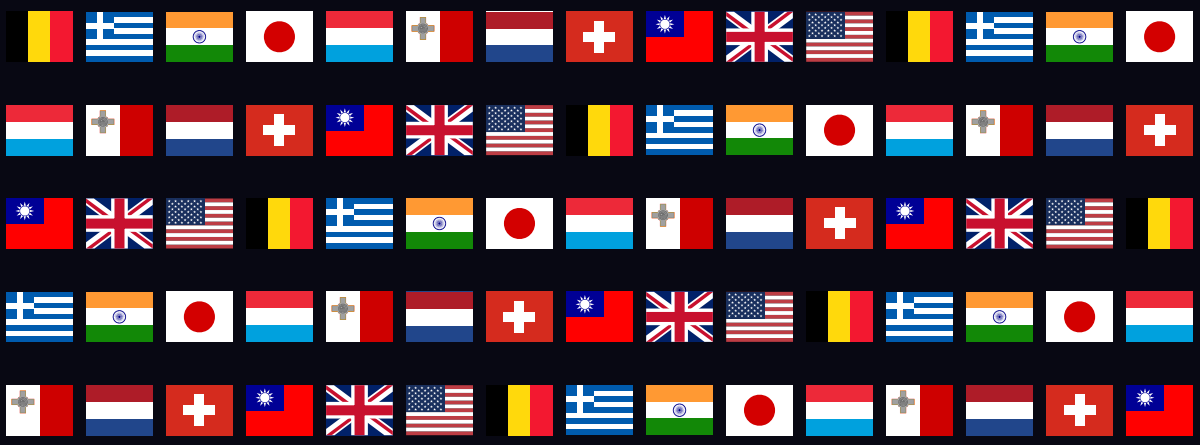
DEBT CAPITAL MARKETS

Netherlands



LEXOLOGY
Getting The Deal Through

Consulting editor
Sullivan & Cromwell LLP

Debt Capital Markets

Consulting editors

Catherine M Clarkin, John Horsfield-Bradbury, Ekaterina Roze, Jeffrey D Hochberg

Sullivan & Cromwell LLP

Quick reference guide enabling side-by-side comparison of local insights, including an overview of the market climate and regulatory framework; documentation and filing requirements; cross-border issues; underwriting; management of outstanding debt securities; reporting; liability regime; investor remedies; enforcement; and recent trends.

Generated 27 April 2022

Table of contents

Contributors

Netherlands

Marieke Driessen
marieke.driessen@stibbe.com
Stibbe

Niek Groenendijk
niek.groenendijk@stibbe.com
Stibbe

Nils Beijeman
nils.beijeman@stibbe.com
Stibbe

MARKET SNAPSHOT

Market climate

What types of debt securities offerings are typical, and how active is the market?

There has traditionally been a deep and active market for debt securities in the Netherlands.

The Dutch financial sector comprises large globally operating financial institutions as well as small institutions with a more domestic focus, albeit with significant cross-border activities in many cases. Both categories are active participants in the Dutch and international capital markets, with Dutch financial institutions issuing debt instruments across the international spectrum, including commercial paper, bonds, structured notes and regulatory capital instruments. Dutch financial institutions have historically also been active in the asset-backed capital markets, particularly in the context of covered bonds and residential mortgage-backed security transactions. At the same time, large Dutch pension funds and other institutional investors make significant investments in debt instruments issued in the Dutch and international capital markets.

In addition to the financial sector, various large international corporate conglomerates headquartered in the Netherlands tap the Dutch and international capital markets with various debt instruments, including commercial paper, bonds, convertible bonds, exchangeable bonds and high-yield notes.

The Netherlands is also known for its flexible corporate law, a favourable regulatory regime for group finance companies, the quality of financial regulators and, historically, a favourable tax climate. This has led to many international financial institutions and global corporates establishing Dutch finance companies, which act as a treasury and cash management centre for their group and issue various types of debt instruments, primarily bonds and structured notes.

Law stated - 28 February 2022

Regulatory framework

Describe the general regime for debt securities offerings.

Regulators

The Dutch Authority for the Financial Markets (AFM) is tasked with market conduct supervision and supervises the Dutch capital markets and its participants. The AFM provides guidance on capital markets issues as relevant for the Dutch capital markets, in addition to guidance from the European Securities and Markets Authority. The Dutch Central Bank (DCB) and the European Central Bank are tasked with prudential supervision.

