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Supplementing a prospectus – key considerations

This note is written in the context of DCM bond issues in the European market, offered to professional investors and under an exemption to the registration requirements of the US Securities Act of 1933 (as amended), on either a Regulation S or a Rule 144A/Regulation S basis. It is a high-level overview of a complex topic, intended to provide a general overview of the issues. Prior to taking any specific actions, the particular factual circumstances of an individual bond issue and issuer should be considered and specific legal advice sought.

What triggers the requirement for a supplement under the Prospectus Regulation?

For a prospectus subject to either the EU or UK Prospectus Regulation (i.e. because an offer to the public is being made or admission to trading on a regulated market is being sought, in either case in the EU or UK as applicable), **any significant new factor, material mistake or material inaccuracy** relating to the information included in the prospectus which could influence the assessment of the investment, which arises or is noted after the publication of the prospectus but prior to the closing of the offer or the start of trading on a regulated market (whichever occurs later), requires the preparation, approval and dissemination of a supplement. The supplement must be published without undue delay. See Article 23(1) of the relevant Prospectus Regulation.

Similar provisions exist in the rulebooks of certain multi-lateral trading facilities on which bonds are commonly listed (e.g. Section 3, Paragraph 5 of the London Stock Exchange's International Securities Market Rulebook), save that the obligation to supplement arises in the period between publication of the admission particulars and the time of admission of the relevant securities (i.e. there is no "public offer") – see further below *"What if the bond is outside the scope of the Prospectus Regulation and is being listed on an exchange-regulated market?"*.

When could a supplement arise in relation to an MTN programme or a standalone bond?

As stated above, supplements can only be published during a defined and limited period in relation to a bond that will be listed[1]: (i) in the context of an application to trading on a regulated market, between the approval of a prospectus and the later of closing of the offer and the start of trading on a regulated market; and (ii) in the context of an exempt offer listed on an MTF, in the period specified in the rules of the relevant stock exchange, which for the LSE's ISM, is the period between publication of the prospectus and the admission of the bonds.[2]

As the period of validity for a base prospectus approved in connection with a programme is 12 months for regulated markets subject to the EU or UK Prospectus Regulation and most of the major MTFs on which bonds are listed, the timing window during which a requirement to publish a supplement could arise is much longer for a programme than a standalone bond.

In the case of a standalone there are only a few days between the date of signing when the "final" or "black" prospectus is published and either closing of the offer/start of trading on a regulated market or admission of the bonds on the MTF when a supplement could arise.

The likelihood of a supplement in a standalone bond context should therefore be very low, especially as the period between signing and closing on a standalone is normally a matter of two or three business days. In addition, the due diligence processes, including the calls prior to the pricing of the transaction and prior to signing, will have focussed on whether there is any possible pending news which could render the prospectus contents misleading or inaccurate, further reducing the likelihood of a supplement being required on a standalone.

What amounts to a significant new factor, material mistake or material inaccuracy?

What does the Prospectus Regulation actually mean by "a significant new factor, material mistake or material inaccuracy relating to the information included in the prospectus which could influence the assessment of the investment"? The terms "material" and "significant" are not defined in the Prospectus Regulation. In addition, there is limited regulatory guidance specifying when a supplement must be published. Whilst Article 18 of Commission Delegated Regulation (EU) No.2019/979 (and the retained UK law version of this regulation), sets out a non-exclusive and limited list of situations where a supplement is expressly required, these are not particularly helpful for bond issuers, as most of the situations identified would either not be directly relevant for bond issuers or are uncontroversial (for example, increasing the aggregate nominal amount of the offering programme).

Therefore, the test for whether a significant new factor, mistake or inaccuracy qualifies as a triggering event for a supplement actually requires the application of the same test that is used when a prospectus is drafted – that is, is the new factor, mistake or inaccuracy such that it would be "necessary information... material to an investor for making an informed assessment of: (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor; (b) the rights attaching to the securities; and (c) the reasons for the issuance and its impact on the issuer".[3] For a programme, typical examples of when a supplement is required include the release of financial information (annual or interim)[4], or when a rating change occurs.[5]

1 In addition, an unlisted bond that is being offered to the public as defined in the UK and EU Prospectus Regulations would also be subject to the same requirements for prospectus supplements as a bond being listed on a Prospectus Regulation regulated market.

