

## **Regulatory Issues and Concerns in On-line Trading Markets for Antique and Craft Goods Sourced from Illegal Ivory: Some Empirical Evidence from eBay.**

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### **ABSTRACT**

The global trade in illegal wildlife is estimated to be collectively worth US\$7-23 billion a year (UNEP, 2016). These figures put wildlife crime on a par with human trafficking, illegal arms and drugs in terms of the illicit profits it creates (United Nations Office on Drugs and Crime, 2017). Of equal concern is that the illegal wildlife trade is estimated to have increased by 26% between 2014 and 2016 (UNEP, 2016). However, the illegal wildlife trade does not only exist in the corporeal commercial world. Commentators, conservation groups and researchers have argued that there has been a substantial increase in the amount of on-line trade online (Shirley and Lamberti, 2011) (Beardsley, 2007). It is contended that the internet presents a perfect platform for dealers in illegal goods being easily and cheaply accessible on the one hand and notoriously difficult to regulate on the other (INTERPOL, 2013). It is therefore not a surprise that the illegal wildlife trade has thrived on-line. The so-called Dark Web (the term used to describe the collection of websites that exist on an encrypted network and cannot be found by using traditional search engines or visited by using traditional browsers) has been identified as an illicit market place for the sale and purchase of endangered species (Lavorgna, 2014). However, commentators have been increasingly pointing to the use of on-line auction sites such as eBay as a sales platform for illegal wildlife products (Fleming, 2013). This phenomenon has been noted by wildlife monitoring network TRAFFIC, which in a press release stated that: "Ivory is coming off the shelves in the US, which is a win for elephants...But as state and federal law enforcement crack down on illegal sellers, trade is apt to move online and into back rooms" (TRAFFIC, 2017).

As the sales of ivory on-line rise, this study empirically explores the contradiction between eBay's strict policy against the sale of ivory and the apparent ease with which ivory can be purchased on its sites. By systematically tracking the on-line sales of ivory products over the course of xxx months, we identify not only how eBay's own regulations are being circumnavigated by sellers, but also provide calculation estimates of the value of these illegal sales to eBay's profit streams. In addition, given the new position of the British government (currently consulting on a ban of almost all sales of ivory in the U.K.) we consider the regulatory implications and role that on-line auction sites can play in seeing the trade move, as TRAFFIC put it, "off the shelves" and on to the web.

### **Introduction**

On the 23 May 2018, the International Fund for Animal Welfare published its report, *Disrupt: Wildlife Cybercrime – Uncovering the scale of online wildlife trade* (IFAW, 2018).

The report concluded that the online illegal wildlife trade is openly operating on many online marketplace platforms. IFAW investigators conducted analysis in France, Germany, Russia and the UK over a six week period in 2017, and uncovered 5,381 advertisements across 106 online marketplaces and social media platforms offering live endangered and threatened animals and animal products for sale. One fifth of the products being advertised were ivory, or suspected ivory. This project focuses on the eBay UK market place as a platform for the sale of ivory online and analysis the amount, type and value of ivory artefacts being sold.

The eBay corporation is a mammoth amongst online sale platforms to the extent that it markets itself as “one of the largest online auctions websites in the world” (eBay Inc., 2018). The site has certainly come a long way since its founding in 1995 by Pierre Omidyar. It took two years from its inception to build to a point where it was hosting 2,000,000 auctions a year. By 2017 that figure was 3,000,000 a day. Its 2017 revenue were returned at \$9.6 billion (Market Watch, 2018) and at the time of writing its shares were quoted on the NASDAQ at \$43.70 and rising.<sup>1</sup> There is no doubt of the power of the eBay machine however eBay recognises that which power comes responsibility. In 1998, Omidyar set up the eBay Foundation which oversees the corporation’s Global Impact policy (eBay, 2018). Through its wide and diverse programme of CSR activities which are, in the main, conducted through The EBay Foundation, the company’s activities are widely publicised via its website and its annual Global Impact Summary (EBay Inc, 2016). Activities referred to in the Summary include community support, environmental initiatives and employees rights. Indeed, eBay’s ability to empower its users to engage in socially responsible activities was recognised for its philanthropic work at the 2012 Social Innovation Awards in Boston, U.S.A. where the corporation was a finalist (Pasolini, 2012). eBay prides itself on its responsible practices and its own marketing literature refers to the company’s creation of a “trusted, transparent marketplace, based on the strong ethical values we follow as a business. We strive to operate our business in the most environmentally and socially sustainable way—creating a safe, trusted, diverse environment in which our employees, buyers, sellers, suppliers and partners can thrive.” (EBay Inc., 2017)

With an online community of more than 169 million active users (Statista, 2017), eBay is well placed to influence the behaviour of its members and has attempted to do so since the inception of its charitable giving programme. One example of this influence is the \$725 million raised by eBay’s users for charities worldwide (EBay For Charity, 2017). This paper focuses on one particular aspect of eBay’s well publicised environmental policy namely its responsibility to its users and the wider community with regards to sale of elephant ivory through its online sales platforms.

## Ivory and the Law

The Convention on International Trade in Endangered Species of Wild Fauna and Flora sets out the international legal position on the sale of ivory. Its provisions states that all

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<sup>1</sup> This does not include the revenue of eBay’s sister company PayPal. It’s returned revenue for 2016 was \$10.842 billion (PayPal, 2017).

commercial international trade in the ivory of African elephants is currently prohibited under the CITES regulations (CITES, 2018).<sup>2</sup> However there are differences between ratifying states as to the penalties they apply for breaches and the priorities each state places on legislative changes, public awareness campaigns and enforcement methods.

In European Union Member States, the CITES requirements are implemented by two EU Regulations, namely Council Regulation No 338/97 which sets out the protection of CITES species by regulating trade and Commission Regulation No 865/2006 (“the Regulations”). These two Regulations set out provisions regarding the issue of permits and certificates across all EU Member States and are directly applicable to the law in each of the Member States. However, they require each Member State to implement their own domestic legislation as to the penalties which will be applied for a CITES offence. For instance, in the U.K. the relevant legislation is contained in the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (“COTES”) which sets out penalties and makes it an offence “to purchase, offer to purchase, acquire for commercial purposes, display to the public for commercial purposes, use for commercial gain, sell, keep for sale, offer for sale or transport for sale any specimen of a species listed in Annex A to the Principal Regulation”. This means that any commercial dealing in ivory is prohibited. In August 2016, France announced a (near complete) ban on the sale of all elephant ivory both at home and in its overseas territories (House of Commons Library, 2017). However, French legislative exemptions continue to allow trading in ivory artefacts produced before July 1, 1975 (being the day the CITES convention entered into force). In Germany, local legislation goes beyond that required by CITES and offences including taking, possession and other restrictions. Despite this recent report found that the country “appears to be an important transit country for ivory and other illegally traded animal parts from Western and Central Africa with East and South-East Asia (in particular China and Vietnam) as the region of destination.” (Klass, 2016)

Outside of Europe, legislative frameworks also differ from state to state. In the United States, the Department of the Interior published a “Final Rule” (U.S. Fish and Wildlife Service, 2016) on the possession, sale, transportation, import and export of African elephant ivory, on the 6<sup>th</sup> June 2016. This created a “virtual ban on inter-state commercial trade in ivory in the US” (Riedel, 2016)<sup>3</sup>. While the U.S. states of California, Hawaii, Nevada, New Jersey, New York, Oregon, and Washington imposed their own in-state ivory trading bans in the wake of this, the remaining states did not.

These differences in legislation (and the issues with cross jurisdictional enforcement) lay behind eBay’s 2008 announcement that it was to ban the sale of ivory on its auction site. Announcing the company’s new policy, Richard Brewer-Hay stated that “The team concluded that we simply can’t ensure that ivory listed for sale on eBay is in compliance with the complex regulations that govern its sale. So, to protect our buyers and sellers, as well as animals in danger of extinction, eBay has decided to institute a global ban on the sale

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<sup>2</sup> Exemptions to this do exist for, amongst others, pre-Convention ivory and ivory legally acquired prior to the CITES prohibition date.

