

The cannabis market: helping investors navigate the UK regulatory regime

In 2018, the global legal cannabis market was estimated to be worth USD12 billion.¹ The market appears set for further significant growth, with some estimating its value to be over USD166 billion by 2025.² This is fuelled by a growing number of countries liberalising their cannabis drug laws.

Since 1 November 2018, the UK has joined the ranks of over 30 countries legalising medicinal cannabis. Two countries, Uruguay and, most recently, Canada, also permit widespread recreational cannabis use. Other countries could soon follow suit, with Luxembourg and Mexico intending to legalise recreational cannabis in the near future, and the New Zealand government's commitment to a 2020 binding referendum on the issue. Various US states and Washington DC have also legalised cannabis for recreational use, although it remains illegal at the federal level.

These developments have generated significant interest and investment from major players in other consumer product sectors, such as tobacco and foodstuffs. Financial investors are similarly considering opportunities both within the UK and overseas.

This article discusses the current regulatory regime in the UK regarding legalised cannabis, and assesses the opportunities and risks for UK investors seeking to enter legal cannabis markets overseas.

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¹ Market Research Blog (2019), Euromonitor International: <https://blog.euromonitor.com/global-legal-cannabis-market-to-reach-us166-billion-by-2025/> (Accessed 25 May 2019).

² Ibid.

The UK position

After high-profile public campaigns involving children in the UK with severe epilepsy stressed the need for reform, the Home Secretary announced in June 2018 a two-part review of the medicinal benefits of cannabis. At that time, cannabis products were controlled drugs under the Misuse of Drugs Act 1971 (**MDA**) and listed in Schedule 1 to the Misuse of Drugs Regulations 2001 (**2001 Regulations**).³ They were subject to stringent regulation, with supply only being permitted under licence or other authority issued by the Home Office.⁴

The first part of the review, conducted by the Chief Medical Officer for England and Chief Medical Advisor to the UK Government, found that there was conclusive evidence of the therapeutic value of cannabis products for certain medical conditions. On this basis, the review recommended that cannabis-based medicinal products be removed from Schedule 1 under the 2001 Regulations.⁵

In light of this recommendation, the Government asked the Advisory Council on the Misuse of Drugs (**ACMD**) to provide short-term advice. Amongst other things, the ACMD recommended that cannabis-derived medicinal products “of the appropriate standard” be moved from Schedule 1 to Schedule 2 of the 2001 Regulations,⁶ thus making them more accessible. The ACMD is expected to provide further advice in 2020, which will (amongst other things) assess the impact of the rescheduling of cannabis-based products for medicinal use and consider whether any further legislative amendments are required.

Accepting these recommendations, the Government introduced the Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018⁷ to amend the 2001 Regulations to reschedule “cannabis-based products for medicinal use in humans” as Schedule 2 drugs.⁸ All other cannabis-based products not falling within this definition remain Schedule 1 drugs under the 2001 Regulations. Smoking cannabis (for all purposes except research) continues to be prohibited.⁹

Although Schedule 2 drugs can usually be prescribed by a general practitioner, cannabis-based unlicensed medicinal products (i.e., without a marketing authorisation) can only be prescribed by a doctor on the Specialist Register of the General Medical Council.¹⁰ As at the date of this article, only one cannabis-based medicinal product (Sativex®) was known to have a marketing authorisation in the UK. Accordingly, all other medicinal cannabis products are brought into the existing UK “Specials” medicines framework, under which unauthorised products can be supplied to meet the special needs of a particular patient.

However, there are concerns that patients in the UK who meet the special needs test under the Specials framework are not readily able to access prescriptions for cannabis-based products, and that the current prescribing guidelines are overly restrictive. In light of this, NHS England has been asked to carry out a “process evaluation” as soon as possible to assess barriers to prescribing medicinal cannabis. Further measures are also anticipated, as outlined below.

³ The Misuse of Drugs Regulations 2001 (SI 2001/3998) and the Misuse of Drugs Regulations 2002 (Northern Ireland) 2002 (SR 2002/1) (**2002 Regulations**) regulate legitimate access to controlled drugs under the MDA. The Schedule to the 2001 Regulations and 2002 Regulations in which a drug is placed depends on an assessment of its medicinal benefits (and the need to allow access to it) and its potential to cause harm or be misused. Schedule 1 drugs are considered to have little or no therapeutic value and are subject to the most stringent controls.

⁴ By virtue of the designation of cannabis-products under the Misuse of Drugs (Designation) (England, Wales and Scotland) Order 2015 (SI 2015/704) as falling within the ambit of section 7(4) of the MDA. The Misuse of Drugs (Designation) Order (Northern Ireland) 2001 (SR 2001/431) also permitted supply of cannabis products under authority of the Department of Health.

⁵ The first part of the review can be found at: <https://www.gov.uk/government/publications/cannabis-scheduling-review-part-1>

⁶ The ACMD's advice can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727333/ACMD_advice_on_scheduling_of_cannabis_derived_medicinal_products.pdf

⁷ The Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations (SI 2018/1055).

