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Client Alert

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In re Vivendi Universal, S.A. Securities Litigation: The Long Arm of US Jurisdiction

"The *Vivendi* decision shows that the lack of collective actions in Europe does not necessarily protect European companies with a global business footprint from mass litigation. As long as US courts are willing to apply their securities laws extraterritorially, European companies that participate in the global economy are at great risk of being sued in US class actions."

In 2002, plaintiffs from France, England, the Netherlands, Germany, Austria and the United States brought a securities class action against defendants Vivendi Universal, S.A. and its two most senior former officers (CEO and CFO). Plaintiffs alleged that the defendants' materially false and misleading statements caused Vivendi's securities (such securities being traded on European exchanges and the New York Stock Exchange) to trade at artificially inflated prices and induced them to acquire Vivendi's securities pursuant to a registration statement and prospectus dated October 30, 2000 issued in connection with the December 8, 2000 three-way merger of Vivendi, Seagram Company Limited and Canal Plus, S.A., in violation notably of section 10(b) and 20(a) of the Securities Exchange Act of 1934.

The United States District Court for the Southern District of New York held on March 22, 2007[1] that foreign investors from France, England and the Netherlands, but not from Germany and Austria, are eligible to participate in (and will be bound by) a securities class action brought in US courts under US law. More specifically, the court's decision indicates that foreign class members are free to export their securities fraud claims to the US so long as they reside in countries that are hospitable to the "class action" style litigation and, thus, likely to enforce a judgment from a US court.

The Court's Analysis in *In re Vivendi Universal*, S.A.

The decision is based on a two step analysis.

First step: in November 2003, the *Vivendi* court found that foreign investors that acquired shares of Vivendi Universal, S.A. on foreign stock exchanges were entitled to bring US securities law claims in a US court against Vivendi.[2]

The decision is particularly notable, because the vast majority of Vivendi common stock was traded on European exchanges and held by European investors. Vivendi was not subject to the periodic filing requirements of the US Securities & Exchange Commission. Despite these facts, the *Vivendi* court noted that US law permits courts to assert subject matter jurisdiction over the securities claims of foreign investors where they allege that their losses were directly caused by the defendants' conduct in the US. Noting that a significant number of the alleged misleading statements were made to analysts and investors in New York, the *Vivendi* court found a sufficiently strong US-nexus to trigger US-jurisdiction:

"Given [M's] *and* [H's] *decision to move to the United States, allegedly to better direct corporate operations and more effectively promote misleading perceptions on Wall Street, which harbors some of the most watched securities exchanges in the world, one can reasonably infer that the alleged fraud on the American exchange was a 'substantial' or 'significant' contributing cause of* [foreign investors'] *decision*[s] *to purchase* [Vivendi's] *stock' abroad."*[3]

Second step: having found that it could hear the foreign investors' claims, the next question was whether their claims could be aggregated for adjudication in the form of a class action.

The certification of a class action in the US is governed by Federal Rule of Civil Procedure 23. In the typical securities fraud case, the various Rule 23 elements for class certification are easily satisfied. This was true in the Vivendi case, too. The court concluded that the inclusion of foreign investors in the proposed class did not, with one exception, raise any unique considerations in the usual Rule 23 analysis. Specifically, the *Vivendi* court held that the foreign investors did not change the usual analysis of the numerosity and commonality elements of Rule 23(a) and the predominance element of Rule 23 (b)(3). These elements, under the court's analysis, were present in the case irrespective of the foreign investors' involvement.

The only element for which the presence of the foreign investors was found to matter was superiority. The superiority element requires a plaintiff seeking to certify a class action to show that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy."

The *Vivendi* court noted that several factors should be considered in determining whether a class action is "superior;" including the existence of other litigation, the desirability of concentrating the litigation in the particular forum, and the difficulties in managing the particular action.

The *Vivendi* court identified the "desirability" factor as the most vexing in considering whether foreign investors should be included in the class. This factor came down to a question of whether the foreign jurisdictions would give preclusive effect to a judgment from the US court in a class action.

Under Second Circuit law, if there exists a great risk that a given foreign court would not bind its citizens by the US decision, the putative class members hailing from that nation should not be included in the class, in order to protect the rights of the defendant. The *Vivendi* court found that case law in the Second Circuit was somewhat unclear as to the precise standard – while some cases held that there must be a "near certainty" that the foreign court would not enforce the judgment, others held that any risk of non-enforcement was merely a "factor" in determining superiority. Taking this precedent into account, the *Vivendi* court found that the appropriate way to determine whether a class of foreign investors should be certified was to assess the risk of "*non recognition* [of a class action judgment] *along a continuum*. […] *The closer the likelihood of non-recognition is to being a 'near certainty,' the more appropriate it is for the court to deny certification of foreign claimants*."[4]

Thus, a court confronted with a class that purports to include foreign investors must analyze the law of each foreign nation represented in the class to determine how a court sitting in that nation would react to a request to enforce a US judgment in a class action.

