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THE (LACK OF) ECONOMIC ANALYSIS BY COURTS

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Abstract

This Article shows that Israeli case law refrains from economic analysis of harm to competition when it comes to determining whether agreements are antitrust violations. It also shows that the antitrust agency seems, de facto, to be content with the fact that courts tend not to conduct economic analysis in antitrust cases. Moreover, it shows that many times the antitrust agency itself initiated interpretations of the statute that set a broad range of per se prohibitions that do not require economic analysis. I hypothesize that the reason that the antitrust agency is content with the lack of economics analysis stems from the fact that broad per se prohibitions assist the agency in its role as a major litigator of antitrust cases. They also cause many of the business transactions to be subject to ex ante review by the antitrust agency, thereby enhancing the agency's regulatory powers. After fifteen years of broad per se prohibitions, courts concerned with the opportunism of parties began interpreting the statute to enable per se legality in many cases. It was only then that the antitrust authority responded by helping to

propose an amendment that would make the statute less vague.

THE (LACK OF) ECONOMIC ANALYSIS BY COURTS IN ISRAELI ANTITRUST CASES CONCERNING RESTRAINTS OF TRADE

*David Gilo**

This Article shows that Israeli case law refrains from economic analysis of harm to competition when it comes to determining whether agreements are antitrust violations. It also shows that the antitrust agency seems, de facto, to be content with the fact that courts tend not to conduct economic analysis in antitrust cases. Moreover, it shows that many times the antitrust agency itself initiated interpretations of the statute that set a broad range of per se prohibitions that do not require economic analysis. I hypothesize that the reason that the antitrust agency is content with the lack of economics analysis stems from the fact that broad per se prohibitions assist the agency in its role as a major litigator of antitrust cases. They also cause many of the business transactions to be subject to ex ante review by the antitrust agency, thereby enhancing the agency's regulatory powers. After fifteen years of broad per se prohibitions, courts concerned with the opportunism of parties began interpreting the statute to enable per se legality in many cases. It was only then that the antitrust authority responded by helping to propose an amendment that would make the statute less vague.

I. Introduction

Antitrust law seems to be one of the fields of law where economic analysis is the most appropriate. This Article shows, however, that Israeli case law refrains from economic analysis when it comes to determining whether agreements are antitrust violations. It also shows that the antitrust agency seems, de facto, to be content with the fact that courts tend not to conduct economic analysis in antitrust cases. Moreover, it shows that many times the antitrust agency itself initiated interpretations of the statute that set a broad range of per se prohibitions that do not require economic analysis. I hypothesize that the reason that the antitrust agency is content with the lack of economics analysis stems from the fact that broad per se prohibitions assist

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the agency in its role as a major litigator of antitrust cases. They also cause many of the business transactions to be subject to *ex ante* review by the antitrust agency, thereby enhancing the agency's regulatory powers: The agency can then monitor most of the transactions, and also condition their pre approval upon business behavior that the agency is not empowered to regulate directly according to the Antitrust Statute of 1998 (hereinafter The Antitrust Statute).¹ This Article also shows that not only do courts avoid economic analysis while discussing antitrust cases, but also that as a result the outcomes of these cases are not consistent with the appropriate results had economics analysis been utilized.

The Article starts by discussing the courts' lack of economic analysis in their application of the common law to non-competition clauses. It continues with the ways the courts have traditionally interpreted the antitrust statute as prohibiting restraints regardless of the economic analysis of their effect on competition in the relevant market, both in the realm of horizontal restraints (among competitors) that are not within the hard core (i.e., are not price fixing, market division, quantity fixing, and the like) and in the realm of vertical restraints (restraints between supplier and buyer).

The Article then continues to explore a newer trend in the case law, in which the courts avoid economic analysis by interpreting the statute as setting per se legality of restraints. Courts do so both by overbroad interpretations of exemptions, as well as by a literal reading of the statute, that produces loopholes.

II. *Noncompetition Clauses*

One of the areas of law that exhibits a lack of economic analysis when dealing with competition issues is that of non-competition clauses—clauses in which a party to a contract restricts its ability to compete with the other party or to be employed by the other party's competitor when the contract is terminated. Such clauses are abundant

¹ Under the antitrust statute, when a transaction such as a restrictive agreement is subject to pre-approval, the antitrust agency has broad powers to condition its approval upon certain changes in the business behavior of the entities involved, including, for example, unilateral behavior, such as pricing, tie-ins, refusals to deal, etc. These are types of behaviors that the agency could have regulated directly, under the statute, only vis-à-vis monopolies.



in employment, distribution, and partnership contracts, as well as in contracts for the sale of an asset. Such clauses could be deemed to be against the public interest under Section 30 of the Contracts Statute (General Part)-1973, which declares as void, in relevant part, contracts in which the aim, content, or result is against the public interest. Courts apply the common law regarding non-competition clauses that includes a balancing of the conflicting interests, in order to determine whether the clause is indeed void under this provision. A non-competition clause can also be considered void in Israel under the Antitrust Statute as an illegal restraint of trade under Section 2 of the Statute. Section 30 of the Contracts Statute (General Part)-1973 declares, in relevant part, that contracts in which the aim, content, or result is illegal are void.

Normally one would expect a policy-oriented court that is willing to engage in economic analysis to balance, in such cases, between all of the values affected by non-competition clauses, including the welfare benefits involved in the protection of trade secrets, stimulation of an employer who is the beneficiary of the non-competition clause to grant its employees expensive training, the freedom of occupation, and the anticompetitive effects in the relevant market. Such anticompetitive effects indeed exist in some cases, since non-competition clauses that deter or prevent new entry into the market by potential entrants could help enshrine a monopolistic or oligopolistic (i.e., with only a few firms) market structure.

However, Israeli case law in this area is a far way from being policy oriented in such a manner. The cases can be divided into the cases preceding the seminal decision of the Supreme Court in Additional Civil Appeal 4465/98 *Tivol Ltd., v. Shef Hayam (1994) Ltd.*,² on one hand, and the *Tivol* decision, on the other hand. The cases preceding *Tivol*, when assessing the legality of a non-competition clause, give no weight at all to the value of competition. The *Tivol* case, on the other hand, gives substantial weight to the value of competition but does not engage in any form of economic assessment of this value.

