

Planned obsolescence and the rule of law

Jesús Alfonso Soto Pineda
Editor

Planned obsolescence and the rule of law

Universidad Externado de Colombia

Planned obsolescence and the rule of law / Magdalena Correa Henao [y otros] ; editor Jesús Alfonso Soto Pineda. – Bogotá : Universidad Externado de Colombia. 2018.

378 páginas ; 21 cm.

Incluye referencias bibliográficas al final de cada capítulo.

ISBN: 9789587900248

1. Derecho y economía 2. Derecho económico internacional 3. Ciclo de vida de los productos -- Aspectos constitucionales 4. Competencia (Derecho) -- Aspectos constitucionales I. Soto Pineda, Jesús Alfonso, editor II. Universidad Externado de Colombia III. Título

344.35

SCDD 15

Catalogación en la fuente -- Universidad Externado de Colombia. Biblioteca. MVT.
Noviembre de 2018

ISBN 978-958-790-024-8

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© 2018, UNIVERSIDAD EXTERNADO DE COLOMBIA
Calle 12 n.º 1-17 Este, Bogotá
Teléfono (57-1) 342 02 88
publicaciones@uexternado.edu.co
www.uexternado.edu.co

Primera edición: noviembre de 2018

Diseño de cubierta: Departamento de Publicaciones
Composición: Precolombi EU-David Reyes
Impresión y encuadernación: Imageprinting Ltda.
Tiraje de 1 a 1.000 ejemplares

Impreso en Colombia
Printed in Colombia

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PRESENTATION

Nowadays, largely because of the speed of technological and scientific progress and an increasing globalized society with capacity to interact communicating relevant information fluently, it is possible to easily identify huge commercial emporiums, big corporations and endless multinationals that use their influence in different fields, such as politics, society, culture, innovation and/or economy itself.

As a result of companies' dimensions and their disproportionate influence, citizens, societies, environment, governments and social stakeholders have to endure even more inequality today that the one they have had to confront in their past interactions with undertakings. Large companies are now in a favourable position to impair the rights of private parties, as well as to implement unacceptable, abusive demeanors.

Many important companies are taking advantage of their level of scientific and technological knowledge with regard to product's manufacturing, their financial support, influence, juridical resources, the complexity of legal tools made available to non-corporative individuals, and the lack of interest of private individuals to take legal actions against fuzzy injuries. Companies have chosen to come close to a barely defined legal line, just "minimally" fulfilling the formal requirements of the law and favouring

at the same time their incursion into “reckless” actions, which evidently cause social, ethics and legality distress in the amount of individual and collective repercussions worldwide.

Planned obsolescence is one of those conducts that can be interpreted as “irresponsible” or “not very considerate of citizens” and because of that, deserves an in-depth analysis from the law perspective.

In that context, this collective research book configures an academic resource aimed at raising hypotheses, arguments and legal proposals to address planned obsolescence. Practitioners, academics and researchers from five different universities in Colombia and Spain, led by the Law and Economics research group of Universidad Externado de Colombia, face the aforementioned business behaviour from different law outlooks that link planned obsolescence with the constitutional sphere, contractual theory, consumer protection law, antitrust law, private and public international law perspectives, human rights and European Union Law.

As leader of the research project which supported this legal creation it is a pleasure to present this collective book. An effort of all the parties involved that surely will lead the succeeding debates around planned obsolescence.

JESÚS ALFONSO SOTO PINEDA
Madrid, July 2018

CHAPTER 1
PLANNED OBSOLESCENCE: A NON-RESTRICTABLE
INDUSTRIAL PRACTICE?
ANSWERS FROM CONSTITUTIONAL LAW,
COMPARED LAW AND ABUSE OF THE LAW

MAGDALENA CORREA HENAO¹

INDEX: I. Introduction; 1. Planned Obsolescence: What is It?; 1.1. Concept and History; 1.2. Categories and Scope; 2. Planned Obsolescence from Constitutional Law and Legal Assets in Dispute; 2.1. Legal assets whose fulfilment is favoured; 2.1.1. Achieving Objective Legal Assets; 2.1.2. Subjective rights Grounds; 2.1.2.1. The pro libertate principle; 2.1.2.2. Animus Lucri faciendi; 2.2. Affected rights and Interests; 2.2.1. Affected collective assets; 2.2.2. Violation of Subjective Rights; 2.2.2.1. Limitations to the Consumers' right to information; 2.2.2.2. Narrowing the right to quality goods?; 2.2.2.3. Affecting the right to safety and activating the right to damage reparation?; 2.2.2.4. Violation of consumers' freedom right and proprietary rights and violation of rights associated to consumption; 3. Answers from the sources of law and assessment; 3.1. Hard Law, Semi-Hard Law and especially Soft Law; 3.2. Solutions

1 Thanks to my young colleague and collaborator VERÓNICA DELGADO, for her much appreciated support at researching and preparing this document.

proposed by the doctrine; 3.3. assessment; 4. A complementary Solution: An answer from the principle of Non-Abuse of rights; 4.1. How to Apply the principle of Non-abuse of Rights? A Proposal arising from its structural elements; 4.2. Planned Obsolescence as an abuse of right; II. Conclusion.

ABSTRACT: The main purpose of this research is to approach the study of the planned obsolescence from the sight of constitutional law, as a concept that in law has two sides (faces); on one hand the planned obsolescence favours the achievement of legal assets and find itself protected by the principles of *pro libertate* and *pro legalidade*, and on the other it affects collective (public) goods and infringes subjective rights such as the consumer's right to information, the right to quality goods, the right to security and the damage repair. In this context, a review about the answers offered by the different sources of law and the possible classification of the planned obsolescence as a hypothesis of abuse of rights, must be made.

Keywords: Planned obsolescences, principle of *pro libertate*, principle of *pro legalidade*, consumers, abuse of rights.

I. INTRODUCTION

How can constitutional law analyze planned obsolescence, which is a "firm's decision to limit a product useful life"? Which legal assets are stressed by its application and which answers are offered by the higher legal order?

