

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under the provisions of Section 37(1) of the Competition Act, 2010)

**IN THE MATTER OF UNFAIR TERMS OF CONSUMER CONTRACT BY M/S
INDUS MOTOR COMPANY LIMITED**

BY

Nadia Nabi/Ishtiaq Ahmed

Dated: 15/02/2013

I. BACKGROUND

1. This Enquiry Report is prepared pursuant to an Enquiry conducted under the provisions of Section 37 of the Competition Act, 2010 (the 'Act') against, *prima facie*, unfair terms and conditions of Provisional Booking Order (PBO) for new cars by M/s Indus Motor Company Limited (hereinafter referred as "Indus Motor"), in contravention of Section 3 of the Act.
2. The Competition Commission of Pakistan (hereinafter the "Commission") took notice on its own, of terms and conditions mentioned in PBO issued to a customer by an authorized dealer on behalf of the Indus Motor at the time of purchase of new Corolla car . PBO appeared to be a standard form contract entered into by Indus Motor with its customers comprising terms and conditions including price, design, specification, delivery among other terms. From the perusal of specimen PBO, it appeared that it contains terms and conditions which create significant imbalance in the parties' right to the detriment of customers and may tantamount to unfair terms imposed in violation of Section 3 (3) (a) of the Act.
3. Keeping in view the above, the Commission decided to initiate an Enquiry in accordance with Section 37 of the Act by appointing Ms. Nadia Nabi (Senior Joint Director) and Mr. Ishtiaq Ahmed (Deputy Director) to conduct enquiry and to determine (i) the relevant market, (ii) as to whether the Indus Motor has a dominant position in the relevant market, (iii) as to whether Indus Motor has abused its dominant position in the relevant market, and has thereby violated Section 3 or any other provisions of the Act, and to prepare a comprehensive report under Section 37 of the Act.

II. UNDERTAKINGS

4. The term undertaking has been defined under clause 2(1) (q) of the Act in the following terms:

“undertaking” means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertaking.”

5. M/s Indus Motor Company Limited is a public limited company listed on the stock exchange with equity and management participation of Toyota, Japan. Indus Motor was formed in accordance with the terms of a joint venture agreement concluded amongst House of Habib, Toyota Motor Corporation and Toyota Tsusho Corporation for the purpose of assembling, progressive manufacturing and marketing of Toyota Vehicles. Hence, M/s Indus Motor Company Limited is an undertaking as defined in clause (q) of sub-section (1) of Section 2 of the Act.

III. AUTOMOBILE INDUSTRY

6. It is a universally acknowledged fact that the automobile industry in any country is the mother of engineering industry. Growth of a few sub-sectors of engineering industry such as vendors of auto parts and components, steel mills and foundries that supply raw material to the vendors largely depends upon the health of the automobile industry.
7. The first phase of automobile assembling in Pakistan started in 1950 but during this period the indigenized parts in these vehicles did not exceed 20% with the only exception of Bed Ford trucks with a deletion level of 80%. From 1980s onward, the process of privatisation started and the private sector re-entered the industry. Different vehicles *e.g.* Suzuki, Toyota, Honda, Hyundai, Santro, Kia, Cuore, Revo, Proton, and Chevrolet cars were introduced by PACO, Pak Suzuki Motors, Indus Motors, Honda Atlas Cars, Dewan Farooq Motors, Adam Motors, Proton, Geely and Nexus Auto.¹

¹ http://cc.gov.pk/images/Downloads/research_and_publications/automobile%20sector_study_2013.pdf

8. Currently, the automobile industry in Pakistan has three major car manufacturers/assemblers.² Pak Suzuki Motors is a joint venture formed in 1983 between the Pakistani government and Suzuki of Japan. Pak Suzuki is in the business of assembling, progressively manufacturing, marketing and distributing Suzuki brand vehicles in Pakistan. Both parties have entered into a Technical Assistance Agreement. Pak Suzuki manufactures cars for the middle-income group in Pakistan
9. Indus Motor is a joint venture company set up by Toyota Motor Corporation, Toyota Tsusho Corporation, and House of Habib. All three parties have entered into a Technical Assistance Agreement in which Indus Motor has been granted a license to manufacture Toyota cars in Pakistan. Similarly, Daihatsu Motor Co. Limited signed a Technical Assistance Agreement with Indus Motor, granting it a license to manufacture Daihatsu motor vehicles in Pakistan.
10. The third important player in the automobile market is Honda Atlas Cars (Pakistan) Limited, which is also a joint venture between the Atlas Group and Honda Motor Co. Ltd., Japan. Honda Atlas has signed a Technical Assistance Agreement with Honda to assemble, manufacture, market and distribute Honda Civic and City cars in Pakistan.

IV. RELEVANT MARKET

11. The concept of relevant market is central to determination of any allegation as to abuse of dominance as in the instant case. Relevant market is defined in clause (k) of sub-section (1) of Section 2 of the Act in the following words:

“relevant market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristic, prices and intended uses. A geographic market comprises the area in which the undertakings

² *Ibid*

concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas.

12. The term relevant market, has two important elements which need to be given due consideration. First element is product and second is geographical market/area. Determinations of both the elements are very crucial to assess the market share of an undertaking which enables it to hold a dominant position. For that purpose, certain factors are taken into account e.g. what products are interchangeable and substitutable for consumers depending on their physical characteristics, intended use and price. Similarly, which area is significantly important to be considered where undertakings involved in supply of goods and services face homogenous conditions in competing with each other.

