

CANNABIS LAWS IN THE US AND EUROPE CONTINUE TO EVOLVE

But many uncertainties remain and there is a need for clarification

Although cannabis laws and regulations in the US and EU are different, the same kinds of legal uncertainties and tensions exist at the macro level. Despite these strains, cannabis laws and the cannabis industry continue to evolve on both continents.

Cannabis regulation in the United States

Under federal law in the US, marijuana remains an illegal schedule I drug, along with other drugs deemed to have a high potential for abuse and no accepted medical use. Since the mid-1990s, state laws have departed from this federal prohibition.

Currently, adult recreational use, sale, and possession of marijuana is legal in 11 states (plus Washington, DC). Medical use of cannabis is legal in 36 states, but many of these states have THC limitations or CBD requirements. Four states continue to outlaw cannabis in all forms, including marijuana and hemp or CBD. State legalisation initiatives will be considered this autumn or next year. With Covid-19 contracting state economies, there may be even more support for state legalisation. At the federal level, legalisation is not likely to gain traction any time soon.

Thus, the federal-state tensions and resulting legal uncertainties for cannabis and ancillary businesses, including difficulties in banking and financing and finding protections under bankruptcy laws, will persist. The cannabis industry, however, remains undaunted and continues to grow, with sales reportedly soaring during the pandemic.

The 2018 federal Farm Bill opened up the CBD market in the US considerably, effectively carving out legal hemp from the definition of an illegal controlled substance under federal law. Legal hemp is defined under this federal law as containing not more than 0.3 per cent THC. Any higher THC content is marijuana and remains illegal. Legal hemp is only legal where produced by a licensed grower under a USDA-approved or created regulatory scheme in the state where the hemp is produced.

Although the industry waits for the FDA to approve adding CBD to edible products at the national level, the industry continues to expand. The CBD market, crowded with thousands of competitors, is positioned for gains in the US in 2020, with a reported estimated 14 per cent growth rate from 2019.

Cannabis regulation in Europe

Cannabis regulation in the EU is currently characterised by little harmonisation and a lot of legal uncertainty.

In EU member states, the cultivation, processing and sale of cannabis products containing a significant level of THC (e.g. marijuana) for recreational purposes is illegal and constitutes a criminal offence. Some liberal jurisdictions in the EU have decriminalised and do not prosecute the possession and consumption of “small amounts” of marijuana “for personal use”. However, the definition of these terms is in no way harmonised. The EU has approved a limited number of medical drugs containing THC for treatment of certain severe illnesses, but typically these drugs may only be prescribed where “there is no alternative treatment available”.

The regulation of the EU CBD market (for products containing mainly non-psychoactive cannabinoids (CBD) with a THC content of less than 0.2 per cent), which includes a wide variety of food and cosmetic products and is projected to grow from €8.3bn in 2020 to €13.6bn in 2025, remains highly fragmented, thus putting European companies at a significant competitive disadvantage vis-à-vis other companies operating in more liberalised markets.

Another example of inconsistency is the EU’s approach to the registration of CBD products designed for human consumption as “novel foods”. Most recently, the EU Commission surprisingly suspended all pending novel food applications for CBD products, issuing a “preliminary conclusion” that these products would be better regulated as “narcotics”. This conclusion, should it stand, would have a devastating effect on the European hemp industry.

In May 2020, in a French case before the European Court of Justice (ECJ), the Advocate General argued that a French law imposing a broad ban on the import of CBD products violates the principle of free movement of goods under EU law because CBD is not a “narcotic drug”. The ECJ in its decision, expected September 2020, has an opportunity to clarify many of the regulatory approaches regarding CBD products.



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