

## Inception Impact Assessment on an initiative to improve the food supply chain

### Overall summary

1. EuroCommerce has serious concerns over some of the proposed policy measures being considered by the European Commission as part of an initiative to improve the food supply chain.
2. **Regulating alleged unfair trading practices (UTPs) at EU level is not the right tool to address issues related to farmers' incomes**, their competitive position or ability to embrace future market challenges. We furthermore **do not see any added-value in further EU level regulation**, as all member states have basic regulations covering contractual relationships, and a significant majority have adopted complementary schemes to address alleged UTPs, including enforcement provisions.
3. On this basis, we would favour option 1 (status quo). We would see value in a non-regulatory framework (option 2), if the Commission would take into account the role of the Supply Chain Initiative (SCI), its national platforms and other similar initiatives, in defining and promoting good trading practice across Europe as part of this approach. We are strongly opposed to the suggested options 3 and 4 (regulatory options).
4. We support transparency as a means to promote a better understanding of the functioning of the food supply chain, but this has to take place in full compliance with competition law, and avoid overburdening companies. We support better organisation of farmers as a means to address fragmentation at farm level, but do not see value-sharing mechanisms as being the appropriate tool, nor this initiative as an appropriate basis of achieving this.
5. Farmers are a key partner in the food supply chain and, in order to meet consumer demand for diverse foods catering for varied needs and expectations, **retailers have a direct interest in maintaining sustainable and efficient supply chains**. In our opinion, **structural measures** such as supporting better farmers' organisation (within the boundaries of competition rules), entrepreneurship, the development of risk management tools and supply chain dialogue to better match production with demand, **would be more appropriate in addressing the concerns raised**.
6. In practice, food supply chains have grown increasingly complex as a result of consumer demand for more sophisticated products. Retailers compete hard and innovate to meet ever changing consumer demand. Strong competition in retail leads to narrow net margins (1-3% on average). Retailers have, on average, few direct relationships with farmers (less than 5% of their contractual relationships). The majority of contractual relationships are with processors and manufacturers, many of whom are large multinational businesses. **Engaging in fair relationships makes business sense** and our members highly value these crucial relationships. A critical mass of retailers have signed up to the **Supply Chain Initiative (SCI)** as a means of signalling their

**commitment to fair trading relations** and to resolving disputes in a way that preserves, rather than undermines their trading relationships. We ask the Commission and the member states to **further support the SCI, its national platforms and similar voluntary initiatives**.

7. We are concerned that perception surveys, without being complemented by objective evidence, do not provide the solid evidence to justify the need to take action. **The Impact Assessment should be evidence-based and avoid proposing measures based on perceptions or emotions**. In particular, we ask that the Impact Assessment addresses:
  - the alleged **widespread existence and impact of alleged unfair trading practices**, taking into account several years' experience with the SCI and the absence of solid, verifiable evidence to back-up such claims; we note, for instance, that the SCI provisions on aggregated complaints, which protect for anonymity of parties, were never used in this respect<sup>1</sup>;
  - to what extent the suggested measures, on their own, will **improve farmers' situation and help them become more competitive**; the Impact Assessment will have to demonstrate how farmers' interests will be served by imposing regulation on relationships often far removed from farmers;
  - how the **suggested measures will be more effective than national legislation** in addressing the alleged issues;
  - how **different UTP laws constitute significant obstacles to intra-community trade or might lead to an appreciable distortion of competition in the internal market**;
  - how **the suggested measures will effectively contribute to removing these obstacles and not go beyond what is necessary**.
8. We note that the considerable potential impact of the suggested measures on consumer prices, innovation and choice as well as on larger operators is absent from the Inception Impact Assessment.
9. We would also ask the Commission to emphasise what has changed since its report of 2016<sup>2</sup>, which concluded that at this stage there was no need to regulate UTPs further at EU level, and provide the necessary compelling evidence justifying the need to reverse their decision.
10. You will find below our detailed comments on the various chapters of the Inception Impact Assessment.

## A - Context, Problem definition and Subsidiarity check

### *Context*

11. The sequence of events is clearly set out. We thank the Commission for their appreciation of the role of voluntary practices, including the SCI, in complementing national legislation and promoting the use of out-of-court dispute resolution mechanisms, and thereby contributing to a better functioning of the food supply chain.
12. However, we **regret the use of perception surveys as the main basis for justifying action** and ask that, in line with better regulation principles, **any policy measure is based on an objective and detailed understanding of their likely impact on the market**.

