

Thermo's summary of its responses

THERMO ELECTRON MANUFACTURING LIMITED / GV INSTRUMENTS LIMITED

THERMO'S SUMMARY OF ITS SUBMISSIONS IN RESPONSE TO THE COMPETITION COMMISSION'S PROVISIONAL FINDINGS AND NOTICE OF POSSIBLE REMEDIES

1. Response to the CC's Provisional Findings

- 1.1 The CC concludes in its Provisional Findings that the acquisition of GVI by Thermo may be expected to result in a substantial lessening of competition in both the Gas IRMS and the TIMS markets in the UK. The CC's Provisional Findings are based on the following key conclusions.
- (i) New entry into the Gas IRMS and TIMS markets could not be expected within a time period or on a sufficient scale to constrain the merged entity.
 - (ii) The likely counterfactual, given that the business was rapidly in decline and in the absence of a sale to Thermo, is that GVI would have failed in the near future. On failure, the relevant insolvency process would have been GVI's bank initiating and funding an administration, rather than the company being placed into liquidation.
 - (iii) If GVI had been acquired out of administration, the business and its assets would have been "cleansed" by the administration process of the significant material defects and liabilities that the CC has acknowledged characterised those assets prior to the acquisition of GVI by Thermo.
 - (iv) Any of the possible purchasers from administration that the CC has identified for either the whole of GVI's business or the individual product lines would have been able effectively to exploit the acquired assets so as to capture at least 50% of GVI's market share and, by doing so, to represent a competitive constraint on Thermo.
- 1.2 Thermo considers that each of these conclusions is unsubstantiated and contrary to the facts. Therefore the Provisional Findings should not stand.

New entry by Nu Instruments fundamentally alters the factual matrix

- 1.3 With regard to the CC's first conclusion, the actual entry by Nu Instruments into the Gas IRMS market announced on 3 April 2007 has fundamentally changed the factual basis of the competition analysis that underpins the CC's Provisional Findings.
- 1.4 The CC's position in its Provisional Findings is that entry into the Gas IRMS market would not be within a timescale to impact the existing IRMS suppliers and is unlikely to be of sufficient scale to provide an effective competitive constraint on the merged firm. These views on entry underpin the CC's conclusions that potential competition would not constrain the merged entity, which is one of the assumptions upon which the provisional finding of a significant lessening of competition in Gas IRMS rests. In fact, Nu Instruments' market entry provides additional actual competition to the merged entity.

- 1.5 This additional actual constraint is a material new fact which fundamentally changes the evidential basis for the CC's Provisional Findings and means that the CC must review its competition assessment. In particular:
- (i) The Provisional Findings were taken on the basis that after the merger Thermo's only actual competitors in the Gas IRMS market would be a number of fringe players. Given Nu Instruments' entry with a newly developed product, this conclusion on the market structure must be revised.
 - (ii) The Provisional Findings relied on an assertion that entry by additional players was unlikely. That conclusion has been disproved by Nu Instruments' entry.
 - (iii) The Provisional Findings assumed that the merger would bring about a reduction in the number of actual competitors in the Gas IRMS market. Given Nu Instruments' entry, it is likely that the merger has not changed the number of actual competitors in the market with respect to the counterfactual. A reduction in the number of players could only have occurred in relation to a counterfactual scenario in which Nu Instruments launches the Nu Horizon and a firm other than Nu Instruments enters using GVI's assets. This is not the most likely counterfactual scenario; but even on this basis a substantial lessening of competition would be unlikely to arise.
 - (iv) The CC's analysis must now factor in that if Nu Instruments were to have entered the market using GVI's Gas IRMS assets this would have cannibalised or completely displaced the competitive constraint that will now be exerted by the Nu Horizon. If GVI's assets were to have been bought by a player other than Nu Instruments, that firm would have been less likely than Nu Instruments to exert an effective constraint on Thermo.

The relevant counterfactual is liquidation and not administration

- 1.6 The second of the CC's key conclusions is that the likely counterfactual if GVI had not been bought by Thermo is that the company would have failed in the near future. On failure, the relevant insolvency process would have been GVI's bank funding an administration, rather than the company being placed into liquidation. This is not merely an academic question, but one which has a fundamental impact on the CC's judgment as to the nature of the assets which could have been acquired and consequently on the degree of competitive constraint that any acquirer of assets could be expected to exert.
- 1.7 The CC's conclusions rely on the fact that administration would have enabled a purchaser to maintain much of the value of the GVI assets, in particular by retaining access to a significant number of key employees. The main reason given by the CC in support of this conclusion is the likely speed of an administration process. Thermo considers that it is an entirely flawed assumption that any purchaser would have moved quickly to acquire the whole or any part of GVI's business. The evidence in the Provisional Findings suggests that neither of the two buyers identified by the CC as interested in buying GVI as a whole would have been likely to move quickly in an administration. Even if a quick administration were the likely outcome from GVI's failure rather than liquidation, Thermo has provided considerable evidence as to why this would not have guaranteed the retention of key staff.

