Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 23 March 2023 [1]

Case C-83/22

RTG
v
Tuk Tuk Travel SL

(Request for a preliminary ruling from the Juzgado de Primera Instancia nº 5 de Cartagena (Court of First Instance No 5, Cartagena, Spain))

(Reference for a preliminary ruling – Article 267 TFEU – Directive (EU) 2015/2302 – Package travel and linked travel arrangements – Article 5(1) – Pre-contractual information obligations – Annex I, Parts A and B – Standard information form – Article 12(2) – Termination of a package travel contract – Unavoidable and extraordinary circumstances significantly affecting the performance of the package – COVID-19 – Right to a full refund of any payments for the package – Request by the traveller of a partial refund – National court – Examination by the court of its own motion – Principles of national procedural law)

1. Among the sectors most seriously and immediately affected by the COVID-19 pandemic was the sector of travel and tourism. [2] The uncertainty the pandemic provoked and its rapid spread across different continents led many travellers to terminate their package travel contracts before emergency measures were adopted by governments and borders were closed. That context of uncertainty raised doubts as to the exact scope of the rights and obligations of the parties to a package travel contract and, more specifically, made it difficult for travellers to exercise their right to terminate the contract without paying a termination fee, pursuant to Article 12(2) of Directive 2015/2302. [3]

2. Against that backdrop, the present reference for a preliminary ruling raises a pure matter of procedural law. It relates to the powers of the courts to recognise, of their own motion, the rights consumers derive from Directive 2015/2302 and, more specifically, the right of the traveller to terminate the package travel contract without paying any termination fee in the event of unavoidable and extraordinary circumstances, according to the conditions laid down in Article 12(2) of that directive. Moreover, it raises the issue of whether a court should have the power to award a consumer, of its own motion, more than what he or she has claimed in order to ensure the effective exercise of the rights he or she derives as a traveller under that directive.

1 Original language: English.

2 See, further, UNWTO, *Secretary-General's Policy Brief on Tourism and COVID-19* (available at https://www.unwto.org/tourism-and-covid-19-unprecedented-economic-impacts).

3 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ 2015 L 326, p. 1).

3. There is settled and abundant case-law on the powers of national courts to determine of their own motion whether a term of a contract is unfair. That line of case-law, underpinned by considerations of protection of the weaker party, comprises some of the landmark judgments in EU consumer law,[4] such as *Océano Grupo*,[5] *Cofidis*[6] or *Aziz*.[7] The judgment in *Océano Grupo* has been considered as 'a powerful tool to eliminate unfairness and re[-]establish social justice in contract law',[8] while the judgment in *Cofidis* has inspired even the arts.[9] After more than two decades of development and consolidation of that line of case-law, the most recent judgments concentrate on the clarification of aspects of the *ex officio* doctrine, striking a sometimes delicate balance between effective consumer protection and fundamental principles of procedural law.[10] From that perspective, the *ex officio* doctrine seems to be reaching a stage of 'maturity' in its development or, as one author aptly puts it, the '*age of reason*'.[11] The present case is part of that stage.

Legal framework

European Union law

Directive 2015/2302

4. Chapter II of Directive 2015/2302 is headed 'Information obligations and content of the package travel contract'. Under that chapter, Article 5, entitled 'Pre-contractual information', provides:

'1. Member States shall ensure that, before the traveller is bound by any package travel contract or any corresponding offer, the organiser and, where the package is sold through a retailer, also the retailer shall provide the traveller with the standard information by means of the relevant form as set out in Part A or Part B of Annex I, and, where applicable to the package, with the following information:

(a) the main characteristics of the travel services:

…

[4] See Terryn, E., Straetmans, G. and Colaert, V. (eds), *Landmark Cases of EU Consumer Law, In Honour of Jules Stuyck*, Intersentia, Cambridge – Antwerp – Portland, 2013.

[5] Judgment of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346; 'the judgment in *Océano Grupo*').

[6] Judgment of 21 November 2002, *Cofidis* (C-473/00, EU:C:2002:705).

[7] Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164). For a detailed analysis of the case in the context of mortgage enforcement proceedings, see Fernández Seijo, J.M., *La Tutela de los consumidores en los procedimientos judiciales, Especial referencia a las ejecuciones hipotecarias*, Wolters Kluwer, Barcelona, 2013.

[8] Nicola, F. and Tichadou, E., '*Océano Grupo*: A Transatlantic Victory for the Consumer and a Missed Opportunity for European Law', in Nicola, F. and Davies, B. (eds), *EU Law Stories, Contextual and Critical Histories of European Jurisprudence*, Cambridge University Press, 2017, p. 390.

[9] The novel by Emmanuel Carrère, *D'autres vies que la mienne* (Folio, 2010), retraces the personal story of the French judge Etienne Rigal, who made the reference for a preliminary ruling in the judgment of 21 November 2002, *Cofidis* (C-473/00, EU:C:2002:705). The book inspired, in turn, the film *Toutes nos envies* (2010) (Dir. Philippe Lioret), starring Vincent Lindon in the role of the judge.

[10] See Werbrouck, J. and Dauw, E., 'The national courts' obligation to gather and establish the necessary information for the application of consumer law – the endgame?', *European Law Review*, 46(3), 2021, pp. 331 and 337.

[11] Poillot, E., 'Cour de justice, 3e ch., 11 mars 2020, *Györgyné Lintner c/ UniCredit Bank Hungary Zrt.*, aff. C-511/17, ECLI:EU:C:2020:188', in Picod, F. (ed.), *Jurisprudence de la CJUE 2020: décisions et commentaires*, Bruylant, 2021, p. 966 ('*âge de raison*' in the original French).

(g) information that the traveller may terminate the contract at any time before the start of the package in return for payment of an appropriate termination fee, or, where applicable, the standardised termination fees requested by the organiser, in accordance with Article 12(1);

…

3. The information referred to in paragraphs 1 and 2 shall be provided in a clear, comprehensible and prominent manner. Where such information is provided in writing, it shall be legible.'

