



## **The Consequences of Timber Legality Legislation for FSC Certificate Holders Producing for Customers in the USA, European Union, Switzerland and/or Australia**

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The USA, the European Union<sup>1</sup> and Australia have implemented legislation to prevent imports of illegally harvested timber, as well as wood-based products. The laws also cover domestic harvesting, but that is not relevant for this briefing. Switzerland has a law with a more modest aim: it obliges importers to declare origin and species with each shipment.

These laws have impacts on supply chains in the rest of the world, including those for FSC certified products. This briefing clarifies what can be expected from FSC certificate holders outside the USA, the EU, Switzerland and Australia, when they are part of a supply chain which ends in one of these countries.

The legislation applies to companies active in the countries where it is in place. These companies have to apply “due diligence” or “due care” to avoid involvement with illegal logging. To achieve this, the companies may need the assistance of their suppliers, other companies further up the supply chain, and even forest management units.

FSC has adapted its standards for chain of custody, controlled wood and audits on forest management units to facilitate compliance with these laws and cooperation within the supply chain. These adaptations are also relevant for companies from outside the USA, EU, Australia and Switzerland, when, in particular, they are part of a supply chain which ends in one of these countries.

### **FSC’s attitude to legislation against illegal timber harvesting**

FSC strongly supports governmental action to ban the trade of illegally harvested timber. Illegal harvesting can lead to deforestation, forest degradation, unacceptable labor conditions, violation of local and indigenous rights, as well as being unfair competition for foresters working within the law. It is often strongly linked to corruption and loss of tax revenues. In 2012, Interpol and the United Nations Environment Programme (UNEP) estimated the economic value of global illegal logging, including processing, to be between US\$ 30 and US\$ 100 billion, or 10–30 per cent of global wood trade. In the same year, the Australian government quoted estimates of the global annual economic cost of illegal logging being approximately US\$ 46 billion, whilst global social and environmental costs add up to around US\$ 60.5 billion.

The presence of illegal timber on the market also directly impacts FSC’s mission. It exerts negative pressure on the prices for timber and forest products – between 7 and 16 per cent –

<sup>1</sup> , The area covered by the EU Timber Regulation includes Iceland, Liechtenstein and Norway in addition to the 28 EU Member States



undermining the economic viability of investments required for responsible forest management.

Legality of harvesting is the first requirement for any FSC forest management certification and of the FSC controlled wood standards. However, national legislation in timber producing countries is usually not enough to ensure the sustainable harvesting FSC is promoting. That is why legality, while necessary, can only be seen as a first step towards sustainable forest management.

### Specific features of the current timber legality laws

The **US Lacey Act**<sup>2</sup>, originally planned to protect US wildlife, was amended in 2008 to ban the trade of wood and wood-based products originating from illegally harvested timber. 'Trade' in this case includes import, export, transport, sale, receipt, acquisition and purchase. The scope of 'wood and wood-based products' covers anything for which wood has been used. Any company inside the USA caught with illegal timber or wood-based products can be penalized. When importing into the USA, the importer has to submit a declaration with each shipment. However, this obligation to declare excludes large product groups, such as pulp and paper, and most types of furniture.

There is no legal obligation for companies to exercise due care to minimize the risk of trading timber that was originally illegally harvested, but, it is generally accepted, that having a due care policy will be to a company's advantage if an illegal wood product has been identified. The Act, however, does not define due care, leaving interpretation in the hands of the companies and, in the end, the judiciary.

It is important to note that the Lacey Act not only looks at harvesting, but also at the legality of trade related to laws specific for wood and wood products. This relates, for example, to export bans of timber.

The **EU Timber Regulation**<sup>3</sup> entered into force on 3 March 2013. It prohibits placing illegally harvested timber and a range of wood-based products on the EU market. It has a slightly different scope from the US Lacey Act, including pulp, paper and most types of furniture.

It requires companies importing timber or timber-based products to apply a due diligence system, and prescribes the essential components of such a system:

- Access to information, including on timber origin and species, the laws of the harvesting country, and evidence the laws were respected.
- A risk assessment carried out on basis of this information, to evaluate whether the information is reliable, and whether a 'negligible risk' of illegal harvesting can be assumed.

<sup>2</sup> <https://ic.fsc.org/file-download.fsc-brief-on-the-lacey-act.a-1708.pdf>

<sup>3</sup> <https://ic.fsc.org/file-download.fsc-qa-on-eu-timber-regulation-english.a-9.pdf>



- If the risk assessment does not lead to the conclusion that the risk of illegal harvesting involved is negligible, the company has to undertake risk mitigation. This can consist of collecting more information, assessing again, requiring certified materials, or changing supplier.

If a company is not able or willing to develop a due diligence system itself, it can pay for the services of an officially recognized monitoring organization, although the company itself remains responsible for the compliance.

Importing declarations are not necessary and the due diligence requirement is not obligatory for each shipment, but on a regular basis for each supplier.

Wood and wood-based products imported with a valid CITES license are regarded as legal automatically, as well as (future) imports with a FLEGT license.

The **Australian Illegal Logging Prohibition Act**<sup>4</sup> entered into force on 30 November 2012. Like the others, it covers both domestic and imported timber and certain imported wood-based products. It bans the import and use of illegally-harvested timber and wood-based products and requires, from 30 November 2014, that importing companies apply due diligence, along the lines of the EU Timber Regulation. But, in common with the Lacey Act, also a declaration is required for every shipment. The Act defines a specific scope of products, more complete on furniture and less on paper than the EUTR, and it excludes fuelwood.