Regulatory framework

The regulatory framework for debt capital markets consists of various laws and regulations at a domestic and European level. EU directives relevant to the capital markets are mostly implemented into the Dutch Financial Supervision Act (and its underlying regulations) typically on time and without substantial deviations. EU regulations such as the Prospectus Regulation have direct effect in the Netherlands and do not require implementation.

Financial Supervision Act

The Dutch Financial Supervision Act (FSA) and its underlying regulations implement, among other things, the Transparency Directive, the Markets in Financial Instruments Directive (MiFID) and other EU directives relevant to the

debt capital markets. The FSA more generally sets out market access and rules for financial institutions active in and from the Netherlands and contains market conduct rules for the financial sector and participants in the capital markets, which are primarily intended to protect market integrity, investors and clients of financial institutions.

The FSA and its underlying regulations also set out powers of the AFM and DCB to supervise the financial markets and impose sanctions where necessary.

The Dutch Civil Code and the Dutch Insolvency Act

The Dutch Civil Code provides the main Dutch statutory framework for corporate law, contract law, liability law, international private law and consumer protection law, which all affect the documentation and interpretation of debt instruments that are issued by Dutch entities or governed by Dutch law.

The Dutch Insolvency Act provides for the ranking of creditors in general, as well as in relation to regulatory capital instruments, including as a result of implementation of the Bank Recovery and Resolution Directive into Dutch law.

EU regulations

A significant part of the law relevant to capital markets transactions comprises EU law, in the form of directives, as implemented into Dutch law, or in the form of directly applicable EU regulations.

EU regulatory capital requirements applicable to financial institutions have shaped the capital markets, including in relation to banks and investment firms under the Capital Requirements Directive and Regulation, the Bank Recovery and Resolution Directive and the Single Resolution Mechanism Regulation, and in relation to insurance companies under the Solvency II Directive.

Other relevant EU regulations include:

- the Prospectus Regulation, setting out the framework for when a prospectus is required when offering debt instruments to the public or admitting the same to trading on a regulated market;
- the Benchmarks Regulation, governing the provision and administration of benchmarks, the contribution of input data to a benchmark and imposing additional requirements on supervised entities that use benchmarks;
- the Market Abuse Regulation, providing for an EEA-wide framework on all forms of market abuse, such as prohibitions on insider dealing, the unlawful use of insider information and market manipulation, and a requirement to publish price sensitive information;
- the Markets in Financial Instruments Regulation, supplementing MiFID, which introduced changes to the laws applicable to capital market transactions and capital market participants;
- the Packaged Retail and Insurance-based Investment Products Regulation, which sets out information requirements relating to packaged retail investor products and insurance-based investment products in an effort to make them more transparent and their risks and costs more understandable for retail investors; and
- the Securitisation Regulation, which provides for an EEA-wide framework applicable to simple, transparent and standardised securitisations and general rules on due diligence and transparency.

In relation to sustainable finance, other relevant regulations include the EU Taxonomy Regulation, which provides a general framework to determine whether a certain activity is sustainable, and the EU Sustainable Finance Disclosure Regulation, which applies to the activities of investment firms, including in relation to capital markets.

Future developments

The year 2022 onwards will be characterised by further developments and implementation of current and new European initiatives in relation to sustainability and environmental, social and governance (ESG) initiatives. In this context, relevant developments include the proposed EU Green Bonds Standard and a sustainable securitisation framework. Other elements that will likely affect the capital markets include the regulation of crypto-assets and the use of distributed ledger technology.

Market infrastructure

Euronext Amsterdam

Euronext Amsterdam is the main regulated market in the Netherlands for the listing and trading of debt instruments. Its rule books provide for listing requirements.

Euroclear Netherlands

Debt instruments are generally cleared through Euroclear or Clearstream and may be cleared through Euroclear Netherlands, in which case the Dutch Securities Giro Act and Euroclear Netherlands' rules apply. If a clearing member were to become insolvent, in certain circumstances, investors could benefit from additional protection of their ownership rights in the securities held by such clearing member under the Dutch Securities Giro Act.

Industry

The International Capital Markets Association is an important forum for Dutch capital markets participants, offering principles and standards facilitating the functioning of the market. Other notable local industry associations advocating for the Dutch capital markets and its participants include the Dutch Association of Banks, the Dutch Securitisation Association and the Dutch Covered Bond Association. The Dutch Fund and Asset Management Association is the main Dutch industry association for asset managers.

