NAVIGATING THE REGULATORY FRAMEWORK FOR ON-DEMAND FOOD DELIVERY PLATFORMS*

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ABSTRACT

Online food delivery platforms (e.g. GrabFood, Honestbee, Foodpanda) fall under the ambit of numerous Philippine statutes and, consequently, have legal obligations. These legal obligations are assumed by employers, food business operators, and nationalized industries. However, online food delivery platforms, claiming to be solely technology companies, tend to disregard compliance with these obligations. But, considering the novel way by which these platforms operate and the gains they bring to society, the imposition of these obligations should be reconsidered. The regulatory framework should be adjusted to balance the interests of the State, customers, workers, and even of the platforms. While some of the regulatory changes can be implemented by administrative agencies, ultimately, it is best for Congress to pass a governing law specifically governing the platforms.

I. INTRODUCTION

Traditionally, getting food delivered meant choosing among a limited pool of restaurants, which operate their own food delivery services. Most of these restaurants were fast food chains or pizza joints.[1] Ordering from a certain establishment entails calling said establishment and giving it one's personal details, such as one's name, address, and contact number. If one does not know the restaurant's offerings, one has to ask for its menu. The request would be answered

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[1] Sheryl Kimes & Philipp Laque, *Online, Mobile, and Text Food Ordering in the U.S. Restaurant Industry*, 11 CORNELL HOSPITALITY REPORT 6, 10 (2011).

by a customer service representative who enumerates each menu item. The customer also has the option of looking through the restaurant's website that allows one to choose and order food without referral to a customer representative.

Around 15 years ago, a new entity called the "aggregator" showed up.[2] It did away with the unwieldy process of having the customer deal with each restaurant separately.[3] Instead, it provided access to multiple restaurants through a single online portal.[4] Customers could use the aggregator's website or application ("app") to quickly compare menus, prices, and reviews.[5] However, the restaurant still does the actual delivery.[6] The restaurant benefits from the additional orders made by customers who appreciate the convenience of using the aggregator's services, while the aggregator profited by collecting a fixed margin of the order from the restaurant.[7] There was no additional cost to the customer.[8]

Today, however, food delivery is handled by the platforms themselves. They are called "new-delivery players".[9] With just one entity controlling the delivery process, the whole thing becomes a cinch. All one has to do is open an app on a smartphone, choose from a wide range of restaurants, and click the "order" button.[10] If one is not sure what particular restaurant to choose, one can search by picking a specific cuisine or food item.[11] Some apps even show restaurant reviews.[12] Personal details need only be entered once because the app makes a profile for customers that they use in every transaction.[13] Even the delivery address, which is easily the most tedious personal detail to communicate in order to complete a transaction, can effortlessly be obtained by the app automatically via Global Positioning System ("GPS") data.[14] Most importantly, these platforms provide delivery services to another segment of the restaurant

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[2] Carsten Hirschberg et al., *The changing market for food delivery*, MCKINSEY & COMPANY WEBSITE, *at* https://www.mckinsey.com/industries/high-tech/our-insights/the-changing-market-for-food-delivery (last visited Mar. 21, 2019).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Eastern Peak, *All You Need to Know about Building a Food Delivery App: Gruhhub Case Study*, EASTERN PEAK WEBSITE, *at* https://easternpeak.com/blog/all-you-need-to-know-about-building-a-food-delivery-app-grubhub-case-study (last visited May 19, 2019).

[11] SteelKiwi Inc., *Types of On-Demand Delivery Apps,* THE STARTUP, *at* https://medium.com/swlh/types-of-on-demand-delivery-apps-bd5d8d917b02 (last visited May 19, 2019).

[12] *Id.*

[13] *Id.*

market system: higher-end restaurants.[15] The new-delivery players are compensated by the restaurant with a fixed margin of the order price,[16] as well as a delivery fee from the customer.[17]

Due to the ease of using these apps, it is not surprising that the market for platform-to-customer services grew. Globally, the market for platform-to-customer food delivery is valued at USD 20.963 billion in 2019, with an annual growth rate of 11.9%, resulting in a market volume of USD 32.843 billion by 2023.[18] In the Philippines, the market grew to USD 15.9 million in 2019 from a modest USD 4.7 million in 2017.[19] With an even faster annual growth rate of 34.8%, the local market is projected to balloon to USD 52.4 million by 2023.[20]

The trouble with such a fast-growing novelty lies in its regulation. Legal scholars are generally in agreement that leaving innovation unregulated should not be considered as an option, for it leaves customers exposed to risk.[21] This is especially important in view of the numerous issues associated with on-demand food delivery.

To illustrate, suppose that a delivery is made in the blazing heat of the afternoon sun and the customer, after consumption, acquires food poisoning. Alternatively, imagine that the food spills out of its container during the delivery. Given the control which these platforms have over the delivery logistics, the question of who assumes liability in these situation arises. Or consider the hypothetical situation of a delivery personnel who, during the course of the delivery, crashes into a third party's vehicle and damages it. Is it possible for the platform to be held liable as the employer of these delivery personnel? In the first place, what kind of legal creature are these platforms? Which government agency has the authority to regulate them?

As with all innovations, these legal issues are just the tip of the iceberg, posing difficult questions for regulatory bodies to consider. But one thing is for sure: regulation is a must. The only question is how.

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[15] Hirschberg et al., *supra* note 2.

[16] *Id.*

[17] Nibble Matrix, *How does online food ordering system work? (infographic)*, NIBBLE MATRIX, *at* http://www.nibblematrix.com/how-does-online-food-ordering-system-work/ (last visited May 19, 2019).

[18] Statista, *Online Food Delivery - Philippines*, STATISTA, *at* https://www.statista.com/outlook/374/123/online-food-delivery/philippines (last visited Mar 21, 2019).

[19] *Id.*

[20] *Id.*

[21] Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413, 438 (2015).

This Note seeks to analyze the application of laws to new food delivery systems and the establishment of a regulatory framework over them. It will begin with a definition of food delivery platforms in Part II. Part III will discuss the legal characterization of their business models and the extent to which they are subject to specific laws. Part IV will explore the areas of regulatory concern and propose how they should be regulated. Given the proposed regulatory framework, Part V will examine the powers and functions of the relevant regulatory bodies to determine if the framework will require new legislation. Lastly, Part VI will present a comprehensive discussion of the entire Note through a conclusion.

II. WHAT ARE ON-DEMAND FOOD-DELIVERY PLATFORMS?

The rise of food delivery technology is a recent phenomenon. In the Philippines, the first company to offer online food delivery services started in 2014.[22] As with most innovations, there is no single accepted term or definition for on-demand food-delivery platform ("OFDP"). What is common among OFDPs, however, is their use of the services of freelancers—called "riders"—to make the deliveries.[23] These riders are treated by the OFDPs as independent contractors instead of employees.[24] Since these riders deliver only on demand, the OFDPs do not maintain a permanent rider fleet, but contract with riders on an own-time-own-target basis.[25] This means that a rider can work on his or her own time—the rider may be a student who makes deliveries only at night, or is the rider may be a weekend warrior who has a day job but wants to make extra money on the side. The scheme of using freelance riders is integral to what is termed as the "sharing economy," which encompasses not just OFDPs, but also other new services e.g. Airbnb and Uber. Thus, for a full definition of OFDPs, there must first be an explanation of what is meant by the sharing economy.

Due to technological advances, the sharing economy has become prevalent worldwide.[26] However, much like the OFDP, the term "sharing economy"—also known as the "gig economy" or "collaborative economy"—escapes exact definition. It is characterized as a way to offset the cost of ownership

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[22] Lee Chipongian, *Online food delivery takes on local market*, MANILA BULLETIN, Mar 28, 2017, *available at* https://business.mb.com.ph/2017/03/28/online-food-delivery-takes-on-local-market/.

[23] Eastern Peak, *supra* note 10.

[24] *Id.*

[25] Joanne Poh, *Food Delivery Riders (2019) - How Much Can You Make as a GrabFood, Foodpanda, Honestbee or Deliveroo rider?*, MONEY SMART, *at* https://blog.moneysmart.sg/career/food-delivery-riders-grabfood-foodpanda-deliveroo-rider/ (last visited Mar 21, 2019).

[26] Ranchordás, *supra* note 21 at 416.

through sharing and allocating underused resources.[27] Some have coined it as a disaggregation revolution, which allows users to exchange ever-smaller units of goods, services, or experiences at low transaction costs.[28] Others say that it is simply a dynamic where providers who have certain assets or skills are matched with customers who need them.[29] However it may be described, one thing is common from these definitions: the sharing economy allows more people to benefit from an individual's small pool of resources, at lower costs.

