BELGIUM

Law and Practice

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1. Market

1.1 Debt Finance Market Performance

Belgian Debt Finance in 2023

General context

The Belgian economy is estimated to have expanded by 1.5% in 2023, with a slight resurgence in investment compared to 2022, driven primarily by a rebound in corporate investment activities. The overall finance sector in Belgium showcased notable durability, rebounding from the impacts of the COVID-19 pandemic, increased interest rates and various geopolitical uncertainties. Despite encountering reduced accessibility and elevated expenses associated with debt financing, there has been sustained robust activity in deal-making, although lead times for deals were much longer and negotiations prolonged.

M&A

Despite the relatively small Belgian M&A market and the changing market conditions, Belgian companies continue to be the focus of M&A transactions due to several factors, including high levels of export, the presence of niche sectors such as life sciences, healthcare, agriculture, technology and construction materials, and broad international networks.

Real estate

Real estate financing in Belgium suffered from a decline in volume in 2023. Given their limited availability, the value of environmentally friendly properties in the Belgian market increased, leading to a growth in this segment of the market.

Asset-based finance

The market has seen some significant activity in the asset-based finance sphere, which is viewed as a defensive strategy in a market with a tight monetary policy, persistent inflation and noticeable volatility.

1.2 Market Players

International and domestic banks remain the primary providers of secured finance in Belgium. Belgian banks are robust against any major shocks and are among the strongest banks in Europe. A significantly increased presence of debt funds is notable of late, in both the leveraged finance and asset-based finance segments, notwithstanding the higher interests rates offered by debt funds compared to traditional banks.

There is also growing interest in alternative financing avenues, such as crowdfunding and credit from alternative investment funds, although the overall volume of credit provided

through such alternative channels remains relatively minimal.

1.3 Geopolitical Considerations

The interplay of several global factors, including the war in Ukraine, conflicts in the Middle East, fluctuating interest rates and the ongoing effects of the COVID-19 pandemic, has significantly impacted the Belgian debt finance market.

Transaction Volumes and Timelines

The heightened geopolitical tensions resulting from the war in Ukraine and conflicts in the Middle East have led to increased uncertainty among investors and borrowers alike. This uncertainty has, in turn, contributed to a degree of volatility in transaction volumes, with some deals having much longer lead times as parties assess the geopolitical landscape. Moreover, the evolving nature of these conflicts has added complexity to negotiations, potentially extending transaction timelines.

Required Diligence

The geopolitical instability in regions affected by conflict necessitates a more thorough due diligence process for debt financing transactions, with lenders now placing greater emphasis on assessing the geopolitical risks associated with borrowers and their operations. The economic sanctions implemented by the EU in response to Russia's aggression towards Ukraine are of particular significance in this regard and encompass a range of measures, including financial restrictions such as prohibiting the sale of securities to Russian individuals and entities. These actions are complemented by heightened due diligence and reporting obligations aimed at combatting money laundering activities.

Types of Documentation

The turbulent global environment has prompted lenders and borrowers to reassess the adequacy of their contractual arrangements, and lenders have placed increased emphasis on covenants and risk mitigants in the documentation. There may be an increased focus on incorporating robust provisions addressing force majeure events, political risk and geopolitical instability into financing agreements. In addition, parties may seek to include more flexibility clauses to accommodate unforeseen circumstances arising from geopolitical developments.

Impact of COVID-19

While the direct effects of the COVID-19 pandemic may have subsided somewhat, its lingering repercussions continue to shape the debt finance market. The pandemic accelerated the adoption of digital tools and processes in debt financing transactions, facilitating remote due diligence and document execution. Moreover, the economic ramifications of the pandemic have prompted lenders to exercise greater caution, resulting in stricter credit assessments and potentially higher financing costs.

Elections

2024 is poised to be a significant election year, with EU and US elections coming up in June and November, respectively, and many other EU (including Belgium) and non-EU countries organising national elections, covering in aggregate nearly half of the global population. Elections often introduce uncertainty in the financial markets since the outcome of elections can lead to shifts in economic policies and therefore influence interest rates and regulatory frameworks. Changes in, inter alia, taxation, trade policies and fiscal stimulus measures can impact investor sentiment and borrowing expenses within the Belgian debt finance sector.

Looking ahead, it is likely that the lessons learned from navigating the challenges posed by the recent geopolitical context will lead to lasting changes in transaction practices, such as increased reliance on digitalisation and a heightened focus on risk management.

2. Types of Transactions

2.1 Debt Finance Transactions

In Belgium, all types of debt finance transactions can be observed, including:

- acquisition financings, asset-based financing and securitisations with a focus on receivables;
- commodities and inventory financings;
- project financings with respect to renewables and infrastructure;
- real estate financings; and
- corporate loans providing credit to address working capital needs, expansion projects or the refinancing of existing debt.

3. Structure

3.1 Debt Finance Transaction Structure

Forms of Bank Facilities

Common forms of bank facilities in Belgium include term loans, which provide a lump sum of capital repaid over a specified period, and revolving credit facilities, which allow borrowers to draw funds for working capital purposes up to a predetermined limit and repay them at their discretion. Other types of bank facilities may include overdraft facilities, asset-based lending arrangements and bridge loans.

Loans v Debt Securities

Advantages of syndicated bank loans compared to debt securities in Belgium include greater flexibility in structuring terms and conditions, and the ability to negotiate directly with a group of lenders. Syndicated loans may also offer lower transaction costs and faster execution compared to debt securities offerings, which require more regulatory requirements to be satisfied, including disclosure obligations (compared to prospectus obligations).

However, syndicated loans may come with disadvantages, such as the potential for conflicting interests among syndicate members and the need to manage multiple lenders and coordinate complex documentation. Debt securities offerings, on the other hand, provide access to a wider pool of investors and may offer longer tenors and fixed interest rates.

Types of Investors

Investors participating in bank loan and debt securities financings in Belgium can include commercial banks, institutional investors such as pension funds and insurance companies, asset managers, hedge funds and private equity firms. The choice of financing instrument and the type of investor participation will depend on factors such as the size of the financing, the creditworthiness of the borrower, market conditions and investor preferences.

4. Documentation

4.1 Transaction Documentation

The documentation used for debt financing transactions in Belgium varies based on several factors. While there are no legally mandated forms for secured finance transactions, certain standard bank agreements or templates are

commonly employed. The key aspects are as follows.

- Large syndicated loans:
  (a) if the borrower's group is global, the loans will follow either English law, with reference to Loan Market Association (LMA) standard documentation, or New York law, based on Loan Syndication and Trading Association (LSTA) standard documentation;
  (b) Belgian law terms and legal provisions are incorporated into these forms to comply with local requirements;
  (c) if the borrowers are Belgian-based, loan documentation is generally under Belgian law, which often aligns with LMA standards, as adapted to fit the Belgian context; and
  (d) security documentation is typically governed by Belgian law, as the international private law rules will often refer to Belgium for the enforceability or perfection of Belgian security (eg, due to the location of the asset or the habitual residence of the pledgor).
- Intercreditor agreements play an important role in debt financing transactions. They define the rights and priorities of different classes of creditors and address issues such as subordination, enforcement of collateral and co-ordination among lenders (see also **6.1 Role of Intercreditor Arrangements**).
- Additional transaction-specific documentation will be required, depending on the type of transaction. For example, receivables purchase agreements and (asset) servicing agreements are commonly used in asset-based financing transactions.
- Legal opinions:
  (a) in Belgium, it is customary for lenders' counsel to issue an enforceability opinion, confirming the validity and enforceability of the transaction; and
  (b) borrowers' counsel typically provides a capacity opinion, assuring that the borrower has the legal capacity to enter into the financing arrangement.
- Corporate authorisations:
  (a) board resolutions are usually required, along with the customary director's certificates. A company's articles of association may provide that the board's decision-making can take place by unanimous written resolutions. If not explicitly permitted, a meeting of directors must be held and the approval of the relevant transaction must be carefully considered in light of corporate interest; and
  (b) these authorisations demonstrate the company's approval for the financing transaction.

