EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

25 August 2004 **Case Document No. 1**

COLLECTIVE COMPLAINT No. 28/2004

National Union of Dermato-Venereologists (SNDV) v. France

(TRANSLATION)

registered at the Secretariat on 12 July 2004

Letter of 24 June 2004 from Doctor Gérard Rousselet, Chair, French National Union of Dermato-Venereologists (SNDV), 79 rue de Tocqueville, 75017 Paris.

To the Secretariat of the European Social Charter

Dear Sir,

Collective Complaint of the National Union of Dermato-Venereologists (SNDV)

In accordance with the Additional Protocol to the European Social Charter of 9 November 1995, as Chair of the National Union of Dermato-Venereologists (SNDV) I wish to lodge this collective complaint with the European Committee of Social Rights.

It asks the Committee to find that France is failing to apply satisfactorily Articles 1 paragraph 2 and E of the Revised Social Charter of 3 May 1996. The SNDV considers that the French regulations governing the payment of fees to doctors in private practice constitute discrimination in breach of these articles.

1. The SNDV's status as a representative national organisation

The SNDV, which was founded in 1929 and currently has a membership of more than 2100 dermato-venereologists, is a national representative organisation within the meaning of Article 1c of the Additional Protocol of 9 November 1995. It is a legally constituted and registered trade union under French law (Appendix 1).

Moreover, the SNDV has particular competence in the matters governed by the Charter, as specified in Article 2.1 of the Protocol.

Under its statute, as amended on 9 March 1977 (Appendix 2), the SNDV is required to:

1. represent this specialist field in all its relations with government and public and private authorities,
2. defend its members' professional, material and intangible interests and generally improve the economic and professional situation of the medical practitioners concerned (Article IV of the SNDV statute).

To achieve these goals, the statute authorises the organisation's representatives to:

3. take all forms of action to defend its members' professional interests before government, public and private authorities or the courts, promote legislation and regulations to safeguard the interests of the profession and its patients and ensure that those in force are applied (Article V of the SNDV statute).

2. Competence of the Chair of the SNDV

In accordance with Rule 23 of the European Committee of Social Rights' rules of procedure (May 2004), this collective complaint is signed by the Chair of the trade union, who is "the person with the competence to represent the complainant organisation".

Article XVI of the organisation's statute states that *the Chair shall represent the trade union in all transactions with third parties, organs of government and the courts. He is empowered to commence any proceedings, subject to the approval of the union's governing body.*

On 10 June 2004, the governing body of the SNDV duly authorised the Chair, Doctor Gérard Rousselet, to lodge this collective complaint with the European Committee of Social Rights (Appendix 3).

3. France's application of Articles 1 paragraph 2 and E of the Revised Social Charter

3.1 Relevant French legislation and regulations

Under Article L. 163-5 of the Social Security Code, *relations between health insurance bodies and doctors are governed by medical agreements.*

These agreements specify:

1. The respective obligations of health insurance bodies and doctors in private practice;

6. The arrangements for controlling medical expenditure in accordance with the requirements of Article L. 162-5-2, and in particular appropriate measures for ensuring quality of care; how medical protocols are to be selected, whether these protocols are binding and the conditions governing their application; and the implementation of local expenditure control contracts in each insurance fund area;

8. Where appropriate, the circumstances under which the charges and fees covered by Article L. 162-5-2 may be raised for certain authorised doctors or certain activities to encourage medical practices reflecting quality criteria laid down in these agreements (Article 162-5 of the Social Security Code).

Where there is no national agreement, a minimum agreement regulation (*règlement conventionnel minimal – RCM*) must be issued by interministerial decree after consultation with the national employees' health insurance fund, trade unions representing general and specialist practitioners and, in so far as it has ethical aspects, the national council of the medical association (Article L. 162-5-9 of the Social Security Code). (Appendix 4, Articles L. 162-5, L. 162-5-2 and L. 162-5-9 of the Social Security Code).

This is the situation regarding specialist medicine. In the absence of an agreement, a minimum agreement regulation (RCM) was issued by interministerial decree on 13 November 1998 (Appendix 5), and amended by a further interministerial decree on 22 September 2003 (Appendix 6).

According to Article 12 of the RCM regulation:

Subject to the need to set their fees with tact and moderation, practitioners may apply variable fees in the following cases:

a. A higher fee (DE) in excess of the standard rate where there are exceptional circumstances relating to time or place owing to a particular requirement of the patient. In such cases, the practitioner shall inform the patient of the amount of the fee that is not reimbursable by the insurance fund and explain the reasons for the supplement. The letters DE are then recorded on the payment form for presentation to the insurance. The supplement may only apply to the main item of service provided by the practitioner and not to any ancillary costs.

b. A permanent right to charge a higher fee (DP) for doctors already entitled to do so when the regulation came into force.

c. Application of variable fees for doctors already entitled to practise them when the regulation came into force.

The doctors entitled to opt for variable fees are ones becoming private practitioners for the first time after the current regulation came into force and ones who moved into such practice for the first time between 7 June 1980 and 1 December 1989, if they are also certified as having previously held one of a number of specified junior medical posts in university, general, non-university regional, specialist or military hospitals, including that of full-time hospital practitioner under decree 84-131 of 24 February 1984, in public hospitals and hospitals forming part of the public system, or elsewhere in the European Community.