The thesis put forward in this document suggests that planned obsolescence is supported by the *pro libertate* and *pro legalidade* principles, so that those rights that might be affected as a result of a firm's decision to limit lifespan of products, can only be addressed in the presence of breaches of Competition Law, Environmental Law, Consumers rights or, generally, measures of intervention on the economic activity.

Such answer does not seem to be very protective of rights, therefore we feel it is appropriate to complement it with some rules-principles that give greater fairness and justice to the legal solutions offered.

Our thesis, and its complement, will unfold as follows: first, we'll review the concept of planned obsolescence, in order to identify the object on which our analysis fall. Secondly, we will analyze the structural elements of free enterprise, that underlies the strategy of producing obsolete goods; third, we will point out those rights and interests that are breached due to the acceptance of such a practice. Fourth, we will briefly review the answer drawn from Comparative Law on planned obsolescence, to formulate preliminary conclusions that confirm the proposed thesis. This, in turns, opens the way to studying abuse of right and the principle prohibiting it, as a possible legal basis to turn to, in the event of lack rules-hard rule, to reduce the uneven costs and benefits allocation, caused by this business strategy, between producers on the one hand and consumers, the State and society in general, on the other hand.

1. Planned obsolescence: What is It?

1.1. Concept and History

Doctrine seems to agree on the concept of “planned obsolescence”, as the expression that describes the “*set of techniques*”², *strategies*³ or *business practices that seek to*

2 LATOUCHE, SERGE, *Hecho para tirar, La irracionalidad de la obsolescencia programada*, Barcelona, Octaedro, 2014, p. 78. Ver GILES, SLADE, *Made to Break: Technology and Obsolescence in America*, Cambridge, Harvard University Press, 2006.

3 SOTO PINEDA, “En torno a la relevancia jurídica de una estrategia empresarial consolidada y subyacente: la obsolescencia programada”, *Colección Enrique*

artificially reduce durability of manufactured goods⁴, through the “design, planning, projection and control”⁵ of the “its spare parts life cycle”⁶. All of that, with the purpose of stimulating the “repeated consumption”⁷ of such goods “within a short period of time”⁸, that is, “to stimulate demand, boost consumption and encourage individuals to buy new goods”⁹, and to strengthen “premature repurchase”¹⁰, due to loss of “functionality” of purchased goods, “or due to their expiration”¹¹⁻¹².

However, such concept has not been incorporated into legislated law, neither in Colombia nor in any of the countries of our comparative study. The only exception found is the recent French Law n° 2015-992^[13] (August 17, 2015)

Low Murtra *Derecho Económico*, Bogotá, Universidad Externado de Colombia, 2015, p. 327 y DE CASTRO VIERA, GABRIELLA, NACUR REZENDE, ELCIO, “A responsabilidade civil ambiental decorrente da obsolescência programada”, *Revista Brasileira de Direito*, jul-diz, 2015, p. 68.

- 4 MIRAGEM, BRUNO, “Vício oculto, vida útil do produto e extensão da responsabilidade do fornecedor: comentários à decisão do Resp 984.106/SC, do STJ”, *Revista de Direito do Consumidor*, São Paulo, vol. 85, p. 325. Also See LATOUCHE, SERGE, *op. cit.*, p. 78. Ver GILES, SLADE, *Made to Break: Technology and Obsolescence in America*, Cambridge, Harvard University Press, 2006.
- 5 SOTO PINEDA, JESÚS ALFONSO, *op. cit.*, p. 327.
- 6 MIRAGEM, BRUNO, “Vício oculto, vida útil do produto e extensão da responsabilidade do fornecedor: comentários à decisão do Resp 984.106/SC, do STJ”. *Revista de Direito do Consumidor*, São Paulo, vol. 85, p. 325.
- 7 LATOUCHE, SERGE, *op. cit.*, p. 78. Ver GILES, SLADE, *Made to Break: Technology and Obsolescence in America*, Cambridge, Harvard University Press, 2006.
- 8 DE CASTRO VIERA, GABRIELLA, NACUR REZENDE, ELCIO, *op. cit.*, p. 68.
- 9 SOTO PINEDA, JESÚS ALFONSO, *op. cit.*, p. 327.
- 10 MIRAGEM, BRUNO, *op. cit.*, p. 325.
- 11 SOTO PINEDA, JESÚS ALFONSO, *op. cit.*, p. 327.
- 12 That is, the “intentional programming of appliances to shorten their lifespan. That is, manufacturing devices with a limited life to stimulate purchase of their substitutes”. GARMA, JORGE (November 21st, 2014). “¿Por qué los electrodomésticos duran tan poco?”, *Diario de Ibiza*. Retrieved from: <http://www.diariodeibiza.es/vida-y-estilo/tecnologia/2014/11/21/alargar-vida-electrodomesticos/733382.html>
- 13 The only regulation that states a definition of planned obsolescence.

on Green (ecological) Energy Transition development¹⁴; its article L.213-4-1. L defines it as: “*L’ensemble des techniques par lesquelles un metteur sur le marché vise à réduire délibérément la durée de vie d’un produit pour en augmenter le taux de remplacement*”. In line with the above, the French Ministry of Ecology, Sustainable Development and the Sea (ADEME) radically states that it is “*Un stratagème par lequel un bien verrait sa durée normative sciemment réduite dès sa conception, limitant ainsi sa durée d’usage pour des raisons de modèle économique*»¹⁵.

Don’t let that mislead you: planned obsolescence is not a recent practice, nor is solely implemented by certain CEOs. In fact, references to its implementation as a manufacturing standard date back to the second industrial revolution¹⁶, with the discovery of new sources of energy¹⁷, as well as the precision with which durability of manufactured goods was calculated or defined¹⁸⁻¹⁹. But its introduction into the

14 Available on: [https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031044385& categorieLien=id](https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031044385&categorieLien=id)

15 Ministry of Ecology, Sustainable Development and the Sea, *2014-2020 National Program for waste prevention*, p. 37. [Online] [Checked on May 10, 2015] http://www.developpement-durable.gouv.fr/IMG/pdf/Programme_national_prevention_dechets_2014-2020.pdf

16 CHARLES BABBAGE, in 1823, was the first to describe it; with no need for such label, to this Cambridge professor this was a matter inherent to the industrial revolution. See: LATOUCHE, SERGE, *op. cit.*, p. 33.

