

December 2018 update

**Worldwide
investments in
CLUSTER MUNITIONS
a shared responsibility**

PAX

Chapter 5

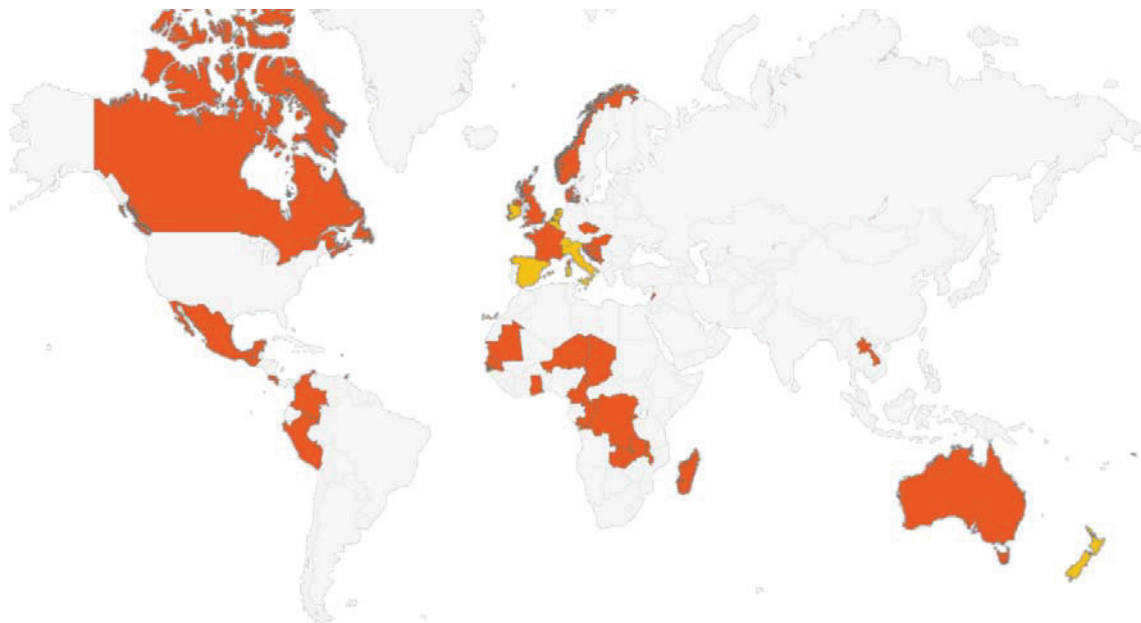
Countries' best practices

5.1 Introduction and methodology

Investment in arms and cluster munitions is an important topic in many international financial institutions' corporate social responsibility, a many financial institutions still seem to seek for guidance from their governments on this issue. Stringent international regulation and legislation are needed to stem the flow of capital to cluster munitions producers.

Governments can and should, of course, lead the way by providing good examples. Article 1(1) c 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 financing or investing in cluster munitions producers is a clear form of assisting with production, the CCM's provisions should be understood to also prohibit investing in cluster munitions producers.⁶⁹¹

The Dubrovnik Action Plan that was adopted by States Parties during the First Review Conference on the Convention on Cluster Munitions in 2015 stipulates that "states may wish to consider enacting national legislation prohibiting investments in producers of cluster munitions."⁶⁹² Governments that oppose the use of cluster munitions, should not allow investment in cluster munitions producers. Any governmental effort to oppose the misery that cluster munitions cause should include efforts to dry up the supply of capital that funds the companies that produce cluster munitions.



States with legislation (yellow) or interpretive statement (orange)

An ever growing group of states shares the view that the Convention bans investment in cluster munitions. Below we will list 11 countries that have addressed the investment issue as part of the Convention on Cluster Munitions ratification measures or that have issued separate laws to prohibit investments. In addition, we also list 35 states that have issued statements that they consider the CCM's prohibition on assistance to cover investment in cluster munitions.

We consider countries to have prohibition investments in cluster munitions, when a country has either passed legislation banning investments or has stated officially that investments in cluster munitions are or should be seen as prohibited under the CCM or another legal instrument. We also make note of legislative proposals that contain an explicit ban on investment in cluster munitions.

We welcome the steps these states have taken towards banning all investments in cluster munitions and call upon other states to follow suit.

5.2 Divestment – legislation

Some states have adopted national legislation prohibiting investments in cluster munitions as part of their ratification of the CCM. Others have covered the issue in separate laws. In what follows, we describe existing legislation with regard to investments in cluster munitions. For each state, we give an excerpt quote of the relevant legislative texts, followed by a commentary.

This chapter could serve as inspiration for states that have not yet enacted similar legislation and for states that have to adapt their legislation to be even more comprehensive in banning all investments in cluster munitions producers.

The following questions structure our commentary:

- **What exactly does the legislation exclude from investment?**
The legislation should prohibit investing in all companies involved in the production of cluster munitions, and define cluster munitions producers in a comprehensive way. This means that key components and submunitions should also fall under the definition. All of the company's activities should fall under the prohibition of financing. First of all, only a ban on *all activities* of a company that produces cluster munitions will lead to the desired outcome. A law that only limits (project) financing of the actual production of cluster munitions will be less effective. Whereas there are no known instances project finance of cluster munitions, a company that produces cluster munitions, can use a general purpose corporate loan to continue its production.
- **How does the legislation define 'investment' or 'financing'?**
The legislation should exclude all types of investments in or financial services offered to producers of cluster munitions. The legislation should cover all types of corporate banking, investment banking and asset management and should not make exceptions for specific types of investments. For example, the law should make no exceptions for index based funds or other ways to circumvent the prohibition.
- **To whom does the legislation apply?**
To create a complete ban on investment, legislation should make clear that it forbids any investment by any party, especially private financial institutions.
- **How is the legislation enforced?**
Legislation on divestment is powerless without monitoring, whether by public institutions, ethical councils or others assigned to audit compliance with the law.

5.1.2 Belgium

Background

Belgium signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 22 December 2009.⁶⁹³

Belgium was the first country in the world to prohibit investments in producers of cluster munitions in March 2007. Its legislation was adopted even before the Convention on Cluster Munitions came about. The bill acknowledges that cluster munitions are inhumane weapons and the role of financial institutions.

Belgium has called on states parties to the CCM to take the necessary measures to prohibit all financial assistance to cluster munition production in order to ensure full application of the prohibition on assistance in article 1 of the CCM.⁶⁹⁴

Legislation

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.⁶⁹⁵ The text is as follows:⁶⁹⁶

“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 on 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.”^{XXI}

Commentary

What does the legislation exclude from investment?

- The Act prohibits investments in companies that undertake a wide range of activities related to anti-personnel mines and submunitions. The law does not specify how to deal with (key) components of anti-personnel mines or submunitions.
- The ban does not apply to financing specific projects of the above mentioned companies when it can be demonstrated that the financing will not 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 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 of cluster munition producing companies, when the financed project is not related to the forbidden activities. This exception weakens the law, for it will not prevent companies from transferring money internally to projects connected with anti-personnel mines or cluster munitions.

How does the legislation define ‘investment’ or ‘financing’?

- The law prohibits “all forms” of financial support, yet it defines financing in a rather restrictive way: “credits, bank guarantees or the acquisition for own account of the financial instruments” issued by cluster munitions producers.
- Furthermore, the law 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 it is not prohibited to invest in index funds that contain shares or bonds of cluster munition producing companies. This exception weakens the law.

To whom does the legislation apply?

- The Act is a supplement to article 8 of the Act of 8 June 2006 governing economic and individual activities involving arms, which mentions “no one may [...]”; therefore it should be understood that the Act applies to all natural and legal persons, thereby including financial institutions.⁶⁹⁷

XXI 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.” Translated by certified translator P. van Weeghel; text in PAX’ archives.

How is the legislation enforced?

- The 2006 act that the law builds upon includes the penalty provision that “those who violate this law [...] will be punished with imprisonment ranging from one month to five years and a fine of 100 Euro to 25,000, or one of these penalties.” This penalty also applies to those who violate the prohibition on investment.⁶⁹⁸
- The law provides for a public exclusion list. However, at the time of writing, over ten years after the legislation was passed, the responsible minister has still not published an exclusion list. This substantially weakens the application of the law.

5.2.2 Ireland

Background

Ireland was a driving force behind the Oslo process. It signed and ratified the Convention on Cluster Munitions on 3 December 2008.⁶⁹⁹

Even before that, Irelands 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.⁷⁰⁰

On 22 October 2008, Ireland presented the 2008 Cluster Munitions and Anti-personnel Mines Act to its Lower House. It paved the way for Ireland being one of the four countries signing and ratifying the convention at once on 3 December 2008.⁷⁰¹

Ireland was the first country to specify an investment prohibition in the legislation implementing and ratifying the CCM. This is an important example for other countries. Ireland has also stated that investing in or financing prohibited weapon production undermines the international legal framework that governs their prohibition.⁷⁰²

Legislation

The 2008 Cluster Munitions and Anti-Personnel Mines Act explicitly prohibits investment of public money in cluster munitions producers. The prohibition is set out in Part 4 of the act:⁷⁰³

“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

What does the legislation exclude from investment?

- The law clearly prohibits investment in cluster munitions producers (whether for munitions-linked or other activities). This includes producers of specifically designed components of cluster munitions.

How does the legislation define ‘investment’ or ‘financing’?

- 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.
- The law prohibits many types 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 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.

To whom does the legislation apply?

- The legislation indicates that an “investor” is a person or body responsible for investing public moneys under the authority of a government minister. As mentioned before, the Act only applies to money in the Central Fund. The fact that the act does not extend to private financial institutions weakens the law.

How is the legislation enforced?

- The legislation does not provide for specific supervision or monitoring tools. It is therefore 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 also no provisions setting criteria for determining which companies are involved in the manufacture of prohibited munitions or their components.