Law stated - 28 February 2022

FILING AND DOCUMENTARY REQUIREMENTS

General filing requirements

Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

The Prospectus Regulation requires a prospectus to be published if securities are to be offered to the public or admitted to trading on a regulated market in the Netherlands. The Prospectus Regulation defines an 'offer of securities to the public' as 'a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities'. This definition also applies to the placing of securities through financial intermediaries.

The Dutch Authority for the Financial Markets (AFM) is the Dutch competent authority with regards to approving prospectuses. Typically, a draft prospectus is sent to the AFM together with all incorporated information and reference tables, allowing the AFM to verify where mandatory disclosure items have been reflected in the prospectus. Should the AFM have any comments, these should be incorporated in the prospectus. Once the AFM has indicated that it has no further comments, the prospectus can be filed for official approval. After the prospectus is approved, the AFM publishes it on its website. Supplements to the prospectus must be approved by the AFM as well and include additional

disclosure in relation to the issuer of the securities, such as the incorporation of recent financial results.

If the final terms of the offer of debt securities are not included in the base prospectus, the final terms need to be filed with the AFM, where possible prior to the offer of such securities.

Additional disclosure requirements apply to securitisations and packaged retail investor products, such as the making available of the prospectus and relevant transaction documentation through a securitisation repository and a key information document, respectively.

Law stated - 28 February 2022

Prospectus requirements

In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

Unless an exception or exemption applies, an issuer will have to publish an approved prospectus before offering debt securities to the public in the Netherlands. The prospectus must comply with the requirements set out in the Prospectus Regulation and its underlying regulations.

An issuer can publish either a prospectus or a registration document, together with a summary and a securities note. The approved prospectus will be valid for 12 months following approval, provided it is supplemented from time to time in accordance with applicable regulations.

The standard of disclosure in a prospectus is that it must contain the information required by an investor to make an informed investment decision in respect of the debt instruments. This includes information about the issuer and the debt instruments, such as:

- the assets and liabilities, profits and losses, financial position, and prospects of the issuer and any guarantor;
- the rights attaching to the debt instruments;
- the reasons for the issuance and its impact on the issuer;
- relevant risk factors; and
- the terms and conditions of the debt instruments.

In general terms, the content requirements are more onerous for complex debt securities and those aimed at retail investors. Depending on the product, other requirements may apply. For example, the Packaged Retail and Insurance-based Investment Products Regulation requires issuers to produce a key information document when offering packaged retail investor products to retail investors, which may include structured notes.

Offering and listing documents follow recommendations by regulatory bodies, such as the European Securities and Markets Authority (ESMA) and the AFM, and industry bodies, such as the International Capital Markets Association, to ensure the prospectus is consistent with market practice. For example, following guidance from regulators and best market practices identified by industry associations, green, sustainability-linked, social and other environmental, social and governance bonds require additional disclosure to inform investors of their particular characteristics.

Law stated - 28 February 2022

Documentation

Describe the drafting process for the offering document.

In the Dutch market, either counsel to the issuer or the arranger may hold the pen on drafting the prospectus and other issuance documentation, while the other side provides comments. The dealers, agents, auditors, rating agencies and other third parties involved provide further input to the documentation. Regardless of the division of tasks and responsibilities when preparing the prospectus, the issuer is ultimately responsible for all information contained in the prospectus, while other parties sometimes take responsibility for specific parts of the prospectus.

Key documentation issues typically revolve around the inclusion and contents of risk factors, transaction structure, description of the issuer and, if relevant, assets backing the transaction. In addition, selling restrictions are included in the prospectus to ensure compliance with applicable securities offering and listing laws. Often, local counsel are engaged to cover relevant offering or listing jurisdictions.

In determining what information to disclose, the issuer needs to consider whether such information is required to be included for investors to understand the investment and the debt securities offered or otherwise relevant to their investment decisions. In reviewing the prospectus, the AFM will also consider whether the information contained in the prospectus is sufficiently clear, concise and material. However, the AFM's approval of the prospectus cannot be seen as an endorsement of the issuer or the debt instruments that are the subject of the prospectus.

Private placements are usually structured in such a way that they are exempt from the prospectus requirements. However, sometimes an offering circular is drafted for private placements that closely follow the form of prospectuses used in public transactions.

