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Illegal wildlife trade and the EU: legal approaches

Contents

1	Executive summary	3
2	Introduction	4
3	CITES	6
3.1	Background	6
3.2	Key provisions	6
4	EU Laws	7
4.1	Background	7
4.2	Key legal provisions.....	7
5	US Lacey Act.....	10
5.1	Background	10
5.2	Key legal provisions.....	10
5.3	Enforcement	11
5.4	Penalties and offences	13
6	Why might we need an EU Lacey Act?	14
7	Impact of EU Treaties and trade agreements on a new EU Lacey Act	15
7.1	Treaties.....	15
7.1.1	Subsidiarity and proportionality	15
7.2	EU Trade Policy.....	16
8	Would a new EU Lacey Act duplicate aspects of existing EU law?.....	17
8.1	Appendix III of CITES	17
8.2	Annexes A and B of the EU Wildlife Trade Regulation.....	19
9	Conclusions	19

1 Executive summary

Current EU wildlife protection laws do not go far enough to protect endangered and vulnerable species from the damaging impacts of the global illegal wildlife trade.

The current EU legislative framework in place to address the illegal wildlife trade generally protects species listed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The European Commission recently carried out a review of this framework, and found its controls and provisions to be effective in relation to the species protected by it.¹ However, this analysis glosses over the significant threat to many non-CITES species that are not currently protected by the legislation, but which are nonetheless heavily targeted and traded into and within the EU, threatening their conservation status. For example, 45% of the world's reptiles have been assessed for the IUCN Red List, which found that 180 species are Critically Endangered, 361 species are Endangered and 403 species are Vulnerable.² However, of the 355 most threatened reptile species, only 194 species are currently protected by CITES. Some of these species are collected for other purposes, but most are collected for the international pet trade.³

The EU has been identified as a major destination for smuggled wildlife, including for the international pet trade, due to its wealthy clients and lack of internal barriers.⁴ Many of these specimens are endangered and vulnerable non-CITES species, which are protected by domestic legislation in the states where they occur. However, once they reach the EU, the species can be legally and openly offered for sale; and given the difficulties in obtaining them and their limited availability on the market, they can reach high prices. Some traders even specialise in the sale of such species because the profit margin is so high.⁵

This gap, or loophole, has been acknowledged in reports and documents from the European Commission, the United Nations Office on Drugs and Crime (UNODC) and others, but measures to tackle it at EU level have not yet been put in place. New EU legislation to address this loophole is clearly needed. This could be modelled on the US Lacey Act, which provides a broad range of protections to any plant or species illegally harvested or taken in its country of origin. This has distinct advantages over a static, list-based model, as it enables a flexible, real-time approach to enforcement based on current context and conditions. However, because the remit of the legislation would be so wide, careful thought and guidance would be needed to produce enforcement priorities and criteria that are effective in creating positive conservation outcomes for non-CITES species. New legislation would also need to be designed to avoid duplication of or major revisions to existing EU wildlife trade legislation, which has been found to work well.

¹ Commission Staff Working Document, 'Analysis and Evidence in support of the EU Action Plan against Wildlife Trafficking', European Commission, 2016, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0038&from=EN>

² Auliya, M. et al. (2016): Trade in live reptiles, its impact on wild populations, and the role of the European market. *Biological Conservation* 204:103–119.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

2 Introduction

In this report, we explore different ways that new and existing EU laws could be used to tackle the illegal trade in wildlife more effectively. Illegal wildlife trafficking is often perceived by the public as being associated with countries in other parts of the world, such as Asia. However, seizure data and reports prepared by experts (and even the EU itself) reveal that the EU is in fact a key destination and also 'transit' region for the trade.⁶ The EU is even a source region for some illegally traded species. For example, data suggests that 7-20 tonnes of glass eels were illegally smuggled from the EU to East Asia each year between 2012 and 2015.⁷

In recognition of this, and under increasing international pressure to tackle this issue,⁸ the European Commission recently adopted a new 'EU Action Plan against wildlife trafficking'. This outlines actions that aim to 'address wildlife trafficking within the EU' and 'strengthen the EU's role in the fight against these illegal activities globally' and led to a review of the effectiveness of current EU wildlife legislation.⁹

While this move to tackle the trade is laudable, the EU's focus has so far centred almost entirely on measures designed to control the trade in species protected by CITES.¹⁰ Current EU wildlife trade laws, which the EU's recent review found to be effective in relation to the species they protect,¹¹ largely implement CITES listings. This leaves a significant gap in relation to the trade of non-CITES species that have been illegally obtained in their country of origin and may be endangered or vulnerable. The sale of such species within the EU is in most cases perfectly legal. This gap has been confirmed by a 2016 report from the UNODC, which concluded that 'Illegal trade could be reduced if each country were to prohibit, under national law, the

⁶ Commission Staff Working Document, 'Analysis and Evidence in support of the EU Action Plan against Wildlife Trafficking', European Commission, 2016, p.15, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0038&from=EN>

⁷ Ibid., p.20.

⁸ See for example two UN Resolutions on tackling wildlife trafficking, Resolution A/RES/69/314 (available here: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/314), passed in July 2015 and resolution A/71/L.88 (available here: <http://undocs.org/A/71/L.88>), passed in September 2017. Resolution A/71/L.88 encourages Member States to 'adopt effective measures to prevent and counter the serious problem of crimes that have an impact on the environment, such as illicit trafficking in wildlife' (para. 2) and urges them to 'take decisive steps at the national level...including by strengthening the legislation necessary for the prevention, investigation and prosecution of such illegal trade' (para. 3).