In summary, Belgium's debt financing landscape involves a mix of legal opinions, standardised templates and tailored agreements to meet the needs of various transactions.

4.2 Impact of Types of Investors

Both bank lenders and debt funds or other types of lenders would use the LMA or LSTA standard forms of loan documentation, as explained in **4.1 Transaction Documentation**.

For facility agreements governed by the laws of a country outside the European Economic Area (EEA), such as US law, specific bail-in provisions are to be included if EEA financial institutions are or might become party to such facility document. These bail-in provisions describe the write-down and conversion powers of the relevant regulator under banking recovery and resolution regulations, and contain the acknowledgement by the parties that any liabilities of the

EEA financial institutions may be subject to the exercise of write-down and conversion powers by the relevant regulator.

Banks typically request full security packages and guarantees. More and more debt funds act as corporate lenders and typically ask higher interest rates but sometimes slimmer or more targeted security. Security interests can be granted to any type of secured creditor, regardless of whether or not they qualify as financial institutions.

4.3 Jurisdiction-Specific Terms

Belgian-specific wording to be included in cross-border transactions will largely depend on the type of transaction and the type of parties involved, yet typically includes the following elements as a minimum.

- "Belgian terms": these terms describe the Belgian legal concepts behind certain important definitions with a local law angle, such as "insolvency", "trustee in bankruptcy", "incorporation" and relevant Belgian legislation referred to in the transaction documents.
- Guarantee limitations with respect to upstream and cross-stream guarantees (see **5.2 Key Consideration for Security and Guarantees**).
- A representation regarding financial assistance, whereby the borrower confirms that none of the funds will be used in contravention of the Belgian financial assistance rules.
- Appointment of the security agent: to ensure that the security agent can act as agent for the lenders, it must be so appointed by the lenders with respect to Belgian security interest. Typically, a waiver of the joint and several liability of the agent is also included.
- Preservation of security: wording that explicitly reserves the security rights in case of a change in the lenders.
- Parallel debt: if a mortgage is to be granted under the transaction, relevant parallel debt wording is typically included in the finance documents.
- Conditions precedent: these include at least constitutional documents, corporate approvals, financial statements and copies of share registers. Depending on the type of transaction, one might also need to provide assets lists, third-party approvals, licences or permits, tax or due diligence reports, mortgage certificates or rating letters.

5. Guarantees and Security

5.1 Guarantee and Security Packages

In general leveraged finance transactions, a typical Belgian guarantee and security package consists of the following.

- Guarantees: generally, downstream, upstream and cross-stream guarantees may be provided, although they must satisfy corporate interest requirements. For downstream guarantees, it is usually assumed that the parent derives a corporate benefit from supporting its subsidiary. For upstream and cross-stream guarantees, one must demonstrate that the corporate interest test is met. Financial assistance restrictions may also apply (see **5.2 Key Considerations for Security and Guarantees**).
- Share pledges: parties may enter into a pledge over registered shares, which does not require any notary involvement. Such pledge will be perfected by registration in the original share register of the company (which

can be either a physical or an electronic register).

- Pledges over bank accounts: these are perfected towards third parties from the moment of entry into the pledge agreement. For perfection towards the debtor (ie, the bank), a notification or acknowledgment is required. Typically, in the relevant notice, the bank is requested to waive any prior security right, set-off and unicity of account (provided for in the bank's general terms and conditions).
- Pledges over receivables: similar to a bank accounts pledge, a pledge over receivables is perfected towards third parties as of the date the pledge agreement is entered into and towards debtors of the receivables as soon as they have been notified of, or have acknowledged, the pledge.
- Register pledges: a register can cover all the movable assets relating to a company's business, including inventory, and is similar to the concept of a floating charge under English law. Any type of movable assets (such as commodities, IP and vehicles) may be subject to a register pledge, the scope of which will depend on the type of transaction and the nature of the business. Perfection is achieved through registration in the Belgian pledge register against a limited fixed cost.

None of the above security interests requires the involvement of a notary.

In a real estate financing, a mortgage will be granted. In other debt finance transactions, mortgages are not often part of the security package. Mortgage deeds must be passed before a notary public, and the creation of a mortgage will incur substantial mortgage registration, inscription duties and notarial fees calculated on the total secured amount. Due to this high cost, it is commonly agreed to only have a mortgage securing a certain percentage of the total commitments and to have a mortgage mandate for the remainder. A mortgage mandate is not an actual security right in rem but will grant the lender/agent a right to take a mortgage at a later point in time (at its discretion or possibly upon a trigger event to be agreed, at which time the mortgage costs will be due).

5.2 Key Considerations for Security and Guarantees

Security Agent and Parallel Debt

Shared security in favour of joint lenders of the same loan is possible under Belgian law. The security agent concept is recognised for taking security on financial collateral (including bank accounts and shares), the business of a debtor and all other types of movable assets (including inventory, receivables and IP rights).

Security over immovable assets (ie, mortgages) to secure a loan can only be granted to the actual creditor of such debt, and not to a representative. Since a security agent or trustee is not a lender as such, the creation of a parallel debt in favour of the security agent is a usual technique for sharing security between various lenders. There are no regulatory restrictions for the security agent to act as creditor under a parallel debt; although largely accepted in Belgium, the technique has not yet been tested in court. In case of a parallel debt, the secured parties will have a credit exposure on the security agent. Even in case of a trust over the assets and proceeds, the risk is likely not alleviated, since Belgian law does not recognise the proprietary effects of trusts on assets situated in Belgium.

Corporate Purpose and Corporate Interest

Companies can only validly enter into transactions if they benefit the realisation of the corporate purpose of the company (ie, the purpose for

which the shareholders have incorporated the company, as laid down in the articles of association) and if they are in its corporate interest.

- If the granting of security is inconsistent with the corporate purpose of the company, in principle its validity cannot be challenged, but the resulting obligations can be declared unenforceable at the request of the company itself (or its bankruptcy receiver), provided that it can demonstrate that the relevant counterparties knew (or reasonably should have known on the basis of all circumstances) that entering into the security entailed a violation of the corporate purpose of the company. The mere publication of the articles of association (including the specific corporate purpose) does not constitute sufficient evidence in this respect.
- Whether a transaction is in the company's corporate interest is largely dependent on factual considerations, and the responsibility for such assessment lies with the board of directors of the company. Belgian company law does not recognise the notion of group interest, but certain criteria are generally accepted by legal authors in determining the extent to which a group's interests can be taken into account in assessing the individual corporate interest, such as the direct benefits a company receives from the transaction in proportion to its commitment, a balance between commitments and the fact that no company is sacrificed for the benefit of the group or a third party. In practice, it is to be established that the company receives a direct benefit or an indirect benefit resulting from a global assessment of the intra-group transactions, provided the indirect benefit is certain and current. Alternatively, a guarantee fee could be negotiated. Also, the transaction should not be disproportionately burdensome nor exceed the financial means of the company. There are no legal provisions determining a maximum amount or proportion a company can finance/guarantee, although market practice has resulted in specific guarantee limitations. If any transaction is held to be contrary to the company's corporate interest, under certain conditions it could be held to be null and void. Furthermore, the directors of the company could be held personally liable for having approved such transaction.

