



# Interview with FTC Commissioner Mozelle Thompson



Mozelle Thompson

**Editor's Note:** Since his appointment to the Federal Trade Commission in December 1997, Commissioner Mozelle W. Thompson has been actively engaged in all aspects of international consumer protection policy, enforcement, and international cooperation. He has served as the head of the U.S. delegation to the Committee on Consumer Policy (CCP) of the Organization for Economic Cooperation and Development (OECD), and was recently elected Chair of the CCP, where he has been involved in the adoption and dissemination of the OECD Consumer Protection Guidelines for E-Commerce. Commissioner Thompson is also past president of the International Marketing Supervision Network (IMSN), an association of international consumer protection enforcement agencies.

In considering the role of consumer protection in the international marketplace, Commissioner Thompson calls upon experience as a policy maker, government official, academic, and private practitioner. Prior to his appointment to the FTC, he served as Principal Deputy Assistant Secretary at the Department of the Treasury, and before that was Senior Vice President and General Counsel to the New York State Finance Agency, an adjunct associ-

ate professor at the Fordham University School of Law (where he taught courses in municipal law and finance), and engaged in private practice at Skadden, Arps, Slate, Meagher and Flom. In addition to his law degree, he also holds an M.P.A. from Princeton University's Woodrow Wilson School of Public and International Affairs where he is a Visiting Lecturer, co-teaching a policy workshop on the Next Generation Internet.

The interview was conducted by ANTITRUST Editors Dennis Cross and Edward Blester, with assistance from ABA Antitrust Section Consumer Committee Chair Robert Langer and Council Liaison Edward Glynn.

**ANTITRUST:** You have put a lot of time and effort into consumer protection issues and international consumer protection cooperation. What inspired you to get involved to the extent you are today?

**COMMISSIONER THOMPSON:** When I first got here, about four years ago, one of the things I noticed was that the Commission needed to get some perspective on where it was in relation to new economy issues like the Internet and what our face to the world was going to be. In the United States we have enjoyed a great deal of respect and attention for the work we have done in protecting consumers here, but I think that we did not spend, perhaps, enough time and attention on how we could talk to the world about what we do. That includes learning from other countries about what their best practices are and expressing to them our areas of concern and how we have approached certain problems. With the onset of the Internet in the new economy, it was very clear that consumers would be operating in a global environment. So, the Commission would be required to take not just a narrow view of what happens within our borders but to have an understanding of how the marketplace works on a cross-border basis. My first recognition of that came early on, when I was asked to travel to the OECD Committee on Consumer Policy. The OECD was trying to become more responsive and accountable to its members, and the Consumer Policy Committee faced extinction, so one of the Committee's chal-

lenges was how it was going to make itself relevant to the emerging economic picture throughout the world. We were able to talk about a very important new initiative, creating a set of guidelines that countries could use to look at consumer protection in the world of e-commerce. I am happy to say that was one of our great accomplishments, internationally, and the U.S. perspective and understanding about the global marketplace led to a very dynamic document that has now been translated into approximately seventeen languages.

**ANTITRUST:** How does your role in the international forums relate to the other Commissioners and your position at the FTC?

**THOMPSON:** I have tried very hard to develop an overall U.S. position and FTC position on international issues and to report back to the people here about where we are and where we are going. I have been very fortunate, so that in the OECD, for example, I am Vice Chair of the Consumer Policy Committee; but I also lead the U.S. delegation. There are also certain things that make our delegation look different from those other countries. First, we are bigger, which is not surprising, but we also include someone from the Department of Commerce, a consumer representative, and a representative from the business community. That way, as we talk about important policy issues right there on the floor and as they are discussed in the Committee, we get a

good cross-section of viewpoints for what the various stakeholders really think is important. Also, before we go to any Committee meeting, we have several meetings here in Washington where we talk to other stakeholders about the issues that are going to be presented. That kind of interactive process is not something that necessarily occurs in a lot of other countries, but we have demonstrated the value of close cooperation. As a result, several other countries have begun to follow our example.