⁹ 'EU Action Plan against Wildlife Trafficking', European Commission, 2016, available here: http://ec.europa.eu/environment/cites/pdf/WAP_EN_WEB.PDF

¹⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora, available here: <https://www.cites.org/eng/disc/text.php>

¹¹ Commission Staff Working Document, 'Analysis and Evidence in support of the EU Action Plan against Wildlife Trafficking', European Commission, 2016, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0038&from=EN>

possession of wildlife that was illegally harvested in, or illegally traded from, anywhere else in the world.¹²

The EU has been identified as a key destination for the international pet trade, including for reptiles.¹³ Unfortunately, many of the reptilian species that are traded are not protected by CITES and therefore are also not protected under EU law. This means that these species can be safely placed on the EU market, after being taken from their country of origin, often in violation of domestic laws.¹⁴ For example, *Lygodactylus williamsi*, or dwarf gecko, is a critically endangered species of lizard, which is endemic to a small area of Tanzania. It is estimated that within a 4.5-year period (December 2004–July 2009), approximately 40,000 specimens of *Lygodactylus williamsi* were collected for the international pet trade, resulting in a severely depleted population - as recognised by the categorisation of the species as Critically Endangered under the IUCN Red List of Threatened Species, in 2012.¹⁵ This wildlife trade happened despite the fact that the unlicensed collecting of the species had been strictly prohibited in Tanzania since 2002 – and according to officials of the Tanzania Wildlife Research Institute as of 2012, collection and export of the species had never been licenced by the Tanzanian authorities.^{16 17} Hence, all specimens of *Lygodactylus williamsi* collected during the period 2004-2009 (and indeed after this time), were taken illegally. The EU was a main destination for this species;¹⁸ however, it took several years, until 2015, before the EU decided to take action and bring this species within the remit of EU laws on wildlife trade - and the decision to protect a threatened species not listed by CITES was at the time unprecedented.¹⁹ It then took another two years before the species was protected by CITES.²⁰ However, there are many more threatened species that are not covered by CITES or EU laws, but which are nonetheless strictly protected in their range states.²¹

In this report, we seek to explore the ways in which EU law could be used to address this loophole. We begin by setting out a brief outline of the species-specific international legal obligations created by CITES on parties to the Convention. We then consider how this has been

¹² UNODC, World Wildlife Crime Report: Trafficking in protected species, 2016.

¹³ Auliya, M. Et al. (2016): Trade in live reptiles, its impact on wild populations, and the role of the European market. *Biological Conservation* 204 (2016) 103–119.

¹⁴ Ibid.

¹⁵ Flecks, M., Weinsheimer, F., Böhme, W., Chenga, J., Lötters, S., et al., 2012. Watching extinction happen: the dramatic population decline of the critically endangered Tanzanian turquoise dwarf gecko, *Lygodactylus williamsi*. *Salamandra* 48, 23–31

¹⁶ Ibid, p. 24.

¹⁷ CITES COP17 'Consideration of proposals for amendment of appendices I and II', p.5, available here: <https://cites.org/sites/default/files/eng/cop/17/prop/060216/E-CoP17-Prop-30.pdf>

¹⁸ Ibid., p.2.

¹⁹ There had been previous listings of non-CITES turtle species; however, this was due to their invasive potential, rather than to protect the species.

²⁰ The species was added to Annex B of the Wildlife Trade Regulation 338/97. The species was later (in 2017) added to Annex A of the Wildlife Trade Regulation 338/97, when it became a CITES Appendix I species.

²¹ See for example species referred to in Auliya, M. Et al. (2016): Trade in live reptiles, its impact on wild populations, and the role of the European market. *Biological Conservation* 204 (2016) 103–119.

transposed into EU law. Following this, we consider the different legal approach offered by US legislation known as the 'Lacey Act', which protects all wildlife that has been illegally taken in its country of origin. Finally, we consider how, and whether, an EU law based on the Lacey Act (for convenience, the concept will be referred to in this report as the 'EU Lacey Act') could be an appropriate legal tool for tackling the trade in the EU, including consideration of any impacts that EU Treaties and trade agreements could have on the implementation of such a new law.

3 CITES

3.1 Background

CITES is the primary international agreement governing the illegal trade in wildlife globally. The Convention aims to co-ordinate action at a global scale, to ensure that international trade does not threaten the survival of endangered species.

The Convention has 183 Parties who agree to be bound by its provisions, which protect more than 35,000 species of animals and plants.²² Parties must implement their own national legislation to ensure that the Convention's provisions are legally binding in their own jurisdictions.

3.2 Key provisions

The Convention works by obliging parties to implement and enforce a permitting/certification system to regulate the trade in their countries. Depending on the CITES appendix in which it is listed, those wishing to export, import, or re-export a specimen (whether alive or dead) or part of a specimen of a species protected by the Convention into or out of the country may need to possess a valid permit or certificate, issued by the state's designated 'management authority'.

There is a multi-tiered level of protection. Appendix I lists species that are threatened with extinction, while Appendix II lists species that may be threatened with extinction in the future if trade in them is not controlled. Import certificates for Annex I species may be obtained only where the trade is for primarily non-commercial purposes and will not endanger the species. Export certificates may be issued only if the specimen was legally obtained, the trade will not be detrimental to the survival of the species and an import permit has already been issued. Re-export certificates may be issued only where the species has been imported in compliance with the Convention, and if (in the case of a live animal or plant specimen) an import permit has already been issued. Annex II specimens may be imported without a permit unless one is needed under national law. A permit or certificate is needed for export or re-export.

These species lists are reviewed periodically at Conferences of the Parties (CoPs),²³ with reference to a set of biological and trade criteria, which are used to establish whether a species should be added to the list. Amendments are discussed and then voted on at the CoP.

