CEEMET

Council of European Employers of the Metal, Engineering and Technology-based industries

LEGAL & PRACTICAL IMPLICATIONS

Revision of Directive 96/71/EC concerning the Posting of Workers in the Framework of the Provision of Services[1]

May 2016

Summary

→ The priority must be on implementing the Enforcement Directive first and improving enforcement of the current Directive.

→ The proposals will restrict the cross border movement of workers to their detriment and do not conform to established Better Regulation principles.

→ The Commission's proposals are in conflict with existing law and would harm small businesses in particular.

→ Attempts to interfere with wage setting mechanisms are protectionist and unlawful.

[1] COM(2016) 128 final, 2016/0070 (COD)

[2] European Commission Guidelines on Stakeholder Consultation, point 4.

[3] European Commission {COM (2015) 215 final, Regulatory Fitness and Performance Programme (REFIT) State of Play and Outlook «REFIT Score-board» 2015, p66

GENERAL COMMENTS

Enforcement has to remain main priority

The Commission has stated that the proposed revision to the Posting of Workers Directive (96/71/EC) intends to "address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner." Unfortunately, the substantial changes that have been proposed will not meet the objectives of creating fair competition and increasing labour mobility. Instead, the proposed revisions will create unintended barriers to the free movement of services. They would hinder, not promote labour mobility across the European Union.

- There are existing opportunities for improving the implementation and enforcement of the Posting Directive that do not require any revision, particularly one as substantial as that proposed on 8 March 2016.

Firstly

Effective implementation of the Enforcement Directive (2014/67/EU) is essential. This Directive supports Member States in the practical implementation, monitoring and enforcement of the rules laid down in the Posting of Workers Directive and further increases the protection afforded to posted workers.
The debate around Posting has been tarnished by confusing the concepts of "social dumping" and "unfair competition". The debate of what constitutes social dumping should be based not on what is subjectively perceived as unfair, but rather "illegal competition" - such as undeclared work or bogus self-employment. These practices, already unlawful, will not be remedied by revising the legislation on posting of workers, but can only be addressed by enforcing the legislation.

