

Deminor *Damage Recovery*

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Dear Reader,

On 21 December 2010, the S&P 500 closed above the 1,254 point level, the first time the benchmark index managed to get back to the level it had reached before the investment bank Lehman Brothers collapsed in September 2008. The market far happily continued its recovery towards the end of February 2011 when it reached the 1,319.88 point level.

The financial crisis, however, did not start with the Lehman Brothers bankruptcy. The S&P had reached its highest point one year earlier, on 10 September 2007 (at 1,565) before setting in its decline since then, with a few ups and downs in between. Around 3.5 years after it reached its summit, the market has still not fully recovered. This should not be surprising. When the market reached its previous high on March 27, 2000 (at 1,523), it took more than 7 years to get back to that level again.

Equities have performed dreadfully over the last decades, especially in comparison with safer asset classes such as bonds and cash. We need to go back 20 years in order to have equities perform better than bonds, and even more years for the outperformance to compensate for the risks assumed by equity investors.

Unfortunately, this comparison does not tell the whole story. Indeed, when companies in an index go bankrupt or cause non-repairable losses (such as corporate fraud), they are usually replaced with other companies entering the index (a “clean up” of the index). Those replacement companies may contribute to future index gains while investors are left with the losses. Stock market indices therefore do not fully reflect the real return realized on a portfolio of individual stocks, even if the portfolio replicates the index.

It would be interesting to perform an analysis of the real return realized on a broad market index, taking into account the full effect of fraud, bankruptcy or other non-recoverable losses. It is likely to paint an even more negative picture for the real returns realized by investors on equities over the last two decades.

The real story is of course even more complex. After the stock market correction of 2001-2003, financial institutions heavily promoted complex structured products that would offer a better risk/return ratio than equities. Those who invested with Madoff were not chasing high speculative returns, but were attracted by the steady returns and low risk profile generated by the (fictitious) strategy. The same goes for the many investors (including institutional investors) who purchased CDO's, or the hundreds of thousands of retail investors who bought structured products issued by Lehman Brothers.

Fraud, bankruptcy and corporate wrongdoing are non-negligible factors on real stock market returns. Sadly enough, when investors stayed away from stock markets after the 2001-2003 correction, they were lured into flawed structured products that caused losses on an even more massive scale.

The lesson of all this may be that abundant money always finds its way, if not in real profitable investments, then in the hands of fraudsters who promise better or safer returns. QE2 may help the economy to recover, and hopefully it will last, but let's hope it does not lead to another wave of losses in some product or asset categories.

Erik Bomans

Partner

EU consultation on the UCITS depositary

Deminor is closely following the legislative work and the initiatives of the EU Commission as some major reforms are expected a.o. in the financial services sector in order to implement the G20 commitments.

As part of its work on preventing a future financial crisis, improving crisis management and strengthening the financial system, the European Commission (DG Internal Market) has announced a detailed package of legislative measures for the financial services sector which will be submitted to the Council and European Parliament after stakeholder consultation. These measures should enter into force by the end of 2013 at the latest. The aim is to prevent future crises by improving market transparency, strengthening financial supervision and enforcement, enhancing financial stability and offering better investor protection.

Some EU initiatives have already been taken, like the adoption of the Alternative Investment Fund Managers Directive, more commonly referred as the AIFM Directive (**see our December newsletter**), a regulation on credit rating agencies, two Recommendations of the Commission on remuneration principles and the reform of the EU's financial supervisory framework (**see our September newsletter**).

Next to these existing measures, the coming regulatory reform of the EU Commission includes the following key proposals:

- proposals to improve the functioning of derivatives markets;

- appropriate measures on short selling and credit default swaps;

- improvements on the Markets in Financial Instruments Directive (MiFID) in order to strengthen pre- and post-trade market transparency and extend its scope of application to derivatives;

- a revision of the Deposit Guarantee Schemes Directive and the Investor Compensation Schemes Directive in order to better protect investors and depositors;

- legislative proposals on packaged retail investment products (PRIIPs);

- revision of the Market Abuse Directive in order to extend its rules beyond regulated markets and to include derivatives in its scope of application;

- amendments to the Capital Requirements Directive (CRD IV) to improve the quality and quantity of capital held by banks;

- a Communication on sanctions in the financial services sector to promote harmonization of national supervisory practices and sanctions in the financial sector;

- an action plan on crisis management leading to legislative proposals for the prevention and resolution of failing banks.

Another initiative of the EU Commission is the revision of the UCITS Directive, as it plans a "UCITS V reform",

including amendments to the UCITS depositary liability regime following the lessons learned from the Madoff and Lehman cases. In that respect, Deminor has taken part to **the consultation launched in December 2010 by the EU Commission**, in order to voice the point of view of the investors and share its experience in the Madoff case regarding the liability regime of the depositary.

