



WORST, BETTER, BEST: Supermajority Provisions in European High Yield Bonds

Shoshanna Harrow, J.D.: *Senior Covenant Analyst, Covenant Review*

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The Bottom Line™:

- Subscribers often ask for suggestions as to how a weak covenant provision could be improved.
- In our “Worst, Better, Best” series, we review provisions from recent European high yield bonds and leveraged loans, explaining the concerns raised by the “Worst” category and the heightened protection provided by those in the “Better” and “Best” categories.
- Investors can refer to these examples when negotiating for improvements in covenant terms in primary deals.
- In this report, we consider supermajority consent provisions in European high yield bonds.

Overview

At Covenant Review, identifying weaknesses in high yield bond and leveraged loan covenants is our bread and butter. Once we’ve pointed out risks in relation to a particular provision, subscribers often ask us for suggestions as to how it could be improved, ideally (given the power of precedent) supported by examples of better wording included in other deals.

In our “Worst, Better, Best” series, we provide actionable intelligence using examples of key covenant provisions from recent European high yield bonds and leveraged loans, explaining the drafting deficiencies of those in the “Worst” category and the heightened protection provided by samples in the “Better” and “Best” categories, which investors can refer to when negotiating for improvements in covenant terms in primary deals.

In this installment, we consider supermajority consent provisions in European high yield bonds.

Supermajority Consent Requirements in European High Yield Bonds

The Amendments provision in a typical European high yield bond permits amendments or waivers of most indenture and intercreditor agreement terms if holders of at least a majority of the outstanding notes consent. However, amendments and waivers of some fundamental terms (often referred to as “sacred rights”) require a higher level of consent. Normally, holders of at least 90% of the outstanding bonds must consent to amendments or waivers of these terms, although a 75% consent threshold is common for Italian issuers.¹

Particularly in the context of liability management transactions, the list of sacred rights is critical. If a term is not included, it can be changed or waived with simple majority consent, setting a relatively low bar for priming or other transactions that disfavor minority holders.

¹ Even at 90%, the typical consent threshold for amendments and waivers of sacred rights in European high yield is [lower than what is typical for US high yield bonds](#), which normally require the consent of all affected holders.

ANALYST CONTACT:

Shoshanna Harrow / Kirsten Heenan

+44 (0)20 7469 0987 / +44 (0)20 7283 9699

sharrow@covenantreview.com / kheenan@covenantreview.com

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Below, we consider several supermajority consent provisions from recent European high yield bonds and explain their strengths and weaknesses.

Worst

The example below is a particularly lax supermajority consent provision:

[W]ithout the consent of Holders holding not less than 90% (or, in the case of clause (8), 75%) of the then outstanding aggregate principal amount of Notes affected, or if any amendment, waiver or other modification will only amend, waive or modify one series of the Notes, without the consent of Holders holding not less than 90% (or, in the case of clause (8), 75%) of the then outstanding aggregate principal amount of Notes of such series amended, waived or modified, an amendment or waiver may not, with respect to any such series of the Notes held by a nonconsenting Holder:

- (1) reduce the principal amount of such Notes whose Holders must consent to an amendment;*
- (2) reduce the stated rate of or extend the stated time for payment of interest on any such Note (other than provisions relating to a Change of Control and Asset Dispositions);*
- (3) reduce the principal of or extend the Stated Maturity of any such Note (other than provisions relating to a Change of Control and Asset Dispositions);*
- (4) reduce the premium payable upon the redemption of any such Note or change the time at which any such Note may be redeemed, in each case as described above under “—Optional Redemption”;*
- (5) make any such Note payable in money other than that stated in such Note;*
- (6) amend the contractual right of any Holder to bring suit for the payment of principal, premium, if any, and interest on its Note on or after the respective due dates expressed or provided in such Note;*
- (7) make any change in the provisions of the Indenture described under “—Withholding Taxes” that adversely affects the right of any Holder of such Notes in any material respect or amends the terms of such Notes in a way that would result in a loss of an exemption from any of the Taxes described thereunder or an exemption from any obligation to withhold or deduct Taxes so described thereunder unless the Payor agrees to pay Additional Amounts, if any, in respect thereof;*
- (8) release (i) all or substantially all security interests granted for the benefit of the Holders in the Collateral or (ii) all or substantially all of the Guarantors from their obligations under the Notes Guarantees or the Indenture, in each case, other than pursuant to the terms of the Security Document or the Indenture, as applicable, except as permitted by the Intercreditor Agreement or any Additional Intercreditor Agreement;*
- (9) waive a Default or Event of Default with respect to the nonpayment of principal, premium or interest (except pursuant to a rescission of acceleration of the Notes by the Holders of at least a majority in aggregate principal amount of such Notes and a waiver of the payment default that resulted from such acceleration); or*
- (10) make any change in the amendment or waiver provisions which require the Holders’ consent described in this sentence.*

The example above does include several important items in the list of matters requiring the consent of holders of 90% of the outstanding notes – namely, changes to principal amount, interest rates, interest payment and maturity dates, currency, optional redemption provisions, withholding tax provisions, holders’ rights to sue for enforcement of payment, and the consent thresholds themselves. However, a number of exceptions and omissions mean the provision qualifies for “Worst” status.