5.2.3 Italy

Background

Italy signed the CCM on 3 December 2008 and ratified it on 21 September 2011. On 4 July 2011, the Law on the Ratification and Implementation of the Oslo Convention on the ban on cluster munitions (Law no. 95) was published.⁷⁰⁴

Legislation

Art. 7 (1) of the Law on the Ratification and Implementation of the Oslo Convention on the ban on cluster munitions (Law no. 95) declares financial assistance to acts prohibited by the law a crime:

“Whoever uses, subject to the provisions of Article 3, paragraph 3, develops, produces, acquires in any way, stores, retains, or transfers, directly and indirectly, cluster munitions or parts thereof, or financially assists, encourages or induces others to engage in such activity, is punished with imprisonment from three to twelve years and a fine of 258,228 Euro to 516,456 Euro.”^{705 XXII}

The Italian Campaign to Ban Landmines has advocated a separate, more detailed law. On 26 April 2010, separate draft legislation on investments was introduced in the Senate. It would prohibit all Italian financial institutions from providing any form of support to Italian or foreign companies performing a range of activities including the production, use, sale, import, export, stockpiling, or transport of antipersonnel mines as well as cluster munitions and explosive submunitions.⁷⁰⁶

The draft legislation was referred to the Senate financial and treasury commission on 26 May 2010. On 18 December 2012, the legislative finance committee of the Chamber of Deputies approved the draft legislation.⁷⁰⁷ On 27 June 2013, Deputy Minister for Foreign Affairs Lapo Pistelli said the government favours rapid approval of the disinvestment law.⁷⁰⁸ On 24 September 2013, the draft legislation was sent to the Committee on Constitutional Affairs, the Foreign Affairs Committee, the Defence Commission, the Budget Committee and the Industry Committee for advice.⁷⁰⁹ On 23 September 2015, the review process recommenced and the Bill obtained positive opinion by the Foreign Affairs Committee, the Committee on Constitutional Affairs and the Defence Commission. On 6 October 2016, the Finance Commission unanimously voted in favour of the adoption of the law. In October 2017, the Chamber of Deputies voted in favour of the draft bill. However, the President of the Republic subsequently asked for amendments to the bill's provision for penalties to be made. As of August 2018, the amended law (now referred to as S.1) is again pending approval through a privileged process in the Senate.⁷¹⁰

On the occasion of International Mine Awareness Day 2018, the President of the Republic Sergio Mattarella made a statement saying “*I address a special thanks to all the volunteers and associations who, with great civil passion, work indefatigably in the places most plagued by war to finally reopen the doors to a more decent future. (...) Lastly, on this Day, I reaffirm the hope that the Italian Parliament might soon promote a new legislative effort, consistent with our constitutional principles, to also effectively combat supporting companies that produce anti-personnel landmines and cluster munition.*”⁷¹¹

The Italian Campaign to Ban Landmines will keep advocating for the adoption of the bill. Until the new legislation enters into force, the current law will remain the legislative framework for investment in cluster munitions.⁷¹² The following commentary discussed the legislation as it is currently in place and indicates where changes would be made by the proposed new law.

XXII Original text: “Chiunque impiega, fatte salve le disposizioni di cui all'articolo 3, comma 3, sviluppa, produce, acquisisce in qualsiasi modo, stocca, conserva o trasferisce, direttamente o indirettamente, munizioni a grappolo o parti di esse, ovvero assiste anche finanziariamente, incoraggia o induce altri ad impegnarsi in tali attività, e' punito con la reclusione da tre a dodici anni e con la multa da euro 258.228 a euro 516.456.” Translated by Suzanne Oosterwijk, PAX.

Commentary

What does the legislation exclude from investment?

- The text of Law no. 95 prohibits financing the development and production of cluster munitions or parts thereof. It does not explain whether this means that it prohibits investment in cluster munitions producers or whether it only covers producing cluster munitions. The latter would permit general purpose financing for cluster munitions producers.

How does the legislation define ‘investment’ or ‘financing’?

- The text of Law no. 95 does not define “financial assistance.” In that respect the draft proposal of 26 April 2010 defines the scope of financial assistance more precisely. The latter prohibits the provision of any form of financial support, including granting any type of credit, issuing financial guarantees, equity participation, acquisition or subscription of securities issued by companies producing antipersonnel mines or cluster munitions. It forbids Italian and foreign companies operating in Italy from financing companies performing a range of activities relating to antipersonnel mines, cluster munitions and submunitions.
- The reference to the prohibition of “financial assistance” in the law is due to an approved amendment to the original text. As a consequence, financial assistance to the production, development, storage, etc. of cluster munitions or parts thereof is a national crime. However, the current text seems to leave the possibility open that it only applies to the Italian level. The Italian Campaign to Ban Landmines warns that the law currently still makes it possible to offer financial assistance on an international level.

To whom does the legislation apply?

- The law states that “whoever” engages in a prohibited act, commits an offence. Whereas it is not specified exactly how broad that is meant, it should be understood that the law applies to all natural and legal persons, thereby including financial institutions.

How is the legislation enforced?

- The Italian law defines penalties, but does not provide for specific supervision or monitoring tools. The implementation order will have to regulate all of these issues and will be decisive for the law’s scope.
- The 26 April 2010 draft proposal is more detailed. It requires the Bank of Italy to appoint a third party to monitor compliance and to publish a list of companies involved in the production, use, repair, promotion, sale, distribution, import, export, storage, possession or transportation of cluster munitions.

5.2.4 Liechtenstein

Background

The Principality of Liechtenstein signed the Convention on Cluster Munitions in Oslo on 3 December 2008. It ratified the convention on 4 March 2013.⁷¹³ At the same time, the Parliament of Liechtenstein approved an amendment to the Law on Brokering War Material, which entered into force on 1 September 2013. That amended law prohibits brokering and direct and indirect financing of prohibited war material, including cluster munitions.⁷¹⁴

Due to the Customs Union Treaty between Liechtenstein and Switzerland, “the development, manufacture, purchase, acquisition, transfer, import, export, transport, and stockpiling and possession of cluster munitions is governed by Swiss legislation in Liechtenstein.” Therefore, the amendments to Switzerland’s Federal Law on War Material, which the Swiss parliament passed in March 2012, also apply in Liechtenstein.⁷¹⁵

Legislation

The prohibition is set out in Articles 7b and 7c, governing direct and indirect investment. Their wording is similar to that of the Swiss legislation (see below):⁷¹⁶

“Art. 7b Prohibition of direct financing

- 1 The direct financing of the development, manufacture or acquisition of prohibited war material is prohibited.
- 2 Direct financing within the meaning of this Act is the direct extension of credits, loans or donations or comparable financial benefits to cover the costs of or to promote the development, manufacture or acquisition of prohibited war material.

Art. 7c Prohibition of indirect financing

- 1 The indirect financing of the development, manufacture or acquisition of prohibited war material is prohibited where the prohibition of direct financing is circumvented thereby.
- 2 Indirect financing within the meaning of this Act is:
 - a. the participation in companies that develop, manufacture or acquire forbidden war material.
 - b. the acquisition of bonds or other investments products issued by such companies.”^{XXIII}

Article 29b of the law stipulates the punishment of offences against the prohibition of financing:

“Art. 29b Offences against the prohibition of financing

- 1 Any person who wilfully fails to comply with the prohibition on financing under Articles 7b or 7c without being able to claim an exemption under Article 6 paragraph 2, Article 7 paragraph 2 or Article 7a paragraph 3 is liable to a custodial sentence not exceeding five years or to a monetary penalty by the Court.”^{XXIV}

Commentary

What does the legislation exclude from investment?

- The legislation prohibits directly or indirectly financing the development, manufacture or acquisition of forbidden war material (including cluster munitions). The law does not specify how to deal with (key) components.
- The definition of financing of the law means that financing other activities of cluster munitions producers not linked to war material is still possible. This weakens the effect of the law because, as stated above, financial flows in companies are hard to divide because they are interconnected. Only a ban on the financing of all activities of these manufacturers will guarantee that no war material is funded.

XXIII Original text:

“Art. 7b Verbot der direkten Finanzierung

- 1) Die direkte Finanzierung der Entwicklung, der Herstellung oder des Erwerbs von verbotenem Kriegsmaterial ist verboten.
- 2) Als direkte Finanzierung im Sinne dieses Gesetzes gilt die unmittelbare Gewährung von Krediten, Darlehen und Schenkungen oder vergleichbaren finanziellen Vorteilen zur Bezahlung oder Bevorschussung von Kosten und Aufwendungen, die mit der Entwicklung, der Herstellung oder dem Erwerb von verbotenem Kriegsmaterial verbunden sind.

Art. 7c Verbot der indirekten Finanzierung

- 1) Die indirekte Finanzierung der Entwicklung, der Herstellung oder des Erwerbs von verbotenem Kriegsmaterial ist verboten, wenn damit das Verbot der direkten Finanzierung umgangen werden soll.
- 2) Als indirekte Finanzierung im Sinne dieses Gesetzes gilt:
 - a) die Beteiligung an Gesellschaften, die verbotenem Kriegsmaterial entwickeln, herstellen oder erwerben;
 - b) der Erwerb von Obligationen oder anderen Anlageprodukten, die durch solche Gesellschaften ausgegeben werden.”

XXIV Original text:

“Art. 29b Widerhandlungen gegen das Finanzierungsverbot

- 1) Vom Landgericht wird mit Freiheitsstrafe bis zu fünf Jahren bestraft, wer vorsätzlich und ohne dass er eine Ausnahme nach Art. 6 Abs. 2, Art. 7 Abs. 2 oder Art. 7a Abs. 3 in Anspruch nehmen kann, gegen das Finanzierungsverbot nach den Art. 7b oder 7c verstösst.” Translated by Suzanne Oosterwijk, PAX.

How does the legislation define ‘investment’ or ‘financing’?

