



Professional exclusivity through the lens of object-based restrictions: severe penalties with problematic foundations

Elise THOMAS

To quote this paper: E. THOMAS, “Professional exclusivity through the lens of object-based restrictions: severe penalties with problematic foundations”, *Competition Forum*, 2026, n°0090 <https://competition-forum.com>.

Resume: *In Decision No. 26-D-03 of March 17, 2026, the French Competition Authority imposed a fine of €3.4 million on the National Union of French Ski Instructors (SNMSF) for having included, since May 12, 2006, an exclusivity clause in the standard instructor agreement, prohibiting instructors from teaching at competing entities or developing a personal clientele outside the École du Ski Français (ESF).*

The Authority characterizes this practice as a restriction of competition by object within the meaning of Article 101(1) of the TFEU and Article L.420-1 of the Commercial Code.

While the general approach appears justified in its overall framework, both the definition of the relevant market and the method for calculating the penalty, as well as the scope of the injunctions, raise substantive issues that this study aims to examine.

The National Union of French Ski Instructors (SNMSF) is the leading professional union for alpine ski instructors in France. As of 2022, it represents more than 16,000 instructors, approximately 80% of all active instructors in the country, spread across 216 French Ski Schools (ESF) located

in nearly all French ski resorts. The combined revenue of member instructors amounts to approximately €300 million for the 2022/2023 season.

As commentators have noted, the dominance of the ESF in French ski resorts makes it an

unavoidable player in the market for ski instruction¹.

In 2006, the SNMSF National Congress adopted, by a 93.59% majority, a motion amending the standard instructor contract to include a professional exclusivity clause: this clause states that instructors are prohibited from teaching for a competing entity, whether individual or collective, and from developing a personal client base outside the ESF².

In 2013, this obligation was strengthened by the introduction of a penalty of automatic expulsion and a ban on joining a competing union. It applies to all instructors, regardless of their category, and for the entire duration of their annual membership in the SNMSF.

As underlined in the commentary literature, the average membership duration reached 21 years in 2024, which further entrenched the exclusivity's practical effect³.

The regional directorate of Auvergne-Rhône-Alpes (also called the "DIRECCTE")

had competence and submitted an administrative investigation report to the French Competition Authority (FCA) in October 2020⁴.

A notice of grievance was sent to the SNMSF on February 4, 2025. The case was reviewed at a hearing held on October 7, 2025.

In the commented decision, the Authority finds that the SNMSF violated Article 101(1) TFEU and Article L.420-1 of the Commercial Code between May 12, 2006, and February 4, 2025, and imposes a fine of €3.4 million calculated using a flat-rate method, orders the amendment of all statutory documentation for memberships for the 2026/2027 season, and orders various publication measures.

This decision is built on a landmark ruling of the former French Competition Council (now the "French Competition Authority") of February 19, 1991⁵, which had previously ruled against a non-reemployment clause in the ESF's standard instructor agreement.

¹ J. Berlemont, "Obligation d'exclusivité : sortie de piste pour le Syndicat National des Moniteurs du Ski Français", *Revue Lamy de la concurrence*, n° 159, 1st Apr. 2026 ; A.-S. Choné-Grimaldi, "Coup de froid sur l'ESF !", *L'Essentiel Droit de la distribution et de la concurrence*, LEDICO Apr. 2026, n° DDC203r7.

² A.-S. Choné-Grimaldi, *op. cit.* : the author emphasizes that instructors are *independent workers* and not *employees*, and that their remuneration and course allocation depend on seniority, creating strong incentives to renew membership annually.

³ J. Berlemont, *op. cit.*: the author notes that the average membership duration was 21 years in 2024, which contributed to ensuring compliance with the exclusivity obligation.

⁴ The authority took up the matter *ex officio* by Decision No. 21-SO-05 of April 2, 2021.

⁵ FCA, Decision No. 91-D-07 of February 19, 1991, regarding the competitive situation in the ski instruction sector: upholding a non-reemployment clause in the standard contract for ESF instructors (hereinafter "GIE Taxis case").

Thirty-five years later, the Authority is considering a substantially similar restriction.

While the substantive ruling appears justified in principle, the decision raises serious methodological questions that this commentator must identify.

The first concerns the definition of the relevant market and the classification as a restriction by object, which were sometimes handled in a perfunctory manner in light of the requirements of the case law of the Court of Justice⁶.

The second concerns the use of a lump-sum method that is insufficiently justified. In addition, the broad scope of non-monetary injunctions raise questions of proportionality of the punitive response.

