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State Aid for Digital Games and Cultural Diversity: A Critical Reflection in the Light of EU and WTO Law

Christoph Beat Graber*

ABSTRACT

Governments in Europe and elsewhere increasingly subsidise the production of digital games. Often they argue that such support measures are necessary for promoting the diversity of cultural expressions in the Internet. The question whether digital games belong to the sphere of culture has important implications for European and international economic law because of the legal safeguards justifying exemptions from the principle of trade liberalisation for cultural purposes. The paper first looks generally at the question whether digital games are cultural expressions. Second, the paper analyses how this question has been dealt with by the competent authorities in the realm of EU competition law. Here, cultural purposes justify both privileges for public service broadcasters and exemptions from the general ban on subsidies. The last part of the paper is dedicated to the law of the World Trade Organization (WTO), where the question whether digital games are cultural expressions may determine their classification within the General Agreement on Tariffs and Trade (GATT) and/or the General Agreement on Trade in Services (GATS) and impacts on the applicable level of commitments for trade liberalisation.

KEY WORDS

Digital games, state aid, trade, culture, cultural diversity, EU and WTO law.

* Christoph Beat Graber is Professor of Law at the University of Lucerne. He is the leader of the research centre i-call (International Communications and Art Law Lucerne), as well as of the NCCR individual project "eDiversity: The Protection of Cultural Diversity in a Digital Network Environment".

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Christoph Beat Graber*

1. Introduction

Digital games are fascinating and are rapidly becoming a major attraction for a new generation of media consumers. This is a phenomenon that public service broadcasters have also noticed. In order to tie young audiences to their programmes they are expanding into the world of interactive online games. An example is *Ski Challenge 2008*, an interactive online game which allows the player to virtually hit the slopes of the five most spectacular downhill races of the Ski World Cup.¹ The game was offered by SRG and ORF, i.e. the Swiss and the Austrian public service broadcasters. It was presented by the broadcasters and their sponsors on independent web pages,² but the broadcasters placed advertisements for the game in their official web pages.³ For the 2008 edition, more than 3 million downloads of the game were registered worldwide and the follow-up *Ski Challenge 2009* is already a fact.⁴ Since public service broadcasters are financed by a licence fee or other form of state aid, a question that arises is whether such initiatives are legitimate from the public service perspective.

The legitimacy question is also raised with regard to schemes by which governments in Europe, Canada,⁵ South Korea⁶ and the United States⁷ support the

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¹ See "1000 Stürze im fiesen Brüggli-S", *Tages-Anzeiger*, 9 January 2008.

² Gamers in Switzerland and Austria registered with their national broadcaster in order to be allowed to participate online in a multiplayer competition on a national and international level. Lists on the broadcaster's web pages showed the best performances and indicated with a national flag accompanying each player's name, which national team he or she belonged to.

³ In 2008, the SRG also offered *Fussball Challenge*, an online game accompanying the UEFA EURO on an independent web page (www.fussballchallenge.ch). OFCOM, the Swiss broadcasting regulator, held in a decision of 14 January 2009 that SRG, by inserting links and references to the game into its official web pages violated the rules on advertising as provided by Swiss broadcasting law (see http://www.bakom.ch/themen/radio_tv/00511/03079/index.html?lang=de). SRG criticised the decision and announced its intention to bring it before the Swiss Federal Administrative Court (*Bundesverwaltungsgericht*). See *Neue Zürcher Zeitung*, 18 February 2009.

⁴ See <http://www.skichallenge.at> and <http://www.skichallenge.ch>.

⁵ In Canada, the domestic games industries have been supported by government both at the federal and provincial levels. At the federal level, programmes that originally were designed for the support of industrial and scientific research purposes now also include the games industries. These programmes include tax credits and grants for novel scientific and industrial research in the field of games. Furthermore, game projects may receive repayable advances from Telefilm Canada's New Media Fund, covering up to 50% of expenses (up to 550.000 dollars). See Nick Dyer-Witford and Zena Sharman, "The Political Economy of Canada's Video and

development and production of new games. In the UK, developers of digital games push for tax incentives or some other assistance to maintain a competitive market.⁸ Sales of games have become a very important factor in national economies and the market for computer and video games is considered to have a high potential in terms of innovation and growth. According to a study sponsored by the European Commission, revenues from digital games in the European Union (EU) will grow from 698 million Euro in 2005 to 2.3 billion Euro in 2010. With a share of 27.7% of the aggregated revenues of all digital content markets in the EU (8.3 billion Euro), digital games are thus expected to remain the biggest sector.⁹ Whereas in 2005 the share of digital games accounted for only 11% of the overall games market in the EU it will amount to 33% in 2010.¹⁰ Recently, several governments in Europe have introduced or announced the introduction of support schemes designed to make their national games industries more competitive with respect to the more dynamic environments existing in the United States, South Korea and Canada.

In Germany, a coalition of Members of Parliament requested the *Bundestag* in November 2007 to take measures supporting the production of computer and video games.¹¹ The applicants argued that few of the games sold in Germany were developed and produced domestically. They proposed to follow the example of France, Canada, South Korea and the Scandinavian countries, where state aid for computer games has been successful. Public funding, the coalition argues, will contribute to the building of media competence and foster “positive values”¹² in computer and video games.¹³ Similarly, the German *Kulturrat*, a politically independent working group of cultural institutions in Germany, called on

Computer Game Industry” (2005) *Canadian Journal of Communication*, 30, pp. 187-210, at pp. 198-200. At the provincial level, games created in Ontario benefit from a tax break of 30% (20% for companies with annual revenues of more than 20 million dollars). See <http://www.gamespot.com/news/6183562.html?&print=1>. Quebec grants tax credits up to 30% for developers of games with a 7.5% bonus if the game includes a French language version. See <http://arstechnica.com/news.ars/post/20080528-game-developers-flee-uk-for-canada-tax-breaks.html>. Manitoba has the most generous tax system, allowing companies to write off 45% of labour costs. Nova Scotia and Prince Edward Island also provide labour tax breaks, see “Battling to keep Vancouver’s game creators”, *Vancouver Sun*, 14 December 2007.

⁶ In South Korea, the government has been supporting the games industry for more than ten years. In 1999, the Ministry of Culture and Tourism established KOGIA, the Korean Games Industry Agency, with the objective of “developing the game industry as a key future strategic industry of the country.” See, Korea Game Industry Agency at <http://www.kogia.or.kr/index.jsp>. Under Korean law the games industry is considered to be part of the culture industry. The “Game Industry Promotion Law”, which was adopted by the National Assembly in 2006, constitutes the legal bases for governmental measures supporting the domestic games industry. See Ministry of Culture & Tourism of Korea, 2006 *The Rise of Korean Games. Guide to Korean Game Industry and Culture*, available at <http://www.kogia.or.kr/index.jsp>.

⁷ In the US, Georgia passed the Entertainment Industry Investment Act in 2008, introducing 20% tax breaks for video game and film production, see <http://www.georgia.org/NR/rdonlyres/829D4E9A-4740-4830-BC6C-AAC44B3B66F0/0/HighlightTaxCredit2008.pdf> and Michigan is proposing new legislation to grant a 40% rebate on state taxes on films, TV and Internet programmes, and video games, see <http://news.filefront.com/michigan-forging-ahead-on-tax-breaks-for-games-movies/>.

⁸ See <http://www.gamesindustry.biz/articles/downing-street-receives-developer-petition>.