In its response, Deminor strongly advocated for enhanced investor protection and enforceable rules regarding the liability of the UCITS depositary, so that investors can have effective remedies in case of losses due to failure by the depositary. Deminor believes that private enforcement is a necessary complement to public regulations and that UCITS investors should always be entitled to enforce their rights as provided under the UCITS Directive before local courts in all EU Member States (level playing field). This will be beneficial in two ways: (1) investors will be able to recover their losses and (2) the risk of court actions will act as a deterrent against misconduct or fraud.

While drafting its response, Deminor has also taken into account the newly voted AIFM Directive applying to professional and sophisticated investors in alternative investments. The UCITS Directive should not provide for less stringent rules as it concerns mainly retail investors who deserve even more protection.

If you want to read Deminor's response to the consultation, please click here.

EU consultation on collective redress

As announced in our previous newsletter, the EU Commissioners for Competition, Justice and Consumer Affairs have jointly launched on 4 February 2011 a horizontal public consultation on collective redress.

The purpose of this consultation is to define a common and coherent framework for collective redress drawing as much as possible on the different national traditions. Based on the result of this consultation, a general legal framework on EU collective redress will be prepared, allowing thereafter specific legislative initiatives in the different policy areas (antitrust, consumers, etc.).

The consultation explores in which fields collective redress could have an added value for improving the enforcement of EU legislation and for better protecting the right of victims of mass injury. The clear intent behind this consultation is also to avoid the excesses of the US class actions and to make sure that an EU regime on collective redress would establish the necessary safeguards against abusive litigation.

Deminor will of course participate to this consultation as it has a broad experience of collective actions in Europe. A summary of Deminor's response will be published in the forthcoming newsletter.

To view this consultation, please click here.

Consob consultation on remuneration

Deminor recently participated to the public consultation launched by Consob (the Italian Market Regulator) on remuneration of directors, succession programs for executive directors and mechanisms of self-evaluation of the Board. These issues will be systematically addressed by Consob while implementing the new legislative provisions on remuneration approved by the Italian Government in December 2010.

Considering recent events which involved important Italian listed companies, Deminor decided to take part to this consultation, on the basis of its expertise gained in the field of corporate governance and minority shareholders' rights.

In its comments, Deminor pointed out how the consultation particularly focuses too much on the fixed part of the remuneration of executives and suggested to require more disclosure also on the variable part of the remuneration linked to corporate and individual performance (such as bonuses and stock option plans). Deminor's response to the consultation also underlined the fact that more disclosure should be required on how special termination agreements are negotiated and approved (and how shareholders are involved in this process), and the link between their amount the manager's and company's performance. Finally, Deminor suggested that more importance should be given to the Nomination Committee and its independence as it exercises a pivotal role in the creation of the

executives' retirement plans.

Deminor firmly believes that the disclosure standards of Italian companies must be improved in order to ensure a higher degree of protection for institutional and retail shareholders. The Italian Authority's proposals are a positive evolution in that respect.

Deminor's comments to the consultation paper will soon be published on the Consob website, but in the meanwhile **you can view Deminor's response to the consultation, by clicking here.**

Update on cases

Madoff

Since the Madoff fraud was revealed in December 2008, Deminor has been active defending the interests of 2,500 investors from all over the world (excluding the US) who suffered losses on their investments in so-called “*Madoff feeder funds*” like Luxalpha, Herald Lux, Luxinvest, Thybo, Hermes, Fairfield, Kingate, and Plaza. Assets of these funds were entrusted to and managed by Bernard L. Madoff Investment Securities LLC (hereafter “BMIS”). These investors have lost altogether around EUR 400 million.

After successful pre-trial discovery proceedings, Deminor has undertaken legal actions on the merits in various jurisdictions, including the Netherlands and Luxembourg, in order to seek damages for its clients. Simultaneously, the liquidators of the feeder funds and/or of the BMIS’ estate have also undertaken actions to recover assets on behalf of the estate they each represent. These actions will be outlined below by jurisdiction. Some details will also be made public in this newsletter about Deminor’s contemplated action against JP Morgan regarding bonds it issued and whose underlying assets were investments in Madoff feeder funds.

1. Luxembourg (relevant for: Luxalpha, Luxinvest, Herald Lux, Thybo, Plaza and Hermes)

Since 2010 Deminor has filed more than 16 claims on behalf

of around 1.750 investors against service providers located in Luxembourg.

