This presentation will cover just an overview of the chapter. The many details and ideas on investigation planning in the chapter are intended for anyone who does merger investigation.
This chapter is the 4th chapter drawn from the topics presented at the Investigative Techniques staff-level workshop on merger investigation in Washington in November 2002. The first three chapters addressed 1) a Compendium of Investigative Tools (as a result of a survey the subgroup sent to members); 2) Developing Reliable Evidence in all forms, documents, testimony, written inquiries, and data; and 3) the Role of Economists and Economic Data.
The structure of the paper. The paper is focused on the possible elements that go into a merger investigation plan. It consists of 4 sections:

1. **Section 1**: Planning the Investigation
   - Focus of paper: mapping out a strategy for investigation
   - Includes a list and brief description of topics to cover in an investigation plan.

2. **Sections II-IV**: Three concepts related to effective planning:
   - Focusing Theories and Facts (Section II)
   - Managing Evidence (Section III)
   - Timing (Section IV)

The remaining three sections of the chapter deal with **planning-related concepts** -- ideas that can help improve effective planning, and therefore effective investigation. These three areas are Focusing Theories and Facts, Managing Evidence, and Timing considerations.
I. Planning the Investigation

The Investigation Plan:
- is a written plan
- sets priorities for investigation team
- guides investigative strategy and decisions
- is a living product to be revised throughout the investigation
- will vary by jurisdiction according to the available tools and techniques
- will vary according to the level of scrutiny needed

What do we mean by an Investigation Plan? Here we have some of its attributes and objectives. An investigation plan is (cf. slide)
I. Planning the Investigation

Planning Based on Level of Scrutiny Needed:

- Initial Stages of an Investigation
  - If no concerns, no plan needed; clear transaction quickly
  - If there is a question, informal planning should focus solely on whether further investigation is warranted, using an “initial plan” (This can be as simple as a few tasks or even a single threshold issue, such as whether there is an overlap.)

- In-Depth Investigations: The Investigation Plan

The level of planning needed is partly based upon the level of scrutiny needed and the perceived competitive concerns.

For initial stages of review, little formal planning is required. For transactions with no concerns, there is no planning. For transactions where it is not clear whether there are significant concerns, the investigation team should focus on simple, clear, short-term inquiries as to whether an in-depth investigation is needed. Such ‘initial plans’ need not be elaborate, and can focus on a single threshold issue such as whether the parties overlap in any geographic area. For In-Depth Investigations – the focus of the paper – purposeful planning, which includes a written investigation plan, is appropriate.
I. Planning the Investigation

Recommendations on Developing an Investigation Plan for In-depth Investigations:
- Focus on identifying the likely areas of concern;
- Determine factual issues for investigation;
- Brainstorm on critical issues and possible theories of harm;
- Identify possible sources of information;
- Consider the required time to complete goals;
- Consider resources needed; and
- Develop a written plan.

The paper addresses how an investigation team should go about developing an Investigation Plan. Some of the recommendations are. . cf. slide
I. Planning the Investigation

An Investigation Plan covers three primary areas:

- **Candidate Theories of Harm**
  - Plan may include: the reason for the investigation; main issues to be investigated; possible remedies

- **Sources of Evidence**
  - Plan may cover: the types of information needed; likely sources of information; method to gather information

- **Timing and Administrative Tasks**
  - Plan should include: an overall timing plan; case agenda schedule; various administrative tasks

There are three primary categories for topics on a written Investigation Plan. They cover investigative theories, evidence, and administrative tasks. Examples under Candidate Theories of Harm include an articulated reason for the investigation, the main issues to be investigated, unresolved questions, and possible remedies. Each is explored in more detail in the paper. Under Sources of Evidence, topics can include the types of information needed, the likely sources for information, and the methods to gather the information. Finally, the plan should cover overall timing, specific task scheduling, and needed administrative tasks.
I. Planning the Investigation

Possible elements for an Investigation Plan:

- The reason for opening the investigation;
- The working theory (ies) of potential harm;
- Unresolved questions critical to the investigation;
- Possible remedies that resolve the theory of harm;
- The types of information necessary to evaluate theories of harm and resolve key questions;
- The sources of information to be explored;
- The information that supports the theory (ies) of potential harm;
- The information that refutes the theory (ies) of potential harm;
- An agenda, or schedule, that prioritizes and assigns tasks such as interviews to be conducted or information requests to be made;
- Key deadlines for the investigation;
- Analytical economic projects;
- Expert projects;
- Coordination with another jurisdiction;
- Staffing needs

The paper does not present a ‘one size fits all’ approach to Investigation Plans, but presents possibilities to consider for inclusion in a plan, which range from some of the most important aspects like the working theory of harm to more routine needs, such as staffing needs.

A dire avant de passer au prochain slide, comme introduction pour le prochain slide: Keeping in mind investigation plans can come in all types and formats, here is a brief example of how simple and effective purposeful planning can be. Taken from the ‘Candidate Theories of Harm’ section of a hypothetical merger plan, we begin with . . .
I. Planning the Investigation

Investigation Plan Example:
Candidate Theories Section

1. *Description of Transaction*: Alpha Company has filed a notification that it has reached an agreement to acquire all the stock of Beta Ltd. Alpha is a diversified industrial company that produces a number of products, including widgets. Beta is a specialized widget producer.