**ANTITRUST:** It's been observed that one of the differences between the United States and Europe is that in Europe advertising is often subject to prior clearance either by a self-regulatory organization or in some cases a branch of the government, while in the United States you can say pretty much anything you want with the recognition that if it's not truthful or substantiated the Federal Trade Commission will be asking questions. Have you observed that and does it have implications for the kind of analysis or work you do with foreign countries?

**THOMPSON:** You make an important observation because when you are talking to other countries about not only where they are but where they are likely to be regarding consumer issues, you are solving for multiple variables. Many European countries, for example, have a history of being very regulatory with regard to company practices, whether it is advertising, direct marketing, or the basic operation of a company and its ability to sell. In the United States we have become less regulatory, but we have stronger enforcement tools. We talk about the importance of having a market dynamic that actually values good consumer protection. Where we see the market needing a course correction, we step in, we go after bad behavior. We have a marketplace that recognizes that consumers are part of the value proposition and if you deceive or take advantage of consumers it's not a good long-term winning strategy. Now, in Europe, many countries are in a process of deregulating, and they need to try to strike the appropriate balance between an old regulatory regime and a more dynamic, open-market regime. But they also need to determine what the new role of enforcement is going to be. You can see that in the text of the OECD guidelines, which in many ways reflect this new thinking about how to deal with markets. It was amazing to me, for example, that although we have much in common with many of our European counterparts in terms of consumer protection, in many countries they don't have some very basic overarching rules, like "consumers are entitled not to be defrauded" and "if somebody makes a product claim or representation it should be substantiated." Those are two elements in the OECD guidelines, for example, that we think represent larger kinds of principles based on a market dynamic that values consumer protection. So as countries go through a process of deregulating, they have basic principles that allow their consumer market to value good behavior.

At the same time, we are very active with the IMSN (International Marketing Supervision Network), which is not the policy arm for many countries for consumer protection, but their law enforcement arm. So we are able to work on that side of the equation to talk to other countries about providing effective tools for enforcing consumer protection. Also, we are able to tell them what works in the United States and we are able to alert them to fraud schemes (especially in new areas like the Internet) that they can expect to see on a cross-border basis. One of things we have learned is that fraud knows no boundaries: those who cheat tend to export pretty readily and bad ideas sometimes are exported faster than good ideas. Working cooperatively with other countries we can root out some of the really bad actors.

**ANTITRUST:** Can you give us a snapshot of the functions of the OECD and the IMSN in consumer protection?

**THOMPSON:** The OECD is mostly a policy-making arm. The guidelines on e-commerce, for example, are not binding laws

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## Online References

COMMISSIONER THOMPSON REFERENCES expressly or implicitly in this Interview the following materials, which may provide useful background for the reader:

- For information on the OECD and its E-Commerce Guidelines, see <http://www.oecd.org> under the Electronic Commerce theme, and more specifically, [http://www.oecd.org/oecd/pages/home/display\\_general/0,3380,EN-about-44-nodirectorate-no-no-no-29,FF.html](http://www.oecd.org/oecd/pages/home/display_general/0,3380,EN-about-44-nodirectorate-no-no-no-29,FF.html).
- For further information on the IMSN and its activities, see <http://www.imsnricc.org>.
- Online database for consumer complaints and information sharing, see <http://www.econsumer.gov>.
- EU Privacy Directive, see [http://europa.eu.int/eur-lex/en/lif/dat/1995/en\\_395L0046.html](http://europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html).
- Safe Harbor for US organizations' compliance with the EU Privacy Directive, see <http://export.gov/safeharbor>.
- Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress (FTC May 2000), see <http://www.ftc.gov/reports/index.htm>.
- FTC October 2001 Privacy Agenda, see <http://www.ftc.gov/opa/2001/10/privacyagenda.htm>.
- Eli Lilly Agreement and Consent Order, Jan., 2002, FTC File No. 012 3214, available at <http://www.ftc.gov/os/2002/01/lillyagree.pdf>.

but are intended to provide guidance to countries as to the kinds of things they should be thinking about, not only in terms of what laws they pass but also how they begin to implement certain principles. What is interesting is that, unlike the United States, in many countries the policy arm of the government is not the enforcement arm of the government, so you may have two different organizations working on consumer protection in a given country. In the United States we are very fortunate because the FTC does both. We look at policy, but we also do enforcement that allows us to be forward looking in addition to looking backwards at events.