Law stated - 28 February 2022

Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of debt securities (and their offerings) are primarily provided for in:

- the prospectus, which must be approved by the AFM and made available to the public;
- the underwriting or subscription agreement, which is entered into by the issuer, lead managers or dealers, setting out the terms governing the subscription for the debt security offer. It is usually not publicly available (in the case of a base prospectus, this subscription agreement is typically a short-form document that builds upon the terms of an underlying programme-wide programme or dealership agreement);
- the agency agreement, which is entered into by the issuer and agents (such as the paying agent or calculation agent), setting out the terms and conditions concerning services to be rendered on behalf of the issuer in relation to the notes or the noteholders. It is usually not publicly available;
- the trust deed and deed of covenant, which sets out the rights of noteholders and responsibilities of the (security) trustee (if applicable). The trust deed or deed of covenant will not be published, but the terms and conditions will generally be included in the prospectus; and
- any security documents: when the debt securities are secured, security documents will be entered into by, among others, the issuer and the security trustee.

Which of these documents are used in a particular transaction depends on the nature of the instrument and the governing law. For example, a vanilla debt instrument governed by Dutch law would typically not involve a deed of covenant or trust deed.

Note that for securitisations, the transaction documents need to be made available to investors, competent authorities and, upon request, potential investors prior to pricing.

Law stated - 28 February 2022

Does offering documentation require approval before publication? In what forms should it be available?

Yes, the AFM must review and approve a prospectus (including supplements) before it can be published and before debt securities can be offered to the public or listed and traded on a regulated market. A final prospectus must be submitted to the AFM in PDF format and in a version that can be directly published (including the date, final format and any images). The Prospectus Regulation requires a prospectus to be made available to the public. In this context, issuers will generally also publish their prospectus upon approval on their website. The prospectus may also be made available in other forms provided for in the Prospectus Regulation. The AFM will also publish prospectuses on its website, which the AFM also submits to ESMA for inclusion in its register of approved prospectuses.

Law stated - 28 February 2022

Authorisation

Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

An issuer seeking to offer debt securities to the public, or admit them to trading on a regulated market, must submit a draft prospectus to the AFM for approval. The AFM has 10 business days to review the prospectus and notify the applicant of its decision. If the prospectus is for public debt securities to be issued for the first time, the time frame for approval is 20 business days. The AFM can approve the prospectus or request the issuer to incorporate additional information in the prospectus in the form of a response sheet, after which it will review the prospectus again within 10 business days. It may be that the procedure is repeated several times before the prospectus is approved, and this is not atypical, in particular, for new issuers.

Once the prospectus has been approved, it can only be amended or supplemented via a supplement in accordance with the terms of the Prospectus Regulation. In principle, the AFM must approve supplements to prospectuses within five business days, although it may occur that the AFM provides comments before a supplement can be approved. Previously, the AFM allowed for the approval of a supplement within one business day if that supplement related exclusively to incorporation by reference to a press release, quarterly report or (semi-)annual financial results of the issuer. This is no longer an officially guaranteed procedure, although similar supplements can typically still be approved quite swiftly.

There are no restrictions imposed on the issuer and underwriters during the review process, other than that they are not allowed to offer the debt securities, and changes can be made to the prospectus and transaction documents (which will also need to be reflected in the prospectus where relevant). Changes to the prospectus will need to be reviewed and approved by the AFM and could therefore result in delays in the approval process. Once a prospectus is approved, and changes are made to the prospectus during an offer by way of a supplement, investors may be entitled to revoke their investment orders pursuant to the Prospectus Regulation.

A preliminary prospectus is typically used for marketing purposes and roadshows, but no debt securities may be marketed in such a way that this constitutes a public offer of debt securities.

Law stated - 28 February 2022

On what grounds may the regulators refuse to approve a public offering of securities?

The AFM will only approve a prospectus once it is satisfied that it meets all the requirements set out in the Prospectus Regulations and its underlying regulations. If relevant requirements are not met, it will refuse to approve a prospectus, whether for a public offering or a listing.

Law stated - 28 February 2022

How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

The Prospectus Regulation exempts certain public offers of debt instruments from requiring an approved and published prospectus. These exemptions are related to, among other things:

- debt securities offered solely to qualified investors;
- debt securities offered to fewer than 150 natural or legal persons per member state, other than qualified investors;
- debt securities that can only be acquired for a total consideration of at least €100,000 per investor, per offer;
- debt securities with a denomination of at least €100,000; and
- debt securities with a total consideration of less than €5 million in all EEA member states, calculated over a period of 12 months, provided that such offering is notified to the AFM and an information document is provided to the AFM, and a warning is included in marketing and offering materials that there is no requirement to publish a prospectus and that the offering does not fall under the supervision of the AFM.