WE begin with a description of the transaction. cf. slide
I. Planning the Investigation

Investigation Plan Example:
Candidate Theories Section

2. Reason for investigation. Alpha and Beta appear to be two of only 3 or 4 widget producers in the country. We should investigate to see if widget consumers would be hurt by the merger, especially to see if gadgets are a good substitute for widget consumers or if imports of widgets will protect consumers from any loss of competition.

. .  next we have a concise reason for the investigation. cf. slide
This brief statement of purpose highlights why the transaction is worthy of scrutiny.
I. Planning the Investigation

Investigation Plan Example:
Candidate Theories Section
3. Main issues to be investigated.
   a. Working theory of harm: Widget consumers are likely to be harmed only if there is a relevant market for widgets produced locally and elimination of the competition between Alpha and Beta will leave consumers with so few choices that prices are likely to increase. If this is the relevant market, consumers probably would be hurt because Alpha’s widgets are particularly good substitutes for Beta’s widgets and other widgets are more expensive.

...Next, under the main issues to be investigated, the working theory of harm. cf. slide . This of course will be refined over the course of the investigation, but is starting point for concrete thinking about what is at issue.
I. Planning the Investigation

Investigation Plan Example:
Candidate Theories Section
3. Main issues to be investigated.
   b. Unresolved questions: Are gadgets a good substitute for a significant number of widget customers? Do imported widgets constrain the price of domestically produced widgets? Do consumers regard widgets produced by Gamma or Delta to be good substitutes?

The next part of the plan identifies the primary unresolved questions in the investigation. cf. slide. Again, this is a section likely to change drastically over the course of the investigation, as issues are resolved and new ones uncovered.
Moving from the theories section of an investigation plan, to the administrative section, here we have an example of an investigation agenda. This is just a portion of the agenda, as the timeline would expand out further, and there could be other additional tasks. The agenda establishes a timeline for all tasks to be completed, along with the staff person allocated to the task. No working theory or other substantive matters here, just a catalogue of the day-to-day tasks that keep an investigation moving along. Thank you to Australia for this real-world example.

That was just a brief, simplified example of what we mean by some of the concepts identified in the paper.
### II. Focusing the Investigation: Planning Concepts

- Develop and prioritize candidate theories
  - Identify potential issues, pursue those most likely to reveal effects
- Discuss Theories
  - Expose arguments to critical analysis from merging parties and third parties
- Test with evidence, reevaluate and revise
  - Test theories with facts, revise theories according to facts
- Focus the Facts
  - Prioritize and narrow the search for relevant information

Now, moving from the specifics of the Investigation Plan, the paper addresses three key concepts that complement effective planning. The first is titled “Focusing the Investigation.” This investigative focus can be accomplished by: 1) developing and prioritizing candidate theories of the cases; 2) discussing the investigation team’s theories with the merging parties or third parties, where appropriate, 3) testing theories with facts, and using the facts to adjust and refine the theories, and 4) focusing the search for facts, particularly the way in which the investigation team goes about requesting information.
III. Manage the Investigation and Evidence

- Organize the Information
  - Develop a document to organize case information (by product or by issue)
  - Where appropriate, address technology issues
- Maintain Communications
  - Dialogue with Merging Parties – regular opportunity to discuss progress
  - Dialogue with Third Parties – can provide crucial fact information and perspectives on merger
  - Keep Decision Makers Informed

The second broad planning-related concept is how to manage the investigation and evidence. The paper details two important ideas. The first is how to organize the information that is learned during the course of an investigation by collecting the key points in a common document and, where appropriate, incorporating technology -- for instance by ensuring information received from the parties is usable or by using technology to aid data evaluation. The second point is for the investigation team to maintain communications with the various participants in the investigation process, including the merging parties, third parties, and the agency decision makers.
IV. Timing: Keeping an eye on the clock

- Investigation team should use the initial phase to frame issues for inquiry and quickly identify issues that are not of concern.
- In an in-depth review, the investigation team may confront timing issues in three contexts:
  - Statutory Periods
  - Internal Timetables
  - Timing Agreements

The third broad concept the paper addresses is timing. Timing constraints can come up in three contexts: deadlines imposed by statute, internal timetables where the investigation team has the most ability to plan and focus its investigation, and where permissible, timing agreements. The investigation plan should account for all such timing issues. Whatever the timing situation is in a specific jurisdiction, the investigation team should engage the parties in discussion on the timeline of the investigation.
Conclusion

Comments are welcome on the chapter during the breakout sessions.

The subgroup will refine and integrate the chapter into the complete Investigative Techniques handbook along with the other chapters on merger investigation.

That is the brief overview of the subgroup’s paper -- we encourage you, and your merger investigators to look to the more detailed ideas in the paper. We welcome any comments you have in the breakout sessions. As for the future of the paper, we hope to refine it with any comments, and integrate it into a completed Investigative Techniques handbook along with the other chapters.

I would like to thank Paul O’Brian for his great help in preparing this presentation.