

# Political Contestation under the Shadow of Hierarchy: European Intermodal Transport Standardization and the Threat of Mandatory Compliance

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## Abstract

In the public policy literature, there is a widespread belief that industry self-regulation will only take place—and lead to satisfactory results—if industry is faced with a credible threat of negative or positive sanctions through legislative or executive interventions. This paper challenges this view. It claims that this ‘shadow of hierarchy’ is neither a sufficient nor necessary condition. Instead it hypothesizes that under certain circumstances the shadow of hierarchy may actually undermine industry self-regulation by exposing it to political contestation. This hypothesis is applied to the case of private industry standardization in the intermodal transport sector.

## 1 Intro

In the public policy literature, there is a widespread assumption that industry self-regulation would only take place—and lead to satisfactory results—if industry was faced with a credible threat of negative or positive sanctions through legislative or executive decisions (Héritier & Lehmkuhl, 2008; Héritier & Eckert, 2008; OECD, 2003, 1999). The stronger public government’s instruments of control and coercion, it is argued, the better private governance would perform. Government would not necessarily use these instruments. Assuming that industry wants to prevent command and control regulation,

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Héritier and Eckert (2008) argue that the threat of wielding such instruments of control and coercion alone should be sufficient to prompt industry to engage in self-regulation. The more credible this ‘shadow of hierarchy,’<sup>1</sup> it is argued, the more likely it would be that industry resorted to voluntary action to preempt such measures. Particularly in political science principal-agent theory, upon which the shadow-of-hierarchy hypothesis is based, there is a strong assumption that hierarchical control represents the most effective way for governmental actors (principal) to improve the performance of the independent or self-regulators (agent) (Bendor, Glazer, & Hammond, 2001; McCubbins & Schwartz, 1984; Pollack, 1997; Rasmussen, 2005; Thatcher & Stone Sweet, 2002). The more rigorous the instruments of control over the agent’s performance, or the stronger the positive incentives of reward, the better the agent’s performance would be, the less agency shirking there would be and the better the policy would perform (McCubbins, Noll, & Weingast, 1987; Pollack, 1997).

This paper challenges this view. It claims that where there are multiple and heterogeneous agents and principals, the shadow of hierarchy undermines industry self-regulation by exposing it to political contestation. However, this should not be mistaken as an argument for *laissez faire*. Governmental actors may very well have an important role to play in industry self-regulation but the threat of hierarchical intervention is neither a sufficient nor necessary condition for self-regulation to succeed.

## 2 Where is the Politics?

An obvious angle attack against Héritier’s and Eckert’s (2008) shadow-of-hierarchy hypothesis is presented by the fact that in the context of industry self-regulation there generally is no formal act of top-down delegation of regulatory authority from governmental actors and that the principal-agent framework upon which this hypothesis is based is therefore not applicable. Héritier and Eckert (2008, p. 114), however, convincingly argue that the framework is applicable nonetheless because, in theory, public actors could take over and prohibit private self-regulation. Industry self-regulation, they argue, thus results from an act of informal delegation—the tacit or explicit tolerance of self-regulation by industry (agent) on part of public actors (principal) (Héritier & Eckert, 2008, p. 114). Governmental actors, most often the European Commission, have stressed their intention to retain control as principal over regulatory processes (Héritier & Lehmkuhl, 2008, p. 5).

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<sup>1</sup>This notion refers to Scharpf (1997), who used the term ‘hierarchy’ to describe the legislative decisions and executive decisions that steer democratic governmental action.

Therefore, I will concentrate on different weaknesses of the shadow-of-hierarchy argument.<sup>2</sup>

My main criticism against the shadow-of-hierarchy hypothesis is that it neglects the political context in which delegation and self-regulation take place. It is too functionalist in that it simply assumes that delegation and self-regulation take place for it leads to superior governance solutions.

The insensitivity to the political context is closely linked to the assumption that the principal and the agent are unitary actors, an assumption that is quite common in the EU focused principal-agent literature (Lyne, Nielson, & Tierny, 2006; Pollack, 2006). In practice, however, in pluralistic political systems grants of delegation are always by multiple principals. Both the delegation and the subsequent use of hierarchical instruments of control is subjected to checks and balances and the participation of a wide range of principals, such as parliaments and the courts (Bendor et al., 2001, 244f.). In the same way, industry cannot be considered to be a unitary ‘agent’ for it is made up of a multitude of firms with heterogeneous interests.

