

MMITM Ep 015 - 15 - Assistant Attorney General Makan Delrahim: Antitrust, Consumer Protection, and Privacy

Announcer: From Curtco Media. So what are you gonna do about.

Bill Curtis: So if you're new to our show, we exist to help bridge the political divide in our society and strive to listen to issues from all perspectives with respect, reasonableness and the knowledge that most solutions can best be crafted from the middle. Now, of course, our co-host, Pulitzer Prize winning author, historian, international lecturer and our human sourcebook of historical expertise, Professor Ed Larson. How you doing Ed?

Ed Larson: Thank you for having me back.

Bill Curtis: And our special guest here in Curtco's Malibu Studios, Makan Delrahim. He's currently serving as Assistant Attorney General for the United States Department of Justice, Antitrust Division. He was confirmed by the Senate in September of 2017. And he's got quite a personal history, starting with moving to the U.S. from Iran when he was 10. He earned his law degree from George Washington University Law School in 1995. And if that wasn't good enough, he went on to earn a masters of science in biotechnology from none other than Johns Hopkins. His law accolades are too many to mention. He was deputy assistant attorney general during the George Bush presidency. And after that, he came back to L.A., joined Brownstein, Hyatt, Farber, Schreck and focused his time on antitrust and intellectual property matters for such auspicious clients as Google, Apple, Qualcomm and Anthem. Makan, thank you for joining us today.

Makan Delrahim: Bill, thanks so much for inviting me. And it's a great honor to be here with Professor Larson and with you in this format.

Bill Curtis: Makan, tell us a bit about your department's current charter.

Makan Delrahim: We are two agencies. The antitrust division and there's also the Federal Trade Commission. We both share the civil enforcement of the antitrust laws at

the Justice Department. We exclusively do all the criminal enforcement and our role and my job isn't to protect a competitor. It is to protect competition and the free markets. Antitrust is not a club to punish a company who has become a successful competitor. And so my job is really to make sure that the markets are fair.

Bill Curtis: The T-Mobile takeover of Sprint, a merger, I believe that you were in favor of.

Makan Delrahim: With the remedies that I put in place.

Bill Curtis: Their competitors like Verizon and AT&T are huge. Basically putting Sprint and T-Mobile together gives them some ability to compete in the marketplace. Can you give us an idea who was against those mergers? How did they fight against the merger and how did it turn out?

Makan Delrahim: The deal is still pending before Judge Marrero in Manhattan and southern district of New York. I believe ultimately it was 13 states attorneys generals who brought a suit to block that merger. So where everybody is, I think, waiting to see what happens there.

Bill Curtis: What was their influence? Why were they trying to block it?

Makan Delrahim: Well, so they did not agree with the remedy and the resolution that I put in place,.

Bill Curtis: Which was?

Makan Delrahim: It's complicated. But let me mention a few of them. So there was a lot of pro-competitive aspects of this merger, such as T-Mobile will now have the capacity to compete with AT&T and Verizon on quality and extra capacity to be able to sell. They are at capacity now with the spectrum that they have. So Sprint and T-Mobile were competing, but they were kind of in a different league than AT&T and Verizon as far as quality goes. So there was positive aspects. There was also some anti-competitive harm from that merger, which we identified. And in court I filed, I said I would block this transaction had it not been remedied. And so we will engage in negotiations.

Bill Curtis: And what were those?

Makan Delrahim: So the FCC had a set of remedies. So for three years, they can't, you know, charge higher prices and they had some build-out requirements. And then on top of that, what we did, was we required a number of provisions, a sale of a number of assets to a third party, which happened to be Dish. And why do we pick Dish networks?

Bill Curtis: You actually pick Dish?

