

E-mail
oking@consumentenbond.nl

Date:
March 25, 2020

REGISTERED MAIL
Airbnb Ireland UC, private unlimited company
Attn. the Management Board
The Watermarque Building, South Lotts Road
Ringsend, Dublin 4
IRELAND

Re:
Airbnb General Terms & Conditions

Dear Sir/Madam,

The Consumentenbond would like to draw your attention to the following.

The Consumentenbond is the Dutch consumer organisation that represents the interests of consumers. The Consumentenbond has recently become aware that Airbnb Ireland UC ("**Airbnb**"), in violation of Dutch law, disadvantages Dutch consumers in the conclusion of rental agreements between consumers and landlords¹. The Consumentenbond wants Airbnb to stop disadvantaging these consumers as soon as possible and to compensate disadvantaged consumers. This letter will explain the above.

Factual description of the case

Airbnb operates a platform aimed at establishing rental agreements between landlords of real estate, or part of it, and tenants. As part of this, Airbnb enters into agreements with both the tenant and the landlord, to which Airbnb declares its terms and conditions applicable. Under these agreements, Airbnb either acts as an intermediary between the aforementioned parties or as an agent for both the tenant and the landlord. On its platform, Airbnb presents the rental properties of landlords to consumers - and thus to potential tenants - in the Netherlands. This makes it impossible for the tenant and the landlord to contact each other outside of Airbnb before the agreement is concluded through Airbnb. As an intermediary or agent, Airbnb handles the concluding of the rental agreement between the tenant and landlord. In order to fulfil the agreements concluded with both the landlord and the tenant - and thereby as part of the intermediary activities - Airbnb charges a service fee (brokerage fee) to both. Given the fact that Airbnb decides what costs it will charge, and thereby also the amount of the service fee to be charged on to the tenant, it is ultimately Airbnb that determines the final total price. The total amount owed will be paid by the tenant to Airbnb, and subsequently - after deduction of the service fee - to the landlord.

Mandatory provisions under Dutch law

Airbnb's general terms and conditions are governed by Irish law, subject to mandatory provisions in the country of residence. More specifically, Article 21 of the general terms and conditions states that the choice of Irish law does not affect the validity of mandatory provisions under Dutch law for consumers, and that the consumer is entitled to claim more favourable provisions under Dutch law.

¹ Judgment of the District Court of Amsterdam of 9 March 2020 (ECLI:NL:RBAMS:2020:1477)

In accordance with Article 7:417 paragraph 4 of the Dutch Civil Code and as a result of Article 7:425 of the Dutch Civil Code in conjunction with Article 7:427 of the Dutch Civil Code and Article 7:417 paragraph 4 of the Dutch Civil Code, it is prohibited under Dutch law to act as an intermediary/agent for both the landlord and the tenant and to charge a service fee to the tenant as a consumer. The above was also expressly confirmed and endorsed by the Dutch Supreme Court on 16 October 2015 (ECLI:NL:HR:2015:3099).

Furthermore, the fact that Irish law does not contain a regulation such as Article 7:417 paragraph 4 of the Dutch Civil Code, which prohibits double brokerage fees, results in the conclusion that the aforementioned provisions are classified as more favourable within the meaning of the general terms and conditions, which a consumer can rely on. However, Airbnb has charged a service fee to consumers in violation of the aforementioned provisions. Pursuant to Article 3:40 paragraph 2 of the Dutch Civil Code, the relevant clause and/or (insofar as necessary) the agreement with Airbnb may be nullified. The Consumentenbond invokes such nullification.

Unfair commercial practice

Furthermore, Airbnb's actions classify as unfair commercial practices within the meaning of Article 6:193b of the Dutch Civil Code (inter alia, actions in violation of Article 6:193b paragraph 2 under a of the Dutch Civil Code). This classifies as an unlawful act on the part of Airbnb (see Article 6:193b paragraph 1 of the Dutch Civil Code).

The structural violation of Article 7:417 paragraph 4 of the Dutch Civil Code, which serves to protect the consumer, is also regarded by the Consumer and Market Authority as an unfair trade practice within the meaning of Section 3a of Title 3 of Book 6 of the Dutch Civil Code.² This constitutes a violation of Article 8.8 of the Consumer Protection (Enforcement) Act. Two-sided commission fees for two-sided brokerage activities, whereby prohibited rental brokerage fees are charged to the consumer tenant, is therefore contrary to Article 6:193b of the Dutch Civil Code because it causes or may cause damage to the collective interests of consumers.