Héritier and Eckert acknowledge this weakness of the principle-agent framework but do not seem to provide sufficient attention to it. They point out that agent may exploit situations where there are multiple principals by cooperating with the most lenient principal—i.e. venue shopping (Héritier & Eckert, 2008, p. 118). While this may be true, this is far from the only implication from the existence of multiple principals and agents, as is argued below.

This over-simplification has two important consequences for the analysis of public-private governance relations. First, it discourages the researcher to look for the potential influence of actors and institutions that stand outside the principal-agent relationship. Individual principals and agents may both try to strengthen their position in this arrangement by forging strategic alliances with third-parties. These alliances can be horizontal—among principals or among agents alone—as well as vertically bottom-up (capture) and top-down between individual principals and agents. The over-simplification distracts the analysts’ attention to one of the core elements of public politics, which is the strategic inclusion and exclusion, mobilization and de-mobilization of political allies and enemies.

Secondly, it neglects the fact that the multiplicity and heterogeneity of

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<sup>2</sup>The shadow-of-hierarchy assumption is quite wide spread and not unique to the political science principal-agent literature alone. But since the principal-agent theory constitutes the dominant theoretical framework in much of the public policy literature that deals with issues of self-regulation, I will challenge this assumption within the context of that framework. However, this argument of this paper does not depend on the principal-agent framework. The central argument also holds outside this framework.

principals and agents has an important, constraining impact on collective decision-making at the public as well as the private level. At the public level, a principal may not be able to delegate regulatory authority to an agent and subsequently control the performance of that agent through hierarchical instruments without the formal consent or scrutiny of other principals, such as parliaments, courts etc. Such consensus, however, may be difficult to achieve as each of these actors may represent have—and represent—different interests. At the private level, too, collective decision-making among directly competing firms (agents) on self-regulatory arrangements tends to be quite difficult for there usually are several self-regulatory measures through which a given public objective can be achieved. With heterogeneous preferences and opportunities for hold out and other bargaining strategies, self-regulation like public policy-making can fail, too, because firms cannot reach agreement on a common set of voluntary rules and standards.

This is grossly underestimated by the shadow-of-hierarchy literature. It seems to assume that self-regulation is merely a question of goodwill and ignores the fact that private firms' primary interest is profit-maximization and not necessarily the prevention of regulatory interventions by public actors. When a given self-regulatory arrangement threatens to weaken a firm's market position, it will seek to prevent self-regulation, even if that meant public intervention. And when firms participate in self-regulatory arrangements they will do so to help increase the size of their industry or consolidate their market position and to make sure that their competitors do not use the process to weaken it. Just as firms seek to influence public policy-making processes to shape the formal rules that govern their market, firms participate in self-regulation to make sure that the informal rules that govern their market have a positive effect on their business.

The looming shadow of hierarchy may simply raise the stakes of the game, which is unlikely to make it easier for private firms to reach agreement on the precise nature of self-regulation. To the contrary, I will argue, that it merely exacerbates bargaining problems. First, raised stakes of the game make it more profitable for firms that have less to lose from hierarchical intervention and less to gain from self-regulation to hold out agreement against firms that have more to gain from self-regulation.

## **2.1 Multiplication of veto players**

Secondly, the looming shadow of hierarchy is likely to increase the number and heterogeneity of participants and thus potential veto players. This undermines one of the main facilitating factors: Exclusivity. A significant number of firms tend to be excluded from the definition of self-regulatory arrangements.

Participants will actively seek to exclude potential veto players or outsiders either cannot afford to participate because they do not have the financial means or deliberately choose not to participate out of rational ignorance, hoping that the definition process will not succeed or that the eventual cost of adapting their business to the resulting self-regulatory measures will not exceed the cost of participating in the process to shape the measures according to their own preferences (Quelin, Abdessemed, Bonardi, & Durand, 2001, p. 7). Therefore, the definition of self-regulatory arrangements tends to take place in relatively small and homogeneous groups of firms. Under these circumstances mutually-acceptable compromises are easier to achieve as the participant's preferences tend to be more compatible. Firms will realize their mutual dependence and replace strategic bargaining with more deliberative forms of interaction (Porter, 1979, p. 215).