²² CITES website, 'What is CITES?', accessible here: <https://www.cites.org/eng/disc/what.php>

²³ CoPs are usually held every two to three years - see the CITES website, 'Conference of the Parties', accessible here: <https://www.cites.org/eng/disc/cop.php>

Appendix III lists species that are protected in at least one country that has asked for help in controlling the trade from other parties. Amendments to this list may be made unilaterally by each Convention Party. An export permit issued by the management authority of that state is needed for trade from any State that has included the species in Appendix III. This may be issued only if the specimen was legally obtained, according to the laws of that country. In the case of export from any other State, a certificate of origin issued by its management authority is needed, demonstrating the country of origin. A re-export certificate from the relevant State of re-export is also needed.

4 EU Laws

4.1 Background

Wildlife trade has been regulated at EU level since 1983. The main legal instrument is Council Regulation (EC) No 338/97,²⁴ which incorporates CITES provisions into EU law. This 'EU Wildlife Trade Regulation' goes beyond CITES in certain respects, in particular by regulating trade in a very small number of non-CITES listed species, imposing stricter import restrictions for some species and empowering the EU to suspend imports of species from particular exporting countries even when this is still permitted under CITES.

Implementation of the EU Wildlife Trade Regulation is regularly monitored by the Commission, working with Member States and civil society partners, including the UN Environment World Conservation Monitoring Centre.

4.2 Key legal provisions

The EU Wildlife Trade Regulation has several annexes (Annexes A-C), which broadly correspond with the Appendices to CITES. Annex A mainly includes species listed in Appendix I to CITES, which cannot be traded or used for primarily commercial purposes (plus some Appendix II species, which therefore have a higher level of protection under EU law). Annex B mainly contains species listed in Appendix II to CITES. Annex C contains species listed in Appendix III to CITES. An additional annex (Annex D) monitors the level of imports of species that might be eligible for listing in one of the other annexes. The species lists in these annexes each have different permitting and certification requirements, in line with CITES requirements – although the requirements for Annex B (equivalent to Appendix II CITES) species are stricter than the CITES obligation, since an import permit is also needed for these species. For Annex C and D species, no import permit is needed, but an import notification must be made, to assist with monitoring. The Regulation applies to trade into and out of the EU, as well as trade within and between EU Member States.

²⁴ Available here: http://eur-lex.europa.eu/search.html?DTN=0338&DTA=1997&qid=1484753427128&DB_TYPE_OF_ACT=regulation&DTS_DOM=EU_LAW&typeOfActStatus=REGULATION&type=advanced&lang=en&SUBDOM_INIT=CONSLEG&DTS_SUBDOM=CONSLEG

The Regulation also sets out the framework for an extensive administration system. Member States must designate customs offices for carrying out checks and formalities for imports and exports and, in addition to establishing a 'scientific authority', each Member State must also establish a 'management authority', with responsibility for implementation of the Regulation. Member State authorities must also monitor compliance and investigation of infringements and there are reporting requirements, both inter-Member State and to the Commission. As well as the Scientific Review Group, the Regulation also creates a Committee to assist the Commission with ensuring that the Regulation is properly implemented at Member State level.

In relation to the legislation's capacity to protect non-CITES as well as CITES species, Article 3(1) of the Regulation says that Annex A *shall* comprise the following:

1. Species listed in CITES for which Member States have not entered a reservation; or
2. Any species:
 - **Which is, or may be, in demand for utilization in the Community or for international trade and which is either threatened with extinction or so rare that any level of trade would imperil the survival of the species;** or
 - Which is in a genus of which most of the species or which is a species of which most of the subspecies are listed in Annex A in accordance with the criteria in subparagraphs (a) or (b)(i) and whose listing in Annex A is essential for the effective protection of those taxa.

(Our emphasis).

Similarly, Article 3(2) provides that Annex B *shall* contain those species listed in Appendix II to the Convention AND any other species not listed in Appendices I or II to the Convention:

1. Which is subject to levels of international trade that might not be compatible:
 - **With its survival or with the survival of populations in certain countries,** or
 - **With the maintenance of the total population at a level** consistent with the role of the species in the ecosystem in which it occurs.

(Our emphasis).

While it may not be all-encompassing, a mechanism therefore does already exist in EU law which in theory enables, and indeed requires, the protection of non-CITES species where there is a threat to their survival or population level. In fact, this mechanism is rarely used. By way of illustration, while additional non-CITES species may have been listed in the past,²⁵ at the time of

²⁵ As in the case of *Lygodactylus williamsi*, which was initially listed in Annex B as a non-CITES species, but was then later added to Appendix I of CITES and also upgraded to Annex A of the EU Wildlife Regulation.

writing, Annex A lists only a single species not protected by either Appendix I or II to CITES,²⁶ and the same is true in relation to Annex B.²⁷

It appears that these and the other annexes to the EU Wildlife Trade Regulation are updated only every few years, usually after CITES CoPs.²⁸ Scientific opinions regarding amendments to the list are issued by the EU Scientific Review Group established by the Regulation, which consists of representatives from Member States' Scientific Authorities (also established by the Regulation).²⁹ Therefore, the process for updating these annexes is slow and infrequent, particularly when compared to the dynamic and changing context of the illegal wildlife trade.

However, there is a very clear and much more flexible mechanism for suspending imports of Annex A or B species, or refusing import permits for Annex A species, for conservation reasons. The EU Scientific Review Group meets four times each year, to discuss whether the conservation requirements of the EU Wildlife Trade Regulation are being met.³⁰ These discussions include the question of whether trade in any species should be suspended because detriment to the conservation status of that species or to the extent of the territory occupied by it cannot be excluded, both in terms of Annex A and Annex B imports and exports.³¹ The opinion of the EU Scientific Review Group should be taken into account by the Scientific Authorities of each Member State, whose job it is to advise about the impact of the import or export on the conservation status of the species and monitor Annex A and Annex B imports and the issue of Annex A export permits into and out of their respective EU Member States. In practice, opinions of the Scientific Review Group about whether to suspend imports or exports are normally followed by individual Member States' Scientific Authorities, unless the relevant Authority has additional or new information that might impact on a decision whether to suspend imports or exports of a certain species.³² This mechanism allows the EU to react in a timely manner to changing conservation needs - although this remains limited to the specific species listed in Annex A or B.