⁹ Screen Digest et al., 2006, *Interactive Content and Convergence; Implications for the Information Society*, study commissioned by the Information Society and Media Directorate-General of the European Commission, October 2006, at pp. 38-39.

¹⁰ European Commission, Staff Working Document, SEC(2007) 1710, 3 January 2008 accompanying the Communication from the European Commission on Creative Content Online in the Single Market, COM(2007) 836 final, 3 January 2008, at p. 15.

¹¹ *Deutscher Bundestag*, Drucksache 16/7116, 14 November 2007.

¹² On positive values in a games context, see Edward Castronova, *Synthetic Worlds: The Business and Culture of Online Games*, Chicago: University of Chicago Press, 2005, at p. 123.

¹³ *Deutscher Bundestag*, supra note 11, at p. 3.

politicians to assume more responsibility in the field of games. Bernd Neumann, the Minister for Culture in the federal government, reacted swiftly and announced the setup of a national prize for computer and video games. The prize, endowed with a total sum of 300,000 Euro, will be awarded annually to games content of German origin conforming to a high standard of cultural quality and pedagogical values. Awarded for the first time in 2008, the prize is meant to contribute to the cultural diversity in the games market.

In Scandinavia, the Nordic Game Program was launched in 2006 and is funded by the Nordic Council of Ministers representing the governments of Denmark, Finland, Iceland and Sweden. The programme is designed to ensure that children and young people have access to “quality Nordic computer games”.¹⁴ The programme does not specify any quality criteria. The desired Nordic aspect, however, can be demonstrated by the means of language or the national origin of the production and the ownership of intellectual property rights. Language is a particularly sensitive issue not only in terms of culture but also in economic terms. Since every member of the programme has its own language, market fragmentation is perceived to be a major reason why less than 1% of the games sold on the Nordic market are of Nordic origin. In order to compensate for such disadvantages the programme is funding the development of games content.¹⁵ The programme will run until 2012.

Whereas the German and Scandinavian initiatives are tying games content to cultural diversity, the interesting question is whether digital games belong to the sphere of culture at all. According to the Interactive Software Federation of Europe (ISFE), a pressure group for the games industry, it is wrong to characterize digital games in a similar way to films, television programmes or music and it would be more appropriate to treat them as software.¹⁶ The ISFE argues that since it is software that gives the product its interactive entertainment nature, governments should follow the example of the UK, which is limiting government support for games to the development of new technologies.

The question whether digital games belong to the sphere of culture has important implications for European and international economic law, because of the legal safeguards justifying exemptions from the principle of trade liberalisation for cultural purposes. This paper first looks generally at the question whether digital games are cultural expressions. In accordance with an established terminology, “digital games” is used as a generic term encompassing both “video games” (referring to games played on consoles) and “computer games” (referring to games played on computers).¹⁷ The term applies to both offline and online access since all games will eventually go online.¹⁸ Second, the paper analyses how this question has been dealt with by the competent authorities in the realm of EU competition law. Here, cultural purposes justify both privileges for public service broadcasters and exemptions from the general ban on subsidies. The last part of the paper will be dedicated to the law of the World Trade Organization (WTO),

¹⁴ See Nordic Game Program fact sheet at <http://nordicgameprogram.org>.

¹⁵ 28 million Danish crowns have been invested during the first three years of the programme. See Nordic Game Program fact sheet, <http://nordicgameprogram.org>.

¹⁶ See ISFE position paper on French state aid scheme for video games at <http://www.isfe-eu.org/index.php?PHPSESSID=9bute5eubjlmrgudagcpm4mq2&oidit=T001:dfeb8bc4a6dcf3052747cea0839f32f75>.

¹⁷ Edward Castronova, *Exodus to the Virtual World. How Online Fun Is Changing Reality*, New York: Palgrave Macmillan, 2007, at p. 21; see also Aphra Kerr, *The Business and Culture of Digital Games. Gamework and Gameplay*, London: Sage, 2006.

¹⁸ Castronova, *ibid.* at pp. 35 and 46–48; see also Kerr, *ibid.* at p. 58.

where the question whether digital games are cultural expressions may determine their classification within the General Agreement on Tariffs and Trade (GATT) and/or the General Agreement on Trade in Services (GATS) and impacts on the applicable level of commitments for trade liberalisation.

2. Do digital games belong to the sphere of culture?

The question whether digital games belong to the sphere of culture is highly relevant from a trade perspective at the levels of both EU and WTO law. In the context of EU law, the answer to the question may decide, for example, whether state aid is legitimate. In the realm of WTO law it may determine, among other things, whether digital games must be classified in a subsector of the GATS where governments have accepted commitments to liberalise trade. Finding an answer to this question presupposes a definition of culture.

2.1. Defining culture

Defining culture proves to be an extremely difficult task – not only in a trade context. Due to the characteristics of its subject matter, culture is a principally undetermined notion and manifold definitions are in use. As we have elaborated elsewhere,¹⁹ in the realm of international trade law and policy making, three different versions of the concept of culture can be identified empirically:

(1) In the Anglo-Saxon world, in particular, culture is often used as a synonym for civilization. Used in this sense, culture encompasses all spiritual, intellectual and practical activities of distinct social groups.

(2) A second version equates culture with the cultural heritage of humankind. This version focuses on outstanding treasures of art and archaeology of past epochs. UNESCO has adopted *inter alia* the Convention on World Cultural and Natural Heritage²⁰ and the Convention on Intangible Cultural Heritage²¹ to protect culture in this sense of the word.

(3) Third, culture sometimes denotes a process of creativity in all areas of knowledge production, such as art and, to a limited extent, the sciences and education. Culture in its denotation of artistic creativity can be further subdivided into fine art and folklore, i.e. creative expressions emerging from a traditional context.

With regard to all three versions one should bear in mind that culture and art are two distinct concepts. Sociological systems theory allows this distinction to be understood as follows: Art is an autonomous functional system of society.²² Its function consists in the opening of new communicative perspectives within society. Art confronts the everyday world with the contingency of contrasting worlds and enables escape from the confines of existing communicative forms to produce

¹⁹ Christoph Beat Graber, “Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity”, in Hildegard Schneider and Peter van den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, Antwerp: Intersentia, 2008, pp. 141-162.

²⁰ Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972, entry into force 17 December 1975.

²¹ Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the General Conference on 17 October 2003, entry into force 21 April 2006.

²² Niklas Luhmann, *Die Kunst der Gesellschaft*, Frankfurt: Suhrkamp, 1995.

variation.²³ In its works, art makes society and the world of this society visible, palpable and audible. At the same time, art demonstrates that such perceptions are always contingent.

