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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

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

MAGDALENA CORREA HENAO[1]

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

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 obsolescenes, principle of *pro libertate,* principle of *pro legalidade,* consumers, abuse of fights.

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*

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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 goods[4], *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 development[14]; 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 revolution[16], with the discovery of new sources of energy[17], as well as the precision with which durability of manufactured goods was calculated or defined[18-19]. But its introduction into the

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14 Available on: 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, prevailed*[20], at a time when such reactivation could only be considered positive, so much that it was even suggested it could become a mandatory production standard[21]. However, once the Great Depression was overcome, far from being abandoned, the use of this industrial practice increased[22], with strategic designs, drawn by big enterprises[23], that ended up becoming in a trend[24].

"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 teoría do decrecimiento 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 identified[27]:

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

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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 Direitto*, 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 services[29].
- Discontinuing spare parts or accessories for the product[30].

– Technical objective obsolescence[31], according to which a product disuse is a consequence of technical progress, which incorporates improvements leading to the product renewal[32]. 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

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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 advertisment 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.

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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 in 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

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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 goods[38], 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 right[39].

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 faciendi* 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 6º Const.: *"Individuals are solely responsible before the authorities for violations of the Constitution and laws. Public servants are*

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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. 1º 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 freedoms[41].

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 rights[42]. Finally, it gives

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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.er 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 necessary[43].

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 so[44]*, with specific obligations, rules, burdens and responsibilities*[45]*. 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.

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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 Ciencias 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 jurisprudence[46] and doctrine[47] 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 understood[48] as the result of a skillful management of

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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 Vniversitas*, 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 it[49]. 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 element[50].

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, Bogota, 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*

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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 well[54].

As to the environment, the problem is that planned obsolescence creates natural resources waste and residues overflow[55], 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-

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54 *Certainly, the lack of infrastructures for treating* IT *waste is such that many useless products are illegaly exported to other regions of the world, where waste disposal cost less, but have multuiple 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 consumers[57]. 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-

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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 market[58], 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

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

identifiable and *iusfundamental* of consumers' rights[59] vis-à-vis manufacturers[60], among the many settled by the law[61].

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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 advertising[62].

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,

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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 *Ibídem*.

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*

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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

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

70 *Ibídem*.

71 Soto Pineda, Jesús Alfonso, *op. cit*., p. 329.

not elucidated, even less when it comes to goods manufactured to have an artificially limited useful life.

Therefore, as to rules that legally specify the meaning of constitutional principles, it is not indisputable that non-disclosure of a product planned obsolescence is itself a non-compliance, punishable by law, due to a violation of the right to information and its derivatives.

Moreover, it would not be possible in regards to notified planned obsolescence, nor to goods subject to objective planned obsolescence, insofar as the consumer might be held responsible for breaching his/her duty to "*Inquire into the quality of products*" (art. 3º, num 2.1. Law 1480 of 2011), which would cover its durability and repair conditions. The same thing could be said as to subjective planned obsolescence, since advertising oriented towards purchase (renewal) of products –which is typical of the freedom of Enterprise[72]–, does not affect those protected areas of consumers' autonomy to reasonably decide whether to consume or not to consume a certain good offered in the market.

In summary, only a rights-based interpretation arising from the principle of *in dubio pro consumatore*[73], can definitely

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72 See judgements of the Colombian Constituional Court, C-010 of 2000 and C-830 of 2010.

73 This principle is established in art. 4 sec. 2 of Law 1480 of 2011, stating that *"rules of this law shall be interpreted in the way most favourable to the consumer. Doubts will be solved in favor of consumer". "Because of its structure, this composite principle has enormous power, not only to give meaning to the law, and to interact with the rest of the legal system. It plays for consumers' benefit, both when interpreting fundamental rules, and during procedures relating to the burden of the proof. It will play a part in administrative and judicial actions set forth by Law 1480 and, generally speaking, in any matter where consumers or users act as a party in the process or as interested party. And thanks to its ability to renovate the legal system of economic relationships and of the constitutional notion of consumers' rights, it must be understood as a general principle of the market Law, that is with universal vocation which will have to apply to all existing regimes, as an interpretation guideline that usually activates normative and factual interpretation in favour of*

open the argumentation and maintain that with objective non-served planned obsolescence, the fundamental right to information of potential and effective consumers, is violated. Thus, only if we agree that products whose durability is artificially shortened are comparable to perishable goods, effective protection of the consumers' right to information becomes feasible. By doing this, a limitation to the firms' freedom to advertise and sell their product can be achieved, that is enforcing the obligation to make a distinction between the product durability and its disposal for reasons beyond its usefulness, which would allow consumers to fully exercise their autonomy, when purchasing.

2.2.2.2. Narrowing the right to quality goods?

From a consumer's perspective, planned obsolescence is a positive cutdown of his right to quality goods. The legal position of having the right to something, is part of the legislation because it is an intrinsic ingredient of goods and service provision, and because of it, consumers' rights are protected[74].

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the consumers' interests. (…) A legal iusfundamental stance, at least prima facie*, that, from the standpoint of rights rationality, transposes into social and economic dynamic the dogmatics of material equality, through the set of varied legal rules, capable – at least for the normative power of the legal order – of incorporating into the market the idea of fair economic and social order". See* CORREA HENAO, MAGDALENA, "El Estatuto del Consumidor: aspectos generales sobre la naturaleza, ámbitos de aplicación y carácter de sus norma", VALDERRAMA, CARMEN LIGIA (ed.), *Perspectivas del Derecho del Consumo,* Bogotá, Universidad Externado de Colombia, 2013, p. 131 y 139-141.

74 For example, Chater III of the aforementioned *Ley General para la Defensa de los consumidores y usuarios* and other complementary Spanish laws, incorporates provisions relating to institutional cooperation as to training and quality control. In turns, despite not delving into the matter, Law nº 24.240 of Argentina, relating to the Consumers' Associations, establishes (art. 56) its purpose as follows: "*g) To organize, conduct and disclose market analysis, quality*

The Colombian Constitution also commands the legislator to include within consumers' rights, rules on "*quality control of goods and services offered and provided to the community*" (art. 78 Const.). The uneven development of the quality of products circulating in the market, despite counting on a complex system of sources[75] –according to its statutory rule, art. 3, Law 1480-2011–, acknowledges, within consumers' rights, the one to "obtain quality products", which means the right to "Receive the product in accordance with conditions established in the legal warrant, the ones that are specifically offered and the usual conditions of the market".

This conception of quality responds to the narrow definition of quality in Spanish, framed in the notion of "*Adaptation of a product or a service to the specified characteristics (…)*", rather than in the notion of "*Feature or set of features inherent to something, that allow to appreciate its value. (…)*" or in the notion of "*Good quality, superiority or excellence (…)*"[76]. A choice –we infer– that is rooted in the lack of legal certainty and lack of submission to the principle of legality, which would be at the basis of both.

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control studies, price statistics and any other information of interest to consumers. As to quality control studies, prior to their disclosure, control bodies will be required to issue a certification, within the deadlines established by regulations". Likewise, in Peru, Chapter IV of the Code for the Consumers' protection and defense, Law 29.571, refers to quality and standardization of producing goods and services. In Costa Rica, the Law on Promotion of competition and effective defense of Consumers (law 7472, 20-dec-1994) sets the following duty for merchants and manufacturers: "*m) Comply with quality standards and technical regulations of mandatory compliance*".

