

Advisory | White Collar Defense & Special Investigations



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Roll Up, Roll Up: ‘Cannabis Inc.’ Is Open for Business, but UK Investors Must Wait Their Turn

With the U.S. cannabis market **reported** to be worth around \$10 billion, sales in Canada expected to reach \$6.5 billion by 2020, and the UK having recently decriminalised the use of the drug for medicinal purposes, UK-based investors are eyeing the potential for profit from this new business area.

In this GT Advisory we consider what UK criminal laws will apply in this new, complex, and evolving area.

UK versus U.S. and Canada

Broadly speaking, medicinal cannabis is now legal in the UK, but in contrast to Canada and some U.S. states, recreational use remains outlawed.

Worldwide and local developments in the cannabis sector are being capitalised on by at least two UK companies listed on the NEX Exchange Growth Market – a market for ‘earlier stage, entrepreneurial companies’.

Sativa Investments PLC describes itself as an ‘Investment Vehicle, established to identify investment opportunities in the Medicinal Cannabis sector in Canada...’. Another company, **Ananda Developments PLC** also says its strategy is to invest in projects and products in therapeutic cannabis research in Canada, but also in Israel and the Netherlands.

With its high projected sales figures, it is easy to see why Canada is considered fertile ground for both companies. The country is also home to Canopy Growth Corporation, a giant in the cannabis industry which has a medicinal cannabis subsidiary in the UK called Spectrum Biomedical but also owns Tweed, a recreational-use brand.

In Canada, the medicinal use of cannabis has been legal since 2001. However, it was not until October 2018 that the recreational use of cannabis became legal under the Cannabis Act.

While the possession, use, and supply of cannabis remains a federal offence in the United States, some states have chosen to depart from that position by legalising the medicinal use of cannabis. A handful have legalised recreational use of the drug.

In the UK, the Misuse of Drugs Act 1971 makes the possession, supply, production and cultivation of cannabis illegal; however, since November 2018 specialist medical practitioners have been able to prescribe cannabis-based products for medicinal use. Additionally, companies wishing to enter the market in the UK can apply to the Home Office for license to possess, supply, manufacture, import or export such products.

Anyone convicted of the possession of cannabis could find themselves facing a prison term of up to five years, whilst the punishments for supply and cultivation are much more severe. Against this backdrop, while legalised cannabis is undoubtedly a growth industry, investors should take care they do not land in hot water by running afoul of UK money laundering and anti-drugs laws.

Before we consider the law, a practical example:

Ms G, a wealthy retired businesswoman, invests in a Canadian company specialising in the eco-friendly growth of cannabis plants for onward sale to recreational users. She uses Mr A, a financial advisor, as an intermediary for the deal. Mr A arranges for Ms G to purchase some shares in the company.

After 12 months, the company is doing very well, and the value of Ms G's investment has increased by 150%. Her shares have also paid her a dividend each quarter. Ms G asks Mr A to arrange for her to sell her shares, which he does. With her healthy profit, Ms G buys a holiday home and a new sportscar.

Have any offences been committed? Let's first consider the law.

The Law

Under the UK Proceeds of Crime Act 2002 (POCA) it is an offence for a person to:

1. Conceal, disguise, convert, transfer or remove criminal property (s327);
2. Enter into or become concerned in an arrangement which he or she knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person (s328); or
3. Acquire, use or have possession of criminal property (s329).

Punishment for violation of these provisions includes unlimited fines, up to 14 years in prison and confiscation of any benefits received.

Criminal property is defined in POCA as property which constitutes a person's benefit from criminal conduct or which represents such a benefit (in whole or in part, directly or indirectly).

Importantly, the definition of 'criminal conduct' includes conduct which 'would constitute an offence in any part of the United Kingdom if it occurred there'. In other words, if something is legal in the United States or Canada but is still an offence in the UK, then UK money laundering laws still apply, subject to an applicable defence.

Defences and Exceptions

While defences do exist, extreme care must be taken, and many will likely not apply. A money laundering offence will *not* have been committed if:

1. The individual knows or believes on reasonable grounds that the relevant conduct occurred in a particular country or territory outside the UK; and
2. The relevant conduct was not at the time it occurred unlawful under the criminal law then applying in that country; and
3. The relevant conduct is not of a description prescribed by an order made by the Secretary of State.

Unfortunately, this defence will not apply to cannabis offences, as the UK government has limited its application to crimes with punishments of 12 months in custody or less. Cannabis offences carry punishments in excess of 12 months in custody.

POCA also provides a specific defence to the offence of acquiring, using or possessing criminal property where the individual acquired the property for 'adequate consideration'. This defence, however, is not available for the arrangement offence (s328), so this is unlikely to be of use.

Finally, under the Suspicious Activity Report regime (SAR), a Defence Against Money Laundering (DAML) report can be submitted to the National Crime Agency (NCA). An individual requests consent to proceed with a transaction which if carried out would constitute a money laundering offence under POCA. Broadly speaking, if consent is provided by the NCA, the individual who submitted the request may carry out the transaction with a defence. However, this defence may have limited application. There is also a risk that submission of the DAML could lead to further investigative and/or enforcement action by the NCA.

So, back to our practical example: on the available facts, have Mr A and Ms G committed any offences? The short answer is arguably yes.

Whilst the intermediary is committing an arrangement offence under section 328, Ms A is potentially committing an array of offences including acquisition (s329), transferring or converting (s327), and arranging (s328).

In any case, the only safe way for both to proceed is to file a DAML for each stage of the transaction. While it might be reasonably expected that in straightforward examples consent may be obtained, unfortunately this cannot be guaranteed. Further, the practicality of obtaining consent every time you want to transact with shares or money is questionable. Faced with such practical difficulties and legal uncertainty, investors may decide to look elsewhere.

Either way, legal advice should be taken.

The Outlook

Those investing in companies that expressly state they are involved only in medicinal cannabis projects have nothing to worry about, if such projects would be considered legal if carried out in the UK. If they would fall foul of the UK's regulatory and licencing framework for medicinal cannabis, UK-based investors run the risk of criminal prosecution.

Some argue the UK will eventually converge with the position taken by Canada and many U.S. states in legalising the recreational use of cannabis; however, there is little indication amongst the current political class that this is on the horizon.

A compromise could be the removal of or an amendment to the criteria for the POCA overseas exemption, to ensure investment in the legal production and/or sale of cannabis overseas qualifies. However, such an amendment would likely require significant lobbying to encourage what would be a major policy shift.

For now, the scope for investment in the legal overseas cannabis industry is extremely limited. Investors risk prosecution should they purchase an interest in any company involved in the recreational cannabis industry in another country.

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