The economy is an autonomous functional system as well. That is, art and the economy are two distinct systems, which both operate their specific *code* in a process of self-organisation. This theoretical setting requires an explanation of the interplay of artistic and economic decisions in a process leading to the creation of an artwork. According to sociological systems theory, the fact that the production of an artefact depends on investments of money or that the final product is destined to be sold on the market does not prevent a creative expression from being an expression of art. In order to understand this important specification, a distinction between the *code* and the *programmes* of a system is necessary. Whereas the *code* determines the unity of the system, *programmes* are structures that define the conditions of possibility of the code's operation.²⁴ Accordingly, the economic modalities of the production or sale of a work of art are defined by the programmes of the art system and do not affect the code's autonomy.²⁵

Since art produces the perceptions of society, it is the social system with the greatest importance for culture. Culture, in contrast to art, is not a social system. According to Niklas Luhmann, culture is the memory of society.²⁶ It is a filter allowing operation of the distinction between forgetting and remembering and enabling use of the past to define the framework of future communicative variations.²⁷ It should be noted that this concept of culture is not static but dynamic. Hence, culture is not about reifications but rather about communicative processes.²⁸

Luhmann's concept of culture explains well that all three variations identified empirically are interrelated. Contemporary artists and creative persons wish to benefit from (economic, political or legal) conditions offering the best chances in the production and dissemination of creative expressions. However, contemporary artistic production does not take place in a historical void, since new art is always influenced by pre-existing creative expressions. The memory of society allows art to observe the past, to notice the contingency of these observations and to confront them with alternative ways of observation. Finally, a given civilization in as far as it establishes a framework for producing, disseminating and collecting creative expressions, can serve as an entity that allows one to distinguish and compare different forms of knowledge and social organisations in terms of time or space.²⁹

²³ Christoph Beat Graber, *Zwischen Geist und Geld. Interferenzen von Kunst und Wirtschaft aus rechtlicher Sicht*, Baden-Baden: Nomos, 1994, at, p. 130, with references to basic features of Niklas Luhmann's systems theory.

²⁴ On code and programmes of art, see Luhmann, *supra* note 22, at pp. 301-340.

²⁵ For an analysis of the interplay between art and the economy from a systems theory perspective, see Christoph Beat Graber and Gunther Teubner, *Art and Money: Constitutional Rights in the Private Sphere* (1998) *Oxford Journal of Legal Studies* 18, pp. 61-73, at p. 71.

²⁶ Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, 2 volumes, Frankfurt: Suhrkamp, 1997, at p. 588.

²⁷ *Ibid.*

²⁸ Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung*, Bern: Stämpfli, 2003, at p. 13.

²⁹ *Ibid.* at p. 14.

2.2. The UNESCO Convention on Cultural Diversity and the discursive approach to culture

On 18 March 2007 the new UNESCO Convention on Cultural Diversity (CCD) entered into force.³⁰ Due to its ratification by an impressive number of states in a relative short period of time, the CCD has become the new reference point for any discussion related to defining culture in international law or policy making. The Convention does not provide a direct definition of “culture”. Rather, “cultural diversity” is circumscribed in Article 4 CCD as referring to “the manifold ways in which the cultures of groups and societies find expression”.³¹ This indirect approach rightly avoids the ambiguities of UNESCO’s standard definition of “culture” in use since the 1982 UNESCO World Conference on Cultural Policies in Mexico City. The so-called MONDIACULT conference adopted a Declaration on Cultural Policies, which – in its preamble – defined “culture” as encompassing “the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs”.³² This definition is ambiguous in so far as it does not indicate whether it is intended to protect a community’s cultural expressions or rather its characteristic forms of social organisation.³³ To rely on this definition in a Convention on cultural diversity would have been dangerous since some cultural practices of certain social groups, including female circumcision, ritual killing or physical punishment, are gross violations of international human rights standards. To avoid such ambiguities, the CCD refrains from any substantial definition of culture and focuses instead on the creative *expressions* of groups and societies.³⁴ Recital 12 of the Preamble to the CCD establishes a direct link between “cultural expressions” and “freedom of thought, expression and information” and thus emphasises the human rights foundations of this notion.³⁵ Focussing on expressions, the Convention presupposes a *discursive concept of culture*, aiming at furthering the diversity of media – media being understood in a broad sense as the means to convey creative information.

Adopting a discursive notion of culture, the question whether digital games belong to the sphere of culture must be answered in the affirmative. Digital games are undoubtedly a form of creative expression similar to other works of art,

³⁰ UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005, entered into force 18 March 2007.

³¹ Christoph Beat Graber, “The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?” (2006) *Journal of International Economic Law* 9:3, pp. 553–574, at p. 558; Graber, *supra* note 19, at pp. 142–146.

³² See Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies Mexico City, 26 July–6 August 1982.

³³ Ivan Bernier, “A UNESCO International Convention on Cultural Diversity” in Christoph Beat Graber, Michael Girsberger and Mira Nenova (eds.), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services*, Zurich: Schulthess, 2004, pp. 65–76, at pp. 66–67.

³⁴ “Cultural expressions” are described in Article 4(3) CCD as “expressions that result from the creativity of individuals, groups and societies, and that have cultural content”. “Cultural content” is described in Article 4(2) as “symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities”.

³⁵ Furthermore, recital 5 of the Preamble celebrates “the importance of cultural diversity for the full realization of human rights and fundamental freedoms” and Article 2(1) stresses that “[n]o one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law or to limit the scope thereof”.

including, for example, verbal, musical, graphic, sculptural or audiovisual art.³⁶ Narrative, which is crucial in literature and films is also important in many digital games.³⁷ According to Castronova, narrative is critical in digital games for explaining why certain activities within the game matter.³⁸ In contrast to a fictional film, where the plot navigates the audience through the story,³⁹ in a game narrative is something rather diffuse, i.e. gamers rather than actively seeking the lore, “seep it through the atmosphere”. The lore “is in the air, both unnoticeable and unavoidable at the same time. The brief dialogues that send players on quests are grounded in the lore; the place and creature names come from the lore; even the look and feel of the buildings and landscapes derive from the lore”.⁴⁰ As Carr et al. have emphasised, some games rely more on narrative than others.⁴¹ The importance of narrative in a game will vary according to genre⁴² and will be greater for games where representational aspects⁴³ prevail over *gameplay*, i.e. the ludic aspects of a game.⁴⁴ Evidently, the fact that digital games are a construct of software code does not foreclose their cultural quality since it is the expression that counts and not the technology underlying it. Similarly, a cinematographic film does not stop being a cultural artefact simply because in the digital age it is fixed in combinations of zeroes and ones on a hard disk rather than in analogue format on celluloid.

2.3. Can cultural diversity be measured?

The acceptance of the cultural qualities of digital games does not imply, however, that government measures in support of games are automatically legitimised. An advantage of a discursive approach to culture is that it would not be incompatible with a necessity test for such measures, based on empirical economic analysis. Indeed, a discursive approach would allow analysis of cultural expressions in the markets where they are represented and consideration of the *economic modalities* of the production, dissemination, distribution and enjoyment of expressions. For the purpose of implementing the CCD, an expert group convened by UNESCO's Culture Sector and the UNESCO Institute for Statistics is currently discussing the possibilities of developing a shared methodology for statistical

³⁶ According to Balkin, in the United States first-person shooter games have been entitled to First Amendment protection in their quality as artistic creations. See Jack M. Balkin, “Law and Liberty in Virtual Worlds” in Jack M. Balkin and Beth Simone Noveck (eds.), *The State of Play. Law, Games, and Virtual Worlds*, New York: New York University Press, 2006, at p. 89.

³⁷ For a discussion of similarities in the operation of narrative in films and digital games, see Marsha Kinder, “Narrative Equivocations between Movies and Games” in Dan Harries (ed.), *The New Media Book*, London: British Film Institute, 2002, pp. 119–132, at pp. 122–126.

³⁸ Castronova, *supra* note 17, at p. 118.

³⁹ Robert McKee, *Story. Substance, Structure, Style, and the Principles of Screenwriting*, New York: Regan, 1997, at p. 43; Seymour Chatman, *Story and Discourse. Narrative Structure in Fiction and Film*, Ithaca: Cornell University Press, 1978, at p. 43.

⁴⁰ Castronova, *supra* note 17.

