



M&A LAB

HERO HONDA SPLIT Dissection

Dissected by – *Team M&A*

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PROLOGUE

Auto giant 'Hero Honda' is to be henceforth known without the term 'Honda' – sounds bizarre – but that's the reality. The parent brand name that everyone has been paying heed to over last 26 years is going to melt down. Bringing down curtains to one of the most successful joint ventures in the automobile industry across the world, Hero Group of India and Honda Motor Company Limited of Japan have announced to pull out of their joint venture in India that was run in the name of – Hero Honda Motors Limited.

Amongst several commercial and other reasons, including reluctance to share key technology and quest to take the company global and expand its routes beyond the Indian markets, both the parties had to take the fateful decision of parting their ways with each other and draw the dividing line in their relationship that had commenced in 1984 when Hero Honda Motors Limited was incorporated as a joint venture entity between both the parties. The formal announcement of the separation between the parties has attracted interest from all quarters.

Founded in early 1984, the joint venture has been one of the most successful one and has carved out a large customer base for itself over the years. Having effectively tapped each other's strengths and expertise, in 2001, Hero Honda Motors Limited achieved the coveted position of being the largest two-wheeler manufacturing company in India and the 'World No.1' two-wheeler company in terms of unit volume sales in a calendar year by a single company. Hero Honda Motors Limited has retained that coveted position till date.¹ Hero Honda Motors Limited is listed on the National Stock Exchange ("NSE") and the Bombay Stock Exchange ("BSE") in India.

Though some form of affiliation will continue between Honda Motor Company Limited of Japan and Hero Honda Motors Limited till 2014, the dream run is close to being over with the announcement of the exit of Honda Motor Company Limited from the joint venture.

We, in this M&A Lab, examine the proposed exit of Honda Motor Company Limited from Hero Honda Motors Limited ("**Proposed Transaction**") based on the information available in public domain and probe the commercial, legal, regulatory and tax aspects of the same.

PARTIES INVOLVED IN THE PROPOSED TRANSACTION

<i>Brief snapshot of the Proposed Transaction</i>	
Company (India)	Hero Honda Motors Limited
Seller (Japan)	Honda Motor Company Limited
Buyer (India)	Hero Group through Hero Investments Private Limited
Proposed Transaction	Buyout of 26% stake of Hero Honda Motors Limited by Buyer as currently held by the Seller

¹ http://www.herohonda.com/co_corporate_profile.htm (last visited on February 17, 2011)

❖ Hero Honda Motors Limited (“Company”)

Company is a joint venture between the Hero Group of India (through Hero Investments Private Limited and Bahadur Chand Investments Private Limited) and Honda Motor Company Limited of Japan. The Company was incorporated on January 19, 1984 and is headquartered in New Delhi. Company is the world’s largest two-wheeler company in terms of sales volumes, a position that it has been holding for the last 9 consecutive years. Company has 3 manufacturing facilities, located at Gurgaon (Haryana), Dharuhera (Haryana) and Haridwar (Uttarakhand) with an aggregate capacity to produce 5.4 million vehicles per annum. It has an extensive sales and service network spanning around 4,500 customer touch points and ability to increase reach in new geographies and growth markets has proven to be very beneficial for the company.²

Company offers motorcycles in all the three two-wheeler segments: ‘*CD Dawn*’ and ‘*CD Deluxe*’ in the entry segment; ‘*Splendor*’, ‘*Passion*’ and ‘*Glamour*’ in the executive segment; and ‘*Achiever*’, ‘*Hunk*’, ‘*CBZ Xtreme*’ and ‘*Karizma*’ in the premium segment. ‘*Splendor*’ and ‘*Passion*’ are the two largest selling two-wheeler brands in India with monthly sales of around 200,000 and 100,000 units, respectively. The Company made its debut in the scooters segment in January 2006 with the launch of ‘*Pleasure*’ in the ungeared scooters segment; the sales volumes of this model have grown from around 93,000 units in financial year 2007 to over 200,000 units in financial year 2010.³

❖ Honda Motor Company Limited (“HM Japan”)

Formed on September 24, 1948, HM Japan is a multinational corporation which manufactures automobiles, motorcycles and power products as their chief products and is headquartered in Japan. HM Japan has grown to become the world's largest motorcycle manufacturer and one of the leading automakers. With a global network of 492 subsidiaries and affiliates (as of March 31, 2010) accounted for under the equity method, HM Japan develops, manufactures and markets a wide variety of products, ranging from small general-purpose engines and scooters to specialty sports cars.⁴

❖ Hero Group (“Hero Group”)

Hero Group is a vast conglomerate of companies owned by the Munjal family, either in the form of collaborations, joint ventures or fully-owned subsidiaries with a turnover of more than INR 100 billion annually (app. USD 2.22 billion). These companies have a presence largely in automobiles, automobile components, finance, bicycles, real estate and steel business. It began with the establishment of Hero Cycles Limited, based in Ludhiana, Punjab. The business was started by the four Munjal brothers establishing a bicycle spare parts business in Amritsar in the year 1944. By 1975, Hero Cycles Limited became the largest bicycle manufacturer in India. Over the years, they started moving into other fields, most notably the motorcycle sector and the Hero Group now consists of more than 18 companies. The Hero Group besides being the world’s largest manufacturers of bicycles, motorcycles and chains to this date, has in recent year also diversified into newer segments like Information Technology, IT Enabled Services and Financial Services.

❖ Hero Investments Private Limited (“HIPL”)

HIPL is a non-banking financial company registered with Reserve Bank of India (“**NBFC**”) and is part of the Munjal-family owned Hero Group. Recently in July 2010, pursuant to a family arrangement, all of Hero Cycles Limited shares in the Company were transferred to HIPL, which is held by partnership

² <http://www.icra.in/files/pdf/HHML-201012.pdf> (last visited on February 17, 2011)

³ *Ibid*

⁴ <http://world.honda.com/profile/overview/> (last visited on February 18, 2011)

firm Brij Mohan Lall Om Prakash. Along with Bahadur Chand Investments Private Limited, HIPL is one of the promoters of the Company.

❖ **Bahadur Chand Investments Private Limited (“BCIPL”)**

Bahadur Chand Investments Private Limited is part of the Hero Group and is also one of the promoters of the Company. It is an investment company primarily involved in the promotion and assistance of the Hero Group of companies and also actively involved in investments in the Group companies. This company too is held by the partnership firm Brij Mohan Lall Om Prakash.

