

## 3.3 Countries' best practices

### 3.3.0 Introduction and methodology

Based on the research results revealed in this report, and several campaigning and research experiences 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 we see that an expanding group of financial institutions has decided to disinvest from cluster munitions, there is still a big difference in the effectiveness of their policies. Moreover, many financial institutions around the world do not appear to feel any need to assume responsibility.

While investment in arms and cluster munitions may have become an important topic within the social responsibility divisions of international banks, cluster munitions production has not yet suffered from underfunding. Strong international regulation and legislation will be needed to stem the flow of capital toward cluster munitions production.

Unfortunately, there seems to be no tradition of legislated restrictions on investment. On the contrary, economic deregulation and the globalisation of 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 take their own responsibility in responsible investment.

Governments can, of course, lead the way in providing good examples. The ethical guidelines that Norway gave its pension fund, and the resulting investment decisions, are a good example. Governments cannot afford to maintain double standards by opposing the use of cluster munitions, while continuing to invest in cluster munitions production.

Therefore, any governmental effort to fight the misery related to the use of cluster munitions should include efforts to dry up the supply capital used to fund cluster munitions' production.

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

- **Research**

To be listed as a country banning investments, a country must either have officially stated that it considers investment to be part of the Convention on Cluster Munitions, or have proposed and/or passed legislation which bans investments. Proposed legislation does not need to be comprehensive, but it should meet the following criteria to be listed:

The law proposal must be discussed in Parliament or another body with power to issue legislation.

The law proposal should contain an explicit ban on investment in cluster munitions.

We were limited to policy statements available in English and/or 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 the ethical argument against cluster munitions with a strong legal background. The convention will be legally binding on signatory states six months after 30 countries have ratified the convention.

Article 1c of the Convention 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 explained in a CMC Policy Paper, the Cluster Munition Coalition states that the prohibition on assistance includes a prohibition on investments in cluster munitions.<sup>469</sup> Several countries have confirmed this: Lebanon, Mexico, Norway, Ireland and Rwanda have identified investment among the prohibited forms of assistance.<sup>470</sup>

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

Lebanon, Mexico and Rwanda have not yet ratified the Convention, but have stated that they consider investment to be among the prohibited forms of assistance. Since these countries have not yet proposed or enacted legislation we are, obviously, unable to provide a commentary. Yet we still include them in the list of countries that agree that investment is a form of assistance. It is important if and when these countries should propose and enact legislation that this legislation contains an effective, operative ban on investment.

Denmark is discussing a law proposal that says that a law should be issued making both private and public investing in companies involved in activities relating to cluster munitions illegal. The proposal has been tabled by the opposition and is currently being discussed in the Danish Parliament.<sup>471</sup> Since it is not yet available in English, we are not able to comment on it either.

### 3.3.1 Ireland

#### BACKGROUND

Ireland was a driving force behind the Oslo process. It is thought to deserve much of the credit for the successful outcome of the negotiations and the strength of the convention. It signed and ratified the *Convention on Cluster Munitions* on 3 December 2008.<sup>472</sup>

Even before it signed the Convention, on 3 March 2008, Ireland’s 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 following the government’s request to withdraw support from companies involved in the manufacture of cluster munitions.<sup>473</sup>

On 22 October 2008, Ireland presented the 2008 Cluster Munitions and Anti-personnel Mines Bill to its Lower House. This act, number 20, was Ireland’s way of signing and ratifying the Convention. It made Ireland one of the four countries that signed and ratified the same day on 3 December 2008.<sup>474</sup>

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.<sup>475</sup>

#### *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.*

#### COMMENT

- 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 producers of cluster munitions (not only the munitions-linked 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. S/He “shall endeavour to avoid the investment of public money in a munitions company” and s/he must “exercise due diligence” when investing in collective products.
- The Irish law makes an exception for financial instruments based on a financial index: investments are allowed even when these 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. 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 stipulations on how to determine which companies are involved in the manufacture of prohibited munitions or components.

