

Response to the consultation paper:

**Review of Statutory Instrument 1997 No 1372
The control of Trade in Endangered Species (Enforcement)
Regulations 1997 (COTES)**

April 2003



Background

Wildlife and Countryside Link (Link) brings together environmental voluntary organisations in the UK united by their common interest in the conservation and enjoyment of the natural and historic environment. Taken together, Link's thirty-two members turnover more than £500 million per annum, employ 7,200 full-time staff and have the support of approximately 6 million people in the UK.

This statement is supported by the following organisations:

The Bat Conservation Trust
Environmental Investigation Agency
Herpetological Conservation Trust
IFAW - International Fund for Animal Welfare
Marine Conservation Society
Royal Society for the Protection of Birds
Royal Society for the Prevention of Cruelty to Animals
Shark Trust
The Wildlife Trusts
WWF-UK

Review of Statutory Instrument 1997 No. 1372 The Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES)

Wildlife and Countryside Link consultation response

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POLICE POWERS, ANNEX C PROPOSALS

Summary

These proposed powers combined will ensure that police officers can investigate wildlife trade crime more vigorously than they have been able to in the past. They will allow for police officers to enter premises being used for trade in wildlife species controlled under the EU Wildlife Trade Regulations and require the presentation of relevant CITES documents and specimens for inspection. In addition, these powers will give the police officer the ability to stop and search any person or vehicle if he suspects (with reasonable cause) that evidence of the commission of an offence is to be found, and to seize any items under the Police and Criminal Evidence Act 1984 (PACE). These powers will broaden the blood and tissue sampling provisions, ensuring that samples can be taken not only from the specimen which is the subject of the investigation, but also any others where this will tend to establish the identity or ancestry of the specimen. Lastly, the provision to be able to require Annex A specimens to be made available for unique and permanent marking is vital in ensuring that specimens can be left in the care of the potential offender. This will avoid many of the practical problems that can arise when live specimens are seized by the police, who then have a duty of care to properly house and look after them.

Proposal C1

This proposal is endorsed. However, we suggest amending the wording to ensure that police officers have the power to enter **and search** any premises being used for trade in wildlife species subject to control under the EU Wildlife Trade Regulations. Search of the premises would only be justified where police officers have reasonable cause to believe an offence has been or is being committed. A power of entry alone is too restrictive to determine if trade controls are being complied with.

Proposal C2

This proposal is endorsed.

Proposal C3

This proposal is endorsed. However, we suggest amending the wording to ensure that all types of EU Wildlife Trade Regulations certificates are included, rather than limiting it to only Article 10 or Article 30 certificates. In future there may be other types of certificates issued, for example under Article 8.2, and this suggested revised wording allows for that eventuality.

Proposal C4

This proposal is endorsed. However, we suggest amending the wording of the requirement for a person to assist the police officer, so that the person may refuse to assist if he has reasonable cause.

Proposal C5

This proposal is endorsed. However, we suggest amending the wording to provide for police officers to require live **or dead** Annex A specimens to be made available for micro chipping

or marking. It is essential that even dead specimens are marked because laundering and/or changing specimens is possible using the same certificates. Further, the wording should be amended to state that all marking of live specimens should only be carried out by a qualified person. It would not be appropriate for a person who is not qualified to attempt to mark live specimens. For example, many Police Officers would not have the skills required to ring a bird.

Link Suggestion to Create New Offences

- It is suggested that two new offences should be created in support of proposal C5. To alter or tamper with any such unique mark made at the police's request should be an offence (see 'New Offences' annex below). To sell or dispose of in any way any specimen subject to an investigation that has been left in the care of the potential offender should be an offence.

GOVERNMENT WILDLIFE INSPECTORS' POWERS, ANNEX D PROPOSALS

These proposals are endorsed. This will ensure that wildlife inspectors' powers are brought in line with those that are being proposed for the police in Annex C. It is important that the changes suggested here by Link to the Annex C proposals are also made in the Annex D proposals. With regards to proposal D1 these powers should be the same as are available under the Countryside and Rights of Way Act 2000 (CRoW Act).

NEW OFFENCES, ANNEX E PROPOSALS

(a) Marking of specimens

We would endorse a proposal to make tampering with unique identifiers, e.g. leg rings, microchips, an offence and would also recommend that any proposal of this kind also made it an offence to be in possession of a tampered marker, failure to report a tampered marker without reasonable excuse and re-using a marker on another specimen. We believe that this is a legitimate provision to include and that the experience gained by the RSPB, RSPCA and others in showing that rings required under the terms of the Wildlife and Countryside Act 1981 have been tampered with indicates that proving such an offence is not difficult.

