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The many facets of culture in digital games policy: the EU dimension

ABSTRACT

State supports for digital games production within the European Union are subject to State aid rules, which are ostensibly justified on cultural grounds under the terms of the treaties of the European Union. So far, there are few decisions granting approval by the European Commission on aid regimes for video games (or digital games) in contrast to the extensive number of decisions for other audio-visual forms, such as film. The Commission's policies towards digital games, as can be gleaned from an analysis of the current corpus of decisions, illustrates a complex and pragmatic approach to the digital games sector, one that considers games to be cultural, but not quite as cultural as film. This article places the Commission decisions into a wider context of discourses on the cultural and creative industries and illustrates the significance of EU State aid policy to the digital games sector. The study also emphasises the importance of seeing State aid policy as a form of cultural policy and it highlights how culture as a concept may operate as an empty cipher to be filled with meaning.

1. INTRODUCTION: CULTURAL POLICIES AND THE DIGITAL GAMES INDUSTRY

The digital games industry is a relevant sector of the globalised media economy. Issues of scale, at the regional, the national, and the supranational scale, also continue to be important within this globalised digital games sector. This article focuses on state supports for the cultural production of digital games or videogames within a national/regional and supranational context, taking policy within the European Union ("EU") as its focus. Supports in the forms of tax credits/incentives are common within other creative industries, such as the film industries, with Olsberg SPI cultural consultants identifying over 90 such incentives (Olsberg SPI, 2022). They are less common in an EU context, with digital games incentives which have been approved by the European Commission (Commission) identified in a number of EU member states, including France, Italy, Denmark, Belgium, and certain regions of Germany and Ireland. In addition, schemes operate in other jurisdictions which have not come under the Commission's requirements for notification. These are not considered in

this article as they have not required approval by the Commission under the particular terms of EU law considered here.

As such incentives are considered a form of State aid, that is, they operate as an aid from the state to incentivise particular forms of industry within a national or regional boundary, they are deemed incompatible with the core tenets of the European treaties. Incentives may distort trade within the EU. Article 107 (1) (ex. Article 87 of the Treaty of the Functioning of the European Union (“TFEU”)), which holds that:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Therefore, such aids require approval from the Commission, either under the general block exemption regime or under cultural or industrial grounds (on State aid, law see Craig & De Burca, 2020; Piernas López, 2015). This paper looks at EU policy for cultural incentives approved under Article 107(3)(d) TFEU, which allows for approval of “aid for a cultural rationale”. This study interrogates the complexity of the rationalisations for cultural policies that support regional/national production in the context of an industry that is understood as global, and upon cultural grounds for a sector that tends to be framed within a creative industries or industrial discourse. In this way, the understanding of the operation of the digital games industry as a form of culture unravels key assumptions around national culture, national policies, and the very understanding of the sector as part of the cultural fabric of society.

While there is extensive discourse on the significance of digital games as a representational part of the cultural and creative industries, an interrogation of how digital games may be understood as a cultural form is underexplored in policy discourse. This is significant because the policy decisions that serve to support digital games production operate to shape the form, nature, agents, and ecology of game making, distribution and engagement. This article interrogates how the consideration of games as a cultural artefact operates within funding policy discourses, particularly for the provision of tax incentives for production. Specifically, this study interrogates how this policy is instrumentalised within both national discourses and the policy discourses of the EU, to the extent that the conception of culture can be seen as an empty cipher that is subject to a cacophony of meanings.

Policy definitions of what constitutes a game need to be taken seriously. Much of the literature on videogames/digital games addresses the cultural and social significance of the games industry and takes seriously the structural contexts within which games are produced and played. Where this article identifies

a gap is in the analysis of policy understandings, at both national and EU level, of the cultural nature of digital games, more specifically within the rationalisations for state aids for cultural production. The distinctions identifiable in the development of tax incentives for film and video games shed light on the motivations and ideologies underpinning such tax incentive policies.

This article therefore explicitly considers the cultural aspect of games as identified and defined through policy rationales for State aids, as inherently part of the industrial understanding of games, rather than oppositional thereto. The cultural and industrial/economic justifications for the introduction of support measures for digital games development are not discrete but constitutive in a continuously evolving process. The games as culture debates in EU policy circles is an important discussion to unravel precisely because it acts as a way of thinking about the role of policy towards culture more broadly, and the uneasy and reductive industry/culture debates. Culture and economic rationales for policy must not be seen as distinct, but as co-constituted. Cultural goals are based on economic rationales: for example, goals that seem cultural or social are in fact driven by political goals. There is merit in identifying and unravelling these goals. However, putting such goals into distinct containers fails to understand their co-dependent nature.

To develop these key arguments, this article interrogates the body of Commission's decisions approving State aid regimes for games under a "cultural rationale". Before carrying out analysis of these decisions, it examines the literature in the context of understanding of games as both a form of culture and as a valuable global industrial sector. In particular, this study suggests that State aid decisions by the Commission are a form of cultural policy and should be examined in this light. In order to identify some of the key drivers of State aid policy development within the framework of State aid as a form of *cultural policy*, the study employs a critical discourse analysis methodology underpinned by law and political economy theories. This serves the aim of unravelling the key drivers of policy from a Commission perspective. In essence, the policy rationales driving the Commission's approval of digital games tax incentives or credits are multiple, including cultural, political, and economic drivers. The terms of the legal requirements of EU law as contained in Article 107(3)(d) TFEU require that aid be for a cultural rationale. However, pragmatically, the understanding of what might constitute cultural aid for the digital games sector is driven by wider policy considerations of a globalised industrialized sector. This pragmatic approach on the part of the Commission acknowledges that culture does not exist in a vacuum.