OFDPs are just one type of an on-demand delivery app, which itself is a subset of the sharing economy.[30] The arrangement contemplates a food delivery service that is facilitated by a third party, the OFDP, instead of being provided by the restaurant itself.[31] Some examples of local players are GrabFood, Foodpanda, and Honestbee. In lieu of the restaurant, the OFDP delivers.[32] OFDPs also act as a type of marketing company—the OFDP displays photos of each restaurant's food and offers promos to the customers when they order.[33] More importantly, customers can choose the OFDP that will facilitate the delivery.[34] A restaurant's presence on the app increases that restaurant's visibility to the OFDP's customers. Because of this, restaurants tend to partner with an OFDP that has the biggest market share.[35]

OFDPs are fast, cheap, and convenient, not just for the customer, but also for the restaurant.[36] For the convenience of using their services, OFDPs charge their customers fees in addition to the regular dine-in price of the order, which could be a flat rate either with or without a minimum order price, or an amount

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[27] Rebecca Elaine Elliott, *Sharing App or Regulation Hackney: Defining Uber Technologies, Inc. Notes*, 41 J. CORP. L. 727 (2015).

[28] Daniel Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901 (2015).

[29] Catherine Lee Rassman, *Regulating Rideshare without Stifling Innovation: Examining the Drivers, the Insurance "Gap," and why Pennsylvania should get on board*, 15 PITTSBURGH J. TECH. L. AND POL'Y 81 (2015).

[30] SteelKiwi Inc., *supra* note 11.

[31] Eastern Peak, *supra* note 10.

[32] *Id.*

[33] Woxapp, *How to make an app like Foodpanda? Cost of the food app like Foodpanda*, WOXAPP WEBISTE, *at* https://woxapp.com/our-blog/how-to-build-an-app-like-foodpanda/(last visited May 19, 2019).

[34] Eastern Peak, *supra* note 10.

[35] Jacqueline Woo, *Food Fight! The Battle for the Food Delivery Market*, THE BUSINESS TIMES, SEPT. 8, 2018, *available at* https://www.businesstimes.com.sg/brunch/food-fight-the-battle-for-the-food-delivery-market.

[36] SteelKiwi Inc., *supra* note 11.

proportional to the distance of the customer from the restaurant, among others.[37] The restaurant, depending on the business model of the OFDP, may also pay commission fees to the OFDP.[38] These commission fees are paid in exchange not only for serving the previously untapped market of on-demand delivery customers, but also for the advertisement and marketing services that the restaurant gets when it is part of the available choices on the OFDP.

To facilitate the transactions, OFDPs have software in the form of a smartphone app. The app allows the customer to choose what food he or she would like to have delivered and where the delivery is to be made.[39] A transaction typically begins when the customer opens the app and selects the food he or she wants.[40] The OFDP offers choices from a list of restaurants among which the customer may choose.[41] The list of restaurants depends on their proximity to the delivery address.[42] After choosing a restaurant, the customer is shown its menu so that he or she can specify what food items he or she wants to order. Subsequently, the customer must indicate the payment method to be used, e.g. through debit card, credit card, or cash on delivery payment.[43]

What happens after this step is dependent on the particular system and business model of the OFDP. The platform may partner directly with the restaurant and charge commission fees for its services.[44] Alternatively, the OFDP may act merely as a "concierge service", so that the restaurant appears as a choice on the platform with no prior, direct arrangement between the OFDP and the restaurant.[45] If the OFDP has partnered with the restaurant, the request is then sent directly to the chosen restaurant, which starts preparing the order according to the chosen delivery period. Once the order is prepared, the rider collects the order. However, if the OFDP is only a concierge service, the app first sends a delivery request to a rider in the nearby area. Once a rider accepts the request, he proceeds to the chosen restaurant to make and pay for the order, and then to pick up the prepared food.

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[37] Anastasia Z., *Four Monetization Techniques for Food Delivery Apps*, RUBY GARAGE WEBSITE, *at* https://rubygarage.org/blog/food-delivery-apps-monetization (last visited May 19, 2019).

[38] Eastern Peak, *supra* note 10.

[39] *Id.*

[40] Anastasia Z., *supra* note 37.

[41] *Id.*

[42] *Id.*

[43] SteelKiwi Inc., *supra* note 11.

[44] Eastern Peak, *supra* note 10.

[45] *See* Grab, *Why is my Restaurant on GrabFood*, GRAB WEBSITE, *available at* https://help.grab.com/passenger/en-ph/360000620427-Why-is-my-Restaurant-on-GrabFood (last visited May 19, 2019).

In every case, the rider then goes to the customer to deliver the order. If the customer chose cash on delivery, then he or she must pay the rider the restaurant price of the order, as well as the delivery fee, before he or she can collect the order. Afterwards, the transaction is marked by the rider as completed, and the customer can rate the services of the rider. If the OFDP has partnered with the restaurant, then it may also ask for a rating of the delivered food.

Aside from the flow of delivery transactions, the business models of OFDPs also deviate from each other in other ways, such as in how the riders are compensated for their work. For example, the platform could pay its riders either on a base salary per hour or on a commission-per-delivery basis.[46] Due to the variations in business models, the legal nature of OFDPs and their relationships with the customer, restaurant, and rider differ substantially. The difficulty of pinning down what kind of legal entity they are is enhanced by the secretive nature of the contracts between the restaurant, rider, and OFDP.

III. LEGAL CHARACTERIZATION OF ON-DEMAND FOOD DELIVERY PLATFORMS

A. Are They the Employers of Their Riders?

The first and most important issue to consider is the legal relationship between the rider and the OFDP—is there an employer-employee relationship? Unfortunately, there is no jurisprudence in the Philippines yet that can shed light on this matter. Currently, the riders are treated as independent contractors, not as employees. Asa a consequence, riders are not entitled to minimum wage, overtime pay, or security of tenure, among others. The presence or absence of an employee-employer relationship is also significant in other ways, which will be discussed later on in this Note.

It is a basic tenet of labor law that employment status is defined and prescribed by law, and not by what the parties say it should be.[47]

To determine the existence of an employer-employee relationship, the four-fold test is used.[48] In this test, the following elements are considered: "(1) the selection and engagement of the employee; (2) the payment of wages; (3) the

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[46] Poh, *supra* note 25.

[47] Century Properties, Inc. v. Babiano, G.R. No. 220978, 795 SCRA 671, 674 (2016), *citing* Insular Life Assurance Co., Ltd. v. NLRC, 350 Phil. 918, 926 (1998).

[48] *Id.*

power of dismissal; and (4) the power to control the employees' conduct—although the fourth is the most important element."[49]

The control test entails that an employer-employee relationship exists only when the person for whom the services are performed reserves the right to control not only the end achieved, but also the manner and means to be used in reaching that end.[50] For the control test to be met, the rules imposed by the person for whom the services are performed must control or fix the methodology and bind or restrict the party hired to the use of such means. The rules should not be mere guidelines geared towards the achievement of the mutually desired result without dictating the means or methods to be employed in attaining it.[51] If the rules are mere guidelines, there is no employer-employee relationship.[52]

Where the four-fold test is not satisfied, the worker is not an employee but an independent contractor. An independent contractor has been defined as one who exercises independent employment and contracts to do a piece of work according to his or her own methods and without being subject to control of his or her employer except as to the result of the work.[53]

The Supreme Court has declared that in the determination of the existence of an employer-employee relationship, each case must be determined on its own facts and all the features of the relationship are to be considered.[54] The task then is not cut-and-dry, but depends greatly on how the courts exercise their discretion. However, certain aspects of the relationship between the rider and OFDP might be determinative, and they are as follows:

1. Service fees

Most OFDPs have a commission arrangement with their riders, which means that each rider earns a service fee per transaction. Other OFDPs pay at an hourly rate instead of per transaction.

Neither of these arrangements go against the existence of an employee-employer relationship. The term "wage" is broadly defined in Article 97 of the Labor Code as remuneration or earnings, capable of being expressed in terms of

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[49] Mafinco Trading Corp. v. Ople, G.R. No. 37790, 70 SCRA 139, 141 (1976), *citing* Viaña vs. Al-Lagadan and Piga, 99 Phil. 408, 411 (1956).

[50] Atok Big Wedge Co., Inc. v. Gison, G.R. No. 169510, 655 SCRA 193, 194 (2011).

[51] Orozco v. Court of Appeals, G.R. No. 155207, 562 SCRA 36, 40 (2008), *citing* Insular Life Assurance Co., Ltd. v. NLRC, G.R. No. 84484, 179 SCRA 459, 460 (1989).

[52] *Id.*

[53] Mafinco Trading Corp. v. Ople, G.R. No. L-37790, 70 SCRA 139, 141 (1976).

[54] Acevedo v. Advanstar Co. Inc., G.R. No. 157656, 474 SCRA 656, 658 (2005).

money whether fixed or ascertained on a time or commission basis. In the words of the Supreme Court, payment by the piece is just a method of compensation and does not define the essence of the relations.[55]

2. Delivery guidelines

OFDPs endeavor to maintain the quality of deliveries by subjecting riders to delivery guidelines. For example, riders may be advised to wear the OFDP's shirt or uniform, and to conduct themselves in a certain way with customers.[56] They may be told not to cover their faces or argue with customers. They also may be instructed not to handle unpackaged food.[57] The OFDP may even require them to attend training sessions.[58] However, compliance with most of these guidelines is quite difficult for the OFDPs to monitor, because riders do their work on the field without any supervision. The binding force of these guidelines over the riders is instead accomplished through the app's feedback system.

