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Acquisition Finance 2025

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Netherland: Law and Practice
& Trends and Developments

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NETHERLANDS

Law and Practice

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Contents

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1. Market

1.1 Major Lender-Side Players

Market Players

The Dutch acquisition finance market is traditionally divided into three market segments based on debt quantum, being:

- small (up to approximately EUR30 million) – often lent by traditional (Dutch) commercial banks and on a bilateral basis (and increasingly by a direct lender);
- medium (from approximately EUR30 million up to approximately EUR250 million) – often lent by a direct lender or a club of (Dutch) commercial banks; and
- large (in excess of EUR250 million) – often lent by larger syndicates consisting of ((non-) Dutch) commercial banks (or direct lenders).

Over the last few years, the Dutch acquisition finance market has become crowded in terms of the number of debt providers active in the small, medium and large financing space. Even though traditional commercial banks are still active, direct lenders (often private credit funds) have grown their market share in the Netherlands. New direct lenders are still entering the Dutch debt market, but there have also been the occasional direct lenders that have decided to exit. Direct lenders typically operate outside the scope of EU banking supervision, affording them exemption from regulatory pressure.

As this trend of the increasing market share of direct lenders is developing over the years, we see direct lenders exploring new market areas, such as the financing of working capital (including asset based lending), financing of (stretched) senior solutions (rather than unitranche), financing based on recurring revenue as opposed to EBITDA and financing of smaller–sized private equity transactions (ie, companies with an EBITDA around EUR10 million or less). As such, traditional bank-led leveraged loan financing is no longer the predominant source for funding private equity transactions in the Netherlands.

Impact of Types of Investors

Different types of investors have different preferences, risk appetites and business models that impact the negotiation and structuring of loan agreements. Compared to direct lenders, commercial banks often impose more traditional and conservative covenants and financial ratios to mitigate their risk. On the other hand, direct lenders, often seeking higher yields, are comfortable with a higher debt quantum and are willing to offer more flexible structures and documentary terms, such as fewer interim repayment

obligations and more headroom on the financial covenants. Direct lenders are often flexible on equity cure mechanics, normalisation provisions with respect to financial covenants, access to incremental lines and the use of grower baskets that are linked to financial performance or size of the borrower. As a result of this flexibility, borrowers are less likely to default under these financing arrangements, which in turn minimises interference from debt providers.

Although the level of negotiation strongly varies per transaction and debt provider, key areas of negotiation typically revolve around what is permitted under the general undertakings (even more so in light of buy-and-build strategies), equity cures, financial covenants and financial reporting. As to financial covenants, an important area of negotiation between the borrowers and the lenders is the use of equity cures and calculations of the structuring EBITDA (including normalisations).

Market Performance

In 2024, the Dutch acquisition finance market slowly started to emerge from the slowdown caused by a challenging environment of rising interest rates in 2023 and inflation and geopolitical uncertainties that had dampened investment appetite. While deal activity picked up in 2024 after hitting a low point the previous year, overall deal volume remained below initial expectations.

Throughout 2024, refinancing activity remained the primary driver of volume in the debt finance market, while low M&A volumes endured due to elevated cost of debt and delayed sponsor exits. Despite some stabilisation, the *"value gap"* (the difference between what a seller expects and a buyer is willing to pay) still presents a challenge within the market. Ongoing economic uncertainty makes buyers more cautious, leading them to review asset valuations, while sellers often expect prices to stay at levels seen before the 2023 increases. In particular, this has affected larger transactions and the high-yield bond market, which primarily remains open to strong sponsors and high-quality assets. This mirrors general private equity transaction market activity, although market participants in the medium and smaller-sized space are still considered active.

The continuing market volatility has forced certain lenders to reassess their capital requirements and financing strategies. Most lenders have become more risk-averse, and are closely monitoring portfolio-company performance to determine the impact of inflation, labour costs and supply-chain issues. Longer timelines for deal closures have resulted from increased due diligence and a need for lenders to assess and mitigate potential risks associated with geopolitical events and economic changes. Due to a longer process and risk-shy investors, parties were less likely to come to a deal or deals came to a (temporary) halt or stopped altogether. In addition, commercial banks need to cope with capital requirements which often affect debt quantum and pricing. As a result, borrowers in the Netherlands may face increased costs and stricter terms when accessing finance.

(Borrower-Friendly) Terms

Although the current market can still be classified as borrower-friendly, lenders do seek additional protections amid ongoing economic uncertainties by tightening conditions on certain types of transactions. For example, they may demand tighter financial covenants and enhanced reporting requirements, or require higher equity contributions from sponsors to manage risks. In addition, lenders have become more selective, and focus on a higher quality threshold for credits

and borrowers prioritising strong cashflow and lower leverage ratios. As long as interest rates remain relatively high (compared to the years preceding 2022), the expectation is that lenders will remain focused on free cash flow instead of growth (EBITDA).

1.2 Corporates and LBOs

Cautious Buyers and Decreasing Interest Rates

Higher pricing of debt products has caused borrowers to drop (part of) their planned debt financing and explore alternative forms of financing, such as vendor loans and subordinated financings. These include back-leverage such as Holdco financing or, in the private equity space, financings at fund level. Certain borrowers financed acquisitions without third-party debt, hoping to obtain a debt financing in the future whenever markets, pricing and terms improve.

The economic environment has resulted in some borrowers being unable to fulfil obligations under their financing documentation. In these cases, this was with regard to payment obligations and financial ratios. In return for waiving certain defaults, lenders often impose additional conditions on borrowers that can lead to amending the financing documentation, such as agreeing to new financial ratios, limiting flexibility for borrowers on general covenants, or imposing more extensive information undertakings and charging amendment fees.

That said, the European Central Bank's monetary policies led to a decline in interest rates during 2024, which is expected to make debt servicing more manageable for borrowers. In addition, there is an increasing willingness among lenders, particularly in the unitranche and direct lending market, to accept lower margins in order to secure deals. Looking ahead, the Dutch acquisition finance market is expected to benefit from the improving economic environment and easing financial conditions (eg, lower interest rates and subdued inflation), although challenges such as geopolitical conflict, trade restrictions and inflationary pressures are likely to continue to influence market dynamics. Lenders and borrowers alike will need to adapt to these evolving conditions to navigate the acquisition finance landscape effectively.

2. Documentation

2.1 Governing Law

Save for investment grade corporates, there is not much difference between corporate loans, acquisition finance or leveraged buyout loans. The larger deals are often documented under US or English law especially where syndication is relevant. For mid-market and smaller deals, Dutch law is often used, especially if EU commercial banks or debt funds are involved. Given that Dutch law is rather creditor friendly (the position of the lender under Dutch, English or US law does not materially differ) and for smaller and/or mid-market deals, most often assets are located in the Netherlands or the EU, in which case Dutch law facilitates enforcement. The level of *"borrower friendliness"* of the documentation often depends on the strength of the corporate or sponsor.

2.2 Use of Loan Market Association (LMA) Agreements or Other Standard Loans

The basis for the finance documentation in an acquisition finance transaction is, in most cases, the documentation as published by the Loan Market Association (the LMA), but especially large deals often deviate heavily from the format. In addition, commercial banks often stay closer

to the format (also for syndication purposes), while private credit funds given more tailored solutions.

In some medium and small financings, alternative lenders have been willing to work off short(er) form documentation which is often a stripped-down version of the LMA format. Dutch commercial banks also offer short form documentation for smaller transactions where, at the offset, syndication of the product is not considered part of the bank's strategy nor commercially likely.