2. THE LITERATURE ON GAMES AS A FORM OF CULTURE

The academic literature on the cultural aspects of digital games addresses the concept of games as producer of symbolic meaning, and places that discussion within context of the political economy of production. However, the produc-

tion of symbolic meaning does not take place in a political or societal vacuum, and therefore it is important to consider the different contexts under which games have meaning. There is scope for more nuanced analysis of digital games as a cultural and political form in the policy discourse and particularly to interrogate the impact of state aid policies on digital games production.

There is undeniably a broad recognition of the social and cultural significance of games. For Nichols, games are “now recognised as a unique embodiment of culture worth of study” (2014, p.3). Muriel & Crawford’s intervention in the games as culture debate highlights how “video game culture is diverse, complex, and constantly evolving” (2018, p. 2) and considers that games provide a lens from which we can analyse wider social issues. For them, “video games are therefore understood as an expression of life and culture in late modernity” (ibid). For O’Donnell, “game development is not ‘just’ software development, video games are not just games and the video game industry is not the software industry”; as such, any attempts to collapse one into to either fails to heed the, cultural, social, technological and political-economic system within which game development is rooted (2012, p. 17).

However, while there is broad consensus that games are significant as a cultural form, this article goes further to interrogate what this stance means within the operation of EU state aid law and what the implications are of the particular meaning(s) associable with national games production industries. It is contended that the Commission, in their role of approver of state aid regimes, has developed a particular understanding of how a digital games production industry might fit within a particular understanding of what is sufficiently “cultural” to fall under the requirements of Article 107(3)(d): that is, that the state aid measures constitute a form of aid to promote culture. Therefore, the Commission’s understanding from a policy perspective of how and in what sense digital games might be understood as coming within and falling outside that understanding of the notion of “culture” is of enormous significance to the European games industries, given the increasingly important role of state aids (including tax credits, expenditures, incentives and direct grants) to production.

The complexity of the categorisations of video games and of culture are described by Navarro-Remesal as “two complex and messy concepts” at once “ubiquitous and deceitful”, in their familiarity and as holding multiple meanings (2021, p.1). Cultural policy as a field acknowledges the complexity and interdisciplinary inherent therein (Durrer/Miller/O’Brien, 2017; Gray, 2010). For this work, the definition of culture is important from a policy perspective as it affects what is to be funded. It is an explicit finding that taxation policy in the form of state aid policy is a form of policy with attendant consequences.

While it is acknowledged broadly that digital games are an important cultural form, within the particular state aid policy discussions the interrogation of games as representative of a national culture brings to the fore complex issues of national identity, national culture, and the artificiality of state-imposed

boundaries. Certainly, the study of national games cultures is important in the face of a problematic elision of the local, regional, or national in a reification of the globalised games economy. While games are taken as a part of a globalised economy, national borders are still important. Fung's intervention into the consideration of games in their global context acknowledges the importance of the national, holding that "when we talk about the industrial aspect of culture, we then directly refer to cultural production—which presumably has a wide distribution and consumption—and national policies that govern, restrict, or enhance creative industries early in the twenty-first century" (2016, p.2). An insider-analysis of EU policies in regard to specific forms of national/regional games production through the use of local incentives for production illustrates the continued importance of the identification of borders within both national production and EU policy. For Consalvo, "even as the culture of games is losing, or has lost, any claim to an 'originary' national culture, capital seeks to keep some boundaries in place to channel this flow" (2006, p.133). Taking this into account, such an interrogation of national taxation policies for the digital games industry, as shaped by the EU state aid regulation regime, illustrates the continued significance of the concept of the national, but in a way that is shaped by the forces of capitalism.

In the body of Commission decisions approving state aids for digital games, there is an identifiable rhetoric around protecting national/regional industries from the vagaries of the free market, on the understanding that such games are less likely to be consumed as they do not meet with the broad USA/Asian trends of the industry. In this way, approvals of national State aids for national games industries are framed as a culture-versus-industry dichotomy. Games are increasingly accepted as part of the cultural industries (Kerr, 2017). Muriel and Crawford develop this argument to illustrate how games are following in the path of other industries such as film to establish their cultural credentials, and as "a relevant cultural manifestation of contemporary society" (2018, p.47). However, like all cultural and creative industries, the games sector has become increasingly embedded in capitalism. For Dyer-Witheford & de Peuter, "it is therefore hardly surprising that in several registers ... the emphasis is on the subsumption of gaming by capital" (2021, p. 373). It is not only that games are subsumed by capital, but games as a cultural form are subsumed by a politics of capital. Nichols states that it is imperative that games studies pay attention to "the institutional nature of the commodities and texts being studied" (2014, p.10) and points out that "video games are cultural commodities – the products of a cultural industry organised through the capitalist exchange of goods" with a potential for "considerable ideological influence" (p. 6). Therefore, we should take seriously the industrial conditions under which they are produced. This article emphasises however that we also need to take seriously the converse position, that is, the policymakers' understanding of what constitutes a cultural form and thus what is worthy of support through taxation policies.