13. For the purpose of this Enquiry Report the relevant product is passenger car which is further categorized into different segments according to the engine size. Cars in different segments of passenger car market have specific demand and preference of customers. Customers' choice of car is mainly dependent on engine capacity, technology/features of a car, price and cost of maintenance. Therefore, customers may have choices among different brands within a particular segment of passenger car market but their demand may not change across different segments of passenger car market.

14. There are mainly three local manufacturers in the automobile market; namely, M/s Pak Suzuki Motors, M/s Indus Motors, and M/s Honda Atlas. Therefore, it can be said that market for passenger cars is highly concentrated. Further, if we look at the market shares of these three manufacturers, it reveals a market split among three players according to engine capacity of passenger cars. For this purpose, we refer to market share of automobile manufacturers according to following categories of passenger cars based on the size of engine:

- 800 cc
- 1,000 cc
- 1,300cc- to 1,600 cc

The 800cc Segment

15. In this category there were only two players i.e Suzuki and Indus Motor till 2012, who manufactured competing models Suzuki Mehran and Bolan- just under 800 cc and Daihatsu Cuore- little less than 850 cc respectively. From the statistical data shown below one can clearly see that this market was dominated by M/s Pak Suzuki Motors.

Number of Cars Produced and Sold in the 800 cc Category³

		2008-09	2009-10	2010-11	July 2011 to March 2012
Daihatsu (Cuore)	P	5,803	5,145	6,280	3,608
	S	5,852	5,301	6,007	3,186
Suzuki (Mehran)	P	13,239	22,271	25,935	23,974
	S	13,421	22,513	24,119	25,583
Suzuki (Bolan)	P	9,639	10,541	14,359	14,617
	S	8,664	11,439	13,311	15,148
Total Sold		27,937	39,253	43,437	43,917

Market Shares in the 800 cc Car Market (%)

		2008-09	2009-10	2010-11	July 2011 to March 2012
Suzuki		79.05%	86.49%	86.17%	92.75 %
Indus Motor (Daihatsu)		20.94%	13.50%	13.82%	7.25%

Since 2012 sales of Daihatsu Cuore was stopped by the Indus Motor and now we have only one manufacturer in the segment of 800 cc car market.

³ PAMA website, <http://www.pama.org.pk/images/stories/pdf/production-sale-2011.pdf>

The 1,000 cc Segment

16. The 1,000 cc car market reveals a picture similar to the 800 cc car market. We see that this car market segment again had only two players – Pak Suzuki and Dewan Farooq Motors (Hyundai). However due to nil production by Dewan Farooq Motors (Hyundai) in 2010, this segment is also dominated by Suzuki with 100% market share during the year 2010-11 and onward .

Number of Cars Produced and Sold in 1,000 cc Car Category⁴

		2008-09	2009-10	2010-11	July 2011 to March 2012
Suzuki Cultus	P	9,181	12,453	12,414	9,905
	S	9,198	12,658	11,428	10,598
Suzuki (Alto)	P	6,641	10,665	12,873	11,739
	S	6,550	10,794	11,932	11,818
Hyundai (Santro Plus)	P	327	212	0	0
	S	404	244	0	0
Total Sold		16,152	23,696	23,360	22,416

Market Shares in the 1000 cc Car Market (%)

	2008-09	2009-10	2010-11	July 2011 to March 2012
Suzuki	97.49%	98.97%	100%	100 %
Hyundai	2.50%	1.02%	0%	0%

The 1,300 cc and above Segment

17. In this category there are three players namely; Indus Motors, Honda Atlas, and Pak Suzuki. However, one can find that this category is essentially taken over by Indus Motors having 70.74% market share.

⁴ PAMA website, <http://www.pama.org.pk/images/stories/pdf/production-sale-2011.pdf>

Number of Cars Produced and Sold in 1,300 cc and above Car Category⁵

		1300cc & above			
		2008-09	2009-10	2010-11	July 2011 to March 2012
Honda (Civic)	P	4,985	5,648	6,408	3,786
	S	4,662	5,908	6,365	3,747
Honda (City)	P	6,755	7,852	9,294	4,032
	S	6,482	8,212	9,121	4,252
Suzuki (Baleno)	P	0	0	0	0
	S	0	0	0	0
Suzuki (Liana)	P	684	900	614	235
	S	851	1,025	470	374
Suzuki (Swift)	P	~	2,578	4,376	5,222
	S	~	2,353	4,080	5,201
Toyota (Corolla)	P	27,054	43,382	41,419	32,941
	S	26,760	43,510	41,111	32,814
Total Sold		38,755	61,008	61,147	46,388

Market Shares in the 1,300 cc & above Car Market (%)

	2008-09	2009-10	2010-11	July 2011 to March 2012
Honda	28.75%	23.14%	25.32%	17.24%
Suzuki	2.19%	5.53%	7.44%	12.02 %
Toyota	69.04%	71.31%	67.23%	70.74%
Others	0.02	0.02	0.01	0.00

⁵ PAMA website, <http://www.pama.org.pk/images/stories/pdf/production-sale-2011.pdf>

18. Since the above mentioned categories relate to new cars which are manufactured /assembled in Pakistan. Conditions of competition to manufacture/supply of the passenger cars are homogenous throughout Pakistan, therefore, it can be said that the relevant geographic market is Pakistan.

19. In view of above we conclude that relevant market is different segments of passenger car market manufactured/supplied in Pakistan.

V. DOMINANCE

20. Dominant position is defined in clause (e) of sub-section (1) of Section 2 of the Act, as following:

“dominant position” of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.

