Delivery Platforms Europe Remarks on ST 5510/24

This new proposal by the Belgian Presidency brings no real improvement compared to ST 5133/24 and lacks the legal certainty offered by the General Approach, and even of the Commission's 2021 initial proposal, especially with regards to Chapter III. The new version of the text undermines the position of the Council and does not constitute a solid basis to resume negotiations with the EU Parliament that will request further concessions. This text will lead to huge numbers of unnecessary proceedings and significantly increase the risk of reclassification of hundreds of thousands of individuals legally self-employed under national law across Europe.

Criteria/Indicators

- **Indicator (b):** Indicator (b) has been amended, but the proposed amendment is cosmetic and fails to bring more clarity to the scope of the specific actions covered by the indicator. On the contrary, the wording introduced in recital (32) raises more questions:
    - What does it mean to assess or regularly take stock of the work performance or work progress?
    - What does it mean to verify the quality of the results of the work of persons performing platform work? If a platform contacts a courier following a complaint from a consumer to verify if an order has been received, would this be considered as verification of the quality of the results?
    - Recital (32) considers location tracking as an indicator of employment, except in the specific case of matching. However, location tracking is inherent to the functioning of platforms, also beyond matching and is no indication of an employment relationship. It is clear that this wording is designed to apply automatically to digital platforms, thus triggering indicator (b) in basically all location-based services.
- **Low threshold to trigger the presumption:** The threshold (2/5) remains unchanged. This constitutes a significant deviation from the Council's General Approach (3/7). Combined with unclear/broad criteria, it would significantly increase the risk of reclassification of genuinely self-employed. Overall, the approach explicitly described in the cover letter, where there are intentionally broad indicators in addition to more specific indicators of employment, is flawed. The purpose of the presumption and the threshold is to focus on the most likely cases of bogus self-employment. Broad and non-employment specific indicators go directly against this approach and only create more uncertainty and need for further interpretation, which risks more cases that will be disputed.
- **Indicators of employment:** The Belgian Presidency notes that indicators (c), (d) and (e) are inspired by the Yodel order of the CJEU and that indicators (a) and (b) are 'broad'. It is important to recall that the indicators were intended to indicate an employment relationship but at present indicators (a) and (b) are more akin to indicators of a platform business model. They should be reviewed to ensure that they capture behaviour

indicative of employment or they, inevitably, will capture individuals that are not employees.

- **Indicators vs. Criteria:** The proposal maintains 'indicators' over 'criteria'. The Parliament's Rapporteur stated clearly in December that, while criteria are linked to providing evidence, only 'hints' are needed to meet indicators. If indicators are not replaced by criteria before negotiations with the Parliament resume, the foundational principle of assessment of the facts of an employment relationship will be undermined.

Inspection of platforms after a successful reclassification case

The requirement for labour authorities to conduct inspections where misclassification has been determined in national law remains in the text (Article 7.1 (c)) and is largely unchanged. The addition *'where appropriate'* does not adequately address the fact that it is an excessive interference in national processes and would result in significant burdens on competent authorities.
The wording from the General Approach (*(c) in line with national law or practice, develop guidance for competent national authorities to proactively target and pursue non-compliant digital labour platforms;*) already included significant guidance from the EU to national authorities and should be reintroduced as such.

Additional remarks on recitals

- **Recital 35** is very unclear and partially contradicts the mere principle of the rebuttable presumption. The first paragraph describes the relationship between a digital labor platform and people performing platform work, outlining that this relationship is employment in case digital labor platforms fail to prove otherwise. While mentioning the rebuttal mechanism, the recital fails to recognize that the presumption should be based on a clear assessment of facts.

Chapter 3 and algorithmic management provisions

No change has been made to Chapter 3. This chapter continues to receive no attention, while it contains problematic provisions and contradicts existing and upcoming EU laws such as GDPR and the AI Act.

Our specific concerns remain unchanged:

- **Scope of systems:** The definition of automated-decision making risks capturing any electronic system in use by companies. The scope has been further broadened by the Spanish Presidency, without having received the approval of Member States since. More specifically, Article 10(1a) would require platforms to provide information on huge numbers of systems and decisions because (a) extends it to systems which support

rather than take decisions and to ones affecting people in a non-significant manner. Providing information on all systems regardless of their significance to people performing platform work is simply disproportionate.

- **Prohibitions on processing of personal data:** Platforms should be in a position to process personal data where obligated to by law or where it is in the public interest. The prohibitions on processing of personal data, while well intentioned, will have negative consequences on platforms ability to cooperate with law enforcement and risk complicating compliance with existing national and Union laws. With the GDPR entering its mandated review, extensive changes should be avoided at this time. In general, there has been a move to narrow the grounds for data processing with consent emerging as the primary justification. If rushed into, the new prohibitions combined with other developments with the GDPR result in too narrow a space for platforms to function.
- **Limits to consent:** Recital 40 limits the use of consent as a valid means to process personal data. While this is largely in line with the interpretation of authorities and courts, it provides no exceptions. Facial recognition, used to fight illegal substitution, generally relies on consent. Recital 42 expressly permits this form of verification but Recital 40 would inadvertently prohibit it.