3. METHODS: A LAW AND POLITICAL ECONOMY RESEARCH PERSPECTIVE

This paper explicitly considers State aid policy as a form of cultural policy, taking on board Paquette & Beauregard's observation that "cultural policy is often contextualised as an element of another policy sector's strategy or as a piece of a much broader policy program" (2017, p.29). This analysis uses both critical discourse and policy analysis (Bacchi, 2009) to interrogate the policy decisions taken by the Commission towards the games sector. The use of a critical discourse analysis (CDA) approach to interrogate Commission decisions on State aids is particularly suited to the analysis of regulatory decisions, as it identifies different rationales driving the framing of such regimes for games. At its heart, CDA interrogates the role of language and communication within society. Fairclough holds that "the operationalisation of discourses is always subject to conditions which are partly extra-discursive", 2013, p.20). In their interrogation of the relevance of critical discourse studies to law, Cheng and Machin (2023) hold that "the law shapes, legitimizes and naturalizes social practices" (p. 244). It is the aim of this article to identify those extra-discursive concepts that shape and legitimise cultural policy approaches to state aids.

The analysis of Commission policy is further shaped by Law and Political Economy (LPE) theory as a method (Blalock, 2022; Britton-Purdy *et al*, 2020; Harris & Varellas, 2020; Wilkinson & Lokdam, 2018). LPE is an emerging field of legal scholarship that seeks to advance scholarship on the intersection of law and political economy in a way that acknowledges the constitutive role of the state and market towards issues of power and democracy. In this way, it aligns with the CDA methodology outlined above, particularly in the recognition that law is constitutive of social practices and society. A critical examination of State aid policy from a national and EU perspective for cultural and creative production offers much to the LPE project in that it foregrounds the complexity of state/market relations and is intimately imbricated with questions of power and representation. This interrogation of the spatial dynamics of State aid policies looks at the commodification of space of nation space/region in policy considerations. For Soja, "we must be insistently aware of how space can be made to hide consequences from us, how relations of power and discipline are inscribed into the apparently innocent spatiality of social life, how human geographies become filled with politics and ideology" (1989, p. 6).

4. THE ROLE OF THE EUROPEAN UNION AND STATE AID REGULATION

This section addresses the significance of framing State aid policy as a form of cultural policy within EU discourse. The framing of State aid policy as something "more" than administrative is seen in Ferri's observation that State aid has become politicised (Ferri, 2015, p. 129) and echoed in Piernas López's work (2015). This section briefly covers the development of EU policy towards the cultural and creative industries to further explore this framing in the context of State aid regulation. This paper looks at how State aid policy from an EU

perspective frames digital games as both cultural and industrial, but takes a step further to think about what those complex terms mean. It posits that the uneasy position of digital games within State aid policy as somewhat cultural is significant in the understanding both of the positioning of games as part of the cultural fabric of society and of the role of culture and the cultural industries (howsoever defined) to the integration process of the EU.

Tax incentives (or reliefs or credits: to offer alternative terms) are a form of State aid which may tend to distort or threaten to distort the fundamental freedoms of the EU, and thus challenge the EU project. As such, they are not allowed under the terms of the EU treaties, save under specific rules. For our purposes, Article 107(3)(d) TFEU provides for explicit exemption for cultural projects. State aid policy of the Commission has been increasingly regulated since the 2000s as part of the neoliberal consolidation of competition, with the Commission acquiring what Buch-Hansen & Wigger define as “an enhanced grip on the course of the member states’ national industrial policies” (2011, p. 80). However, while other forms of State aid might be increasingly regulated, the broad thrust of State aid for audio-visual industries is to allow expanded forms of aid for cultural rationales.

State aid policy is usually considered within the purview of competition policy and thus concerned with the issues around the internal market of the EU. It is contended here that State aid policy is, as a “living instrument” actively deployed in accordance with the main policy priorities of the Commission. It is thus more correctly thought of as a cultural policy as well as competition policy, given the significance of the EU State aid regime in the shaping of national cultural/industrial audio-visual policies in individual member states. This paper analyses the spatial dimension to policy development towards digital games from multiple perspectives, including the relationship with the space of the nation-state (thus bringing into play both the “value” of the nation-state, of the EU as a concept and raises issues around legitimacy). It also interrogates the cultural space that is brought into being through representation via media products produced within the EU – how are these shaped by policies at the EU level, particularly State aid policies. In this context, spatialization refers to the way states reconstruct the national space to include within the boundaries of the national territory, actors and activities which may, in fact, originate from outside.