- The law prohibits directly and indirectly financing the development, manufacture or acquisition of forbidden war material. Article 7b(2) defines direct financing as: “the direct extension of credits, loans or donations or comparable financial benefits to cover the costs of or to promote the development, manufacture or acquisition of prohibited war material.”⁷¹⁷
- Article 7c forbids indirect investments only “where the prohibition of direct financing is circumvented thereby.” This constitutes an exception to the prohibition which is difficult to verify, as the exact motive of the investor will be hard to ascertain.
- Moreover, Article 7c narrows the definition of “indirect investment” to shares and bonds, which therefor does not include corporate finance for example, thereby further limiting the application of the law.
- Article 29b addresses the problem of unintended investment: if an investor did not know he was investing in prohibited war material, he will not be sued. However, without a clear definition of “unintended”, investors could easily claim their financing was “unintended” and therefore bypass the law.

To whom does the legislation apply?

- According to article 29b, the legislation applies to “Any person who wilfully fails to comply”. This means that the law applies to all natural and legal persons, thereby including financial institutions.

How is the legislation enforced?

- The law defines penalties, but does not provide for specific supervision or monitoring tools. Following article 29b, any person who wilfully violates the prohibition can be punished by a custodial sentence not exceeding five years or to a monetary penalty.

5.2.5 Luxembourg

Background

Even before the Oslo Convention was signed, Luxembourg developed draft legislation on cluster munitions that included a ban on investments. Luxembourg decided to freeze this procedure to wait for the final text of the CCM in December 2008. It signed the Convention on Cluster Munitions on 3 December 2008 and ratified the convention on 10 July 2009. The ratification legislation includes a prohibition on financing cluster munitions.

Legislation

The Luxembourg “Bill approving the Convention on Cluster Munitions” of 7 May 2009 ⁷¹⁸ contains a ban on investments:

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

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.” ^{XXV 719}

At the first Meeting of States Parties to the Convention on Cluster Munitions in Lao PDR, Luxembourg’s Vice-Prime Minister, Jean Asselborn, encouraged all the states that have signed the convention “to prohibit the financing of cluster bombs.”⁷²⁰ During the First Review Conference of States Parties to the Convention on Cluster Munitions, in September 2015 in Croatia, Luxembourg expressed the hope that other States Parties would follow Luxembourg’s example and prohibit investment in cluster munitions.⁷²¹

XXV 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, Action on Armed Violence.

Commentary

What does the legislation exclude from investment?

- The law forbids financing of cluster munitions or explosive submunitions. It does not explain whether this means that cluster munitions producers are excluded from investment, or that the exclusion only covers the act of producing cluster munitions.

How does the legislation define ‘investment’ or ‘financing’?

- The text does not define “financing.” Making the definition of these terms explicit would clarify the law.
- 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.”⁷²² The term “knowingly” could create difficulties in implementing this legislation. 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. Publishing a black list of cluster munitions producers could solve this problem.

To whom does the legislation apply?

- Following article 3, the law prohibits “all persons, businesses and corporate entities” from knowingly financing cluster munitions or explosive submunitions.

How is the legislation enforced?

- According to Article 4, “knowingly” breaching the prohibition can result in a prison sentence of 5 to 10 years and/or to a €25,000 to €1 million fine.
- The law does not provide for specific supervision or monitoring tools. The implementation order will have to specify all of these and is of major importance for the implementation and scope of the law. At the first Meeting of States Parties to the Convention on Cluster Munitions in Lao PDR, Luxembourg announced that it would set up an ethics commission. Minister for Foreign Affairs Asselborn launched the idea to create an ethical council in the Grand Duchy of Luxembourg. This council would be composed of Luxembourg financial (Alfi, Gafi, ABBL, CSSF) and public institutions (Ministry of Finance, Ministry of Justice, Ministry of Foreign Affairs, Compensation Fund). It would be responsible for monitoring and verifying present and future investments by the State of Luxembourg to prevent improper investments in companies involved in the production of cluster munitions.^{xxvi} This commission would be of great assistance in monitoring investments and enforcing the law, but it is not in place at the time of writing.⁷²³

XXVI Original text: “Lors d’une prise de position devant la presse luxembourgeoise, le Vice-Premier Ministre a réitéré son appel à l’interdiction du financement en connaissance de cause d’armes à sous-munitions. Au vu des difficultés de prévoir les ramifications de certaines sociétés dans des secteurs industriels qui produisent des armes à sous-munitions, le ministre Asselborn a lancé l’idée de créer une enceinte éthique au Grand-Duché de Luxembourg qui serait composé d’institutions financières luxembourgeoises (Alfi, Gafi, ABBL, CSSF) ainsi que d’institutions publiques (ministère des Finances, ministère de la Justice, ministère des Affaires étrangères, Fonds de Compensation) et qui serait chargé de contrôler et vérifier les investissements actuels et futurs de l’État luxembourgeois en vue de prévenir des investissements erronés dans des sociétés impliquées dans la production d’armes à sous-munitions.” Translated by Esther Vandenbroucke, FairFin.

5.2.6 The Netherlands

Background

The Netherlands signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 23 February 2011. The Dutch legislation implementing the CCM contains no prohibition on investment in cluster munitions.⁷²⁴

However, on 1 January 2013, the amended Market Abuse (Financial Supervision Act) Decree entered into force. The Decree “imposes an obligation that prevents an enterprise from directly supporting any national or foreign enterprise which produces, sells or distributes cluster munitions.”⁷²⁵ During the Fifth Meeting of States Parties to the Convention on Cluster Munitions in Costa Rica in September 2014, the Netherlands called upon other states who have not yet done so to take measures prohibiting investments in cluster munitions.⁷²⁶

During the 8th MSP of the CCM in 2018, the Netherlands added that “In order to ensure full and effective compliance with the Convention, the Netherlands has adopted legislation that prohibits direct investments (...) which is “in line with Article 1.1.(c) of the Convention”⁷²⁷

Legislation

The prohibition, set out in Article 21a of the Decree, states the following:

- “1. An enterprise as referred to in Article 5:68 (1) of the Act, not being a clearing institution, will take adequate measures to ensure that it does not:
 - a. carry out transactions or has transactions carried out with a view to acquiring or offering a financial instrument that has been issued by an enterprise that produces, sells or distributes cluster munitions as referred to in Article 2 of the Convention on Cluster Munitions which was concluded in Dublin on 30 May 2008 (published in the Bulletin of Treaties 2009, 45) or essential parts thereof;
 - b. provide loans to an enterprise as referred to in subsection (a) above;
 - c. acquire non-marketable holdings in the capital of any enterprise described under (a) above.
2. The first section above is equally applicable to carrying out transactions, or having them carried out, with a view to acquiring or offering a financial instrument that has been issued by any enterprise that holds more than half of the share capital of an enterprise as referred to in subsection 1 (a) and also to loans to, or non-marketable holdings in such an enterprise.
3. Section 1 above will not apply to:
 - a. transactions based on an index in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total;
 - b. transactions in investment funds operated by third parties in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total; and
 - c. investments in clearly defined projects carried out by an enterprise described in subsection 1 (a) insofar as such funding is not utilised for the production, sale or distribution of cluster munitions.
4. Without prejudice to the provisions of section 1 above, enterprises that do hold financial instruments, loans or non-marketable holdings as described in that section should dispose of them or terminate them within a reasonable period of time.”

A Dutch financial institution in violation of Article 21a of the Market Abuse (Financial Supervision Act) Decree can be sanctioned to a fine with a set basic amount of €500,000 and a maximum of €1,000,000.XXVII ⁷²⁸

XXVII A fine of category 2 applies to a financial institution in breach with Article 21a of the Market Abuse (Financial Supervision Act) Decree. The set basic amount is €500,000 with a maximum of €1000,000. The Netherlands Authority for the Financial Markets can increase or decrease the basic amount as it sees fit, according to duration and nature of the violation.

Commentary

What does the legislation exclude from investment?

- The legislation defines the subject of financial exclusion as “an enterprise that produces, sells or distributes cluster munitions” or “essential parts thereof.” The explanatory note defines essential parts as “those (components) which are indispensable for the functioning of cluster munitions.” Dual use components are explicitly excluded from the scope of the definition.⁷²⁹ The legislation clearly prohibits investing in the entire company involved in the production of cluster munitions, which makes it more effective than legislation prohibiting only investments in cluster munition related activities of such a company.
- Section 2 applies the prohibition equally to holdings containing a subsidiary, defined as majority-owned, with activities related to cluster munitions. According to the explanatory notes: “without this addition, it would be relatively easy to evade the provision by establishing a parent company (holding) in which investments could be made and transferring the activities related to cluster munitions to a separate, wholly or partly-owned subsidiary.”
- The ban does not apply to financing specific projects of companies involved in the production, sale or distribution of cluster munitions if it can be verified by the supervisory authority that the financing provided to a company will not be used for operations linked to cluster munitions. Some kind of assurance will have to be available like for example a written declaration from the cluster company confirming the nature of the project and that financing will not be used for operations linked to cluster munitions. This still permits investors and lenders to finance projects of companies identified as cluster munitions producers, but only when the project has nothing to do with the prohibited activities. This exception weakens the law, for it will not hinder recipient companies from transferring money internally to projects that are connected with cluster munitions.

How does the legislation define ‘investment’ or ‘financing’?

- The legislation applies only to “direct and demonstrable investments.” These are defined in article 21a as investments, loans or non-marketable holdings in or to an enterprise that produces, sells or distributes cluster munitions. The “adequate measures to prevent investment” pertain particularly to measures by a financial institution that are legally possible and are unilaterally enforceable. According to the explanatory notes, “this is at least the case when an institution is acting on its own behalf and for its own account, is itself manager of an investment fund or receives explicit instructions from a client, without an associated request for advice, to invest in an enterprise as referred to in subsection 1 (a); this is known as an ‘execution only’ situation.” This would suggest that investments on behalf of clients, investments under external management, or investments at a client’s instructions with an associated request for advice are permitted. The addition of “at least” however, suggests this is a minimal approach to implementing the law, and therefore leaves financial institutions uncertain about how to implement the law.
- The prohibition contains several exceptions.: Subsection (3) provides an exception for transactions following an index, when less than five percent of the total assets of that index are invested in companies producing cluster munitions. These transactions are defined as including “index funds, index trackers, the replication of indices in a ‘basket’, and similar financial products.”
- Subsection 3 (b) holds a similar exception for “transactions in investment funds managed by third parties, where one or more of the enterprises that produce, sell or distribute cluster munitions constitute less than five percent of the total.”
- This means that funds following an index and investment funds may still contain the specified percentage of cluster munitions producing companies. This exception weakens the prohibition, especially since companies involved in the production of cluster munitions usually do not represent more than 5% in funds that follow an index or investment funds.

