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REGULATING CHINA'S FOOD E-COMMERCE:  
HARMONIZATION OF LAWS

Pinghui Xiao

# Regulating China's Food E-commerce: Harmonization of Laws

Pinghui Xiao\*

## I. Introduction

Internet commercialization began in China in 1995.<sup>1</sup> Since then, China has seen a digitalization movement, which has become a joint undertaking between industry and government in the age of ubiquitous Internet in China.<sup>2</sup> China's Premier Li Keqiang announced 'Internet Plus' as the national strategy in his Government Work Report presented during the Two Sessions of the year of 2015.<sup>3</sup>

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<sup>1</sup> Chen Jinxiong (陈金雄), 互联网+医疗健康: 迈向5P医学时代 [INTERNET+HEALTHCARE: TOWARD 5P MEDICAL AGE] 147 (2015).

<sup>2</sup> Xiaoyi Wang (王晓易), 易观国际董事长CEO于扬: "互联网+" (Yu Yang, CEO of Analysys International: Internet +'), NETEASE TECHNOLOGY (November 14, 2012 10:12 AM), <http://tech.163.com/12/1114/10/8G8VCEVN00094N6H.html>.

<sup>3</sup> *Internet Plus set to push China's economy to higher level: Premier*, XINHUANET (Mar. 15, 2015), [http://www.xinhuanet.com/english/2015-03/15/c\\_134067831.htm](http://www.xinhuanet.com/english/2015-03/15/c_134067831.htm). The 'Two Sessions' ('两会' in Chinese), refers to annual plenary sessions of the two organizations that make national-level political decisions: National People's Congress of the People's Republic of China and Chinese People's Political Consultative Conference. *China's 'two sessions': Economics, environment and Xi's power*, BBC (Mar. 5, 2018), <https://www.bbc.com/news/world-asia-43239646>. Yu Yang, CEO of Analysys International is considered the first person putting forward an idea of 'Internet Plus' in 2012. Zhequian Su, Et Al., *On the Background of "One Belt and One Road+Internet" The Dilemma and Strategy of TCM "Cultural Output"*, ATLANTIS PRESS (2015), <https://download.atlantis-press.com/article/25840516.pdf>. The idea was then further explored by Pony Ma, founder of China's Internet giant, Tencent Group in 2013, with a view to extending their businesses into conventional sectors. Yifang Rui (芮益芳), 马化腾"WE大会"分享通向互联网未来的七个路

Following Premier Li's vision for the 'Internet Plus' Strategy, China is now determined "to integrate mobile Internet, cloud computing, big data, and the Internet of Things with modern manufacturing, to encourage the healthy development of e-commerce, industrial networks, and Internet banking, and to help get Internet-based companies to increase their presence in the international market."<sup>4</sup> Under the auspices of 'Internet Plus,' e-commerce became one of the most important priority areas to promote China's continuing prosperity.<sup>5</sup>

China's digitalization movement has substantially impacted the food sector, creating the so-called digital food economy and allowing food e-commerce, or online food trading, to become a rising star in China's ever-increasing digital economy.<sup>6</sup> While the internet has connected and shaped China's industries and businesses, it has also created problems. When new types of businesses proliferate and start to penetrate into conventional sectors, regulations, created based on the traditional sectors, become outdated. Unfortunately, this has been the case with food e-commerce as well.<sup>7</sup> As with any new sector, government policies and laws are not without drawbacks, and indeed gaps have arisen. In response, China has already amended its

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(Pony Ma Shared His View of Seven Directions to Future Internet during WE Summit), HUANQIU (Nov. 10, 2013 10:37 PM), <http://tech.huanqiu.com/internet/2013-11/4549329.html>.

<sup>4</sup> Gordon G. Chang, *China's 'Internet Plus' Strategy, A Net Minus*, FORBES (Apr. 19, 2015 1:28 PM), <https://www.forbes.com/sites/gordonchang/2015/04/19/chinas-internet-plus-strategy-a-net-minus/#42c78def4e05>. For the whole text of the Premier Li's Government Work Report, please refer to China Daily website at [http://www.chinadaily.com.cn/china/2015-03/16/content\\_19826391.htm](http://www.chinadaily.com.cn/china/2015-03/16/content_19826391.htm).

<sup>5</sup> Peter Cai, *Internet+: China's grand plan to harness the internet*, THE AUSTRALIAN (June 25, 2015 12:59 AM), <http://www.theaustralian.com.au/business/business-spectator/internet-chinas-grand-plan-to-harness-the-internet/news-story/506204d3cddb763a31868e65f95a1fb1>.

<sup>6</sup> Online food trading and food e-commerce are two terms used roughly interchangeably in China. Pinghui Xiao, *Legislative Development of Food E-commerce Regulation in China and its Challenges.*, 13 EUROPEAN FOOD & FEED L. REV. 313, 313 n.1 (2018) [hereinafter Xiao, *Legislative Development*], <https://effl.lexxion.eu/article/EFFL/2018/4/5>. For the purpose of this paper, online trading and e-commerce will be used interchangeably unless expressed otherwise. That being said, from a legislative perspective, these terms may have different legal implications. Part III of the paper will illustrate the relationship between these terms; see e.g., Ting Guo (郭婷), *数字食品经济来临, 无人零售且行且珍惜 [Digital food economy emerges witnessing unmanned supermarket]*, 中国医药报 Aug. 30, 2018, 7th ed., at 1, <http://epaper.cnpharm.com/zgyyb/images/2018-08/30/07/zgyyb2018083007.pdf>.

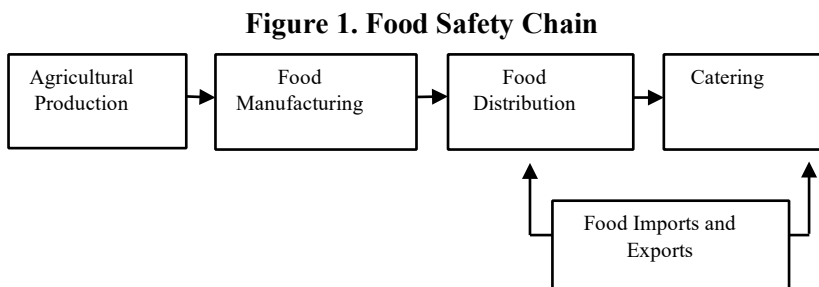
<sup>7</sup> Xiao, *Legislative Development*, *supra* note 6, at 319.

*Food Safety Law* in 2015 (hereinafter referred to as '2015 FSL Amendment'), introducing specific rules related to online food trading.<sup>8</sup> Equally important, in August 2018, China's top legislature, the Standing Committee of the NPC, promulgated its first *E-commerce Law*, which has greatly impacted food e-commerce.<sup>9</sup>

This paper documents the development of China's digital food economy in the course of China's digitalization movement and takes a closer look at China's legislative approach to regulation of food e-commerce by paying particular attention to all the major pieces of legislation relating to food e-commerce, particularly the *2015 FSL Amendment* and the *E-commerce Law*. This paper will then examine challenges China faces in harmonizing its food e-commerce laws.<sup>10</sup>

## II. China's Digital Food Economy and Rising Food E-commerce

Food supply chain includes, but is not limited to, stages of production and manufacturing, storage, transport, retailing and the like.<sup>11</sup> In other words, the whole food supply chain consists of agricultural production, food manufacturing, food distribution, catering and food import and export, which can be illustrated in the following figure (Figure 1).<sup>12</sup>



<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> The author understands that his published paper titled 'Legislative Development of Food E-commerce Regulation in China and its Challenges,' has already illustrated the legislative development of food e-commerce regulation. This paper, however, is created to be an updated complement to the published one by providing more details.

<sup>11</sup> *China Focus: China Adopts E-commerce Law to Improve Market Regulation*, XINHUANET (Aug. 31, 2018 11:07 PM), [http://www.xinhuanet.com/english/2018-08/31/c\\_137434452.htm](http://www.xinhuanet.com/english/2018-08/31/c_137434452.htm).

<sup>12</sup> PINGHUI XIAO, *China's Rising Online Food Trading: Its Implications For the Rest of the World*, in RESOURCE SECURITY AND GOVERNANCE: GLOBALISATION AND CHINA'S NATURAL RESOURCES COMPANIES 127, 127 (Xinting Jia & Roman Tomasic eds., 2017).

The Internet can be widely used in the above interlinked sectors within the food supply chain to create a digital food economy.<sup>13</sup> The actual functionality of the Internet throughout the digital food economy varies. The Internet alone cannot produce food, but it can be used to increase production efficiency for certain food production lines, like sugar plants.<sup>14</sup> Hence, the application of the Internet in production and manufacturing exemplifies the Industrial Internet, which sees ‘the deeper meshing of the digital world with the world of machines holds the potential to bring about profound transformation to global industry.’<sup>15</sup> The Industrial Internet can be an efficient and productive tool to facilitate production and manufacturing.<sup>16</sup> Furthermore, within sectors in which consumers play a larger role, such as distribution, catering services, and import and export, the Internet has even more to offer. The Internet became a transaction and trading platform for foods. Here, in this circumstance, due to the fact that the Internet is used for the purpose of consumers and trading, the use of the Internet creates a Consumption Internet or e-commerce scenario. All the factors combined made China enter the age of the digital food economy, which is comprised of the Industrial Internet and the Consumption Internet, or e-commerce.

To date, there are quite a few government initiatives to promote both the Industrial Internet and e-commerce in China. According to the *Action Plan for Industrial Internet Development (2018-2020)* enacted by the Ministry of Industry and Information Technology, China will have to tackle the problems arising from the development of the Industrial Internet.<sup>17</sup> To do this, it will be necessary to carry out research on such legal issues as network security, data protection, as well as information protection and government data disclosure, and enact laws and rules relating to the

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<sup>13</sup> See Juergen Voegelé, *Farm and Food Policy Innovations for the Digital Age*, BROOKINGS INST. (Nov. 23, 2018, 10:43 PM), <https://www.brookings.edu/blog/future-development/2018/10/11/farm-and-food-policy-innovations-for-the-digital-age/>.

<sup>14</sup> Peter C. Evans & Marco Annunziata, *Industrial Internet: Pushing the Boundaries of Minds and Machines*, GEN. ELEC., at 16 (Nov. 26, 2012), [https://www.ge.com/docs/chapters/Industrial\\_Internet.pdf](https://www.ge.com/docs/chapters/Industrial_Internet.pdf).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> 工业互联网发展行动计划（2018-2020年）[Action Plan for Industrial Internet Development (2018-2020)], MINISTRY OF INDUSTRY AND INFORMATION TECHNOLOGY (MIIT) (June 7, 2018), [http://www.cac.gov.cn/1122955095\\_15284189066411n.pdf](http://www.cac.gov.cn/1122955095_15284189066411n.pdf).