Makan Delrahim: Well, here's why. Dish was the only company that had spectrum, this rare finite resource that could be used for five G networks. Sprint was sitting on one hundred megahertz of 2.5 spectrum, also valuable, undeveloped. That's where T-Mobile was going to invest, about \$40 billion to build this new network. We would have four real high quality competitors if this all goes through. Otherwise, you have the two incumbents, AT&T and Verizon. T-Mobile will continue to linger. Maybe they'll buy the assets like the spectrum from Sprint, but maybe AT&T will buy that spectrum to build out more network, but continue to entrench their market power. Or Verizon, you know, depends on what that market is. I saw this opportunity where you could save the pro-competitive benefits of this transaction, totally remove the harm that would, you know, that would come from one less competitor. And now you have a different quality of a competitor. So it's a complex resolution at work.

Bill Curtis: I have to ask you, Makan, do you dive this deep into developing your own knowledge of an industry every time you guys enter into a case like this?

Makan Delrahim: Yes,.

Bill Curtis: Rather impressive. You're talking like a guy who has been in the cellular business for 25 years.

Makan Delrahim: You have to know this. Now, I don't know as much as their chief engineers or as much as some of our staff do. But to make the right policy calls and the decisions, you know, I have to protect the trust of the public. I have to protect the

competition. I take that very seriously. My days run 17, 18 hours. It is important to get up to. But that's also why I have so many smart people.

Bill Curtis: How do you do it? Do you have people who brief you on these these matters?

Makan Delrahim: Yes, we have, you know, fifty PhD economists that are experts in various different markets just inside of the antitrust division. I engage with them. The parties certainly come in and they give you their pitch.

Bill Curtis: Clearly, money is a driving force in this whole discussion. When huge companies can afford the most influential lobbyists and those mergers result in higher prices, lousier services for the consumer. I have to use AT&T as an example of that. And they have this kind of undue influence with their lobbyists, their power and the power of throwing expensive lawsuits in the way of potential competitors. The system seems to be ineffective.

Makan Delrahim: I've lived through that experience. I brought a lawsuit against AT&T and the judge disagreed with us. It wasn't so much their lobbying that affected that. Now, you know, lobbying is a part of general life in the United States because it's protected under the First Amendment, the right to petition your government. But it doesn't and it shouldn't influence the decision of the antitrust enforcer. I can tell you there being there's certainly 112 registered lobbyists for AT&T.

Bill Curtis: One hundred and twelve,.

Makan Delrahim: 112. And I don't know how many of those actually worked on the merger. Let's just say a dozen. That didn't influence my decision to bring a case, obviously.

Bill Curtis: Did it influence the outcome of the case?

Makan Delrahim: No. It influenced the public relations campaign. It certainly influenced, I think, a number of states attorneys generals, none of whom joined our case, I publicly disclosed that one state attorney general had demanded that in writing, we write in there

as a condition of them joining our suit, they would want in writing that no assets would ever be sold to Rupert Murdoch. I just think that's just.

Bill Curtis: That's just ridiculous.

Makan Delrahim: That would probably violate 12 constitutional amendments. But at least the first one, I think if I had agreed to that, that's just bad government policy that shouldn't happen. In our system we have to go to a judge to prove our case and bear the burden. And that's a good thing. There has to be constant oversight to make sure that antitrust does its job.

Bill Curtis: Now, I own a theater chain. OK. Now you have the big bad studio that calls me up and says we've got the next Avengers Endgame coming up. It's going to be a three billion dollar box office hit. But in order to take Avengers Endgame, you have to take the following crappy titles that nobody's going to watch. And I've got a tough enough time right now as a theater owner dealing with the fact that people are going to theaters less, although revenues are up and there's a million other entertainment sources out there. So I'm struggling as a theater owner. If you deregulate, you know that the big monoliths are going to require that I show their crap in theater five and six in order to show their good stuff in one, two and three. You know, that's going to happen. So Makan, I've got to ask you, do we want to deregulate and take away.

Makan Delrahim: The consent decrees,.

Bill Curtis: Consent decrees, or do we want to work on them, adjust them and make some minor changes so that we don't find ourselves letting too much water in the boat/.

Makan Delrahim: I filed in the southern district in New York to terminate those because those restrictions in those consent decrees are no longer relevant.