21. As discussed in detail under the heading of ‘Relevant Market’ Toyota Corolla enjoys 70% market share in its relevant segment of passenger car market. A customer while selecting a compact car gives due consideration to features of car which satisfy his/her requirements and gives the best value for money. Therefore, a car that offers comfort blended with reliability/durability, easy maintenance, fuel efficiency and good resale value, can outsell the competitor cars.

22. Toyota Corolla is the world’s best-selling car, with more than 35 million sold over 10 generations since 1966.⁶ Corolla has been named the best-selling compact car in America for the last nine years in a row.⁷ Toyota has also been categorized as the most fuel-efficient full-line automotive manufacturer in America⁸ and awarded for the Best Resale Value of all brands for 2013 according to Kelley

⁶ <http://www.guinnessworldrecords.com/records-10000/best-selling-car/>

⁷ <http://touch.toyota.com/corolla/awards.html>

⁸ <http://touch.toyota.com/corolla/awards.html>

Blue Book's KBB.com. Similarly, in Pakistan Toyota Corolla has become the most popular Sedan and not only this has also earned the distinction of being the highest volume seller in Asia for the second year running.⁹

23. Maintenance and after sales services is as important as other features. Indus Motor provides a vast after sale services network. There are 30 dealers (3S) in 16 cities of Pakistan which are more than any other automobile manufacturer has in Pakistan. All the genuine spare parts of 'Toyota' are easily available and beside this the locally made body and engine parts spare are also easily available to the 'Toyota' car owner at cheaper rate as compared to other competing cars such as 'Honda'.

24. In view of above mentioned features, we conclude that Indus Motor has a major market share/specific demand in the relevant market for 1300cc and above cars and enjoys economic strength which enables it to behave to an appreciable extent independently of its competitor and customers.

VI. TERMS AND CONDITIONS OF PROVISIONAL PURCHASE ORDER

25. Following are the terms and conditions of PBO issued to a customer of Indus Motor which will be scrutinized in this Enquiry Report: *(Copy of PBO at Annex A)*

⁹ <http://new.toyota-indus.com/corporate/investor-relation/financial-results/>

TERMS AND CONDITIONS

1. This document is issued by the authorized dealer of M/s. Indus Motor Company Ltd., Karachi. The term 'COMPANY' whenever used means INDUS MOTOR COMPANY LIMITED. The term 'APPLICANT' wherever used means a person who has applied for booking of the vehicle. The term 'VEHICLE' means and includes the optional items, accessories and other articles offered/supplied with the vehicle at the time of delivery.
2. This Provisional Booking Order (herein after referred to as the 'PBO') is subject to confirmation by M/s. Indus Motor Company Ltd., Karachi.
3. The Company reserves the right to alter the design, construction specification, and price and delivery schedule of the vehicles without notice at its sole discretion. The Company also reserves the right to transfer this order to another authorized dealer without assigning any reason without prior notice and the vehicles may be supplied with or without such alterations and change through any authorised dealer. Subject to change/addition/deletion the Applicant may select any two in order of priority from available colors.
4. (i) The provisional price(s) indicated/advertised are tentative retail prices inclusive of sales tax (excluding other levies, govt. and local taxes) and may be changed without any notice.
(ii) The price payable shall be applicable as prevalent, i.e. fixed by the Company at the time of delivery.
(iii) Payment (Full Payment or Balance Payment) will be accepted in form of pay order/ demand draft only in the name of INDUS MOTOR COMPANY LIMITED A/C (give name of the Applicant as appearing on the PBO).
(iv) The difference of price, if any, between the price at the time of booking and delivery shall be payable at the time of delivery of the vehicle.
(v) If the Applicant wishes, at any time before the vehicle is ready for delivery, to cancel the booking he may do so only by making a written application (accompanied by the Applicant's copy of the PBO in original) to the concerned authorized dealer, who will forward the same to the Company for consideration, and the Applicant hereby accepts and acknowledges that the authorized dealer has no authority whatsoever to either accept or reject any application for cancellation of the booking. No application shall be considered unless accompanied by the Applicant's copy of the PBO in original. If the Company in its sole and absolute discretion decides to accept the application, the Applicant shall be informed accordingly within thirty days of the application reaching the Company and thereupon, the Company shall refund the amount paid by the Applicant through the concerned authorized dealer (subject to any applicable deductions). If the Company does not respond within the period stipulated aforesaid and/or the application is rejected, the Applicant shall continue to remain bound by all terms of the agreement between the Company and the Applicant including, inter alia, to take delivery of the vehicle on full payment for the same.
5. The Authorized Dealer or the Company shall use make reasonable endeavours to deliver the vehicle by the tentative delivery month, but shall not be responsible for any delays in the delivery of the vehicle, including but not limited to, any delays occurring due to acts of God or enemy, change in Government policies, labor strikes or civil commotion, injunctions granted by courts of law, Force Majeure or for any other reason beyond the control of either authorized dealers or the Company. No delivery shall be made of the vehicle unless at the time of delivery, the Applicant has available his copy of the PBO in original, which shall be surrendered to the Company through the authorized dealer at the time of delivery.
6. The information provided by the Applicant as appearing overleaf has been provided on his own responsibility and without any verification by the Company or obligation on the Company to verify the same. The Company is and shall be entitled to consider the information provided as correct and sufficient for all purposes, including but not limited to, the purposes of correspondence/communication. Any notices/letters sent at the given address shall be deemed to have been delivered in due course of post. Non-receipt of letters, correspondence/communication shall not be considered an excuse for delay in payment. Incomplete forms may be rejected at the sole discretion of the Authorized Dealers/Company. No request for change of name shall be entertained.
7. The Company inspection at factory will be final for all the purposes and they will be indemnified and will be deemed to have always been so indemnified against all damages.
8. The Company reserves the right to change and alter some or all the terms and conditions of the PBO and all such changes and alterations shall be conclusive and binding on the Applicant. Furthermore, the Company's interpretation of all terms and conditions shall be final and binding on all parties.
9. In case of any dispute between the Applicant and authorized dealers and/or the Company, the case shall be referred to the Managing Director, Indus Motor Company Ltd., whose decision shall be final and binding on all parties in all respects.
10. Separate Provisional Booking Order form is required for each vehicle ordered.
11. The Applicant agrees and undertakes to pay all taxes, fees and other charges etc. or any other levy of whatsoever nature as may be levied from time to time by any government authority, local body or other organization or agency at the time of delivery of the vehicle or otherwise. All such amounts as aforesaid shall be paid as and when indicated by the Company and the Company's communication in this regard shall be conclusive and binding.
12. Delay in taking delivery and/or making Balance Payment on account of wrong/incomplete address recorded with the Company or change of address not intimated to the Company in time or due to any other reason whatsoever will be entirely at the Applicant's risk and responsibility.
13. The Applicant hereby understands that authorized dealers are not acting as agents or representatives of or for the Company and nothing contained herein or any further/subsequent correspondence/communication between authorized dealers and the applicant shall have the effect or be construed as having the effect as aforesaid.
14. The Applicant hereby confirms that he will only pay, and be liable only to pay, the Company, the price for the vehicle and other charges related thereto as herein provided, i.e., Sales Invoice Price and the applicable Government and local levies as prevailing at the time of delivery and insurance and other such charges and expenses, if applicable.