The IMSN is a less formal body. It is largely represented by the thirty OECD countries, but has a much more practical law enforcement orientation. Let me give you some examples of things the IMSN has accomplished. We have conducted a number of international sweep days. Those are periods of time when the consumer protection agencies of various countries get on the Internet and look for certain kinds of fraud schemes. We have had one international sweep day that focused on rooting out "get rich quick" schemes, and we've had one that dealt with faulty health claims. When you act on a global basis, you begin to send a signal to the marketplace that you can't hide—we're going to find you no matter where you go. At the same time, last year we introduced econsumer.gov, which is a database of fraud complaints that members of IMSN and other law enforcement agencies can participate in. It's done on a country-by-country basis, and we have a Web site that is translated into four different languages so consumers in various countries can report certain types of fraud schemes. Countries that participate in econsumer.gov can get that information and share their investigative processes with other countries, and then we can begin to track certain kinds of behavior around the world. For example, when consumers in France report that they were defrauded when they visited a U.S. Web site, the French and U.S. enforcement officials are able to see that someone in the United States is defrauding French consumers, and we can determine jointly what kind of action is appropriate to root out that kind of fraud scheme.

In addition, we also have developed some bilateral relationships over the past couple of years. We have treaties with Canada and Australia and we just entered into a memorandum of understanding with the U.K. We are also working with several other countries to try to determine how we can cooperate more closely in individual cases. I think this shows a real change over the past several years in how the United States, particularly the FTC, has used its role in the global community. I think the FTC has been a world leader in a lot of these areas.

**ANTITRUST:** How do the bilateral relationships with enforcement agencies in specific countries compare with the enforcement cooperation through organizations like IMSN? Do you see universal cooperation being more relevant in e-commerce than in other areas?

**THOMPSON:** The bilateral agreements we are engaged in govern consumer protection generally and are not limited to cooperation in e-commerce. We recognize that countries have different traditions and legal bases for prosecuting consumer protection claims. I believe that eventually there might be opportunities to have some more global cooperative agreements, but I don't think that consumers would want us to wait in order to act. So we are trying to find areas of common understanding and agreement with some countries and use that as a platform for reaching agreements with other countries. I think the way we have approached it, incrementally, has been very helpful because it has allowed other countries to view us with less skepticism or suspicion. It has also allowed us to focus on areas of consumer interest rather than only talking about our differences.

**ANTITRUST:** In what areas of consumer protection do you find that the bilateral agreements are most effective?

**THOMPSON:** They are very helpful when talking about information sharing. One of the interesting challenges with any law enforcement agency is the extent to which you can share confidential investigative materials. A bilateral agreement at least establishes the ground rules for what information you can share and under what circumstances. This is a concern not just for us here at the FTC but for each of the other countries we are involved with. Bilateral agreements also allow us to talk in a fairly candid way with law enforcers not only on the civil side but on the criminal side, whether it's the Royal Canadian Mounted Police or the FBI or Scotland Yard. We are also looking at broader agreements. For instance, I have been speaking with some colleagues at Interpol about their participation in econsumer.gov. They are very interested in participating because in many instances cross-border behavior that may at first appear civil has underpinnings in some criminal activity as well.

**ANTITRUST:** The Commission has a long history of both multilateral and bilateral involvement on the antitrust side. Is there a difference between bilateral relationships on the consumer protection side and on the antitrust side? Is the flavor of the discussion more informal in one area than the other or are they more useful in one area or the other?

**THOMPSON:** On the consumer protection side they might be a little less formal and a lot more practical, and probably more immediate in the sense that if you see fraudulent activity in the consumer protection arena, generally it's happening now and you need to reach out to someone right away because it's generally ongoing activity. Let me give you an example. About eighteen months ago we took an action; we were concerned about what we found were American companies that were being defrauded by a Web site that claimed to be a site that would give out domain names. It had a name that was closely similar to the official domain name registry but it was-

n't. And instead of charging thirty dollars for a domain name they were charging three hundred dollars. I think they defrauded American consumers to the tune of about two million dollars. We were able to trace it through to a couple of enterprising young Australians. We were able to work closely with the Australian Consumer and Competition Commission to develop evidence and to involve the ACCC so that they could issue search warrants. The Australian authorities found the wrongdoers, prosecuted them, and obtained refunds of about two million dollars for American consumers. That kind of international cooperation is going to be very helpful in the future and it's because we have a good and trusting working relationship.