We shall begin below with the cases preceding *Tivol*, but before we do so, it should be emphasized that the antitrust agency did not take part in the civil litigations concerning non-competition clauses. Moreover, to the best of my knowledge, the antitrust agency had never challenged a non-competition clause ancillary to an employment contract. In any case, as noted, the antitrust agency never joined a civil case, brought before a

² FHCA 4465/98 *Tivol Ltd. v. Shef Hayam Ltd.* [1999] IsrSC 46(1) 56.



civil court, concerning the legality of a non-competition clause, be it ancillary to an employment contract or another kind of contract. Normally, the issue arises in such civil cases when the party who is subject to the non-competition clause breaches this clause, and then, when sued according to the clause, challenges its legality. Given the fact, portrayed below, that civil courts never engage in economic analysis of the harm to competition in the relevant markets in such cases, it is not surprising that the antitrust agency was never invited by courts to participate in such litigations.

A. *The Cases Preceding Tivol*

As noted, the old cases, prevailing up to the *Tivol* case, did not give any weight to the value of competition, and, accordingly, lacked any economic analysis assessing this value. More accurately, some of these cases incidentally mention the value of competition, but de facto do not give it any weight in the actual decision-making, while other cases do not even mention competition as a relevant value to be balanced vis a vis other values.³

For example, in the *Rav Bariach*⁴ case, the Supreme Court upheld the specific performance of a non-competition clause that prevented the entry of a former employee into the market of steel doors and locks. This market has been analyzed extensively by the antitrust authority who views it prone to monopolization and anticompetitive conduct.⁵ Nevertheless, there is no analysis in this case of the harm to competition caused by blocking a potential entrant to a relevant market.

Similarly, in the *Orbach* case⁶ the court upheld a preliminary injunction enforcing a noncompetition clause that had prevented a former employee from entering the elevator sales market. Here too the relevant market is extremely concentrated and prone to cartelization.⁷ Still, the court, when enforcing the covenant, did not discuss the harm to competition in the relevant market.

³ To be sure, in many of these cases, the parties themselves failed to claim that competition had been harmed, so that the court allegedly did not have the tools or factual basis to deal with these issues.

⁴ CA 155/80 *Rav Bariach Ltd. v. Amgar* [1980] IsrSC 35(1) 817.

⁵ See Decision of the Head of the Antitrust Authority in the Matter of Restraints of Trade in the Steel Door Market; Antitrust Authority, Publication number 3003977 (1985), available at <http://www.etype.co.il/anti1/?cmd=4&text=51,48,48,51,57,55,55> (last visited October 5, 2006).

⁶ CA 79/80 *Orbach v. I.M.S. Eilin* [1982] IsrSC 34(1) 125.

⁷ See CC 238/94 *The State of Israel v. Nehushtan Elevator Industries, Ltd.*; 1995 Antitrust 3001783 (convicting elevator firms for creating cartels in the market).



In the *Amiad* case⁸ it appears from the facts of the case that the Amiad Kibutz held a monopoly position, or close to a monopoly position, in relevant markets in the field of irrigation, due to trade secrets and patents it held. Nevertheless, the Court enforced a covenant blocking entry into Amiad's markets by a former employee; again, without conducting any analysis of the harm to competition. This is despite the apparent non-competitive structure of the markets involved and despite the fact that the former-employee appeared to be practically the only potential entrant into these markets that could do so without infringing Amiad's patents.

To be sure, the protection of trade secrets, that definitely played a role in this case, may well be justified, in certain cases, and non-competition covenants are an effective way to protect them. However, some sort of balancing between the interest in trade secret protection and the harm to competition involved in such protection would definitely be in place had the court been inclined to give any weight to the harm to competition.

In the *Shefi* case,⁹ the labor court upheld a noncompetition clause forbidding a former production executive of a firm in the carton boxes market from competing with its former employer for two years following termination of employment. The former executive attempted to join a new entrant into this market. This market too is characterized by extreme concentration and threats of cartelization.¹⁰ Again the court's decision lacks any form of economic analysis of the potential harm to competition. Any court inclined to conduct such an analysis should have inquired to what extent the former executive was key to the new entry of the new employer?; were there other potential entrants which would have alleviated the concerns about the anticompetitive harm?, and so on.

In the *Egged* case,¹¹ the Supreme Court upheld a noncompetition clause that prohibited members of a monopolistic public transportation company who enjoyed early retirement, from competing against the company, for three years after their departure from the company. As in the other cases, the decision lacks any economic analysis of the potential harm to competition. This is despite the fact that the public

⁸ HP (Nz) 854/84 Tavor v. Amiad [1985] IsrDC 45(3) 221.

⁹ 9 NB 1048-12/92 Shefi Arizot Ltd. v. Medi [1992] IsrLC 25(2) 5.

¹⁰ See Decision of the Head of the Antitrust Authority in the Matter of Restraints of Trade between Manufacturers of Carton Boxes, Antitrust—Decisions of the Head of the Antitrust Authority and Court Decisions (Israeli Bar Association, Tel Aviv District, Vol. B) 66.

¹¹ CA 672/96 Egged Ltd. v. Rechtman [1999] IsrSC 44(5) 25.



transportation market has been monopolistic in nature, and opened to competition only a short period before the decision.¹²

Even decisions that condemned non-competition clauses on the basis of their violation of the freedom of occupation generally lacked economic analysis of the harm to competition. For example, in the *Checkpoint* case¹³ a noncompetition clause was struck down by the highest labor court due to its infringement on the ex-employee's freedom of occupation. The ex-employer, Redguard, was a small firm that wanted to expand and become a viable competitor to Checkpoint in the market for security firewalls that protect computer networks. Checkpoint, for its part, seems to be the market's dominant firm.¹⁴

Checkpoint was the firm that attempted to employ its rival, Redguard's, former employee. In this particular case, had the court conducted an economic analysis regarding the harm to competition (as apposed to an examination of merely the harm to the former-employee's freedom of occupation), the court might have chosen to *uphold* the non-competition clause. This is because such non-competition clauses could help small fringe competitors, such as Redguard, to expand by recruiting loyal talents, become viable competitors to Checkpoint, and challenge its dominance in the market. It is the declaration of such non-competition covenants as void which enables Checkpoint, the dominant player, to "steal" the newly recruited talents of its smaller rivals, thereby enshrining its dominant position. Had Redguard made this claim, according to which, in its particular case, non-competition covenants were actually pro-competitive, and had the court been inclined to conduct such an economic analysis, perhaps Redguard would have prevailed (assuming the appropriate balancing between the pro-competitive effects of the covenants and the harm to the freedom of occupation would have tipped in favor of the former).

Another case where the court, this time the Supreme Court, exhibited a harsh approach toward non-competition clauses, again, solely on the basis of the harm to the freedom of occupation, is the *Saar* case.¹⁵ Here the non-competition clause prevented

¹² See Decision of the Head of the Antitrust Authority in the Matter of Declaration of a Monopoly Egged and NZBA, Antitrust Authority, Publication number 3003820 (1999), available at <http://www.etype.co.il/antil/> (last visited October 25, 2006).