Under the shadow of hierarchy many previously not participating firms may no longer be able to afford to stay out. They will actively push into the group in order to make sure that the resulting self-regulatory measures are in line with their preferences. The increased number and heterogeneity of participants, however, increases bargaining costs and reduces the scope for a mutually acceptable agreement on common self-regulatory measures.

Under these circumstances, the looming shadow of hierarchy should be expected to undermine rather than to promote self-regulation. By raising the stakes and increasing the number and heterogeneity of firms involved in the definition of self-regulatory measures, the shadow of hierarchy exacerbates bargaining problems. Industry will be less likely to agree to common self-regulatory measures. Therefore, I hypothesize:

**Hypothesis 1** *Government envisaging first legislative steps or the tightening of existing legislation exacerbates private decision-making problems and leads to the failure of self-regulation.*

This is diametrically opposed to the shadow-of-hierarchy hypothesis that "Government envisaging first legislative steps or the tightening of existing legislation prompts self-regulation by industry" (Héritier & Eckert, 2008, p. 116).

The conditions under which the shadow of hierarchy should undermine private self-regulations include the following:

1. The objective of self-regulation can be achieved through several self-regulatory measures but firms need to agree to a single measure for self-regulation to succeed.
2. Firms preferences diverge as to what measure should be chosen. Hold out strategies are possible.

## 2.2 Multiplication of veto points

The third implication of shadow of hierarchy on private decision-making on self-regulatory measures is that it opens up further avenues of appeal to the opponents of self-regulation. In pluralist political systems, the execution of the threat of sanctioning legislation or executive decisions as well as the use of instruments of control over self-regulators, as any legislative or executive decision, conventionally requires the consent of—or is subjected to the scrutiny of—other public actors, such as parliaments and courts. The multiplicity of principals’—to stay within the principal-agent language—provides opponents of a particular self-regulatory arrangement or self-regulation in general with effective veto points. Institutions such as parliaments and courts tend to be a lot more open and accessible to outsiders than the exclusive circles of firms monopolizing the development of self-regulatory measures. Particularly where public institutions (principals) have retained authority and formal instruments of public control over the performance of private self-regulators, appealing to different principals to use these instruments to prevent the adoption of a given self-regulatory measure offers a good strategy for the opponents of self-regulation.

**Hypothesis 2** *The more rigorous governmental actors’ instruments of control over the self-regulators’ performance, the more likely self-regulation is going to be undermined through political contestation.*

Again, this hypothesis, too, predicts the opposite of what is predicted by the shadow-of-hierarchy hypothesis. H  ritier and Eckert (2008, p. 117) suggest that the more rigorous the instruments of control over the self-regulator’s performance, the better the latter’s performance will be.

In the following section, I will apply and empirically assess these hypotheses developed above for the case of European intermodal transport standardization. Technical standardization is often considered as one of the most successful cases of industry self-regulation. In intermodal transport, however, industry failed to agree to a common European loading unit/container standard. Therefore, the Commission threatened to intervene if industry did not finally develop a common standard. This case is quite favorable to the shadow-of-hierarchy theory. First, industry perceived the Commission’s threat to be very credible. Secondly, the Commission, European Parliament and Council had a comparatively high degree of control over the standardization process. According to the shadow-of-hierarchy theory both should make the threatening to intervene an effective strategy to prompt self-regulation.

## 3 European Intermodal Transport Standardization

### 3.1 Lack of Common Standards

The international success story of containerization, which in the words of Levinson (2006), “made the world smaller and the world economy bigger,” began in the United States (US). With the help of combined scale economies and network effects, its domestic shipping container standard quickly gained currency in domestic as well as international sea transport. By the time the International Standardization Organization (ISO) started to look at the issue in 1968, the American standard had already become the *de facto* standard for international deep sea transport. Therefore, the ISO delegates had little choice but to adopt the American standard as the international *de jure* standard.<sup>3</sup>

The international standard, however, did not take account of the standardization work on pallets that had already been carried out in 1947. The ISO container was incompatible with the standard pallets commonly used in Europe. As illustrated by Figure 1, the ISO Series 1 containers sacrifice valuable cargo space, which also increases the risk of pallets rattling around (Freudmann, September 15, 1998). Although pallets would be relatively inexpensive to replace, assembly lines and warehouses across Europe were optimized for the handling of pallets. Adapting these to the international container standard would be prohibitively expensive. Therefore, the ISO container never gained any significant market shares in intra-European transport.