- As mentioned before, there is also an exception for so-called ringfencing: if the cluster munition producing company can prove the funds will be used for other purposes, financing is not prohibited by the Dutch law.

To whom does the legislation apply?

- The prohibition's scope is limited to financial institutions that operate in the Netherlands and that have substantial dealings with the financial markets. This means that Article 21a does not apply to individuals, to legal entities other than those specified in the prohibition's accompanying explanatory notes, or to foreign subsidiaries of financial institutions in the Netherlands.

How is the legislation enforced?

- The Netherlands Authority for the Financial Markets (AFM) is in charge of monitoring the implementation of the prohibition. Financial institutions that violate the prohibition are subjected to administrative financial penalties to be imposed by the AFM, or can be prosecuted by the public prosecutor.
- The Dutch legislation does not provide for a blacklist of companies involved in the production of cluster munitions. However, the AFM that supervises the implementation of the law, has cooperated with the Dutch financial sector to provide for a regularly updated list of cluster munitions producers, called a risk radar. This list helps financial institutions comply with the law's requirements. However, financial institutions remain responsible for ensuring they do not invest in cluster munitions producers, even if a specific company is not listed on the AFM's risk radar. The AFM will start an investigation if investment in any of the identified companies occur.^{XXVIII}

5.2.7 New Zealand

Background

New Zealand signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 22 December 2009.⁷³⁰

On 10 December 2009, the New Zealand parliament unanimously voted to pass legislation to implement the CCM. This Cluster Munitions Prohibition Act contains a prohibition on investments in cluster munitions, that was added after strong campaigning by the Aotearoa New Zealand Cluster Munition Coalition.

Legislation

Article 10-2 of the Cluster Munitions Prohibition Act 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."

Article 5 of the law defines clearly what it means by funds: "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."⁷³¹

Article 10-4 provides for penalties for violations of the act:

"A person who commits an offence against subsection (1), (2), or (3) is liable on conviction to imprisonment for a term not exceeding 7 years or a fine not exceeding NZD\$500,000, or both."

XXVIII See "Frequently Asked Questions" on the website of the Netherlands Authority for the Financial Markets (AFM), at <https://www.afm.nl/en/professionals/veelgestelde-vragen/clustermunitie-investeringsverbod> (available in English), last viewed 2 November 2018.

Commentary

What does the legislation exclude from investment?

- It is not clear whether the law prohibits all financing of cluster munition producing companies including general purpose corporate funding. Because the terms “knowing” and “with the intention” are not further specified, it is not clear if the law should be interpreted to mean that under this law cluster munitions producers would still be able to obtain general purpose corporate funding if an investment is not intended for the development and production of cluster munitions. The law does not clearly exclude all financing of cluster munition producing companies.

How does the legislation define ‘investment’ or ‘financing’?

- The definition of financing is more comprehensive. Article 5 of the law defines clearly that funds “assets of every kind” are covered by the prohibition and provides an extensive list of asset types within the scope of the definition.

To whom does the legislation apply?

- Preliminary provision 9 of the Act mentions that it “applies to all acts done or omitted in New Zealand and also applies to all acts done or omitted outside New Zealand by citizens and residents of New Zealand, [...] a body corporate, or a corporation sole, incorporated in New Zealand.” This means that the law applies to all New Zealand’s natural and legal persons, including financial institutions.

How is the legislation enforced?

- The Act defines penalties, in article 10-4, but does not provide for specific supervision or monitoring tools.
- 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.

5.2.8 Saint Kitts & Nevis

Background

Saint Kitts & Nevis acceded to the Convention on Cluster Munitions on 13 September 2013.⁷³² Its “Cluster Munitions Prohibition Act” came into effect in 2014. The Act contains an explicit prohibition on investments in cluster munitions. A reference to the Act was also contained in Saint Kitts & Nevis’ Article 7 report over 2017, as part of the reporting on measures for national implementation.⁷³³

Legislation

Article 4 of the Cluster Munitions Prohibition Act states that:

“[...] A person shall not provide or invest funds with the intention that those funds are to be used, or knowing that they are to be used, in the development or production of cluster munitions.”

It also provides for penalties for violation the Act: a person who commits an offence against the investment prohibition can be convicted to a prison sentence of maximum of ten years or a fine of maximum EC\$ 50,000, or both.

Article 7 clarifies the scope of application of the Act:

“(1) This Act applies to all acts done in Saint Christopher and Nevis.

(2) This Act also applies to all acts done outside Saint Christopher and Nevis by a citizen of Saint Christopher and Nevis or by a company incorporated in Saint Christopher and Nevis or by a member of the Defence Force.”⁷³⁴

Commentary

What does the legislation exclude from investment?

- The legislation prohibits providing or investing funds with the intention that they be used, or knowing that they are to be used, in the development or production of cluster munitions.

How does the legislation define 'investment' or 'financing'?

- The terms "provide or invest funds" are broadly worded and could therefore include all types of financing. Making the definition of these terms explicit would clarify the law.
- It is not clear whether the law prohibits all financing of cluster munition producing companies including general purpose corporate funding. Because the terms "knowing" and "with the intention" are not further specified, it is not clear if the law should be interpreted as to mean that cluster munitions producers would under this law still be able to obtain general purpose corporate funding if an investment is not intended for the development and production of cluster munitions.

To whom does the legislation apply?

- The Act states it applies to "all acts done in Saint Christopher and Nevis" and to all "acts done outside Saint Christopher and Nevis" by citizens of or companies incorporated in Saint Christopher and Nevis". Therefore, the law applies to all St. Kitts and Nevis' natural and legal persons, including financial institutions, regardless of their location.

How is the legislation enforced?

- The Act defines penalties, but does not provide for specific supervision or monitoring tools. A person who commits an offence against the investment prohibition can be convicted to a prison sentence of maximum of ten years or a fine of maximum EC\$50,000, or both.
- Were the government of Saint Kitts & Nevis 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 in the development or production of cluster munitions.

5.2.9 Samoa

Background

The Independent State of Samoa signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 28 April 2010.⁷³⁵ Samoa's Cluster Munitions Prohibition Act came into effect on 27 April 2012. This Cluster Munitions Prohibition Act 2012 contains a prohibition on investments in cluster munitions.⁷³⁶

Legislation

The Cluster Munitions Prohibition Act 2012 states that:

Article 6 of the Cluster Munitions Prohibition Act describes the activities prohibited under the Act, including the prohibition on investment, and proscribes penalties:⁷³⁷

"(1) [...] a person who directly or indirectly does one (1) or more of the following commits an offence:

- (f) 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."

“(3) A person who commits an offence under subsection (1) and (2) shall be punishable, upon conviction, by:

- (a) in the case of a corporation, a fine not exceeding 100,000 penalty units; or
- (b) in the case of a natural person, a fine not exceeding 10,000 penalty units or imprisonment for a term not exceeding seven (7) years, or both.”

Investments are defined in Article 2:

“funds means

- (a) assets of every kind, whether tangible or intangible, moveable or immovable, however acquired; and
- (b) includes legal documents or instruments in any form evidencing title to, or an interest in, assets of any kind.”

Article 4 clarifies the scope of application of the Act:

(3) This Act extends to acts done or omitted to be done outside Samoa by –

- (i) a Samoan citizen; or
- (ii) a person ordinarily resident in Samoa; or
- (iii) a member of the Police Service; or
- (iv) a corporation

A corporation is defined in Article 2 as:

“a body corporate formed or incorporated whether in Samoa or outside Samoa”

Commentary

What does the legislation exclude from investment?

- It is not clear whether the law prohibits all financing of cluster munition producing companies including general purpose corporate funding. Because the terms “knowing” and “with the intention” are not further specified, it is not clear if the law should be interpreted as to mean that cluster munitions producers would under this law still be able to obtain general purpose corporate funding if an investment is not intended for the development and production of cluster munitions.

How does the legislation define ‘investment’ or ‘financing’?

- Article 2 of the law defines clearly what it means by funds: “funds means assets of every kind, whether tangible or intangible, moveable or immovable, however acquired; and includes legal documents or instruments in any form evidencing title to, or an interest in, assets of any kind.”

To whom does the legislation apply?

- Apart from applying to Samoan citizens, persons ordinarily residing in Samoa or a member of the Police Service, the Act extends to corporations, thereby clearly covering financial institutions as well as individuals

How is the legislation enforced?

- Samoa’s law defines penalties, but does not provide for specific supervision or monitoring tools. Article 6(3) clarifies that violating the act can be punished by a fine of maximum WS\$100,000 in case of a corporation and for natural persons a fine of maximum WS\$10,000 or a prison sentence of maximum seven years or both.
- Were the government of Samoa 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.

5.2.10 Spain

Background

The Kingdom of Spain signed the Convention on Cluster Munitions on 3 December 2008. Spain then ratified it on 17 June 2009 and became a State Party on 1 August 2010.⁷³⁸

On 30 July 2015, amendments to existing legislation that incorporate the provisions of the Convention on Cluster Munitions took effect. These amendments updated Law 33/1998, a total ban on antipersonnel mines and similar arms, which was enacted in October 1998.⁷³⁹ The amendments add “a total ban on cluster munitions and similar arms” and include a prohibition on financing cluster munitions.⁷⁴⁰ Spain has also called on other states to include a prohibition on investment in cluster munition in their national legislation as a matter of consistency.⁷⁴¹

Legislation

Article 2.1 of the amended legislation, Law 27/2015, prohibits the

“use, development, production, acquisition in any way, stockpile, conservation, transfer or exportation, directly or indirectly of antipersonnel mines, cluster munitions, explosive bomblets, and weapons of similar effect.”