Following the submission of supporting documents, the cases have been duly registered with the Luxembourg Civil Court (“*Tribunal d’Arrondissement*”). The court has issued a “schedule” for each case and parties are invited to exchange their written argumentation with the other parties. Deminor will focus in the next couple of months on the drafting of such argumentation, replying to the service providers’ defence.

As indicated in our previous newsletters, investors represented by Deminor sued UCITS feeder funds incorporated in Luxembourg (i.e. Luxalpha, Luxinvest and Herald Lux) for misleading information. The prospectus intentionally failed to reflect the genuine structure of the fund, as it later appeared that the service providers (first class institutions like UBS and HSBC), fully delegated their functions to BMIS. In addition, following the pre-trial discovery actions undertaken in 2009, it seems that the board of directors of each feeder fund was aware of the scope of BMIS’ involvement in the fund. Despite this actual knowledge, the fund - through its board of directors - kept issuing a prospectus containing false and misleading information.

On the Luxalpha case, the liquidators of the fund recently filed a petition to force UBS (as promoter and investment manager of Luxalpha) and E&Y to take a position on the prospectus’ liability issue. The liquidators tend to suggest that the

aforementioned service providers should also be held liable for the content of the prospectus.

This is extremely important, as this strategy – the one we are pursuing since the beginning of the case – could open new perspectives of remedies for final investors, taking into consideration the ruling of 4 March 2010 on the legal standing of final investors to sue third parties. In other words, UBS – alongside E&Y and Luxalpha - could be sued by the investors before the Luxembourg civil courts for its role in the drafting and diffusion of the prospectus.

Finally, the criminal investigation launched by the Luxembourg Public Prosecutor against some employees of UBS could be finalized in a near future. The Public Prosecutor will have to decide whether the case is transferred directly to the Criminal Court or to an investigating magistrate, or whether the criminal procedure has to be closed if he is convinced that there is no possible indictment of UBS’ employees.

Deminor will closely monitor the situation and will intervene in the criminal proceedings in its clients’ best interests. Deminor does not exclude to take new initiatives in different jurisdictions, if and when appropriate.

Contact persons: **Erik Bomans** and **Edouard Fremault** (Deminor Brussels) & **Fabrice Rémon** (Deminor France)

2. The Netherlands (relevant for: Fairfield Sentry, Fairfield Sigma and Fairfield Lambda)

Deminor defends the rights of a group of approximately 700 investors in Fairfield Sentry Ltd., Fairfield Sigma Ltd. and Fairfield Lambda Ltd. (hereinafter “Fairfield”) representing together around €200 million of losses.

Those investors are members of the Stichting Fairfield Compensation Foundation (hereinafter the “Foundation”) which was created by Deminor in July 2009.

At the end of 2010, the Foundation served a writ of summons against Citco seeking damages before the Court of Amsterdam. Citco is being sued as custodian of Fairfield.

The legal and factual basis of the claim has been broadened in part due to evolutions in the U.S., including the court actions launched by the U.S. Trustee and class actions launched by investors. Citco is expected to file its first counterarguments in March of this year.

Deminor has also investigated in-depth the role of the Fairfield auditors, PwC. As auditor, PwC had the duty to conduct an investigation into the financial statements of the Fairfield funds and to undertake a thorough due diligence, including on Madoff’s role and operations. It appeared however that no such due diligence had occurred.

Following this analysis of the role of PwC, Deminor has started disciplinary proceedings against

PwC before the chamber of auditors (the “*Accountantskamer*”, a special department within the Court of Zwolle in The Netherlands). The purpose of those disciplinary proceedings is to pave the way for court proceedings to claim damages on behalf of investors.

Contact persons: **Charles Demoulin** (Deminor Brussels) and **Joost Kramer** (Deminor Netherlands)

3. The British Virgin Islands (relevant for: Kingate Global and Kingate Euro)

After having investigated the potential causes of actions that Kingate investors could have against the fund’s service providers, Deminor recently proposed a “*monitoring mission*”.

Taking into account that (i) investors have to rely on the liquidators’ actions, and (ii) there is still a long way to go before any pay-out (if any), Deminor strongly believes that investors should mobilize themselves in order to make their voice heard throughout the Kingate liquidation process. This is the reason why Deminor runs for the election to the investors’ committee that will be set up by the Kingate liquidators aimed at having an ongoing dialogue with the investors.

Kingate has basically two main assets whose realization will influence the final pay-out (if any) that could be distributed by the Kingate liquidators to the investors: (1) the “*customer claim*” in the BMIS’ estate, and (2) the

potential recovery deriving from the legal actions to be initiated by the liquidators against third parties.