Separate exemptions apply in relation to the admission of trading of debt securities. If one of the exceptions for a public offer applies and the debt securities are admitted to trading on a regulated market, a prospectus is still required in accordance with the Prospectus Regulation unless a separate exemption applies for this admission to trading.

Law stated - 28 February 2022

Offering process

Describe the public offering process for debt securities. How does the private offering process differ?

The timetable for a debt securities offering depends on various factors. Most importantly, it depends on whether the issuance is done under an existing debt issuance programme, which can be done within a matter of days or weeks, or as a stand-alone issue, which can take two months or more to complete. A private placement typically takes less time to complete than a public offering, in particular, where no approved prospectus is required.

A deal typically starts with the appointment of the (lead) managers and legal counsel to both the issuer and the managers. Together with the auditors, these parties will agree on the transaction's structural features, draft the transaction documentation and, if applicable, the prospectus, and liaise with relevant third parties, including the AFM, credit rating agencies and third-party service providers. The main transaction documents are:

- the prospectus;
- the underwriting or subscription agreement;

- the agency agreement;
- the trust deed and deed of covenant; and
- any security documents.

Once the prospectus is in final form (subject to pricing information) and the transaction documents are either signed or in agreed form, a public offering is launched with a public announcement. The marketing often comprises:

- a roadshow, during which the issuer (and sometimes the arranger or managers) speaks to investors; and
- an investor information package, which typically include, among other things, an investor presentation, term sheet and a preliminary prospectus.

After launching the deal, the issuer, arranger and lead managers answer questions from prospective investors and fill their order book.

During or shortly after the marketing period, the transaction documents are signed. The final prospectus is then submitted for approval to the AFM and, following approval, the notes are issued, and settlement takes place.

Law stated - 28 February 2022

Closing documents

What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

Closing documents generally include:

- legal opinions in respect of legal and tax elements relevant to the transaction, including the enforceability of the transaction documents and the capacity of the issuer and other relevant transaction parties, such as guarantors;
- corporate authorisations and closing certificates;
- comfort letters;
- due diligence reports and reliance letters (if applicable); and
- rating and listing confirmations.

Law stated - 28 February 2022

Listing fees

What are the typical fees for listing debt securities on the principal exchanges?

Issuers pay a fee to the AFM for the approval process for a prospectus, information document or supplement. These fees range from €7,500 to €15,000 for the approval process relating to a prospectus for debt securities (depending on the nature of the issuer) and amount to €2,500 for a supplement to the prospectus.

To list medium- or long-term debt securities on Euronext, the following fees can be expected:

- annual fee: no fee for straight debt securities, and up to €2,500 for issuers of debt securities linked to equity securities;
- admission fee for a stand-alone debt securities issuance: €165 per tranche of €25 million (with a maximum of €4,000);

- admission fee for an issuance under a programme: €800 per issuance;
- annuity fee: between €600 and €700, depending on the issued amount; and
- maximum fees of €18,000 (stand-alone) or €14,500 (programme).

To list short-term debt securities on Euronext, the following fees can be expected:

- admission fee: €150;
- per million admitted to Euronext market on a pro rata temporis basis: €10;
- maximum total fee: €15,000.

Law stated - 28 February 2022

KEY CONSIDERATIONS

Special debt instruments

How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

There is an active market in the Netherlands for special debt instruments, including equity-linked notes, convertible debt and other derivative products. However, such a market is generally less active than that for plain vanilla debt instruments, such as fixed-rate notes, floating-rate notes, zero coupon notes and so on.

Financial institution issuers (including banks, certain investment firms and insurers) subject to regulatory capital requirements (such as Capital Requirements Directive and the Solvency II Directive) and bail-in legislation (the Bank Recovery and Resolution Directive), have been actively issuing debt instruments to satisfy applicable capital requirements. Examples include additional tier 1 and tier 2 notes and senior non-preferred notes for minimum requirement for own funds and eligible liabilities purposes.