75 I.e., the case of technical standards, in SANTAELLA, QUINTERO. HÉCTOR, *Normas técnicas y derecho en Colombia. Desafíos e implicaciones para el derecho en un entorno de riesgo,* Bogotá, Universidad Externado de Colombia, 2008.

76 See www.rae.es, term "quality".

Since the industrial strategy of planned obsolescence offers and delivers to consumers a product that is protected under the conditions of its legal guarantee and responds to the usual conditions with which goods are offered in the market, no lessening of the consumer's right to goods of quality can be envisaged.

Only a broad interpretation of the quality concept, which includes its inherent features to perceive its obsolescent value, or its superiority or excellence as an ingredient to exclude those goods with artificially limited life or use, makes it possible to ascribe to an industrial cunning or scheme, the legal consequences of its negative effects, liable for breaching consumers' right to quality products.

2.2.2.3. Affecting the right to safety and activating the right to damage reparation?

It is also possible to associate planned obsolescence of a product, with the right to safety and liability for faulty products, as a hypothesis in which concerns fall not on quality inadequacy and suitability of the product, but rather on the specific effects that the product has had on consumers' physical, moral and material integrity. It is about going back to guaranteeing wider consumers rights, as a result of their proximity to the traditional damage compensation law[77].

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77 Since Directive 85/374 (July 25, 1985), the European Community Law has taken this into account. Specifically, on liability in this Directive, *Woolcott* stated: *"In fact, the manufacturer's responsibility as established in the Directive, is that resulting when a faulty product marketed in the EEC has caused harm to people or private property. We are not referring to the liabilty arising from a product not satisfying the manufacturer's intended use. This is the notion based on which manufacturer's liability has been imputed, in domestic law. A notion that refers to the concept of vice of products, as intended in contracts, and clearly to the notions of marketability guarantee"*. WOOLCOTT, OLENKA DENISS, *La responsabilidad del*

In Colombia, on the issue of liability for faulty products, the constitutional jurisprudence has stated: *"Defects of products and services do matter to consumers and users, since the injuries they generate might affect their life, physical integrity and health. That explains why consumers' right is one of its essential elements, the right to obtain, from professional manufacturers and distributers, compensation for damages caused by defects of products or services, in order to ensure its safe use (…); liability of manufacturer and distributor arises* ex constitutione *and can therefore be deduced by consumers of the product or users, regardless of the existence of a direct contractual relation with the former"*[78].

Now, as provided by the 2011 Consumers' Statute, article 5o, num 17, a faulty product is *"that portable or non-portable good which, due to a mistake of design, manufacture, construction, packaging or information, does not provide reasonable safety, to which any person is entitled". According to the foregoing, and according to article 6, when a manufacturer breaches the duty of* "ensuring suitability and safety of goods and services offered on the market, as well as their quality", he shall be liable as indicated, jointly with the supplier "for the product guarantee to the consumers"; as well as in an individual way "to the authorities of supervision and control (…)" and to the consumers "for the faulty product harm".

In the latter case, in addition to the duty of information arisen from the "awareness that at least one of his manufactured, imported or marketed products has a defect that created or might create an adverse event, detrimental to

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productor, estudio comparativo del modelo estadounidense y el Régimen de la Comunidad Europea, Pontificia Universidad Católica del Perú, Fondo Editorial, 2003, p. 414.

78 Judgement of the Colombian Constitutional Court, C-1141 (Aug. 30, 2000), M.P. Eduardo Cifuentes Muñoz.

health, life or safety of people" (art. 19), article 20 establishes, specifically on liability due to damage from faulty product, joint responsibility for manufacturers and retailers, additional to what is intended as damage[79].

Nevertheless, when determining liability, following the general rules of Damage Compensation Law, article 21 states that: "*To determine Liability, the affected party shall demonstrate defect of the product, damage existence and causal link between the two*"[80]. Moreover, article 22 provides a wider regime of liability exemption, which also includes the possibility that "*damages occur, due to exclusive fault of the affected party*", or that damage comes from applying mandatory rules or non-imputable scientific or technical lack of awareness[81].

Thus, as observed by European Laws, although the manufacturers' fault is excluded, the same thing happens with the so-called "*product liability, strictly based only on the causal link between the product and the resulting damage to the*

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79 Art. 20 of law 1480 - 2011, secc. 2) states: "By damage, any of the following is intended:1. Death or personal injury, caused by the faulty product;/2. Any damage caused to others than the faulty product, caused by the faulty product /The above, notwithstanding the fact that the injured party may claim a different compensation, according to the law". This would be the case of non-material damages arisen from a faulty product.

80 In case of infringment of health or phytosanitary statutes, or technical regulations, art. 21 paragraph explains that "the product fault shall be presumed".

81 Art. 22 of law 1480 literally says: "The following are the only admissable causes of liability exemption from faulty product damages:1. Force majeur or unforseable event; 2. The damage ocurrs due to exclusive fault of the affected party; 3. Act of a third party; 4. The product has not yet been introduced into the market; 5. The defect is a direct consequence of the product elaboration, labeling or packaging, according to mandatory rules in force, and the defect could not be avoided by the manufacturer without violating such rule; 6. When the product entered the market, scientific and technical knowledge did not allow the defect to be discovered (…). PARAGRAPH. In the presence of concurrence of causes in damage production, the manufacturer's liability may be reduced".

victim". In this way, onto the consumer-victim of the damage falls the decisive task of documenting the product fault, *"without imposing excessive burden on the manufacturer, allowing him to continue developing its activities"*[82].

Given the aforementioned rules, it is especially difficult to estimate the application of liability regime for faulty product, to goods with planned obsolescence. To reach such conclusion, it would be necessary to prove that the trick causing the product to have a shorter lifespan is in fact a defect, which, according to the previous legal definition, has not been endorsed by the Law[83]. And although the possibility that it could in fact be prejudicial is not excluded, the event would not be attributed to built-in obsolescence, but to a different feature of the product, which would be accepted as a fault of the product; or it would be attributed to insufficient legal warrant information on the risks using it after a certain amount of time.

2.2.2.4. Violation of consumers' freedom right and proprietary rights and violation of rights associated to consumption

In addition to the previously mentioned rights and interests, planned obsolescence can illegaly violate consumers' freedom to decide –with no restrictions or external pressure

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82 Woolcott, Olenka Deniss, *op. cit.*, p. 421.

83 On the issue, a different definition of faulty product is provided by the aforementioned Directive 85/374 of 1985, art. 6o, according to which *"1. A product is faulty when it fails to provide the safety to which a person is legitimately entitled, given all the circumstances, including: a) product presentation; b) the reasonably expected use of the product; c) the moment when the product started circulating". This broader and more comprehensive definition, which would admit an argument in favour of considering a product built-in obsolescence as a defect, would not however include the case of technological objective obsolescence, since paragraph 2 of the same precept establishes: "A product shall not be considered faulty on the sole ground that an improved product has subsequently been put into circulation".*

and with total autonomy– on the purchase of a product, since the *obsolescence* it encloses, leads to its disuse and to a new purchase that becomes urgent when the product in question satisfies a consumer's need.

Besides, such practice wrongly penalizes the consumers' right to wealth. In fact, far from contributing to its purpose as economic freedom –its use, enjoyment or disposal at least should preserve or increase his/her wealth–, its premature obsolescence openly contradicts such right, by rapidly using up the benefit of purchasing the product and forcing to a new purchase, soon to be replaced anyway[84].