¹³ LA 164/99 Fromer v. Redguard Ltd. [1999] IsrSC 34 294.

¹⁴ These are estimates as the decision lacks details regarding the parties' corresponding market shares or the structure of the relevant market.

¹⁵ CA 6601/96 AES System Inc. v. Saar [2000] IsrSC 43(3) 850.



a former employee from offering competitive services in connection with software supplied by the former employer, who also offered such services. The Supreme Court invalidated the clause, claiming that the clause harmed the former employee's right to freedom of occupation.

Although the Supreme Court accepted the notion that an 18 month non-competition period may have been reasonable had it been necessary to protect the former employer's trade secrets, it found that the former employee did not use the former employer's trade secrets with regard to the single large customer that transferred its business from the former employer to the former employee. Accordingly, the Supreme Court overturned the lower court's order for damages against the former employee concerning this customer.

Again, no analysis of the harm to competition was conducted. This lack of economic analysis is particularly striking given the potential richness of the circumstances in this particular case: The extremely interesting and important question in antitrust policy of whether the relevant market for services for particular software, hardware, or machinery constitutes only services for this particular product, or rather services for all of the competing products.

This very question was discussed by the US Supreme Court in the *Kodak* case,¹⁶ in which a rigorous analysis of the relevant market for antitrust purposes was conducted. For example, suppose the Supreme Israel Court in the *Saar* case had concluded that the relevant market is confined to the market for services for the former employer's particular software, due to the fact that buyers of this software are locked-in and as such do not see service providers of other software as reasonable substitutes for service providers for the software they have. If, in addition, the number of competing service providers for the former employer's software was small, the anticompetitive effect of the non-competition clause would have been substantial, as it helped enshrine the concentrated structure of the relevant market. Such a conclusion would have reinforced the court's conclusion, and also may have caused it not to see the 18 month non-competition period as legitimate, even in circumstances where the non-competition clause was necessary to prevent the use of trade secrets.

¹⁶ Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451 (1992).



B. *The Tivol Case*

The *Tivol* case definitely enhanced the value of competition as a central value, which needs to be given substantial weight, separately from the right to freedom of occupation. This case involved a joint venture between a producer of vegetarian meat substitute products and a producer of fish products. In an agreement for the dissolution of the joint venture, the parties signed non-competition clauses according to which they would not enter each other's markets for five years after the partnership dissolves. One of the parties attempted to enter the other party's market who then sued for breach of contract. The party in breach claimed that the non-competition covenant constitutes an anti-trust violation and is therefore void. The Supreme Court, in a special seven-judge panel, accepting a critique found in the academic literature¹⁷ of the previous disregard by the case law of the value of competition, indeed invalidated the non-competition clause, based on Section 2 of the Antitrust Statute. The Supreme Court added that competition is an important basic value that the legal system needs to promote. The novelty of the judgment in *Tivol* is that it gives competition a separate and overriding value, external to the balancing of interests between the parties to the contract. It stresses that the value of competition seeks to address public and consumer welfare, and criticizes the previous decisions' sole emphasis on the interests of the parties to the contract for freedom of occupation of the party subject to the covenant verses the legitimate interests of the party enjoying the covenant.

Justice Tirkel, dissented in the *Tivol* case on the basis that a party breaching a contract while claiming it to be an illegal restraint of trade is not acting in good faith. The majority opinion dismissed this approach as because it focused, like the previous cases, on the parties to the contract, rather than on consumers, which are the beneficiaries of the Antitrust Statute.¹⁸ Indeed, when a contract harms competition, the very essence of competitive forces that the antitrust statute seeks to promote is that each of the parties has an opportunistic incentive to breach the contract and promote competition. Just as we would like each party to a cartel to follow his natural short-run incentives and breach the cartel agreement in order to make a profit at the expense of

¹⁷ This critique is made in David Gilo, *Toward a New Legal Policy for Non-Competition Covenants*, 23 IUNEI MISHPAT 63 (2000) [in Hebrew]; 1 DANIEL FRIEDMANN & NILI COHEN, CONTRACTS 52 (1991); Dror Strum, *A Change in the Monitoring of Restrictive Practices*, available at www.antitrust.gov.il (last visited October 3, 2006).

¹⁸ *Tivol Ltd. v. Shef Hayam Ltd.*, *supra* note 2, at 106-108.



the other parties, who kept their promise not to cut prices, we would like to encourage any party to an illegal restraint of trade to breach in order to promote competition.¹⁹ The *Tivol* decision, forbidding a disregard to consumer welfare in such cases, and disregarding the claim that the breaching party did not act in good faith, has not been overturned to date.

Unfortunately, however, the particular restraint before the court was considered by the court to be a per se violation of the antitrust statute, making an economic analysis of the harm to competition in the relevant markets unnecessary. Indeed, the briefs before the court did not contain any attempt to conduct such an economic analysis. In this particular instance, the per se treatment of the restraint was indeed justified. Israeli antitrust law treats non-competition clauses that prevent a party from entering the other parties market under a per se prohibition, because they are viewed as market division agreements between potential competitors, that are considered per se violations according to section 2(b)(3) of the Antitrust Statute.

To be sure, the per se prohibition of non-competition clauses under the Antitrust Statute cannot justify the lack of economic analysis in the previous cases. These cases did not discuss the application of the antitrust statute to non-competition clauses, but rather the common law concerning covenants not to compete, which does not include per se prohibitions, but rather a rule of reason analysis, according to a balancing of the intersecting interests involved (including the public interest in promoting competition in the relevant market).

One could claim, in the defense of courts, that they lack sufficient tools to make the proper economic analysis regarding the degree of harm to competition. However, such a claim is in conflict with the fact that civil courts often engage in quite complex issues, such as medical malpractice, evaluation of damages, or of lost profits, etc., with the assistance of expert testimony. The evaluation of the degree of harm to competition in the relevant markets is arguably no more complex than such issues.

¹⁹ Similar reasoning implies that it would be a good idea to prevent the party who suffered breach of an illegal restraint of trade to sue for restitution of the value that he transferred to the breaching party in exchange for the restraint of trade. Otherwise, the parties could *ex ante* arrange for a large transfer in favor of the party restraining himself from competing, the restitution of which would deter this party from breaching (thereby promoting competition) in the future. Section 31 of the Contracts Statute (General Part) (1973) indeed enables the court to hold that there would be no restitution. The court in *Tivol Ltd. v. Shef Hayam Ltd.*, however, does not deal with the issue of restitution.