Industrial Internet when necessary.<sup>18</sup> As per the *Opinions on the Development of E-commerce to Accelerate the Development of New Economy* enacted by the State Council, China is committed to introducing laws and rules relating to food e-commerce to speed up e-commerce.<sup>19</sup> To this end, China will introduce measures to regulate food e-commerce and strengthen monitoring mechanisms for food e-commerce.<sup>20</sup>

Simply put, the above government Industrial Internet and e-commerce initiatives create China's big picture of digital food economy. Because problems arise from both the Industrial Internet and food e-commerce in the age of the digital food economy, regulation is required. At the moment, challenges relating to food e-commerce are more acute and urgent than those relating to the Industrial Internet.<sup>21</sup> Therefore, this paper will pay more attention to food e-commerce regulation.

According to Statista, nine of the world's top twenty Internet companies are from China.<sup>22</sup> At least five of these Chinese Internet companies are involved in food e-commerce. These companies are: Alibaba, Baidu, JD.com, Meituan and Tencent.<sup>23</sup> These Internet companies have grown to become China's most influential food e-commerce platforms, which are "unicorn players involving food e-commerce including but not limited to online food retailing, online catering services and cross-border food e-commerce."<sup>24</sup>

China's food e-commerce creates market failure arising from information asymmetry.<sup>25</sup> Such market failures include: unlicensed food businesses, fake and inferior food products purchased online, false information about foods, and ineffective

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<sup>18</sup>*Id.* at 11.

<sup>19</sup> 关于大力发展电子商务加快培育经济新动力的意见 [Opinions on the Development of E-commerce to Accelerate the Development of New Economy], 国务院 [STATE COUNCIL] (May 4, 2015), [http://www.gov.cn/zhengce/content/2015-05/07/content\\_9707.htm](http://www.gov.cn/zhengce/content/2015-05/07/content_9707.htm).

<sup>20</sup> *Id.*

<sup>21</sup> Pinghui Xiao [肖平辉], 我国网络食品立法进程及相关问题探讨 [A study of legislative development of online food trading and relevant issues in China], 工商行政管理 [ADMINISTRATION FOR INDUSTRY AND COMMERCE] (2018).

<sup>22</sup> See MARKET CAPITALIZATION OF THE BIGGEST INTERNET COMPANIES WORLDWIDE AS OF MAY 2018, STATISTA (May 2018), <https://www.statista.com/statistics/277483/market-value-of-the-largest-internet-companies-worldwide/>.

<sup>23</sup> Xiao, *Legislative Development*, *supra* note 6, at 314-16.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 315.

logistics and delivery.<sup>26</sup> E-commerce lawsuits increased by more than 40% in 2017, far higher than the average lawsuit growth.<sup>27</sup> More than half of these e-commerce lawsuits are food products related, with 83% of food e-commerce disputes involving platforms.<sup>28</sup> Violation of food laws has an issue for platforms selling food. For instance, March 2016 saw many restaurants on Ele.me, one of China's biggest online food catering platforms, charged for operating without licenses.<sup>29</sup> In addition to fabricating addresses and images of outlets shown in the platform, it was also revealed that the platform helped food business operators fabricate information for non-existing restaurants to create 'ghost restaurants,' which provided catering services.<sup>30</sup>

### III. Regulating Food E-commerce: Policy and Laws

To tackle the challenges arising from food e-commerce, China introduced the *2015 FSL Amendment*, which became the country's first law to regulate food e-commerce.<sup>31</sup> Following the *2015 FSL Amendment*, China Food and Drug Administration (hereinafter referred to as 'CFDA') also introduced the *Measures for Investigation and Punishment of Unlawful Acts Concerning Online Food Safety* (hereinafter referred to as '*Online Food Measures*') in 2016 and the *Measures on Supervision and Administration of Food Safety Concerning Online Catering Services* (hereinafter referred to as '*Online Catering Services Measures*') in 2017 to implement the law.<sup>32</sup> The *2015 FSL Amendment*, along with the two other specific Measures, constitute the *2015 FSL Amendment* cluster, which regulate food e-commerce. Of equal importance is that the Standing Committee of the NPC promulgated China's first *E-commerce Law* on August 31st, 2018. This law adopted a new approach to e-

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<sup>26</sup>PINGHUI XIAO [肖平辉], 互联网背景下食品安全治理研究[CHINA'S FOOD SAFETY GOVERNANCE IN THE AGE OF THE INTERNET PLUS] 知识产权出版社 [Intellectual Property Publishing House, 2018] 230-31 [hereinafter CHINA'S FOOD SAFETY GOVERNANCE IN THE AGE OF THE INTERNET PLUS].

<sup>27</sup> Xiao, *Legislative Development*, *supra* note 6, at 313.

<sup>28</sup> *Id.*

<sup>29</sup> Zhang Shuai, *Ele.me Apologizes for Unlicensed Restaurants on App*, CREGLISH (Mar. 17, 2016, 7:12 PM), <http://english.cri.cn/12394/2016/03/17/3821s920837.htm>.

<sup>30</sup> Xiao, *Legislative Development*, *supra* note 6, at 316.

<sup>31</sup> See *China Passes Sweeping Amendment to Food Safety Law: The Most Stringent To Date*, LEXISNEXIS (July 16, 2015), <https://www.lexisnexis.com/legalnewsroom/public-policy/b/public-policy-law-blog/posts/china-passes-sweeping-amendment-to-food-safety-law-the-most-stringent-to-date>.

<sup>32</sup> Xiao, *Legislative Development*, *supra* note 6, at 318-19.



commerce regulation, which will have a profound effect on food e-commerce.<sup>33</sup> This *E-commerce Law* goes hand in hand with the *2015 FSL Amendment* cluster to shape food e-commerce. The paper will provide an in-depth discussion of both the *2015 E-Commerce Law* and the *2015 FSL Amendment* cluster and explore their impacts upon China's rising food e-commerce regulation.

*A. Regulating food e-commerce under the 2015 FSL Amendment*

Within the *2015 FSL Amendment* cluster, the *Online Food Measures* and the *Online Catering Services Measures* are rules enacted by the CFDA. These rules belong to lower level of laws, which are meant to implement the *2015 FSL Amendment*.<sup>34</sup> However, in terms of coverage, both the *2015 FSL Amendment* and the *Online Food Measures* are generally applied to all kinds of online food trading, while the *Online Catering Services Measures* are applied to online catering services providers.<sup>35</sup> Simply put, the *2015 FSL Amendment* and the *Online Food Measures* are framed to provide a general regulatory system for online food trading. However, the *Online Catering Services Measures* are rules established to specifically regulate the online catering sector rather than general food e-commerce.<sup>36</sup> The *2015 FSL Amendment* created a legal term called 'online third-party food trading platform provider' to denote the platforms involving foods.<sup>37</sup> Considering the fact that online food platforms play an ever-increasing role in online food trading, all the above pieces of legislation treat online food platforms as co-regulators with food authorities to ensure online food safety.<sup>38</sup> To this end, quite a few provisions of the *2015 FSL Amendment*

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<sup>33</sup> Pinghui Xiao [肖平辉], *我国网络食品立法进程及相关问题探讨 [A study of legislative development of online food trading and relevant issues in China]*, 工商行政管理 [ADMINISTRATION FOR INDUSTRY AND COMMERCE] (2018).

<sup>34</sup> YIBO JIANG ET AL., CHINA FOOD SAFETY LAW- PRACTICAL PROCEDURES, TRENDS AND OPPORTUNITIES FOR DUTCH COMPANIES 5 (2018), <https://www.netherlandsandyou.nl/binaries/netherlandsandyou/documents/publications/2018/03/14/booklet-on-the-china-food-safety-law/final+booklet.pdf>.

<sup>35</sup> BUILDING FOOD SAFETY GOVERNANCE IN CHINA 212 (Jerome Lepeintre and Juanjuan Sun, eds., 2018), [https://eeas.europa.eu/sites/eeas/files/building\\_food\\_safety\\_governance\\_in\\_china.pdf](https://eeas.europa.eu/sites/eeas/files/building_food_safety_governance_in_china.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> For the purpose of this paper, 'online third-party food trading platform provider' is hereinafter referred to as 'online food platform provider' and 'online third-party food trading platform' as 'online food platform.'

<sup>38</sup> Xiao, *Legislative Development*, *supra* note 6, at 318.

cluster compel online platforms to monitor and supervise online food operators. This creates a public-private co-regulation scenario, which reflects the so-called social co-governance principle as established in the *2015 FSL Amendment*.<sup>39</sup> In addition, because of the unique nature of the sector, special regulations have been created for online catering.

i. Obligations for online food platforms

The *2015 FSL Amendment* laid down the first comprehensive legal obligations requiring platforms to ensure food business operators within the platforms do business in compliance with food safety requirements as laid down in the law.<sup>40</sup> Online food platforms are required to fulfill the following supervisory roles: 1) to conduct real-name registration for food business operators within the platforms and to define food safety management responsibility of the food business operators,<sup>41</sup> 2) to check and inspect licenses obtained by the food business operators, 3) when there is a minor noncompliance from food business operators, to stop the violation and report back to the local food authority, and 4) when there is a serious noncompliance from food business operators, to stop providing services to the operators.<sup>42</sup> The above four tasks can be grouped into two categories of obligations as assumed by the platforms, namely, obligations relating to entry control and obligations relating to process control.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Real-name registration here should not be confused with industrial and commercial registration for the purpose of individual industrial and commercial households and companies. The former is conducted by the online platforms, which are a private stakeholder whereas the latter is done by public authorities. See e.g., 中华人民共和国个体工商户条例 (2016修订) [*Regulation on Individual Industrial and Commercial Households (2016 Revision)*], 国务院[STATE COUNCIL] 2016); 中华人民共和国公司登记管理条例(2016修订) [*Regulation of the People's Republic of China on the Administration of Company Registration (2016 Revision)*], 国务院[STATE COUNCIL] (Feb. 6, 2016).

<sup>42</sup> Zhōnghuá rénmin gònghéguó xíngzhèng xūkě fǎ (中华人民共和国食品安全 (2015年修订) [*Food Safety Law of the People's Republic of China (Amended in 2015)*] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2009, revised Apr. 24, 2015), art. 62, 2015 CHINA LAW LEXIS 1812 [hereinafter *Food Safety Law of the People's Republic of China*].

### 1. *Entry control obligations*

The real-name registration and defining food safety management on the one hand, and license inspection on the other, are both concerned with entry control, which serves as a screening mechanism that keeps unqualified food business operators from entering the platforms and selling food via them.<sup>43</sup> In addition, the entry control procedures also make it possible to collect relevant identity information from those food business operators, which allow the platforms to better monitor them. The above tasks evolved into more specific sub-tasks under the *Online Food Measures*.