### 3.3.2 Lebanon

The Republic of Lebanon signed the Convention on Cluster Munitions in Oslo on 3 December 2008.<sup>476</sup>

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.”<sup>477</sup>

### 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 process to wait for the final text of the CCM in December 2008. After signing the Oslo Convention, a second version and draft ratification law was published. It prohibited all persons or businesses from knowingly financing cluster munitions or explosive submunitions.<sup>478</sup> The ratification law was passed 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”<sup>xiv</sup>*

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.<sup>479</sup>

#### COMMENT

- The term ‘knowingly’ did not appear in the first draft legislation. In June 2008, the ABBL, the Luxembourg Bankers Association, and the ALFI, Luxembourg Fund Association, published a comment on this draft. These associations suggested including the term ‘knowingly’ into 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 proposed replacing the words ‘direct or indirect financing’ with ‘knowingly financing’.<sup>480</sup> The term ‘knowingly’ could be a loophole in this legislation. This term shrugs off responsibility for identifying transactions related to cluster munitions. It could release banks from their duty of due diligence and scrutiny. Luxembourg’s implementation law will have to provide an explicit definition of ‘knowingly’. Luxembourg could do the same as in Belgium where the state is obliged to draw up a list of cluster munitions producers.
- The text does not define ‘financing’. Because this word can be interpreted in several ways; its scope needs to be specified.

<sup>xiv</sup> 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.

- The law forbids financing of cluster munitions. It does not explain whether this means that producers of cluster munitions 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 foresee monitoring tools, producer or financier lists, auditing methods, etc. The implementing decree 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.<sup>481</sup>

In a letter to Human Rights Watch, the Government of Mexico offered its understanding of several provisions in the Convention on Cluster Munitions. It stated: “Also, it is Mexico’s opinion that investment for the production of cluster munitions is also prohibited by the Convention.”<sup>482</sup>

### 3.3.5 Norway

Norway – 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 that same day.<sup>483</sup>

The Convention on Cluster Munitions is implemented in Norway primarily through a separate law on cluster munitions as set out in Proposition n° 7. It has not yet been formalised.<sup>484</sup>

In Proposition n° 7 to the Odelsting, the Norwegian lower house, the Norwegian Ministry of Foreign Affairs 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. They refer to a previous assessment of this question made by the Petroleum Fund’s Advisory Commission on International Law in 2002, referring to the identically worded prohibition against aiding and abetting set out in Article 1 of the Convention on Anti-personnel Landmines: “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.<sup>485</sup>

### 3.3.6 Rwanda

The Republic of Rwanda signed the Convention on Cluster Munitions in Oslo on 3 December 2008 and has begun its ratification process.<sup>486</sup>

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’.<sup>487</sup>

## OTHER LEGISLATION

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.

An example of this international consensus is the European Community, which expressed concerns about cluster munitions. The European Parliament Resolution on a Mine-Free World was adopted 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.*”<sup>488</sup>

In October 2007 this claim was repeated in the European Parliament resolution Towards A Global Ban To Ban All Cluster Munitions. In that resolution, 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.*”<sup>489</sup>

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.

Below you will find information on proposed and passed legislation and an assessment of this legislation’s strengths and weaknesses.

### 3.3.7 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, the 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:<sup>490</sup>

*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.<sup>xv</sup>

## COMMENT

- 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 discussions about how to interpret this term.
- The law explicitly mentions two exceptions however:
  - It states 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 or obligations of anti-personnel mines and cluster munitions producers. This exception weakens the law.
  - The ban does not apply to the financing of specific projects by these companies when it can be demonstrated that the financing cannot be used for anti-personnel mines or cluster munitions activities. To ensure exemption, the financier needs a written declaration to confirm the nature of the project and the fact that financing will not be used for anti-personnel mines or cluster munitions related operations.

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<sup>xv</sup> 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, in possession by IKV Pax Christi.

This still permits project financing for a company identified as anti-personnel mines or cluster munitions producer, but only if the project has nothing to do with the forbidden activities. This may sound like a reasonable exception, but it leaves room for companies to internally transfer funds to anti-personnel mines or cluster munitions that would otherwise have been needed for these projects. This can legitimise financing of companies involved in very controversial activities that breach international humanitarian law. Legislation in other countries should prevent this loophole.

- The law contains no sanctions, nor does it assign responsibility for enforcement.

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- 471 Written response by a Danish government official on 25 September 2009.
- 472 “Banning Cluster Munitions: Government Policy and Practice”, Human Rights Watch and Landmine Action, Mines Action Canada, May 2009, p. 92, available at [www.lm.icbl.org](http://www.lm.icbl.org).
- 473 Written response by NPRF to Netwerk Vlaanderen on 30 July 2009.
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