

MAYER • BROWN

Antitrust Risks: Increased Dangers in a Global Enforcement Environment

Michael Volkov, *Partner*
Washington, DC

Nathalie Jalabert Doury, *Partner*
Paris, France

Christopher J. Kelly, *Partner*
Palo Alto, CA

Mayer Brown is a global legal services organization comprising legal practices that are separate entities ("Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. In Brazil Mayer Brown is in association with Tauil & Chequer Advogados, a Brazilian partnership.

Global Antitrust Enforcement Trends

- The EU has become the driver when it comes to monetary fines for antitrust violations
- The US continues to push global antitrust cartel enforcement through leniency or amnesty program
- U.S. imposes jail sentences for antitrust violations and continues to impose significant fines
- Antitrust enforcers in Europe, Latin America, and Asia are increasing enforcement
- Multi-national coordination of cartel investigations is increasing

Antitrust Enforcement In The EU

- A two level system
 - European Commission – DG COMP
 - 27 National Competition Authorities - NCAs
 - Constant exchanges of cases, evidence and experience in the European Competition Network – ECN and ECA
- “Administrative” in nature
 - Relies mainly on competition authorities holding the powers of investigation, decision and sanction
 - Results in fines on companies – not on individuals
 - The ultimate goal is not enforcement but the regulation of markets/ensuring the level playing field

Parallel Criminal Sanctions Exist In Some Member States

- France
 - criminal sanctions for individuals (fines and imprisonment)
 - almost exclusively applied in bid-rigging cases
 - expected increase for other hard core infringements
- The UK
 - criminal sanctions for individual (fines, imprisonment and disqualification orders)
 - hard core horizontal cartels
- Criminal or semi-criminal sanctions (disqualification orders only) in a number of other Member States

Antitrust Enforcement Level – DG COMP

- Commissioner Almunia is committed to keep the level of enforcement high

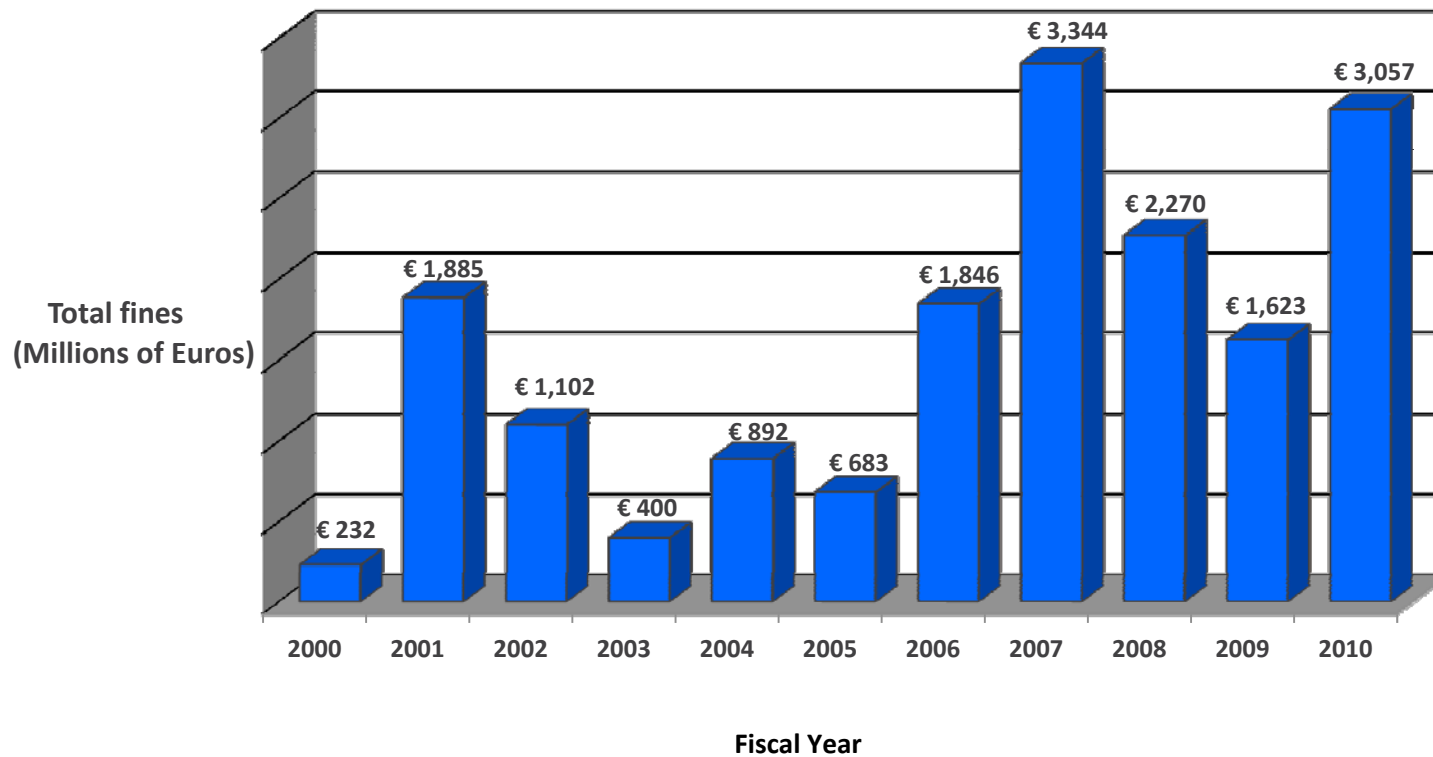
“My first priority is to ensure a rigorous application of the EU antitrust rules to all anticompetitive behaviors, cartels or abuses of dominance, in all economic sectors and in all Member States”