**First, platforms are required to file official records.** For those platforms, which are thought of solely as intermediaries, the EU is not poised to make them subject to licenses or any other authorizations, with a few case-by-case exceptions.<sup>44</sup> However, licensing in China has become a very important mechanism for government regulation, the legal basis of which can be found in the *Administrative License Law*.<sup>45</sup> Under this Law, China's public regulatory authorities grant licenses to citizens, legal persons, or other organization to engage in special activities according to their applications.<sup>46</sup> Since the introduction of the *Administrative License Law*, China has created a comprehensive administrative registration and licensing system for all kinds of commercial and industrial activities. The system is comprised of industrial and commercial registration (hereinafter referred to as 'ICR') as administered by competent public authorities and other special business licenses as organized by various other public authorities.<sup>47</sup> The legal requirements for the former registration are laid down in the *Regulation on the Administration of Company Registration* and the

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<sup>43</sup> FIA Staff, *Food Safety in China's e-Commerce Platforms*, FOOD INDUSTRY ASIA (Nov. 3, 2014), <https://foodindustry.asia/food-safety-in-china-s-e-commerce-platforms>.

<sup>44</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region: A European Agenda for the Collaborative Economy*, COM (2016) 356 final (Feb. 6, 2016).

<sup>45</sup> Zhōnghuá rénmín gònghéguó xíngzhèng xǔkě fǎ, (中华人民共和国行政许可法) [Administrative Licensing Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug 27, 2003, effective July 1, 2004), 2003 China Law Lexis 4454 (China).

<sup>46</sup> *Id.* at art. 1.

<sup>47</sup> The industrial and commercial registration should not to be confused with platform registration, which is private by nature. See *id.* at art. 12.

*Regulation on Individual Industrial and Commercial Households*, whereas the latter are specified in quite a few scattered laws depending on specific relevant fields, for instance, the *2015 FSL Amendment*.<sup>48</sup>

Nevertheless, it was suggested that China introduce a licensing mechanism to online food platforms prior to the *2015 FSL Amendment*. However, at that time, the State Council was in an effort to streamline administration. It announced a reform scheme dedicated to relaxing market access, by which the pre-existing registration and licensing would continue to be greatly streamlined.<sup>49</sup> Local governments in China are undergoing deregulation reform, which is made possible through various initiatives, for instance, De-licensing Scheme created by Shaoxing, Zhejiang Province.<sup>50</sup> Within the Scheme, licensing and other authorization mechanisms are replaced with filing for records, among others, to reduce market access barriers.

Online food platforms are a technology driven phenomenon which can help generate jobs. However, the idea to create a special license as a market access mechanism for these platforms was finally rejected.<sup>51</sup> Instead, CFDA promulgated the *Online Food Measures*,

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<sup>48</sup> See e.g., Guówùyuan guānyú xiūgǎi “zhōnghuá rénmin gònghéguó gōngsī dēngjì guǎnlǐ tiáolì” de juédìng (2016).

(中华人民共和国公司登记管理条例 (2016修订 [Regulation of the People's Republic of China on the Administration of Company Registration (2016 Revision)] (promulgated by the Standing Comm, Nat'l People's Cong., revised Feb. 6, 2016), 2016 China Law Lexus 1322; Food Safety Law of the People's Republic of China, *supra* note 42, at art. 46.

<sup>49</sup> Guó wù yuán guān yú jiā kuài gòu jiàn qún zhòng chuàng yè chuàng xīn zhī chēng píng tái de zhǐ dǎo yì jiàn (国务院关于加快构建群众创业创新支撑平台的指导意见) [Guiding Opinions of the State Council on Accelerating the Construction of Supporting Platforms of Mass Entrepreneurship and Innovation] (promulgated by the State Council, Sept. 23, 2015, effective Sept. 23, 2015) 2015 China Law LEXIS 1075 (China).

<sup>50</sup> Kuotsai Tom Liou, *Local Economic Development in China and the United States: Strategies and Issues*, 69 PUB. ADMIN. REV. S29 (2009).

<sup>51</sup> See Wǎng luò shí pǐn ān quán wéi fǎ xíng wéi chá chǔ bàn fǎ (网络食品安全违法行为查处办法) [Measures of Investigation of Illegal Conducts Concerning the Safety of Food Sold Online] (promulgated by China Food and Drug Administration, July 13, 2016, effective October 1, 2016) art. 16, 2016 Lexis China Law 370, (China). (stating that "a party engaging in food production that has obtained licensing for food production is not required to obtain licensing for food business operations if it sells self-produced food products online" and "a party engaging in food business operations that has obtained licensing for food business operations is not required to obtain licensing for food production if it sells online food products that it produces and processes").

and it introduced a recordation mechanism, which is less stringent than a licensing mechanism.<sup>52</sup> The recordation mechanism is not meant to provide market access for platforms. Local food safety authorities in certain localities, where an online food platform operates, will at least have a record of the platform information, which helps the government to supervise the platforms.

Under the *Online Food Measures*, the provider of an online food platform shall, within 30 working days upon approval by the competent communications authorities, file for the recordation formalities with the provincial food authority at the place where it is located.<sup>53</sup> Upon success, the provider will be issued a recordation number. The information for recordation shall include domain name, IP address, telecommunications business permit, enterprise name, name of the enterprise's legal representative or person in charge and recordation number, among others. The food authorities at the provincial level and the municipal and county level shall, within 7 working days after the completion of the filing, disclose the relevant recordation information to the public.<sup>54</sup>

**Second, platforms are entitled to make rules.** The provider of an online food platform is obliged to introduce all kinds of rules to ensure industry compliance from food business operators, which is comparable to rule-making. Here the rule-making obligation actually amounts to rule-making powers delegated from the government, which empowers online food platforms to be legislators. Online food platforms are now officially recognized as rule makers. This enables online food platforms to be more institutionalized to supervise online food operators within the platforms.

These rules were enacted to examine and register online food business operators, to stop and report violations of food safety laws, to stop platforms from providing services for severe violators of

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<sup>52</sup> See *id.*, at art. 5 (stating that "providers of third-party online food transaction platforms and parties engaging in food production and business operations by online means shall . . . provide relevant data and information concerning online food transactions in accordance with the requirements of food and drug administrations" and making no mention of a licensing requirement under the measure).

<sup>53</sup> *Id.* at art. 8.

<sup>54</sup> *Id.*

laws, and to publicly disclose the relevant rules on the online platform.<sup>55</sup>

**Third, platforms are required to inspect business licenses and other information of the food business operators.** Under the *Administrative License Law*, ICRs, and specific business licenses constitute the fundamental business licensing institutions in China.<sup>56</sup> As for food business operation, those operating food businesses will have to apply for food business licenses from CFDA. Food business operators include food producers, food retailers and catering services providers, among others in China. Chinese food businesses are generally divided into two types, namely, food production and distribution. Correspondingly, China creates two food business licenses for the entire food chain, namely, food production licenses and food distribution licenses.<sup>57</sup>

The above-mentioned food business licenses are granted by public authorities rather than online food platforms.<sup>58</sup> However, the provider of an online food platform is obliged to inspect relevant food licenses of production, food additive production, and/or food distribution as obtained by online food business operators, and record and update when needed. In the case of small food business operators, in particular small farm operators selling edible

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<sup>55</sup> *Id.* at art. 10.

<sup>56</sup> See Zhōnghuá, *supra* note 45.

<sup>57</sup> See, e.g., Shí pǐn shēng chǎn xǔ kě guǎn lǐ bàn fǎ (2017 xiū zhèng) (食品生产许可管理办法) (2017修正)[Administrative Measures for Food Production Licensing (2017 Amendment)] (promulgated by the China Food and Drug Administration, Nov. 11, 2017, effective Nov. 17, 2017) 2017 China Law LEXIS 1410 (China); Shí pǐn jīng yíng xǔ kě guǎn lǐ bàn fǎ (食品经营许可管理办法) [Administrative Measures for Food Distribution Licensing] (promulgated by the China Food and Drug Administration, Aug. 31, 2015, effective Oct. 1, 2015) Enpkulaw.cn CLI.4.256408 (EN) (China).

<sup>58</sup> See Shí pǐn shēng chǎn xǔ kě guǎn lǐ bàn fǎ (2017 xiū zhèng) (食品生产许可管理办法) (2017修正)[Administrative Measures for Food Production Licensing (2017 Amendment)] (promulgated by the China Food and Drug Administration, Nov. 11, 2017, effective Nov. 17, 2017) 2017 China Law LEXIS 1410 (China) (noting that "local food and drug administrative authorities at or above the county level shall be responsible for the food production licensing administration within their respective administrative areas"); See Shí pǐn jīng yíng xǔ kě guǎn lǐ bàn fǎ (食品经营许可管理办法) [Administrative Measures for Food Distribution Licensing] (promulgated by the China Food and Drug Administration, Aug. 31, 2015, effective Oct. 1, 2015) Enpkulaw.cn CLI.4.256408 (EN) (China) (noting that "local food and drug administration at and above the county level shall be responsible for administering food distribution licensing within their respective administrative regions").

agricultural products over the platform, the provider is obliged to keep a record of the operators' ICR, ID number, home address, contact information, and update when needed.<sup>59</sup>

**Fourth, platforms are required to conduct profiling and filing of food business operators.** China's food authorities engage in profiling and filing activities for the purposes of food business operators. For instance, local food authorities at and above the county level should create food safety credit files of food producers and distributors to record the information on the issuance of food production licenses, inspection of licensing matters, daily supervision and inspection, and investigation of and punishment against licensing-related violations, among others.<sup>60</sup> The filing can be used to increase the frequency of supervision and inspection of food producers and distributors in case of poor credit records.<sup>61</sup> This will be made public, through which food business operators can be motivated to abide by the law. Food authorities are also required to create files of food business operators for their own records.<sup>62</sup> For instance, a food authority at or above the county level, shall establish management rules for food production and distribution licensing archives, and archive in a timely manner the materials on the above licenses.<sup>63</sup>

Similarly, as the provider of an online food platform is considered a co-regulator, it is obliged to create a profile of online food business operators and file accordingly. In addition, it will have to keep a record of the basic information of the food business operators and the food safety management personnel.<sup>64</sup>

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<sup>59</sup> Wǎng luò shí pǐn ān quán wéi fǎ xíng wéi chá chǔ bàn fǎ (网络食品安全违法行为查处办法) [Measures for the Investigation and Handling of Illegalities of Online Food Safety] (promulgated by the China Food and Drug Administration, July 13, 2016, effective Oct. 1, 2016), art. 11, Westlaw China Order No. 27.

<sup>60</sup> Shí pǐn shēng chǎn xǔ kě guǎn lǐ bàn fǎ (2017 xiū zhèng) (食品生产许可管理办法) (2017修正) [Administrative Measures for Food Production Licensing (2017 Amendment)] (promulgated by the China Food and Drug Administration, Nov. 11, 2017, effective Nov. 17, 2017), art. 45, 2017 China Law LEXIS 1410.