OUTLINE OF THE M&A LAB

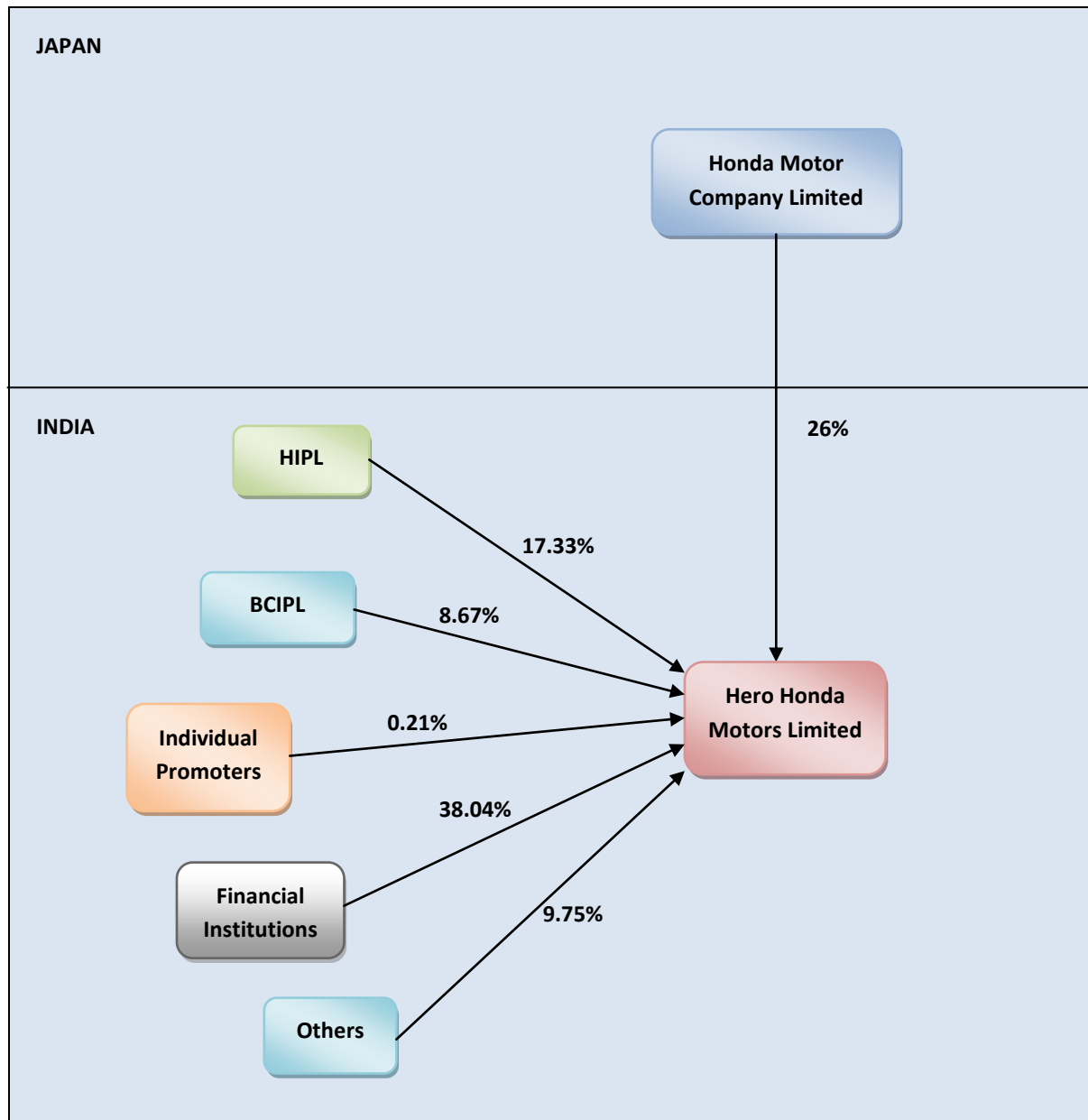
This M&A Lab is divided into 2 parts:

- **Part A – Pre Termination Scenario** – This part would primarily deal with the formative years of the Company, the key commercials of the joint venture and the reasons for split between Hero Group and HM Japan.
- **Part B – Post Termination Scenario** – This part covers the commercial, legal, regulatory and tax considerations in light of the current position of the Proposed Transaction and the effect of the exit of HM Japan, on the Company.

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CURRENT STRUCTURE**Current shareholding pattern of the Company**

The following diagram provides a schematic representation of the current shareholding pattern of the Company. At present, each of HM Japan and the Hero Group (through HIPL and BCIPL) hold 26% of the shares of the Company, 0.21% shares are held by other Indian individual promoters, 38.04% by institutions and 9.75% by others.



PART A – PRE TERMINATION OF JOINT VENTURE

This **Part A** provides an analysis of the formative years of the joint venture.

COMMERCIAL FRAMEWORK

THE JOINT VENTURE BETWEEN HERO GROUP & HM JAPAN⁵

1. What were the market dynamics before the joint venture between Hero Group & HM Japan?

Subsequent to independence and until the 1980s, foreign companies were not permitted to enter the Indian market. These restrictions were relaxed to a certain extent in the mid 1980s when foreign companies were allowed to enter the market through minority joint ventures. This period saw the setting up of numerous joint ventures along with foreign companies, and the Company was one such example. This brought about a transformation in the Indian economy making it more demand oriented in contrast to the earlier supply oriented strategies. Hence, the joint venture came into existence at a very critical time and provided HM Japan a means of entry into Indian markets. As mentioned further above, Company was incorporated early in 1984.

2. What was Hero Group's position before the joint venture?

Prior to the joint venture, Hero Cycles Limited had established itself as one of the major manufacturers of bicycles in India and manufactured close to 16,000 bicycles a day. In the process, they had nurtured an excellent network of dealers and distributors to serve India's expansive markets. This would go on to be one of the critical factors for the Company's success in India and was something that most other companies had not achieved to that by that time. The Hero Group had also entered multiple business areas in the meanwhile and were looking to expand its scope of businesses.

3. Was Hero Group the apt partner for HM Japan to enter into India?

HM Japan had been looking to tap the Indian markets for quite a while and with the relaxation of regulations they were seeking to enter into a joint venture with a suitable partner in India. HM Japan was already renowned for its technological expertise in the automobile and motorcycle manufacturing sector and this would prove to be their biggest contribution to the Company. Their initial plans called for an entry into the two-wheeler market as well as the electric generator market and accordingly Kinetic Engineering Limited was their first choice for partnership in India. They entered into a joint venture in 1984 but this was terminated in 1998. Hero Group was their next choice for their motorcycle venture.

4. Why did HM Japan select Hero Group for the joint venture?

The Hero Group through their company Hero Cycles Limited had made a mark for themselves in the Indian market. Hero was a well-known and respected brand name and an association with Hero would make the entry into Indian market a lot easier for HM Japan. Hero Cycle Limited's engineering

⁵ <http://www.herohonda.com/index.htm> (Source for all the commercials and formation of the joint venture.) (last visited on February 17, 2011)

capabilities, their know-how, experience in handling large volume production and their extensive distribution networks were also attractive factors in their favor. Their tight focus on financials and raw material processes also made them a suitable partner for HM Japan.

