

3.3 Countries' Best Practices

3.3.0 Introduction and Methodology

Based on the results of research in this report, and the research and experience drawn from Netwerk Vlaanderen and other NGOs, we can conclude that self-regulation in the financial industry does not necessarily lead to strong results. Even though a growing group of financial institutions has decided to disinvest from cluster munitions producers, the effects of their decisions are far from even. Many financial institutions do not appear to feel a great need to shoulder moral responsibility.

While investment in arms and cluster munitions may have become an important topic in international banks' social responsibility divisions, cluster munitions production has yet to suffer from underfunding. Stringent international regulation and legislation will be needed to stem the flow of capital to cluster munitions production.

Unfortunately, there seems to be no tradition of legislated restrictions on investment. On the contrary, economic deregulation and the globalisation in the financial sector have dramatically loosened governments' grip on the allocation of financial resources. While banks often argue that governments, not banks, should decide whether investments in certain sectors should be forbidden, governments argue that banks will have to set their own standards for socially responsible investment.

Governments can, of course, lead the way by providing good examples. The ethical guidelines that Norway gave its pension fund and the resulting investment decisions are one such. Governments cannot afford to maintain double standards by opposing the use of cluster munitions, while continuing to invest in cluster munitions production. Any governmental effort to oppose the misery that cluster munitions cause should include efforts to dry up the supply capital that funds cluster munitions production.

Recent years have witnessed legislative proposals to ban investment in cluster munitions. Some countries took action even before the Convention on Cluster Munitions took effect; others addressed the investment issue as part of the Convention on Cluster Munitions.

• Research

To be considered as a country banning investments in cluster munitions, a country must either have stated officially that it considers investment to be part of the Convention on Cluster Munitions, or have proposed or passed legislation banning investments. Legislative proposals need not be comprehensive, but they should meet the following criteria:

- The proposed law should be discussed in Parliament or another body with power to issue legislation.
- The proposed law should contain an explicit ban on investment in cluster munitions.

We had to work within the limits imposed by language (English and Dutch). We welcome additions from those able to provide them.

DISINVESTMENT AS PART OF THE CONVENTION ON CLUSTER MUNITIONS

In December 2008, 94 countries signed the Convention on Cluster Munitions in Oslo. This convention provides an ethical argument against cluster munitions with a strong legal background. In February 2010, the Republic of Moldova and Burkina Faso were the 29th and 30th of the 104 signatory countries to ratify the convention. The convention was set to take effect 6 months after the 30th ratification. That means that the convention will enter into force on 1 August 2010 and become binding international law.

Article 1c of the CCM states, “Each State Party undertakes never under any circumstances to assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.” As the Cluster Munition Coalition (CMC) explains in one of its policy papers, it regards prohibiting assistance as including prohibiting investment in cluster munitions.⁵⁵⁷ Several countries have confirmed this; Ireland, Lebanon, Mexico, New Zealand, Norway and Rwanda have defined investment as one the prohibited types of assistance.⁵⁵⁸

Of the countries mentioned, Ireland, Luxembourg, New Zealand and Norway have proposed or enacted legislation. We will offer a brief description of and commentary on this legislation below.

Lebanon and Rwanda have not yet ratified the Convention, but have stated that they consider investment to be among the prohibited types of assistance. Mexico ratified the Convention on 6 May 2009. Since these three countries have as yet neither proposed nor enacted legislation, we cannot offer a commentary. Nevertheless, we include them in the list of countries that consider investment to be one kind of assistance.

3.3.1 Ireland

BACKGROUND

Ireland was a driving force behind the Oslo process. It deserves much of the credit for the successful outcome of the negotiations and the convention’s strength. It signed and ratified the Convention on Cluster Munitions on 3 December 2008.⁵⁵⁹

Even before Ireland signed the Convention on 3 March 2008, its National Pensions Reserve Fund announced that it would withdraw €27 million in investments from six international companies involved in producing cluster munitions. This announcement was made in response to a government request to withdraw from companies involved in the manufacture of cluster munitions.⁵⁶⁰

On 22 October 2008, Ireland presented the 2008 Cluster Munitions and Anti-personnel Mines Bill to its Lower House. Presenting this act, number 20, was Ireland’s way of signing and ratifying the Convention. It made Ireland one of the four countries signing and ratifying the convention all at once on 3 December 2008.⁵⁶¹

The 2008 Cluster Munitions and Anti-Personnel Mines Act explicitly prohibits investment of public money in cluster munitions producers. It made Ireland the second country to prohibit investment in cluster munitions.