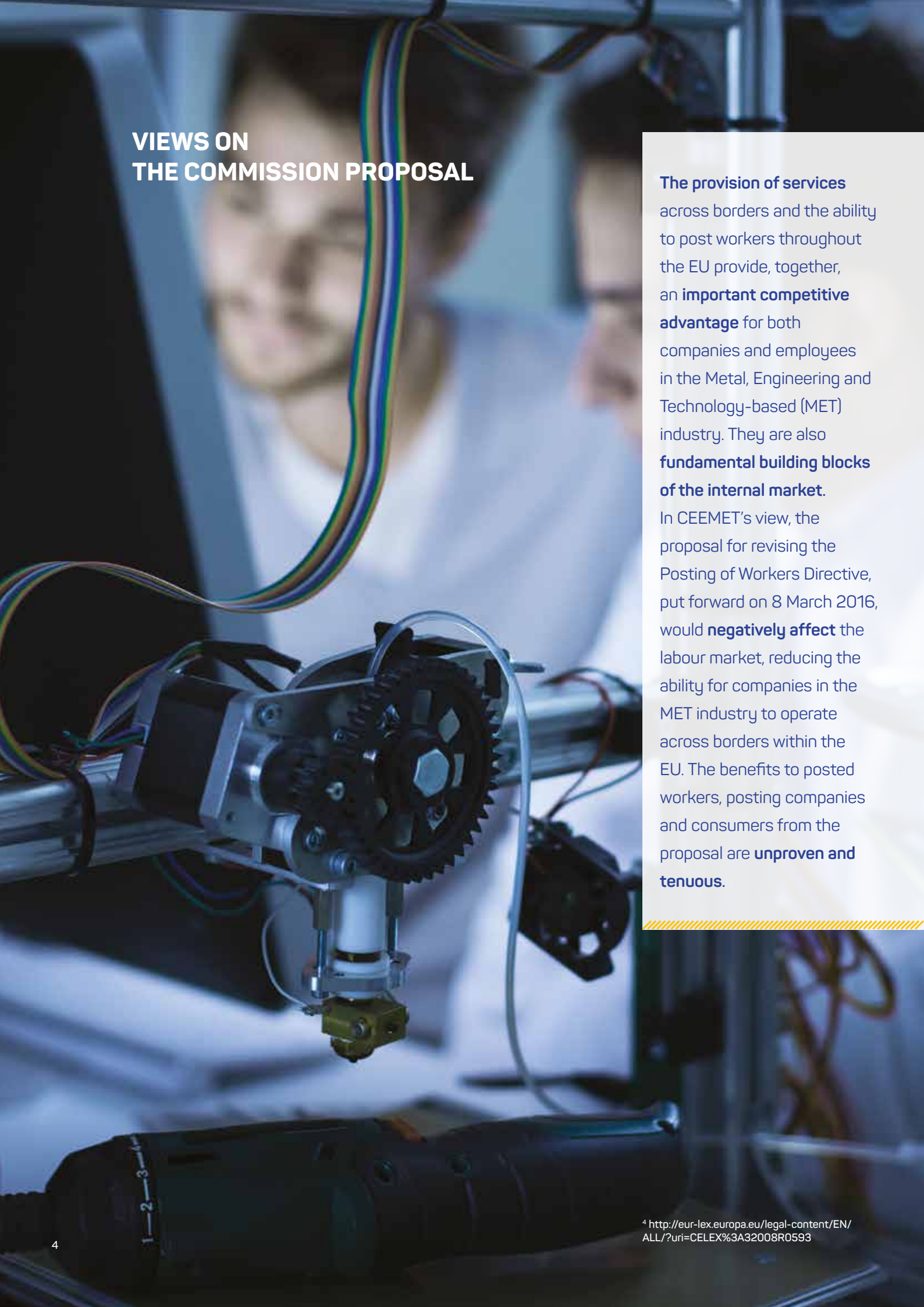
Secondly

It is imperative that national administrations devote adequate resources and engage in genuine cooperation with other Member States, for example by properly establishing and expanding the use of the Internal Market Information (IMI) systems and other notification systems.

Not Better Regulation

Revising the Posting of Workers Directive, before the Enforcement Directive has been fully implemented does not adhere to the principles of Better Regulation. While the Commission's new internal guidelines on Better Regulation state that "Stakeholders should always be consulted when preparing a Commission legislative or policy initiative" [2], this has not been the case.

The re-opening of the legal framework on Posting of Workers is contrary to the Commission's own Regulatory Fitness (REFIT) Scoreboard of 19 May 2015 which states that the objectives on Posting had been reached.
"The adopted [Enforcement] Directive contains a balanced package of measures guaranteeing a better protection of posted workers and a more transparent and predictable legal framework. This will clarify and simplify procedures and ensure a better level playing field from which all SMEs will benefit."[3]



VIEWS ON THE COMMISSION PROPOSAL

The provision of services across borders and the ability to post workers throughout the EU provide, together, an **important competitive advantage** for both companies and employees in the Metal, Engineering and Technology-based (MET) industry. They are also **fundamental building blocks of the internal market.**

In CEEMET's view, the proposal for revising the Posting of Workers Directive, put forward on 8 March 2016, would **negatively affect** the labour market, reducing the ability for companies in the MET industry to operate across borders within the EU. The benefits to posted workers, posting companies and consumers from the proposal are **unproven and tenuous.**

[4] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593

Fixing the **duration of posting** is legally problematic, imposing barriers on labour mobility

The changes proposed to Article 2 aim to modify the Rome I Regulation (Regulation 593/2008/EC)[4] by defining a time limit for the notion of habitual place of work (Article 8).