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<sup>1</sup> the IIA points out to perception surveys conducted several years ago by processors' and farmers' organisations, without providing any solid measurement of the existence of a systemic issue.

<sup>2</sup> Report from the Commission on "unfair business-to-business trading practices in the food supply chain" COM(2016) 32 final

13. If the objective is to address alleged UTPs, we would ask the Commission, in its Impact Assessment to provide convincing and objective evidence of:
- the **widespread existence and impact of alleged unfair trading practices** taking into account several years' experience with the SCI; the IIA points out to perception surveys conducted several years ago by processors' and farmers' organisations, without providing any solid measurement.
  - **a lack of common contract rules across countries, demonstrably creating dissimilar conditions** for businesses in the food sector **as compared to other sectors in the economy**;
  - **transnational transactions being significantly affected by alleged UTPs**, and of significant levels of trade not taking place because of alleged UTPs;
  - **how regulation can act as an incentive for operators, including farmers, to join codes of conduct.**

#### *Problem the initiative aims to tackle*

14. The **exact objective of the initiative is unclear**, and seems to mix-up a number of issues. We would like to clarify that **trading practices relate to contractual relationships, whereas farmers' incomes or farmers' position in the chain** are issues pertaining to the structure and financing of the farming sector and therefore better addressed through other tools, such as the Common Agriculture Policy. Initiatives such as joint retailer-farmer efforts in developing a distinctive fresh assortment can help significantly in achieving this aim.
15. If the main purpose of the initiative is strengthening farmers' position in the chain, we struggle to see how the suggested measures can, on their own, deliver this objective (see below our comments on the suggested policy options). In practice, only 5% of retailers' transactions take place with farmers directly. In our view, proposals to address contractual practices which overwhelmingly take place between large retailers and large manufacturers, would overlook much more efficient means of achieving this objective, such as encouraging producers to better organise, supporting entrepreneurship and supply chain dialogue to help farmers produce what consumers are willing to buy.
16. Enhancing producer cooperation is a useful way of addressing fragmentation in the agriculture sector, provided this is achieved in compliance with competition law and does not create unfair competition conditions with wholesalers<sup>3</sup>. However, this is **also best addressed through the Common Agriculture Policy. We do not see how extending value-sharing agreements to all agriculture sectors can help address this issue** (see our comments paragraphs 40-43).

#### *Subsidiarity check and legal basis*

17. **We do not see added-value in EU level action.** The large majority of retailers' transactions are national, and **national solutions, which comply with internal market regulations and principles, are most appropriate. Subsidiarity should remain the norm**, and we question whether the EU Commission has legislative powers to propose EU legislation in an area largely involving national retail transactions with no discernible EU impact. All member states have basic regulation covering contractual relationships and a significant majority have complementing provisions on alleged unfair trading practices, including enforcement. National commercial practice and contract law vary substantially across Europe, and national regulations reflect this. These regulations seek to achieve the same outcome. Following an extensive legal comparative analysis, the Commission concluded that *"since different approaches could address UTPs effectively, the Commission does not see the added value of a specific harmonised regulatory*

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<sup>3</sup> Wholesalers support farmers in many ways such as offering alternative ways of marketing, opening new markets, financing transactions and offering insurance services. Legal measures supporting producer cooperation should provide fair competition conditions and ensure a level playing field for wholesalers.

*approach at EU level at this stage*<sup>4</sup>.

18. In **cross-border B2B contracts**, parties always agree on the applicable national law and jurisdiction; as a result, **national law is always the basis for any business relations**. It provides certainty on the applicable rules, as well as clarity about enforcement and how to seek redress<sup>5</sup>. Contract terms are applied in the same way, irrespective of the origin of the supplier. The Inception Impact Assessment does not explain how EU regulation could fit into those national arrangements as long as there is no move to harmonise contract law at EU level.
19. As concerns the **legal base**, we would ask the Commission to provide convincing evidence that it has legislative powers to propose legislation, and in particular that:
  - **addressing contractual practices, alone, will help achieve CAP objectives** –ie. “ensure a fair standard of living for the agriculture community” or “ensure that supplies reach consumers at reasonable prices”;
  - the **suggested measures will be more effective than national legislation** in addressing the alleged concerns;
  - different **UTP laws constitute significant obstacles to intra-community trade**, or might lead to an appreciable distortion of competition in the internal market;
  - the suggested measures will **effectively contribute to removing obstacles** to intra-community trade, respect freedom of contract as a principle civil right, and **do not go beyond what is necessary**.
20. We would also ask the Commission to analyse in detail existing national measures and indicate whether they have been effective in addressing the issue, whether some approaches work better than others, and what gaps exist to justify EU action.

