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Debt Finance 2025

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Netherlands: Law and Practice & Trends and Developments

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NETHERLANDS

Law and Practice

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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 its home markets of the Netherlands, Belgium, Luxembourg and Switzerland. Loyens & Loeff keeps track of developments in the constantly evolving banking environment and helps its clients navigate the increasingly complex debt and financial markets. It also goes a step further, guiding clients in identifying opportunities and innovative ways to access the funding most suitable for them, whilst also managing risk. The firm's ability to stay ahead of these changes enables clients to stay focused on their core business.

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1. Market

1.1 Debt Finance Market Performance

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

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 (due to rising wages almost completely offsetting (decreasing) inflation), although investment growth remained subdued due to earlier financial tightening.

In addition, the European Central Bank's monetary policies led to a decline in interest rates during 2024. The falling interest rates were expected to make debt servicing more manageable for borrowers, but despite this, borrowing costs remained relatively high.

Although conditions have improved compared to the conditions in 2023, the current economic environment has resulted in borrowers being unable to fulfil obligations under the financing documentation, particularly with regard to payment and financial ratios. In return for waiving certain defaults, lenders often impose additional conditions on borrowers that can lead to amendment of the financing documentation, such as agreeing to new financial ratios, increasing interest rates, limiting flexibility for borrowers on general covenants or imposing more extensive information undertakings and charging amendment fees.

Throughout 2024, refinancing activity continued to be the main driver of volume in the debt finance market, while M&A volumes remained low due to the elevated cost of debt and delayed sponsor exit activity – especially in larger transactions and the high-yield bond issuance market. This mirrors the general private equity transaction market activity, although market participants in the medium and smaller-sized space are still considered active.

1.2 Market Players

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

- small (up to circa EUR30 million) – often lent by traditional (Dutch) commercial banks and on a bilateral basis (and increasingly by a direct lender);
- medium (from circa EUR30 million up to circa 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 commercial banks (or direct lenders).

Over the last few years, the Dutch debt 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, especially in the leveraged finance market. New direct lenders are still entering the Dutch debt market but there have also been the occasional direct lenders that decided to move away from the Dutch market. Direct lenders typically operate outside the scope of EU banking supervision, affording them exemption from regulatory pressures.

As this trend of direct lenders increasing their market share develops, direct lenders are exploring new market areas, such as the financing of working capital (including asset-based lending), the financing of (stretched) senior solutions (rather than unitranche), financing based on recurring revenue (as opposed to EBITDA) and the financing of smaller sized private equity transactions (ie, companies with an EBITDA of 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.

1.3 Geopolitical Considerations

The Dutch (and – more generally – European) loan market currently faces geopolitical and economic challenges that are influencing lending conditions and borrower risk profiles. Key concerns include ongoing tensions between Russia and Ukraine, which have disrupted energy supplies and increased commodity prices, driving up inflation and operational costs for businesses. Additionally, strained relations between China and Western countries, the re-election of President Trump and related prospects of an upcoming trade war have led to trade uncertainties and supply chain disruptions, which may impact revenues for Dutch businesses and (potentially) their ability to service debt.

Within the EU, stricter banking regulations and compliance requirements are putting pressure on both Dutch banks and borrowers. The uncertainty surrounding the European Central Bank's interest rate policies also poses risks, with potential implications for loan pricing and refinancing costs (although the prospects here seem rather positive). Cybersecurity threats and sanctions risks, particularly those linked to Russia, add another layer of complexity to cross-border lending and investment decisions.

These economic changes and geopolitical tensions and conflicts have introduced uncertainty into the financial markets, affecting investor confidence, risk appetite and deal volumes. 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. In addition, commercial banks need to cope with the capital requirements that often affect the debt quantum and pricing. As a result, borrowers in the Netherlands may face increased costs and stricter terms when accessing finance.

Direct Lending

As a result of unpredictability around pricing, more borrowers have turned to direct lending options. The private credit market has grown explosively over the years and, especially in leveraged finance transactions, direct lenders are considered dominant in the market in the Netherlands. While direct loans are typically more expensive than traditional loans, direct lenders have been able to secure more deals as they underwrite and hold debt themselves, which removes syndication risk and uncertainty for borrowers. Compared to syndicated loans, private credit is attractive to certain borrowers for its tailored and more flexible terms and structures, while investors are drawn to the prospect of higher returns, diversification and opportunities to deploy capital at scale. Therefore, issuers and investors will likely continue to drive private credit growth in 2025.