Legally

This would represent a major change to the Regulation. Rome I provides that a posted employee cannot be deprived of the protection of the labour law at his habitual place of work – almost always their home country. This cannot be derogated from by agreement should they work temporarily in another country, irrespective of the choice of law made in the employment contract. This means that it is most feasible and transparent for both the employee and the employer to base the posting contract on the labour law of the home country. The Posting of Workers Directive (Article 3) ensures that certain minimum standards from the host country are then added on to the posting agreement. With the suggested proposal, should a worker be posted for more than 24 months, then they would be subject to the labour law of the host country, and this cannot be derogated from by agreement.

This changes the fundamental right of a worker to be governed by the labour law of their home country for the duration of their posting, set out in the Rome I Regulation and therefore presents a legal conflict as a directive cannot change a regulation in this way.

In practice

This will force employees and employers to base the posting contract on the labour law of the host country. Otherwise, they would run the risk of conflicting legal rules. This fundamental change will make it much harder for companies – particularly SME's – to post workers for periods exceeding 24 months, as they are unlikely to have the detailed knowledge necessary of the host country's labour law.

In the case of dismissals, for instance, companies would have to apply their home country's legislation to domestic workers but apply the rules of the host country to their posted workers. Given that dismissal law varies greatly between Member States, this presents challenges in treating employees equally as well as places a considerable burden on companies in complying with up to 28 different sets of labour legislation.

Posted employees, who generally want to remain with the labour law of their 'home' country/habitual place of work, would have to understand a different set of labour laws for each single country they are posted to for more than 24 months. This will not reduce barriers to labour mobility in Europe.

Threshold for **cumulative duration** of posting source of unequal treatment

The difficulties in defining a time limit for the notion of a habitual place of work[5], are repeated in the proposal to apply the same 24-month threshold in the context of cumulative postings. Postings exceeding this cumulative period would also be governed by the labour law of the host member state[6]. Again, this would constitute a fundamental change of the rules in the Rome I Regulation.

The proposal is in breach of the Treaty of the Functioning of the European Union (TFEU) Article 56 on the free movement of services. Accumulating posting periods for different workers, to determine where they "habitually carry out their work", serves only to impede the free movement of services and protect high-cost labour markets in the EU, forcing companies posting workers to adhere to all mandatory rules regarding labour law in the host country and circumventing Article 3 of the Posting of Workers Directive. Since it cannot be argued that this protects the individual worker, who might be posted for only six months, this barrier to the free movement of services is unfounded and disproportionate.

The ruling by the European Court of Justice (ECJ) in Portugaia Construções (C-164/99) very clearly concluded that national laws aimed to protect domestic economic interests are unlawful: *"...according to settled case-law, measures forming a restriction on the freedom to provide services cannot be justified by economic aims, such as the protection of domestic businesses."*

- CEEMET cannot support the changes proposed to Article 2 in any form and considers them to be in conflict with existing law. Further, the proposed changes do not benefit or offer added protection to the posted worker.

Making **collective agreements** applicable in all sectors incoherent with Enforcement Directive