C. Interim Conclusions and Cases after Tivol

The aim of this section is to show how the analysis of non-competition clauses by Israeli courts lacks economic analysis. This phenomenon was most pronounced before the *Tivol* case, when courts did not even take account of the harm to competition when assessing non-competition clauses. The *Tivol* case signaled an improvement in that it mandates courts to take serious account of the harm to competition. Unfortunately, in this particular case, there was no economic analysis, because the case discussed the antitrust statute, condemning non-competition restraints under a per se prohibition rather than the common law doctrine, that requires a rule of reason analysis.

Of course, the rule of reason analysis required under the common law doctrine necessitates a balance between the harm to competition and the freedom of occupation, on one hand, and other values, such as the protection of trade secrets, etc., that could change from case to case, on the other hand. One would expect this balancing to be different with regard to employment contracts than with regard to contracts for the sale of property or joint ventures. Be the particular balancing in a particular as it may, the harm to competition needs to be taken into account. Regretfully, cases following *Tivol* that implemented the common law doctrine again continued to ignore the value of harm to competition.²⁰

III. *The Lack of Economic Analysis in the Definition of an Illegal Restraint of Trade*

Let us now turn to the interpretation of the Israeli Antitrust Statute by the case law. I will show in this section that the courts have consistently interpreted the statute in a manner that relieves them from any form of economic analysis in determining the legality of restraints under the statute.

²⁰ See, e.g., LabA (Hi) 1800/00 Tanko International Ltd. v. Guy Ofra [May 18, 2006] (not yet published)(the labor court upheld a non-competition clause without regard or analysis of the harm to the competition); LabA 1457/05 Meir Peles v. Modgal Metals (99) Ltd. [March 26, 2006] (not yet published); LabA 26/99 Spector v. Direx Medical Systems Ltd. [April 21, 2006] (not yet published) (where the labor court did not uphold the non-competition clause, but, again, without any regard or assessment of the harm to competition in the relevant market).



A. *Horizontal Restraints, the Interpretation of Section 2(a) of the Antitrust Statute, and Why Antitrust Agencies are Content with the Non-economic and Broad Interpretations*

Restraints of trade are discussed in Section 2 of the Antitrust Statute. Section 2(a) defines an illegal restraint of trade as “a restraint among people conducting business according to which one of the parties restrains himself in a way that might harm competition between him and the other party to the restraint or between him and a third party.” Section 2(b) includes a closed list of restraints that are deemed to be illegal restraints of trade, regardless of the harm to competition in a particular case. Accordingly, Section 2(a) seems to demand that courts and antitrust agencies conduct an economic analysis of the harm to competition, while Section 2(b) eliminates the need for such economic analysis with regard to the restraints included in this section.

When it comes to horizontal restraints—restraints among competing firms or potential competitors, a short list of hard core per se prohibitions, such as the prohibitions of horizontal price fixing, market division, or quantity fixing, is usually justified. The reason is that such hard core restraints are harmful to competition in the vast majority of cases, and it is hard to imagine why the parties create such restraints unless their aim is to harm competition in a relevant market. Such per se prohibitions can be found in Section 2(b) of the Antitrust Statute.

Many agreements among competitors, however, are not included in this short list of hard core restraints. For example, a joint-venture, in which competing firms cooperate in production or in research and development, whereas the parties market their products separately and also may set product quality separately, typically does not involve hard core restraints, when there is no price fixing, market division, quantity, or quality setting. Accordingly, one would expect such restraints to be an antitrust violation subject only to an economic analysis of the probable harm to competition of the particular restraint in the particular market.

Indeed, restraints that do not involve price fixing, quantity setting, market division, quality setting, or analogous restraints do not fall within Section 2(b) of the Statute. Instead, such restraints are typically dealt with under Section 2(a) of the Statute, which demands a probable effect on competition in order for restraints to violate it.



Unfortunately, however, the wording of Section 2(a) is somewhat clumsy, in the sense that it demands probable harm to competition “*among the parties*” to the agreement. For example, if two shoe-shop owners in a shopping mall cooperate by constructing a joint external stand within the mall (while setting prices separately), and there are ninety-eight other similar shoe shops in the same mall, is there probable harm to competition “*between the shops*” so that the restraint is illegal under Section 2(a), even though, due to the presence of the other ninety-eight shops in the mall, consumers are not harmed?

The Israeli case law took this wording of Section 2(a) literally: Cases examine whether the agreement between competitors tends to harm competition between them (in the literal sense). For example, in the shoe store example above, the courts, as well as the antitrust commissioner, would have found that the cooperation agreement between the two shoe stores is a restraint of trade under Section 2(a), because it allegedly harms competition *between* the shoe stores. They would have reached this conclusion regardless of the fact that there are 98 other similar shoe stores in the relevant market, so that competition in the relevant market could not be harmed.²¹

This sort of literal interpretation of the statute manifests the courts’ unwillingness to engage in economic analysis in competition issues in general and in particular with regard to the determination of an illegal restraint. It also exhibits how the uneconomic interpretation may well initiate with the antitrust agency itself. One may wonder why the antitrust agency, which is accustomed and well equipped to conduct economic analysis of the harm to competition, prefers the literal interpretation to the economic oriented one.

I propose that the agency, as a litigator of cases brought against alleged restraints of trade, is quite content with a broad prohibition that lacks the need for economic analysis. Such an interpretation of the statute eases the burden resting on the antitrust

²¹ This literal interpretation of Section 2(a) began with the Antitrust Commissioner, in decisions such as the decision in the matter of Cur Industries Ltd. and Columbus Capital, Klaridge Group, 1998 Antitrust 3001322 (this decision dealt with the antitrust commissioner conditions for his approval of a merger between Cur and Klaridge. The conditions included the need for prior approval for joint holdings between the parties and other large conglomerates. The commissioner mentioned that such joint holdings are illegal restraints of trade, due to the literal interpretation of the statute, regardless of the harm to competition in the relevant markets). It was upheld by the antitrust tribunal (the instance which is above the antitrust commissioner, and specializes in antitrust) in cases such as HA 2/97 Mizrachi v. the Antitrust Commissioner, 1999 Antitrust 3004577 (this case dealt with question whether a non-competition clause signed by a real estate agent is a restraint of trade).



agency to prove its case in court. The agency often litigates the question of whether an agreement that did not receive prior approval by the agency or by the antitrust tribunal (a procedure that will be explained in more detail below) is indeed an illegal restraint of trade. This could happen in criminal cases litigated by the agency in the district court. It could also happen when the agency declares an agreement as an illegal restraint of trade, as empowered to do under Section 43 of the Antitrust Statute, and then has to defend its declaration in front of the antitrust tribunal, the instance above the antitrust agency, when the parties appeal the agency's decision. Of course, the agency could always use its discretion not to challenge transactions that are of less priority in its mind. Hence, once the agency decides that a practice is harmful, it uses such broad interpretation of the statute to ease its "day in court."