As previously mentioned, the customer is given the option to rate the quality of the delivery after the transaction is completed. This is done by giving the riders a score and leaving a comment. These ratings act as an incentive for riders to be on their best behavior during deliveries. A rider who garners a low average score and poor reviews may be penalized with the withholding of incentives, suspension of access to the app platform, or even termination of access and blacklisting from the app.[59] However, the problem with the rating system is that it is only optional for the customer to accomplish. OFDPs may thus not get enough feedback on their riders. Alternatively, they may only get feedback when the experience was poor, which would skew the rating of a rider who normally performs excellently. It is also difficult to account for the lack of bias in such ratings, or even how such ratings reflect the rider's compliance with delivery guidelines.[60] The uncertain binding force of the guidelines makes the existence of

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[55] *See* Lambo v. Nat'l Lab. Rel. Comm'n, G.R. No. 111042, 317 SCRA 420, 427 (1999), where the Supreme Court held that the mere fact that the petitioners were paid on a piece-rate basis does not negate their status as regular employees.

[56] *Safety and Conduct Reminders*, FOODPANDA, *at* https://www.pandariders.sg/safety-and-conduct-reminders (last visited May 19, 2019).

[57] *Id.*

[58] *Overview of Grab's Supplement Terms of Use*, GRAB PH, *available at* https://www.grab.com/ph/safety2/codeofconduct/ (last visited May 19, 2019).

[59] *Id.*

[60] *See* Samantha Khor, *Some Uni Students Are Giving Grab Drivers 1-Star Ratings Because They Drive Local Cars*, SAYS NEWS, *available at* https://says.com/my/news/uni-students-are-apparently-rating-uber-grab-drivers-based-on-the-car-brands-they-drive (last visited May 19, 2019).

employer control hazy—to reiterate, mere guidelines which do not dictate the means or methods to be employed do not give rise to the power of control.[61]

3. Working hours

To reiterate, OFDP riders are freelancers who work on an own-time, own-target basis, and consequently have no set working hours.[62] They can turn on the app and start taking deliveries whenever they like. On the flip side, they can even walk away from the delivery business altogether, without so much as the bat of an eye. This scheme strongly militates against the finding of an employer-employee relationship, because the fourth element of control is sorely lacking—it means that the OFDP has zero control over the number of hours worked, the option to work, and the compliance with work guidelines of the rider.

Clearly, the facets of the relationship between the rider and OFDP make it difficult to fit that relationship into its corresponding legal pigeonhole. While some aspects weigh heavily in favor of the absence of an employer-employee relationship, particularly the lack of fixed working hours, other aspects, such as the unilaterally imposed rider qualifications, act as ample counterweights. Ironically, the most confusing aspect of the OFDP-rider relationship is control, which is the weightiest factor in the four-fold test.

To answer the question of whether or not an employment relation exists, it may be useful to resort to the economic reality test, which is utilized when the control test is not sufficient to give a complete picture of the relationship between the parties.[63] This test examines the economic realities prevailing within the activity or between the parties, taking into consideration the totality of circumstances surrounding the true nature of the relationship between the parties.[64] The proper standard of economic dependence is on the worker's reliance on the alleged employer for his or her continued employment in that line of business.[65] In this instance, the arrangement may be properly considered as an employment.

Notably, many riders view their activities as a regular nine-to-five job. Even in first-world countries, riders are usually not part-time workers.[66] They are

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[61] Orozco v. Court of Appeals, G.R. No. 155207, 562 SCRA 36, 51 (2008).

[62] Eastern Peak, *supra* note 10.

[63] Francisco v. Nat'l Lab. Rel. Comm'n, G.R. No. 170087, 500 SCRA 690, 691 (2006).

[64] Orozco v. Court of Appeals, G.R. No. 155207, 562 SCRA 36, 40 (2008).

[65] Francisco v. Nat'l Lab. Rel. Comm'n, G.R. No. 170087, 500 SCRA 690, 699 (2006).

[66] Homa Khaleeli, *The truth about working for Deliveroo, Uber and the on-demand economy*, THE GUARDIAN, June 15, 2016, *available at* https://www.theguardian.com/money/2016/jun/15/he-truth-about-working-for-deliveroo-uber-and-the-on-demand-economy.

people who are strapped for cash, who leave their old career behind and treat their delivery jobs as a full-time stint.[67] What more for riders in third-world countries such as the Philippines, who are struggling to make ends meet? Riders do not have any bargaining power over the OFDPs, which impose the same qualifications and standards of work on every rider.

While the control test may not definitively say that there is an employer-employee relationship, the economic reality test certainly does. It is also worth considering that the consequences imposed due to a low rating shows that the OFDP has the power of dismissal over its riders.

The issue would be less foggy if the state policy behind the law is considered—as the Supreme Court has held, our labor laws are pieces of social legislation.[68] They have been adopted pursuant to the constitutional recognition that labor is a primary social economic force and to the constitutional mandates that the state must protect the rights of workers and promote their welfare.[69] These policies are further reinforced by the mandate of the Labor Code to resolve all doubts in its implementation and interpretation in favor of labor.[70] All things considered, most particularly the economic circumstances involved, riders would be classified as employees in the Philippine jurisdiction. Riders also benefit from the presumption of employment, for it is the burden of the employer to prove otherwise.[71] In any case, it remains to be seen whether the courts will agree.

B. Are They Food Businesses?

OFDPs market themselves to hungry customers who want to fill their cravings immediately. Customers expect that the food will be fresh and warm.But suppose the food is delivered negligently and in sub-optimal conditions, causing it to become spoiled?[72] Alternatively, suppose that a rider opens the food package and, consequently, contaminates the food. These considerations lead one to wonder what type of a legal creature an OFDP is, i.e. whether or not they can be considered as a type of food business subject to regulation under law.

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[67] Minka Klaudia Tiangco, *Foodpanda on bikes*, MANILA BULLETIN, Dec. 2, 2018, *available at* https://news.mb.com.ph/2018/12/02/foodpanda-on-bikes/.

[68] Rivera v. Genesis Transport Serv., Inc., G.R. No. 215568, 764 SCRA 653, 661 (2015).

[69] *Id.*

[70] LAB. CODE, art. 4.

[71] Fuji Television Network, Inc. v. Espiritu, G.R. No. 204944-45, 744 SCRA 31, 40 (2014).

[72] Joanna Fantozzi, *Are Speedy Delivery Apps Skimping on Food Safety?*, THE DAILY MEAL, Jan. 11, 2016, *at* https://www.thedailymeal.com/news/eat/are-speedy-delivery-apps-skimping-food-safety/011116.

The Food Safety Act of 2013 ("Food Safety Act") aims to strengthen the food safety regulatory system in the country by, among others, protecting the public from food-borne and water-borne illnesses and unsanitary, unwholesome, misbranded or adulterated foods,[73] and establishing policies and programs for addressing food safety hazards and developing appropriate standards and control measures.[74] Under the Food Safety Act, "food safety regulatory system" refers to the combination of regulations, food safety standards, inspection, testing, data collection, monitoring, and other activities carried out by food safety regulatory agencies and by the local government units ("LGUs") in the implementation of their responsibilities for the control of food safety risks in the food supply chain.[75] Meanwhile, "food supply chain" refers to all stages in the production of food from primary production, post-harvest handling, distribution, processing and preparation for human consumption.[76] A "food business" refers to any undertaking, whether public or private, that carries out any of the activities related to, or any of the stages of the food supply chain.[77]

The Food Safety Act and its implementing rules and regulations do not have a particular section governing food delivery. This is understandable, given that the Food Safety Act was promulgated in 2013, and its implementing rules and regulations were promulgated in 2015. Traditionally, food supply chains would end with the restaurant.[78] At the time the law was conceived, it was not perhaps considered by policy-makers that OFDPs would take over the distribution segment of the supply chain and stake out their hold on a new and substantial segment of the market. In fact, Foodpanda, which is possibly the first OFDP in the Philippines,[79] only came into the country in 2014.[80] That being the case, it is evident that the question of whether or not OFDPs fall into the definition of a food business has no clear-cut answer.

More confusion results when OFDPs claim to be purely technology companies. For instance, GrabFood's terms and conditions state that it is a technology company that does not provide transportation, food and beverage, courier, or delivery services.[81] It claims to be merely an intermediary that connects the actual parties to the delivery transaction. In such a case, the riders themselves

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[73] Rep. Act No. 10611 (2013), § 3(a).

[74] *Id.* at § 3(3).

[75] *Id.* at § 4(q).

[76] *Id.* at § 4(r).

[77] *Id.* at § 4(k).

[78] Hirschberg et al., *supra* note 2.

[79] Chipongian, *supra* note 22.

[80] Annelle Tayao-Juego, *Foodpanda delivers the goods*, INQUIRER, Feb. 19, 2017, *available at* https://business.inquirer.net/224836/foodpanda-delivers-goods.

[81] *Terms of Service*, GRAB PH, Oct. 16, 2018, *at* https://www.grab.com/ph/terms/.

are clearly a part of the food supply chain, since they distribute the food by delivering food to customers on demand. But does this mean that the OFDP itself is also part of the food supply chain?

What may be determinative is whether or not the rider is an employee of the OFDP. If the answer is yes, then the OFDP is likewise part of the food supply chain, and consequently, a food business subject to the Food Safety Act and its implementing rules and regulations.