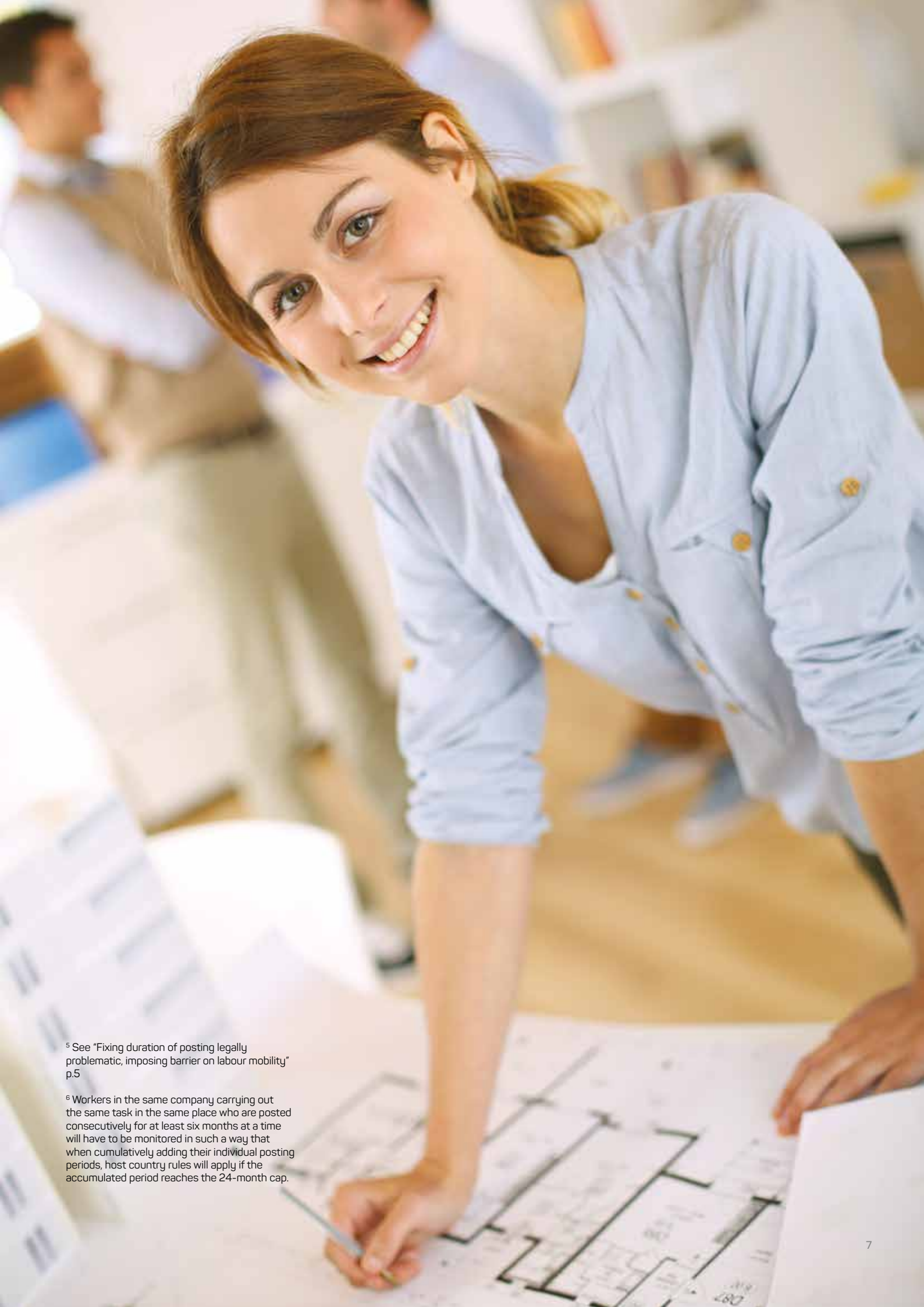
The proposed change in Article 3 to remove the reference to the Annex makes universally applicable collective agreements (so-called erga omnes agreements) applicable to posted workers in all sectors of the economy, irrespective of whether the activities are referred to in the Annex to the Directive or not.

Firstly

This will be inconsistent with the recently adopted Enforcement Directive, which contains some provisions, that are limited only to the construction sector. Therefore, CEEMET believes that the Annex should be retained in the revised version of the Directive.

Secondly

Removing the Annex is problematic in Member States where Article 3 of the Directive only cover activities listed in the Annex (construction) or where there are a great number of different collective agreements, even in each sector. This creates legal uncertainty, as it is difficult for posting companies not only to determine which agreement is applicable, but to determine which sector they should be considering. This exacerbates existing problems for companies, potentially impeding the free movement of services in sectors – such as those represented by CEEMET - where posting is currently unproblematic and based on the free movement of highly qualified service providers.