Interview of Commissioner Almunia, Entrée Libre n° 8, May 2010

- Since 2006, fines reach extremely high levels
 - Between € 1.5 – 3.5 billion each year
 - 2010: € 3 billion
 - Highest individual fine slightly above € 1 billion

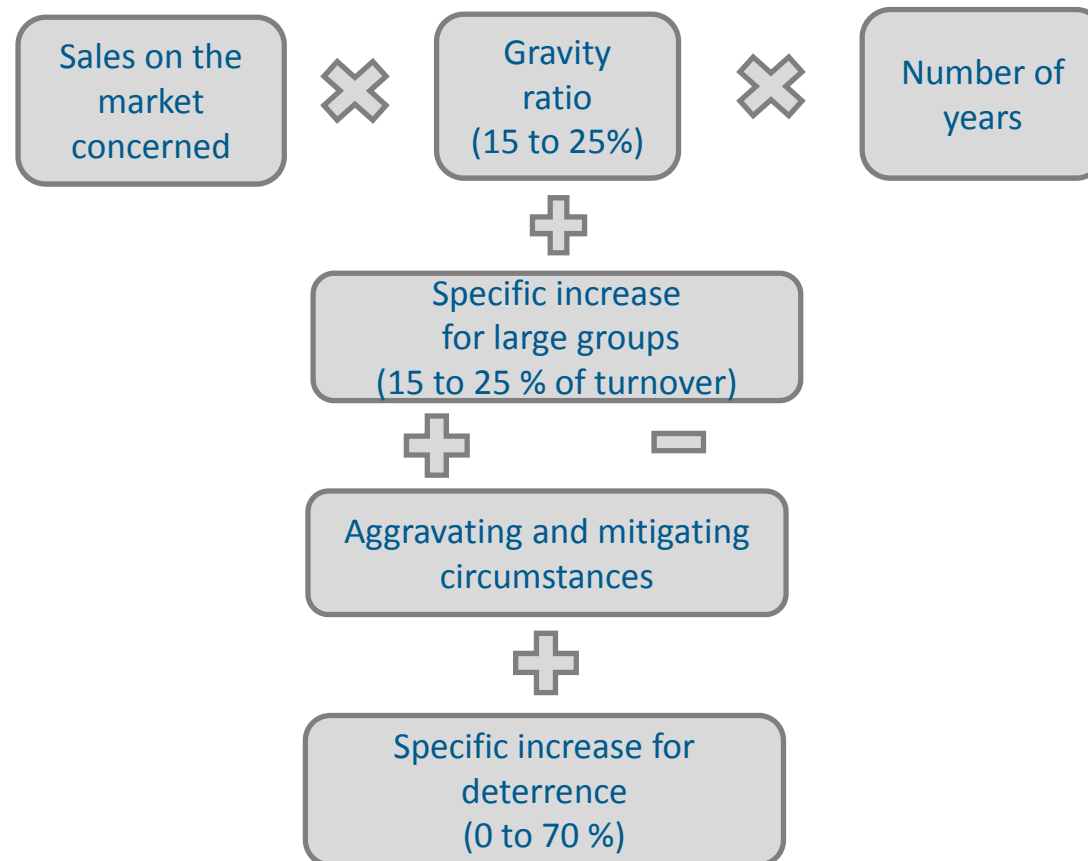
European Commission Cartel Fines FY2000 – FY2010