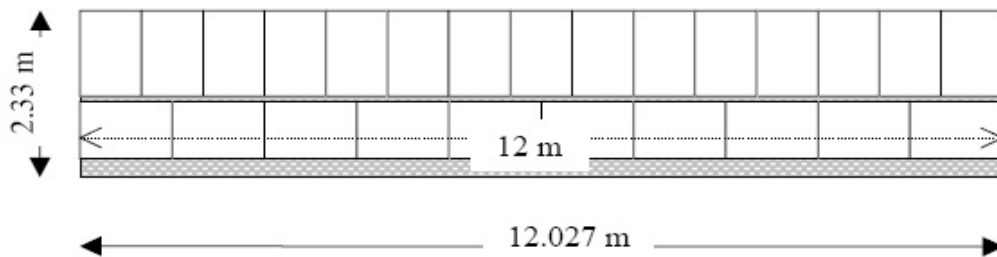


Figure 1: ISO 40 foot container loaded with pallets  
*Source:* European Commission (EC, 2003, p. 15)

Therefore, the European transport industry developed a wide range of alternative loading units for intra-European transport. Instead of agreeing

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<sup>3</sup>The international container standard specified the dimensions, handling equipment, terminology, ratings and identification markings of containers. Four different containers of 10, 20, 30 and 40 feet were adopted.

to a single common standard, however, industry developed multiple, mostly incompatible loading units. Each mode of transport—road, rail, short sea and inland waterway—developed its own loading units based on its own technical preferences, without paying sufficient attention to loss of efficiency that this meant for the entire transport system as a whole. This situation resembles the ‘tragedy of the commons’, where actors consume the public good in such a way that leaves them worse off than if they would have taken the repercussions of their actions on each other into account. If individual actors were to change their preferred transport unit for a common standard but the rest of the world did not, they would incur all the cost of having to adapt to the common standard but would not see any benefit.

While the sea and inland waterway transport operators were interested in stack-ability, for instance, road haulers sought to minimize the tare weight of loading units in order to reduce fuel consumption. Therefore, they favor light-build loading units and were not interested in stack-ability.<sup>4</sup> Deep-sea transport operators, however, did not prefer pallet-wide containers because all modern containers vessels are nowadays fitted with cellular frames that increases load stability at sea and accelerates the (dis)charging process in port. The rail transport operators had no interest in stack-ability either but required lift-able loading units.

Operators from every mode, however, shared the interest to minimize labor and handling costs by fully exploiting the legal limits on size and payload of loading units. These limits, however, used to differ across modes and across countries.<sup>5</sup> The size of loading units is crucial. The marginal cost of transporting and handling larger loading units tends to be minimal. In container terminals, for instance, the price charged per crane lift generally does not vary with the size of the loading unit. Therefore, deep-sea transport operators have progressively increased the height of their loading units as they can neither increase their width nor length.<sup>6</sup> Also labor costs, the highest cost factor in road transport, do not increase proportionally with the size of the loading unit. Larger units are therefore always tend to be more economical. Table 1 provides an overview of each modes technical preferences.

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<sup>4</sup>This led to the development of the swap body. This un-stackable loading unit owes its name to four up-folding legs that make it possible to ‘swap’ them from one trailer to another, or to leave them at a loading bay, without the help of a crane.

<sup>5</sup>Because of German regulations the transport industry developed short (7.15 meter) loading units, based on the commonly used road train (lorry + trailer). The French transport industry, by contrast, developed longer (12 meter) loading units, based on the length of the predominant semi-trailer. This difference also had a direct impact on European standardization.

<sup>6</sup>This led to the development of the so-called ‘high-cube’ containers



Table 1: Modal preferences

Mode	Stack-ability	Top-lift-ability	Low tare weight	Pallet-width	High cube
Road			✓	✓	✓
Rail				✓	
Deep-sea	✓	✓			✓
Inland waterways	✓	✓			
Combined transport				✓	✓