Annex D lists non-CITES species that are 'imported into the Community in such numbers as to warrant monitoring'. However, the description of this category is very vague – would a very small number of imports of a species that has a very small, endemic population for example, warrant inclusion on this list? This is not clearly defined. In addition, inclusion on this list does not

²⁶ *Acrocephalus rodericanus*, or Rodrigues Warbler, which was unilaterally added to Appendix III of CITES by Mauritius.

²⁷ *Odobenus rosmarus*, or Walrus, which was unilaterally added to Appendix III of CITES by Canada.

²⁸ This is clear from minutes of Scientific Review Group Meetings, which make clear recommendations about (i) import suspensions; and (ii) whether Regulation annexes should be updated, available here: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>

²⁹ *Ibid.*

³⁰ European Commission website, 'Environment - Scientific Review Group', accessible here: http://ec.europa.eu/environment/cites/srg_en.htm

³¹ European Commission, 'DUTIES OF THE CITES SCIENTIFIC AUTHORITIES AND SCIENTIFIC REVIEW GROUP UNDER REGULATIONS (EC) No 338/97 AND (EC) No 865/2006', 2017, available here: <http://ec.europa.eu/environment/cites/pdf/srg/guidelines.pdf>

³² European Commission website, 'Environment - Scientific Review Group', accessible here: http://ec.europa.eu/environment/cites/srg_en.htm

regulate the trade in any way – the only requirement is for the trader to present a notification to the border agency before importation. For the species to be regulated by a permit system, it would need to be moved from Annex D to Annex A or B when these lists are reviewed. This would happen if the species meets the criteria for inclusion in these Annexes, and, thus, depends on factors such as the seriousness of the threat to its survival.

The Regulation criminalises the purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A and Annex B. Exemption certificates may be granted in certain circumstances. There are also offences relating to false labelling and other administrative matters. Penalties are set by the Member States in their national legislation, but these must nonetheless be ‘appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure, and where appropriate, confiscation of specimens’ (Article 16).

5 US Lacey Act

5.1 Background

Known officially as ‘The Lacey Act of 1900’, the Lacey Act is a visionary US conservation law for controlling the illegal trade in wildlife. Significantly, the law does not restrict its scope to a specific list of wildlife. Rather, it sets out an all-encompassing prohibition on trade into, from, through or inside the US of any wildlife that was illegally taken in its country of origin.

The Act was originally implemented to preserve game and wild birds. Today, its application is much broader, regulating the trafficking of many endangered and threatened species. In 2008, the Act was amended to apply to all plants and plant products. Following this change, it is also used as a tool to prevent the import and use of wood that has been illegally logged in other parts of the world.

This all-encompassing approach to controlling the trade has advantages over a static species-specific model. It provides a potential solution to the issue of trafficking in wildlife that may not be imported at high volumes, but where the trading may nonetheless contribute to the depletion or extinction of that species. It is also more flexible than a static list that needs to be periodically updated to take into account global trafficking trends, usually via a lengthy approval system that requires extensive scientific evidence and administrative hurdles to be tendered and negotiated before changes can be implemented.

5.2 Key legal provisions

Section 3372(a)(2) of the Lacey Act provides as follows:³³

‘It is unlawful for any person ...

³³ Extract of the US Lacey Act, 16 U.S.C. § 3372, available here: <https://www.fws.gov/le/pdf/files/Lacey.pdf>

...(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce--

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law;

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State...'

The Act defines 'Fish or wildlife' as '*any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof.*

The term 'taken' is defined as '*captured, killed, or collected*', while 'transport' means '*to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment.*

There are also provisions criminalising the possession of any wildlife or plants taken in violation of US law, foreign law or tribal law (16 U.S.C. §3372(a)(3)(A), (B)) and a ban on the sale, purchase, movement into, out of or within the US of 'any prohibited wildlife species' (16 U.S.C. §3372(a)(2)(C). This means any live species of lion, tiger, leopard, cheetah, jaguar, or cougar or any hybrid of such species.

The legislation does not create a general system of permitting and certification requirements. However, in relation to plants and plant products specifically, operators must make an 'import declaration' when importing these items (16 U.S.C. §3372(f)).³⁴

In addition to these key provisions, the Act also creates marking and false labelling offences. This means that all packaging containing any fish or wildlife must be plainly and accurately marked in accordance with the regulations (16 U.S.C. §3372(b), (d)).

5.3 Enforcement

In contrast to CITES and the EU Wildlife Trade Regulation, the US legislation does not create a permitting or certification system to enforce its requirements. This is because the law is essentially a framework to enable the enforcement of existing wildlife laws, both in the US and abroad, which set out their own requirements regarding the taking, handling, transportation and documentation of wildlife. Wherever these requirements have been violated, an offence is committed under the Lacey Act.