Under Article 193j paragraph 3 of the Dutch Civil Code, the agreement between Airbnb and the tenant may be nullified as well. The Consumentenbond also invokes that nullification.

Unfair and unreasonably onerous clause

Furthermore, Article 6 of the general terms and conditions - pursuant to which Airbnb withheld the service fee - classifies as an unfair and unreasonably onerous clause within the meaning of Directive 93/13/EEC and Article 6:233 under a of the Dutch Civil Code (see inter alia Article 237 under b of the Dutch Civil Code).

Any clause in an agreement which has not been individually negotiated and which is contrary to good faith or significantly upsets the balance between the parties' rights and obligations ensuing from the agreement to the detriment of the consumer, is considered unfair under Article 3 of Directive 93/13/EEC. It is undisputed that charging prohibited rental brokerage fees to the consumer tenant significantly distorts the rights and obligations of the parties to the detriment of the consumer. The contested clause also does not escape a classification as unreasonably onerous within the meaning of Article 6:233 under a of the Dutch Civil Code. In Article 6:237 under b of the Dutch Civil Code, a clause in which the obligations of the user are substantially limited is presumed to be unreasonably onerous, also having regard to the legal rules applicable to the agreement.

² <https://www.acm.nl/sites/default/files/documents/2019-09/last-onder-dwangsom-goeth-vastgoed-voor-rekenen-van-verboden-bemiddelingskosten.pdf>

As a result of the aforementioned, such a clause is not valid between Airbnb and the consumer and does not apply. The invalidity of the clause and/or the nullity of this clause is hereby invoked. Insofar as necessary, the clause will also be nullified, and the Consumentenbond invokes such nullification.

In conclusion, we consider it important to expressly state that acting contrary to statutory provisions is generally unlawful towards the consumer. Pursuant to Article 6:162 of the Dutch Civil Code or Article 6:74 of the Dutch Civil Code, this conduct can also be classified as unlawful or as an attributable failure.

Conclusion

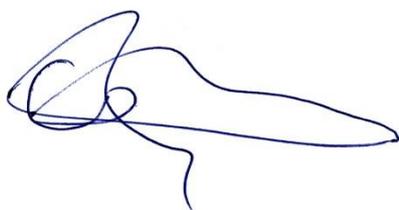
The nullification of the clause and/or insofar as necessary, the agreement with Airbnb under which Airbnb withheld the service fee, means that the service fee amounts have been paid unduly by consumer tenants without any legal basis. As a result of this conduct, and therefore Airbnb's unlawful actions, consumers have suffered loss.

The Consumentenbond principally wants Airbnb to immediately stop the conduct that violates mandatory provisions of Dutch law. More specifically, the Consumentenbond requests – and insofar as necessary demands – that Airbnb confirms that it will immediately stop charging the service fee to consumers, or that within two weeks after receipt of this letter it will enter into consultations with the Consumentenbond on the discontinuation of the current practice. If Airbnb does not respond to this notice from the Consumentenbond, the Consumentenbond will take (legal) action, including actions pursuant to Article 6:240 of the Dutch Civil Code and/or Article 3:305d of the Dutch Civil Code. However, the Consumentenbond trusts that this will not be necessary.

Furthermore, the Consumentenbond wants Airbnb to compensate the consumers it has disadvantaged. The Consumentenbond requests and insofar as necessary demands – that Airbnb confirms that it will refund the service fees already paid by consumers. The Consumentenbond also expressly invites Airbnb to enter into consultations to discuss this within two weeks after receipt of this letter. If Airbnb does not comply with the above, the Consumentenbond will take further (legal) action in this regard as well.

This letter must also be construed as an express interruption of the limitation period of the claims set out in this letter, and is without prejudice to any of our rights and remedies.

Yours faithfully,
Consumentenbond

A handwritten signature in blue ink, appearing to be 'Olof King', with a long horizontal stroke extending to the right.

Olof King
head of advocacy