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EUROPEAN HIGH YIELD 2018
Part II: Off-Market Terms To Resist In 2019

In Part I of our 2018 Review, we provided a general overview of certain established defining aspects of the European high yield covenant structure to demonstrate how these parameters had framed the overall landscape of investor protections during the course of the year.

In this Part II, we focus more specifically on the trajectory of certain off-market features that we have been observing only since 2017 in the debt, restricted payments and asset sales covenant.

DEBT COVENANT

Expansive Acquired/Acquisition Debt Basket

For some years now in the European HY market, the Permitted Debt basket for investment-related debt has extended beyond acquired debt (i.e. assumed target debt) to acquisition debt (i.e. debt raised specifically to finance an acquisition), but subject always to the typical proviso that, *either* the restricted group would have ratio debt capacity, *or* that the transaction would not cause the FCCR at the time to reduce/worsen (in other words: FCCR-neutral).

We understand that some investors already view this 'no deterioration' alternative condition as unnecessarily permissive and consider that acquired/acquisition debt incurrence should only be allowed subject to compliance with a specific ratio level (e.g. 2x FCCR, so that the investment cannot be debt financed at a time when the coverage ratio is lower than that prescribed threshold). Yet, this formulation is current high yield market standard.

In 2017, in less than a dozen of the most audacious sponsor HY deals (~6% of 2017 full suite HYB reviewed), we noted an exceptionally expansive deviation from this standard construct. This afforded issuers further flexibility, either:

(1) as to ratio compliance: so that, for example, even if FCCR *already* below 2x *and* would be (pro forma for such incurrence) lower than pre-transaction, such debt incurrence is permitted if, *alternatively*, leverage (at whatever level it then is) is not thereby increased – essentially allowing issuers to 'cherry pick' the ratio with which the transaction can comply (on a 'no deterioration' basis); or

(2) through a 'freebie' amount for such debt incurrence that is available without testing any ratio; OR

(3) by including *both* a 'ratio cherry pick' and *additionally* a 'freebie'.

Lamentably, variations on this off-market formulation have proliferated in 2018, appearing (as demonstrated in the chart overleaf) in ¼ of all full suite HYB we reviewed during the year. The most aggressive of these deals combine the 'freebie' amount soft-capped by reference to EBITDA with the 'ratio cherry pick' on a 'no deterioration' basis (e.g. **Stada, Techem**, **BMC Software** and **Travelport**).

Given the unprecedented level of indiscipline and latitude this expansive investment debt permission grants issuers, its apparition in any future offering memoranda should be robustly challenged by investors in 2019.

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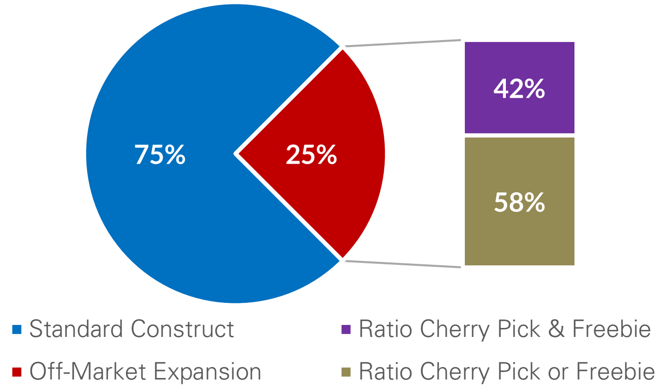
Off-Market Investment Debt Basket



Encouragingly, the 'ratio cherry pick' formulation (enabling investment debt incurrence even if FCCR lowered, provided total net leverage not increased) was removed from final documentation for the **Algeco** offering, due to buysider objection.

200% Contribution Debt Basket

Another Permitted Debt basket that has been a banal feature of the European high yield landscape for the past several years is the uncapped contribution debt basket. This is an allowance for the restricted group to incur debt to match any net cash proceeds of equity issuance or subordinated shareholder funding received by/contributed to its capital after the issue date.

In the majority of European senior secured notes, any such contribution debt can be secured on the bond collateral on a pari passu basis and, in many cases, without compliance with any secured leverage test (but never on an effectively senior basis on non-collateral, more on which below).