⁴¹ For a sophisticated discussion of the possibilities of making use of “classic” literary and film narrative theory to develop a narrative theory for role playing games, see Diane Carr, David Buckingham, Andrew Burn and Gareth Schott, *Computer Games. Text, Narrative and Play*, Cambridge: Polity, 2006, at pp. 30–44.

⁴² Frequently used genre classifications distinguish Action, Adventure, Racing, Puzzle, Role Playing, Simulations, Sports and Strategy. See Carr et al., *ibid.* at pp. 18–19. See also Aphra Kerr's contribution to this volume.

⁴³ With regard to representational aspects of a game (narrative, music, characterisation) Carr et al., *supra* note 41, at p. 16 and 18, distinguish between science fiction, high fantasy and urban realism.

⁴⁴ With regard to styles of *gameplay*, Carr et al, *supra* note 41, at p. 16, distinguish multiplayer, networked and single user.

measurement of cultural diversity. However, as a recent report shows, this task is extremely complex and is far from being accomplished.⁴⁵

In view of the special situation of the digital games sector, existing economic analysis differentiates market segments on the basis of a distinction between console games, personal computers (PC) games, massively multiplayer online role-playing games (MMORPGS), mini games etc.⁴⁶ For our purpose, however, a classification based on differences in game genres (e.g. Action, Adventure, Racing, Puzzle, Role Playing, Simulations, Sports and Strategy) would be more useful, since genres are used to describe and classify games not only by developers and marketing departments but also by users.⁴⁷ A further difficulty is that an empirical analysis based on formal markets fails to take into account content created by developers at the fringe of the markets such as user groups, artists or academics.⁴⁸ Although user content creation is rather marginal in most digital games, according to Castronova it might become more relevant in future if the industry starts to see it as a solution to the problem of labour and cost intensity.⁴⁹

Once the sought-after methodology and empirical data for measuring cultural diversity in specified markets, including the markets for digital games, becomes available, the discursive approach will contribute to rationalise the debate on trade and culture in the context of international trade regulation. Governments will then be under the pressure to test the legitimacy of policy measures for cultural expressions in function of the presence or absence of failures in the relevant markets. Consequently, a discursive approach to culture is compatible with the needs of international trade disciplines, which, generally speaking, are designed to protect the Members' expectations of equal competitive relationships in specific markets.

2.4. Are there structural failures in the digital games market?

As an important contribution towards rationalising the debate on trade and culture at the international level, a discursive approach to cultural diversity opens the door for a political economic analysis. There exists little literature specifically analysing online digital games from a political economic perspective.⁵⁰ There is available, however, sophisticated pre-Internet economic critique of the film and TV industries in the context of international trade regulation, which, while we are awaiting more specific research, may help us to draw some preliminary conclusions regarding failures in the structure of digital games markets.⁵¹

⁴⁵ See UNESCO, Expert Group Meeting (EGM) on the Statistical Measurement of the Diversity of Cultural Expressions, UIS Montreal, 27–28 September 2007.

⁴⁶ Kerr, *supra* note 17, at pp. 52–62.

⁴⁷ See Carr et al., *supra* note 41, at p. 14.

⁴⁸ *Ibid.* at p. 73.

⁴⁹ Castronova, *supra* note 17, at pp. 58–61. On user created content, see also the contribution of Mira Burri-Nenova to this volume.

⁵⁰ For one of the rare political economic views on the digital games industry, see Kerr, *supra* note 17.

⁵¹ See C. Edwin Baker, *Media, Markets, and Democracy*, Cambridge: Cambridge University Press, 2001; C. Edwin Baker, "An Economic Critique of Free Trade in Media Products" (2000) *North Carolina Law Review* 78:5, pp. 1357–1436, at pp. 1379–1391; Pierre Sauvé and Karsten Steinfatt, "Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?" in Productivity Commission and Australian National University, *Achieving Better Regulation of Services*, Canberra: Australian National University, 2000, pp. 323–346, at pp. 326–339; John David Donaldson, "'Television Without Frontiers': The Continuing Tension between Liberal Free Trade and European Cultural Integrity" (1997) *Fordham International Law Journal* 20:1, pp. 90–180, at p. 171; Stefan Ospel, *Ökonomische Aspekte elektronischer Massenmedien*, Aarau: Sauerländer, 1988, at pp. 25–36.

From a political economic perspective the crucial question is whether there are structural failures in the games market. From the types of failures that have commonly been identified by economists as being typical of the markets for cultural goods and services under pre-Internet conditions,⁵² failures due to *economies of scale* in production and distribution of cultural products and failures due to the impact of *externalities* on the pricing of cultural products seem to be relevant under the conditions of the Internet.

With regard to *economies of scale*,⁵³ there appear to be several communalities between digital games and audiovisual media and for both sectors there are strong incentives to maximise audiences. According to Kerr, the film and the games industries are both high risk and high fixed cost enterprises.⁵⁴ In the games sector, developing game design is particularly labour-intensive. Hence, bringing games to a higher level of aesthetic sophistication requires huge investments.⁵⁵ In the production of digital games, development and publishing are the two main stages to be distinguished.⁵⁶ Kerr reports data suggesting that the global publishing industry has consolidated around a few major companies during the last 15 years.⁵⁷ Accordingly, *vertical integration*⁵⁸ is becoming a dominant business strategy, uniting the stages of development and publishing under the roof of one big corporation such as Nintendo, Microsoft or Sony.⁵⁹ A further issue is *diagonal integration* of the film and the games industries.⁶⁰ Almost no Hollywood blockbuster film is likely to be released without a game associated with it.⁶¹ Besides licensing, adapting a game from a successful film often seems to be a quick route to high profits.⁶² Adapted games benefit enormously from the film's brand name and "players can bring memories of the original actors and back-stories to the game and put them into play".⁶³ The question is whether these processes will have a negative impact on the diversity of games produced. For Kerr, the trends discussed suggest "that there is decreasing space for small and/or independent publishers and developers". Consequently, there is the danger that less "original game ideas [...] make it in to the marketplace".⁶⁴

With regard to *externalities*, *positive externalities* seem to be the failures most likely to be present in the markets for digital games in an online environment. Positive externalities are defined as benefits arising to persons others than those

⁵² See Baker, supra note 51, Sauv e and Steinfatt, supra note 51.

⁵³ According to the concept of "economies of scale" unit costs tend to decrease with larger quantities produced. See Sauv e and Steinfatt, supra note 51.

⁵⁴ Kerr, supra note 17, at p. 46. Similar to films, digital games distributed by the means of CD sales, are characterised by very high relative costs of production and low relative reproduction costs. This characteristic, however, does not extend to subscription-based online games.

⁵⁵ See Castronova, supra note 17, at p. 59.

⁵⁶ Ibid. at p. 23.

⁵⁷ Kerr, supra note 17, at p. 65, referring to James Cornford, Richard Naylor and Stephen Driver, "New media and regional development in the case of the UK computer and video games industry" in Anna Giunta, Arnold Lagendijk and Andy Pike (eds.), *Restructuring Industry and Territory: The Experience of Europe's Regions*, London: Stationery Office, 2000, pp. 83–108. See also Aphra Kerr's contribution to this volume.

⁵⁸ Vertical integration means a process integrating both upstream and downstream markets.

⁵⁹ Kerr, supra note 17, at p. 70.

⁶⁰ Ibid. at p. 46. Diagonal integration is defined as an expansion of a firm's business activities into a new market.

⁶¹ Castronova, supra note 17, at p. 57.