2 For Euronext's GEM in Ireland, the relevant period is the time between the approval of the listing particulars and the commencement of dealings in the securities on the GEM. For Luxembourg's EuroMTF, the relevant period is the time between when the prospectus is approved and the time when trading begins on the EuroMTF.

3 Article 6(1) Prospectus Regulation.

4 In December 2022 the EU Commission proposed amendments to the EU Prospectus Regulation which intend to remove the requirement to publish a supplement for updating annual or interim financial information incorporated by reference in a base prospectus which is still valid.

5 In relation to ratings, including a ratings "outlook" in the prospectus should normally be avoided, as an outlook is more likely to be changed with less notice to an issuer than the actual rating itself. If the ratings outlook is not included in the prospectus, then a change to the outlook should not, in the absence of other factors, trigger a supplement requirement.

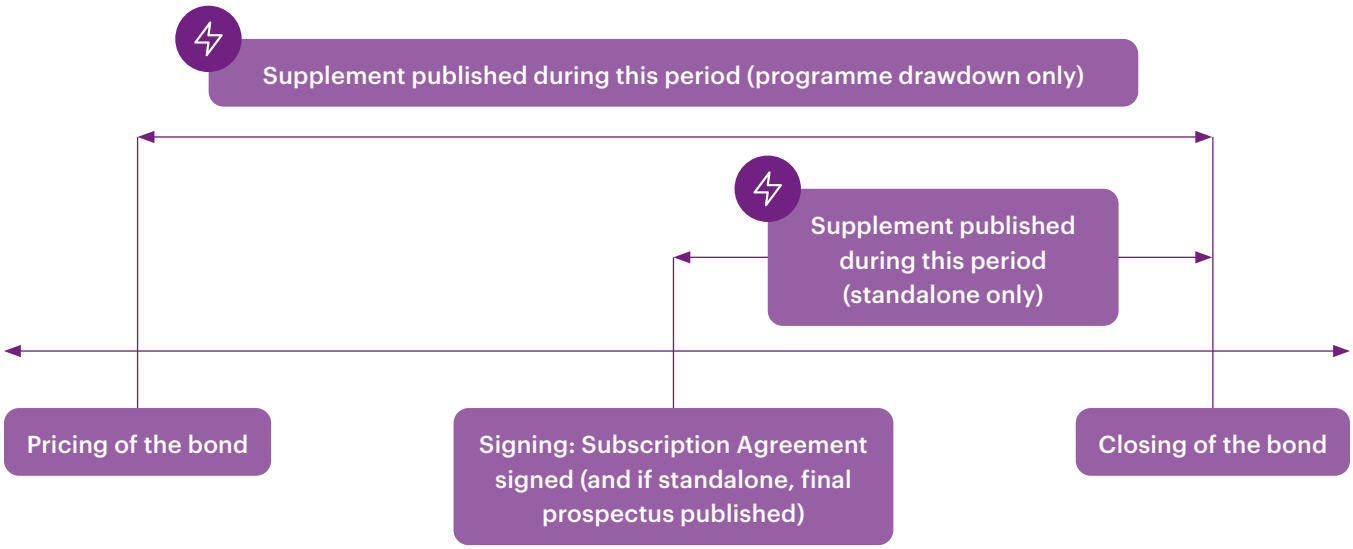
In the case of a Rule 144A offering, any new developments must also be considered against the relevant US disclosure standards. In certain cases, this may result in the need to amend the disclosure even where the standard under the Prospectus Regulation may not have been satisfied.

What can't be included in a supplement?

There are limits to what can be included in a supplement. While the position is more flexible on multi-lateral trading facilities, the applicable competent authority for regulated markets in the UK and EU can be expected to refuse to approve supplements, among other things: (i) where there is no material or relevant information included and there is therefore no significant new factor, material mistake or inaccuracy (e.g. a supplement should not be used simply to clarify existing drafting that does not amount to a material mistake or inaccuracy); or (ii) in the context of a programme, where a supplement attempts to add new types of securities or to change the terms of the securities such that a new type of security is being created.[6]

In relation to (ii) above, it should be noted that certain competent authorities, in assessing supplements for regulated markets, have approved supplements which amend programme terms and conditions to introduce sustainability-linked bond coupon step-up mechanics, on the basis that this does not create a new type of security, but is merely an amendment to the interest/coupon wording that does not change the security originally covered in the base prospectus from being a fixed rate note. This is helpful as it allows issuers who have introduced sustainability-linked bond frameworks as part of their ESG strategy to modify their programmes to allow for the issue of sustainability-linked bonds by way of supplement, rather than having to wait until, or bring forward the timing of, their annual programme update.