Financial Assistance

With some exceptions, a Belgian company cannot provide financial assistance except under very stringent conditions, which in practice are hardly ever satisfied. Financial assistance is defined as any:

- advance of funds;
- granting of loans; or
- provision of securities by the target company with a view to the acquisition of its shares by a third party.

Penalties for violation are nullity of the transaction(s) and director's liability. Financial assistance rules apply in an initial acquisition financing and may also prevent certain actions – eg, in a refinancing context. Structural solutions include debt pushdowns or the tranching of facilities, whereby a security interest is only granted to secure the tranches whose proceeds are not used to acquire or refinance the acquisition of its shares. In addition, the facility agreement and guarantee will need to contain specific language to limit any financial assistance risk.

6. Intercreditor Issues

6.1 Role of Intercreditor Arrangements

Intercreditor agreements are commonly used instruments in financing transactions in Belgium, where different classes of creditors exist. These agreements address several key aspects, as follows.

- Priority of claims: by specifying the priority of claims on loans and collateral, these agreements establish a clear order in which creditors can recover their funds. In case of financial distress or default by the borrower, this clarity helps to prevent conflicts among creditors.
- Enforcement mechanisms: these agreements also outline mechanisms for enforcing collateral, including voting arrangements, standstill provisions, information undertakings and turnover obligations. When collateral needs to be enforced, the parties can follow pre-agreed procedures, minimising uncertainty and potential disputes.

Intercreditor agreements are especially prevalent in multi-tiered debt financings, where various types of loans (senior, second-lien, mezzanine and shareholder) are combined. By co-ordinating their interests upfront, creditors can work together efficiently and mitigate risks associated with shared borrowers.

6.2 Contractual v Legal Subordination

The priority of competing security interests hinges on when the validly established security becomes enforceable against third parties. Upon the borrower's bankruptcy, mortgagees or creditors will be compensated based on their priority and the timing of their respective secured interests' registration. Where several classes of creditors exist with different seniority, deals typically include contractual and legal subordination.

If multiple pledges are established on the same shares, the first registered pledge in the share register holds the highest priority. Similarly, for pledges over the same receivables or bank accounts, the first notified pledge to the debtor takes precedence. If there are multiple mortgages on the same property, their ranking depends on their registration time in the mortgage registry.

While Belgian law lacks specific provisions regarding contractual subordination, it is customary to employ subordination or intercreditor agreements (see **6.1 Role of Intercreditor Arrangements**). The agreement's specifics are determined by the parties involved, considering the transaction's particulars.

Unsecured and unsubordinated payment obligations (excluding those preferred by law or specified in a subordination or intercreditor agreement) rank pari passu.

7. Enforcement

7.1 Process for Enforcement of Security

Security interests are accessories to the principal obligations that they secure and can only be enforced if the secured obligations they secure become due and payable. Such enforcement triggers can be pre-agreed in the security documentation or loan documentation. The process of enforcement varies per type of asset class as set out below; depending on the asset, it can include the appropriation of all or any of the assets (to be provided for explicitly in the security document, which has become general market practice), the set-off of any assets against

the secured liabilities or the selling, renting out or otherwise disposing of any or all of the assets.

Register Pledge Agreement (Business and/or Movable Assets)

The procedure for enforcing a register pledge over the business and/or certain movable assets starts with a mandatory notification to the pledgor, any other pledgees and any other party who has attached the pledged assets the lender wishes to enforce. The notification must be delivered at least ten days in advance. For perishable goods or goods susceptible to fast value depreciation, the notice period is reduced to three days.

The notification must be sent to all parties by registered mail or bailiff writ, and must include at least:

- the amount of the secured claim at the time of notification;
- a description of the pledged goods;
- the intended manner of enforcement; and
- the pledgor's right to redeem the pledged goods by satisfying the secured claim.

Upon expiry of the notice period without opposition against the pledge enforcement, the pledgee shall have the right, without needing any court authorisations, to instruct a bailiff to take possession of the pledged assets, and the pledgor will be obliged to deliver the pledged assets to the bailiff.

In accordance with the Belgian Pledge Act, the courts will have the right to exercise an a posteriori control to verify the conditions in connection with the realisation of the relevant collateral and the agreed valuation rules.

Receivables Pledge Agreement

The pledgee under a receivable pledge agreement will be entitled by law to collect both the principal amount and interest of the receivables pledged to it, and to apply them to the secured liabilities. It is common practice to provide that the pledgee starts collection as from the occurrence of a pre-agreed trigger event. Certain limitations may apply, especially in case of attachment procedures with respect to the pledged receivables, in which case payment in respect of the pledged receivables must be made in the hands of a bailiff, or if the secured liabilities are not yet due, in which case any amounts recovered must be deposited in a segregated bank account with an obligation to return the amount when the secured liabilities have been duly discharged.

Bank Accounts Pledge Agreement

A pledgee under a Belgian law-governed bank accounts pledge can enforce the pledge without prior written notice and court approval, and may take all steps and measures it deems necessary or desirable for that purpose, including the right to apply the balance or the closing balance of each pledged bank account. For the purpose of such application, the value of the balance or closing balance will be equal to the amounts standing to the credit of the bank account on the date the pledge is enforced, minus any breakage and/or transfer costs.

Share Pledge Agreement

The pledgee may enforce the share pledge by either selling the shares or, to the extent appropriation is explicitly stipulated within the security document, appropriating the shares, in each case without obtaining prior court approval. In the case of appropriation, the pledgee is empowered to either retain or divest such appropriated shares as it deems fit. Furthermore, in their

capacity as a shareholder, the pledgee has the ability to exert influence over the board of directors by exercising their voting rights to effect the removal and/or appointment of directors. Belgian share pledge agreements often provide for the possibility to exercise voting rights and include a dividend stop at an earlier trigger event prior to an actual enforcement.

Mortgages

For the enforcement of mortgages, prior default notice must be given and an executory title must be obtained. If the loan agreement is included in the notarial mortgage deed it shall have executory title. If not, a prior court decision will be required. Enforcement will take the form of either an auction or a private sale under supervision of a notary public.

Abuse of Right

Enforcement of a security interest could be restricted if such enforcement would constitute an abuse of right. An abuse of right is a general principle of law that would be upheld by the Belgian courts if the damage caused to one party upon the exercise of a right by another party is not in proportion with the advantage the latter party derives therefrom. In addition, Belgian law provides that a pledge must be enforced in good faith and in an economically responsible manner.

7.2 Enforcement of Foreign Judgments

Foreign judgments are recognised and enforced in Belgium, subject to certain restrictions set out in:

- the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussel Ibis Regulation);
- the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention);
- the 2005 HCCH Convention on Choice of Court Agreements;
- the 2019 HCCH Convention on Judgments;
- other international treaties or bilateral agreements to which Belgium is a party; and
- the Belgian Private International Law Code (PIL Code).