(Borrower-Friendly) Terms

Although the current market can still be classified as borrower-friendly, lenders are seeking additional protections amid ongoing economic uncertainties by tightening conditions on certain types of transactions. For example, lenders may demand tighter financial covenants and enhanced reporting requirements or require higher equity contributions from sponsors in leveraged deals to manage risks. In addition, lenders have become more selective and focus on a higher quality threshold for credits and borrowers, prioritising strong cash flow and lower leverage ratios. As long as interest rates remain relatively high, the expectation is that lenders will remain focused on free cash flow instead of growth (EBITDA).

Market Outlook

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, the authors have noticed an increasing appetite among lenders, particularly in the unitranche and direct lending market, where lenders are willing to accept lower margins in order to secure deals.

Looking ahead, the Dutch debt finance market is expected to benefit from the improving economic environment and easing financial conditions (eg, lower interest rates and subdued inflation) but challenges such as geopolitical conflicts, 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 debt finance landscape effectively.

2. Types of Transactions

2.1 Debt Finance Transactions

In the Netherlands, various types of debt finance transactions are prevalent. The specific types of transactions may vary based on the needs of businesses and the economic environment. The main types of debt finance transactions commonly observed in the Netherlands include leveraged acquisition finance, asset-based finance (including receivable-based financings such as factoring and supplier financings), securitisations, project finance, real estate finance, ship finance, fund finance and general corporate finance.

In addition, there has been growing interest in sustainable finance, with businesses and financial institutions in the Netherlands exploring green or sustainable-linked loans and other environmentally friendly financing options. Companies committed to sustainability may use green loans to fund projects with positive environmental and social impacts. Furthermore, the interest rates or terms of a sustainable-linked loan can be tied to the borrower's achievement of sustainability-related key performance indicators (KPIs) or targets, such as carbon emissions, incentivising the borrower's achievement of ESG targets.

3. Structure

3.1 Debt Finance Transaction Structure

Loan Facilities

Debt finance transactions in the Netherlands can take various forms; the structure highly depends on the specific needs of the borrower, the type of debt provider, the prevailing market conditions and the nature of the financing. The following forms of loan facilities are often seen in the Netherlands:

- term loans to (re)finance the underlying asset;
- revolving credit facilities that allow borrowers to draw and repay funds to finance working capital as needed; and/or
- overdraft facilities.

In leveraged financings, sponsors often negotiate such that the term loans are non-amortising (term loan B) and include 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 to renegotiate the entire agreement.

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

Syndicated Loans Versus Debt Securities

The choice between syndicated loans/unitranche facilities and debt securities often depends on factors such as the issuer's preferences, the 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.

Types of Investors

For both loan facilities and debt securities, the investor base can be diverse, reflecting the varied risk appetites and investment preferences of financial institutions. Loan facilities are traditionally provided by commercial banks and/or private credit funds but institutional investors, such as pension funds and insurance companies, increasingly offer and participate in bank loan financings. Debt securities financings are provided by a wide range of institutional investors, including asset managers, pension funds and insurance companies. In some cases, retail investors may participate through individual bond purchases. Hedge funds are also active participants in the debt securities markets, especially in more complex or distressed situations.

4. Documentation

4.1 Transaction Documentation

In Dutch debt finance transactions, in most cases the basis for the finance documentation is the documentation published by the Loan Market Association (LMA).

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 (based on general terms and conditions) for smaller transactions where, at the offset, syndication of the product is not considered part of the bank's strategy nor commercially likely.

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

4.2 Impact of Types of Investors

Different types of investors have different preferences, risk appetites and business models, which 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 the 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 the general undertakings (even more so for buy-and-build companies), the 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).