Moreover, as mentioned, under Israeli antitrust law, any restraint in violation of the act can be approved *ex ante* by the antitrust authority or by the antitrust tribunal. This too can explain the antitrust agency's central role in creating overreaching interpretations of the statute according to which practically all restraints, regardless of the economic analysis, are violations. Such interpretations increase the number of restraints that need to be pre-approved by the authorities. In this way, the authorities have a better regulatory grip on a wide range of transactions. Their power is enhanced, as they can approve transactions (as they often do) subject to various conditions, that the authorities are otherwise unauthorized to dictate. In this manner the antitrust authorities broaden the powers originally granted to them by the Statute.²²

B. *Vertical Restraints*

The case law's tendency to make economic analysis superfluous when it comes to the determination of whether a restraint is a violation is very clear through the interpretation by most courts of Section 2(b) of the Statute, the section containing *per se* prohibitions. Most judges and courts interpret Section 2(b) as applying to vertical restraints (restraints between supplier and buyer) as well as to horizontal restraints.

²² To be sure, a few block exemptions were issued by the antitrust commissioner, granting an automatic exemption for restraints of trade that qualify, according to various characteristics of the market and the transaction. However, the block exemptions include various proviso's, and many restraints that have negligible effects on competition do not qualify for the exemptions. See David Gilo, *Anticompetitive Contracts, Antitrust and Monopoly*, in 3 *CONTRACTS* 635 (Daniel Friedmann & Nili Cohen eds., 2003) [in Hebrew] [hereinafter Gilo, *Contracts*].



Section 2(b)'s wording does not distinguish between horizontal and vertical restraints. Therefore, its *per se* prohibition of "price fixing" was interpreted by many courts and judges as including not only price fixing among competitors, but also "price fixing" between supplier and buyer. This included not only resale price maintenance, in which the supplier dictates the resale price that should be charged by the buyer,²³ but also most-favored-customer clauses, in which a supplier promises a buyer that he will receive any discounts that other buyers receive.²⁴ This is while Section 2(b)'s *per se* prohibition of "market division" has been interpreted as applying also to vertical exclusivity arrangements.²⁵

Interestingly, this broad interpretation of section 2(b) also began with the Antitrust Commissioner, and was later adopted by the courts. This too shows, in my view that the Antitrust Agency is content with an interpretation that relieves it (as a litigator of cases it brings to court) from the burden of economic analysis. Again, the agency may also be content with such an interpretation because it forces many parties to submit their agreements to the agency *ex ante*, thereby broadening the scope of the agency's regulatory powers.

A similar interpretation was applied by Justice Naor in the *Extel* case, to a "black list" of restraints that cannot enjoy block exemptions, regardless of their effect on competition, which is included in Section 4 of the Antitrust Rules (Instructions and General Definitions), 2001.²⁶ This "black list" of restraints is included in a regulation

²³ See CrC (Jer) 1142/01 The State of Israel v. Shulshtein [January 15, 2002] (unpublished) (applying the section to the dictation of minimum resale prices); CA 3700/98 A.M. Hanayot 1993 Ltd. v. The Municipality of Jerusalem [2003] IsrSC 57(2) 590 (applying the section to the dictation of maximum resale prices).

²⁴ See Justice Naor's opinion in FHCA 6233/02 Extel Ltd. v. Kalma Y. Industry, Marketing of Aluminium Glass and Metal Fixtures Ltd. [2004] IsrSc 58(2) 635.

²⁵ See decision of the General Director of Israel Antitrust Authority in the Matter of the Exclusivity Arrangements between the Gasoline Companies and Operators of Gas Stations, in 1 ANTITRUST-DECISIONS OF THE GENERAL DIRECTOR AND DECISIONS OF THE ANTITRUST COURT 19 (Tova Ulstein ed., 1995) [in Hebrew]; Decision of The General Director of Israel Antitrust Authority in the Matter of Kosher Flour for Passover, *id.*, at 62; Decision of The General Director of Israel Antitrust Authority in the Matter of Manufacturers of Carton Boxes, in 2 ANTITRUST—DECISIONS OF THE GENERAL DIRECTOR AND DECISIONS OF THE ANTITRUST COURT 66, 70 (Tova Ulstein ed., 1995); Motion (TA) 269/97 Berman v. Nikotron Ltd. [November 15, 1998] (unpublished); HA (Jer) 469/98 Delek, The Israeli Petroleum Company Ltd. [March 25, 2001] (not yet published), available at <http://www.antitrust.gov.il> (last visited September 17 2006); See also Justice Naor's above-mentioned opinion in the *Extel* case, *supra* note 24.

²⁶ K.T. 750 [2004- consolidated version].



that determines the proper scope and interpretation of the block exemptions issued by the Commissioner.

In order to better understand the way in which this “black list” applies, the following clarifications are needed. Most of the block exemptions explicitly exempt certain types of restraints, under certain conditions. Such is, for example, the exemption included in the Antitrust Rules (Block Exemption for Exclusive Purchasing Agreements), 2001,²⁷ which provides exemptions to exclusive purchasing agreements, under certain conditions regarding market shares and the like. When a block exemption specifically exempts a restraint in such a manner, the above-mentioned “black list” should be construed as inapplicable and the restraint is indeed exempt.²⁸ The “black list,” therefore, is applicable when a block exemption does not specifically exempt a restraint. Such are the Antitrust Rules (Block Exemption for Agreements of Minor Harm to Competition), 2006.²⁹ This block exemption does not specifically deal with a certain type of block exemption, but rather exempts restraints of trade that, pursuant to an economic assessment, involve minor harm to competition.

It turns out, then that restraints falling within the “black list” cannot be exempt under the block exemption for agreements of minor harm to competition. As noted, Justice Naor in *Extel* went as far as interpreting the “black list” as applying not only to horizontal restraints but also to vertical restraints. This means that vertical restraints that do not enjoy a block exemption that explicitly exempts them, can never, under Justice Naor’s interpretation at the time, be exempt, even if a full blown economic analysis shows that it does not harm competition at all.

For example, a vertical most favored-consumer clause was treated by Justice Naor as “price fixing,” falling within this black list. According to this line of reasoning, vertical agreements such as most favored-consumer clauses, price matching policies, or maximum or minimum resale price maintenance not only constitute *per se* violations according to the statute, but also can never be saved by block exemptions, again making any form of economic analysis irrelevant.³⁰

²⁷ K.T. 749 [2004- consolidated version].

²⁸ I show why this is the only viable interpretation of the black list in Gilo, *Contracts*, *supra* note 22, at 685-686.

²⁹ K.T. 796.