At last, such effects penetrate regulations on human and fundamental rights, since more and more often, consumed goods are intended to materialize regulations, that allow to exercise and fulfill civil and social rights. This is the reason why, time and again, rapidly obsolescent goods are indeed consumed. Proof of it, is the fact that increasing individual, familiar and collective wellbeing (covering basic needs and those required to live as anyone wishes, to live well and without indignities[85]) is achieved through market mechanisms. Hence, much of the fulfillment of individual and social rights, even in their essential feature, is sought from consumption, from the access to goods and services that circulate in more or less regulated markets[86]. This is

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84 Such penalization is confirmed, when proven that the lesser price paid for obsolescent products does not compensate the lost investment accumulated by the consumer along the purchase chain, over time.

85 As essential definition of human dignity, according to the Judgement of the Colombian Constitutional Court T-881 of 2002.

86 And that is why the doctrine refers to consumer's rights as human rights, with special protection. See TAMBUSSI, CARLOS EDUARDO, "Los derechos del consumidor como derechos humanos", GORDILLO, AGUSTÍN *et. al*., *Derechos humanos, 6ª edición.* Buenos Aires, Fundación de Derecho Administrativo, 2007, pp. VII-1-VII-14. Also TAMBUSSI, CARLOS EDUARDO, "Los derechos de los

the case of the rights to free movement and to respectable housing, which materialize with the purchase of a vehicle or a house/apartment; or the right to acceptable diet or education in equal conditions; or to recreation, to information, expression and communication, which in turns materialize with the purchase of a refrigerator, a computer, a television or a mobile phone.

When you look at it from this point of view, planned obsolescence not only plans to artificially cut down on lifespan of a product, affecting consumers' rights as economic actors of the market; indirectly, it also plans to artificially cut down the satisfaction of rights that are protected by the Constitution and the International Law of Human Rights.

However, in these three cases, due to the lack of specific regulations forbidding or restricting planned obsolescence of products, limitation of rights does not constitute the basis to establish objective limits to the practice in the spotlight[87].

3. Answers from Sources of Law and Assessment

Colombia is not the only country where planned obsolescence lacks express prohibition, despite the TENSIONS it creates between rights and interests. It is indeed an INSTITUTION that

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usuarios y consumidores son derechos humanos". *Revista LEX,* n.º 13 - año XII - 2014-I, pp. 89-114.

87 This, despite the notorious crisis and weakening of the social rule of law, facing economic globalization. On the issue, see WITKER, JORGE, Los derechos económicos y sociales (DESC) en el contexto de la globalización económica. Availbale at http://bibliohistorico.juridicas.unam.mx/libros/6/2897/4.pdf. SAVARIS, JOSÉ ANTONIO, "Globalización, crisis económica, consecuencialismo y la aplicación de los derechos económicos, sociales y culturales (desc)", *Revista Prolegómenos - Derechos y Valores,* 2012, pp. 21-44-II; TAJADURA TEJADA, JAVIER, *La crisis de los derechos sociales en el conexto de la mundialización*. http://www.juntadeandalucia.es/institutodeadministracionpublica/anuario/articulos/descargas/02_EST_03_tajadura.pdf

soft law is just starting to address, although it still does not appreciate what it represents in the short and long term to consumers, society and the State.

3.1. Hard Law, Semi-Hard Law and Especially Soft Law

Although there is no express prohibition on planned obsolescence, there are some restrictions to it. Indeed, various national legislations require manufacturers to provide sellers with an adequate stock of spare parts during useful life of a product.[88]

In this regard, quickly reviewing comparative law, two sets of laws can be classified as exceptions to the non-prohibition rule on planned obsolescence. The first legal rule on this issue is found in Bolivia, in the General Law of Users and Consumers' Rights (Law 453 dated Dec. 4, 2013), when it states (art. 37) that responsible and sustainable consumption programs and projects should provide "*Awareness of negative impacts of planned obsolescence of products and imposed needs*"[89]. However, the mentioned law does not establish specific obligations or restrictions for those companies that manufacture products subject to obsolescence.

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88 Such is the case, for instance, of France, Malta, Greece, Rumania, Portugal, Slovenia. Ver PEGADO LIZ, JORGE, "DICTAMEN del Comité Económico y Social Europeo sobre la Propuesta de Directiva del Parlamento Europeo y del Consejo relativa a determinados aspectos de los contratos de suministro de contenidos digitales", COM (2015) 634 final – 2015/0287 (COD) y "la Propuesta de Directiva del Parlamento Europeo y del Consejo relativa a determinados aspectos de los contratos de compraventa en línea y otras ventas a distancia de bienes", COM(2015) 635 final – 2015/0288 (COD), p. 12.

89 Available at: http://www.ecolex.org/ecolex/ledge/view/RecordDetails?index=documents&id=LEX-FAOC138816

The second overwhelming example is the aforementioned French Law n. 2015-992 (August 17, 2015) on Green (ecological) Energy Transition development[90]. After defining planned obsolescence as described above, it expressly states its character of punishable conduct, thus establishing a criminal punishment to it[91]; this, in addition to the fact that the fight against planned obsolescence is one of the goals of the national policy on waste prevention and management[92].

A third reference worthy of mention could be found in Brazilian legislation, which, although lacking specific provisions on obsolescence, does emphasizes on the importance of giving sufficient guarantees to ensure the quality of goods and correct information on their lifespan[93].

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90 See News. Lopez Alonso, Eduardo (16 October 2014), "France leads the fight against planned obsolescence", *El periódico*. Retrieved: http://www.elperiodico.com/es/noticias/economia/francia-abandera-lucha-contra-obsolescencia-programada-3607010# Salinas, José Luis (10 november 2014). "Electrodomésticos caducos, La Nueva España". Retrieved: http://vlex.com/vid/electrodomesticos-caducos-

91 The article says: "II.-L'obsolescence programmée est punie d'une peine de deux ans d'emprisonnement et de 300000 d'amende". "III.-Le montant de l'amende peut être porté, de manière proportionnée aux avantages tirés du manquement, à 5 % du chiffre d'affaires moyen annuel, calculé sur les trois derniers chiffres d'affaires annuels connus à la date des faits".

92 "Lutter contre l'obsolescence programmée des produits manufacturés grâce à l'information des consommateurs. Des expérimentations peuvent être lancées, sur la base du volontariat, sur l'affichage de la durée de vie des produits afin de favoriser l'allongement de la durée d'usage des produits manufacturés grâce à l'information des consommateurs. Elles contribuent à la mise en place de normes partagées par les acteurs économiques des filières concernées sur la notion de durée de vie. La liste des catégories de produits concernés ainsi que le délai de mise en œuvre sont fixés en tenant compte des temps de transition technique et économique des entreprises de production". *Idem.*

93 See law n.º 8.078 of 1990, Código de defesa do consumidor (CDC), particularly arts. 4º, sec. II, letra de, arts. 20, 31 and 51. Also see Fado, Sandra, *CDC deve proteger consumidor da obsolescência programada, diz ministro Salomao*. Available at http://app.vlex.com/#/vid/cdc-deve-proteger-consumidor-575744446

The doctrine also relates some judicial cases. Amongst them, the US doctrine highlights the case of the *Phoebus Cartel of mid-20th century, on the reduction of lightbulbs useful life*[94]. More recently, Westley vs Apple Computer Inc. (2003) known by the Supreme Court of California[95], and Mosley vs Apple (2004)[96], known by the District Court for the Southern District, both relating to iPods batteries obsolescence in the USA[97]. Against the same firm –Apple–, there is also an ongoing issue in Brazil, a demand filed in 2013 by the *Instituto Brasileiro de Direito da Informática, concerning the introduction of iPad 3 and iPad 4 in the same year, as evidence of the prejudicial practice of planned obsolescence*[98].