The prohibition is set out in Part 4 of the act.⁵⁶²

PART 4: Investment of Public Moneys

11.—In this Part—

“components” means components specifically designed for use in prohibited munitions;

“investor” means a person or body responsible for the investment of public moneys owned by a Minister of the Government;

“munitions company” means a company involved in the manufacture of prohibited munitions or components;

“prohibited munition” means a cluster munitions, explosive bomblet or anti-personnel mine;

“public moneys” means moneys provided by the Oireachtas out of the Central Fund, or the growing produce thereof.

12.—(1) Nothing in any enactment that authorises the investment of public moneys shall be taken to authorise any investment, direct or indirect, in a munitions company.

(2) Notwithstanding any other enactment, an investor, in the performance of any function conferred on it by or under any enactment, shall endeavour to avoid the investment of public moneys in a munitions company.

(3) In pursuing the objective set out in subsection (2) an investor shall have regard to the matters set out in this Part.

13.—(1) An investor shall endeavour to avoid the direct investment of public moneys in equity or debt securities issued by a munitions company.

(2) Where public moneys are directly invested in a company which is or becomes a munitions company, the investor shall—

(a) establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or

(b) divest itself of its investment in that company in an orderly manner.

14.—(1) An investor shall avoid investing public moneys in collective investment undertakings or investment products unless, having exercised due diligence, the investor is satisfied that there is not a significant probability that the public moneys will be invested in a munitions company.

(2) Where public moneys are invested in a collective investment undertaking or investment product which invests these moneys in a company which is or becomes a munitions company, the investor shall—

(a) establish to its satisfaction that—

(i) the company intends to cease its involvement in the manufacture of prohibited munitions or components,

or

(ii) the collective investment undertaking or investment product intends to divest itself of its investment in the company, and that there is not a significant probability that the collective investment undertaking or investment product will again invest public moneys in a munitions company,

or

(b) so far as possible, taking into account any contractual obligation it has assumed, divest itself of its investment in that collective investment undertaking or investment product in an orderly manner.

15.—Nothing in this Part shall prevent an investor from contracting derivative financial instruments based on a financial index.

COMMENTARY

- Ireland was the first country to specify an investment ban in the text ratifying the CCM. This is an important example for other countries.
- The law leaves no doubt about what is excluded from investments. It prohibits investment in the cluster munitions producers (whether for munitions-linked or other activities). These producers include producers of specifically designed components of cluster munitions.
- The law prohibits many investment products: equity and debt securities issued by a munitions company, collective investment undertakings or investment products that invest in the involved companies (unless the company and/or the financial product severs its link to cluster munitions).
- The law stipulates that the investor has a role to play. He/She “shall endeavour to avoid the investment of public money in a munitions company” and he/she must “exercise due diligence” when investing in collective products.

- The Irish law makes an exception for financial instruments based on a financial index: these investments are allowed even when they contain shares in or obligations issued by cluster munitions producers. This exception weakens the law.
- The law covers only public money provided by the “Oireachtas out of the Central Fund, or the growing produce thereof”. This means that the act does not cover money from sources other than the Central Fund, e.g. it does not extend to money from counties and municipalities or money from private sources. Moreover, the law says nothing about withdrawing bank guarantees; the Irish government can still grant a guarantee to a bank that invests in cluster munitions producers.
- It is not clear how the law will be enforced: the law does not stipulate that the investment of public money should be made public to ensure that none is invested in companies that produce cluster munitions. There are no provisions setting criteria for determining which companies are involved in the manufacture of prohibited munitions or their components.