An exception to this are the rules in relation to plant and plant products, added in 2008, which require importers to make an 'import declaration' when importing these items. The declaration

³⁴ The text for this updated section of the Act can be found here: <https://www.law.cornell.edu/uscode/text/16/3372>

must contain information including the scientific name of the plant, a description of the value of the import, the quantity and the name of the country from which it was taken (16 U.S.C. §3372(f)).³⁵

In addition, the legislation does not create any special enforcement bodies or scientific committees. It appears that wildlife crime under the Lacey Act is enforced by a range of agencies, including the Department of Homeland Security's Customs and Border Patrol, the US Fish and Wildlife Service Office of Law Enforcement, the Animal and Plant Health Inspection Service (part of the US Department of Agriculture) and the Department of Justice. These agencies are also responsible for enforcing other US wildlife laws, including the laws that implement CITES in the US. Enforcement is carried out by officers stationed at entry and exit points such as ports and also via warehouse inspections and other investigations.³⁶

Since the Act covers offences in relation to such a wide range of specimens and products, the US authorities appear to operate a policy of identifying priority categories of crime for enforcement. Much of the information available about enforcement of the Act relates to invasive species issues, and illegal commercial fishing and logging activities, which are viewed as the biggest conservation threats. For example, the U.S. Fish and Wildlife Service Office of Law Enforcement has adopted a 2016-2020 Strategic Plan for the enforcement of wildlife laws.³⁷ It confirms that, while enforcement of CITES is 'high priority', enforcement of the Lacey Act is only 'medium priority'.³⁸ However, it is difficult to ascertain what if any the official US-wide enforcement priorities are – perhaps because there is no centralised plan. Instead, a guidance document published by US Department of Agriculture appears to indicate that each agency takes its own approach to enforcement.³⁹

Therefore, while the Lacey Act is frequently enforced and in theory protects a very broad range of plants and species on paper, in practice its application is by necessity guided by enforcement priorities. Due to the lack of a US-wide enforcement plan, these priorities will vary from State to State, or District to District, depending on what the conservation priorities in the relevant region are. For example, authorities in Arizona appear to focus on native reptile poaching activities, which are very prevalent in that state, while in Hawaii, a high priority is placed on tackling the region's problem with invasive and injurious species.⁴⁰ However, these priorities are not limited to CITES

³⁵ The text for this updated section of the Act can be found here: <https://www.law.cornell.edu/uscode/text/16/3372>

³⁶ 'Setting the story straight, The U.S. Lacey Act: Separating Myth from Reality', Environmental Investigation Agency, 2010, available here: <http://www.forestlegality.org/sites/default/files/EIA%20Lacey%20Mythbusters%20-%20English.pdf>

³⁷ U.S. Fish and Wildlife Service Office of Law Enforcement Strategic Plan 2016 – 2020, 2016, available here: <https://www.fws.gov/le/pdf/OLE-Strategic-Plan.pdf>

³⁸ Ibid.

³⁹ https://www.aphis.usda.gov/plant_health/lacey_act/downloads/Lacey-Act-Program-faq-11-23-2016.pdf

⁴⁰ In relation to Arizona, see for example, <https://www.fws.gov/news/ShowNews.cfm?ref=arizona-man-sentenced-for-violating-wildlife-laws-&ID=36200>, <http://www.hcn.org/issues/48.20/in-arizona-reptile-poaching-made-easy>; In relation to the invasive species problem in Hawaii, see for example <https://dlnr.hawaii.gov/hisc/info/>

species. In fact, some of the most impactful cases under the Lacey Act, involving the highest possible penalties, concern species that are not CITES listed.⁴¹ Within the remit of such a broad piece of legislation, it is of course practical and necessary to identify enforcement priorities - and this should not be construed as a negative. However, in the context of an EU Lacey Act, the goal of the legislation, i.e. protecting vulnerable species not currently listed by the EU Wildlife Trade Regulation, would need to be clearly stated and criteria for adopting enforcement priorities that reflect the legislation's goals would need to be developed. At the same time, the legislation would need to create sufficient flexibility for enforcement priorities to be adapted, enabling a prompt response to changes in wildlife trafficking trends, in order to avoid static policies that in practice do not improve on the drawbacks of the current 'list-based' approach taken by the EU Wildlife Trade Regulation.

5.4 Penalties and offences

The Act creates both civil (i.e. non-criminal, such as financial penalties) and criminal penalties, as well as provisions relating to forfeiture of goods. This applies to any person who engages in conduct prohibited by the legislation, including anyone who *should have known* that they were committing an offence, if they had carried out proper enquiries – this is known as the 'due care' obligation. Therefore, no intention, recklessness or even knowledge is required to commit the offence - a business or individual can face penalties even if they did not know they were dealing with an illegally harvested or taken product, and no third-party certification or verification schemes can be used to 'prove' legality under the Act.

Where a person has knowingly committed an offence involving a fish or wildlife or plants with a market value of \$350 or more, the fine may be up to \$20,000, or the person may be imprisoned for up to five years, or both. Each violation is treated as a separate offence, meaning that a person could be liable to multiple fines if several items are being trafficked. In determining the amount of the fine, the nature, circumstances, extent and gravity of the offence will be taken into account, as will the offender's degree of culpability and ability to pay. Fines will be higher for those who knew they were trading in illegally harvested materials. If, having exercised 'due care', the individual or business can show that it did not know, penalties vary based on whether the individual or company in question did everything possible to determine that the product was legal.

⁴¹ For example, U.S. v. BENGIS (South African Rock Lobster trafficking case resulting in restitution order to South Africa of over \$22 million USD, available here: <https://law.justia.com/cases/federal/appellate-courts/ca2/13-2543/13-2543-2015-04-16.html>) and U.S. v. LUMBER LIQUIDATORS (non-CITES, non-ESA lumber trafficking case resulting in over \$13 million USD penalties and restitution - more information available here: <https://www.justice.gov/opa/pr/lumber-liquidators-inc-sentenced-illegal-importation-hardwood-and-related-environmental>) and more recently, Operation Broken Glass, an ongoing Lacey Act investigation involving trafficking in American eels - see <https://bangordailynews.com/2016/10/07/news/state/operation-broken-glass-nets-7-men-for-1-9-million-in-illegal-elver-sales/?ref=relatedBox>

Anyone found guilty of trade prohibited by the Act involving a fish or wildlife or plants with a market value of less than \$350, is liable to a fine not exceeding \$10,000. Again, each offence is treated separately.