The “claw-back” issue has not been settled in a firm way. Therefore, Kingate’s claim in BMIS’ estate is not allowed and Kingate remains subject to claw-back actions before the courts of New-York or elsewhere. You may have read in the press that the U.S. Trustee has been able to recover substantial money on behalf of the BMIS’ estate. Such money will be redistributed to the “*customers*” of BMIS, subject however to a prior settlement of the claw-back issue. The outcome of the settlement discussions between the U.S. Trustee and the Kingate liquidators will strongly influence the amount of the final recovery.

The liquidators may have some causes of actions against the auditors, the investment manager and entities affiliated to Mr. Carlo Grosso and Federico Cerruti. They are currently reviewing opportunities to file lawsuits against several entities and have, in that respect, initiated preliminary legal actions. Again, the outcome of these legal proceedings will influence the amount of the pay-out (if any) to be paid to Kingate investors.

It should be underlined that the methodology to be used by the Kingate liquidators in the admission process of investors’ claims has not been decided so far. Similarly to what happened in the U.S., a fundamental question is to determine whether or not the Ponzi profits should be considered.

Contact persons: **Erik Bomans** and **Edouard Fremault** (Deminor Brussels)

4. The U.S. (general relevance for each feeder fund)

As reported by the international press and in our previous newsletter, the U.S. Trustee of BMIS' estate (I. Picard) filed a number of lawsuits in Europe against various financial intermediaries, including UBS and HSBC. The lawsuits are twofold and aim at implementing claw-back actions on the one hand and, on the other hand, at seeking damages from the service providers of the feeder funds. The U.S. Trustee is ultimately claiming more than USD 80 billion from these persons. Please note that, since 15 December 2010, the U.S. Trustee is not allowed to file additional lawsuits.

The initial defence of the European service providers, who are being sued by the U.S. Trustee before the courts of New-York, is relevant for our case in Europe. Three arguments are likely to be further presented by the European service providers in the course of the U.S. legal procedure:

- Service providers argue that the U.S. Trustee is acting far beyond the authority granted to him by the U.S. Congress. Most of the European service providers tend to consider that the U.S. Trustee is actually launching a back-door "class action", instead of a classical lawsuit by a bankruptcy trustee;

- Service providers are of the opinion that the U.S. Bankruptcy

Court, which is handling the case for the moment, is not competent as each case involves numerous legal issues non-related to bankruptcy law. In addition, the case will be handled by a single professional judge and not by a jury;

- Service providers stress that there is a substantial risk of duplicating recoveries and of inconsistent results, taking into account the fact that they were already being sued in Europe by European investors and/or liquidators of feeder funds. This argument will most probably be the cornerstone of their defence. The European service providers' negligence hit almost exclusively the European investors' community who were the first one to take appropriate legal initiatives to obtain damages before European courts. It is highly unlikely that the responsible service provider will settle twice, if it ever decided to take on its responsibility.

5. Potential case against JP Morgan

Deminor is currently reviewing the merits of a cause of action against JP Morgan for investors who subscribed to bonds originated and issued by JP Morgan and whose underlying assets were investments in Madoff feeder funds. The outcome of such review could lead to active litigation against JP Morgan aimed at obtaining damages.

The due diligence process of JP Morgan could be harshly criticized in court. As JP Morgan was unable to perform a proper due diligence on BMIS - who systematically

denied any request – the bank decided to obtain information directly from the Madoff feeder funds. One of its major concerns was the identity of Madoff's counterparties. The results were quite surprising: for instance, Tremont (a Madoff feeder fund based in the U.S.) indicated in April 2007 to JP Morgan that even though Tremont was the party entering into the agreement with the option counterparties, it did not know who the counterparties were. JP Morgan received similar answers from Bank Medici later on. The same pattern occurred with Fairfield when it came to the due diligence issues: Fairfield openly admitted that Madoff refused to disclose the list of counterparties.

Internal documents revealed real concerns of JP Morgan on the Madoff-related investments: in a document entitled "*Transaction Approval Package*", which was necessary to clear beforehand each transaction, JP Morgan identified key transaction weaknesses as follows: "*Investors, sub-custodians, auditors, etc... rely solely on Madoff produced statements and have no real way of verifying positions at Madoff itself, and fraud – given the significant reliance on BMIS for verifications of assets held, and no real way to confirm those valuations, fraud presents a material risk*". Despite the conclusions of such report, JP Morgan prepared proposals to get respectively a USD 600 million exposure to Tremont and USD 225 million to Herald.