As set out in detail below, the *Vivendi* court's analysis concluded that the courts of France, England and The Netherlands would likely enforce a US judgment. The *Vivendi* court, however, found insufficient certainty that German and Austrian courts would respect a US judgment.

Would a US Class Action Judgment be Recognized in England?

There are no treaties or conventions between the US and England that provide for reciprocal recognition and enforcement of judgments, so a party wishing to enforce a US judgment in England must proceed under the common law.

The *Vivendi* court's decision to include English investors in the class was based on its conclusion that it was more likely than not that a judgment or settlement in the *Vivendi* action would have a *res judicata* effect on the English investors.

The English Court of Appeal decision in *Good Challenger v. Navigante SA v. Metalexportimport SA* [2003] EWCA Civ. 1668 (the Good Challenger) sets out the four conditions that have to be satisfied to establish *res judicata* in England:

i) the judgment has to be given by a foreign court of competent jurisdiction;
ii) the judgment has to be final and conclusive and on the merits;
iii) there has to be identity of parties; and
iv) there has to be identity of subject matter.

Under English law, a foreign court is only considered to have competent jurisdiction when:

i) the defendant was present within its jurisdiction when proceedings were issued; and
ii) the defendant submitted to the jurisdiction of the court.

The *Vivendi* court decided (the defendants having not disputed the point) that a judgment or settlement in the *Vivendi* action would satisfy the criteria set out in the Good Challenger.

However, the *Vivendi* court queried whether members of a class under Rule 23(b)(3) – wherein class members are not parties for various procedural purposes, including service – would be bound as parties under English law. There is English case law which suggests that a judgment in a US class action would not support the defense of *res judicata* against a party who had not been served in the US proceedings. Conversely, Part 19 of the English Civil Procedure Rules (which establishes the mechanism for group actions) provides, at 19.6(4)(b), that a judgment in a group action may, with the permission of the court, be enforced by or against a person who is not a party but is represented in the group action.

On this basis, the *Vivendi* court decided that the English courts are competent to bind non-parties in appropriate circumstances and it therefore determined that it is likely that all class members would be bound as parties for *res judicata* purposes and that the English courts would recognize a judgment or settlement in the *Vivendi* action.

Despite the decision of the *Vivendi* court, there is no authority for the recognition or enforcement of a US class action in England, so it is important to note the circumstances in which a foreign judgment will not be enforced by the English courts, even if it appears capable of supporting a plea of *res judicata*.

Foreign judgments which are not enforceable in England include judgments which are: (i) contrary to natural justice (in a procedural context, the requirements of due notice and proper opportunity to be heard are basic requirements of natural justice, so all class members must be given notice of the action and the opportunity to object or withdraw); (ii) for multiple damages (although the English courts will not treat the multiple damages element of the judgment as definitive of the judgment as a whole and will enforce the non-multiplied element); (iii) penal (*i.e.* comprising penalties imposed to

protect the revenue or other municipal laws of the state); (iv) tainted by fraud; or (v) contrary to public policy.

Would a US Class Action Judgment be Recognized in France?

The *Vivendi* court found that a judgment of the US action would, more likely than not, be granted recognition by French courts, because such judgment would meet the conditions required for an "exequatur" proceeding. These criteria, laid down by French case law and conditioning the enforceability of a foreign decision under French law, require that (1) the foreign court had proper jurisdiction under French law (the jurisdictional prong);[5] (2) the foreign court applied the appropriate law under French conflict-of-law principles (the applicable-law prong); (3) the foreign decision does not contravene French concepts of international public policy (the public policy prong); and (4) the decision does not result in a circumvention of the law or forum shopping (the forum shopping prong).[6]

The *Vivendi* court found that the jurisdictional and forum shopping prongs would very likely be met by a US decision in the *Vivendi* case, mainly because of the connections of the case with the US, *i.e.* a substantial number of Vivendi's securities were traded in the US, the CEO and CFO moved to the US to expand Vivendi's presence there, and a number of the alleged fraudulent acts took place in the US. Likewise, the *Vivendi* court found that the applicable-law prong should be met, because of the substantial similarities and, thus, equivalence between US and French law regarding securities fraud.

However, it is highly questionable whether the public policy prong could be met in the *Vivendi* case, mainly because of the underlying opt-out mechanism pursuant to which Vivendi's investors are deemed to be class members unless and until they expressly opt-out. In that regard, after weighing the parties' competing affidavits, the Vivendi court concluded that "*an opt-out class judgment would not offend French concepts of international public policy. While it is clear that such class actions are presently not permitted, it is equally clear that the ground is shifting quickly.*"[7] This conclusion could be the subject to several criticisms.

