

# Vivendi Securities Class Action

Louis F. BURKE<sup>1</sup> and Christopher J. GRAY<sup>2</sup>



Louis F. BURKE



Christopher J. GRAY

**A** United States District Court sitting in New York City rejected arguments by defendants Vivendi, S.A. (“Vivendi”) that certain European investors could not participate as class members in a securities class action arising out of Vivendi’s much-publicized accounting problems. The Court certified a class including non-United States Vivendi shareholders from the United Kingdom, France and Holland, but declined to certify the class to include investors from Austria and Germany. In certifying the class,<sup>3</sup> the court distinguished between countries in which the judgment in a U.S.-style “opt out” class action would likely be recognized and enforced in the event that defendants prevail in the Vivendi class action, and countries in which such a judgment would be unenforceable. The decision is significant because the court rejected defendants’ arguments that the inclusion of foreign investors in the class would render the action unmanageable and that a class action would not be a superior procedural device to individual litigation for resolving class members’ claims. The decision is also significant because the court certified a class including foreign investors who purchased their Vivendi shares on the Paris Bourse (as well as those who purchased Vivendi ADSs on the New York Stock Exchange).

## The Factual and Procedural Background of the Vivendi Class Action

Vivendi is a French corporation engaged in the news and entertainment media business, as well as so-called “Environmental Services.” At relevant times, Vivendi had approximately 1.08 billion shares outstanding, of which twenty-five percent of these were held by United States shareholders as American Depositary Shares (“ADSs”) traded on the New York Stock Exchange. The

remainder of Vivendi’s shares were ordinary shares traded primarily on the Paris Bourse and held predominantly by persons in France and the rest of Europe.

Between 1996 and 2001, Vivendi, under the leadership of CEO Jean-Marie Messier, caused the company to engage in several multi-billion dollar acquisitions of U.S. and non-U.S. companies by using Vivendi stock as payment and by borrowing cash against future earnings. In the course of financing these acquisitions, Vivendi incurred substantial additional debt.

The plaintiffs in the Vivendi class action alleged that the company reported materially false and misleading financial results and made false filings with the United States Securities and Exchange Commission (“SEC”) that, *inter alia*, failed to timely record goodwill impairments and improperly applied generally accepted accounting principles (“GAAP”).<sup>4</sup> Although Vivendi was allegedly on the verge of insolvency by the end of 2001, defendants continued to reassure investors that Vivendi had sufficient cash to meet its obligations for the next twelve months. Defendants continued with these assurance even though by the time defendant Messier was forced out as CEO, Vivendi was allegedly on the verge of being unable to pay its bills and was on the edge of bankruptcy. Vivendi later wrote down the value of its assets by billions of dollars and declared a multi-billion dollar loss for 2002.

Disgruntled shareholders brought multiple class action lawsuits against Vivendi, Messier and Vivendi Chief Financial Officer Guillaume Hannezo (“Hannezo”) beginning in July 2002. The class actions were later consolidated into a single case. Defendants moved to

dismiss the consolidated class action, arguing, *inter alia*, that plaintiffs' complaint insufficiently described the alleged fraud, that the Court lacked jurisdiction over the claims brought by foreign class members who bought Vivendi ordinary shares traded on foreign markets, and that defendants' alleged unlawful conduct had insufficient nexus with the United States for a U.S. court to assert subject matter jurisdiction<sup>5</sup>.

The court denied in part and granted in part defendants' motion to dismiss, leaving plaintiffs able to assert substantially all of their claims against defendants<sup>6</sup>. In its ruling, the court rejected defendants' contentions that Vivendi and the individual defendants' conduct had insufficient nexus with the United States, and noted that both of the alleged principal individual actors Vivendi's accounting fraud (Messier and Hannezo) moved to the United States during 2001 and that many of the statements alleged to be false and misleading were made by defendant Messier after he had moved to New York<sup>7</sup>.