3.3.2 Lebanon

The Republic of Lebanon signed the Convention on Cluster Munitions in Oslo on 3 December 2008.⁵⁶³

In a letter to Human Rights Watch, the government of Lebanon wrote: “It is the understanding of the government of Lebanon that Article /1/ Paragraph (c) of the Convention prohibits the investment in entities engaged in the production or transfer of cluster munitions or investment in any company that provides financing to such entities. In the view of Lebanon, “assistance” as stipulated in Article /1/ paragraph (c) includes investment in entities engaged in the production or transfer of cluster munitions and is thus prohibited under the Convention.”⁵⁶⁴

3.3.3 Luxembourg

BACKGROUND

Even before the Oslo Convention was signed, Luxembourg developed draft legislation on cluster munitions that included a ban on investment. Luxembourg decided to freeze this procedure to wait for the final text of the CCM in December 2008. After signing the Oslo Convention, it published a draft ratification law. This included a prohibition for all persons or businesses from knowingly financing cluster munitions or explosive submunitions.⁵⁶⁵ Luxembourg passed the law on 7 May 2009.

Article 3 contains the investment ban:

Art 3. “All persons, businesses and corporate entities are prohibited from knowingly financing cluster munitions or explosive submunitions”^{XVI}

Article 4 states that those who knowingly breach Articles 2 or 3, can be penalised with 5 to 10 years detention and a fine ranging from € 25,000 to € 1 million.⁵⁶⁶

XVI Original text: “Il est interdit à toute personne physique ou morale de financer, en connaissance de cause, des armes à sous-munitions ou des sous-munitions explosives”. Translated by Katherine Harrison, Landmine Action.

COMMENTARY

- The term knowingly did not appear in the first draft of the legislation. In June 2008, the Luxembourg Bankers Association (ABBL) and the Luxembourg Fund Association (ALFI) published a commentary on this draft legislation. These associations suggested adding the term knowingly to the text. They argued that a bank could never be 100% sure that their client or any given transfer of money had no link to cluster munitions. They suggested replacing the words ‘direct or indirect financing’ with ‘knowingly financing’.⁵⁶⁷ The term knowingly could be a loophole in this legislation. It shrugs off responsibility for identifying transactions related to cluster munitions. It could release banks from their duty of due diligence and operate with scrutiny. Luxembourg’s implementation order will have to provide a clear and airtight definition of knowingly. Luxembourg could consider doing the same as Belgium, where the state is obliged to draw up a list of cluster munitions producers.
- The text does not define financing. This word’s scope should be pinned down precisely, because it is open to multiple interpretations.
- The law forbids financing cluster munitions. It does not explain whether this means that cluster munitions producers are excluded from financing, or whether the exclusion covers only the act of producing cluster munitions. The latter would permit general purpose financing for cluster munitions producers.
- The law does not provide for monitoring tools, producer or financier lists, auditing methods, etc. The implementation order will have to specify all of these and is of major importance for the implementation and scope of the law.

3.3.4 Mexico

The United Mexican States signed the Convention on Cluster Munitions in Oslo on 3 December 2008 and ratified it on 9 May 2009.⁵⁶⁸

In a letter to Human Rights Watch, the government of Mexico offered its understanding of several provisions in the Convention on Cluster Munitions. It wrote, “Also, it is Mexico’s opinion that investment for the production of cluster munitions is also prohibited by the Convention.”⁵⁶⁹

3.3.5 New Zealand

BACKGROUND

On 10 December 2009, the New Zealand parliament unanimously passed its legislation to implement the Convention of Cluster Munitions. This Cluster Munitions (Prohibition) Bill contains a prohibition on investments in companies that manufacture cluster munitions. Late amendments after strong campaigning by the Aotearoa New Zealand Cluster Muniton Coalition added this investment ban to the law. The law states that

*“A person commits an offence who provides or invests funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions.”*⁵⁷⁰

The law defines clearly what it means by funds when it says: “funds means assets of every kind, whether tangible or intangible, moveable or immovable, however acquired; and includes legal documents or instruments (for example bank credits, travellers’ cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit) in any form (for example, in electronic or digital form) evidencing title to, or an interest in, assets of any kind.”

The law contains strong and clear wording on penalties for those who breach the law.