5. Article 12(1) and (2) of Directive 2015/2302 provides:

'1. Member States shall ensure that the traveller may terminate the package travel contract at any time before the start of the package. Where the traveller terminates the package travel contract under this paragraph, the traveller may be required to pay an appropriate and justifiable termination fee to the organiser. …

2. Notwithstanding paragraph 1, the traveller shall have the right to terminate the package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. In the event of termination of the package travel contract under this paragraph, the traveller shall be entitled to a full refund of any payments made for the package, but shall not be entitled to additional compensation.'

6. Article 23 of Directive 2015/2302, headed 'Imperative nature of the Directive', provides in paragraphs 2 and 3 thereof:

'2. Travellers may not waive the rights conferred on them by the national measures transposing this Directive.

3. Any contractual arrangement or any statement by the traveller which directly or indirectly waives or restricts the rights conferred on travellers pursuant to this Directive or aims to circumvent the application of this Directive shall not be binding on the traveller.'

7. Article 24 of that directive, entitled 'Enforcement', states:

'Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.'

8. Part A of Annex I to Directive 2015/2302, entitled 'Standard information form for package travel contracts where the use of hyperlinks is possible', sets out, in a text box, the content of that form and indicates that, by following the hyperlink, the traveller will receive the following information:

'Key rights under Directive (EU) 2015/2302

…

– Travellers may terminate the contract without paying any termination fee before the start of the package in the event of exceptional circumstances, for instance if there are serious security problems at the destination which are likely to affect the package.

…'

9. Part B of Annex I to Directive 2015/2302, entitled 'Standard information form for package travel contracts in situations other than those covered by Part A', sets out, in a text box, the content of that form, followed by the same key rights under that directive as those set out under Part A of Annex I to that directive.

Spanish law

The General Law for the protection of consumers and users

10. Articles 5 and 12 of Directive 2015/2302 are transposed into Spanish law by Articles 153 and 160, respectively, of Real Decreto Legislativo 1/2007, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Royal Legislative Decree 1/2007 approving the consolidated text of the General Law for the protection of consumers and users and other supplementary laws; 'the General Law for the protection of consumers and users') of 16 November 2007 (BOE No 287 of 30 November 2007, p. 49181).

Law on Civil Procedure

11. Article 216 of Ley 1/2000 de Enjuiciamiento Civil (Law 1/2000 on the Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575; 'the LEC') provides as follows:

'Civil courts before which cases are brought shall dispose of them on the basis of the facts, evidence and claims put forward by the parties, save where otherwise provided by law in specific cases.'

12. According to Article 218(1) of the LEC:

'Legal decisions must be clear and precise and must be commensurate with the requests and other claims of the parties, made in a timely manner in the course of the proceedings. Those decisions must contain the requisite declarations, find in favour of or against the defendant and settle all points in dispute which form the subject matter of the litigation.

The court, without departing from the cause of action by accepting elements of fact or points of law other than those which the parties intended to raise, must give its decisions in accordance with the rules applicable to the case, even though they may not have been correctly cited or pleaded by the parties to the procedure.'

13. Article 412(1) of the LEC is worded as follows:

'Once the subject matter of the proceedings has been established in the application, in the defence, and, as the case may be, in the counterclaim, the parties may not vary it at a later date.'

Facts, procedure and the questions referred

14. On 10 October 2019, the applicant purchased from the defendant, Tuk Tuk Travel SL, a package trip for two persons to Vietnam and Cambodia, departing from Madrid (Spain) on 8 March 2020 and returning on 24 March 2020.

15. The applicant paid EUR 2 402 at the time of signature of the contract, whereas the full cost of the trip was EUR 5 208. The general conditions of the contract provided information about the option 'to cancel the trip before it starts upon payment of a termination fee'. No contractual or pre-contractual information was included regarding the possibility to cancel the trip in the event of unavoidable and extraordinary circumstances occurring at the travel destination or its immediate vicinity and significantly affecting the performance of the package.

16. On 12 February 2020, the applicant notified the defendant of his decision not to take the trip, in view of the spread of COVID-19 in Asia, and he requested the refund of the amounts due to him as a result of that decision.

17. The defendant replied to the applicant on 14 February 2020, informing him that, after deduction of the cancellation costs, it would reimburse the applicant EUR 81. The applicant contested the calculation of the cancellation costs. Finally, the defendant notified the applicant that it would reimburse him EUR 302.

18. The applicant decided to bring an action before the referring court and to plead his case, as he is entitled to do according to national procedural law, without legal representation. He argued that his decision to cancel the trip was due to a reason of *force majeure*, namely the worrying developments in the health situation as a result of COVID-19. He claimed an additional refund of EUR 1 500, allowing the agency to retain EUR 601 as administration costs.

19. The defendant submitted that, on the date of termination of the contract, the applicant's decision to cancel the trip was unjustified. In February 2020, travel to the countries of destination was continuing as normal. Therefore, according to the defendant, the applicant was not entitled to plead a situation of *force majeure* in order to terminate the contract. Moreover, the defendant stated that the applicant had agreed to the general conditions of the contract relating to the administration charges in case of early termination of the package (amounting to 15% of the total cost of the trip), and that the cancellation charges are those applied by each of its providers. In addition, by failing to take out insurance, the applicant assumed the risks related to cancellation.

20. As the parties did not request an oral hearing, the case entered the deliberation stage on 22 June 2021. However, on 15 September 2021, the referring court issued an order ('the order of 15 September 2021') and invited the parties to submit their observations within 10 days on the following issues: first, the question whether the health situation alleged by the consumer could be considered an exceptional and inevitable risk, within the meaning of Article 160(2) of the General Law for the protection of consumers and users; second, the legal consequences of the failure by the travel organiser to inform the consumer of his right to terminate the contract without paying a termination fee and, more precisely, the question whether the absence (in the view of the referring court) of an obligation to provide such information under Directive 2015/2302 is contrary to Article 169 (1) and (2)(a) TFEU; third, the question whether the court may inform a consumer, of its own motion, of the extent of his or her rights, when it appears from the claim that he or she is not aware of them; and, fourth, the question whether consumer protection requires that the court order the defendant to grant the consumer a full refund, disregarding the

principle that the subject matter of an action is delimited by the parties and the principle of *ne ultra petita*, in circumstances in which the consumer was not informed of the extent of his or her rights. Finally, the referring court asked the parties to present argument as to the necessity to make a reference for preliminary ruling.