5. How was the joint venture formed?

The joint venture was in the nature of HM Japan providing technical know-how, setting up manufacturing facilities and future research and developments assistance. In furtherance of this, the Hero Group first signed the technical agreement with HM Japan in June 1984. This agreement was renewed in 1994 and again in 2004. At this stage, it is next due for renewal in 2014. In consideration for this technological support, HM Japan would receive a lump sum fee of USD 500,000 and 4% royalty on spare parts. At the beginning, both partners held a 26% stake in the equity of the Company. Another 26% was sold to the public and the rest was held with financial institutions. An important restriction under the agreement prevented Hero Group from collaboration with any other foreign player or allowing the Company to export its products. Hence, right from the beginning, the target for the Company was only limited to the Indian market.

6. How successful is the joint venture between Hero Group and HM Japan?

Over the year, Company has grown consistently, earning the title of the world's largest motorcycle manufacturer after having manufactured 1.3 million vehicles in 2001. They have retained this distinction till date and have an annual sales volume of over 2 million motorcycles, also owning '*Hero Honda Splendor*' which is the world's biggest motorcycle brand. They have successfully penetrated markets across the nation with over 5,000 outlets. In the last financial year 2009-2010, the company had total unit sales of 4,600,130 two-wheelers, a total net operating income of INR 158.605 billion (app. USD 3.52 billion) and a growth of 28.1%.

7. What were the reasons for the success of this venture?

Sound and proven technical capabilities of HM Japan and the reliability of Hero Group made an effective combination. HM Japan's technical expertise provided better fuel efficient motorcycles and was easily sold through Hero Group's deep distribution network. The fact that there were no major competitors in the initial years helped the Company make the best of the growing market demand for motorcycles. With the decrease in price difference in comparison with scooters, that were the more popular choice earlier, the Company was able to successfully stabilize in the Indian market.

THE FALL OF THE JOINT VENTURE BETWEEN HERO GROUP AND HM JAPAN

It all began when the Company, Hero Group and HM Japan, in a joint press release dated on December 16, 2010, conveyed the decision to terminate the celebrated joint venture. The parties made public, the fact of selling of HM Japan's holding of 26% in the Company to Hero Group. Further, on the same date, Company also disclosed a Memorandum of Understanding ("**MOU**") signed between the Company, HM Japan and Hero Group pursuant to which the parties would enter into a new license agreement. This proposal was rolled out keeping with the plan and taking the first step in the phased process of the HM Japan's exit from the Company. This decision meant curtains for the 26 year old Indo-Japanese partnership.

1. What are the key clauses in the MOU signed between both the parties?

In a meeting held on December 16, 2010, the board of directors of the Company approved the new licensing arrangement with HM Japan concurrent with the Hero Group's proposed acquisition of 26%

stake held by HM Japan in the Company.⁶ The highlights of this new arrangement (as per the press release from the Company) are given below⁷:

- All existing products of the Company to continue
- The fresh licensing agreement with HM Japan to provide new models to the Company
- Company will have the freedom to export to new markets
- Company will have the independence to set-up its own research and development (R&D) and new product development capabilities and acquire technology
- No change in ongoing operations
- Process for smooth transition was finalized between the parties
- Name of the Company and the brand name to be changed over time.

Subsequently, vide a disclosure made on January 24, 2011, Company confirmed that HM Japan and the Company had executed the final binding licensing agreements on January 22, 2011 with respect to existing products and new products following the MOU of December 16, 2010, which had been approved by their respective boards of directors.⁸

2. What are the main reasons for the split?

In spite of being the largest two-wheeler manufacturer in the world and riding on one of the most successful joint ventures, it seems like both the partners have had some misgivings. Amongst other, some of the key reasons that could have played a role in this historic descend are discussed here:

(i) Supply of components

The disagreement between the two partners started after HM Japan asked the Company to increase the supply of components ordered from HM Japan. HM Japan wants to increase its royalty from the sales of components in the joint venture, but has been unable to do so because the bulk of the sales of almost 60%, are contributed by relatively older bikes — ‘*Splendor*’ and ‘*Passion*’ for which the components are relatively standard and the profit margins are less.

(ii) Reluctance to share key technology

More stringent emission norms are set to kick in by 2015 for two-wheeler makers in India. The new Bharat Stage IV norms (BS-IV), to be imposed across India for two-wheelers by then, would be very different from the Bharat Stage III norms (BS-III) applicable today. Manufacturers are expected to make technical changes to their vehicles accordingly. Industry sources say that HM Japan and other global two-wheeler makers are investing heavily on upgrading technology to comply with new emission norms in different parts of the world. While the Indian two-wheeler market will move to BS-IV (corresponding to Euro-IV) in 2015, the European region will be upgraded to Euro-V in the same period. HM Japan knows that better fuel injection systems are required to meet the next level of emission standards in India. HM Japan has invested heavily in making its products more fuel-efficient and it is aware that it does not stand to gain much by sharing this crucial technology with the Company.⁹ This seems to be one of the reasons why HM Japan opted to end its 26-year-old alliance with the Hero Group.

⁶ <http://www.bseindia.com/stockinfo/anndet.aspx?newsid=bfe25ca2-c4de-4f75-9217-a3c48f694d75¶m1=1> (last visited on March 10, 2011)

⁷ http://www.bseindia.com/xml-data/corpfiling/AttachHis/Hero_Honda_Motors_Ltd_161210.pdf (last visited on March 10, 2011)

⁸ <http://www.bseindia.com/stockinfo/anndet.aspx?newsid=54d0d519-450a-47c8-9f37-2c7d8c61feec¶m1=1> (last visited on March 10, 2011)

⁹ <http://www.bsmotoring.com/news/emission-norms-triggered-honda-exit/2940/1> (last visited on March 10, 2011)

(iii) Brand confusion

Analysts feel that the expansion of Honda Motorcycle and Scooter India Private Limited (“HMSI”) and the overlaps between the two companies (i.e. HMSI and the Company) is hurting the Company. They also feel that this is leading to brand confusion because the products of both the companies are out in the market and they seem to believe that the consumer is getting confused as to which is the real ‘Honda’.

(iv) Distrust between the two companies

Certain board members also feel that there has been preferential treatment that has been given to HMSI when it comes to product and technology. They feel high-margin products seem to have found out their way into the HMSI stable whereas the low-margin products seem to have gone the way of the Company.

(v) Bar on exports hurt the long term growth of the Company

The board members also feel that the bar on exports for the Company is not an equitable arrangement. So far, the joint venture did not permit the Company to set foot overseas. An industry peer such as Bajaj Auto Limited exports about 30% of its motorcycles in a year. As a consequence, under the MOU and the new licensing agreement, Company won’t have geographic constraints.