## B- Objectives and policy options

### *Unfair trading practices*

21. **Option 1: we would favour this option**. As stated above (see paragraphs 17-19), member states have well-developed regulatory solutions in B2B transactions, and parties are able to decide on the law and jurisdiction applicable to the contract. As a signatory to the Principles of Good Practice<sup>6</sup>, we believe that stakeholders are better placed to define what good practice is. As a member of the SCI, we are supporting efforts to deliver on the announcements made at the High-Level Forum meeting in December 2016, including the appointment of an independent chair and adaptation of the SCI rules. We ask the Commission and the member states to further support the work of the SCI and its national platforms in promoting good practice.
22. **Option 2: there may be scope for a non-regulatory framework** (option 2) if the Commission would take into account the role of the Supply Chain Initiative (SCI), its national platforms and other similar initiatives, in defining and promoting good trading practice across Europe as part of it. Market operators understand the market, and are therefore best placed to define good practice and react more flexibly when market conditions change. We regret that the Commission omitted to make any reference to the SCI in this option.

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<sup>4</sup> Report from the Commission on “unfair business-to-business trading practices in the food supply chain” COM(2016) 32 final

<sup>5</sup> In B2B contracts, parties are free to choose the applicable contract law and jurisdiction, though principles of imperative law (overriding mandatory provisions) may override provisions of a contract established in another jurisdiction. This makes allegations of forum shopping unfounded. EC reg 593/2008 on the law applicable to contractual obligations (Rome I)

<sup>6</sup> “Vertical relations in the food supply chain: Principles of good practice” put forward by 11 EU level stakeholder organisations and endorsed by the High Level Forum in November 2011

23. Any considered non-regulatory EU level framework should aim to provide a useful mechanism to support the development of national dialogues, enhance peer pressure to observe principles of good practice, facilitate exchange of information and knowledge about regulatory provisions applicable in other countries and making these available to stakeholders. This could help create confidence that protection is available in other countries as well. It could also help ensure that **national frameworks** remain both **proportionate** as concerns the practices considered, their sanctions mechanisms and enforcement, and **non-discriminatory** in terms of the nature and origin of the operators concerned, as well as enforcement practice<sup>7</sup>.
24. Member States could also play a role in promoting the use of voluntary mechanisms, such as the SCI, national platforms and other similar initiatives, and dialogue as a means of building trust and understanding among stakeholders in the food supply chain.
25. **Option 3: we oppose EU-level legislation:** further EU-level regulation on trading practices is neither an appropriate or effective mechanism to address structural issues facing agriculture, including fragmentation; it will only shift pressure to other parts of the chain, risk to fragment the internal market further, and ultimately lead to higher consumer prices.
26. As stated above, we would ask the Commission to **provide convincing evidence that regulating contracts will contribute to achieving CAP Treaty objectives**, namely, improving farmers' revenues, ensuring stable prices and reasonable prices for consumers. Farmers' revenues are in fact influenced by much wider forces such as market dynamics, volatility, farmers' organisation, global trends, consumer demand, costs of production and the level of subsidies, not by regulating contractual relationships, when the majority of these make no direct transactions between farmers and retailers.
27. We question to what extent an absolute prohibition of certain trading practices, which are the common transaction model between large retailers and large manufacturers rather than farmers or SME processors, would be proportionate or effective in providing farmers with the protection they seek. As a general principle, individual practices should be considered in the light of the overall contractual relationship, and contracts allow flexibility to adapt to circumstances, provided the conditions are foreseen in the contract. **Making it more difficult for retailers to negotiate with their suppliers will mean that the only element remaining to negotiate will be price.** This will not address the fragmentation issue at farm level, will not benefit farmers, and **will work to the advantage of large manufacturers**, who already make substantial net margins. Ultimately, this will also run against consumers' interests, who will face higher prices.
28. In principle, large businesses tend to deal with their SME suppliers, including farmers, in a different way than with large companies. **Smaller businesses play an increasingly important role in retailers' assortment strategies**, as they complement their brand assortment and allow them to differentiate. They need simple and workable rules, as they do not have the same legal resources as large businesses.
29. We question **the basis on which the Agri-Markets Task Force (AMTF) established the list of practices it recommended should be prohibited**, and encourage the Commission **to assess how relevant they are to the reality of the market.** EuroCommerce is a signatory to the Principles of Good Practice endorsed by the Commission-led High-Level-Forum on a better functioning food supply chain. These principles were defined by operators along the supply chain, including farmers and represent a common understanding of what is good practice in B2B relations in the