⁶² Kerr, supra note 17, at p. 70.

⁶³ Kinder, supra note 37, at p. 119.

⁶⁴ Kerr, supra note 17, at p. 73.

that have produced the product.⁶⁵ In such a case, prices do not reflect the full benefits in production or consumption of a product or service and there are too little incentive on parties to participate in activities that lead to these positive externalities. Consequently, the presence of positive externalities means that the market at issue fails to allocate resources efficiently.⁶⁶ Where positive externalities can be shown, renowned economists including Krugman and Obstfeld see a “good case” for governments to subsidise the product.⁶⁷ In the digital games sector, positive externalities are related to the use of language and the presence of violence. The use of English together with a high degree of action and violence seem to be preconditions for a universal audience appeal not only in the film industry but also in the digital games sector. Hence, existing market structures in many regions of the world clearly favour the production of games in English.⁶⁸ Although the availability of cultural products in the national language(s) can help to shape more tolerant national identities,⁶⁹ in Europe there is little economic incentive to produce video games in languages other than English. Considerable positive externalities are also contributed by games that are socially integrative and of a pedagogical value.⁷⁰ A high percentage of the interactive games sold on the market reside in a player identity of “militarized masculinity”,⁷¹ which is an issue raising concerns regarding the social construction of gender.⁷²

According to a recent survey published in the *Lancet*, a renowned scientific journal, there is sufficient evidence today that regular exposure to violent scenes in videos or digital games incites a higher level of physical and verbal aggression in consumers.⁷³ Moreover, there have been cases in which digital games were imputed to be responsible for school killings.⁷⁴ Research tells us that digital games

⁶⁵ Paul R. Krugman and Maurice Obstfeld, *International Economics, Theory and Policy*, 8th ed., Reading, MA: Addison-Wesley, 2000, at p. 267.

⁶⁶ Joseph E. Stiglitz, *Economics of the Public Sector*, 3rd ed., New York: W.W. Norton & Company, 2000, at pp. 80–81; Baker, supra note 51, at p. 1392.

⁶⁷ Krugman and Obstfeld, supra note 65, at p. 267.

⁶⁸ A distinction between regional markets is necessary, since economies of scale will provide enough incentives to produce games in Mandarin or Spanish.

⁶⁹ Sauv e and Steinfatt, supra note 51.

⁷⁰ See also Thomas Steiner, “Advertising in Online Games and EC Audiovisual Media Regulation”, NCCR Trade Working Paper No. 2008/3, at p. 20.

⁷¹ Stephen Kline, Nick Dyer-Witheford and Greig de Peuter, *Digital Play. The Interaction of Technology, Culture, and Marketing*, Montr al: McGill-Queen’s University Press, 2003, at p. 26; Kerr, supra note 17, at p. 100. According to Kline et al., at pp. 12–13, young males are still the consumers most attracted by interactive games. Although the percentage of female players seems to have risen during recent years, girls are still the minority.

⁷² From a gender perspective, Kerr, supra note 17, at pp. 92–93 and chapter 5, has identified an interdependence between the dominance of heterosexual masculine fantasies in games and production structures in games development, where only a very small percentage (between 5 and 15%) of the workers are women.

⁷³ See the discussion of the Lancet survey in Stephanie Lahrtz, “Wie das Gehirn Bildschirmgewalt verarbeitet”, *Neue Z rcher Zeitung*, 21 May 2008. For a comprehensive analysis, see the contribution of Miriam Sahlfeld to this volume.

⁷⁴ Just to mention two cases: in 2002 a 19-year-old man killed 17 persons (including himself) at the Gutenberg Gymnasium in Ehrfurt, Germany. The investigation conducted by the Gutenberg Commission found that the killer was in possession of several violent video films and a great number of first shooter digital games including *inter alia* *Return to Castle Wolfenstein*, *Half-Life* and *Hitman*. See Bericht der Kommission Gutenberg-Gymnasium, Ehrfurt, 19 April 2004, at p. 336. Another case is the killing at Dawson College in Montreal, Canada, where on 13 September 2006 a 25-year-old man in a black trench coat killed one young woman and badly injured 19 people before killing himself. The killing recalled the 1999 massacre at Columbine High School, Colorado, where two students in black trench coats killed 13 people before committing suicide. The criminal investigation revealed that the Montreal gunman loved to play *Super Columbine Massacre*, a digital game reconstructing the Columbine massacre from a first shooter perspective. See

are becoming more and more important in the socialisation of children and adolescents.⁷⁵ Since democratic societies build on peaceful interaction and exchange of views among members it is understandable that governments are alarmed and likely to consider funding alternative games content in order to offer a more varied selection. The danger, however, is that certain politicians may be tempted to hide protectionist interests behind alarmist rhetoric.

In conclusion, a discursive concept of cultural diversity would allow fighting against protectionism in the debate on trade and culture in the field of digital games. However, with regard to the state of research discussed above, we recommend a more thorough economic assessment of the structures in the digital games market. Such assessment would presuppose the availability of specific statistical data on the basis of which the presence or absence of market failures in the digital games markets could be scrutinised. Hence, methodological improvements in the analysis of digital games markets would be necessary not only for a more sophisticated determination of market failures but also for determining the legitimacy of policy measures designed to further cultural diversity in the field of digital games.

3. EU law

3.1. Support for digital games within the MEDIA programme

The support of digital services and European catalogues is one of the priorities of the MEDIA 2007 programme.⁷⁶ The programme is not limited to fictional films, documentaries and animated films but also includes multimedia. The question is whether the term “multimedia” would also cover digital games. The European Commission seems to answer this question positively since it reserved a budget for the support of development projects in the field of video games in the MEDIA 2007 programme.⁷⁷ When explaining the new initiative in a recent speech, Viviane Reding, the Commissioner responsible for Information Society and Media, emphasised the cultural dimension of digital games and stressed “the need to promote this industry as a cultural industry”. The endowment of the fund is very modest, amounting to a total of 1.5 million Euro.⁷⁸ With this fund, studios developing games can obtain between 10,000 and 100,000 Euro in direct and non-repayable aid. The financial support is limited to 60% of the total budget if the project is “presenting an interest in promoting European cultural diversity”; for other projects the limit is 50%.⁷⁹ According to the guidelines for implementing the fund, “Projects presenting an interest in promoting European cultural diversity are those which bring together different national and/or regional cultural identities within a framework of inter-cultural dialogue among at least two European

Christoph Beat Graber, “La régulation des jeux vidéo en ligne/Regulation von Online-Games” (2007) *medialex* 12:1, p. 1, at p. 1.

⁷⁵ Kline et al., *supra* note 71, at p. 13.

⁷⁶ See recital 8 and Articles 1(3)(d), 3(1)(c) and 5(d) and (e) of Decision No 1718/2006/EC of the European Parliament and the Council of 15 November 2006 concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), OJ 2006, L 327/12.

⁷⁷ Vivian Reding, “Video Games: Let’s Go for PEGI Plus!”, Speech at the Annual Conference of the Interactive Software Federation of Europe, Brussels, 7 May 2008.

⁷⁸ See www.developmag.com/news/28449/European-Commission-creates-15m-game-fund (21.8.08).

⁷⁹ European Commission, MEDIA 2007 – Development, Distribution and Promotion, Call for Proposals–EACEA/17/07, OJ 2007, C 204/10.

countries. The project must be centred on the cultural specifics of the countries involved and highlight the values held by their populations⁸⁰. To qualify, studios must have developed at least one successful game since the start of 2005.