<sup>3</sup> The final rule provides for certain very narrow exceptions to the near-total ban on elephant ivory trade. There are exceptions for antique items, musical instruments and for de-minimus items.

of all types of ivory. This global ban will be effective January 1, 2009.” (eBay Inc. , 2008) As a result of the company’s change in policy, it is now prohibited to sell all but a few wildlife products on the site. Some items are completely banned, including all types of ivory (elephant, hippopotamus, walrus and narwhal). This ban also includes prehistoric ivory (mammoth tusks) (eBay Inc., 2018). For other items, their sale is restricted. Such items include cultured, man-made, or vegetable ivory as long as the listing description specifies what the item is made of and bone from non-ivory-producing animals (such as bison, buffalo, and oxen) as long as the species is clearly stated in the listing description (eBay Inc., 2018).

The policy is clearly set out in eBay’s selling guides and this has enabled the corporation to assert that the work they are doing to prevent the sale of ivory on the site is robust. However, eBay sellers wishing to advertise ivory through the platform flout the rules by simply calling the item something else, for example “ox-bone” (Collins, 2017). Despite this, in the last two years there have been successful prosecutions of eBay sellers using the site to sell illegal ivory. While it is not an easy task to monitor prosecutions of people selling illegal ivory through eBay,<sup>4</sup> three recent examples include the November 2016 case of one Chao Xi from Portsmouth, U.K. He was successfully prosecuted following an investigation by Hampshire Constabulary’s Wildlife Crime Unit. He was sentenced to a six-month prison sentence on each of two charges brought against him, suspended for two years together with 150 hours of unpaid community work. A more recent example is that of Janet Winstanley, a sixty year old eBay seller who was successfully prosecuted for attempting to sell elephant ivory ornaments she advertised for sale as “bovine bone”. The Metropolitan Police Service’s Wildlife Crime Unit’s investigation showed her to be attempting to sell more than 100 items through the site. Winstanley was fined £1000 by Westminster Magistrates’ Court for attempting to re-export the ivory items contrary to Article 8.<sup>5</sup> Finally, the National Wildlife Crime Unit supporting Cumbria Police led the successful prosecution of Shane Ball in September 2014. The antiques dealer had posted 22 adverts for carvings he described as “bone”. Carlisle Crown Court sentenced Ball to a seven-month jail sentence, suspended for 18 months. In addition the eBay seller was ordered to pay £1,134 costs (Winter, 2014).

These sellers were not identified by eBay. Despite eBay’s assurances of a robust policy against the sale of ivory on its site it appears that it is down to vigilant users of the site or law enforcement officers to police eBay’s own policies. Indeed, the writer tested this hypothesis in 2016. We followed the listings and sales of one eBay seller, located in the U.K. The seller was selected because he had been brought to our attention as someone who had in the past sold items which appeared to be ivory. We monitored the seller’s eBay shop (referred to in our data collection records as PS1) throughout February 2017 by setting up an eBay alert for items he listed as “cow bone”, “bovine bone”, “antique Chinese bone” and “ox-bone” all of which are known to be used by sellers as euphemisms for ivory. Over the

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<sup>4</sup> Unlike in Scotland, most wildlife crimes in England and Wales are not centrally recorded. Research by the Wildlife and Countryside Link illustrates that there were more than 4,000 incidents of wildlife crime - involving four of the Government’s priority wildlife crime areas (which includes ivory) - between 2005 and 2010. Yet this data is not collated through police forces and the Home Office.

<sup>5</sup> Article 8(3)(a) of Council Regulation (EC) No. 338/97

course of the month the eBay advertiser sold a total of sixteen items which were described as “ox-bone”. The items ranged from snooker balls to sculptures and in addition we noted that this seller was also offering for sale other artefacts derived from CITES species. Following scrutiny from independent specialists it was concluded that all of the sixteen items were ivory. As part of this short project, we also wished to test the robustness of eBay’s regulatory and monitoring system. To this end, each of the items suspected to be ivory were reported to eBay through their on-line reporting system. None of the items were removed from eBay and all of them proceeded to a successful sale. This would have in sales revenues to the eBay advertiser of £3,092.00. As the seller made it a condition of sale that his buyers used PayPal requires his buyers to use PayPal these sixteen transactions resulted in commission to eBay and PayPal totalling £669.06.

## It isn’t easy being eBay

There is no doubt that the eBay Corporation faces considerable daily challenges in the running, monitoring and governance of the business. eBay is active in 190 markets bringing its brand to more than 170 million active buyers (Kantar Retail, 2017). At any one time there are more than 1 billion active listings ranging from used cars to a power lunch with Warren Buffett.<sup>6</sup> This is achieved with a staff of only 12,600 (Kantar Retail, 2017) who have taken the company from a bright idea to one of the world’s top ten global retail brands (Kantar Retail, 2017). Add to this mix, the multiple international and national laws to which a global online auction platform like eBay must comply, the undoubted issues with cross-jurisdictional enforcement and the “camouflage” words rogue eBay sellers use to sale illicit goods (including ivory) in contravention of the corporation’s policies and eBay can, perhaps be forgiven for struggling to effectively police the sale of ivory on its platform.

*Another jurisdiction, another regulation.*

When eBay announced its global ban on the sale of ivory objects in 2008, it did so, in part in response to the complexities of cross jurisdictional regulations on ivory sales. Following the ban by eBay, Richard Brewer-Hay in an eBay press release stated that “given the complexities of the global ivory trade, and the distinct and unique characteristics of the eBay Marketplace, the sale of any ivory on our site continued to be a concern within the company and among stakeholders.” By the “unique characteristics of the eBay Marketplace” Brewer-Hay was referring to the difficulties inherent in a cross jurisdiction sales platform such as eBay where a seller advertises their wares to the world – not just potential buyers within their own legal jurisdiction. No doubt, he was also reflecting on the nature of the eBay model which sees thousands of types of item advertised daily by millions of sellers. The “marketplace”, as eBay refers to itself, is a long way from the traditional, quaint street stall commerce of personal interaction between seller and buyer.

## Enforcement

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<sup>6</sup> The charity auction for lunch with Warren Buffett sold on eBay for \$2.679M in 2017.

### Enforcement in the “corporeal world”

It is hard enough enforcing the current ivory legislation in the corporeal world. In the U.K. between 1992 and 2014, there were only 15 convictions for offences relating to the trade in ivory (National Wildlife Crime Unit, 2016). It is suggested that there are a number of reasons for this; differing approaches by prosecuting authorities, lack of specialist training of police officers and prosecutors, the current burden of proof lying on the Crown to establish the age of the artefact and an historic perception that the prosecution on wildlife crime is not in the “public interest” (Cox C. , *The Elephant in the Sales Room: Ivory and the British Antiques Trade*, 2016). This perception is changing. The introduction of proposal by the Department for Food and Rural Affairs (Defra) to make the U.K.’s ivory legislation the strictest in the world has followed several years of debate and action within British law enforcement. The Metropolitan Police Service’s “Operation Gulak” is one example of this (Green Space Information for Greater London, 2013). The operation, led by Inspector Matthew Appleton resulted in the first successful prosecution of an auction house in the U.K. (Cox C. , *The Elephant in the Sales Room: Ivory and the British Antiques Trade*, 2016). The Operation took place with volunteer officers over a number of weekends in London’s Portobello Road Antiques Market. Acting on intelligence, officers were able to sweep the market and take immediate action either by confiscating illegal ivory or advising sellers of the law. However, the difference between an operation such as Gulak and the problems of policing on sales platforms is marked. There have been a limited number of successful ivory prosecutions in the U.K. against on-line traders. One of the most recent cases was that of Chao Xi from Portsmouth, led by the Hampshire Constabulary’s Wildlife Crime unit. In November 2016, Portsmouth Magistrates Court found him guilty of selling 102 items made from elephant ivory worth £9,981 between 2011 and 2016 (*R v Chao Xi*, 2016). However, the reality is constraints on man-power and current policing priorities means that U.K. police forces are not able to commit officers to trawling the thousands of eBay adverts for sale of potentially illegal ivory.

