



LAWFUL SALE OF CANNABIS LIGHT IN ITALY: IS IT GOING UP IN SMOKE?

Italy's cannabis market has been booming since December 2016, when Law 242 regulating hemp cultivation and production entered into force ("**Law 242**"). While Law 242 governs the cultivation of the hemp plants, it does not address other implications of hemp cultivation such as the sale of hemp derivatives containing tetrahydrocannabinol ("**THC**"). This regulatory gap has created a gray area that a number of entrepreneurs have parlayed in an opportunity to open stores selling "cannabis light" products, including inflorescences derived from *Cannabis sativa* L.

A recent ruling by the Italian Supreme Court, however, is likely to tamp down enthusiasm in this new sale stream. Although the full implications of this ruling of the Supreme Court are not yet clear, we can offer our preliminary considerations below.

Inconsistent views of the Italian Courts: at least 3 different interpretations of framework relating cannabis

The ambiguity of certain provisions of Law 242 has led to several cases being heard by various Italian Courts, adding to the ongoing political debate arising from businesses' requests to have a clear legal framework governing cannabis. The Italian Courts have not been able to agree on an unilateral interpretation of a number of provisions of Law 242, thus one of the key questions is still open: is it lawful to sell cannabis and cannabis derivatives where, on the one hand, there are laws on the books forbidding it and, on the other hand, laws are being enacted to promote the "*cultivation and the agro-industrial use of the hems*"?

Until the recent ruling of the joint sessions of the Supreme Court, Italian Courts had offered three different responses:

- **according to a minority trend:** Law 242 allows any conduct, including the sale of cannabis products listed in Law 242 derived from the cultivation of *cannabis sativa*, provided the THC level is not higher than 0.6 %, deeming substances with THC at or below 0.6% not to be narcotics (and, therefore, outside the scope of the Italian Consolidated Act on Narcotics (i.e. Italian Presidential Decree 309/1990, as from time to time amended)¹;
- **according to the majority trend:** the sale of so-called light cannabis products is not permitted under Italian law, and the reference to the 0.6% THC level is a tolerance margin, allowed under Law 242, for cultivation purposes only; thus, under this view the sale and marketing to the public, for any reason, of products derived from *Cannabis sativa* L. is a criminal offence²;

¹ See, *ex multis*, Judgment of Italian Supreme Court no. 17387, third section, dated 10 January 2019.

² See, *ex multis*, Judgment of Italian Supreme Court no. 4920, sixth section, dated 29 November 2018.

- **according to a third trend:** the sale and marketing to the public of products derived from *Cannabis sativa* L. may be deemed a criminal offence unless the products sold contain a level of THC lower than 0.2%³.

The Supreme Court weighs in

In a joint session, the Italian Supreme Court ("**Supreme Court**"), on 31 May 2019, issued ruling no. 30475 (the "**Judgment**"), setting forth the guidelines for the interpretation of Law 242.

The Judgment set out the following holding:

"the sale to the public of Cannabis sativa L. and including oil, leaves, inflorescences and resin derived from Cannabis sativa L., is not included within the scope of Law no. 242, which considers legitimate the cultivation of the hemp varieties included into the Common Catalogue of Varieties of Agricultural Plant Species as referred to in Article 17 of the Council Directive 2002/55/EC, strictly listing the products derived from Cannabis sativa L. that can be sold; therefore the sale to the public, at any title, of the products derived from cannabis sativa L., including oil, leaves, inflorescences and resin is considered a criminal offence under article 73 of Decree of the President of the Republic of Italy no. 309 of 9 October 1990, as amended, even if the THC level is within the parameters under articles 4 and 5 of Law no. 242, with the sole exception for those products in practice without any doping effect."

The Supreme Court is a panel of judges from the various sections of the Supreme Court, and is entrusted to decide upon cases involving divergent interpretations of the law. Although the statements issued by the Supreme Court are not binding and are not considered a legislative source, they represent the trend to be followed by the lower Italian Courts when ruling on the same matter. Therefore, it is likely that the next rulings of the lower Italian Courts will follow the holding of the Judgment.

The newly published opinion setting out the reasoning for the Judgment

On 10 July 2019, the Supreme Court finally issued its long-awaited opinion, setting forth the following main reasons in support of the Judgment:

- the Italian Consolidated Act on Narcotics makes no distinction, for the purpose of sale, on the basis of the type of Cannabis plants: its Article 13 provides for substances that in Italy are considered narcotic or psychotropic, by including them in specific schedules, while its Article 14 sets forth the criteria for including a substance or a substance related product in such schedule. **Pursuant to Article 14, Cannabis, including leaves and inflorescence, the products obtained from cannabis,** the substances that can be obtained by synthesis or semi-synthesis, and those similar to them in chemical structures or pharmacological effects, as well as the preparations containing them, **are included in "Schedule II", and as such they must be deemed to be narcotics irrespective of the level of THC they contain,** unless their intended uses are exclusively the production of fibers or other industrial uses permitted under European Union regulations;
- Law 242 allows the **cultivation only** of certain varieties of hems, which can be used solely for the activities expressly provided therein: i.e. (i) food and cosmetics produced in compliance with the specific sector legislation; (ii) semi-finished products such as fibers, powders, hemp chips, oils and

³ See, *ex multis*, Judgment of Italian Supreme Court no. 10809, third section, dated 7 December 2018.

propellent to be supplied to industrial and artisanal activities of several sectors – including the energy sector; (iii) materials needed for green manure practices; (iv) organic materials needed for bioengineering or products useful for "green building" activities; (v) materials needed for phytoremediation for the recovery of polluted sites; (vi) cultivations dedicated to educational and research activities performed by public or private institutions; and (vii) cultivations by plant nurseries;

- the **tolerance margin of a maximum THC content of 0.6%** provided by Law 242 refers to the level of THC allowed for the **cultivation** of hemp only, and does not apply to the products derived from hemp.

On the basis of the foregoing, the Supreme Court has held that, regardless of the THC percentage in the product, the sale to the public, for any reason, of products derived from Cannabis sativa L. can be considered a criminal offence under the Italian Consolidated Act on Narcotics, unless the products, in practice, have no **doping effect** according to the principle of offensiveness of the conduct.

What next?

It is a fact that, also on the basis of the provisions of Law 242, many began to view Italy as a potential opportunity for cannabis light sales. A new market opened, and has been growing quickly, with both national and international businesses interested in bringing in investments and know-how, hoping to exploit the growing boom of the cannabis and cannabis derivatives industry in the United States and Canada.

These entrepreneurs are not likely to welcome the newly-issued opinion by the Supreme Court, which - by aligning all previous Court rulings to the less favourable interpretation - is likely to cause uncertainty as to the future of the cannabis light market in Italy. From a legal perspective, the Judgment has definitely brought clarity on how the Courts should interpret Law 242 provisions, and this interpretation cannot now be ignored. The new clarity as to what is lawful, in terms of sales, may require re-testing of business models.

Is the Judgment the beginning of the end of sales in Italy of cannabis light and related products? It is difficult to say: now more than ever, any one hoping to enter the market will need to seek legal advice, to achieve a full understanding of the applicable authorisation process and a clear map of the legal boundaries. The one sure thing is that the Judgment will spark much social and political debate, one where politics will have a strong voice, which may lead to further evolutions and changes in the current legal framework.

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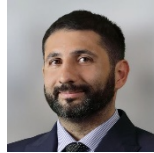
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