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Law and Economics

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New ruling by the Court of Justice of the European Union on the opening commission: analysis of the judgment of 30 april 2025 (case c-699/23)

In the context of contractual relationships between consumers and banking institutions—which have been extensively analyzed by our courts—the opening commission is a clause that, like many others, has not been free from controversy.

This often-debated commission generally represents a percentage of the total loan amount, charged to the consumer at the time the loan is granted. It aims to compensate for the services and expenses incurred by the bank due to the assessment process involved in granting a loan, typically a mortgage.

Thus, even though the Supreme Court validated this clause in its Judgment 816/2023 of May 29, many Provincial Courts have interpreted that, according to the previous Judgment of the Court of Justice of the European Union (CJEU) of March 16, 2023 (case C-565/21), the opening commission clause was abusive. It was essential, they argued, for the bank to prove the specific services justifying the collection of such a commission in order to deem it valid.

In this national scenario, marked by legal disagreements over this commission, there were two opposing views. On the one hand, the Supreme Court stated it was not necessary to prove the specific services rendered by the bank to charge the commission (since such services were presumed provided under the legal framework of the Order of May 5, 1994). On the other hand, there was opposing case law declaring the clause null and void unless, in a judicial process, the bank could prove which specific services it had provided to justify charging the borrower.

Against this backdrop, following the preliminary questions submitted to the CJEU by the presiding judge of the Court of First Instance No. 8 of San Sebastián (a court specialized in these matters), the recent Judgment of the CJEU of April 30, 2025 (case C-699/23) was issued. As we will see, it supports the national judge's role in determining the validity or nullity of the opening commission, helping to unify case law criteria.

Firstly, the CJEU emphasizes that the bank is not required to detail every service provided as part of the opening commission. It clarifies that Directive 93/13 does not require the lender to provide the consumer with, for example, invoices listing the specific services related to loan assessment.

However, the CJEU does point out that, for a reasonably well-informed and observant consumer to understand the financial impact of the opening commission clause—and for the clause to pass the transparency test in court—it is crucial to examine the information provided to the borrower before the loan contract was signed. Specifically, it must be assessed whether the bank provided the pre-contractual information it was obligated to deliver according to national law at the time of contracting.

The judgment also states that expressing the commission as a percentage of the total loan does not, in principle, hinder the consumer's understanding of the clause. Therefore, stating the cost as a percentage does not appear to violate transparency requirements.

In conclusion, although the CJEU notes that the opening commission does not inherently create an imbalance between the contracting parties—and that banks are not obliged to explain what exact services it remunerates—this latest ruling shifts the focus to the pre-contractual information provided to the consumer. Particular attention must be given to whether the bank delivered the documentation it was legally required to provide.

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Bill Proposal for the Fiscal Reform of the Real Estate Market: More Pressure on Owners and Foreign Investors

On May 22, 2025, the Socialist Parliamentary Group submitted a bill proposal with significant implications for the real estate market. Among the new measures, three major tax changes stand out: a reform of the system for imputing real estate income, the creation of a new tax for foreign buyers not resident in the European Union, and an increase in the special tax rate for publicly traded Real Estate Investment Trusts (known as SOCIMIs). These measures, which aim to mobilize vacant housing, have already sparked notable debate among tax experts and economists in the sector, who foresee that this new set of tax policies will increase the fiscal burden on citizens and result in an ineffective stimulus for the real estate market.

The first affected area in the new bill proposal is directly related to the system of imputing real estate income in the Personal Income Tax (IRPF). Until now, owners of non-rented properties had to impute, as a general rule, a real estate income of 2% on the cadastral value of the property in their income tax return. For properties in municipalities where the cadastral value had been reviewed in the last 10 tax years, the percentage rate was reduced to 1.1%. If this reform proceeds, the current calculation system would disappear and be replaced by a progressive bracket system, as follows:

- Up to €100,000 of cadastral value sum: 1.1%
- From €100,000 to €500,000: 1.5%
- From €500,000 to €1,000,000: 2%
- Over €1,000,000: 3%

In short, Spaniards will face a higher tax burden for owning a second home or a vacation property.

Another key point of this bill focuses on toughening the tax regime applicable to SOCIMIs. The legal text intends to modify the fourth paragraph of article 9 of Law 11/2009, of October 26, which regulates SOCIMIs, by increasing from 15% to 25% the special tax rate applicable to undistributed profits of these legal entities, provided that these profits derive from rental housing activity.

This new measure could significantly impact the tax planning of many SOCIMIs, especially those focusing their real estate business on renting housing in major cities.