State aids threaten the integrity of the European Union’s fundamental freedoms, by introducing restrictions along national grounds that destabilise the free movement of goods and services within the EU’s borders. In keeping with a change in approach towards regulation of State aid, there has been an identifiable shift in perception of the approach of the EU towards the cultural sector. This interrogation of State aid as pragmatic, in Pauwels (2014) terms, highlights the multiplicity of values underpinning State aid policy from both the perspective of the EU Commission as the institution of the EU with competence in

this sector and a nation-state perceptive. On cultural policy, certain observers have identified a “paradigmatic shift” (Littoz-Monnet, 2015, p.25) within the EU around issues of audio-visual cultural policy, with Craufurd Smith identifying a shift towards “an industrial policy for Europe’s cultural and creative sectors, rather than a cultural policy for the EU” (Craufurd Smith, 2015, p.22).

We can trace how policy framings of the role of culture within the EU has shifted from its earliest perception as “outside” the purview of the EU (or EEC) and solely the domain of the individual Member States to an instrumentalist view of culture as operating within a political context to assist in establishing and underpin a common European culture, and encapsulated in the EU motto “United in Diversity”; and to a current iteration of culture as having both economic and social potential, albeit within a knowledge or creativity framework that is increasingly subject to market forces. Psychogiopoulou acknowledges the dual role of culture, holding that “the fact that the EU cultural policy is simultaneously a cultural and an economic, social and political project remains the case nowadays, although admittedly the economic dimension has gained much weight” (2015, p.238).

From one perspective within EU discourse, culture is seen as a competence of the individual member states. However, as Mattocks describes, EU cultural policy governance is simultaneously peripheral and “symbolically powerful” (2017, p. 397). Culture in various manifestations is also simultaneously industrially, socially, and politically significant. It is the perception of culture as an empty cipher that allows for multiple instrumentalizations of the concept of culture, from an industrial and political perspective. Looking at games through this lens sheds light on mixed role of culture within the EU through analysis of the role of State aid actions by the Commission towards cultural forms. For Mattocks, the fragmentation of EU policy for culture is in part because of the political sensitivity of culture, at once paradoxically linked to furthering European integration but constrained by subsidiarity and national competence (p.407). Therefore, we see a continuing instrumentalization of games as a form of culture.

The political sensitivities of EU cultural policy have led to a complex understanding of the role of culture. A useful intervention is the identification of a pragmatic discourse by Pauwels. This discourse starts not from rhetorical question of what Europe can do for culture but rather from what culture can do for the economy (Pauwels, 2014, p. 118). The pragmatic discourse acknowledges the internal diversity of the EU and illustrates what Pantel describes as a “conscious legitimacy-building strategy on the part of the European Commission and the European Parliament” (2005, p. 60). Pauwels describes the pragmatic discourse in the following terms:

If the political-rhetorical discourse appears too utopian and the narrowly formalistic discourse too categorical, European intervention in the cultural sector, in this case the audio-visual sector, will then indeed actually be realized along pragmatic

lines. The pragmatic discourse is situated somewhere between the formalistic and the political-rhetorical discourse (Pauwels, 2015, p. 117).

Echoing what we can identify as instrumentalism of culture for political rationales, Calligaro holds that “culture therefore has a dual nature, oscillating between symbolic and material spheres and between intrinsic value and market value, thus raising a series of economic, social, and identity-based issues for those actors involved in its governance” (2017, pp. II-III).

The following sections trace the EU policy developments towards games as a cultural form as seen in State aid policy. It identifies key policy developments, most notably the exclusion of games from the 2013 Cinema Communication, the development of Commission decision on State aids “by analogy” of the Communication, and in particular traces trends in the decisions taken towards State aids within different individual member states. Crucially, there is evidence of a distinction between how film, and thus the film industry, is understood as a cultural form worthy of preservation, and how the games industry is required to identify a market failure for particular “nationally” inflected games that are less likely to succeed on the global market. From an ontological perspective, the definition of what is a game is complex (Stenros, 2017). But while Stenros provides a definition of what a game is from a ludological perspective, it is equally important to look at how policymakers define what constitutes a game that is worthy of funding via State aid regimes. From a policy perspective, the definition of what constitutes a game worthy of support through tax incentives is not driven by ontological complexity, but by alternative goals that we can think of as pragmatic (following Pauwels).

The Commission’s own soft power document, the 2013 Cinema Communication, applies to various audio-visual cultural formats including film, but, in the revision process from 2011 to 2013 culminating in the final form of the 2013 Cinema Communication, explicitly rejected inclusion of games. As it states:

Conversely, although games may represent one of the fastest-growing form of mass media in the coming years, not all games necessarily qualify as audio-visual works or cultural products. They have other characteristics regarding production, distribution, marketing, and consumption than films. Therefore, the rules designed for film production cannot apply automatically to games. [...] Consequently, this Communication does not cover aid granted to games (Commission, 2013, para 24).

5. ANALYSIS OF SELECT COMMISSION DECISIONS ON DIGITAL GAMES STATE AID REGIMES

Six member states in the EU (France, Denmark, Germany Bavaria/North Rhine Westphalia, Belgium, Italy, and Ireland) have introduced incentives or credits with approval from the Commission under the State aid regime. Other jurisdictions have introduced similar regimes either under *de minimis* rules or

by application of the General Block Exemption Relief process (GBER). These are not analysed in this article. In addition, the United Kingdom obtained approval for the Video Games Tax Relief in 2014. While post-Brexit UK is no longer part of the EU, the digital games tax initiative approved by the Commission in 2014 is analysed as part of the corpus of decisions as it is of particular interest in thinking through key concepts explored here around national policies towards the creative industries. Several additional decisions are extensions, prolongations, or amendments of previous approvals.