In any case, as with all other entities, an OFDP's self-definition is not conclusive as to its legal character. It is the law which determines the legal character of any entity. Because the term "food supply chain" is broad and refers to *all* stages in the production of food, including distribution, it would be reasonable to claim that food supply chains as contemplated in the Food Safety Act now include OFDPs. This especially rings true in cases where the OFDP has a partnership with the restaurant, considering the nature and extent of the OFDP's control over the food delivery transaction. Deeming them a type of food business would be in line with the objectives of the Food Safety Act, one of which is to protect the public from contaminated or unsafe food.

C. Are They Common Carriers?

Since OFDPs are in the delivery business, another question to be asked is whether or not they are common carriers. Under the Civil Code, common carriers are "persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air, for compensation, offering their services to the public."[82] The characterization of an OFDP as a common carrier would make it bound to comply with certain legal obligations. For example, if an entity falls within the definition of a common carrier, then it is bound to observe extraordinary diligence in the vigilance over the goods,[83] from the time the goods are placed in the possession of, and received by the carrier for transportation until the same are delivered, actually or constructively, by the carrier to the consignee, or to the person who has a right to receive them.[84]

Traditionally, delivery services would be provided by the restaurants themselves through their own employees.[85] The restaurants could not be classified as common carriers because they do not offer their transportation services to the

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[82] CIVIL CODE, art. 1732.

[83] CIVIL CODE, art. 1733.

[84] CIVIL CODE, art. 1736.

[85] Hirschberg et al., *supra* note 2.

public.[86] For OFDPs, however, the lines begin to blur. Adopting a simplistic approach, it could be said that OFDPs are common carriers because their business involves the transportation of goods by land for compensation to the public. However, OFDPs such as UberEats have claimed to be merely a digital platform for a referral system, i.e. an "Internet-enabled network utility" that facilitates the matching of willing riders and customers.[87] Similarly, GrabFood's terms and conditions state that it is a technology company that does not provide transportation or delivery services.[88] In other words, they purport to act only as intermediaries in the transaction between the actual transporters and the customers who procure the transportation. Again, an OFDPs self-characterization is not conclusive, but it is worth noting that the application of the common carrier law to these entities in our jurisdiction is not so clear.

To shed light on the issue, it might be useful to consider the case of *Crisostomo v. Court of Appeals*.[89] In this case, a travel agency, which only arranges and facilitates booking, ticketing, and accommodation, was held not to be a common carrier by the Supreme Court.[90] From this ruling, it is possible that the OFDP's services may be confined merely to the arrangement and facilitation of the transaction between the rider, restaurant, and customer. If it could, then by analogy, an OFDP itself could not be classified a common carrier; instead, the rider, who does the actual transportation, would be the common carrier. Whether the rider only delivers full or part-time does not matter, because the common carrier law does not distinguish between the carrying of goods as a principal business and as an ancillary activity.[91] Neither does it distinguish between carrying the goods pursuant to a scheduled business or to an occasional episodic business.[92]

Significantly, the conclusion that the OFDP itself is not a common carrier operates on the presumption that the rider is merely an independent contractor and not an employee of the OFDP. If riders are employees under Philippine law, then the business of an OFDP is not limited to referral, but necessarily involves the transportation of goods for compensation to the public. Hence, the whole question of whether or not an OFDP is a common carrier is hinged on the existence of an employer-employee relationship between the OFDP and its riders. If the courts agree that such a relationship exists, then the conclusion that OFDPs are common carriers would follow as a matter of course. Considering further that

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[86] *Id.*

[87] Kevin Werbach, *Is Uber a Common Carrier?*, 12 ISJLP 135 (2015).

[88] *Supra* note 81.

[89] Crisostomo v. Ct. of Appeals, G.R. No. 138334, 409 SCRA 528 (2003).

[90] *Id.*

[91] De Guzman v. Ct. of Appeals, G.R. No. 47822, 168 SCRA 612, 617 (1988).

[92] *Id.*

OFDPs have some level of control over their riders through the enforcement of the feedback system, it would be logical to say that they are indeed common carriers.

D. Are They Mass Media Entities?

Currently, the closest thing in the Philippine jurisdiction to a court decision on the legal character of OFDPs are opinions of a government agency. In 2012, the Securities and Exchange Commission (SEC) issued an opinion ("2012 opinion") on whether or not the marketing and sale of discount coupons for goods and services through the internet constitutes advertising.[93] The corporation involved in this opinion intended to display vouchers of its merchant partners on its website, and to sell these vouchers to end-consumers who would redeem the vouchers from the relevant merchant.[94] The merchant was to dictate the conditions and duration of the vouchers, while the design of the voucher was placed in the hands of the corporation.[95] The vouchers were to be sold at the price agreed upon with the merchant.[96] In return, the corporation would be remunerated with commission fees.[97]

First, the SEC stated that it was necessary to distinguish an advertising agency from a mass media entity—advertising agencies do not do the actual dissemination of materials they prepare, as they have to utilize or avail of mass media for that purpose.[98] Because the corporation intended to provide an online platform aimed at increasing the sale of a particular product, the SEC concluded that the corporation, in effect, would disseminate information to the general public online, and would consequently be considered as a mass media entity.[99] Note that a mass media entity is subject to the nationality restriction provided in the 1987 Constitution, which limits ownership and management to citizens of the Philippines.[100]

In a subsequent opinion issued in 2014 ("2014 opinion"), SEC reinforced its stance, and further stated that the Internet is a recognized mass media platform due to its evolution and proliferation.[101] To bolster this argument, SEC cited the

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[93] SEC Op. No. 12-16 (Sept. 13, 2012). Re: Marketing and Sale of Discount Coupons.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] CONST. art. XVI, § 11(1).

[101] SEC Op. No. 14-06 (May 8, 2014). Re: Marketing and Sale of Digital Publication Through the Internet and Mobile Technology, Advertising; Mass Media.

Tobacco Regulation Act of 2003, which specifically includes the Internet in the definition of "mass media."[102] It likewise cited the 1998 opinion of the Department of Justice that mass media refers to any medium of communication designed to reach the masses and that tends to set the standards, ideals, and aims of the masses, the distinctive feature of which is the dissemination of information and ideas to the public, or a portion thereof. In this 2014 opinion, the corporation involved was in the business of marketing and selling digital publications through the internet and mobile technology. In addition to classifying the corporation as a mass media entity, the SEC also considered it as an advertising agency under the Consumer Act of the Philippines ("Consumer Act")[103], which is subject to the thirty percent maximum foreign equity limit under the 1987 Constitution.[104]

The business activities involved in these opinions are substantially similar to those of OFDPs, which likewise connects end-consumers and restaurant-merchants.[105] Restaurants appear on an OFDP's website for the purpose of both selling and increasing the sales of the restaurants' offerings to customers.[106] Does this mean that OFDPs are also mass media entities?

While the SEC's opinions are not binding on courts of law,[107] these opinions nevertheless have some persuasive weight because they can influence the actions of corporations. This is especially true in the case of OFDPs, most of which are multinational companies operating locally.

By saying that the dissemination of information to the general public online makes the corporation a mass media entity,[108] the 2012 opinion implied that any use of the Internet would render an entity a mass media entity. This is erroneous, because the Internet, as a platform must be distinguished from its use. The Internet is, at its very core, a network that allows the exchange of information between computers.[109] The reach of the Internet is massive, such that it can even be said to be the only global medium that is accessible anywhere on the earth.[110] As a platform, the Internet can be classified as mass media. But with this line of

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[102] *Id.*

[103] Rep. Act No. 7394 (1992), art. 4(a).

[104] SEC Op. No. 14-06 (May 8, 2014). Re: Marketing and Sale of Digital Publication Through the Internet and Mobile Technology; Advertising; Mass Media.

[105] Hirschberg et al., *supra* note 2.

[106] *Id.*

[107] *See* SEC. REG. CODE, § 5.2, which transferred the jurisdiction of the SEC to the regular courts.

[108] SEC Op. No. 12-16, *supra* note 93.

[109] Obiageli Ohiagu, *The Internet: The Medium of the Mass Media*, 16 KIABARA JOURNAL OF HUMANITIES. 225 (2011).

[110] *Id.*

reasoning, a question on whether or not the nature of use attached with the operation of the Internet automatically makes it a mass media entity arises. However, this line of thought verges on superficiality. It would also cause confusion given the massive Internet use by the public.[111] Interestingly, the inclusion of the Internet in the enumeration of mass media by the Tobacco Regulation Act of 2003 likewise raises question. The provision itself says that the definition is only for the purposes of that particular law,[112] which is limited to the regulation of the sale and advertisements of tobacco products.[113] The state policy behind the restrictions on mass media must be examined in order to reach a reasonable conclusion.

Nationality restrictions for mass media entities were first incorporated in the 1973 Constitution, which stated that "the ownership and management of mass media shall be limited to citizens of the Philippines or corporations or associations wholly owned and managed by such citizens."[114] The 1973 Constitution did not define mass media, leaving it to both the judiciary and the legislature. Accordingly, the only tool left in that era to interpret the provision is Presidential Decree No. 1018 ("P.D. No. 1018"), which sought to implement the mass media mandate in the 1973 Constitution.