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94 In 1942, the Government of the United States of America demanded General Electrics and Other manufacturers, accusing them of unfair competition, price fixing and shortening life span of light bulbs. After 11 years of litigation, in 1953 the court passed and prohibited General Electric and its partners to limit lifespan of light bulbs. However, the judgement had hardly any effect, light bulbs kept on having 1000-hour life, dozens of them were even patented, including one that lasted 100 thousand hours, although none of them was ever marketed. DANNORITZER, COSIMA (dir.), *Comprar, tirar, comprar (documentary)*, 2010. Available at: https://www.youtube.com/watch?v=mUaCLzbDgm0

95 Gathering the following procedures: *Craft vs. Apple Computer Inc, Chin vs. Apple Computer Inc, Keegan vs Apple Computer Inc, Kieta vs Apple Computer Inc,* amongst oothers.

96 A class action was installed in Westchester County, NY on June 23, 2004, claiming violation of the General Business Law of Nueva York, due to unfair competition practices and misleading advertising, as to iPod's Lithium battery. See http://www.wikinvest.com/stock/Apple_%28AAPL%29/Mosley_Apple_Computer_Inc

97 None of those lawsuits made it to judgement. In the first case, the parties reached an agreement in which Apple created a battery change service and extended warranty to 2 years; besides, plaintiffs received a compensation. Quoted in: SOTO PINEDA, JESÚS ALFONSO, *op. cit*., p. 364.

98 See DE CASTRO VIERA, GABRIELLA. NACUR REZENDE, ELCIO, *op. cit.*, p. 71. Information on this issue can also be found in *Instituto Brasileiro de Direito da Informática* – Available at: http://www. ibdi.org.br/site/noticias.php?id=859. Ver también "En Brasil demanda a Apple por obsolescencia Programada", *Perú*, febrero 22 de 2013. [online]. Available at " http://peru21.pe/reportuit/brasil-demandan-appleobsolescencia-programada-2118626".

In addition, in a case ruled by the *Primera Turma de Recursos-Capital*[99] in Brazil, an Action for moral damages compensation (March 2013), a computers supplier was judged for violating the principle of objective good faith that must govern relations with consumers and the right to transparent and precise information to consumers, by failing to adequately inform consumers on possible obsolescence of the operative system, when the supplier unequivocally knew that later it would have to be replaced or updated[100].

The few examples found in compared hard law, both legislation and doctrine, prove that conclusions derived from the Colombian legislation are not isolated or exceptional, as to how difficult it is, despite the guarantees in force to ensure complete and truthful disclosure of information, the quality of products or the responsibility for defective damage, to make a claim on planned obsolescence of products.

The most explicit considerations and guidelines on the outcomes of this industrial strategy come from Soft Law, mainly from the European Union and the United Nations.

As to European Law, its decisions give instructions on public procurement to member States, in order to avoid products with built-in obsolescence[101], to introduce labels

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99 Available at: http://www.ibdi.org.br/site/jurisprudencia.php?id=29

100 There is also reference of an ongoing lawsuit in Rio de Janeiro – 4 Sala Civil, seeking moral damages indemnity due to product liability, based on a consumer request, who had purchased a TV with a 1-year guarantee, and only twelve days after its expiry date, he did not recive technical assistance, due to lack of spare parts for its repair. See http://www4.tjrj.jus.br/consultaProcessoWebV2/consultaProc.do?numProcesso= 2008.004.006163-7&USER=.

101 The European Economic and Social Committee, in its opinion on "*the issue «Towards more sustainable consumption: industrial product lifetimes and restoring trust through consumer information*", encouraged member States to take into account established parametres to fight against planned obsolescence, within their public procurement policy. "*Given the volumen of public procurement*

indicating minimum life-cycle of products[102], to design ecological products that guarantee – from the start - sustainability of resources, to implement circular economic models "that transform one firm's waste into another firm's input"[103]. Moreover, it calls for "policymakers to weigh the possibility of completely forbidding products with incorporated faults, designed to provoke the end of a product useful life"[104].

We have also found a draft (May 2016) of the Committee on Industry, Research and Energy, for the Commission on environment, public health and food safety, for a Directive

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in UE member states (16 % of GDP), public autorities playa n important role, and they must be exemplary". LIBAERT, THIERRY, *op. cit.*, p. 18.

102 Also, in the *Opinion on the "Proposal for Regulation of the European Parliament and of the Council setting a framework for energy efficiency labeling and repealing Directive 2010/30/UE,* aiming to discourage planned obsolescence, the Committee proposed that label content should include the *"minimum duration of products"* and *"energy consumption of the product during lo largo de su vida útil". See* FATOVIC, EMILIO, Comité Económico y Social Europeo, *Dictamen sobre la "Propuesta de Reglamento del Parlamento Europea y del Consejo por el que se establece un marco para el etiquetado de la eficiencia energética y se deroga la Directiva 2010/30/UE"*, Brussels, January 20, 2016, p. 3.

103 LIBAERT, THIERRY, *op. cit.*, p. 26.

104 LOHAN, CILLIAN, Comité Económico y Social Europeo, *Dictamen sobre la Comunicación de la Comisión al Parlamento Europeo, al Consejo, al Comité Económico y Social Europeo y al Comité de las Regiones –Cerrar el círculo: un plan de acción de la UE para la economía circular–*, COM (2015) 614 final, la Propuesta de Directiva del Parlamento Europeo y del Consejo por la que se modifica la Directiva 94/62/CE relativa a los envases y residuos de envases –COM (2015) 596 final –2015/0276 (COD), la *Propuesta de Directiva del Parlamento Europeo y del Consejo por la que se modifica la Directiva 2008/98/CE, sobre los residuos–*, COM (2015) 595 final –2015/0275 (COD), *la Propuesta de Directiva del Parlamento Europeo y del Consejo por la que se modifica la Directiva 1999/31/CE, relativa al vertido de residuos–*, COM(2015) 594 final –015/0274 (COD) y la *Propuesta de Directiva del Parlamento Europeo y del Consejo por la que se modifican las Directivas 2000/53/CE, relativa a los vehículos al final de su vida útil, 2006/66/CE, relativa a las pilas y acumuladores y a los residuos de pilas y acumuladores*, y 2012/19/UE, *sobre residuos de aparatos eléctricos y electrónicos–*, COM(2015) 593 final – 2015/0272 (COD), Brussels, april 27, 2016, p. 4.

of the European Parliament and Council, amending directives on waste prevention, in order to strengthen the position of member States in chasing planned obsolescence and to reduce consumers' mistrust[105].

The UN system is also aware of this business practice, particularly because of the worrisome waste coming from planned obsolescence; its recommendations to countries and manufacturers are just guidelines to rethink their actions[106] and essentially to make an acute diagnosis of the situation[107].