17 Entering the 20th century, some facts contribute to consolidate this concept: the replacement of stoves and fireplaces by household appliances. See: VEBLEN, THORSTEIN. *Teoría de la clase ociosa*, Madrid, Alianza, 2011.

18 Ocampo points out how the earliest precursors of planned obsolescence date back to the 19th century, when THOMAS ALBA EDISON manufactured (1881) the first lightbulb, which lasted for 1.500 hours. See: OCAMPO, ELENA (June 9, 2013). “Los orígenes de la obsolescencia programada”, *El faro de Vigo*. Retrieved from: <http://www.farodevigo.es/sociedad-cultura/2013/06/09/origenes-obsolescencia-programada/825617.html>.

19 Specifically, in the USA, as the consumption society was born, in the 20’s, lightbulbs were manufactured to last no longer than 2.500 hours. In 1924,

market economy operated primarily as an industrial mechanism to overcome the economic crisis that plunged the United States around 1929 and in the following years. So, even though it was perceived as an adulteration or some kind of “*quality or quantity trick, in order to reduce costs*”, its value as an industrial strategy to stimulate demand growth, prevailed²⁰, at a time when such reactivation could only be considered positive, so much that it was even suggested it could become a mandatory production standard²¹. However, once the Great Depression was overcome, far from being abandoned, the use of this industrial practice increased²², with strategic designs, drawn by big enterprises²³, that ended up becoming in a trend²⁴.

“General Electric met in Geneva to discuss the duration of lightbulbs”; “The agreement was called «the Phoebus cartel». The purpose was to limit lightbulb life to 1.000 hours and it was accomplished in the 40’s, thanks to the «1.000 hours Committee» monitoring”, LATOUCHE, SERGE, *op. cit.*, p. 42.

- 20 LATOUCHE, SERGE, *Hecho para tirar, La irracionalidad de la obsolescencia programada*, Barcelona, Octaedro, 2014, p. 33.
- 21 A proposition formulated by Bernard London, in two works of different character published between 1932 and 1933 (Ending the Depression through Planned Obsolescence –and - The New Prosperity–. OLIVEIRA DA SILVA, MARÍA BEATRIZ, “Obsolescência programada e teoria do decréscimo versus Direito ao desenvolvimento e ao consumo (sustentáveis)”, *Veredas do Direito*, Belo Horizonte, vol. 9, n.º 17, p. 183.
- 22 On the subject, GÜNTHER ANDERS states that “the effective immortality of these products would have led to death of production. But manufacture feeds on the death of products (always must buy the new one); consequently, to ensure eternal life for production, each specimen must be mortal”. GÜNTHER, ANDERS, “La obsolescencia del hombre”, *Pre-Textos*, Valencia, 2011. Quoted on LATOUCHE, SERGE, *op. cit.*, p. 39.
- 23 In the 50’s, Clifford Brooks Stevens designed new models with no technical improvements, to encourage consumers into buying products before their old ones were out of order, calling such behavior ‘planned obsolescence’. (Quoted on LATOUCHE, SERGE, *op. cit.*, p. 39). See: ONETTO MUÑOZ, BRENO, “El sueño de las máquinas. Reflexiones en torno a la obra de GÜNTHER ANDERS”, *Alpha: revista de Artes, letras y filosofía*, n.º 39, 2014, pp. 301-308. Available at: <https://dialnet.unirioja.es/servlet/articulo?codigo=5000351>
- 24 The term use-and-discard was born and the automobile market referred to

1.2. Categories and Scope

The acceptance and promotion of planned obsolescence put scientists at the service of manufacturing enterprises. Therefore, implementing methods have diversified. Nowadays, they can be classified into two categories: objective planned obsolescence and subjective planned obsolescence.

i. *Objective planned obsolescence operates on the product. "It's based on useful lifespan or actual duration of the product or good, which has been previously estimated. User is compelled to buy a new product, since the one he/she owns has no use"*²⁵. Thus, *"artificial wearout or defects are planned by the manufacturer from the start, so that the product has a limited lifespan, thanks to the systematic introduction of ad hoc devices"*²⁶.

Within this category, two conducts of the manufacturer can be identified²⁷:

– Functional objective obsolescence is *"based (...) on the inclusion of elements required to ensure that the product will adjust*

the so-called Detroit model, that is the "practice consisting of encouraging consumers into changing car model every year or every two years, without a real modification of the product". LATOUCHE, SERGE, *op. cit.*, p. 59 y ss. See: DE CASTRO VIERA, GABRIELLA, NACUR REZENDE, ELCIO, "A responsabilidade civil ambiental decorrente da obsolescência programada", *Revista Brasileira de Direito*, jul-diz, 2015.

25 RUIZ MALBAREZ, MAYRA, ROMERO, ZILATH, "La responsabilidad social empresarial y la obsolescencia programada", *Saber, ciencia y libertad*, vol. 6, n.º 1, 2011, p. 133.

26 LATOUCHE, SERGE, *op. cit.*, pp. 33-34.

27 There may be a third one, that the doctrine identifies as objective obsolescence by advice note (eg: razor blades, printer cartridges): when buying the product, consumers are informed on the product durability and when it must be replaced by a new one. Thus, the limited durability of the product is incorporated into the elements that define the good, and it is acknowledged by consumers when purchasing the product.

*its lifespan to the one estimated by the manufacturer*²⁸. Here, the manufacturer is well aware of the product lifespan and puts in motion conducts that reinforce it, such as:

- Setting up a system where replacement costs are similar to repair costs.
 - Obstructing consumers' care and assistance services²⁹.
 - Discontinuing spare parts or accessories for the product³⁰.
- Technical objective obsolescence³¹, according to which a product disuse is a consequence of technical progress, which incorporates improvements leading to the product renewal³². A product becomes obsolete not necessarily because it does not last longer, but also because, according to the consumer, the product is unable to perform the functions that were guaranteed when buying the current product.