Eventually, the level of negotiations strongly depends on the size of the deal, type of lenders, type and size of borrower/sponsor and the borrower's/sponsor's strategy and financial performance.

2.3 Language

There are no requirements relating to the language used in finance documentation (save for a deed of mortgage (in relation to registered property) which must be executed in the Dutch language or, if in another language, come together with a certified translation. However, in most cases, the finance documentation will be drafted in English.

2.4 Opinions

Legal opinions play an important role in acquisition finance transactions in the Netherlands by providing assurances to lenders regarding capacity of the obligors and the legal validity and enforceability of the finance documents. The legal opinion will often be a condition precedent to funding and will typically cover:

- the capacity of the Dutch entities entering into the finance documentation; and
- the enforceability in the Netherlands of the finance documentation.

It is market practice in the Netherlands that lender's counsel issues a full legal opinion, covering both capacity of the obligors and enforceability aspects of the transaction.

3. Structures

3.1 Senior Loans

Acquisition finance transactions in the Netherlands can take various forms and the structure highly depends on the specific needs of the borrower, type of debt provider and prevailing market conditions. That said, forms of senior loan facilities we often see in the Netherlands are term loans to (re)finance the acquisition and the existing debt of the target, combined with revolving credit facilities to finance working capital as needed. In leveraged financings, sponsors often negotiate that the term loans are non-amortising (term loan B) and require inclusion of accordion features, which allows them to increase the size of the facility or attract additional financing under certain conditions. This feature provides the flexibility to adapt the financing arrangements to changing needs or increased funding requirements without the need for renegotiating the entire agreement. Commercial banks usually want to see that part of the term loan is amortising (term loan A).

As a result of the increase of direct lenders, medium and large–sized private equity transactions are often structured as unitranche products (meaning a blended senior and mezzanine risk structured as a non-amortising secured term loan). In larger, internationally arranged financings, we usually see senior financing being combined with mezzanine or second lien financing or high–yield bond issuances.

In addition, an increasing number of direct lenders are introducing stretched senior products aimed at competing with the syndicated term loan B market, as they diversify their strategies to deploy more capital. Stretched senior solutions add an additional layer of senior-like debt, effectively stretching the borrowing capacity while maintaining a higher priority in repayment hierarchy compared to subordinated debt.

3.2 Mezzanine/Payment-in-Kind (PIK) Loans

Mezzanine financing can be an important component of the capital stack in acquisition finance transactions in the Netherlands. Mezzanine financing is structured as subordinated debt, meaning it ranks behind senior debt in terms of repayment priority but before equity. This subordination increases the risk for mezzanine lenders but that is balanced by higher interest rates and potential equity upside through conversion rights, warrants or equity kickers if certain conditions are met.

The interest rates of mezzanine loans can be fixed or floating and are often structured to include a cash pay component along with a PIK component. The latter can be attractive to borrowers as it provides flexibility in managing cash flow, especially in the early stages of ownership when cash may be limited due to operational changes or investments.

3.3 Bridge Loans

In some cases, a bridge loan may be used to provide short-term financing to facilitate the acquisition of a target company. Bridge loans are intended to provide immediate financing and bridge the gap between the acquisition closing date and the availability of long-term financing (therefore often referred to as interim financing), such as high yield bonds (bridge to bond). The bridge commitment is usually set up to incentivise the borrower to pursue permanent financing options in the commitment phase and before the closing of the acquisition, or if the bridge loan is utilised, to refinance it as soon as possible after the transaction has closed.

3.4 Bonds/High-Yield Bonds

Borrowers can opt to (partly) finance an acquisition by raising funds on the debt capital markets, including through the issuance of (high-yield) bonds. The choice between (syndicated) loans/unitranche facilities and bonds often depends on factors such as the issuer's preferences, market conditions, and the desired level of flexibility or liquidity. Borrowers tend to choose loans or unitranche facilities over debt securities, up to a certain size (in terms of debt quantum), as those facilities generally provide for more bespoke terms, quicker execution and no disclosure of information to the public. On the other hand, bonds provide access to a broader pool of investors through the capital markets and can be traded on secondary markets, providing more liquidity for investors compared to syndicated loans.

3.5 Private Placements/Loan Notes

The features of private placements and/or loan notes can be attractive for companies and sponsors to raise capital to fund the acquisition of a target company or finance other corporate activities, such as refinancing existing debt, funding capital expenditures or supporting growth initiatives. Similar to bonds, these products can be utilised alongside a bridge facility and other types of debt.

As costs of debt products offered by regulated entities, such as commercial banks, have been fluctuating, private placements and loan notes can be a safer choice as they often have a fixed

interest rate (although rates can also be floating). In addition, private placements and loan notes allow for greater flexibility in negotiation and structuring compared to traditional bank financing. The terms of the financing are negotiated directly between the issuer and the investors, based on their respective needs and preferences. Private placements and loan notes attract a diverse investor base, including institutional investors, private equity funds, family offices and accredited investors. These investors may have different risk profiles, return expectations and investment criteria, which can influence the terms of the financing.

Private placements and loan notes may be subject to securities laws and regulations in the Netherlands, as well as any applicable regulations in the jurisdiction where the offering is conducted.

3.6 Asset-Based Financing

Asset-based financing structures are recently more often used in the Dutch market within the context of financing an acquisition. In practice, it has been observed that some lenders are also keen to enter the market for asset-based financing, which is attractive for companies, and all the more so when the (target) companies have valuable assets (such as accounts receivable, inventory, equipment, etc) that can be leveraged to secure financing. Asset-based financing provides a flexible and more affordable source of capital.

Asset-based financing structures offer flexibility and scalability, allowing borrowers to access financing based on the value of their assets and adjust the financing as their needs evolve. This makes asset–based financing an attractive option for companies seeking flexible capital solutions for acquisitions and growth initiatives.

Asset-based financing requires thorough due diligence to assess the quality and value of the assets being financed. Lenders will typically conduct asset appraisals, inventory audits and other assessments to determine the collateral's value and eligibility for financing. In addition, asset-based financing arrangements often include monitoring and reporting requirements to ensure compliance with the terms of the financing. This may involve regular reporting of financial and operational metrics, asset inspections, and other monitoring mechanisms to protect the lender's interests.

4. Intercreditor Agreements

4.1 Typical Elements

Role of Intercreditor Agreements

Creditors have an equal right to be paid from the net proceeds of all assets of their debtor in proportion to their claims (paritas creditorum – equality of creditors) and as such, their claims rank equally or pari passu. Dutch law, however, allows for intercreditor structures to be based on both lien subordination and claim subordination. Under Dutch law multiple liens (eg, security interests) can be created on the same asset whereby the ranking of each lien/security right is determined by the moment of perfection (or alternatively as determined between the parties). Similarly, a contractual arrangement between a creditor and a debtor may stipulate that a claim of a creditor shall take, in respect of all or certain other creditors, a ranking lower than the ranking conferred by law. Such contractual arrangements can for example be included in an intercreditor agreement or subordination agreement.

Intercreditor arrangements are particularly relevant in finance transactions involving multiple layers of debt (senior, bonds and/or mezzanine).

The primary purpose of the intercreditor agreement is to rank the creditor's debt and their entitlements to the enforcement proceeds and by contractually restricting their behaviour; by for example arranging when and by whom security might be enforced and when payments can be made by a borrower to a given class of creditors. Intercreditor arrangements in Dutch law debt financings are considered largely similar to those in key jurisdictions, such as the United Kingdom. A wide variety of types of documentation is available and applied, ranging from short form priority deeds to long form intercreditor agreements based on the relevant LMA format. The big difference between LMA based intercreditor agreements and US law–based intercreditor agreements is that the LMA–based intercreditor agreements assume enforcement of security, whilst the US law–based intercreditor agreements assume restructuring under the US Chapter 11 upon acceleration of the debt.