(vi) The split was inevitable

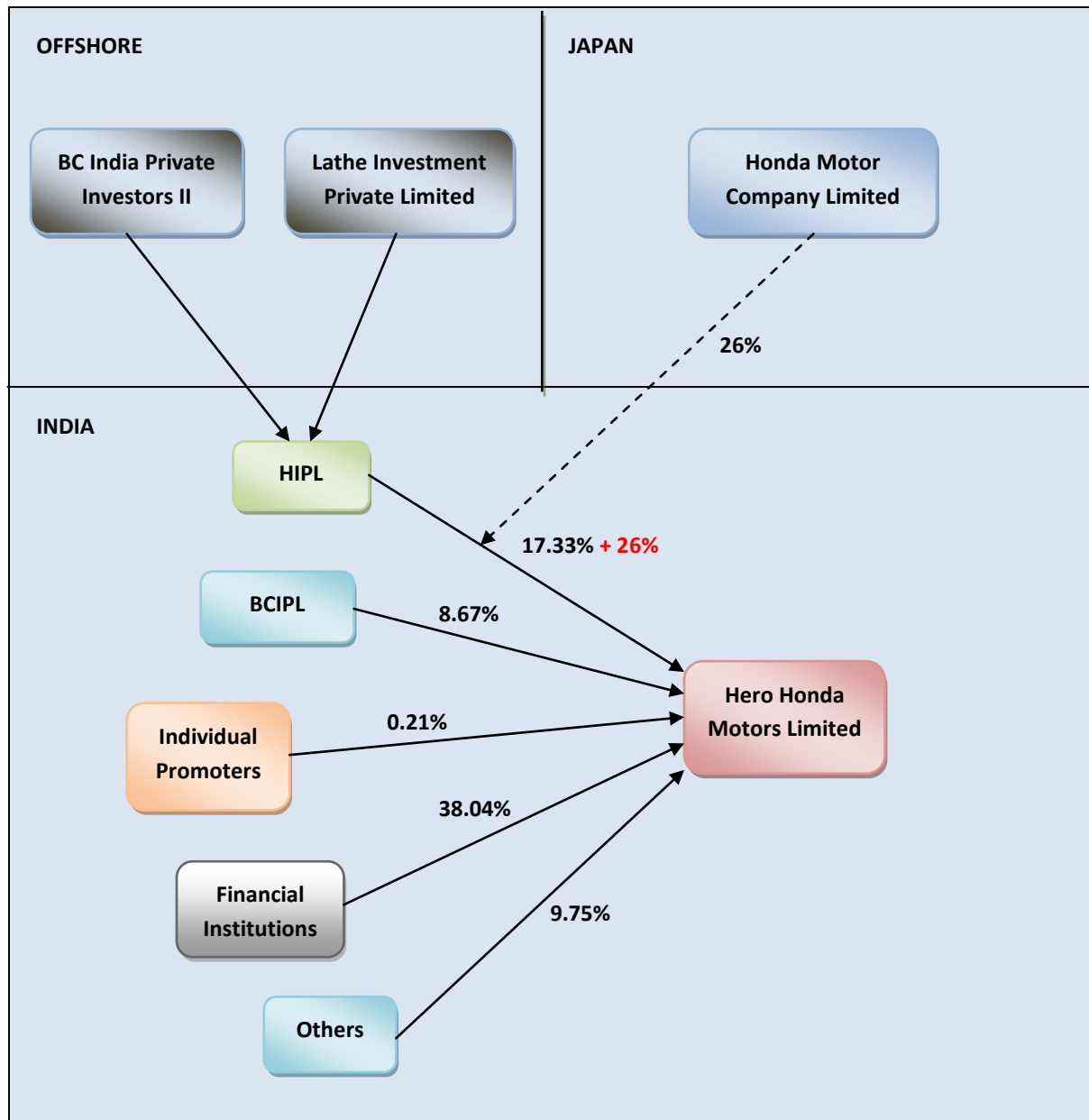
The regulatory restrictions did not permit foreign investments in the 1980s. Joint ventures were a necessity at the time, done more from legal compulsions rather than commercial aspirations. Today, there are fewer restrictions. Global companies in most sectors, seeking to enter India, can make pure commercial decisions for themselves, if they want to set up a 100% subsidiary in India or enter through a joint venture. Companies with a strong network and international operating experience may like to come into India through a 100% stake and this is what HM Japan is aiming for.

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PART B – POST TERMINATION OF JOINT VENTURE

This **Part B** deals with the commercial, legal, regulatory and tax issues involved between the Hero Group and HM Japan in light of the current standing of the Proposed Transaction.

The proposed structure is as depicted below:



COMMERCIAL FRAMEWORK**1. How is HM Japan exiting the joint venture?**

As mentioned further above, the parties initially made it clear that the termination of the joint venture will happen by way of the acquisition of the full 26% holding of the Company held by HM Japan by HIPL. On March 8, 2011, HIPL made a filing to the BSE and NSE as required under Regulation 3(3) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“**Takeover Code**”) thereby disclosing that it proposes to acquire the entire 26% shareholding of the Company, currently held by HM Japan, on or about March 22, 2011.¹⁰ As a consequence of such an acquisition, the Hero Group, through its subsidiary HIPL, will consolidate its holding in the Company to 43.33%. In combination with BC IPL, Hero Group will, thus, indirectly hold 52% in the Company.

2. What is the mode of funding for Hero Group for the acquisition of the 26% holding of the Company from HM Japan?

As a remarkable turnaround and rather an eye opener, Hero Group announced on March 8, 2011 that HIPL will be acquiring the 26% shareholding of the Company from HM Japan for a deal size of INR 38.418 billion (app. USD 851 million), which breaks into INR 739.97 (app. USD 16.44) per share of the Company.¹¹ The announced purchase price is at a sharp discount than the market price of the shares of the Company. Interestingly, on the date of announcement of the deal size, the share price of the Company on the stock exchange in India is almost double than the acquisition price per share.

HIPL has sourced the funds for the said acquisition of 26% stake of the Company in the following form:

(i) Bridge Financing

HIPL has pledged its entire shareholding of 17.33% in the Company in order to bridge finance its buyout of HM Japan’s 26% stake in the joint venture. HIPL has pledged:

- (a) 10,741,798 shares representing 5.379% of stake in the Company towards Axis Trustee Services Limited;
- (b) 11,935,331 shares representing 5.977% of stake in the Company towards IL&FS Trust Company Limited; and
- (c) 11,935,331 shares representing 5.977% of stake in the Company towards IDBI Trusteeship Services Limited.

The above mentioned shares have been pledged by HIPL in favour of Axis Trustee Services Limited, IL&FS Trust Company Limited and IDBI Trusteeship Services Limited (together hereinafter referred to as the “**Pledgees**”) to issue short term debt, through non-convertible debentures expiring in 3 months, to fund the purchase of the shares of the Company from HM Japan. Insurance companies, Non-banking financial companies and mutual funds have bought the short-term bonds of the Company.¹²

¹⁰ http://www.bseindia.com/xml-data/corpfiling/announcement/Hero_Honda_Motors_Ltd_080311_SAST.pdf (last visited on March 10, 2011)

¹¹ http://articles.timesofindia.indiatimes.com/2011-03-09/india-business/28671937_1_private-investors-ii-lathe-investment-private-limited-hero-honda (last visited on February 17, 2011)

¹² *Ibid*

(ii) Funding from private equity investors

Preceding the pledge of shares of the Company by HIPL, HIPL had made an application to the Foreign Investment Promotion Board (“FIPB”) in respect to foreign investment in HIPL by certain private equity investors for the purpose of acquisition of the stake of the Company held by HM Japan. As the consideration involved is in excess of INR 12 billion (app. USD 266.66 million), and the investment requires prior FIPB approval, the same needs to be approved by the Cabinet Committee on Economic Affairs (“CCEA”), in addition to the FIPB. As on the date of this M&A Lab, the said approval from the CCEA is pending. Subsequent to the approval from the CCEA and FIPB, HIPL would repay the short term debt raised from the debenture holders from the funds invested by the Investors in HIPL.