The following analysis takes the decisions in broadly chronological order, highlighting the shifting understanding of the cultural status of games within the decision-making process of the Commission. It is particularly interesting to note the shift in perception from viewing games as a lesser cultural form to a more nuanced understanding of games as a cultural form.

The Commission was faced with considering the cultural nature of games in 2006 with the notification by France of their proposed tax relief (C47/2006). The Commission notified the application in 2006 under Article 108 on several grounds to allow for submissions by the parties concerned. The Commission considered that while certain video games might constitute cultural products within the meaning of Article 87(3)(d) (now Article 107(3)(d)), concerns were raised that some of the examples provided to the Commission by the French authorities suggested that the criterion could be applied overly broadly. The Commission was also concerned that the requirement of eligibility based on strength and quality of concept and contribution to expressing European cultural diversity and creativity could be broadly interpreted. In a telling indictment on the Commission's then view of the role of games, the Commission were concerned that the conditions of the proposed aid were not restrictive enough as "the criterion of the quality and originality of the concept could, moreover, be used to select video games that are good fun rather than actually cultural" (para 2, 2006). The approval of the aid in 2007 followed submissions by interested parties (including TIGA, GAME, EGDF) to the Commission's emphasis on the cultural nature of games, as cited in para 36 of the 2007 approval. As highlighted by Kerr (2013), submissions by certain representative bodies argued that video games were not cultural in an attempt to avoid content and access regulations applicable to cultural industries in Europe (p.274).

The selective nature of the Commission's approach to games is seen in the assumption that games are primarily a form of software and only sometimes constitute cultural products. The decision states that "De même, le fait que les jeux vidéo puissent être considérés comme des logiciels plutôt que comme des produits audiovisuels n'affecte en rien le fait que certains d'entre eux puissent également être considérés comme des produits culturels au sens de l'article 8" ("Similarly, the fact that video games can be considered software rather than audio-visual products does not affect the fact that some of them may also be considered as cultural products within the meaning of Article 8") (para 64).¹

1. Translation by the Author.

Since then, various prolongations and extensions have amended the French games tax credit regime to make it more competitive, raising the rate to 30%, doubling the tax credit ceiling from €3M to €6M) and increasing European subcontracting expenses that can be taken into account (€1M to €2M).

Moving onto the Commission approach to the application of the UK, the proposal to introduce a video games tax relief (VGTR) was being lobbied for in the UK for some time. While the tax relief was finally approved in an amended format in 2014, upon the initial submission for approval the Commission again initiated the procedure under Article 108 (2) TFEU following notification of the UK of intention to introduce a tax relief for video games. By initiating this procedure, the Commission indicated that they doubted whether the measure respected the general legality principles, i.e., that it was necessary, proportionate, and well-designed, that the aid was directed towards a cultural product, and that it worked to balance this with the effects on trade and competition within the EU. In the Commission's stated opinion, as set out in the notification of initiation of investigation, it considered that the proposed aid may not be necessary (thus not complying with general legality) and that the proposed territorial conditions to be attached to the aid may not be necessary or proportionate given that "video games can (and often are) developed by people working on computers in different countries" (recital 20 notification). This opinion of the Commission failed to recognise the complexity of the video games industry, which is often based around creative clusters. The Commission questioned the necessity of implementing the tax relief, given that the video games sector was the fastest growing form of mass media; however, it accepted the UK statement that there was market failure for culturally specific British games and finally approved the aid subject to certain amended conditions. However, despite such an acknowledgement, the public press in the UK provided a different framing of the tax credit scheme. For Webber, the media rhetoric was seen as an opportunistic industrial framing of credit advantages, rather than being genuinely aimed at the development of culturally specifically British games (Webber, 2020).

In Denmark, measures implemented in 2017 illustrate a narrow understanding of the nature of digital games, arising at least in part because of the primarily social rather than industrial nature of the proposed Danish scheme. Granted in 2017, the objectives of the measure were "to promote Danish video games as a culture-bearing medium and to strengthen the cultural qualities of video games for play and learning" (SA.45735, para 2). The smaller market and higher economic risks within the Danish sector mean that "culturally significant games" (para 3) experience difficulties compared to games with more globalised content. The aid takes the form of a direct grant and thus does not operate as a tax incentive, like other schemes discussed here. However, it is relevant to consider from the perspective of the Commission's analysis of the scheme as a cultural State aid, that is, the consideration of the artistic and cultural nature of the game. To qualify for the Danish scheme, there a cultural assessment is

performed by an independent expert committee. The grant is subject to the condition that “the game production must contain a unique artistic or technical effort that contributes to the advancement of Danish game development as an art form and a culture” (para 17). For the project to benefit for the scheme, it must be released in a Danish version, and key creative and technical team members must either be resident or have a “substantial and significant connection to Danish gaming art or gaming culture” (para 17). In certain cases, the language requirement must be waived, but in a co-production, the Danish co-producer must hold distribution rights within Denmark. The project must be evaluated positively on cultural, originality, implementation, and responsibility criteria. The cultural value criterion means the game must be “outstanding” (para 20) on one of four criteria, which are aesthetic, educational, social, and of Danish relevance. Implementation relates to quality of craftsmanship and realisability of the project. Responsibility includes transparency in payments, responsible handling of personal information, social responsibility in handling chat function, and enhanced focus on responsibility if aimed at children. Again, we see an emphasis on cultural content, with the Commission’s assessment of the measure on cultural grounds believing that only games with “significant cultural or educational content” (para 46) can be supported by the scheme. The 2019 prolongation and amendment of the Danish scheme provides for a higher aid intensity, an overall budget increase and prolongation of the term, but does not provide for significant changes to the format of the scheme.