Does a supplement after publication of a prospectus and before closing give investors walk-away rights under the Prospectus Regulation?



In circumstances where the Prospectus Regulation (either the EU or the retained UK version) applies, and a supplement is required in the period between (i) pricing of a drawdown / signing of a standalone, and (ii) closing, the supplement will need to be drafted and approval sought from the relevant competent authority before the supplement is published. Consideration will also need to be given to whether the supplement (and the time taken to prepare and approve it), will impact the timing of closing (for which reason there is normally a right in subscription agreements for joint lead managers to postpone

6 The December 2022 proposals by the EU Commission to amend the EU Prospectus Regulation propose to add an explicit prohibition on the use of a supplement to add a new type of security for which the necessary information has not been included in the base prospectus. It is also proposed that ESMA be tasked with developing guidelines to specify what is considered the introduction of a new security.

closing by up to 14 calendar days). In addition, as discussed below "*What rights do the joint lead managers typically have in relation to a prospectus supplement?*", the subscription agreement will normally provide managers with a right not to proceed with their underwriting, either on the basis of an express termination right relating to a breach of representation, or failure of a condition precedent. Furthermore, counsel will need to consider whether Article 23(2) of the Prospectus Regulation is applicable.

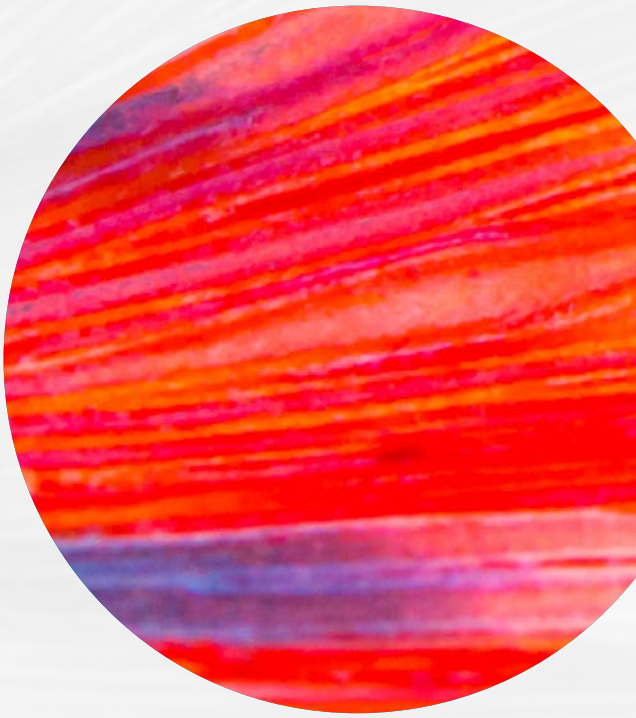
Article 23(2) gives investors who have already agreed to purchase or subscribe for the securities before the supplement is published a "walk-away" right; that is, a statutory right to withdraw their acceptances within two[7] "working days"[8] after the publication of the supplement. However, this only applies "where the prospectus relates to an offer of securities to the public". Despite some uncertainty on this issue in the past, ESMA helpfully clarified in its Final Report on Draft regulatory technical standards under the Prospectus Regulation, published on 17 July 2018, that Article 23(2) walk-away rights only apply to supplements to prospectuses relating to offers to the public and not supplements to prospectuses which are produced in relation to an admission to trading on a regulated market only. As pre-Brexit guidance, this guidance remains valid in relation to the UK on-shored version of the Prospectus Regulation post-Brexit.

Therefore, where a Prospectus Regulation compliant prospectus is only required due to the bonds being admitted to trading on a regulated market, and there is no offer to the public (which there would not be if the bond has a denomination of at least EUR 100,000, or where any of the other exemptions to the requirement to publish a prospectus for an offer of securities to the public as set out at Article 1(4) of the Prospectus Regulation apply), no investor walk-away rights would arise on publication of a supplement. Consequently, wholesale bonds being listed on a regulated market, whether issued on a standalone basis or under a programme, should not be subject to statutory investor walk-away rights.