The heterogeneity of loading units and the lack of common standards had—and still has—devastating consequences for the European economy and environment. First, it significantly increases transportation costs.<sup>7</sup> The lack of interoperability between systems often requires the reloading of freight from one loading unit to another, whenever a national or modal boundary are crossed, thus defeating the purpose of containerization. Second, the excessive heterogeneity of loading units undermined automation, thus jeopardizing potential efficiency increases even further. Third, the lack of standardization significantly increases the number of empty back-hauls, exacerbating the problem of traffic congestion. Europe’s trucks run empty 35~% to 40~% of the time (Freudmann, October 21, 1999). Fourth, it undermines the integration of different transport networks, undermining the utilization of unused capacities of the rail, inland waterway, and short-sea networks.<sup>8</sup> Because of the high frictional costs involved in integrating different modes of transport, a lot of freight that could be transported more efficiently by alternative modes never leaves the road. Therefore, 72~% of all inland freight transport is still carried out by road (Eurostat, 2007, p. 68). This does not only lead to a more road congestion but also increases the number of accidents and environmental pollution.<sup>9</sup>

<sup>7</sup>The European transport industry accounts for 7 % of the EU’s gross national product (GNP), 7 % of all jobs, which is quite large considering that it is merely meant to be an intermediary (Eurostat, 2007).

<sup>8</sup>Air and pipeline transport also commonly regarded to constitute distinct modes of transport. Therefore, they are deliberately excluded from this case study. Because they either require very specialized loading units (round containers in the case of air transport) or no loading units at all (pipeline transport) they generally do not play a role in intermodal transport standardization.

<sup>9</sup>The transport sector accounts for 30 % of the Community’s energy consumption and the maintenance and adaption of the transport infrastructure ties 40 % of member states’ public investment (Eurostat, 2007).

### 3.2 Self-regulation

By the mid-1990s, a group of firms that had specialized in the combination of rail and road transport to push transportation costs—and therefore became known as the combined transport sector—decided to do something about lack of common standards. As the transfer of freight between different modes was at the core of their business, the combined transport operators had a natural interest in intermodal interoperability. Therefore, they started to meet in the Technical Committee for “Swap bodies for combined goods transport” (TC119) of the Comité européen de Normalisation (CEN) to start working on the development of common standards.

Operators from other modes did not participate in TC119. Deep-sea transport had traditionally focused their attention on the ISO’s TC104. Inland waterway transport, in turn, was generally not concerned with technical standardization. Moreover, neither the firms themselves, nor their industry associations have the financial resources, expertise nor staff to do participate in formal standardization processes, an industry representative argued (Interview B14, 2009). Only the short-sea shipping operators occasionally participated, particularly in the Dutch and British shadow committees (Interview B9, 2009). Therefore, the combined transport community also took over the chair of the committee. This provided the combined transport operators with a strategic advantage. While other modal players were only indirectly represented through their national shadow committees, combined transport was the only sub-sector that was directly represented (Interview B4, 2009; Interview B7, 2009; Interview B8, 2009).

By May 1997, the TC119 participants came to a preliminary agreement on the basic parameters of an intermodal loading unit (see Deutsche Verkehrszeitung [DVZ], 1997). The standard clearly reflected TC119’s bias toward combined transport operators. Despite its top-liftability and stackability, which is essential in both sea and inland waterway transport, it is still essentially swap bodies, optimized for land-based combined road-rail transport. It is still relatively light and while its internal width is optimized for pallet accommodation, its external width is too large for most cellular container ships and barges.

Despite this bias, the TC119’s standard might have very well become the *de facto* standard for intra-European transport just like the international container standard that was strongly biased toward the interests of the American transport industry became the *de facto* standard for international goods transport. The market deployment of loading units is affected by a combination of network effects and scale economies, which may trigger a positive feedback loop until the entire market has tipped toward one standard

or another.

### 3.3 Delegation and the Shadow of Hierarchy

During the 1990s, the European Commission's Directorate-General for Energy and Transport (DG TREN) became increasingly concerned about the lack of common standards in the European transport industry. The 1997 Communication on Intermodality and Intermodal Freight Transport, for instance, suggests that "unless standards are harmonized . . . the growing complexity of logistics requirements and the growth in international trade will reinforce a tendency for transport modes to diverge, (and) the use of specialized containers will increase the occurrence of their empty returns" (European Commission [EC], 1997, p. 8).<sup>10</sup> In its 2001 White Paper, the Commission estimated that by 2010 the massively growing volume of freight transport would soon outstrip the capacity of the existing and planned transport infrastructure.<sup>11</sup> To solve this problem the Commission proposed promote intermodalism, which suggests that by combining multiple modes of transport—air, rail, road, inland waterways, short and deep-sea—it is possible to take advantage of each mode's inherent economies. Intermodalism was supposed to unleash unused capacities, relieve pressure on the existing infrastructure, reduce carbon emissions, traffic jams and accidents (European Commission [EC], 1995). Intermodalism became the dominant policy paradigm during the coming years.