Whereas Community funding for video games is still emergent, several EU Member States have been supporting the digital games sector for several years now, both directly and indirectly. Direct support is being provided through financial aid paid by national governments directly to the games industry. Indirect funding of digital games is an issue where publicly financed broadcasters expand their activities into the field of Internet games. Both avenues of government intervention in the games market will be discussed in the following sections.

3.2. State aid for the digital games industry in Europe

In the context of European Community law the issue of state aid for games was recently addressed by the Commission with regard to applying Article 87(3)(d) of the Treaty Establishing the European Community (EC Treaty)⁸¹ to a French tax credit scheme for video game creation. Article 87(3)(d) EC Treaty authorises aid to promote culture and thus provides for an exemption from the general prohibition of state aid in EU law.⁸² France had introduced a measure granting 20% tax breaks for the production of video game content meeting the criteria of quality and originality and contributing to cultural diversity. This scheme was authorised on 12 December 2007 by the European Commission under EU treaty rules on state aid after conducting an in-depth investigation.⁸³

In the process of the investigation the French government argued that the scheme meets the requirements of Article 87(3)(d) EC Treaty since eligible digital games *inter alia* must respect one of two cultural criteria. Whereas the first cultural criterion requires that “games should adapt an existing work from Europe’s cultural heritage” the second criterion requires the concept of the game to meet quality and originality standards in order to contribute to “expressing Europe’s cultural diversity and creativity in the field of video games”.⁸⁴ In addition, a European cultural criterion provides that a minimum number of the persons involved in the production process are nationals of an EU Member State.⁸⁵ According to the French authorities the measures are covered by the exception in Article 87(3)(d) from the general ban on state aid because they are designed to promote creativity and to conserve cultural heritage. The French authorities argued that video games constitute cultural objects in the sense of Article 87 (3)(d) EC Treaty for a number of reasons, including the following:

(1) Games are conceived on the basis of a screenplay written in the French language.

⁸⁰ See guidelines implementing the fund at http://ec.europa.eu/information_society/media/producer/develop/interactive/docs/guidelines_en.pdf.

⁸¹ OJ 2006, C 321 E/77.

⁸² Evangelia Psychogiopoulou, “EC State Aid Control and Cultural Justifications” (2006) *Legal Issues of Economic Integration* 33:1, pp. 3–28.

⁸³ European Commission, “State Aid: The Commission Authorises French Aid Scheme for Video Game Creation”, IP/07/1908, 12 December 2007.

⁸⁴ European Commission, State Aid No C 47/2006, Tax Credit for the Creation of Video Games, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ 2006, C 297/19, at pp. 20–22.

⁸⁵ *Ibid.* at p. 22.

(2) Video games are an artistic and technological creation. A substantial part of the expenditures necessary to produce a game arise from creative contributions such as the development of the gameplay.

(3) Video games manifest a close affinity to films since many of them are inspired by existing films and such games often use the narrative techniques of the film.

Although the Commission did not exclude the possibility that certain digital games constitute cultural products, it expressed its doubts, that the measures at issue complied with Article 87(3)(d) EC Treaty. For the Commission, the question whether a game has a cultural character in the sense of Article 87(3)(d) depends on its content.⁸⁶ In the case at issue, this question was answered on the basis of the selection criteria for eligible games operated by the French authorities. With regard to the first selection criterion, the adaptation of an existing work of the European cultural heritage on the basis of a screenplay written in French, the Commission found that some of the games provided by the French authorities as examples suggest that the criterion could be applied very broadly. The Commission therefore requested that the concept of "Europe's cultural heritage" be defined.⁸⁷ With regard to the second selection criterion, the requirement for the concept of the game to meet quality and originality standards, the Commission also found that it lends itself to an overly broad interpretation which could include, for example, simulation or sports games. Furthermore, the criteria of quality and originality could be used "to select video games that are good for fun rather than actually cultural".⁸⁸ Hence, the Commission asked the French authorities to show that only video games with cultural content could benefit from the aid. Furthermore, the Commission introduced a quantitative criterion. If the evaluation of the production over several years reveals that a large proportion of the annual production is being supported, the measure would be considered to be alienated from its cultural purpose. For the Commission it is important that the measure does not act as an industrial policy instrument in favour of the game sector.⁸⁹ Finally, the Commission raised the criticism that subcontracting costs were not included within the category of eligible costs.⁹⁰

After the French authorities had clarified the selection criteria to make sure that only video games with cultural content could benefit from the aid and also accepted the need to change the other points criticised, the European Commission authorised the scheme on 12 December 2007.⁹¹

3.3. Public service broadcasters and digital games

In a recent speech, Neelie Kroes, the European Commissioner for Competition Policy, emphasised that "it is certainly [not] obvious to the naked eye or the taxpayer why public broadcasters should be using state money to run on-line video games".⁹² This remark is to be understood as a warning to public service broadcasters (PSBs), who, as we have briefly shown in the introduction, have discovered the potential of online digital games as a means to attract the attention

⁸⁶ Ibid. at p. 24.

⁸⁷ Ibid.

⁸⁸ Ibid. at p. 20.

⁸⁹ Ibid. at p. 25.

⁹⁰ Ibid.

⁹¹ European Commission, *supra* note 83.

⁹² Neelie Kroes, "State Aid for Broadcasting", Speech/08/313, Medienforum, Cologne, 9 June 2008, at p. 4.

of young audiences. The Internet activities of public broadcasters in general have been a major subject of the heated debate during the last couple of years between the European Commission and certain Member States regarding the legitimacy of financial regimes in support of public service broadcasting. While many PSBs consider an expansion of their activities into the Internet as a natural and necessary adaptation to technological change, newspapers and commercial broadcasters, required to survive without state aid, complain of being “crowded out” of a market where there is no shortage of Internet services and allege that competition is distorted by an unrestrained use of public money.⁹³

From the perspective of EU law, the fundamental question underlying these disputes has always been whether and how far the contribution of public service broadcasting towards assuring diversity of opinion and high quality information would qualify for an exemption from the general ban on subsidies in the competition law chapter of the EC Treaty.⁹⁴ In the *TV10* judgment, the European Court of Justice (ECJ) held in 1994 that television falls into Member States’ competences as far as it is a cultural phenomenon.⁹⁵ Accordingly, Member States are free to formulate policies and to adopt laws to assure a plurality of social, spiritual and religious views. Conversely, with regard to financing public service broadcasting, Article 87 EC Treaty, which provides for a general prohibition on subsidies, must be respected. The difficult relationship between the Member States’ cultural competences in the field of public service broadcasting and the competition law rules of the EC Treaty was addressed in the 1997 Protocol (32) to the Treaty of Amsterdam on the System of Public Broadcasting in the Member States.⁹⁶ According to the Protocol, the financing regime of public service broadcasting is subject to supervision by the Commission. Such financial support will be tolerated as long as it is related to the specific public service remit and meets the requirements of proportionality. These principles were confirmed in the 1999 Resolution of the European Council concerning public service broadcasting.⁹⁷

The ECJ has not yet pronounced its views on the scope of competition law in the specific field of public service broadcasting. Beyond the broadcasting sector, the Court clarified in its *Altmark* jurisprudence that as long as a governmental measure is merely compensation for services provided in the general interest it must not be considered a subsidy under Article 87(1) EC Treaty.⁹⁸

The Commission, in turn, has scrutinised more than 20 cases to determine whether Member States’ definitions and financing schemes for public service broadcasting meet the requirements of EU competition law.⁹⁹ The question

⁹³ See *ibid.* at p. 3.

