

Chapter 6: Criminal Proceedings against a Legal Person

General Commentary

Article 19 of the MCC establishes criminal responsibility over legal persons, or corporate criminal responsibility, a concept that is increasingly being recognized at both the international and the domestic levels. Under the terms of Article 19, a legal person may be prosecuted for any criminal offense set out in the MCC. Reference should be made to Article 19 and its accompanying commentary for a detailed discussion on the criminal liability of legal persons. Reference should also be made to Section 12, Subsection 4, of the MCC, which provides specific penalties for legal persons; these penalties are distinct in some respects from those applicable to natural persons.

Bringing a legal person before the court for the trial of a criminal offense has its own peculiarities in terms of the law of criminal procedure. Chapter 6 of the MCCP lays out a number of procedural rules that apply to proceedings against legal persons. The provisions of Chapter 6 have been drawn from domestic legislation on the liability of legal persons.

Article 80: Proceedings against a Legal Person

1. The prosecution of a legal person for a criminal offense, or offenses, may be undertaken even if the prosecution of a natural person for the same criminal offense or offenses has been undertaken or is concluded. The prosecution of a legal person may also take place where there has been no prosecution of a natural person for the criminal offense concerned.
2. Where a legal person and a natural person are being prosecuted for the same criminal offense or for different criminal offenses committed in the course of the same transaction, they may be jointly charged in one indictment under Article 193.

Commentary

Article 80 reiterates the principle set out in Article 19(3) of the MCC that the prosecution of a legal person may proceed independently of any prosecutions of a natural person with regard to the same criminal offense. No issues of double jeopardy, or *ne bis in idem*, contained in Article 8 of the MCC arise to block the prosecution or trial; that principle applies only to one person being prosecuted twice for the same offense.

For the sake of judicial and prosecutorial economy, where a legal person and a natural person are being prosecuted for the same criminal offense at the same time, both persons may be jointly charged in one indictment. Joinder of the accused persons is permissible under Article 193 of the M CCP, which concerns two natural persons who are charged with the same or different criminal offenses committed in the course of the same transaction. Article 80 expands that scope to allow for the joinder of a natural person and a legal person. Reference should be made to the commentary to Article 193 that discusses the concept of joinder, including the meaning of “committed in the course of the same transaction” that is used in Article 193.

Article 81: Representative for a Legal Person in Criminal Proceedings

1. Where a legal person is being prosecuted for a criminal offense or offenses, one representative of the legal person must be present at all proceedings.
2. A representative of a legal person is a person who is authorized to represent the legal person under the applicable law.
3. A person may not act as a representative of the legal person where:
 - (a) the person is a witness at the trial of the legal person; or
 - (b) the person has been prosecuted for the same criminal offense, unless he or she is the only representative of the legal person.
4. Where a person is not eligible to be a representative of the legal person under Paragraph 3, the competent trial court must request the competent body of the legal person to appoint another representative within a specified period and to notify the court of the appointment in writing. If this is not done within the specified period, the court may appoint a representative for the legal person.
5. The registry of the competent trial court must notify the [insert name of body responsible for registering legal persons in the state] that the legal person is subject to legal proceedings and cannot be dissolved during proceedings against the legal person.

Commentary

Because a legal person is incorporeal and therefore cannot appear in court to face prosecution, it is necessary for a representative of the legal person to appear in court. As stated in Paragraph 2, the representative is the person who is designated as such under the applicable law. The applicable law is the law of the state and includes company/corporate law that designates who the representatives of the legal person are. Paragraph 3 sets out the instances in which the representative may not act as a representative. In such a case, the court must require that the “competent body of the legal person”—most likely the board of directors of the company—appoint another representative and notify the court in writing. Where this is not done in the time specified by the court, a court-appointed legal representative must represent the legal person in court.

Paragraph 5: The penalties provided for in the MCC for legal persons (see Article 68), in part, target the assets of the legal person. If the legal person were to be dissolved (e.g., terminated or wound up) during the legal proceedings, the assets would not be available if the penalty involved use of the legal person’s assets (e.g., if the penalty was confiscation of assets under Article 68[d] or payment of compensation to a victim under Article 68[b]). Thus, the MCCP provides that no proceedings to dissolve the legal person may be brought during criminal proceedings. This provision would certainly need to be harmonized with the relevant provisions of the applicable law on legal persons.

Article 82: Defense Counsel for a Legal Person in Criminal Proceedings

1. A legal person may have defense counsel in addition to a representative of the legal person.
2. Where a legal person and a natural person are being tried for the same criminal offense or different criminal offenses committed in the course of the same transaction, the legal person and the natural person must not have the same defense counsel.

Article 83: Service of Documents and Other Court Materials on a Legal Person

1. Service of documents and other court materials, including summonses, orders, decisions, indictments, judgments, or items whose delivery is required under any provision of the MCCP, must be delivered to the address of the legal person.
2. Documents or other court materials served on the legal person under Paragraph 1 must also be served on the representative of the legal person in accordance with Article 27.

Article 84: Contents of the Indictment against a Legal Person

The indictment against a legal person must include, in addition to the information set out in Article 195(3), the following:

- (a) the name under which the legal person operates under the applicable law;
- (b) the seat of the legal person; and
- (c) the basis for the liability of the legal person under the MCC.

Article 85: Opening Statements at Trial

1. The representative of the legal person may make a statement at trial in accordance with Article 223.
2. The representative of the legal person must not be compelled to make solemn declaration and must not be examined about the content of the statement by the prosecutor or the trial court.
3. The trial court must decide on the probative value, if any, of the statement of the representative.

Commentary

Under Article 223 of the MCCP, the accused may make an unsworn opening statement to the court. Article 85 extends the scope of this provision to allow the representative of the legal person to make a similar statement.

Article 86: Written Judgment against a Legal Person

In addition to the requirements of Article 269, the written judgment against a legal person must contain:

- (a) the name under which the legal person operates under the applicable law;
- (b) the seat of the legal person; and
- (c) the basis for the liability of the legal person under the MCC.