Furthermore, assisting, encouraging or inducing anyone to participate in any activity prohibited by the Convention on Cluster Munitions or the implementation legislation is also banned.

The second paragraph of Article 2.1 includes a prohibition on financing:

“Also, the financing or advertising by any means of this type of arms, and of all related concepts described in the previous paragraph, is prohibited.”^{XXIX 742}

Commentary

What does the legislation exclude from investment?

- Law 27/2015 forbids financing or advertising of cluster munitions or explosive submunitions. It does not explain whether the prohibition on financing applies either to investment in cluster munitions producers or to the production of cluster munitions alone. The latter approach would permit general purpose financing for cluster munitions producers.

How does the legislation define ‘investment’ or ‘financing’?

- Law 27/2015 specifies that financing “by any means” is prohibited. This includes ‘direct’ and ‘indirect’ financing. Although the text is not unambiguously clear, the wording “by any means” points towards all forms of financing being prohibited.

To whom does the legislation apply?

- Since Law 27/2015 on the modification of Law 33/1998 on the total prohibition of antipersonnel mines and similar weapons establishes a general prohibition, it can be understood that the investment ban applies to both individuals and legal entities such as financial institutions.⁷⁴³

How is the legislation enforced?

- Law 27/2015 states that violations shall be punished in accordance with the Penal Code. In accordance with Article 9 of the convention, Spain amended its penal code in 2010 to include sanctions of five to ten years for violations of the prohibitions on the use, development, production, sale, stockpiling, and transfer of cluster munitions. Furthermore, violations of the prohibitions on assistance with these banned activities will be sanctioned with three to five years.⁷⁴⁴ However, the Penal Code does not include a specific reference to financing or advertising cluster munitions. It would therefore appear that imposing criminal penalties for violating the prohibition on financing and advertising cluster munitions is not a possibility.⁷⁴⁵

XXIX Original text: “[...] (“Asimismo, queda prohibida la financiación o la publicidad de este tipo de armas, y de los conceptos explicitados en el párrafo anterior, por cualquier medio.” Translated by Wouter Kolk, PAX.

- The law does not provide for specific supervision or monitoring tools. The implementation order will have to specify the enforcement of the prohibition on financing and advertising and is of major importance for the implementation and scope of the law.

5.2.11 Switzerland

Background

The Swiss Confederation signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 17 July 2012.⁷⁴⁶ On 16 March 2012 both Chambers of the Swiss parliament had accepted the ratification legislation.⁷⁴⁷ In the same session the Parliament approved a revision in the Federal Law on War Material that incorporates a prohibition on financing of cluster munitions and antipersonnel mines into the law, which entered into force on 1 February 2013.⁷⁴⁸

Legislation

The prohibition of investment in forbidden war material (including cluster munitions) is set out in Articles 8b and 8c, dealing with direct and indirect investment respectively:⁷⁴⁹

“Art. 8b Prohibition of direct financing

- 1 The direct financing of the development, manufacture or acquisition of prohibited war material is itself prohibited.
- 2 Direct financing within the meaning of this Act is the direct granting of credits, loans or gifts or comparable financial advantages in order to pay or advance costs and expenditures that are associated with the development, manufacture or acquisition of prohibited war material.

Art. 8c Prohibition of indirect financing

- 1 The indirect financing of the development, manufacture or acquisition of prohibited war material is itself prohibited where the prohibition of direct financing is circumvented thereby.
- 2 Indirect financing within the meaning of this Act is:
 - a. participation in companies that develop, manufacture or acquire prohibited war material;
 - b. the acquisition of debt securities or other investment products issued by such companies.”^{xxx}

Article 35b of the law stipulates the punishment of offences against the prohibition of financing:

- “1 Any person who wilfully fails to comply with the prohibition of financing under Articles 8b or 8c without being able to claim an exemption under Article 7 paragraph 2, Article 8 paragraph 2 or Article 8a paragraph 3 is liable to a custodial sentence not exceeding five years or to a monetary penalty.
- 2 A custodial sentence may be combined with a monetary penalty.
- 3 A person who merely accepts the possibility of an offence against the prohibition of financing under Articles 8b or 8c does not commit an offence.”^{xxxI}

XXX Original text:

“Art. 8b Interdiction du financement direct

1 Il est interdit de financer directement le développement, la fabrication ou l’acquisition de matériels de guerre prohibés.

2 Est considéré comme financement direct au sens de la présente loi l’octroi direct de crédits, de prêts, de donations ou d’avantages financiers comparables en vue de couvrir ou d’avancer les coûts du développement, de la fabrication ou de l’acquisition de matériels de guerre prohibés ou les frais liés à de telles activités.

Art. 8c Interdiction du financement indirect

1 Il est interdit de financer indirectement le développement, la fabrication ou l’acquisition de matériels de guerre prohibés si le but visé est de contourner l’interdiction du financement direct.

2 Est considéré comme financement indirect au sens de la présente loi:

- a. la participation à des sociétés qui développent, fabriquent ou acquièrent des matériels de guerre prohibés;
- b. l’achat d’obligations ou d’autres produits de placement émis par de telles sociétés.”

XXXI Original text:

“Art. 35b Infractions à l’interdiction de financement

1 Est punie d’une peine privative de liberté de cinq ans au plus ou d’une peine pécuniaire toute personne qui, intentionnellement et sans qu’elle puisse invoquer l’une des exceptions prévues aux art. 7, al. 2, 8, al. 2, ou 8a, al. 3, enfreint les interdictions de financement prévues aux art. 8b et 8c.

2 La peine privative de liberté peut être assortie d’une peine pécuniaire.

3 Si l’auteur ne fait que s’accommoder de l’éventualité d’une infraction aux interdictions de financement prévues aux art. 8b et 8c, il n’est pas punissable au sens de la présente disposition.”

Shortly after the entry into force of the Federal Law on War Material, questions were raised in the National Council about how Switzerland would ensure the prohibition on direct and indirect financing were respected and implemented.⁷⁵⁰ The Federal Council answered these questions on May 2013⁷⁵¹ after which the National Council postponed further discussion. The deadline for the discussions expired on 20 March 2015 after having been on hold for two years.⁷⁵²

On 21 March 2014, a motion was submitted to the National Council that called for an amendment to the law. The motion sought to close the loophole in Article 8c which prohibits indirect investments where these circumvent the prohibition of direct financing. It called for the Federal Law on War Material to be applied to all types of investments in companies that produce prohibited war material, such as cluster munitions.⁷⁵³ In a reply on 14 May 2014, the Federal Council advised to reject the motion, arguing that the situation that led to the adoption of Article 8c has remained unchanged. According to the Federal Council, a prohibition on all investments in companies involved in producing prohibited war material goes beyond the aim of circumventing funding for prohibited war material.⁷⁵⁴ On 29 February 2016, the National Council rejected the motion.⁷⁵⁵

Commentary

What does the legislation exclude from investment?

- The legislation prohibits directly or indirectly financing the development, manufacture or acquisition of forbidden war material (including cluster munitions). The law does not specify how to deal with (key) components.
- As a result of the debate in the National Council on the motion to expand Article 8c, the law does not prohibit investments in cluster munitions producers, but in the activity of producing cluster munitions. This would suggest that the law permits general purpose financing for cluster munitions producing companies.

How does the legislation define ‘investment’ or ‘financing’?

- Article 8 of the law prohibits directly or indirectly financing the development, manufacture or acquisition of forbidden war material. Direct financing is described as: “the direct granting of credits, loans or gifts or comparable financial advantages in order to pay or advance costs and expenditures that are associated with the development, manufacture or acquisition of prohibited war material.” This means that financing other activities of cluster munitions producers not linked to war material is still possible. This weakens the effect of the law because, as stated above, financial flows in companies are hard to divide because they are interconnected. Only a ban on the financing of all activities of these manufacturers will guarantee that no war material is funded.
- According to Article 8c, indirect investments are only forbidden “where the prohibition of direct financing is circumvented thereby.” This exception to the prohibition is difficult to verify, as the exact motive of the investor will be hard to ascertain.
- The wording of Article 8c narrows the definition of “indirect investment” to shares and bonds, which therefore does not include corporate finance for example, thereby further limiting the application of the law.
- Article 35b addresses the problem of unintended investment: if an investor did not know he was investing in prohibited war material, he will not be sued. However, without a clear definition of “unintended”, investors could easily claim their financing was “unintended” and therefore bypass the law.

To whom does the legislation apply?

- According to Article 35, the legislation applies to “Any person who wilfully fails to comply with the prohibition of financing.” This means that the law applies to all natural and legal persons, thereby including financial institutions.

How is the legislation enforced?

- The Swiss law defines penalties for any person wilfully not complying with the prohibition on financing.
- The Swiss State Secretariat for Economic Affairs (SECO) is responsible for the implementation of the Law on War Material. The Swiss State Secretariat for Economic Affairs had started discussions with the Swiss Financial Market Supervisory Authority FINMA, the Federal Department of Justice and the Federal Department of Foreign Affairs on how to apply the prohibition. These authorities are also in discussion with the Swiss Bankers Association, with some Swiss banks and with other providers of financial services. Compliance with the prohibition is to be checked through targeted controls when the responsible authorities hold probable cause to believe the prohibition has been violated. If these assumptions are confirmed, criminal proceedings will be initiated.⁷⁵⁶

5.3 Divestment - parliamentary initiatives

In some instances, parliamentarians have taken steps to ban investments in cluster munitions. We offer an update on the current state of these efforts and, where available, provide information and a preliminary commentary on the draft legislation. Proposed legislation is also pending in Italy but this is discussed in the paragraph on Italy in the legislation section above, as this proposal is supplemental to legislation already in place.