It should be finally noted that JP Morgan Private Bank carefully avoided doing business with Madoff and/or Madoff related feeder funds. Following the fraud, JP Morgan – who was very proud

to have redeemed all its positions a few weeks before the arrest of Madoff – wrote a letter to its private bank’s clients commenting the Madoff situation, and stating that they had refused to have exposure to Madoff because the bank had “*never been able to reverse engineer how they made money*” and BMIS “*did not satisfy their requirement for administrative oversight*”. Later on, a JP Morgan employee provided a list of red flags, supporting the private bank decision not to invest with BMIS for the following reasons: (1) BMIS served as its own broker, custodian and investment adviser, (2) BMIS made use of the accounting services of 3 persons in practice, (3) the audits of the feeder funds’ auditor did not cover BMIS’ operations, (4) the Private Bank team was not allowed to meet with Madoff, (5) BMIS did not charge its investment advice, (6) volatility was only 2.5% over the preceding 17 years, and (7) Madoff’s funds lost money in only 2 of 214 rolling quarterly periods since 1990.

It is therefore obvious that JP Morgan had clearly identified a series of red flags inherent to Madoff-related investments. Despite these alarming conclusions, they accepted to issue structured bonds giving exposure to Madoff. JP Morgan did not act in the best interest of its clients by proposing investments the bank had doubts on.

Investors interested in receiving additional information on Deminor’s contemplated actions regarding JP Morgan are invited to contact Deminor.

Contact persons: **Erik Bomans** and **Edouard Fremault**

(Deminor Brussels)

Fortis

Back in April 2009, Deminor and the VEB filed a lawsuit in the Netherlands against the Dutch State, in order to hold the Dutch State liable for abuse of circumstances (“*misbruik van omstandigheden*”) while nationalizing Fortis’ Dutch activities (banking and insurance). The pleadings in this procedure took place before the Court of Amsterdam on 29 November 2010. The Court is now deliberating and should render its decision soon.

On 13 January 2010, Deminor launched in Belgium the first large scale collective action against Fortis (now Ageas) before the Commercial Court of Brussels in order to claim compensation for the losses suffered by investors due to the misleading information disclosed by Fortis during the period of time between the official announcement of the takeover bid on ABN AMRO in May 2007 and the dismantling of the group in October 2008.

The group of investors having joined Deminor’s court action in Belgium currently consists of 4,900 retail investors and 450 institutional investors from various regions of the world, including Europe, America and Asia. This group around Deminor is the largest and most representative group of investors having suffered losses because of Fortis’ misleading communication.

Since the launch of the case in January 2010, Deminor’s own

analysis of Fortis’ communication has been confirmed and reinforced on several occasions, including in the report of the court-appointed Dutch experts published in June 2010 and the two decisions of the Dutch Market Authority (Autoriteit Financiële Markten) in February and August 2010 imposing fines on Fortis for violation of the Dutch law on financial supervision.

Deminor is currently calculating the losses for all its clients on an individual basis while using the information provided by them.

Since the Deminor court action is a “*direct action*” and due to the interest expressed by many investors to participate in this court action, Deminor has decided to reopen registrations in order to enable investors to join the Deminor group and the current court action in Belgium.

Contact persons: **Charles Demoulin** and **Paul Van den Abeele** (Deminor Brussels)

Parmalat

Deminor has recently been contacted by a number of investors, shareholders of the new company Parmalat S.p.a. (that was created after the bankruptcy of the former Parmalat Group), who were worried about the current situation of the Parmalat Group and wanted to understand what they could do to maximise shareholder value. Deminor has therefore proposed to these and other investors to support an action plan aimed at proposing some measures that would benefit all Parmalat shareholders.

A “proxy fight” between the board of directors and a group of shareholders may be expected at the next general meeting to be held on 12 April 2011. The names of the candidates have not been disclosed yet. Besides, Deminor believes that the main concerns for Parmalat shareholders is rather on the future strategy of the new board of directors with respect to value creation for shareholders and how this value will benefit all shareholders.

Deminor believes that the board of directors should have a better focus on cash management and strategy, through acquisitions or distribution of cash to shareholders (dividends and/or share buybacks).

The articles of association of Parmalat provide for the creation of three committees within the board: (i) the Internal Control and Corporate Governance Committee, (ii) the Appointments and Compensation Committee, and (iii) the Committee for Legal Disputes. There is however no board committee responsible for the company’s strategy, acquisition policy and cash management.

Deminor’s proposed action plan includes an amendment to the articles of association of Parmalat in order to provide for the creation of a Strategic Committee consisting of three to five directors, with a majority of independent directors and whose responsibilities shall include the review of the company’s strategy, acquisition policy and management of cash (including dividend policy and share buybacks) and the submitting of proposals to the board of directors. Deminor also considers

that the opportunity to buy back shares should be considered at the general meeting. It will be the board’s responsibility to make use of this authorization.