4.3 Jurisdiction-Specific Terms

There are generally no Dutch-specific terms that need to be included in cross-border loan documentation that affect the commercial agreement between a lender and a borrower. However, it is common to cater to certain Dutch law concepts in loan documentation, especially around the permitteds – eg, to allow for Dutch fiscal unities between members of the borrowers' group. It is also common to include a section on Dutch terms to clarify which Dutch terms correspond to certain terms included in the credit agreement.

5. Guarantees and Security

5.1 Guarantee and Security Packages

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 **5.2 Key Considerations for Security and Guarantees** for information on parallel debt.

Types of Assets and Security

The typical security package in connection with debt financing in the Netherlands consists of shares, real estate, movable assets, receivables (eg, insurance and intercompany receivables), bank accounts (and cash deposited therein) 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 that are acquired or come into existence after the security provider has been granted a suspension of payments or been declared bankrupt. In deals involving a strong borrower (sponsor), collateral is often limited to shares, material intercompany receivables and material bank accounts of the material companies only.

Creation of Security

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

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

- Shares 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 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.
- Movable assets are created by way of a right of pledge and can take two forms:
  - (a) A possessory right of pledge is created by bringing the movable 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.
  - (b) A non-possessory right of pledge does not require the secured party to take con-

trol 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 will be converted to a possessory pledge.
- Receivables are created by way of a right of pledge and can take two forms:
  (a) A disclosed right of pledge is created by entering into a private deed and notifying the debtor of the right of pledge. A disclosed right of pledge can cover all existing and future receivables a security provider has against a debtor, 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.
  (b) An undisclosed right of pledge does not require debtors to be notified, instead merely requiring a private deed that 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 result directly from existing legal relationships. 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 banks. 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 associated with monitoring 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 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 in order to be enforceable against third parties.

Signing Formalities

As Dutch law allows for a generic description of assets, 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, such as vessels or aircrafts) must be executed in the Dutch language or, if in another language, must be accompanied by 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.

5.2 Key Considerations for Security and Guarantees

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 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 will be recognised under Dutch law if the governing law provides for trusts and the trust has been created voluntarily and is evidenced in writing. However, the courts in the Netherlands will not be bound to recognise a trust if the significant elements of said trust are more closely connected with states that do not provide for the institution of the trust.

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 providing guarantees for debt used to acquire shares in its capital, and its direct or indirect subsidiaries are prohibited from doing the same.

Notwithstanding the foregoing, 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 of this (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 does not generally pose a problem with respect to group financings for upstream guarantees, and is also not something that renders certain guarantee limitation wording applicable.

6. Intercreditor Issues

6.1 Role of Intercreditor Arrangements

Creditors of Dutch debtors 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. Other preferred creditors are creditors with a right of retention, the Dutch tax authority and the bankruptcy trustee (for certain claims only). Similarly, a contractual arrangement between a creditor and a debtor may stipulate that the claim of a creditor shall take a ranking lower than the ranking conferred by law in respect of all or certain other creditors. Such contractual arrangements can be included in an intercreditor agreement or subordination agreement, for example.

The primary purpose of the intercreditor agreement is to rank the creditor's debt and their entitlements to the enforcement proceeds, and to contractually restrict their behaviour – eg, by 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 are available and applied, ranging from short-form priority deeds to long form intercreditor agreements based on the relevant LMA format.

6.2 Contractual v Legal Subordination

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

- Contractual (claim) subordination: 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 differ 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 the consents to the priority of security rights are subject to the same formalities that 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. As an 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 would effectively allow the junior creditor to take priority over the senior creditor.

7. Enforcement

7.1 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 containing the relevant monetary payment obligations.

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

- 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 applying 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 foregoing, 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, a court hearing will be scheduled within two to four weeks after the request has been filed, 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 (in the event of either approval or rejection) is not open to appeal on the merits of the case.

7.2 Enforcement of Foreign Judgments

The recognition of foreign judgments is 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. 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 that are compatible with the Dutch concepts of due process;
- the judgment does not contravene the public policy of the Netherlands;
- the jurisdiction of the non-Dutch court is based on internally acceptable grounds; 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 by a non-Dutch court provided that such judgment qualifies for recognition in the Netherlands.