P.D. No. 1018 states that "[t]he term 'mass media' refers to the print medium of communication, which includes all newspapers, periodicals, magazines, journals, and publications and all advertising therein, and billboards, neon signs and the like, and the broadcast medium of communication, which includes radio and television broadcasting in all their aspects and all other cinematographic or radio promotions and advertising."[115] This enumeration naturally does not include the Internet. As P.D. No. 1018 was issued in 1976, it could not have contemplated the Internet, which came into large commercial use only in 1995.[116] The other provisions in P.D. No. 1018 may be more enlightening. Aside from repeating the constitutional mandate, P.D. No. 1018 forbid aliens from circulating in the Philippines any publications made abroad,[117] and enjoin them to course the circulation through wholly-Filipino entities.[118] The intent was

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[111] Raul Palabrica, *Internet sale is mass media*, INQUIRER WEBSITE, May 26, 2014, *at* https://business.inquirer.net/171449/internet-sale-is-mass-media.

[112] Rep. Act No. 9211 (2003), § 4.

[113] Rep. Act No. 9211 (2003), § 2.

[114] CONST. (1973), art. XV, § 7.

[115] Pres. Dec. No. 1018 (1976), § 1.

[116] National Science Foundation, *A Brief History of NSF and the Internet,* NATIONAL SCIENCE FOUNDATION WEBSITE, *at* https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050 (last visited May 19, 2019).

[117] Pres. Dec. No. 1018 (1976), § 3.

[118] Pres. Dec. No. 1018 (1976), § 4.

clearly not to ban foreign media altogether, but to ensure that any such media would be subject to the control of Filipinos.

Of course, any guideline for interpretation that may be gleaned from P.D. No. 1018 is not fully persuasive, because the 1973 Constitution was replaced with the present 1987 Constitution. The exact same provision restricting foreign ownership for mass media can be found in Section 11, paragraph 1, Article XVI ("Sec. 11(1)") of the 1987 Constitution, which differs from the previous provision only in that it includes cooperatives in addition to corporations and associations. Again, there is no definition of mass media. Thankfully, however, the intent of the framers can be culled from the Records of the 1986 Constitutional Commission ("Commission").

First, in her sponsorship speech for the constitutional provisions on communication and information, Commissioner Florangel Braid emphasized the role and reorientation of the media so that they truly serve the economic, political, social, and cultural development of the nation.[119] She stated that these provisions note the significant impact of the media on Filipino values and culture, which is why there is a provision requiring the Filipinization of ownership of the mass media. According to her, the media have such a powerful socializing effect that they could tell audiences how to think and behave, and that they have a tremendous influence in shaping opinions and attitudes and could lead to cultural alienation and social uniformity.[120]

Second, one member raised the issue of whether or not mass media should be differentiated from telecommunications and advertising, to which Commissioner Braid replied that Sec. 11(1) was copied from the 1973 Constitution.[121] Although Commissioner Braid said that Sec. 11(1) merely maintained the distinction in the 1973 Constitution, the members of the Commission did not come to a conclusion on whether or not there should be an actual distinction, saying only that the issue would be reserved for mature consideration.[122]

Regrettably, there is not much in the Records of the 1986 Constitutional Commission which discusses Sec. 11(1) in particular. However, in discussing another provision limiting the monopolization of mass media, a member of the Commission said that it was proposed in view of the fact that the combination of

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[119] V RECORD CONST. COMM'N 92 (Sept. 25, 1986), 82.

[120] *Id.* at 83.

[121] *Id.* at 94.

[122] *Id.* at 95.

newspaper, television, and radio is powerful, which may pave the way for some form of economic or political control..[123]

In summary, the provisions on mass media were included by the framers in our fundamental law only in order to ensure that Filipino values, cultures, and opinions can be protected from the sway of harmful and controlling influence. Sec. 11(1) was copied from the 1973 Constitution presumably because the framers agreed with the intent of the prior constitutional regime, which, again, did not proscribe all foreign media. With this policy in mind, it is clear that mass media in the Constitution cannot refer to every single dissemination of information on the Internet. A blanket mass media ownership restriction on all Internet sales leads to absurd results and displays a facile understanding of how the Internet works.

Let us consider a hypothetical situation: if, for example, an alien makes a public post on Facebook, selling a shirt in the Philippines for PHP 150, should that be prohibited by the Constitution? This constitutes dissemination of information on the Internet, but it can hardly be contemplated that the post would have a significant effect on Filipino mores. But what if he or she is selling multiple shirts? What if he or she is selling a car? What if a partnership of aliens makes the Facebook post? Clearly, it is difficult to draw the line where dissemination would sufficiently influence Filipinos. The interpretation adopted by the SEC would not just prohibit OFDPs from operating, but would disallow every alien from engaging in any kind of commercial transaction through a post on the World Wide Web. More importantly, considering the fact that a vast number of foreign-owned businesses has Internet presence, would this interpretation halt virtually all foreign trade? Surely, the framers could not have intended for the Philippines to be an isolated state. It is more fitting with the constitutional policy to exclude OFDPs and like businesses from mass media entities for the purpose of Sec. 11(1).

E. Are They Advertising Agencies?

In addition to classifying the corporation as a mass media entity, the SEC also considered it as an advertising agency under the Consumer Act of the Philippines ("Consumer Act")[124], which is subject to the thirty percent (30%) maximum foreign equity limit under the 1987 Constitution.[125] If an OFDP is not a mass media entity, is it nevertheless an advertising agency that is still subject to the constitutional foreign ownership restrictions? The 1987 Constitution merely says in Article XVI, Section 11 that: (1) "the advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and

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[123] V RECORD CONST. COMM'N 95 (Sept. 29, 1986), 197.

[124] Rep. Act No. 7394 (1992), art. 4(a).

[125] SEC Op. No. 14-06, *supra* note 104.

the promotion of the general welfare"[126]; and (2) "only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry."[127] Like in the case of mass media entities, the 1987 Constitution is silent on what constitutes advertising. For guidance, SEC opinions have instead referred to the definition of advertisements and advertising in the Consumer Act to conclude that corporations engaged in activities similar to those of OFDPs are advertising agencies. The opinions seem sound. While the definitions are, like in the Tobacco Regulation of 2003, only for the purposes of the Consumer Act,[128] they are similar to the conceptualization of advertising by the framers of the 1987 Constitution, as evidenced by the Records of the Commission.

In discussing Section 11, paragraph 2, the members of the Commission referred to jingles and commercials as advertising.[129] In particular, Commissioner Minda Luz Quesada discussed how the media projected pills as necessities, and Yakult as an energizing drink.[130] This dovetails with the definitions of advertising under the Consumer Act, where "advertisement" means "the prepared and through any form of mass medium, subsequently applied, disseminated or circulated advertising matter"[131], while "advertising" means "the business of conceptualizing, presenting or making available to the public, through any form of mass media, fact, data or information about the attributes, features, quality or availability of consumer products, services or credit."[132] Considering the intent of the framers and our current legislation, courts may find it appropriate to characterize OFDPs as advertising agencies.

F. Are They Retail Trade Entities?

Like mass media entities and advertising agencies, entities who engage or invest in the retail trade business are subject to foreign equity participation restrictions under the Retail Trade Liberalization Act of 2000 ("RTLA").[133] In a 2014 SEC opinion, it was stated that an entity engaging in the sale of digital

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[126] CONST. art. XVI, § 11.
[127] CONST. art. XVI, § 11.
[128] Rep. Act No. 7394 (1992), art. 4(a).
[129] V RECORD CONST. COMM'N. 93 (Sept. 26, 1986), 108.
[130] *Id.*
[131] Rep. Act No. 7394 (1992), art. 4(a).
[132] Rep. Act No. 7394 (1992), art. 4(b).
[133] Rep. Act No. 8762 (2000), § 4.

publications in retail as opposed to wholesale is covered by the RTLA.[134] Again, while the SEC's opinions are not binding on courts of law,[135] these opinions have a persuasive effect. It is then consequently important to determine whether or not the opinion has a bearing on OFDPs.

"Retail trade" is defined by the RTLA as "any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption."[136] It does not include services. We are again faced with the quandary of OFDPs that call themselves technology companies, only providing a matching service and not selling or reselling food. Would the scheme of OFDPs, which only connect a rider with a customer, fall under the definition? Unfortunately, the legislative record cannot enlighten us, as there was no interpellation or objection to the RTLA bill. Nevertheless, based on the definition alone, some OFDPs could be said to be engaged in retail trade.

To recall, some OFDPs have partnerships with restaurants, while others have no agreement with the restaurant whatsoever. In the latter situation, the rider uses his or her own money to pay for the restaurant's food and only reimbursed by the customer upon delivery. In that case, there is a wholly separate and distinct sale between the sale from the restaurant to the rider, and the sale from the rider to the customer. If riders are deemed employees of OFDPs, there is no question that the selling would be habitual. It therefore makes sense to conclude that these particular OFDPs are covered by the RTLA. In the former case, however, the conclusion is different. When restaurants partner with OFDPs, the arrangement changes so that the order goes directly to the restaurant and not the rider. Restaurants may refuse to accept orders or even cancel them, independently of the OFDP's consent—in effect, the OFDP only acts an agent of the restaurant, and has no personal liability. This reasoning gives credence to the OFDPs' claim that they do not actually sell food, but merely link the restaurant and customer for purposes of delivery.