On July 15, 2005, plaintiffs filed a motion to certify a class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure consisting of all persons who purchased or otherwise acquired Vivendi ordinary shares or ADSs between October 30, 2000 and August 14, 2002<sup>8</sup>.

### Federal Rule of Civil Procedure 23 and the "Opt-Out" Class Action

In most class actions for damages under Federal Rule of Civil Procedure 23<sup>9</sup>, the procedural rule setting forth the standards for certification of class actions in the federal courts of the United States, a class of persons defined by the district court is represented by one or more "class representatives," who prosecute claims on behalf of the class. In the event that the class action case is litigated to a judgment in favor of the plaintiffs (or, as happens much more frequently, settled on a classwide basis), all members of the class who submit the required claims paperwork by a deadline set by the court are entitled to participate in the proceeds of the judgment. Those who do not either submit a claim or provide notice to the defendants that they wish to be excluded from the class (or "opt out") by the deadline set by the court receive

nothing as a result of the class action judgment, but are forever barred from pursuing individual claims against the class action defendants that overlap with the claims in the class action<sup>10</sup>.

Even class members who have **no** active participation in the class action whatsoever will have their claims against defendants released in connection with the entry of judgment in a Fed. R. Civ. P. 23(b)(3) class action, unless the class members take the affirmative step of "opting out" of the class action and pursuing individual claims. Thus, in settling a class action, defendant buys peace with a defined class of persons, for an ascertainable sum. Class members' subsequent claims may be barred "where there is a realistic identity of issues between the settled class action and the subsequent suit, and where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members."<sup>11</sup> A class action settlement may "prevent class members from subsequently asserting claims relying on a legal theory different from that relied on in the class action complaint, but depending on the very same set of facts."<sup>12</sup>

In the event that a class action is litigated to a judgment in favor of the defendant, the defendant also obtains a release against both the named plaintiffs in the class action, and the absent class members who are members of the class. As one U.S. federal court observed: "[I]f defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been."<sup>13</sup>

Because of this rule, and in the interest of fairness and mutuality, U.S. courts have attempted to permit foreign investors to participate in class actions only in cases in which the defendant would have the fair benefit of a victory on the merits, *i.e.*, when the defendant would be able to enforce a class action judgment *in the defendant's favor* in the home countries of foreign class members. As framed by the Vivendi court, this question turns on whether the foreign country would enforce a class action judgment even against an *absent class member* who had no individual active participation in the United States class action<sup>14</sup>.

### The Vivendi Court's Country-By-Country Analysis Concerning Enforceability of the Judgment in an "Opt Out" Class Action

United States courts have "somewhat haphazardly" (in the words of the Vivendi court) grappled with the question of when it is appropriate to permit foreign investors to assert claims against companies as part of a class action, due to the fact that some foreign jurisdictions will not recognize and enforce a judgment in an "opt out" class action as precluding subsequent claims by class members in the event that the class action is unsuccessful<sup>15</sup>. After reviewing the various cases that had addressed this issue, the Vivendi court carefully analyzed the law in each of France, Great Britain, Austria, Germany and the Netherlands to determine whether the courts in those countries are likely to enforce a judgment in a U.S.-style "opt out" class action against absent class members.

#### France

In order for a foreign judgment to be enforceable and given *res judicata* effect in France, the foreign judgment must be granted *exequatur*.<sup>16</sup> *Exequatur* is a procedure pursuant to which the courts of France evaluate a foreign judgment to determine whether it is enforceable in France.

The *exequatur* procedure has three prongs. The first prong is that the foreign court must properly have jurisdiction under French law (the "jurisdictional prong"). In order to satisfy the jurisdictional prong the following conditions must be met: (1) the case must not fall within the exclusive jurisdiction of the French courts; (2) the circumstances of the case or judgment at issue must be linked in a "characterized manner" to the foreign court; and (3) the choice of the foreign court must not be fraudulent.<sup>17</sup> The Vivendi court found that the jurisdictional prong would probably be met in a French court because a number of the fraudulent acts occurred in the United States, trading in Vivendi securities occurred in the United States, and individual defendants moved to the United States.<sup>18</sup> Therefore, the Vivendi court reasoned, it would be unlikely that a French court would find that the plaintiffs engaged in forum shopping by bringing the case in the United States.