We often see intercreditor agreements in unitranche leveraged finance transactions, where a debt fund will pair up with a commercial bank for the purpose of financing working capital. The debt fund will typically provide the term loans for the purpose of paying the purchase price and the commercial bank will provide a revolving facility for working capital of the target group. There is a tendency that commercial banks only want to provide the working capital solution if they can also participate in the term loans to make it commercially attractive.

Subordination

In the Netherlands, there are essentially three ways of implementing subordination, as follows.

- Contractual (claim) subordination – as mentioned, creditors can agree on a different ranking by way of contractual arrangements. In this case, the creditors typically finance the same borrower and share in the same security package of the same ranking, which is often granted in favour of a common security agent. The ability to enforce the security of the junior creditor will be restricted by contractual arrangements.
- Lien subordination (in rem) – both the junior lender and the senior lender finance the same borrower and have security over the same collateral, but different in ranking. The ranking is determined by the moment of perfection of the security and has property law effect. Dutch law also allows for the parties to implement a change of ranking of existing security rights. Any amendments and consents to the priority of security rights are subject to the same formalities as are required for creating a new security interest.
- Structural subordination – claims are subordinated based on the corporate structure of the relevant debtors, rather than by way of contractual arrangements. For example: a junior lender provides a loan to a parent company, the shareholder of the corporate group to which the senior lender makes its loan. Security, if any, for the junior loan will be granted at parent level, and security for the senior debt will be granted at corporate group level. Funds will only be upstreamed from the corporate group to the parent company (to be applied towards repayment of the junior loan) if there is still value left after the senior loan has been repaid. In practice, the upstreaming of cash from the corporate group to the parent level is subject to restrictions in the senior loan documentation protecting the senior lenders from cash *"leakage"* to the parent company, which leakage would effectively allow for the junior creditor to take priority over the senior creditor.

4.2 Bank/Bond Deals

Where both banks and bondholders are involved in an acquisition financing transaction, the LMA intercreditor agreement is typically used as a starting point for negotiations. The LMA intercreditor agreement provides a standardised framework for managing the relationship between different classes of creditors in leveraged finance transactions, including banks and bondholders. The approach taken towards intercreditor agreements in bank/bond deals is in itself not very different from any other transaction where multiple layers of debt are involved.

4.3 Role of Hedge Counterparties

Lenders regularly require borrowers to enter into hedging in respect of a minimum proportion of its term facilities in order to mitigate interest or exchange rate fluctuations and enhance the stability and predictability of cash flows of the target group. As the borrower may incur significant payment obligations to the hedge counterparties, the lenders want the hedge counterparties to become a party to the intercreditor agreement to ensure that the ranking and priority of any hedging liabilities in relation to the other lenders are regulated. The hedge counterparties in their turn want to benefit from the guarantees and security granted by the borrower. Hedging counterparties in principal rank before or pari passu with the senior lenders and share in the security package. A hedge counterparty generally only gets a vote on enforcement actions after a termination or close-out of a hedging transaction has occurred and the resulting settlement amount is due and has not been paid. As a result, a hedge counterparty has very limited control on the enforcement strategy as long as it is continued to be paid.

5. Security

5.1 Types of Security Commonly Used

Types of Assets and Security

The typical security package in connection with acquisition financing in the Netherlands comprises all asset security, consisting of shares, real estate, moveable assets, receivables (eg, insurance and intercompany receivables), (cash deposited in) bank accounts and IP rights. In principle, both present and future assets can serve as collateral. A security right over future assets can be granted but will not catch any assets which are acquired or which come into existence after the security provider has been granted a suspension of payments or has been declared bankrupt.

In deals where a strong borrower (sponsor) is involved, collateral is often limited to shares, material intercompany receivables and material bank accounts of the material companies only. The security package is typically implemented as follows:

- on closing: shares and assets of the bidco (purchasing entity); and
- post-closing (upon accession of the target group): shares and assets of the target and material subsidiaries.

5.2 Form Requirements

Secured Liabilities

Dutch law security can only secure monetary payment liabilities. Security rights are accessory rights that follow the claims they secure by operation of law, meaning that they cannot be transferred or assigned independent from the secured liabilities. See also the information on parallel debt (below).

Creation of Security

For a valid security right, collateral needs to be capable of being pledged (ie, no transfer/assignment restrictions apply – see **10.1 Other Acquisition Finance Issues** – and sufficiently identifiable (a generic description often suffices). In addition, the following conditions need to be met:

- the security provider must have the authority to dispose of and encumber the collateral;
- there need to be an agreement to create a security right; and
- the formalities for creating security as prescribed by law are complied with.

Formalities and Perfection Requirements

Unlike other jurisdictions, the Netherlands does not provide for the concept of *"floating charge"*. The formalities and perfection requirements for creating security vary per type of asset:

Shares

These are created pursuant to a notarial deed of pledge, executed in front of a civil law notary. The security provider typically remains entitled to collect dividends and exercise voting rights until a certain trigger event occurs. Security over shares needs to be registered in the shareholder's register to have third-party effect.

Real estate

This is created by way of a notarial deed of mortgage, executed in front of a civil law notary. The deed of mortgage must be registered with the Land Register upon execution. In addition, the mortgage usually provides for a maximum secured amount, which typically amounts to the principal loan amount increased by 40% to cover interest and costs.

Moveable assets

These are created by way of a right of pledge and can take two forms:

- possessory right of pledge – created by bringing the moveable assets under the effective and exclusive control of the secured party (or a third party acting on its behalf). As this might raise practical difficulties in the ordinary course of business of a security provider, it is more common to create a non-possessory right of pledge.
- non-possessory right of pledge – does not require the secured party taking control over the assets. Instead, it is created by entering into a private deed which is registered with the Dutch tax authorities (no public register; date stamp only). Upon the occurrence of a certain trigger event, the non-possessory pledge can be converted to a possessory pledge.

Receivables

These are created by way of a right of pledge and can take two forms:

- disclosed right of pledge – created by entering into a private deed and notification to the debtor of the right of pledge. A disclosed right of pledge can cover all existing and future receivables and allows the secured party to collect the receivables. In practice, the secured party authorises the security provider to keep on collecting receivables until the occurrence of a certain trigger event.
- undisclosed right of pledge – does not require debtors to be notified but merely requires a private deed which is registered with the Dutch tax authorities. An undisclosed right of pledge covers all receivables existing on the day of the registration and future receivables that directly result from existing legal relation-

ships existing on the date of registration. As a result, the scope of the security should be regularly updated by means of supplemental deeds to capture future receivables that are not covered by the initial pledge.

Cash deposited in bank accounts

For the purpose of taking cash as collateral, a Dutch bank account is considered to be a receivable against the account bank and security is therefore created in the same way as a pledge over receivables. The Dutch general banking conditions render bank account receivables incapable of being pledged and provide for a first ranking right of pledge and a right of set-off for the account bank. To secure a (first ranking) right of pledge for the secured party, certain consents/ waivers need to be obtained from the account bank. Due to the increasing burden to monitor clients to mitigate risks regarding money laundering, Dutch account banks are often reluctant to provide consent to pledge bank account receivables. If the account bank does not want to co–operate, no valid right of pledge can be created.

IP rights

These are created by way of a right of pledge by entering into a private deed. IP rights are only capable of being pledged if specifically provided for by law. Registration of the private deed with the Dutch tax authorities is only a condition for the creation of a valid right of pledge over licences and domain names. While not a constitutive requirement for the creation of a right of pledge, a right of pledge over IP rights needs to be registered in the relevant IP register to be enforceable against third parties.

