



AP Photo

MOTORHEAD'S Lemmy Kilmister might sound like a damage case, but it's definitely not overkill during the "TV Total Stock Car Crash Challenge 2006" on German television October 7. The show featured celebrities racing in western Germany.

(US\$2.07 billion) deal to buy BMG Music Publishing is based on the "Hell Or High Water" approach, so called because the buyer bears the financial burden if the monopolies authorities object.

If the European Commission has a problem with the deal – it's already facing opposition from the independent music companies – the German media giant gets paid its money just the same.

The French company knows the risks involved. It employed a similar strategy to BMG when it was a seller needing to see a quick cash return on assets.

During the Vivendi fire sale of 2002, a time when the company was said to be close to collapsing under a US\$20 billion mountain of debt, it hived off its publishing interests, including the best-selling dictionaries put out by Larousse and Le Robert, for a reported euro 1.25 billion.

Lagardere, the purchaser, took all the risks on regulatory approval and the deal was done and Vivendi was paid within a couple of months.

Lagardere was making big money out of its aerospace business and producing cars for Renault, but what concerned the regulators was that it would give the company too much of the French publishing market. It has a huge stable of magazines including *Elle* and *Car & Driver*.

The EC approved the Vivendi purchase, but only subject to Lagardere disposing of the equivalent of half of its new assets. Waiting for the ruling – and then selling off the requisite assets – took Lagardere a little more than two years.

Some newspaper reports suggest the European regulators aren't happy with this acquisition technique. It's based on the principle that the risk of owning an asset falls on the buyer, leaving the vendor as custodian of a business that it's already sold.

Vivendi appears to have hedged some of its bets by operating BMG Music Publishing as an entirely separate business to its own music publishing interests, thereby greatly

cutting the cost of unraveling the two businesses should the EC rule against the deal.

The EC is also said to be concerned about the number of companies using this "Hell Or High Water" strategy. Cable operator Liberty Global is using it to buy Czech company Karneval for US\$416 million, with JPMorgan and Deutsche Bank overseeing the deal.

Denver-based Liberty Global, Europe's largest supplier of cable services, already owns the Czech Republic's top cable provider, so there was regulatory risk inherent in buying the country's number two.

However, the strategy is more common in the media sector because there are often extra layers of regulatory clearance needed due to heightened concerns about concentration.

Claude Luter Dies

CLARINETTIST AND BAND LEADER Claude Luter, 83, has died, depriving France of one of the few remaining veterans of the post-war Paris jazz scene.

French Culture Minister Renaud Donnedieu de Vabres paid tribute to Luter, describing him as "a very great name in French jazz."

The son of a musician, Luter discovered New Orleans jazz in his teens and began performing in Paris during the German occupation in World War II.

After the liberation, he and his band became a fixture at the Lorientais, the first of the great Latin Quarter jazz clubs that were the center of France's burgeoning musical and intellectual revival.

He met Louis Armstrong at the Nice jazz festival in 1948 and, the following year, began a working relationship with U.S. clarinet and saxophone player Sidney Bechet. It lasted until the American jazzman's death 10 years later.

He also accompanied Armstrong and, in 1970, was invited to Los Angeles for Satchmo's 70th birthday celebrations.

Luter, who died October 6, continued to perform until a few months before his death.

GERMANY

Scorpio Case Stings Euro Tax Laws

HARALD GRAMS AND DICK MOLENAAR look to have made a legal breakthrough that will shake up tax laws in most of Europe's major live music markets.

Regular touring territories including Germany, France, Spain and Italy are among the countries that need to

change the way they tax musicians from fellow EU member states.

It could also be good news for U.S. acts. Molenaar said the October 3 European Court of Justice victory is a crucial step toward unifying EU tax law.

"When all countries come to operate the same system, I can't see the law being framed in such a way that it would only apply to EU acts. It would make sense to treat all visiting acts in the same way," he explained.

Grams and Molenaar's June 2003 "Gerritse" case victory established the principle that countries that apply a gross withholding tax on artists' earnings are in breach of Articles 59 and 60 of the EC Treaty.

It means an artist is entitled to claim expenses against withholding tax, whereas the October 3 ECJ ruling took that a step further by saying the artist is also entitled to deduct those expenses at source and only get taxed on the gross profit.

Belgium, Austria, Sweden and Poland are also among the countries that'll need to change their non-resident artist tax system into net taxation, after the deduction of direct expenses.

Of the 25 EU member states, only the U.K., Ireland, Holland and Denmark have tax regs that fall within the EC Treaty. Denmark, which has a 25 percent VAT rate, doesn't collect withholding tax.

Countries that have been withholding taxes, at rates as high as 25 percent, will now have to follow something closer to the U.K. tax model, which has allowed expenses to be deducted at source since January 1987.

The Dutch have been running a similar system, but that'll be scrubbed at the end of the year because the government has decided to stop bothering to tax non-resident artists and athletes.

Finance minister Gerrit Zalm made the announcement at the beginning of September, although the argument for such a course of action first appeared in Molenaar's "Taxation of International Performing Artistes," the thesis the All Artistes (Rotterdam) director wrote when studying for his doctorate.