Apart from the above, and sideways, the "Guiding Principles on enterprises and human rights. Implementing the United Nations 'Protect, Respect and Remedy" Framework, elaborated by Rapporteur Jhon Ruggie in 2011[108], point out the

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105 Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-582.196%2b01%2bDOC%2bPDF%2bV0%2f%2fES

106 The April 19, 2015 Report, submitted by the team led by Ruediger Kuehr of the *Institute for the Advanced Study of Sustainability* at UN University (UNU-IAS), within the *Sustainable Cycles* (SCYCLE) program, pointed out that in one year a total of 41.8 million tons of waste were produced, resulting from electronic and electrical appliances waste, mainly due to the end of useful life of stoves, washing machines, bathroom equipments, microwave ovens and dishwashers; of all these, only less than the sixth part is in fact re-used or recycled. Moreover, it further says that the increasing global problem is associated to increasing sales and to the cutback of electrical and electronic products' life cycles. Available at http://i.unu.edu/media/unu.edu/news/52624/Discarded-Kitchen-Laundry-Bathroom-Equipment-Comprises-Over-Half-of-World-E-waste.pdf

107 Despite pointing out that monitoring has provided a baseline to redesign actions of policymakers, manufacturers and actors of the recycling industry, as well as to facilitate cooperation, in order to provide support for the required technological development and to give assistance to international organizations, Governments and research institutes striving to deplete appropriate containment measures, the report essentially provides an empirical, greatly detailed review of the magnitude of the "e-waste problem" in different regions of the world. *Idem*.

108 Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_SP.pdf

principle of "human rights due diligence", established to "identify, prevent, mitigate and respond for the negative consequences of their activities on human rights". To this purpose, firms must include "an assessment of real and potential impacts on human rights, including conclusions and lines of action; a follow-up of their reply and a communication on how to face negative consequences".

As explained in the introduction, due diligence not only refers to the negative consequences indeed occurred; it also includes risk of their occurrence, potential impacts to which the firms must "respond with prevention or mitigation actions, while the real impacts –those that have in fact occurred– must be mended (Principle 22)". In terms of production, in the event of chains of value with multiple actors, the firms shall "identify the general areas presenting greatest risk of negative consequences on human rights, due to the operative context of certain suppliers or clients, to operations, products or services in question", in order to "prioritize due diligence in human rights, as to these areas"[109].

There is no concrete indication on the duty of providing durable, quality goods, although it establishes that adverse consequences on human rights could come from products manufactured by business operation. The break point is the possibility of understanding that planned obsolescence –as a strategy within the manufacturing process that leads consumers to dispose of products, due to the end of their life-cycle and consequently to purchase again the same product in a short lapse– constitutes itself, or might come to constitute, a business operation acknowledged as prejudicial to human rights.

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109 *Idem*, p. 19.

In short, except for the new French legislation and the Bolivian and Brazilian mentions, no solutions can be found in hard law or jurisprudence regarding the mentioned troubles, by means of a system of prohibitions, restrictions and responsibilities aiming to balance costs and benefits of planned obsolescence. Nor we see in soft international or regional law, in International law on human rights, or even in economic law, a positive determination steering Governments towards recognizing this business practice for what it is: an action harmful to consumers and society, that should be censured, prosecutable and punishable.

3.2. Solutions Proposed by the Doctrine

Facing the silence of legislators and rules and regulations –both international and regional–, doctrine has formulated alternative solutions based on existing principles and rights.

Indeed, to deal with violations of the right to information, Garma[110] and Soto[111] have proposed to introduce life span of products as mandatory information.

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110 See: Garma, Jorge, *op. cit*.

111 On the right to information, Soto considers that "Companies have the obligation, in any case, to fully and sufficiently inform consumers on the essential features of the products they sell. They must always obey parametres of loyalty and truth, that do not mislead consumers or harm them (…) Life span of products is one of the parameters that, in most citations, can be found under consumer protection regulations and it is considered essential to consumers' information. It is relevant, whether the good is perishable or non-perishable". The author points out that not providing comprehensive information on a product durability "has been considered an absolute deception; it indicates a great deal of disloyalty in the consumption relationship, due to the fact that consumers' expections when using a product, based on its exposure during the marketing campaign set forth by the compañy, do not match the conditions of the product itself, because they were not informed on the possibility –increasingly common– that the purchased product would cease functioning at the warranty expiry date,

Vance Packard[112] *considers* that the solution lies in consolidating regulations on quality "*to fight against the reigning confusion on the quality of products and labels*"[113]. *Along the same line, Latouche* proposes to establish a standard warranty duration and, at the same time, the so-called eco-conception of products, so that they could be repaired, as well as recycled or re-used[114].

Likewise, the importance of intensifying the use of the so-called Corporate Social Responsibility Reports, which disclose to consumers the firm's policies to raise products life span, as well as reports on "*efforts to reduce social costs arising from planned obsolescence, which will help to improve their reputation with clients, suppliers, creditors, consumers and society in general*"[115] has been maintained.

Finally, as observed by Latouche, let's not forget the value of consumers and citizens reaction to demonstrate against, for instance, the unbridled waste facing the current ecological crisis, since "action of consumers associations (…)

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or its features would be modified and/or lessened. SOTO PINEDA, JESÚS ALFONSO, *op. cit*., p. 389 y ss. See. TREBILCOCK, MICHAEL, *Consumer Protection in the Affluent Society*, p. 276 y ss. Available at: http://lawjournal.mcgill.ca/userfiles/other/3180042-trebilcock.pdf

112 See PACKARD, VANCE, *La persuasión clandestine*, Calmann Lévy Éditeurs, Paris, 1958; PACKARD, VANCE, *The waste makers*, New York, DAVID MCKAY, 1960. These works, as far as remedies are concerned, offer arguments to oppose the disastrous ecological consequences of planned obsolescence and make some suggestions to contain them.

113 LATOUCHE, SERGE, *op. cit*., p. 96.

114 (The production of) "*goods designed to be disassembled, repaired and reused or recycled, must be promoted. (…) The Swiss Company Rohner et DesignTex manufactures an upholstery fabric that decomposes naturally at the end of its life-cycle (…) BASF, the German giant of chemical industry, has perfected a nylon fabric which is indefinitely recyclable. After being used to manufacture a product, it can be decomposed into its essential elements to be used again in new products*" LATOUCHE, SERGE, *op. cit*., p. 102.

115 RUIZ MALBAREZ, MAYRA, ROMERO, ZILATH, *op. cit*., p. 134.

creates a counterweight that should not be neglected and which leads to a protective legislation in terms of quality of products, manufacturing transparency and warranty life span"[116].

Such measures, however, despite their broad sense of fairness, suppose that States and enterprises do what they should have done all along, but haven't so far. But they do not establish which is the determining factor for their implementation, in the event of planned obsolescence. As to consumers claims and the social movement, although their demand and contribution are decisive, their ability and effectiveness to give way to the regulatory, productive and cultural transformations required to solve collective and individual problems created by planned obsolescence, is not absolute.

That means they all are slow, politically or socially challenging, soft, and they all require non-existent factual premises.