Signing Formalities

The security over different types of assets can, to a large extent, be combined in one agreement/ private deed (a so-called *"omnibus pledge"*). As mentioned, a notarial deed of mortgage and pledge over shares must be executed before a civil law notary. In practice, each party grants a power of attorney to the notary to avoid having to physically appear in front of the notary. The signatures on such powers of attorney must be legalised (including a statement of authority) and furnished with an apostille.

A deed of mortgage (in relation to real estate assets and certain registered assets (vessels or aircrafts)) must be executed in the Dutch language or, if in another language, come together with a certified translation. No language requirements apply for share pledges or private deeds. Private deeds may be executed in counterparts and no other execution formalities apply.

5.3 Registration Process

See **5.2 Form Requirements**.

5.4 Restrictions on Upstream Security

See **6.2 Restrictions**.

5.5 Financial Assistance

See **6.2 Restrictions**.

5.6 Other Restrictions

Parallel Debt

It is generally assumed that a Dutch law security right cannot be validly created in favour of a person who is not the creditor of secured liabilities. For this reason, if Dutch law security is held by an agent or trustee for the benefit of other parties, it is standard market practice to use a parallel debt structure (as often included in the credit or intercreditor agreement). This structure creates a separate claim owed by the obligors to the security agent which equals the total amount owed to the secured lenders. A parallel debt becomes due and payable at the same

time as the amounts owed to the secured lenders become due and payable and is discharged when the debt of the secured lenders is repaid. The secured liabilities under the Dutch security documents refer to the parallel debt.

Trust

A trust created under the laws of another jurisdiction is recognised under Dutch law, provided that the governing law provides for trusts and the trust has been created voluntarily and is evidenced in writing. The courts in the Netherlands will, however, not be bound to recognise a trust of which the significant elements are more closely connected with states which do not provide for the institution of the trust.

5.7 General Principles of Enforcement

Process for Enforcement of Security

A Dutch law security right can be enforced only following a default by the debtor in relation to the (monetary) secured liabilities. In other words, there must be a payment default (usually triggered by way of acceleration after an event of default). Whether a payment default has occurred, should be determined based on the laws that govern the underlying documentation which contains the relevant monetary payment obligations.

The enforcement of Dutch security rights is a relatively easy and quick process and can take place by:

- a public sale (without court involvement) or private sale (with court approval);
- in case of a pledge only, a private sale agreed between the secured party and the security provider (without court involvement); or
- in case of a pledge of receivables only, collecting receivables and application of the proceeds towards the secured obligations.

Appropriation is not allowed but a secured party may bid in a public sale, or it may buy the asset with the approval of the court.

As follows from the above, judicial enforcement may be required if out-of-court enforcement is not possible or unsuccessful. This involves filing a request to obtain a court order for the enforcement of security. Generally, within two to four weeks after the request has been filed a court hearing will be scheduled in which the secured party will be heard. Although there is no formal requirement to also hear the security provider or any other interested party, practice has shown that the court will either give notice itself or order the secured party to give notice of the intended sale to the security provider and any interested party. The court ruling (either in the event of approval or rejection) is not open to appeal on the merits of the case.

Enforcement of Foreign Judgments

Recognition of foreign judgments are subject to the existence of treaties. Judgments by any EU Member State court can generally be enforced in the Netherlands without any need for a re-examination of the merits of a case and without any declaration of enforceability being required. However, in the absence of a treaty (for example in case of the United States), a judgment by a non-Dutch court cannot be enforced in the Netherlands without re-litigation of the merits. A Dutch court will typically grant the same judgment without substantive re-examination of the merits if:

- the judgment results from proceedings compatible with the Dutch concepts of due process;
- the judgment does not contravene public policy of the Netherlands;

- the jurisdiction of the non-Dutch court is based on internally acceptable ground; and
- the judgment by the non-Dutch court is not incompatible with an earlier judgment rendered between the same parties concerning the same subject and cause by a Dutch court, or non-Dutch court provided that such judgment qualifies for recognition in the Netherlands.

Enforcement in Insolvency

In general, secured creditors have a very strong position under Dutch insolvency law. Under Dutch law, a secured party may enforce its security rights as if there were no suspension of payments or bankruptcy and without any co-operation of a bankruptcy trustee being required. In addition, Dutch security rights create a preferred right on the distribution of the proceeds and rank above any other right (subject to limited exceptions, eg, certain claims of the Dutch tax authorities).

A court may order a general stay of all creditors' actions for a maximum period of four months in a suspension of payments or bankruptcy. This will give the bankruptcy trustee time to investigate the debts and assets of the bankrupt company, during which rights of creditors are suspended. The bankruptcy trustee may also require the secured party to enforce its security within a reasonable period. Failure to comply may lead to the bankruptcy trustee selling the assets. In that case, the secured party will keep a statutory priority right on the proceeds, but will only receive payment when the bankruptcy estate is distributed and will have to share in the bankruptcy costs.

WHOA

The Dutch scheme of arrangement (*Wet homologatie, onderhands akkoord ter voorkoming van faillissement,* WHOA) is based on the UK Scheme of arrangement and the US Chapter 11. Companies have the possibility to offer a composition to their (secured) creditors without having to file for bankruptcy and retaining control of their assets (eg, debtor in possession). Also, creditors, shareholders and a works council (if established) can initiate the launch of a composition by requesting the court to appoint a restructuring expert. Such expert can offer a composition to the creditors and shareholders on behalf of the company.

The purpose of a composition can be to: (i) restructure the company's debts; or (ii) to liquidate the company and distribute amongst the creditors. A composition under the WHOA can only be offered if the debtor is in a situation where it can be reasonably expected that it will be unable to continue to pay its debts. This will be the case if there is no realistic prospect of the debtor avoiding insolvency without restructuring its debts. During the negotiating process, the debtor stays in possession and is offered protection against enforcement actions.

Only creditors whose rights are affected by the composition are entitled to vote and must be placed in a class. The court can be asked for ratification if at least once class of creditors voted in favour of the composition. If ratified by the court, a composition can be imposed on dissenting (classes of) creditors and shareholders. Future obligations can be amended or terminated and guarantees issued by group entities can also be included in the composition. The court's decision cannot be appealed.

There are several mandatory grounds for refusal which require the court to reject the relevant motion (to ratify the plan as offered), such as procedural requirements not being met or the

composition being a result of fraud. In addition, the court can refuse ratification upon request of a dissenting creditor or shareholder if:

- the creditor or shareholder would be worse off than in a bankruptcy scenario (*"no creditor worse-off rule"*)
- the statutory or contractually agreed ranking is deviated from to the detriment of this class, unless there is a reasonable ground for doing so and the interests of the creditors or shareholders involved are not prejudiced (*"absolute priority rule"*). The court will only rule on any motion invoking the absolute priority rule to the extent that the relevant creditor is part of a dissenting class; or
- the relevant creditors are not offered a cash amount under the composition.

6. Guarantees

6.1 Types of Guarantees

Corporate (cross–)guarantees and declarations of joint and several liability by the target and its (material) subsidiaries are commonly used in group financings to enhance the creditworthiness of the borrower and provide additional security to lenders. In addition, the parent company may be required to issue a parent guarantee to assure the obligations of its subsidiary, typically the borrower in the acquisition finance transaction.

