



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO
M/S INDUS MOTOR COMPANY LIMITED
(F. NO: 1(45)/IM/C&TA/CCP/2012)**

Dates of hearing: April 9, 2013, September 19, 2013

Present: Dr. Joseph Wilson
Chairman

Dr. Shahzad Ansar
Member

On behalf of:

M/s. Indus Motor Company Ltd Mr. Pervaiz Ghais, Chief Executive Officer
Ms. Anum Fatima Khan, Company Secretary
Mr. Yasir Niazi, Resident Director, Islamabad

ORDER

1. This order disposes of proceedings initiated under Section 30 of the Competition Act, 2010 (hereinafter the “Act”) vide Show Cause Notice No.15 dated 13 March, 2013(the “SCN”) issued to M/S Indus Motor Company Limited (“Indus Motors”).
2. The issue in this case was whether the Provisional Booking Order (“PBO”) issued by Indus Motors to its potential buyers for purchase of a new car included terms and conditions that amounted to abuse of a dominant position by Indus Motors by imposing unfair trading conditions on its customers in violation of Section 3(3) (a) of the Act.

UNDERTAKING

3. Indus Motors is a company incorporated in Pakistan under the Companies Ordinance, 1984 and engaged in assembling, manufacturing and marketing of Toyota vehicles in Pakistan and is therefore an undertaking as defined in clause (q) of sub-section (1) of Section 2 of the Act.

BACKGROUND

4. The Competition Commission of Pakistan (the “Commission”) took notice of the terms and conditions mentioned in the PBO issued to potential buyers by an authorized dealer on behalf of Indus Motors which is ostensibly a standard contract comprising terms and conditions pertaining to price, design, specification, time of delivery, among others. A perusal of the terms and conditions stipulated in the PBO appeared to create a significant imbalance in the parties rights in favor of the seller i.e. the Indus Motors and tantamount to unfair terms as envisaged in Section 3(3)(a) of the Act.

PERTINENT CLAUSES OF PBO

5. Followings are the clauses which raised competition concerns:

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 authorized dealer. Subject to change/addition/deletion the Applicant may select any two in order of priority from available colors.
 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.
(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 sale 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.
 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 dispute between the Applicant and authorized dealer and/or the Company, the case shall be referred to the Managing Director of the Company, whose decision shall be final and binding on all the parties in all respects.
6. In view of the above the Commission decided to initiate an enquiry and formulated an Enquiry Team comprising Senior Joint Director, Ms. Nadia Nabi and Deputy Director, Mr. Ishtiaq Ahmed (hereinafter collectively referred to as 'Enquiry Committee') pursuant to Section 37 of the Act.
7. During the enquiry, the Enquiry Committee held meetings with the representatives of Indus Motors to address the competition concerns raised by the Commission.

With Indus Motors cooperation, the meetings brought forth a partially favorable outcome. Indus Motors revised its PBO on June 15, 2012 wherein it relinquished its unilateral right to reject the cancellation of booking by the buyer and its absolute right to modify the terms and conditions of PBO. However, the pith of the issue remained unchanged with serious competition concerns relating to the final price, uncertainty in design/specification and the conclusive right of interpreting the terms of PBO resting with Indus Motors.

8. The Enquiry Committee submitted its Enquiry Report in February, 2013, wherein it noted that it appears that Indus Motor holds a substantial market share and enjoys economic power in the 1300cc segment of car market, which enables it to behave independent of its competitors and customers, thereby making it a dominant player in the relevant market of passenger cars of 1300cc. Under the circumstances, Indus Motor's buyer is apparently in a weaker bargaining position. PBO gives Indus Motor the sole right to (i) change the price, (ii) design/specification, (iii) delivery schedule without any notice to the buyer, (iv) a conclusive right to interpret the terms of the contract and (v) to decide the dispute between a buyer and Indus Motor. Such terms create a significant imbalance to the disadvantage of buyer's rights and obligations arising under the contract. Thus, the terms of PBO, *prima facie*, being unfair to the buyers were in contravention of 3(3)(a) of the Act.

9. In view of the recommendations of the Enquiry Report, the Commission decided to initiate proceedings under Section 30 of the Act for a, *prima facie*, violation of Section 3(3) (a) of the Act and the SCN was issued to Indus Motors. Pertinent parts of the SCN are being reproduced below for reference:

And Whereas in terms of the Enquiry Report in general and para 32 to 51 in particular, terms and conditions of PBO appear to give the Undertaking Unilateral rights to change the final price, design and specification of car without any notice before delivery and also give the Undertaking conclusive right to interpret the terms and conditions of the contract. Such terms put unnecessary burden on customers and are, prima facie, unfair trading conditions for the following reasons:

- i. Cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- ii. Terms are not reasonably necessary to protect the legitimate interests of the undertaking; and
- iii. Cause detriment (whether financial or otherwise) to customers.