- 1.8 The CC's Provisional Findings do not substantiate why GVI's bank would have initiated and funded an administration in preference to liquidation. In order to initiate an administration, GVI's bank would need to have been satisfied that it had a financial interest in doing so. It is extremely unlikely that any bank would initiate an administration unless it had first determined, on the basis of a structured analysis, that it could expect to receive a realistic level of minimum return in addition to covering the costs of the administration process. GVI's bank would therefore have been very unlikely to fund a period of administration unless it was protecting real value in the business. There is no evidence that the bank would have reached that conclusion.

Administration would not have cleansed the GVI assets

- 1.9 With regard to the third of the CC's key conclusions, the CC's Provisional Findings are predicated on the assumption that administration would have removed many of the financial and commercial risks associated with purchasing GVI, such as the amounts due to outstanding creditors and potential liabilities to rectify problems with disgruntled customers. This is an entirely flawed assumption.
- 1.10 Thermo has explained to the CC in detail the significant material defects and non-severable liabilities attached to all of GVI's assets and the reasons why these would have remained after any acquisition out of administration. The CC has not addressed in its Provisional Findings any of the issues raised by Thermo that a purchaser would have to have dealt with.
- 1.11 In relation to GVI's order log, for example, it is correct that an administration would technically have resulted in the erasing of any liability to account to customers for their deposits. The practical reality, however, would be the acquisition of a backlog of customers for whom no product had been delivered despite the down-payment of a large proportion of the final purchase price. After writing off their deposits, many of these customers may simply not have had the money to proceed and the sales would simply have been lost. Other affected customers would simply have transferred their orders to an alternative manufacturer. Those customers who retained funding and who also decided that they wished to proceed with their order would be likely to have considered the acquirer of GVI's assets as the successor business and in all probability would have requested some kind of compensation for the lost deposits (for example, through a discounted sales price).
- 1.12 Similarly, although the debts to suppliers would have been erased as a matter of law, as a matter of practice and commercial reality any acquirer would have had either to make some recompense if it wished to resume the supply relationship or at least to have paid for any order in advance on less advantageous terms. Even after paying suppliers in full immediately following the acquisition, it took Thermo several months to restart the supply chain. GVI's failure would also have prompted suppliers to re-assess the risk of dealing with IRMS manufacturers in general and with GVI's successor business in particular. Those that were prepared to resume trade with GVI's successor business would have been likely to request a risk premium, either in the form of higher prices or more onerous conditions. For example, it is likely that they would have insisted in receiving a large part or all of their payment up-front. This would have put any purchaser of GVI at a distinct competitive disadvantage.
- 1.13 Thermo considers that administration would not have removed the risks associated with an acquisition of GVI and the CC's contention that it would have done so is simply not credible.

Acquisition of GVI assets from insolvency would not materially assist new entry

- 1.14 With regard to the fourth of the CC's key conclusions, the particular GVI assets that would have been available from an insolvency process would not have provided their acquirer with material assistance to establish a competitive constraint to Thermo. The CC concludes that an acquirer of assets from administration would have been able effectively to exploit the acquired assets so as to represent a competitive constraint on Thermo. It asserts without substantiation that any of the potential purchasers it identified would have been able to retain at least 50% of GVI's pre-merger market share and, at the upper end, the buyer would capture 100% of GVI's pre-merger market share. The CC has confirmed to Thermo that it did not use any analytical methodology to arrive at this conclusion. Instead, the CC simply asserted that this was its judgment as to the number of sales that a potential purchaser could achieve.
- 1.15 Thermo contests the CC's assumption that GVI's assets in the hands of any potential purchaser identified by the CC would have provided the basis for the development of a material competitive constraint on the merged entity in relation to either Gas IRMS or TIMS. Thermo has described in detail to the CC why an acquisition of GVI's assets out of insolvency would not have materially assisted a purchaser in making sales. In addition, the position would have been made yet more difficult by the fact that GVI was reliant on third party software licences, hardware patent licences and method licences. The only way for the necessary GVI licences automatically to transfer to a purchaser is on a share sale. Such an outcome is extremely unlikely in any sale out of administration and impossible on liquidation.
- 1.16 Moreover, the assumption that a purchaser would have been able effectively to exploit the assets it acquired directly contradicts the CC's analysis of barriers to entry and expansion. The CC has produced no reasons why the acquisition of GVI would have enabled a purchaser to overcome these barriers.

2. Response to the CC's Notice of Possible Remedies

- 2.1 The fundamental change in the factual background deriving from Nu's actual market entry requires formal reconsideration by the CC of its Provisional Findings. As a consequence, Thermo does not consider the CC's Notice of Possible Remedies to have any continuing validity.