The broader doctrinal debate also invites reflection on whether the Authority selected the most appropriate legal characterization of the practice⁷.

It is therefore necessary to examine, in turn, the problematic characterization of the practice as a restriction by object in an

imperfectly defined market (I), before analyzing the punitive response based on the weak grounds constituting the imposed sanction (II).

I. The controversial characterization of a restriction by object in an imperfectly defined market

The Authority concludes, first, that the relevant market is the national market for alpine skiing instruction, and, second, that the exclusivity requirement constitutes a restriction of competition by object.

While this dual characterization is not without merit, it raises concerns regarding both the geographic definition of the market (A) and the thoroughness of the contextual analysis conducted to establish that the agreement is sufficiently harmful (B).

A. A national definition of the relevant market whose rigor is questionable

The definition of the relevant market forms the basis of any competitive analysis⁸. The Authority relies on Council Decision No. 91-D-07, which identifies the market for

⁶ CJEU, September 11, 2014, *CB v. Commission*, C-67/13 P: “A restriction by object should be applied only to certain types of coordination between undertakings that are sufficiently harmful to competition”.

⁷ A.-S. Choné-Grimaldi, *op. cit.*: the author raises the question of whether a finding of abuse of dominant position would not have been more appropriate, given

that 80% of ski instructors in France teach under the ESF brand, characterizing the ESF as an inescapable actor (in French, “*incontournable*”) in the ski market.

⁸ CJEU, February 13, 1979, *Hoffmann-La Roche*, 85/76: the definition of the relevant market must precede any assessment of market power.

alpine skiing instruction as being of “*at least national*” scope, thereby rejecting the local scope advocated by the SNMSF. This position warrants several critical observations.

Indeed, the Authority underlines the mobility of instructors and the diverse geographic origins of customers to establish the national scope of the market. But the Commission’s communication of February 22, 2024 points out that the geographic market must cover a territory in which “*competitive conditions are sufficiently homogeneous*”⁹.

However, the ski instruction sector is structurally rooted in ski resorts: lessons are provided on-site, customers travel to a specific resort for their stay, and instructors, although legally mobile, in practice work in a geographically stable manner, as evidenced by average career lengths of 15 to 22 years at the same local ESF, depending on the resort.

Furthermore, by automatically adopting a national definition without conducting an in-depth analysis of demand-side substitutability between resorts, the Authority is ignoring an obvious industry reality. A customer wishing to take ski lessons at a specific resort has no practical option to switch to a school located

in another resort, several hours’ drive away. Supply substitutability alone cannot justify a national market dimension in the absence of demand substitutability.

Admittedly, the Authority notes that the existence of local-level markets would be “*irrelevant to the analysis of the practice, as it was implemented across all resorts nationwide*”¹⁰.

This precautionary observation is technically accurate insofar as a practice with a national scope affects competitive conditions across all relevant local markets. However, it does not resolve the issue of market definition, which determines the correct assessment of market shares and the actual gravity of the infringement.

By adopting a national definition as the primary one, the Authority reduces a multifaceted economic reality to a unitary model that simplifies the analysis at the expense of its precision.

It would have been more methodologically rigorous to define local markets while noting that the practice simultaneously affected all of these markets, which would have allowed for a more detailed analysis of its effects on each competitive

⁹ Commission Communication of February 22, 2024, on the definition of the relevant market (C/2024/1645), para. 12(b).

¹⁰ FCA, Decision No. 26-D-09 of March 17, 2026, regarding practices in the downhill ski instruction sector, §143 (free translation).

market and a more precise assessment of the severity of the impact¹¹.

B. A classification under object-based restriction too automatic and lacking sufficient evidence

The Authority concludes that the exclusivity obligation constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU and Article L. 420-1 of the Commercial Code.

On this point, it is worth noting that the SNMSF had argued, with some doctrinal support¹², that the practice should be analyzed through the lens of vertical rather than horizontal relationships, a framing that would have engaged the block exemption regulation n° 2022/720.

This characterization, based on the three criteria established in the case law of the Court of Justice, namely the content, the context, and the objectives¹³, calls for several critical observations.

With regard, first and foremost, to the content of the agreement¹⁴, the Authority highlights the combination of broad exclusivity, deterrent penalties, and a ban on membership in competing unions, emphasizing that the exclusivity clause is particularly harmful from a competitive standpoint insofar as it prevents certified instructors from teaching in any school other than those affiliated with the SNMSF, thereby foreclosing the relevant market by depriving competing schools of access to essential assets, whether structural or human¹⁵.