3.3. Assessment

There is no doubt that the outstanding protection of economic freedom is the strong notion, the *leit motiv* that lies at the basis of the lack of legislation or measures to control planned obsolescence. Such choice is the capital expression of economic models that have been adopted, not because they were constitutionally defined economic system,

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116 LATOUCHE, SERGE, *op. cit.*, p. 93. An example of such reaction is FENNIS (Fundación Energía e Innovación Sostenible Sin Obsolescencia Programada). FENNIS is a foundation in Barcelona, whose goal is to contribute to planned obsolescence ban, to preserve natural resources through participation, helping to transform an economic and social model, based on sustainability and environmental preservation. See http://feniss.org/.

but due to the assumption of certain dogmas, according to which private enterprise is the market engine that, in turns, favours a more adequate scenario to guarantee development, collective wellbeing and the best operation of the economy.

The answers provided by the sources of law that have been studied, do not grant absolute value to planned obsolescence over the remaining rights, thus it is not a non-restrictive tool for economic growth, business sustainability, or the application of *pro libertate* principle and the pursuit of maximum profit in a unlimited way.

Therefore, it is convenient to take into consideration an additional foundation, which strengthens the argument of answers provided so far. Facing the lack of explicit rules, it is necessary to turn to the general principles of law, and the principle of non-abuse of the law is one of the main lanterns, traditionally guiding legal operators to reach a safe port.

4. A Complementary Solution: An Answer from the Principle of Non-Abuse of Rights

Can the principle of non-abuse of rights serve as legal ground against planned obsolescence? We do think so, as it can be inferred from its origin and its concept[117], its esta-

117 As a general principle of the Law, it has been mainly the doctrine in charge of delineate its concept, not without controversy and denial (Planiol's critics). Thus, according to Josserand "the abuse represents an act against the purpose of subjective rights, the spirit of its institution (…) the act was abusive if the owner acted with no legitimate motive, betraying his prerogative, the very same that came from the general principles that provided for its consolidation". With a wider view of the reasons why the exercise of a right becomes abusive, Rubio Correa considers it is "a conduct lawful at first, which becomes unlawful when it goes against the Principles of Law".

blishment and application in the Colombian legal system[118], its configuring features and finally its use as an argument when trying to solve disputes of rights and interests that arise between manufacturers and consumers, concerning such practice.

4.1. How to Apply the Principle of Non-Abuse of Rights? A Proposal Arising from Its Structural elements

Non-abuse of rights is a rule-principle, therefore, its structure is wide open, which in turns makes its application a quite difficult exercise. The rule does not state under which factual assumptions it can be invoked, nor which are its legal consequences. Thus, the interpreter's role is crucial to define the rules for its application[119]. Moreover,

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See: JOSSERAND, LOUIS. *Essais de téléologie juridique, I – De l esprit des Droits et de leur relativité, Théorie dite de l'abus des Droits*, Dalloz, 1939 n.º 176. pp. 398 y ss. Likewise, according to VALENCIA ZEA, "*Subjective rights of individuals, both their existence and their exercise, obey to a given orientation; such rights are abused when they are not exercised, despite the obligation to, or they are exercised in a direction opposite to their own destiny or content* ". Cfr. VALENCIA ZEA, ARTURO, *Derecho civil de las obligaciones*, t. III, Bogotá, Editorial Temis, 1998, p. 304. Likewise, VEGA MERE, YURI, "Apuntes sobre el denominado abuso del derecho", *Themis 21 Revista de Derecho,* 1992, pp. 35-36. PLANIOL, MARCEL; RIPERT, GEORGES, *Tratado práctico del derecho civil francés*, Ed. Cultural. La Habana, Cuba, 1936, p. 787.

118 Before the 1991 Colombian Constitution, abuse of right was just for civil and commercial matters. By express dictate of art. 95 n.º 1 of the Constitution, it goes on to radiate all fields of law. Proof of it, is the copious constitutional jurisprudence in which this principle is used as a parameter to define the legal exercise of subjective rights. See, amongst others, judgements of the Colombian Constitutional Court, T-425 of 1995, M.P. Eduardo Cifuentes Muñoz; T-713 de 1996, Judgement Dec 12-1996, M.P. José Gregorio Hernández; T-017 of 1995, Judgement (Jan 30-1995), M.P. José Gregorio Hernández.

119 However, some concrete, real applications had diverse responses, although they appear to be based on the same assumptions. This is specifically the case of the strain between the right to education and the right of educational institutions to receive payment for their services. Jurisprudence sways

when abuse of the law is invoked, this cannot leave out its own disputes with principles that, in turn, are essential for the Rule of Law, such as the principle of freedom and the principle of legality[120].

Thus, it becomes necessary to briefly portray abuse of rights, to establish its essential elements, how and when it is configured, based on constitutional jurisprudence of Colombia, and its doctrine.

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when stating the prevalence of the earlier over the second as to abuse of rights, when Universities withhold certifications due to outstanding tuition payments, or when students' parents invoke the fundamental right to education in orden not to honour their obligations. See judgements of the Colombian Constitutional Court SU 624-99, T-1467-00, T-1468-00, T-1676-00. T-361-00. T-379-00. T-811-00. T-803-01 T-038-02. T-151-02. T-382-02. T-767-02. T-801-02, T-508-03. T-983-03. T-194-04. T-1107-05. T-209-05, T-544-06, T-635-06. T-1228-08. T-339-08. T-459-09. T-616-11. T-659-12. T-997-12. T-635-13.

120 As an example, the logic applied in two judgements relating to dominant position of a bank over mortgage debtors, is opposite. judgements of the Colombian Constitutional Court C-332 of 2001 states that the explanatory clause of a standard contract enforced for mortgages, did not constitute a violation of the principle of no abuse of right, nor of the solidarity obligation. Thus, it points out the artcle 69 of Law 45 (1990) – challenged, at that time – did not violate the Constitution, since the "contract freedom has no specific limitations, directly arising from the Consrtitution, as to the duty of acting with solidarfity established by article 95-2. The obligation not to abuse those rights settled by article 95-1, is not violated by the legal possibility of agreeing on explanatory clauses that stay within the limits established by the law. This is said, after pointing out that "In a Social, Rule of Law State founded on the respect of dignity (art. 1º Constitution) and on the inalienable rights of men, the constitutional obligations cannot be interpreted with widening criteria". Article 95-2 does not impose the execution of joint conducts when individuales, led by free will, decide to contract obligations arising from any contract they celebrate. As to the market, contracting parties look to promote a private economic interest, which finds no express limit in the principle of solidarity established by the Constitution". On the other hand, judgement C-313 of 2013 stated that eliminating the fine for pre-paying debts under a certain amount, was a right way to correct a dominant (abusive) position of Banks towards their debtors.

1. The abuse of right supposes the use of a subjective right, granted by a rule or permitted by positive law, which harms somebody else's right or interest, "obviously «not protected by a specific legal prerogative» (otherwise, we would be facing a case of a simple violation of contradicting rules, not a case of abuse)"[121].

2. Abuse recognition springs from powerful reasons, funded on legally substantial, constitutional principles, which include private or collective interests, that are integrative to the regulatory system and sufficiently acknowledged to allow, in case of breach, to transmute a licit conduct into an illicit one, and thus generate liability.

3. "The existence of intention or fault"[122] of the holder of the abused right is not required, in order to hold him liable for it. Therefore, it is not necessary to prove his/her harmful intention and he/she can be charged, "*since he/she is presumed to act with discernment, intention and freedom, unless proven otherwise*"[123].