We are, however, concerned that the Management Authority has not apparently issued guidance on what form unique identifiers such as rings or microchips required under EU Regulation 1808/2001 should take. Without clear guidance or instruction it may prove difficult to prove an offence of tampering. We believe that the Management Authority should be responsible for authorising the use of such unique marks and that a central register should be maintained. This would set a benchmark against which accusations of tampering could be judged.

(b) Illegal Possession

An offence of 'illegal possession' is not required as this is a stricter measure than allowed under the EU Wildlife Trade Regulations and is very difficult to enforce fairly for the reasons outlined in the consultation document.

Proposal E1

This proposal is endorsed.

Proposal E2

This proposal is endorsed.

Proposal E3

We agree with the principles of the proposal but feel it will be difficult to enforce. It would be very difficult to prove the level of husbandry knowledge of the person who relinquished the live specimen and to establish a baseline of what information he should have provided to the recipient. This proposal relates to all live specimens, including plants that are sold in large quantities in supermarkets etc., such as orchids and cacti. It is impractical for this extensive retail market to inform every purchaser.

The associated penalties suggested seem very high when this is such an uncertain area and there are sometimes very different opinions and approaches to maintenance of certain species.

There is also no mention of Annex A species which, with 'specimen specific' Article 10 certificates, can change hands easily without any involvement of the Management Authority. Why are Annex B specimens treated differently from Annex A specimens in this regard?

The suggested new Link proposal below linking proposal E3 to the tracking system for specimen specific certificates should be considered as a potential solution to strengthen this proposal.

Proposal E4

This proposal should be amended so that it is an offence **without reasonable cause** to make a specimen available to a police officer or wildlife inspector for examination. In addition, the proposed penalties for failing to do so should be a level five fine (£5000) **and/or a prison sentence of up to six months** for these offences on summary conviction, and an unlimited fine **and/or a prison sentence of up to 2 years** on indictment. This would bring the penalties in line with proposals E3 and E5 in the consultation document.

Proposal E5

This proposal is endorsed.

New Link Proposals

- With Specimen Specific Certificates (SSC) there is an issue with traceability of specimens on a number of levels. The SSC is issued to an applicant on the basis that they wish to sell the specimen. Once it is sold it is unknown with whom that specimen resides because once a specimen with a SSC has gone through one transaction, Defra's records for that specimen end. This means that enforcement officers are unable to ascertain from Defra with any certainty whether an individual trading in an Annex A specimen has an Article 10 certificate for that specimen, unless the police are able to contact the trader and physically inspect the certificate if one is present. This impacts on the Police Officers' ability to obtain a search warrant, as they are unable to show with any degree of certainty to a magistrate that the individual in question does not have an Article 10 Certificate. In addition the current SSC system has implications for the health and welfare of live animal specimens, where checks cannot be made on the keeper to ensure that the animal is being kept appropriately prior to sale of the specimen as the keeper is not known. There is also no way of checking whether the applicant who sold the animal was able to impart the correct knowledge of the husbandry of the animal to ensure its well being.

The proposal we make is that there is a way to alleviate these problems if a simple tracking mechanism is built into the SSC system for **live animals only**. For example, if the SSC were to have a number of tear-off slips (similar to the V5 vehicle registration documentation) that are completed by the purchaser at point of sale and sent to Defra, the chain of ownership can be recorded. It would therefore be an offence if the tear off slip were not completed and sent to Defra with the name and address and a signed statement that the husbandry of the animal had been explained to the new owner by the seller of the specimen. This new proposal will mean that Defra will be able to provide enforcement officers with up to date information on which individuals have been party to purchases/sales concerning individual specimens covered by specific certificates. It will also combat the problem of proving whether the seller did provide the correct information on the husbandry of the animal, which will ultimately be an argument of the word of the seller versus the word of the buyer. The burden will also be shared by the buyer who has to sign that he is aware of how to keep the animal.

- The Transaction Specific Certificates (TSC) system is open to fraudulent use when the original copy is retained by the seller, which can then be used to sell other specimens of the same species. This is the main loophole by which illegally sourced specimens are laundered into the legal market. It should be a requirement for all TSC to be passed onto the new keeper at point of sale. This should be written as a condition on each TSC, and it should be an offence not to pass on the TSC to the new keeper. It must be the original TSC that is passed on, not just a copy, or simply a record of the TSC number. This will ensure that any purchaser can provide evidence of their legal acquisition of an Annex A specimen directly to the police when requested to do so. It will also remove some of the burden from Defra to provide instant information to enforcement officers who currently need to request from Defra whether an individual has been issued with a TSC.
- It is proposed that an offence similar to that included as 18(2) in the Wildlife and Countryside Act 1981 (...having in ones possession anything capable of being used to commit an offence...) is considered for inclusion in COTES.
- It is proposed that consideration be given to including a new clause creating an offence of attempting to commit an offence under COTES. Clause 18(1) of the Wildlife and Countryside Act 1981 provides a useful precedent.