The Swiss law of 2010 does not require legality of timber, but it requires companies that put timber and/or wood-based products on the market to provide the commercial (and, on request, scientific) names and the countries of harvest of the timber being traded. Discussions have started in Switzerland to adapt the law to make it consistent with the EU Timber Regulation.

*For more information on these laws, look at the FSC webpages on timber legality<sup>5</sup>.*

### **Consequences for FSC certificate holders outside these countries**

The EU and US legislation does not recognize voluntary certification schemes as automatically compliant. The Australian legislator recognizes FSC (and PEFC) as “relevant tools in complying with the Act” and in June 2016 a “notice” aimed to clarify the situation, but the situation is still ambivalent (see separate briefing about the Australian act). So far it seems that a similar information obligation as that under the EU Timber Regulation applies to FSC certified materials.

This means that in the EU and the USA, importers of FSC certified products and controlled wood materials need to apply due care or due diligence. In Australia, they need to at least collect information about the origin and species of timber, and the supply chain.

The EU legislation however, allows for the use of certification schemes as part of a due diligence system, provided the scheme complies with some specific requirements. From 2012,

<sup>4</sup> <https://ic.fsc.org/file-download.fsc-and-the-australian-illegal-logging-prohibition-act-2012.a-19.pdf>

<sup>5</sup> <https://ic.fsc.org/en/for-business/fsc-and-timber-regulation> and sub-pages



FSC has taken several initiatives to ensure that in the EU, but also in the US, Australia and Switzerland, FSC certificate holders can rely on certification as a means to comply with the legal requirements. This adaptation process has resulted in a number of Advice Notes that amended the relevant FSC standards (see below).

With these tools, importers of FSC certified materials and products in the EU, USA, Australia and Switzerland should have an easier task to comply with the timber legality laws than those importing non-certified materials and products. This means they will be less inclined to stop importing, even when the source of the timber is in a country regarded as high risk.

However, FSC certification can only become a real facilitator if certificate holders outside these countries assist their trading partners, when requested, in collecting the information they need so that they will be able to show compliance with the legislation.

Enforcement of the Lacey Act in the USA and the Australian Act has so far been weak, so importers have not been systematically challenged. Many may rely on the FSC certificate as evidence of legality, and will continue to do so. However, in the EU, enforcement authorities are becoming more and more active, and several do not accept FSC certification as sufficient evidence of compliance. They require an importing company to have not just certification, but specific information on where the timber originates from, what species have been used and, in the case of high risk countries, additional evidence of legality.

### **What is specifically required from FSC certificate holders?**

In 2013 and 2014, FSC adopted a set of specific advice notes for certificate holders to ensure that our scheme complies with the requirements of the abovementioned legality legislation as complete as possible (in particular with regards to the Lacey Act uncertainty cannot be avoided, given the lack of indication in that Act on what is expected in terms of “due care”). In the meantime most of these advice notes have been integrated in new/revised FSC Standards, but in all cases the advice notes are still relevant where these new standards have not been applied yet.

The advice notes focussed in particular on four issues:

1. **Clarification of the scope of legal harvesting:** For forest management and Controlled Wood FSC adopted a list of relevant legislation which was made obligatory for Certification Bodies to apply when auditing certified forests and forests with a controlled wood claim, as well as for CoC companies who used the Controlled Wood Standard to assess non-certified/non-recycled material before introduction in an FSC supply chain. The list was presented in three advice notes:
  - a. **ADVICE-20-007-17:** for FSC certified forest. The advice note addresses in particular Certification Bodies. However, the FSC International Generic Indicators (FSC-STD-60-004 V1, 2015), which is the tool to agree on new FSC National Forest Stewardship Standards on the basis of FSC’s Principles and Criteria Version 5 (2012), include this list, so in the future all FSC National Standards will have a sufficiently broad and precise legality scope.



- b. ADVICE 30-010-01 addressing for forest managers producing controlled wood. This remains valid as before.
- c. ADVICE 40-005-19 for users of the FSC Controlled Wood Standard. In the meantime this list has been integrated in the new FSC Controlled Wood Standard (FSC-STD-40-005 V3-0, 2015) and has become part of the requirements for FSC Risk National Assessments.

**2. Compliance with trade and customs laws:**

ADVICE-40-004-11 requires from exporting companies to take measures to ensure they comply with relevant trade and customs laws. In an improved wording this has now been transferred into the new FSC CoC Standard (FSC-STD-40-004 V3, 2016)

**3. Information about origin and species**

ADVICE-40-004-10 introduced the obligation for FSC chain of custody certificate holders, at any point, in any supply chain, to provide information, on request, to their customers about the country, or countries, where the timber used for FSC certified products, or identified as controlled wood, was harvested; customers can even request information about specific forest management units, or which species have been used. If the certificate holder does not have that information they are obliged to go to their own supplier(s) to find it. This advice note has now been integrated into the new FSC Chain of Custody Standard (FSC-STD-40-004 V3, 2016).

**4. Dealing with recycled inputs:** chain of custody certificate holder exporting FSC certified products that contain pre-consumer reclaimed wood material to companies based in the EU, Australia or the USA have to either inform their customers about the presence of pre-consumer reclaimed wood material in the product before its delivery, and commit to support its customers in applying their due diligence system, or ensure that pre-consumer reclaimed wood (except paper scraps) used in the manufacturing of FSC certified products is FSC controlled wood. (ADVICE-40-004-12)<sup>6</sup>. Also this advice note has been integrated into the new FSC Chain of Custody Standard which was adopted in November 2016 (FSC-STD-40-004 V3)

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<sup>6</sup> see note 7