European Commission Cartel Fines



The EU Method to Calculate Fines

- Maximum : 10 % of total worldwide turnover (rebuttable presumption for 100 % held companies)



Fines Imposed By Most NCAs Are Also Increasing

- Encouragement of NCAs to apply significant levels of fines
- Convergence on maximum fines/method of setting fines

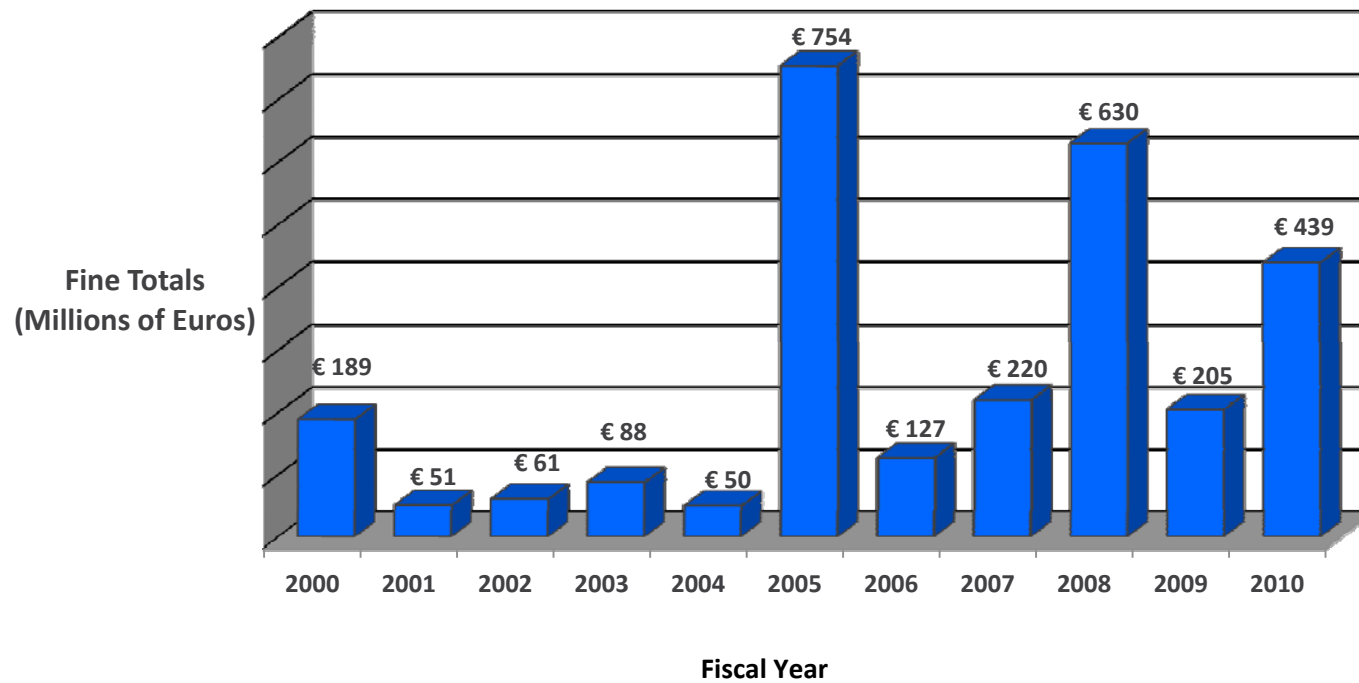
ECA Working Group on pecuniary sanctions imposed on undertakings for infringements of antitrust law: Principles for convergence (2008)

European Court of Justice case law

Member States	Fines (million of € between 2007/2009)
Germany	1061
France	1058
UK	482
Spain	260

The French Competition Authority Is Among The Most Active FY2000 – FY2010

French Competition Authority Fines



A Very Effective Leniency Program

- Major reform of the EU Leniency Program in 2006
 - Only the first cartel member to self-report cartel activity may receive immunity of fines (*“first in the door”* principle)
 - Others: between 0 and 50% maximum
 - Procedural improvements