8. Lenders' Rights in Insolvency

8.1 Rescue and Reorganisation Procedures

WHOA

The Dutch scheme of arrangement (*Wet homologatie, onderhands akkoord ter voorkoming van faillissement*, or 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, retaining control of their assets (eg, debtor in possession). 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 restructure the company's debts or to liquidate the company and distribute proceeds amongst the creditors. A composition under the WHOA can only be offered if the debtor is in a situation where it can reasonably be 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 they must be placed in a class. The court can be asked for ratification if at least one 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 that 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:

- such 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.

8.2 Main Insolvency Law Considerations

Enforcement in Insolvency

In general, secured creditors have a 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 time the 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 it will only receive payment after the bankruptcy estate has been distributed, and it will have to share in the bankruptcy costs.

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 that have been prejudicial to creditors if they were entered into by a company prior to bankruptcy (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, 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 the loan agreement will often contain an undertaking to create (additional) security (positive pledge).

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, in principle, claims of shareholders shall not be subordinated and shall rank pari passu with other unsecured debt, unless there is a contractual subordination of such claims.

9. Tax and Regulatory Considerations

9.1 Tax Considerations

Withholding, Stamp and Other Taxes

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:

- a 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 *"noncooperative"* jurisdictions or hybrid entities, and in certain abusive situations – the risk allocation in this regard is typically addressed in the financing documentation; and
- a 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 that 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 the deemed dividends may also be due, which could effectively result in 25.8% withholding tax being due.

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.

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 million.

9.2 Regulatory Considerations

Licence Requirements

Lending to businesses is not regulated in the Netherlands, and it is not necessary for lenders to a company to 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.

Attracting Funds From the Public

A Dutch borrower is not permitted to attract funds from a person who belongs to *"the public"*, as referred to in Article 4.1(1) of the Capital Requirements Regulation (EU/575/2013). The reason for this is that the public cannot, among other things, assess the risks attached to the provision of financial services. Violating this rule may result in criminal liability for the borrower.

Dutch law qualifies *"the public"* as parties other than professional market parties, and parties that do not belong to a restricted circle with the entity that receives the repayable funds.

Qualified investors and persons in relation to which a party attracts repayable funds are considered *"professional market parties"* if – in short – the minimum drawing per lender exceeds EUR100,000.

10. Jurisdiction-Specific or Cross-Border Issues

10.1 Additional Issues to Highlight

Leakage Outside of the Obligor Group

In the Netherlands, the following two situations could result in 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 in which 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-banking group entities that are members of the same fiscal unity.
- 403 statement: Under Dutch law, parent companies may choose to file consolidated financial statements for their subsidiaries. If a parent company chooses to do so, (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 additional debt being incurred (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 banking group to prevent any leakage. On the other hand, the borrower wants to ensure that the actual intra-group liabilities are correctly reflected in the relevant section to avoid any misrepresentations and defaults under the loan documentation.

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 remaining with the fiscal unity parent. As this may have adverse consequences for a lender's recourse, it is usually assessed in the relevant financing documentation.

Works Councils

The Works Councils Act (WCA) obliges a company with 50 employees or more 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 can 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 attracting financing out of its ordinary course of business, granting guarantees or security for third parties and pledging shares in the company. If the company has failed to (in a timely manner) request and obtain advice from the works council (when it should have done so), or if the company did not follow 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 in Amsterdam against the decision of the company, which will in any case lead to a delay of the contemplated transaction.

Transfer/pledge restrictions

Collateral needs to be capable of being pledged to create a valid Dutch law security right. Traditionally (and currently widely used in practice), parties (namely 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 to medium-sized 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 three months after 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 of the financing obstacles that currently 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 the asset base, and the new law will cause 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 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 its home markets of the Netherlands, Belgium, Luxembourg and Switzerland. Loyens & Loeff keeps track of developments in the constantly evolving banking environment and helps its clients navigate the increasingly complex debt and financial markets. It also goes a step further, guiding clients in identifying opportunities and innovative ways to access the funding most suitable for them, whilst also managing risk. The firm's ability to stay ahead of these changes enables clients to stay focused on their core business.