COMMENTARY

- The addition of the words knowingly and intention could pose a problem. This term shrugs off responsibility for identifying transactions related to cluster munitions. It could release banks from their duty of due diligence and operate with scrutiny. It is important to define precisely what knowingly and intention mean. The law contains penalty clauses; nevertheless, complications arise when it comes to proving that money was intentionally used to produce cluster munitions. If the law contains no clear and unambiguous definitions for intention and knowledge, there is a danger that the law will be interpreted as covering only project financing for cluster munitions and that cluster munitions producers would still be able to obtain funding. That would be one enormous loophole, given the ease with which companies can redirect funds internally.
- Were the New Zealand government to publish a list of cluster munitions producers, this would provide a strong tool for determining whether there is an intention or knowledge that the funds will be used to finance the production of cluster munitions.

3.3.6 Norway

Norway – a driving force behind the so-called Oslo process - signed the Convention on Cluster Munitions in Oslo on 3 December 2008. It was one of the four countries that signed and ratified the convention on that same day.⁵⁷¹

The Convention on Cluster Munitions primarily is implemented in Norway primarily in a separate law on cluster munitions as set out in Proposition n° 7. It has not yet been formalised.⁵⁷²

Proposition n° 7 has been submitted to the Odelsting, the Norwegian lower house. The Norwegian Ministry of Foreign Affairs has agreed that investment in companies that develop or produce cluster munitions may fall within the scope of the Convention's prohibition against aiding and abetting cluster munitions producers. When assessing in 2002 an identically worded prohibition against aiding and abetting found in Article 1 of the Convention on Anti-personnel Landmines, the Petroleum Fund's Advisory Commission on International Law wrote "In the Advisory Commission's view, the point is that any investment of money in a company may be regarded as a form of support to the company even though the sums, relatively speaking, are small. The mere fact that the Petroleum Fund invests in a company at all, could, for example, encourage other States and investors to follow suit. And even if an investment in a company was so modest that it probably would not reach the threshold of the prohibition against States assisting in landmine production, this would probably nevertheless be covered by the alternatives "encourage or induce in a way". Owning shares in (...) as long as the company (or its subsidiary) continues to produce anti-personnel mines, may, in the view of the Advisory Commission, therefore fall within the scope of the provision concerning aiding and abetting set out in Article 1, para. i (c)."

Proposition n° 7 concludes that, in the Ministry's view, this assessment is also true of the prohibition of aiding and abetting set out in the Convention on Cluster Munitions. Therefore, it cannot be excluded that private investment, for example, in companies that develop or produce cluster munitions, may be incompatible with the Convention.⁵⁷³

3.3.7 Rwanda

The Republic of Rwanda signed the Convention on Cluster Munitions in Oslo on 3 December 2008 and has started its ratification process.⁵⁷⁴

In a letter to Human Rights Watch, the Rwandan Ministry of Foreign Affairs and Cooperation stated that "any investment in the production of cluster munitions is prohibited."⁵⁷⁵

OTHER LEGISLATION AND LEGISLATIVE INITIATIVES

Even before the Convention on Cluster Munitions, there was an international consensus that cluster munitions are indiscriminate and inhumane weapons that, for that reason, should be considered illegal under humanitarian law.

One example is the European Community, which expressed concern about cluster munitions. The European Parliament adopted its Resolution on a Mine-Free World on 7 July 2005. This resolution explicitly addresses the role of financial institutions. It “calls on the EU and its Member States to prohibit through appropriate legislation financial institutions under their jurisdiction or control from investing directly or indirectly in companies involved in production, stockpiling or transfers of anti-personnel mines and other related controversial weapon systems such as cluster sub-munitions.”⁵⁷⁶

In October 2007, this call was repeated in the European Parliament’s resolution Towards A Global Treaty To Ban All Cluster Munitions. There, the European Parliament calls for “an immediate moratorium on using, investing in, stockpiling, producing, transferring or exporting cluster munitions, including air-dropped cluster munitions and submunitions delivered by missiles, rockets, and artillery projectiles, until a binding international treaty has been negotiated on the banning of the production, stockpiling, export and use of these weapons.”⁵⁷⁷

Acknowledging that cluster munitions are inhumane weapons and acknowledging the role of financial institutions, Belgium adopted legislation banning investment even before the Convention on Cluster Munitions.