Makan Delrahim: I do not have just the power.

Bill Curtis: Packaging films in such a way is no longer an issue.

No. Well, for a number of reasons. So the market on all sides of this distribution chain has completely changed. You now have basically four companies that control 80 percent of the screens in this country. You used to until not that long ago, 10 years ago, when you put a film in a theater. It came on the actual film. Somebody had to come in there and put it into the reel.

Bill Curtis: Yeah, now they are, they basically stream in a movie.

Ed Larson: Right.

Bill Curtis: They can.

Makan Delrahim: They can do it in fiber.

Bill Curtis: They can adjust it five minutes before the movie starts.

Ed Larson: And you have Amazon and Netflix and everybody else.

Makan Delrahim: The market has completely changed. The consumer, those who actually still watch movies can watch it on multiple distribution channels.

Bill Curtis: But to what extent, Makan, is it your division's job to also protect the theater owner?

Makan Delrahim: None. My job is to protect competition. Not a competitor, ultimately, the consumer, but the competition. And that's a small distinction. But ultimately, the consumer wins when competition is protected and not necessarily because it's a cheaper price. It's cheaper price. But there's also the quality. There is also innovation and R&D. All of these we want to keep the incentive for. So you now have Amazon Studios, Apple, Netflix. They're producing movies that are just as good of a quality with just the same type of directors. They're paying for them. That's called competition. And you have many choices. So if you're a theater owner and you are worried about, you know, not being able to show.

Bill Curtis: If the studio buys the theater down the block and they don't give me the right to show the Marvel movie, then I'm going out of business.

Makan Delrahim: Maybe except for Marvel is not the only movie out in the market. Well, the output is just huge.

Bill Curtis: Well the big movies are the big movies. And they come with a whole lot of power.

Makan Delrahim: They do. But there's a difference in the relative powers that they have.

Ed Larson: And if you think about it, now Amazon and Netflix and all these other people can have all these distribution networks. Well, why shouldn't Fox be able to have their distribution?

Makan Delrahim: And then there's also a dozen business models that is prevented by these consent decrees. Who would have thought that their market would support and not only support, but a company would thrive where you have a whole season of TV shows dumped in one day on a \$7.95 a month subscription plan.

Ed Larson: And the result is sure, there are winners and losers, but that's how the free market works with winners and losers. All anti-trust cares about is that the consumer wins, not whether one of the competitors wins.

Bill Curtis: That's a great place for us to take a break and we'll be right back. And I want to talk a little bit about some of the companies whose actions I think affect the consumer, but it prevents companies from getting into the business. And that that hurts me at the end of the day, too. We'll be right back.

Promo - CTM: Hi, I'm Robert Ross, host of Cars That Matter. You might be wondering what makes a car matter, and I have a feeling you already know the answer. Some cars have changed history. Some you can hear a mile away. Some have lines that make your heart skip a beat. If a car's ever made you look twice, then I think you know the ones that matter. Join me as I speak with designers, collectors and market experts

about the passions that drive us and the passions we drive. Cars that matter. Wherever you get your podcasts.

Theme: Whatcha gonna do about it.

Bill Curtis: One of the benefits to my position on this show is that I get to change horses. So for the next segment, I'm only gonna be interested in the consumer's point of view. Gotta bring up Amazon, Google, Facebook. Like, first of all, do you protect the consumer's right to privacy?

Makan Delrahim: Our job is to protect competition for the benefit the consumer. We're not the privacy regulator. Privacy could be an element of quality, meaning that if you're one company that has inordinate amount of market share and are keeping other competitors from coming in and the consumer wants a product that is much more privacy sensitive. But the anti-competitive conduct of you as the monopolist is keeping that second company from entering the market. That's something we would care about. But it's not because they didn't ask you permission for using your data or information or abused it somehow. Of course, data and the network effects that ownership of data could provide to a company could have competition concerns. But we don't force you if you've collected data through proper means to share it with your competitor.