21. The applicant did not submit observations. The defendant reaffirmed its position as to the absence of unavoidable and extraordinary circumstances that would justify the termination of the contract. As to the rest, it considered that there was no need to make a reference for preliminary ruling, as the applicant did not submit any observations on the issues raised by the referring court in the order of 15 September 2021.

22. The referring court has doubts, first, as to the validity of Article 5 of Directive 2015/2302. In particular, it asserts that neither that directive nor the Spanish legislation transposing that directive includes among the compulsory information to be provided by the organisers to travellers the right to terminate the package travel contract in the event of unavoidable and extraordinary circumstances without paying a termination fee. Due to the absence of such a requirement, the applicant was unaware of his right to obtain full reimbursement of the payments made. On the basis of those considerations, the referring court raises the question whether the minimum information that was provided to the applicant pursuant to Directive 2015/2302 is insufficient in the light of Article 169 TFEU, in conjunction with Article 114 TFEU.

23. Second, the referring court raises the question whether it is possible, under EU law, to award in the judgment, of its own motion, the reimbursement of all payments made by a consumer exceeding the amount of his or her claim. The referring court explains that such an *ex officio* award would be contrary to a basic principle of Spanish procedural law, namely that the ruling contained in the operative part of a judgment must be commensurate with the claims put forward in the action (Article 218(1) of the LEC).

24. In those circumstances, the Juzgado de Primera Instancia nº 5 de Cartagena (Court of First Instance No 5, Cartagena, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Articles 169(1) and (2)(a) TFEU and 114(3) TFEU be interpreted as precluding Article 5 of [Directive 2015/2302], since that article does not include, among the compulsory pre-contractual information to be provided to travellers, the right, conferred on travellers by Article 12 of the directive, to terminate the contract before the start of the package and obtain a full refund of payments made in the event of unavoidable and extraordinary circumstances which significantly affect the performance of the package?

(2) Do Articles 114 and 169 TFEU, and Article 15 of Directive 2015/2302, preclude the application of the principles of the delimitation of the subject matter of an action by the parties and of the correlation between the claims put forward in the action and the rulings contained in the operative part, which are laid down in Articles 216 and 218(1) [of the LEC], where those procedural principles are liable to impede the full protection of the applicant consumer?’

25. Written observations have been submitted by the Czech, Spanish and Finnish Governments, the Council of the European Union, the European Parliament and the European Commission. The Spanish and Finnish Governments, the Parliament and the Commission were represented at the hearing which took place on 12 January 2022.

Assessment

Preliminary observations

26. As a preliminary issue, the Czech Government submits that the reference for a preliminary ruling relies implicitly on the assumption that, in the circumstances of the specific case, the applicant was entitled to terminate the contract due to unavoidable and extraordinary circumstances occurring at the travel destination, pursuant to Article 12(2) of Directive 2015/2302. However, according to the Czech Government, that assumption is erroneous. In its view, the existence of unavoidable and extraordinary circumstances has to be assessed at the time of termination of the package. The mere risk of such circumstances occurring in the future may not give rise to a right on the part of the traveller to terminate the package.

27. However, the questions asked by the referring court do not relate to the question whether, in the circumstances of this specific case, the applicant had the right to terminate the contract without paying any termination fee in accordance with Article 12(2) of Directive 2015/2302. Therefore, that matter will not be examined in the context of the present case. The Court must give its ruling in the light of the factual and legal considerations set out in the order for reference. [12]

The first question

28. By its first question, the referring court raises, in essence, the issue of validity of Article 5 of Directive 2015/2302, in the light of Article 169(1) and (2)(a) TFEU, read together with Article 114(3) TFEU. It appears from the order for reference that the doubts of the referring court with respect to the validity of that provision stem from the premiss that that provision does not include, among the mandatory pre-contractual information to be provided to travellers, the right set out in Article 12(2) of that directive.

29. In that regard, it must be observed, as was submitted by the Czech and Finnish Governments, and by the Council, the Parliament and the Commission in their written observations, that the premiss which underlies the doubts of the referring court with regard to the validity of Article 5 of Directive 2015/2302 is erroneous.

30. Indeed, Article 5 of Directive 2015/2302, governing the obligation to provide pre-contractual information, needs to be read in the light of the content of the standard information form set out in Part A and Part B of Annex I. More specifically, according to the first sentence of Article 5(1) of Directive 2015/2302, the organiser should provide the traveller with the standard information by means of the relevant form as laid down in Part A or Part B of Annex I, and, where applicable to the package, the information which is set out in that provision.

31. The standard information form, set out in Part A and Part B of Annex I to Directive 2015/2302, indicates the key rights on which travellers are to be informed. Those rights include, according to the seventh indent in Part A and Part B of that annex, the right of travellers to 'terminate the contract without paying any termination fee before the start of the package in the event of exceptional circumstances, for instance if there are serious security problems at the

[12] See, to that effect, judgment of 5 March 2015, *Statoil Fuel & Retail* (C-553/13, EU:C:2015:149, paragraph 33).

destination which are likely to affect the package'. Although the exact provision of Directive 2015/2302 that confers that right, namely Article 12(2), is not explicitly cited in the text of the standard information form, it is clear that that form needs to set out the content of that right.

32. Moreover, the Commission has pointed out that Article 5(1) of Directive 2015/2302 and Annex I thereto have correctly been transposed into Spanish law and more particularly into the General Law for the protection of consumers and users.