There is no equivalent of walk-away rights in the rulebooks of the major multi-lateral trading facilities on which international debt capital market bonds are commonly listed – see below "*What if the bond is outside the scope of the Prospectus Regulation and is being listed on an exchange-regulated market?*".

While the 2018 ESMA guidance has therefore clarified that no walk-away rights apply to wholesale bonds being listed on a regulated market, it should always be remembered that the capital markets are a repeat and relationship-driven business. Consequently, we would expect that if the significant new factor, material mistake or material inaccuracy was significant or material enough that the transaction participants considered a supplement was necessary, the joint lead managers are likely to feel the need to contact the investors and reconfirm their orders in any event, in the interests of preserving good longer term relationships with those investors.

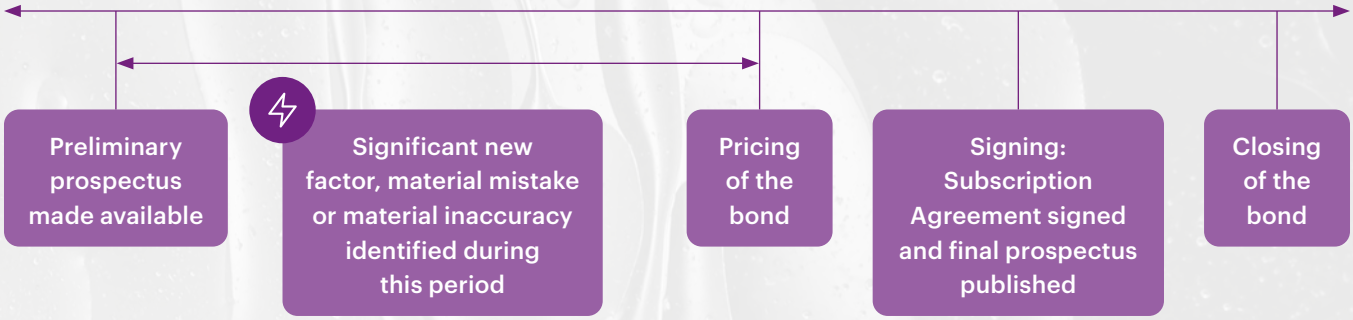
Depending on the view of the joint lead managers as to the likelihood of investors electing not to reconfirm their orders, the joint lead managers may choose to exercise their termination rights under the subscription agreement – see further below "*What rights do the joint lead managers typically have in relation to a prospectus supplement?*".



7 In the EU this period was temporarily extended to three working days by Article 23(2a), from 18 March 2021 to 31 December 2022, and the EU Commission proposals of December 2022 suggest permanently increasing the period to three working days in the EU.

8 For the purposes of the EU Prospectus Regulation, "working days" means working days of the relevant competent authority responsible for approving the supplement, excluding Saturdays, Sundays and public holidays, as defined in the national law applicable to that competent authority. For the purposes of the UK Prospectus Regulation, "working days" means a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a UK bank holiday.

What if a significant new factor, material mistake or material inaccuracy is identified post-release of the preliminary prospectus but prior to pricing in the case of a standalone?