Material Omissions from the List of Supermajority Matters

A central issue with the list above is that it makes no mention of three important matters: (1) changes to payment ranking, (2) changes to lien priority, and (3) changes to the application of collateral enforcement proceeds. As a result, none of those changes require supermajority consent, which paves the way for subordinating the notes in one

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or more ways with simple majority consent.

As we explained in [Liability Management: The Distinct Lack of Anti-Subordination Protection in European High Yield](#), these omissions are unfortunately common for European high yield bonds – unlike US high yield bonds, which are likely to require heightened consent for some, if not all, of these items. What this means in practice is that a European bond issuer would often be able to do any or all of the following things with simple majority consent:

- subordinate the bonds in right of payment to other debt,
- permit super senior debt under a bond that previously did not allow debt to be secured on a super senior basis, and/or
- change the intercreditor arrangements to give other creditors priority with respect to receipt of collateral enforcement proceeds.

This is far more than a theoretical risk. [Hunkemöller](#) subordinated its minority bondholders' notes in right of payment with simple majority consent (willingly provided by the majority holders who benefitted from the change). [Swissport](#) amended its bonds to permit super senior debt with simple majority consent, allowing the company to incur a €380 million facility that primed the existing senior secured bonds. [Victoria PLC](#) subordinated its senior secured notes in right of payment and lien priority with simple majority consent. Yet despite these and other examples, it remains the norm in European high yield to permit these kinds of changes without a heightened level of consent.

Lower Consent Requirement and "All or Substantially All" Threshold for Guarantee and Collateral Release

The example above sets a 75% consent threshold (rather than 90%) for the release of all or substantially all of the bond collateral and the release of all or substantially all of the bond guarantees, making it easier to obtain consent for dramatic changes to bondholders' credit support. Worse, this supermajority consent is only required to release "all or substantially all" of the collateral and/or guarantees, meaning that the company could release credit support below that (notably vague and difficult to prove) threshold with simple majority consent.

Potential grace period loophole

While the example above requires supermajority consent to "reduce the stated rate of or extend the stated time for payment of interest" and to waive payment-related defaults, it says nothing about changing the grace period that applies before a "default" in the guise of a missed interest payment ripens into an "Event of Default" that gives holders the right to accelerate the bonds. We've seen a number of issuers, including [Food Delivery Brands](#) and [Codere](#), seek simple majority consent for a grace period change, presumably relying on the form-over-substance argument that the amendment technically does not change the "stated time" for the interest payment (*i.e.*, the interest due date itself remains the same), instead it merely changes the amount of time that must elapse before failure to make an interest payment at that "stated time" is considered an Event of Default.²

An Exception for Certain Changes to Payment Terms

Supermajority consent is required to reduce principal or interest rate or extend payment / maturity dates "other than provisions relating to a Change of Control and Asset Dispositions." Like most European high yield bonds, the bonds in this example require the issuer to offer to purchase the bonds if a change of control occurs or if disposal proceeds that are not applied as permitted under the Asset Sales covenant exceed a specified threshold. The exception

² We've noted [previously](#) that an aggressive issuer might seek to convert interest payments from cash to PIK with simple majority consent based on the similarly hyper-technical reasoning that such an amendment technically would not change the stated time for payment of interest or reduce the stated interest rate. Fortunately, we haven't seen this attempted (yet – never say never when it comes to covenant-related maneuvers).

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described here would allow amendments of amounts due and/or due dates in connection with these offers with simple majority consent.

Class Voting

It's common for a company to issue more than one tranche of notes under the same indenture (whether offered at the same time or separately). For example, a company might issue a fixed rate tranche and a floating rate tranche, or a euro-denominated tranche and a sterling-denominated tranche, or a tranche that matures in 2030 as well as a tranche that matures in 2032, in each case under a single indenture. In such a circumstance, the indenture normally defines the term "Notes" to include all of those tranches (plus any future tranches issued) and says that the tranches will be considered separate "series" but will be treated as a single class for all purposes, including with respect to amendments and waivers, unless otherwise specified.