⁹⁴ See Psychogiopoulou, *supra* note 82, at pp. 11–16.

⁹⁵ See European Court of Justice, Case C-23/93, *TV10 SA v Commissariaat voor de Media* [1994] ECR I-04795.

⁹⁶ According to Article 311 EC Treaty, Protocols are an integral part of the Treaty and have the same legal effects as Treaty provisions.

⁹⁷ Resolution of the Council and of the Representatives of the Governments of the Member States, Meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ 1999, C 30/1.

⁹⁸ See European Court of Justice, Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-07747. According to the ECJ, the definition of a subsidy in Article 87(1) *inter alia* requires an advantage for the beneficiary (at paras 75 and 83–87). Consequently, payments intended to compensate a service of general interest do not constitute an advantage, provided that they meet a number of conditions defined by the ECJ in *Altmark*.

⁹⁹ The Commission took its decisions on the basis of a framework set out in its 2001 Broadcasting Communication. See European Commission, Communication from the Commission on the application of State aid rules to public service broadcasting, OJ 2001, C 320/5. In November 2008, the Commission circulated for public consultation the draft of a new Broadcasting Communication destined to clarify and consolidate its

whether public money may be used to fund new Internet activities of PSBs which are not TV programmes in a strict sense was generally the most contested issue in these cases.

A good example is a recent proceeding which started in 2005, when the European Commission asked Germany, Ireland and the Netherlands to clarify the role and the financing regime particularly with regard to the activities of PSBs on the Internet. In the proceedings involving Germany, the Commission took the view that the German licence fee is a subsidy in the sense of Article 87(1) EC Treaty.¹⁰⁰ As an exception to the general prohibition on subsidies in Article 87(1), Article 86(2) EC Treaty allows subsidies, which are justified by the public service remit. The Commission did not *a priori* exclude the possibility that the Internet activities of a PSB can be part of its public service remit. It required however a clear definition of the scope of these activities and that the financing regime respects certain conditions.

The Commission found that the German financing regime was not in conformity with the rules of the EC Treaty on state aid.¹⁰¹ It requested Germany to clarify further the public service remit by setting a number of conditions for new activities on the Internet. In particular, such activities must pass a so-called “contribution to editorial competition” test.¹⁰² This test, to be administered by the KOF (Commission for the Determination of the Financial Needs of Public Service Broadcasters in Germany) and by the Court of Auditors reflects the relevance of a given offer for opinion shaping in the light of other offers available on the market. Furthermore, the proposals of the broadcasters ARD and ZDF for such activities must be formally adopted by the German *Länder* and commercial activities shall not benefit from any state aid. Once Germany had committed itself to bringing its domestic laws into conformity with these requirements within the next two years,¹⁰³ the Commission closed the proceedings.

This proceeding is very important because the Commission will apply the principles developed therein to the other pending and future cases regarding the Internet. It is not unlikely that the “contribution to editorial competition” test introduced by the Commission will become the touchstone for judging the legitimacy of any content-related activity of PSBs in the Internet and will thus also be relevant for online games.¹⁰⁴

policy as set out in the Commissions case practice. See IP/08/1626, 4 November 2008. The draft is available at http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm.

¹⁰⁰ European Commission, Decision E 3/2005, Aid to the German public broadcasters, OJ C 185, 8 August 2007, see European Commission, State aid: Commission closes investigation regarding the financing regime for German public service broadcasters, IP/07/543, 24 April 2007. For the full reasoning of the Commission’s decision, see European Commission, Staatliche Beihilfe E 3/2005 – Die Finanzierung der öffentlich-rechtlichen Rundfunkanstalten in Deutschland, K(2007) 1761 endg., 24 April 2007.

¹⁰¹ The Commission held at paragraph 232 of the full reasoning (supra note 100), that new online offers, including online games, cannot automatically be considered to be “services of general economic interest”.

¹⁰² In the decision, which is drafted in German, this is called “*Beitrag zum publizistischen Wettbewerb*”. Ibid. at paras 309–311 and 362–365.

¹⁰³ On 23 October 2008 the Conference of Ministers of the German *Länder* adopted a new broadcasting treaty (12. Rundfunkänderungsstaatsvertrag), which implements the Commission’s decision. According to the new law, after 2010, not only new but also existing activities of ARD and ZDF on the Internet must conform to the “contribution to editorial competition” test.

¹⁰⁴ In the draft for its new Broadcasting Communication (supra note 99, at pp. 21–24), the Commission set a general framework for a proportionality test “considering whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service” (at p. 21). The “contribution to editorial competition” test appears to be a specific application of the Communication’s proportionality test in cases of expansion of PSBs into the Internet.

3.4 Preliminary conclusion on the situation in the EU

In drawing a preliminary conclusion on the situation in the EU, it is first striking to note that digital games qualify for support under the MEDIA programme. The MEDIA programme was originally designed to support project development and the distribution of European audiovisual works but has been extended to include multimedia services. The Commission considers digital games to qualify for support under this category. Second, regarding national schemes for the support of digital games, our analysis shows that the Commission is willing to consider governmental measures for the support of diversity in the digital games sector under Article 87(3)(d) EC Treaty, which is a specific safeguard for cultural purposes. The support of the production of games in the national language(s) is clearly considered to be covered by the scope of Article 87(3)(d). However, with regard to other measures including measures to adapt audiovisual works of “Europe’s cultural heritage” or to promote quality and originality standards in games, the Commission requests the selection of criteria that are not applied too broadly and that ensure that only cultural content is supported. However, the Commission does not provide for a definition of “cultural content” beyond simply excluding simulation or sports games from this concept. Finally, with regard to public service broadcasters offering digital games on their Internet platforms, the Commission has not yet taken a decision. However, considering the Commission’s existing policy regarding state aid for public service broadcasters, it seems unlikely that the Commission will accept such activities as being part of the broadcasters’ public service mandate. In our view, offerings such as ORF’s *Ski Challenge* discussed in the introduction would hardly be likely to pass the “contribution to editorial competition” test if such a case was to be brought before the Commission.

4. WTO law

4.1. GATT or GATS?

With regard to the question whether government measures promoting digital games are in conflict with the law of the WTO one must first clarify whether this is an issue of the GATT or the GATS. The answer to this question is important because of the broader reach of the GATT rules on non-discrimination (national treatment obligation and most-favoured-nation obligation) and on market access.¹⁰⁵ In the realm of the negotiations on electronic commerce, which later became part of the Doha Development Agenda,¹⁰⁶ the United States suggested opting for a GATT rather than a GATS approach to digital products since the application of the GATT would “provide for a more trade-liberalizing outcome for electronic commerce”.¹⁰⁷ The argument is that digital products including digital media which are delivered electronically should be subject to the GATT. While the electronic delivery may be characterized as a service, the products themselves arguably show qualities of goods, since they “are not consumed in their transmission, but rather retain a

¹⁰⁵ Graber, “Audio-visual Policy: The Stumbling Block of Trade Liberalisation” in: Damien Gérardin and David Luff (eds.), *The WTO and Global Convergence in Telecommunications and Audiovisual Services*, Cambridge: Cambridge University Press, 2004, pp. 165–214, at pp. 171–172.

¹⁰⁶ See WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 14 November 2001, at para 34 and WTO, Doha Work Programme, Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005, at para 46.