[5] See "Fixing duration of posting legally problematic, imposing barrier on labour mobility" p.5

[6] Workers in the same company carrying out the same task in the same place who are posted consecutively for at least six months at a time will have to be monitored in such a way that when cumulatively adding their individual posting periods, host country rules will apply if the accumulated period reaches the 24-month cap.

Replacing "minimum rates of pay" with **"remuneration"** requires Treaty change

In the Posting of Workers Directive, posted workers are entitled to minimum rates of pay in the host country, as set out in erga omnes agreements or by law. In the proposal for a revision, the reference to "minimum rates of pay" has been replaced with "remuneration", i.e. the rules on "remuneration" applicable to local workers, stemming from law or universally applicable collective agreements (within the meaning of Article 3(8)), are also to be applied to posted workers.

This clearly violates the Treaty.

Article 56 TFEU

Sets the boundaries for restrictions on the freedom to provide services. Following the well-established case law of the ECJ, restrictions must have a legitimate goal, must be proportionate and must be necessary to achieve their legitimate goal.

Article 153 TFEU

Does not allow the European Union to interfere with national wage setting systems. Wage setting is and remains a national competence. The Posting of Workers Directive must therefore retain its current remit, which states: "For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted".

According to case law of the ECJ, the TFEU only allows minimum rates of pay to be applied to posted workers. The Court has tried a number of cases where it ruled that national legislation violates the existing Directive if it contains requirements that go beyond the scope of the core employment conditions of Directive 96/71.

In the Laval case (C-341/05), it should be noted that the Court ruled that the national legislation was found to be in violation not only of Article 3 of the Posting of Workers Directive, but also of Article 56 TFEU.

A revision of the Posting of Workers Directive must therefore be in compliance with Article 56 TFEU. **Legally**, the proposed changes to Article 3 of the Posting of Workers Directive go beyond the minimum wage and would therefore require a fundamental change to Article 56 TFEU.

By seeking to impose the full set of national rules applicable to local workers upon posted workers, the proposal violates the case law of the ECJ on Article 56 TFEU.
A Directive clearly cannot exceed the limits set in the TFEU. A Directive, as secondary legislation, cannot seek to change the Treaty itself. In principle, changes to the scope of the core requi rements of Directive 96/71 can be introduced, but cannot change the principle that they are limited to **only minimum requirements**, set out in TFEU and established Court case law.

In practice

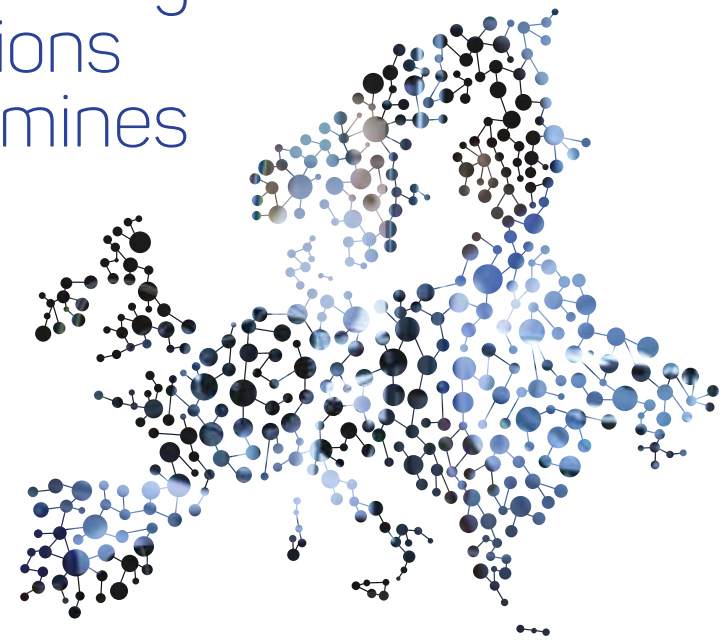
From a company, particularly SME, perspective, the proposal is overly burdensome. MET companies that post their workers to Member States where there exist erga omnes collective agreements will have to calculate and adapt their remuneration to that of the host country, taking into consideration all mandatory pay elements in both the home and the host country. The administrative burden is disproportionate, particularly for SME's. Companies that provide services in several Member States are required to have a profound knowledge of the applicable rules for every individual posted worker.