What is starkly off-market for Europe is the apparition of 200% contribution debt baskets in 2018 – i.e. allowing <u>double</u> the amount of equity/shareholder funding receipts to be raised as debt. Albeit limited to less than a handful of bonds (**Refinitiv**, **WMG** and **Hertz**), it's interesting to note that all these deals are Reverse Yankees[1]. Although such 200% baskets are more prevalent in US high yield, they nonetheless remain notably anomalous. Indeed, in the **BMC Software** offering (another Reverse Yankee), the 200% contribution debt basket that appeared in the POM was pared back to the customary $1 debt- for -$1 equity/contributions ratio in the pricing supplement.

There have been intermittent sightings of the 200% contribution debt basket in Europe in previous years (e.g. observed in 3 bonds in 2017)[2], but it's worth bringing attention to its limited re-emergence in 2018 to deflect any attempts at it gaining traction in 2019.

Converting RP Capacity into Debt Capacity

A novel debt permission to be watchful for in the coming year is what we'll dub the "RPs capacity debt allowance": an additional carve-out to trade certain baskets under the restricted payments (RPs) covenant for commensurate debt capacity.

Three of 2018's most notable LBO financings – Cirsa, Refinitiv and AkzoNobel (translating into roughly 5% of the year's full suite HYB complement) – featured three different versions of this highly irregular channel for enhanced leveraging potential. **Cirsa** tacked it on to the end of its contribution debt basket, whereas it appeared as a separate Permitted Debt basket in each of AkzoNobel and Refinitiv (in **Refinitiv**, by reference to the term "Available RP Capacity Amount"). The most expansive of these is **AkzoNobel**, which enables transfer of capacity from the entirety of the Build-Up Basket (including the soft-capped starter amount) as well as five Permitted Payments baskets (including both the soft-capped general RPs and the leverage-based RPs baskets) into additional debt capacity.

Also worth noting is that (unlike AkzoNobel) both Cirsa and Refinitiv feature a dedicated liens exception permitting such "RPs capacity debt allowance" to be

[1] Most aggressively in **Refinitiv**: this 200% contribution debt basket can be secured - including on an effectively senior basis - pursuant to a dedicated liens exception without reference to any secured leverage test.
[2] These are: *<u>Schenk</u>*, *<u>Aramark</u>* and *<u>Ceva Group</u>*.

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secured, *both* on collateral on a pari passu basis *and* on non-collateral on an effectively senior basis.

What's the mischief here?

Arguably, unlike the rationale for the (standard 100%) contribution debt basket, which allows cash contributed to the restricted group's capital to be borrowed against instead of being used to fund RPs, the RPs capacity debt allowance permits further leveraging up without the need to have the cash available. So, even though, in switching RPs capacity to (potentially prior ranking secured) debt capacity, the issuer may have forgone its *covenant capacity* to make a shareholder distribution or repay its junior creditors early, this may not in reality represent a sacrifice where there is *no actual cash available* to make that payment. This is likely to be most starkly illustrated in a distressed scenario.

The other objection to this additional flexibility is, of course, transparency. In Part I of our 2018 Review, we attempted to show the leverage multiples that the most aggressive debt covenants of the year were affording issuers merely through certain *quantifiable* Permitted Debt baskets. Given the woeful level of disclosure required of bond issuers, the "RPs capacity debt allowance" adds yet another layer of obfuscation for analysts trying to evaluate how much scope for leverage and/or value leakage the documentation actually affords their credit.

We noted the "RPs capacity debt allowance" only once previously in 2017: *Schenk* adds this on as a supplement to the contribution debt basket[3]. Interestingly, the prevalence of this allowance appears to have been higher in European loans in 2018 (and has also been observed in US loans of late). See Part II of our 2018 European Loan Trends Round-Up for a discussion of this phenomenon.

RESTRICTED PAYMENTS COVENANT

Escalating restricted payments capacity and flexibility has been a pronounced topic of focus for us since early 2017. To give a flavour of 2018 on the cash leakage front, we saw *quantifiable* aggregated RPs and Permitted Investments baskets reaching well in excess of a turn of leverage. The most audacious deals in this regard included **Cirsa** (~1.59x EBITDA, after pushback!), **AkzoNobel** (~1.6x EBITDA), **Travelport** (~1.65x EBITDA), **Stars** (~1.7x EBITDA) and **Refinitiv** (~2.1x EBITDA)[4].