3. Who are the offshore private equity investors investing in HIPL?

Dr. Brij Mohan Lall Munjal, Chairman of the Company, confirmed that HIPL has signed “definitive agreements” with private equity firms BC India Private Investors II, an affiliate of Bain Capital LLC, and Lathe Investment Private Limited, a wholly owned subsidiary of Government of Singapore Investment Corporation (Ventures)¹³ (together hereinafter referred to as the “Investors”). HIPL proposes to fund the acquisition by issuing securities to the Investors worth INR 45 billion (app. USD 1 billion).¹⁴ BC India Private Investors II has agreed to pick up 70% of the investment and the balance 30% will be held by Lathe Investment Private Limited.¹⁵

4. What is the speculation regarding payment of royalty under the new licensing arrangement?

As was expected, HM Japan will end up selling its 26% stake to the Hero Group at a substantial discount to the market price. To offset this, there is a speculation that the Company would now have to pay higher royalty amounts till 2014 as an arrangement under the new licensing agreement entered between the parties on January 22, 2011.

In addition, experts say the Japanese automaker's royalty from the Company will ‘most likely’ be subject to corporate tax in Japan. Interestingly, on December 18, 2010, Japan's Nikkei daily reported that HM Japan would divest its stake to its Indian partner for INR 54 billion (app. USD 1.2 billion) when the current market value of its holdings is nearly INR 99 billion (app. USD 2.1 billion), that is, at a discount of nearly 45% to the market. However, as per a report, HM Japan's royalty from the Company is expected to jump three-fold, from the present 2.6% of total sales to 8%. This will last 3 years till 2014 when the technology pact between the two partners expires. At present, this royalty outgo is around INR 4.2 billion (app. USD 93.33 million), which will triple to nearly INR 14 billion (app. USD 311.11 million) per year, for the next 3 years. In the process, HM Japan will get over INR 40 billion (app. USD 888.88 million), as pre-tax royalty.¹⁶

However, the Hero Group has denied any increment in rate of payment of royalty to HM Japan and the licensing agreement signed between the two groups on January 22, 2011 seeks to keep the royalty rate at around 2.3 -3%.¹⁷

¹³ *Ibid*

¹⁴ http://articles.timesofindia.indiatimes.com/2011-03-09/india-business/28671621_1_pe-investment-hero-honda-munjals (last visited on March 10, 2011)

¹⁵ *Ibid*

¹⁶ <http://www.blonnet.com/2010/12/05/stories/2010120552310100.htm> (last visited on March 10, 2011)

¹⁷ http://www.moneycontrol.com/news/business/hero-honda-execute-final-binding-license-agreement_515705.html (last visited on March 10, 2011)

Therefore, it will be interesting to see the arrangement, if any, between Hero Group and HM Japan to compensate HM Japan for the heavily discounted deal price.

5. What are the consequences of HM Japan exiting the joint venture? How does it impact on the future of the Company?

Continuation of support from HM Japan in the form of a licensing agreement related to technology transfer for new products is expected to provide the Company an adequate time to put in place long term alternatives for technology support. On the business side, notwithstanding the cessation of joint venture agreement, the Company (sans HM Japan) may be considered to have the ability to protect its market share and product franchise over the short to medium term benefitting from the Company's management's knowledge of the Indian consumers, Company's wide distribution network, an established supply chain besides strong relationship enjoyed by the Company with its dealers and vendors.¹⁸

The impact on the Company over the longer term would depend on the Company's ability to forge alternative technology tie-ups and sustain the confidence of all stakeholders. Overall, with the exit of HM Japan, the Company would need to scale up its product development initiatives, which may impact its return indicators going forward.¹⁹

Nevertheless, the Company could benefit from expanding its presence in overseas markets through exports and/or by establishing production facilities overseas, something it could not do earlier because of the restrictions under the joint venture agreement with HM Japan. Given the high competitive intensity in overseas markets on account of presence of many players from India, China, Japan etc, Company's ability to increase penetration in new geographies and at the same time maintain profitability would be tested in the coming years.

LEGAL AND REGULATORY CONSIDERATIONS

1. Will HIPL be required to make an open offer under the Takeover Code?

Under the Takeover Code, the open offer requirements are triggered in the following three situations:

- (i) 15% shares or voting rights: When an acquirer acquires shares or voting rights which entitles it to exercise 15% or more of the voting rights in a listed company.²⁰
- (ii) Creeping acquisition limit: When an acquirer, who holds 15% or more, but less than 55% shares or voting rights in a company, acquires, additional shares or voting rights entitling him to exercise more than 5% of the voting rights of a company, in a given financial year.²¹

¹⁸ www.icra.in/files/pdf/HERO_HONDA_MOTORS_LIMITED-201012.pdf (last visited on March 10, 2011)

¹⁹ *Ibid*

²⁰ Regulation 10 of the Takeover Code: No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise 15% or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Takeover Code.

²¹ Regulation 11 of the Takeover Code: (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, with post acquisition shareholding or voting rights not exceeding fifty five per cent., in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.

(2) No acquirer, who together with persons acting in concert with him holds, fifty-five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company, shall acquire either by

(iii) Voting Control: When an acquirer acquires control over the target company, irrespective of whether or not there has been any acquisition of shares or voting rights.²²

However, Regulation 3 of the Takeover Code provides certain exemptions from the open offer requirements as mentioned above, i.e. if an acquirer satisfies any of the conditions mentioned in Regulation 3, he need not make an open offer. One such exception is *inter se* transfer of shares amongst 'qualifying promoters'; provided that the transferor promoter as well as the transferee promoter has been holding shares in the target company for a period of at least 3 years prior to the proposed acquisition.²³

'**Qualifying promoters**' have been defined to mean – (i) any person who is directly or indirectly in control of the company; or (ii) any person named as a promoter in any document for offer of securities to the public or existing shareholders or in the shareholding pattern disclosed by the company under the provisions of the Listing Agreement, whichever is later.

Since, shares of the Company are proposed to be purchased by HIPL from HM Japan, and both HIPL and HM Japan have been named as promoters in the shareholding pattern disclosed to the stock exchanges for the past 3 years, the *inter se* transfer of shares amongst them should not trigger the open offer requirements under the Takeover Code.

2. Does the investment by Investors in HIPL require prior Government / FIPB approval?

Regulation 4.6.4 of the Consolidated Foreign Direct Investment Policy, released on October 1, 2010 ("**FDI Policy**") provides the guidelines for foreign investment into investing companies. Regulation 4.6.4 (iii)(a) of the FDI Policy states that – foreign investment in '*Investing Companies*' will require the prior Government / FIPB approval, regardless of the amount or extent of foreign investment.