Section 16 U.S.C. §3371(e) (definition of 'person') makes these offences applicable to individuals, partnerships, corporations, trusts, or any officer, employee, agent, department, or instrumentality of the Federal Government or of any State or political subdivision of a State, or any other entity subject to the jurisdiction of the United States.

6 Why might the EU need an EU Lacey Act?

As explained in the introductory section to this report, the current EU legislation leaves a loophole, whereby species not listed in the EU Wildlife Trade Regulation that were taken and exported against the laws of their country of origin can continue to be legally imported. As part of its 'Action Plan against Wildlife Trafficking', the European Commission undertook a review of current EU legislative controls. A 'staff working document' analysing and producing evidence in support of the Action Plan was produced in 2016.⁴² While the Staff Working Document concludes that the current legislation is adequate to protect species listed by CITES, it does nonetheless make observations within the body of the document that suggest the controls could be improved if they covered a wider range of species. The European Commission's document acknowledges this problem, stating that one of the barriers to tackling this issue is that 'the data on many lesser-known species are limited'.⁴³ This is because monitoring of imports and movements of non-CITES species is not currently required by EU laws, unless they have been specifically added to the Regulation's annexes.

The Staff Working Document acknowledges that trafficking in non-CITES as well as CITES species is also a significant concern to the EU, stating that 'Trafficking, both in CITES-listed plants and animals and in other natural resources, is of major concern to the EU and the international community'⁴⁴. The Staff Working Document goes on to state that 'Transit routes change according to the relative stringency of checks at major ports and airports, **new species appear in the illegal wildlife trade**, and new poaching areas are targeted'⁴⁵ (our emphasis).

In an explicit acknowledgment of the problem of failure to address the problem on non-CITES species, the Commission's Staff Working Document states at page 24⁴⁶ that 'Demand for rare live birds and reptiles in the EU seems to play a particularly significant role in driving illegal imports. Their high prices generate significant profits and attract criminal networks. The illegal trade in

⁴² Commission Staff Working Document, 'Analysis and Evidence in support of the EU Action Plan against Wildlife Trafficking', Available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0038&from=en>

⁴³ Ibid., p.5.

⁴⁴ Ibid., p.6.

⁴⁵ Ibid., p.7.

⁴⁶ Ibid., p.24.

exotic pets, especially in live reptiles, has received increased attention, with the EU appearing as an important consumer region and thus driver of this trade. *This includes species which, though not covered by the CITES Convention, are protected nationally. Exporting them thus breaks the law of their country of origin. But in the absence of an appropriate legal basis through a CITES listing, EU Member States are not always able to seize these species once they are on the EU market.*⁴⁷

Given that the Commission has acknowledged this problem, it would seem logical that the same approach should be taken in relation to a broader range of wildlife and wildlife products.

7 Impact of EU Treaties and trade agreements on a new EU Lacey Act

7.1 Treaties

New laws implemented at EU level must be consistent with EU Treaty principles. In particular, the Treaty on European Union (TEU)⁴⁸ creates two key principles that must be taken into account when implementing new laws - the principle of subsidiarity, and the principle of proportionality.

7.1.1 Subsidiarity and proportionality

Article 5(1) of the TEU provides that the 'use of Union competences are governed by subsidiarity and proportionality'. More detailed information about the application of the subsidiarity and proportionality principles is set out in a protocol to the Treaty on the Functioning of the European Union (TFEU).⁴⁹

These principles are relevant in areas where the EU does not have exclusive competence, such as the environment.⁵⁰ They exist to safeguard the ability of Member States to make their own decisions, limiting the need for intervention by the EU to circumstances when the objectives of an action cannot be sufficiently achieved at Member State level, but can be better achieved by taking action at EU level, 'by reason of the scale and effects of the proposed action' (Article 5(3) of the TEU). The idea is also that powers should be exercised as close to the citizen as possible, in accordance with the proximity principle (Article 10(3) of the TEU).

The Protocol on subsidiarity and proportionality provides that there is an obligation to 'consult widely' before proposing new legislation.⁵¹ The protocol explains that draft legislation must be justified with regard to the principles of subsidiarity and proportionality, and must consider the following things: the proposal's financial impact; its implications for the rules to be put in place by Member States; the reasons for concluding that a Union objective can be better achieved at

⁴⁷ Ibid., p.24.

⁴⁸ Available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>

⁴⁹ Available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

⁵⁰ Article 4 TFEU confirms this.

⁵¹ Available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02>

Union level (substantiated by qualitative and, wherever possible, quantitative indicators); and the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

Following this step, any national Parliament or chamber of any national Parliament may submit to the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. Such opinions must be taken into account by the European Parliament, the Council and the Commission and may lead to the need for the proposal to be reviewed, after which it may be maintained, amended or withdrawn.

There is no question that tackling the illegal trafficking of wildlife is a cross-border challenge that is most effectively addressed at EU, rather than Member State, level. Therefore, in this sense, the principles of subsidiarity and proportionality are satisfied. There is also clear evidence that threatened and vulnerable species which are not currently protected by CITES are being traded into and within the EU. This evidence will need to be clearly presented in order to demonstrate that the creation of new legislation, when considering the financial and administrative burdens that this will impose, is justified.