The procedure for the enforcement of foreign judgments in Belgium therefore depends on whether there is a special regime applicable under an international treaty, such as the Brussels Ibis Regulation, and is otherwise governed by the PIL Code.

The Belgian PIL Code provides for automatic recognition of a foreign judgment without the need for any court proceedings. Although recognition is automatic, it should be noted that it is precarious and subject to compatibility with the grounds for refusal. On the other hand, a foreign judgment that is enforceable in the country where it was given can only be fully or partially enforced in Belgium after a successful court application (exequatur). A foreign judgment will be recognised or declared enforceable if it does not violate one of the grounds for refusal set out in the PIL Code, which include an examination of whether:

- the result of recognition or enforceability would be manifestly contrary to Belgian public policy;
- the rights of the defence have been violated; and
- the decision is appealable or final under the law of the State in which it was given.

8. Lenders' Rights in Insolvency

8.1 Rescue and Reorganisation Procedures

Belgian law provides for different in-court reorganisation procedures, which aim to safeguard the continuity of (part of) a business in distress. The available reorganisation options are:

- judicial reorganisation by amicable settlement between the debtor and one or more of its creditors;
- judicial reorganisation by collective agreement (or reorganisation plan); or
- a court-ordered transfer of (part of) the enterprise.

The debtor may opt for an amicable settlement or collective agreement via the public judicial reorganisation or a private judicial reorganisation procedure. The court-ordered transfer of an enterprise is only available under a public procedure. In a private procedure, the opening of such a procedure is not published in the Belgian Official Gazette nor in the publicly available online insolvency register RegSol.

Moratorium

The opening of a public judicial reorganisation or court-ordered transfer procedure triggers an automatic and general moratorium applicable to pre-existing claims (ie, for debts incurred before the judgment opening the reorganisation procedure).

The granting of the temporary moratorium operates by way of a stay of enforcement. No enforcement measures (including any attachments) with respect to pre-existing claims in the moratorium can be continued or initiated against any of the debtor's assets from the time of the granting of the moratorium until the end of the period, with limited exceptions.

However, the following applies:

- pledges on receivables that have been specifically pledged to the benefit of third parties will not be affected by a judicial reorganisation (with a pledge of a business including receivables not being considered a pledge specifically with respect to receivables);
- pledges of financial instruments that are subject to the Belgian Financial Collateral Act of 15 December 2004 (the Collateral Act), as well as close-out netting agreements relating thereto, will not be affected by the opening of judicial reorganisation proceedings; and
- pledges of bank accounts and bank receivables subject to the Collateral Act as well as close-out netting agreements relating thereto will be affected by the opening of judicial reorganisation proceedings unless there is a payment default or both the creditor and the debtor are "public and financial legal entities" as listed by the Collateral Act (such as banks, insurance companies, financial institutions, central banks and government entities).

Personal guarantees granted by third parties in favour of the debtor's creditors are not subject to the moratorium, nor are the debts payable by co-debtors, subject to certain exceptions or qualifications in respect of guarantees granted by individuals.

Under a private judicial reorganisation proceeding, the court may grant an ad hoc moratorium, which shall apply to certain creditors involved in the procedure. The consequences and exceptions to the moratorium are the same as under the public judicial reorganisation procedure (see above).

Amicable Settlement

In the case of an amicable settlement, only the parties to such amicable settlement will be bound by the terms they have agreed. Such in-court agreement requires unanimity among the creditors concerned.

Collective Agreement (or Reorganisation Plan)

A collective agreement may include measures such as the reduction or rescheduling of liabilities and interest obligations and the swapping of debt for equity, and may be based on a limited (justified) differentiated treatment of certain various categories of liabilities. However, the conditions under which such measures can be imposed on non-consenting creditors differ and are subject to the applicable regime and the type of creditor involved.

Since 1 September 2023, a dual regime applies regarding the content, voting and homologation of a collective agreement, depending on whether the plan relates to an SME or large company debtor in distress. The “large company regime” is mandatory for any large company debtor, while SMEs may opt in to this “large company regime” or apply the “simplified” SME regime.

Under the SME regime, a collective agreement is approved by a double majority of the creditors (in terms of both headcount and value of the claims) and by the court. It will bind all creditors, including those who voted against it or did not vote. However, a collective agreement can only bind secured creditors if interest is paid on the principal amount of their outstanding debts, and if their rights are not suspended for more than 24 months as of the date of filing of the petition. No other measures can be imposed on such creditors without their individual agreement.

Under the large company regime, creditors (including shareholders) can – and to a certain extent must – be placed in different voting classes if their rights in a hypothetical liquidation or the rights obtained under the collective agreement are so dissimilar that there is no comparable position. In principle, a collective agreement is adopted if every class has voted in favour of the plan – ie, if a simple majority (in terms of amount of the claim or interest) is obtained.

The limitations applicable to the position of secured creditors under the SME regime do not apply here. However, the court must refuse to ratify the plan if not all creditors voted in favour of it and if the “best interest of creditors” test is not complied with. This test is met if it appears that no non-consenting creditor is manifestly worse off under the plan than they would be if the normal order of priority in bankruptcy were applied. In addition, the court may refuse to ratify the plan if, among other grounds, the conditions of the judicial reorganisation act have not been satisfied, the fair allocation between the different classes is not complied with or if any new financing is not considered to be needed or materially prejudices the other creditors’ rights. If one or more classes vote against the plan, the court can only sanction a collective agreement via a “cross-class cram-down” mechanism. This requires additional confirmation criteria to be met.

Court-Ordered Transfer

In a transfer of (part of) the activities of the company in distress under court supervision, a liquidation expert will be appointed by the commercial court to organise and effect the transfer in the name and for the account of the company in distress. Creditors will be paid out of the proceeds in accordance with their legal ranking. Subsequently, the court-ordered transfer must

be followed by a liquidation or bankruptcy procedure of the debtor that has transferred (part of) its business or assets, in which the remaining assets of the company (if any) will be further liquidated.

8.2 Main Insolvency Law Considerations

Lenders' Rights to Enforce a Loan, Guarantee or Security in Insolvency

As a general rule, the enforcement rights of individual creditors are suspended upon the rendering of the judgment opening bankruptcy proceedings; after such order is made, only the bankruptcy trustee may proceed against the debtor and liquidate its assets. The suspension of their enforcement right, however, in no case affects the right of the secured creditor to be satisfied first from the sale of the encumbered assets. Only if the proceeds from the sale of the encumbered assets exceed the secured claims will the remainder be distributed among the other creditors.

However, different exceptions apply. Firstly, such suspension does not apply to a pledge on financial instruments (including shares) or cash held on account falling within the scope of the Collateral Act.

For creditors with claims secured by movable assets (not subject to the Collateral Act), the suspension of their enforcement rights would normally be limited (only) until the bankruptcy trustee has filed the first report verifying the claims. In general, this report should be filed within two months following the date of the bankruptcy judgment. The exact date should also be mentioned in the bankruptcy judgment. Once the report is filed, the secured creditor's enforcement rights are reinstated. At the request of the bankruptcy trustee, however, the suspension period may be extended for up to one year from the bankruptcy judgment. Such extension requires a specific order of the court, which can only be granted if the further suspension allows for a realisation of the assets in the interest of all creditors without prejudicing the secured creditors, and provided that those secured creditors have been given the opportunity to be heard by the court.

