Commission des normes comptables
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UNOFFICIAL TRANSLATION

CNC Opinion 09/002 (withdrawn)	**Withdrawal of Opinion CNC 09/002 issued by the Accounting Standards Board at the request of the Minister of Justice pursuant to Article 74 (1) of the amended Law of 19 December 2002 on the trade and companies register as well as on bookkeeping and annual accounts of undertakings, concerning the interpretation of Article 317 (3) c) of the amended Law of 10 August 1915 on commercial companies, in the specific case of investment companies in risk capital (*venture capital / private equity*)**

On 18 December 2009, the Accounting Standards Board (CNC) issued CNC Opinion 2-1, since then renumbered as CNC Opinion 09/002, aimed at interpreting Article 1711-8, para. 3, point 3 LSC, then numbered Article 317, para. 3, point c) LSC, in the specific case of investment companies in risk capital (*venture capital and private equity firms*).

The purpose of this opinion was for CNC to set out complementary guidance for the application of the aforementioned provision by investment companies in risk capital (*venture capital / private equity*) that do not have SICAR status within the meaning of the amended Law of 15 June 2004 on investment companies in risk capital.

The scope of this opinion was circumscribed to companies incorporated under Luxembourg law held by one or more well-informed investors, the sole purpose of which was to invest their funds in one or more securities representing risk capital (hereinafter "investment"), defined as the direct or indirect provision of funds to one or more entities for the purpose of launching, developing or floating such entity or entities, such investment(s) being held by the company with the intention of reselling it or them at a profit.

The opinion then set out four conditions that these companies must cumulatively meet in order to make use of the aforementioned provision, the application of which to all subsidiaries would, in practice, result in an exemption from consolidation due to the absence of a scope of consolidation.

It has since become apparent that the implementation of this opinion has given rise to difficulties in its interpretation and application.

Furthermore, new factors have also emerged that need to be taken into account.

Thus, IFRS 10, "Consolidated Financial Statements", was issued in May 2011 by the IASB and came into force in the European Union on 1 January 2014. This standard provides for a consolidation prohibition – rather than an exemption – for the investment entities it defines, assists in identifying and describes the typical characteristics of.

Finally, Article 1711-9 (2) LSC – as introduced by the Law of 18 December 2015 transposing Accounting Directive 2013/34/EU[1] of 26 June 2013 – provides as follows: " (…) *any parent company* (…) shall be *exempted from the obligation imposed by Article 1711-1* [Author's note: obligation to prepare consolidated financial statements and a consolidated management report] *if:* (…) 2° *all its subsidiary undertakings can be excluded from consolidation by virtue of Article 1711-8*[2]". It follows that a parent company whose subsidiaries may all be excluded from the scope of consolidation benefits in practice – and now legally – from an exemption from the obligation to prepare consolidated financial statements and a consolidated management report.

[1] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC

[2] It should be noted that under Article 1711-8 LSC, the exclusion of a subsidiary from the scope of consolidation may result not only from exclusive holding with a view to subsequent resale, but also from the subsidiary's immateriality, from severe and lasting restrictions on the parent company's ability to exercise control, or from the inability to obtain the necessary information from the subsidiary without disproportionate cost or undue delay.

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CNC Opinion 09/002 (withdrawn)	**Withdrawal of Opinion CNC 09/002 issued by the Accounting Standards Board at the request of the Minister of Justice pursuant to Article 74 (1) of the amended Law of 19 December 2002 on the trade and companies register as well as on bookkeeping and annual accounts of undertakings, concerning the interpretation of Article 317 (3) c) of the amended Law of 10 August 1915 on commercial companies, in the specific case of investment companies in risk capital (*venture capital / private equity*)**

In light of the above, CNC considered it appropriate to issue guidance regarding the interpretation of Article 1711-8, paragraph 3, point 3 LSC in the specific case of companies operating in the alternative investment sector (see: Q&A CNC 25/036) and to withdraw CNC Opinion 09/002.

Disclaimer

This document - provided as a courtesy - is an unofficial translation of the French original document entitled " *Retrait de l'avis CNC 09/002 de la Commission des normes comptables formulé sur demande du Ministre de la Justice en vertu de l'article 74 point 1 de la loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises et portant sur l'interprétation de l'article 317 (3) c) de la loi modifiée du 10 août 1915 concernant les sociétés commerciales dans le cas particulier des sociétés d'investissement en capital à risque (venture capital / private equity)*". In case of discrepancy in interpretation, the French version shall prevail.

The "questions and answers" published by the "Commission des normes comptables (CNC)" (Luxembourg Accounting Standards Board):

- are of a general nature and do not refer to the specific situation of any natural or legal person;
- are intended to contribute to the development of accounting doctrine in accordance with Article 73(b) of the amended Law of 19 December 2002 on the trade and companies register, as well as on the bookkeeping and annual accounts of undertakings;
- represent only the opinion of the GIE CNC on a number of doctrinal and interpretative issues;
- do not prejudge the tax implications that may arise from the accounting treatments mentioned.

The administrative or management bodies of undertakings remain responsible in accordance with general law for any decisions taken based on this document.