The FDI Policy defines '**Investing Company**' to mean an Indian Company holding only investments in other Indian company(ies), directly or indirectly, other than for trading of such holdings/securities.

Since, HIPL is holding the shares of the Company and is registered as a NBFC as per the list of non deposit accepting NBFCs on the RBI website²⁴, foreign investments in HIPL will require prior FIPB approval.

himself or through or with persons acting in concert with him any additional shares entitling him to exercise voting rights or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations:

...

Explanation.—For the purposes of regulation 10 and regulation 11, acquisition shall mean and include,—

- a. direct acquisition in a listed company to which the regulations apply;
- b. indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad.

²² Regulation 12 of the Takeover Code: Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations:

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a special resolution passed by the shareholders in a general meeting :

Provided further that for passing of the special resolution facility of voting through postal ballot as specified under the Companies (Passing of the Resolutions by Postal Ballot) Rules, 2001 shall also be provided.]

Explanation — For the purposes of this regulation, acquisition shall include direct or indirect acquisition of control of target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abroad.

²³ Regulation 3(1)(e)(iii)(b) of the Takeover Code.

²⁴ <http://rbidocs.rbi.org.in/rdocs/content/pdfs/73342.pdf> (last visited on February 24, 2011)

Further, as per Regulation 4.9.1(ii) of the FDI Policy, the recommendations of FIPB on proposals with total foreign equity inflow of more than INR 12 billion (app. USD 266.66 million) would be placed for consideration of CCEA.

From the press release dated February 23, 2011 issued by the Government of India, Ministry of Finance, Department of Economic Affairs, (FIPB Unit) it is clear that HIPL had applied to FIPB for approval of induction of foreign equity upto INR 45 billion (app. USD 1 billion), and the matter has now been recommended for the consideration of CCEA.

3. Will the Investors be required to make an open offer under the Takeover Code?

Since, acquisition of stake in HIPL by the Investors will only give it an indirect holding of less than 15% in the Company,²⁵ and it does not seem that the Investors would be acquiring control of the Company, the Investors may not be required to make an open offer under the Takeover Code.

4. What will be the disclosure requirements in respect of the proposed transfer of shares of the Company?

Disclosures by HIPL

(i) Under Takeover Code

Since, post the acquisition, the shareholding of HIPL would entitle it to more than 14% shares / voting rights in the Company, HIPL will need to make a disclosure under Regulation 7(1)²⁶ of the Takeover Code to the Company and to the stock exchanges where shares of the Company are listed.

Further, since the acquisitions will be under Regulation 3(1)(e), and the acquisition will be more than 5%, HIPL will be required to notify the stock exchanges where the shares of the company are listed, for information of the public, of the details of the proposed transactions at least 4 working days in advance of the date of the proposed acquisition.²⁷

(ii) Under SEBI (Insider Trading) Regulations, 1992 (“Insider Trading Regulations”)

Since, HIPL is currently holding more than 5% shares in the Company, and pursuant to the Proposed Transaction it will acquire more than 2% of the total shareholding in the Company, HIPL will need to make a disclosure under Regulation 13(3) of the Insider Trading Regulations²⁸ to the Company.

²⁵ <http://www.business-standard.com/india/news/honda%5Cs-exit-gives-bain-gic-15-in-hero-honda/427844/> (last visited on March 11, 2011)

²⁶ Regulation 7(1) of Takeover Code: Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent or fifty four per cent or seventy four per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.

²⁷ Regulation 3(4) of Takeover Code: In respect of acquisitions under clauses [***] (e), (h) and (i) of sub-regulation (1), the stock exchanges where the shares of the company are listed shall, for information of the public, be notified of the details of the proposed transactions at least 4 working days in advance of the date of the proposed acquisition, in case of acquisition exceeding 5 per cent of the voting share capital of the company.

²⁸ Regulation 13(3) of Insider Trading Regulations: Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company in Form C the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation(1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the Company.

Disclosures by the Investors

(i) Under Takeover Code

Since, post the acquisition, PE Investors, will get an indirect holding of close to 13% in the Company²⁹, the Investors will need to make a disclosure under Regulation 7(1) of the Takeover Code to the Company and to the stock exchanges where shares of the Company are listed.

Disclosures by the Company

(i) Under Takeover Code

Since, Company's shares are acquired in a manner referred to in Regulation 7(1) as mentioned above, Company needs to disclose to all the stock exchanges on which the shares of the Company are listed, the aggregate number of shares held by each of such persons referred above, within 7 days of receipt of information under Regulation 7(1).³⁰

(ii) Under Insider Trading Regulations

The Company shall within 2 working days of receipt of information under Regulation 13(3) from HIPL as mentioned above, disclose the same to all the stock exchanges on which the Company is listed.³¹

5. What will be the mode of acquisition of shares of the Company by HIPL?

From the shareholding pattern on the BSE website as on December, 2010³², it appears that the shares of the Company held by HM Japan are in physical form. If the transfer of shares takes place in physical form, a stamp duty of 0.25% of the value of shares shall be applicable;³³ however, no stamp duty shall be applicable, if the shares are transferred in dematerialized form.

If the shares are in dematerialized form, the transfer may take place either off the floor of the stock exchange or on the floor of the stock exchange. As mentioned above, an off the floor of the stock exchange transfer may lead to higher tax implications compared to an on the floor of the stock exchange transfer. On the floor of the stock exchange, the transfer can take place in two ways, i.e. (i) by way of a block deal and (ii) by way of a bulk deal.

Block deal

A block deal is execution of large trades through a single transaction. For this purpose, stock exchanges are permitted to provide a separate trading window. Block deal will be subject *inter alia* to the following conditions³⁴:

²⁹ <http://m.economictimes.com/PDAET/articleshow/7568148.cms>, (last visited on February 25, 2011).

³⁰ Regulation 7(3) of Takeover Code: Every company, whose shares are acquired in a manner referred to in sub-regulations (1) and (1A), shall disclose to all the stock exchanges on which the shares of the said company are listed the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under sub-regulations (1) and (1A).

³¹ Regulation 13(6) of Insider Trading Regulations: Every listed company, within two working days or receipt, shall disclose to all stock exchanges on which the company is listed, the information received under sub-regulations (1), (2), (3) and (4) in the respective formats specified in Schedule III.

³² http://www.bseindia.com/shareholding/shareholdingPattern_60.asp?scripcd=500182&qtrid=68.00, (last visited on February 28, 2011).

³³ Schedule I Article 62(a) of Indian Stamp Act, 1899.