In what follows, you will find information on proposed and passed legislation and an assessment of this legislation’s strengths and weaknesses.

3.3.8 Belgium

BACKGROUND

At the end of 2006, the Belgian Senate passed a bill forbidding Belgian financial institutions to invest in cluster munitions producers. The bill also instructed the Belgian government to produce a list of cluster munitions producers. In March 2007, Belgian Chamber of Representatives unanimously passed the law, making Belgium the first country to ban investment in cluster munitions producers.

The Belgian Act Prohibiting the Financing of the Production, Use and Possession of Anti-personnel Mines and Submunitions supplements article 8 of the Act of 8 June 2006 governing economic and individual activities involving arms. The text is as follows:⁵⁷⁸

Also prohibited is the financing of a company under Belgian law or under the law of another country, which is involved in the manufacture, use, repair, marketing, sale, distribution, import, export, stockpiling or transportation of anti-personnel mines and or sub-munitions within the sense of this act, and with a view to distribution thereof.

To this end The King shall, no later than the first day of the thirteenth month following the publication of this act, prepare a public list

i) of companies that have been shown to carry out an activity as under the previous paragraph;

ii) of companies holding more than half the shares of a company as under i) and;

iii) of collective investment institutions holding financial instruments of companies as designated in i) and ii).

He shall also determine the further regulations for the publication of this list.

Financing of a company on the list includes all forms of financial support, namely credits, bank guarantees and the acquisition for own account of financial instruments issued by the company.

In the event that a company which has already been granted financing is included in the list, this financing should, insofar as contractually possible, be fully terminated.

This prohibition does not apply to investment institutions where the investment policy under the articles of association or management regulations is to follow the composition of a specific share or bond index.

Similarly, the prohibition on financing does not apply to the well defined projects of a company on the list, insofar as the financing does not envisage activities as stated in this article.

The company is required to confirm this in a written statement. »

Art. 3. Paragraph 6 of article 67 of the act of 20 July 2004 governing certain forms of collective investment portfolio management is withdrawn.

Art. 4. The fourth indent of Article 3, § 2, 1, of the act for the prevention of money laundering and the financing of terrorism, dated 11 January 1993 as amended by the act of 12 January 2004, is supplemented as follows:

« including anti-personnel mines and/or sub-munitions ».

Art. 5. This act comes into force on the day it is published in the Belgian Monitor.^{XVII}

COMMENTARY

- The law states the exact meaning of financing, which it defines as ‘any kind of financial support, more concrete credits, bank guarantees or the acquisition for own account of the financial instruments these companies have issued.’ This definition is comprehensive and avoids the need for discussions about how to interpret the term.
- However, the law explicitly mentions two exceptions:
 - It says that “This prohibition does not apply to investment institutions where the investment policy under the articles of association or management regulations is to follow the composition of a specific share or bond index”. This means that index funds may still contain shares in or obligations issued by companies that produce or sell anti-personnel mines, depleted uranium weapons and cluster munitions. This exception weakens the law.

XVII Original text :

‘Est également interdit le financement d’une entreprise de droit belge ou de droit étranger dont l’activité consiste en la fabrication, l’utilisation, la réparation, l’exposition en vente, la vente, la distribution, l’importation ou l’exportation, l’entreposage ou le transport de mines antipersonnel et/ou de sous-munitions au sens de la présente loi en vue de leur propagation.

A cette fin, le Roi publiera, au plus tard le premier jour du treizième mois suivant le mois de la publication de la loi, une liste publique i) des entreprises dont il a été démontré qu’elles exercent l’une des activités visées à l’alinéa précédent;

ii) des entreprises actionnaires à plus de 50 % d’une entreprise au point i).

iii) des organismes de placement collectif détenteurs d’instruments financiers d’une entreprise aux points i) et ii).

Il fixera également les modalités de publication de cette liste.

Par financement d’une entreprise figurant dans cette liste, on entend toutes les formes de soutien financier, à savoir les crédits et les garanties bancaires, ainsi que l’acquisition pour compte propre d’instruments financiers émis par cette entreprise.