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<sup>7</sup> See [EuroCommerce recommendations for an EU framework to address trading practices in the EU, contribution to the HLF sherpa group](#), February 2017

food supply chain. They should form the basis of any initiative, should any further policy measure be proved as necessary.

30. Furthermore, we would like to invite the Commission **to avoid reinforcing structures that tend to lock farmers into long-term relationships**, making it very difficult for farmers to switch to another processor and seek better conditions or making entry into the market more difficult. In this regard, we would like to point out to the on-going enquiries in Germany<sup>8</sup> and in France<sup>9</sup> into the practices of dairies and sugar companies. In particular, the German enquiry revealed that contracts between many milk producers and dairies in Germany have long periods of notice and duration. Farmers are generally obliged to supply the milk they produce exclusively to the respective dairy, **making it very difficult to switch to another dairy, of for competing dairies to enter that market and offer better prices**. They further raised concerns over pricing mechanisms.
31. We would also question **to what extent farmers' associations should be entitled to the same degree of protection as individual farmers and SMEs**. Some farmer cooperatives have developed into (sometimes very) large (and occasionally transnational) businesses which negotiate on equal terms with large processors or retailers; these businesses should not be considered in the same way as SMEs.
32. With regard to the **product scope**, we would point out that annex I of the CMO regulation covers a range of diverse products with different degrees of processing and perishability (e.g. long-life milk, wine, sugar or canned vegetables should not be regarded a highly perishable product). We would ask the Commission to properly define the scope of products, and whether all are relevant to the objectives it seeks to achieve.
33. On **enforcement**, we are concerned that focusing, as suggested by the AMTF, on ex-officio investigations and high sanctions fuels antagonism in the chain. Such investigations often lead to lengthy procedures and litigation; and they tend to benefit larger operators with the resources to take legal action. Even in countries where these are in place, we see an increased use of mediation and out-of-court dispute resolution mechanisms as a means to solve disputes in a quick and efficient manner.
34. **Option 4**: as indicated above, **we oppose EU-level legislation on trading practices**.
35. We ask the Commission in its Impact Assessment to properly assess to what extent legislation based on minimum criteria will be more effective in addressing the alleged issue than existing national schemes and, will solve any alleged internal market problem. Member states will be allowed to maintain mechanisms that go beyond these minimum requirements, thus creating no uniform regulatory environment.
36. A **minimum harmonisation directive will not remove national differences**. On the contrary, it will allow member states to go beyond its minimum requirements and therefore contribute to further fragmentation of the single market. There is also a risk that this could give comfort to national regulatory practices that de facto discriminate against foreign operators, and infringe basic tenets of the single market. Some of these have been, or are currently being examined by the Commission as to their compatibility with EU law.

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<sup>8</sup> [Interim conditions on the supply of raw milk](#), German competition authorities, 13/03/2017

<sup>9</sup> [Tereos takes commitments under the French competition authority that it will open up its procurement contracts. Sugar beet growers will benefit from greater freedom to choose the sugar groups that they want to supply](#). French competition authority, 26/07/2017

37. We are concerned that it may, in fact, fuel protectionism and **make it more difficult for the European Commission to address national schemes and provisions that do not respect the basic rules of the single market or non-discrimination principles.**
38. Furthermore, we do not see **how regulation can act as an incentive for operators, including farmers, to join codes of conduct.** We would instead see a risk that, by imposing legislation, this may reduce, rather than increase, incentives for operators to open up to dialogue and develop or join codes of conduct, which can offer smaller players easier access to redress than regulation which can end up in lengthy court action.
39. We raise the **same concerns on enforcement as for option 3.**