Yet, that's just a rather unscientific, generalised (and only partial) overview of increasing value leakage capacity through the RPs covenant. When viewed against the backdrop of receding conditionality to basket availability and advancing prevalence of certain indulgent permissions, the multi-pronged deterioration of RPs covenant protection over the past 12 months appears all the more striking…and that's despite it being the most negotiated provision of the year.

Diminishing Conditionality to RPs

❖ Absence of default condition: In Part II of our 2017 Annual Review focussing on the RPs covenant, we warned of the dangers represented by diminishing default blockers whereby usage of permitted payments (PP) baskets and, in certain cases, the build-up basket (BUB) is prevented only on the occurrence of an *actual* Event of Default (EoD), as opposed to at the earlier point of a Default (which would become an EoD with the passage of time or notice).

Evidently, value leakage from the restricted group at a time when a breach of the bond's terms may be imminent is never appropriate.

[3] Like **Cirsa**, another Blackstone deal; although note **Refinitiv** is also a Blackstone deal, but features the flexibility as a stand-alone Permitted Debt basket.
[4] This is just the tip of the iceberg: these are Xtract calculations of 'Day One Capacity' through EBITDA-based general Permitted Payments baskets and BUB starter amounts (if any) plus aggregation of Permitted Investments baskets *that are quantifiable*.

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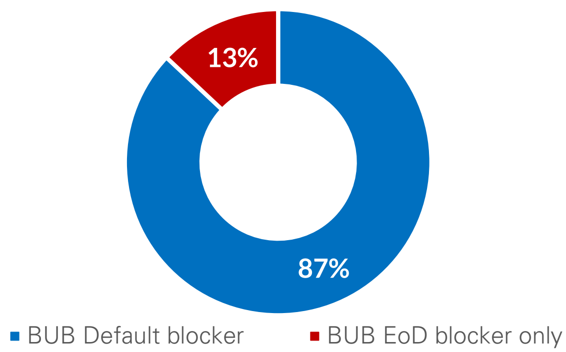
The chart below reveals that 13% of 2018 full suite HYB allow usage of the BUB until the occurrence of an EoD (thereby eschewing the customary 'early warning signal' of a Default blocker).

RPs BUB EoD Blocker Only



This prevalence in itself is off-market and should be reversed in 2019, but it does not reveal the extent to which default blockers have also been diminishing on the availability of PP baskets. As such, it's worth drawing attention to the myriad ways in which certain of the year's most aggressive deals pushed the boundaries even further beyond market standard.

In **Travelport** and **Corestate**, the BUB is only conditional on absence of an EoD, – but none of the PP baskets is subject to *any* default blocker.

Hertz and **AkzoNobel** use even narrower parameters: RPs made from the BUB and under certain PP baskets are blocked *only* if there is a payment or insolvency EoD.

In **Refinitiv**, the making of RPs from the BUB is subject to an EoD but the making of any Restricted Investments from the BUB is only subject to a payment or insolvency EoD.

Another permutation is found in **BMC Software**, in which the making of RPs from the BUB is subject to absence of an EoD as well as (after investor pushback) a Default, but only the making of Restricted Investments from the soft-capped starter amount of the BUB is subject to absence of a Default or EoD relating to non-payment or insolvency.

Encouragingly, there was noticeable European HY buyside engagement during the course of 2018, resulting in improvements being made to final terms on several deals on this front in particular (e.g. **Albea Algeco**, **GFKL**, **Selecta**, **Stark** and **BMC Software**). Nevertheless, still more needs to be done to reinstate consistently the market standard that availability of the BUB and each of the material PP baskets should cease (as is rational) from occurrence, not only of any EoD, but also of any Default.

❖ Removal of financial condition for BUB use: In **Tele Columbus** and **Altice**, Restricted Investments made from the BUB are not subject to the typical condition of ability to meet the ratio debt test[5]. In **Samsonite** and **BMC Software**, (i) the 2x FCCR test does not apply at all to Restricted Investments, but also (ii) *only* applies to RPs made from the 50% CNI component (and the returns on investments component in BMC Software) of the BUB[6].