5.3.1 Canada draft legislation

In December 2016, bill S-235 was introduced by the Honourable Senator Atallahjan was tabled in the Canadian Senate that would amend the Prohibiting Cluster Munitions Act by inserting an explicit prohibition on investments.⁷⁵⁷ As of February 2018, the Bill was pending examination by the Standing Senate Committee on Foreign Affairs and International Trade.⁷⁵⁸

The proposed prohibition would amend Paragraphs 6(e) to (h) of the Act to read:

Subject to sections 7, 8, and 10 to 12, it is prohibited for any person to “(d.1) acquire or have, directly or indirectly or as a shareholder, partner or otherwise, any pecuniary interest in, or loan funds or guarantee a loan of funds to, a person knowing that the person has committed or has aided or abetted in the commission of any act referred to in paragraphs (a) to (d);

- (e) attempt to commit any act referred to in paragraphs (a) to (d.1);
- (f) aid, abet or counsel another person to commit any act referred to in paragraphs (a) to (d.1);
- (g) conspire with another person to commit any act referred to in paragraphs (a) to (d.1); or
- (h) receive, comfort or assist another person, knowing that the person has committed, or has aided or abetted in the commission of, any act referred to in paragraphs (a) to (d.1), for the purpose of enabling the person to escape.”^{XXXII}

XXXII Text of the existing legislation: “Prohibitions 6 (a) use a cluster munition, explosive submunition or explosive bomblet; (b) develop, make, acquire or possess, a cluster munition, explosive submunition or explosive bomblet; (c) move a cluster munition, explosive submunition or explosive bomblet from a foreign state or territory to another foreign state or territory with the intent to transfer ownership of and control over it; (d) import or export a cluster munition, explosive submunition or explosive bomblet; (e) attempt to commit any act referred to in paragraphs (a) to (d); (f) aid, abet or counsel another person to commit any act referred to in paragraphs (a) to (d); (g) conspire with another person to commit any act referred to in paragraphs (a) to (d); or (h) receive, comfort or assist another person, knowing that the person has committed, or has aided or abetted in the commission of, any act referred to in paragraphs (a) to (d), for the purpose of enabling the person to escape.” See: laws-lois.justice.gc.ca/PDF/2014_27.pdf.

The bill would also amend 4 Paragraphs 11(3)(a) to (c) of the Act so that they would say:
“Section 6 does not prohibit a person (...), in the course of military cooperation or combined military operations involving Canada and a state that is not a party to the Convention, from:
(a) aiding, abetting or counselling another person to commit any act referred to in paragraphs 6(a) to (d.1), if it would not be an offence for that other person to commit that act;
(b) conspiring with another person to commit any act referred to in paragraphs 6(a) to (d.1), if it would not be an offence for that other person to commit that act; or
(c) receiving, comforting or assisting another person, knowing that that other person has committed, or has aided or abetted in the commission of, any act referred to in paragraphs 6(a) to (d.1), for the purpose of enabling that other person to escape, if it was not an offence for that other person to commit that act.”

“Transitional Provision

Divestment

5 Paragraph 6(d.1) of the *Prohibiting Cluster Munitions Act*, as enacted by section 2 of this Act, does not apply to a person in respect of a pecuniary interest that they have or a loan of funds or the guarantee of such a loan that they made before the coming into force of this Act, provided that they divest themselves of the pecuniary interest, loan or guarantee within one year after the coming into force of this Act.”

Commentary

What does the draft legislation exclude from investment?

- The amended legislation would exclude from investment any person who “has committed or has aided or abetted in the commission of any of the acts prohibited”, which are to “use a cluster munition, explosive submunition or explosive bomblet; develop, make, acquire or possess, a cluster munition, explosive submunition or explosive bomblet; move a cluster munition, explosive submunition or explosive bomblet from a foreign state or territory to another foreign state or territory with the intent to transfer ownership of and control over it; import or export a cluster munition, explosive submunition or explosive bomblet.”

How does the draft legislation define ‘investment’ or ‘financing’?

- The proposed legislation defines financing as to “acquire or have, directly or indirectly or as a shareholder, partner or otherwise, any pecuniary interest in, or loan funds or guarantee a loan of funds.”
- Furthermore, it would be prohibited to attempt to commit to invest, aid, abet or counsel another person to invest, conspire with another person to invest, as well as receive, comfort or assist another person, knowing that the person has committed, or has aided or abetted in the commission of, such investment.^{xxxiii}

To whom does the draft legislation apply?

- Canada’s current cluster munitions implementation legislation applies to “any person”, defined as “an individual or an organization as defined in section 2 of the Criminal Code.” The word “person” in the draft legislation clearly also includes legal persons and therefore companies.
- A transitional provision is included in the draft for persons that have made investments as defined under paragraph 6 (d.1) to disinvest within one year after the entering into force of the amended legislation.

xxxiii These acts are not prohibited in the course of military cooperation or combined military operations involving Canada and a state that is not a party to the Convention, as laid out in Paragraphs 11(3)(a) to (c).

How will the draft legislation be enforced?

- Paragraph 17 of the original act specifies that any person who violates the prohibition in paragraph 6 could be subjected to “(a) a fine of not more than \$500,000 or to imprisonment for a term of not more than five years, or to both; and (b) on summary conviction, to a fine of not more than \$5,000 or to imprisonment for a term of not more than 18 months, or to both.”
- Neither the draft Bill nor the existing legislation provides for specific monitoring tools or auditing methods, nor does it provide for a black list of companies involved in the production of cluster munitions which will complicate the implementation of the law.

5.3.2 European Parliament

The European Parliament has also expressed itself against investment in cluster munitions producers.

In 2005 the European Parliament adopted its *Resolution on a Mine-Free World*, explicitly addressing 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 antipersonnel mines and other related controversial weapon systems such as cluster sub-munitions.”⁷⁵⁹

In October 2007, this call was repeated in the European Parliament’s resolution *Towards A Global Treaty to Ban All Cluster Munitions*. In this 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.”⁷⁶⁰

5.4 Statements on investments in cluster munitions

Several states have confirmed the position that article 1(1)c of the CCM on prohibiting assistance includes a prohibition on investing in cluster munitions. At the time of writing, 35 states have issued interpretive statements that indicate investments in cluster munitions are or can be seen as prohibited by the Convention on Cluster Munitions. These are: Australia, Bosnia and Herzegovina, Cameroon, Canada, Chad, Colombia, the Democratic Republic of Congo (DRC), the Republic of Congo, Costa Rica, Croatia, the Czech Republic, Denmark, France, The Gambia, Ghana, Guatemala, the Holy See, Hungary, Lao PDR, Lebanon, Madagascar, Malawi, Malta, Mauritania, Mexico, Montenegro, Niger, Norway, Peru, Rwanda, Senegal, Slovenia, Trinidad & Tobago, the United Kingdom and Zambia.

Some of the statements were made in the context of Meetings of States Parties to the Convention on Cluster Munitions, others were declarations by state officials on the country's position and still others were made in the context of national legislative procedures implementing or ratifying the CCM.

These statements reconfirm the norm against investments in cluster munitions producers and thereby contribute to reducing these investments worldwide.

At the time of writing, 35 states have issued interpretive statements that indicate investments in cluster munitions are or can be seen as prohibited by the Convention on Cluster Munitions

5.4.1 Australia

Australia signed the Convention on Cluster Munitions on 3 December 2008. Australia deposited its instrument of ratification on 8 October 2012 and became a State Party on 1 April 2013.⁷⁶¹ The Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012 implemented the Convention on Cluster Munitions.

The Cluster Munitions Prohibition amendment contains no provision prohibiting investment in cluster munitions.⁷⁶² However, in October 2010, the Attorney-General offered the following example of prohibited conduct: "where a person provides financial assistance to, or invests in, a company that develops or produces cluster munitions, but only where that person intends to assist, encourage or induce the development or production of cluster munitions by that company."⁷⁶³

In March 2011, when asked about the issue again in the Australian senate, the Attorney General's Department on the Bill confirmed that "the intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions will amount to an offence."⁷⁶⁴

5.4.2 Bosnia and Herzegovina

Bosnia and Herzegovina signed the Convention on Cluster Munitions on 3 December 2008, ratified it on 7 September 2010, and became a State Party to the convention on 7 September 2010.⁷⁶⁵

In July 2011, the head of the department of conventional weapons of the Ministry of Foreign Affairs expressed the Ministry's view it, "considers investment in the production of cluster munitions to be prohibited."⁷⁶⁶

5.4.3 Cameroon

The Republic of Cameroon signed the Convention on Cluster Munitions on 15 December 2009. Cameroon deposited its instrument of ratification on 12 July 2012 and became a State Party on 1 January 2013.⁷⁶⁷

In a May 2011 letter to Handicap International France, the Ministry of External Relations declared: “Cameroon [...] approves therefore [...] the prohibition on investments in cluster munitions.”⁷⁶⁸

5.4.4 Canada

Canada signed the Convention on Cluster Munitions on 3 December 2008, ratified it on 16 March 2015 and became a State Party to the convention on 1 September 2015.⁷⁶⁹

Canada’s implementation legislation does not contain a specific prohibition on investment in cluster munitions. However, in a debate in the Senate in May 2012, the Honourary Suzanne Fortin-Duplessis said that “under the bill it is prohibited to assist, encourage or induce anyone to engage in any prohibited activity including knowingly and directly investing in the production of cluster munitions.”⁷⁷⁰ In addition, in July 2012 a Senior Defence Advisor from the Ministry of Foreign Affairs and International Trade stated in an email to Human Rights Watch that: “an investment that is executed with the knowledge and intention that it will encourage or assist cluster munitions production would be captured by the legislation’s prohibition on aiding and abetting any primary offence.”⁷⁷¹ In May 2013, the Parliamentary Secretary to the Minister of Foreign Affairs reiterated the view that investment is prohibited under the bill.⁷⁷²

In December 2016, Senator Ataullahjan tabled bill S-235 in the Canadian Senate that would add an amendment with an explicit prohibition on investments to the existing legislation.⁷⁷³ As of February 2018, the Bill was pending examination by the Standing Senate Committee on Foreign Affairs and International Trade.⁷⁷⁴ If this draft legislation is adopted, Canada’s interpretation of the prohibition of financing of cluster munitions producers would be clarified and strengthened by national legislation directly binding financial institutions.