### Enforcement in the incorporeal world of online sales platform

One of the reasons suggested for the low number of prosecutions of illegal ivory sales is the difficulties associated with identification. Not only to law enforcement officers need to be able to accurately identify ivory from similar materials (such as bone or horn) that also need to be able to ascertain whether the item in question was carved before or after 1947. Correct identification can be difficult enough when the physical item is available for inspection. When the item can only be viewed by means of a description and photographs on an online sales platform the task becomes even harder.

As mention above, eBay’s own selling policy attempts to address this issue by placing the onus on the seller to make the identification and be clear about species from which the artefact is made (eBay Corporation, 2018). However, as our own pilot project and previous studies have shown this policy is being flaunted by some eBay sellers (Yeo, 2017). However, because the word “ivory” describes a colour as well as an organic material policing eBay for ivory being offered for sale in breach of their policy is not as simple as using “ivory” as the search term. Indeed, on a single day on eBay’s U.K. site alone such a search returns

1,794,120 items being offered for sale (eBay UK, 2018). These items included ivory coloured wedding dresses to make-up. Finding elephant ivory amongst them is more difficult and requires an understanding of the strategies and methods used by sellers who are deliberately using the platform to sell ivory artefacts.

### Regulating an online trade

The emergence of e-commerce has led policy makers to question the very fabric of commercial transactions. This was brought in to sharp focus for eBay in 2011 when the English High Court requested clarification from the European Court of Justice as to the liability of on-line sales platforms for trade mark infringements committed by their users. L'Oreal v eBay International AG<sup>7</sup> saw the world's biggest on-line auction go head to head with one of the world's most successful beauty brands over the illegal use of its trademark on the site.

#### L'Oreal SA v eBay International AG<sup>8</sup>

In May, 2007, L'Oréal expressed their concerns regarding a number of unauthorized sales of its trademarked products on eBay's European sales platforms. Similarly to the situation with the sale of ivory, eBay requires its users to accept its user agreement policies which prohibit the sale of counterfeit goods on its site. This case arose following the sale 17 items on eBay by sellers, all of whom were outside of the European Union. L'Oréal alleged that the 17 items were either counterfeit cosmetics (which were illegally branded with L'Oréal) or were L'Oreal products which were not intended for sale (i.e. they were tester products or products only intended for sale outside of the E.U.)

Having first approached eBay direct with their concerns and not receiving a satisfactory response, L'Oréal commenced legal actions against the corporation in a number of EU States, including the Chancery Division of the UK High Court of Justice. In their pleadings, L'Oreal claimed that eBay was liable for the use of its trademarks.

In its consideration of the case in the U.K., the High Court acknowledged that eBay did have in place a filter mechanism which was set up to detect and remove goods which violated the intellectual property rights of a third party. However, the High Court was not convinced that eBay's system went far enough to absolve it of liability for any such breaches. In particular, the High Court believed that eBay was in a position to put in place more "restrictive steps towards addressing the widespread problem of infringement" (Columbia University, 2018). Given the issues the case presented, the High Court stayed the proceedings pending a ruling from the European Court of Justice on three key points: firstly, as to whether EU Directive 89/104 and Regulation 40/94, enables the owner of trademark to prevent an authorized sale of its registered on an online auction platform. Secondly, the two EU Directives enable the trademark owner to prevent an operator of an on-line auction platform advertising its

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<sup>7</sup> L'Oreal SA v eBay International AG (C-324/09) EU:C:2011:474 (12 July 2011)

<sup>8</sup> L'Oreal SA v eBay International AG (C-324/09) EU:C:2011:474 (12 July 2011)

goods via sponsored links and finally, whether such an on-line auction platform is able to claim a defence under Article 14(1) of the Directive 2000/31.<sup>9</sup>

The European Court of Justice (ECJ) found that eBay was liable as an intermediary when sellers on its platform sold items in contravention of trademark protection. In doing so, the ECJ rejected eBay's assertion that L'Oreal, as owner of a trademark, was not entitled to protection under the Directives when the goods in question are located in a State outside of the European Union and may not necessarily be forwarded to the territory covered by the trademark in question.<sup>10</sup> In their decision the ECJ were clear that "the mere fact that a website is accessible from the territory covered by the trademark is not a sufficient basis for concluding that the offers for sale displayed there are targeted at consumers in that territory."<sup>11</sup> The ECJ ruled that it is for national courts to assess a matter on the facts to conclude whether or not a transaction was targeted at consumers in a particular jurisdiction. A relevant fact would include the geographic area to which the seller states they are willing to ship the item being offered for sale.

The second aspect under consideration by the ECJ was that of the on-line advertisement on the eBay site. The issue in the L'Oreal case was that there were found to be key words used to advertise the counterfeit goods which led potential buyers to the items being offered for sale on eBay. The ECJ considered whether this type of use of key words fell within the scope of Directive 89/104<sup>12</sup> and Regulation No. 49/94<sup>13</sup>. It found that as "a keyword is the means used by an advertiser to trigger the display of his advertisement," sponsored advertisements do amount to using a mark "in the course of trade" within the meanings of Article 5(1) of the Directive and of Article 9 of the Regulation.

Finally, the ECJ considered the ability of L'Oréal to prevent the use of online advertisements which resembled its trademarks being displayed by eBay on sponsored links provided by third party search engines (such as Google). The Court found that in using this type of advertisement eBay was attempting to promote itself as an online auction site rather than promote the counterfeit goods directly. However, the Court also found that eBay had failed to comply with the required "transparency in the display of advertisements on the Internet" within the EU community and failed to "disclose both the identity of the online marketplace operator and the fact that the trademarked goods advertised are being sold through the marketplace that it operates." As a result, the Court stated that in such a circumstance an owner of a trade mark is able to rely on Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No. 40/94 to prevent an online auction house such as eBay from advertising goods identical to its trademarks, "where advertising does not enable reasonably well-informed and reasonably observant Internet users, or enables them only with difficulty, to ascertain whether the goods in fact originated from the proprietor."

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<sup>9</sup> The Article 14(1) provides a defence from liability here the internet service provider merely hosts the site on behalf of its users.

<sup>10</sup> Article 9 of EU Regulation No. 40/94

<sup>11</sup> L'Oréal SA v. eBay International AG, 2011

<sup>12</sup> Council Directive (EC) 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks

<sup>13</sup> Council Regulation (EC) No 40/941 of 20 December 1993 on the Community trade mark



In its defence, eBay argued that it was exempt from liability by virtue of Article 14 of EU Directive 2000/31. Article 14(1) prohibits liability against service providers where: (i) the provider does not have actual knowledge of the illegal act, or (ii) on becoming aware of an illegal act removed or disables access to the illegal information. However, the Court dismissed eBay's defence stating that Article 14 will only apply when the information service provider acts only as an intermediary and not when "plays an active role of such a kind as to give it knowledge of, or control over, those data [entered by recipients]." In this case, the Court held that because eBay not only possessed the data inputted but its users but in some cases actively assisted the users to promote their items for sale it could not rely on the Article 14(1) defence.

### Can e-commerce save the elephant?

The case was clearly significant in that it set a clear precedent prevents online auction sites such as eBay (as well as other internet service providers) cannot claim they are merely the "host" if it is aware (or should have been aware) of illegal activity on its site and failed to act promptly to stop it.

L'Oreal v eBay International concerned trade mark infringements (i.e. a civil wrong) the question is whether courts will extend this principle to the online sale of illegal ivory (i.e. criminal liability) where an online auction site has taken an active role in the sale of an item? The question of eBay's criminal liability in the sale of antiquities in its site were discussed in Jennifer Kreder and Jason Nintrup's 2014 paper, *Antiquity Meets The Modern Age: eBay's Potential Criminal Liability For Counterfeit And Stolen International Antiquity Sales*. The arguments considered in this paper appear to have direct relevance to ivory trading on eBay in that; firstly, both in the sale of antiquities and ivory there may be a mixture of items that are either legal or illegal to sale or items that are specifically prohibited by eBay's own policies (eBay Corporation, 2018), secondly, certain code names are used to attempt to disguise the real provenance of an item of antiquity<sup>14</sup> in the same way that known euphemisms are used by eBay sellers to advertise ivory on the site and finally the ability of eBay to effectively police its own policy has been questioned (Kreder J, 2014).

