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## Changing Labour Market and Gender Equality: The Role of Policy

### INTRODUCING EQUAL PAY FOR WORK OF EQUAL VALUE IN COLLECTIVE BARGAINING: BELGIUM

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*This document is a detailed outline of the presentation by Chris Vanlaere, Equal Opportunities Division, Department of Employment and Labour, Belgium. The presentation will be made at Workshop A on "Low Pay and Equal Pay"*

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## INTRODUCING EQUAL PAY FOR WORK OF EQUAL VALUE IN COLLECTIVE BARGAINING: BELGIUM

Chris Vanlaere,  
Equal Opportunities Division, Department of Employment and Labour - Belgium

### I. Wage determination in Belgium.

1. In Belgium, as in most other European countries, wages consist of different components: the basic pay, variable bonuses on the basis of merit (competence remuneration), statutory benefits and extra-legal benefits. Discriminations can occur on each of these wage levels.

2. The basic pay (i.e. the main wage component) is primarily determined on the basis of “job classification” or “job evaluation” (on sectoral level in joint committees or on company level). Job evaluation is a means of establishing the relative position of different functions in a hierarchy or job classification (ranking). This job classification provides the final basis for the wage determination (i.e. the linking of pay scales to the different function groups in the job classification).

3. Research has shown that about 60% of all operational job classifications in Belgium are sectoral classifications<sup>1</sup>. The problem however is that no socially objective criteria can be found to determine the weight or the nature of functions. In Belgium, most job classifications appear to be outdated and to contain evaluation factors that are chosen arbitrarily or on the basis of tradition (stereotyping). In such cases, the job evaluation system often confirms historically “awry-grown” relations between employees. Furthermore, it appears that the outdated job classifications do not take into account the massive entry of women on the labour market in the past twenty years, in such a way that most of the female dominated functions are not included in the classification. Thus, distortions disfavouring female dominated functions appear during different moments in the job evaluation process.

### II. The bottlenecks of the Belgian system with regard to equal pay and job evaluation.

4. It can be noticed that Belgium has a detailed legislation in the field of equal pay. More specifically in the case of job evaluation, the Collective Bargaining Agreement no. 25<sup>2</sup> even stipulates expressly that

“equal remuneration of male and female employees must be ensured in respect of all wage-related elements and provisions including the job evaluation system wherever such a system is applied. Under no circumstances the system of job evaluation may give rise to discrimination, nor by the choice of the criteria, nor by the weighing of

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<sup>1</sup> In Flanders 61.5% of the companies apply a sectoral classification and 43% uses a personal system for the company: see SEGHERS, N., ‘Functieclassificatie: supernova of uitdovende ster?’, *Nieuwsbrief van het standpunt WAV*, no. 4/1994, p. 99.

<sup>2</sup> Collective Bargaining Agreement no. 25 of the National Labour Council of 15 October 1975 concerning the equal pay for male and female workers, declared generally binding by royal decree of 9 December 1975, *B.S.*, 25 December 1975.

those criteria, nor by the system of converting the job points into wage points”<sup>3</sup>.

This stipulation of the Collective Bargaining Agreement no. 25 comes under the general principle, only later developed in Title V of the Law on economic reorientation, that the equal treatment must be safeguarded in all stipulations and practices concerning the conditions of employment, to which also the wage and professions classification belong<sup>4</sup>.

5. Although Belgium has a legislation with adjusted contents regarding equal pay, in practice, however, one has to conclude that there still is a substantial wage gap of 26% on average between the wages of male and female employees. A large part of that wage gap cannot be explained by so-called “objective” factors<sup>5</sup> and must be linked to hidden mechanisms of discrimination in job evaluation systems and the job classifications which are the result of it.

6. It is typical for Belgium that most job classifications are put into effect at sectoral level, after applying a job evaluation system which was negotiated by the representative employers’ and employees’ organisations. These sectoral job classifications often contain discriminatory elements or they are formulated too vaguely, which gives the individual employer enough scope to consciously discriminate or not<sup>6</sup>. Furthermore, in many cases also the criteria and weighing factors of the job evaluation system are negotiated, so that also here distortions emerge.