### *Producer cooperation*

40. We see value in supporting producer cooperation as a means of addressing fragmentation in the agriculture sector, **but do not see value-sharing mechanisms as the appropriate tool to address issues related to producer organisation.** We are further concerned that, what was developed in the specific context of the sugar sector characterised by highly fragmented producers, and monopolistic structures in the sugar processing industry, cannot usefully be extended to all agriculture sectors. **Different agriculture sectors have different characteristics, requirements and needs, and therefore require different approaches.**
41. As a principle, in a functioning market economy, all parties should work to make a profit, based on their expectation of what the market will deliver. The share of commodities in the final consumer price of processed products is very low, and we therefore struggle to see how such a mechanism could deliver any real benefit for farmers.
42. We would again warn against establishing mechanisms in which farmers would be locked into long-term relationships which they cannot leave, as shown by the on-going competition enquiries in Germany and in France into the practices of dairies and sugar companies. (see paragraph 30).
43. We would instead support further reflection on:
- **helping producers to identify market opportunities earlier and adapt their production to new trends:** today, consumers increasingly value high-quality products and the fastest-growing segments are those that can offer added-value (e.g. local, organic, animal welfare, free-from) and for which consumers are prepared to pay a premium. Supply chain dialogue (e.g. through Interbranch Organisations or other forms of dialogue) can offer a framework where such information can be exchanged to help farmers maximise the value they add and receive;
  - **the processes that can be established to ensure that farmers are properly rewarded for specific added-value that consumers ask for:** in the vast majority of cases, retailers have no direct relationship with farmers and, therefore, unless specific schemes are in place, have no guarantee that the benefits of higher prices would accrue to farmers rather than be absorbed by intermediaries. In this respect, we see voluntary initiatives, such as dedicated supply chains or tripartite contracts, as a step in the right direction.

### *Market transparency*

44. **We support the status quo:** transparency can generate a better understanding of the contribution of each link in the food supply chain, and how prices are formed in an aggregated form, thus alleviating some of the misconceptions about the functioning of the supply chain, and

offering a strong basis for evidence-based policy making. It supports dialogue and mutual understanding among operators and can help farmers understand consumer demand better and what the market can offer. Our experience in market observatories has so far been positive in this respect. Consumers are also increasingly demanding more information about what they buy

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45. Transparency obligations should however be mindful of the following:

- information about the final consumer price of a processed product can help explain the process of value transmission but will do little to help farmers negotiate better prices with their direct buyer. The farm-gate and consumer prices are well-known. Producer prices depend on conditions in the market in which farmers operate; consumer prices depend on retail competition, the degree to which intermediaries add value or costs and retailers' own costs, such as investing and running stores, infrastructure, logistics, employment, taxes, quality assurance, etc.;
- price data is strategic and highly confidential; therefore data should be provided in a sufficiently aggregated form, through credible organisations, so as to ensure that their collection and publication does not encourage anti-competitive, coordinated or collusive behaviour in the market<sup>11</sup>;
- compliance costs and burdens on companies to provide the data should be kept to the minimum.

## C- Preliminary assessment of expected impacts

46. We are concerned that, nowhere in this IIA, is the consumer interest given any consideration, in particular how the suggested measures will impact on final consumer prices, choice and innovation. This is part of Treaty objectives as set out in articles 39(1)c TFEU and 101(3)c. We would ask the Commission to consider this, in appropriate detail in its Impact Assessment.

### *Likely economic impact*

47. As indicated above, strengthening farmers' position in the chain is a fundamental objective in helping build resilience at farm level and making the sector more attractive to younger generations of farmers.

48. We agree that **strengthening dialogue and exchange of good practice contributes to a better mutual understanding and the promotion of fair practice across Europe**; thereby laying down the foundations for "putting the food supply chain on a fairer, sounder and more transparent footing". Dialogue, across the supply chain, rather than systems locking farmers into long-term relationships with an intermediary, can help farmers understand better what consumers are willing to buy. It can also help farmers with innovative ideas to bring these to the market.