Finally, the third novelty is the introduction of a new tax into the legal framework called the State **Complementary Tax on the Transfer of Real Estate to Non-Residents in the European Union.** The purpose of this indirect tax is to levy the onerous acquisition by subjects (individuals and legal entities) who are non-residents of the EU of real estate located in Spanish territory.

The taxable base of this tax will be the highest of the following amounts: the reference value of the property, the declared value by the interested party, and the transfer price of the property. From the resulting taxable base amount, any mortgage debt that the buyer may have will not be deductible.

The total tax rate is 100% of the taxable base amount.

Only amounts paid as other indirect taxes (such as Transfer Tax and Stamp Duty - ITP-AJD) will reduce the total tax. Consequently, any non-EU resident wishing to purchase property in Spain will pay, in taxes, roughly the same amount as the price paid for the acquisition, which practically means paying double compared to an EU resident for buying property in Spain.

As expected, this legislative initiative has sparked controversy in the legal and tax community, as the imposition of a 100% tax rate is considered to violate the constitutional principle against confiscatory taxation.

This complementary tax will not apply to property sales when the sellers are businesses or professionals acting within their economic activity, in which case the transfer will be subject to VAT. In summary, it will be important to watch how this bill evolves in parliament, as, as noted above, it is already generating controversy in the legal and economic sectors.

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The CJEU Declares the Gender Gap Pension Supplement Discriminatory

A new setback for Spanish legislators: the Court of Justice of the European Union (CJEU) declares that the current gender gap pension supplement infringes the principle of equality enshrined in Directive 79/7/EEC, constituting indirect sex discrimination, which once again opens the door for men to claim it.

Let's look at the background.

In 2016, through Article 60 of the General Social Security Law, a supplement to the retirement pension called the "maternity supplement" was introduced, intended solely for women who had been mothers, recognizing their demographic contribution to Social Security.

Therefore, from January 1, 2016, this supplement was granted only to women and denied to men who requested it. However, one man who was denied this supplement appealed the decision all the way to European courts, and in December 2019, the CJEU ruled that the maternity supplement, as configured, was discriminatory against men.

This was confirmed by the Supreme Court's Social Chamber Full Bench Judgment on May 17, 2023 (appeal 3821/2022), establishing that the maternity supplement for demographic contribution could be granted to both women and men, provided they met the legally required conditions.

This led to a modification of the said supplement — and consequently Article 60 of the General Social Security Law — which, from February 3, 2021, was renamed the "contributory pension supplement for the reduction of the gender gap."
Thus, pensions obtained between January 2016 and February 2021 were subject to the "maternity supplement" and granted to both women and men.

But since the new supplement came into effect in February 2021, the requirements changed:

- Women are granted it **automatically** simply for having been mothers of one or more children, due to the general impact the gender gap has on women's contributory Social Security pensions.

- Men must meet stricter conditions, requiring that, in the case of retirement or permanent disability pensions, their professional career must have been interrupted or adversely affected due to the birth or adoption of a child, including periods of contribution interruption exceeding 120 days between nine months before the birth and three years after (or equivalent periods for adoption). Additionally, the pension amount must be lower than the mother's pension for the supplement to be granted.

In this way, with the new wording of Article 60 LGSS, women automatically receive the supplement for having had at least one child, without needing to justify any professional detriment, whereas men must prove that certain conditions are met.
Well, this "contributory pension supplement for the reduction of the gender gap" has again been brought before the CJEU, which issued a ruling on May 15, 2025 (case C-623/23), concluding that this disparity between men and women grants less favorable treatment to men compared to women, even though either could be in a similar situation.

For this reason, under Directive 79/7/EEC, which expressly prohibits discrimination based on sex in the calculation of social benefits, Article 60 of the LGSS in its current version is incompatible with European law because by imposing stricter requirements on men, it violates the principle of equality.

However, the CJEU finds it lawful for the supplement to be granted only to the parent with the lower retirement pension, regardless of whether it is the man or the woman.

Therefore, just as with the initial "maternity supplement," the CJEU opens the door for men who have been fathers and who have accessed retirement pensions from February 2021 onward to claim the right to the "contributory pension supplement for the reduction of the gender gap," provided they meet certain conditions.

This will almost certainly lead to a significant increase in such claims by male parents, and it remains to be seen what the public administrations decide: whether they continue denying them, forcing judicial appeals, or whether they change their approach. In any case, since Article 60 LGSS has not yet been amended, it appears that, for now, the Administration's criteria will remain unchanged.