The latter subspecies specializes in computer objective obsolescence, that springs from technology evolution, as well as from

28 SOTO PINEDA, JESÚS ALFONSO, *op. cit.*, p. 336.

29 "By incompatibility, this obsolescence relates to that of the after-sales service, meaning that consumers will be more inclined to buy a new product than to repair the old one, partly due to the duration and price of repairs". LIBAERT, THIERRY, European Economic and Social Committee, *Opinion of the European Economic and Social Committee on 'Towards more sustainable consumption: industrial product lifetimes and restoring trust through consumer information'* (2014/C 67 /05) approved on Sept. 26, 2013 by the Consultative Commission on Industrial Change (CCMI), p. 27.

30 Also called indirect planned obsolescence, "*generally born from the impossibility to repair a product due to lack of suitable spare parts or because repair is impossible*". LIBAERT, THIERRY, *op. cit.*, p. 27.

31 An example of this type of obsolescence are VHS, which were replaced by DVD.

32 See: VEGA, OMAR ANTONIO, "Efectos colaterales de la obsolescencia tecnológica", *Revista Facultad de Ingeniería*, UPCT, Enero-junio de 2012, vol. 21, n.º 32, pp. 55-62; DUQUE GÓMEZ, ERNESTO, *Geopolítica de los negocios y mercados verdes*, Bogotá, ECOE ediciones, 2011.

“the withdrawal, by the firms, of those conditions required by users to continue using the product and to maintain its functionality”³³.

ii. *Subjective or non-functional planned obsolescence* applies to consumers, not to products. It’s based on the development of marketing techniques according to which, although *“the product is still useful, the owner wishes to renew it for a more recent or a more attractive one, which translates into enjoying more comfort and projecting better financial status to society”³⁴.*

This results into psychological obsolescence, where the act of discarding or not using a product, is a consequence of advertisement and fashion.

From this brief reference to the object of our analysis, it is possible to characterize planned obsolescence as a business formula that increases both production and consumption, either by shortening the objective life span of goods, or because new technologies and trends favour disuse and purchase of new products.

2. Planned Obsolescence from Constitutional Law and Legal Assets in Dispute

Once identified the issue, it is necessary to determine which legal assets are in dispute with its implementation, that is, which rights or interests are exercised with planned obsolescence and which, in turns, are affected by being reduced, limited or put at risk of annulment.

33 SOTO PINEDA, JESÚS ALFONSO, Thus, the present category arises: (i) When a *software* is pushed into disuse, due to the appearance of a new one, incompatible with the first one, and (ii) When a lesser hardware performance is perceived, due to the evolution of the software installed”, *op. cit.*, p. 339.

34 RUIZ MALBAREZ, MAYRA, ROMERO, ZILATH, *op. cit.*, p. 133.

2.1. *Legal Assets whose fulfilment is favoured*

2.1.1. Achieving objective legal assets

According to Soto Pineda, the practice of planned obsolescence allows to develop and protect certain legal assets of objective nature, such as economic sustainability of firms, as well as their capacity to generate and preserve employment. It also serves to promote economic growth and stimulate “innovation as an indispensable element of development and as a justification for the ‘imperative’ legality of the strategy itself”³⁵.

Those are significant and protectable legal assets, based on constitutional provisions stating that enterprise is the “basis of development” (art. 333 Const.)³⁶, in addition to considering that stimulation of competitiveness and productivity are targets for public economic intervention (art. 334 Const.). And let’s not forget that technological and industrial innovation are two of the business competitiveness conditions to act in the market (art. 333 Const.)³⁷, as well as one of the premises for social development based on knowledge (art. 71 Const.).

Likewise, under the –actually verifiable– assumption that goods with planned obsolescence are considerably

35 SOTO PINEDA, JESÚS ALFONSO, *op. cit.*, p. 382.

36 On the issue, some constitutional jurisprudence in Colombia stands out on the importance for the Government to protect the firm, as both objective interests of growth and development, as well as the achievement of subjective rights of employers, workers, suppliers and consumers, depend on the firm. Vid. i.e., judgements of the Colombian Constitutional Court C-1143 of 2000, C-854 of 2005, C-1319 of 2000, C-620 of 2012, T-760 of 2013.

37 See judgements of the Colombian Constitutional Court C-616 of 2001, C-815 of 2001, C-197 of 2012.

cheaper than durable goods³⁸, it could be affirmed that the mentioned industrial practice has allowed to fulfil, form the market, one of the purposes of the Social Rule of Law, namely, the achievement of certain kind of real and effective equality, at least in regard to mass access to certain material goods (art. 13, 334 Const.). Thus, to the extent that they improve people's living conditions, planned obsolescence fulfils, even for a short time, the function of meeting the needs that represent the content of right³⁹.

2.1.2. Subjective rights grounds

By subjective rights, we mean to say that the practice of planned obsolescence is carried out as a legal capability inherent to business freedom, within the Social Rule of Law. Specifically, we refer to *pro libertate* and *animus lucri facienda* principles.

2.1.2.1. The *pro libertate* principle

In Colombia, the *pro libertate* principle is stated in several constitutional provisions and therefore has different legal natures: It is a fundamental principle, as provided in article 6° Const.: "*Individuals are solely responsible before the authorities for violations of the Constitution and laws. Public servants are*

38 This is an assumption that has not been confirmed. See: VIDALES, R., "Lavadoras con muerte anunciada", *El País*, 2 noviembre 2014, available at: http://economia.elpais.com/economia/2014/10/31/actualidad/1414761553_335774.html.