4. The determining criterion to identify the abuse lies in the outcome of exercising the right itself, since it is "openly and excessively against the purpose intended by the law for a legal provision or institution"[124]. That is:

4.1. The *"inappropriate and unreasonable" use or exercise of rights, "in light of its essential content and purposes" constitutes abuse of right. Even more so, considering it seeks or generates "in-*

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121 Palombella, Giangluigi, "El abuso del derecho, del poder y del rule of law", *doxa, Cuadernos de Filosofía del Derecho*, 29 (2006), p. 38.

122 Judgement of the Colombian Constitutional Court C-258 of 2013.

123 Rengifo, Ernesto. *Del abuso del derecho al abuso de la posición dominante,* Bogotá, Universidad Externado de Colombia, 2004, p. 51.

124 Judgement of the Colombian Constitutional Court C-258 de 2013.

compatible results" or "results that contradict the constitutional aims that justify its existence in the system of regulations"[125].

4.2. Its most visible expression is the "«inadmissible inequality» of «pursued interests versus those sacrificed»"[126], that is, when the rules upholding the right are invoked and utilized "*in an excessive and disproportionate manner, distorting the legal aim that was pursued*"[127].

To assess the inequality that definitely constructs the legal situation of abuse of rights, intense –although *sui generis*– judgement must be applied: checking the conduct grounds or righteousness must be excluded, since there is none. What must be established is if, by using the power granted to rightholders, the constitutional purposes that justify it are contradicted. And if such use or expression of freedom or right, is unnecessary, for not responding to the best possible option to reach such purposes. In addition, it must be established if the use or exercise of the freedom or right, creates a cost-benefit distribution that is openly unfair, compared to other legal rights and interests it relates with.

5. As to harm, "(…) abuse is flagrant when it unjustifiably affects other rights"; but also "when its exercise goes beyond the material limits imposed by the legal order to the natural expansion of law, regardless of the fact it might lead, in this case, to harming third parties"[128], insofar as their rights and interests are cut down to a degree they should not have to endure. The liability for abusing the settled right, will have different legal contents in each case.

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125 *Ibídem.*

126 Palombella, Giangluigi, *op. cit*., p. 39.

127 Judgements of the Colombian Constitutional Court C-258 of 2013, May 7, 2013, M.P. Jorge Ignacio Pretelt.

128 Judgement of the Colombian Constitutional Court, T-511 of 1993.

In regard to freedoms, this element of rights abuse introduces the "principle of harm" which justifies its legitimate limitation, like no other motive might, with sufficient force.

"This principle –Stuart Mill points out– states that the only reason why we justify that humanity, individually or collectively, shall interfere with the freedom of action of any of its members, is its own protection. That the only aim with which power can be legitimately exercised over a member of a civilized community, against his/her will, is to prevent harm to others. Its own physical or moral wellbeing is not sufficient justification (…) The only part of each person behaviour for which he/she shall be liable for to society, it is the one that harm other people"[129]. In view of this, according to José Luis Gómez[130], the mentioned principle "authorizes to prohibit and punish actions that (…) cause harm to others"[131], either by legislators or, otherwise, by judges.

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129 Mill, John Stuart, *Sobre la libertad*, Madrid, Alianza, 1977, pp. 94-95.

130 Gómez Colomer, José Luis, *Libertad individual y límites del derecho, El liberalismo y sus críticos*, Mentioned by: Díaz, Elías e id, (eds.), *Estado, justicia, derechos*, Madrid, Alianza, 2002, p. 183.

131 And it is much more controversial, considering that at the same time it could set limits to conducts that can only affect the subject executing them. On the issue, Miguel Carbonell observes the principle of damage, considering various perspectives, emphasizing "the one concerning the question on the possibility of imposing limits to freedom to protect the individual against certain objective risks (…), in other words: when and how protection measures for individuals are justified, even in the case of conducts harmful only to himself?". This is why paternalistic, ultra liberal stances appeare, "accepting the fact that the establishment cannot put limits to freedom through legal rules, starting from or taking into account the principle of harm". But it is also accepted as "task of any constitutional system (…) [the] protection of freedom, given that such freedom does not cause harm to others, which does not mean that the State cannot favourably regulate certain areas considered more positive than others". Carbonell, Miguel, *La libertad, dilemas, retos y tensiones*, México, Universidad Nacional Autónoma de México, 2008, pp. 23, 25, 29.

4.2. Planned Obsolescence as an Abuse of Right

Following the proposed application of the principle, planned obsolescence could be considered an abuse of the freedom of enterprise, because:

– It arises from the application of the *pro libertate* principle to the freedom of enterprise protected by the Constitution, and it determines a lessening of other rights of equal category. These are the collective rights to public health and healthy environment, to free market and consumers' rights, particularly, their subjective rights to information on products and quality; as well as to consumers' ownership and to human rights related to goods and services consumption.

– None of these affected assets has specific legal protection, able to restrict or confront an entrepreneur who offers and sells products with built-in obsolescence.

– At the same time, they all have a legal essence which is at least equally important as private autonomy and the pursuit of business profit. It may even be said –as the Colombian constitutional jurisprudence has repeatedly stated– that the nature of freedom of enterprise and the exercise of autonomy for a business to be profitable, are not essential *per se*, and therefore, as they collide with other rights of the same nature, shall yield, since they have lesser caliber than those rights essential to mankind survival (i.e., healthy environment, preserving natural resources), or essential to market stability and trust (i.e., consumer freedom rights and the right to complete and trustworthy information or quality of goods purchased). They cannot prevail over fundamental rights such as wealth preservation, minimum living wage and human dignity conditions of consumers, which could be affected by obsolescent products.

– Basis for right abuse does not arise from plain ethical or moral harm, or from idle argumentation or natural law, unable to impose, on the rightholder, the duty to shelter social interests not belonging to him/her. Its basis is found instead in the constitutional value of legal assets adversely affected by built-in obsolescence and in the fair economic order created by the Constitution, whose normative power legitimately and reasonably allows transmutation of a legal conduct into illegal or against the Law.

– As to the possibility of imputing this conduct to manufacturers, it is presumed. This means we assume that, by implementing this business practice, there is the intention of damaging, insofar as the artificial design that causes shorter life of a good is not chance: instead, it comes from discernment, from the decision and concrete action for manufactured goods not to last and be discarded to purchase a new one, due to the application of artificial pattern in the productive cycle, in marketing, in after-sales service. This is the will that materializes when consumers are forced to buy time and again the same product, which is prejudicial to their right to wealth preservation.

– Planned obsolescence as an expression of the *pro libertate* principle, facing the lack of express prohibitions and *anímus lucri faciendi*, turns out to be a divergent or incorrect use of the right to the freedom of enterprise: on one hand, it goes against objective good faith, *the rules of* honesty, rectitude, loyalty and, above all, the consideration of somebody else's interest[132]; on the other hand, it distorts the institutional guarantee of enterprise being the *basis of development, since*

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132 Neme Villa, Martha, Buena fe subjetiva y buena fe objetiva. Equívocos a los que conduce la falta de claridad en la distinción de tales conceptos, *Revista de Derecho Privado,* Universidad Externado de Colombia, n.º 17, 2009, p. 49.

development must be sustainable, coherent with the Social Rule of Law and the variety of rights that it guarantees, which is disobeyed when production is raised and, thus, the demand for scarce natural resources is raised, due to the decision of functional, technical or psychological death of products.