Lorsqu’un financement a déjà été accordé à une entreprise figurant dans la liste, ce financement doit être complètement interrompu pour autant que cela soit contractuellement possible.

Cette interdiction ne s’applique pas aux organismes de placement dont la politique d’investissement, conformément à leurs statuts ou à leurs règlements de gestion, a pour objet de suivre la composition d’un indice d’actions ou d’obligations déterminé.

L’interdiction de financement ne s’applique pas non plus aux projets bien déterminés d’une entreprise figurant dans cette liste, pour autant que le financement ne vise aucune des activités mentionnées dans cet article.

L’entreprise est tenue de confirmer ceci dans une déclaration écrite.’

Art. 3. Le paragraphe 6 de l’article 67 de la loi du 20 juillet 2004 relative à certaines formes de gestion collective de portefeuilles est abrogé.

Art. 4. Le quatrième tiret de l’article 3, § 2, 1, de la loi du 11 janvier 1993 relative à la prévention de l’utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme, modifié par la loi du 12 janvier 2004, est complété par la disposition suivante: « en ce qui compris les mines anti-personnel et/ou les sous-munitions ».

Art. 5. La présente loi entre en vigueur le jour de sa publication au *Moniteur belge*.

(Loi interdisant le financement de la fabrication, de l’utilisation ou de la détention de mines antipersonnel et de sous-munitions, available at <http://staatsbladclip.zita.be/staatsblad/wetten/2007/04/26/wet-2007003169.html>, last check 17 September 2009.) Translated by certified translator P. van Weeghel; text in IKV Pax Christi’s archives.

- The ban does not apply to financing specific projects by these companies when it can be demonstrated that the financing cannot be used for operations linked to anti-personnel mines or cluster munitions. To ensure exemption, financiers need a written declaration confirming the nature of the project and the fact that financing will not be used for operations linked to anti-personnel mines or cluster munitions. This still permits investors and lenders to finance projects for companies identified as anti-personnel mines or cluster munitions producers, but only when the project has nothing to do with the forbidden activities. This may sound like a reasonable exception, but it frees companies to transfer to projects that are connected with anti-personnel mines or cluster munitions funds that would otherwise have been needed for other purposes. This can legitimise financing for companies committed to very controversial activities that contravene international humanitarian law. When passing legislation, other countries should close this loophole.
- The law contains no penalties, nor does it assign responsibility for enforcement.

3.3.9 The Netherlands

The Dutch Ministry of Foreign Affairs believes that investment in cluster munitions production run counter to the spirit of, but are not necessarily banned by, the Convention on Cluster Munitions. In a letter to the Parliament in September 2008, the Ministry of Foreign Affairs stated that the convention cannot be applied to private institutions or persons and that an additional law banning investment in cluster munitions was not deemed necessary.⁵⁷⁹

In July 2009, a coalition of Dutch NGOs released a report on the financial links between banks and the arms industry. Cluster munitions was one of the main controversial weapons studied.⁵⁸⁰ When questioned in parliament about this report, the Finance Minister replied that it was the ethical responsibility of the financial sector how to invest their money as long as it did not break any national or international law.⁵⁸¹ In December 2009 however, Dutch Socialist and Labour parties called upon the government to prohibit investments in cluster munitions through a motion in Parliament.⁵⁸² The motion was adopted by a majority of votes in Parliament.

However, on March 31st of 2010, the Dutch Minister of Finance decided not to carry out the motion.⁵⁸³ IKV Pax Christi, amongst others, rejects this decision and will continue to strive for an implementation of the motion which will lead to a ban on investments in cluster munitions.

3.3.10 Switzerland

On 10 March 2010 the Swiss parliament adopted two motions that prohibit any investments in banned weapons, like cluster munitions and anti-personnel landmines.⁵⁸⁴ Because Switzerland signed the Convention on Cluster Munitions in 2008, but did not yet ratify it, it is thought and believed these motions will be included in the development of the implementation legislation to ratify the Convention.

Because Switzerland is home to many big financial institutions, these motions and the expected legislation can have a major impact on the financial markets regarding the cluster munitions issue.

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