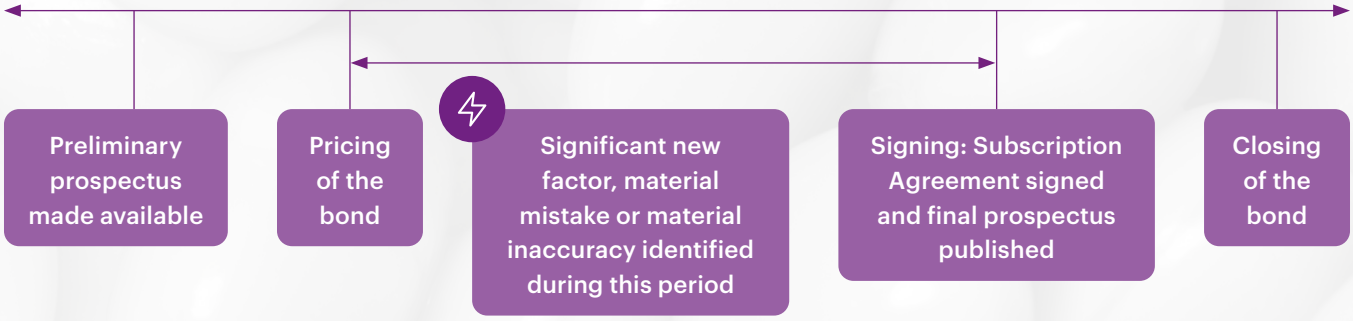


For a standalone bond issue, the "final" or "black" prospectus will only be published on the day of signing the subscription agreement. Prior to signing, a "preliminary" or "red herring" prospectus is used to market the bond, and the bond is priced on the basis of the information contained in the red herring prospectus. As the prospectus has not been approved and published at this point, any amendment to the preliminary prospectus is not made pursuant to Article 23 of the Prospectus Regulation, but rather to reduce any potential concern that the bonds are being priced on the basis of misleading information.

If information that would be a significant new factor, material mistake or material inaccuracy if the final prospectus had already been published is identified prior to the pricing of the bond, the best option will usually be to update the preliminary prospectus, and to ensure that every investor to whom a copy of the preliminary prospectus was sent, receives both a copy of the updated preliminary prospectus, and a blackline (ideally both a full blackline and a "page pull" showing changed pages only) showing the amendments that have been made to the version of the preliminary prospectus originally distributed.

If the issuance is being made on a Rule 144A basis, the pricing term sheet delivered to investors at the "time of sale" will set out any material amendments or changes in the disclosure from the preliminary prospectus. Importantly, this need not include every change to the preliminary prospectus, but only those that, in the judgement of US counsel and other transaction participants, are material to making a decision to invest in the securities. Where amendments are more significant and may take more time to analyse, US counsel may advise that relevant changes be communicated prior to the time of sale, in the form of an amendment or supplement to the preliminary prospectus (i.e. similar to the Reg S approach where there is a significant new factor, material mistake or material inaccuracy identified, as in the preceding paragraph). In either case, from a US securities law perspective, investors will then be making their investment decision and placing their order at pricing on the basis of the updated information, which will be consistent with the final prospectus published on signing.

What if a significant new factor, material mistake or material inaccuracy is identified post-pricing but prior to signing (and therefore prior to publication of the final prospectus) in the case of a standalone issuance?



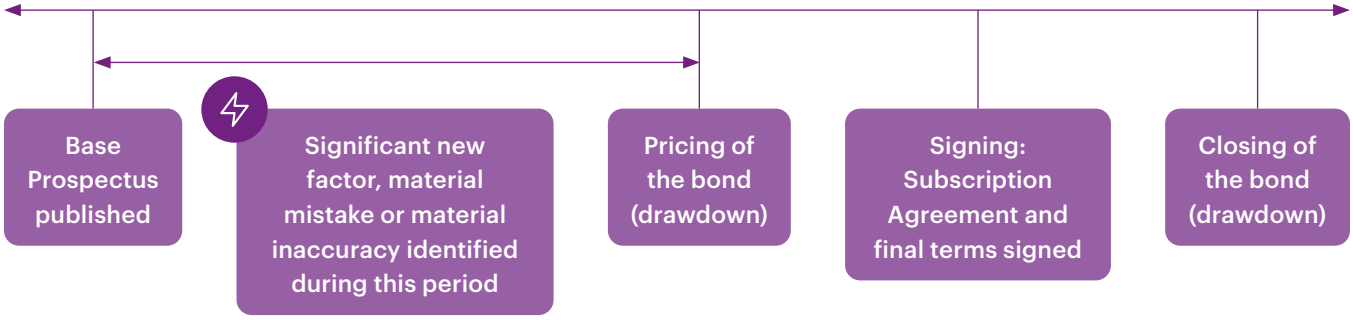
If the significant new factor, material mistake or material inaccuracy is only identified or only arises after pricing but prior to signing, the prospectus will not have been published, and the investors will have received and made their investment decision on the information in the preliminary prospectus.[9] In such a situation the managers are faced with the question of whether they want to go ahead and sign the subscription agreement. If the managers wish to proceed, it is recommended to ensure all investors who have been allocated bonds are made aware of the issue by communicating to investors the changes being made to the preliminary prospectus as a result of the significant new factor, material mistake or material inaccuracy, either through an updated pricing term sheet or highlighting the amendments to the prospectus, and for the joint lead managers to contact investors who have been allocated bonds to ensure that they are comfortable with their allocations and to "reconfirm" the sales on the basis of the new information.

