COLLAS CRILL

Money laundering challenges for cannabis businesses

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Money laundering challenges for cannabis businesses - what do cannabis businesses need to know when it comes to off-shore dealings and the risk of prosecution for proceeds of crime?

Wayne Atkinson discusses the complex criminal law surrounding cannabis businesses, and how the Bailiwick of Guernsey's new position on proceeds of crime is attracting cannabis investors to the island.

In Shakespeare's Measure for Measure, Escalus, a lord, questions Pompey, a pimp, on his profession and asks him 'is it a lawful trade?' Pompey replies, in a response beloved of well-read lawyers everywhere that it would be 'If the law would allow it, sir.'

At its heart, this 400-year-old exchange and the question 'is my trade lawful?', is a question that will be a familiar one to many in the global cannabis industry, with recreational business becoming increasingly globally accepted in many nations but off the table in many others, and with varying levels of acceptable content and medical licensing requirements in different jurisdictions. This becomes even more of a challenge when one looks to use another jurisdiction, such as an offshore finance centre to assist with international structuring.

Almost everyone reading this will be familiar at some level with obligations to prevent money laundering and ensure people do not profit from the proceeds of crime. Of course, preventing this requires us to answer again the question: 'What is a crime?'

In many jurisdictions, laws relating to money laundering and the proceeds of crime attempt to impose their own standard on worldwide behaviour. Some jurisdictions for example talk (amongst other things) about conduct that constitutes a criminal offence under the laws of that jurisdiction, or which would constitute such an offence if it were to take place there. This is intended to ensure actions criminalised by particularly chaotic or despotic regimes in isolation do not get captured within the proceeds of crime regime. By taking this view, however, jurisdictions are imposing their own criminal system onto actions that are perfectly legal where they are committed, which is a tricky area, particularly with cannabis.

Imagine a situation where a business takes the best legal advice on offer in respect of its conduct in a specific country and is told everything is legal, but once that company pays a dividend to an investor in another jurisdiction that investor is considered to have 'received the proceeds of crime'. This seems unduly harsh on the investor who has invested in what Pompey would call a 'lawful trade'. Harsher still would be sanctions against that investor's local bank, which failed to report that the monies it received for the investor were the proceeds of crime.

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Put in this situation, many financial services businesses feel they have no option but to throw the baby out with the bathwater and decline business which they feel is close to the line. The cost of cross-border legal analysis and the risk of sanction is simply too great to ignore. In some offshore jurisdictions, the position is even clearer – all cannabis business is off the table.

Happily, recent legislative guidance from my own jurisdiction, Guernsey, has clarified our position and provided local service providers with the comfort they need to move forwards in this space.

Last year, the Guernsey Policy and Resources Committee (effectively our equivalent of a Home Office), issued an Information Notice on Cannabis Cultivation and Production in Other Jurisdictions. That note helpfully clarified Guernsey's own position, making clear that where drug-related conduct outside Guernsey generates proceeds, those proceeds only fall within the scope of our Drug Trafficking Law if the conduct that generated them is unlawful in the jurisdiction where it took place (subject to some limited exemptions not relevant to cannabis).

This test of requiring an offence to have been committed in both jurisdictions is known as dual criminality and is obviously tremendously helpful in allowing for the proceeds of cannabis business (and other businesses involving potentially unlawful drugs such as psilocybin-producing fungi).

Going back to Pompey's lawful trade, even this position can be confusing when one considers how complicated criminal law can be in and of itself. The same action could be lawful or unlawful depending upon one's possession of a licence. Is it reasonable to expect offshore banks to distinguish between medicinal cannabis production in Canada, decriminalised cannabis production in California, hemp oil production in Suffolk and a hydroponic cannabis farm in an industrial part of London? All of these examples place a different legal analysis on the cultivation of plants of the genus Cannabis.

Meanwhile florists in the UK frequently produce bouquets featuring the dried seed head of the opium poppy, Papaver somniferum, which is the same plant used to produce heroin in Afghanistan, but which has also been widely grown in Tasmania since the sixties for the lawful production of morphine and codeine. Gardeners in the UK can readily acquire opium poppy seed from major seed companies to beautify their borders and, by the way, that lemon and poppy seed muffin you are enjoying whilst you read this? Same poppy! The law is complicated.

To assist with this concern HM Procureur, Guernsey's equivalent of an Attorney General, issued guidance making clear the Law Officers would only prosecute money laundering offences in respect of the proceeds of cannabis business where:

- That business is illegal in the foreign jurisdiction in which it is operated; and
- The person involved had actual knowledge or suspicion that the proceeds of the Target Business are the proceeds of cultivation or production of cannabis-related activities which are unlawful where it occurs.

Whilst broader regulatory obligations in Guernsey still require businesses to make an effort to understand the legality of the business in question, this gives comfort around the risk of prosecution for an innocent mistake.

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The combination of these two clarifications means Guernsey's institutions are increasingly open to cannabis business and we are already seeing investment funds formed in Guernsey specifically to invest into the sector. With Guernsey offering a well-regulated, efficient and easy-to-use company law regime ideally placed for outward investment globally, it is easy to see why this pragmatic and sensible guidance has led to it becoming the go-to offshore jurisdiction for businesses in the sector.

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COLLAS CRILL

For more information please contact:



Wayne Atkinson

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734225 | **e:** wayne.atkinson@collascrill.com

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