39 In fact, it is possible that not only economies of scale, but low-cost production of goods associated to technology, such as mobile phones, TVs, computers, are at the base of the expansion of their consumption. Such goods might constitute material elements to meet the protection of the rights to information, recreation, work and education.

held responsible for the same violations and omissions or ultra vires acts committed in exercising their functions". It is also a right, that determines the wide premise of the Rights of freedom, when stating that "All individuals are entitled to the unrestricted development of their identity without limitations other than those imposed by the rights of others and the legal order." (art. 16 Const.). It is also a constitutional guarantee, protecting constitutional rights and freedoms, as it establishes: "When a right or an activity has been regulated in a general way, the public authorities may not establish or demand permits, licenses, or impose additional conditions for their exercise" (art. 84 Const.). Likewise, it is an explanatory component of constitutional duties, when it provides that: "The exercise of the rights and liberties granted by this Constitution implies responsibilities", which springs from the principle stating that "Every individual is obliged to obey the Constitution and the laws" (art. 95, s. 1° C.P.). Finally, it is a definite guarantee of the freedom of enterprise or economic freedom, when it is foreseen after declaring that "Economic activity and private initiative must not be impeded within the limits of the public good", that "For their exercise, no one may demand prior permission or licenses without authorization of the law" (art. 333 Const.).

This shows the value and specific weight it has within the constitutional order, as a protected formula to ensure broader areas of freedom, in this case, business economic freedom.

But what is the notion of constitutional freedom, preserved by all these provisions of the Constitution?

With regard to the economic freedoms of article 333 of the Constitution, constitutional jurisprudence has indirectly referred to the principle *pro libertate*, by repeatedly stating how important is that its limitation "*i) must neces-*

sarily be carried out by the law”⁴⁰, that means protected under the principle of reserve required by law, as a legal position of guarantee that calls for a Parliament decision, supporting and justifying the restriction of what can be considered free within freedoms⁴¹.

Based on what was said, how can we justify *pro libertate* principle to play out as the basis of planned obsolescence production strategy?

On the issue, we wish to point out that the *pro libertate* principle protects elements of the essence of freedom, in areas exclusively reserved to the domain of individuality. Thus, it enables the ability to repel external obstacles, impediments or interferences that oppose to exercising the prerogative of doing or not doing, but it also grants sufficient legal and material or economic capacity to meet the needs that allow effective exercise of all the contents of freedoms attributed to people, as subject of rights⁴². Finally, it gives

40 See: jurisprudence of the Colombian Constitutional Court T-291 of 1994; C-830 of 2010.

41 Express reference might be found in two decisions related to Public Procurement. When separating economic freedoms, judgement of the Colombian Constitutional Court C-618 of 2012, referring to judgement of the same Court, C-415 of 1994, states that “these are two constitutional rights which, although their legal significance, describe an area of private action that, beyond certain limit, is not susceptible of being later restricted, otherwise it would violate their essential core”. Thus, “the legal restriction seeks to reconcile interests of free economic activity with those required by common good, in a system that, according to its grounds, shall follow the *pro libertate* principle. Hence, as an additional guarantee, it should be stipulated that ‘the laws on economic intervention, provided by article 334 (...) shall specify their purpose and scope, as well as the limit to economic freedom’ (Const. art. 150-21)”. Vid. Colombian Constitutional Court, judgement C-618 of 2012, 8th of August of 2012, M.P. Gabriel Eduardo Mendoza Martelo.

42 This relates to the concept of positive and negative freedom; see: BERNAL PULIDO, CARLOS, “El concepto de libertad en la teoría política de NORBERTO BOBBIO”, *Revista de economía institucional*, vol. 8, n.º 14, 1.º semestre, 2006, p. 69.

grounds to act according to individual will or within the limitations imposed by legitimate authorities, as long as they are reasonable and necessary⁴³.

Thus, our conclusion is that resting planned obsolescence on the *pro libertate* principle comes from applying economic freedoms in negative: from this stand point, since planned obsolescence is not prohibited nor included within the legal restrictions ascribed to corporate autonomy, it is allowed by the legal system.

And although free enterprise and economic activity must be exercised within the limit of common good and although Enterprise has a social function that implies obligations (art. 333 C.P.), these ingredients can only be objected when the legislator orders so⁴⁴, with specific obligations, rules, burdens and responsibilities⁴⁵. If they do not exist, such constitutional limitations inherent to the structure of freedom of enterprise, cannot be invoked. Therefore, they cannot be invoked against planned obsolescence.

Hence, it is possible to produce more, to offer more, to influence (objectively) the product or (subjectively) the consumer, to achieve market power, as manifestations of free initiative and economic activity and freedom of competition, to access and stay in the market.

43 See: SEN, AMARTYA, *Desarrollo y libertad*, pp. 57 y 58. Quoted by: PEDRAJAS, MARTA, *La perspectiva de la libertad real en Amartya Sen*, in *XV Congrés Valencià de Filosofia "Josep L. Blasco" in memoriam*", Valencia, Facultat de Filosofia i Ciències de l'Educació, 1,2 i 3 d'abril de 2004, pp. 212-213.

44 See CORREA HENAO, MAGDALENA, *Libertad de empresa en el Estado social de Derecho*. Bogotá, Universidad Externado de Colombia, 2008, pp. 763-766.

45 *This can be seen in the Colombian constitutional jurisprudence, collected in judgement T-781 of 2014, regarding the social function of enterprise, when it says "it falls within the Government powers of general intervention in the economy (judgement of the Colombian Constitutional Court C-851 of 2013) and it supports "restrictions such as operating licenses, urban and environmental permits, health permits, safety permits, technical suitability concepts, and so on". (Judgements of the Colombian Constitutional Court C-524 of 1995, C-486 of 2009, C-352 of 2009)".*

2.1.2.2. *Animus lucri faciendi*

Animus lucri faciendi is considered the purpose at the basis of any economic freedom, that is, the pursuit of economic benefit.

In fact, when defining economic freedoms, both Colombian jurisprudence⁴⁶ and doctrine⁴⁷ generally describe them as the set of powers granted to people to develop economic activities, in order to create, maintain or increase their patrimony. Its most ambitious expression is the profit aim sought through freedom of Enterprise, in other words, the freedom to become rich. This is a right that must be understood⁴⁸ as the result of a skillful management of

46 See also, judgements of the Colombian Constitutional Court, T-425 of 1992, C-624 of 1998, C- 616 of 2001, C-654 of 2003, C-228 of 2010, C-263 of 2011, C-197 of 2012.