VII. ANALYSIS

UNFAIR TERMS- VIOLATION OF SECTION 3, IF ANY

26. The Competition Act, 2010 intends to protect customers from anti-competitive practices by prohibiting ‘exploitative’ abuses by dominant undertaking(s) and not merely ‘exclusionary’ abuses because the main concern appears to have been not only the effects on competitors of the dominant undertaking(s), but the effects on their customers. Section 3 is reproduced in relevant context as under:

3. **Abuse of dominant position.**- (1) No person shall abuse dominant position.

(2) an abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.

(3) The expression “practices referred to in sub section (2) shall include, but are not limited to-

(a) limiting production, sales and unreasonable increase in price or other unfair trading condition.

27. Exploitative abuse is a peculiar situation when a dominant undertaking makes use of its market power against its customers in a way considered **unfair** or **underhand**. Section 3(3)(a) is a classic example of such scenario when a dominant undertaking imposes unfair trading conditions on its customers. The basic ideology of having instances/illustrations of exploitative abuses in the Act is that the ultimate goal of competition law is enhancing the ‘consumer welfare’.

28. Unfair commercial term exists or unfair trading condition is superimposed where a dominant undertaking fails to comply with the principle of *proportionality*¹⁰. A dominant undertaking is under a duty to be ‘proportionate’ taking into account the economic strength of the parties confronting each other. Therefore, ‘fairness’

¹⁰ *DSD case*, C(2001) 2672)

appears to have been understood as that to the customers of the dominant undertaking in the sense that the interests of the contracting parties be balanced.

29. When a customer enters into a contract with the supplier to buy goods or services and specifically when supplier is someone whose normal business is to sell that products or services, this is called a consumer contract. Most of consumer contracts are standard form contracts, offered on a take it or leave it basis in contrast to those traditional contract which are drafted or freely negotiated by both contracting.

30. In the absence of free negotiation, customers feel unable to do anything about unfavorable terms they discover, because they are unable to bargain. More importantly, when the seller/supplier is a dominant undertaking and the goods or services provided by the undertaking have low substitutability in the market or inelasticity in demand, the probability increases that unfair standard terms are forced upon the customers to take undue advantage of market position and reap monopoly profits.

31. A term in a standard form consumer contract is unfair if:

- It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- The term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

On the basis of above description of unfairness test, there are three main categories that unfair terms may fall into:

- Term that gives the supplier the right to change the terms of the contract.
- Term that limits the liability of the supplier of goods and services.
- Term that puts an unfair burden on the consumer.

32. Indus Motor holds 70% market share and the reason that customers have preference for “Toyota” brand in the relevant market, the Indus Motor is capable of behaving independent of its customer and competitors.
33. PBO issued by an authorized dealer on behalf of the Indus Motor appears to be a standard form contract entered into with its customers comprising unilateral terms and conditions. This means that PBO contains the standard terms and conditions of sale of which the Indus Motor operates on and the customers are not able to alter any of the terms. Even a customer does not agree with the terms and conditions of sale, he/she will not be able to negotiate at the time of purchasing ‘Toyota’ car from the Indus Motor.
34. Terms conditions mentioned in the PBO appear to cause a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of customers as they give the Indus Motor sole right to (1) change the price before delivery (2) change/interpret the terms of the contract; (3) limit the liability as to design/specification; and (3) put an unfair burden on the consumer. Therefore, the terms and conditions mentioned in the PBO appear to be unfair trading conditions imposed on customers by Indus Motor in terms of Section 3(3)(a) of the Act on the basis of following clauses and grounds of unfairness mentioned thereafter:

1. The Company reserves the right to alter the design, construction specification and price and delivery schedule of the vehicles without notice at its sole discretion. The Company also reserves the right to transfer this order to another authorized dealer without assigning any reason without prior notice and the vehicles may be supplied with or without such alterations and change through any authorised dealer. Subject to change/addition/deletion the Applicant may select any two in order of priority from available colors.