In order for the Deminor’s proposed action plan to be implemented, Deminor needs the support of a large and representative group of investors who represent together at least 2.5% of the share capital, which corresponds under Italian law to the minimum threshold in order for shareholders to add an item on the agenda of the general meeting.

To view Deminor’s Alert, please click here.

Contact persons : **Charles Demoulin** (Deminor Brussels) and **Arturo Albano** (Deminor Italy)

Premafin/Groupama

Deminor wrote a letter to Consob, the Italian market regulator, asking for investigation on the possible existence of a “concert party action” between Premafin - the Italian holding company of the Ligresti family - and the French insurer Groupama.

Deminor also drew the attention of Consob to a number of transactions completed before the announcement of the agreement between Premafin and Groupama that might be considered as insider trading.

Investors are worried as they believe that the whole Premafin/Groupama operation, is aimed to transfer *de facto* the control of

Premafin and, consequently, the control of the other two listed companies, i.e. Fondiaria SAI and Milano Assicurazioni, controlled by Premafin, without launching a tender offer on the whole share capital of Premafin, Fondiaria SAI and Milano Assicurazioni.

Deminor’s letter also questioned the share purchase of Mr Vincent Bolloré acquiring a 5% stake in Premafin just a few weeks before the announcement of the agreement between Premafin and Groupama.

Contact persons : **Erik Bomans** (Deminor Brussels) and **Arturo Albano** (Deminor Italy)

Lehman Brothers

1. Netherlands

Deminor has federated approximately 400 investors grouped in the Dutch Foundation “*Stichting Hulp Gedupeerden*” and who had bought Lehman Brothers’ notes through the investment firm Wijs & Van Oostveen and who lost most of their investments after Lehman Brothers went bankrupt in 2008.

As the first attempts to settle failed, the *Stichting Hulp Gedupeerden*, with the assistance of Deminor and the law firm Barents Krans, initiated legal proceedings before the Courts in Amsterdam against Wijs & Van Oostveen and its directors in April 2010. A first writ of summons was served in 2010 on behalf of investors holding 100% and 90% guaranteed notes. The writ of summons on behalf of the other investors was served in the beginning of 2011.

This collective action launched in the Netherlands aims at claiming around EUR 16 million on behalf of the investors who bought Lehman Brothers structured products through Wijs & Van Oostveen, without having been properly informed on the underlying risks.

Deminor is now expecting the decision of the judge in the case of the 100% guaranteed notes. In the case of the 90% guaranteed notes, Deminor is waiting for the introductory hearing and the decision of the judge about the further steps in the procedure. In the case filed on behalf of the other investors, the Stichting awaits the answer of Wijs & Van Oostveen.

Contact persons: **Bernard Thuysbaert** and **Joost Kramer** (Deminor Netherlands)

2. Belgium

The civil proceedings initiated in July 2009 against Deutsche Bank before the Court of Commerce of Brussels are still pending. These proceedings aim at obtaining damages for the investors to whom Deutsche Bank had sold Lehman Brothers Notes. Deminor is also awaiting a decision of the Brussels public prosecutor whether or not to file a criminal lawsuit against Deutsche Bank and its directors.

The Brussels public prosecutor will certainly take into account the recent decision of the criminal court of Brussels on the 1st December 2010 in a similar case involving Lehman Brothers notes. The criminal court declared Citibank Belgium SA

and some of its officers guilty of not disclosing in the prospectus the necessary information for the investors in order to make an informed decision on the proposed investment. Citibank Belgium SA (but not the officers) filed an appeal against this decision.

Contact persons: **Charles Demoulin** and **Edouard Fremault** (Deminor Brussels)

3. U.S. bankruptcy proceedings

Deminor's clients are the holders of structured bonds issued by Lehman Brothers Treasury Co. BV, a limited liability company incorporated pursuant to the laws of the Netherlands and currently bankrupt (hereafter referred to as "LBT"). Some of these bonds were guaranteed by Lehman Brothers Holdings Inc., a limited liability company incorporated pursuant to the laws of Delaware (USA) that filed a Chapter XI petition in September 2008 (hereafter referred to as "LBH").

Money collected by LBT was transferred to LBH in accordance with the terms and conditions of an intercompany loan agreement. LBT is therefore creditor of LBH for the outstanding amount relating to the loan agreement (i.e. USD 34 billion).

As holders of LBT bonds, Deminor's clients are deemed to be creditors of both (i) LBT (as issuer of the bonds), and (ii) LBH (as guarantor of the bonds).