In 2017 (Commission Decision), Germany applied for the approval of a measure aimed at “the development of high-quality, culturally or pedagogically valuable digital games and innovative, interactive media projects with a games element” (para 2.1(2)). The selective criteria (or cultural test) proposed evaluating projects on criteria of cultural context and cultural content, and the effect on a cultural or creative hub in Bavaria, or artistic, creative, or technological innovation. Described by the Commission as an “extensive selection procedure” (para 42) to ensure alignment with cultural goals of the scheme, the Commission pointed out how the conditions of the scheme “puts emphasis on the cultural content of the game, its innovative character and its cultural affiliation with the Bavarian games and/or educational community” (para 43). While a loan scheme rather than a tax credit, the narrow considerations of what constitutes cultural digital games is of interest.

In 2019, the German authorities notified to the Commission a direct grant scheme for German games. The scheme was aimed at game production with a cultural link to Germany or the EU, with an assessment that small and medium-sized enterprises in Germany often focus on “culturally and pedagogically valuable games and thus become producers and interpreters of cultural assets and heritage” (para 2.1(4)). The selection criteria were similar to the other German schemes and thus the Commission held that the “selection process ensures that only digital games of high quality, which are culturally or educationally

valuable, can be supported under the scheme. It emphasises the cultural content of the game, its innovative character and its cultural affiliation with Germany or German culture” (para 35).

In Italy, a decision on the Italian tax credit for video games of cultural value was taken in 2021 (SA63373). The Italian Commission took a more nuanced approach to the sector. It acknowledged the cultural nature of the digital games industry and illustrated a pragmatic recognition of how to support national or local industries. The pragmatic recognition of the globalised nature of the games industry is shown by the Commission’s statement that “by increasing Italy’s international competitiveness in the sector, the Scheme contributes to the strengthening of Europe’s digital audiovisual sector” (para 2). There is an assumption by the Commission that video games with local (i.e., Italian) content are high-risk compared to “productions characterised by content in line with international market trends”, i.e., North American and Asian (para 3). Aid is subject to conditions of Italian nationality as assessed by a points-based approach based primarily on those working on the development team, with points for Italian or dialect language, and territorial base/location base in EEA (80%) and 20% in Italy and of cultural value. Cultural value is assessed by a points-based system based on the origin of content, narrative development, originality, innovation in software or technology, audio-visual experience, and production processes. The incentives also consider quality, originality, and technological and artistic innovation as requirements.

While there is a lot to unpack on the conditions, e.g., that cultural value is measured on contents, technological innovation and production location spend or spend on artistic matters, this is in fact a pragmatic way of thinking about how to establish cultural value rather than taking a quality based subjective approach. We might think of it as an objective evaluation of potential cultural value rather than a subjective identification of a particular manifestation of cultural value. The Commission is careful not to explicitly impute a singular view of what is culture. The Italy scheme conditions are to ensure that the aid is for a cultural purpose. We see in the Commission decision the development of slippage between production issues and the cultural nature of the games sector with the assumption that a lack of local production means a lack of local games. Therefore, it is believed in this approach that the aid will increase the diversity of supply, in what sounds like a potentially valid assumption.

In 2019, Belgium proposed to extend the existing tax shelters to artistic/educational video games (Decisions SA.55046: Walimage and SA49947: VAF Gamefonds). These initiatives were aimed at what were considered European video games, that is principally made with authors/creative collaborators resident in Belgium or other EU member states, or by producers/co-producers in the EU / European Economic Area. The justification offered by Belgium was that many of the games developers were small enterprises, that games were a

risky business, and that financial impediments represented an obstacle for development of local knowledge and development (para 17).

The Berlin-Brandenburg loans scheme was notified by the German authorities in April 2022. Again, the proposed scheme is relatively narrow, aiming to support “the development and production of high quality, cultural or pedagogical digital games and interactive media projects” (para 2.1(2)). The conditions broadly followed the earlier Bavarian scheme. While this 2002 scheme is a loan rather than a tax credit, it is considered as a State aid and thus is of interest to the overall discussion in this article.