5.4.5 Chad

Chad signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 26 March 2013.⁷⁷⁵

During the 8th Meeting of States Parties to the CCM in 2018, Chad stated:

“Investing in or financing of the production of prohibited weapons undermines the international legal framework that governs their prohibition. We therefore consider investments in the production of cluster munitions are in violation with Article 1 of the CCM.”⁷⁷⁶

Investing in or financing of the production of prohibited weapons undermines the international legal framework that governs their prohibition

5.4.6 Colombia

The Republic of Colombia signed the Convention on Cluster Munitions on 3 December 2008 and ratified the convention on 10 September 2015.⁷⁷⁷

Responding to a questionnaire by the Landmine and Cluster Munition Monitor in 2010, the Ministry of Foreign Affairs of Colombia stated that it views, “investment by any government in the production of cluster munitions”^{xxxiv} as prohibited under article 1(1)c of the CCM.⁷⁷⁸

5.4.7 Congo, the Democratic Republic of

The Democratic Republic of Congo (DRC) signed the Convention on Cluster Munitions on 18 March 2009. The ratification process is underway.⁷⁷⁹

On 15 April 2012, the National Focal Point of the Struggle Against Mines (PFNLAM) stated that “[...] the provisions of the convention forbid the [...] investment in the production of cluster munitions [...]”⁷⁸⁰

5.4.8 Congo, the Republic of

The Republic of Congo (Congo-Brazzaville) signed the Convention on Cluster Munitions on 3 December 2008. It ratified the convention on 2 September 2014.⁷⁸¹

On 8 June 2013, Colonel Lucien Nkoua, National Focal Point of the Struggle Against Mines, informed the Cluster Munition Monitor that “[...] the Republic of Congo agrees with the views of a number of States Parties to the convention and the Cluster Munition Coalition that investment in the production of cluster munitions is also prohibited by the convention.”⁷⁸²

5.4.9 Costa Rica

The Republic of Costa Rica signed the Convention on Cluster Munitions on 3 December 2008 and ratified on 28 April 2011.⁷⁸³

At the First Review Conference of the CCM in 2015, Costa Rica declared that it views “investment in the production of cluster munitions [...] as a form of assistance that is prohibited by the convention.”⁷⁸⁴

5.4.10 Croatia

The Republic of Croatia signed the Convention on Cluster Munitions in Oslo on 3 December 2008. The Croatian parliament approved the “Law for the Ratification of the Convention on Cluster Munitions” on 5 June 2009. Croatia formally deposited its ratification with the UN in New York on 17 August 2009. It was the 16th country to ratify, and thus among the first 30 ratifications that triggered the entry into force of the convention on 1 August 2010.⁷⁸⁵

Responding to a questionnaire by the Cluster Munition Monitor, the Ministry of Foreign Affairs and European Integration of Croatia stated on 23 March 2011 that it agrees that “investment in the production of cluster munitions is prohibited.”⁷⁸⁶

XXXIV Original text: En relación con los asuntos anteriores Colombia ha dado estricto cumplimiento al objeto y fin de la Convención de Oslo el cual en su artículo 1 establece: “Cada Estado Parte se compromete a nunca, y bajo ninguna circunstancia: ... (c) Ayudar, alentar o inducir a nadie a participar en una actividad prohibida a un Estado Parte según lo establecido en la presente Convención.”

Así, en estricto cumplimiento de estas obligaciones, el Gobierno de Colombia tiene una clara posición de rechazo y prohibición absoluta de cualquier conducta encaminada así como la inversión por parte de cualquier gobierno en producción de municiones en racimo.” Translated by Esther Vandenbroucke, FairFin.

5.4.11 The Czech Republic

The Czech Republic signed the CCM on 3 December 2008 and ratified it on 22 September 2011.⁷⁸⁷

The Ministry of Foreign Affairs of the Czech Republic confirmed in a letter to Human Rights Watch in 2012 that the Czech Republic agrees that “investment in the production of cluster munitions is prohibited under the Convention.”⁷⁸⁸

5.4.12 Denmark

The Kingdom of Denmark signed the Convention on Cluster Munitions on 3 December 2008 and ratified on 12 February 2010. It was among the first 30 ratifications to trigger entry into force of the Convention on 1 August 2010.⁷⁸⁹

In 2011 the Danish government issued a Guide to responsible investment based on the Principles for Responsible Investment, a voluntary set of responsible investment principles supported by the United Nations. According to the Danish government, “although the Principles for Responsible Investment do not include specific references to international conventions, they are to be seen in connection with the ten principles of the UN Global Compact. As such, responsible investment according to PRI and the Danish Guide to responsible investment would demand all investors to respect international norms and conventions including e.g. the CCM.”⁷⁹⁰

Responsible investment according to PRI and the Danish Guide to responsible investment would demand all investors to respect international norms and conventions including e.g. the CCM

5.4.13 France

The French Republic signed the Convention on Cluster Munitions on 3 December 2008. France ratified the convention on 25 September 2009 and was thus among the first 30 ratifications that triggered the entry into force of the Convention on 1 August 2010. The convention is implemented through the Law on the Elimination of Cluster Munitions.⁷⁹¹

The French government gave an interpretive statement specifying that it understood investments in cluster munitions as being banned under the prohibition on assistance. On 6 July 2010, the Deputy Minister of Defence said in an address to the National Assembly that “any knowingly financial assistance, directly or indirectly, in the production or trading of cluster munitions would be considered as assistance, encouragement or inducement falling within the scope of the law under criminal complicity or commission of offences under this bill. If monitoring of the implementation of the law by the National Commission for the Elimination of Anti-personnel Mines (CNEMA) shows a failure on this point, the Government would draw the appropriate conclusions, proposing to the Parliament the necessary legislative changes.”^{XXXV 792} After a period of inactivity, CNEMA restarted its work in 2012. It decided to look into how the investment prohibition as declared by the French government is being implemented and to consider possible further actions.⁷⁹³

XXXV Original text: “Concernant le financement, il est clair, dans notre esprit, que toute aide financière, directe ou indirecte, en connaissance de cause d’une activité de fabrication ou de commerce d’armes à sous-munitions constituerait une assistance, un encouragement ou une incitation tombant sous le coup de la loi pénale au titre de la complicité ou de la commission des infractions prévues par le présent projet de loi. Si les travaux de suivi de l’application de la loi par la Commission nationale pour l’élimination des mines antipersonnel, la CNEMA, amenaient à constater une insuffisance de la loi sur ce point, le Gouvernement en tirerait les conclusions qui s’imposent, en proposant au Parlement les modifications législatives nécessaires.” Translated by Esther Vandenbroucke, FairFin.

5.4.14 The Gambia

The Gambia signed the Convention on Cluster Munitions on 3 December 2008 but as of November 2018 has not yet ratified it.⁷⁹⁴

Participating in the 8th Meeting of States Parties to the CCM in 2018, The Gambia stated: “The production, sale and use of cluster munitions should stop and states could do more by stopping the investment in companies either state or non-state, that produce cluster munitions.”⁷⁹⁵

States could do more by stopping the investment in companies that produce cluster munitions

5.4.15 Ghana

The Republic of Ghana signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 3 February 2011.⁷⁹⁶

On 12 September 2013, Ghana said during the Fourth Meeting of States Parties to the Convention on Cluster Munitions in Lusaka, Zambia that “[...] Ghana considers investments in the production of cluster munitions a form of assistance that is banned by the Convention.”

Furthermore, Ghana stated that it would ensure that its national legislation will criminalise investments in the production of cluster munitions. Ghana encouraged all States Parties to make known their view that the convention prohibits investment in the production of cluster munitions.⁷⁹⁷

5.4.16 Guatemala

The Republic of Guatemala signed the Convention on Cluster Munitions in Oslo on 3 December 2008 and ratified it on 3 November 2010.⁷⁹⁸

On 14 May 2010, the Permanent Representative of Guatemala to the United Nations in Geneva wrote in a letter to Human Rights Watch that “- according to the interpretation of the government of Guatemala - the Convention also includes a prohibition on investments in companies that manufacture cluster munitions.”⁷⁹⁹

5.4.17 The Holy See

The Holy See signed and ratified the Convention on Cluster Munitions in Oslo on 3 December 2008.⁸⁰⁰

In a statement to the First Meeting of States Parties in Vientiane, Lao PDR in November 2010 the Holy See said that “In a world ever more globalised and interdependent, some countries produce or possess production methods or invest in the military industry, outside their national borders. It is important for the integrity of the Convention and for its application to include these investments in the list of prohibitions.”⁸⁰¹

5.4.18 Hungary

The Republic of Hungary signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 3 July 2012.⁸⁰²

In a letter dated 27 April 2011, the Minister of Foreign Affairs János Martonyi informed Human Rights Watch of Hungary’s interpretation of the convention. On disinvestment the Minister wrote, “[...] Hungary believes that the convention prohibits investment in the production of cluster munitions.”⁸⁰³

5.4.19 Lao PDR

The Lao People's Democratic Republic (Lao PDR) signed the Convention on Cluster Munitions on 3 December 2008. Lao PDR ratified the convention on 18 March 2009, the fifth country in the world and the first in Asia to do so, making it among the first 30 that triggered the entry into force of the Convention on 1 August 2010. As the most heavily affected country in the world, the support of Lao PDR was a crucial element in the success of the Oslo Process that produced the convention.⁸⁰⁴

On 1 June 2011, a Ministry of Foreign Affairs official informed Human Rights Watch of Lao PDR's interpretation of the convention, including the issue of disinvestment. "For us it is clear that we strongly support the full prohibition of cluster munitions, including those activities during the joint military operations, transiting, foreign stockpiling and investment in the production of cluster munitions."⁸⁰⁵