PENALTIES, ANNEX F PROPOSALS

These proposals are endorsed.

MISCELLANEOUS, ANNEX G PROPOSALS

These proposals are endorsed.

Link Suggestion to Create a New Offence

- A new offence should be introduced of holding (defined as 'has in their possession or control') a live specimen contrary to Article 8.2 and 9.6 of Regulation 338/97. In addition, powers should also be put in place that would enable ministers to determine which species should be subject to restrictions under Article 8.2. This would enable Defra to prohibit the holding of the most endangered Annex A specimens thereby contributing to the protection of highly endangered species in trade. The offence of holding should refer

only to live animals as one of the major benefits of this system will be to identify animals in captivity that could potentially enter into formal captive breeding conservation programmes. The list of most endangered species would need to be determined through consultation and should have strict criteria to ensure that only the most critically endangered species are listed, rather than a blanket possession control on the majority of Annex A specimens. Parts and derivatives should not be included as these are often more likely to be pre-convention, the number of specimens requiring certification may be large and identification may be problematic and costly.

Link - Further points for consideration

- **Asset Forfeiture:** There is currently provision under the Customs and Excise Management Act for the seizure of assets believed to have been obtained through illegal activity. In cases such as Sissen who was convicted under CEMA this procedure was used effectively. This option is not currently available for dealers who may face charges under COTES
- **Registration of vulnerable Annex A species:** The requirement to register and ring species listed on Schedule 4 of the Wildlife and Countryside Act 1981 has proved very useful in enforcing the Act and has enabled the effective use of DNA testing where alleged parent sibling birds have been located. We believe that the most vulnerable (in conservation terms) Annex A species should be included in this or a similar scheme to prevent illegal trade.

OTHER MATTERS, ANNEX H PROPOSALS

The proposed increased penalty suggested in H1 is endorsed, as is the recommendation that certain COTES offences should be made arrestable (proposal H2). The maximum prison sentence for offences under Regulations 3(1), 3(2)(b), 4(1)(b), 4(2)(b), 4(3)(b), 6(b), 7(2)(b), 8(8)(b) and 9(7)(b) of COTES tried on indictment should be increased from two to five years. This would mean that certain offences under COTES would automatically become arrestable in England, Wales and Northern Ireland and bring them in line with the provisions for native species in England and Wales brought into force by the CRoW Act 2000. The expansion of the legal protection of some native species in the CRoW Act has been very effective in increasing investigatory powers available to the Police and has resulted in more effective prosecution of cases concerning protected native species. It would be sensible and desirable if the improvements made to the CRoW Act 2000 were emulated in relation to offences under COTES, in order to achieve greater consistency and certainty within the matrix of offences committed against wildlife.

Currently there is a paradox: a person could be arrested without warrant for attempting to sell, or in any other way trade in, a protected native species, but the same person would not be liable to immediate arrest if the offence were under COTES. One of the fundamental principles of European Community law is the general principle of equality, which requires that similar situations shall not be treated differently unless the differentiation is objectively justified. As the CRoW Act amendments to the Wildlife and Countryside Act 1981 discriminate between native and non-native threatened species, there is a strong argument that the European law would require that the species listed on the CITES appendices and on the EC Regulation Annexes be extended the same legal protections.

An increase in sentences would send a strong message to those engaged or considering engaging in criminal activity related to wildlife. Penalties available today under COTES fail to deter wildlife offenders. They are regarded by many as derisory and in addition, the maximum penalty of two years imprisonment has never been applied for a single offence. Comments from Police Wildlife Liaison Officers to a WWF/TRAFFIC questionnaire regarding COTES in October 2002, included:

“Sentences are not sufficient to bring them into the definition of serious crimes for RIPA purposes, therefore hampering investigations”

“Sentences are generally inadequate and as with other wildlife legislation, options are not consistent. COTES are mainly trade offences and sentencing options should be in line with CEMA”

Research recently commissioned by DEFRA¹ found that the majority of respondents regarded wildlife trade offences as the most serious wildlife crimes. The Customs and Excise Management Act 1979 (CEMA) provides enforcers with powers of arrest and has a seven year maximum sentence. CEMA's focus is clearly broader than wildlife trade, encompassing as it does a range of smuggled goods, including drugs. This accounts for the higher penalties available. However, in a CEMA case in 2002 a wildlife crime was deemed serious enough by a judge to hand down a 6½ year custodial sentence. Because the maximum penalty available for an offence is often taken as a barometer of its seriousness, there should be more parity in penalties available under CEMA and COTES. This would send a more consistent message regarding the seriousness of the illegal wildlife trade – whatever statute is invoked and whatever agency enforces it.