Bill Curtis: I'm sorry, we don't force you to share...

Makan Delrahim: We do not force you to share that data. So there's a lot of product improvements that could come with the collection of data that could be a product improvement, you could do that. But you can't use your data to prevent competitors from entering in. But we don't view just a collection of data in and of itself as a violation of the antitrust laws. There's a lot of pro-competitive uses of data. I can sell you more products that you might find relevant. I could know about it now. Some of this stuff could get really creepy, real fast.

Bill Curtis: Yeah, when you have a conversation with a buddy and I don't know about listening or something and worse, all of a sudden the next day you get a whole bunch of ads in front of you for a product that you only talked about. That's a really creepy thing.

Makan Delrahim: There might be an asymmetry of information at the consumer. They might not know what is being done with the information that's being collected from them. They may have agreed by just pressing an accept button on a favorite app that they're using, but the amount of information that's collected is incredible.

Bill Curtis: Now, once upon a time, there was a a no call list. Now there really is no centralized place where a consumer could go and say, I don't want my information collected by any of these guys. Why isn't there a place to go that allows me to say I want to be private?

Makan Delrahim: So on the phones, the chairman of the Federal Communications Commission, Ajit Pai, just recently announced some policies in partnership with the cell phone companies to prevent the spam and the telemarketers from coming in. In fact, I've noticed that recently. All of a sudden, you know, I used to get a dozen phone calls that look like they're legitimate. They start with the same prefix as...

Bill Curtis: You think you're getting a call from a friend,.

Makan Delrahim: But it's not. They're robo calls coming in from somebody trying to sell you the next health insurance or warranty on a car. And they now, what they're showing up is potential spam.

Bill Curtis: But I'm not just talking about the idea of calling you when you don't want to call. I'm saying that if there was the concept once upon a time of a no call list in a centralized form, was that a government entity that was doing that?

Makan Delrahim: That was there was a do not call list that the Federal Trade Commission and I believe with the FCC together may have put that together,.

Ed Larson: But it required legislation. You're right. Yes, that was congressional legislation. Congress got together and passed a law. But I don't really view that as anti-trust issue. I view that as a privacy issue. It's like the consumer protection agency that protected the consumer. But then it can be weakened by other interests coming in and weakening how it operate.

Bill Curtis: If what we're trying to do is protect the consumer, we need an organization where I could decide to register that would send a notice to all players that I don't want to be tracked. I don't want to be, have my privacy taken from me in order to participate in consumer behavior.

Makan Delrahim: And I think that's a good point. And again, it's an important policy, a public policy issue that is on the top of a number of legislators and policy apparatus leaders, as well as some interest groups. But there's different privacy. There's privacy from the government that gets into the Fourth Amendment and the police powers and all of that. Then there's the privacy from just commercial companies. And like they say, you don't have to use that app. You don't have to use that phone. But we're getting to a place where some of these are becoming almost necessities.

Ed Larson: It would be hard to operate today without a smartphone of some sort.

Makan Delrahim: Yes.

Ed Larson: And yet it follows you exactly where you are. Even if you turn it off. It knows where you are,.

Bill Curtis: Really.

Ed Larson: Yes.

Makan Delrahim: Absolutely.

Ed Larson: Even if you turn it off. It knows where you are. If you leave it at home it doesn't know where you are. But if you take it with you, it knows where you are, even if it's turned off.

Makan Delrahim: And so it knows when you're breathing. It knows when you get up at night. It knows if you're in a car. It knows when you're walking. It's got about some of these phones.

Bill Curtis: Why?

Makan Delrahim: Because that data is going back to a company that has this information about you.

Ed Larson: And they want that information because they can market that information in its value.

Bill Curtis: A minute ago. You guys said that the goal was to protect the consumer. So what I want is an organization that allows me to have that choice, not you.

Makan Delrahim: Now, that could be a law that passed because of.

Bill Curtis: But I still have to request it. It still has to be my decision, because maybe I like what it does for my life to be followed.