7. In order to concretely determine the discriminatory character of job classifications and the infringements on the legislation regarding equal pay involved, Belgium has mainly appealed to the labour inspection until now. More specifically, the following civil servants and officials, who fulfil the supervision they were charged with in accordance with the legislation on the labour inspection, were appointed<sup>7</sup> to supervise the implementation of Title V of the Law on economic reorientation<sup>8</sup>:

1. the mining engineers;
2. the inspectors and deputy-inspectors of the Administration for the Labour Relations and regulation;
3. the inspectors of the Administration for employment;
4. the engineers, technical engineers and monitors of the Administration for industrial safety, and

<sup>3</sup> Art. 3 para 2 Collective Bargaining Agreement no. 25.

<sup>4</sup> Art. 127 and 128 Title V (Equal treatment of men and women with regard to the conditions of employment, the access to employment, professional training and the promotion opportunities and with regard to the access to an independent profession) of the Act of 4 August 1978 for economic reorientation, *B.S.*, 17 August 1978.

<sup>5</sup> As e.g. the difference in training, professional and labour market segregation, the greater presence of women in atypical work, part-time jobs and homework, the limited access of women to high jobs, the different career pattern of women (among other things, through career interruption for raising the children)...

<sup>6</sup> e.g. , By putting certain employees in the wrong scales.

<sup>7</sup> Art. 1 royal decree of 27 November 1978 for the appointment of the civil servants and officials, in charge of supervising the implementation of Title V of the Act of 4 August 1978 for economic reorientation, *B.S.*, 1 December 1978.

<sup>8</sup> Art. 137 para 2, Title V, Act of 4 August 1978 for economic reorientation.

5. the medical doctors- labour inspectors, the civil servants of the chemical inspection and the visitors of industrial hygiene of the Administration for industrial hygiene and medicine.

8. Legally speaking, the members of the labour inspection are competent to make a report of the offence of the employer who is guilty of violating the social and legal rules and regulations they are supervising<sup>9</sup>. Such reports can only be drawn up if the regulations involved have been guaranteed by criminal law (this is the case for the regulations regarding equal pay<sup>10</sup>) and be passed on to the labour audit which finally decides over the further prosecution by a court or not.

9. In order to be proceeded before a court, the employer needs to have acted in a conscious way when violating the law. After all, in principle an offence consists of two basic components: a *material* part (the punishable act) and a *moral* part<sup>11</sup>. The moral element requires that the material behaviour is committed while being conscious of committing an offence and doing so with a free will, this implies the possibility to make the discrimination between fair means and foul<sup>12</sup>. *Punishability because of an offence certainly requires the knowledge that this offence is being committed*<sup>13</sup>.

10. A first problem that arises here is that in many cases, it will be impossible to prosecute the employer involved because *he himself was not involved in the decision on the use of the job evaluation system*. As was mentioned earlier, the majority of systems in Belgium are negotiated at sectoral level between the representative employers' and employees' organisations, *in other words*, above the heads of the individual employer. In the end, the job classifications, which are the result of the job evaluation systems agreed upon at sectoral level, are laid down in a Collective Bargaining Agreement, which afterwards becomes generally binding and is subsequently, applied in the sector concerned. The result of all of this is that the individual employer cannot be prosecuted for a discriminatory job classification, he did not have a say in and on top that, he is obliged to apply. Moreover, the individual employers and the labour inspection do not have any insight into job evaluation, so that they themselves do not know either whether the job classification they are applying is discriminatory and therefore in breach of the law or not.

11. The eventual result is that the labour inspection members in such cases will not be competent to make a report against the individual employer, because of a lack of a moral element in the latter. It goes without saying that the latter will be the case when the employer consciously ranks an employee in the wrong scale or also when he applies the system of the company which is discriminatory. However, this is where the second and far more fundamental problem arises: the lack of expertise of the labour inspection.

12. In order to determine adequately whether certain job evaluation systems and classifications work in a gender discriminating manner, one needs to possess extensive expertise in the field of job evaluation. Usually, the civil servants mentioned above, in charge of supervising the implementation of Title V, usually do not dispose of the necessary expertise in the field of job evaluation and in addition, they do not even always have enough time and resources to conduct a thorough investigation. After all, as labour

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<sup>9</sup> Art. 9 para 1 Act of 16 November 1972 concerning the labour inspection, *B.S.*, 8 December 1972.