For creditors with claims secured by immovable assets, an exception to the suspension of enforcement rights of creditors applies for the first ranking mortgagee only. The latter will generally also be entitled to pursue the enforcement of its mortgage as soon as the bankruptcy trustee's first report verifying the claims is submitted.

The end of the suspension of creditors' realisation rights during bankruptcy proceedings does not mean that creditors must realise their collateral themselves. Creditors will still be able to opt for the bankruptcy trustee to realise their collateral.

If a security interest (such as a pledge or mortgage) has been granted over assets that are located in another state at the time of the opening of an insolvency proceeding, the rights the creditor has under such security shall not be affected by the opening of such insolvency proceedings. This includes individual creditors' rights to enforcement.

Bankruptcy also does not affect the right of recovery of the owner of any property in the debtor's possession – eg, goods subject to retention of title in favour of a creditor. However, the creditor must exercise its right of recovery before the first report on the verification of claims is filed.

Claw-Back Risks

Claw-back actions aim to recover assets transferred or disposed of by an insolvent debtor prior to bankruptcy, benefitting its insolvency estate and ultimately its creditors as a whole. In this respect, upon request of the bankruptcy trustee, the bankruptcy court can render (and will sometimes be obliged to do so) certain acts of the bankrupt company unenforceable against the body of creditors (ie, these acts will be considered as non-existent).

Certain acts must or can be declared unenforceable if they were performed by the company at a time when it had already ceased its payments – ie, during the suspect period (*verdachte periode/période suspecte*), which is a maximum of six months prior to the date of the bankruptcy judgment. Bankruptcy does not automatically trigger a suspect period under Belgian law: a suspect period can only be put in place by a court decision when there are clear indications that the company has already persistently ceased its payments before the date of the court decision opening the bankruptcy proceedings. If a company was wound up more than six months before the bankruptcy order, the date of cessation of payments can be brought back to the date of its winding-up if the winding-up was done to the prejudice of its creditors.

The following actions will be declared unenforceable against the body of creditors if performed during the suspect period:

- transactions for free or not at market conditions;
- payments of undue debts;
- payments in kind of due debts; and
- security interests granted for pre-existing debts.

All other payments for outstanding debts and all acts for valuable consideration that took place during the suspect period can be declared unenforceable by the bankruptcy court if the debtor's contractor knew of the cessation of payments.

Preferential rights and mortgages can be declared unenforceable if they were registered during the suspect period and more than 15 days have lapsed between the deed creating the preferential right and mortgage and the date of their registration.

Finally, any act or payment that is fraudulent may be declared unenforceable (actio pauliana), regardless of when it was performed and therefore regardless of whether a suspect period has been imposed.

Some acts, such as loans and/or security interests, that are entered into during reorganisation proceedings or that are included in or result from the execution of a judicial reorganisation instrument benefit from protection against certain claw-back actions.

Equitable Subordination

There is no automatic or legal subordination under Belgian law with respect to shareholder loans in insolvency situations. A lender who is also a shareholder would still be considered a lender for the amount of the loan and/or its guarantee in the context of an allocation of the bankruptcy estate.

Order of Payment

Secured creditors

Secured creditors always have priority over unsecured creditors with regard to the secured assets, to the extent that their claims are fully covered by the security.

In addition to the contractually secured creditors (ie, creditors that benefit from a pledge, mortgage or retention of title), Belgian insolvency law gives certain creditors a statutory special lien, including a preferential right over specific assets; creditors with a specific statutory lien are hence also secured creditors. Examples include the privilege of the lessor over the debtor's assets present in the leased property, or the right of the unpaid seller over the unpaid goods (to the extent the goods remained within the possession of the debtor and unless such goods have become immovable). Some of these special privileges prevail over contractual security interests.

If the bankruptcy trustee has contributed to the realisation and enforcement of secured assets, its related costs will be paid to the trustee in priority out of the proceeds of the realised assets before the remainder is distributed to the secured creditors.

If the secured claims cannot be fully satisfied from the proceeds of the relevant collateral, the secured creditor assumes the status of an unsecured creditor in the general bankruptcy estate for the remainder of the claim.

General bankruptcy estate

The proceeds of the bankruptcy estate are all of the debtor's non-collateralised assets and – if any – the surplus of the proceeds of collateralised assets if the proceeds exceeded the claims of the relevant secured creditors. In addition, additional assets may be added to the general bankruptcy estate after bankruptcy via successful claw-back actions or liability claims.

In the general bankruptcy estate, the following ranking applies for the payment of the proceeds:

- debts of the bankruptcy estate – this refers to expenses incurred by the bankruptcy trustee in the bankruptcy proceedings, such as the bankruptcy trustee's fees, court costs, the cost for the liquidation of assets from the general estate or expert fees; it also includes any costs related to the continuation of agreement by the trustee following the opening of the bankruptcy, such as rent due for the period after the opening of the bankruptcy;
- creditors benefiting from a general lien by law – eg, employee claims, social security payments, VAT and income tax claims;
- unsecured creditors (also referred to as "ordinary" creditors); and
- subordinated creditors.

Proceeds are not allocated to creditors in a subsequent class of the general bankruptcy estate until the creditors in the preceding class (eg, debts of the estate or general privileged claims) have been fully satisfied.

Within the class of creditors benefitting from a general lien, the proceeds are distributed in accordance with the legal ranking among these creditors by law.

Unsecured creditors are to be treated equally (pari passu), which entails the distribution of the proceeds of the bankruptcy estate in proportion to the amount of each creditor's claims.

9. Tax & Regulatory Considerations

9.1 Tax Considerations

Withholding Tax

In general, Belgian source interest is subject to withholding tax (WHT) at the flat rate of 30%. However, various exemptions and reduced WHT rates are provided for in Belgian law and in tax

treaties concluded by Belgium. The eligibility for the exemptions and reduced rates may depend on:

- the nature of the instrument used;
- the status of the person liable to pay; and
- the beneficiary of the interest.

Domestic law exemptions for loans

The most common exemptions provided by domestic law are:

- interest payments to qualifying credit institutions (Bank Exemption);
- interest payments to qualifying collective investment vehicles (CIV Exemption);
- interest payments by Belgian qualifying group financing companies to non-resident entities (Finco Exemption); and
- interest payments between related entities within the EU (IRD Exemption).

Bank Exemption

A WHT exemption applies to interest payments under a loan made to licensed credit institutions located in the EEA or a country with which Belgium has concluded a tax treaty. The Bank Exemption is not subject to particular formalities.

Non-bank debt funds, securitisation vehicles and other institutional lenders receiving interest under an ordinary loan do not qualify for the Bank Exemption. For such lenders, the CIV Exemption and the Finco Exemption may apply under domestic law (in addition to a treaty exemption and exemptions under certain types of bonds; see below).

CIV Exemption

A WHT exemption applies to interest payments under a loan made to qualifying collective investment vehicles (CIV) established in Belgium or in the EEA, as referred to in Article 116 RD/BITC (Belgian Royal Decree implementing the Income Tax Code 1992).

Qualifying EEA CIVs are companies referred to in non-Belgian law provisions that are similar to certain specifically listed Belgian regulated investment undertakings, including Belgian UCITS, undertakings for investment in receivables, public alternative investment funds (AIFs, including public SICAFs) and institutional AIFs with fixed and variable capital.