Ed Larson: But right now there is no law. And I think that's what we're both saying. There is no law that does that. The antitrust law doesn't do that in particular.

Makan Delrahim: No.

Ed Larson: You would need to pass a new law that would say that, and then you'd have to develop a regimen either with regulations or with legal cases that you could bring. You could do it either way. The Europeans have, to an extent, passed it. Now, you've got to realize, though, if you pass that law, it would regulate American companies, but it probably wouldn't regulate China. And China would probably still know when you were breathing and where you were.

Makan Delrahim: And also, you know, look, those laws, those apps.

Bill Curtis: That really that did not sit well with me, Ed. That's an interesting.

Makan Delrahim: Have you ever use Tick-Tock? Well, the law all it could say is you must get the consent from the consumer. And this is like a next time, you're on favorite app, a little Pop-Up Window comes up, says if you want to continue on. You must press OK. And you accept by pressing OK. All of these rules.

Bill Curtis: So I'd like to bring up a kind of a distant subject for a second. I'm I like single malt bourbons. I like to experiment in nice restaurants and bars and learn new things. But do you know how hard it is for a small producer of a spirit to get into restaurants when you have the big players telling restaurants and bars. No, no, no. You're not giving up your shelf space to some new guy. So to what extent do you look at protecting my interest of wanting variety, price competition, new product and protect the reality that the big guys are owning the shelf space because of their power?

Makan Delrahim: Look, we of course, we care. Ultimately, it is the choice. We want to ensure that you as the consumer will have the choices that you want. But we also look at the economic factors in play. We look at the supply and the demand. None of us have necessarily the right to have anything we want in the local supermarket that's privately owned. They make their decisions. We want to ensure that there's enough outlets, enough distribution channels. What's great about technology is that if you don't find something at the local Ralph's or Safeways, you can now just go to your phone, order it on, you know, half a dozen different outlets and some of them with free delivery. You'll have it by tomorrow and maybe some of them, you'll even have it by the evening and you'll cut out some more of the folks in the middle. And so the technology has solved some of these issues.

Bill Curtis: Maybe I didn't present the problem clearly enough. There's a guy in Malibu that has a new champagne called Mod. Do you think that Moet Hennessy is going to allow that to show up anywhere where they have such power over the shelf space for champagnes and restaurants and bars?

Makan Delrahim: I don't know.

Bill Curtis: I'm here to tell you they won't.

Makan Delrahim: If the quality is good,.

Bill Curtis: The quality is excellent.

Makan Delrahim: And they do enough the marketing so the consumer awareness will be there and therefore the demand, I think it becomes difficult. Now, if Hennessy comes in and puts restrictive covenants, saying that as a condition of offering my product, you cannot offer any of my competitors. That's something anti-trust law will address. But if the business owner on his own makes a decision, look, nobody has ever heard of MOD. There's not going to be the consumer demand. I'm not going to waste the shelf space. I could sell five more Hennessy products because in addition to that, they're also going to bring in all these other promotions that they do. That's a decision that business owner will make.

Bill Curtis: But of course we know that big companies do flex their muscle often and prevent new competitors from coming in that take bits of their market. You know, all of us who went to business school. We all had to learn a case study that we called the spaghetti sauce wars. Right? So we remember the days where now Ragu did it differently back then. They decided to lower the price of their spaghetti sauce because of their power beneath the price that it cost to make it. For years, they made the price so low that it put all the other spaghetti sauces out of business and they got another seven years of basically exclusivity. Their power allowed them to do that. Is that something that the trust department thinks is cool?

Makan Delrahim: Well, it depends on the facts, on the product. You know, I think, you know, nowadays you can order again that over the Internet, the spaghetti sauce. What we would look at is, are you pricing your product below market? And there's a test for this called predatory pricing in order to drive out competition. But now the consumer is winning as long as you're doing that because they're getting a smaller, a lower price for a better quality or at least as good of a quality product,.