35. This clause appears to give an arbitrary right to Indus Motor to substitute something different for what it has actually agreed to supply. Customers are legally entitled to expect satisfactory quality in goods and services, but that does not mean it is fair to reserve the right to supply something that is not what was agreed but is of equivalent standard or value.

36. Terms should respect both the right to receive products that are as described and the right to satisfactory quality, not one or the other. The above mentioned clause apparently conflicts with the consumer's legal right to receive something that is in all significant respects what he or she agreed to buy and, therefore, appears to create imbalance of rights between Indus Motor and the customer to the detriment of customer.

2. (i) **The provisional price(s) indicated/advertised are tentative retail prices inclusive of sales tax (excluding other levies, govt. and local taxes) and may be changed without any notice.**

(ii) The price payable shall be applicable as prevalent, i.e. fixed by the Company at the time of delivery.

(iii) Payment (Full Payment or Balance Payment) will be accepted in form of pay order/demand draft only in the name of INDUS MOTOR COMPANY LIMITED A/C (give name of the Applicant as appearing on the PBO).

(iv) The difference of price, if any, between the price at the time of booking and delivery shall be payable at the time of delivery of the vehicle.

37. Indus Motor reserves the right to change the price at any time without any notice which the customer is liable to pay at the time of delivery. This means that the customer is not sure of how much extra amount is to be paid for getting what he or she has been promised even though the 'consideration' has already been paid.

38. Further, any purely discretionary right to add to a price after the consumer has already paid the price is unnecessary to protect the legitimate interest of supplier as to consideration. That applies particularly to terms allowing the supplier to charge a captive customer a price on delivery of goods that is not what was claimed from the consumer and paid by the customer when the order was placed. Therefore, such a clause allowing Indus Motor to increase the price – varying the most important of all of the consumer's contractual obligations – appears to have potential for unfairness.

(v) If the Applicant wishes, at any time before the vehicle is ready for delivery, to cancel the booking he may do so only by making a written application (accompanied by the Applicant's copy of the PBO in original) to the concerned authorized dealer,

who will forward the same to the Company for consideration, and the Applicant hereby accepts and acknowledges that the authorized dealer has no authority whatsoever to either accept or reject any application for cancellation of the booking. No application shall be considered unless accompanied by the Applicant's copy of the PBO in original. If the Company in its sole and absolute discretion decides to accept the application, the Applicant shall be informed accordingly within thirty days of the application reaching the Company and thereupon, the Company shall refund the amount paid by the Applicant through the concerned authorized dealer (subject to any applicable deductions). If the Company does not respond within the period stipulated aforesaid and/or the application is rejected, the Applicant shall continue to remain bound by all terms of the agreement between the Company and the Applicant including, inter alia, to take delivery of the vehicle on full payment for the same.

39. In case, the customer wishes, at any time before the vehicle is ready for delivery, to cancel the booking he will make a written application to the Indus Motor for consideration. If the Indus Motor in its sole and absolute discretion decides to accept the application, the customer shall be informed accordingly and the amount paid by the customer will be refunded subject to any applicable deductions. However, if the Indus Motor rejects the application, the customer shall continue to remain bound by all terms of the agreement including, inter alia, to take delivery of the vehicle on full payment for the same.

40. Such clause creates imbalance between the rights of both parties, supplier/seller and customer, to end or withdraw from the contract. The supplier's rights should not be excessive, nor should the consumer's be over-restricted. This does not, however, mean a merely formal equivalence in rights to cancel, but rather that both parties should enjoy rights of equal extent and value. Excessive rights for the supplier. Cancellation of a contract only at the prerogative of the supplier can leave the consumer facing inconvenience including the cost.

41. In fact, such terms may be intended to allow the supplier to do more than protect himself legitimately. Where that is so, a unilateral right for the

supplier to cancel without is likely to be considered unfair.

8. The Company reserves the right to change and alter some or all the terms and conditions of the PBO and all such changes and alterations shall be conclusive and binding on the Applicant. Furthermore, the Company's interpretation of all terms and conditions shall be final and binding on all parties.

42. This clause appears to give a capricious right to Indus Motor to change and alter some or all the terms and conditions of the PBO and all such changes and alterations shall be conclusive and binding on the customer. Furthermore, clause also adds that Indus Motor's interpretation of all terms and conditions shall be final and binding on the customer.
43. A right for one party to alter the terms of the contract after it has been agreed, or right to interpret the terms conclusively regardless of the consent of the other party, is under strong suspicion of unfairness. A contract can be considered balanced only if both parties are bound by their obligations as agreed.
44. Having such a clause which confers right to Indus Motor only to alter or interpret the contract means that could be used to force the consumer to accept increased costs or penalties, new requirements, or reduced benefits, and is therefore likely to be considered unfair whether or not it is meant to be used in that way.
45. The Enquiry Officer sent a letter to Indus Motor on 18 April 2012 and informed that the Commission is enquiring into the terms and conditions mentioned in the PBO in terms of Section 3(3)(a) and also required Indus Motor to address the aforesaid competition concerns. Thereafter, a meeting was held with the officials of Indus Motor and during the meeting the enquiry officer apprised them each competition concern, as elaborately discussed above, regarding the PBO's terms and conditions.
46. Chief Executive Officer present in the aforesaid meeting proposed to review the PBO along with their legal team and revise it in the light of competition issues

raised and discussed during the meeting with the enquiry officer. Finally, Indus Motor sent a draft proposed amendments in PBO on 15 June 2012. The proposed amendments to PBO along with the comparison of original PBO is reproduced here under: *(Copy of proposed amendments to PBO at Annex B)*