6.2 Restrictions

Guarantee Limitations

Under Dutch law, there are no general legal restrictions on providing guarantees for obligations of third parties, except for the financial assistance prohibition applicable to a public limited liability company (*naamloze vennootschap*). A public limited liability company is restricted from granting security or provide guarantees for debt used to acquire shares in its capital; its direct or indirect subsidiaries are prohibited from doing the same.

In addition, corporate benefit rules which might play a role. A company (or the bankruptcy trustee on its behalf) can challenge the validity of a transaction if the company has acted beyond the scope of its corporate objects (ie, its business purpose) and the counterparty was aware or should have been aware thereof (generally this concept is referred to as *"corporate benefit"* or *"ultra vires"*). In determining whether there is corporate benefit, all circumstances must be considered. While the wording of the objects clause in the articles of association of the company is relevant, it is not decisive. In particular, it must be considered whether the interests of the company are served by the transaction and, on the downside, whether the existence of the company is jeopardised by the transaction. This is a factual test to be made by the management. The fact that the legal entity is part of a group can be taken into account (indirect benefit), particularly if the members of the group are economically and operationally intertwined. This test generally does not pose a problem on group financings for upstream guarantees and also not something that renders certain guarantee limitation wording applicable.

6.3 Requirement for Guarantee Fees

Under Dutch law, there is no requirement for guarantee fees to be charged (but it might be necessary to deal with transfer pricing issues or to mitigate corporate benefit issues, if any).

7. Lender Liability

7.1 Equitable Subordination Rules

No Equitable Subordination

The Netherlands does not acknowledge the concept of equitable subordination. More specifically, there is no statutory provision under Dutch law pursuant to which shareholder loans are subordinated to the claims of other creditors. This means that claims of shareholders shall in principle not be subordinated and shall rank pari passu with other unsecured debt unless there is a contractual subordination of such claims.

There have been a limited number of court cases in which the court ruled that a shareholder loan should be subordinated, even though there was no contractual basis to this effect. The circumstances in this case law were rather exceptional (eg, a parent company provided a loan to its subsidiary which was considered to be *"informal capital"*, provided in circumstances and under conditions that a third party would not accept) and will likely not be relevant or applicable in the context where the lender is a professional party and not a controlling shareholder.

7.2 Claw-Back Risk

Fraudulent Conveyance

There are no general hardening periods in the Netherlands. However, in an indirect way, there is a hardening period of one year in relation to fraudulent conveyance claims. Creditors and the bankruptcy trustee have the right to challenge the validity of certain transactions entered into by a company prior to bankruptcy which have been prejudicial to creditors (fraudulent conveyance or actio pauliana). The challenge generally requires that both the company and (if the transaction was entered into for consideration) the counterparty, knew or should have known that the other creditors would be prejudiced. For certain transactions (eg, with related parties, where there is a significant imbalance in consideration, where the debtor pays or provides security for a debt that is not yet due), required knowledge is presumed if the transaction occurred less than one year prior to the bankruptcy or suspension of payments. This presumption does not apply if there was an existing obligation to create the security (predating the bankruptcy by more than one year), which is why often (in smaller or mid-market deals) the loan agreement will contain an undertaking to create (additional) security (positive pledge).

8. Tax Issues

8.1 Stamp Taxes

Stamp and Other Taxes

No Dutch registration tax, stamp duty or other similar documentary tax or duty is due in respect of or in connection with debt financing involving Dutch borrowers, except for Dutch real property transfer tax, which may be due upon a (deemed) acquisition of (an interest in) an asset that qualifies as or a right over) real property situated in the Netherlands.

Interest or other payments by a Dutch borrower for the granting of credit under the debt financing should not attract Dutch VAT.

8.2 Withholding Tax/Qualifying Lender Concepts

Withholding Tax

Interest payments by a Dutch borrower under a loan provided by a third-party lender can in principle be made free from withholding or deduction of or for Dutch taxation, except that:

- 25.8% Dutch conditional withholding tax may be applicable in respect of interest payments

(deemed to be) made by a Dutch taxpayer to *"related party"* in case of financing structures involving so-called *"low tax"* or *"non-cooperative"* jurisdictions or hybrid entities, or in certain abusive situations.
- 15% Dutch dividend withholding tax may be applicable if the debt is granted under such terms and conditions that it is capable of being classified as or actually functions as an equity interest in the Dutch borrower (eg, a loan which has no term or a term in excess of 50 years, which has a profit-contingent interest and which is subordinated to claims of other creditors); in these cases, Dutch conditional withholding tax on these deemed dividends may be due, which may effectively result in 25.8% withholding tax being due.

With the entry into force as from 1 January 2021 of the Dutch conditional withholding tax in respect of interest payments as mentioned above, the inclusion of a Qualifying Lender concept in case of a Dutch borrower generally in line with the LMA standard has become standard.

8.3 Thin-Capitalisation Rules

There are no thin-capitalisation rules in the Netherlands as such, but in addition to the various interest deduction limitations that may apply to a Dutch borrower in respect of intragroup debt financing, there is a general interest deduction limitation that applies to a Dutch taxpayer's intragroup and/or third-party net borrowing costs for each financial year to the highest of: (i) 24.5% of the EBITDA (for tax purposes); and (ii) EUR1,000,000.

9. Takeover Finance

9.1 Regulated Targets

Apart from antitrust scrutiny by the European Commission and the Dutch Authority for Consumers and Markets (ACM), acquiring privately owned companies is in principle not regulated in the Netherlands. Specific regulatory approvals or notifications may be required based on the sector in which the target company operates, and supervision is carried out by various authorities. The Dutch Central Bank (*De Nederlandsche Bank*, DNB), the Dutch Authority for Financial Markets (*Autoriteit Financiële Markten*, AFM) and the European Central Bank oversee M&A activity involving financial institutions such as banks and insurers, the DNB supervises M&A transactions involving corporate services providers (eg, trust firms), the Dutch Healthcare Authority (*Nederlandse Zorgautoriteit*) regulates the healthcare industry and the Minister of Economic Affairs and Climate Policy (*Minister van Economische Zaken en Klimaat*) oversees certain large energy installations.

Any acquisition resulting in a change of control of a regulated entity typically requires prior approval from the relevant regulatory authority. The approval process involves an assessment of the acquirer's suitability, financial stability and strategic intentions. The acquiring party must submit detailed information to the regulator, including the business plan, financial statements and any other relevant documents. Unlike public M&A, there is no statutory requirement to submit *"certain funds"* statement to the relevant regulator (see **9.2 Listed Targets**), but the transaction documentation will obviously contain relevant provisions in this respect.

Generally speaking, lending to businesses is not regulated in the Netherlands and it is not

necessary that lenders to a company should be licensed, qualified or otherwise entitled to carry on business in the Netherlands by reason only of entering into a loan agreement or acting as agent or security agent and enforcing their rights thereunder. That said, bank financing provided for acquisitions of regulated targets must adhere to the applicable regulatory standards. This may include, among others, compliance with capital adequacy and leverage ratios, liquidity standards and anti-money laundering and counter-terrorist financing regulations. Banks must conduct thorough due diligence on both the bidder and the target to assess financial stability (including the ability to meet its financial obligations under the financing agreement) and compliance with regulatory requirements and risks associated with the transaction. In addition, the finance documentation must comply with Dutch banking regulations and parties must ensure that the financing structure aligns with legal requirements. Finally, banks may be obliged to comply with regulatory reporting requirements imposed by banking regulators regarding their exposure to regulated targets and other counterparties. This may include reporting on credit exposure, risk concentrations, capital adequacy ratios and other relevant metrics to regulatory authorities.