The *Vivendi* court's conclusion is drawn from mere political considerations and, specifically, from the mere fact that the former President of the French Republic, Jacques Chirac, had called for a development of collective actions and had put in place a commission of study in 2005 for the introduction of a sort of class action for relationships with consumers. However, contrary to the *Vivendi* court's assessment, the introduction of class actions under French law is, to date, far from moving quickly since the very principle, not to say the scope, of such actions is still highly debated and one still cannot say with certainty or even high probability that such a mechanism will ever blossom in France. From a political standpoint, this is all the more unclear, because the newly elected President, Nicolas Sarkozy, expressed strong reservations against class actions during his campaign. And the fact remains that "*such class actions are presently not permitted*" which clearly indicates that they cannot be deemed compatible with the French legal regime for mere political considerations.

The *Vivendi* court's conclusion could face several serious legal obstacles, which may well preclude recognition of the decision in France. First, the French Constitutional Council (Conseil Constitutionnel), which is the guardian of the French Constitution, has already decided that "*although trade unions may be allowed, by the legislator, to defend a particular employee or to promote a collective action through a particular one, it is conditioned upon the*

fact that the individual at stake has been given the opportunity to fully consent and that he/she may still personally conduct his/her defense and terminate the action."[8]

The opt-out mechanism contradicts this position in that it does not allow individual investors to consent in advance to the class action. Second, this mechanism could be regarded as violating the principle of "equality of arms" set forth by Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in the sense that the defendants, in an opt-out class action, do not know all of their opponents who remain invisibles and cannot object to their claims by, for instance, raising a defense based on the behavior of the victims. Finally, the President of the French Supreme Court (Cour de Cassation) expressed during a public meeting held by the French union for the protection of consumers (UFC que choisir) in November 2005 strong reservations on the compatibility of an opt-out class action with French law. These reservations may lead us to foresee what the position of the French Supreme Court could be if an exequatur proceeding was referred to it.

Would a US Class Action Judgment be Recognized in Germany?

The *Vivendi* court's decision to exclude German investors from the class is consistent with fundamental principles of German law and recent German legislation on shareholder suits.

Whether a US-class action judgment will be enforced and recognized is determined by German Procedural law.[9] While never directly addressed by German courts, the question has been a matter of controversy among legal scholars and practitioners. The discussion's main focus is the conformity of US-class actions with German principles of procedural law and due process rights. A US class action judgment or settlement, for example, if recognized by German courts, could bar a German plaintiff from bringing its claim in Germany in an individual action even if the plaintiff was not aware that claims had been brought in the US and that he had been included in the US class. This result would implicate principles of due process, because the German constitution provides for a "right to be heard" before a judgment with a binding effect can be rendered.[10]

The *Vivendi* Court queried whether "*the use of a collective action is so contrary to German public policy that a US class action judgment will not be recognized under any circumstance*[.]" It noted that an Investor Protection Model Procedure Act[11] (Model Procedure Act) had recently been adopted in Germany which addresses multiple suits by shareholders. Under the Model Procedure Act, certain issues of fact and law are decided in a model proceeding with binding effect for related individual lawsuits brought by other investors. The *Vivendi* Court correctly found that, unlike a US class action, the German model proceeding "*is not a collective action in the sense that non-party shareholders are bound by the results."*[12]

In sum, the *Vivendi* court was rightfully "*left with the distinct impression that the formalities of German law may well preclude the recognition of a* [US] *judgment in the instant case."*[13] While considering the actual risk of subsequent litigation in Germany to be low, the Court concluded that "[t]*his likelihood of nonrecognition in Germany* […] *raise*[s] *weightier issues of fairness and lessen*[s], *albeit in limited realistic situations, the promise of economy, consistency, and finality made possible when class members are bound to a final judgement or settlement."*

Would a US Class Action Judgment be Recognized in The Netherlands?

The *Vivendi* Court found that Dutch courts would probably recognize a judgment or settlement of the US action because recent legislation indicates that a class action is not contrary to "*fundamental principles of fairness in Dutch law.*"[15] While Dutch law does not provide for a class action mechanism, the Dutch legislature adopted in 2005 an Act on Collective Settlement of Mass Damages (wet collectieve afwickeling massaschade hereinafter the Act) that permits the resolution of collective claims through settlements.[16] The Act allows parties to a settlement agreement to request that a court declares the settlement binding upon a class of persons who have suffered similar damages.

In fact, in April 2007, Royal Dutch Shell plc (Shell) announced that it had settled securities claims with European investors under the Act (the Dutch Shell Settlement) representing its first application to shareholder claims for alleged violations of securities law. The Dutch Shell Settlement is contingent upon a ruling by the Amsterdam Court of Appeals to declare it binding.

Conclusion

The *Vivendi* decision, while perhaps questionable on some of its grounds, is certainly an important one for non-US companies who could be subject to suit in the US. Still, many questions remain.