The example above requires supermajority consent from holders of the "Notes" unless the amendment or waiver only affects one series, in which case supermajority consent from holders of that series is required. In the case of amendments that affect all series, this language can leave holders of the smaller series at a distinct disadvantage. If holders of a sufficient percentage of "Notes" across *all* of the series consent to the proposed changes, then the smaller series will be subject to those amendments even if the consent level achieved for that particular series is below the supermajority threshold.³

Better

The following provision makes some improvements to the one above:

[W]ithout the consent of holders holding not less than 90% of any series of Notes, then outstanding, no amendment, supplement or waiver may under the Indenture (with respect to any Notes of such series held by a nonconsenting holder):

- (1) reduce the percentage of the aggregate principal amount of Notes of such series whose holders must consent to an amendment, supplement or waiver;*
- (2) reduce the rate of or extend the time for payment of interest or Additional Amounts, if any, on any Note of such series;*
- (3) reduce the principal of or change the Stated Maturity of any Note of such series;*
- (4) waive a Default or Event of Default in the payment of principal of or premium, if any, or interest on the Notes of such series, except a rescission of acceleration of the Notes of such series with respect to a nonpayment default by the holders of at least a majority in aggregate principal amount of the Notes of such series and a waiver of the payment default that resulted from such acceleration;*
- (5) reduce the premium payable upon the redemption of any Note of such series or change the time at which any Note of such series may be redeemed as described under "—Optional Redemption" (other than, in each case, any change to the notice periods with respect to such redemptions) or "—Redemption for Taxation Reasons";*
- (6) make any Note of such series payable in money other than that stated in such Note;*
- (7) impair the right of any holder of Notes of such series to institute suit for the enforcement of any payment on or with respect to such holder's Notes;*
- (8) make any change in the provisions of the Indenture relating to waivers of past Defaults or Events of Default or the rights of holders of Notes of such series to receive payments of principal of or premium, if any, or interest on the Notes of such series;*
- (9) release any security interests granted for the benefit of the holders in the Collateral other than in*

³ The same regime applies to simple majority amendments, where the risk can be more acute, mathematically speaking. If a larger series represents more than 50% of the outstanding "Notes" (as was the case for [Victoria PLC](#), where the 2026s represented 66% and the 2028s represented 34% of the "Notes" under a single indenture), then it is possible to make amendments to both series with the consent of very few holders of the smaller series – perhaps even none of those holders, depending on the actual split.

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- accordance with the terms of the Security Documents, the Intercreditor Agreement, any applicable Additional Intercreditor Agreement, the Indenture or the applicable Security Documents;*
- (10) *make the Notes of such series or any Guarantee subordinated in right of payment to any other obligations;*
or
- (11) *make any change in the amendment or waiver provisions of the Indenture that require the holders' consent as described in clauses (1) through (10) of this sentence.*

This drafting improves on the first example in several respects:

- Clause (10) requires supermajority consent to subordinate the notes or guarantees in right of payment to other debt, meaning that this form of priming would require a heightened level of consent.
- The 90% consent threshold applies to all of the items on the supermajority list (unlike the “Worst” example above, which had a 75% consent threshold for some of the items)
- The supermajority consent requirement, rather than “all or substantially all” consent, applies to the release of any, rather than all or substantially all, collateral.
- The drafting requires consent from holders of 90% of any series of Notes, rather than consent from holders of 90% of the Notes in aggregate.
- There are no exceptions for changes in payment terms in relation to disposals or a change of control.

However, several weaknesses remain:

- The omission of any reference to lien subordination or changes to the application of collateral enforcement proceeds means it could be possible to change lien priority or the enforcement proceeds waterfall with simple majority consent.
- The list fails to include guarantee releases, meaning that any (or even all) guarantees could be released with simple majority consent.
- The drafting still leaves room for the potential interest payment grace period workaround described above.

Here's another “Better” example from an offering of senior secured notes.