9.2 Listed Targets

The acquisition of listed companies is primarily governed by the Financial Supervision Act (*Wet op het financieel toezicht*, Wft) and more specifically the Public Takeover Bid Decree (*Besluit openbare biedingen*, Wft), which provides detailed procedural rules on public bids. Listed companies in the Netherlands are subject to supervision by the AFM.

According to the Public Takeover Bid Decree, the bidder is not allowed to make a bid for securities listed on a regulated market in the Netherlands without first submitting an offer document to the AFM (or a comparable supervisory market authority in another EU/EEA Member State) and obtaining its approval. The bidder is required to publish *"certain funds"* announcement when the offer document is submitted to the AFM for approval. This announcement must provide a detailed explanation of how the bidder has secured the payment of the offer price. However, the AFM does not need to approve the certain funds announcement, nor is there a requirement to prove that the offeror has the necessary funds in place, by for example submitting a commitment letter to the AFM or providing evidence of third-party opinions. The protection lies in the fact that if the statement is false, the bidder can be sued (and in addition will jeopardise its reputation). In practice, evidence of certain funds is crucial in these transactions in order to secure the support of the target management.

Lenders providing financing for the acquisition of listed targets must comply with the relevant regulatory requirements.

10. Jurisdiction-Specific Features

10.1 Other Acquisition Finance Issues

Leakage Outside of the Obligor Group

In the Netherlands, the following two situations could result into intra–group liabilities outside the banking group.

- Fiscal unity – a Dutch obligor may be part of a fiscal unity for Dutch corporate income tax and/or VAT purposes (either as a parent or a subsidiary) if certain conditions are met, which may provide for certain benefits for several reasons. Generally, each fiscal unity member is and remains jointly and severally liable for taxes payable by the entire fiscal

unity with respect to the period it was part of the fiscal unity. The potential (secondary) tax liability of a Dutch obligor may therefore extend to the (potential) standalone tax liabilities of non–obligor group entities that are a member of the same fiscal unity.
- 403 statement – under Dutch law, parent companies may choose to file consolidated financial statements for its subsidiaries. If a parent company chooses to do so, then: (i) the subsidiaries are exempted from their obligations to file financial statements; and (ii) the parent company declares itself jointly and severally liable for all obligations of its subsidiaries that result from legal acts by issuing the so-called 403 statement.

As both the fiscal unity and the 403 statement qualify as a guarantee and may result in incurring additional debt (other than debt arising from it being an obligor under the credit agreement), these concepts should be considered in the context of the loan documentation. If such liabilities are incurred, a lender would typically want to limit these to liabilities between members of the obligor group to prevent any leakage.

If a Dutch obligor is part of a fiscal unity for Dutch corporate income tax purposes, deconsolidation of such fiscal unity (including as a result of security enforcement) may result in taxable income (and actual tax cash outs) for the Dutch obligor and in principle results in any available tax loss and interest carry forwards to remain with the fiscal unity parent. As this may have adverse consequences to a lender's recourse, this is usually assessed in the relevant financing documentation or a separate tax sharing agreement.

Works Council

The Works Councils Act (WCA) requires that a company with 50 employees or more is obliged to set up a works council. A company that is not obliged to set up a works council under the WCA can be obliged to do so under a collective bargaining agreement or do it voluntarily.

A works council with jurisdiction over a Dutch company has or may have the right to render its advice on certain important economic or organisational decisions, such as the transfer of control of the company or any part thereof, attracting financing out of its ordinary course of business, granting guarantees or security for obligations of third parties and pledging shares in the company. If the company has failed to request and obtain advice on a timely basis from the works council when it should have done so, or has not followed the advice of the works council when making its final decision, the works council can lodge an appeal with the Enterprise Chamber of the Amsterdam Court against the decision of the company, which will lead to a delay of the contemplated transaction.

Transfer/Pledge Restrictions

It is important that it be possible to pledge collateral for encumbrance with a valid Dutch law security right. Traditionally (and currently widely used in practice) parties (being the creditor and the debtor of a receivable) can agree on clauses in their contracts prohibiting the transfer and/or pledging of receivables, known as transfer, assignment or pledgeability restrictions. Such restrictions may limit companies (especially small and medium enterprises (SMEs)) in using receivables as collateral for financing, which in turn reduces their access to credit.

The Dutch parliament recently approved the Act on the abolition of pledge prohibitions (*Wet opheffing verpandingsverboden*) which is aimed at stimulating credit provision, particularly for SMEs, by removing restrictions on the transfer-

ability and pledging of commercial receivables. With the introduction of this law, it will no longer be possible to contractually limit or exclude the transferability or pledging of certain commercial receivables arising from business activities. If parties do agree on such restrictions, they will be considered null and void – existing restrictions will also become null and void after three months following the date on which the new law comes into force. There are, however, exceptions for certain types of receivables, such as those related to bank accounts and syndicated loans.

The abolition of pledge prohibitions is expected to significantly expand the credit capacity for Dutch businesses (up to approximately EUR1 billion), as it will remove certain financing obstacles which exist under Dutch law. It is also expected to have a positive effect on asset-based lending activities in the Netherlands where receivables are part of assets and the new law causes the borrowing base to be increased. On the other hand, the proposal has been criticised in legal literature as it is considered to be an intervention in the freedom of contract, also affecting contractual clauses in contracts that do not involve SMEs. In addition, critics fear that the position of unsecured creditors will be weakened by allowing more receivables to be pledged, as secured creditors (such as banks) may recover a higher percentage of their loans in insolvency scenarios.

Trends and Developments

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Loyens & Loeff

Loyens & Loeff is a leading continental European law and tax firm with over 1,000 advisers and is the logical choice for companies doing business in or from the Netherlands, Belgium, Luxembourg and Switzerland, its home markets. The banking environment is constantly evolving. Financing solutions are multiplying and legal implications related to financial products are becoming more complex. Due to the ever-changing economic, political, environmental and regulatory worlds, financial markets will continue to be a challenge in the years ahead. Loyens & Loeff keeps track of the developments and helps its clients to navigate the increasingly complex debt and financial markets. It also goes a step further – guiding its clients in identifying opportunities and innovative ways to access the funding most suitable for them, whilst also managing risk. It is the firm's job to stay ahead of these changes for its clients, allowing them to stay focused on their core business.

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In 2024, the Dutch acquisition finance market continued to navigate challenges as the macroeconomic landscape evolved. While inflationary pressures eased compared to 2023, the effects of previous interest-rate hikes were still noticeable, influencing investor sentiment, credit availability and overall market activity. The anticipated rate cuts by the European Central Bank (ECB) materialised in the second half of the year and provided some relief, but uncertainties endured due to global economic headwinds and geopolitical tensions. Despite hopes for a recovery, larger transactions and high-yield bond issuance remained subdued, with investors maintaining a cautious approach. The general private equity transaction market showed some improvement, particularly in the mid-sized and smaller segments, but overall activity remained below pre-pandemic levels. Market participants adapted to the new market and ongoing challenges by adopting alternative debt structures and private credit solutions. While activity picked up in 2024, overall deal volume remained below initial expectations.

Macroeconomic Backdrop

The Dutch economy showed signs of recovery in 2024, with real GDP growth projected at 0.9% after two years of stagnation. This upturn was supported by increased public spending and private consumption – driven by significant wage increases exceeding 6% almost entirely offsetting inflation, and a persistently tight labour market – although investment growth remained subdued due to earlier financial tightening.

As an economy heavily reliant on international trade, the Netherlands remained vulnerable to international market fluctuations. Key macroeconomic trends that shaped the Dutch acquisition finance market in 2024 included the following.