<sup>61</sup> *Id.* at art. 40, art. 45.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at art. 48; Shí pǐn jīng yíng xǔ kě guǎn lǐ bàn fǎ (食品经营许可证管理办法) [Administrative Measures for Food Distribution Licensing] (promulgated by the China Food and Drug Administration, Aug. 31, 2015, effective Oct. 1, 2015), art. 43, Enpkulaw.cn CLI.4.256408 (EN) (China).

<sup>64</sup> Wǎng luò shí pǐn ān quán wéi fǎ xíng wéi chá chǔ bàn fǎ (网络食品安全违法行为查处办法) [Measures for the Supervision and Administration of the Safety of Food

Profiling and filing here is different from filing for an official record as discussed above. Here, the information for profiling and filing is mainly from the food business operators whereas filing for an official record is targeted at information of online food platforms.

## 2. Process control obligations

The process control requirements as laid down in the *2015 FSL Amendment*, oblige platforms to monitor and supervise food business operators within the platforms.<sup>65</sup> The above tasks evolve into more specific sub-tasks under the *Online Food Measures*.

**First, platforms are obliged to fulfill certain technical requirements.** In 2016, China promulgated the *Cyber Security Law*, the first of its kind in China.<sup>66</sup> The law recognizes the Internet provides a very important infrastructure for economic development and, if not well controlled, could endanger national security.<sup>67</sup> Under the law, even food delivery platforms may be considered critical infrastructure.<sup>68</sup> This means that any entity considered “critical information infrastructure”, some of which hold significant amounts of information on Chinese citizens, will be under scrutiny from cyberspace regulators.<sup>69</sup>

Similarly, an online food platform is required to fulfill technical requirements before they provide services. Technical requirements include, but are not limited to, maintaining data backup and recovery technologies with a view of ensuring the reliability and security of the data and information relating to online food trading.<sup>70</sup>

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Offered through Online Catering Services] (promulgated by the China Food and Drug Admin., Nov. 06, 2017, effective Jan. 01, 2018), art. 13, 2017 China Law Lexis 1348.

<sup>65</sup> Food Safety Law of the People's Republic of China, *supra* note 42, at art. 78.

<sup>66</sup> Zhonghua Renmin Gongeguo Wangluo Anquan Fa (中华人民共和国网络安全法) [Cyber Security Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong, Nov. 7, 2016, effective June 1, 2017), 2016 China Law LEXIS 1398.

<sup>67</sup> *Id.* at art. 1.

<sup>68</sup> Mirren Gidda, *China's New Cybersecurity Law Could Cost Foreign Companies Their Ideas*, NEWSWEEK (May 31, 2017), <https://www.newsweek.com/china-cyber-security-hacking-intellectual-property-multinationals-618345>.

<sup>69</sup> Carly Ramsey & Ben Wootliff, *China's Cyber Security Law: The Impossibility of Compliance?*, FORBES (May 29, 2017), <https://www.forbes.com/sites/riskmap/2017/05/29/chinas-cyber-security-law-the-impossibility-of-compliance/#1d96f231471c>.

<sup>70</sup> WǎNG LUÓ SHÍ PǐN ĀN QUǎN WĒI Fǎ XǐNG WĒI CHǎ CHŪ BÀN Fǎ (网络食品安全违法行为查处办法) [Measures for Investigation and Punishment of



**Second, platforms will have to maintain a record-keeping system to document business transactions of the food business operators.** Under the *2015 FSL Amendment*, record-keeping is a very important mechanism to ensure compliance.<sup>71</sup> Both food producers and distributors are required to keep a record of product and trading information. For instance, a food distributor shall establish a record system for checking the purchased food, honestly record the name, specifications, quantity, date or batch number of production, shelf life, and date of purchase of food and the names, addresses, and contact methods of suppliers, and retain the relevant vouchers.<sup>72</sup> The retention period of records and vouchers shall not be less than six months after the expiry of the shelf-life of products; or shall not be less than two years for products without an express shelf life.<sup>73</sup>

Similarly, the provider of an online food platform is obliged to maintain a record of food trading information and record-keeping time shall not be less than 6 months after the expiry date of the food products; in case of food products without any express expiry date, record-keeping time shall not be less than 2 years after the selling.<sup>74</sup>

**Third, platforms are required to monitor business operation of the food business operators within the platforms.** The provider of an online food platform trading platform is obliged to set up a food safety department or assign a food safety professional to inspect online food business activities and information.<sup>75</sup> If the provider is aware of food safety violations, it shall timely stop and report them to the local food authorities at the county level.<sup>76</sup>

The above obligation requires platforms to detect misconducts and false information from food business operators. As

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Unlawful Acts concerning Online Food Safety] (promulgated by China Food and Drug Administration, July 13, 2016, effective October 1, 2016), art. 9, 2016 Lexis China Law 370 [hereinafter Measures for Investigation].

<sup>71</sup> Food Safety Law of the People's Republic of China, *supra* note 42, at art. 46.

<sup>72</sup> *Id.* at art. 51.

<sup>73</sup> Wǎng Luò Shí Pǐn Ān Quán Wēi Fǎ Xíng Wéi Chǎ Chǔ Bàn Fǎ (网络食品安全违法行为查处办法) [Measures of Investigation of Illegal Conducts Concerning the Safety of Food Sold Online] (promulgated by China Food and Drug Administration, July 13, 2016, effective Oct. 1, 2016) art. 13, 2016 Lexis China Law 370, 5 (China).

<sup>74</sup> *Id.* at art. 14.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

observed by Mr. Chen Xu, former Director-General of CFDA's Department of Legal Affairs, online catering platforms are required to conduct random inspection and surveillance to detect noncompliance from the catering service providers.<sup>77</sup> This is very challenging to some extent, because platforms are expected to monitor the whole process of online food business running within the platforms. In practice, the platforms only have information of food products and logistics, submitted or generated by food business operators. The platforms are expected to watch business activities from online food businesses. This is hardly made possible for platforms without assigning their management team for an on-site inspection. However, it is too expensive for online food platforms, in particular those involving food retailing, to create teams like this. Simply put, the platforms involving food retailing don't think it is feasible for them to do on-site inspection, considering high cost arising from manpower and time. Nevertheless, there is no clarification as to how this obligation should be implemented in practice to date.

**Fourth, platforms are required to stop providing services under certain specific circumstances.** On the one hand, *Online Food Measures* specifies scenarios in which the platforms will have to stop providing services to online food operators upon their serious violations. On the other hand, there are scenarios in which authorities will order platform providers to cease operations if their failure to fulfill obligations leads to public harm.

The provider of an online food platform trading platform is obligated to timely stop and report food safety violations to the food authorities when a violation is made known to it.<sup>78</sup> In case of a serious violation, the provider must stop providing further platform

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<sup>77</sup> See *id.* at arts. 29–37 (providing penalties for platform providers who fail to comply with various obligations pertaining to the monitoring and record-keeping of online food producer/trader business practices).

<sup>78</sup> See *id.* at art. 15 (requiring online third-party food trading platforms to cease provision of services to online food traders and producers who are under investigation for or are civilly or criminally liable for violations); see also *id.* at art. 37 (requiring Food and Drug Administration officials to order third-party platform providers to cease operations when providers' failures cause serious foodborne illness, death, the infringement of consumers' rights and interests, or other serious consequences); see also, 肖平辉 [PINGHUI XIAO], 互联网背景下食品安全治理研究 [CHINA'S FOOD SAFETY GOVERNANCE IN THE AGE OF THE INTERNET PLUS] (知识产权出版社 [Intellectual Property Publishing House] (2018) at 54.

services to the violator. Scenarios of serious violations include, among others, the following circumstances: 1) online food business operators accused of a crime relating to food safety are being investigated by public security departments or prosecuted by procuratorate;<sup>79</sup> 2) online food business operators are convicted of a crime relating to food safety by court;<sup>80</sup> 3) online food business operators are held in detention or punished with other administrative penalties by public security departments due to violation of food safety laws;<sup>81</sup> and 4) online food business operators are ordered to cease business operations or their food licenses are revoked by food authorities.<sup>82</sup>

The provider of an online food platform trading platform shall be ordered to cease operations and the case will be filed to communications departments for investigation when failing to fulfill relevant obligations cause the following serious consequences: 1) death or serious injury, 2) serious food safety incidents, 3) serious foodborne illness, or 4) violating consumers' legal rights and interests and causing serious adverse social impacts.<sup>83</sup>

#### ii. Special rules for online small food operators

According to the International Labour Organization, small food business operators like street vendors absorb large numbers of surplus labour. But there is a demand side as well. A mass of consumers welcome street vendors because they provide consumers with the accessibility to affordable goods and services. Therefore, it can have positive impacts on poverty reduction, employment, entrepreneurship, and social mobility to ensure the right to run small businesses.<sup>84</sup> Over the past thirty years, China's urban population has risen from 22.9% to 56.8% of its 1.3 billion people.<sup>85</sup> China's urbanization has seen a large migrant population enter large and medium-sized cities. "Currently, many people from the countryside live in cities, but lack access to social services [,]"

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<sup>79</sup> *Id.* at art. 15.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at art. 37.

<sup>84</sup> KYOKO KUSAKAKE, INT'L LABOUR ORG., POLICY ISSUES ON STREET VENDING: AN OVERVIEW OF STUDIES IN THAILAND, CAMBODIA, AND MONGOLIA 3 (2006).

<sup>85</sup> Brendan Ahern & Grant DePoyster, *A Journey to the New Heart of Urbanization in China*, KRANESHARES (Aug. 15, 2017), <https://kraneshares.com/a-journey-to-the-new-heart-of-urbanization-in-china/>.

which means, for instance, they have few jobs. That actually creates a barrier to social stability.<sup>86</sup> So job creation is of great importance to maintain the social stability. China is now entering the age of the ubiquitous Internet. The Chinese government has considered it a great means to generate prosperity and jobs. In addition, it also treats online platforms as a channel to nurture small businesses under the so-called Mass Entrepreneurship and Innovation Campaign.<sup>87</sup>

Thus, small food businesses play an important role in China. According to Jiangsu Province, among its 330,000 catering service providers, more than 70 percent are small businesses.<sup>88</sup> As China experienced rapid economic growth since its open policy, “it also faced an accompanying widening income gap” and there is a lack of balanced regional development, due to stark differences between coastal areas and rural regions.<sup>89</sup> Considering all the above factors, local governments are required to promulgate local rules to administer small food workshops, food vendors, and other small food business operators under the *2015 FSL Amendment*.<sup>90</sup> That means China introduces a regulatory decentralization strategy to regulate small food business operations considering local circumstances. Simply put, rules and policies as applied to small food workshops and food vendors, among other small food business operators, vary from province to province.