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Introduction

In 2024, the Dutch debt finance market continued to experience volatility as a result of evolving macroeconomic conditions. While inflationary pressures eased compared to 2023, the impact of past interest rate hikes remained evident, 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, providing some relief, but uncertainties remained 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 using alternative debt structures and private credit solutions. While deal activity picked up in 2024, the overall deal volume remained below initial expectations.

Macroeconomic Context

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 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 an average of 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% today). While this stimulated borrowing and investment, the pace and extent of the cuts remained gentle to balance economic growth and inflation control.

Economic pressure

The feared recession of 2023 did not materialise, as the labour market remained strong, household spending persisted (remaining a key driver of economic activity) and businesses adapted to higher financing costs. On the other hand, business investment, including mergers and acquisitions (M&A), remained weak due to high borrowing costs. Market participants were cautious, leading to deals falling through, not being completed or experiencing long lead times. Investors continued prioritising 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 to deploy their investments.

Default rates

Corporate defaults increased, particularly in highly leveraged sectors, and restructurings became more prevalent throughout the year. Fitch Ratings projected default rates for European high-yield bonds and leveraged loans to rise to approximately 4% in 2024 and 2025, compared to 2.5% and 3%, respectively, in 2023. This reflected a growing risk for lenders and investors.

Market Overview

The 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 credits, more stringent due diligence, tighter covenants and close monitoring of the performance of (portfolio) companies 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. In addition, commercial banks need to cope with capital requirements, which often affect the debt volume and pricing. Many borrowers remained hesitant to lock in expensive financing, delaying planned debt financings or exploring alternative funding structures. Vendor loans, subordinated financings (including holding company 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 towards monetary easing.

The deal activity in 2024 was a mix of amend-and-extend transactions and refinancings driven by upcoming maturities; and as M&A-related financing showing signs of recovery later in the year, acquisition finance became part of the mix as well. Borrowers facing upcoming debt maturities prioritised restructurings and liability management exercises. The economic conditions led to borrowers being faced with higher borrowing costs, tighter credit conditions and a struggle to meet their obligations under financing agreements, especially concerning payment schedules and financial covenants. Lenders, in exchange for waiving certain defaults, often imposed additional terms on borrowers, necessitating amendments to financing agreements. These amendments often involved agreeing to new financial ratios, more restrictions in 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. However, defaults remained at level that was not historically high.

Liquidity challenges persisted for some companies, particularly for borrowers with floating-rate debt. Many borrowers sought additional financing, either by expanding credit facilities or securing new credit lines. However, obtaining such financing typically entails lenders imposing additional conditions, and shareholders are often expected to inject additional equity as well.

Market Participants

The Dutch debt 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 also by direct lenders;
- medium – ranging from approximately EUR30 million to EUR250 million, commonly lent by direct lenders or consortia of Dutch commercial banks; and
- large – exceeding EUR250 million, usually lent by larger syndicates comprising both Dutch and non-Dutch commercial banks or direct lenders.

As a result of ongoing 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) and in particular gained market share in the (sponsored) middle market. As of early 2024, European private lending to corporates reached approximately USD500 billion in assets under management, representing nearly 30% of the USD 1.75 trillion global private credit market according to Preqin data.

As direct lenders grow their market share, they are also exploring new market areas. Direct lenders are increasingly investing in 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 some market share by mirroring the offering of direct lenders at lower rates.

Trends and Developments

NAV facilities

In the face of the current challenges in the (leveraged) loan market, borrowers and lenders are seeking new opportunities. As investment funds are experiencing more difficulties in securing financing on favourable terms for their portfolio companies, more complex structures are being explored, for example at the fund level. A type of facility that is frequently used by investment funds is the so-called 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 particularly used when the undrawn investors' commitments are low, or when the investment phase of the fund has ended, and there is a need for liquidity to distribute to investors, make additional investments or bolster the financial stability of distressed portfolio companies. NAV facilities have proven to be a strategic tool for investment funds, filling the gap when portfolio company level financings do not provide the desired outcome.

