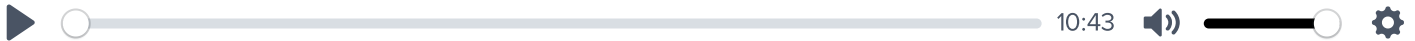


## Episode 5: Beware of Corona Cartels!

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### Audio Transcript

**Host:** Welcome to Winston & Strawn's Competition Corner Podcast where we discuss hot topics and U.S. antitrust law for businesses operating in the United States and elsewhere.

In this episode, we'll discuss the antitrust challenges and risks posed by the spread of the coronavirus responsible for COVID-19. With us today is Eva Cole, who is co-chair of Winston's Antitrust practice group. Eva has had deep involvement with all things cartel, representing both companies and individuals caught up in price-fixing, bid-rigging, market allocation, and other situations, and often with global implications. She also counsels clients on antitrust compliance.

Eva, welcome to the podcast and thank you so much for joining us.

**Eva Cole:** Thanks for having me.

**Host:** Well, Eva, obviously this is an unprecedented time in many ways. But the one thing we can say for certain is there's lots of uncertainty about how to cope. I think this creates an atmosphere ripe for collusion that could cross antitrust boundaries. Do you agree?

**Eva Cole:** I do agree, Molly. Look, you and I have seen examples of this same sort of thing in the past, increased cartel activity amidst times of crisis. And a few examples come to mind. We've seen this in the context of natural disasters like earthquakes, floods, hurricanes that disrupt or destroy factories or distribution facilities. In fact, I think

we've even seen it in the context of fires of major factories. And we've also seen it following sudden shortages in raw materials, for example when conflict minerals can no longer be safely mined and sold.

**Host:** Those are all good examples, and while it may be okay to get together for the purpose of exchanging information about the current conditions that everyone is facing, unfortunately we've seen those types of discussions, time and time again, cross the line.

**Eva Cole:** That's true. And here's why I think that happens. All of these types of events have in common, or typically have in common, supply chain disruption. While companies are still facing pressures to meet targets, to meet contractual obligations, and to make profits, there is a strong desire, understandably, to minimize damage. And that may lead to a false sense, really, of comradery with competitors who are in the same boat. And what ends up happening is it seems more profitable and easier to collaborate with those competitors than to compete in these times of heightened insecurity.

**Host:** Well, you mentioned supply issues, and we're seeing the same exact thing happening with the coronavirus. Chinese suppliers and manufacturers have closed offices and factories in an effort to contain the virus. And companies around the world, especially I think in the automotive, tech, and pharmaceutical sectors, are facing enormous supply chain disruptions as the virus continues to spread.

But, here's the message for our listeners, a crisis—even a worldwide crisis like this—is not a defense to cartel conduct.

**Eva Cole:** That's right. There is no free pass to violate antitrust law even in tough circumstances. In fact, the DOJ recently issued a press release cautioning businesses against violating antitrust laws in the manufacturing, distribution, and sale of public health products that are in high demand right now, like face masks, respirators, and diagnostics. And they're reminding everybody that it is a criminal violation, in fact, to fix prices or rig bids for those types of products. The DOJ will continue to prosecute market allocation schemes among competitors who agree to allocate amongst themselves consumers of public health products. And so, it's really a dangerous time in that sense.

I'll also mention that several months ago, the DOJ announced the creation of a procurement collusion strike force, which is going to be focused on deterring, detecting, investigating, and prosecuting bid-rigging and other antitrust crimes and related schemes in the context of government procurement. And in fact, last week's press release notes that the Strike Force is going to be on high alert for collusion in connection with the sales of public health products to federal, state, and local agencies.

**Host:** That's good to know. And also it's not just the DOJ, and it's not just cartels. Government authorities globally are paying attention to potential anti-competitive conduct during this period.