7.2 EU Trade Policy

When negotiating trade agreements, the European Commission routinely seeks to include substantial environmental provisions of relevance in the trade context.⁵² These systematically include:

- Commitments to implementing multilateral environmental agreements (MEAs), such as CITES, effectively in domestic law and practice;
- Commitments to ensuring high levels of environmental protection and the effective enforcement of domestic laws in this area; and
- Specific provisions encouraging trade practices and schemes that support and promote sustainable development goals, such as the sustainable management and use of natural resources.⁵³

For example, such provisions are included in the EU's free-trade agreements (FTAs) with South Korea, Peru/Colombia, Central America, Singapore, Canada, Ukraine, Georgia and Moldova.

Administrative burdens are also created as a result of entering into these agreements, with Committees being established in order to monitor implementation of environmental provisions. In addition, a system of financial trade incentives has also been established by the EU to promote effective implementation of CITES and other conventions relating to human and labour rights,

⁵² European Commission website, 'Sustainable development', accessible here: http://ec.europa.eu/trade/policy/policy-making/sustainable-development/index_en.htm

⁵³ Ibid.

environmental protection and good governance.⁵⁴ Participating countries are those with low or lower-middle incomes, which are able to enjoy lower tariffs for their exports of certain products to the EU if they have effectively ratified and implemented certain Conventions, including CITES. Monitoring of whether these conditions have been satisfied is required, as well as reporting to the Council and the European Parliament.

It remains to be seen whether a new EU Lacey Act might require additions or changes to these agreements and create additional administrative burdens on trade partners. However, the evidence shows that this new legislation is urgently needed to tackle the loopholes in current EU wildlife legislation.

8 Would a new EU Lacey Act duplicate aspects of existing EU law?

8.1 Appendix III of CITES

As referred to earlier in this report, Appendix III of CITES enables Convention Parties to unilaterally list species to protect them in that country and gain help from other countries with controlling the trade in that species. As a result of listing, all specimens traded from a Party that listed the species must be accompanied by an export permit; while a certificate of origin must accompany specimens being exported from other 'range States' where the species also occurs.

The similarities between Appendix III and the US Lacey Act are striking. Indeed, in a newsletter issued in 2003 by the CITES Secretariat,⁵⁵ it is stated that Appendix III to the Convention 'creates the possibility to use, when appropriate, measures similar to the United States of America's Lacey Act'.⁵⁶ In common with the Lacey Act, it is for the country of origin to decide unilaterally the circumstances in which the Appendix III-listed species may be traded. This means that decisions about this are not subject to the scientific scrutiny of an independent committee or body and therefore there is no guarantee that trade in the relevant species will be maintained at sustainable levels. This is in contrast with decisions about whether to list species under CITES, which are discussed by the CITES Scientific Committee. However, the key difference between the two models is that the Lacey Act automatically applies to all species where the country of origin has laws restricting their trade, whereas Appendix III relies on the country of origin to proactively seek help from other countries with controlling the trade by listing a single or few species in the Appendix.

Another key difference between Appendix III and the Lacey Act is the use of a list/permitting system, versus an open-ended prohibition on wildlife that has been illegally taken in its country of origin, enforced via a due diligence/declarations system. The all-encompassing approach may seem advantageous, but a list-based approach also has advantages. One of the challenges inherent to the Lacey Act model is knowing what restrictions exist for which species and whether

⁵⁴ European Commission website, 'GSP+', accessible here: <http://ec.europa.eu/trade/import-and-export-rules/import-into-eu/gsp-rules/gsp+/>

⁵⁵ CITES World, Official newsletter of the Parties, Issue 11, July 2003, CITES Secretariat, available here: <https://cites.org/sites/default/files/eng/news/world/11.pdf>

⁵⁶ Ibid., p. 1.

regulations have been transgressed in a certain case. Appendix III, on the other hand, provides certainty within the framework of a list that can in theory be quickly and easily adapted. This helps Parties determine more easily when trade is legal and in accordance with CITES provisions.

However, there are issues with the Appendix III model. According to the CITES Secretariat, the Appendix has been little used and is poorly understood.⁵⁷ In 2003, the list contained only 300 species, equivalent to one per cent of all CITES listings, listed by only 21 parties.⁵⁸ Since 2003, the number of species protected by the Appendix has declined even further, with it now containing only around 160 species.⁵⁹ There has been confusion about requirements (e.g. certificate of origin requirements and who they should be issued by), problems with identifying goods, a lack of human and financial resources to implement the listing effectively within Management Authorities and at border points, and information management and reporting requirements have not been met.⁶⁰

In addition, offences and sanctions in relation to breach of Appendix III requirements, which are established and enforced by individual Convention parties, are not as stringent as those for breaching Appendix I or II requirements. For example, in the UK, there is a range of offences relating to falsifying or misusing permits, certificates or import notifications - each with a maximum liability of 2 years' imprisonment (when tried in the higher courts) and a potentially unlimited fine. However, in reality, these offences are more likely to be tried and sentenced in the lower courts, where lower fines would ordinarily be imposed and the maximum custodial sentence is only three months.⁶¹ In relation to Annex A or B (roughly equivalent to Appendix I and II of CITES), specific additional offences are created, with higher maximum custodial sentences. Crimes relating to Annex A species, and in particular multiple offences involving Annex A species, are also more likely to be tried in the higher courts, resulting in overall higher potential financial penalties and longer potential custodial sentences.⁶² This compares unfavourably with the US Lacey Act, where all offences are treated the same way, with penalties based on the market value of the traded item concerned. Lack of awareness has also been pinpointed as a major stumbling block to the effective implementation of Appendix III, with the CITES Secretariat newsletter branding it an 'interesting, if obscure, conservation mechanism'.⁶³

Also, while in theory any Convention Party may unilaterally submit an Appendix III listing to the CITES Secretariat, guidance agreed by the Convention Parties⁶⁴ recommends otherwise. The guidance suggests that wider consultation with other 'range States' and the Animals and Plants Committee should first take place, and that submissions should be timed with changes agreed to

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ The text of Appendix III is available here: <https://www.cites.org/eng/app/appendices.php>

⁶⁰ CITES World, Official newsletter of the Parties, Issue 11, July 2003, CITES Secretariat, p.7, available here: <https://cites.org/sites/default/files/eng/news/world/11.pdf>

⁶¹ See UK Crown Prosecution Service Website, section entitled 'International Trade in Endangered Species: CITES and COTES - Defences' for information about sentencing wildlife crimes in UK courts - accessible here: http://www.cps.gov.uk/legal/v_to_z/wildlife_offences/

⁶² Ibid.