The EU leniency program does not protect against private enforcement claims for damages nor against criminal prosecution where applicable

- Coordination with NCAs
 - Almost all NCAs have adopted leniency programs
 - ECN model leniency program allows coordination (complete filing to the European Commission, summary requests in Member States)

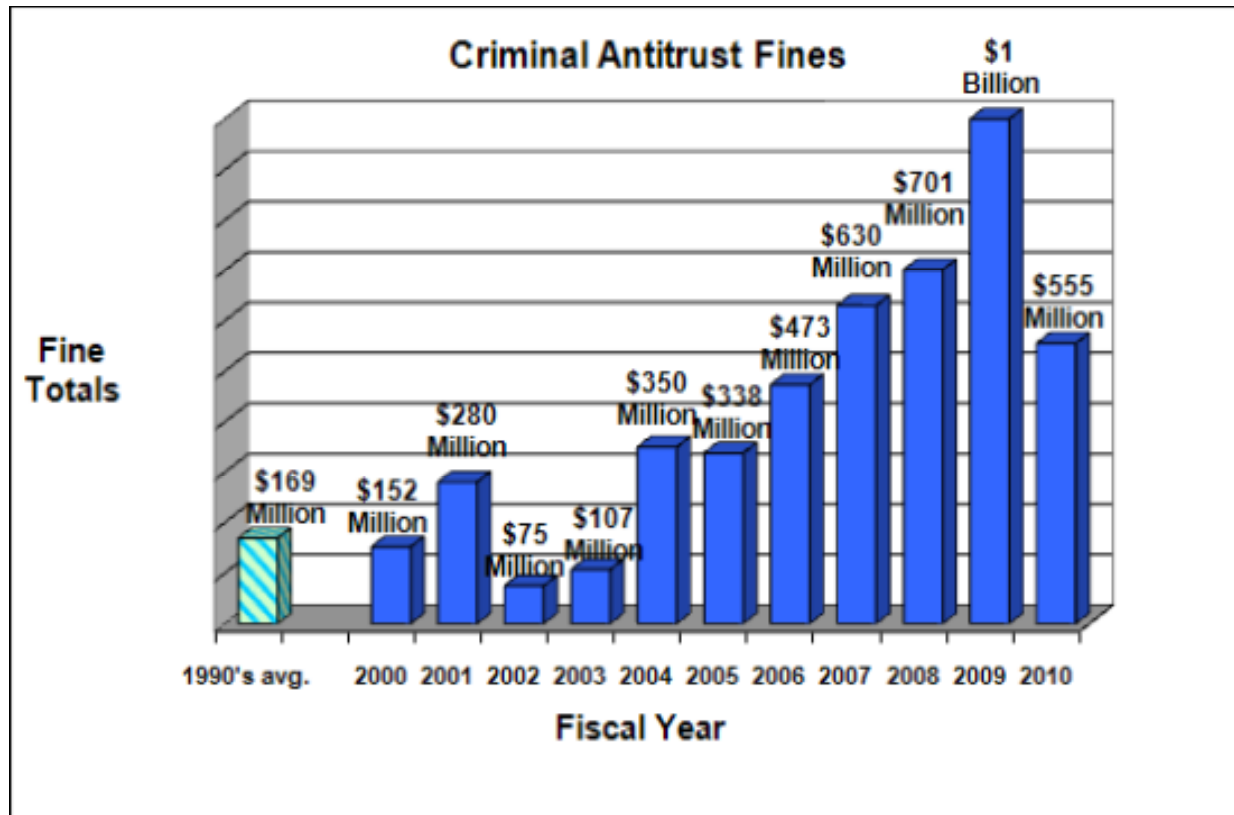
Other EU Cartel Detection Strategies

- Leniency programs encourage latecomers to reveal other infringements
- "Rolling Investigations" are used by the Commission and the NCAs
- Ability to carry out sectoral inquiries i.e. investigation of entire sectors absent any suspicion of infringement (incl. dawn raids)
- Active promotion of whistleblowing
 - UK: the OFT's hotline (incl. reward)
 - France: amendment of data protection rules to facilitate the implementation of whistleblowing hotlines (CNIL Oct.2010)