The second prong of the *exequatur* procedure is that the foreign court must have applied the appropriate law under French conflict-of-law principles (the “applicable-law prong”).<sup>19</sup> This factor will be satisfied if it is determined that an equivalent decision would have been reached by a French court.<sup>20</sup> The Vivendi court found that based on the substantive similarities of U.S. and French laws prohibiting the dissemination of false and misleading information to shareholders, the law of France and the United States is considerably equivalent and the applicable-law prong was met.<sup>21</sup>

The final *exequatur* prong is known as the “public policy prong” and requires that the decision in the foreign court must not contravene French concepts of international public policy.<sup>22</sup> The Vivendi court determined that the U.S.-style “opt out” class action model is not offensive to French conceptions of international public policy.<sup>23</sup> The court rejected defense contentions including the argument that an “opt out” class action violates the French principle of law known as *nul ne plaide par procureur*, which essentially holds that no person can make a legal claim in court without making his identity known individually in the proceedings.<sup>24</sup> The Vivendi court reasoned that an opt-out class action does not violate this principle because absent class members in an opt-out class action are reasonably identifiable as participating parties. The court further noted that French law appears to be evolving in the direction of permitting U.S.-style opt-out class actions.<sup>25</sup>

Finally, the court concluded that it was unlikely that a French court would find that there was fraud or undue forum-shopping in procuring a judgment in the Vivendi class action, and concluded as follows: [A] judgment in this case would, more likely than not, be granted recognition at such time as an *exequatur* proceeding is instituted.<sup>26</sup>

### Great Britain

The Vivendi court next considered whether the courts of England would recognize and enforce a judgment in an opt-out class action. An English court will enforce a foreign judgment if it finds that the court that entered the judgment was competent to do so.<sup>27</sup> Competency is determined by examining the jurisdictional

power of the court over the defendant.<sup>28</sup> Therefore, an English court will enforce a foreign judgment if it finds either that the defendant was present within the foreign court’s jurisdiction when proceedings were instituted, or that the defendant submitted to the foreign court’s jurisdiction.<sup>29</sup>

Under this standard, the Vivendi court found that an English court would be likely to enforce a judgment in the Vivendi action. The court rejected a defense contention that the courts of England would refuse to enforce a judgment in an opt-out class action against absent class members because the absent class members were not individually served with process.<sup>30</sup> The court reasoned that the inference that absent class members could not be bound by a judgment in the Vivendi case contravened Rule 19.6 of the (English) Civil Procedure Rules, which specifically allows absent parties to be bound by a judgment in a representative action.<sup>31</sup>

### Germany

The Vivendi court concluded that it is not likely that a German court will enforce a judgment in an opt-out class action.<sup>32</sup> The court was not persuaded by the defense contention that enforcing a judgment in the Vivendi class action would likely violate the German legal principle of *ordre public*, which establishes the right of all citizens to be heard and participate in legal proceedings that affect their rights.<sup>33</sup> The court reasoned that the actual notice to class members required in a class action under (United States) Fed. R. Civ. P. 23(b)(3) would, if carried out in an appropriate manner, likely satisfy German due process requirements.

However, unlike France and England, Germany has never utilized or recognized collective or representative actions in which the litigation results obtained by a party representative bind non-parties.<sup>34</sup> Based on the fact that the concept of a representative action appears to be alien to German law, the court concluded that “plaintiffs have not shown a probability that German courts will give *res judicata* effect to the judgment in this case.”