There are two major objections to these deviations to discriminate between (A) Restricted Investments and other RPs and (B) BUB components to which conditionality applies. First, bear in mind the loophole that "Investments" (as is typical) is very broadly defined in high yield (and, would encapsulate, for example: upstream loans). Secondly, this is yet another attack on transparency. Over time, it may become impossible to determine (and police!) from which BUB component an RP has been made and, accordingly, to keep track of how much RPs capacity remains available to the restricted group at any given time.

The worst offenders on this front are: **Refinitiv** and **Transdigm** (the latter, senior subordinated notes and both Reverse Yankees) which do away with the ratio

[5] Ratio debt test is based on net leverage in both these telecoms deals. Note this deficiency has been observed in previous Altice bonds, as well as those of Liberty Global portfolio companies.
[6] See also **WMG**, where 2x FCCR compliance condition only applies to payments made from 50% CNI component.

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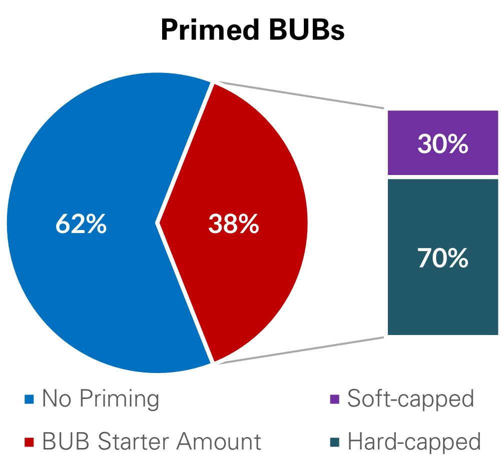
debt test as a condition for BUB use altogether.

Needless to say, permitting distributions from the BUB at a time when the restricted group cannot even meet its test for ratio debt incurrence is counter-intuitive. It's worth noting the ratio test condition for availability of the BUB was omitted from the marketing documents for **Corestate** but reinstated in final terms.

BUB Starter Amounts



Around 38% of 2018's full suite HYB contain BUBs that are 'salted' with a starter amount that can be paid out immediately (assuming compliance with the BUB conditions)[7]. When compared against the roughly 16% prevalence of these starter baskets in 2017, this is a troubling trajectory. Within the 2018 cohort, a significant 30% of these starter amounts are soft-capped by reference to EBITDA.

Although more widespread in US HY, (as we highlighted in Part II of our 2017 Annual Review, when we first brought attention to it), the 'primed BUB' phenomenon has not been limited to Reverse Yankees. BUB starter amounts continued to feature in 'straight' European deals in 2018 (e.g. **Selecta**, **Techem**, **Nexi**, **Refresco**, **Stada**).

Interestingly, starter amounts are also more frequently observed in European loans, appearing in 56% of the European senior facilities agreements (featuring 50% CNI-based BUBs) we reviewed in 2018.

There was some documentary capitulation from European bond issuers on this front in 2018, resulting in the starter baskets being reduced in **Cirsa** and **BMC Software** and discarded in **Aurum**.

Notwithstanding, we remain strongly opposed to the idea of BUB starter amounts as a matter of principle and believe well-informed investor engagement on covenants could prevent them from proliferating further in the European HY market in 2019.

As we have highlighted frequently over the past year, the concept of 'priming' is glaringly antithetical to a basket of which the very function is to accumulate capacity earned *gradually* from profit generation. As such, it is particularly objectionable in an LBO (e.g. **International Design Group**, **Olympic**, **Italmatch, Flora Food**).

Worse still, where the starter amount is soft-capped by reference to EBITDA, bear in mind the consideration that this is essentially 'double-counting' the growth with which the BUB is already increasing through (often artificially inflated) CNI (e.g. **AkzoNobel**, **Refinitiv**, **Travelport**).

Off-Market Post-IPO Dividends Basket

Where a bond contemplates a relaxed dividends regime following a public float of the issuer group's shares (what we refer to as the "Post-IPO Dividends Basket"), prevailing European HY market convention for the past several years has allowed a Permitted Payment carve-out with the following construct: enabling the issuer (or its parent guarantor) to distribute annually up to *the greater of either*: 6% of net public offering proceeds *or*

[7] i.e. ratio debt capacity and absence of default - the effectiveness of which as BUB conditions, as we observed earlier, is already being eroded in certain bonds.