LE GOUVERNEMENT
DU GRAND-DUCHÉ DE LUXEMBOURG

Ministère de la Justice
Commission des normes comptables

CNC Opinion 09/002

Luxembourg, 18 December 2009

CNC OPINION 2-1

Opinion of the "Commission des normes comptables (CNC)" (Accounting Standards Board) drawn up at the request of the Minister of Justice pursuant to article 74 point 1 of the amended law of 19 December 2002 on the trade and companies register as well as the bookkeeping and annual accounts of undertakings on the interpretation of article 317 (3) c) of the amended law of 10 August 1915 on commercial companies in the specific case of investment companies in risk capital (*venture capital / private equity* companies)

Article 317 (3) c) of the amended law of 10 August 1915 on commercial companies (hereinafter "the law of 1915") provides as follows: "*In addition, an undertaking need not be included in consolidated accounts where: (…) c) the shares of that undertaking are held exclusively with a view to their subsequent resale.".*

While article 317 (3) c) of the law of 1915 may be claimed by any company holding shares or units exclusively with a view to their subsequent sale, the purpose of this opinion is to set out the conditions of application in the specific case of investment companies in risk capital[1] (*venture capital / private equity*) which do not have the regulatory status of SICAR within the meaning of the amended law of 15 June 2004 relating to the investment company in risk capital (SICAR) (hereinafter "the 2004 law") and which meet the conditions set out below.

Without prejudice to any obligations arising from other legal or regulatory provisions, in particular of a prudential nature, or to the right of its shareholders to request the preparation of consolidated accounts, any investment companies in risk capital (*venture capital/private equity*) (hereinafter "the company") may, in the opinion of the Accounting Standards Board, claim the application of Article 317(3)(c) of the law of 1915 if the following conditions are met:

1) The company is a company governed by Luxembourg Law within the meaning of Article 2 of the Law of 1915 held by one or more well-informed investors[2].

2) Its exclusive purpose is to invest its assets in securities representing risk capital (hereinafter "investment"), which is defined as the direct or indirect contribution of funds to one or more entities with a view to the launch, the development or the public listing of such entity or entities. This or these investments are held by the company with the intention of reselling them at a capital gain.

[1] The concept of risk capital is defined by reference to the meaning given to it in Luxembourg regulatory practice as set out, in particular, in the circulars and other documents published by the "Commission de Surveillance du Secteur Financier (CSSF)".

[2] A well-informed investor is defined in accordance with article 2 of the 2004 law and also includes directors and other persons involved in the effective management of the target company.

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3) Its management or administrative body formally defines *ex ante* in a written document communicated to its investors an exit strategy[3] as part of its investment policy, which implies an intention to divest over the medium term, generally 3 to 8 years. This investment policy should be distinguished from a strategic investment, which is held for an indefinite period.

4) Its aim is to enable investors to benefit from the result of the management of its investment(s) in consideration for the risk which they incur.

5) If its investment(s) are not measured at fair value in the balance sheet, it discloses this fair value in the notes to its annual accounts in order to provide relevant information to its investors.

6) Any event, guarantee or uncertainty that could have a material impact on the company's ability to continue as a going concern, on its cash position, on its liquidity or on its solvency must be appropriately disclosed in the notes to the annual accounts of the company[4].

The Board is also of the opinion that

- any company organised under Luxembourg law which is exclusively owned by and acts exclusively on behalf of investment companies in risk capital (*venture capital/private equity*) as referred to above may also claim Article 317(3) c) above, provided that the conditions listed above are met in respect of its parent company.

- any company organised under Luxembourg law which is wholly owned and acting exclusively on behalf of SICARs within the meaning of the 2004 law may also claim Article 317(3) c) above.

Application date

This opinion applies to any investment company in risk capital (*venture capital / private equity*) organised under Luxembourg law which meets the conditions set out in points 1) to 6) for any financial year beginning on or after 1st January 2009.

Disclaimer

The administrative or management body of the company concerned shall be solely liable, in accordance with general law, for any decision taken on the basis of this document.

This document – provided as a courtesy – is an unofficial translation of the French original document entitled "*Interprétation de l'article 317 (3) c) de la loi du 10 août 1915 concernant les sociétés commerciales dans le cas particulier des sociétés d'investissement en capital à risque (venture capital / private equity)*". In case of discrepancy in interpretation, the French version shall prevail.

[3] An exit strategy is defined according to a plan to achieve maximum return, including sale, write-offs, repayment of preference shares/loans, sale to another venture capitalist, sale to a financial institution and sale by public offering (including Initial Public Offerings) (source: European Commission - Guidelines on State aid to promote risk capital investments in small and medium-sized undertakings - *OJ C 194, 18.8.2006, p. 2-21*).

[4] It is understood that the determination of the fair value of the securities held in the portfolio is supposed to incorporate and reflect these different parameters. The inclusion of specific information in the notes to the accounts regarding any significant risks relating to the company's ability to continue as a going concern, its liquidity or its solvency is necessary, in the interest of transparency and proper disclosure, in order to draw the attention of investors, stakeholders and other users of the annual accounts to these points. By way of example, a description should be provided in the notes – insofar as the impact on the company is material – of the potential consequences of the implementation of guarantees given directly or indirectly by the company to third parties.