

THERMO ELECTRON MANUFACTURING LIMITED/GV INSTRUMENTS LIMITED
SUMMARY OF SUBMISSIONS

Rationale for the transaction

1. Thermo Electron Manufacturing Limited ("Thermo"), a subsidiary of Thermo Fisher Scientific, Inc. ("Thermo Fisher") acquired the entire issued share capital of GV Instruments Limited ("GVI") on 20 July 2006. The transaction did not meet the turnover threshold of the Enterprise Act and indeed GVI's UK turnover in the year prior to acquisition was less than £350,000. However, the transaction qualified for review under the share of supply test and the OFT opened an investigation into the acquisition, which led to the completed acquisition being referred to the Competition Commission for investigation in December 2006.
2. For Thermo, the acquisition of GVI was of interest for the following two strategic reasons:
 - (i) entry into the Noble Gas sector of IRMS where Thermo was not represented; and
 - (ii) the addition of GVI's largely complementary portfolio of lower end IRMS instruments more suitable for routine research applications to Thermo's portfolio of higher end performance instruments.
3. Thermo also perceived an opportunity to expand GVI's offer to its customers (and to Thermo customers overall), by integrating GVI commercial operations into Thermo's existing and well-established sales, service and technical support organisation.
4. Thermo believed that further benefits to customers would arise as a result of Thermo Fisher's broader economies of scale and that there were significant opportunities to reduce GVI's cost structure.

Benefits of the transaction

5. Thermo considers that GVI would have failed and would have entered liquidation had Thermo not completed its acquisition in July 2006. In contrast, as a result of Thermo's acquisition:
 - (i) all creditors, including all GVI suppliers have been paid in full;
 - (ii) all customer deposits have been protected and the order backlog fulfilled, with compensation for late delivery paid where appropriate;
 - (iii) design flaws in new and existing GVI products are being addressed with temporary solutions in the field offered where appropriate;
 - (iv) after-sales service, including engineer visits, expert telephone support and provision of spare parts that are not available from other suppliers, has been preserved without disruption; and

- (v) GVI's product pipeline has been preserved.

The Failing Firm Criteria - the Counterfactual

6. Thermo considers that the key issue in this case is whether any substantial lessening of competition that may arise from its acquisition of GVI is attributable to the merger, or, as Thermo submits, to the inevitable failure of GVI. In Thermo's view, there is no causal relationship between any substantial lessening of competition and its acquisition of GVI. In other words, the failing firm defence ought to apply.
7. The CC Guidance on Merger References outlines the criteria to be met in order for this defence to apply¹:
- (i) the business must be unable to meet its financial obligations in the near future;
 - (ii) the business must be unable to restructure itself successfully; and
 - (iii) there should be no less anti-competitive alternative to the merger.
8. With regard to the first condition, GVI was in a very serious financial position at the time of the acquisition by Thermo. Thermo's analysis of its financial position reveals that GVI had made substantial operating losses for a prolonged period of time, was unable to satisfy its existing orders, was in significant debt to numerous creditors, including key suppliers, and was struggling to meet ongoing obligations, including staff salaries. Moreover, Thermo submits that GVI did not have access to appropriate external funding that it needed to overcome these problems.
9. With regard to the second condition, Thermo does not believe that GVI would have been able to restructure itself successfully. Thermo understands that GVI's relationship with its bank had already deteriorated significantly and there was no realistic prospect of procuring the funding necessary to effect a restructuring from any other source.
10. In relation to the third condition, Thermo does not consider that an alternative purchaser would have acquired the business as a whole. There was no realistic prospect of a third party completing due diligence and investing the necessary funds into the business, either at all or within a sufficient timeframe to keep GVI going. For this reason, Thermo submits that the competition implications of its acquisition must be considered by reference to a hypothetical liquidation counterfactual. Such a counterfactual hypothesizes a liquidator seeking to realise as much value as possible from a sale of GVI's assets.
11. Thermo does not believe that acquisition of GVI assets in a hypothetical liquidation counterfactual would have materially assisted a purchaser in overcoming the substantial barriers to entry and expansion that characterise the IRMS business. In particular, for

¹ CC Guidance on Merger References (CC2), paragraphs 3.61-3.63.

the reasons developed below, the assets were not suited to help a purchaser build the necessary reputation in the market place and would not have reduced the substantial amount of continuous R&D investment required to maintain a competitive product offering. For those potential purchasers with existing market experience, acquisition of the GVI assets would not have materially increased either the timeliness or the likely scale of any such entry.

12. GVI's assets that would have been available to purchase in a hypothetical liquidation counterfactual were the designs, the brands, the customer base and the order log. In Thermo's view, within the context of a hypothetical liquidation counterfactual these assets would have been flawed and in some cases not severable from material liabilities.
13. In relation to GVI's product designs, Thermo considers that at the date of its acquisition (and therefore at the relevant time for any hypothetical liquidation counterfactual), these were either of limited value, not fully developed or related to products that were discredited in the market place. It also considers that any purchaser of assets in a liquidation scenario would inevitably have assumed significant problems, not least in the form of a wary and disrupted supply chain, customer backlogs and deficient instruments in the field. Thermo believes that as a result of these factors GVI's brand had been severely compromised and would have been destroyed on failure of the company. Given the circumstances, Thermo also believes that to describe the GVI customer base and order backlog as assets in a liquidation would be to ignore closely associated and significant liabilities. Both suppliers and customers awaiting delivery were certain to have lost considerable sums of money in any liquidation. Any acquirer of the assets in such a counterfactual would have needed to offer some financial incentive to disgruntled customers in order to realise any value from the customer backlog. Even restarting the supply chain would have taken considerable time and would have been on less advantageous terms following liquidation. The combination of these factors means that a purchaser would have needed to commit significant resources on an ongoing basis before it realised value from the assets it acquired.
14. Moreover, had GVI entered liquidation GVI's staff would have been made redundant and would have been likely to seek alternative employment. It is far from certain that any of GVI's key employees would have been available to any purchaser of the assets had Thermo not acquired GVI.

Conclusion

15. It follows that Thermo believes that all three conditions of the failing firm test are met. GVI would have failed and exited the market in the near future and there was no reasonable prospect of a viable restructuring. There was no less anti-competitive alternative to an acquisition by Thermo, which has delivered the benefits to customers, suppliers, creditors and employees noted in paragraph 1.5 above. As a result, Thermo's acquisition of GVI should be cleared without conditions.