## Methodology

### Identifying ivory for sale on eBay UK - Time period of analysis

We analysed items that have been sold through eBay U.K.'s online platform during the period 25th December 2017 to the 25<sup>th</sup> March 2018. eBay's "Advanced Search" function allows users to advert for items that have successfully sold through the site for maximum a period of the preceding 90 days by checking the "sold items" box on the Advanced Search page. In this study, our search included items that had been sold by auction or as a "buy it now". The items we analysed had been sold either by auction or as "buy it now" in the 90 day period from the 25th December 2017 and ending on the 25<sup>th</sup> March 2018. This period

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<sup>14</sup> See discussion of Nazi memorabilia below

included both the Christmas period and the Chinese New Year (Friday, 16<sup>th</sup> February 2018). It also included the period immediately following the end of the British Government's consultation on the sale of ivory in the U.K.<sup>15</sup> The consultation closed on the 16<sup>th</sup> December 2017.

We used the search terms “antique bovine bone”, “antique mammoth tusk” and “antique Chinese cow bone”. These search terms were chosen on the basis of the previous research in to the terms used to sell ivory online (Harrison, 2016) and following discussions with law enforcement officers working in this field. Each advert listed under the defined search terms were downloaded and entered on to an Excel spreadsheet in which the following points were noted for further analysis: initial information obtainable from the photograph accompanying the item (this included obvious evidence of Schreger Lines<sup>16</sup>, colour or alternatively obvious indications that the item was not ivory<sup>17</sup>; the type of item being offered for sale<sup>18</sup>; information given regarding the size of the item; information regarding the weight of the item; price; the stated origin of the item.

#### Identifying ivory for sale on eBay UK - Analysis of adverts



*Item described as “Lovely Antique Meiji Japanese Bovine Cattle Bone Small Okimono Masamitsu”.*

*Buy in now: £695*

*eBay UK, 2018.*

#### Schreger Lines

Tusks and teeth have the same origins. Whereas teeth are found inside the mouth, tusk protrude outside the mouth. Both teeth and tusks share the same makeup of a pulp cavity, dentine, cementum and enamel (Espinoza & Mann, 1991). It is the dentine of an elephant's tusk which may show Schreger lines. Schreger lines are also referred to as cross-hatchings, engine turnings, or stacked chevrons (Espinoza & Mann, 1991) and these terms may appear in adverts to describe the items being offered for sale.

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<sup>15</sup> The Department for Environment, Food and Rural Affairs (Defra) sought views in this consultation on banning UK sales of elephant ivory, and seeking evidence as to the effect such a ban would have.

<sup>16</sup> Schreger lines are visual artefacts that are evident in the cross-sections of ivory.

<sup>17</sup> For example, an item made of bone will not display schreger lines but would show dark flecks across the surface of the item.

<sup>18</sup> Some items are more likely to be made of ivory than an alternative material. For example, okimono have historically been carved from ivory.

Following the initial download of items within the search parameters, each item was analysed and data collected as to evidence of Schreger lines , colour, type, size, price and description.

All of the items analysed within the search parameters had at least one accompanying photograph. In the case of items with photographs, evidence of Schreger lines was noted. The outer Schreger lines are easily seen with the naked eye and so in cases where the item has been carved from the root of the tusk they are easily visible even from a photograph provided it is of reasonable quality. Schreger lines are less easy to see from a photograph if the item has been carved from tusk nerve or if the photograph is of poor quality. In such cases, a positive, negative or not known identification of ivory was made by examination of additional information given in the listing. In the first instance, each advertisement was analysed by a PhD Forensic Science student studying at the University of Portsmouth's Institute of Criminal Justice Studies. Her PhD research focuses on the identification of ivory.

In addition to the analysis of photographs for evidence of Schreger lines, we also looked at photographs for evidence that the items being offered for sale was not ivory (e.g. was in fact bone or horn). Bone is identifiable (even from photographs provided they are of reasonable quality) by the presence of dark flecking to the surface of the material. Flecking does not appear on ivory items. When an item was discovered that showed flecking, it was disregarded and no further analysis conducted on it.



Evidence of flecking to the surface of a pair of glove stretchers. This type of flecking appears on bone but not in ivory.  
eBay, 2018.

Examination of the description of the item

Once items had been either included (by clear evidence of Schreger lines or no clear evidence of such but no flecking) the text of the advertisement was scrutinised. Sellers appear to be aware of the ivory ban imposed by eBay and so it is very rare to see an advertisement in which the item is described as ivory. As noted above, sellers use a variety of terms in the heading of the advertisement but provide enough details in the advertisement text for a buyer to understand the true nature of the item being offered for sale.

Under the categories of the four chosen search terms, we analysed each advertisement paying attention to the seller's description of the item offered for sale.

### Colour

We noted how the colour of the item was described. We were interested in seeing whether advertisements included the word “ivory” to describe the colours. Alternatively, we noted whether sellers used more opaque descriptions of the colour, for example, terms like “lovely patina”, “genuine colour” or “natural colour”.

### Weight

Items purporting to be made of bone but in which the seller gave the weight (not with regards to the postage costs but as part of the description of the item) were common where the item was ivory. There is evidence that ivory is bought in the U.K. and sent to the Far East to be re-carved or sold on (Environmental Investigation Agency, 2018) and so the weight of an items, linked to the seller being prepared to ship to the Far East is relevant in making an identification of ivory.

### Price

We considered that the price an item was either being offered for sale (on a “buy it now” advertisement), or the price an item sold (in an auction sale) would be a legitimate indication of whether the item was ivory. While it is possible for antique carved bone items to sell for considerable sums of money where it is of exceptional quality, the value of ivory remains consistently higher by virtue of it being ivory.<sup>19</sup> As a result, a more valuable item, regardless of it being described as bone, was more likely to be ivory particularly in conjunction with positive physical identification and reference to weight.

### Photographs

Photographs of the items being offered for sale were key in the descriptions. We were interested in observing how sellers used photographs of an items to avoid the need for a lengthy text statement. We hypothesised that in using multiple, high quality photographs rather than text descriptions of items for sale, sellers may be actively seeking to evade eBay’s monitoring policy.

### Age

Where the seller had stated the age or the approximate age of the item, this was noted. Although eBay’s policy prohibits the sale of all ivory, regardless of age, the current legislation in the U.K. does allow the sale of pre-1947 worker ivory items. We were therefore interested in observing whether sellers of ivory on eBay considered the age of the item to be important to their description.

### Size

In addition to the weight of the items being offered for sale, we also collected data as to the size of the items being offered for sale. We were interested in observing whether eBay was acting as sales platform for smaller items or whether items of varying size were being sold through the platform. We had hypothesized that as eBay is a worldwide platform, most

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<sup>19</sup> Although the price of ivory has been seen to fall over the last few years, from a high of \$2,100 per kg in 2014 to \$730 in 2017, it remains a valuable commodity.

items would be posted to buyers and that this may have an impact on the size of the item being sold.

#### Type of item

Most of the advertisements gave a description of the type of item being offered for sale. We noted the accuracy of the description and the level of knowledge of the seller of the artefact being offered for sale. For instance, where a seller used specialist terminology such as “netsuke”, “okimono” or “puzzle ball” this was noted. As stated previously, we also noted where a seller gave statements as to the age of the item being offered for sale.

#### Additional information regarding the seller

Finally, we collected any other data that we considered to be relevant from the information shown in the advertisement. Such data included, where the seller was based (i.e. were they based in the U.K. or based abroad but using eBay U.K. to sell their items), any instructions given by the seller as to where they were (or were not) willing to post the item and where possible, the seller’s history of selling similar items on eBay U.K. We noted “advert within the advert”. For instance, were sellers indicated that they were willing to sell other similar items “off-site”. We additionally noted where sellers advertised their items both in English and in Chinese.