Following the Chapter XI filing, restructuring plans have been submitted by the debtor

(i.e. LBH) and some creditors of LBH (i.e. Paulson). Such plans influence the "grey market" of Lehman-related (distressed) securities.

a) The initial Debtor plan (April 2010) – the "50% haircut"

Under that plan, the intercompany claim held by LBT against LBH shall be allowed in an aggregate amount equal to 50% of the net amount owed by LBH to LBT. In addition, the plan does not recognize the intercompany claim's status as senior debt under LBH subordinated indentures.

LBH justified the 50% haircut on the fact that LBT would have no real existence and should therefore be economically consolidated. Moreover, it has been discussed whether or not LBT investors have relied on the independent guarantee issued by LBH while investing in LBT bonds.

LBT creditors are concerned by that situation, since the main assets of LBT is its claim against LBH. LBT creditors, as well as LBT itself through its court-appointed trustees, are challenging the 50% haircut.

b) The Paulson plan (December 2010) - the "substantive consolidation"

A group of LBH creditors led by Paulson, Pimco and Calpers filed an alternative plan that is based on the "substantive consolidation" of LBH and certain other U.S. debtors and non-U.S. entities of the Lehman group.

Under that plan, Lehman

Brothers would be considered as one global entity, paying the creditors to all Lehman entities mostly equally. As a consequence, the plan would provide a better recovery to creditors of LBH, while offering a smaller payout to some creditors of LBH's (foreign) subsidiaries.

c) The amended debtor plan (January 2011) – “something in between”

The new plan filed by LBH basically increases payments to LBH bondholders while reducing payouts to foreign affiliates. However, as opposed to the Paulson plan, LBH does not propose to “consolidate” all claims into one pool, but each class of creditors is being asked to give up something. Such plan could be seen as something in between the initial plan and the Paulson plan.

It is anticipated that LBH will present this plan to the US Bankruptcy Court for approval by July 2011 and to win support of creditors by November 2011.

In order to be confirmed by the court, (i) the plan must demonstrate that it does “*not discriminate unfairly*” and is “*fair and equitable*” with respect to each impaired, non accepting class (“*cram down tests for secured and unsecured creditors, and equity interests*”), (ii) the plan is not likely to be followed by liquidation or the need for further financial reorganization (“*feasibility test*”), and (iii) the plan is in the best interests of all holders of claims and equity interests that are impaired by the plan and have not accepted the plan.

4. Collective actions against Ernst & Young

Since the publication of the Valukas Report in March 2010, the US class action complaint in the Lehman Brothers case has been amended in order to also include Ernst & Young as defendant. According to the Valukas Report, “*there is sufficient evidence to support a colorable claim that Ernst & Young was negligent*”.

The largest US class action complaint currently pending does not include the buyers of securities issued by LBT. With the decision of the US Supreme Court in *Morrison* (see our related article in our previous newsletters), it is very likely that the claims brought against Ernst & Young in the class action for breach of federal securities regulations could not benefit non-US investors having purchased notes issued by LBT in Europe. Most of those purchases would not satisfy the requirements of the transaction test under *Morrison* (securities listed on a US stock exchange or transaction having taken place in the US).

As previously announced, Deminor investigated whether a collective action could be brought against Ernst & Young in Europe. In addition to its own analysis, Deminor has sought the opinion of a Professor of Law specialized in the field of international private law. According to Deminor's own analysis and the Professor's opinion, a claim could be brought against Ernst & Young outside of the US by European investors depending on the place where they suffered losses. For instance, Dutch (institutional and retail)

investors who purchased LBT notes and held those notes on an account in the Netherlands could bring a suit against Ernst & Young before the Dutch courts.

We therefore invite European investors – both institutional and retail – who had invested in securities issued by LBT and who suffered losses in Europe to contact us.

Contact person: **Charles Demoulin** (Deminor Brussels)

Natixis

Deminor sent **an open letter to Mr François Pérol on 17 February 2011**. Deminor intended thereby to call on the current Chairman of the Board of Directors of Natixis to take a stand about the sales of Natixis shares in December 2006, at the time of the Natixis public offering for retail investors.

Indeed, Deminor considers that the sales of Natixis shares were not performed in accordance with the elementary rules and duties a Bank is supposed to follow, especially professional obligations related to advice, disclosure and fairness. In this letter, Deminor also revealed some details of the marketing and commercial policy of BPCE and asked Mr Pérol to comment on all these elements.

On the same date, **Deminor also wrote to the AMF** and asked the French Authority not to “bury” and forget the Natixis case.

Deminor asked the Chairman of the AMF to take into consideration the documents received by

Deminor while demonstrate the inappropriateness of the selling methods used by the banking network of BPCE at the time of the Natixis public offering.

Finally, Deminor questioned the decision of the AMF not to launch sanction proceedings while the media revealed the existence of an internal investigation by the AMF about the misleading and false information disclosed by Natixis. Deminor officially called for the AMF to review its decision not to launch proceedings and to show support for the 3 millions shareholders of Natixis.