³⁴ SEBI Circular No. MRD/DoP/SE/Cir- 19 /05 dated September 2, 2005; SEBI Master Circular CIR/MRD/DP/12/2010, dated April 6, 2010 (<http://www.sebi.gov.in/circulars/2010/annncir1.pdf>); Please note that the timings for the trading window for the block deal as per the abovementioned circulars is 9:55AM – 10:30AM; however, it has been revised to 9:15AM-9:50AM by the BSE and the NSE pursuant to the SEBI Circular SEBI/DNPD/Cir-

- (a) The said trading window may be kept open for a limited period of 35 minutes from the beginning of trading hours i.e. the trading window shall remain open from 9.15 am to 9.50 am.
- (b) The orders may be placed in this window at a price not exceeding +1% from the ruling market price / previous day closing price, as applicable.
- (c) An order may be placed for a minimum quantity of 5,00,000 shares or minimum value of INR 50 million (app. USD 1.11 million).
- (d) Every trade executed in this window must result in delivery and shall not be squared off or reversed.
- (e) The stock exchanges shall disseminate the information on block deals such as the name of the scrip, name of the client, quantity of shares bought/sold, traded price, etc to the general public on the same day, after the market hours.

Since, the proposed consideration price for the transfer of the shares of the Company is INR 739.97³⁵ (app. USD 16.44) and the prevailing market price on March 10, 2011 is INR 1,537, it is unlikely that the condition (b) mentioned above will be satisfied. Therefore, block deal seems to be improbable option. Further, SEBI has in the past refused to grant exemption for condition (b) mentioned above, as in the case of acquisition of shares of Ranbaxy by Daiichi.³⁶

Bulk deal

Moving on to bulk deal, it constitutes all transactions in a scrip (on an exchange) where the total quantity of shares bought/sold is more than 0.5% of the number of equity shares of the company listed on the exchange.³⁷ The quantitative limit of 0.5% can be reached through one or more transactions executed during the day in the normal market segment.³⁸

However, the drawback with bulk deal is that there might be a leakage, because before the transfer between HM Japan and HIPL takes place, the higher pre-existing orders will have to be exhausted first. Also, as the share transfer is taking place at a substantial discount, it may lead to huge volatility to the price of the shares of the Company.

Further, as per the SEBI informal guidance³⁹, such a transaction can expose the Parties to be examined by the stock exchanges / SEBI in light of all circumstances, including other transactions of the Parties, for motive / intent behind the same or its manipulative effect, with a view to verify whether it was in compliance with the applicable laws, regulations and bye-laws, including section 12A of the SEBI Act, 1992 and the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003.

47/2009, dated October 23, 2009 which granted the stock exchanges the flexibility to set the trading hours between 9AM and 5PM.

³⁵<http://timesofindia.indiatimes.com/business/india-business/Hero-gets-Honda-stake-at-big-discount/articleshow/7659129.cms> (last visited on March 9, 2011)

³⁶ Please refer to our M&A Lab on Ranbaxy - Daiichi Deal (<http://www.nishithdesai.com/M&A-Lab/Ranbaxy%20Daiichi%20Deal%20-%20November%202008.pdf>)

³⁷ Circular No. SEBI/MRD/SE/Cir-7 /2004 dated January 14, 2004

³⁸ *Ibid*; Circular No. MRD/DoP/SE/Cir- 19 /05 dated September 2, 2005

³⁹ MRD/Policy/IGS/AT/26980/2004, dated December 1, 2004

6. Why is HIPL issuing debentures of minimum maturity of 3 months and not less?

From reports dated February 28, 2011⁴⁰, it appears that HIPL is raising short term debt through non-convertible debentures expiring in 3 months, for which it has pledged the shares of the Company as collateral. The group is raising debt because funds from private equity firms will take some time and HM Japan wants an early exit.⁴¹ But why is the term of the debentures for 3 months and not shorter?

The RBI had issued directions⁴² (“**NCD Directions**”), to regulate the issuance of non-convertible debentures of original or initial maturity up to 1 year and issued by way of a private placement (“**NCDs**”) by corporates.

The NCD Directions provides that the NCDs shall not be issued for maturities of less than 90 days from the date of issue. The exercise date of option (put/call), if any, attached to such NCDs, also shall not fall within the period of ninety days from the date of issue. Therefore, in light of the NCD Directions, HIPL is prohibited from issuing NCDs of maturity less than 3 months.

7. What will be disclosure requirements in case of pledge of shares of the Company to raise loans by way of NCDs?

By HIPL

HIPL, being a part of the promoter group of the Company, shall within 7 working days from the date of creation of pledge on shares of the Company held by it, inform the details of such pledge of shares to the Company under Regulation 8A(2) of the Takeover Code.⁴³

By the Pledges

Since, the term acquirer under Regulation 7(1) of the Takeover Code has been clarified to include a pledgee, other than a bank or a financial institution, therefore, the Pledges in whose favour the shares of the Company are pledged, and the threshold of 5%, 10%, 14% etc. are crossed, shall make disclosure to the Company and to the relevant stock exchange within 2 days of creation of pledge.

By the Company

Company shall disclose the information received by it under Regulation 8A(4) of the Takeover Code to all the stock exchanges on which its shares are listed.⁴⁴ Further, the Company shall also disclose to all the stock exchanges on which the shares of the Company are listed, the aggregate number of shares held by each of such persons referred above within 7 days of receipt of information under Regulation 7(1) of the Takeover Code.

⁴⁰ <http://m.economicstimes.com/PDAET/articleshow/7590790.cms> (last visited on March 10, 2011)

⁴¹ *Ibid*

⁴² Direction IDMD.DOD.09/11.01.01(A)/ 2009-10 dated June 23, 2010, effective from August 2, 2010

⁴³ Regulation 8A(2) of the Takeover Code: A promoter or every person forming part of the promoter group of any company shall, within 7 working days from the date of creation of pledge on shares of that company held by him, inform the details of such pledge of shares to that company.

⁴⁴ As per Regulation 8A(4) of the Takeover Code, a company shall disclose the information received under regulations 8A (1), (2) and (3) to all the stock exchanges, on which the shares of company are listed, within 7 working days of the receipt thereof, if, during any quarter ending March, June, September and December of any year:

- a) aggregate number of pledged shares of a promoter or every person forming part of promoter group taken together with shares already pledged during that quarter by such promoter or persons exceeds twenty five thousand; or
- b) aggregate of total pledged shares of the promoter or every person forming part of promoter group along with the shares already pledged during that quarter by such promoter or persons exceeds one per cent. of total shareholding or voting rights of the company, whichever is lower.

8. Will the recently notified merger control regulations affect the Proposed Transaction?

On March 4, 2011, the Government of India, Ministry of Corporate Affairs notified the much debated provisions of the Competition Act, 2002 ("**Competition Act**") relating to "combinations" namely Sections 5 and 6. Although notified as of March 4, 2011, these provisions are to take effect from June 1, 2011 ("**Effective Date**") giving all those subject to the same, a period of 3 months to tie loose ends and complete unfinished transactions before getting entangled in the web of the Act. Please refer to our hotline titled "[*Acquirers Beware: Indian Merger Control Regulations Notified!*](#)" for detailed analysis on the implications of the merger control regulations.