## Data

### Number of items analysed over the search period

Information was gathered as described above from items that had successfully sold on eBay UK over the 90 day period 25<sup>th</sup> December 2018 to 25<sup>th</sup> March 2019. During the search period a total of 684 items advertised under either Antique Mammoth Tusk, Antique Chinese Cow Bone or Antique Bovine Bone proceeded to a successful sale on the eBay U.K. site.

#### Antique Cow Bone

eBay’s seller’s policy states that the sale of bone is permissible provided the species from which it is derived is stated in the advertisement.

During the search period, we recorded a total of forty six items listed under this category heading (fig. 1). The sales value for these items was recorded as £4003.04. We disregarded five of those items because we either ascertained they were not ivory (they did not display the characteristics either in the photographs or in the text of the advertisements) or we ascertained that although they were potentially ivory, we could not commit to a firm conclusion. Of the remaining forty one items which, following our criteria for ascertaining the material from which the artefacts were made, collectively they sold for a total of £3788.79.

The search period covered the end of the Christmas period and New Year period and the Chinese New Year (Friday, 16<sup>th</sup> February 2019). We had hypothesised that these period would result in higher levels of sales across this and the other categories we search. However, our results showed that the number and value of items increased in the final

thirty day period of the search (from 25<sup>th</sup> February to 25<sup>th</sup> March, 2018). This was the case across all three of our search terms.

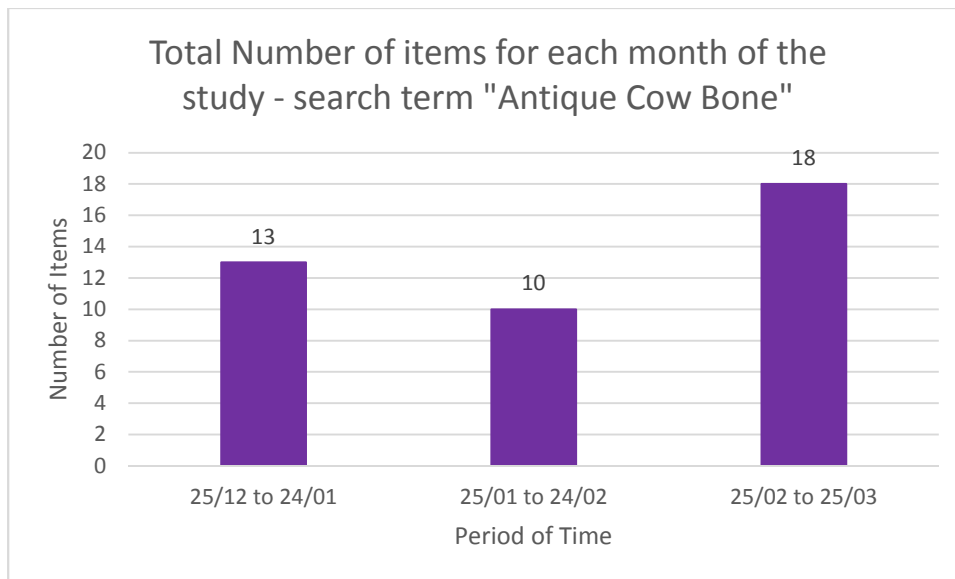


Fig. 1: Number of items sold in each thirty day period of the search for Antique Cow Bone

One of the listing was described as “Antique Vintage Hand Carved Elephant Tusk Ivory Bovine Japanese Asian Man Figure”. The item successfully sold (for \$45) having, despite its description being clearly in contravention of eBay’s ivory policy (eBay Corporation, 2018) in its blatant advertisement of elephant ivory.

We were not specifically analysing advertisements for other CITES protected species in this exercise however, one of the advertisements in this category described the items for sale as “big cat – lion or tiger tooth”. Both species are CITES protected and as such eBay’s selling regulations prohibit their sale. Whilst we were not surprised to find the sale of other protected species taking place in eBay’s site, the fact that the item was able to proceed to a successful sale and that the description did not attempt to disguise the origin of the artefact would suggest that eBay’s regulatory problems with illegal wildlife products goes beyond elephant ivory. This, we would suggest warrants further research in the future.

#### Antique Chinese Cow Bone

A total of twenty four items were listed under this heading. The use of “cow bone” as a selling term for ivory has been previously noted (Yeo, 2017) and of the twenty four listings we analysed on eBay UK's site we concluded that sixteen of these were in fact ivory. The remaining five items could not be positively identified as ivory either because the photographs accompanying the advertisements were not clear enough to make a visual identification or there was insufficient evidence within the text of the advertisement to make a positive identification.

In this category the total value of the twenty four items sold amounted to £2253.83. The five items we disregarded as either not being ivory or having insufficient evidence to

conclude they were ivory amounted to a value of £168.8. This resulted in a value of ivory sales under this category of £2085.03.

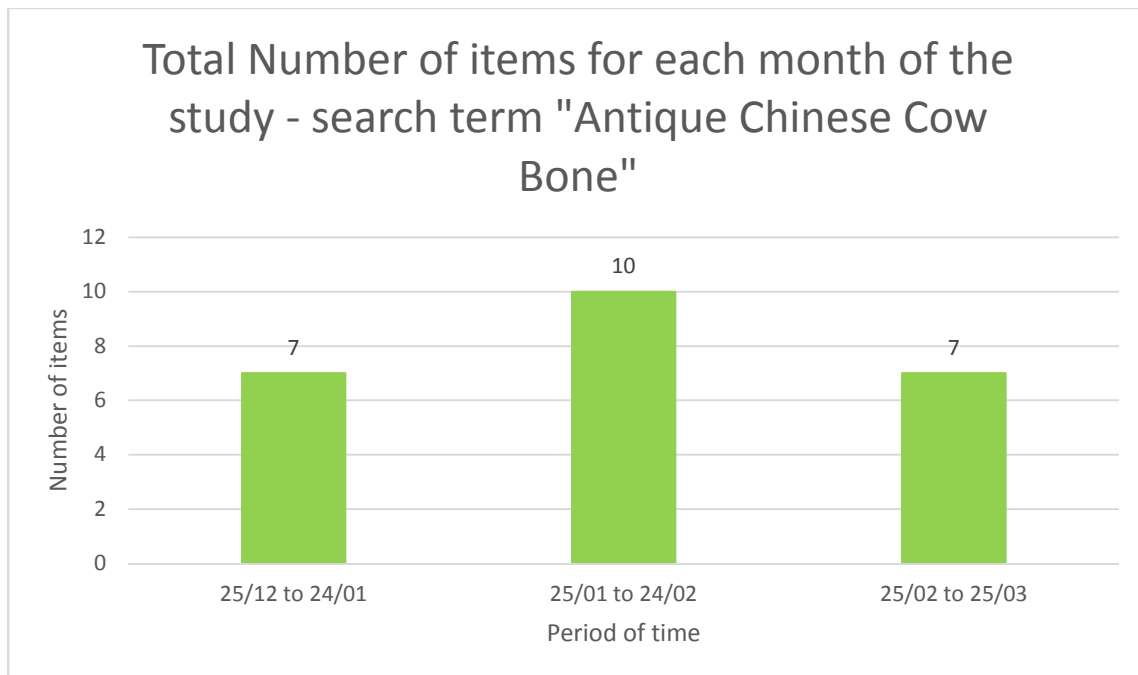


Fig. 2: Number of items sold in each thirty day period of the search for Antique Chinese Cow Bone