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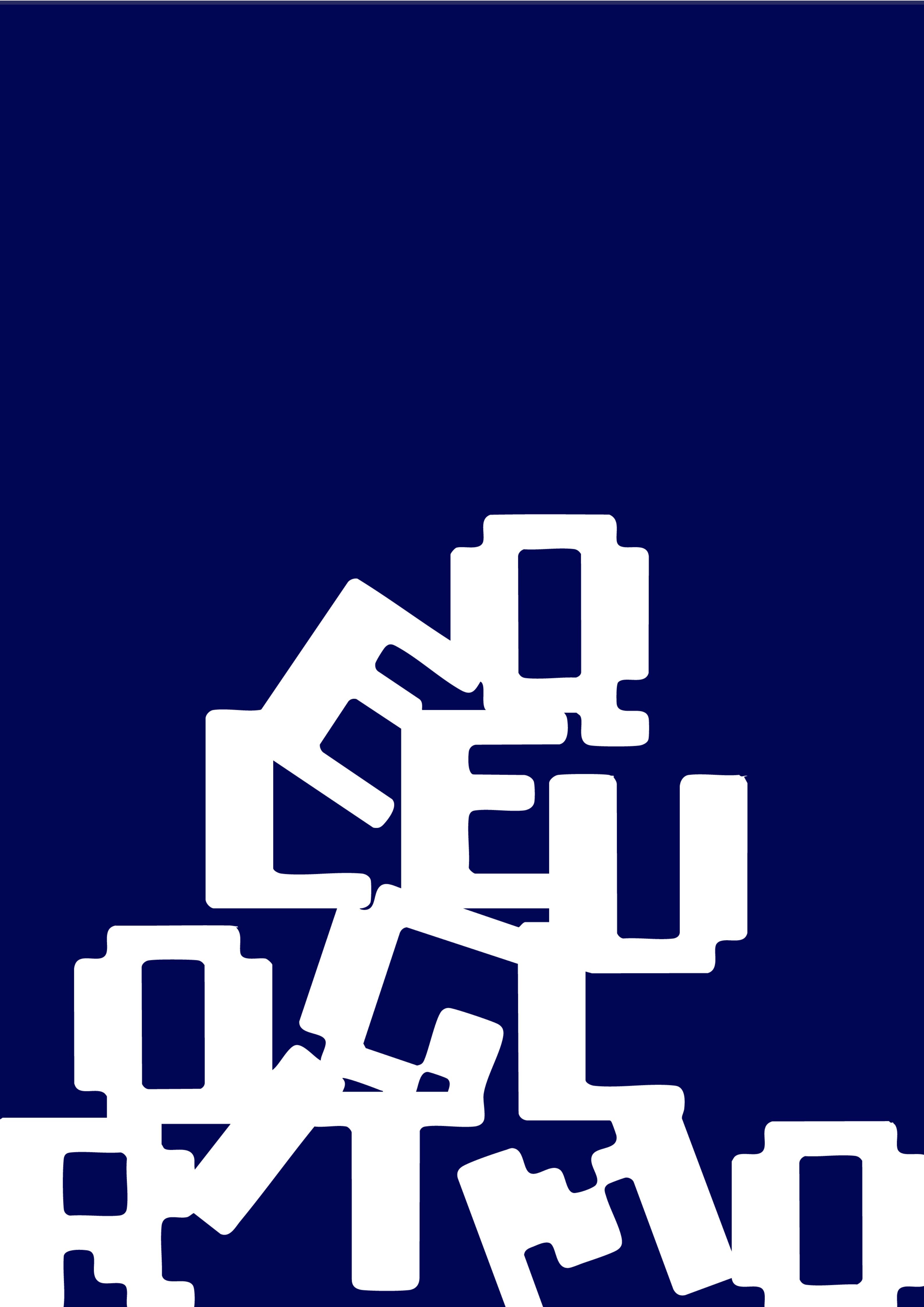

JULY

The Supreme *Court closes the door to permanent* status without competitive examination in public employment

The recent Judgment 687/2025, dated February 25, from the Administrative Litigation Chamber of the Supreme Court, represents a highly significant ruling in the field of public employment. In it, the High Court establishes that it is not permissible to recognize permanent civil servant status for interim staff through judicial means if doing so would violate the constitutional and legal principles governing access to public office.

The mentioned judgment resolves a cassation appeal filed by an interim worker who had accumulated more than 13 years in the same position without the post ever having been opened in any selection process. She requested her conversion into a permanent civil servant and, subsidiarily, compensation for abusive temporary employment, alleging violation of Clause 5 of the Framework Agreement annexed to Directive 1999/70/EC.

The Supreme Court dismisses the appeal and reminds that access to public office is constitutionally reserved for those who pass merit-based, capacity, and equality-guaranteed selection processes. While acknowledging that there has been abusive use of temporary contracts, the Chamber concludes that automatic conversion to permanent status outside the legal access system cannot operate, as it would constitute an interpretation contra constitutionem (against the constitution).