The Indenture will provide that with respect to any Notes held by a non-consenting Holder an amendment or waiver may not, without the consent of Holders holding not less than 90% of the then outstanding principal amount of the Notes affected (provided that (x) if any such amendment or waiver will only affect one series of Notes (or less than all series of Notes) then outstanding under the Indenture, then only the consent of Holders holding not less than 90% of the then outstanding principal amount of the Notes affected of such series ... shall be required and (y) if any such amendment or waiver by its terms will affect a series of Notes in a manner different and materially adverse relative to the manner such amendment or waiver affects other series of Notes, then the consent of Holders holding not less than 90% of the then outstanding principal amount of the Notes affected of such series ... shall be required):

- (1) *reduce the principal amount of such Notes whose Holders must consent to an amendment, supplement or waiver;*
- (2) *reduce the principal of or change the fixed final maturity of any such Note or reduce the premium payable upon the redemption of such Notes on any date;*
- (3) *reduce the rate of or change the time for payment of interest on any Note;*
- (4) *waive a Default in the payment of principal of or premium, if any, or interest on the Notes, except a rescission of acceleration of the Notes by the Holders of at least a majority in aggregate principal amount of the Notes and a waiver of the payment default that resulted from such acceleration;*
- (5) *make any Note payable in money other than that stated therein;*

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- (6) *make any change in the provisions of the Indenture relating to waivers of past Defaults;*
- (7) *make any change in these amendment and waiver provisions that is materially adverse to the Holders;*
- (8) *impair the contractual right under the Indenture of any Holder to institute suit for the enforcement of any payment on or with respect to such Holder's Notes;*
- (9) *make any change to or modify the ranking of the Notes that would adversely affect the Holders;*
- (10) *release all or substantially all of the Guarantors from their obligations under the Guarantees or the Indenture, except in accordance with the terms of the Indenture and the Intercreditor Agreement; or*
- (11) *release all or substantially all of the security interests granted for the benefit of the Holders in the Collateral other than in accordance with the terms of the Security Documents, the Intercreditor Agreement, any applicable Additional Intercreditor Agreement or the Indenture.*

Again, this wording improves on the “Worst” version above in some ways.

- First and foremost, it gives some protection against subordination, as clause (9) requires supermajority consent to change or modify the ranking of the notes in a way that would adversely affect noteholders. However, the reference to “ranking” is ambiguous – in particular, it’s not clear whether it would cover lien priority as well as payment priority, leaving the door open for an argument that the ranking of the liens on the bond collateral could be changed with simple majority consent.

(A side note on vague references to subordination: some deals require supermajority consent to “*make any change to any provision of the Indenture or the Intercreditor Deed affecting the ranking or priority of any Note or Guarantee that would adversely affect the rights of the holders of the Notes in any material respect.*” This language is a bit broader than clause (9) above, referring to “ranking or priority” as well as changes that affect holders’ “rights ... in any material respect,” both of which lend support to an argument for a broader interpretation but remain ambiguous all the same. Others require supermajority consent to “*expressly subordinate the notes or any Guarantee related thereto to any other Indebtedness of the Issuer or any Guarantor.*” Here, the interpretation of the ambiguous provision may tilt the other way, as the reference to express subordination arguably suggests contractual subordination in right of payment more so than lien subordination.)

- Additionally, this example doesn’t include a lower consent threshold for collateral and guarantee release, nor do the payment-related matters include exceptions.
- It is also slightly more protective than the “Worst” example in terms of voting by series (although it doesn’t go as far as our first “Better” example above). Supermajority consent from holders of a specific series is required for amendments that only affect that series and also for amendments that will affect that series “in a manner different and materially adverse” to the other series.

However, the drafting still omits changes to the application of collateral enforcement proceeds, sets an “all or substantially all” threshold for release of guarantees or collateral, and leaves open the grace period loophole.

Best

The most robust supermajority consent provisions tend to be found within bonds issued in connection with a restructuring, a context where minds are naturally focused on covenant protections (all the more so if previous steps of the transaction have taken advantage of some of the weaknesses we’ve described above).

The language below comes from such a bond.

Without the consent of the Holders holding no less than 90% in principal amount of the Notes then outstanding (or, if a modification or amendment will only affect one series of the Notes, the Holders of at least 90% of the aggregate principal amount of the Notes then outstanding in such series), no amendment, modification,

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supplement or waiver ... may:

- (1) extend the Stated Maturity of the principal of, or any instalment of or Additional Amounts or interest on, any Note (or change any [interest payment-related] Default or Event of Default);
- (2) reduce the principal amount of any Note (or Additional Amounts or premium, if any) or the rate of or extend the stated time for payment of interest on any Note (or change any [principal or premium payment-related] Default or Event of Default);
- (3) reduce the premium payable upon the redemption of any such Note or change the time at which any such Note may be redeemed, in each case as set forth in [the optional redemption provision] of the Notes (or other relevant sections for any Additional Notes);
- (4) change the coin or currency in which the principal of any Note or any premium or any Additional Amounts or the interest thereon is payable on or after the due dates thereof;
- (5) impair the right to institute suit for the enforcement of any payment of any Note in accordance with the provisions of such Note and this Indenture;
- (6) make any change to the amendment or waiver provisions which require the Holders' consent described in this [supermajority consent provision];
- (7) release any Guarantee, other than in compliance with the guarantor release provisions of this Indenture and the Intercreditor Agreement (and any Additional Intercreditor Agreement);
- (8) release any Lien on the Collateral granted for the benefit of the Holders, other than in compliance with the terms of the Indenture and the Intercreditor Agreement (and any Additional Intercreditor Agreement); and
- (9)
 - (a) subordinate the Notes in right of payment or the Liens over the Collateral to any other Debt or other obligations of the Issuer and its Restricted Subsidiaries (or the Liens securing such Debt or other obligations) unless the beneficial owners of the Notes have first been offered with a bona fide opportunity to provide their pro rata share of such Debt on the same terms,
 - (b) change the application of proceeds from the enforcement of the security interests over the Collateral,
 - (c) increase the amount or change the type of Debt that may be secured on a "super senior" basis pursuant to the definition of "Permitted Collateral Liens" where such Debt would be incurred for the purposes of conducting a liability management transaction;
 - (d) make any other changes to the restrictive covenants set forth in [the restrictive covenants] or Article 5 [the Mergers covenant] or any corresponding definitions used therein for purposes of conducting a liability management transaction or
 - (e) amend [the Payment for Consents covenant] of this Indenture.

This example casts a much wider net in terms of supermajority consent requirements.

- Importantly, the provision unambiguously requires supermajority consent for payment subordination, lien subordination, and changes to the application of proceeds from the enforcement of collateral. However (proving that "Best" doesn't mean "Perfect"), in the case of payment and lien subordination, the supermajority consent protection is watered down by offering an out if noteholders are offered a "bona fide opportunity" to participate in the new priming debt on a pro rata basis. A stronger provision would require supermajority consent regardless.
- The example above also explicitly requires supermajority consent to increase the amount or change the type of permitted debt that can be secured on a super senior basis, meaning a priming transaction that would normally be straightforward to accomplish with simple majority consent will instead require a heightened level of consent. Again, the protection isn't perfect, as these amendments only require supermajority consent if the relevant debt "would be incurred for the purposes of conducting a liability management transaction." For one thing, the term "liability management transaction" is not defined (although, as we noted in a previous report on [anti-LMT provisions](#), a definition might have the perverse effect of inviting hair-splitting workarounds). For

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another, proving the purposes of an amendment could be difficult. Nonetheless, the requirement is a distinct improvement on the examples above.

- The provision also includes an overarching supermajority consent requirement for any other changes to the restrictive covenants, the Mergers covenant, and related definitions for purposes of a liability management transaction. Again, the purpose qualifier and vagueness of the term “liability management transaction” weaken the requirement somewhat, but this broad blocker offers far more protection than the examples presented earlier in this report.
- Additionally, this example requires supermajority consent for amendments to the [Payment for Consents](#) covenant, which prohibits the company from paying consideration to any holder for a consent unless the same consideration is offered and paid to all consenting holders. As we regularly warn, the absence of a Payment for Consents covenant means that the issuer won’t be required to make an exchange offer or consent solicitation to all holders on the same terms, effectively paving the way for a non-pro rata deal – a situation that minority holders of [Victoria PLC](#)’s bonds unfortunately experienced. What’s more, even if a bond does include a Payment for Consents covenant, amendment or wholesale deletion of the covenant is normally possible with simple majority consent, as [Hunkemöller](#) demonstrated in an aggressive liability management transaction last year.⁴
- In another positive, the provision seeks to close the grace period loophole by requiring supermajority consent for changes to payment-related defaults and Events of Default (and there are no exceptions to the supermajority requirement for changes to payment terms).
- Finally, the example above appropriately requires supermajority consent to release of any bond guarantee or lien on the bond collateral.

However, note that this provision fails to require supermajority consent by series (instead limiting it to amendments that affect only one series).

Conclusion

Drafting of covenant provisions varies widely, of course, and studious attention to the detail is always required. We hope the specific examples and explanations in our “Worst, Better, Best” series help investors analyze provisions in new deals and push for more protective versions whenever possible.

— *Covenant Review*

⁴ Hunkemöller’s minority bondholders sued over this transaction, arguing (among other things) that the company breached the Payment for Consents covenant prior to its removal by offering the majority holders consideration for their consent to remove the covenant without offering the same consideration to other holders. The company denies that any consideration was offered in connection with the covenant’s removal. Litigation is ongoing.

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