This analysis is generally convincing. The clause was structurally similar to the clauses that were ruled unlawful in the “GIE taxis” case of 1991: the authority draw such an analogy¹⁶.

However, the analysis of the economic and legal context¹⁷ is conducted in a manner that tends toward the desired

¹¹ In this regard, see CJEU, February 6, 1973, *Brasseries de Haecht v. Wilkin-Janssen*, 48/72: consideration of contractual relationships of the same nature in the assessment of the economic context.

¹² A.-S. Choné-Grimaldi, *op. cit.*: the author considers that the SNMSF argued “*à juste titre*” (“rightly”) for a vertical relationship framework, allowing it to invoke the vertical exemption regulation No. 2022/720. She further notes that the Authority’s refusal to apply the block exemption regulation was “*très étrange*” (“very strange”) since the regulation is not limited to franchise agreements.

¹³ CJEU, July 29, 2024, *Banco BPN v. BIC Portuguais et al.*, C-298/22, para. 45: “*the content of the agreement*”, “*the*

economic and legal context”, and “*the objectives pursued*” are the three cumulative criteria for classification by object.

¹⁴ FCA, Decision No. 26-D-09 of March 17, 2026, *op. cit.*, para. 198-224.

¹⁵ CJEU, October 4, 2024, *FIFA v. BZ*, C-650/22: The essential human resources of a market (in this case, ski instructors) can constitute an essential asset for companies in the market.

¹⁶ FCA, Decision No. 26-D-09 of March 17, 2026, *op. cit.*, para. 186.

¹⁷ FCA, Decision No. 26-D-09 of March 17, 2026, *op. cit.*, para. 225-242.

conclusion rather than toward a genuine verification of circumstances that could have rebutted the presumption of harmfulness¹⁸.

Indeed, the Authority dismisses the SNMSF's arguments regarding the cooperative model of ESFs, the need for course planning, and the clause with mere rhetorical phrases, without seriously addressing them in light of the observations made by the party concerned. However, the Court of Justice underlined that an authority must ensure that no particular circumstance is such as to rebut the presumption of harmfulness. This is not a mere formality but a substantive review. Thus, the clause could have been found lawful regarding the increasing number of ski instructors or regarding the fact that competitors lack access to human resources only during particular periods¹⁹. Despite these facts, the authority stated that lack of access to ski monitors caused financial issues to competing schools (first), that ESF has a high market share (second) and that the advantages given to the ski instructors are increasing barriers to entry (third)²⁰.

¹⁸ CJEU, November 26, 2015, *Maxima Latvija*, C-345/14, para. 20: an examination of the economic and legal context must ensure that no specific circumstances rebut the presumption of harmfulness.

¹⁹ FCA, Decision No. 26-D-09 of March 17, 2026, *op. cit.*, para. 193.

²⁰ FCA, Decision No. 26-D-09 of March 17, 2026, *op. cit.*, para. 230, 235 and 238.

²¹ FCA, Decision No. 26-D-09 of March 17, 2026, *op. cit.*, para. 243-247.

²² Art. L. 420-4 of the Commercial Code and Art. 101(3) TFEU: four cumulative conditions for an

Third, with regard to the objectives pursued²¹, the Authority quickly dismisses the justifications put forward by the SNMSF.

While the rejection of the individual exemption under Article 101(3) TFEU and Article L. 420-4 of the Commercial Code²² is properly justified, noting, in particular, that competing schools operate under more flexible exclusivity agreements²³, The conclusion that the restriction is “manifestly anti-competitive” appears to preempt an assessment that should instead be based on an analysis of the effects. The Court of Justice has reiterated that a finding of anti-competitive intent cannot be based on the accumulation of potential effects, but must be grounded in the intrinsic characteristics of the agreement²⁴.

Ultimately, while characterizing the clause as a restriction by object may seem defensible given the objective severity of the clause and the precedent set in 1991, the analysis conducted lacks the methodological

individual exemption; the burden of proof rests with the party claiming the exemption.

²³ CJEU, March 19, 2003, *CMA CGM*, T-213/00: The exemption must be denied if the restrictions are not indispensable to achieving the stated objectives.

²⁴ CJEU, December 21, 2023, *European Superleague Company*, C-333/21, para. 162: a restriction by object covers certain forms of coordination that are, by their very nature, considered harmful; such a classification cannot be based solely on the accumulation of potential effects.

rigor required by European case law, particularly with regard to the examination of the context. This weakness could strengthen the SNMSF's arguments in the event of an appeal to the Paris Court of Appeal.