COMPARISON OF AMMENDMENTS MADE TO THE PBO

CURRENT PBO	AMENDED PBO
<p>This document is issued by the authorized dealer of M/s. Indus Motor Company Ltd., Karachi. The term 'COMPANY' whenever used means INDUS MOTOR COMPANY LIMITED. The term 'APPLICANT' wherever used means a person who has applied for booking of the vehicle. The term 'VEHICLE' means and includes the optional items, accessories and other articles offered/supplied with the vehicle at the time of delivery.</p> <p>2. This Provisional Booking Order (herein after referred to as the 'PBO') is subject to confirmation by M/s. Indus Motor Company Ltd., Karachi.</p> <p>3. The Company reserves the right to alter the design, construction specification, and price and delivery schedule of the vehicles without notice at its sole discretion. The Company also reserves the right to transfer this order to another authorized dealer without assigning any reason without prior notice and the vehicles may be supplied with or without such alterations and change through any authorised dealer. Subject to change/addition/deletion the Applicant may select any two in order of priority from available colors.</p> <p>4. (i) The provisional price(s) indicated/advertised are tentative retail prices inclusive of sales tax (excluding other levies, govt. and local taxes) and may be changed without any notice.</p> <p>(ii) The price payable shall be applicable as prevalent, i.e. fixed by the Company at the time of delivery.</p> <p>(iii) Payment (Full Payment or Balance Payment) will be accepted in form of pay order/ demand draft only in the name of INDUS MOTOR COMPANY LIMITED A/C (give name of the Applicant as appearing on the PBO).</p> <p>(iv) The difference of price, if any, between the price at the time of booking and delivery shall be payable at the time of delivery of the vehicle.</p> <p>(v) If the Applicant wishes, at any time before the vehicle is ready for delivery, to cancel the booking he may do so only by making a written application (accompanied by the Applicant's copy of the PBO in original) to the concerned authorized dealer, who will forward the same to the Company for consideration, and the Applicant hereby accepts and acknowledges that the authorized dealer has no authority whatsoever to either accept or reject any application for cancellation of the booking. No application shall be considered unless accompanied by the Applicant's copy of the PBO in original. If the Company in its</p>	<p>1. This document is issued by the Authorized Dealer of Indus Motor Company Limited, Karachi. The term "Company" whenever used means Indus Motor Company. The term "Applicant" wherever used means a person who has applied for booking of the Vehicle. The term "Vehicle" means and includes the optional items, accessories and other articles offered/supplied with the Vehicle at the time of delivery.</p> <p>2. This Provisional Booking Order (hereinafter referred to as the "PBO") is subject to confirmation by the Company.</p> <p>3. The Company reserves the right to alter the design, construction specification, and price and delivery schedule of the Vehicle without notice. The Company also reserves the right to transfer this order to another authorized dealer without assigning any reason without prior notice, and the Vehicle may be supplied with or without such alterations and change through any authorised dealer. Subject to change/addition/deletion the Applicant may select any two in order of priority from available colors.</p> <p>4. (i) The provisional price(s) indicated/advertised are tentative retail prices inclusive of sales tax (excluding other levies, government and local taxes) and may be changed without notice.</p> <p>(ii) The price payable by the Applicant for the Vehicle shall be prevailing, i.e., fixed by the Company, at the time of delivery.</p> <p>(iii) Unless otherwise agreed by the Company, payment will be accepted in form of pay order/ demand draft only in the name of INDUS MOTOR COMPANY LIMITED A/C (give name of the Applicant as appearing on the PBO).</p> <p>(iv) The difference in price, if any, between the price at the time of booking and the price at delivery shall be payable at the time of delivery of the Vehicle.</p> <p>(v) The Vehicle shall not be delivered to the Applicant unless and until the Company receives full payment of the price.</p> <p>(vi) If the Applicant wishes, at any time before the Vehicle is ready for delivery, to cancel the booking under the PBO, the Applicant may do so by making a written application (accompanied by the Applicant's copy of the PBO in original) to the concerned authorized dealer, who will forward the same to the Company. The Company shall refund the amount paid by the Applicant, less any applicable deductions and less an administrative charge of Rs. 25,000, which net amount shall be paid to the Applicant through the concerned Authorized Dealer by means of a crossed cheque in the name of the</p>

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sole and absolute discretion decides to accept the application, the Applicant shall be informed accordingly within thirty days of the application reaching the Company and thereupon, the Company shall refund the amount paid by the Applicant through the concerned authorized dealer (subject to any applicable deductions). If the Company does not respond within the period stipulated aforesaid and/or the application is rejected, the Applicant shall continue to remain bound by all terms of the agreement between the Company and the Applicant including, inter alia, to take delivery of the vehicle on full payment for the same.

5. The Authorized Dealer or the Company shall use make reasonable endeavours to deliver the vehicle by the tentative delivery month, but shall not be responsible for any delays in the delivery of the vehicle, including but not limited to, any delays occurring due to acts of God or enemy, change in Government policies, labor strikes or civil commotion, injunctions granted by courts of law, Force Majeure or for any other reason beyond the control of either authorized dealers or the Company. No delivery shall be made of the vehicle unless at the time of delivery, the Applicant has available his copy of the PBO in original, which shall be surrendered to the Company through the authorized dealer at the time of delivery.