Considerations for directors and supervisory board members in LBOs

Another interesting development has been the increased awareness of the responsibilities of directors and supervisory board members in the context of leveraged buyout (LBO) transactions. This awareness has come up against the backdrop of the recent judgment of the Enterprise Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal relating to the childcare organisation Estro Group (formerly named Catalpa), which was acquired by the private equity investor Providence in 2010 through an LBO. As is customary in LBO transactions, 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 the 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 target company (Estro) level. Estro went bankrupt in 2014 because of revenue losses due, at least in part, to government cutbacks of subsidies. The bankruptcy trustee filed a petition for an inquiry into the policies and affairs of Estro in relation to the acquisition. Following the investigation results, the Enterprise Chamber has now 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, this should be corrected 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 further shows that directors must carefully consider the (financial) pros and cons of an LBO, given that an LBO is often accompanied by 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 the LBO has taken place. During the entire process, the board must consider whether the LBO and its conditions can still be aligned with the interest of the target company, or whether these conditions require adjustments. The target company management board must adopt a proactive approach and, when necessary, challenge the parties involved in the process (including the private equity investor). In doing so, directors should provide for an accessible paper trail to ensure transparency in decision-making processes.

In making the corporate benefit analysis, directors should seek the assistance of independent experts to determine any issues and risks associated with the LBO. If certain red flags are identified, the board should quantify these and, if necessary, take measures to address any possible consequences. If recommendations for further investigation are made, the board should consider whether any such investigation is necessary to gain sufficient knowledge of the potential impact of the LBO on the target company.

Directors should keep in mind that an increased duty of care may apply due to personal financial interests, such as entitlements to exit bonuses or management participation incentives. In their decision-making, the board should consider the potential effects of such personal interests and demonstrate that these 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 interest was therefore also influenced by the public interest in the continuity and accessibility of high-quality and affordable childcare, and this interest therefore had to be considered in the board's decision-making.

Supervisory board members need to ensure that directors who are subject to an enhanced duty of care observe that duty of care in the preparation, decision-making and execution of the 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 of the supervisory board should be aware that an enhanced duty of care may also apply to them due to conflicting interests arising from involvement in the preparations or execution of the LBO.

ESG

A final notable trend in the Dutch debt finance market is the growing emphasis on sustainability and green finance. Investors are increasingly prioritising environmental, social and governance (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. By doing so, banks are less likely to have to deal with regulatory supervision and potential sanctions given the increased focus of the ECB on incorporating such criteria into lending policies.

In this context, several market initiatives have been undertaken to standardise terms and provisions for loan products with a focus on a green or sustainability aspect. For example, the Loan Market Association has developed principles and guidance for two commonly used types of loans: (i) the green loan (available exclusively to finance green projects) and (ii) the sustainability-linked loan (which incentivises the borrower's achievement of sustainability performance targets, for example by reducing the margin).

Act on the Abolition of Pledge Prohibitions

Under Dutch law, collateral needs to be capable of being pledged to create a valid Dutch law security right. Traditionally (and currently also in practice), parties (namely the creditor and the debtor of a receivable) can agree on clauses in their contract prohibiting the transfer and/or pledging of receivables. Such restrictions may limit companies (especially small to medium-sized enterprises; SMEs) in using outstanding 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 three months after 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 of the financing obstacles that currently 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 the asset base, and the new law will cause 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 ongoing geopolitical challenges, particularly the ongoing tensions between Russia and Ukraine, strained relations between China and Western countries, the re-election of President Trump and related prospects of an upcoming trade war, the market outlook for 2025 remains cautiously optimistic. Improving market conditions, including a decline in inflation and easing interest rates, create hope for economic stabilisation. Activity in the debt markets has picked up slightly, and the prospects for M&A are much more positive.

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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, the authors have noticed an increasing appetite among lenders, particularly in the unitranche and direct lending market, where lenders are willing 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) but challenges such as geopolitical conflicts, 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. On the other hand, weaker borrowers may wait for more favourable market conditions and look into more complex alternative financing options or debt structures, such as NAV financing on a fund level. Direct lenders will continue to play a crucial role in providing liquidity, though commercial banks may regain some market share by adopting elements of direct lenders' offerings. Sustainability and green finance remain significant trends in 2025, with growing investor demand and increased regulatory initiatives further pushing the agenda for responsible investment. In addition, corporate commitments to ESG principles are expected to continue driving the market towards more sustainable financing options.

CHAMBERS GLOBAL PRACTICE GUIDES