Indeed, due to the decentralization approach to small food business regulation, different provinces have introduced different

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<sup>86</sup> Sara Hsu, *China's Urbanization Plans Need To Move Faster In 2017*, FORBES (Dec. 28, 2016), <https://www.forbes.com/sites/sarahsu/2016/12/28/chinas-urbanization-plans-need-to-move-faster-in-2017/#6a58422174db>.

<sup>87</sup> 关于大力推进大众创业万众创新若干政策措施的意见 [Opinions on Policy Measures Implemented to Promote Mass Entrepreneurship and Innovation], 国务院 [State Council of the People's Rep. of China] (2015); see China boosts mass entrepreneurship and innovation, STATE COUNCIL OF THE PEOPLE'S REP. OF CHINA (Jun. 16, 2015), [http://english.gov.cn/policies/latest\\_releases/2015/06/16/content\\_281475128473681.htm](http://english.gov.cn/policies/latest_releases/2015/06/16/content_281475128473681.htm) (noting the government's specific intents to promote means to support Internet service providers, start-ups, and “platforms for innovative technologies”).

<sup>88</sup> 丁冬 [Dong Ding], *小餐饮立法与监管政策评析 (上)* [Analysis on legislation and policy of small catering services industry (part one)], 中国医药报 [CHINA PHARMACEUTICAL NEWS], (Aug. 22, 2018).

<sup>89</sup> Sara Hsu, *High Income Inequality Still Festering In China*, FORBES (Nov. 18, 2016), <https://www.forbes.com/sites/sarahsu/2016/11/18/high-income-inequality-still-festering-in-china/#571e0e291e50>.

<sup>90</sup> Food Safety Law of the People's Republic of China, *supra* note 42, at art. 36.

policies to regulate online small food businesses. Some advocate full liberalization, while others totally prohibit small food operators from doing business over the Internet. For instance, Hebei Province promulgated local rules allowing small food business operators including small workshops, vendors and small restaurants to sell foods and provide catering services via the Internet.<sup>91</sup> Those small food operators can enter online platforms to do business after real-name registration.<sup>92</sup> Guangdong Province, however, does not allow small workshops to sell the foods produced thereby over the Internet.<sup>93</sup> That piecemeal approach creates a challenge for online small food business operators and online food platforms. For instance, foods produced in small workshops in Hebei can be legally sold in this province over the Internet. However, if they are sold to consumers in Guangdong over the Internet, they can be considered illegal according to rules as established in Guangdong.<sup>94</sup> Taken together, small food businesses, including small workshops and small restaurants, which trade foods over the Internet are encouraged to respect, but are not required to abide by, the *Online Food Measures* enacted by CFDA, which is regarded as a national rule applied throughout the entire country.<sup>95</sup>

*B. Regulating food e-commerce under the E-commerce Law cluster*

The *E-commerce Law* created the term 'e-commerce business operators,' which denotes natural persons, legal persons, or organizations without the status of legal person that engage in the business activities of selling commodities, or providing services, through the Internet or any other information network. Here e-commerce business operators comprise: 1) e-commerce platform business operators, 2) in-platform business operators, and 3) e-commerce business operators that sell commodities or provide

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<sup>91</sup>河北省食品小作坊小餐饮小摊点管理条例 [Regulation of Small Food Workshops, Small Canteens and Food Vendors in Hebei] (Hebei People's Congress Standing Committee 2016). Article 17.

<sup>92</sup> *Id.*

<sup>93</sup> CHINA'S FOOD SAFETY GOVERNANCE IN THE AGE OF THE INTERNET PLUS, *supra* note 26, at 299.

<sup>94</sup> *Id.* at 303.

<sup>95</sup> Measures for Investigation, *supra* note 70, at art. 46.

services through a self-built website or any other network services.<sup>96</sup> Of note is that ‘business operators’ are used in a very broad sense here, so platform providers are considered e-commerce business operators. In comparison, the *2015 FSL Amendment*, through its provisions relating to online food trading, makes it clear that food business operators are intentionally distinguished from platform providers. It further implies that providing platform services is not regarded as a business operation.<sup>97</sup> In other words, the *2015 FSL Amendment* treats food business operators in a narrow sense, and online food platforms are not considered food business operators. Taken together, the term ‘platform providers’ in the *2015 FSL Amendment* and that of ‘platform business operators’ in the *E-commerce Law* both recognize platforms are run as third-party entities to provide services, though the interpretation of ‘business operation’ is treated in a different manner in these two laws. Nevertheless, the *E-commerce Law* recognizes the special characteristics of platforms. So, an ‘e-commerce platform business operator’ is especially defined as a legal person, or an organization without the status of legal person. The platform provides multiple parties with services, such as online places of business, match-making, and releasing information, for them to independently conduct trading activities.<sup>98</sup> Simply put, e-commerce platform business operators are articulated to be different from other e-commerce business operators, e.g., those directly selling goods and providing services to consumers. The above observation is equivalent to saying that, as far as e-commerce as defined in the *E-commerce Law* and online food trading as described in the *2015 FSL Amendment* are concerned, ‘e-commerce platform business operators’ are similar, if not identical to ‘online platform providers.’

Similarly, the law recognizes the co-governance principle as previously established in the *2015 FSL Amendment*. China is dedicated to establishing a collaborative regulatory system in line with the characteristics of e-commerce and promoting the formation of an e-commerce market governance system jointly participated in

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<sup>96</sup> Zhonghua Renmin Gongheguo Dianzishangwu Fa 中华人民共和国电子商务法 [E-commerce Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2018, effective Jan. 1, 2019), 2018 CHINA LAW LEXIS 633, art. 9 [hereinafter E-commerce Law of the People’s Republic of China].

<sup>97</sup> See Food Safety Law of the People’s Republic of China, *supra* note 42, at art. 62 (describing the requirements of third-party platforms).

<sup>98</sup> E-commerce Law of the People’s Republic of China, *supra* note 96, at art. 9.

by relevant authorities, e-commerce industry associations, e-commerce businesses, and consumers, among others, so e-commerce platforms are treated as a co-regulators of e-commerce under the *E-commerce Law*.<sup>99</sup> The law creates a collaborative governance scenario, in which e-commerce platform business operators play a key role in regulation of e-commerce. In addition, the *E-commerce Law* also created the term 'in-platform business operator' to denote an e-commerce business which sells commodities or provides services through an e-commerce platform, which is different from an e-commerce operator through self-built websites.<sup>100</sup> Like in the *2015 FSL Amendment* cluster, special rules were created for the purpose of small e-commerce businesses under the *E-commerce Law*.<sup>101</sup>

i. Obligations for e-commerce platform business operators

Under the *E-commerce Law*, similar to the *2015 FSL Amendment*, the e-commerce platform business operators are obliged to ensure that in-platform business operators are in conformity with law. To this end, provisions for purposes of both entry control and process control mechanisms are created.

1. *Entry control obligations*

Under the law, the in-platform business operator is obliged to submit information including its identity, address, contact information, and administrative licensing to the platform business operator. In addition, the platform business operator shall establish a register, and make regular updates and inspections of the above information.<sup>102</sup> For those individuals who are eligible to conduct e-commerce activities and can be exempted from ICRs, e.g., a farmer selling agricultural or sideline products produced by him or herself, the platform will have to at least verify and keep a record of basic information of those individuals, whereas in the case of in-platform business operators operating as legal persons or organizations without the status of legal person, on top of that information, the platform will also have to verify and keep a record of business licenses.<sup>103</sup> Of note is that a co-regulation scenario is applied here, in which both e-commerce regulatory authorities and platform business operators play a role. Simply put, the e-commerce regulatory

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<sup>99</sup> *Id.* at art 7.

<sup>100</sup> *Id.* at art. 9.

<sup>101</sup> *Id.* at art. 71.

<sup>102</sup> *Id.* at art. 27.

<sup>103</sup> *Id.*

authorities issue all kinds of business licenses and the platform business operators will have to inspect the above licenses as required by the law so they are complementary to each other in this context.<sup>104</sup>

When an e-commerce platform business operator provides services for non-business users selling commodities or provides services in the platform, the e-commerce platform business operator shall observe the relevant provisions in this Section.<sup>105</sup> Here, ‘non-business users’ largely denotes those second-hand goods or occasional sellers who are not regular business operators and thus exempted from business licenses. For safety and security purposes, platform business operators will have to collect their information before they are allowed to conduct e-commerce activities within the platforms.<sup>106</sup>

The e-commerce platform business operator shall submit the identity information of in-platform business operators to the administrative authorities of market regulation as required and remind any in-platform business operator that has not obtained ICRs to file for application from relevant public authorities as required by the law. In this case, it will cooperate with the administrative authorities of market regulation and offer help to in-platform business operators to file for ICRs.<sup>107</sup> E-commerce platform business operators are required to share information collected from those in-platform business operators with public authorities to better regulate e-commerce.<sup>108</sup> In addition, an e-commerce platform business operator shall submit the identity information and the information related to tax payment of in-platform business operators to the taxation authorities.<sup>109</sup> In the third reading of the draft *E-commerce Law*, platform business operators were even required to submit information of e-commerce business activities to the taxation authorities on top of identity information. But the information of e-commerce business activities can be interpreted so loosely that even trade secrets and like information can be included, which is not

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<sup>104</sup> 赵旭东 [XUDONG ZHAO], 中华人民共和国电子商务法释义与原理 [INTERPRETATION AND PRINCIPLES OF THE E-COMMERCE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] (中国法制出版社 [China Legal Publishing House]. 2018).156-7.

<sup>105</sup> E-commerce Law of the People's Republic of China, *supra* note 96, at art. 27.

<sup>106</sup> 赵旭东 [XUDONG ZHAO], *supra* note 104, at 157.

<sup>107</sup> E-commerce Law of the People's Republic of China, *supra* note 96, at art. 28.

<sup>108</sup> 赵旭东 [XUDONG ZHAO], *supra* note 104, at 162.