33. It follows from the above considerations that Article 5 of Directive 2015/2302 includes among the mandatory pre-contractual information to be provided to travellers the right, conferred on travellers by Article 12(2) of that directive, to terminate the contract before the start of the package and obtain a full refund of payments made in the event of unavoidable and extraordinary circumstances which significantly affect the performance of the package. Consequently, the premiss to the contrary, which underlies the doubts of the referring court with respect to the validity of Article 5 of Directive 2015/2302, is in fact incorrect.

34. That being the case, consideration of the first question has revealed nothing capable of affecting the validity of Article 5 of Directive 2015/2302.

The second question

35. As a preliminary observation, it should be borne in mind that, in the procedure laid down in Article 267 TFEU for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it, and, with this in mind, the Court may have to reformulate the questions referred to it. In order to provide such a useful answer, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question. [13]

36. On the basis of that case-law, it needs to be observed, as the Spanish and Finnish Governments and the Commission have essentially pointed out in their written observations, that it is apparent from the context of the second question that the referring court seeks an interpretation of Article 12(2) of Directive 2015/2302, and that the reference in that question to Article 15 of that directive may be attributed to a typographical error.

37. In the light of those considerations, it is necessary to reformulate the second question referred to the effect that, by that question, the referring court asks, in essence, whether Article 12(2) of Directive 2015/2302, read in the light of Articles 114 and 169 TFEU, must be interpreted as precluding the application of principles of national judicial procedure, under which a national court hearing a dispute may not award the consumer of its own motion the full amount of the refunds to which he or she is entitled, in circumstances in which the consumer has claimed less.

38. In order to respond to that question, it is necessary to make some observations with regard to its scope. As was already mentioned, [14] by the order of 15 September 2021, the referring court invited the parties to present their comments with regard to certain matters. Those matters included the question whether that court has the power, on the one hand, to inform the consumer, of its own motion, on the extent of his rights and, on the other hand, to award the

[13] Judgment of 9 September 2021, *LatRailNet and Latvijas dzelzceļš* (C-144/20, EU:C:2021:717, paragraph 29 and the case-law cited).

[14] Point 20 above.

consumer an amount exceeding the *petitum*. The consumer did not submit observations on those matters. At the hearing, the Spanish Government submitted that, according to its own understanding of that order, the referring court informed the consumer of his rights. However, the consumer remained passive. In my opinion, the order of 15 September 2021, as presented by the referring court, and the file before the Court do not make it possible to infer that the national court, indeed, informed the consumer of his rights.

39. Taking into account those considerations, the structure of my analysis is as follows. First, by way of introduction, I will present the most important elements of the obligation of national courts to apply of their own motion provisions of EU legislation on consumer protection. Second, I will analyse the question whether a national court has the obligation to apply of its own motion Article 12(2) of Directive 2015/2302. Finally, I will analyse the question whether a national court should have the power to award an amount exceeding the one claimed by the consumer in his or her application.

(a) The obligation of national courts to apply of their own motion provisions of EU law on consumer protection

40. The Court has already defined, on several occasions, the way in which national courts must ensure the protection of the rights which consumers derive from EU consumer legislation and the impact of that legislation on the powers of the courts to apply of their own motion provisions of EU consumer law.

41. The most important line of that case-law concerns Directive 93/13.[15] The national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task.[16]

42. The principle of the *ex officio* control of unfair contract terms is founded on a combination of elements which are essentially drawn from the system of protection established by Directive 93/13, from the mandatory nature of the provisions concerned, from the nature and significance of the public interest constituted by the protection of consumers and from considerations of effectiveness.

43. More specifically, in its case-law, the Court has placed emphasis on the nature and significance of the public interest constituted by the protection of consumers, who are in a position of weakness vis-à-vis sellers or suppliers, as regards both their bargaining power and their level of knowledge.[17] It has also underlined that Article 6(1) of Directive 93/13 is a mandatory provision which aims to replace the formal balance which the contract establishes

[15] Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). For a systematic presentation of that line of case-law see Commission notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (OJ 2019 C 323 p. 4), Section 5.

[16] Judgment of 17 May 2022, *Ibercaja Banco* (C-600/19, EU:C:2022:394, paragraph 37 and the case-law cited).

[17] Judgment of 4 June 2020, *Kancelaria Medius* (C-495/19, EU:C:2020:431, paragraph 30 and the case-law cited). See Opinion of Advocate General Saggio in Joined Cases *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:1999:620, point 26), who points out that Directive 93/13 safeguards interests which form part of the 'economic public policy' and therefore 'extend beyond the specific interests of the parties concerned'. As observed in literature, the considerable imbalance in the contractual relationship that results from the use of unfair contract terms affects not only the private sphere of the consumer but 'undermines … the legal and economic order as a whole'; see Podimata, E., 'Standard Contract Terms and Rules on Procedure', in *Essays in Honour of Konstantinos D. Kerameus*, Ant. N. Sakkoulas; Bruylant, Athens, Brussels, 2009, pp. 1079 to 1093.

between the rights and obligations of the parties with an effective balance which re-establishes equality between them.[18] That provision is regarded as being of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.[19]

44. In addition, Directive 93/13, as is apparent from Article 7(1) in conjunction with the twenty-fourth recital of that directive, obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.[20]

45. The considerations justifying a positive intervention by the national court in order to compensate for the imbalance between the consumer and the trader are not limited to Directive 93/13. The Court has required, on the basis of the principle of effectiveness and notwithstanding rules of domestic law to the contrary, the national courts to apply of their own motion certain provisions contained in EU directives on consumer protection. That requirement is justified by the consideration that the system of protection introduced by those directives is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his or her bargaining power and his or her level of knowledge, and that there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him or her.[21]

46. More particularly, the Court had the occasion to rule on the application by the courts, of their own motion, of certain provisions of Directive 1999/44/EC[22] (judgments in *Duarte Hueros*[23] and in *Faber*[24]), and Directive 87/102/EEC[25] (judgment in *Rampion and Godard*[26]). Moreover, the Court has recalled on numerous occasions the obligation of national courts to examine, of their own motion, infringements of certain provisions of EU consumer-protection legislation, particularly with regard to Directive 85/577/EEC[27] (judgment in *Martín Martín*[28]), and Directive 2008/48/EC[29] (judgments in *Radlinger and Radlingerová*[30] and in *OPR-Finance*[31]).