Finco Exemption

In addition, a broad exemption is available for any non-resident legal entity with respect to loans granted to intra-group financing companies. To benefit from the Finco Exemption, the borrower should meet the following cumulative conditions during the period to which the interest paid relates:

- be a Belgian resident company or a Belgian establishment of a foreign company;
- be part of a group of related or associated companies as defined by Articles 1:20 and 1:21 of the Companies and Associations Code;
- carry out its activities solely for the benefit of these related or associated companies;
- provide services mainly or exclusively of a financial nature;
- be financed exclusively by Belgian or foreign companies or legal entities (ie, entities with separate legal personality);
- be financed for the sole purpose of financing its own activities or the activities of related or associated companies; and
- not hold securities whose acquisition value exceeds 10% of its net tax value.

IRD Exemption

Finally, following the implementation of the EU interest and royalty directive (2003/49/EC) (IRD), a WHT exemption applies regarding interest payments occurring between associated EU group companies. The following conditions should be cumulatively met:

- the recipient of interest paid is resident in an EU member state;
- the lender and borrower are associated, meaning one of them holds directly or indirectly at least 25% of the capital, or a third EU company holds directly or indirectly at least 25% of the capital of the two companies – a minimum holding period of one year applies;
- the lender and borrower should have one of the legal forms listed in the Annex to the Directive and be subject to corporate income taxation; and
- the recipient has to formally certify to the debtor that all the conditions are fulfilled.

Double tax treaties

All double tax treaties concluded by Belgium provide for either a WHT exemption or a reduced rate under certain conditions. The benefit thereof is dependent on compliance with the applicable treaty anti-abuse rules and beneficial ownership.

Interest Deductibility

Various tax law provisions limit the tax deductibility of interest payments in the hands of the Belgian borrower. The most noteworthy provision in this respect is the 30% EBITDA interest limitation rule, according to which exceeding borrowing costs are only tax deductible up to the higher of 30% of the borrower's fiscal EBITDA or EUR3 million. For the application of this interest limitation rule in a group context, a special "ad hoc consolidation" rule applies.

Documentary, Transfer or Other Taxes

A documentary tax of (usually) EUR0.15 applies to each originally signed credit agreement or pledge agreement for the benefit of a bank, if executed or initialled in Belgium. A notarial deed is subject to a documentary tax of EUR100 if it is executed for a company having legal personality. In all other cases, a documentary tax of EUR50 is due on notarial deeds, except for the registration of deeds regarding the purchase of immovable property or regarding the establishment, confirmation or recognition of mortgages, for which the documentary tax is EUR100.

If the loan is secured by a mortgage, a 1.3% registration and inscription duty will be due on the secured amount (plus notional stamp duties and mortgage keeper's fees). If the loan is secured by a register pledge on a commercial business, a retribution is due that varies between EUR25 and EUR610, depending on the maximum amount of the secured debt claim.

9.2 Regulatory Considerations

SME Financing

The Belgian SME Financing Law of 21 December 2013 (the SME Act) introduced certain limitations/obligations for credit providers/lenders when providing credit to SMEs. A borrower will qualify as an SME within the meaning of the Law of 21 December 2013 if such borrower does not exceed more than one of the following criteria (on a consolidated basis) at the time of the credit request:

- 50 employees – however, an undertaking cannot be considered an SME if it has more than 100 employees;
- EUR11,25 million annual turnover excluding VAT; and
- balance sheet total of EUR6 million.

The SME Act requires that the lender, the credit intermediary and the SME itself act in good faith, and that the information provided by each of them must be correct, clear, not misleading and complete. In addition, the credit provider has certain information duties, pursuant to which the credit provider must obtain the pertinent information deemed necessary to review the following elements:

- the feasibility of the project for which funding is requested;
- the financial situation of the borrower (and any person granting a personal surety); and
- their repayment possibilities and ongoing financial obligations.

In light of the financial situation of the borrower, among other things, the credit provider is obliged to search for the most suitable form of credit and to give potential borrowers a written explanation of the forms of credit that are relevant to them. The credit provider is obliged to detail its motivation if it decides not to provide credit to a certain borrower.

Importantly, the borrower has at all times a right to early repayment. The amount of the funding loss is limited on the basis of Article 1907bis of the (old) Belgian Civil Code or, depending of the initial credit amount, must be in compliance with the calculation method as set forth in a code of conduct agreed between the representatives of the SMEs and of the credit sector.

Finally, certain contractual provisions, are considered forbidden and are thus void, such as the provision that allows the credit provider to unilaterally terminate an agreement for a definite period of time without any reasonable compensation for the borrower.

Besides Belgian credit providers, the SME Act is also applicable to foreign credit providers that “target” Belgium or different countries, regardless of the law governing the loan agreement.

Banking Licences

Providing loans (excluding consumer credit and mortgage-backed credit to consumers for residential purposes) is not a regulated activity in Belgium, provided that the lender does not solicit funds from the public. B2B credit offering or distribution are not activities that, as such, are subject to any licence requirement. The provision of credit for one’s own account combined with the activity of taking deposits or other repayable funds from the public may, however, potentially trigger the requirement for a licence as a credit institution. Under Belgian Banking Law, a company is only to be regarded as a credit institution if it both collects money deposits or other repayable funds from the public and provides loans for its own account. Consequently, engaging in these activities on Belgian territory will, in principle, require a licence as a credit institution or bank.

The notion of “repayable funds” includes not only deposits (ie, funds credited to a bank account) but also debt instruments, such as notes, or potentially even non-negotiable agreements that provide for the repayment of a nominal amount. An undertaking will be considered to take repayable funds “from the public” when one or more of the following conditions are met:

- the use of publicity addressed to more than 50 persons in order to announce or recommend the soliciting of deposits or other repayable funds;
- the use of one or more intermediaries (excluding the credit institution acting as a

link in payment transactions) in order to solicit funds; and
- more than 50 persons are solicited.

Belgian law does not distinguish between "qualified investors", corporates and retail clients. For the Belgian Banking Law to apply, such activities need to be carried out on Belgian territory.

Consumer Credit and Mortgage Credit Providers

It is important to note that the lending or granting of (mortgage) credit to individuals for purposes other than business or commercial activities may qualify as consumer credit, which is regulated by the Belgian Code of Economic Law. Specific rules and formalities apply, which may deviate from what is described above. The concept of a consumer is defined in Belgian law as "any natural person who acts for purposes that do not fall within the scope of their commercial, industrial, artisanal or liberal activity". Only a natural person residing in Belgium who acts for private purposes is protected by these provisions.

10. Jurisdiction-Specific or Cross-Border Issues

10.1 Additional Issues to Highlight

Transfer of Significant Assets in Listed Companies

On 8 April 2024, new legislation came into force that requires shareholder approval for the transfer of significant assets in Belgian listed companies or their subsidiaries. More specifically, if a transfer of assets by a Belgian listed company or its (non-listed) subsidiaries involves 75% or more of the total (consolidated) assets of the listed company, it must be approved in advance by the general meeting of shareholders of the Belgian listed company. The 75% threshold must be assessed in relation to the last published (consolidated) annual accounts of the listed company.