6. The information provided by the Applicant as appearing overleaf has been provided on his own responsibility and without any verification by the Company or obligation on the Company to verify the same. The Company is and shall be entitled to consider the information provided as correct and sufficient for all purposes, including but not limited to, the purposes of correspondence/communication. Any notices/letters sent at the given address shall be deemed to have been delivered in due course of post. Non-receipt of letters, correspondence/communication shall not be considered an excuse for delay in payment. Incomplete forms may be rejected at the sole discretion of the Authorized Dealers/Company. No request for change of name shall be entertained.

7. The Company inspection at factory will be final for all the purposes and they will be indemnified and will be deemed to have always been so indemnified against all damages.

8. The Company reserves the right to change and alter some or all the terms and conditions of the PBO and all such changes and alterations shall be conclusive and binding on the Applicant. Furthermore, the Company's interpretation of all terms and conditions shall be final and binding on all parties.

9. In case of any dispute between the Applicant and authorized dealers and/or the Company, the case shall be referred to the Managing Director, Indus Motor Company Ltd., whose decision shall be final and binding on all parties in all

Applicant within thirty (30) days of the date of receipt by the Company of the Applicant's written cancellation of the PBO. If the Applicant wishes to cancel their booking under the PBO on account of an increase in price or due to delays in delivery of the Vehicle, the Company shall refund the amount paid by the Applicant, without deducting the administrative charge of Rs. 25,000. The Company reserves the right to refuse any application for cancellation which is not accompanied by the Applicant's copy of the PBO in original.

5. The Authorized Dealer or the Company shall make reasonable endeavours to deliver the Vehicle by the tentative delivery month, but shall not be responsible for any delays in the delivery of the Vehicle, including but not limited to, any delays occurring due to acts of God or enemy, change in Government policies, labour strikes or civil commotion, injunctions granted by courts of law, Force Majeure or for any other reason beyond the control of either Authorized Dealers or the Company. No delivery shall be made of the Vehicle unless at the time of delivery, the Applicant has available his copy of the PBO in original, which shall be surrendered to the Company through the Authorized Dealer at the time of delivery.

6. The information provided by the Applicant as appearing overleaf has been provided on his own responsibility and without any verification by the Company or obligation on the Company to verify the same. The Company is and shall be entitled to consider the information provided as correct and sufficient for all purposes, including but not limited to, the purposes of correspondence/communication. Any notices/letters sent at the given address shall be deemed to have been delivered in due course of post. Non-receipt of letters, correspondence/communication shall not be considered an excuse for delay in payment. Incomplete forms may be rejected at the sole discretion of the Authorized Dealers /Company. No request for change of name shall be entertained.

7. In the case of any dispute between the Applicant and the Authorized Dealers and/or the Company, the matter will be referred to the **Company, and the Company's interpretation of all terms and conditions shall be final**

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<p>respects.</p> <p>10. Separate Provisional Booking Order form is required for each vehicle ordered.</p> <p>11. The Applicant agrees and undertakes to pay all taxes, fees and other charges etc. or any other levy of whatsoever nature as may be levied from time to time by any government authority, local body or other organization or agency at the time of delivery of the vehicle or otherwise. All such amounts as aforesaid shall be paid as and when indicated by the Company and the Company's communication in this regard shall be conclusive and binding.</p> <p>12. Delay in taking delivery and/or making Balance Payment on account of wrong/incomplete address recorded with the Company or change of address not intimated to the Company in time or due to any other reason whatsoever will be entirely at the Applicant's risk and responsibility.</p> <p>13. The Applicant hereby understands that authorized dealers are not acting as agents or representatives of or for the Company and nothing contained herein or any further/subsequent correspondence/communication between authorized dealers and the applicant shall have the effect or be construed as having the effect as aforesaid.</p> <p>14. The Applicant hereby confirms that he will only pay, and be liable only to pay, the Company, the price for the vehicle and other charges related thereto as herein provided, i.e., Sales Invoice Price and the applicable Government and local levies as prevailing at the time of delivery and insurance and other such charges and expenses, if applicable.</p> <p>15. By signing the Provisional Booking Order form, the Applicant hereby acknowledges that the information provided is true and correct and that the PBO is to be confirmed by the Company as per clause 2 on the basis of such information. The Applicant accepts that in case any of the information provided by him is false, incorrect or misleading in any particular whatsoever, the Company has the right exercisable at any time to cancel the PBO and refund the amount paid, without any prior notice or intimation.</p>	<p>and binding on all parties.</p> <p>8. Separate Provisional Booking Order form is required for each Vehicle ordered.</p> <p>9. The Applicant agrees and undertakes to pay all taxes, fees and other charges etc. or any other levy of whatsoever nature as may be levied from time to time by any government authority, local body or other organization or agency at the time of delivery of the Vehicle or otherwise. All such amounts as aforesaid shall be paid as and when indicated by the Company and the Company's communication in this regard shall be conclusive and binding.</p> <p>10. Delay in taking delivery on account of wrong/incomplete address recorded with the Company or change of address not intimated to the Company in time or due to any other reason whatsoever will be entirely at the Applicant's risk and responsibility.</p> <p>11. The Applicant hereby understands that Authorized Dealers are not acting as agents or representatives of or for the Company and nothing contained herein or in any further/subsequent correspondence/communication between Authorized Dealers and the Applicant shall have the effect or be construed as having the effect as aforesaid.</p> <p>12. The Applicant hereby confirms that he will only pay, and be liable only to pay, the Company, the price for the Vehicle and other charges related thereto as herein provided, i.e., Sales Invoice Price and the applicable Government and local levies as prevailing at the time of delivery and insurance and other such charges and expenses, if applicable.</p> <p>13. By signing the PBO form, the Applicant hereby represents that the information provided is true and correct and that the Company's confirmation is based on such information. The Applicant accepts that in case any of the information provided by him is false, incorrect or misleading in any particular manner whatsoever, the Company has the right exercisable at any time to cancel the PBO and refund the amount paid, less any applicable deductions and less the administrative charge, without any prior notice or intimation.</p>
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47. Detail examination of proposed amendments to PBO revealed that most of the competition concerns pointed out remained unaddressed and the same was also