Therefore, the DG TREN also supported the work of the TC119. In 1998, it subsidized a pre-normative research and development (R&D) project, which was formally meant to support the development of a European intermodal loading unit. In return, the standard-setters provided the Commission with the market information and technical expertise it required for its further policy interventions.

In 2003, however, the Commission decided to put more weight behind its demands for a common European intermodal loading unit and published a formal proposal to the European Parliament and the European Council to provide CEN with a mandate to define a European Intermodal Loading Unit (EILU) (European Commission [EC], 2003). The proposed mandate gave the Commission, Council and Parliament a considerable degree of control over the standardization process. The proposal was based on the *New Approach*, a legislative innovation from 1985 (European Council, 1985) that allowed the

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<sup>10</sup>It is estimated that 35 % to 40 % of all loading units are transported empty (Freudmann, October 21, 1999).

<sup>11</sup>It was predicted that the volume of freight transport would grow by 38 % by 2010, road freight transport would increase by 50 % over its 1998 level, which translates into an additional 156 billion ton-kilometers (European Commission [EC], 2001, p. 11).

European legislators to take advantage of the superior technical expertise of private standard-setters while specifying the legal limits within which industry could develop the desired standard. According to the *New Approach*, the European Parliament and Council were supposed to define the “essential requirements,” such as levels of health and safety protection etc., of the standard before delegating the task to transpose these requirements into technical standard to one of the official standards-writing organizations of the European Union (EU). According to the shadow-of-hierarchy literature, which suggests that the more formal instruments of control over the performance of self-regulators the better the latter will perform, the Commission’s intervention should therefore prompt industry to finally adopt a common intermodal loading unit standard.

For the essential requirements the Commission proposed to follow the specifications developed by the combined transport community in TC119.

To promote its the development and deployment, however, the Commission backed up its proposal with the threat to rely on more coercive instruments if it was not satisfied with the outcome of the standardization process. On the one hand, there was the implicit threat that compliance with the EILU standard would be made mandatory and that other types of loading units—such as swap bodies, semi-trailers and containers—would have to comply with the essential requirements defined in the proposal too. According to the proposed Directive compliance was going to remain voluntary at first.<sup>12</sup> Very soon, however, rumors emerged that other types of loading units would only be allowed to remain on the market for a transition period of several years. The Commission actively nourished these speculations by refusing to clarify its future strategy. In a consultation paper, for instance, the Commission had formulated the expectation that the old loading units would gradually disappear from the market during the following five to fifteen years (European Commission, 2002), without specifying whether this was going to happen through regulatory intervention or market forces alone. At an open forum organized by CEN, the Commission skillfully ignored all questions on this issue (CEN, 2003; Interview B8, 2009).

On the other hand, it was widely expected that the market deployment of

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<sup>12</sup>It is clearly stated in the proposal that all types of loading units, including both swap bodies and ISO Series 1 containers, can remain on the market as long as they comply with the safety and security norms defined in the international Convention for Safe Containers (1972) (Article 2(b) and Annex I), of which all EU member states are signatories. While the Convention for Safe Containers already applies to ISO Series 1 containers, swap bodies have been so far been exempted. Only the new EILU, however, would *additionally* have to comply with the dimensions and handling features specified in the proposed Directive (Article 2(c) and Annex II).

the EILU standard would be financially subsidized by making eligibility to Marco Polo funding conditional on the use of and compliance with the EILUs standard. Moreover, it was expected that Member States might be allowed to provide tax incentives and favor the EILU standard in public procurement (Deutsche Verkehrszeitung, 2004).

The threat of future negative or positive sanctions was reinforced by the fact that DG TREN had gained the reputation of superimposing legislation on the industry.<sup>13</sup> Moreover, the Commission had accumulated broad competences in transport policy,<sup>14</sup> which it might use to propose such measures. Therefore, industry perceived the shadow of hierarchy to be very real and credible.

### 3.4 Political contestation

With the combined proposal for a standardization mandate and the threat of further regulatory intervention, the Commission expected to accelerate the standardization process. Also the shadow-of-hierarchy would predict self-regulation—i.e. standardization—to succeed. Moreover, standardization seemed relatively straight forward. All that CEN had to do was to take the specifications developed by the combined transport community in TC119 and adopt these as formal technical standards. In practice, however, the Commission exposed the progress on common intermodal loading units that was already achieved by the combined transport operators to political contestation by drawing further veto players and veto points into the standardization process.