To start, will other US courts follow the reasoning of the *Vivendi* decision? Assuming the *Vivendi* court's interpretation of US law is accurate, what other nations could be found to be amenable to inclusion in US class actions? In addition, what can nations do proactively to increase or decrease the chance that US courts will purport to resolve claims affecting their citizens through a class action?

From a European perspective, while collective actions do not yet dominate the European legal landscape as class actions do in the US, the trend is in favor of promoting collective redress in Europe as this litigation vehicle is regarded as a cost efficient means to regulate the global business activities of multinational corporations that benefits consumers and shareholders and reduces the pressure on state funding for the court systems.

Several European countries already have introduced new rules facilitating collective actions, and others are considering the same. Moreover, on March 13, 2007, the Commissioner of Consumer Affairs, Meglena Kuneva, unveiled to the European Parliament a proposal to allow individuals from different EU member states to enter into group litigation to improve the likelihood of successful claims[17] and to bolster the strength of consumers and stockholders in seeking redress throughout Europe. At the same time, the UK National Association of Pension Funds (NAPF) – £800 billion managed in retirement savings – has issued advice to Trustees on how to join US-driven class actions. During the past few years, large mass actions have been launched in Europe: Approximately 16,000 plaintiffs in shareholder litigation in Germany against Deutsche Telekom AG,[18] hundreds of plaintiffs in the French mass consumer action against mobile phone operators and in the French mass consumer action against the DRM;[19] the action by Railtrack shareholders against the UK government.

The *Vivendi* decision shows that the lack of collective actions in Europe does not necessarily protect European companies with a global business footprint from mass litigation. So long as US courts are willing to apply their securities laws extraterritorially, European companies that participate in the global economy are at great risk of being sued in US class actions. In this given context, should the lack of a Europe-wide collective action procedure

be viewed as legal protection or, to the contrary, as a new legal uncertainty for multinational companies? To date the lack of procedural clarity regarding the enforceability of US class action judgments in Europe has been seen as an element of comfort and protection.

But the trends for collective redress are plainly evident. Unless European States clearly indicate that they would not enforce an US class action judgment, the risk to become exposed to a litigation like the *Vivendi* matter could increase in the future. For that reason, European companies should be at the front of efforts to shape the permissible scope of collective actions. Without a doubt, European companies would hope to avoid the parts of the US model that encourages speculative actions without legal merit.

European companies should strive to ensure that any European collective procedure will be designed in a way that balances the interests of providing redress for actual illegal conduct with the need for legal clarity, due process and legal certainty for corporations. Indeed, the *Vivendi* decision may be a sign that large European companies can no longer delay the finding of a common approach to address the emerging area of collective actions in Europe. The existence of a European collective action procedure may prevent a situation like the one in the *Vivendi* case in the future and, eventually, could provide transparency and legal certainty and establish a uniform process for disputes of a global magnitude.

Endnotes

[1] *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 861147 (S.D.N.Y., Mar. 22, 2007). On May 21, 2007, a revised decision was issued to correct a typographical error relating to the starting date of the class period. *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466, FN* (S.D.N.Y., May 21, 2007).

[2] *In re Vivendi Universal, S.A. Securities Litigation*, 381 F.Supp.2d 158 (S.D.N.Y. 2003).

[3] *Id*. at 170.

[4] *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466, at *18 (S.D.N.Y., May 21, 2007).

[5] Please note that in a very recent case (Cour de Cassation, February 20, 2007, n° pourvoi 05-14082), the French Supreme Court considered that this prong was no longer a requirement.

[6] *In re Munzer*, January 7, 1964, Bull. Civ. 1, n°15.

[7] *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466, at *26 (S.D.N.Y., May 21, 2007).

[8] *Conseil Constitutionnel*, decision 257 DC, July 25, 1989, dr. Soc. 1989, page 627.

[9] Specifically, § 328 Par. 1 No. 4 Civil Procedural Code (*Zivilprozessordnung*) prohibits the recognition of a foreign judgment if this would lead to a violation of fundamental principles of German law and public policy (*ordre public*).

[10] Article 103 Basic Law (*Grundgesetz der Bundesrepublik Deutschland*).

[11] *Kapitalanlegermusterverfahrensgesetz*.

[12] *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466 at *30 (S.D.N.Y., May 21, 2007).

[13] *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466 at *30 (S.D.N.Y., May 21, 2007).

[14] *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466 at *31 (S.D.N.Y., May 21, 2007).

[15] *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466 at *31 (S.D.N.Y., May 21, 2007).

[16] Increasingly, however, securities claims are purchased at a discount before a "collective" claim is brought.

[17] *LegalNews*, March 23, 2007

[18] Represented by Latham & Watkins' Frankfurt office

[19] Represented by Latham & Watkins' Paris office

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