– Likewise, the decision of limiting products life span or making them useless in the short term, is an abuse of the freedom of enterprise, because it creates an inadmissibly uneven cost-benefit distribution among entrepreneurs and consumers, society and the Establishment. If accepted with no restrictions, it would give way to great satisfaction of entrepreneurs' profit and growth interests, opposite the profound sacrifice of collective and individual or social rights of consumers specifically, and of society, generally speaking.

So far, it could be said that planned obsolescence, being justified by constitutional assets, is a suitable mechanism to create growth and wealth and (maybe) employment, or to ease up the access to goods and services for most consumers and to accomplish the very purposes at the basis of free enterprise. Likewise, an argument on such practice be necessary would also be admissible, if envisioned as the best possible mechanism to raise productivity, competitiveness, affordability and accessibility to mass consumption goods, required for wellbeing and profit pursued by entrepreneurs.

What has no grounds in a Constitutional regime, and thus fails to dodge the declaration of substantial illegality for the manufacturing strategy of introducing goods with built-in obsolescence into the market, are its concrete outcomes: a few people earn a lot and lose nothing, whilst many people earn little and lose a lot, as shown below:

Criterion	Manufacturers	State	Consumers	Society
Benefit	Technological business Development. Efficient Application of investment. Greater earnings.	Supply and demand growth. Increased taxation	Opportunity to access cheap goods. Increased supply. Opportunity to Access new technology	None
Cost	None	Waste collection and disposal. Harm to public health	It forces the decision to consume. It affects wealth to access goods, in the short term. Dissatisfaction of rights, due to poor quality of goods	Waste creation. Indiscriminate exhaustion of natural resources.

– The distribution generated by built-in obsolescence gives way to a fabulous expansion of the freedom of enterprise, in terms of its autonomy and the pursuit of growth and increasing profit for investors, which opposes an evident decrease of the power to protect the right to a healthy environment and public health, as well as consumers' rights as such and as owners of human rights that are satisfied by consuming.

However, the mere adaptation of structural elements of the abuse of right to planned obsolescence, does not imply it's easy to claim it before a judge. It is necessary to submit concrete arguments and to collect required evidence to prove how it shapes up, for each individual or collective action, and what liabilities or legal consequences it generates, in order to restore the harm caused to somebody else's right, and to correct the scope of the right that was exercised.

II. Conclusion

1. Planned obsolescence is an industrial practice that artificially reduces life span of products, either because their

parts lose functionality, or because repairment is difficult or excessively expensive, or because technological innovations lead consumers to waste or disuse.

2. Built-in obsolescence was born as the result of advancing knowledge, but above all as a strategy to encourage economic growth in times of crisis, during the 1930's. Once the crisis was over, however, it became an efficient source to increase consumption and –therefore– business profit, which, over time, turns it into a generalized production formula.

3. A constitutional reading of this strategy indicates strains among legal assets and, within them, strains among protected rights.

4. On one hand, there are the foundations on which planned obsolescence might be justified; according to the Colombian Constitution, they can have an objective and subjective nature.

4.1. As to its objective foundations: the business strategy to manufacture and offer obsolescent goods, favours productivity and economic sustainability, as well as the creation of jobs required to attend demand, which are goals for public economic intervention and therefore identify the economic order outlined by the Constitution as fair.

4.2. As to its subjective foundations: such practice also responds to the *pro libertate* principle, which applies to those freedom areas that are not forbidden and allows holders of the freedom of enterprise, to produce goods with built-in obsolescenc and offer them on the market.

4.3. This business decision is the expression of negative freedoms and of the autonomy of freedom of enterprise's holders. All the more so, since it makes up an efficient strategy to increase profits as a defining purpose of free economic activity, within the limits of a market economy supporting any liberal and social rule of law.

5. On the other hand, there are also reasons to argue that planned obsolescence visibly affects other objective and subjective legal assets, also protected.

5.1. To the Colombian Constitution, the fact that goods themselves, or to consumers', rapidly lose the usefulness, directly affects public health and healthy environment, while disposal or destruction of obsolescent goods is expensive, it generates high levels of toxicity and pollution and it puts great pressure on natural resources, due to their excessive use, in order to meet the pace of production and market supply of disposable goods. And by becoming a generalized mechanism imposed by corporations, planned obsolescence deepens inequality, that is the asymmetry of the economic relationship between them, and undermines the goal pursued by Free competition law and Consumer law in regulated markets, which is setting up plural, efficient markets.

5.2. Likewise, the circulation of manufactured goods in such conditions lessens the scope of consumers' freedom, their right to full and sufficient information and to quality products, and their right to preserve their wealth. And while consumption does not operate mainly to satisfy whims but vital needs, or necessities that materialize dignified living conditions, built-in obsolescence is at the same time a business decision-action that negatively affects human and fundamental rights, civil and social rights, that are satisfied by marketed goods consumption.

6. The Colombian legislation and compared law have not contemplated concrete measures to solve these strains, and up until now, only European and United Nations soft law has put forward answers that hardly suggest what measures can be adopted by States, corporations and society.

7. This legal overview clearly shows the great value that Governments and legislators grant, according to the chosen

economic model, to markets and freedom of enterprise, facing the set of existing guarantees and rights.

8. Even so, neither the lack of prohibition or restriction, nor the purposes it serves for economic growth, business sustainability or seeking the highest profit possible, can turn built-in obsolescence into a business practice with absolute power, over other people's rights, regardless of how it affects them.

9. For this reason, it is helpful to use the principle of abuse of right as a direct clause that complete the rule in those cases of lack of legislated answers. In this way, we can attribute to the artificial deception of built-in obsolescence, the character it possesses as an abuse of the right to the freedom of enterprise.

10. This principle, shaped up within liberal states subject to legality, granting judges the legal power to turn a licit conduct into an illicit one, has been embraced by doctrine, legislation and jurisprudence, as is the case of Colombian law.

11. It springs from the legal protection of the abused right, and the specific and effective misprotection of the rights affected. It does not include proof of the intention to harm, which is presumed, since the exercise of the freedom under examination, is deliberate. And as to harm, it can be demonstrated by proving the actual damage of manufacturer's rights, or even without it, since the freedom or right exercised deviates from its constitutional goal and forms an uneven cost and benefit allocation amongst rights.

12. Based on the above assumption, it is possible to say that planned obsolescence is an abuse of the right to freedom of enterprise.

12.1. It affects collective and subjective rights protected by the Constitution, whose specific weigh can exceed the one granted to such right, since –more than legitimate eco-

nomic interests– they represent legal areas that guarantee human existence and dignity, the right of consumers as the weak side of the consumption relation, and the economic fair order which should come from the market.

12.2. Likewise, this practice translates into abuse of right, attributable to the producer, because of a deliberate act by which consumer is forced to buy once and again the same product, which harms or damages his freedom, his rights to complete and truthful information, to quality products, to the preservation of wealth invested into those goods, which will soon be discarded.

12.3. It is also an atypical use of right, conflicting with the due rectitude of entrepreneurs and with the meaning of business at the basis of development, which is especially evident when it satisfies both profit interests and growth pursued by those, with a profound sacrifice of collective and individual rights or social rights of consumers and society, in general terms.

13. From here on, judges must complete a definition, to set forth individual and collective actions that can be exercised by interested subjects, according to an indirect legitimacy and proofs and assumptions to be determined in each case, in order to declare and identify relevant responsibilities or legal consequences that shed the light of legal resolutions on the resounding wrongdoing of built-in obsolescence.

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