Since, the merger control provisions will come into force from the Effective Date, and the proposed acquisition of the shares of the Company is to take effect on March 22, 2010, the acquisition may not be subject to the filing / approval requirements under Sections 5 and 6 of the Competition Act.

However, if the subscription of the shares of HIPL by the Investors does not take place before June 1, 2011, due to delay in approval by the CCEA or otherwise, it is likely that the Investors would be hit by the notifications regarding merger control provisions as mentioned above.

However, vide its notification on March 4, 2011 the Government of India has exempted the acquisitions of small enterprises whose turnover is less than INR 7.5 billion (approx USD 167 million) or whose assets value is less than INR 2.5 billion (approx USD 56 million) from the definition of combination as defined under Section 5 of the Act. Therefore, if HIPL does not breach any of the exemption thresholds as mentioned above, the Investors will be exempted from the approval requirements under the Competition Act, even if the Proposed Transaction closes post June 1, 2011.

9. Would HM Japan have required any prior approval while setting up its subsidiary HMSI in India?

Press Note 18 (1998 Series) issued by the Department of Industrial Policy & Promotion provides that "*automatic route for FDI and/or technology collaboration would not be available to those who have or had any previous joint venture or technology transfer/trade-mark agreement in the same or allied field in India.*" Since, both HMSI and the Company are in the same / allied fields, and HMSI was set up post 1998, it is likely that HM Japan may have obtained Government / FIPB approval prior to or at the time of setting up its subsidiary.

TAX CONSIDERATIONS

1. What will be the tax implication of the transfer on HM Japan in India?

As per Article 13(3)⁴⁵ of the '*Agreement for avoidance of double taxation and prevention of fiscal evasion with Japan*', gains derived by a resident of a contracting state from the alienation of shares of

⁴⁵ ARTICLE 13 - 1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in article 6 and situated in the other Contracting State may be taxed in that other Contracting State.

2. Gains from the alienation of any property, other than immovable property, forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of any property, other than immovable property, pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other Contracting State.

3. Unless the provisions of paragraph 2 are applicable, gains derived by a resident of a Contracting State from the alienation of shares of a company which is a resident of the other Contracting State may be taxed in that other Contracting State.

a company which is a resident of the other contracting state may be taxed in that other contracting state. Therefore, the capital gains arising out of transfer of the 26% stake in the Company will also be taxed in India.

Section 45 of the Income Tax Act, 1961 (“IT Act”) provides for capital gains tax on transfer of shares of an Indian company. Such capital gains are deemed to be long term where the shares have been owned and held by the transferor for more than 12 months.⁴⁶ Therefore, the current Proposed Transaction will result in a long term capital gains tax @ (i) 10%⁴⁷ in the hands of HM Japan if the shares are transferred off the floor of stock exchange and (ii) zero capital gains tax⁴⁸ if the shares are transferred on the floor of stock exchange provided they pay the applicable securities transaction tax.

2. Will HIPL be subject to any tax pursuant to the Proposed Transaction?

Section 56(1) of the IT Act provides that income of every kind which is not to be excluded from the total income under the IT Act, shall be chargeable to income tax under the head “Income from other sources”, if not chargeable to income tax under any of the other heads. In particular and without prejudice to the generality of the abovementioned provision, certain items have been specified to be chargeable to tax under income from other sources.

Section 56(2)(viiia)⁴⁹ provides one such instance wherein it states that where a firm or a company, not being a company in which the public is substantially interested, receives, in any previous year, from any person or persons, on or after the June 1, 2010 any property, being shares of a company not being a company in which the public are substantially interested for a consideration which is less than the aggregate fair market value of the property by an amount exceeding INR 50,000 (app. USD 1,111.11), the aggregate fair market value of such property as exceeds such consideration.

The Company, being listed on the BSE and NSE, is a ‘company in which the public are substantially interested’ as per the definition provided under the IT Act. Therefore, Section 56(2)(viiia) of the IT Act does not apply to HIPL.

However, as per the report dated March 9, 2011⁵⁰, it appears that the income tax department is considering raising a demand of INR 12.48 billion (app. USD 277.33 million) on HIPL for buying the stake at a substantial discounted price in an off-market deal. Considering, the difference between the market value of shares and the actual acquisition price of shares, as income, and taxing it under Section 56(1) of the IT Act seems very unlikely since transfer of shares of a listed company does not fall under Section 56(2)(viiia) of the IT Act. Therefore, it will be interesting to see under which provision of the IT Act does the Income Tax Department raises a demand of tax on HIPL.

3. What will be the tax implication of the transfer on HM Japan in Japan?

Since, Article 13(3) of the ‘Agreement for avoidance of double taxation and prevention of fiscal evasion with Japan’ (“Tax Treaty”), does not restrict a Contracting State from taxing its resident on the gains derived by it from the alienation of shares of a company which is a resident of the other Contracting State, therefore, in the instant case, the tax implications of share transfer in Japan also become pertinent.

⁴⁶ Section 2(42A) read with Section 2(29A) of the IT Act.

⁴⁷ Section 112 of the IT Act; Tax rate exclusive of surcharges and education cess

⁴⁸ Section 10(38) of the IT Act.

⁴⁹ Inserted by the Finance Act, 2010, w.e.f June 1, 2010

⁵⁰ <http://timesofindia.indiatimes.com/business/india-business/I-T-may-slap-huge-tax-bills-on-Hero-Honda/articleshow/7659143.cms> (last visited on March 9, 2011)

Japanese tax law does not distinguish capital gains from ordinary income for corporate taxpayers, and the taxes applicable to corporate income are national corporate income tax (30%), local enterprise tax and inhabitants' tax (each of which vary depending on the size of the taxpayer's business and its location, but can add up to 10% to a corporation's tax liability). Further, domestic corporations are subject to these three taxes on their worldwide income. Therefore, HM Japan may be subject to the abovementioned taxes in Japan.⁵¹

Further, Article 23(3) of the Tax Treaty provides that where a resident of Japan derives income which may be taxed in India, in such case, the amount of Indian tax payable in respect of the same shall be allowed as a credit against the Japanese tax imposed on that resident, subject to the availability of such credit under the Japanese local tax laws.

EPILOGUE

A smooth ride over the years has taken a 'U' turn; however, a lot has to be seen as to how composed can the lone driver drive its bike in the turmoil ahead. Over the years, Hero Group has gained ground on several aspects and contains enough confidence to take the challenge ahead. It'll be interesting to notice the moves of the Company going forward and the tie-ups it undertakes, not only in India but even offshore. More interestingly, life after 2014 and with the full exit of HM Japan, it will be a challenge for the Company to pave its way ahead and instead take HM Japan as a competitor in its own backyard.

DISCLAIMER

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As you would be aware, we have been providing regular information on latest legal developments. M&A Lab is our initiative to provide you knowledge based analysis and more insight on latest M&A deals. You can direct your views / comments / suggestions on our initiative to mateam@nishithdesai.com.

⁵¹ Global Tax Guide, 2009/10, 2009 BNA International, (Consultant editor: Neil Smith), pages 627-628.