The Enforcement Directive will give the necessary information about the national applicable rules and give inspectors and administrations the necessary tools to go pursue posting companies that do not respect the host Member States core employment conditions, including minimum wages. Again, before introducing new rules through a revised of the Posting Directive, it is vital to await the implementation of the Enforcement Directive, before adding further to the burden of companies.

Overall, removing the reference to minimum rates of pay (and the established case law on it) only brings legal and practical complications. It also fundamentally changes the rules of the game. It introduces strong protectionist safeguards which ultimately are to the benefit of the domestic companies and which constitute an obstacle to free movement of services.

Moreover, the term 'remuneration' is unclear and will bring much legal uncertainty given that it is open to various interpretations.

Sub-contracting: Imposing same national obligations on entire chain undermines collective bargaining



The Commission's proposal includes a new paragraph, which deals with subcontracting chains. The proposal gives Member States the option to impose the same obligations concerning *"certain terms and conditions of employment regarding remuneration"* on all national subcontractors, as well as foreign subcontractors operating in the same chain. This would force any subcontractors to apply the same terms and conditions as companies higher up in the subcontracting chain. This is a clear protectionist measure and is to the detriment of smaller businesses.

Legally

there is an issue of proportionality, as the legal obligations imposed on subcontractors would go far beyond the core of employment conditions in Article 3 of the Directive on the Posting of Workers and conflict with the Treaty. There is no basis for treating subcontracted workers differently from other posted workers. It makes the proposal disproportionate and constitutes an unlawful limitation on the freedom of movement of services as set out in Article 56 TFEU.

Moreover, it is problematic that the proposed revision would allow Member States to derogate from the principle of Article 3(1) of the Directive on the Posting of Workers, which is central for safeguarding the free movement of services.

Furthermore, wage setting is a purely national matter and must remain as such. The European Union must fully adhere to the stipulations of the TFEU (152) according to which it has to take into account the diversity of national industrial relations systems and respect the autonomy of Social Partners. This includes in particular wage setting, which in many Member States is excluded from the competence of heads of state and governments and left entirely to the Social Partners, including employers and workers at company level, to determine. The proposal on subcontracting would undermine two types of collective bargaining:

1. In those countries where collective agreements are binding only for those companies with voluntary membership in an employer organisation, the new proposal would unhinge this principle; companies could be forced by Member States to apply collective agreements to their posted workers just because they are a subcontractor in a supply chain.
2. In companies with their own collective agreements. These agreements could be rendered irrelevant for workers who could be subject to another company's terms and conditions.

- The Commission must abstain from any initiatives that violate this principle as set out in Article 153 (5) TFEU. This is also in complete contradiction to the Commission's objective of strengthening social dialogue.

Temporary agency workers: minor clarification does not justify revision

The proposed changes clarify the treatment of temporary agency workers in the case of "posting", and oblige Member States to apply to cross-border agencies the same conditions that apply to national ones.

CEEMET is of the view that the proposed change could effectively improve the situation in some Member States. This is seen as the only constructive element in the Commission proposal and aims at solving the limited debate on whether the Temporary Agency Workers Directive takes precedence over the Posting Directive. However, a minor clarification for a particular sector does not justify a reopening of the Directive.