³⁰ Other block exemptions that could explicitly exempt vertical restraints concern exclusive distribution agreements and franchising. *See generally*, Gilo, *Contracts*, *supra* note 22.



Interestingly, the Antitrust Commissioner is part of a committee that was formed to draft a proposed amendment to the statute, according to which vertical restraints would be outside the *per se* prohibitions of Section 2(b) of the Statute, and therefore analyzed solely according to Section 2(a). This proposal was published in the Proposed Amendment to the Antitrust Statute (Amendment number 9), 2005 (hereinafter The Proposed Amendment).³¹ This proposal, however, was not yet implemented. The fact that the antitrust authority was involved in drafting this proposal could stand in tension with my claim that the authority is content with the broad interpretation of the statute. Its involvement, however, could be explained by the fact that such an amendment of the statute was inevitable anyway, in light of the criticism of the statute's vagueness and broad interpretation. It was a process that could not be stopped by the antitrust authority. Accordingly, it could be claimed that the best the authority could do is join the process. Indeed, The Proposed Amendment is quite modest in certain respects. For example, according to the proposed amendment, if the parties to the agreement are vertically related, but also compete (even in a different market than the market in which they are vertically related) then they are considered "competitors" and the restraint is considered horizontal, and subject to the *per se* prohibition of section 2(b).³²

More important is the timing of the initiative to make the proposed amendment. As noted below, this initiative was not made for fifteen years in which the *per se* prohibition of vertical restraints ruled. It was only made when civil courts began to circumvent the *per se* prohibitions by interpreting the vague statute as applying *per se* legality of agreements.³³

Another positive step that the Antitrust Authority took was to amend the "black list" included in the above-mentioned Section 4 of the Antitrust Rules (instructions and general definitions), 2001.³⁴ According to this amendment, the "black list" would not apply to vertical restraints. That is, Justice Naor's broad interpretation of the black list in the *Extel* case would no longer hold, since the black list drafted by the Antitrust Commissioner explicitly states that it applies only to horizontal restraints. This means that now although vertical restraints are illegal restraints under the *per se* rule (according to the antitrust authority and some of the judges in the Supreme Court)

³¹ Available at <http://www.antitrust.gov.il> (last visited September 18, 2006).

³² See *id.*, the definition of "competitors."

³³ See Section III C *infra*.

³⁴ See Antitrust Rules (General Instructions Definitions), 2006, K.T 786.



they still could be exempt according to the block exemptions for agreements of minor harm to competition.

This move by the Antitrust Authority too contrasts with my claim that the Antitrust Authority is generally content with broad interpretations of the statute. Still, one should bear in mind that as long as vertical restraints are under the *per se* prohibition of Section 2(b), the burden of bringing economic evidence and conducting the economic analysis is in the hands of the parties to the agreement, to show that their vertical restraint enjoys the block exemption. Therefore, the antitrust authority, for the most part, continues to enjoy the benefits of the *per se* prohibition portrayed above: The burden on the authority to bring economic evidence to support its claim that a vertical restraint is illegal is still minor. Moreover, entities that are averse to being in breach of the Antitrust Statute will hesitate to consider their vertical restraint exempt under the block exemption for agreements of minor harm to competition when they know that if attacked, the burden would be on them to provide the economic evidence to show that the harm to competition is indeed small enough.

As for the Supreme Court, it is only recently that at least one justice (Justice Tirkel) of the Supreme Court agreed with the critique made within academic circles.³⁵ In his opinion, the *Exetel* case³⁶ held that all vertical restraints should be dealt with solely under Section 2(a) of the Statute (demanding a probable harm to competition in order for the restraint to be an antitrust violation) and not under section 2(b)'s *per se* rules. As noted, Justice Naor apposed Justice Tirkel's view and claimed that the critique in the academic literature, although it may constitute sound policy, should be addressed by the legislator. The third justice in the *Exetel* case, Justice Proccia, agreed with Justice Tirkel's result but claimed that she refused to take sides regarding the antitrust issue.

Nevertheless, Justice Proccia's opinion seems to be inclined toward the need for economic analysis when it comes to vertical restraints. The *Exetel* case involved a dispute regarding whether an arbitrator is authorized to discuss a breach of a most-favored consumer clause. The breaching party claimed that the arbitrator lacked such authority, because the most-favored consumer clause is an illegal contract, as it constitutes an antitrust violation, and Israeli arbitration law prohibits an arbitrator from discussing an illegal contract.

³⁵ See David Gilo, *Is it Sensible to Break Down the Dam of Restraints and then Block the Flood with Ad Hoc Fences*, 27 IUNEI MISHPAT 751 (2004) [in Hebrew].

³⁶ *Supra* note 24.



According to Justice Naor's opinion, most-favored consumer clauses, as other vertical restraints, are under Section 2(b)'s *per se* prohibition, and therefore, they are clearly illegal. Hence in Justice Naor's opinion, the arbitrator indeed lacks authority. Justice Tirkel, on the other hand, was of the opinion that vertical restraints, including most-favored consumer clauses, should be held as antitrust violations only according to Section 2(a), demanding an economic showing of probable harm to competition. Since the party claiming that there was an illegal restraint failed to show such probable anticompetitive harm, Justice Tirkel held that the contract was not illegal, and, accordingly, the arbitrator may discuss its breach.

As to Justice Proccia, she agreed with Justice Tirkel that the arbitrator is authorized, but, alleged that there was no need to make a statement regarding whether there was an antitrust violation. This is because, as Justice Proccia stressed, the question of whether there was an antitrust violation in this case requires complex economic analysis, including the use of expert testimony. Thus the illegality of the contract is not clear on face value alone. Accordingly, at the very least, despite Justice Proccia's alleged refusal to take sides on the antitrust issues, she too implies that in vertical restraints such as most-favored consumer clauses, an economic analysis is required before the agreement can be held as an antitrust violation. Had Justice Proccia agreed with Justice Naor that the restraint before the court was under a *per se* prohibition, the immediate outcome should have been that this restraint is clearly illegal, with no need for any kind of economic analysis.

To be sure, Justice Naor's opinion is based partly on the quite reasonable fear that civil courts are not equipped to deal with the profound economic analysis of harm to competition in the relevant market that is needed in order to properly assess the restraint.³⁷ The fear that civil courts are not equipped to conduct economic analysis is, in and of itself, a form of economic analysis.

C. Cases Holding *Per Se* Legality—Without Economic Analysis

As noted, Israeli courts tend to create legal rules that enable them to refrain from economic analysis of the harm to competition when determining whether an antitrust violation had occurred. Much of the case law achieves this outcome via a broad

³⁷ See *id.*, at par. 12 of Justice Naor's opinion.



application of *per se* prohibitions, so that all restraints are violations, regardless of the economic analysis. Some of the more recent cases, on the other hand, achieve the same outcome—of refraining from economic analysis—via an opposite approach: They hold that restraints are legal *per se*, again, with no need for any kind of economic analysis.