Green or sustainable bonds are being issued by many issuers, including financial institutions and corporate issuers. Such bonds are considered green or sustainable either based on an issuer benchmark or on the use of proceeds of the bonds, with the latter being more common at this point in time. Most large financial institutions have a green or sustainable bond framework that they use in environmental, social and governance issuances.

Large volumes of structured notes featuring underlyings, caps, floors and other embedded derivatives, are issued by Dutch (group) finance companies.

Law stated - 28 February 2022

What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

The main rules governing issuances from a regulatory perspective consist of the Prospectus Regulation, the Market Abuse Regulation, the Markets in Financial Instruments Regulation (MiFIR), the Benchmarks Regulation, and Dutch Financial Supervision Act and its underlying regulations, which implements, among other things, the Transparency Directive and the Markets in Financial Instruments Directive (MiFID). From a contractual and company law perspective, the main rules are set out in the Dutch Civil Code. The Dutch Insolvency Act provides for the ranking of creditors in general, as well as in relation to regulatory capital instruments, including as a result of implementation of the Bank Recovery and Resolution Directive into Dutch law.

Additional rules may apply depending on the specific security. For example, retail offerings of structured and insurance-linked products under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation and securitisations under the Securitisation Regulation.

Issuers should be aware of the accounting, tax and regulatory implications of debt instruments with equity features that are particularly relevant in the context of highly structured (asset-linked) transactions. For example, such notes may, depending on the features and circumstances, not qualify as 'debt' for regulatory purposes, in which case a given transaction structure could potentially qualify as an investment fund (requiring licensing or registration); give rise to regulatory capital or bail-in issues (if the issuer is a financial institution); create accounting issues; and forfeit beneficial tax treatment applying to debt instruments.

In relation to zero coupon notes, Dutch law transfer limitations may apply.

Law stated - 28 February 2022

Classification

What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

The Prospectus Regulation distinguishes between debt and equity securities. This distinction affects, among other things, applicable exemptions from the requirement to publish a prospectus as well as the disclosure and information requirements (with issuers of equity securities generally being subject to more onerous requirements). Equity securities are defined as shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the issuer. All other types of securities are considered non-equity securities.

Certain types of perpetual, subordinated and profit-linked debt securities may be reclassified as equity for tax purposes, which in particular may affect the withholding tax analysis in the context of a particular issue, and regulatory issues may arise where securities do not qualify as debt from the perspective of investment fund regulation (eg, debt structures are generally out of the scope of AIFMD).

Law stated - 28 February 2022

Transfer of private debt securities

Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

There are no general transfer or trading restrictions that apply to privately offered debt securities (unlike in the US) other than usual selling restrictions to ensure compliance with the Prospectus Regulation and its underlying regulations. In addition, typically, limitations are imposed in connection with compliance with the product governance rules under the MiFID and in order to avoid the application of the PRIIPs Regulation.

Zero coupon notes may also be subject to Dutch law transfer limitations.

Law stated - 28 February 2022

Cross-border issues

Are there special rules applicable to the offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

None.

Law stated - 28 February 2022

Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

Under the Prospectus Regulation, a prospectus approved in one EEA country can be passported into another EEA country through a notification procedure. Foreign issuers are permitted to make use of exemptions from prospectus requirements on the same basis as any domestic or EU issuers.

Pursuant to the Prospectus Regulation, the Dutch Authority for the Financial Markets (AFM) may approve third-country prospectuses provided they comply with the information requirements set out in the Prospectus Regulation and provided that the relevant supervisory authority of the issuer has concluded a cooperation arrangement with the AFM. The AFM will not cooperate with supervisory authorities in a third country where the relevant third country is on the European Commission's list of jurisdictions that have strategic deficiencies in their national anti-money laundering and counter-terrorism financing regimes.

Passporting rights also apply to dealers, agents and other investment services providers with a licence in an EEA jurisdiction, and this licence is required to participate in a transaction.

Law stated - 28 February 2022

Underwriting

What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

Across Europe, (investment) banks have been less willing to underwrite corporate debt issuances due to increased capital requirements and lower risk appetite.

In the Netherlands, managers of debt securities offerings will typically only underwrite the securities at the end of the book-building process when they are satisfied that there is sufficient demand from investors for such offering. A typical underwriting agreement will allow the managers to underwrite the offered debt securities on joint and several bases. It will, among other things, include provisions relating to each manager's commitments and their fees and commissions, offering restrictions, the representations and warranties of the issuer (in respect of itself and the offering documentation) and broad indemnity provisions in favour of the managers.