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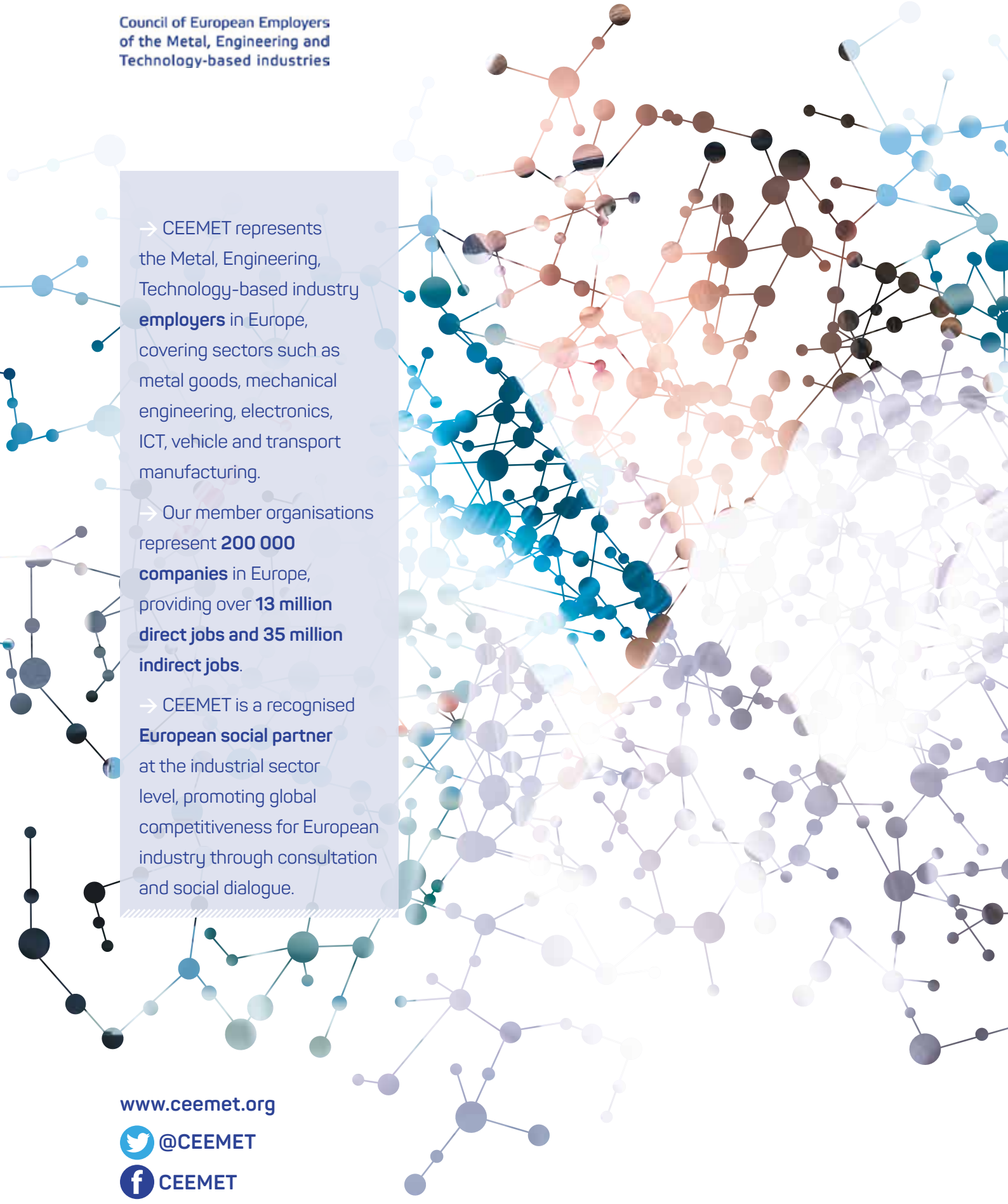

→ CEEMET represents the Metal, Engineering, Technology-based industry **employers** in Europe, covering sectors such as metal goods, mechanical engineering, electronics, ICT, vehicle and transport manufacturing.

→ Our member organisations represent **200 000 companies** in Europe, providing over **13 million direct jobs and 35 million indirect jobs**.

→ CEEMET is a recognised **European social partner** at the industrial sector level, promoting global competitiveness for European industry through consultation and social dialogue.

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