**ANTITRUST:** Every country is probably not as cooperative as Australia, and the Internet is as wide as the globe. How do you get cooperation from all nations in this effort?

**THOMPSON:** Well, you're not going to get cooperation from all nations. One of the things we want to try to do is at least to reach mutual understandings so you don't have a race to the bottom, in which you encourage companies to locate in places where they have no consumer protection laws at all. The kind of work we have been doing—talking about what we think works in the United States—has been remarkably attractive to other countries. In the past year, for example, I have addressed a consumer protection conference in Budapest for all the Eastern European nations to talk about what they can expect in the Internet and how they deal with international cooperation and e-commerce. I have spoken to the Japanese Government as they restructure their government's consumer protection system and try to build a more consumer-friendly marketplace. We discussed what kinds of things they should be thinking about, in terms of combining enforcement and policy making. Similarly, in the UK, the consumer protection function is divided between the Office of Fair Trading and the Department of Trade and Industry. Recently, the heads of those agencies invited a small number of us to brainstorm about how they can improve their consumer relationships because one thing that everybody does know, especially in the time of a down economy, is that consumer confidence is the key to economic survival.

**ANTITRUST:** You have suggested that privacy regulation is very important to consumer confidence, especially in the field of e-commerce. What are some of the most significant points of common ground and some of the most significant differences between the United States and the EU on privacy regulation?

**THOMPSON:** That's a very important question. For what it's worth, I have been involved with the U.S.-EU discussions of privacy since the day I got to the Commission. I am happy to say that our thinking on both sides of the Atlantic has pro-

gressed in a significant way to where there is a lot of convergence in how we think of data protection. But we start out from very different places. In Europe, for the most part, they believe that privacy is a human right, and they have a directive that is prescriptive and directed at certain kinds of behaviors and activities. We in the United States have a much less restrictive view of privacy. With our concept of privacy we also have important concepts of self-determination, individual choice, and freedom of speech. That being said, I think we have been able to talk in a fairly constructive way about where we needed to go; in other words, I don't think that on either side of the Atlantic people have an interest in stopping data flows.

The EU Safe Harbor is one of the things that developed from our concern about what's needed to give consumers in Europe and the United States some confidence. What's good is that there is now a common understanding of principles for privacy protection that include notice, choice, access, and security. It's a great benefit to U.S. businesses in that it allows the EU and the U.S. Government, through this certification process, to allow companies to do it once instead of having to meet the requirements of every EU member. The FTC has an important role there. When companies make representations with regard to the Safe Harbor, we are the enforcement arm. If companies don't meet those representations, then we believe that they may have a problem under our deception jurisdiction.

The difference in approach stems in large part from the EU countries' top-down perspective. If you have a law, that's very important, but we look at it from the bottom up, e.g., what do consumers actually experience? Do they experience better privacy protection? What consumers end up with depends not just on policy but also on enforcement. For example, in the United States we have brought over 200 actions dealing with Internet-based fraud, and a number of those cases deal directly with privacy breaches or data protection issues. I don't think there is any other country that comes close to us in terms of the number of enforcement actions.

Notwithstanding our success in the enforcement context, I do believe that there should be some privacy baseline in the United States. This is where I differ with Chairman Muris. It is not because legislation might be easier to enforce. Rather, I think that especially in the electronic marketplace, consumer confidence is really important. Uncertainty does not benefit a new arena. Fifty states getting involved with setting standards is not helpful to consumers or businesses. The real cost of uncertainty hurts consumers and businesses alike, because what consumers do is instead of saying "I don't like what Macy's is giving me on the Web site so I'll go to Banana Republic," they'll say "I'm too nervous about participating in this arena so I won't participate." I don't think that helps consumers because they are denied the benefit of what really can happen in the electronic marketplace and I don't think it helps responsible businesses that

really want to include consumers in their value proposition. That's why some baseline legislation might be very helpful in stabilizing that uncertainty. I believe that there is growing consensus among business and consumers that this is something they want. So, we'll see how the issue arises, especially over this next legislative session.