In an interesting development in this area, in 2019 Belgium notified the Commission of a proposal to extend an existing tax shelter for the audio-visual production of video games (Decision SA.54817). In April 2020 the Commission informed Belgium of its intention to open initiate a procedure under Article 108(2) TFEU to interrogate the compatibility of the proposed scheme for games with the internal market. The Commission pointed out that the proposal to base the value of the tax shelter in a way that related values to the amount of Belgian territorial expenditure was likely to constitute an obstacle to freedom of movement within the internal market, and thus in conflict with the general Treaty provisions (para 31). The Commission made a distinction between film production, which was seen as mobile and relatively free in choice of location, in contrast with the industrial structures of video games, which were seen as produced primarily in a stable and continuous environment. Therefore, there is less justification for imposing territorial conditions in a games production environment. The amended scheme was finally approved in July 2022, with a change to the territorial conditions. The modified territorial provisions extended to an amount based on production and operation expenses in the EEA (European Economic Area) rather than just within Belgium. Thus, the scheme is no longer likely to constitute an obstacle to free movement of goods and provision of services within the internal market (2022, para 49). In this way, the Commission emphasises the importance of the role of the Commission as guardian of the EU Treaties.

The most recent Commission decision in this area was the approval of the Irish state aid regime for digital games. Under Decision SA102047 on 27th September 2022, the Commission authorities approved the introduction of a new tax credit, the Digital Games Tax Credit (DGTC). The conditions under which the approval is granted illustrate a deepening recognition of the pragmatic approach to the digital games sector. The credit is framed in a way that recognises the importance of developing a games industry rather than a games culture. The points-based cultural test, the passing of which is a prerequisite for claiming the credit, is based upon the establishment of a robust industry base rather than upon the content of the game itself. It provides for development of creative clusters, and it allows for points for key employees. The credit scheme represents a production context-oriented rather than a narrative content-driven approach to align-

ing with cultural requirements under Article 107(3)(d). Legislation enacting the Digital Games Tax Credit in Ireland was introduced in November 2022 by way of amendments to the Taxes Consolidation Act, in the form of Section 481A.

6. DISCUSSION: WHERE TO NOW?

This policy analysis is an important intervention into the debates on whether games constitute part of the software industries or part of the creative industries, with all the conceptual baggage that the term entails. It is a finding of this article that the approach taken by the Commission, as seen in the developing policies towards State aid regimes for games funding within the EU, considers that certain types of games are justified as worthy of funding for a cultural rationale. However, at times the justification for approving of specific State aid regimes is instead seen as supporting what might be considered indie creative industries, where the justifications for approval of conditions is based on supporting educational or cultural games rather than “games for fun”. It is acknowledged that the State aid sector towards digital games is a new field of competence for the Commission, with a developing policy towards the sector. The Commission’s rationalisations for approving aid regimes are based on a multitude of reasons which are primarily underpinned by the Commission’s role as serving the Treaties of the EU, and thus political reasoning comes into the Commission’s decisions.

The UK’s VGTR regime is a case in point. While the rhetoric around the approval suggested that the regime would support culturally British games that would otherwise not be made, in practice the VGTR was used to support big studios such as Rockstar. However, to assume that the regime should only support arthouse/art/educational games fails to understand the complexity of the cultural and creative industries sector. In practice, there are assumptions around spillover effects underpinning the Commission’s later decisions, e.g., the Italian and Belgium decisions, with the assumption that supporting local industries will lead to more representation of local content. However, relying on a tax credit to do the work of supporting industries is not enough. Instead, a tax credit must be seen as part of a broad swathe of policy interventions. Relying on a tax credit entails the assumption that market interventions will support multiple forms of production. However, theories of capitalism show us that the market is a fictional construct that serves not society but the market leaders and those that gain to benefit most are those that hold the power.

In a curious way, the analysis of the Commission’s perspective on cultural policies towards digital games illustrates an ostensibly contradictory position. On the one hand, there is a belief that games are somewhat less cultural than other audio-visual media forms, e.g., film. Thus, to qualify for the cultural state aid exemption, games must prove their worth as a cultural form. On the other hand, the Commission’s position *vis-à-vis* their function in the State aid process illustrates its pragmatic position that acknowledges the industrial element of games.

The Commission's current pragmatic approach to tax incentives is seen more as a hands-off, non-interventionist approach that leaves decisions around what might be worthy of support within individual member states, at least if it does not overtly interfere with the essential freedoms within the EU. The requirement that State aid regimes align with the conditions of Article 107(3)(d) in that they are required to be aids for a "cultural rationale" in no way imposes a narrow conceptualisation of culture on member states, in contrast to Messerlin and Parc's (2020) assertion on the role of cultural tests for the film industries. Rather, the current pragmatic approach by the Commission imposes certain rules on notified regimes around the requirement to not interfere with the careful balance of the internal market.

Overall, there is evidence of a relatively narrow framing of the justification for tax schemes for digital games. It is more difficult for the digital games industry to "prove" alignment with the cultural rationale contained in Article 107(3)(d) (i.e., to qualify as aiding culture) than it is for the film sector, which is already widely accepted as a cultural form. However, the analysis of the body of decisions by the Commission on applications for approval of State aid regimes concerning digital games does show the recent development of a more nuanced approach to the sector, as exemplified in the recent decision outlining the Irish scheme. There is also further evidence of such a shift in the wider EU policy. Some recent developments illustrate this. For example, the European Parliament's Committee on Culture and Education's draft report on E-sports and videogames from April 2022 "calls on the Commission to map and define the European video game industry, and to foster the creation of a 'European Video Game' label to improve the discoverability and encourage the dissemination of video games created in Europe" (clause 3). The explanatory statement highlights the value of games as a European ecosystem, with both cultural and economic value. In addition, the European Parliament project on value in games² is an important move in further interrogating the wider cultural and societal values of the sector and promises to add much to policy development in this area.