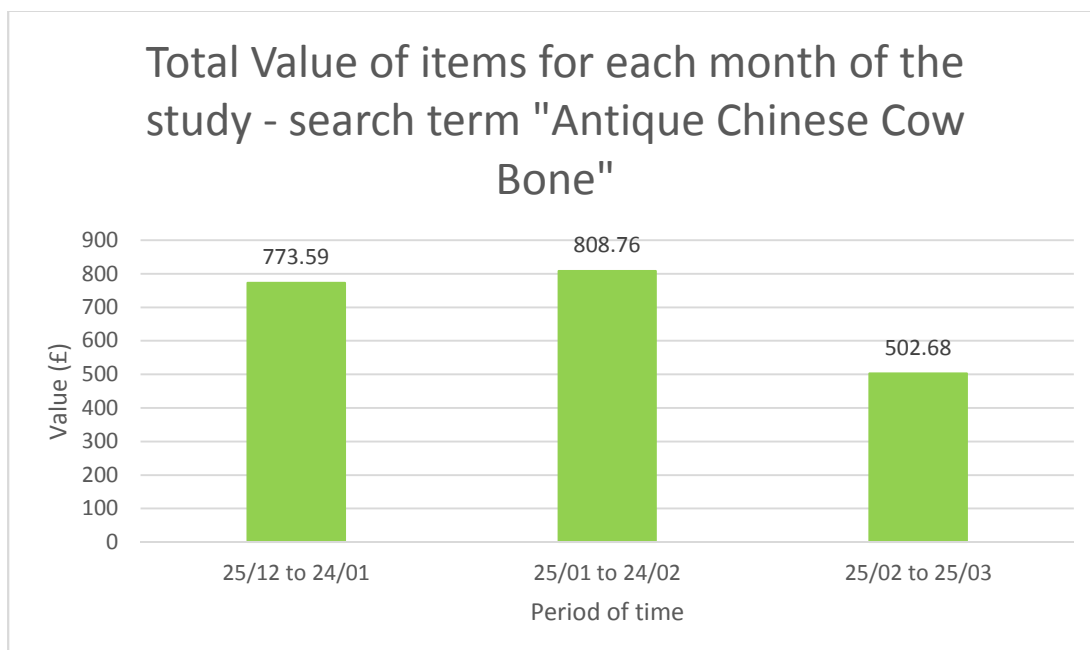


Fig. 3: Total sales values for Antique Chinese Cow Bone

The items listed under the heading of Antique Chinese Cow Bone that we determined to be ivory all shared similar characteristics. All displayed multiple, good quality photographs with the item description. In most cases, the text of the description specifically drew the potential buyer's attention to the photographs ("Please look at picture", "see pictures"). All

of the listings we determined to be ivory displayed the weight of the item being offered for sale and (in most cases) the size.

### *Recurring Themes*

#### Snooker/Billiard Balls

We found five snooker balls being offered for sale under this heading. Three of these were through the same UK based seller. Throughout the eighteenth and nineteenth centuries Billiards (snooker) balls were made from ivory (Clarke, 2018). It was not until the end of the nineteenth century that Composition Balls were introduced and became a popular alternative to ivory. This is referred to in three of the advertisements we examined (all three from the same seller) which stated that the item was “one antique 19th century snooker ball...its not resin”. In another advertisement for a snooker ball, the description read, “superb vintage billiard ball, over 100 years old, nice color and grain, weight is 2.9 oz.....vintage elephant”.

The seller offering three snooker balls had listed them with identical advertisements and in addition to the descriptions stated above, also stated that they would post worldwide. This is significant in several ways. Firstly, whether or not the snooker balls would be currently legal to sell in the U.K. (by virtue of being made before 1947) all ivory items (including those which fall within the antiques derogation require a CITES Certificate to send outside of the E.U. area. No statements are made in the advertisement about provision of a CITES certificate. Secondly, it is known that ivory items are imported to China, Hong Kong and Laos where they are re-carved for the home consumer (House of Lords Hansard, 2017). These advertisements appear to be appealing to this market.

#### Jewellery

Eleven of the items we analysed under this heading were items of jewellery. Five necklaces and six bracelets or bangles were offered for sale and subsequently sold. All but one of the descriptions for these items referred to weight and size. The only listing that did not state the weight of the item was also the only one that would not post worldwide. Small items of jewellery are easy and cheap to post. During research for *The Elephant in the Sales Room: An inquiry in to the U.K. Antiques Trades' sale of ivory* (Cox C. , 2016) the author spoke with law enforcement officers who had monitored post leaving the U.K. for undeclared ivory items. Their anecdotal evidence was that they believed small items such as jewellery was being posted outside of the E.U. area without the correct customs declarations being made.

#### Age

Twenty two of the items in this category included a statement as to the age of the artefact in the advertisement. In some cases this was detailed and precise and appeared to be fundamental in indicating the antique characteristics of the item (e.g. “Old hand carved antique 1900-1930's Chinese...bead necklace”). Although eBay’s ivory policy is clear (no ivory can be sold through the site), while it remains legal to sell pre-1947 worked ivory in the U.K. this could explain the prevalence of item dating in the advertisements we analysed. While eBay have stated that their ban was introduced to remove the potential for confusion



between the differing ivory laws from jurisdiction to jurisdiction is it possible that confusion remains between the current law in the U.K. and eBay's regulations. However, there is another potential explanation. Clearly, these sellers know enough about the item they are offering for sale to state its date. It therefore does not seem unreasonable to suggest that with this level of knowledge they are also aware that the material from which the item is made is not cow bone but ivory. In other words, we would suggest that the inclusion of date information in an advert is evidence that the seller is listing an item with the full knowledge that they are doing so in breach of eBay's ivory policy. In addition, where they sell to a buyer outside the E.U., they are also in breach of the COTES Regulations. We would suggest that a seller who has gone to deliberate lengths to conceal the true nature of the item being offered for sale is (at worst) knowingly breaching COTES or (at best) negligently doing so.

### Antique Bovine Bone

This search category returned the largest number of sold items. In total during our search period six hundred and forty one items sold through eBay U.K. under "Antique Bovine Bone" (fig. 4). The total value of these items amounted to £50,538.34.

Again, using the same methodology as for the previous listing we were able to disregard seventy five items as either not being ivory or there being insufficient evidence to confirm whether or not the item was ivory. The value of these disregarded items amounted to £3546.88, leaving the sales value for ivory items being sold under this category £46991.46 (fig. 5).

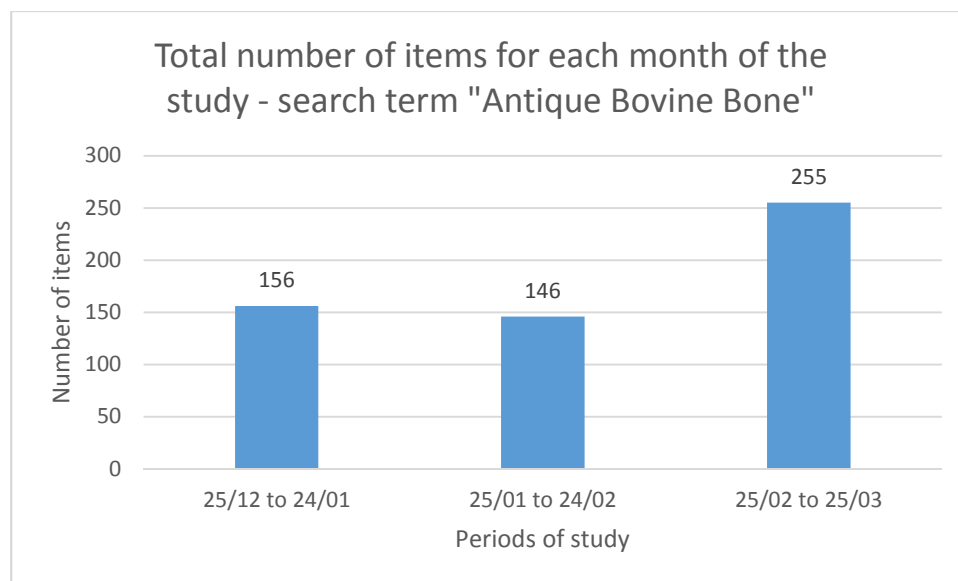


Fig. 4: Number of "antique Bovine Bone" items sold over search period

This category again showed a similar phenomenon to the other two search categories in that the value and number of items sold increased in the final thirty days of the search period.