**Eva Cole:** Yeah, that's right. In fact, there have been press reports of antitrust and consumer protection authorities around the world warning against a range of anti-competitive actions tied to the coronavirus. So, let me give you a couple of examples.

Price gouging: That's not illegal under us federal law, but some state and local laws do restrict price gouging, often making it illegal after a state of emergency is declared to raise prices excessively on things like food, medical supplies, emergency supplies, and gasoline. The state AGs in Washington, California, and New York, among others, have issued warnings of investigations. And countries like the UK, France, and Italy have all announced looking into claims of excessive pricing and potentially instituting price controls over things like masks and hand sanitizers, which are obviously in very high demand right now.

Okay. Let me give another example. Tying is something else to look out for. Just last month, the JFTC in Japan warned companies against forcing customers to purchase other products along with face masks.

And, in fact, Polish authorities are investigating whether it was an abuse of dominance or a price-fixing violation when wholesalers canceled contracts to supply hospitals with surgical masks, allegedly so they could resign contracts at significantly higher prices.

**Host:** That's all interesting. And we also want to make it clear that, in addition to Eva's examples, there are also risks for companies that are not in the healthcare industry and not making products closely tied to the virus itself.

**Eva Cole:** Right. There's all kinds of pressure on companies, both from the perspective of their supply chain, and also from the perspective of maybe having less consumer demand for their products right now, and it's putting pressure in all sorts of ways.

**Host:** Okay, so then let's talk about what we can do then to help mitigate against some of the risks, and that would be compliance. So Eva, I'm responsible for compliance at my company, what do you think I should be doing right now?

**Eva Cole:** Well, I think it's a really good time to give people a refresher training and some reminder instructions on antitrust compliance, even basic do's and don'ts, just to put this on people's radar. I think it's also really important to enhance your monitoring efforts right now, particularly opportunities for whistleblowing. It's a good time to set up a system—if you don't already have it, or to make sure people know about it if you do have it—for people to be able to self-report any misconduct that has already occurred to in-house legal and let people take steps to alert in-house legal to potential issues.

**Host:** Okay, well let me stop you there because we often hear the concern is that's not going to work because employees are really going to hesitate about self-reporting because then you're essentially just turning yourself in, right?

**Eva Cole:** Well, there are lots of ways to actively encourage self-reporting, and the idea is to let people know that the earlier that questionable conduct is brought to light, the better and easier it is to deal with. You should consider incentives for self-reporting, and you should certainly consider immunizing people in that context.

**Host:** Okay. Good idea. And then what if you're in the position of a company that unfortunately discovers something questionable has occurred already?

**Eva Cole:** Well, first things first, you want to make sure the conduct stops, and then you want to act fast to get a real sense of what has actually occurred and get outside counsel to help explain the risks and options. The inquiry, which may involve ultimately self-reporting to a government in exchange for potential leniency or amnesty, is becoming more and more nuanced.

Experienced antitrust counsel could also advise on how to legally set up a potential collaboration. So look, if you're now thinking about doing a joint venture or joint licensing or having some other contractual arrangement which might make sense because of the issues that your company is facing as a result of the coronavirus, those things can often be arranged legally. You just need to make sure that you're following the DOJ and FTC guidelines.

So, let me give you just one example on that. After Hurricanes Harvey and Irma, the DOJ issued antitrust guidance noting that following a disaster, hospitals or other healthcare facilities may need to temporarily combine certain resources or services to better treat communities. So, there are ways to be able to address this crisis and to do it in a way that mitigates your antitrust risks.

I'll also just throw out, if you think you are a company that's been a victim of price-fixing or bid-rigging or some other anti-competitive scheme that's arisen out of this coronavirus crisis situation, you should also speak to your counsel and see what options are available to you to recover.

**Host:** Okay. That all makes sense and is helpful advice. I see that we're out of time, but this has been, I think, a great discussion on a very timely issue. So thank you so much Eva, for joining us today.

**Eva Cole:** My pleasure.

**Speaker**

Eva Cole

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Eva Cole