IV. HOW SHOULD THEY BE REGULATED?

Innovation—including OFDPs and all forms of the sharing economy is a boon to society.[137] It "improves, from a technological, social, or economic

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[134] SEC Op. No. 14-06, *supra* note 104.

[135] *See* SEC. REG. CODE, § 5.2, which transferred the jurisdiction of the SEC to the regular courts.

[136] Rep. Act No. 8762 (2000), § 3(1).

[137] Ranchordás, *supra* note 21.

perspective, the status quo."[138] Due to the benefits of innovation, it is widely agreed that sharing economy regulation should be crafted in a way that will not stifle innovation and allow it to deliver its key efficiencies, while still envisioning customer protection.[139] A prohibitive regulatory framework for OFDPs will only result in the possible closure of the platforms. The recent suspension of Honestbee food delivery operations in Asia, suspected to be caused by a combination of tight profit margins and insufficiency of capital, is an illustrative cautionary tale.

In the previous section, we explored the legal characterization of OFDPs in the Philippine jurisdiction. The next question to ask is whether or not the current regulatory framework properly balances the interests of the customers and of the innovators, and if not, what factors should be changed in order to craft such a balance. This section will first discuss the obligations of OFDPs under Philippine law and the corresponding rules and regulations. Next, it will see if there are problems that are not sufficiently addressed by those legal obligations. It will also assess which legal obligations are not followed. Lastly, it will suggest how to regulate these problems—specifically, which legal obligations should not apply to OFDPs, and which should be imposed upon them additionally.

A. Employer-Employee Relationship

We begin with the backbone of an OFDP—its riders. Like any sharing economy enterprise, the OFDP business model relies on keeping its assets light.[140] OFDPs manage to do this by classifying their riders as independent contractors. The foremost impact of this tactic is on profitability. When OFDPs are not deemed employers of their riders, they have no duty to provide the riders with the benefits that accord to employees, such as leaves, rest days, overtime and holiday pay, and separation pay in case of termination.

The treatment of riders as independent contractors also benefits the OFDP in terms of scalability. In other words, the freelancer scheme helps the OFDP grow its business quickly and reach more areas. This is due to the lenient recruitment procedures for independent contractors. Because riders are not treated as employees, it is easier to get them onboard: for example, in the Philippine jurisdiction, the OFDP does not have to maneuver through the red

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[138] *Id.*

[139] *See* e.g. *Id.*; Rassman, *supra* note 29; Caleb Holloway, *Uber Unsettled: How Existing Taxicab Regulations Fail to Address Transportation Network Companies and why Local Regulators should Embrace Uber, Lyft, and Comparable Innovators*, 16 WAKE FOREST J. OF BUS. & INTELL. PROP. L. 20 (2015).

[140] Daniel Thong, *A cautionary tale from the depths of the sharing economy*, THE STRAITS TIMES WEBSITE, Jan. 10, 2018, *at* https://www.straitstimes.com/opinion/a-cautionary-tale-from-the-depths-of-the-sharing-economy.

tape of setting up the mandatory SSS, PhilHealth, and Pag-Ibig contributions. On the other hand, it is also easier to terminate them, because there is no obligation to afford them the due process rights of an employee.

The problem with classifying riders as independent contractors is that it is apparently backfiring on the OFDPs. In part, this is because of the constant lawsuits instituted against the OFDPs by their aggrieved freelancers.[141] Some courts abroad have even totally rejected the characterization of riders as self-employed.[142] In the previous chapter, it was argued that local courts might likewise find favor in an employee-employer relationship. However, this classification engenders disastrous consequences for OFDPs, who would be subject to a wave of added business costs, such as separation pay for any and every blacklisted rider. It is possible that OFDPs might leave the country or shut down.

On the other hand, by being classified as mere independent contractors, riders are also left at the mercy of the OFDPs. When emergencies arise, there is no safety net for these riders—no maternity leave, no sick leave, and no health insurance, among others. How can OFDPs be regulated so that they can keep a viable labor model and protect the welfare of riders at the same time?

One option is to create a middle ground between employees and independent contractors. Arguably, the flaw of the current legal system lies in the binary classification imposed by the law: either you are an employee or you are an independent contractor.[143] There is no in-between. In contrast, the complexities of the relationship between an OFDP and its rider are difficult to address with a black-and-white classification. To recall, employing the four-factor test leads to varying conclusions on whether an employer-employee relationship exists, depending on which aspect of the relationship you look at. Perhaps, it would be better to create an entirely separate category for OFDP riders.

While the idea of a third classification is touted by some as a solution to the sharing economy conundrum,[144] the idea of an intermediate classification—or a "dependent contractor"—is actually not new. The category already exists in several countries.[145] However, critics have noted that the experience of countries

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[141] *Id.*

[142] AFP, *Spain court rules against Deliveroo in landmark case*, THE STRAITS TIMES WEBSITE, June 5, 2018, *at* https://www.straitstimes.com/world/europe/spain-court-rules-against-deliveroo-in-landmark-case.

[143] Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017).

[144] *Id.*

[145] Miriam Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2016).

who have implemented it has resulted in workers actually losing their rights.[146] As a caveat, the classification for these countries had been in place for quite some time before the rise of the sharing economy, and was not crafted with the complexities of the gig economy in mind.[147] For example, lawmakers might not have taken into account the fact that gig workers could work for multiple platforms rather than just one.[148] The best way to go about a third classification might then be to make it particularly applicable to gig workers—for example, a proponent has suggested that the definition of a dependent contractor is one who "possesses at least some material and/or infrastructure necessary for the activity, independent of the employer's material and/or infrastructure,"[149] and who "works subject to at least some of their own criteria, subject to organizational, technical and procedural criteria that the employer provides, such as business production styles, scheduling and other employer or end-client requirements."[150] Riders and other sharing economy workers would clearly fall within the definition, creating security and certainty for both them and the OFDP. The corresponding rights and obligations of the employer and dependent contractor would also be a happy medium—perhaps affording the rider mandatory government contributions, and giving them some due process rights for blacklisting, e.g. the ability to question a low rating on a delivery.[151]

The problem with a third classification is that it requires a very thorough study of the business for policy makers. In the time it would take to complete the study, innovation might have already made its next leap, paving the way for OFDP obsolescence. Additionally, policy makers would have trouble in deciding which obligations and rights to add or remove for the class of dependent contractor,[152] especially if they consider that this relationship can exist between an individual and multiple platforms. Finally, even if a third classification may be a workable solution for policy makers, naysayers argue that the problem is with courts, who are prone to misclassify when legal definitions are complex.[153] This only leads to uncertainty for sharing economy businesses,[154] prompting further litigation—a part of what regulation should prevent.

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[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] Megan Carboni, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 1 (2015).

[150] *Id.*

[151] Cherry and Aloisi, *supra* note 145.

[152] *Id.*

[153] *Id.*

[154] *Id.*

If certainty is prioritized over stability, another option may be to simply forego a third classification and make an employer-employee relationship the default assumption, given a minimum number of hours worked.[155] This would pose a solution for the riders who treat their delivery work as a full-time job, but still accommodate those who treat it as a way of making extra cash. Unfortunately, it cannot address those who work for several platforms all at once.

B. Food Safety Issues

OFDPs allow food to be delivered on demand, but how certain is the customer that the food is delivered in a manner that ensures its safety for consumption? Considering that OFDPs can properly be classified as food businesses under the Food Safety Act, let us first look at their obligations under that law and its implementing rules and regulations.

The Food Safety Act provides that the principal responsibility of a food business operator is to ensure that food satisfies the requirements of food law and that control systems are in place to prevent, eliminate, or reduce risks to customers.[156] The law also enumerates a food business operator's specific responsibilities under the act, which are: 1) to be knowledgeable of the specific requirements of food law relevant to their activities in the food supply chain, and to adopt, apply, and be well informed of codes and principles for good practices;[157] 2) to withdraw unsafe food from the market;[158] 3) to effectively and accurately inform the customer of the reason for the withdrawal of a food product where the unsafe food product may have reached the customer;[159] and 4) to allow inspection of their businesses and collaborate with the regulatory authorities on action taken to avoid risks posed by the food.[160] The Implementing Rules and Regulations of the Food Safety Act further requires all food businesses to hire a Food Safety Compliance Officer (FSCO) who has passed a prescribed training course for FSCO recognized by the Department of Agriculture (DA) and/or the Department of Health (DOH).[161] Lastly, a food business operator must acquire the appropriate authorization, or risk being criminally liable.[162]

The inquiry now is to the extent to which their obligations as a food business operator are observed in the current set-up. One obligation is to know,

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[155] *Id.*

[156] Rep. Act No. 10611 (2013), § 13.

[157] Rep. Act No. 10611 (2013), § 14(a).

[158] Rep. Act No. 10611 (2013), § 14(b).

[159] Rep. Act No. 10611 (2013), § 14(d).