- *Inflation moderation* – the aggressive rate hikes by the ECB in 2022 and 2023 began to show results, with inflation in the Eurozone slowing. In the Netherlands, inflation decreased to average 3.2% for the year, down from 4.2% in 2023, based on the Harmonised Index of Consumer Prices.
- *Interest-rate developments* – the ECB signalled a shift in policy, implementing gradual rate cuts starting in mid-2024, reducing the deposit facility rate from 4.00% to 2.50% currently. While this stimulated borrowing and investment, the pace and extent of the cuts were sufficient to balance economic growth and inflation control.
- *Economic pressure* – the feared recession of 2023 did not materialise, as the labour market remained robust, household spending continued – remaining a key driver of economic activity – and businesses adapted to higher financing costs. However, business investment, including M&A, remained weak due to relatively high borrowing costs compared to earlier years. Market participants were cautious, leading to deals falling through, not being completed or experiencing long lead times. Investors continued to prioritise immediate profitability through cost-cutting measures over long-term growth strategies. Additionally, private equity funds continued to hold large amounts of capital, waiting for more favourable market conditions before deploying their investments.

In addition, despite some stabilisation, the *"value gap"* (the difference between what a seller expects and what a buyer is willing to pay) remained a challenge; economic uncertainty makes buyers more cautious, and more likely to reassess asset valuations, while sellers often expect prices to remain at pre-rate-hike levels.

- *Default rates* corporate defaults increased, particularly in highly leveraged sectors, and more restructurings were seen as the year progressed. Fitch Ratings projected default rates for European high-yield bonds and leveraged loans to rise to approximately 4% in both 2024 and 2025, compared to 2.5% and 3%, respectively, in 2023. This reflected a growing risk environment for lenders and investors.

Market Overview

Economic uncertainty resulted in lenders and borrowers adapting their financing strategies. While investor sentiment improved as rates began to decline, lenders remained cautious, maintaining a focus on high-quality credit, with more stringent due diligence and tighter covenants, closely monitoring the performance of (portfolio) companies to determine the impact of inflation, labour costs and supply chain issues. Increased due diligence and the need for lenders to assess and mitigate the potential risks associated with geopolitical events and economic changes pushed back the timelines for deal closures. In addition, commercial banks were faced with capital requirements that affect debt volume and the pricing. Many borrowers remained hesitant to lock in expensive financing, and postponed planned debt financings or explored alternative funding structures. Vendor loans and subordinated financings (including Holdco financing or, in the private equity space, financings at fund level) and private credit solutions remained popular substitutes for traditional third-party debt in anticipation of better terms as central banks moved toward monetary easing.

Deal activity in 2024 was a mix of *"amend-and-extend"* transactions and refinancings driven by upcoming maturities. As M&A-related financing showed signs of recovery later in the year, acquisition finance also became a part of the mix. The economic situation led to borrowers being faced with higher borrowing costs and tighter credit conditions. Lenders, in exchange for waiving certain defaults, often imposed additional terms on borrowers, necessitating amendments to financing agreements. These amendments often involve agreeing to new financial ratios, additional restrictions in the terms of undertakings, and extensive reporting requirements. Default rates increased compared to 2023, with more restructurings and bankruptcy filings as companies struggled with higher debt-servicing costs. That said, defaults were not historically high.

Liquidity challenges persisted for some companies, particularly for borrowers with floating-rate debt. Many of them sought additional financing, either by expanding credit facilities or securing new credit lines. However, obtaining such financing typically comes with additional lender conditions, and shareholders are also often expected to inject additional equity. When shareholders do not cooperate, traditional lenders typically sell their commitments, while direct lenders will stay, take the equity and take control of the company. If the shareholder and existing lenders do not want to provide additional funding or are not willing to take the company over, secondary trading remains essential to securing new credit. In urgent situations, traditional lenders will sometimes resort to private debt as a form of rescue financing.

A current concern is the 2026 maturity wall and the struggle that companies are experiencing refinancing their existing debt. Restructurings are expected to become more complex as there are many stakeholders with different interests involved. An uptick in *"multi-process"* restructurings – where processes in two or more jurisdictions are necessary to implement a single

group restructuring – is also expected. This is because, since the EU Restructuring Directive only provides for a minimum level of regulation, every country has its own restructuring procedure. Throughout the years, valuable tools have emerged in Europe that allow restructurings to take place without the consent of all creditors, including the *"cross-class cram-down"* under the UK restructuring plan and the Dutch WHOA scheme of arrangement.

Unlike the US, Europe has not seen many liability management transactions, and might only have used them as a solution to liquidity issues. That said, there is some interest in these types of transactions within the EU market. In the US, participant lenders are opening up baskets to increase liquidity without the involvement of non-participant lenders. We do see more use of basket capacity to increase liquidity, and often this does not require majority votes.

Market Participants

The Dutch acquisition finance market is traditionally divided into three segments based on debt size.

- Small – up to EUR30 million, often lent by traditional Dutch commercial banks on a bilateral basis, though increasingly by direct lenders as well.
- Medium – ranging from approximately EUR30 million to EUR250 million, commonly lent by direct lenders or consortia of Dutch commercial banks.
- Large – exceeding EUR250 million, usually lent by larger syndicates comprising both Dutch and non-Dutch commercial banks or direct lenders.

As a result of continued unpredictability around pricing, more borrowers and issuers have turned to direct lending options. The private credit market has grown explosively over the years (21% over the past decade), gaining the most traction, in particular, in the (sponsored) middle-market. As of early 2024, European private lending to reached approximately USD500 billion in assets under management, representing almost 30% of the USD1.7 trillion global private credit market, based on Preqin data.

As direct lenders are increasing market share, they are also exploring new market areas. Direct lenders are increasingly investing into financing working capital, providing (stretched) senior solutions, favouring financing models based on recurring revenue over EBITDA, and supporting smaller private equity transactions. Consequently, traditional bank-led financing is no longer the primary source for funding private equity endeavours in the Netherlands. Instead, direct lenders are also expanding their reach into the corporate financing arena. At the same time, commercial banks are trying to regain market share by mirroring the offering of direct lenders at lower rates.

Trends and Developments

NAV facilities

Borrowers and lenders alike are seeking new opportunities in the face of current challenges in the (leveraged) loan market. As investment funds are experiencing more difficulties securing financing portfolio companies on favourable terms, more complex structures are being explored – eg, at fund level. A type of facility that is frequently used by investment funds is the Net Asset Value (NAV) facility. NAV financing provides investment funds with flexible and efficient access to additional capital, based on the value of their portfolio investments. NAV financing is often used when investors' undrawn commitments are low, or when the investment phase

of the fund has ended and liquidity is needed for distribution to investors, or to make additional investments or to support the financial stability of distressed portfolio companies. NAV facilities have proved to be a strategic tool for investment funds, bridging the gap when securing portfolio company financing becomes complicated.

Considerations for board members during LBOs

Another interesting development has been the increased awareness of the responsibilities of directors and supervisory board members within the context of leveraged buyouts, or LBOs. This can be linked to a recent judgment handed down by the Enterprise Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal relating to the childcare organisation Estro Group (formerly Catalpa) acquired by the private equity investor Providence in 2010 via an LBO. As is customary in LBOs, the target group assumes, guarantees and/or secures the acquisition financing provided by third-party creditors. In this case, to avoid financial assistance rules, a legal merger between the bid company (as acquiring entity) and Estro (as the disappearing entity) was set up, resulting, de facto, in both the bank financing and the shareholder loan becoming liabilities at the level of the target company (Estro). Estro went bankrupt in 2014 following revenue losses due, partly, to the government cutting back on subsidies. The bankruptcy trustee filed a petition for an inquiry into the policies and affairs of Estro in relation to the acquisition. Based on the results of the investigation, the Enterprise Chamber has determined that there was mismanagement at Estro.