47 See NAVARRO BELTRAN, ENRIQUE, “La libertad económica y su protección”, *Revista Chilena de Derecho*, vol. 28, n.º 2, pp. 299-310. ALVEAR TÉLLEZ, JULIO, “Hacia una concepción comprehensiva de la libertad económica. Un paradigma a desarrollar”, *Estudios Constitucionales*, vol. 13, n.º 1, enero-junio, 2015, pp. 321-371.

48 This statement is based on how the right to perceive profit—now legislated—is set, due to legitimate expectation of gaining. See contracts of legal stability, or direct expropriation clauses in free commerce and foreign investment treaties. On legal stability, see judgements of the Colombian Constitutional Court C-242 of 2006, C-320 of 2006, C-155 of 2007, an institution that is widely backed by doctrine. See: CAMERON, PETER, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors*, Association of International Petroleum Negotiators, 2006; QUIROGA, EDGAR, VILLEGAS, MARÍA ALEXANDRA, “La constitucionalidad de los contratos de estabilidad jurídica desde la perspectiva del análisis económico del derecho”, *Revista Universitas*, Bogota, Colombia, n.º 115, Jan-June 2008. According to GEMMA BORDAMALO et al, in Colombia, contracts of legal stability set forth by Law 963 of 2005 “which establishes legal stability for investors in Colombia”, seek “to guarantee investors that subscribe them, that, during the contract duration, specific rules or interpretations that were decisive for their decision to invest in Colombia, will continue to apply; even if those modifications are unfavourable to investors”. BORDAMALO, GEMMA et al. “Hacia la promoción eficaz de la inversión: los contratos de estabilidad jurídica”, *Revista de Derecho Fiscal*, Bogotá, n.º 5, 2009,

business resources, of its competitive action, subject to law and to areas of freedom that are not prohibited but permitted, which empower the firm to seek maximum profit, to reach it and to own it⁴⁹. In fact, *animus lucri faciendi* is an essential element of a partnership and in turns, partnership is today's most used tool to set up a firm. Then, far from being an aptitude condemned by the Establishment, the profit aim is a carefully-weighted element⁵⁰.

In summary, planned obsolescence as a practice, and as a technical application of skills and knowledge aimed to artificially reduce the durability of manufactured products, to boost demand and stimulate repeated consumption of such goods over a short period of time, fully satisfies the defining purpose of business freedom. And it is consistent with the economic model that openly privileges –over any

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- p. 51. Vid. GALÁN BARRERA, DIEGO RICARDO, "Los contratos de estabilidad jurídica: un estímulo a la inversión extranjera en Colombia", *Estudios Generales*, vol. 22, n.º 101, octubre 2006. As to indirect expropriation clauses, see Colombian jurisprudence on public treaties, in judgements C-750 of 2008, C-031 of 2009, C-150 of 2009, C-446 of 2009, C-608 of 2010, C-123 of 2012, C-169 of 2012, C-199 of 2012, C-286 of 2015, C-620 of 2015, C-157 of 2016, C-184 of 2016. On the resalted, see the expert's opinions, vrg. MUCHLINSKI, PETER; ORTINO, FEDERICO; SCHREUER, CHRISTOPH, *The Oxford handbook of international investment law*. Oxford University Press on Demand, 2008; UMAÑA MENDOZA, DARÍO GERMÁN, *El Tratado de libre comercio con los Estados Unidos y sus efectos sobre la inversión y las políticas públicas*, Universidad Externado de Colombia, Bogotá, 2013; RODAS, MAURICIO, *Clausulas ambientales y de inversión extranjera directa en los tratados de libre comercio suscritos por México y Chile*, CEPAL, 2003.
- 49 Because of it, our Constitutional Court declared it is constitutional the non-prerogative of merging and full vertical integration or the freedom to advertising goods and services offered on the market, as proof of freedom of enterprise, consistent with its purpose of obtaining profits. Judgements of the Colombian Constitutional Court, C-616 of 2001, C-830 of 2010, amongst many.
- 50 However, the discussion is open on the issue of which partnership interest shall prevail to manage the firm. See: SABOGAL, LUIS FERNANDO, "El "interés social": Apuntes Teóricos en el marco Socio-económico del derecho de empresa", en *Revista e-Mercatoria*, vol. 10, n.º 1, enero-junio, 2011.

other purpose– the pursuit of greatest profits, if they are not prohibited. A model that –it must be said– has not been questioned by the Rule of Law or the Social Rule of Law, regardless of the eventual Government’s intervention in economics.

2.2. *Affected Rights and Interests*

2.2.1. Affected collective assets

Introducing into the market, products whose lifespan has been artificially cut down, has effects of collective nature.

On one hand, there is a wealth decline for lower income populations, more so when products are purchased through easy access - high rates credit. *“People who are most affected by obsolescence are those belonging to underprivileged social categories, which cannot afford to pay more for sustainable products, and are often content with fragile, low-end products”*⁵¹.

On the other hand, the diverse strategies that specifically constitute objective planned obsolescence, can affect the *“level of employment of repair companies”*⁵²⁻⁵³. *On this issue, we notice that planned obsolescence, seen as a practice of those firms that dominate the market, cuts down on free competition, which is a space with many free actors who develop multiple activities at various levels of the economic relation of consumption, and it succeeds as the way to compete ‘par excellence’, to which all*

51 LIBAERT, THIERRY (speaker), *op. cit.*, p. 18.

52 *Ibidem*;

53 The 2007 ADEME report confirms such trend: only 44 % of broken equipment is repaired. As to devices no longer under guarantee, distributors estimate that 20 % of interventions give way to repair. The 2010 ADEME report also shows a significative drop of repairs in France between 2006 and 2009, especially noticeable for house appliances. LIBAERT, THIERRY (speaker) *op. cit.*, p. 18.

entrepreneurs of the economic sector or all those associated with such products, shall align.