<sup>109</sup> E-commerce Law of the People's Republic of China, *supra* note 96, at art. 28.



implementable in practice. So, the idea of including information of e-commerce business activities was ultimately discarded.<sup>110</sup>

## 2. *Process control obligations*

The *E-commerce Law* enforces all kinds of process control measures, which require e-commerce platform business operators to serve as a qualified supervisor of in-platform business operators in a relatively all-encompassing struggle against e-commerce industry in compliance. To this end, platform business operators are required to take a few process control measures relating to monitoring, technical requirements, business transaction recordation, platform rule-making and anti-manipulation, among other things.<sup>111</sup>

**First, platform business operators are required to take measures to monitor certain e-commerce activities as conducted by in-platform business operators and take relevant measures when needed.** All e-commerce business operators are required by the law to obtain relevant administrative licensing.<sup>112</sup> In addition, an e-commerce business operator should not sell commodities or provide services which do not meet the requirements for guaranteeing personal and property safety and for environmental protection and shall not sell or provide commodities or services the trading of which is prohibited by any law or administrative regulation.<sup>113</sup> Where an e-commerce platform business operator discovers that any information on commodities or services in its platform fails under any of the above circumstances, it shall take necessary disposition measures in accordance with the law and report to the relevant competent authorities.<sup>114</sup> Necessary disposition measures include, but are not limited to, stopping the violation in a timely manner and ceasing providing online trading platform services. The former is applied in cases of any minor violation and the latter for any serious illegal act. More importantly, the platform has an obligation to report the violation to the authorities and provide relevant information when necessary. Here the information to be provided is so comprehensive that it can include identity, e-commerce business activities, and the like.<sup>115</sup> It is of importance to

<sup>110</sup> 赵旭东 [XUDONG ZHAO], *supra* note 104, at 162.

<sup>111</sup> E-commerce Law of the People's Republic of China, *supra* note 96.

<sup>112</sup> *Id.* at art. 12.

<sup>113</sup> *Id.* at art. 13.

<sup>114</sup> *Id.* at art. 29.

<sup>115</sup> 赵旭东 [XUDONG ZHAO], *supra* note 104, at 166.

note that an e-commerce platform business operator serving as a private regulator can take measures, such as warning and suspension or termination of services, against an in-platform business in violation of any law or regulation. The platform business operators act this way according to the prior platform service agreement and transaction rules as established between the platform and in-platform business operators, and timely publication shall be made in that scenario.<sup>116</sup>

**Second, there are certain technical requirements, which platform business operators must meet.** An e-commerce platform business shall take technological measures and other necessary measures to ensure its cyber security and stable operation, prevent online illegal and criminal activities, effectively tackle cyber security events, and guarantee e-commerce trading security.<sup>117</sup> Cyber security became a top priority in China, and China's first *Cyber Security Law* was promulgated to tackle ever-increasing hacker attacks and cybercrime in 2016.<sup>118</sup> According to the law, the Internet is regarded as an infrastructure of great importance for economic development. It further contends that cyberspace, if the country loses control of it, can endanger national security.<sup>119</sup> The law creates the term 'critical information infrastructure,' which is so broad that it encompasses both traditional critical sectors like power and transport as well as other infrastructure which could likely harm the people's livelihoods. As the Financial Times reported, even online catering platforms could be considered critical infrastructure.<sup>120</sup> The Law requires that any entity considered a critical information infrastructure, together with those companies having significant amounts of information on Chinese citizens, should take responsibility to ensure cyber security.<sup>121</sup> Simply put, e-commerce platforms, including online

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<sup>116</sup>E-commerce Law of the People's Republic of China, *supra* note 96, at art. 36.

<sup>117</sup>*Id.* at art. 30.

<sup>118</sup> Zhonghua Renmin Gongeguo Wangluo Anquan Fa 中华人民共和国网络安全法 [Cyber Security Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong. Nov. 7, 2016, effective June 1, 2017), 2016 CHINA LAW LEXIS 1398.

<sup>119</sup>*Id.* at art. 1.

<sup>120</sup> Mirren Gidda, China's New Cybersecurity Law Could Cost Foreign Companies Their Ideas, NEWSWEEK (May 31, 2017, 11:35 AM), <https://www.newsweek.com/china-cybersecurity-hacking-intellectual-property-multinationals-618345>.

<sup>121</sup> Carly Ramsey & Ben Wootliff, China's Cyber Security Law: The Impossibility of Compliance?, FORBES (May 29, 2017, 3:29 AM), <https://www.forbes.com/sites/riskmap/2017/05/29/chinas-cyber-security-law-the-impossibility-of-compliance/#157cb17b471c>.

catering platforms, can be regarded as critical infrastructure, so platform business providers are required to take technical measures to ensure the safe and stable operation of the platforms and prevent illegal criminal activities therein.<sup>122</sup>

**Third, platform business operators are required to keep a record of information of business transactions.** An e-commerce platform business operator shall record and retain information on the commodities and services and transaction information released in the platform and ensure the integrity, confidentiality, and availability of the information. The information on commodities, services, and transactions shall be retained for at least three years from the day of completion of the transaction, unless otherwise provided by any law or administrative regulation.<sup>123</sup> Of note is that the information kept here is different from the information required during the entry control in the sense that the former is about business transactions whereas the latter concerns identity. The information of business transactions can be divided into two types, namely information of commodities as sold and services as provided within the platform, first, and trading information, second.<sup>124</sup>

**Fourth, agreements and platform rules, which platform business operators are entitled to introduce will have to meet certain criteria.** Online platforms, including e-commerce platforms, are engines for growth and innovation. To create a good environment for platforms to scale up, they are recognized as a private legislator to lay down certain platform rules, which in-platform business operators will have to comply with. Nevertheless, generally speaking, agreements and platform rules from the platforms are considered contractual terms, which have to be negotiated and agreed by both parties to a certain contract. Because platforms can be incredibly powerful, they may have the ability to manipulate their power to lay down unfair terms. To avoid manipulation by the platforms, China created a lifecycle interference mechanism to prevent potential manipulation. In general, there are quite a few principles for platform rule-making.<sup>125</sup> An e-commerce platform

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<sup>122</sup> Brian Marterer, *China's New E-commerce Food Safety Measures*, PWC, <https://www.pwccn.com/en/food-supply/publications/china-new-e-commerce-food-safety-measures/cfda-measures-for-e-commerce-food-safety.pdf> (last visited Dec. 14, 2018).

<sup>123</sup> E-commerce Law of the People's Republic of China, *supra* note 96, at art. 31.

<sup>124</sup> *Id.* at art. 2.

<sup>125</sup> *Id.* at art. 32.

business operator shall abide by the principles of openness, equity, and impartiality; develop a platform service agreement and transaction rules; and specify the rights and obligations in aspects such as joining and leaving the platform, assurance of the quality of commodities and services, protection of consumer rights and interests, and protection of individual information.<sup>126</sup>

In addition, there are quite a few procedural requirements to be fulfilled by platforms when making platform rules. For instance, an e-commerce platform business operator shall continuously publish the information regarding its platform service agreement and transaction rules, or the mark of the link to the aforesaid information, at a conspicuous place on its homepage to ensure the easy and complete reading and download by businesses and consumers.<sup>127</sup> Another good example can be explained in the following circumstances. An e-commerce platform business operator is obliged, when amending its platform service agreement or transaction rules, to ask for public opinion at a conspicuous place on its homepage and take reasonable measures to ensure that each side is able to express opinions in a timely manner. The amendment shall be published at least seven days prior to its entry into force.<sup>128</sup>

**Fifth, there is an anti-manipulation mechanism created to prevent abuse of market power from platforms.** Market power occurs if a company has a significant share of the market, and many online platforms, including e-commerce ones in China, are unicorns in certain fields, which then enables them to use their technology and other powerful means to abuse market power, which in a way constitutes a violation of anti-monopoly and anti-unfair competition laws.<sup>129</sup> An e-commerce platform business operator shall not, by means such as service terms, transaction rules, and technology, unreasonably restrict, or additionally set unreasonable conditions against the transactions and trading prices of an in-platform business

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at art. 33.

<sup>128</sup> *Id.* at art. 34.

<sup>129</sup> Chen Xinlei, *China's Digital Monopolies are Killing Competition and Need to be Regulated*, SOUTH CHINA MORNING POST (Aug. 19, 2015), <https://www.scmp.com/comment/insight-opinion/article/1850448/chinas-digital-monopolies-are-killing-competition-and-need>.

operator in the platform, or its transactions with other businesses, or collect unreasonable fees from an in-platform business operator.<sup>130</sup>

ii. Special rules for small e-commerce businesses

An e-commerce business shall apply for an ICR, but the following are exempt from this obligation: 1) those individuals selling agricultural or sideline products produced by them; 2) those selling products of a cottage industry; 3) those using their own skills to engage in public convenience services; 4) occasional and low-value transactions, for which no license is required by the law; or 5) those specified unless an ICR is not required by law or administrative regulations.<sup>131</sup>

In 2018, China announced the *Strategic Plan for Rural Revitalization (2018-2022)*.<sup>132</sup> Rural areas are encouraged to take full advantage of e-commerce and 'Internet Plus' to strengthen agricultural product brand marketing. Internet companies are encouraged to establish agricultural service platforms to help better market agricultural products. China is dedicated to promoting e-commerce in rural areas and building extensive infrastructure for the development of e-commerce there.<sup>133</sup> All the factors combined indicate that farmers in rural areas can have greater opportunities to sell agricultural products produced by themselves, including fresh produce, fruits and vegetables, and Chinese medical herbs via the Internet.<sup>134</sup> At present, the e-commerce market is saturated in cities, whereas there is much room in rural areas.

Social media platforms like Webo and WeChat in China are ubiquitous and widely used in China, which due to their large user body, generate a hybrid type of e-commerce, namely social media e-commerce. Most social media users are individuals, so e-commerce business operators in social media platforms are individuals, and they

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<sup>130</sup> E-commerce Law of the People's Republic of China, *supra* note 96, at art. 35.

<sup>131</sup> *Id.* at art. 10.

<sup>132</sup> Guo Yiming, *Rural Revitalization Highlighted at Two Sessions*, CHINA.ORG.CN (Mar. 5, 2018), [http://www.china.org.cn/china/NPC\\_CPPCC\\_2018/2018-03/05/content\\_50659387.htm](http://www.china.org.cn/china/NPC_CPPCC_2018/2018-03/05/content_50659387.htm).

<sup>133</sup> *Id.*

<sup>134</sup> See Teresa Schroeder, *Chinese Regulation of Traditional Chinese Medicine in the Modern World: Can the Chinese Effectively Profit From One of Their Most Valuable Cultural Resources?*, 11 PAC. RIM. L. & POL. J. 687, 709 (2002) (discussing China's regulations for online marketing of medicinal herbs which qualify as Traditional Chinese Medicine, as opposed to medicinal herbs farmers can market as edible agricultural products).

are labeled as a ‘Micro Businesses’ in China, which connotes small businesses conducted in an informal way.<sup>135</sup>

#### IV. Regulating China’s Food E-commerce: Harmonization of Laws

As observed by Fortin, an administrative agency in the U.S. can serve as the legislator, the prosecutor and the judge, ‘all rolled into one,’ which creates open debate on the legality of these powerful agencies. To prevent abuse of power, the U.S., however, limits these agencies to stringent procedural requirements coupled with court review mechanisms.<sup>136</sup> For a long time, online platforms in China also acted like a three-in-one entity with powers of private rule-making, execution, and dispute settlement, and therefore, similarly, questions arise as to whether or not this is acceptable and how the platforms can be better controlled.<sup>137</sup> Interestingly, the Chinese government did not intervene in this Internet economy ecosystem, but actually created a relatively loose and supportive market policy environment during the early stages of Internet development. The Chinese government understands that the concentration of these powers in online platforms in that way could make Chinese platform economy scale up to be competitive in the world. This idea can be seen in policy documents of China’s ‘Internet Plus’ Strategy in the course of China’s digitalization movement.<sup>138</sup> However, there is an issue of harmonization between the *2015 FSL Amendment* and the *E-commerce Law*.