18 Judgment of 17 May 2022, *Ibercaja Banco* (C-600/19, EU:C:2022:394, paragraph 36 and the case-law cited).

19 Judgment of 17 May 2022, *Unicaja Banco* (C-869/19, EU:C:2022:397, paragraph 24). See Fekete, B. and Mancaleoni, A.M., 'Application of Primary and Secondary EU Law on the National Courts' Own Motion', in Hartkamp, A., Sieburgh, C. and Devroe, W. (eds), *Cases, Materials and Text on European Law and Private Law*, Hart Publishing, Oxford and Portland, Oregon, 2017, p. 440, who point out that 'the question of the *status* of the rules on consumer contracts – whether merely mandatory or of public policy – has been a significant issue particularly in Dutch law, which traditionally allows *ex officio* application only for public policy rules, not for mandatory rules (irrespective of whether or not they "only" have a protective purpose)'.

20 Judgment of 17 May 2022, *Ibercaja Banco* (C-600/19, EU:C:2022:394, paragraph 36 and the case-law cited).

21 Judgment of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 42 and the case-law cited).

22 Directive of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12).

23 Judgment of 3 October 2013, *Duarte Hueros* (C-32/12, EU:C:2013:637, paragraph 39).

24 Judgment of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 56).

25 Council Directive of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48).

26 Judgment of 4 October 2007, *Rampion and Godard* (C-429/05, EU:C:2007:575, paragraph 65).

27 Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31).

28 Judgment of 17 December 2009, *Martín Martín* (C-227/08, EU:C:2009:792, paragraph 29).

29 Directive of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66; and corrigenda OJ 2009 L 207, p. 14; OJ 2010 L 199, p. 40; and OJ 2011 L 234, p. 46).

30 Judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 67).

31 Judgment of 5 March 2020, *OPR-Finance* (C-679/18, EU:C:2020:167, paragraph 23).

47. As regards the implementation of that duty of positive intervention by the courts, it is subject to the availability of all the legal and factual elements necessary for that task. [32]

48. Moreover, where the national court has, of its own motion, found that there has been a failure to comply with certain obligations set out in EU legislation on consumer protection, it is obliged, without waiting for the consumer to make an application to that effect, to draw all the consequences arising under national law from that failure, provided always that there has been compliance with the principle of *audi alteram partem* and that the penalties laid down in national law are effective, proportionate and dissuasive. [33]

49. The application of EU consumer law by the national courts of their own motion is liable to have implications for national procedural law. By virtue of the principle of national procedural autonomy, in the absence of EU legislation, the detailed rules governing procedures for safeguarding the rights which individuals derive from EU law fall within the domestic legal system of the Member States, subject to the principle of equivalence and the principle of effectiveness. [34] With regard to the principle of effectiveness, the Court has held, however, that the need to comply with that principle cannot be stretched so far as to make up fully for the complete inaction on the part of the consumer concerned. [35]

50. In addition, the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law on consumer protection implies a requirement for effective judicial protection guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, which applies, inter alia, to the definition of detailed procedural rules relating to actions based on such rights. [36]

51. From all of the above considerations, it appears that the requirement of positive intervention of national courts in consumer litigation has developed, as aptly observed in academia, into a 'true European regime of *ex officio* application' [37] which introduces in EU consumer law a 'comprehensive encompassing procedural remedy'. [38]

(b) The ex officio *powers of the courts in the context of Directive 2015/2302*

52. The comprehensiveness of the *ex officio* doctrine leads me to consider that the reasons which underpin the obligation of national courts to apply EU consumer protection law of their own motion are equally valid with regard to Directive 2015/2302. A different interpretation, as the Commission pointed out at the hearing, would create inconsistency in consumer protection.

53. All interested parties that took part in the hearing acknowledged that the national courts are obliged to apply of their own motion Article 12(2) of Directive 2015/2302 and recognise the right of the consumer to terminate the contract without paying a termination fee, where they have the

[32] See, to that effect, judgment of 5 March 2020, *OPR-Finance* (C-679/18, EU:C:2020:167, paragraph 23 and the case-law cited). For the circumstances in which a national court might be required to take *ex officio* investigative measures in order to complete the file, see judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraphs 35 to 38).

[33] See, to that effect, judgment of 5 March 2020, *OPR-Finance* (C-679/18, EU:C:2020:167, paragraph 24 and the case-law cited).

[34] See, in detail, judgment of 17 May 2022, *Unicaja Banco* (C-869/19, EU:C:2022:397, paragraph 22 and the case-law cited).

[35] See, to that effect, judgment of 17 May 2022, *Unicaja Banco* (C-869/19, EU:C:2022:397, paragraph 28 and the case-law cited).

[36] See judgment of 17 May 2022, *Unicaja Banco* (C-869/19, EU:C:2022:397, paragraph 29 and the case-law cited).

[37] Poillot, E., '*L'encadrement procédural de l'action des consommateurs*' in Sauphanor-Brouillaud, N. et al., *Les contrats de consommation. Règles communes*, L.G.D.J, Paris, 2013, p. 971 ('*un véritable régime européen du relevé d'office*' in the original French).

[38] Micklitz, H., 'Theme VIII. Unfair Contract Terms – Public Interest Litigation Before European Courts', in Terryn, E., Straetmans, G. and Colaert, V. (eds), op. cit., note 4, p. 641.

legal and factual elements necessary for that task available to them. In that regard, it is, in principle, for the national court, for the purpose of identifying the legal rules applicable to a dispute which has been brought before it, to assign a legal classification to the facts and acts on which the parties rely in support of their claims. [39] In the main proceedings, it would therefore be for the national court to examine whether the circumstances invoked by the claimant as a basis for his claim may qualify as 'unavoidable and extraordinary circumstances' giving rise to the right provided for under Article 12(2) of Directive 2015/2302.