**ANTITRUST:** Some countries impose restrictions on advertising that in this country would be protected by the First Amendment. This sometimes leads to problems in the context of Internet advertising. Is there a role for the FTC in promoting the American values of free speech and openness in cross-border advertising?

**THOMPSON:** I think the answer is to some extent, yes, and I think that we have led by example. We do it in a fairly quiet way but it occurs when we are able to approach people and encourage them to adopt a more pragmatic system. For example, there's no question we have distinct differences with some of our colleagues in other countries. In Scandinavia, for example, they have a ban on all advertising to children. We do not agree with that ban, and that's one of the reasons it does not appear in the OECD guidelines for consumer protection in e-commerce. I also think that the discussion that we have had with the German Government about advertising has led them to change their law. They had banned all comparative advertising. They changed that last year, partly because I raised it as an example of things that we won't agree to. So, I think we have a positive influence, not only from our policy stands, but also with subtle persuasion and discussions about practical consequences. This is actually one of the interesting challenges for the United States. Although we represent such a large part of the global consumer market, at the same time we must talk to our colleagues in a way that isn't overbearing and threatening. We need to focus on advancing good ideas. We have been fortunate in being able to achieve that so far.

**ANTITRUST:** In the antitrust area, Articles 81 and 82 of the Treaty of Rome have been at the core of the EU's concerns. By contrast, until recently, consumer protection was relegated to the national member states. Do you see an increasing involvement of the EU in consumer protection over the next few years? Is that a good thing from the point of view of the United States?

**THOMPSON:** I do see that, and it's something that the EU has talked about in various papers. The EU, for example, now participates in the OECD Consumer Policy Committee and the IMSN. And I think that there is a growing feeling that having at least some capability in policy and in law enforcement might be helpful in Europe to level the playing field for consumers on a cross-border basis.

In some areas I think that is a good thing. It may allow them to reach a clear understanding of their role in the glob-

al marketplace, and in that sense also get a better understanding of how we approach the subject—we also deal with multiple jurisdictions, but we also have an idea of where the consumer stands in the equation, and that's in the center. The EU itself has been very clear that this is an area they want to explore, at the very least in the e-marketplace, but also in a variety of other areas like charge-backs, credit systems, and other financial services across Europe. I think you will see more and more there and I think it's an opportunity for us to talk about areas where there could be increased flexibility and common understanding.

**ANTITRUST:** In the U.S., we have fifty states involved in consumer protection efforts, and, historically, they have been pretty active in that area. Do they have a role in international cooperation?

**THOMPSON:** One of the good things that has occurred during my time at the Commission is the cooperative relationship we have with groups like the National Association of Attorneys General, working with attorneys general and localities on a cooperative basis so that we don't duplicate resources. One of the advantages we have here is that at least we have Section 5 of the FTC Act, and the "little FTC acts," so that everybody works pretty much on the same slate. One of the challenges for Europe is to begin to define the essential elements for consumer protection across a wide range of countries, which have different standards of enforcement. I think we can be helpful, but I also think we need to be cautious and not get embroiled in their own issues of self-determination; what happens between EU and the member states they are going to have to work out for themselves.

**ANTITRUST:** Going back to privacy issues, if there is no legislation in the United States, do you think the Safe Harbor will continue to operate? Do you see significant changes in the Safe Harbor, and do you think it's adequate for the needs of American companies?

**THOMPSON:** I think it is. I think there is a substantial incentive for American companies to participate in the Safe Harbor. It consists essentially of a one-stop shop; it provides a clear basis for proceeding and it also provides a clear intersection between the U.S. and Europe instead of multiple points of entry and regulation. So that, I think, is a positive. I'll tell you one of the challenges we have; first of all, I think there are many people who believe that there are no privacy laws in the United States. That's not true; we at the FTC enforce many of them whether it's Gramm-Leach-Bliley privacy protections, whether it's the Fair Credit Reporting Act, etc. The reason I say that there should be, at least in the online world, some privacy baseline is that there are a lot of companies that are doing good things here yet a lot of the experience on the Internet is judged by the worst case and not the best case. So I would like to see some real safe harbors in

the United States for companies that are doing the right thing and legislation to form the basis for the FTC to go after companies that are doing the wrong thing—to get at the holes in the Swiss cheese. I think that we have an opportunity to do that here, and I think the approach I have suggested taking in the United States is a far more flexible approach and a more realistic approach than the Europeans contemplate in their own directive.