[160] Rep. Act No. 10611 (2013), § 14(c).

[161] Joint DA-DOH Adm. Order No. 2015-0007 (2015), art. V, § 14(a), rule 14a.1.

[162] Rep. Act No. 10611 (2013), § 37(f).

adopt, and apply good practices. Unfortunately, these practices are not specified in the Food Safety Act or its implementing rules and regulations. Government agencies other than those specified under the Food Safety Act have likewise not issued any guidelines or standards. Given the uncertainty, it is not clear what constitutes compliance or non-compliance with this obligation. OFDPs may argue that their training is sufficient compliance, but to sanction this would not seem to achieve the purposes of the Food Safety Act. Allowing the current practice of OFDPs also ignores the scenario where riders deliver certain food items which are normally not allowed to be delivered by restaurants for safety reasons.

Perhaps the best way to ensure that OFDPs comply is for these good practices to be outlined by regulations. For example, there could be an imposition of a maximum delivery time, after which food must be disposed of and cannot be given to the customer. OFDPs do not have a guaranteed delivery time for their orders, unlike for fast food. The apps only give estimated delivery times and do not promise that orders will be delivered within those times. Consequently, food is sometimes delivered very late.[163] It is interesting to juxtapose this with the regulation in the United States, where food is considered unsafe after an hour in the danger zone (above 90 degrees Fahrenheit).[164] This danger zone is the typical temperature of a Philippine afternoon. A guaranteed delivery time of an hour would avoid the distribution of spoiled food. Proscribing the delivery of food after a certain time would also constitute compliance with the second obligation of a food business operator, i.e. is to withdraw unsafe food from the market.

The other obligations seem sufficient to protect customers. The employment of an FSCO would ensure that the training of riders is sufficient to arm them with knowledge of best practices for food delivery. But this is true only if OFDPs can be made to comply. One way to ensure compliance is to clearly include the business of OFDPs within the definition of a food business operator. For example, policy makers could consider a provision that says organizations distribute food when they provide delivery services for food from third-party establishments for compensation, using Internet-based technology application or digital platform technology to connect customers, third-party food establishments, and riders using their personal vehicles.

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[163] Earth Rullan, *My FoodPanda Philippines Experience and Review*, EARTHLINGORGEOUS, Oct. 6, 2014, *at* https://www.earthlingorgeous.com/2014/10/my-foodpanda-philippines-experience-and-review.html.

[164] *Danger Zone*, UNITED STATES DEPARTMENT OF AGRICULTURE - FOOD SAFETY AND INSPECTION SERVICE, June 28, 2017, *at* https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/danger-zone-40-f-140-f/CT_Index.

Another way to ensure compliance is to prohibit OFDPs from making deliveries without the knowledge or consent of the restaurant. Because restaurants already follow food safety rules and regulations, this would assure customers of safe food.

C. Nationality Requirements

In the prior chapter, OFDPs were classified as advertising agencies, retail trade entities, and common carriers. All of these kinds of entities are subject to nationality requirements for ownership and management. For advertising agencies, the Constitutional requirement is seventy percent Filipino ownership.[165] For retail trade entities, the RTLA obliges every enterprise that does not sell high-end or luxury products to possess a paid-up capital of at least two million five hundred thousand US dollars before the enterprise can be subject to foreign ownership.[166]

As for common carriers, the requirement is sixty percent Filipino ownership, although this is established in a roundabout way. The requirement is not imposed on common carriers directly, but on the grant of a certificate of public convenience, for which the Constitution necessitates that 60% of the applicant corporation's capital be owned by Filipinos.[167] This is because OFDPs, as common carriers, also fall within the ambit of being a public service. The term "public service" includes every person that may "own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, either for freight or passenger, or both with or without fixed route and whether may be its classification."[168] Under the Public Service Act, no public service shall operate in the Philippines without possessing a certificate of public convenience or certificate of public convenience and necessity, as the case may be.[169]

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[165] CONST. art. XVI, § 11, ¶ 2.

[166] *See* Rep. Act No. 8762 (2000), § 5. There are three categories under the RTLA for enterprises who do not sell high-end or luxury products, depending on the paid-up capital of the enterprise. For an enterprise which possesses a paid-up capital of less than two million five hundred thousand US dollars (US$2,500,000.00), the requirement is that it be wholly owned by Filipinos. For an enterprise with a paid-up capital of seven million five hundred thousand US dollars (US$7,500,000.00), ownership may be wholly foreign. For those with paid-up capital in an amount in between the two previous categories, the enterprise may still be wholly owned by foreigners, except for the first two years after the effectivity of the RTLA in 2002, wherein foreign participation shall be limited to not more than sixty percent (60%) of total equity.

[167] CONST. art. XII, § 11.

[168] Com. Act No. 146 (1936), § 13(b).

[169] Com. Act No. 146 (1936), § 13(a).

One problem that may arise is the possibility that OFDPs will not comply with these nationality requirements. For certificates of public convenience in particular, there are no regulations in place that specifically cater to the business of OFDPs, in contrast for ride-sharing. This allows OFDPs to take advantage of gaps in the regulatory framework.

Should OFDPs be subject to these exacting prohibitions on foreign ownership? With the exception of the RTLA, these ownership requirements exist because of the mandate of the Constitution. The intent of the framers might shed light on why these ownership requirements have been imposed, and if the justification is still applicable to current developments.

For advertising agencies, Commissioner Edmundo Garcia made the point in favor of ownership restrictions that in 1983, 76% of products advertised were all foreign brands.[170] Additionally, these commercials stressed an urban and Western lifestyle, which created a consumption-oriented mentality, a strong urban bias, elitism and very often a favorable image of foreign products.[171] Commissioner Quesada agreed, expressing wariness at the control which was exercised by foreigners through advertising and media.[172] If this is the reasoning behind the adoption of the policy, then it would not really apply to OFDPs. For one, OFDPs, generally, do not discriminate among the restaurants that they feature on their apps; in fact, their advertising would be even more beneficial for small local businesses which do not have the technical capability or manpower to implement a delivery system. Additionally, if OFDPs advertise, it is simply by featuring a menu, or showing a promo for food at lower prices. There are no subliminal messages which tend to steer the mind of a customer towards Western lifestyles, or lead a customer to favor foreign restaurants over locally owned establishments.

In the case of public utilities, the intent was to limit foreign control over the vital industries of the state. This was especially clear when some of the framers pushed for one hundred percent Filipino ownership for telecommunications, because they concern national security.[173] Again, this logic does not strictly apply to the business of OFDPs; precisely, the sharing economy is built for small-scale, private transactions, consummated upon the demand of individuals. Delivery to hungry individuals is hardly a crucial industry; it is merely a convenience and not

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[170] V RECORD CONST. COMM'N 95 (Sept. 29, 1986), 211.

[171] *Id.*

[172] *Id.*

[173] *See* V RECORD CONST. COMM'N V 94 (Sept. 27, 1986), 185–186.

essential to the workings of a state. Consequently, there should be an exception to the public utility rule for OFDPs.

Finally, there seems to be no problem in keeping the RTLA as it is. Multinational OFDPs have immense capital—when Uber still operated in the country, it had USD 700,000,000 in capital in the Southeast Asian region.[174] On the other hand, Grab pulled in a whopping USD 4,000,000,000 as capital for the same region.[175] It is highly probable that foreign players could easily comply with the requirements of the RTLA, which currently requires only a minimum of USD 2,500,000.00 for foreign ownership.[176]

V. IS NEW LEGISLATION REQUIRED?

Preferably, regulation of innovation should allow it to flourish, but this depends on whether or not the current laws allow it to do so.[177] If the laws in place are inadequate, then changes should be made to them. However, lawmaking is a slow process. This is why the problems of innovation are best addressed by administrative authorities, to whom legislative power may be delegated. After all, administrative regulations or "subordinate legislation" calculated to promote the public interest are necessary because of "the growing complexity of modern life, the multiplication of the subjects of governmental regulations, and the increased difficulty of administering the law."[178]

The authority of administrative agencies to make rules and regulations is confined to the specific purpose provided in the law.[179] Rules and regulations issued by administrative officials to implement a law cannot go beyond the terms and provisions of the latter.[180] For such rules and regulations to pass the test of validity, all that is required is that the regulation should be germane to the objects and purposes of the law; that the regulation be not in contradiction with it, but conform to standards that the law prescribes.[181] Thus, once the necessary changes in or additions to the regulatory framework have been determined, the next question to ask is whether or not regulatory bodies may validly issue these

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[174] Ben Kritz, *Grab is a disaster in progress*, THE MANILA TIMES ONLINE, June 7, 2018, *at* https://www.manilatimes.net/grab-is-a-disaster-in-progress/405407/.

[175] *Id.*

[176] Rep. Act No. 8762 (2000), § 5.

[177] Ranchordás, *supra* note 21.

[178] People v. Maceren, G.R. No. 32166, 79 SCRA 450, 452 (1977).

[179] Olsen & Co., Inc v. Aldanese, 43 Phil 345, 346 (1922).

[180] Phil. Bank of Commc'ns v. Comm'r of Internal Revenue, G.R. No. 112024, 302 SCRA 241, 244 (1999).