Contact persons: **Fabrice Rémon** and **Blandine Pellat** (Deminor France)

DeutschePostbank

Deminor is in the process of analyzing the takeover of Deutsche Postbank by Deutsche Bank, more in particular from the angle of §35 of the German Takeover Act. This legal provision obliges any person who acquires a controlling stake in a target company to launch a takeover bid on all outstanding shares.

Under the share purchase agreement, Deutsche Bank immediately acquired 22.9% of Deutsche Postbank shares from Deutsche Post and secured the acquisition of a further 39.5% through a call option, a put option and a mandatorily convertible bond. The full takeover price was immediately paid, while the shares remained with Deutsche Post until maturity (or exercise) of the derivatives. Deutsche Bank claims that it will only acquire control (i.e. breach

the 30% threshold set by the German Takeover Act) once the derivatives will be exercised and that therefore the share purchase agreement in itself does not trigger any obligation to launch a bid.

In October 2010, Deutsche Bank surprised markets by voluntarily launching a takeover bid on Deutsche Postbank with the stated objective of reaching the 30% threshold. The price paid under the bid (EUR 25 per share) was far below the highest price to Deutsche Post (EUR 49.42), i.e. the price that Deutsche Bank would have to pay to minority shareholders under the mandatory bid rule. Deutsche Bank claims that the voluntary offer exempts it from the obligation to launch a mandatory offer pursuant to §35 (3) of the German Takeover Act.

For Deutsche Bank the story is closed, but not necessarily for minority shareholders who feel they have been unlawfully excluded from participating to the hefty control premium paid by Deutsche Bank to Deutsche Post. The transaction has clearly been structured in two steps with the sole objective of circumventing the obligation to launch a mandatory bid. This has even openly been confirmed by Deutsche Bank's CEO in the framework of the voluntary takeover bid.

The main legal question is whether under German and European takeover law, derivative contracts which have as effect to securing the transfer of control for the bidder while merely postponing the delivery of the shares (and the voting rights) can be qualified as a concert action.

According to German (§ 30) and European takeover law, the voting rights owned by parties acting in concert must be aggregated with a view to calculating whether the threshold (in this case 30%) has been reached. If the effect of the derivatives is that the full economic benefits and risks of the controlling stake are borne by the bidder and that the seller consequently has no further interest in exercising his voting rights in any other way than in the interest of the bidder, Deminor believes that these parties are acting in concert and that therefore control has been transferred.

Another question is whether, in the run-up to a voluntary bid, the bidder can make binding arrangements with the controlling shareholder securing a much higher price for the latter outside of the voluntary bid. Both the European Directive and the German Takeover Act provide that all securities holders must be treated equally, both in the framework of a voluntary and a mandatory bid. We believe there are grounds to argue that such carve-out from a voluntary bid is not possible because it would go against the principle of equal treatment.

Deminor is continuing its analysis of the case under European law and will soon come up with a decision on whether or not to pursue a case before the German courts with the aim of getting damages corresponding to the difference between EUR 49.42 per share and the current stock market price or, for those investors who sold their shares in the framework of the bid, the price of the voluntary takeover

bid (EUR 25).

To view the alert sent by Deminor, please click here.

Contact persons: **Erik Bomans** and **Paul Van Den Abeele** (Deminor Brussels)

National Bank of Belgium

Following the analysis of the two decisions rendered by the Court of Appeals of Brussels of 30 September 2010, Deminor has assessed the strategic rationale of an appeal before Belgium's Supreme Court, more specifically of the decision in the procedure regarding the expiry of the right of the National Bank of Belgium (NBB) to issue banknotes which would lead to the distribution of the NBB's Reserve Fund.

The Court of Appeals had confirmed the decision of the Commercial Court of Brussels and considered that the NBB's right to issue banknotes had not expired as a consequence of Belgium joining the Economic and Monetary Union. As a result, the Court did not order the NBB to distribute its reserve fund to its shareholders.

As Deminor's arguments are construed under European law, the benefit of an appeal before Belgium's Supreme Court would be the opportunity to question the EU Court of Justice through a reference for a preliminary ruling ("*question préjudicielle/ prejudiciële vraag*"). The Supreme Court, unlike lower jurisdictions, has the duty under EU law to ask for such a preliminary ruling.

In order to pursue its action, Deminor needs the support of a significant number of NBB shareholders. The decision whether or not to continue the NBB case will be taken shortly depending on the interest expressed by shareholders to join the Deminor group.

Contact persons: **Charles Demoulin** and **Paul Van den Abeele** (Deminor Brussels)

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