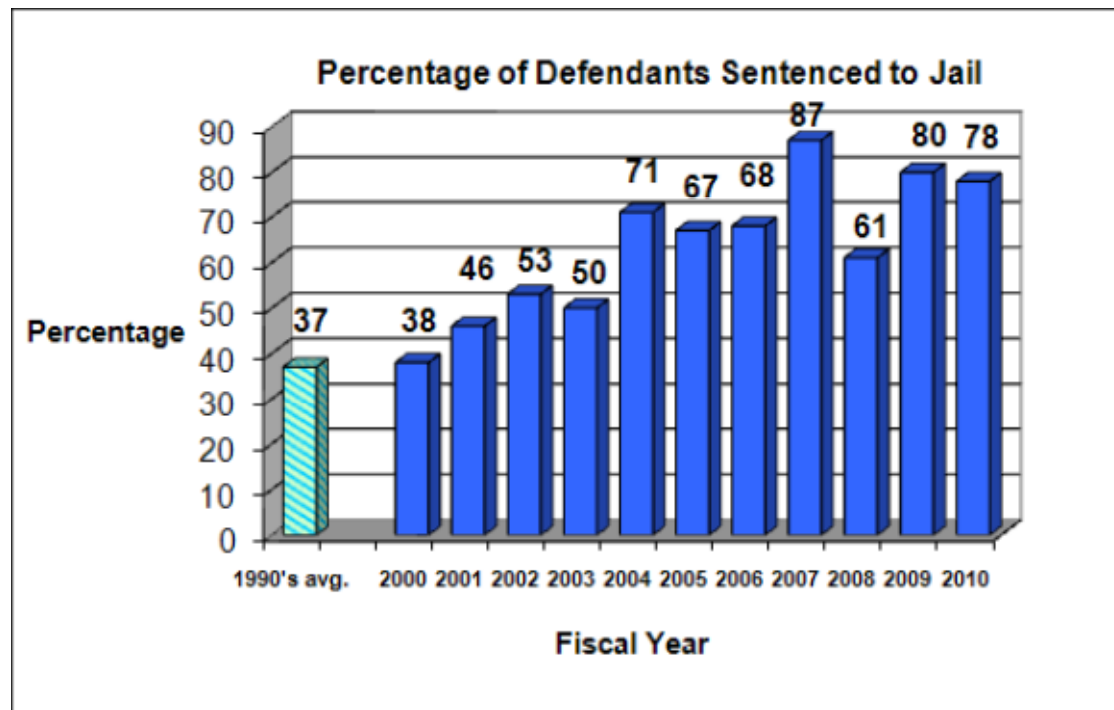
U.S. Antitrust Division Has Reiterated Commitment to Criminal Enforcement

- Assistant Attorney General Christine Varney has stated that Justice Department will not divert resources from criminal enforcement
 - Approximately 135 pending grand jury investigations of alleged domestic and international cartels.
 - AAG Varney has directed staff to increase efforts to detect new cartels

United States Criminal Antitrust Fines FY2000 - FY2010



United States Criminal Antitrust Prosecutions of Individuals: FY2000 - FY2010



US Leniency and Amnesty: The Engine That Fuels Prosecutions

- The US Antitrust Division has more than 130 open criminal investigations, 50 of which involve international cartel activity
- Over half of the investigations were initiated by a leniency applicant
- The Division now insists on jail sentences for individuals, both domestic and foreign
- Since May 1999, more than 50 foreign nationals have served or are serving jail sentences in the U.S.
- The Antitrust Division now uses a variety of investigation tools, including border watches, INTERPOL Red Notices (which have resulted in the apprehension of many individuals) and extradition

US Amnesty/Leniency Program Requirements

- First cartel member to self-report cartel activity receives
 - Immunity for itself and all of its officers, directors, and employees
 - Limitation of its civil exposure to single damages for its own sales, rather than the treble damages and joint and several liability
- Other companies are subject to fines of up to \$100 million or even more, and up to twice the gain from the illegal conduct or twice the loss to victims
- Officers, directors, and employees from other companies face prison sentences of up to ten years and fines of up to \$1 million