II. A repressive response to problematic foundations

The decision does not merely find that a violation has occurred, it imposes a fine of €3.4 million calculated using a flat-rate method whose basis is questionable (A), and accompanies this penalty with structural injunctions whose scope warrants scrutiny (B).

Notably, this decision marks the first occasion on which the Authority applied the new provisions of Article L. 464-2 of the Commercial Code permitting it to assess fines against trade associations by reference to the aggregate turnover of their active members on the affected market²⁵.

A. An opaque and inadequately justified flat-rate method

²⁵ J. Berlemont, *op. cit.*: the author notes that this decision is the first instance in which the Authority applied the new provisions of Article L. 464-2 of the Commercial Code, allowing it to determine the fine amount for a trade association by reference to the combined turnover of its active members on the affected market.

²⁶ Competition Authority, press release on sanctions dated July 30, 2021 (updated November 15, 2021),

The Authority has decided to deviate from the general method set forth in its sanctions notice of July 30, 2021, and to apply a flat-rate method²⁶.

It justifies this decision in two sentences, stating that the general method “*would result in a disproportionate penalty given the SNMSF's own resources and the limited ability of its individuals members to pay*”.

A notable consequence of this approach, remarked upon by both Berlemont and Choné-Grimaldi, is that individual instructors may ultimately be called upon to contribute to the fine payment, creating what has been described as a "double burden" on members who were themselves subject to the exclusivity regime²⁷.

First, the sanctions notice itself provides that the Authority may adjust the penalty to take into account “specific financial difficulties likely to lead to insolvency,” but this consideration applies during the individualization stage of the general method, not through a prior abandonment of that method. By jumping directly to a lump-sum approach, the

para. 6: The flat-rate method constitutes an exception justified by “*the specific circumstances of the case*” or “*reasons of public interest*,” which must be specifically justified.

²⁷ J. Berlemont, *op. cit.*: “*double peine pour les moniteurs donc*” ; A.-S. Choné-Grimaldi, *op. cit.*: “*ceux-ci risquent de ne pas apprécier la double peine...*”. Both authors comment on the dual burden imposed on individual instructors, who may face both the consequences of the exclusivity regime and a financial contribution call.

Authority deprives the analysis of any transparency, as it is unclear what the value of the reference sales would have been, what severity or duration coefficient would have been applied, or what correction factor would have been used.

Second, the Authority itself acknowledges, in paragraph 306, that the applicable legal ceiling exceeds €30-35 million²⁸.

While the €3.4 million fine is considerably lower than that ceiling, it is still necessary to understand the reasoning behind the selection of that specific amount. The lack of detail regarding the components of the flat-rate method deprives the decision of a substantial part of its rationale, contrary to the legal requirement for an individualized and reasoned determination of the penalty.

Third, the decision reveals an internal contradiction.

On the one hand, the Authority rules out the existence of proven insolvency on the part of the SNMSF²⁹ and notes that the solidarity

mechanism provided for in Article L.464-2, VI of the Commercial Code is specifically designed to ensure recovery.

On the other hand, it justifies the use of the lump-sum method on the basis of the “limited ability of its members to contribute,” even though they collectively generated €300 million. This inconsistency significantly undermines the reasoning behind the decision on this point.

It would have been more transparent to apply the general method in full and then adjust the resulting amount based on the union’s ability to pay³⁰, in accordance with the Authority’s previous decisions regarding business associations composed of individuals.

B. Injunctions and proportionality

The Authority has imposed two types of injunctions alongside the monetary penalty, first, that the SNMSF bring all its statutory and contractual documentation into compliance for the 2026/2027 season, and

²⁸ Art. L. 464-2, VIII of the Commercial Code (resulting from Order No. 2021-649 of May 26, 2021, transposing the ECN+ Directive): a cap set at 10% of the sum of the total global turnover of active members in the relevant market.

²⁹ Paris Court of Appeal, July 4, 2019, Case No. 16/23609, para. 683: a party invoking financial difficulties must rely on reliable, comprehensive, and

objective evidence demonstrating the reality of those difficulties and their concrete impact on solvency.

³⁰ Competition Authority, Decision No. 19-D-05 of March 28, 2019, *Antibes Juan-les-Pins taxis*: the Authority had taken into account the ability to pay of the members of an economic interest group (GIE) as part of the general method, without resorting to such an unjustified flat-rate approach.

second, that it publish notices in the press and electronically.

While the latter requirement raises few issues, the former warrants serious scrutiny regarding its proportionality³¹.