An important aspect in the Enterprise Chamber judgment was the disclosure of information to the works council. The directors are responsible for keeping the works council correctly and fully informed during the advisory process. If it turns out that the information used by the works council is not correct, it should be rectified and, if appropriate, the works council should be given the opportunity to issue further advice. If certain deal aspects only become clear at a later stage in the transaction process, the works council should be updated.

The judgment also demonstrates that directors must carefully consider the (financial) pros and cons of LBOs, since they often place a significant financial burden on the target company. The corporate interest analysis should not only consider the continuity of the target company following the LBO, but also whether the LBO contributes to the sustainable success and execution of the strategy of the target company after it has taken place. During the entire process, the board must consider whether the LBO and its conditions can still be aligned with the interests of the target company, or whether these conditions require adjustment. The target company's management board must adopt a proactive approach and, where necessary, challenge the parties involved in the process, including the private equity investor. Directors should provide for an accessible paper trail to ensure transparency on decision-making processes.

In carrying out the corporate benefit analysis, directors should seek assistance from independent experts to determine any issues and risks associated with the LBO. Any red flags should be quantified by the board, with necessary measures taken to address any possible consequences. If recommendations for further investigation are made, the board should consider whether any these are necessary.

Directors should keep in mind that a higher duty of care may apply on account of personal finan-

cial interests, such as entitlements to exit bonuses or management participation incentives. In their decision-making, the board should consider the potential effects of these, and demonstrate that they do not conflict with the interests of the target company. In addition, as the largest childcare company in the Netherlands, Estro was heavily reliant on childcare subsidies from the government. The company's interests were therefore also influenced by the public interest in the continuity and accessibility of high-quality and affordable childcare, which needed to be considered in the board's decision-making process.

Supervisory board members must ensure that directors who are involved in a higher duty of care observe that duty of care in all preparation, decision-making and execution during an acquisition. When recommendations are made by experts, the supervisory board should urge the management board to act upon them. Private equity delegates appointed as board observers in the supervisory board should be aware that an enhanced duty of care may also apply to them due to conflicting interests from involvement in the preparation or execution of an LBO.

Environmental, Social and Governance (ESG)

A final notable trend in the Dutch acquisition finance market is the growing emphasis on sustainability and green finance. Investors are increasingly prioritising ESG considerations when making investment decisions, leading to a surge in demand for green bonds and sustainability-linked loans. Dutch lenders, mainly European banks, have responded by increasing their issuance of green bonds and incorporating ESG criteria into their financing strategies. They are therefore less likely to have to deal with regulatory supervision and potential sanctions, particularly given increased ECB attention to incorporating green criteria into lending policies.

Several market initiatives have been introduced to standardise terms and provisions for loan products with a focus on green or sustainability considerations. For example, the Loan Market Association has developed principles and guidance for two commonly used types of loans: (i) the green loan (made available to exclusively finance green projects); and (ii) the sustainability-linked loan (which incentivises borrowers meeting sustainability performance targets).

Act on the Abolition of Pledge Prohibitions

It is important that it be possible to pledge collateral for encumbrance with a valid Dutch law security right. Traditionally (and currently widely used in practice) parties (being the creditor and the debtor of a receivable) can agree on clauses in their contracts prohibiting the transfer and/or pledging of receivables, known as transfer, assignment or pledgeability restrictions. Such restrictions may limit companies (especially small and medium enterprises (SMEs)) in using receivables as collateral for financing, which in turn reduces their access to credit.

The Dutch parliament recently approved the Act on the abolition of pledge prohibitions (*Wet opheffing verpandingsverboden*) which is aimed at stimulating credit provision, particularly for SMEs, by removing restrictions on the transferability and pledging of commercial receivables. With the introduction of this law, it will no longer be possible to contractually limit or exclude the transferability or pledging of certain commercial receivables arising from business activities. If parties do agree on such restrictions, they will be considered null and void – existing restrictions will also become null and void after three months following the date on which the new law

comes into force. There are, however, exceptions for certain types of receivables, such as those related to bank accounts and syndicated loans.

The abolition of pledge prohibitions is expected to significantly expand the credit capacity for Dutch businesses (up to approximately EUR1 billion), as it will remove certain financing obstacles which exist under Dutch law. It is also expected to have a positive effect on asset-based lending activities in the Netherlands where receivables are part of assets and the new law causes the borrowing base to be increased. On the other hand, the proposal has been criticised in legal literature as it is considered to be an intervention in the freedom of contract, also affecting contractual clauses in contracts that do not involve SMEs. In addition, critics fear that the position of unsecured creditors will be weakened by allowing more receivables to be pledged, as secured creditors (such as banks) may recover a higher percentage of their loans in insolvency scenarios.

Outlook

Despite geopolitical challenges, particularly ongoing tensions between Russia and Ukraine, strained relations between China and Western countries, the re-election of US President Donald Trump and related trade war unease, the market continues to show cautious signs of optimism for 2025. Improving conditions in Europe, including a decline in inflation and easing interest rates, create some hope for an economic stabilisation. Activity in the acquisition markets has picked up slightly, and the prospects for M&A are much more positive. Private equity still sits on a substantial pile of dry powder that needs to be invested, and cash needs to be returned to limited partners, which will drive up deal activity. On the other hand, the expectation for 2025 is that volatility is here to stay, and market participants are mindful of the geopolitical situation filtering through the economy and putting a brake on transactions. If global trade tensions resulting from the US's universal tariffs on its trading partners worldwide escalate, this will further impact trade, supply chain, energy prices and the financial markets.

The ECB's monetary policies led to a decline in interest rates during 2024, which is expected to make debt servicing more manageable for borrowers. In addition, there is an increasing willingness among lenders, particularly in the unitranche and direct lending market, to accept lower margins in order to secure deals. Looking ahead, the Dutch acquisition finance market is expected to benefit from the improving economic environment and easing financial conditions (eg, lower interest rates and subdued inflation), although challenges such as geopolitical conflict, trade restrictions and inflationary pressures are likely to continue to influence market dynamics. Lenders and borrowers alike will need to adapt to these evolving conditions to navigate the acquisition finance landscape effectively.

Anticipated maturities and companies seeking to refinance their debt are expected to drive continued market activity, with refinancings and debt restructurings remaining key themes. As competition intensifies for refinancings, stronger borrowers are likely to secure favourable pricing. Weaker borrowers may wait for more favourable market conditions and look into alternative, more complex financing options or debt structures, such as NAV financing at fund level. The upcoming period is also expected to see the most defaults, inter alia, due to impending maturity walls. Higher-leveraged companies, in particular, will struggle to refinance their existing debt as their interest burden is too heavy. Private

debt can plug the gap here and provide good alternatives, such as subordinated debt (ranking behind the existing senior debt).

More broadly, private credit's market share is expected to continue to grow, (although the sector focus on private equity is likely permanent), and direct lenders will remain key sources of liquidity, offering flexible financing options, so long as the regulatory environment allows them to do so. They will continue to compete with syndicated loans, chasing the same transactions. There will be an increase in more junior opportunities when companies are struggling to refinance their existing debt. Direct lenders will likely be more flexible towards dividend recapitalisation transactions in order to return capital to limited partners when exits are postponed. Commercial banks might regain some market share, given the direct lenders' high costs and a willingness to copy some direct-lender features.

Finally, sustainability and green finance are expected to remain significant themes in 2025, with growing investor demand and increased regulatory initiatives advancing the agenda for responsible investment.

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