<sup>10</sup> Art. 141, 3<sup>rd</sup> Act of 4 August 1978 for economic reorientation.

<sup>11</sup> VAN EECKHOUTTE, W., *Sociaal Compendium Arbeidsrecht 1995-96*, II, Antwerp, Kluwer, 1995, p. 1546.

<sup>12</sup> BOES, R., 'De strafrechtelijke aansprakelijkheid van de werkgever en het kaderpersoneel', in *Sociaal Handhavingsrecht. Studiedag 1 december 1994. "Werkgevers achter de tralies?"*. Toezicht, aansprakelijkheid en beteugeling in het sociaal recht, ASSOCIARE & DEPARTMENT SOCIAL LAW UNIVERSITY GHENT (ed.), Ghent, 1994, p. 16, no. II. 1.

<sup>13</sup> Cass., 10 October 1989, *A.C.*, 1993, no. 441.

inspection they also have to examine the observance of much other social legislation, to which the government sometimes pays more attention <sup>14</sup>.

13. In such a way, one comes to the conclusion that, despite the fact that the rules concerning equal pay are sanctioned by criminal law, there are hardly any reports made up with regard to job evaluation discrimination by the competent members of the labour inspection. The only possibility left for the employee discriminated against is to have her rights enforced as civil rights and to take legal action to the competent judicial authority in accordance with art. 131 of the Act on economic reorientation and art. 5 of the Collective Bargaining Agreement no. 25.

14. Nevertheless, even in this case one encounters the same problems concerning a lack of knowledge and information. In the majority of companies, the employees are not aware of the job evaluation system applied and the resulting job classification applicable to them. Furthermore, it also appears that the existence of the legislation regarding equal pay is hardly known among the employees. As a consequence of this situation, there are hardly any complaints formulated, although it can certainly be said that something is wrong with a considerable number of job classifications in Belgium <sup>15</sup>.

15. However, the problem is more far-reaching than merely the disinformation among the individual employees. Even if an employee were to know that she receives an unequal pay, even then it is noticeable that in general, this will fall on deaf ears at her trade union (which however, functions as the first resort for such problems). Equal pay is not a priority on the Belgian trade unions' agenda and often they feel awkward to take legal steps in this area <sup>16</sup>. In addition, the trade unions find themselves in a delicate position with regard to job evaluation: after all, they themselves negotiated the job classifications in the joint industrial committees and afterwards they do not really feel like taking their doubts about the job classification they worked on to court.

16. It goes without saying that the employee can try and start a legal procedure herself in order to enforce her rights, but here again - and even to a larger extent - it is the case that neither the legal profession nor the magistrature have any insight into job evaluation and discrimination in job evaluation systems. To meet this problem with regard to the lack of knowledge and technicality, the law provides that the court can ask the Women's Labour Commission (Commissie Vrouwenarbeid) or the specialised Commission with equal representation established by the Collective Bargaining Agreement no. 25 <sup>17</sup> for expert advice. However, practice has shown that both bodies have never functioned appropriately in this domain <sup>18</sup>, on the one hand because they never became known in the legislative power, and on the other hand because they are not organised on a permanent basis (in the case of the joint Commission) and have never had the resources for collecting the necessary expertise, at least not in the field of job evaluation. This absence of expert advice in cases concerning job evaluation is however, pernicious for the woman who is proceeding, since she will never be able to prove the discriminatory nature of a particular job classification by herself.

<sup>14</sup> Let's think of e.g. the control of the legislation in the area of moonlighting.

<sup>15</sup> For instance, in some sectors the existing job classifications date back to the sixties.

<sup>16</sup> See JACQMAIN, J., 'De gelijke arbeidsvoorwaarden voor mannelijke en vrouwelijke werknemers in België. Tenuitvoerlegging van richtlijn 76/207 in het Belgisch recht', *Arbbl.*, 1990, (585), p. 593, no. 4.2.