54. Moreover, Parts A and B of Annex I to that directive qualify the right of the traveller to terminate the contract at any time before the start of the package without paying any termination fee as a 'key right'. In view of its importance, that right forms part of the pre-contractual information that the organiser has to provide to the traveller according to Article 5(1) of Directive 2015/2302. [40] It follows from recital 26 of Directive 2015/2302 that such pre-contractual information is 'key information' that should be 'binding'. Therefore, the right to terminate the contract without paying any termination fee in the event of unavoidable and extraordinary circumstances is significant within the system of Directive 2015/2302. It also contributes to the attainment of the objective of that directive, which consists, as can be seen from Article 1 of that directive, read in the light of recitals 3 [41] and 5, in the achievement of a high and as uniform as possible level of consumer protection in respect of contracts between travellers and traders relating to package travel.

55. That objective could not be effectively achieved if the consumer were himself or herself obliged to invoke the rights which he or she enjoys against the organiser in particular because of the real risk that he or she may be unaware of his or her rights or may encounter difficulties in exercising them. [42] Indeed, it is apparent from the case-law of the Court that in consumer law proceedings there is a real risk that the consumer, particularly because of a *lack of awareness*, will not rely on the legal rule that is intended to protect him or her. [43] That risk is exacerbated in situations of self-representation such as the one in the main proceedings.

56. Furthermore, it follows from Article 23 of Directive 2015/2302, read in the light of recital 46 thereof, that the rights of the travellers set out therein are *imperative*. In that regard, it is important to recall that in its case-law the Court has drawn from the binding nature of provisions of EU consumer directives the requirement of their application by the courts of their own motion. That finding was made with regard to Article 6(1) of Directive 93/13, [44] but also with regard to other provisions of EU consumer protection law. In the judgment in *Faber*, [45] the Court pointed out that the rule on the apportionment of the burden of proof laid down in Article 5(3) of Directive 1999/44 is, in accordance with Article 7 of that directive, binding in nature both for the parties, who may not derogate from it by means of an agreement, and for the Member States, which must ensure that it is complied with. The Court held that such a rule had to be applied by the courts of their own motion even though it has not been expressly relied on by the consumer who may benefit from it.

39 Judgment of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 38).

40 See, in detail, my response to the first question.

41 That recital refers to the provisions of the TFEU to which the second question refers, namely Article 169(1) TFEU and point (a) of Article 169(2) TFEU, from which it follows that the European Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU.

42 See, to that effect, judgment of 4 October 2007, *Rampion and Godard* (C-429/05, EU:C:2007:575, paragraph 65).

43 Judgment of 5 March 2020, *OPR-Finance* (C-679/18, EU:C:2020:167, paragraph 22 and the case-law cited).

44 See point 43 above.

45 Judgment of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 55).

57. Therefore, by analogy, it should be accepted that the binding nature of the right of the traveller enshrined in Article 12(2) of Directive 2015/2302, read in the light of Article 23 of that directive, requires that national courts recognise that right of their own motion and duly inform the consumer even though the latter, who may benefit from it, has not expressly relied on it.

58. What is more, in the main proceedings the organiser had *breached its obligation* to inform the consumer of his right to terminate the contract. The recognition by the national court, of its own motion, of the right conferred on the consumer would therefore constitute an *adequate and effective* means to ensure compliance with Directive 2015/2302, as required by Article 24 of that directive.

59. I agree with the Finnish Government, which pointed out at the hearing that a national court should inform the consumer of his or her rights as soon as it has doubts that the latter does not fully claim his or her rights out of ignorance. The 'merest indication'[46] to that effect should suffice. Such an indication should be deemed to be apparent in circumstances, such as the ones in the main proceedings, where the organiser breached its pre-contractual obligation to inform or if the information provided is not given in 'a clear, comprehensible and prominent manner', as required by Article 5(3) of Directive 2015/2302.

60. The Finnish Government also rightly pointed out at the hearing that the national court informing the consumer of his or her rights is a measure of organisation of procedure. It is a distinct procedural step addressed to both parties and carried out in accordance with the formal requirements laid down in that regard by the national rules of procedure.[47] As has already been pointed out,[48] where the national court raises of its own motion a plea in law, it has to act in accordance with the principle of *audi alteram partem* and invite both parties to submit their observations on the court's assessment.

61. It follows from the foregoing that effective consumer protection could be achieved only if the national court were required, where it has available to it the legal and factual elements necessary for that task, to apply of its own motion Article 12(2) of Directive 2015/2302 and duly to inform the consumer of his or her right to terminate the contract without paying any termination fee, set out in that provision, provided always that the principle of *audi alteram partem* has been complied with.

(c) The limitations to the ex officio *powers of the courts: on the principle of* ne ultra petita

62. The next matter raised is whether the obligation of the national court to apply of its own motion Article 12(2) of Directive 2015/2302 and duly to inform the consumer of the rights he or she derives therefrom also implies an obligation on the national court to award a full refund of its own motion exceeding the amount claimed by the consumer. The referring court asks, in essence, whether the application, in such circumstances, of the principle that the subject matter of an action is delimited by the parties as well as the principle of *ne ultra petita* would be contrary to effective consumer protection.

[46] To that effect, Werbrouck, J. and Dauw, E., op. cit., note 10, p. 330.

[47] See, to that effect, judgment of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 31).

[48] Point 48.

63. In that regard, it must be clarified that the court applies the law of its own motion *within its competences* and within the limits of the subject matter of the dispute before it. It is therefore important to distinguish between two different aspects of judicial powers. It is one thing to recognise the power of a court to apply of its own motion the provisions intended to protect consumers and duly to *inform* the consumer of the rights he or she derives therefrom. It is quite another to recognise the power of the court, *after the consumer has been duly informed*, to exceed the limitations of the subject matter of the dispute and to *award* of its own motion more than what the consumer has claimed.