Article L. 464-2, I, paragraph 1 of the Commercial Code requires that injunctions be “*proportionate to the violation committed and necessary to effectively bring the violation to an end*”³². The Authority orders that not only the standard instructor agreement, which directly contains the disputed exclusivity clause, be brought into compliance, but also “*the SNMSF bylaws, the standard bylaws of local unions, the national charter, and any other document ancillary to or necessary for their implementation*”.

The scope of this order, which applies *erga omnes*, is questionable.

The identified violation concerns an exclusivity clause found primarily in the standard instructor agreement. Ordering a comprehensive review of all of the union’s

internal documentation amounts to imposing a general compliance audit that goes beyond what is strictly necessary under the relevant case law³³. The SNMSF’s bylaws or the model bylaws of local unions are merely subsidiary instruments, and their revision was not required solely by the removal of the exclusivity requirement.

The clarification provided by the Paris Court of Appeal in the SEMUP ruling³⁴, namely that the Authority must verify that the deleted clauses are not replaced by others having the same effects, justifies post-decision oversight, not a mandate to overhaul the entire body of documentation. The logic of the SEMUP ruling is remedial and adaptive, as it permits subsequent review; it does not prescribe a preventive “*tabula rasa*” of documentation.

It should also be noted that the Authority has set a very short deadline for compliance, specifically, June 30, 2026, for memberships for the 2026–2027 season, which is less than four months from the date of notification of the decision. Such an order compels the SNMSF to revise all of its

³¹ A.-S. Choné-Grimaldi, *op. cit.*: the author raises the additional question of whether the ESF’s exclusive control over the so-called “*piou-piou*” spaces (beginner slopes for young children) could qualify as an essential facility, noting that competing schools are often unable to offer lessons to the youngest pupils for this very reason.

³² Art. L. 464-2, I, para. 1 of the Commercial Code; CJEU, October 6, 2009, *GlaxoSmithKline*, C-501/06 P, para. 82: remedial measures must be proportionate to the infringement and necessary to bring it to an effective end.

³³ Directive (EU) 2019/1 of December 11, 2018 (ECN+), Recital 69 and Article 13: competition authorities must ensure that any structural or behavioral remedies imposed are strictly necessary to effectively bring the infringement to an end.

³⁴ Paris Court of Appeal, February 21, 2006, *SEMUP*, Case No. 2005/14774: The Authority must verify that the deleted clauses have not been replaced by other provisions that produce the prohibited legal consequences.

regulatory documentation within a timeframe that is practically unfeasible, without the decision addressing the consequences of a potential appeal seeking a stay of execution.

A comparison with previous cases involving exclusivity clauses in professional associations³⁵ shows that the Authority had previously issued injunctions aimed solely at removing the disputed clause, without extending the measures to the association's overall statutory. This precedent contrasts with the scope of the injunction issued in this case, without the Authority providing an explanation for this difference in treatment

Ultimately, while the publication orders constitute adequate and proportionate measures, the order for a blanket review of documents appears to go beyond what the logic of the decision requires.

An order specifically aimed at removing the exclusivity clause from the standard instructor agreement, accompanied by a subsequent review of the compliance of subsidiary documents, would have been more consistent with the principle of

proportionality governing the Authority's power to issue orders.

Conclusion

This decision rightly sanctioned a practice whose anti-competitive nature has been established since 1991 and whose deliberate continuation by the SNMSF over the decades is particularly reprehensible. The decision also fits within a broader trend of competition law enforcement in the sports sector, confirmed by recent CJEU case law³⁶.

However, this substantive correctness is accompanied by methodological weaknesses on two key points: the definition of a national market that reduces a structurally local competitive reality, and the overly automatic classification as a restriction by object, which substitutes reference to a precedent for an in-depth contextual analysis.

The enforcement aspect is also open to criticism, as the opaque lump-sum method and the generalized document production order demonstrate a lack of proportionality that could support a well-founded appeal

³⁵ FCA, Decision No. 97-D-54 of July 9, 1997, Toulon Taxis: injunctions specifically directed at the removal of the disputed clause, without extending the measures to the association's entire set of bylaws.

³⁶ J. Berlemont, *op. cit.*; A.-S. Choné-Grimaldi, *op. cit.* Both authors contextualise Decision 26-D-03 within a

broader trend of competition law enforcement in the sports sector, referencing the CJEU rulings in *Royal Antwerp Football Club* (C-680/21), *European Superleague* (C-333/21), and *FIFA* (C-650/22), which confirmed that sporting activities are subject to competition law in the same way as any other economic sector.

before the Paris Court of Appeal. The decision thus illustrates a recurring paradox in competition law: the certainty of a just

outcome does not exempt one from the rigor of proof.

Elise THOMAS