<sup>17</sup> Art. 135 Act of 4 August 1978 for economic reorientation: art. 6 Collective Bargaining Agreement no. 25; art. 1 royal decree of 17 February 1981 taken for the implementation of art. 135 of the Act of 4 August 1978 for economic reorientation, *B.S.*, 25 February 1981.

<sup>18</sup> The advice of the Women's Labour Commission was never asked; however, the Commission with special joint representation was approached twice for giving advice and has effectively advised once: see JACQMAIN, J., *l. cit.*, p. 593, no. 4.7.

17. The final conclusion is that the female employee is legally too isolated to efficiently combat job evaluation discrimination. Add to that the lack of information and the fact that there is also social pressure on the woman keeping her from taking the case to court<sup>19</sup>, and one can understand why in Belgium so few cases with regard to equal pay and job evaluation are brought before a court.

### **III. Preventive action: introducing equal pay for work of equal value in collective bargaining concerning job evaluation.**

#### ***Why focus on job evaluation and collective bargaining.***

18. As mentioned above, in Belgium most discriminations in the field of pay are linked with the practice of job evaluation (outdated job classifications, discriminatory choice of evaluation criteria, etc.). In order to counter these types of discriminations and to reduce the pay gap, the Belgian government has to focus on the introduction of sex neutral job classifications and on the enforcement of litigation procedures.

19. Traditionally, the determination of wages by means of job evaluation belongs to the domain of the social partners, who bargain on sectoral level in joint committees. Thus, an effective equal pay policy in Belgium would come down on sensitising the social partners to introduce the equality aspect in collective bargaining concerning job evaluation. In this perspective, the Minister for Employment and Labour has subsequently asked the social partners in recent years to put the issue on the agenda of the yearly interprofessional negotiations. Also, in 1996 a campaign was launched to give employees and social partners greater insight into job evaluation and make them aware of the role they can play in the process. This campaign involved the publication of a workbook and teachers pack, especially intended for the social partners and their negotiators. The workbook gives insight into the evaluation process, constantly highlighting the pitfalls preventing equal opportunities. It also provides a detailed survey of job evaluation systems and explains how a sex neutral job classification can be developed using a checklist for equal opportunities.

#### ***What is a sex neutral job classification?***

20. In order to introduce the equality aspect in job evaluation and job classification, one should know what sex neutral job evaluation is. Research carried out by the Ministry of Employment and Labour has revealed that in certain other countries of the European Union (the Netherlands, United Kingdom, Finland) methods are developed to assess the sex neutrality of job evaluation systems. The method used by the Dutch Equal Treatment Commission appears to be the most elaborated one, containing as well technical reliability demands as demands regarding gender neutrality (both types of demands based on the *Rummler*-ruling by the Court of Justice of the European Communities).

21. The demands for technical reliability used by the Dutch Equal Treatment Commission can be presented as follows<sup>20</sup>:

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<sup>19</sup> See JACQMAIN, J., *l. cit.*, p. 593, no. 4.2.

<sup>20</sup> See BISSCHOP, S., VAN 'T LAAR, R. and RILA, P. 'Verandering in functiewaardering in Nederland en de hardnekkigheid van systemen', in *Waardering van werk. Opstellen over functiewaardering en sekse*, BROUNS, M., HALSEMA, L. and DE BRUIJN, J. (ed.), Amsterdam, VU, 1996, pp. 176-177.

- a) the job evaluation system must be set up and established in such a way that differences in evaluation are not the result of differences in the interpretation of the system, set up by well-trained and expert job analysts. This entails that the system needs to be *completely described*, the job characteristics which are to be evaluated need to be clearly defined and the differences in awarding values per characteristic need to be clearly marked.
- b) the method needs to be *consistent*, i.e. the evaluation of the same job by different job analysts at different times, always has to produce the same results, reckoning with an acceptable margin.
- c) the method must have a *description providing insight* and must be well-documented. This precondition is a prerequisite in order to meet what was mentioned under a and b.
- d) the *procedures* used when describing, evaluating and classifying the jobs need to be established and the various stages and the objectives always have to be described clearly.
- e) the evaluation results need to be *recognisable*. The mutual relations of awarding values per job feature and awarding values to the job as a whole, should be substantiated in a convincing manner.
- f) the method must clearly present which *qualities* are evaluated for which characteristics. It should be prevented that a particular quality is evaluated in several features and in such a way attributes a higher value to this quality as a whole.
- g) the method has to be provided with a compilation of *reference jobs*, i.e. jobs, spread as for nature and level (including men's and women's jobs), which serve as example and as standard for evaluating jobs.
- h) the system must offer good *information* to the employees with regard to their job description and also must provide a procedure of appeal.
- i) the *job lists* of the system must be recognisable by the employees in the company.
- j) within the company, the system must be regularly *monitored* and *maintained*.