### Austria

As the Vivendi court noted, an Austrian court will only recognize a foreign judgment if there is formal reciprocity

between the Austrian court and the foreign court.<sup>35</sup> Formal reciprocity can only be established by treaty or an Austrian decree establishing reciprocity.<sup>36</sup>

Since there are no treaties of reciprocity between Austria and the United States, and Austria has issued no decrees regarding the enforcement of U.S. judgments, the Vivendi court concluded that an Austrian court would most likely not enforce a U.S. judgment.<sup>37</sup>

### Netherlands

Finally, the Vivendi court held that a Dutch court would be likely to enforce a judgment in the Vivendi class action.<sup>38</sup> The court noted that while shareholder class actions are not currently available as a remedy under Dutch law, recently enacted class action legislation in other areas of law and shows that the recognition of the judgment would not be contrary to fundamental principle of fairness under Dutch law.<sup>39</sup> Therefore, the court held, plaintiffs had “shown a probability that Dutch courts would recognize a judgment or settlement in this action.”<sup>40</sup>

### Conclusion: As Vivendi Illustrates, There Should Be No Overarching Legal Impediment to Increasing Foreign Investor Participation in U.S. Shareholder Class Actions

Despite finding itself constrained to exclude German and Austrian class members from the Vivendi class, the Vivendi court rejected many arguments by defendants that, if accepted, would require the rejection of many or all foreign class members in U.S. class actions.

The court rejected generic contentions that notice to foreign class members would be “unmanageable”<sup>41</sup>, that certification of a single class was inappropriate because the New York Stock Exchange and the Paris Bourse are not “perfectly integrated” markets<sup>42</sup> and that foreign investors could not serve as class representatives on behalf of U.S. investors if they purchased on the Paris Bourse rather than the New York Stock Exchange<sup>43</sup>.

Thus, the Vivendi decision is fairly read to suggest that foreign investors are eligible to participate in U.S. securities class actions both as absent class members and as full-fledged class representatives, albeit with certain exceptions.

The Vivendi decision comes at a time when foreign institutional investors have shown increasing interest in participating in U.S. class actions, as evidenced by recent research showing that 12% of U.S. securities class actions in 2006 attracted at least one foreign institutional investor seeking appointment as lead plaintiff<sup>41</sup> (up from zero participation in 1999 and 2000)<sup>45</sup>. This trend could quickly be reversed if U.S. courts showed an inclination to reject foreign institutional investors as lead plaintiffs and class representatives due to their perceived susceptibility to unique defenses.

The careful and highly persuasive Vivendi decision, while not binding on other U.S. District Courts, bodes well for increased participation in U.S. class actions by foreign institutional investors because of its scholarly consideration, and rejection, of the principal defense arguments for the wholesale rejection of foreign investors as participants in U.S. class actions.

Louis F. BURKE  
*Louis F. BURKE, P.C.*

Christopher J. GRAY  
*Christopher J. GRAY, P.C.*

<sup>1</sup> Louis F. Burke is a sole practitioner in New York City who specializes in securities and commodity futures litigation. Mr. Burke is President of the UIA's Litigation Commission.

<sup>2</sup> Christopher J. Gray maintains a law practice in New York concentrated in complex litigation, arbitration, and class actions and currently represents the plaintiffs in several class action and shareholder derivative cases pending in state and federal court. Mr. Gray holds a law degree from Georgetown and a bachelor's degree from the University of Wisconsin.

<sup>3</sup> The court certified a class defined as follows: "all persons from the United States, France, England, and the Netherlands who purchased or otherwise acquired ordinary shares or American Depository Shares of Vivendi Universal, S.A. between October 30, 2000 and August 14, 2002." *In re Vivendi Universal, S.A. Sec. Litig.*, 2007 WL 149046 at \*35 (S.D.N.Y. May 21, 2007)(hereinafter referred to as the "Decision").