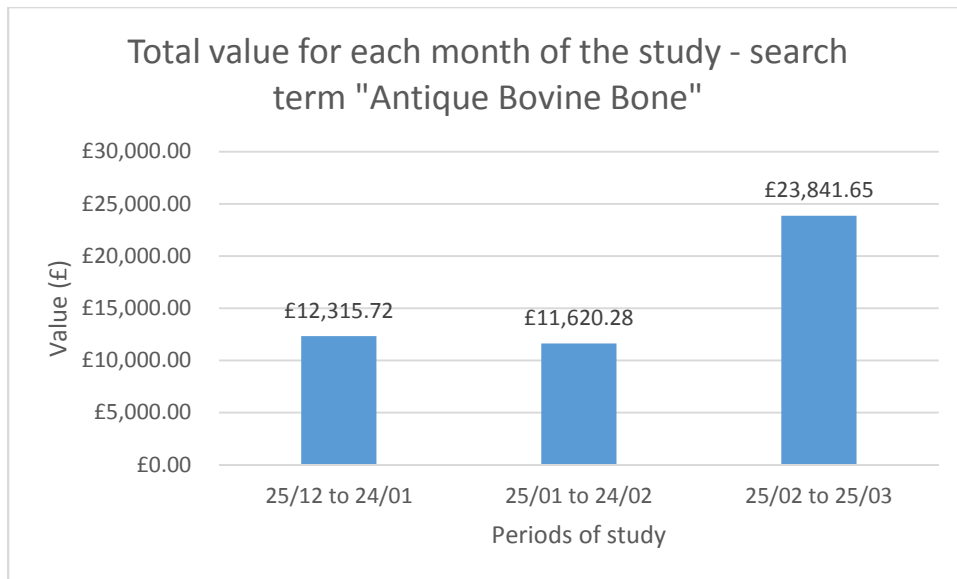


Fig. 5: Total value of Antique Bovine Bone items sold across search period

## Other observations

### *International Sellers*

Although the research was confined to eBay U.K.'s site, we found that international sellers were using the platform. We found sellers from thirteen countries advertising during the period. The largest group were U.K. based sellers (fig. 6) however the fact that 62 sellers were based in the U.S.A. is interesting.

While it is possible for overseas sellers to positively opt in to their advertisements being shown on eBay platforms outside their home country this entails an additional listing fee. In some circumstances a seller may also find that their advertisement is listed on overseas sales platforms if they state that they are willing to post abroad. However, the fact that the number of U.S. sellers is so much higher than those from other jurisdictions may suggest that these sellers are positively opting in to sell on the eBay U.K. site. One reason for this could be the implementation the "Final Rule" introduced by the Obama administration in 2016 which has seen the implementation of strict laws and regulations regarding the sale, importation and exportation of ivory in the U.S. However, commercial exports of worked antique ivory (ivory that is at least 100 years old and demonstrably imported prior to September 22, 1982) are permitted under U.S. law provided the artefact has the appropriate CITES documentation. Sales between states are much more robustly regulated. Interstate commerce in ivory is limited to items that both meet the antiques exemption and only contain a small (*de minimis*) amount of ivory. This *de minimis* exemption provides that where the ivory item in question was imported to the U.S. prior to 1990 it can be sold across state lines provided it is a fixed or integral part of a larger (non-ivory) item and weighs less than 200g. In addition, the ivory in the object must account for less than 50% of the volume of the entire object. As a result where an item is entirely made of ivory, even if it is very small, will not qualify for the *de minimis* exception and therefore not be legal to sell.

The items we observed being offered for sale of eBay U.K.'s site were small, solid ivory items including jewellery (ivory beads) and netsuke. This may suggest that sellers in the U.S. are not prepared to risk breaking federal law in selling intra-state but are prepared to sell outside the U.S. using eBay as a means to do so.

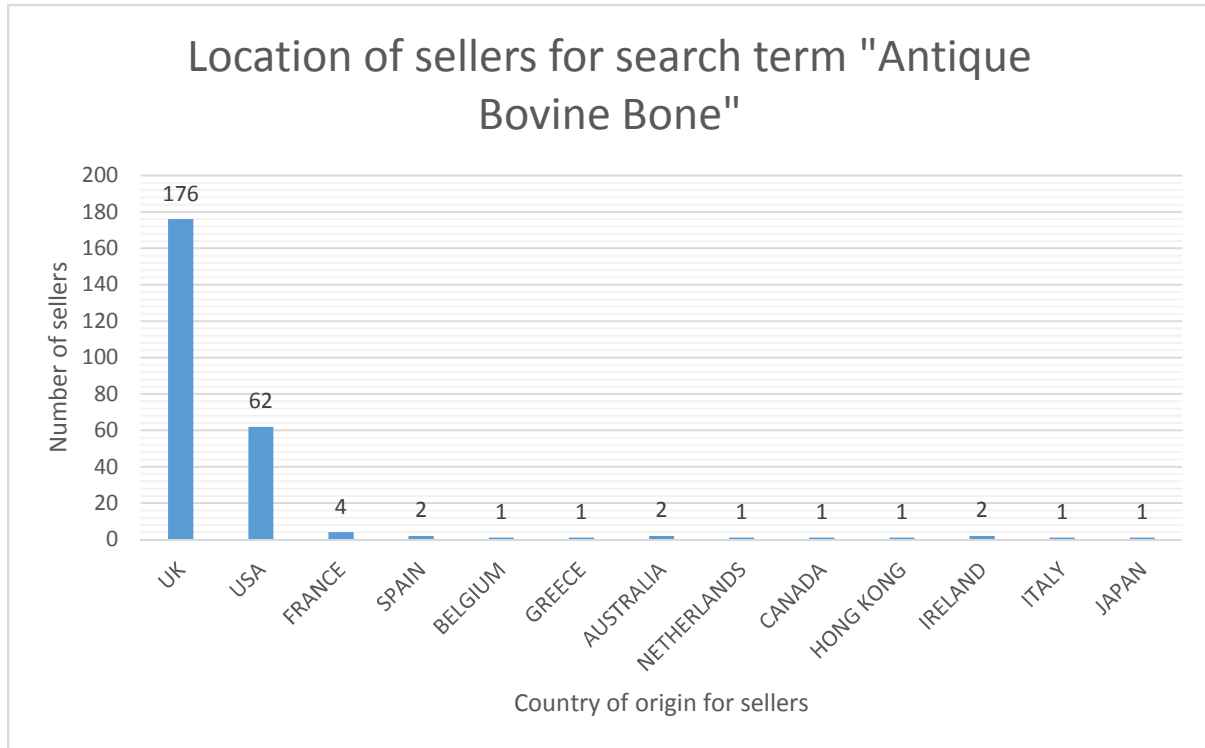


Figure 6: Location of sellers on eBay U.K.'s platform during the research period.

#### Repeat Offenders

We were interested in observing whether sellers were making regular use of eBay U.K. as a platform to sell ivory items. This is particularly important for law enforcement officers when they consider bringing a prosecution for the illegal sale of ivory under the COTES Regulations. Unless the value of the item is high, the police, who must as matter of course make strategic and manpower decisions with regards to prosecution, will not prosecute a one-off seller. One senior police officer we spoke to in the course of the research stated that, "We are not concerned with the seller who has found his granny's old ivory necklace in the attic. We need to concentrate our resources on repeat or high value sellers who know they are breaking the law."

We found that over the course of our research repeat sellers were found (fig. 7). In each case, items were listed individually (i.e. the advertisements were not for more than one item) however, we did find sellers referring potential buyers either to other items they had listed on eBay U.K. or requesting potential buyers to contact them direct for further similar items. This would suggest that these sellers are trade sellers, perhaps antiques dealers.