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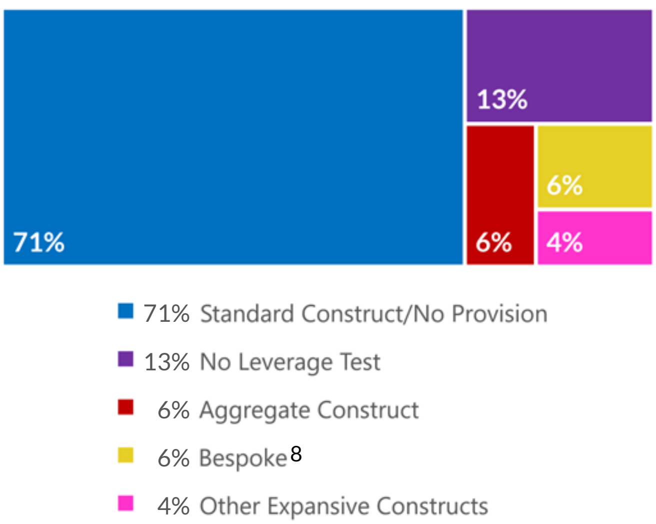
5% of market cap/IPO market cap if a specified leverage test is met, or 7% market cap/IPO market cap if a lower leverage ratio is achieved.

In 2017, we noted less than a handful of highly divergent sponsor deals (representing a negligible ~2% of the year's full suite HYB) on this front: two (*Marcolin* and *Atento*) that did not subject access to the market cap limb to leverage test compliance; and a further two (*Schenk* and *Diversey*) that additionally formulated this basket as the *SUM* of 6% of receipts and a proportion (5% or 6%) of market cap, *rather than alternatives*.

Indulgent Post-IPO Dividends Basket



Unfortunately, deviations from the European market standard for this basket have proliferated in 2018 (as illustrated in the chart above).

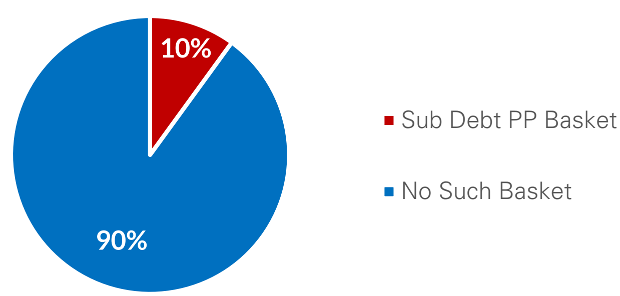
The most aggressive deals in this respect are: **Pure Gym**, **Refinitiv** and **AkzoNobel**, featuring (A) the 'Aggregate Construct' (i.e. allowing annual post-IPO dividends of *BOTH* 6% offering proceeds *PLUS* 5-7% market cap)[9] as well as (B) failing to subject the market cap prong to a leverage test.

Several other 2018 deals remove the traditional 6% of public offering proceeds limb while eschewing the leverage test condition to availability of the 5-7% market cap limb (e.g. **Samsonite**, **Gamenet**, **Cirsa**, **Ceva Logistics**). Other deals have replaced the public offering proceeds limb with a 6-7% market cap limb, but subject to a leverage test (either set at the opening ratio or already met) (e.g. **Tele Columbus** and **Guala Closures**). Others have either inflated the proportion of public offering receipts payable (to 7% in **International Design Group**) or the typical proportion of market cap payable (to 8% in **El Corte Ingles**).

To our knowledge, similar expanded flexibility on this already generous basket formulation has only been rebuffed by European HY investors twice in 2018. The market prong of the post-IPO dividends basket was removed from final terms of **BMC Software** (significantly, a Reverse Yankee - post-IPO dividends by reference to a proportion of market cap continues to be more controversial in the US HY market). In **Corestate**, the basket (comprised of annual dividends of the greater of 7% public offering proceeds and 7% market cap with no leverage test, which would have been immediately available to this public issuer) was removed from final documentation entirely.

Specific Permission for Subordinated Debt

Dedicated Sub Debt Basket



The RPs covenants of several 2018 bonds (equating roughly 10% full suite HYB) featured anomalous soft-capped PP baskets for the repayment of subordinated

[8] Examples of bespoke annual dividends basket include **Vallourec** (basket of greater of €100m/35% consolidated net income) and **Intelsat** (7.5% of public offering proceeds annually plus an additional $300 million (not annually)).
[9] **Flora Food** also uses the Aggregate Construct, but subject to leverage.

