

ADVICE ON LEGAL ISSUES AFFECTING THE FSC ONLINE CLAIMS PLATFORM

Executive Summary

On behalf of itself and the Forest Stewardship Council (FSC), Historic Futures has asked for our advice on the potential legal issues and risks affecting the FSC's Online Claims Platform (OCP), which the FSC is developing in partnership with Historic Futures. We have looked at the areas of confidentiality, data protection, security and competition law, which we consider to be the primary legal risk areas that could affect the OCP.

In summary, our view is that the introduction of the OCP does not present any significant legal risks for the FSC or its users, nor does it materially impact upon the legal issues affecting the OCP as compared with current methods used by the FSC to verify the Chain of Custody (CoC) in relation to FSC-certified products. Our detailed advice follows below. It should be noted that our advice is not directed at, nor should it be relied upon by, members of the FSC.

Background

We understand that use of the FSC logo on products manufactured from wood indicates that the products are certified under the FSC system, meaning that the wood has been responsibly sourced from well managed forests.

The OCP is intended to supplement the CoC certification process throughout the supply chain for FSC certified products, i.e. from forest to end retailer. A key issue with the current CoC process is that purchasers are heavily reliant on their suppliers providing correct information. There is therefore a need to provide a mechanism by which this information can be confirmed, in order to strengthen the integrity of FSC certification and of the FSC logo, as a globally-recognised brand.

The OCP is essentially an online or "cloud" service which digitally connects FSC-certified suppliers and customers, enabling claims for FSC products to be confirmed by both parties to a transaction.

It is proposed that all current FSC certificate holders (CH) will need to register for a user account with the OCP for their certificate. A user account is identified by an email address and has an associated password. A certificate can have one or many user accounts associated with it. The first user account for a certificate must either belong to (one of) the publicly listed FSC contact (found at info.fsc.org) or be authorised by them.

Once CH's have created an OCP user account, they will be able to search for their existing suppliers using supplier FSC certificate IDs (which can be found on invoices and shipping documents received from the relevant suppliers) and much like a social network, send them a request to "connect" via the OCP. The OCP will send a connection request email to the selected registered OCP user for the chosen certificate. If the certificate does not yet have a registered user associated with it, the connection request will remain pending until such registration, and the user will then be notified within the OCP application at log-in.

**Privileged and confidential
legal advice**

Once requests to connect have been accepted, the OCP can be used to record FSC certification claims made by the connected supplier(s).

In order to record a claim, the user is required to provide the following information: transaction date and ID, supplier FSC certificate ID, type of claim and quantity (including units) purchased. This information must be carried on the supplier's invoice, according to the FSC CoC standard, and also forms part of the annual 3rd party audit. No financial or other commercially sensitive information is required. In certain circumstances, the species or country of harvest of the wood may be required, for example, where the transaction relates to a forest management certificate, or if the supplier is selling wood from its controlled wood risk assessment.

Once the claim has been recorded, the supplier will be notified by the OCP and can check that the details are correct before digitally confirming the claim. This confirmation provides assurance to both parties that the FSC claim is accurate. In the event that an error is identified with an FSC claim, both parties will be notified.

The overall objective of the OCP is to provide a means of confirming the accuracy of FSC claims made on transactions between CH's to protect and strengthen the global network of FSC. Users will have the ability to highlight and remedy any discrepancies, minimising the risk of inaccurate or fraudulent FSC claims.

Key features and benefits:

- The OCP will allow users to check overviews of all of their FSC transactions, including volume summaries and the certification status of their suppliers, assisting with annual audit processes.
- Users will only be able to view information relating to transactions to which they have been a party, i.e. as the purchaser or the supplier.
- Neither users nor the FSC itself will be able to view CoC information.
- In future, the OCP may allow users to view country of harvest and species information for selected claims without revealing any other details about the upstream supply-chain associated with that claim.
- The OCP will have strong security measures in place to protect the confidentiality and restricted use of information that is entered by users
- The OCP will be available online 24 hours a day, 7 days a week.
- The OCP may represent a step towards a paperless CoC system.

The OCP will initially be available in beta mode to enable testing and feedback. Users will have the option of setting up either a demo or a live account during this initial period.

Legal Issues

Confidentiality

Users of the OCP may have concerns over the confidentiality of information that they enter in connection with FSC claims.

**Privileged and confidential
legal advice**

The key point for these users to note is that each user of the OCP will only have access to CoC information relating to transactions to which they are a party, i.e. they are the supplier or the purchaser. This is information that these parties will already have access to in any event, i.e. they have entered into the transaction and will have documented records of the transaction, including purchase orders, invoices, payment records etc. The information to be entered on the OCP is in fact only a subset of this information – importantly price and payment information will not be included.

The only minor exception to this is that information entered in relation to country of harvest and tree species may, in future, be included in reports made available to subsequent purchasers along the supply-chain. However, this report will only include country of harvest and species and will not provide any information about the upstream supply-chain.