<sup>4</sup> GAAP is catch-all term for the standards that govern financial reporting in the United States, and consists of those principles recognized by the accounting profession as the conventions, rules, and procedures necessary to define accepted accounting practice at the particular time. SEC Regulation S-X, 17 C.F.R. § 210.4-01(a)(1), provides that financial statements filed with the SEC, which are not prepared in compliance with GAAP, are presumed to be misleading and inaccurate.

<sup>5</sup> See 381 F. Supp. 158 (S.D.N.Y. 2003), *reconsideration denied*, 2004 WL 2375830 (S.D.N.Y. Oct. 22, 2004).

<sup>6</sup> See *id.*

<sup>7</sup> See 2004 WL 2375830, at \*4.

<sup>8</sup> Decision at \*2.

<sup>9</sup> Rule 23 provides in pertinent part as follows: Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

<sup>10</sup> See *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005)

<sup>11</sup> *TBK Partners, Inc. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir.1982).

<sup>12</sup> *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 n. 17 (2d Cir.1981).

<sup>13</sup> *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir.1975).

<sup>14</sup> See *id.*

<sup>15</sup> See Decision at \*16 et seq.

<sup>16</sup> Decision at \*18-19.

<sup>17</sup> Decision at \*19.

<sup>18</sup> Decision at \*20-21.

<sup>19</sup> Decision at \*22.

<sup>20</sup> See *id.*

<sup>21</sup> Decision at \*23.

<sup>22</sup> Decision at \*24.

<sup>23</sup> See *id.*

<sup>24</sup> Decision at \*24.

<sup>25</sup> Decision at \*26.

<sup>26</sup> Decision at \*26.

<sup>27</sup> Decision at \*27.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> Decision at \*27.

<sup>31</sup> See *id.*

<sup>32</sup> Decision at \*29.

<sup>33</sup> See *id.*

<sup>34</sup> Decision at \*30.

<sup>35</sup> Decision at \*30.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> Decision at \*31.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> Decision at \*34.

<sup>42</sup> See *id.*

<sup>43</sup> This conclusion is not square stated, but is implicit in the court's rejection of the need to certify sub-classes of purchasers of ordinary Vivendi shares and Vivendi ADSs. See *id.*

<sup>44</sup> The Private Securities Litigation Reform Act of 1995 ("PSLRA") establishes the procedure for appointment of the lead plaintiff in a securities class action. The process begins when the first plaintiff, within 20 days after filing the initial action, publishes a notice of pendency which informs class members, *inter alia*, of their right to seek appointment as lead plaintiff. PSLRA § 21D(a)(3)(A)(I). Within 60 days of such publication, any person or group of persons may apply to the court for appointment as lead plaintiff. PSLRA § 21D(a)(3)(A)(I).

The court "shall adopt a presumption that the most adequate plaintiff in any private action arising under [the Securities Act and the Exchange Act, respectively] is the person or persons that

(aa) either has filed the complaint or made a motion in response to a notice under subparagraph (A)(I);

(bb) in the determination of the Court has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure."

The presumption that the person or group of persons with the largest financial interest (usually interpreted to mean the largest losses traceable to the alleged fraud) is the most adequate class representative will be rebutted only upon proof by a member of the class that the person or group will not fairly and adequately protect the interests of the class or is subject to unique defenses that render such putative lead plaintiff incapable of adequately representing the class. See *In re Donnkenny, Inc. Securities Litigation*, 171 F.R.D. 156, 157 (S.D.N.Y. 1997).

Thus, some of the arguments that the Vivendi defendants raised in opposing class certification could, if credited, also militate against the appointment of a foreign institutional investor as lead plaintiff.

<sup>45</sup> *Accountability Goes Global: International Investors and U.S. Securities Class Actions* (Institutional Shareholder Services, May 2007), available at [www.issproxy.com/pdf/AccountabilityGoesGlobal.pdf](http://www.issproxy.com/pdf/AccountabilityGoesGlobal.pdf).