US Leniency Program Has Been Matched by Other Antitrust Enforcers

- The success of US leniency/amnesty program has led to adoption of similar voluntary disclosure programs by other jurisdictions
- Canada and the European Commission adopted leniency programs in the 1990s but modified them in early 2000, which has led to significant increase in leniency applicants
- In the last decade, many other jurisdictions around the world have implemented leniency programs and today over 50 jurisdictions have leniency programs in place
- Leniency programs have led to the dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in Australia, Brazil, Canada, the European Union, Japan, Korea, Poland, the United Kingdom, the United States, and other jurisdictions

US Cartel Detection Strategies

- Investigators frequently focus on related markets identified through existing investigations
- "Cartel Profiling" and "Rolling Investigations" are used to expand investigations to include additional markets
 - Cartel participants in one market are investigated for cartel activity in other markets
 - Cartel participants frequently have information about cartel activity in related markets
 - Federal investigators are becoming more sophisticated in mining cooperating witnesses for information about other criminal activity (e.g. FCPA, Fraud, Antitrust)
- Techniques have lead to investigations in transportation, energy, technology, financial and food and agricultural markets

Compliance Programs At The EU Level

- The Commission's practice:

- Compliance programs are not considered as a mitigating factor and may even be an aggravating one
- 10/25/2010: Commissioner Almunia announces that the decisional practice will not change:
 - ✓ “Failed compliance programs” are not to be rewarded by the Commission
 - ✓ The only benefit for a company lies in the reduction of infringements when programs are properly implemented and effective

Proactive Promotion of Compliance Programs by a Group of NCAs

- A group of NCAs incl. the French and UK ones actively promote compliance programs including by granting reduction in fines:
 - France : companies admitting the infringement and undertaking to amend their behavior through strong compliance programs may obtain up to 50 % reduction
Guidelines are announced before year end
 - UK: reduction in fines between 5 and 10% where the parties have introduced a compliance program as a result of the infringement (Guidance published in October 2010)

Other Benefits To Be Expected From Compliance In The EU

- Helps reduce the risk by making everyone aware of the most serious forms of infringements
- Effective compliance programs also help detecting possibly illegal conduct that were not prevented by the program (to stop the conduct, apply for leniency)
- Companies with sincere compliance programs get a number of advantages in enforcement procedures (EU incl.)
 - ⇒ May help obtaining the closure of investigations where there is no conclusive evidence
 - ⇒ Effectively reduces the incentive of case handlers to push for specific fine increases

Compliance Programs and the US: An “Effective Compliance and Ethics Program”

- Standards and procedures to prevent and detect criminal conduct
- Buy-in by “high-level personnel”
- Delegation of operational responsibility to specific individual(s)
 - But no “fox in the henhouse”
- Effective training programs and communications
- Monitoring, auditing, improvement
- System for employee inquiries and violation reports
- Consistent promotion and enforcement

Compliance Programs and the US Sentencing Guidelines: One Hand Gives . . .

- An “effective compliance and ethics program” can reduce criminal fine exposure by **more than half**
 - 3-point reduction in Guidelines “culpability score” – determines the fine multiplier
 - Starting culpability score is 5, subject to other culpability factors

BUT . . .

Compliance Programs and the US Sentencing Guidelines: . . . and the Other Takes Away

- 3-point reduction for compliance program “shall not apply” if:
 - “Unreasonabl[e] delay[.]” in notifying government of offense
 - Any “high-level personnel” of firm (or of unit with 200 or more employees) or compliance program supervisors “participated in, condoned, or [were] willfully ignorant of the offense”
- Rebuttable presumption that program’s not effective if participation, condonation or willful ignorance by:
 - “High-level personnel” of small organization
 - “Substantial authority” personnel of any organization

Compliance Programs and the US Sentencing Guidelines: . . . and Gives Back Again

- November 2010 amendments: Compliance program still eligible for 3-point reduction despite high-level personnel participation in offense if:
 - Persons with operational responsibility report directly to “governing authority or an appropriate subgroup thereof”
 - Program detected offense “before discovery outside the organization or before such discovery was reasonably likely”
 - Prompt reporting of offense to government, **and**
 - No participation in offense by anyone with operational responsibility for compliance program

Mayer Brown Speakers



Michael E. Volkov, *Partner*

202.263.3288

mvolkov@mayerbrown.com



Nathalie Jalabert Doury, *Partner*

+33 1 53 53 43 43

njalabertdoury@mayerbrown.com



Christopher J. Kelly, *Partner*

650 331 2025

cjkelly@mayerbrown.com