22. In addition to the technical reliability demands mentioned above, the Commission has also included a number of specific *demands regarding gender neutrality* in its test model, which are also derived from the *Rummler* judgement. These demands can be presented as follows <sup>21</sup>:

- a) the system needs to analyse jobs and evaluate them from different perspectives (i.e. job features). This means that a system has to be *analytical*, consequently, a few forms of job evaluation have to be regarded as. Among others, this is the case for the rational comparing methods, the ranking methods, the classifications based on level characterisation of the Collective Bargaining Agreement and the classifications based on key jobs/ reference investigations. After all, these methods weigh and evaluate the totality of the jobs, which makes it impossible to compare them with each other at the level of their features. Possible

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<sup>21</sup> See BISSCHOP, S., VAN 'T LAAR, R. and RILA, P. 'Functiewaardering in de praktijk', in *In concreto. Bijdragen voor rechtsvorming gelijke behandeling*, MINISTRY FOR SOCIAL AFFAIRS AND EMPLOYMENT (ed.), Leiden, pp. 194-197.

differences between men's and women's characteristics cannot be discovered anywhere in such a way.

- b) the system needs to evaluate all job features present in the entire company, i.e. the system has to analyse and evaluate *all aspects* of the jobs which are significant when the job is performed. In this case, a number of *main characteristics* definitely has to be analysed and evaluated, viz. knowledge, responsibilities, skills and working conditions (inconveniences). As a consequence of this demand, a system that, e.g. does not weigh working conditions or weighs them separately will be considered to be unreliable.
- c) the system needs to be applied *integrally* in the company, i.e. all jobs in the company, both horizontally and vertically, have to be evaluated with the same system. An exception to this demand can be permitted for very large and complex companies where the organisation structure requires the use of subsystems for various job groups.
- d) in general, the perspectives of the system need to proportionally reckon with the aspects of men's and women's jobs, i.e. the men's and women's job characteristics have to be divided up proportionally in the system.
- e) the system needs to facilitate an equal approach to the *weighing possibilities* of men's and women's characteristics, i.e. both groups of features have to be able to at least score to the same extent.
- f) the *values* awarded by the system need to bear relation to the required effort for the job, i.e. the values awarded per job feature have to be in proportion to each other and to the total attribution of values.

### ***Introducing analytical job evaluation systems in the different sectors in Belgium.***

23. The first demand made by the Dutch Equal Treatment Commission on job evaluation systems is that these systems should be analytical. This should not come as a surprise, since research carried out in the USA and Canada in the 80's has shown clearly that analytical systems are more objective and scientific than any other system, and offer more guarantees in the field of equal pay for work of equal value. It should be notified, however, that in Belgium only 16% of all sectoral job classifications are based on analytical evaluation. Thus, introducing equal pay in collective bargaining in Belgium would mean in the first place revising all sectoral job classifications and introducing analytical systems on a general basis in all sectors of the economy.

24. In April of this year, the Minister of Employment and Labour has asked the national social partners to carry out a general revision of all existing sectoral job classifications. As a result, the social partners have committed themselves in the scope of the Belgian Action Plan for Employment of 1998 to revise the job classifications in all sectors where these classifications lead to inequality. In order to assure that this revision will indeed be carried out, the Minister of Employment and Labour has made a proposal to add a new paragraph with regard to job evaluation in the Belgian equality legislation. This paragraph would enable the government to take measures when the social partners fail to carry out a general revision of all sectoral classifications. In such case, it would come to the government to determine the conditions and standards for job classification. In this way, some or all of the above-mentioned demands on job evaluation systems could be taken up in the legislation. It should however be emphasised that this proposal has yet to be adopted by parliament.