In addition, all transfers of assets by the listed company and its (non-listed) subsidiaries within a 12-month period (which have not been approved by the general meeting of the listed company) must be added to the proposed transfer to calculate the applicable threshold, without considering any de minimis threshold at the level of the individual transfer. There is no exception for security, so any security granted by a Belgian listed company or its (non-listed) subsidiaries over its assets is affected by this new legislation.

However, jurisprudence and practice have not yet settled the implications, particularly whether shareholders' approval is required at the time the pledge is granted or at the time the pledge is enforced.

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 to 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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Debt Finance in Belgium: an Introduction

Overall outlook

During the COVID-19 pandemic, an extended phase of remarkably low borrowing costs, coupled with longer repayment periods for new debts, granted corporations unprecedentedly favourable financing conditions. This trend followed more than a decade of decreasing interest rates, boosted by central bank interventions, which incentivised corporations to leverage heavily.

However, just as swiftly as the pandemic began, its repercussions – marked by economic upheavals and supply chain disruptions – began to manifest, alongside the impacts of fiscal and monetary interventions. Ultimately, the era of favourable financing conditions ended, with many countries seeing their inflation rates peaking in the second half of 2022, thereby forcing central banks to significantly sharpen their monetary policy.

Although inflation rates showed a downward trend in 2023, it became apparent that we have transitioned back to a climate of higher policy interest rates, signalling the conclusion of a period defined by easy access to cheap debt funding. As evidenced by the latest numbers of April, the US inflation rate appears to be more persistent than initially expected, and it is now thought that the US Federal Reserve will announce its first rate cut only towards the end of 2024. In the eurozone, where disinflation appears to persist, it is anticipated that the European Central Bank (ECB) will authorise its first reduction in key interest rates in June 2024.

While market sentiment may incline towards optimism regarding potential policy shifts by central banks, the expectation is for corporate credit expansion to remain restrained this year. The enduring effects of prior tightening measures enacted by central banks, coupled with geopolitical risks – such as tensions between the US and China, ongoing conflicts in Ukraine and the Middle East and a series of upcoming national elections in 2024 – could indeed introduce numerous factors capable of disrupting any positive developments. On the other hand, with interest rates and pricing projected to stabilise in the eurozone and markets adjusting to the new landscape of higher interest rates, there is a modest basis for optimism concerning the outlook for 2024 compared to 2023.

Borrowing costs and tightened conditions

In line with the global trend of rising interest rates, borrowing costs have notably surged over the past two years, exerting significant pressure on the Belgian market. This upward trajectory in interest rates has had profound implications, constraining the ability of corporations to afford new debt facilities and dampening the appeal of refinancing existing obligations.

Belgian borrowers have keenly felt the impact as banks tightened their financing terms and conditions outlined in financing agreements. This tightening of lending criteria has further exacerbated the challenges faced by businesses seeking access to credit.

Against the backdrop of increased borrowing costs and more stringent terms and conditions, the demand for loans in Belgium has witnessed a noticeable decline. This downturn in loan demand not only reflects the reluctance of borrowers to incur higher financing expenses but also underscores the cautious approach adopted by lenders in a climate of heightened economic uncertainty. As borrowing costs continue to exert pressure and lending conditions remain tight, Belgian businesses are compelled

to explore alternative financing options and adopt prudent financial strategies to navigate the challenging debt financing landscape.

The Belgian commercial real estate sector has been notably impacted by the combination of high(er) interest rates, tightened financing conditions and lenders' reduced appetite for subprime real estate assets and a growing preference for energy-efficient properties. The rise in interest rates has indeed led to a decreased debt coverage and an increase in the risk associated with refinancing a real estate asset or portfolio.

This trend is particularly evident in the European capital, where remote working and (the corresponding) lower demand for office space is putting downward pressure on the valuation of commercial real estate. In addition, rising operating costs, the need for rent incentives to tackle vacancy and reduced cash flows of office spaces have made it more difficult for certain real estate companies to meet their interest obligations, leading to an increase in defaults.

Stabilised interest rates are expected to bring a sense of clarity to real estate market pricing and exit yields, facilitating more informed investment decisions and positively influencing market dynamics. However, challenges persist, particularly concerning the aftermath of the higher interest rates, which, as mentioned, led to decreased real estate values and tightened financing policies. Many investments made three to five years ago will soon mature, presenting complex refinancing scenarios where interest rates are higher compared to the initial transaction, real estate values have decreased and financing policies have become more stringent.

The decline in real estate values, coupled with downward adjustments in loan-to-value (LTV) ratios and financing policies, have the potential of creating a refinancing gap, which is expected to primarily affect the office and retail sectors.

Despite these challenges, there are avenues for refinancing, albeit often requiring additional capital contributions from sponsors, (re-)negotiation commercial terms and financial covenants with financiers and adherence to strict financing policies. Alternative financing options exist but tend to be more expensive and complex, involving combinations of mezzanine structures and subordinated loans or higher LTV financing from opportunistic lenders.

Overall, while the refinancing landscape poses challenges, there are opportunities for resolution and potential benefits in the near and medium terms. In the short term, and until deal flow picks up, it is indeed anticipated that lenders might choose to extend loan maturities for (top-tier) commercial real estate and real estate assets featuring strong tenants like government agencies or European institutions. This extension could also apply to other types of commercial properties facing turbulence largely due to higher interest rates. Lenders may indeed prefer this approach in anticipation of a decline in interest rates and a stabilisation of property valuations by the end of 2024.

Debt restructuring and recovery

Although the Belgian market proved to be robust during the course of 2023, the likelihood of increased company bankruptcies looms large across various sectors of the economy, as businesses face financial strain and consumer confidence is wavering. Financiers, including banks and alternative financing entities, are indeed expected to be confronted with increased credit risk and an increase in (potential) loan defaults. This, in turn, may lead to a reduction in the avail-

ability of traditional credit, resulting in additional financial stress for businesses seeking capital. While certain industries may experience a more pronounced impact, such as retail, hospitality and small businesses, larger corporations and sectors less directly affected by consumer spending (such as the commercial real estate sector) may also face challenges.

In response to the evolving economic landscape, the financing sector will need to adapt its strategies to manage heightened credit risk effectively. This may involve implementing more stringent risk assessment measures, adjusting lending criteria and exploring innovative financing solutions to support businesses in distress.

In this respect, debtor in possession (DIP) financings are expected to be an important component of reorganisation procedures. DIP financing ensures that the insolvent debtor can maintain its basic activities, such as paying employees, purchasing inventory and maintaining utilities, while restructuring in an orderly manner. In this respect, it is noteworthy that the reformed Belgian Insolvency framework entered into force at the end of 2023, aiming to offer companies in distress a wider array of tailor-made restructuring tools to safeguard their Belgian assets or business.

In addition, the anticipated increase in bankruptcies is expected to create opportunities and challenges for investors and financial institutions alike. As distressed assets become available in the market, there may be opportunities for investors to acquire assets at discounted prices. However, navigating the complexities of distressed asset transactions and managing associated risks will require expertise and strategic planning.

Furthermore, regulatory considerations and government policies will play a crucial role in shaping the financing landscape amidst rising bankruptcies. Policymakers may implement measures to support businesses facing financial difficulties, such as loan guarantees, debt restructuring programmes and fiscal stimulus initiatives.

Alternative lenders and diversification of funding sources

In Belgium, the provision of (secured) finance has traditionally been the domain of international and domestic banks, which have long served as the primary lenders in the market. Renowned for their stability and resilience, Belgian banks rank among the strongest in Europe, offering a dependable source of capital even in the face of major economic upheavals.