5.4.20 Lebanon

The Republic of Lebanon signed the Convention on Cluster Munitions in Oslo on 3 December 2008 and ratified it on 5 November 2010.⁸⁰⁶

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 Lebanon's view, "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."⁸⁰⁷

5.4.21 Madagascar

The Republic of Madagascar signed the Convention on Cluster Munitions in Oslo on 3 December 2008.⁸⁰⁸

On 2 April 2010, Madagascar's then Permanent Representative to the United Nations in Geneva Ambassador Rajemison Rakotomaharo () wrote in a letter to Human Rights Watch that "the Convention, in the opinion of Madagascar, also precludes investments in companies that produce cluster munitions."⁸⁰⁹

This view was reiterated in the statement Madagascar made on the First Meeting of State Parties to the Convention on Cluster Munitions in Lao PDR. Madagascar stated that "there should be no exceptions when it comes to cluster munitions, which has a negative impact on all human beings, causing unacceptable suffering, therefore any investment in cluster munitions should indeed be prohibited."⁸¹⁰

5.4.22 Malawi

The Republic of Malawi signed the Convention on Cluster Munitions on 3 December 2008. It ratified it on 7 October 2009, becoming the fifth African country and the 22nd in the world to ratify the convention. That placed it among the first 30 ratifications that triggered the entry into force of the Convention on 1 August 2010.⁸¹¹

On 25 March 2010, Major Dan Kuwali, director of Legal Services of the Malawi Defence Force, stated during the Africa Regional Conference on the Universalisation and Implementation of Convention on Cluster Munitions in Pretoria, South Africa that "Malawi is of the opinion that the Convention constitutes a prohibition on the investment in producers of cluster munitions."⁸¹²

5.4.23 Malta

The Republic of Malta signed the Convention on Cluster Munitions in Oslo on 3 December 2008. Malta ratified the convention on 24 September 2009, becoming the 19th country to do so. That placed it among the first 30 that triggered the entry into force of the Convention on 1 August 2010.⁸¹³

On 25 April 2010, the Ministry of Foreign Affairs offered its understanding of several provisions in the Convention on Cluster Munitions in an e-mail to Handicap International France. It stated that “The policy of the Government of Malta on issues of interpretation of the Convention is guided by the need to ensure the rapid destruction of cluster munitions. With regard to investment in the production of cluster munitions, Malta interprets Article 1 (b) of the Convention on Cluster Munitions as prohibiting this activity. Malta believes that the assistance prohibition under Article 1 (c) of the Convention precludes financing and investment in corporations linked with the production of cluster munitions.”⁸¹⁴

5.4.24 Mauritania

Mauritania signed the Convention on Cluster Munitions on 19 April 2010 and ratified it on 1 February 2012.⁸¹⁵

During the 8th Meeting of States Parties to the CCM in 2018, the representative of Mauritania stated: “I would like to use this opportunity to work together with other states against the financing of or assistance to companies for cluster bombs (companies that produce these bombs). These bombs, that kill hundreds of innocent people every day, are an obstacle to development, peace and security.”⁸¹⁶

**Work together with other states
against the financing of or assistance
to companies for cluster bombs**

5.4.25 Mexico

The United Mexican States signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 6 May 2009. Mexico was the seventh signatory to ratify the convention and the first from the Western Hemisphere to do so. That placed it among the first 30 ratifications that triggered the entry into force of the convention on 1 August 2010.⁸¹⁷

In a letter to Human Rights Watch dated 4 March 2009, Ambassador Juan Manuel Gómez Robledo from the Ministry of Foreign Affairs wrote that “It is Mexico’s opinion that investment for the production of cluster munitions is also prohibited by the Convention.”⁸¹⁸

5.4.26 Montenegro

Montenegro signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 25 January 2010.⁸¹⁹

During the 8th Meeting of States Parties to the Convention on Cluster Munitions in 2018, Montenegro stated: “We would like to express our support for the Dubrovnik Action Plan, as a valuable guideline for further implementation of the CCM. We emphasize that investing in or financing prohibited weapons production undermines the international legal framework that governs their ban. Therefore Montenegro understands that any investment in producers of cluster munitions is a contravention of Article 1 (1) c of the CCM.”⁸²⁰

**Investing in or financing prohibited
weapons production undermines
the international legal framework
that governs their ban**

5.4.27 Niger

The Republic of Niger signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 2 June 2009, among the first 30 ratifications that triggered the entry into force of the Convention on 1 August 2010.⁸²¹

During a meeting with the Cluster Muniton Coalition in Geneva, Switzerland, Allassan Fousseini, Expert Mines Action and Small Arms and Light Weapons of the National Commission for the Collection and Control of Illicit Weapons stated that “Niger considers [...] investments in cluster munitions to be banned by the convention.”⁸²²

5.4.28 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 that same day.⁸²³

Norway implemented the Convention on Cluster Munitions in a separate law on cluster munitions. The Norwegian law states that anything prohibited under the convention is also prohibited and punishable under the law.

The preparatory work (Proposition no. 7) of the law notes that certain forms of investment in cluster munitions production “[...] may fall within the scope of the Convention’s prohibition of aiding and abetting” and that “[...] it cannot be excluded that private investment, for example, in companies that develop or produce cluster munitions, may be incompatible with the Convention.”

Proposition no. 7 adds that “the question whether such private financing or investment exceeds the threshold for criminal aiding and abetting in Norwegian law must also be assessed in the light of the general requirement of individual guilt.”⁸²⁴ The requirements would constitute that the offender would have to know that he/she was investing in cluster munitions production, or it would amount to gross negligence if he/she did not know but ought to have known.⁸²⁵

5.4.29 Peru

Peru signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 26 September 2012.⁸²⁶ During the 2017 Meeting of States Parties of the CCM in 2017, Peru issued the statement that it considers investments to be prohibited under the CCM: “Peru (...) understands the interpretation of Article [1]1.c of the Convention (...) includes a prohibition in the investments in cluster munitions, that is to say, provide financial assistance to producers of such weapons.”⁸²⁷

Article 1.1.c of the CCM includes a prohibition in the investments in cluster munitions, that is to say, provide financial assistance to producers of such weapon

5.4.30 Rwanda

The Republic of Rwanda signed the Convention on Cluster Munitions in Oslo on 3 December 2008 and ratified the convention on 25 August 2015.⁸²⁸

In a 2009 letter to Human Rights Watch, Minister Rosemary Museminali of the Ministry of Foreign Affairs and Cooperation made it known that “any investment in the production of cluster munitions is prohibited.”⁸²⁹

5.4.31 Senegal

The Republic of Senegal signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 3 August 2011.⁸³⁰

On 3 February 2011 Colonel Meïssa Niang, Director, Control Research and Legislation of the Ministry of Armed Forces of Senegal answered in a letter to Human Rights Watch that “Senegal considers the transfer and foreign stockpiling of cluster munitions, and investment in cluster munitions to constitute a violation.”⁸³¹

5.4.32 Slovenia

The Republic of Slovenia signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 19 August 2009, among the first 30 to trigger the Convention’s entry into force on 1 August 2010.⁸³²

In 2012 in a letter to Human Rights Watch, the Minister of Foreign Affairs of the Republic of Slovenia confirmed that “Slovenia has no intention to allow for investments in cluster munitions.”⁸³³ In an email to PAX dated July 2013, the Deputy Permanent Representative of the Permanent Mission of Slovenia to the United Nations in Geneva clarified that Slovenia believes that the CCM prohibits investments and financing on Slovenian territory.⁸³⁴

5.4.33 Trinidad and Tobago

Trinidad and Tobago acceded to the Convention on Cluster Munitions on 21 September 2011.⁸³⁵

During the 2017 UN General Assembly First Committee meeting, representative of the Republic of Trinidad and Tobago Ms. Roopnarine issued the statement that Trinidad and Tobago consider investments in cluster munitions to be prohibited under the Convention on Cluster Munitions: “It is unambiguously clear that investing in or financing prohibited weapons undermines the international legal framework that governs their prohibition. My country’s accession to the CCM demonstrates our continued commitment to join efforts to end the terrible harm posed by these indiscriminate weapons. We therefore share the perspective that investment in the production of these weapons are a contravention of the CCM.”⁸³⁶

We share the perspective that investment in the production of these weapons are a contravention of the CCM

5.4.34 United Kingdom

The United Kingdom signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 4 May 2010. The UK “Cluster Munitions (Prohibition) Act 2010” that creates criminal offences for violation of the prohibitions of the convention received Royal Assent on 25 March 2010.⁸³⁷

In both Houses, debates on the Bill questioned whether the financing of cluster munitions production was prohibited under the legislation. The text of the legislation does not explicitly include a prohibition on investment in, or provision of financial services to, companies involved in the production of cluster munitions. However, in response to parliamentary questions the Government issued a Ministerial Statement on 7 December 2009 confirming that “under the current provisions of the Bill, which have been modelled upon the definitions and requirements of the convention, the direct financing of cluster munitions would be prohibited. The provision of funds directly contributing to the manufacture of these weapons would therefore become illegal.”⁸³⁸

The legislation therefore does not prohibit indirect financing of cluster munitions, but the government announced it intended to work with the financial industry, non-governmental organisations and other interested parties to promote a voluntary code of conduct to prevent indirect financing, and if necessary would use their right to initiate legislation.

5.4.35 **Zambia**

The Republic of Zambia signed the Convention on Cluster Munitions in Oslo on 3 December 2008. It formally deposited its instrument of ratification with the UN on 12 August 2009, becoming the 15th country to do so. That placed it among the first 30 ratifications that triggered the entry into force of the convention on 1 August 2010.⁸³⁹

During the National Committee on Anti-personnel Landmines (NCAL) on 11 September 2009 in Lusaka, the Director of Zambia Mine Action Centre stated that “it is the understanding of Zambia that the Convention on Cluster Munitions includes a prohibition on investments in companies that manufacture cluster munitions.”⁸⁴⁰

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