Nevertheless, it's in public health and environment where the negative consequences of manufacturing rapidly obsolescent goods, are more obvious.

As to public health, the problem is the waste that discarded products constitute and how they are disposed of. Waste incineration is a recurrent mechanism, due to the lack of efficient and sufficient recycling system or storage and final disposal systems, which is highly effective because it reduces to ashes the pile of materials used for manufacture; but it has elevated levels of toxicity, especially due to the common presence of electronic pieces. Once again, it's the underprivileged population that must endure this, not only because waste disposal sites are usually located close to where they live, but also because less wealthier countries, with feeble institutions, usually take on the task of managing their own waste and other countries' waste as well⁵⁴.

As to the environment, the problem is that planned obsolescence creates natural resources waste and residues overflow⁵⁵, with high levels of toxins, such as arsenic, lead, nickel and so on. By accelerating production, availability of non-renewable minerals is reduced, while increasing energy consumption, at the same time. Likewise, the men-

54 Certainly, the lack of infrastructures for treating IT waste is such that many useless products are illegally exported to other regions of the world, where waste disposal cost less, but have multiple consequences for the local population (...). Much of this waste is sent to Southern countries, where they cause environmental health problems) Ibidem.

55 The average daily "per capita" waste generation is 1 kg; around the world, in just one day, 7.000.000.000 kg of waste are produced. BARRETO, LUIS LEÓN (30 de julio de 2014). "La trampa de la "Obsolescencia programada", *La Provincia*. Retrieved: <http://www.laprovincia.es/opinion/2014/07/31/trampa-obsolescencia-programada/624014.html>

tioned pollution causes harm not only to humans, but to any living system, and the generation of dioxin and other polluting agents is harmful to the atmosphere. And that is why it was rightly argued that “*the product-integrated limited duration (of useful life) as a commercial strategy goes against the principles of sustainable manufacture and consumption*”⁵⁶.

And although the aforementioned effects can raise questions on the practice of planned obsolescence, they also negatively impact one of the intangible goods that is at the basis of the proper market functioning and relations among agents: consumers’ trust. The existence of goods that are deliberately manufactured so that they must be discarded after short use, lowers hope and security invested in enterprises, undermines the conviction that their actions are in good faith.

Following the same logic, planned obsolescence deepens the asymmetric relation ordinarily existing between manufacturers-traders and consumers⁵⁷. Even though Consumers’ Law was designed precisely to reduce such inequality, the increasingly recurrent appearance of products manufactured under such conditions makes it more difficult for them to choose freely, due to the abundant information available.

The mentioned collective assets are directly guaranteed by administrative and judicial protection, based on the rights in which they reflect. Nevertheless, their effectiveness is not conclusive against planned obsolescence, since manufacturing techniques to artificially limit life stand on the lack of explicit prohibition, therefore on their permis-

56 LIBAERT, THIERRY (ponente), *op. cit.*, p. 58.

57 Cfr. SOTO PINEDA, JESÚS ALFONSO, *op. cit.*, p. 383.

sion, which is also justified because of economic factors that concern both individuals and society.

2.2.2. Violation of subjective rights

The practice of planned obsolescence violates rights that belong to both competitors and consumers.

In free competition law, especially as to the ability to freely enter and stay in the market⁵⁸, planned obsolescence –as a decision of those firms dominating the market– imposes a restriction onto competitors of any size –who have not taken part in the decision–, concerning their freedom to define autonomously their growth strategies and their own way to fulfil the concept of “quality goods”. However, in a free and increasingly globalized market, some actors’ freedoms cut down other actors’ freedoms, markets are becoming less and less plural; in such context, the restriction to compete autonomously and to free initiative might seem tolerable at first sight, and might be considered an underlying requirement of free competition.

Therefore, we need to further investigate on consumers’ rights, since they could effectively put a limit to the practice *sub examine*.

2.2.2.1. Limitations to the consumers’ right to information

Both Constitutions and International Law on Human Rights conceive the right to information as a human right, essential to the consolidation of a true democracy. Such powerful meaning is casted on constitutionally established market relations, since the right to information is easily the most

58 Judgement of the Colombian Constitutional Court, C-197 of 2012.

identifiable and *iusfundamental* of consumers' rights⁵⁹ vis-à-vis manufacturers⁶⁰, among the many settled by the law⁶¹.

59 Such is the opinion of the Colombian Constitutional Court, on financial consumers. On the issue, see judgement T- 136 of 2013, March 13, 2013, M.P. Jorge Iván Palacio. Also see judgement C-313 of 2013. Similarly, see Superintendencia Financiera, Circular externa 038-2011, on *Reglas sobre Competencia y Protección al Consumidor Financiero*. Available at <https://www.superfinanciera.gov.co/SFCant/ConsumidorFinanciero/ce03811.doc>

60 In compared law, many constitutions give the highest status to consumers' right to information; here is a sample: in Argentina, article 42 states that "Consumers and users of goods and services have the right to (...) adequate, truthful information". Following this precept, the Law for Consumers Protection was passed (Law n. 24-240 of 1993, updated by Law n. 26.361), whose chapter III sets forth rules on consumer's information and health protection. In Peru, art. 65 states that "The State protects consumers and users' interest. In order to do so, it guarantees the right to information concerning goods and services available in the market". In Spain, article 51, dictates that "2. Public Powers shall promote information and education of consumers and users, shall encourage their organization, which will be heard on issues that might affect those, according to the provisions of the law". This rule is elaborated in the General Law of consumers and users' protection and other supplementary laws (Real Decreto Legislativo 1/2007, Nov. 16), whose article 8 identify the basic rights of consumers and users, amongst which "d. *Correct information on the various goods and services, education and dissemination to facilitate knowledge on their adequate use, consumption or enjoyment*". Likewise, Chapter V refers to the right to information, training and education.

