, to which the proceedings relate;
  - the result the appellant is seeking;
  - the grounds on which the appellant relies; and
  - any further information or documents required by a practice direction.
- 4.30 The appellant must also provide a copy of the notice sent to him or her detailing the decision to refuse or revoke the exemption certificate.
- 4.31 Under the Act, an appeal must be made by the owner of the item under consideration. However, there is nothing to prevent a representative acting on the instruction of the owner by completing the application for appeal. The representative will be required to provide their personal and contact details and other information specified in the Tribunal Rules. This is in line with existing appeal processes to this Tribunal.

4.32 Also as stated in section 5(4) of the Act, if the owner makes an appeal to the First-tier Tribunal, the Tribunal has the power to take one of the following decisions:

- confirm the Secretary of State's decision to refuse the application or revoke the certificate;
- require the Secretary of State to issue an exemption certificate or to cancel the decision to revoke an existing exemption certificate; or
- remit the decision to refuse or revoke the exemption certificate to the Secretary of State for reconsideration.

4.33 The Tribunal Procedure Rules give the First-tier Tribunal wide powers to regulate its own procedure, for example, to require the parties to provide expert evidence and for parties to provide documents and information. The Tribunal has the power, in certain specified circumstances, to award costs, either on its own initiative or on the application of a party to the proceedings.

4.34 A party who wishes to appeal against the decision of the First-tier Tribunal on a point of law may do so with the permission of the First-tier Tribunal (if the Tribunal decides not to review its own decision), in accordance with the Tribunal Rules. If permission is refused, the party may renew the application for permission to the Upper Tribunal.

4.35 In this context, we do not consider that the First-tier Tribunal requires any further powers than those set out in the Act or contained in the Tribunal's existing Rules. We do not seek to amend the existing Tribunal Rules and these Rules are not within the scope of this consultation.

4.36 However, we propose that three further provisions in respect of appeals should be set out in secondary legislation. These proposed provisions are:

- If an applicant has made an appeal to the First-tier Tribunal against the refusal or revocation of an exemption certificate under section 5(1)(a) of the Act, he or she cannot make a fresh application for an exemption certificate for the relevant item until that appeal is determined. This is to avoid separate processes concerning the same application occurring in parallel. Once the appeal is finally determined, if it is unsuccessful, a fresh application in respect of the same item may be made (it should be noted that this does not imply that a fresh application *should* be made in such circumstances). In addition, if the applicant chose to make a fresh application and was refused a certificate for a second time, the applicant could also appeal that decision.
- That when making an application to appeal the applicant must provide the documents and evidence specified in section 3(1)(a) to (g) of the Act. This would mean that the applicant would need to include the information and evidence

originally provided to the Secretary of State when they made their application for an exemption certificate. This would, for example, include the description and photograph of the item provided and an explanation as to why the owner believes the item satisfies the exemption.

- That once an appeal has been made to the First-tier Tribunal the Secretary of State may notify the First-tier Tribunal that it will not oppose the appeal before it submits a response. The appeal would then be treated as if it was determined in favour of the appellant and the First-tier Tribunal is not required to make an order. The Secretary of State would then need to take action to grant or reinstate the exemption certificate in question within four weeks of making the notification.

**Question 19: Do you agree with our proposed approach to these three further provisions for appeals? A) Yes/No B) If no, please state your reasons**

### **Appeal fee**

4.37 The Act enables us to make provision to require an appellant to pay a fee when applying for an appeal to the First-tier Tribunal against a decision to revoke or refuse an exemption certificate. In line with similar approaches taken for other regulatory regimes, we do not propose to prescribe a fee for such appeals.

**Question 20: Do you agree with our proposed approach to fees for appeals? A) Yes/No B) If no, please state your reasons**