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<sup>135</sup> Pinghui Xiao, *Legislative Development of Feed E-commerce Regulation in China*, 13 EUR. FOOD & FEED L. REV. 313, 321–22 (2018) [hereinafter *Legislative Development of Feed E-commerce Regulation in China*].

<sup>136</sup> N. D. FORTIN, *FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE* 10 (Wiley ed., 2nd ed. 2017).

<sup>137</sup> *Legislative Development of Feed E-commerce Regulation in China*, *supra* note 135, at 320.

<sup>138</sup> For instance, the State Council announced a policy document stating that the Chinese government is dedicated to ‘cultivating’ Internet platforms with global influence. To this end, the enterprises will be hoped to play a key role in establishing of an Internet industrial innovation network or industrial technology innovation alliance, which is a joint undertaking by enterprises, industries, universities and research institutes. The leading enterprises are the main driver to create innovative platforms. To achieve these goals, the Chinese government is committed to breaking down industry barriers to lay a great foundation for the Internet industry to scale up. See 国务院关于积极推进“互联网+”行动的指导意见 [Guiding Opinions of the State Council on Actively Promoting the “Internet Plus” Strategy] (2015), [http://www.gov.cn/zhengce/content/2015-07/04/content\\_10002.htm](http://www.gov.cn/zhengce/content/2015-07/04/content_10002.htm).

### A. Harmonization of definitions and liabilities

For a long time, in practice, food e-commerce and online food trading have been considered two interchangeable notions in China.<sup>139</sup> However, when the *E-commerce Law* was enacted in August 2018, the legal interpretation of these two terms faced challenges.

Under the *E-commerce Law*, e-commerce is defined to contain ‘any business activities of selling commodities or providing services via the Internet or any other information network.’<sup>140</sup> However, under the *2015 FSL Amendment*, the term ‘online trading,’ rather than ‘e-commerce,’ is used, and ‘online trading’ is left undefined.<sup>141</sup> Horizontally, both the *E-commerce Law* and the *2015 FSL Amendment* belong to the same level of laws enacted by the Standing Committee of the NPC. Simply put, according to the *Legislation Law*, neither law is subordinate to the other.<sup>142</sup> In theory then, the *E-commerce Law*, in defining the term of ‘e-commerce’ seems to produce more legal predictability and certainty than the *2015 FSL Amendment*, which does not provide a definition of ‘online trading.’ Professor Gao Fuping argued that since China enacted the *Electronic Signature Law* in 2004, for the purpose of not confusing the *E-commerce Law* with this Law, China should introduce an *Internet Commerce Law* or an *Online Commerce Law* rather than the *E-commerce Law*.<sup>143</sup> Of note is that according to some scholars, the term of ‘online trading’ can be found in some administrative rules enacted by SAIC. For instance, the *Measures for Online Trading* was

<sup>139</sup> Pinghui Xiao, *Legislative Development of Feed E-commerce Regulation in China*, 13 EUR. FOOD & FEED L. REV. 313, 313 n.1 (2018).

<sup>140</sup> E-commerce Law of the People's Republic of China, *supra* note 96, at art. 2.

<sup>141</sup> See generally Food Safety Law of the People's Republic of China, *supra* note 42, at art. 62 (mentioning “online trading” but not defining “online trading”).

<sup>142</sup> 中华人民共和国立法法 (2015) 年修订 [Legislation Law of the People's Republic of China (Amended in 2015)] President Order No. 20 全国人大常委会 (promulgated by the Standing Comm. Nat'l People's Cong. Mar. 15, 2000, effective Jul. 1, 2000), <https://www.cecc.gov/resources/legal-provisions/legislation-law-chinese-and-english-text>. “There are four levels of laws and rules in China, namely, laws enacted by the NPC; administrative regulations promulgated by the State Council; local regulations enacted by local government; and rules introduced by all kinds of ministries affiliated with the State Council and departments of local government.” See Pinghui Xiao, *Legislative Development of Feed E-commerce Regulation in China*, 13 EUR. FOOD & FEED L. REV. 313, 316 n.29 (2018).

<sup>143</sup> 高富平[Fuping Gao], *从电子商务法到网络商务法—关于我国电子商务立法定位的思考* [From e-commerce law to online commerce law: A study of direction of e-commerce legislation in China], 法学[LAW SCIENCE] 145–46 (2014).

promulgated to regulate goods sold and services provided via the Internet in 2014.<sup>144</sup> In other words, ‘online trading’ has been a pre-existing legal term before the introduction of the *2015 FSL Amendment* in 2015 and the *E-commerce Law* in 2018. Other scholars have implied that China should have introduced an *Online Trading Law* rather than the *E-commerce Law*.<sup>145</sup> The *E-commerce Law* recognizes the doctrine of *lex specialis*, which has been endorsed in the *Legislation Law* by stipulating that “where any other law or administrative regulation provides rules for the sale of commodities or provision of services, such other law or administrative regulation shall apply.”<sup>146</sup> Moreover, some scholars, by pointing out this provision, hold that the *2015 FSL Amendment* is a special e-commerce law whereas the *E-commerce Law* is a general e-commerce law.<sup>147</sup> If that is the case, it actually produces a paradox situation.

As far as online platforms are concerned, things become more complicated. The long-winded legal term, ‘online third-party food trading platform provider’ as mentioned early under the *2015*

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<sup>144</sup> See 个体工商户登记管理办法 (2014修订) [Measures for the Administration of Registration of Individual Industrial and Commercial Households (2014 Revised)] (2014) (implementing measures “to standardize online commodity trading and related services, protect consumers’ and operators’ legitimate rights and interests and promote the sustainable and healthy development of [the] online economy”).

<sup>145</sup> 李一笑[Yixiao Li], 网络交易平台间接侵权之相关问题分析——以利益平衡为中心的考量 [Analyses of several problems about the online marketplaces’ indirect liabilities: From the perspective of balance of interests], 网络法律评论 [INTERNET L. REV.] 74-5 (2016).

<sup>146</sup> E-commerce Law of the People’s Republic of China, *supra* note 97, at art. 2. As for the doctrine of *lex specialis*, according to the *Legislation Law*, for laws, administrative regulations, local regulations, autonomous regulations, separate regulations, or rules developed by the same authority, if there is any discrepancy between special provisions and general provisions, special provisions shall prevail. See 中华人民共和国立法法 (2015年修订) [Legislation Law of the People’s Republic of China (Amended in 2015) art. 92] (2009) (China).

<sup>147</sup> See e.g., 陆悦[Yue Lu], 网络食品合规治理再上层楼：当食品行业遇见《电子商务法》 [Online food trading regulation: China’s food industry in the age of E-commerce Law], 中国医药报[CHINA PHARMACEUTICAL NEWS], (Sept. 20, 2018) 王峰[Feng Wang], 滴滴顺风车案改写电商立法 平台违法或承担刑事责任 [Didi scandal restructures the E-commerce Law: platforms may assume criminal responsibilities], 21世纪经济报道[21 Century News](2018), available at <http://www.21jingji.com/2018/9-1/2NMDEzNzlfMTQ0NzE2NQ.html> (last visited Dec. 11, 2018).



*FSL Amendment* is undefined.<sup>148</sup> Nevertheless, the term ‘online food platform provider’ is intentionally created with a view to distinguish responsibilities and liabilities of platform providers from those of food business operators doing businesses within the platforms. That actually delivers a fundamental idea that a platform is a technologically-neutral intermediary, and that essentially “means that the provider of a platform [is treated] as a third-party entity [, who] should not be responsible for, or only in a limited way responsible for, any wrongdoings from [those] using the platform.”<sup>149</sup> Online food platforms play a big role in shaping business modes and models of online food trading in China.<sup>150</sup> The *2015 FSL Amendment* implies that business models of online food trading can be divided into two main types, namely, self-built models and platform models.<sup>151</sup> Later measures enacted by the CFDA also explicitly confirm the above idea.<sup>152</sup> In the course of China’s introduction of the *2015 FSL Amendment*, WeChat, among other social media platforms, raised a compelling argument that social media platforms should not be treated as online food platforms in the sense that social media platforms are meant to be used as a communication tool rather than a trading one. However, the so-called ‘Micro Business’ involving individuals and SMEs selling foods via social media platforms has become a rising phenomenon in China, creating a form of so-called social media e-commerce.<sup>153</sup> When China introduced the *2015 FSL Amendment* it also launched a Mass Entrepreneurship and Innovation Campaign, as mentioned earlier, to boost employment, and the Internet is considered a great means to generate prosperity and jobs.<sup>154</sup> Largely due to this, undefined online platforms can leave more room for employment and a better environment for innovation. However, when it comes to the *E-*

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<sup>148</sup> See Food Safety Law of the People's Republic of China, *supra* note 42, at art. 62 (creating obligations for “third-party online food trading platform[s]” but providing no specific definition for the term).

<sup>149</sup> Pinghui Xiao, *Legislative Development of Feed E-commerce Regulation in China*, 13 EUR. FOOD & FEED L. REV. 313, 317 (2018).

<sup>150</sup> PINGHUI XIAO, CHINA'S RISING ONLINE FOOD TRADING: ITS IMPLICATIONS FOR THE REST OF THE WORLD 125–27 (Xinting Jia & Roman Tomasic eds., 2017).

<sup>151</sup> Pinghui Xiao, *China's Wine and Liquor Laws in the "Internet Plus" Age*, 1 JUS VIN LAW 36 (2018).

<sup>152</sup> *Legislative Development of Feed E-commerce Regulation in China*, *supra* note 149, at 318.

<sup>153</sup> See e.g., *id.* at 321–22.

<sup>154</sup> Yue Zhang, *Nation to boost entrepreneurship, innovation*, CHINA DAILY (Sept. 7, 2018, 8:54 AM), <http://usa.chinadaily.com.cn/a/201809/07/WS5b91cc35a31033b4f4654b65.html>.

*commerce Law*, because e-commerce is defined, which makes it predictable, the term ‘e-commerce platform’ can be equally predictable. By interpretation, it is safe to say that in this law, e-commerce platforms can be so extensive that the *E-commerce Law* is applied to social media platforms and mobile applications. Therefore, it further implies that the platform obligations, as laid down in the *E-commerce Law*, are applied to those social media platforms involving food SMEs and ‘Micro Business,’ which however, is very much contestable under the *2015 FSL Amendment* cluster.