Regarding economic compensation, the Chamber reiterates that indemnity is only due if real and concrete damages are proven, rejecting generic or punitive compensations.

This judgment consolidates national case law on the matter and clarifies the scope of protection against abuse of temporary employment in the public sector.

On one hand, it consolidates the constitutional framework: permanent civil servant status can only be obtained after passing a selection process, without exceptions outside the current legal framework.

On the other hand, it delimits the impact of European Union law. Although Directive 1999/70/EC requires States to sanction abuse in temporary hiring, it does not mandate conversion to permanent status if this conflicts with domestic law, especially constitutional law.

Finally, it highlights the importance of proving damage: not every prolonged situation of temporary employment gives rise to compensation. Concrete, assessable, and directly abuse-derived damage must be demonstrated.

In conclusion, Judgment 687/2025 rejects the possibility of recognizing permanent status without competitive examination and establishes clear jurisprudential criteria about the limits imposed by our legal system to sanction abuse of temporary employment. While it reiterates the obligation of Public Administrations to hold selection processes timely and properly, it also warns that the only way to achieve permanent civil servant status remains, in all cases, strict compliance with the legally established procedures.

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The mitigating circumstance of reparation: current questions

Paraphrasing Luzón Cuesta, mitigating circumstances are incidental elements of a crime—they do not determine its existence but rather reflect reduced imputability, culpability, or unlawfulness, thereby mitigating the legally prescribed penalty. They need not coincide with the moment of the offense to apply.

To understand today's concept of the mitigating circumstance of reparation, one must know its recent history:

The 1973 Penal Code included, among its mitigating factors under Article 9, the fact that the offender—before being aware of judicial proceedings and out of spontaneous repentance—had repaired or reduced the effects of the crime, satisfied the victim, or confessed the offense. With the 1978 Spanish Constitution, a new Penal Code was enacted in 1995, making reparation of victim damage a mitigating factor at any time before the oral trial.

Thus, the previous combined mitigating circumstance of reparation and confession was divided. Regarding the former, earlier legislation imposed several requirements: a chronological one (before awareness of proceedings), an objective one (repairing or reducing effects), and a subjective one (motivated by spontaneous repentance). The new Code relaxed the timing, allowing reparation up to just before the trial, and removed the subjective repentance requirement—focusing instead on encouraging victim reparation. Today, the State incentivizes the offender to lessen the victim's hardship, even if motivated by self-interest, through a utilitarian aim, steering away from moralizing legislation in the Penal Code.

Despite the nearly thirty years of our current Code, practical uncertainties around this mitigation persist. Let's analyze its application, starting with the essential: an unconditional reparation payment does not imply any admission of guilt. Current controversies provide examples, such as the well-known Dani Alves case: the Barcelona Provincial Court (Section 21) on February 22, 2024, convicted Alves of rape while applying the reparation mitigating factor. In its 11th legal reasoning, it held that even if the victim rejected the €150,000 deposited by the accused in escrow unconditionally, that would not nullify the mitigation. However, it was considered only a basic rather than a highly qualified mitigation because "it was a small amount relative to his wealth" and because "sexual offenses cannot be economically repaired."

The Superior Court of Justice of Catalonia, in Judgment 109/2025 of March 28, acquitted him, corrected the lower court's reasoning, and added that discriminating access to reparation due to economic ability is condemnable, as the law does not provide for it. It cited Supreme Court Order 10156/2024, stating that the reparer's economic capacity is not decisive in applying this mitigating factor, although it may be considered. Moreover, laws and jurisprudence allow quantification of damages in sexual offenses, such as Article 53 of Organic Law 10/22.

Other current issues were addressed in the Supreme Court's May 5, 2025 ruling, which summarized its recent doctrine on the matter:

1. The mitigation applies without need for repentance or fact acknowledgment, as the legislature removed subjective motives.
2. However, it does not completely discard subjective elements—it must be performed by the offender (only he can provide such reparation).
3. The judge applying the mitigation can consider personal elements of the reparer, but not to introduce subjective or personal judgments—rather, as part of an overall assessment.
4. It rejects applying this mitigating factor when bail is provided to guarantee civil liability, as that does not relate to damage repair and is legally or judicially mandated (see Articles 783.2 and 589 of the Criminal Procedure Code).

Therefore, only an unconditional, irrevocable deposit by the accused—made exclusively to repair the victim—has mitigating effect, even if the victim renounces the amount offered, since the mitigation is not at the victim's discretion. The Supreme Court's insistence on objectifying this mitigating circumstance reflects the necessity of legal certainty guaranteed by the Constitution—especially today—promoting victim reparation while avoiding needless moralism.

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