49. There is, however, no evidence that regulating alleged UTPs further at EU level can seriously "help increase disposable farm income an investment possibilities (...) thereby making the sector more resilient to price volatility"; "avoid the chilling effect of UTPs on the investment climate"; "help making the farming profession more attractive to newcomers"; "facilitate business activity in the EU Single Market". The IIA furthermore, offers no evidence of a widespread existence and significant impact of alleged UTPs on investment.

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<sup>10</sup> For more details, see [EuroCommerce contribution to the Agriculture markets task force on market transparency tools](#)

<sup>11</sup> See in particular the German competition authority milk sector enquiry (2012), which concluded that too high transparency could encourage companies to coordinate their pricing behaviour

50. Evidence from countries with extensive UTP legislation shows no such results, and in practice, **farmers tend overall to fare better in the countries and sectors where they have been able to organise better; not necessarily in the countries where trading practices are heavily regulated.** Furthermore, most cases have been brought by and tend to benefit to a greater extent large processors.
51. We would ask the Commission to analyse where the benefits of prohibiting certain practices will accrue (see paragraph 26). We would also ask the Commission to properly consider the impact of measures on consumer benefit (choice, innovation, and prices), which is a treaty objective.
52. In a context of uncertainty about future CAP funding, we would urge the Commission to start reflecting on the real levers for addressing these objectives, namely:
- **how to help farmers better organise** (this requires a culture change), within the framework of a functioning market economy and in full compliance with competition rules;
  - developing **risk management tools**, including supporting entrepreneurship, to help farmers build resilience in a highly uncertain and volatile environment;
  - how to help **supply chain dialogue**, so that producers can better understand and factor in, at an early stage of planning their production, changes in consumer demand;
  - how to ensure that more of the **added value** is retained at the farm level.

### *Likely social impact*

53. As stated above, there is no evidence that regulating alleged UTPs further at EU level can, on their own, realistically “make farming more viable”, “boost rural employment and inclusive growth”, “encourage balanced development of rural areas”. Evidence of member states with extensive legislation shows no such results. The social impact of mechanisms likely to increase prices for consumers to the benefit of large processors also needs to be examined in detail.

### *Likely environmental impact*

54. Retailers consider food waste and food losses as a cost, and have a long-standing record of taking action against food waste, including in their relations with suppliers. We are concerned that regulating alleged UTPs will undermine both the flexibility and innovation needed, and proven to effective, in addressing food waste. In fast-moving markets, **businesses need flexibility to adapt to changing market, seasonal, climate and cultural local circumstances.** **Supply chain dialogue** is a more efficient mechanism for helping **ensure that production matches demand**, both in terms of quality and volumes produced, and with that, to jointly reduce food waste.

## **D- Data Collection and Better Regulation Instruments**

55. As stated above, we ask the Commission to **base its policy making on evidence, and not emotions or subjective perceptions.** In particular, we would ask the Commission to provide objective evidence of the need to take action (see paragraphs 13 & 19).
56. From a better regulation perspective, we are concerned at the Commission conclusion that, in the CAP consultation, 96% of respondents agreeing that strengthening farmers’ position in the chain, is a green light to taking action on alleged UTPs. As emphasised throughout this document, addressing alleged Unfair Trading Practices is not the appropriate tool to help strengthening farmers’ position in the chain. Furthermore, responses to a public stakeholder consultation on a largely unrelated subject should not be considered as a representative sample, or as scientific evidence of an issue.

57. In 2016, following an in-depth analysis of national legal frameworks, the Commission concluded that at this stage, there was no evidence of the need to take action. On this basis, we would ask the Commission **to emphasise what has changed since the report was issued and provide the necessary compelling evidence justifying the need to reverse their decision.** A conclusion that “something needs to be seen to be done” to meet political pressure without any objective evidence of a problem, or of the efficacy of the solutions proposed, is not in line with the EU better regulation principles or good policy or administrative practice.
58. Representing a key sector in the food supply chain, we look forward to contributing to the stakeholder consultation, and taking part in future debate.
59. Finally, with regard to the process, launching the IIA on 25 July with a deadline of 22 August leaves stakeholders little time to consult and respond, and is not in line with the Commission’s Better Regulation guidelines which require that “stakeholders must be able to provide feedback on each (...) Inception Impact assessment” and that in setting time limits for stakeholder participation, “the Commission should provide time for planning and responses.”