61 In other systems, protection occurs at legislative level. Thus, Mexico has a Federal Law of Consumers' Protection (Dec 24-1992), whose article 1 sets forth the following principles: "III. *Adequate and transparent information on the products and services, with correct specifics on quantity, characteristics, composition, quality and price, as well as the risks they represent*"; VI. *The provision of information and tools for consumers to defend their rights*"; in its Chapter III, it refers to *Information and advertisement*. In Chile, Law 19.496 as amended by law 20555 of 2012, on protection of consumers' rights confers powers as to financial issues, amongst other powers, to the National Consumers Service; in its article 3 on consumers' rights and duties, it points out "b) *The right to truthful and timely information on the goods and services that are offered, their price, their purchase conditions and other relevant characteristics, as well as the obligation for consumers to responsibly get informed*"; in its Title III, it refers to information and advertising.

Hence, it constitutes a legitimate support to the limitation of business freedoms associated with advertising⁶².

The value assigned to consumers' right to information serves to re-establish "*equilibrium between the parts*"⁶³. It also acts as a guarantee, making it possible for consumers to "*anticipate risks and avoid damages (...)*", and thus allowing them to have "*truthful, complete and timely information*"⁶⁴. Moreover, it gives consumers the possibility to "*choose whether or not to consume a new product or a new technology, as well as to mobilize and claim before Justice, to prevent possible damages to occur*"⁶⁵.

Therefore, the right to information can be enforced since the moment the good or service is made available to consumers, that is "*from the moment it enters the commercial chain of distribution or is offered on the market, through public offer (...)*", which constitutes –in legal terms– the "*declaration of will, the aim to celebrate a certain contract*"⁶⁶. Consequently,

62 See: Judgement of the Colombian Constitutional Court C-830 de 2010, Oct 20-2010, M.P. Luis Ernesto Vargas Silva. In judgement C-592 of 2012, the Court stated: "*The regulation of commercial advertising is one of the mechanisms used by the Colombian legal system to face inequality of information, usually existing in consumption relations. In fact, in such relations, one of the parties usually and consistently has special knowledge about the benefits of the transaction, while the other, to a large extent, lacks such knowledge. In the intent to counterbalance the weakness in which consumers might find themselves, Government intervention is essential to attribute the burden of disclosing information, to determine when such information must be provided and establish the consequences, both contractual and extra-contractual, that arise from defective or insufficient information*". Also, Judgement of the Colombian Constitutional Court C-592 of 2012, July 25-2012, M.P. Jorge Iván Palacio Palacio. Also see C-583 of 2015.

63 ZSAFIR, DORIS, *El consumidor en el derecho comunitario, Proyecto de protocolo de defensa del consumidor del Mercosur*, (sl), Fundación de cultura universitaria, 1998, p. 57.

64 WEINGARTEN, CELIA *et al.* *Derecho del consumidor*, Buenos Aires, Editorial Universidad, 2007, p. 48.

65 *Ibidem*.

66 LASARTE, CARLOS, *Manual sobre la protección de consumidores y usuarios*, Madrid, Dykinson, 2010, p. 108.

its non-compliance gives way to the obligation to repair damages, as it affects both consumer's wealth and his own will. When contravening *"good faith prior to the contract, pre-contractual liability will arise (...), payment of consequential damages can be claimed to compensate expenses, and loss of profit can be claimed for missing other purchase options"*⁶⁷.

Regardless of the legal character of consumers' rights, the Colombian Constitution focusses on the need for the law to regulate *"the information that must be provided to the public when marketing (a product)"* (art. 78 Const.). Based on the above, article 3 of law 1480/2011 (Consumer Statute)⁶⁸ establishes the right to information, that is, *"To obtain complete, truthful, transparent, timely, verifiable, comprehensible, accurate and suitable information for the products that are offered or put into the market, as well as on the risks that may arise from their consumption or use, mechanisms to protect their rights and how to enforce them"*. To such purpose, article 23 establishes that *"Suppliers and manufacturers shall provide consumers with clear, truthful, sufficient, timely, verifiable, comprehensible, accurate and suitable information on the products they offer and, notwithstanding what is said on faulty products, shall be liable for any damage resulting from inadequate or insufficient information"*.

Following criteria set by the national authority in charge of inspection, control and surveillance on the compliance of consumers' rights, truthful information means information that is real, certain and verifiable, *"so that there is a straight relation between those attributes being offered with the good or*

67 ZSAFIR, DORIS, *op. cit.*, p. 61.

68 The same was established in the former Statute of Consumer's Rights, set forth in Decree 3466 of 1982, article 14. On this issue, see the judgement of the Colombian Constitutional Court C-1141 of 2000.

service and those actually obtained by consumers"⁶⁹. Sufficient information, in turns, means that *"Information provided to consumers must be comprehensive so that they have sufficient evidence to enable them to choose among the various goods and services that are offered on the market and to make reasonable consumption decisions"*⁷⁰.

Based on such precepts, the manufacturer's duty to warn on products planned obsolescence could be inferred, for two reasons: (i) It is one of their characterizing attributes, since it is decisive that information supplied to consumers be adequate and sufficient. And (ii) the lack of information on planned obsolescence of goods allows companies to create a peculiar conduct, prejudicial to the consumer: *"given the (consumer's) lack of knowledge on the performance of purchased products, which depend on technological and scientific evolution he is not familiar with, (the consumer) ignores whether the product performance is the result of randomness or of a sufficiently weighed business decision"*⁷¹.

Beyond these forecasts, when article 24 of Law 1480 of 2011 requests "minimum information" for goods and services on the market, it specifies that such information shall also include instructions for use and consumption, as well as the quantity and volume needed and the "expiration date, when applicable". However, this requirement only refers to "perishable products", in which case the expiration date shall be stated "clearly and with no alteration of any kind" on "labels or packaging". In other words, the duty to indicate the expiration date for non-perishable goods is

69 Colombia, Superintendencia de Industria y Comercio, *Guía general de protección al consumidor*, Bogotá, 2011, p. 39.

70 *Ibidem*.

71 SOTO PINEDA, JESÚS ALFONSO, *op. cit.*, p. 329.