64. All the interested parties underlined the significance of the principle that the subject matter of an action is delimited by the parties.[49] It must be pointed out that the doctrine of *ex officio* application of consumer law involves only the *necessary* adjustments to that principle in order to correct the imbalance between the consumer and the professional. It is not meant to disregard fundamental principles of civil litigation or to establish a 'paternalistic' court.[50] As the Court held in *Lintner*,[51] the effectiveness of the protection that the national court is deemed to grant to the consumer, by intervention of its own motion 'cannot go so far as to ignore or exceed the limitations of the subject matter of the dispute as defined by the parties by their claims, in the light of the pleas they have raised, with the result that that national court is not required to extend that dispute beyond the forms of order sought and the pleas in law submitted to it'. The contrary would disregard the principle of *ne ultra petita*, as it would allow the judge to ignore or exceed the limitations of the subject matter of the dispute established by the forms of order sought and the pleas in law of the parties.[52]

65. It must also be pointed out that the Court has attributed particular significance to the wishes expressed by the consumer in the procedure. The Court has made clear, in connection with the obligation on the national court to set aside, if necessary of its own motion, unfair terms pursuant to Article 6(1) of Directive 93/13, that that court is not required to exclude the possibility that the term in question may be applicable if the consumer, after having been informed of it by the court, does not intend to assert its unfair or non-binding status, thus giving his or her free and informed consent to the term in question.[53]

66. Thus, the system of protection established by EU consumer law and introduced for the benefit of consumers cannot go as far as being imposed on them. Accordingly, where the consumer prefers not to rely on it, that system of protection is not applied.[54] The consumer may oppose the *ex officio* application of the law in his or her own case.[55]

[49] For a detailed comparative analysis of the guiding principles of civil procedure and the impact of EU consumer law, see Hess, B. and Law, S. (eds), *Implementing EU Consumer Rights by National Procedural Law: Luxembourg Report on European Procedural Law, Volume II*, Beck, Hart, Nomos, 2019.

[50] See Beka, A., *The Active Role of Courts in Consumer Litigation, Applying EU Law of the National Courts' Own Motion*, Intersentia, Cambridge, Antwerp, Chicago, 2018, p. 354, who observes that the active consumer court 'is not a paternalist court' and that 'it operates within the boundaries of civil justice, albeit adapted to the specificities of consumer litigation'.

[51] Judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 30).

[52] Judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 31).

[53] Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 53).

[54] Judgment of 3 October 2019, *Dziubak* (C-260/18, EU:C:2019:819, paragraph 54).

[55] See Biardeaud, G. and Flores, P., *Crédit à la consommation, Protection du consommateur*, Delmas Express, Paris, 2012, p. 300.

67. The same considerations should prevail in the context of the system of protection provided under Directive 2015/2302. Therefore, if the consumer, after having been duly informed by the court of his or her rights and the procedural means to assert them, does not wish to rely on that protection, the principle of effectiveness cannot be stretched so far as to oblige the national court to extend the claim and breach the principle of *ne ultra petita*.

68. At the hearing, there were questions and observations from the bench with regard to the valid grounds that may explain the consumer's decision to claim less than that to which he or she is entitled. Indeed, depending on the legal system, that decision can be attributed to considerations related to the applicable procedure.[56] It may also not be excluded that personal considerations are involved.[57] In such circumstances, if the consumer remains passive after having been informed by the national court of his or her rights and the means to assert those rights, it is reasonable to infer that he or she makes a free and informed choice to maintain the original claim.

69. However, in the case in the main proceedings, as the Commission pointed out at the hearing, it is not possible to consider that the consumer, who did not submit observations with respect to the matters raised by the national court, expressed a free and informed choice to maintain the original claim. As observed above,[58] it does not clearly follow from the file whether the referring court explained to the consumer his rights and the procedural means available to assert them.

70. It is also important to point out that it follows from the case-law of the Court that national courts have no general obligation to go beyond the ambit of the dispute and grant more or something different from what was asked for. This applies, more specifically, to the right of the consumer to obtain the restitution of amounts wrongly paid under an unfair contract term. There must be *specific and exceptional* circumstances which indicate that the consumer is *deprived of the procedural means* enabling him or her to assert his or her rights under EU consumer law.[59]

[56] The Spanish and Finnish Governments pointed out that a possible reason to file a claim for a smaller amount than what an applicant is entitled to can be due to the possibility of self-representation below a certain threshold. Another consideration could be, depending on what the national law provides, that the judgment issued in small-claims proceedings is not subject to appeal. The Finnish Government noted that if an applicant has to bear his or her own costs in case of partial success of the claim and if he or she is uncertain of the outcome, he or she might choose to file a claim for a smaller amount.

[57] For instance, in view of the pandemic, a consumer might consider that there should be a fair division of the risk of the termination of the contract.

[58] Point 38.

[59] Two examples may be given in that regard. The first one is the judgment of 17 May 2022, *Unicaja Banco* (C-869/19, EU:C:2022:397; 'the judgment in *Unicaja Banco*'). The context of that judgment is very specific. It has to be read in the light of the judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980; 'the judgment in *Gutiérrez Naranjo*'), in which the Court held incompatible with Article 6(1) of Directive 93/13 the case-law of the Tribunal Supremo (Supreme Court, Spain) that temporally limited the restitutory effects connected with the finding of unfairness by a court, in respect of a specific type of clause ('floor clause'), to amounts wrongly paid under such a clause after the delivery of the decision in which the finding of unfairness is made. In the judgment in *Unicaja Banco*, the Court ruled, essentially, that the principle of *ne ultra petita* should not preclude a court hearing an appeal against a judgment temporally limiting the repayment of sums wrongly paid by the consumer under a term declared to be unfair, from raising of its own motion a ground relating to the infringement of Article 6(1) of Directive 93/13 and ordering the repayment of those sums in full, where the failure of the consumer concerned to challenge that judgment cannot be attributed to his or her complete inaction. In the circumstances of that case, the fact that a consumer did not bring proceedings within the appropriate period could have been attributable to the fact that, when the Court delivered the judgment in *Gutiérrez Naranjo*, the period within which it was possible to bring an appeal or cross-appeal under national law had already expired. The second example is the judgment of 3 October 2013, *Duarte Hueros* (C-32/12, EU:C:2013:637). In that case, the consumer had asked only for rescission of the sales contract due to defect of the product bought. The national court considered that, as the defect was minor, the consumer was not entitled to rescission of the contract but instead to reduction of the price. However, the remedy of price reduction could no longer be afforded to the applicant. The Court considered that, in that specific case, the application of the principle that judicial decisions must be commensurate with the requests made by the parties would be liable to undermine the effectiveness of the consumer protection in so far as Spanish procedural law does not allow the national court to recognise of its own motion the right of the consumer to obtain an appropriate reduction in the price of the goods, even though that consumer is not entitled to refine his or her initial application or to bring a fresh action to that end.