⁶³ Ibid., p.1.

⁶⁴ Resolution Conf. 9.25 (Rev. CoP 16), available here: <http://dev.cites.org/eng/res/09/09-25R16.php>

Appendices I and II after Conferences of the Parties. This is so that changes to national legislation can all be made at the same time. In practice therefore, the process is less timely and flexible than it might first appear.

8.2 Annexes A and B of the EU Wildlife Trade Regulation

Article 3 of the EU Wildlife Trade Regulation makes it clear that Annexes A and B are designed not only to protect CITES listed species, but also any species where trade in them could threaten survival or population levels. Changes are made on the recommendation of the EU Scientific Review Group.

The Commission could therefore argue that provision for the protection of non-CITES species is already made by Annexes A and B. However, we have seen how, in practice, Annexes A and B are updated relatively infrequently, and additions of non-CITES species are rarely and seemingly reluctantly actually made. The mechanism for updating Annexes A and B is therefore not sufficiently flexible and not being used adequately to enable conservation needs to be met at all times.

9 Conclusions

There clearly is a gap in the current EU legal framework for tackling the illegal trade in wildlife. Species that are not protected by CITES do not (aside from a handful of rare exceptions) come within the scope of the EU Wildlife Trade Regulation. This gap would be most effectively addressed through the implementation of new legislation.

However, there is a need to ensure that new legislation does not overlap with current EU legislation, creating additional administrative burdens and confusion. For example, a situation could theoretically arise in which a valid CITES permit or certificate has been issued, but the trade was in fact in breach of the EU Lacey Act, because a new law had recently been introduced by a third-party country restricting the circumstances in which the particular specimen could be traded. The two laws would then be inconsistent, creating confusion and legal uncertainty.

In addition, new legislation should not require the EU Wildlife Trade Regulation, which has been found to be effective in relation to the species it protects, be opened up for revision. The EU Wildlife Trade Regulation creates a carefully considered regime of import and export requirements, which are advised on by a scientific committee, on the basis of the conservation threat to a particular species. The aim would be for new legislation to sit alongside, and complement, this system.

In light of the above, the most effective way of addressing this problem would therefore be to introduce a new 'EU Lacey Act' that protects all wildlife and plants, but that carves out species already regulated by the EU Wildlife Trade Regulation. Indeed, this is the way that the EU Timber Regulation operates - Article 3 of that Regulation, entitled 'Status of timber and timber products covered by FLEGT and CITES', provides that 'Timber of species listed in Annex A, B or C to Regulation (EC) No 338/97 [the EU Wildlife Trade Regulation] and which complies with that Regulation and its implementing provisions shall be considered to have been legally harvested for the purposes of this Regulation.' Consideration may also need to be given to the interaction

of an EU Lacey Act with other existing regimes, such as EU legislation relating to invasive species – and whether similar carve-outs might be needed for these.

The EU Wildlife Regulation already places administrative requirements on Member States focused on controlling exports/imports at the point of entry/exit. The implementation of additional controls and systems to enforce the requirements of an all-encompassing EU Lacey Act may not be a realistic goal, when considering the reality of European Commission resources and funding. This is particularly the case in light of the principles of subsidiarity and proportionality, which call for new legislation to justify additional financial and administrative burdens. However, with the allocation of some additional funding, it may be possible to take advantage of some of the existing controls in place in relation to the EU Wildlife Regulation and use these to enforce EU Lacey Act provisions.

An alternative would be for a new EU Lacey Act to follow the enforcement model offered by the EU Timber Regulation. This regulation works by targeting EU operators placing timber on the EU market for the first time, creating an obligation on them to exercise due diligence (i.e. undertake risk assessment to evaluate the risk that their products may be illegal and then take mitigating measures if there is a risk) to ensure that illegally harvested products are not in their supply chain and are not ultimately placed on the EU market. It also creates obligations on traders to track the supply of timber to their suppliers and customers. To enforce the Regulation, the competent authorities carry out checks on operators according to a risk-based plan, to ensure that they have followed proper due diligence processes. This could be a credible model for a new EU Lacey Act, which would monitor the placing on the market of wildlife not already regulated by the EU Wildlife Trade Regulation or the EU Timber Regulation.

As with the US Lacey Act, a new EU Lacey Act with such an incredibly broad scope would likely require enforcement officers to plan and stipulate specific enforcement priorities, based on the most up-to-date evidence about specific non-CITES species that are most at risk. Given the need to identify certain species as enforcement priorities, this could raise the question of the advantages of this model over a list-based model that lists species that are nationally protected in their country of origin. However, the clear advantage of the more flexible approach offered by the Lacey Act model is that enforcement officers should in theory be able to monitor and make decisions based on current wildlife trade trends. This is more difficult to do with a list-based model, where the process to make changes or additions to that list may involve burdensome administrative procedures that take time to complete. With careful thought and planning, including the establishment of adequate and detailed enforcement guidance and criteria issued by the authorities responsible for implementation of the legislation, it should be possible for officers to make effective enforcement decisions designed to improve the conservation status of non-CITES species most at risk from the trade.

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