Available records show that no magistrate has ever imposed a custodial sentence for a wildlife trade offence. By making certain offences under COTES arrestable and by increasing the maximum penalties available these crimes would attain a level of seriousness in the courts that is currently lacking.

An increase in sentences would also equip police officers with additional powers i.e. to enter and search, without a warrant, premises which are owned or occupied by a person who is under arrest for an arrestable offence. Arrestable offences also give the police the power to take fingerprints, obtain DNA samples, compel suspects to be interviewed and to bail suspects to court with conditions, where appropriate. Raising the penalty from two to five years for these COTES offences adds weight to the seriousness with which these offences are taken by the judiciary and potential offenders alike, and has the additional benefit of making certain COTES offences arrestable.

COTES offences, although currently not arrestable (which is unusual, as they are indictable), possess many of the characteristics associated with serious arrestable offences including the interference with the administration of justice and substantial financial gain. In the context of the UK, it has been estimated that 50 per cent of those prosecuted for wildlife crimes over a 12-month period had previous convictions for recognised serious offences including drugs and firearms². An example of a case where the absence of a specific power of arrest has created problems for police officers can be found in the Robert Sclare ‘Get Stuffed’ case. In December 2000, Robert Sclare was sentenced to six months imprisonment at Snaresbrook Crown Court. The owner of the ‘Get Stuffed’ taxidermy shop in London, Sclare was charged

¹ Roberts M, Cook d, Jones P and Lowther J (2001): *Wildlife Crime in the UK: towards a National Wildlife Crime Unit*. Report for the Department for Environment, Food and Rural Affairs.

² Cook D, Roberts M & Lowther J (2002): *The International Wildlife Trade and Organised Crime*. A WWF/TRAFFIC report.

under the Forgery Act for forging permits, and under COTES for buying and selling endangered animals. In this case a search warrant was executed and specimens and documents were seized from the premises. However, there was no evidence of the true origin of many of the specimens. Mr Sclare was invited to be interviewed but declined the invitation. Therefore, it was not possible to question him and the police were unable to ascertain the origins of most of the specimens. Most of these were species not native to the UK and could have entered the country illegally, but without any evidence, the police were unable to proceed with these enquiries. Being unable to interview Sclare also dramatically increased the prosecution workload. The prosecution had to be in a position to rebut any defence he may have come up with in court and this meant trying to follow up enquiries to find suppliers and purchasers all over the country. The Police and Crown Prosecution Service involved in the Sclare case are sure that evidence of more offences would have come to light if there had been a power to arrest.

Some wildlife specimens and their derivatives are highly profitable as they often originate from developing countries and their transport to developed countries for sale increases their value enormously. The level of profit involved has been shown to be even higher than that of the drugs trade for some wildlife. Therefore, because of the potential for huge profit for those involved in the illegal trade, these increased powers would be appropriate. This issue is illustrated in the case of the Renaissance Corporation. This company admitted trading in shawls made from shahtoosh wool, which is produced from the coats of the Tibetan antelope, a critically endangered species. Potentially up to 1,000 antelope were killed to provide the wool for the 138 shawls that were confiscated. Despite the trader's serious impact on an endangered species, and the value of the confiscated shawls being £353,000, the company was fined just £1,500.

There is no doubt that where there is an illegal trade that involves highly profitable goods the associated networks of organised criminality are close behind, linked in many ways to the trade. Wildlife crime is no exception. The profits from the illegal trade in wildlife are substantial and the risks are low. The changes proposed here would go some way to tip the balance in favour of justice and wildlife, rather than the illegal trader.

We believe that the Criminal Justice Bill provides a timely opportunity to amend COTES in relation to proposals H1 and H2³. Such an amendment would ensure greater consistency and certainty within the matrix of offences committed against wildlife and tougher penalties would also help to tackle persistent offenders and promote greater public confidence in the laws governing the illegal trade in endangered species.

³ The Criminal Justice Bill seeks to radically overhaul the criminal justice system by updating procedures associated with arrest, bail, trial procedure, sentencing and appeals, with a view to improving the consistency of sentencing, tackling re-offending and improving transparency and public confidence in the criminal justice system.