While the harmonization of definitions can produce consistent legal predictability as far as the question of what platforms should take what responsibility is concerned, there is a further issue relating to harmonization of liabilities as laid down in the *2015 FSL Amendment* and the *E-commerce Law*.

Under the *2015 FSL Amendment*, where the provider of an online food platform, in violation of this law, fails to assume the supervision tasks required by the law, which results in food business operators’ failure in food safety compliance, food authorities at or above the county level shall order it to take corrective action, confiscate its illegal income, and impose a fine of not less than RMB 50,000 but not more than RMB 200,000 on it. However, under the *E-commerce Law*, where an e-commerce platform business operator fails to take necessary measures to ensure in-platform business operator conducts e-commerce lawfully, relevant authorities shall order the e-commerce platform business operator to take corrective action within a specified period and may fine it not less than RMB 50,000 not more than RMB 500,000; or if the circumstances are serious, it shall be ordered to suspend business for rectification, in addition to a fine not less than RMB 500,000 but not more than RMB 2,000,000.<sup>155</sup> In terms of the fine intervals, the two laws vary greatly, which creates a question of how the administrative penalties should be applied as far as online food platforms are concerned.

As far as online food platform liabilities are concerned, all the above factors combined create a few open questions: 1) should a social media platform, when used to trade in foods, be treated as an online food platform in the *2015 FSL Amendment* or an e-commerce platform business operator under the *E-commerce Law*? 2) when an

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<sup>155</sup> E-commerce Law of the People’s Republic of China, *supra* note 96, at art. 83.

online food platform fails to assume supervision tasks as required by the law, should an administrative fine ranging from RMB 50,000 to RMB 200,000 under *2015 FSL Amendment* be imposed upon the platform or should a fine ranging from 50,000 to RMB 2,000,000 be imposed upon it? In other words, there is a need for further harmonization.

*B. Harmonization of legislative aims and mission*

It is necessary to examine the aims of different pieces of legislation at the outset in the sense that in most Chinese laws, their missions will be clearly articulated at the very beginning, upon which the directions of the laws in question will be largely based. We find varying missions in laws relating to food regulation. For instance, the *E-commerce Law* has two concurrent missions, namely, 1) to safeguard the lawful rights and interests of all parties to e-commerce, to regulate e-commerce conduct, and to maintain the market order, and 2) to promote the sustainable and sound development of e-commerce.<sup>156</sup> But in the *2015 FSL Amendment*, there is only one mission, and that is to ensure food safety and protect the physical health and life safety of the public.<sup>157</sup> Questions arise as to whether there are conflicts between protecting human health on the one hand and promoting economy on the other. Admittedly, there are conflicts between protecting health and safety and promoting industry in the sense that we have past lessons and repeated bad examples in this regard, taking the BSE crisis in Europe and Melamine Milk Scandal in China into consideration.<sup>158</sup> These two incidents have to do with agri-food production, vividly showing conflicts that can occur when public agencies concurrently play a dual role in both industry promotion and health protection.

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<sup>156</sup> See *id.* at art. 1. (drawing similarities to the E-commerce Law, the Law on Agri-product Quality and Safety with the establishment of two concurrent missions, namely, to protect human health on one hand and to promote rural economy on the other); See e.g., Zhong Hua Ren Min Gong He Guo Nong Chan Pin Zhi Liang An Quan Fa (中华人民共和国农产品质量安全法) [Law on Agri-product Quality and Safety of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 2006, effective Nov. 1, 2006), art. 1.].

<sup>157</sup> Food Safety Law of the People's Republic of China, *supra* note 42, at art 1.

<sup>158</sup> See e.g., Pinghui Xiao, *China's Milk Scandals and Its Food Risk Assessment Institutional Framework*, 2 EUROPEAN J. OF RISK REGULATION 397 (2011); Pinghui Xiao, *China's Food Standardization System, Its Reform and Remaining Challenges*, 3 EUROPEAN J. OF RISK REGULATION 507 (2012).

The conflicting aims and missions in the food e-commerce related legislation make harmonization of these laws an issue. The needs for harmonization in this regard are two-fold.

First, we have a within-law harmonization scenario. Because the *E-commerce Law*, simultaneously is aimed at regulation and industry promotion, there is a question of harmonizing those provisions bearing different missions within the same law. For example, the whole Chapter V, containing ten articles, is dedicated to promoting e-commerce through various mechanisms and schemes.<sup>159</sup> Numerous provisions relate to food e-commerce promotion as well, which very much involve small businesses and even ‘Micro Business’ as mentioned earlier. However, as far as agri-foods are concerned, “the state shall promote the application of Internet technologies in agricultural production, processing, and circulation [;]” encourage various social resources to strengthen cooperation; and promote the development of rural e-commerce.<sup>160</sup> It is hoped that e-commerce can play a role in poverty alleviation.<sup>161</sup> Many agri-food operators are small businesses in China. For instance, farmers sell agri-foods produced in their own farms. Farmers in rural areas in China are relatively poor with limited job opportunities, and, therefore, agriculture becomes their main tool to generate wealth and prosperity. In addition, farmers are exempted from an ICR if they sell agricultural or sideline products produced in their farms over the Internet, for which no licenses are required by the law.<sup>162</sup> These provisions relating to agri-food e-commerce are created for the purpose of rural development. However, questions arise as to how these provisions will be harmonized with other e-commerce regulatory provisions within the *E-commerce Law*. There is a question as to which side, industry promotion or regulation, shall prevail when there are conflicts.

Second, there is a between-law scenario harmonization. As for cross-border food e-commerce, it is even trickier. As observed by the OECD, the spread of the digital economy e.g., cross-border e-commerce, poses challenges for international taxation.<sup>163</sup> But the ever-increasing cross-border e-commerce is regarded as ‘an engine

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<sup>159</sup> See E-commerce Law of the People’s Republic of China, *supra* note 96.

<sup>160</sup> *Id.* at art. 68.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at art. 10.

<sup>163</sup> ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY, ACTION 1: 2015 FINAL REPORT, OECD (2015).

for growth.’<sup>164</sup> And it is highly recognized by the Chinese government. Hence, the *E-commerce Law* stipulates that the state shall promote cross-border e-commerce development; establish and improve administrative systems for customs, taxation, entry and exit inspection, and quarantine, among others, in line with the characteristics of cross-border e-commerce; and streamline procedures to facilitate cross-border e-commerce. Cross-border e-commerce platforms are encouraged to provide storage and logistics, customs declaration, inspection and quarantine declaration, and other services for cross-border e-commerce. The state shall support micro and small-sized enterprises in engaging in cross-border e-commerce.<sup>165</sup> For these product categories through cross-border e-commerce, the most popular among Chinese consumers are baby products, foods and cosmetics. This is largely due to domestic safety scandals and incidents in recent years.<sup>166</sup> Quite a few business models of cross-border e-commerce emerge, among which the model of so-called ‘bonded warehouses’ goes like this: goods produced and marketed in a certain jurisdiction are shipped to Chinese consumers in China through Internet order. These bonded warehouses, specifically purposed for storing overseas goods, allow merchants to bulk-ship products to China in private order over the Internet without necessarily being subjected to commercial import duties or strict quality control measures.<sup>167</sup> Under the above provisions as laid down in the *E-commerce Law*, the model of bonded warehouses should not be a problem, since it is done in the name of cross-border e-commerce. Nevertheless, this act may violate the *2015 FSL Amendment*. Because those foods are produced and marketed in other jurisdictions according to food laws thereof, they are not necessarily in compliance with Chinese food safety standards. Hence, according to the *2015 FSL Amendment*, the foods in question may violate Chinese food safety requirements, so they should not have been allowed to be shipped to Chinese consumers. The tricky thing is, that to date there have been quite a few cases relating to cross-border food e-commerce through bonded warehouses, in which some court

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<sup>164</sup> Global Express Association, *Let cross-border e-commerce be an engine for growth*, WCO NEWS MAGAZINE, (Oct. 2015) at 50.

<sup>165</sup> E-commerce Law of the People's Republic of China, *supra* note 96, at art. 71.

<sup>166</sup> Anthony De Gennaro, *China Cross-Border E-Commerce: New Challenges & Opportunities 2017*, DRAGON SOCIAL (Oct. 24, 2017), <https://www.dragonsocial.net/blog/china-cross-border-e-commerce/>.

<sup>167</sup> *Id.*

decisions have upheld the *2015 FSL Amendment*, but others have been overturned. This makes harmonization of these two laws an open question in the future.

## V. Conclusion

China has created a unique regulatory mechanism in which online platforms, considered third-party business entities, are obligated to monitor and supervise food business operators within the platforms. In other words, platforms are treated as co-regulators of food e-commerce. Through the lens of examination of legislative development, we find that online platforms are the key players for food e-commerce regulation, which are required to supervise online food business operators within the platforms. Online food platforms, though, as private players should co-regulate online food safety in close cooperation with government agencies. In case of any food safety non-compliance issues from the online food operators, the online platforms may be jointly punished by government agencies. This approach, though contestable, reflects the principle of co-governance as adopted in *2015 FSL Amendment* cluster and is further recognized as so-called collaborative governance under the *E-commerce Law* cluster. In other words, it creates a public-private co-regulation scenario, which is a recognized practice in both law clusters.

Nevertheless, there is a challenge for harmonization of laws in terms of food e-commerce regulation, in which there are two facets to be considered. The first is concerning harmonization of definitions and resulting liabilities. While the harmonization of definitions can produce consistent legal predictability as far as the question of what platforms should take which responsibility is concerned, as a result there is a further issue relating to harmonization of liabilities as laid down in the *2015 FSL Amendment* and the *E-commerce Law*. The second harmonization facet is concerning legislative aims and missions. The conflicting aims and missions, as appearing in various pieces of legislation relating to food e-commerce, make harmonization of these laws an issue.

In March 2018, the Chinese Central Government announced a mega reform scheme, in which CFDA will be merged into SAIC and another Ministry to create a new agency called State Administration for Market Regulation. It will be the implementing agency of the *E-commerce Law* and the *2015 FSL Amendment* to

regulate food e-commerce.<sup>168</sup> It remains to be seen what impact this institutional reform will have upon harmonization of laws towards a better regulation of food e-commerce in China.

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<sup>168</sup> 韩声江 [Han Shengjiang], 国家市场监督管理总局正式成立, 张茅任局长毕井泉任党组书记 [*State Administration for Market Regulation is Established, and Zhang Mao is Minister Whereas Bi Jingquan is Secretary of the Leading Party Members' Group*], 澎湃 [THE PAPER] (Mar. 21, 2018), [https://www.thepaper.cn/newsDetail\\_forward\\_2036753](https://www.thepaper.cn/newsDetail_forward_2036753).

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