Zalm and the government may also have been persuaded by the fact that taxing visiting EU artists and athletes was only bringing in about euro 6.4 million per year, which is less than 0.01 percent of the Dutch treasury's euro 100 billion annual tax income. When the credits have been paid out to the Dutch acts that have been touring abroad, the net tax in-

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HARALD GRAMS (L) AND DICK MOLENAAR look to have made a legal breakthrough that will shake up tax laws in many of Europe's major concert markets.

come from artists and athletes was very close to zero.

Apart from the scrapping of the tax, the other big plus for Molenaar and Grams was that the Dutch government also said it intended to tell Paris-based OECD, the organisation that frames international tax treaties, that other EU countries should consider following suit.

As far as the Dutch government is concerned, it would be better if artists and athletes just paid tax on foreign earnings in their country of residence – as opposed to the country of performance.

Just as the case that first proved that EU tax laws are unfair to artists became known as “the Gerritse case,” the one that now allows artists to deduct costs at source is likely to become “the Scorpio case.”

It reached Luxembourg and the European Court Of Justice because Folkert Koopmans' Hamburg-based FKP Scorpio Konzertproduktion's appeal against massive withholding tax assessments raised in 1993 was being heard by the German Federal Finance Court (Bundesfinanzhof), which needed some clarification on how the Gerritse ruling should be interpreted.

The German tax authorities have softened their approach since Gerritse, but are still only allowing

expenses to be deducted from the withheld tax at the end of the year.

In 1993, Koopmans held on to his expenses at source and the Bundesfinanzhof wanted to check if Articles 59 and 60 of the EEC Treaty – which deal with the freedom of movement of labour within the EU – entitled him to do that.

By answering “Yes,” the court is saying all EU acts can deduct their expenses at source.

The curious prospect of having a '93 tax issue being decided by a 2003 ECJ ruling only happened because, at the time of the ruling, the EU Court of Justice Advocate General said he felt there should be no legal limit on how far back a company can go to apply for rebates on taxes that were collected outside of European rules.

Sony And BMG Want To Stay Married

EUROPE'S INDEPENDENT MUSIC companies are claiming Sony BMG's appeal against the annulment of its 2005 merger should be thrown out of court on the grounds that it's inadmissible.

The more Japanese electronics giant Sony and Germany's Bertelsmann media group move toward marrying their recorded music interests, the more the indies stand up and claim they have reason and just impediment to say the ceremony should be stopped.

Within 24 hours of the European Court of Justice announcing it will be hearing Sony BMG's appeal against the Court of First Instance's July decision to annul their marriage,

indie trade organisation Impala rushed out a statement saying the majors' appeal “changes nothing.”

“We would be very surprised if the Court were to allow this appeal at all,” the statement continued. “An appeal is only possible on grounds of law. The judgment was based entirely on grounds of fact – material errors of assessment and reasoning by the [European] Commission.

“We would expect it to be struck out on grounds of inadmissibility. The annulment of the Commission's original authorisation of Sony BMG remains in place.”

Impala said it will examine the wording of Sony BMG's case as soon as it's received a copy from the ECJ, but it has already pointed out that it “speaks volumes” that the European Commission itself hasn't appealed the fact the Court Of First Instance has overturned its original decision to allow the merger.

In a July judgment, the Court of First Instance – the EU's second-highest court – annulled the joint venture on the grounds that the European Commission had made errors in law and assessment when it approved the deal.

By not appealing, it looks as if the Commission is accepting that it must re-investigate any competition concerns over the tie-up. It will also have to ask the companies to suggest remedies to any remaining concerns it has.

Impala may also question whether Sony BMG, which had become the world's second-biggest record company, delivered the appeal to the ECJ within the legal time frame.

The Luxembourg-based court will start examining the appeal later in the year. Such cases usually take at least 12 months to decide.

From the numbers the U.S. industry has released so far, it looks as if the major record companies are all

performing to within a fraction of their 2005 market shares.

In round figures, that puts Universal way ahead with close to one-third of the market. Sony BMG, which should already be dismantling itself according to Impala, will have a shade more than one-quarter.

Warner Music Group, which has put its plans to buy EMI on the back burner since the Sony BMG merger was overturned, has a little less than one-fifth.

The British company, which has also put its efforts to buy Warner on ice, has about one-tenth of the market, a couple of percent lower than the combined indie companies.

RUSSIA U.S. Protests 10-Cent Downloads

A ROW OVER A SITE OFFERING 10-CENT downloads could stand in the way of Russia joining the World Trade Organisation (WTO), according to the U.K.'s *The Times*.

U.S. trade representative Susan Schwab wants Russian authorities to close the *allofmp3.com* site, which America regards as one of the world's largest online repositories of pirated music.

“I have a hard time imagining Russia being a member of the WTO with a Web site like that operating,” Schwab told Washington reporters.

MediaServices, the Moscow company running the service, claims it complies with Russian law on copyright protection and actually helped to prevent piracy. It accused U.S. officials of seeking to protect American online music providers from Russian competition, and pointed out that it's signed up thousands of new customers since Schwab's words were made public.

The site has 5.5 million subscribers and sells individual songs for between 10 and 20 U.S. cents each,

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