Bill Curtis: Or we can only buy a crappy product because nobody turns around and buys the good stuff because there's such a massive price difference.

Makan Delrahim: If that higher quality is not worth the higher price then that's the market speaking. But if the consumer's preference is the cheaper one. Now here's where the antitrust laws would step in. If they're dumb enough to sell below their cost for a long period time, they're just going to go out of business. If they then can raise the price because others cannot enter and then they erect barriers that keep somebody

else from giving them price competition. Well, that could be a situation where an antitrust violation would occur because you would meet what's called the predatory pricing test.

Bill Curtis: So I can't help but take the opportunity while you're here. The reason why this program exists is because our society is way too polarized and we're hoping we can bring people together and have them listen to each other with respect and solve issues. You know, have family members get back together and friends be able to dine together again. And I can't help but wonder what it's like for you in the current environment. And I'm wondering how much you can share with us about your experiences in Washington.

Makan Delrahim: There's no question we're living in a time where people are divided and perhaps technology has some reasons for that, because we are getting our information and news through certain sources and we are fed an echo chamber of information that we want to hear. People have lost their ability to be objective about some of these issues. And we, everybody looks at each other as if you are wearing a red shirt or a blue shirt. But the fact that the intolerance has grown for different ideologies is a troubling development in our society because.

Bill Curtis: But, you know, lots of people blame your boss.

Makan Delrahim: And I think probably inappropriately blame him, because I think there's you know, there's a lot of discussion that goes on about some of these issues. And I've seen it, you know, the fact that there are roadblocks thrown to just the proper functioning of the government the way our forefathers wanted.

Ed Larson: People also make a difference. And see, as a historian, I'd say that. So you look back and you take, for example, George Washington. George Washington chose to have a cabinet where he brought in Alexander Hamilton and Thomas Jefferson. He was trying to create a big tent. It depends on the personality. So if the electorate chooses an authoritarian minded leader or a hyper partisan sort of leader, you're going to get one sort of approach.

Makan Delrahim: Well, look, people come to a lot of these jobs with great level of passion, dedication and sacrifice in order to improve the system.

Bill Curtis: Well, Makan Delrahim, speaking about commending half our audience would approach this program, listening to you with incredibly critical minds. And the other half would potentially adopt everything you have to say and be saying. Yeah. The reality here that is obvious to us here at this table, spending this time with you, is that you personally put in the kind of energy, intellectual power, education and time that we are very grateful for. And it doesn't matter what your party affiliations are and it doesn't matter whether or not we agree with everything you have to say. But what we are very impressed with you, what you've chosen to do to try to help our society. And please do something about the cell phones. Okay.

Makan Delrahim: Thank you so much. Again, it's a privilege to serve. And I should also say that all of my colleagues across the government and in both parties throughout we may disagree on the margins of some policy. But across the country, you know, you look at the SEC chairman, the FCC chairman, the FTC chairman, the CFTC, some of these are some of the most brilliant people with incredible character that are sacrificing and serving each day. And I think most of your listeners should know the quality and I thank you for allowing me this opportunity to share some of my experiences and my thoughts with you. Hopefully it will help improve the dialogue.

Bill Curtis: Well, thank you. I hope you'll come back at some point. I know, I know we kept you too long. And Ed Larson, always a pleasure. You certainly bring a knowledge and a sensibility to these discussions that I really appreciate. Have a wonderful day, everybody, and thank you for meeting us in the middle. Thanks for coming. I'm Bill Curtis. Come back again.

Bill Curtis: If you like what you hear, please tell your friends. And let us know how we're doing by leaving a comment. It really helps if you give us a five star rating and we really appreciate it. You can also subscribe to the show on Apple podcasts, Stitcher or wherever you listen to your favorite podcast. This episode was produced and edited by Mike Thomas. Audio Engineering by Michael Kennedy. And the theme music was composed and performed by Celeste and Eric Dick. Thanks for listening.

Announcer: From Curtco Media. Media for your mind.