Interestingly, the traditional approach, of an overbroad application of *per se* prohibitions, which lasted for almost fifteen years, did not trigger any initiative to amend the Statute. This is while it seems that the recent cases, preferring the *per se* legality approach, did trigger (or at least came immediately prior to) a new recent initiative to amend the statute. Such legislative initiatives are made by the Minister of Commerce, who is in charge of the Antitrust Authority.³⁸ Normally, in the field of antitrust, the Ministry of Commerce tends to adopt the Antitrust Authority's views, since this authority has proved to be extremely independent and has gained expertise in the area over the last fifteen years. Accordingly, it would be plausible to assume that an initiative to amend the statute normally is made, *de facto*, by the Antitrust Authority itself. The fact that this authority chose not to initiate any such amendment of the fifteen year old, extreme use of *per se* illegality approach, while there was an initiative to amend the statute following the recent *per se* legality approach is consistent with our claim above according to which the antitrust authority was content with the *per se* illegality approach. Plausibly, it is the concern that courts began to avoid the anomalies of the *per se* illegality approach (while continuing to avoid economic analysis) via the *per se* legality approach that suddenly triggered the legislative initiative.

The next paragraphs will demonstrate some of the “techniques” recently used to achieve *per se* legality.

1. *Overbroad Interpretation of Exemptions Concerning the Use of Land*

In the *A.M. Hanayot* case,³⁹ the restraint under inquiry involved the Municipality of Jerusalem, the owner of a parking lot, which dictated the maximum price and the

³⁸ See, e.g., <http://www.moital.gov.il/NR/exeres/1047D3A0-E109-45A3-B207-B366A2F62EC3.htm> (last visited October 24, 2006).

³⁹ *Supra* note 23.



maximum number of monthly subscribers that the leaser of the parking lot may set. Under the traditional case law, as noted in Part III B above, such restraints are under the *per se* prohibition of Section 2(b) of the Antitrust Statute, despite the fact that these are vertical restraints.

Rather than avoiding the possible anomalistic nature of *per se* condemnation by declaring that vertical restraints should be under a rule of reason, demanding an economic showing of potential harm to competition, all of the judges did so via a broad interpretation of certain exemptions. Justice Rivlin held that as the land owner, the Municipality of Jerusalem is entitled to dictate the price and quantity of products and services to be supplied using its land. However, the Statute includes no such exemption. The only exemption relevant to the use of land is Section 3(3) of the Antitrust Statute, which exempts agreements in which the land owner dictates the *types* of goods or services to be supplied using the land. The exemption does not include dictation of the price and quantity of such goods.

The broad interpretation of the exemption seems to stem from the same tendency identified above of the courts to avoid economic analysis when it comes to determining which restraints are antitrust violations. It is a reaction to the previous cases that, following the same dislike of economic analysis, automatically condemned all vertical restraints, regardless of the economic analysis.⁴⁰

2. Application of a “*de Minimis*” Defense with no Economic Analysis

The other two justices, Or and Tirkel, in the *A.M. Hanayot* case mentioned above escaped the harsh outcome of *per se* condemnation via an exemption for restraints that have a *de Minimis* effect. Such an exemption existed in the case law at the time relevant to the restraint before the court, and, later on, took the form of a block exemption, also cited by these justices.⁴¹ The use of a *de Minimis* exemption could have been an excellent opportunity to apply an economic analysis of the competitive harm to the relevant market. Unfortunately, however, the justices applied this exemption to the case before them without conducting any kind of economic analysis of the restraints’

⁴⁰ For a critique of the over-broad interpretation to the “land use” exemption see Gilo, *supra* note 35, at 767.

⁴¹ Antitrust Rules (Block Exemption For Agreements of Minor Harm to Competition).



effect on competition in the relevant market.⁴² In “The Dam of Restraints,”⁴³ I sharpen this point by showing that, under certain plausible definitions of the relevant market affected by the restraints under consideration, the restraints may have substantially harmed competition. The appropriate market definition, as well as the question how the restraints affected this market, should have been an inseparable factor of applying any exemption based on *de Minimis* effects.

3. Use by the Courts of Loopholes in the Statute’s Language

Another method recently used by courts to achieve *per se* legality, with no need for economic analysis, is the use of a loophole in the language of Section 2(a) of the Statute. While the application of Section 2(a) to horizontal restraints hinges on potential harm to competition between the parties to the agreement, its application to vertical restraints hinges on potential harm to competition between one of the parties and a third party. In particular, Section 2(a) defines an illegal restraint of trade as follows:

An agreement between people conducting business according to which at least one of the parties to the agreement restrains himself in a manner that may prevent or reduce competition between this party and the other parties, or some of them, or between this party and a person that is not a party to the agreement.

This language has been taken literally by the District Court in the Civil Suit, *Ramat Hagolan Wineries v. Stern*.⁴⁴ In this case, an international wine expert, operating through a company he owned, committed that he and his company would refrain from granting services to competing wineries for a certain period following the commencement of his relationship with the Ramat Hagolan Wineries. Nevertheless, the expert granted services to Carmel Mizrachi, a competing winery, within the period covered by the restraint. When sued by the Ramat Hagolan Wineries for breach, he claimed that the contract was a restraint of trade in violation of the Antitrust Statute and therefore void.

⁴² See Gilo, *supra* note 35, at 771-74.

⁴³ *Id.* at 782-86.

⁴⁴ CC (TA) 2011/02 Ramat Hagolan Wineries v. Stern [October 14, 2002] (not published).



Justice Zaft, the district judge held that there was no restraint of trade in violation of the Antitrust Statute; since, according to the accurate language of Section 2(a) of the Statute, in order for a vertical agreement to be a violation, the potential harm to competition needs to be between the party *that restrained itself* and another party. In this case, however, as held by Justice Zaft, (without any kind of economic analysis) the potential harm to competition can only be between the Ramat Hagolan Wineries and its rivals The Ramat Hagolan Wineries was not the party who restrained itself, but rather the wine expert did. The District Court's narrow linguistic interpretation was later adopted, in a laconic one-page opinion, by the Supreme Court as well.⁴⁵

In another case, the same district judge, Justice Zaft, used the same kind of interpretation in order to hold that a commitment given by a mall owner to a store owner not to lease a shop in the mall to competing stores can never be an illegal restraint of trade.⁴⁶ The reason, again, is that, according to Justice Zaft, the harm to competition could only be between the stores in the mall, while the party that restrained itself is the mall owner.⁴⁷

This line of decisions exhibits disregard to economic analysis in various respects. First, the strict linguistic interpretation of the statute leads to absurd results once the economic analysis of the anticompetitive effects of vertical restraints is taken into account. Indeed, as I show elsewhere, it is clear from the legislative history of the Statute that the legislator did not mean for such a result to occur.⁴⁸ This is because exclusive purchasing agreements, for example, in which a buyer restrains himself from buying from competing suppliers, probably poses one of the sharpest threats to competition (in appropriate cases), particularly in the form of excluding competing suppliers from the market and blocking the entry of new suppliers. Exclusive purchasing, however, could almost never be an illegal restraint according to the linguistic interpretation, regardless of the harm to competition, since the harm is mainly in the supplier's market, and the party restraining himself is the buyer.