In the case of posts previously held in other hospitals forming part of the public system or elsewhere in the European Community, the local health insurance fund must certify that they were equivalent to their public hospital counterparts, after consulting the national employees' health insurance fund.

Doctors make their choice when they enter the scheme, as provided for in Article 15.

The current regulations therefore establish three possible forms of relationship between doctors and health insurance bodies, corresponding to different charging arrangements:

1. Insurance scheme doctors with set fees (sector 1), whose patients are reimbursed on the basis of fees fixed by the compulsory national health

insurance funds. No additional amount may be charged and differential fees are only authorised in pre-determined exceptional circumstances (DE).

2. Insurance scheme doctors with differential fees (sector 2), whose patients are reimbursed on the basis of fees fixed by the compulsory national health insurance funds.

Sector 2 is the exception, for whom only the following are eligible:

- doctors who were already eligible before the decree of 13 November 1998 came into force;
- doctors who had opted for this sector when first taking up private practice by the time the RCM regulation came into force;
- doctors opting for this sector if they took up private practice for the first time between 7 June 1980 and 1 December 1989, and were also certified as having previously held one of a number of hospital and/or university posts.

  It is this charging category that causes problems.

- doctors with a permanent right to charge extra fees when the RCM regulation came into force.

3. Non-insurance scheme doctors with freedom to set their own fees (sector 3), whose patients are not reimbursed on the basis of fees fixed by the compulsory national health insurance funds.

3.2 The facts

The sectors 1 and 2 charging system was established under the national medical practitioners agreement of 29 May 1980. At the time, any doctor qualified in general medicine or a medical specialism could opt for sector 2.

The national medical practitioners agreement of 9 March 1990 restricted access to sector 2. From then on, specialist practitioners in sector 1 could no longer opt for sector 2 unless they met the restrictive conditions in Article 12 c of the RCM regulation.

In practice, a considerable number of specialists who opted for sector 1 can no longer choose to charge fees under the sector 2 arrangements. The situation is exacerbated by a near freeze since the national agreement of 21 October 1993 on the fees that sector 1 specialists can charge, which has resulted in a gap of nearly 30% between the net incomes of sector 1 and sector 2 specialists.

Since the national medical agreement of 21 October 1993, that is for more than ten years, there has been a complete freeze on the fees for surgical treatment (code KC), other specialist items of service (K), and consultations in specialists' surgeries (CS). Moreover, since the agreement, there has only been one increase – of 2 euros – introduced very recently by the decree of

22 September 2003, which established a temporary flat-rate supplement (MPC) to the fixed consultation fee (CS).

3.3 The alleged breach of Articles 1 paragraph 2 and E of the Revised Social Charter

The regulations concerned amount to clear discrimination in remuneration.

Article 1 paragraph 2 of Part 2 of the Revised Charter states that with a view to ensuring the effective exercise of the right to work, the Parties undertake "*to protect effectively the right of the worker to earn his living in an occupation freely entered upon*".

States like France that have ratified the Revised Charter (Appendix 7) have a positive obligation to eliminate all forms of discrimination in employment.

The European Committee of Social Rights has ruled, in complaint No. 6/1999, Syndicat national des professions du tourisme v. France, that "*a difference in treatment between people in comparable situations constitutes discrimination in breach of the revised Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds*".

This is precisely the situation in this case.

Firstly, making eligibility to opt for sector 2 conditional on being certified as having held a particular hospital and/or university post is not an objective criterion for differentiating between what must anyway be considered similar situations.

It in no way reflects the purpose of Article 12 c of the RCM regulation, which was to establish the charging arrangements for private medical practice. The key issue is whether having held such a post has any direct bearing on the exercise of medical skills in private practice.

In fact such posts relate to particular medical duties and responsibilities in the public hospital field and are of no relevance to private practice.

It should be added that under French legislation, to practise specialist medicine it is not legally necessary to be certified as having held such a post (Appendix 8).

The fees that can be charged as a direct result of exercising the activity in question should not, therefore, be determined by the possession or non-possession of certificates that are irrelevant for distinguishing between specialists in private practice.

The same applies to the date on which specialists establish themselves in private practice. Article 12 of the RCM regulation establishes different treatment for similar situations for which there are no objective or reasonable

grounds. It is not therefore "proportionate and appropriate" (Complaint No. 6/1999).

The SNDV does not deny that the RCM regulation's stated aims of improving the quality of service to insured persons and controlling health expenditure are legitimate objectives. Nevertheless, the approach adopted by the interministerial decree can be challenged on two grounds.

Firstly, even a minimum application of the proportionality principle requires a direct relationship between the methods used and the outcome sought.

In this case, no such relationship exists because no link can be established between the option available to doctors who have held certain hospital and/or university posts and the twin objectives of improving service and controlling spending.

Secondly, under the proportionality principle one section of the medical community in private practice should not be left to bear a burden that ought to be shared among all their colleagues.

The points made in the last two paragraphs apply equally to the date on which a specialist doctor entered private practice. No link can be established between the option available to doctors who took up practice on a certain date and the twin objectives of improving service and controlling spending.

4. Conclusion

The European Committee of Social Rights is asked to rule that the French regulations on the fees chargeable by doctors in private practice constitute discrimination in breach of Articles 1 paragraph 2 and E of the Revised Social Charter.

Yours etc.

Doctor Gérard Rousselet, Chair