conveyed to the Indus Motor. Indus Motor requested to have another meeting with the Enquiry Committee on 2 August 2012. During the second meeting the representatives of Indus Motor agreed to further revisit the proposed amendments to PBO. However, to our surprise in the email dated 24 August 2012 received from Ms. Anam Fatima Khan, legal representative, Indus Motor stated that

As per our discussion, one area was highlighted by the Commission which aspect remained unresolved during the meeting and we agreed to revisit the relevant portion in Clause 4(vi):

The Company shall refund the amount paid by the Applicant, less any applicable deductions and less an administrative charge of Rs.25,000, which net amount shall be paid to the Applicant through the concerned Authorized Dealer.....[emphasis supplied]

As explained during the meeting, the Company will only deduct Rs.25,000 to cover administrative expenses. Therefore we will be removing the underlined portion mentioned above and the Clause will now read,

The Company shall refund the amount paid by the Applicant less an administrative charge of Rs.25,000 which net amount shall be paid to the Applicant through the concerned Authorized Dealer...”

48. Despite explaining the competition issues to Indus Motor and holding two meetings with their officials, Indus Motor agreed to remove only two terms and conditions from PBO which give (i) unilateral right of Indus Motor to reject the request for cancellation of booking; and (ii) conclusive right of Indus Motor to alter the terms and Conditions of PBO.

49. While the remaining competition issues as discussed above in detail which relate to (i) uncertainty as to final price; (ii) uncertainty as to specification and design; and (iii) conclusive right of Indus Motor to interpret the terms and conditions remain unresolved. Though the minor changes in the language have been made in

the proposed amendments but the crux of proposed amendments reflects the same imbalance of rights of both parties as the original PBO.

50. Uncertainty of price, design/specification and conclusive right of one party to interpret the terms are the conditions that affect validity of a contract. Such uncertainty is ‘undue’ limitation of the freedom of the customers. For that a competition agency takes into account whether parties had effective opportunity to negotiate the terms of the contract and whether one of the parties had all or most of the bargaining power relating to the transaction. The Commission has held in its earlier Order that “*Commission should not indulge in determining or correcting the commercial terms of private free bargain..... Moreover, in the absence of harm to competition, competent authorities should generally make every effort not to interfere in privately-negotiated contracts*”¹¹

51. However, in this instant case the PBO is a standard form contract or consumer contract which is not negotiable at the time of entering the contract. A customer is in a weaker position given the market power of the Indus Motor. Therefore, PBO and proposed amendments to it is, *prima facie*, an *oppressiveness* and *one-sided* contract which entails *unfair terms* to the *detriment of customer* and amounts to abuse of dominance under Section 3(3)(a) of the Act.

VIII. FINDINGS/CONCLUSION

52. In view of foregoing, PBO and proposed amendments to it is a standard form contract or consumer contract between Indus Motor and customers to purchase ‘Toyota’ car which is not negotiable at the time of entering the contract. Indus Motor holds dominant position and enjoys economic strength in the relevant segment of car market which enables it to behave independent of its competitors and customers. Under the peculiar circumstances, Indus Motor’s customer is in a weaker position. PBO and proposed amendments impose terms and conditions on

¹¹ http://www.cc.gov.pk/images/Downloads/section_3_order.pdf

customers which apparently create a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of customers. Therefore, PBO and proposed amendments to it, *prima facie*, entail unfair terms in contravention of 3(3)(a) of the Act. It would be pertinent to mention here that an illustration of uncertainty of specifications was also observed in the standard form contract issued by a competitor of Indus Motor, however it does not hold a dominant position in this relevant segment of passenger car market.

53. Apart from traditional contract law, competition law is more focused on the economy and its competitive structures. The mechanism of competition is understood to promote fair outcomes of contracting in the marketplace. Market forces tend to guarantee a just balance between the rights and obligations of the parties. Therefore, if contracts become unfair, this is seen as a result of market failure and competition law recognizes the possibility of unfairness caused by market failure. Therefore, one of the purposes of the prohibition of abuse of dominant position is to protect those contracting with a business in a dominant position against unfairness caused by the imbalance created by this position. This seems to imply that competition works sufficiently well to guarantee fairness in the latter situation.

54. We are, therefore, of the opinion that it is necessary in the public interest to initiate proceedings under Section 30 of the Act against Indus Motor Company Limited for, *prima facie*, violation of Section 3(3)(a) of the Act.

(NADIA NABI)
SR. JOINT DIRECTOR
ENQUIRY OFFICER

(ISHTIAQ AHMED)
DEPUTY DIRECTOR
ENQUIRY OFFICER