And Whereas in view of foregoing, it appears that the terms and conditions mentioned in the PBO issued for purchase of new Toyota Corolla car from the Undertaking are unfair trading conditions imposed on the customers and therefore, prima facie, constitute violation of section 3(3)(a) read with section 3(1) of the Competition Act;

10. Indus Motors filed a written response explaining its position in respect of the competition concerns raised in the Enquiry Report as well as the Show Cause Notice. Subsequently Indus Motors appeared in a hearing held on April 9, 2013 before this Bench. During the course of hearing, legal representative of Indus Motor requested the Bench to allow another opportunity to revise the draft of PBO to rectify the concerns raised by the Commission.
11. Later on, the revised draft was submitted to the Bench on April 26, 2013, however, the said revised draft did not clarify the ambiguities in respect of the design and price of the car. Thus, another hearing in the matter was held on September 19, 2013. During the hearing, the Bench was apprised of the proposed amendments to address the concerns of the Bench on the revised draft submitted after the issuance of the Show Cause Notice. In pursuance of amendments proposed and agreed before the Bench during the hearing, Indus Motor submitted the final revised draft PBO on 26 October 2013.
12. We have reviewed the original and the revised draft PBO. Terms raising concerns are discussed below:

Cancellation Rights

13. Regarding cancellation of booking, initially the Indus Motor had sole and absolute discretion to accept or reject the request of cancellation by the buyer. If for some reasons Indus Motors failed to delivered the vehicle as ordered or on time, the buyer could not cancel the contract. It was at the entire discretion of the Indus

Motor and the buyer would be bound to take delivery of the vehicle on full payment for the same. Cancellation right is an important tool that creates balance among the parties. Indus Motors has rectified this imbalance not only by relinquishing its unilateral right to reject the request for cancellation by the buyer but also waving off any charges in case the application for cancellation is based on an unsatisfactory change in price or delivery schedule .

14. Such rectification made by Indus Motors has put the consumer at an equal footing with regard to the aspect of cancellation by leaving room for the customer to cancel the booking at no extra expense if the consumer is not satisfied with any changes made in the initial agreement pertaining to price or delivery schedule.

Right to the Alter Terms

15. Under the original PBO, Indus Motor had the sole right to alter some or all terms and conditions of PBO and also the right to interpret them conclusively. Having such a clause in the contract can be used to force the buyer to accept increased costs, new requirements, or reduced benefits, and is therefore considered unfair whether or not it is meant to be used in that way. This clause has been completely removed from the revised draft PBO.

Dispute Resolution

16. Similarly, another condition whereby any dispute between the customer and Indus Motor company was to be conclusively decided by the Managing Director of Indus Motors has been amended to refer such dispute to an Arbitrator to resolve and settle the matter under the arbitration Act 1940 of Pakistan , thus giving fair and equal right to both parties i.e. the buyer and Indus Motor.

Change in Design/Specification without Notice

17. Initially, Indus Motors held the sole right to change the design, construction specification without notice to buyers. Such clause gave power to Indus Motor to substitute something different for what it has actually agreed to supply. During the

hearing it was explained to the Bench that change in specifications of the vehicle could take place due to constant advancement in technology or under the direction of the government. In light of this discussion, PBO was revised which specifically mentions that Indus Motor may make minor alterations to the design and construction specification of the Vehicle, and make such alterations in the vehicle as required by any Federal and/or Provincial legislation.

Right to Change Price without Notice

18. Indus Motor had the sole right to change price of the vehicle without notice to buyer at the time of delivery. This clause created uncertainty as to price and buyer was not sure of how much extra amount is to be paid at the time of delivery for getting what he or she has been promised even though the ‘consideration’ has already been paid. This lacuna has been removed by explicitly mentioning in the revised draft PBO that revision of prices would only be subject to a change, if any, in Government levies/taxes and/or currency fluctuation.

19. In view of foregoing, PBO have been amended and rectified to address the competition concerns raised in terms of Section 3(3)(a) of the Act. Subject to incorporation of revised terms and conditions as approved by this Bench through this Order, the subject proceedings stand disposed of.

Dr. Joseph Wilson

Chairman

Dr. Shahzad Ansar

Member

Islamabad, the November 08, 2013