Another potential confidentiality concern relates to the “search” function which enables users to search for details of Certificate Holders. The results returned by these searches will list matching results and selecting from these results will provide details of registered users to receive connection requests. This search is only available to registered, logged-in users of the OCP.

In view of the above, users of the OCP can be confident that this new system will not impact upon the confidentiality of their commercially sensitive information.

Data Protection

Within the UK and the EU, data protection legislation governs the “processing” of “personal data”. Processing is any activity that takes place in connection with personal data, such as collecting, using, storing, disclosing, deleting etc. this data. Personal data is any data which in its own right or in combination with other data held by an organisation, identifies an individual person. Examples of personal data include names, addresses, dates of birth and medical records.

The extent to which the OCP “processes” personal data is minimal. The OCP records business to business transactions between Certificate Holders. Details stored with the claim include an identifier for the user that recorded it.

The OCP requires users to provide a username and associated email address for identification purposes. In some cases these will be the same as those that appear at info.fsc.org. However, there is no requirement for users to provide personal data, provided that they are using an email address that they have access to (for example this could be a non-personal email address such as purchasing.manager@fsc_certificateholder.com)

The instructive videos on the OCP website clearly demonstrate to users how their email addresses (which potentially contain personal information) will be used by the OCP in the process of connecting with existing suppliers and purchasers. Further, the OCP does not add to or change the current purpose for which the FSC collects these email addresses, i.e. to enable the CoC certification process throughout the supply chain.

On the basis that the FSC is not collecting any additional personal data and is not using currently held personal data for any new or different purposes, we consider that:

Privileged and confidential legal advice

- the OCP does not present any additional risks in respect of data protection compliance as compared with the current process for CoC certification; and
- the introduction of the OCP has no material effect on the FSC's current position in respect of data protection compliance.

It should also be noted that OCP users will be informed of the FSC's data processing activities and privacy obligations in the terms and conditions of use for the OCP, which will be made available to users prior to signing up for an OCP account. In signing up the users are therefore signifying their consent to any processing of their personal data in accordance with these terms and conditions.

As noted above, if users are particularly concerned about use of their personal data, they could create a user account with a contact email address which does not identify an individual.

Security

A crucial component for any organisation in ensuring confidentiality and data protection compliance (as referred to above) with regard to an online service is ensuring an appropriate level of security.

Security is also a concern for users of "cloud" based services. Users may have doubts over where their data is likely to be held and who may have access to it.

The OCP is to be hosted in Ireland on Amazon's Web Service, which provides a high level of internet security. The underlying software within the OCP will be periodically security-tested by an expert independent third party. Further, we understand that Historic Futures, as the developers of the OCP, operates a comprehensive Information Security Management System (ISMS), designed in accordance with the ISO27001 security standard.

These protections (along with our comments on confidentiality and data protection as set out above) should provide users with sufficient assurance that the information they enter into the OCP is securely protected. Of course no online security system is foolproof, but users should be satisfied that the level of security offered is more than sufficient, taking account of the predominantly non-sensitive nature of the information that they will be providing.

Competition Law

Users of the OCP may be aware that the exchange of information between independent parties in a sector can, under certain circumstances, give rise to competition law concerns. In principle, this is the case even if that exchange takes place indirectly through third parties such as trade associations or certification bodies and via online platforms. Broadly, the potential concerns are that the establishment of the OCP may lead to either: first, some form of collusion or softening of competition between the FSC-certified suppliers and customers; and/or second, that third parties who cannot participate in the scheme are prevented from competing effectively with those who can. Neither of these concerns arises in relation to the OCP.

**Privileged and confidential
legal advice**

First, any collusion or softening of competition only generally arises if the characteristics of the market make it likely, and/or if the information exchanged is of a commercially sensitive nature (*e.g.* relating to future pricing intentions). In this case, the OCP is not likely to lead to such risks materialising for a number of reasons.

- The FSC has certified more than 28,000 different organisations – this suggests that there is a healthy level of competition at each level of the supply chain and that the conditions of competition do not lend themselves to a collusive outcome.
- No financial or commercially sensitive information will be exchanged using the OCP. Users will provide only the same information that would be provided for an FSC audit – importantly, information on pricing will not be entered on to the OCP. (The FSC itself will not have access to the data in the FSC, further reducing any risk of inadvertent exchange of information.)
- Any information that a user can access will be historic – it will not relate to future transactions or conduct.
- In any case, each user of the OCP will only have access to CoC information relating to transactions to which it is a party, *i.e.* information to which it already has access (with the exception of the country of origin information, which is unlikely to be commercially sensitive).
- The strong safeguards that will be put in place to protect confidentiality and security as outlined above, should also reduce the risk that any problematic information exchange could take place via the OCP.

Secondly, the OCP will be open to all FSC users following a simple registration and without any extra fee. The OCP will also be available in multiple languages. There should therefore be no impact on the ability of FSC members to compete effectively due to the introduction of the OCP itself. The position of non-members of the FSC will not be affected.

In view of the above, particularly the narrow scope of the information to be exchanged, the OCP system does not give rise to any material competition law risk.

**Bristows
17th March 2014**