On the other hand, for example, vertical restraints that merely harm competition among the buyers of the same brand (intra-brand competition), probably pose the most

⁴⁵ CA 10638/02 Stern v. Ramat Hagolan Wineries [March 2, 2003] (not published).

⁴⁶ See CC (TA) 1160/03 Shikovta Siro v. Lev Ashdod Ltd. [March 17, 2003] (not published).

⁴⁷ Section 2(b) of the Statute, with its *per se* prohibitions, was completely ignored in these decisions. Accordingly, these decisions did not discuss its application on vertical restraints.

⁴⁸ David Gilo, *A Restraint that Harms Competition between the Party Enjoying the Restraint and its Competitors*, 28 IUNEI MISHPAT 517, 550-52 (2004) [in Hebrew].



speculative and controversial harm to competition. This is while such restraints can always be restraints of trade according to the linguistic interpretation, since the harm to competition may also be in the buyers' market, and they are indeed the ones who restrained themselves.⁴⁹

Second, preference of the narrow linguistic interpretation (that, as we have shown above, has no economic logic) is consistent with our claim that courts, in antitrust cases, suffer from a strong tendency to refrain from economic analysis, and seem to look for ways to avoid it. While *per se* illegality would also be a way to avoid economic analysis, it may be that the judge preferred *per se* legality, due to his resistance to the opportunistic nature of the wine expert's and mall owner's antitrust claims. The reader of the opinions of the District and Supreme Courts gets the impression that the judges condemn such opportunistic breach of a promise while using an *ex post* antitrust claim.

Third, a careful economic analysis of the restraints discussed in these two cases reveals that even the narrow linguistic interpretation was applied erroneously. Both cases involve the parallel to an exclusive distribution agreement, according to which a supplier of an input (be it consulting services or land in a mall) promises a buyer that the supplier will not sell the input to competing buyers. In an oligopolistic market, in which there are only a few suppliers in the input market and only a few buyers who purchase the input and compete with each other, when one supplier grants exclusivity to a buyer, the other suppliers gain the power to raise prices to the other buyers.⁵⁰ In this sense, competition between the suppliers could also be harmed, and, indeed, they are the ones restraining themselves, making the restraint possibly illegal even under the linguistic interpretation. Since Justice Zaft claims to conduct his analysis according to Section 2(a), which demands an investigation into the probable harm to competition, even according to his narrow interpretation, he should have explored probable harm to competition also in the supplier's market.

In particular, in the case of the international wine expert committing not to grant his services to competing wineries, suppose an economic analysis of the relevant wine expert market in Israel reveals that there are only a few wine experts interchangeable with the first wine expert. If the first wine expert commits not to grant services to competing wineries, the other wine experts will be able to raise the prices of their services to these competing wineries. Similarly, in the case of a mall owner committing

⁴⁹ For a more elaborate economic analysis of these issues, including application of the distorted outcomes of the linguistic interpretation to the various kinds of vertical restraints, see Gilo, *id.*

⁵⁰ See Gilo, *id.*, at 530-33.



not to lease a shop to a competing store, competing mall owners or commercial center owners (if there are only a few of them in the relevant land-input market) may gain enjoy the power to raise the rent they collect from competing stores. In both cases, competition between the suppliers may be harmed, making the restraints potentially illegal even under the linguistic interpretation.

IV. Conclusion

There are many ways to leave a lover, as the famous Paul Simon song tells us, but we have also seen that there are also many ways to avoid economic analysis in antitrust cases, and these ways are utilized by Israeli courts. The Antitrust Authority, probably for strategic reasons, seems content with the courts' avoidance of economic analysis via an overbroad use of *per se* prohibitions. The courts' dislike of economic analysis may stem from their belief that civil non-expert judges are not equipped to conduct economic analysis in antitrust cases. It is questionable, however, whether this belief is justified, given that US federal courts routinely apply economic analysis in antitrust cases, with the assistance of the parties and their experts, just as is done in other areas that inherently require economic analysis, such as many tort, insurance, or patent cases. A lack of economic analysis in courts seems particularly unjustified in the field of antitrust, where the underlying purpose is the protection of competition. Obviously, subject to a very narrow list of hard core *per se* violations, it is necessary to assess the harm to competition in order to apply antitrust rules, and, obviously, it is necessary to utilize economic analysis in order to assess the harm to competition.

Of course, the economics analysis of harm to competition in a relevant market is not an accurate science. Still, in my view, and also according to the conventional approach in US antitrust doctrine, conducting a profound economics analysis of the probable harm to competition in the relevant market, in appropriate cases, is better than abstaining altogether from economic analysis.

Arguably, broad *per se* prohibitions, combined with a system of pre-approval of restraints by the antitrust authorities, as is the case in Israel, transfers the task of the economic analysis to expert bodies, such as the Antitrust Authority and the Antitrust Tribunal. This may seem to be a better outcome than it really is, however. One important reason is that the need for pre-approval causes delay and reliance on the



authorities and the conditions they are expected to impose in exchange for their approval that could “kill” many efficient and harmless business transactions in their incipiency. Another reason is that many claims of illegal restraints of trade are initiated in civil courts in the context of contractual disputes. In such cases, as I showed, civil courts that dislike parties opportunistically breaching contracts while claiming they are *per se* illegal tend to artificially interpret the statute too narrowly, making many restraints *per se legal*.

Of course, *per se* rules are more certain to the parties than rules that are subject to case-specific economic analysis. When *per se* rules govern the whole array of restraints, including innocent vertical restraints, the parties pay a high price for certainty. One could conduct a survey asking parties whether they prefer such certainty, combined with the need to submit their transactions to pre-approval by the antitrust authorities (with the delays and *ex post* regulation of activity involved in the authorities’ conditions for their approval), or would rather prefer to take the risk of *ex post* assessment of their restraint under a rule of reason analysis, without the delays and regulation involved in the need for pre approval. Casual observation suggests that many entities would prefer the latter.