**ANTITRUST:** Do you think the security procedures outlined in Eli Lilly will become a baseline for what companies will do or must do to protect the security of information?

**THOMPSON:** Each case is different. But I do think it is important that if a company makes a representation about their security, it needs to be able to show that it has taken all deliberate steps to reach that goal. This is especially true in a case like *Lilly*, where you have an area of acute sensitivity—what occurs with respect to your medical information or for that matter your financial information. There are some who would have me say, well you have to look at the relative nature of it, it's only 669 names out of a data base of six million people. But if you are one of those 669 names you don't really care about those other folks, you care about what happened to you. The question you pose is a more important one for industry—they have to think about what they need to do to maintain their consumer base. In other words, an issue like the one that Lilly confronted was not just what it would have to do to satisfy us that it met its obligations, but what it said to all those other people in all those other medical data bases that it owned about whether they could feel secure or not. That is the challenge for all the other companies out there. It's a mistake to think about things like data privacy as an isolated event. Companies have to think about how they are going to relate to their customers, and privacy is one of those elements, especially in the online world where a lot of consumers view how you are handling their data as approximately how you are handling them.

**ANTITRUST:** What are the major consumer protection issues that advisors to American companies doing business overseas have to have on their radar screens over the next two or three years?

**THOMPSON:** One of them is to follow the process the Europeans are going through for looking at consumer protection and defining the line between individual country enforcement and responsibilities the EU will undertake itself. Another is to begin building a system of alternative dispute resolution. Companies can do a lot to avoid litigation by essentially using a consumer satisfaction model that allows consumers to solve disputes online in a cheap, easily accessible fashion. Now, that's not a substitute for legal rights, but I believe that most companies will not only earn a great deal of good will by creating this kind of function, they can also

avoid a lot of litigation because most of those disputes can be resolved out of court. I can't think of a better example than looking at what eBay does; we work very closely with them and they've worked with a company called Square Trade that does online dispute resolution. Last year they did over 2000 disputes online and resolved them; those are all potential cross-border legal cases. One of the challenges that we have is to think out of the box a little, and I know that lawyers find that a little bit daunting. But if consumers' only remedy in a cross-border or international marketplace is resorting to courts, then the ability to use that marketplace is going to be diminished greatly. I also think that companies are going to have to be able to understand local cultures so they can market to people in a non-offensive way that consumers understand so people are comfortable and willing to participate in the process. Believe it or not, that's an area where America has done a fairly good job. One of the great and interesting trends because of e-commerce is that the American platform has become a standard. One other thing is to form a more cooperative relationship with consumer groups and industry.

**ANTITRUST:** Looking forward five years, what do you think will be seen as the major milestones in international cooperation and consumer protection in general?

**THOMPSON:** I think there have been a number of milestones. There is now a foundation for international cooperation right here at the baseline of the global electronic marketplace. Second, the United States is now viewed as a colleague and partner and not necessarily as an adversary. Third, I think that we in the United States will use our international e-commerce framework to begin to educate our own consumers and businesses about not only the opportunities they are provided in the world but what our responsibilities are as well. Leadership comes not just from taking advantage of opportunities, but being able to provide real guidance and assistance when necessary. Finally, I think we now recognize the importance of the free market and the appropriate balance you have between government activity and partnerships with your various stakeholders.

One of my big challenges at the FTC is to begin to have not only just our staff but also the world understand that the world of competition and the world of consumer protection are not unrelated. They aren't separate from each other; they are worlds that actually work very closely together. And in that sense, they are integral parts of the American economic system. We believe that with full and fair competition, consumers get the best goods and services at the lowest prices. Through good consumer protection, consumers feel confident enough to invest in the economy. I see more and more often how those two features dovetail together at our mission. I hope that it's something antitrust lawyers and consumer protection lawyers understand when they're approaching the important issues that we have to decide. ■