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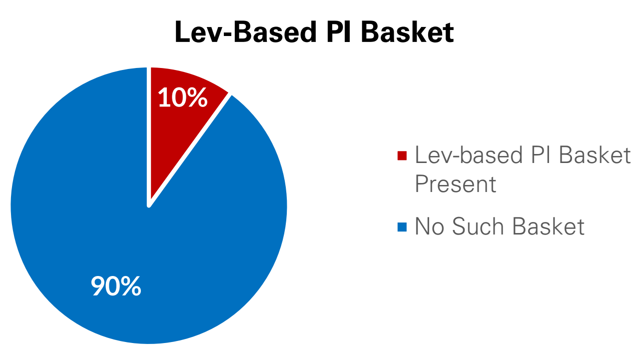
debt (up to the equivalent of 17.5% EBITDA in **Travelport**). As an alternative, this dedicated basket is unlimited in amount in **Selecta**, subject only to compliance with a leverage ratio (requiring under ½ a turn of deleveraging from the opening level).

There have been intermittent sightings of such baskets since mid-2017, but statistically fairly negligible (equating ~ 3% of 2017 full suite HYB).

Despite the increased prevalence in 2018, not only do such baskets remain distinctly off-market, but they are yet another issuer-friendly concession that subverts the very essence of the RPs covenant. Their presence impairs the covenant's intrinsic protection against repayment of debt that is junior to the subject bonds (which should only be permissible to the extent there is *otherwise* capacity to make dividends etc).

Leverage-Based Permitted Investments Basket



Also highly aggressive and disingenuous is the presence of leverage-based baskets for "Permitted Investments" (PI) in roughly 10% of 2018 full suite HYB.

Before 2017, such baskets had been virtually unheard of in the European HY market (although more common in US credit agreements and some US high yield). We first drew attention to their apparition in Part II of our 2017 Annual Review (at which point, prevalence was at about 7% of 2017 full suite). We continue to exhort investors to ensure they are eliminated from offering documents in 2019.

Baskets of this nature are essentially a stealthy way of turning investments capacity into dividends capacity – and earlier (and for longer!) than anticipated!
Here's how:

(A) As highlighted earlier, given the broad definition of "Investments" employed in HY, which encapsulates upstream loans, and the fairly standard PP carve-out allowing the distribution of capital stock of Unrestricted Subsidiaries, such basket (and indeed any general purpose PI basket) can be used to make an upstream loan or invest in an Unrestricted Subsidiary the shares of which are then distributed out of the restricted group;

(B) Several of the leverage-based PI baskets we observed in 2018 are set at higher levels than those of the standard leverage-based PP basket (e.g. **Kraton Polymers** and **BMC Software**[10]. In the case of **Travelport**, for example, 1.5x higher and immediately available as higher than opening leverage);

(C) Even if the PI basket is set as the same leverage level as that for the RPs basket (as in **Energizer**), by contrast to the leverage-based RPs basket, its availability is unlikely to be blocked on a Default or even an EoD[11].

[10] Even though both RPs and PI basket leverage levels reduced in **BMC Software** due to pushback, the 0.25x leverage differential between the two baskets remains the same.
[11] In **Refinitiv** and **Samsonite**, where ratio-based PIs and RPs are permitted at the same leverage level, use of the RPs basket ceases on any EoD, whereas the PI basket remains usable until payment and bankruptcy EoDs.

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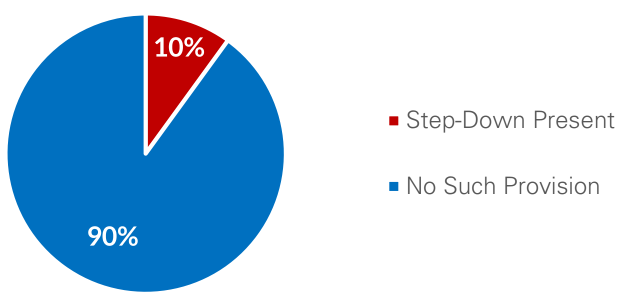
ASSET SALES COVENANT

Disposal Proceeds: Lev-Based Step-Down

2018 also saw unprecedented incursions into the (already liberal) European HY asset sales covenant, by virtue of what we refer to as the 'leverage-based step-down' (appearing in 10% full suite HYB).