Law stated - 28 February 2022

How are underwriters regulated? Is approval required with respect to underwriting arrangements?

MiFID (as implemented in the Dutch Financial Supervision Act) principally regulates underwriters of debt securities, and

the underwriting of debt securities (on a committed or non-committed basis) constitutes a regulated investment service under MiFID. Underwriters are also bound by MiFID product governance requirements. Accordingly, underwriters must ensure that they have a licence for underwriting debt securities when acting in the Netherlands unless an exemption applies.

Law stated - 28 February 2022

Transaction execution

What are the key transaction execution issues in a public debt offering? How is the transaction settled?

Execution and settlement vary from transaction to transaction and depend, among other things, on market conditions and other commercial factors. Global notes are widely used for debt capital markets transactions.

Transactions are often settled on a delivery versus payment basis, where the (global) securities and proceeds of the issuance are exchanged simultaneously. A typical debt securities offering settles within two or three business days after signing.

Debt securities can be cleared through Euroclear Netherlands in accordance with the Dutch Securities Giro Act and Euroclear Netherlands regulations, although it is usual for transactions to clear through Euroclear Bank SA/NV and Clearstream, Luxembourg.

Law stated - 28 February 2022

Holding forms

How are public debt securities typically held and traded after an offering?

Debt securities are generally held in bearer or registered form and represented by a global note or certificate deposited with or registered in the name of the relevant common depositary or safekeeper of the clearing system. If a US offering is made, the offered securities are typically in registered form to ensure compliance with certain US law requirements.

End investors typically hold debt securities through a chain of intermediaries and generally can transfer their interests by way of book-entry transfers.

Law stated - 28 February 2022

Outstanding debt securities

Describe how issuers manage their outstanding debt securities.

Generally, liability management in the Netherlands is in line with international practice. Issuer call options are not unusual, and Dutch issuers also make use of open market purchases, consent solicitations, tender offers and exchange offers to manage their outstanding debt. As a matter of Dutch law, the purchase of debt securities may, by operation of law, extinguish such instruments as the debt and claim are united in the same person. However, specific exceptions to this rule apply in relation to bearer securities.

Market abuse considerations apply, and caution should be exercised to ensure that the purchasing of debt instruments does not constitute the preferential treatment of specific security holders. Repurchases should, therefore, insofar as possible, be effectuated on a random or non-discriminatory basis. Additional limitations apply to the purchasing of subordinated debt securities or capital instruments, as the repurchase of such instruments may be inconsistent with

their subordinated nature or require further consent from regulators.

Law stated - 28 February 2022

REGULATION AND LIABILITY

Reporting obligations

Are there any reporting obligations that are imposed after the offering of debt securities? What information would be included in such reporting?

Reporting obligations for issuers of debt securities derive mostly from the Market Abuse Regulation and the Transparency Directive (each to the extent applicable). Issuers are also bound by the Euronext rules when their debt securities are admitted to trading on Euronext Amsterdam.

The Market Abuse Regulation requires issuers of securities to disclose inside information to the market and to comply with certain procedural requirements.

The Transparency Directive has been implemented in the Dutch Financial Supervision Act. Under the terms of the Transparency Directive, issuers of debt securities (other than those issuers that solely issue debt securities with a minimum denomination per unit of €100,000) are required to publish their semi-annual and annual financial statements within three or four months, respectively, after the end of the reporting period.

The Dutch Foreign Financial Relations Act imposes reporting on certain types of issuers for Dutch national balance reporting purposes. Specific disclosure requirements apply under the Packaged Retail and Insurance-based Investment Products Regulation and the Securitisation Regulation.

Law stated - 28 February 2022

Liability regime

Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

Debt offerings may give rise to various types of liability, ranging from claims in tort for negligent misstatement (including misleading advertisement) to mis-selling claims. Dutch case law has introduced the concept of a 'reference investor', being an ordinary investor who is targeted by the offering and assuming this investor has taken knowledge of the disclosed information, is reasonably informed and cautious, but does not have any (product) specific knowledge or experience. As such, the question is not whether a statement was misleading for a specific investor, but the expectations of such objectified reference investor need to be taken into account. Liability may attach to the issuer and (in certain circumstances) the managers and distributors of the securities.

The liability regime for debt securities is the same as for other types of securities. However, claims for the mis-selling of securities may be more likely to succeed in the case of complex and risky debt securities sold to non-professional investors.