71. Moreover, in a similar vein, the Court has ruled that national courts are not obliged, in principle, to offset of their own motion between the payments unduly made on the basis of an unfair term and the remaining amount due on the basis of the contract, without prejudice to observance of the principles of equivalence and effectiveness. [60]

72. Therefore, it follows from the case-law that the principles of effectiveness and effective judicial protection do not oblige national courts to ignore or exceed the limitations of the subject matter of the dispute established by the forms of order sought by the parties. Those principles require, however, that effective means be available to allow the consumer to assert his or her rights and claim that to which he or she is entitled.

73. This leads us to the question whether such effective procedural means were available in the case in the main proceedings. The order for reference for a preliminary ruling contains only the provision of national law which establishes the principle of non-alterability of the dispute (Article 412(1) of the LEC). However, the national court did not elaborate on the concrete application of that principle in the Spanish legal order. [61] Nor did it elaborate on whether a possible amplification of the claim would require a change in the competent jurisdiction or a change of the procedure applicable. It is therefore a matter of national procedural law to determine the procedural means under which the consumer may exercise the right to claim the entire amount of the payments made, subject to the principles of equivalence and effectiveness. That could consist, for instance, in bringing a new action or in extending the subject matter of the dispute before the referring court on the invitation of the latter. [62] In that regard, it should be recalled that the fact that a particular procedure comprises certain procedural requirements that the consumer must respect in order to assert his or her rights does not mean that he or she does not enjoy effective judicial protection. [63] However, as I have already pointed out, the procedural means available to assert those rights should afford effective judicial protection.

74. In view of the above, I conclude that Article 12(2) of Directive 2015/2302, read in the light of Articles 114 and 169 TFEU, must be interpreted as not precluding the application of principles of national judicial procedure, under which a national court hearing the dispute may not award the consumer, of its own motion, the full refund of the amounts to which he or she is entitled in circumstances in which the consumer has claimed a lesser amount. However, the national court is obliged to apply Article 12(2) of Directive 2015/2302 of its own motion where it has available to it all the legal and factual elements necessary for that task and provided that the principle of

[60] Judgment of 30 June 2022, *Profi Credit Bulgaria (Offsetting* ex officio *in the event of an unfair term)* (C-170/21, EU:C:2022:518, paragraph 44).

[61] The rules governing the possible evolutions of the object of the dispute may vary according to the legal system. For instance, under French civil procedural law, the forms of order sought by the parties, in principle, may not be altered, except with regard to ancillary claims if they are sufficiently linked to the original claims (Article 4 of the Code de Procédure Civile (Civil Procedure Code)). See Cadiet, L, Normand, J. and Amrani-Mekki, S., *Théorie Générale du Procès*, 3rd edition, Thémis droit, Puf, 2020, p. 741, who explain that the principle of non-alterability of the dispute has been transformed into a principle of alterability controlled by the courts ('*principe directeur du procès, l'immutablité du litige s'est muée, au fil du temps, en principe de mutabilité contrôlée du litige*'). In German civil procedure, pursuant to Paragraph 263 of the Zivilprozessordnung (Code of Civil Procedure; 'the ZPO'), upon the dispute having become pending, modifications of the claim filed are generally dependent on the consent of the other party or if the court considers such a modification to be expedient. However, Paragraph 264 of the ZPO excludes certain instances from the rules on the modification of the action provided for under Paragraph 263 of the ZPO and, in the interest of procedural economy, enables the applicant to make changes (Bacher, K., in Vorwerk, V. and Wolf, C., *BeckOK ZPO*, 47th edition, Verlag Beck München, 2022, § 264, point 1). The objective is to avoid new legal disputes and to spare the parties, but also the judiciary, from having to deal repeatedly with the same subject matter (see Foerste, U., in Musielak, H.-J. and Voit, W., *ZPO – Zivilprozessordnung*, 19th edition, Verlag Franz Vahlen, 2022, § 264, point 1).

[62] See, to that effect, judgment of 11 March 2020, *Lintner* (C-511/17, EU:C:2020:188, paragraph 39).

[63] Judgment of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367, paragraph 50).

audi alteram partem is observed. More specifically, the national court is obliged duly to inform the consumer of the rights he or she derives from that provision and of the procedural means available to assert those rights, provided that those means afford effective judicial protection.

Conclusion

75. In the light of the above considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Juzgado de Primera Instancia nº 5 de Cartagena (Court of First Instance No 5, Cartagena, Spain) as follows:

(1) Consideration of the first question has revealed nothing capable of affecting the validity of Article 5 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

(2) Article 12(2) of Directive 2015/2302, read in the light of Articles 114 and 169 TFEU, must be interpreted as not precluding the application of principles of national judicial procedure, under which a national court hearing the dispute may not award the consumer, of its own motion, the full refund of the amounts to which he or she is entitled in circumstances in which the consumer has claimed a lesser amount. However, the national court is obliged to apply Article 12(2) of Directive 2015/2302 of its own motion where it has available to it all the legal and factual elements necessary for that task and provided that the principle of *audi alteram partem* is observed. More specifically, the national court is obliged duly to inform the consumer of the rights he or she derives from that provision and of the procedural means available to assert those rights, provided that those means afford effective judicial protection.