⁸ The Misuse of Drugs (Amendment No. 2) Regulations (Northern Ireland) 2018 (SR 2018/173) similarly amended the 2002 Regulations.

⁹ Regulation 16A 2001 Regulations and 2002 Regulations.

¹⁰ Ibid.

What to look out for in the UK

- **July-August 2019:** Consultation by the National Institute for Health and Care Excellence on draft guidelines for prescribing cannabis-based products for medicinal use, with the final guidelines expected in October 2019.
- **Sometime in 2019:** Response to the European Parliament’s call for an EU-wide policy on medical cannabis and for properly funded scientific research.
- **Sometime in 2019:** Report of Parliamentary inquiry held by Health and Social Care Select Committee on the usage of medicinal cannabis in the UK.
- **November 2020:** The ACMD’s assessment of the impact of the change in legislation on cannabis based products for medicinal use, including whether the rescheduling of these products is appropriate.

Money laundering issues

The shift in attitudes in the UK and worldwide to cannabis use has prompted many UK companies to investigate the opportunities to enter the international legal cannabis market.

However, companies should be aware that such investment may technically trigger money laundering offences under the Proceeds of Crime Act 2002 (**POCA**). These offences include:

- concealing, disguising, converting or transferring criminal property;¹¹
- entering into, or becoming concerned in, an arrangement to facilitate the acquisition or use of criminal property;¹² and
- acquiring, using or possessing criminal property.¹³

A key element of these offences is the existence of “criminal property”. Property is “criminal property” if it constitutes a person’s benefit from criminal conduct, or represents such a benefit (and the person knows or suspects that it constitutes or represents such a benefit).¹⁴

The definition of “criminal conduct” is broad and covers any conduct that is illegal under UK law, regardless of where it occurred (and whether it was legal where it occurred).¹⁵ This would clearly capture conduct related to legal overseas recreational cannabis markets, with any benefit derived from that conduct constituting criminal property under POCA.

Take the example of a UK company seeking to obtain an interest in a Canadian company in the business of lawfully manufacturing and selling cannabis products for recreational use in Canada. Amongst other things, this would raise questions as to whether the UK company’s provision of initial shareholder capital, receipt of dividends and subsequent sale of shares would constitute money laundering offences.

The situation becomes more complex where a UK company seeks to invest in an overseas company that lawfully manufactures and sells cannabis products for medicinal use only. The medicinal cannabis regime in the UK is very prescriptive. So, for example, what might be an authorised supply of a medicinal cannabis product in one country, might not be in the UK. You would

¹¹ Section 327 POCA.

¹² Section 328 POCA.

¹³ Section 329 POCA.

¹⁴ Section 340(3) POCA.

¹⁵ Section 340(2) POCA.

need to analyse the two regimes carefully to ensure the overseas company's conduct would not constitute a criminal offence if undertaken in the UK.

There are limited applicable defences to POCA's money laundering offences. While there is a defence for conduct that is unlawful in the UK but legal in the country in which it occurred, it only applies to offences that would attract less than 12 months' imprisonment in the UK, thereby excluding its application to recreational cannabis offences (which attract up to 14 years' imprisonment).¹⁶

Another defence exists if a disclosure is made to the National Crime Agency (**NCA**) and the NCA provides deemed or explicit consent to undertake the potential money laundering activity.¹⁷ However, this poses challenges from a practical perspective. Even if the NCA were to provide consent, this may not provide a blanket authorisation for all types of conduct. You would need to look closely at the precise terms of any consent and potentially obtain a number of consents at various stages of your investment.

Practical considerations

In addition to the above, UK investors looking at opportunities to enter the legal recreational cannabis market should consider a number of wider implications. For example:

- is the company at risk of losing investments from institutional investors if it becomes involved in the overseas cannabis market?
- will banks continue to do business with the company if it invests in the overseas legal recreational cannabis market?
- do any of the company's key contracts restrict activity that would be a breach of UK law, regardless of where such activity occurred?
- will the company's internal policies prohibit or restrict its ability to enter the market?
- what are the wider reputational risks to the company?

Treading carefully

As the number of jurisdictions legalising cannabis increases, UK companies will continue to grapple with questions of whether and, if so, to what extent, they are able to participate or invest in the legal cannabis market. In the absence of clear regulatory guidance, companies should consider carefully the implications under the UK money laundering regime associated with potential investment opportunities in legal cannabis markets overseas.

This is one area where the law is still catching up with market developments and reforms may be needed if the UK is to become a global hub for investors in the sector.

If you have any questions on any of the issues raised in this article please contact the authors Matt Townsend and Isabella Kelly or other key contacts in our Cannabis practice.

¹⁶ Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006.

¹⁷ Sections 327(2), 328(2), 329(2), 336, 338 POCA.

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