However, recent years have witnessed a noticeable influx of debt funds into the financing landscape. These alternative financing entities have gained prominence in both the leveraged finance and asset-based finance sectors, despite their tendency to offer higher interest rates compared to traditional banking institutions.

The growing presence of debt funds reflects a shifting paradigm in Belgium's financing ecosystem, diversifying the range of options available to borrowers and investors. Alongside this trend, there is rising interest in exploring alternative financing avenues such as credit from alternative investment funds. Although these channels offer potential advantages, such as streamlined processes and increased flexibility, their overall contribution to the credit market remains relatively modest compared to traditional lenders. Nevertheless, the increasing diversity in financing sources underscores Belgium's capacity for innovation and adaptation within its financial sector.

In summary, while banks continue to play a central role in debt finance in Belgium, the emergence of debt funds and the growing interest in alternative financing channels signify a broader evolution in the country's financial landscape. With a robust banking sector, collaboration between traditional banks, debt funds and alternative investment funds becomes increasingly pivotal as businesses and individuals seek diverse capital sources to navigate economic uncertainties. Such collaborative approach would not only fortify the resilience of Belgium's financial system but would also position it to seize emerging opportunities and navigate evolving market dynamics effectively. Backed by a robust financial ecosystem, the increasing prominence of debt funds and a burgeoning curiosity in alternative financing avenues, Belgium's financial sector stands ready to adjust and flourish in the face of shifting economic dynamics.

Direct lending

One of the financing forms through which debt funds are increasingly positioning themselves in the Belgian market is by offering direct lending to a variety of borrowers. Direct lending has gained traction in the past few years, and further growth in the direct lending market, also in Belgium, is anticipated.

Direct lending involves providing credit directly to middle-market companies, bypassing traditional banking intermediaries. This alternative financing method has gained traction as banks have scaled back lending to mid-sized businesses due to the post-financial crisis environment, with bankruptcies and nationalisations of certain banks and the requirement to satisfy stringent capital requirements resulting from the Basel regulations. Direct lending fills a gap left by these changes in the banking sector, offering flexible financing options backed by institutional investors, including insurance companies and asset managers.

These debt funds typically operate with finite lifespans and investment periods, attracting investors seeking strategic diversification. Compared to bank lending, direct lending offers non-amortising structures (compared to bullet loans), increased flexibility on terms and financing solutions covering various parts of a borrower's capital structure, including senior loans, junior loans and unitranche financing.

In Belgium, offering private debt to corporate borrowers is not considered a regulated activity, and the legal framework for lending activities is favourable. With minimal regulatory hurdles and a straightforward legal environment, Belgium is well positioned for direct lending activities, making it an attractive option for corporate borrowers seeking tailored financing solutions.

Private placements

In parallel to direct lending, private placements are increasing in popularity; whilst it has been rather quiet in the Belgian public bond market, private placements have picked up momentum. Private placements are customised financing arrangements where securities or loan notes are sold to a limited number of investors. Often used for specific projects or the acquisition of large assets, they are now more frequently being used by corporates to raise capital.

Private placements may provide competitive pricing at fixed interest rates (although rates can also be floating) and typically long maturities (five to 35 years). They also allow companies to diversify their capital structure. Institutional investors are common participants, including asset managers and insurance companies. The arranger plays a crucial role, facilitating com-

munication and negotiation between investors and issuers. Key terms include the "make-whole amount" for early prepayment, fixed drawdown schedules and tailored documentation.

More private placements are expected in Belgium in the next few years, and in Europe more broadly, as a response to the demands for medium-to long term funding and financing diversification.

Asset-based finance and securitisations

Although not the largest segment of finance transactions in Belgium due to the prominence of traditional lending, asset-based lending (ABL) has remained a robust practice and a much-used alternative for lenders that either have interesting assets to collateralise and attract such funding and/or do not have easy access to regular bank lending. The Belgian ABL market has experienced growth at a quiet but steady pace. More widely, ABL is expected to grow substantially from a value of approximately USD740.24 billion in 2023 to a projected value of USD1,901.66 billion by 2031, and this growth will certainly reflect on the Belgian market.

The ABL landscape is undergoing significant changes driven by technology and market dynamics. A key trend is the adoption of data extraction technology, which streamlines processes for lenders and borrowers. Financial institutions are embracing digital transformation, leading to automation strategies within the ABL workflow. Cloud accounting packages and open accounting applications facilitate seamless data transfer. Software-as-a-Service (SaaS) solutions are also gaining prominence, enhancing real-time data sharing and integration. These novelties must be addressed in the legal documentation, and legal professionals must strike a balance between innovation and legal certainty when navigating these complexities.

Securitisations take a special place within this market segment and were able to increase in number thanks to several legislative initiatives that rendered the Belgian market a rather attractive host for securitisations. These measures include the Belgian Mobilisation Act, which introduced various measures to facilitate the mobilisation of receivables, and the introduction of a specific securitisation vehicle (institutional company for investment in receivables (VBS/SIC)).

Tax audits

Recently, the Belgian Tax Administration has been performing more rigorous tax audits with regard to the application of withholding tax exemptions. Domestic (including European) and treaty exemptions are being challenged on the basis of national and European anti-abuse rules, and are being reviewed in light of the beneficial ownership concept.

Pursuant to this concept, which has recently been given a broad economic interpretation by CJEU jurisprudence (the "Danish cases"), the Belgian Tax Administration examines whether the recipient of the interest – to which the withholding tax exemption applies – has the right to use and enjoy the interest. For treaty exemptions, the Belgian Tax Administration examines the exemptions under the anti-abuse clause of the double tax treaty, verifying whether or not the principal purpose of the finance structure is aimed at obtaining a tax advantage. The Belgian Tax Administration is expected to persist on this path in the coming years.

Belgian legislative developments

Recent years have seen the Belgian legislature developing a legal framework within which bor-

rowers, when competing for credit, can offer lenders a solid security package meeting the requirements of what is considered to constitute "good and marketable collateral" by the financial markets. Various barriers that previously hindered lenders' easy access to collateral and enforcement procedures have effectively been addressed, and concerns within the financial sector have been tackled by providing clarity and predictability, ultimately streamlining processes and fostering a more conducive environment for lending and investing in Belgium.

Except for mortgages and mortgage mandates, which both require the involvement of a notary public, all Belgian security interests can be documented by a private agreement. In addition, and although these vary per type of collateral, the formalities required to obtain perfected security are also straightforward. For instance, the Belgian act on security interests regarding movable assets has fundamentally amended the previously existing security regime with respect to movable assets (not constituting financial collateral) and now allows for a register pledge on movable assets and/or business by way of a registration in the National Pledge Register for a limited capped registration fee. The Belgian Financial Collateral Act, which applies to financial collateral such as bank accounts and shares, also provides for a lender-friendly regime, offering lenders immediate enforceability options regardless of any insolvency, attachment or other arrangement between creditors (it being understood of course that Belgian courts retain the right to exercise control a posteriori).

Most recently, the Belgian legislature has also modernised Belgian contract law. These reforms have introduced novel legal concepts such as hardship, which was previously unrecognised in Belgian law, reflecting a proactive approach to adapting to contemporary commercial realities and providing greater flexibility and fairness in contractual relationships.