#### 3.4.1 Multiplication of veto players

In the face of potential positive and negative regulatory incentives to comply with the EILU standard, many actors that were not previously involved in the standardization process suddenly started to participate. If the adopted standard ever was to become mandatory actors wanted to make sure that the standard was aligned with their own technical preferences or simply to prevent it from being adopted. Actors that had previously shied away

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<sup>13</sup>According to a Commission employee, DG TREN had lost a lot of credit over the years because of its top-down approach to policy making (Interview B2, 2009).

<sup>14</sup>EU Transport policy dates back to the 1958 Treaty of Rome (Article 3f and Title V). Over the years, the Commission has gained a considerable amount of competences in this domain. Article 71(1) provides a legal basis for measures to improve transport safety, an area where it shares jurisdiction with the Member States. Article 80(2) also provides a legal basis to include the maritime sector.

from the high costs of participating, such as the road, short-sea and inland waterways operators, joined the standardization process. This obviously led to a significant increase in the number and heterogeneity of participants (see Table 1). There no longer was a consensus on the characteristics of intermodal loading units in the TC119. Therefore, CEN never called for a vote on the issue. It was clear that there no longer was a sufficient majority within.

Outside of CEN, the opponents of the EILU standard also used the public-decision making process—i.e. the co-decision procedure—that was triggered by the European Commission’s New-Approach proposal to raise their voice. The public decision-making process turned out to be much more accessible than the private decision-making process within CEN’s TC119. Unlike the latter, the former did not require significant financial commitments and technical expertise from the opponents of the EILUs standard. A representative of the European Barge Union, for instance, suggested that the inland-waterway operators would neither have the time, resources nor expertise to participate in the standardization process (Interview B14, 2009). In the political debate, however, the operators were able to play an active and influential role through the European Barge Union.

The public decision-making process provided the EILU opponents with an opportunity to challenge the proposed standard on two levels. First, they tried to undermine the legitimacy of the TC119 community and the Commission’s proposal by emphasizing the redistributive implications of the proposed standards redistributive implications of technical standardization and by pointing out the weaknesses and inconsistencies in the TC119 community’s argumentation to justify their technical choices. The European Barge Union, for instance, argued that because EILUs are wider than ISO containers many barges will only be able to place three instead of four loading units latter next to each other. This would mean a loss of loading capacity of 25~%. While this problem could be circumvented by adapting the design of barges, as suggested by the combined transport community, the canal transport operators argued that the EILUs were still too high for most bridges, ports and terminals. Therefore, the introduction of the EILUs would not only require massive private but also public investments (CEN, 2003; European Barge Union [EBU], 2004, pp. 19–21).

The deep-sea shipping operators, to mention a second example, pointed out another important weakness in the TC119 community’s argumentation. The latter had consistently argued that the EILU cannot be compatible with both international containers as well as the pallets used in Europe. And since the latter were much more important in intra-European transport, the EILU should sacrifice container compatibility. A representative of the deep sea shipper NEN-Norfolk line, however, pointed out that there was a way to

achieve both by using the thin-wall technology developed by the container manufacturer GE SeaCo . This was a significant blow to the credibility of the combined transport community, which eventually lost control of the issue.

Secondly, the EILU opponents used the debate to launch a counter-narrative—co-modalism—against the dominant policy paradigm of inter-modalism upon which the EILU proposal was based. In contrast to inter-modalism, which implied the policy objective of modal shift and the forcing freight off the road, co-modalism has the objective maximizing the efficiency of each mode of transport in its own right. The underlying logic of co-modality is that once each mode is allowed to achieve its full potential, freight traffic would automatically shift to the most efficient combination of modes. Instead of *pushing* freight traffic to what is perceived to be the most efficient combination of modes of transport, the new policy objective is to rely on the market *pull* of the mode that turns out to be the most efficient in practice (Interview B3, 2009; Interview B5, 2009). In contrast to intermodalism, co-modalism does not provide a direct role for government intervention. The idea of co-modalism soon won many adherents. The road transport and shipping operators used this counter narrative to call for a revision of Directive 96/53/EC on vehicle weights and dimensions to permit alternatives larger and longer loading units, such as the 45 foot containers and longer road-trains—the giga-liners—in intra-European transport (Brookes, 2006; Stares, 2006).<sup>15</sup>

As a result of this debate, the combined transport community lost control of the issue. It could no longer shape the terms nor the locus of the debate.