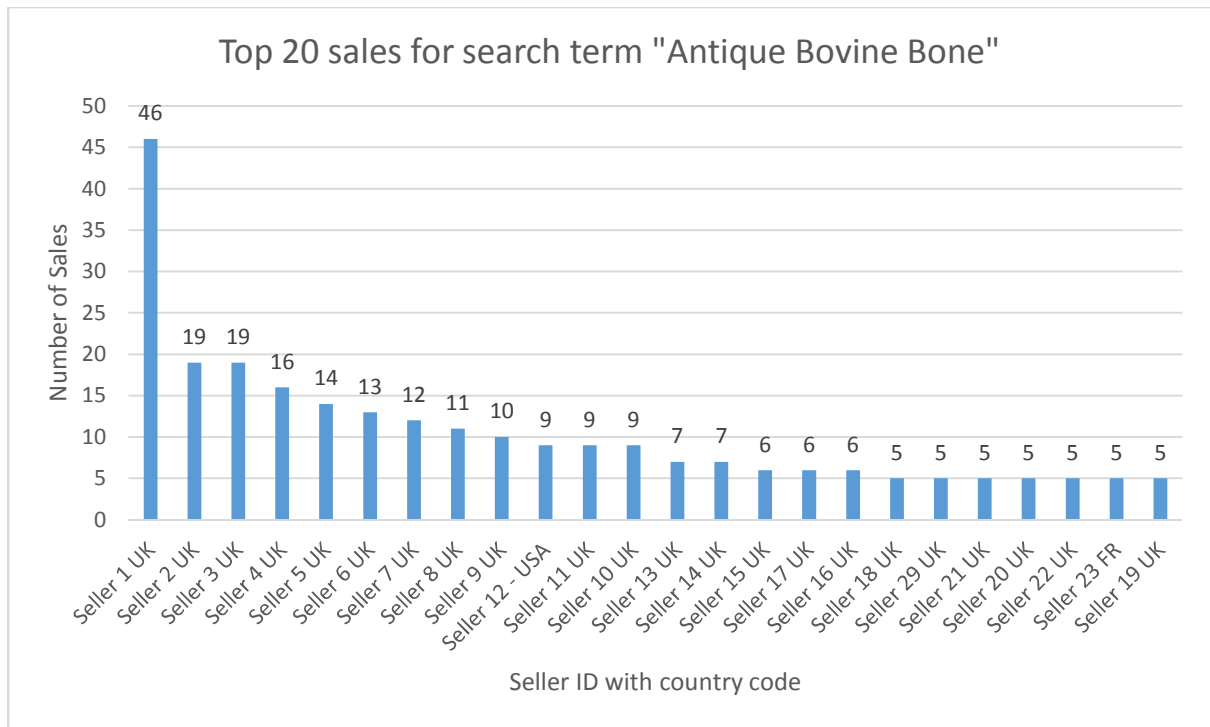
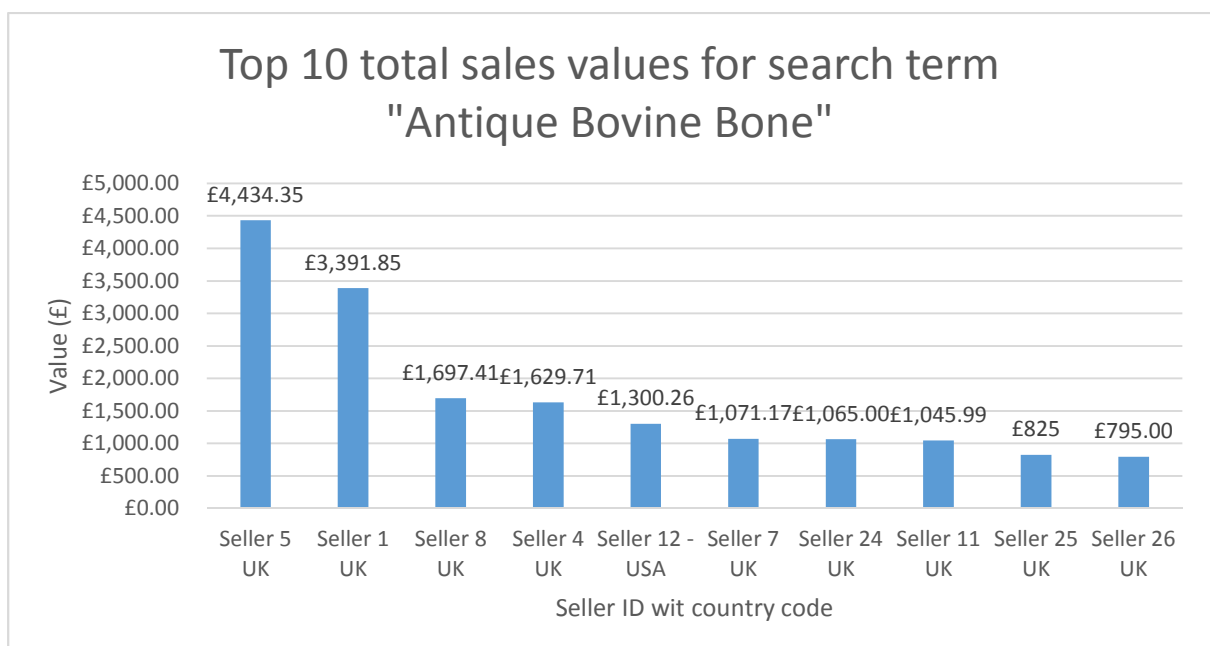


Figure 7: Repeat sellers.

We were also able to consider this information in terms of the value of ivory sales to the top sellers (fig. 8) which showed that in the category “Antique Bovine Bone” the one repeat seller sold a total of £4,434.35 worth of ivory over our search period. This seller (Seller 5 UK), achieved this amount through the sale of fourteen items over the ninety day period. We suggest that this is just the sort of seller that law enforcement officials may be interested in investigating further. None of these items would have been sold with CITES certification (because Seller 5 UK was not declaring them as ivory) and as such, if they were leaving the E.U. these sales, even if they were genuinely pre-1947 worked ivory, would be in breach of CITES regulations.



## Conclusions

Over the course of the ninety day search period we found ivory being sold on eBay U.K.'s site in contravention of the company's selling policy. By far the most used euphemism for ivory in the categories we search was "antique bovine bone". It appears that eBay's policy to allow the sale of bone from an identified source (e.g. cow or bovine) is enabling negligent or unscrupulous users to sell ivory on the platform using these euphemisms.

Over the course of our search period a total of £47,777.65 worth of ivory was sold as "bovine bone". Over the same period, the value of those items we ascertained to actually be bovine bone sold for ££2, 863.04.

eBay's sale platforms charge both a listing fee (this is usually a minimal fee which is calculated by the site according to the package chosen by the seller (eBay Corporation, 2018) and then additionally a sale commission. eBay state that, "When your item sells you pay 10% of the final transaction value, including postage. We call this a final value fee." It is the case that eBay will "reward" regular users with special commission offers from time to time. This could include, for instance a flat fee with no additional sales commission. It was not possible for us to ascertain from the information available whether any of the sellers we analysed were able to use such offers. However, on the basis of a "worst case scenario" we are able to suggest that on the total sales values for those items we have analysed and deduced to be ivory, eBay's total commission across our search period amounted to £5,365.12. In the case of "bovine bone" alone, eBay's commission could amount to a total of £4,777.77. During this period, eBay's commission for real bovine bone would have amounted to just £286.30.

There is no doubt that eBay continues to show a commitment to ending the sale of illegal wildlife products on its sites across the globe. Following the 2009 ivory ban, eBay has continued to declare their intention to work with law enforcement officers and conservation groups. Most recently, eBay have (in conjunction with The World Wildlife Fund (WWF), TRAFFIC, and the International Fund for Animal Welfare (IFAW), Google, Facebook and Instagram) committed to be part of The Global Coalition to End Wildlife Trafficking Online. This grouping aims to reduce the amount of illegal wildlife trade products going through sites by 80% by 2020.

These are positive moves for which the internet giants should be commended but we would suggest from this short study that eBay could make a large impact of the amount ivory selling through their platforms by including the sales of animal bone as a prohibited item. We have shown that this would result in a small loss of revenue to eBay but the impact on the sale of ivory through the site could be large.

We appreciate that the illicit world of the illegal wildlife trade is such that as one door closes another route to sale will undoubtedly open but with the commitment of eBay and similar

online sales platforms, with their technological capabilities and ability to continuing invest in screening tools, the solution to ending the sale of ivory on line lies with them.