



## ONLINE INTERMEDIATION OF GOODS AND SERVICES

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Online commercial transactions are clearly on the rise<sup>1</sup>, taking place in a virtual space, neither physical nor historic, that in some ways could itself be classified as an intermediary, as it brings supply into contact with demand<sup>2</sup>. Such a sweeping statement requires some qualification. The web itself cannot actually be an intermediary, but certainly this sort of activity can be conducted from specific platforms whose services bring sellers into contact with buyers.

Suffice it to consider sites like Amazon or eBay that offer goods for sale, Booking.com with its travel services, Airbnb for real property rentals, or twago for professional services. These sites not only offer users a hosting service, but also utilize cookies to profile internet users and then offer them products that might interest them, earning a fee for any deal concluded. Thus, they cannot be considered simple hosting providers.

The activity of the well-known portal Booking.com effectively resembles that of an intermediary pursuant to Art. 1755 et seq. of the Italian Civil Code. The site's sole purpose is in fact to help bring together supply and demand by conveying the user's request to the hotel, which, again through the site, confirms the hotel booking. Booking.com's

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<sup>1</sup> Data from Eurostat, the European Union's statistical office, confirm the increase in online purchases. Cf. the significant increase shown in [https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce\\_statistics\\_for\\_individuals](https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals). Although the average figure in Europe was 68% in 2017, in Italy only 29% of users buy online, often dissuaded by having to provide their credit card information and credentials.

<sup>2</sup> On intermediation cf., for example, A. LUMINOSO, *La mediazione*, in *Tratt. dir. civ. e comm.*, Cicu, F. Messineo and L. Mengoni (eds.), Milan, 2006; E. GIACOBBE, *Il contratto di mediazione*, in *Tratt. dir. priv.*, Bessone (ed.), Turin, 2015; S. NARDI, *La mediazione*, in *Il codice civile. Commentario*, P. Schlesinger (founding ed.), F.D. Busnelli (ed.), Milan, 2017.



intermediation ends when the reservation is completed, which gives the portal the right to the fee, based on mechanisms comparable to those set out in Art. 1755 of the Italian Civil Code.

Airbnb's activity is also similar to that of an intermediary as defined by the Italian Civil Code. The Airbnb platform in fact connects persons who have an accommodation to rent with persons interested in renting it. The site collects the total price, deducting a fee from both parties<sup>3</sup>. The same holds for twago, whose Italian terms of service specifically mention intermediation, with the supplier of services obligated to pay a fee for the intermediary service in the form of a percentage of the total value of the order<sup>4</sup>. (The English version leaves the word out, merely referring to an “online platform for high quality services operated by Team2Venture GmbH, headquartered at Friedrichstraße 224, 10969 Berlin, Germany.”)

With regard to the probably better known eBay, the decisions of American and French case law have diverged<sup>5</sup>. While the U.S. District Court in California (where the site was created) held that eBay was a neutral hosting provider, a simple marketplace, the Tribunal de Commerce of Paris found that the essence of eBay's service is intermediation between sellers and buyers through the provision of instruments specifically intended to ensure promotion and development of online sales through a “selling manager,” creating “online boutiques” that make it possible to become a “PowerSeller.” The result is that eBay is an inevitable player in online sales. In particular, it plays quite an active role in stimulating business to increase the number of transactions and generate fees for itself. In fact, eBay has a commercial intermediation service and is a leading player in e-commerce; its hosting and intermediary services are inseparable because eBay does not offer an advertisements service, except to ensure intermediation between sellers and buyers and collect the corresponding fee<sup>6</sup>.

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<sup>3</sup> See terms of service at [https://www.airbnb.it/terms/payments\\_terms](https://www.airbnb.it/terms/payments_terms)

<sup>4</sup> Cf. <https://www.twago.it/static/terms-and-conditions/>

<sup>5</sup> Cf. United States District Court – Northern District of California, March 4, 2008 and Tribunal de Commerce de Paris, June 30, 2008, in *Dir. internet*, 2008, pp. 567 et seq., with note by E. FALLETTI, *I vestiti nuovi di eBay: operatore neutrale o intermediario attivo nelle aste su Internet?*

<sup>6</sup> Tribunal de Commerce de Paris, June 30, 2008, cit.



Moreover, this solution seems bolstered by a decision of the German Federal Supreme Court, which held that the sales agreement concluded through eBay was not an auction pursuant to § 156 of the BGB (German Civil Code), but rather a distance sales contract, which gives the purchaser the right of rescission under the terms provided in § 312d BGB<sup>7</sup>.

Indeed, an online auction, held within a simple marketplace, is difficult to square with the aforementioned intermediation services offered by eBay. Above all, it would offer the user fewer guarantees, in particular because a hosting provider has less liability than an intermediary.

Due to the provisions in paragraph 8 of the Ministry for Production Activities Memorandum no. 3561/C of July 7, 2003, issued following Legislative Decree no. 70 of April 9, 2003 to implement e-commerce Directive 2000/31/EC, the general principle for auctions is that the provider has no obligation to monitor the information it transmits or stores, nor any obligation to check for facts or circumstances indicating the presence of unlawful activities, and is responsible for the content of services only if, when so requested by the competent judicial or administrative authority, it fails to act promptly to prevent access to said content, or if, being aware that the content of a service to which it provides access is unlawful or harmful to a third party, it does not inform the competent authority. On the contrary, as the law applicable to the intermediary is that of the country where the action creating the obligation occurred (Art. 61 of Law no. 218 of May 31, 1995) and thus in our case Italy, all the information obligations set out in Art. 1759 of the Italian Civil Code would be applicable.

In our opinion, the preceding brief analysis confirms that an intermediary's activity, even if conducted online, is not bound by any contract between the principal and the intermediary<sup>8</sup>. Indeed, the platform will not demand any performance from users who have not entered into a contract as a result of online intermediation. Registration with the site does not mean a contract has been concluded, as the purpose is merely to obtain data to

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<sup>7</sup> Bundesgerichtshof, VIII, Zivilsenat, November 3, 2004, in *Dir. internet*, 2005, pp. 134 et seq., with note by E. FALLETTI, *E uno, e due, e tre! Aggiudicato! eBay: contratto di vendita concluso a distanza e non asta on line*.

<sup>8</sup> For a differing opinion, cf. Cass. Sez. Un., August 2, 2017, no. 19161, in *Nuova giur. civ. comm.*, 2018, pp. 52 et seq., with note by I. PIZZIMENTI, *Mediazione atipica e diritto alla provvigione: la parola alle Sezioni Unite*.



transmit to the other contracting party so that they can accept the offer. So in this sense, intermediation is simply a tangible activity, in this case distinguished solely by the way it is carried out<sup>9</sup>.

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<sup>9</sup> S. NARDI, *La mediazione*, cit., p. 56 et seq. offers a more specific description of intermediation as a procedure, i.e. a structure that overlaps with the actions it involves, which can be considered both in their dynamic aspect, that is one as a function of and based on the other, specifically conclusion of the deal, and in their static aspect, that is with regard to the result and the effects each of them achieve.