### 3.4.2 Multiplication of veto points

While the shadow of hierarchy raised the stakes of the game and thereby multiplied the number of actors involved, the formal delegation of regulatory authority via the *New Approach* also caused a multiplication of veto points. The *New Approach* procedure required the European Parliament and the Council to agree to the essential requirements of the unit before the standardization process could be formally delegated to CEN. This provided the EILU opponents with two extra veto points.

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<sup>15</sup>The 45 foot container did not comply with Directive 96/53/EC because it exceeded the allowed dimensions. The Directive stipulates 16,650 mm as the maximum permissible length for vehicles on Europe's roads, with a maximum load length of 13,600 mm. The 45 foot container, however, is 13,720 meters long, exceeding the limit by no more than 80 mm. To give industry a chance to slowly withdraw the 45 footers from the market, a 'grandfather clause' had been included into the Directive (Article 4(6)). This clause allowed Member States to permit the container on their roads for a transition period of ten years after September 1997.

Road haulers and deep-sea shipping quickly managed to convince the Council not to support the proposal. After only one round of discussions, the Dutch Council presidency decided that the proposal did not have sufficient support and removed it from the agenda (Interview B3, 2009; Interview B5, 2009).

The European Parliament (EP) initially endorsed the Commission's proposal but the deep-sea shipping operators, against the suggestion of the TC119, managed to convince the parliament to decrease the EILU's external width (from 2,550 mm to 2,500 mm), so that it would fit into the cellular frame of container vessels (European Parliament [EP], 2004).<sup>16</sup>

Eventually, even the Commission itself was transformed into another veto point. During the debate individual members of DG TREN embraced the counter narrative of co-modalism to advance their own agenda and position within the DG. Co-modalism was increasingly perceived by many in the Commission as a more pragmatic alternative to intermodalism. After a re-shuffling of units and responsibilities within DG TREN in consequence of the appointment of a new Commission, the proponents of Commission were suddenly stronger than the proponents of intermodalism (Interview B2, 2009). On March 25, 2008 the Commission finally withdraw the EILU proposal (Dahm, 2009; Wahl, January 23, 2009). Moreover, it the new DG TREN 'reinterpreted' the relevant clauses of the Directive on dimensions and weights (European Commission [EC], 2006) and permitted the 45 foot container. The Maritime Industries Forum had long pushed for this step (Brookes, 2006; Stares, 2006). This lead to the paradoxical situation where the shadow of hierarchy intended to prompt to stricter private self-regulation actually lead to weaker public regulatory standards.

## 4 Conclusion

This paper has shown empirically that the looming shadow of hierarchy is neither a sufficient nor necessary condition for industry self-regulation take place and to lead to desirable results. Any common standard would be better than no common standard. This paper has also demonstrated that the looming shadow of hierarchy may even undermine self-regulation by exposing it to political contestation. Both Hypothesis 1 and 2 were confirmed by the case study. These hypotheses argument should also apply to other cases of self-regulation and not just technical standardization, provided that the following conditions are met.

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<sup>16</sup>In its amended proposal from 2004, the Commission changed the width back to 2,550 mm (European Commission [EC], 2004).



1. Neither industry nor government can be conflated into one unitary actor.
2. The objective of self-regulation can be achieved through several self-regulatory measures but firms need to agree to a single measure for self-regulation to succeed.
3. Firms preferences diverge as to what measure should be chosen. Hold out strategies are possible.

In the specific case of technical standardization, this paper may explain why the *New Approach* that was intended facilitate the removal of technical barriers to trade and thereby speed up the completion of the Single Market. All in all, the *New Approach* could not be successfully used in more than around 30 cases. Technical standardization simply turned out to be not much faster than conventional legislative decision-making.

As argued above, however, this should not be mistaken as an argument for *laissez faire*. Elsewhere I have argued that governmental actors may well have a considerable role to play in promoting industry self-regulation by facilitating collective action and mediating bargaining problems among firms. Furthermore, this paper does not argue that political contestation was undesirable either. Where self-regulation may lead to negative effects for society of the environment, political contestation obviously has to be regarded as highly desirable. The important issue in this paper, however, was whether this result was intended by the governmental intervention.

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