Law stated - 28 February 2022

Remedies

What types of remedies are available to the investors in debt securities?

The remedies available to investors depend on the ground for liability invoked. Damages in contract intend to place the claimant in the position that he or she would be in had the contract been duly performed, whereas damages in tort seek to place the investor in his or her original state before the tort. Dutch law does not provide for punitive damages.

The Netherlands introduced legislative reforms to increase the range and effectiveness of collective claim actions, and the practice of collective claim actions, in general, has expanded.

Law stated - 28 February 2022

Enforcement

What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

The Dutch Authority for the Financial Markets (AFM) may apply informal and formal sanctions, depending on the violation. Informal sanctions include a standard-bearing conversation or letter or a warning letter. Formal sanctions include issuing fines, ordering specific actions, prohibiting further issuance of securities or prohibiting specific securities from being issued and making public announcements of failures to comply. The AFM may also refer matters to the Public Prosecution Service for criminal investigation. Before the AFM proceeds to impose a formal sanction, the offender is usually given the opportunity to express his or her views on a proposed measure. However, in some instances, the AFM may refrain from doing so.

Market participants faced with sanctions imposed by the AFM have recourse to the Dutch courts, which can overturn the sanctions decisions of the AFM.

In recent years, the AFM has exercised its supervisory powers also by way of awareness and information campaigns, conducting market surveys and investigations and requiring market participants to report on compliance with relevant rules and regulations.

Law stated - 28 February 2022

Tax liability

What are the main tax issues for issuers and bondholders?

Dutch issuers themselves are subject to Dutch corporate income tax at the statutory Dutch corporate income tax rates.

Interest paid on debt instruments is generally not subject to Dutch withholding tax, although certain exceptions may apply depending on the identity of the issuer, the bondholder or the characteristics of the debt instruments. For example, where bonds qualify as equity or are issued by entities related to the bondholder, withholding tax may apply. In each case, tax advice should be sought.

Generally, no Dutch VAT or transfer taxes are payable in respect of the issue of bonds or in respect of payments of interest and principal under bonds. Also, there is no Dutch stamp duty, registration tax or any other tax or duty other than court fees in cases of proceedings brought before the court, payable in respect of or in connection with the issue, transfer or redemption of the bonds.

Generally, a bondholder of a debt security who derives income from a bond or realises a gain from the disposal or redemption of a bond, will not be subject to Dutch tax on such income or gain, provided it is not a tax resident in the

Netherlands and certain conditions are met.

Law stated - 28 February 2022

UPDATE AND TRENDS

Key developments of the past year

Please provide any updates and trends in your jurisdiction's debt capital market.

The Dutch finance and corporate sectors aim to take their corporate social responsibilities seriously, and this is reflected in an increase in 'sustainable finance': green or sustainability (or sustainability-linked) or social bonds are being issued and offered by many issuers, including financial institutions and corporate issuers, in the Netherlands. Looking ahead, several major legal developments are underway:

- The EU will continue to develop rules and regulations in relation to environmental, social and governance (ESG) and sustainable finance, and this will continue to affect and develop the capital markets in the Netherlands.
- Regulatory capital requirements remain subject to further legal development, and financial institution issuers (including banks, investment firms and insurers) will need to monitor requirements pursuant to the Capital Requirements Directive and Regulation, the Bank Recovery and Resolution Directive and the Solvency II Directive.
- Further development of European ESG and sustainability regulations will also lead to further scrutiny and supervision by the Dutch authorities. The Dutch Central Bank, the Dutch Authority for the Financial Markets and the Dutch Ministry of Finance are proactively addressing ESG and sustainability issues in the financial sector.
- Further regulatory developments are expected in the context of crypto-assets and the use of distributed ledger technology, with these regulatory developments likely to affect the Dutch and European capital markets directly.

Law stated - 28 February 2022

Jurisdictions

Belgium	Liedekerke Wolters Waelbroeck Kirkpatrick
Greece	Koutalidis Law Firm
India	Cyril Amarchand Mangaldas
Japan	Anderson Mōri & Tomotsune
Luxembourg	Loyens & Loeff
Malta	GVZH Advocates
Netherlands	Stibbe
Switzerland	Niederer Kraft Frey
Taiwan	Lee and Li Attorneys at Law
United Kingdom	Slaughter and May
USA	Sullivan & Cromwell LLP