'Step-Down' Mechanisms



In certain cases, this qualification is crafted as a departure from the standard requirement that 100% of Excess Proceeds (that haven't been applied to reduce senior debt or for reinvestment pursuant to the applications of proceeds menu) be used to make a par offer to redeem the subject bonds (as well as other pari passu debt). In **Travelport**, **Techem, International Design Group** and the **Atotech PIK**, for example, if pro forma total net leverage is no more than a specified level[12], only 50% of Excess Proceeds are required to make an asset sale offer to the noteholders.

Other deals are even more aggressive. In **Hertz** for example, the application of proceeds menu (mandating that disposal proceeds be used either for deleveraging or reinvestment) is disapplied if the leverage ratio is 4.5x or less and the entire asset sales covenant disapplied if leverage reaches 4x or below (by virtue of disposals where pro forma leverage no more than 4x being carved out altogether from the definition of "Asset Disposition"). **AkzoNobel** uses another permutation, such that the proportion of proceeds required to be applied towards debt prepayment or reinvested declines to 50% and then 0% based upon secured net leverage ratios of 4.25x and 3.75x, respectively (from the outset, higher than opening secured leverage!).

Even more disturbingly, the majority of bonds containing such a 'step-down' mechanism in the asset sales covenant feature a corresponding provision in the RPs covenant (usually by virtue of a dedicated PP basket) to allow such asset sales proceeds to be paid straight out as an RP (e.g. to pay a dividend or repay junior debt)[13]. While it is standard that proceeds *declined after an asset sale offer* may be retained by the restricted group for *any permitted purposes*, typically any RP funded with such proceeds could still only be made subject to capacity being *otherwise* available, either under the BUB or general Permitted Payments exceptions.

Such a dedicated Permitted Payment carve-out creates a straight 'pass-through' mechanism, thereby enabling cash leakage from asset sales proceeds - not only where an asset sale offer has been declined by noteholders (e.g. because the notes are trading above par), but now also by operation of the leverage-based step-down. This adds insult to injury.

Another feature to be watchful for was observed in **Refinitiv**, which, although the asset sales covenant did not contain a leverage-based step-down, permitted "Declined Proceeds" – i.e. the amount by which the proceeds available in an asset sale offer exceeds the amount of notes tendered – to inflate the BUB (and accordingly be used immediately to make RPs). Such a 'pass-through' mechanism should be resisted even in the absence of a 'step-down' for the reasons explained above. Indeed, similar flexibilities were removed from final terms for **Aurum** and **Stark** (as well as in respect of "Specified Asset Sales" in **Fedrigoni** and **Nexi)**.

[12] The specified total net leverage ratios for the step-downs in these bonds are: 3.25x in **Travelport**, 3.5x (reduced from 4.75x) in **IDG**, 5x in **Atotech** and 5.55x in **Techem**.

[13] Such 'pass-through' provision does not appear in the RPs covenants of **Cirsa** or **Darling**, the assets sales covenants of both of which contain a leverage-based step-down.

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As for the leverage-based step-down mechanism, the specified leverage ratios were tightened in both **International Design Group** and **Cirsa** but, to our knowledge, have not been removed entirely from any offering documents in which they appeared.

Bizarrely, the 'step-down' mechanism is more prevalent in leveraged loans - both in the US, and now, Europe[14] – than in either European or US high yield (although more common in US HY)[15].

That's no reason to allow it to take hold in European high yield. It all but eviscerates the purpose of this already laissez-faire high yield asset sales regime. To now allow asset disposals to pay shareholders a windfall in preference over deleveraging or reinvestment in the business (or, at the very least, making an offer to redeem the subject bonds and pari debt) may just be the final nail in the coffin of this already severely compromised covenant[16].

[14] Appearing in just over ¼ of European loans reviewed in 2018.
[15] To our knowledge, there were only two apparitions of the step-down mechanism in European high yield in 2017 – *Atotech* (cash pay) and *Atento* – tellingly, these were both Yankee deals (i.e. European companies issuing $-denominated HY).
[16] For a refresher on the parameters of the high yield asset sales covenant, see our Special Report: "What to Expect From an Asset Sale Covenant in the Current European High Yield Market" (28 February 2018).

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