In the context of State aid policy, a particularly significant policy move is shown in a call by the European Council (2022) to review State aid rules to take into consideration other sectors including video games. The European Council's conclusions were used to identify specific issues of concern for the EU and to outline particular actions to take. As such guideline have the effect of influencing and guiding the EU policy agenda, developments in this area are expected in 2024.

7. CONCLUSION

It is a core argument of this article that State aid policy must be understood not only as a branch of competition policy, but as a form of cultural policy. Therefore, the impact of regulatory measures needs to be placed into a wider context of the political economy of national and supranational games production poli-

2. According to the project information on the Commission's website, the project "Understanding the value of a European Video Games Society" delivers insights on the many economic, cultural, financial, and social impacts that video games have on our society, and how this industry impacts a range of policy areas. Understanding the Value of a European Games Society <https://digital-strategy.ec.europa.eu/en/policies/value-gaming>)

cies. This paper has primarily addressed policy considerations while underscoring the multiple, often unspoken understandings of what is considered cultural, of how games constitute a cultural form, and of how culture is instrumentalised under a pragmatic discourse within the EU that underpin such policies. There is scope for additional analysis to be carried out on individual member states implementation, evaluation and gathering of statistics on games industry.

While it would be tempting to claim a niche area and point to an under exploration of the sub-field of national games production policy studies, such work is in fact to be acknowledged as residing within a constellation of fields including EU policy, EU cultural policy, EU state aid policy, creative industries and more. Assuming that this represents a niche does a disservice to the significance of EU policy to production and to games' role in society more broadly. Instead, one should seek recognition of the significance of multiple disciplines (law, political economy, cultural studies and cultural policy / creative industries policies, EU policy) in a way that acknowledges the slippages between these and how law and policy operate in an overarching way to structure cultural production and engagement. From such a perspective, this paper takes on Chess & Consalvo's recent call to arms, where they point to the necessity of observing "why video games should matter in scholarship that goes beyond the material specificity of the media in question" (2002, p. 159). They point to industrial components, issues of inequality and misinformation, and how the games studies field holds resonance for wider media studies issues. To this, I would add the importance of interrogating games industry policies and framings of games that more or less explicitly deems such media forms of lesser or equal cultural value compared to other art forms. This would be significant not only for industrial, social, and media studies, but also for broader considerations of cultural policy and diverse interpretations of culture and its applications.

EU COMMISSION COMPETITION DECISIONS

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2013 State aid – United Kingdom. Commission Decision in Case SA.36139 – UK video games tax relief (OJ C 152, 30.5.2013, p. 24).

2014 Commission Decision of 27.03.2014 ON THE STATE AID SCHEME SA.36139 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for video games 2017 SA.45735 (2017/N) State Aid - Denmark (SA.45735 (2017/N) Scheme for the development, production and promotion of cultural and educational digital games)

- 2017 Commission Decision of 04.09.2017, C(2017) 6048, State Aid SA.46572 – Germany – Bavarian games support measure. OJ C 336, 6.10.2017, p. 1.
- 2018 State Aid – Belgium SA.49947 (2017/N), Belgique – Aide aux jeux vidéo (VAF Gamefonds) Aide d'Etat n° SA.49947 (2017/N) - Belgique Aide aux jeux vidéo (VAF Gamefonds) 25.08.2018.
- 2018 State Aid - Germany North-Rhine-Westphalia State Aid SA.51820 (2018/N) – Germany North Rhine-Westphalian games support measure, 10.12.2018
- 2019 SA. 52951 (2019/N) State Aid – Denmark Prolongation and amendment of scheme for the development, production and promotion of cultural and educational digital games
- 2020 State Aid – Belgium Aide d'État SA.55046 (2019/N) – Belgique Soutien aux jeux vidéo culturels, artistiques et éducatifs (Wallimage) 24.1.2020
- 2020 State Aid – Belgium Decision to initiate under Article 108/ Aide d'État SA.54817 (2019/N) – Belgique Régime d'aide Tax Shelter pour la production des jeux video, 30.04.2020
- 2021 State Aid SA.100581 (2021/N) – Germany Amendment and prolongation of the Bavarian game support measure SA.46572 (2017/N)
- 2021 State Aid – Italy State Aid Tax credit for the production of video games of 'Italian nationality' with cultural value SA.63372(2021/N) Italy 26.10. 2020
- 2022 State Aid - Belgium Approval DÉCISION DE LA COMMISSION du 25.7.2022 concernant le régime d'aides SA.54817 (2020/C) (ex 2019/N) que la Belgique envisage de mettre à exécution en faveur de la production des jeux video 25.7.2022
- 2022 State Aid – Belgium Décision C(2022) 490 de la Commission du 27 janvier 2022, aide d'État SA.101008 – Prolongation du VAF Gamefonds, JO C 106, 04.03.2022.
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