[181] Rabor v. Civil Service Comm'n, G.R. No. 111812, 244 SCRA 614, 616 (1995).

regulations given the present state of the law, or whether they should instead wait for Congress. The query of whether or not new legislation is needed to issue regulations for OFDPs requires a juxtaposition of the prospective regulation with the objects, purposes, and standards of current laws.

A. The Relationship Between Rider and OFDP

To recapitulate, this Note presented two options for dealing with the protection of riders: the first is to make a third classification called a "dependent contractor" with rights between those of employees and independent contractors, and the second is to clearly include riders within the definition of employees, if they satisfy a minimum number of hours worked. The possibility of an administrative implementation of these options will be discussed in that order.

1. Dependent Contractorship

The Labor Code has absolutely no provision that allows an administrative agency to define and regulate a third classification of employee. Only employees and independent contractors are recognized by the statute.[182] Hence, if this option is chosen by policymakers, there is no way to do it other than to pass a new law and introduce amendments to the Labor Code.

However, something akin to a third classification may be achieved by the Secretary of Labor and Employment ("SOLE") through Article 101 of the Labor Code, which gives the SOLE the "authority to regulate the payment of wages by results in order to ensure the payment of fair and reasonable wage rates." This regulation is done preferably through time and motion studies or in consultation with representatives of workers' and employers' organizations.[183] Article 101 should be read in conjunction with Article 82, which states that the coverage of Title I of Book Three, which provides the minimum working conditions and rest periods, "does not include workers who are paid by results as determined by the SOLE in appropriate regulations."[184] Title I of Book Three requires payment of the night shift differential,[185] overtime pay,[186] rest day or holiday pay,[187] and service incentive leave,[188] among others.

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[182] LAB. CODE, art. 106.
[183] LAB. CODE, art. 101.
[184] LAB. CODE, art. 82.
[185] LAB. CODE, art. 86.
[186] LAB. CODE, art. 87.
[187] LAB. CODE, art. 93–94.
[188] LAB. CODE, art. 95.

The existing legal framework thus allows the SOLE to define and classify OFDP riders as workers paid by results, and consequently, to impose lighter regulatory requirements on OFDPs with respect to working conditions, rest periods, and wages. However, the SOLE has no jurisdiction to lighten the burden of employers to pay mandatory government contributions, as these obligations are not encompassed in Title 1 of Book Three.

2. Employment Relationship with a Minimum Number of Hours Worked

If speedy regulation is prioritized, the second option might be better than the first. The Labor Code gives the SOLE plenty of authority to make a clear stance that riders are employees given a minimum number of hours worked. Independent contractors are recognized under Article 106 of the Labor Code, which states that the SOLE may, "by appropriate regulations, restrict or prohibit the contracting-out of labor to protect the rights of workers established under the Labor Code. Furthermore, in so prohibiting or restricting, the SOLE may make appropriate distinctions between labor-only contracting and job contracting as well as differentiations within these types of contracting and determine who among the parties involved shall be considered the employer, to prevent any violation or circumvention of any provision of the Labor Code."[189] This power is very broad for the SOLE, as long as it is exercised to protect workers—hence, there should be no problem for him to implement this option via the issuance of regulations.

B. Food Safety Issues

In Part IV, this Note proposed the issuance of clear rules on food delivery safety in the form of a minimum delivery time and packaging requirements. The question now is who can prescribe these guidelines.

According to the Food Safety Act, the local government units ("LGUs") shall be "responsible for food safety in food businesses such as, but not limited to, activities in slaughterhouses, dressing plants, fish ports, wet markets, supermarkets, school canteens, restaurants, catering establishments and water refilling stations."[190] The LGU shall also be responsible for street food sale, including ambulant vending.[191] Specifically, LGUs are obligated to participate in standards development,[192] and to enforce the provisions of the Code on Sanitation of the Philippines, food safety standards and food safety regulations

[189] LAB. CODE, art. 106.
[190] Rep. Act No. 10611 (2013), § 15(c).
[191] Rep. Act No. 10611 (2013), § 15(c).
[192] Rep. Act No. 10611 (2013), § 19(c).

where food is produced, processed, prepared and/or sold in their territorial jurisdiction.[193] These obligations are quite broad, and are not exclusive enumerations. They could be construed to include the responsibility to make standards for the business of OFDPs, which is akin to ambulant vending.

With regard to food safety guidelines for OFDPs, the responsibility of LGUs overlaps with that of the Food and Drug Administration ("FDA") Center for Food Regulation and Research. The FDA Center for Food Regulation and Research is obliged to implement a performance-based food safety control management system, including the development of food standards and regulations.[194]

Since OFDPs may be considered common carriers, they are also subject to the jurisdiction of the Department of Transportation ("DOTr"), which is mandated to administer and enforce all laws, rules and regulations in the field of transportation and communications,[195] and to establish and prescribe the corresponding rules and regulations for enforcement of laws governing land transportation.[196] As such, the DOTr has the broad power to issue any regulation enforcing the obligation to observe extraordinary diligence in the vigilance over the goods,[197] which is imposed upon common carriers by the Civil Code.

Considering the foregoing, there is clearly a sufficient delegation of authority to the FDA, LGUs, and DOTr to issue the proposed regulations. However, guidelines that set standards should be issued by the FDA. The DOTr's primary mandate is transportation, and not food.[198] As for LGUs, regulation at their level is not viable. Unlike with the other food businesses for which LGUs are responsible, the activities of an OFDP contemplate a constant transfer from place to place, and even beyond cities. Considering that OFDPs are present mostly in urban areas with smaller LGUs, it would be difficult to enforce regulations that differ from LGU to LGU. In addition, the medley of differing regulations would dissuade OFDPs from operating at all—the uncertainty would lead to more litigation, and their riders would be overwhelmed by the complex regulation of what is otherwise a simple transaction. As such, LGU regulation might be overprotection at the expense of technological convenience. In any case, as between the LGUs and the FDA, the decision of which agency has jurisdiction lies with the Food Safety Regulation Coordinating Board, which has the power to

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[193] Rep. Act No. 10611 (2013), § 19(a).
[194] Rep. Act No. 10611 (2013), § 18(b)(1).
[195] REV. ADM. CODE, bk. IV, tit. 15, § 3(4).
[196] Book IV, tit. 15, § 3(14).
[197] CIVIL CODE, art. 1733.
[198] REV. ADM. CODE, bk. IV, tit. 15, § 2.

identify the agency responsible for enforcement based on their legal mandates when jurisdiction over specific areas overlap.[199]

C. Nationality Requirements

To recapitulate, this Note argues that nationality requirements should not continue to be imposed on OFDPs. The difficulty is that the requirements applicable to an OFDP are provided by the Constitution in the case of advertising agencies[200] and public utilities,[201] with the exception of retail trade enterprises.[202] To amend the Constitution would take much time and effort; the business model would in all likelihood be outdated when any amendment comes to pass. However, the Constitution does not provide a definition of either advertising agencies or public utilities; these definitions have instead been crafted by Congress in the Customer Act[203] and the Public Service Act,[204] respectively. There is therefore some leeway in favor of the legislature to remove OFDPs from the ambit of the constitutional prohibitions. Unfortunately, however, there is no quick fix in the form of administrative issuances, because government agencies cannot amend the law.

VI. CONCLUSION

This Note has established that there are five ways in which OFDPs can be classified under Philippine law: employers of their riders, food business operators, common carriers, advertising agencies, and retail trade entities. Many of these characterizations are contingent on the existence of an employee-employer relationship between the OFDP and the rider. Therefore, if policymakers adopt the third classification of dependent contractorship in the Philippine jurisdiction, they must also scrutinize and determine what effect it will have on the legal characterizations of OFDPs.

Additionally, all of the classes that OFDPs fall into are regulated by different government agencies. This is especially significant for food safety issues. Thus, even if the present delegation of legislative power to administrative agencies may be sufficient to create and implement a decent regulatory framework, it may possibly lead to a piecemeal result, with various agencies issuing their own

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[199] Rep. Act No. 10611 (2013), § 20(b).
[200] *See* CONST. art. XVI, § 11(2).
[201] *See* art. XVI, § 11.
[202] *See* Rep. Act No. 8762 (2000), § 5.
[203] *See* Rep. Act No. 7394 (1992), art. 4(a)–(d).
[204] *See* Com. Act No. 146 (1936), § 13(a).

conflicting regulations applicable to OFDPs. This would be a nightmare for OFDPs, who might be dissuaded from continuing their businesses by the chilling effect of an uncertain regulatory framework. The best way to address the problems brought about by OFDPs is, therefore, the creation of a single governing law. The law could place the responsibility for its enforcement on the same bodies as the Food Safety Act, mandating other agencies to cooperate as may be necessary. Congress could even just amend the Food Security Act to make a section primarily for OFDPs, because many of the areas that the State should regulate already fall under the scope of the act.

Consequently, if the Philippines is to accept this technological convenience with open arms, the primary burden to move is not on regulatory bodies, but on Congress. The legislature must act immediately if OFDPs are to remain in the country. Nevertheless, administrative issuances would be useful in the interim period when Congress has yet to pass the necessary laws.

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