Where the significant new factor, material mistake or material inaccuracy is more fundamental to the issuer's credit or the securities, the issuer or the managers may instead decide to effectively cancel the deal and not enter into the subscription agreement. Theoretically, there is a third option, that instead of either proceeding with the deal on the current terms or cancelling the deal, the managers could, following the circulation of the updated preliminary prospectus, effectively seek to reprice the transaction (that is, to avoid allocated investors pulling out of the deal on the current pricing, the transaction is repriced to take into account the significant new factor, material mistake or material inaccuracy). Such repricing may result in changes to the issue size or issue price, or other pricing terms, but would face several practical issues, including most likely a need to delay signing and closing, and the difficulty of getting investors comfortable in a short space of time with the full impact of the new information. In reality, a longer delay to the transaction to allow for further due diligence to be conducted, by both managers and investors, may be considered more appropriate.

The approach taken on any particular transaction will depend on the nature of the significant new factor, material mistake or material inaccuracy and its significance in relation to the issuer's overall creditworthiness, the expected and actual reaction of the investors, and the general conditions of the prevailing bond market at the time.

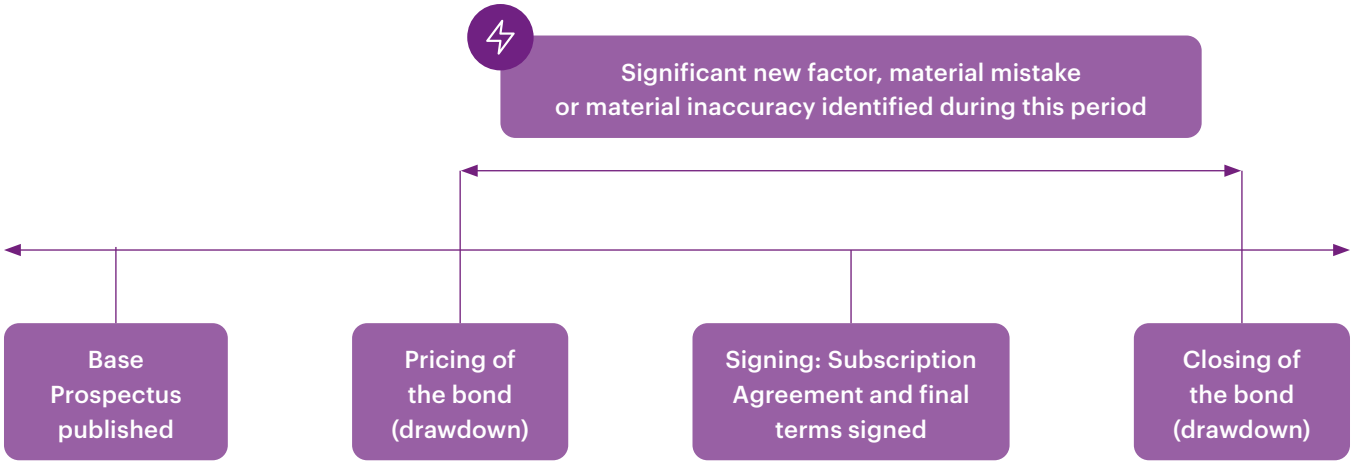
9 This situation is more likely to arise in a Reg S context where there is usually a two to three day period between pricing and closing. In Rule 144A transactions, signing usually follows much more swiftly after pricing, either on the same day, or more commonly in the European market, on the business day following pricing.

What if a significant new factor, material mistake or material inaccuracy is identified prior to pricing in the case of a drawdown under a programme?



For a drawdown under a programme, the base prospectus has already been published prior to the pricing, so the signing date does not impact the status of publication of the base prospectus. If a significant new factor, material mistake or material inaccuracy in the base prospectus is identified shortly before pricing, pricing of the drawdown should be delayed (if necessary) to allow for the required supplement to the programme to be prepared and published. Depending on the content of the supplement and the volume and nature of the information it contains, the joint lead managers may decide that it is appropriate from a marketing standpoint to allow for some time (perhaps a day or so) after publication of the supplement for the market to digest the new information before pricing the drawdown. Such a delay is not strictly necessary however, and will be guided by the joint lead managers acting on the drawdown.

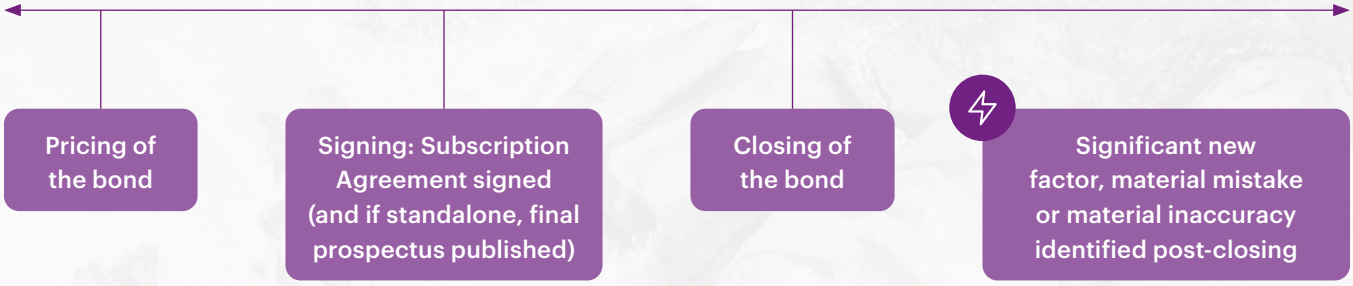
What if a significant new factor, material mistake or material inaccuracy is identified post-pricing (but pre-signing or pre-closing) in the case of a drawdown under a programme?



A significant new factor, material mistake or material inaccuracy identified during the period between pricing of a drawdown under a programme and closing of the drawdown would require Article 23 of the Prospectus Regulation to be considered if the drawdown is subject to the Prospectus Regulation (see above *"Does a supplement after publication of a prospectus and before closing give investors walk-away rights under the Prospectus Regulation?"*). Even if the Article 23 walk-away rights do not apply, the joint lead managers of the drawdown are likely to consider, in addition to potentially delaying closing to allow time for the publication of any required supplement, either (i) refusing to enter into the subscription agreement (if signing has not yet taken place), or (ii) if the subscription agreement has

already been signed, terminating their underwriting commitments (see below "*What rights do the joint lead managers typically have in relation to a prospectus supplement?*"). In theory, an alternative to such refusal to sign the subscription agreement or the termination of an existing subscription agreement, may be the repricing of the bond with investors to reflect the (adverse) news contained in the supplement (and the amendment of the subscription agreement and documents to reflect the repriced bonds), as discussed above for a standalone bond (see "*What if a significant new factor, material mistake or material inaccuracy is identified post-pricing but prior to signing (and therefore prior to publication of the final prospectus) in the case of a standalone?*").

What if a significant new factor, material mistake or material inaccuracy is identified after closing?



If the bond has already been issued and admitted to trading on the regulated market, in respect of either a standalone or a drawdown under a programme, there is no requirement for a supplement under the Prospectus Regulation in relation to that bond and so there is no ability to have one approved by the relevant competent authority. If the significant new factor, material mistake or material inaccuracy had arisen at the time of the publication of the prospectus or had arisen prior to the closing of the bond issue, then the issuer would have potential liability for that misleading information[10] which was not corrected by a supplement.

Regardless of the fact that a supplement is not relevant after closing of the bond, an issuer should bear in mind their continuing obligations, both under the EU or UK version of the Market Abuse Regulation (as applicable) to announce inside information (information of a precise nature which has not been made public, relating directly or indirectly to the issuer or the bonds and which, if made public, would be likely or have a significant effect on the price of the bonds) via a regulatory information service, and their other continuing obligations under the listing rules of the relevant stock exchange upon which the bonds are listed.

Separately, in relation to a programme, the issuer would need to supplement the programme if the issuer wished to keep the programme up to date prior to any further regulated market listed issuances under the programme.

10 In the UK, where the bonds are admitted to the regulated market in the UK, an issuer would have potential liability under section 90 of the Financial Services and Markets Act 2000.

What if the bond is outside the scope of the Prospectus Regulation and is being listed on an exchange-regulated market?

If the bond is outside the scope of the Prospectus Regulation, the requirements for a supplement will be governed by the rules of the relevant stock exchange (referred to herein as an "exchange-regulated market") upon which the bonds are to be listed. A summary of the current requirements of certain UK and European multi-lateral trading facilities with regard to supplements is set out below. Walk-away rights are not triggered by the publication of supplements between the publication of the prospectus and closing of the bond issue on any of these exchanges.

Stock Exchange	Requirement for Supplements
International Securities Market, London Stock Exchange	Section 3, Paragraph 5 of the ISM Rulebook: "If, at any time after the admission particulars has been Published and before the date of admission of the relevant Securities, there arises or is noted any significant new factor, material mistake or material inaccuracy relating to the information included in the admission particulars, a supplementary admission particulars containing details of such new factor, mistake or inaccuracy must be submitted and Published in accordance with the provisions of this Section 3."
Global Exchange Market, Euronext Dublin	Paragraph 3.10 and 3.11 of the GEM Listing and Admission to Trading Rules for Debt Securities: "3.10 An issuer must submit supplementary listing particulars to Euronext Dublin for approval if at any time after the listing particulars has been approved by Euronext Dublin and before commencement of dealings in the securities, the issuer becomes aware that: (1) there is a significant change affecting any matter contained in those listing particulars; or (2) a significant new matter arises, the inclusion of information in respect of which would have been so required if it has arisen at the time when the listing particulars was prepared. 3.11 For this purpose 'significant' means significant for the purpose of making an informed assessment of [(1) the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor; and (2) the rights attaching to such securities]."
EuroMTF, Luxembourg Stock Exchange	Rule 206 of the Rules & Regulations of the Luxembourg Stock Exchange: "Every significant new factor, material mistake or material inaccuracy relating to the information included in a prospectus which may affect the assessment of the securities and which arises between the time when the prospectus is approved and the time when trading begins, shall be mentioned in a supplement to the prospectus, scrutinised in the same way as the prospectus and published in accordance with Rule 205 here above without undue delay."
Vienna MTF, Vienna Stock Exchange	No requirements for supplements in the Vienna MTF Rulebook.
Qualified Investor Bond Market, The International Stock Exchange	Definition of "supplemental listing document" in the QIBM Listing Rules: "if at any time after the listing document is approved and before the commencement of dealings in the bonds (closing of the offer period or the time when listing begins, whichever occurs later) the issuer becomes aware of a material change affecting any matter contained in the listing document, or a material new matter arises which would have been required to be included in the listing document if they were known at the time the listing document was prepared, these are set out in a supplemental listing document"

For those exchange-regulated markets where supplements may be required, the considerations as to how the managers and the issuer may practically manage a situation where a supplement is required will in practice be very similar to when the Prospectus Regulation applies as outlined above in this article.

This is because the concerns as to how investors will react to the publication of a supplement and the information contained in it, and whether the investors will be unwilling to purchase the bonds on closing as a result, is driven by similar commercial and legal factors.

What rights do the joint lead managers typically have in relation to a prospectus supplement?

Once the subscription agreement is signed in relation to a standalone or a drawdown under a programme, the relevant managers will have certain rights and the issuer certain obligations in relation to any supplements to the prospectus.

The managers' rights can be broadly summarised as: (i) rights to be consulted (and in a standalone context, there may be a requirement to obtain the consent of the managers, such consent not to be unreasonably withheld or denied if the supplement is required by law, regulation or a regulatory authority) prior to any supplement being published by the issuer in the period between signing a subscription agreement and closing; (ii) rights to terminate the managers' underwriting commitments (on the basis that the issuer can no longer represent that the un-supplemented prospectus contains all material information)[11]; and (iii) rights to receive copies of any supplements.

The managers' rights of consultation (and in a standalone context, potentially consent), are there to ensure that prior to publication of a supplement after signing of the subscription agreement and before closing, the issuer engages in a discussion with the managers as to whether a supplement is actually necessary – that is, whether the underlying factor prompting the issuer to consider a supplement really amounts to a significant new factor, material mistake or material inaccuracy.

Every situation is different...

As it is not possible to outline in advance every circumstance in which a supplement will be required, any situation where deal participants consider that the trigger for a supplement may be met will need to be considered on its merits. This can be a particularly time-pressured consideration if these questions are being assessed on or around pricing, signing or closing of a transaction. If you would like to discuss the matters raised in this article further, please get in touch with the Dentons DCM team.

11 This can be expressed as a failure of a condition precedent to closing and/or an express termination right.

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