¹⁰⁷ WTO, Work Programme on Electronic Commerce: Submission by the United States, WT/GC/16/G/C/2, S/C/7, IP/C/16, WT/COMTD/17, 12 February 1999, p. 5.

permanence analogous to that in the goods world".¹⁰⁸ This argumentation suggests that even products such as software, which are distributed electronically and are generally not marketed in tangible form, should fall under the scope of the GATT. The European Commission however disagrees with the US and argues that all transmissions of digital products are subject to the GATS rather than the GATT. The European Union and its Member States are keen to avoid the exemption of audiovisual media from existing GATS obligations (negotiated during the Uruguay Round) being bypassed by means of the rules on e-commerce.¹⁰⁹

The US position is to maximise the trade-liberalising impact on electronic delivery of digital media. This is obviously in the interest of the US software industry. Microsoft, its most powerful representative, has been calling for the application of GATT rules on national treatment, MFN and market access to electronically delivered software.¹¹⁰ Microsoft states that software has "long been treated as a good" and argues that the application of GATT rules has produced very positive results. According to Microsoft, the application of the GATT rules "resulted in the elimination of duties on most software products".¹¹¹ Microsoft is aware that tariffs are imposed on the carrier medium of the software (e.g. a disk) rather than on the software code itself. Although major trading nations consider software to be information, which cannot be subject to a tariff, the US software giant urges the WTO Members to "refrain from reclassifying electronically delivered software as a service".¹¹²

The WTO legal framework itself does not provide positive rules allowing one to clearly distinguish goods from services. In the absence of a provision of positive law, a rule of thumb would suggest that goods are tangible whereas services are not.¹¹³ This rule is however of limited help when it comes to products of electronic commerce.¹¹⁴ Does a book, for instance, which is normally a good, become a service when it is distributed in digital form via the Internet? Because of its far-reaching implications for effective trade liberalisation the classification of e-commerce products between GATT and GATS is of a political nature and should be resolved by way of negotiations between the WTO Members. While awaiting such an agreement, the fact that the GATT provides for a tariff number for a product at issue may be an indication for its GATT rather than GATS classification since, as a rule, only goods are subject to customs duties.

Hence, with regard to software products (including games software), one should first find out whether there is a tariff number providing for their classification within WTO Members' tariff schedules. In this context one should

¹⁰⁸ Ibid.

¹⁰⁹ William J. Drake and Kalypso Nicolaidis, "Global Electronic Commerce and GATS: The Millennium Round and Beyond" in Pierre Sauvé and Robert M. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization*, Washington, DC: Brookings Institution Press, 2000, pp. 399–437, at p. 408.

¹¹⁰ Microsoft, International Trade, available at <http://download.microsoft.com/download/9/b/3/9b3b38df-0a36-43ad-adab-6a9d5c0b8882/EUPolicyHandbook/InternationalTrade.pdf>. See Thomas Steiner, *Online Games under WTO Law: Unresolved Issues*, NCCR Working Paper 2009/3, at p. 8.

¹¹¹ Microsoft, *WTO and Electronic Commerce: issues for World Trade*, Microsoft White Paper, 8 September 1999, available at <http://www.microsoft.com/issues/essays/1999/11-15wto-b.msp>.

¹¹² Ibid.

¹¹³ Note that a case between the EC and the US (with Japan and others joining) regarding tariff classification of some information technology products is pending, which may have interesting implications for the goods/services divide. The panel was constituted on 26 January 2009. See *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/9, WT/DS376/9, WT/DS377/7, 26 January 2009.

¹¹⁴ Drake and Nicolaidis, *supra* note 109, at p. 408.

recall that Article II(1) GATT requires a WTO Member not to impose customs duties on other WTO Members which are less favourable than the tariff bindings inscribed in its individual tariff schedule. According to Article II(7) GATT, a Member's individual tariff schedule is made an integral part of the GATT 1994.¹¹⁵ Since tariff schedules constitute a "covered agreement" the Dispute Settlement Understanding (DSU) applies to their interpretation.¹¹⁶ Hence, according to Article 3.2 DSU, tariff schedules and tariff concessions must be interpreted in conformity with customary rules of interpretation of public international law.¹¹⁷

Because customs duties differ from product to product, the determination of the proper classification of a product is very important. WTO law does not prescribe following specific rules on customs classification. Most WTO Members use the *Harmonised System* (HS), which is administered by the World Customs Organization (WCO).¹¹⁸ The Harmonised System is revised every four to six years and today most tariff concessions are based on HS 1996.¹¹⁹ Although not legally binding for WTO Members, the HS plays a crucial role in WTO dispute settlement, whenever it comes to the interpretation of a Member's tariff schedule.¹²⁰

Under the General Rules for the Interpretation of the Harmonised System, the heading providing the "most specific description" shall cover goods, which *prima facie* are classifiable under more than one heading.¹²¹ Regarding the question of games software classification, under the HS 1996 *prima facie* two options seem to be available, namely Heading 85.24 and Heading 9504.10. Heading 85.24 on the one hand, provides for a classification for "records, tapes and other recorded media for sound or other similarly recorded phenomena". Accordingly, if software is considered a "similarly recorded phenomenon" it would be classified under sub-heading 8524.31, if stored on a record, or under sub-heading 8524.40, if stored on a tape.¹²² Heading 9504.10, on the other hand, is described as "video games of a kind used with a television receiver". It seems possible to interpret this description as referring either to video game cartridges or to video game consoles, i.e. the apparatus used to play a video game on a TV screen (e.g. Sony's PS3, Nintendo's Wii and Microsoft's Xbox 360).

This brief analysis suggests that there are principally two options available for the classification of physical media carrying recorded games software. For the purpose of this paper, it is not necessary to explore further the differences between the two options since both refer to tangible items rather than to software code,

¹¹⁵ WTO, Appellate Body Report, *European Communities – Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, at para 84.

¹¹⁶ Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, Cambridge: Cambridge University Press, second edition, 2008, at p. 420.

¹¹⁷ Articles 31 and 32 of the Vienna Convention on the Interpretation of Treaties (VCLT).

¹¹⁸ International Convention on the Harmonized Commodity Description and Coding System of 14 June 1983 (HS), available at <http://www.wcoomd.org/hsconvention.htm>; Van den Bossche, *supra* note 116, at p. 429.

¹¹⁹ Dayong Yu, *The Harmonized System – Amendments and Their Impact on WTO Members' Schedules*, WTO Staff Working Paper ERSD-2008-02, February 2008, at p. 9.

¹²⁰ For the two landmark rulings see WTO, Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and WTO, Appellate Body Report, *European Communities – Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998; for a discussion of the *Chicken Cuts* case, see Matthias Oesch, "The Jurisprudence of WTO Dispute Resolution" (2006) *Schweizerische Zeitschrift für internationales und europäisches Recht* (SZIER) 16:4, pp. 501–523, at pp. 502–507.

¹²¹ General Rules for the Interpretation of the Harmonised System, para 2(a); Van den Bossche, *supra* note 116, at p. 430.

¹²² Sacha Wunsch-Vincent, *The WTO, The Internet and Trade in Digital Products*, Oxford: Hart Publishing, 2006, at p. 233.

which has no “physical attributes”.¹²³ Consequently, it does not seem possible to classify software code under the HS independently from the physical carrier medium in which the software is stored.

Games software can be distributed to the consumer either via the Internet, or off-line, when stored on a carrier medium. In the absence of physical properties of software code, we would find it counterintuitive to argue for a GATT classification of games software distributed online. However, if video games are distributed off-line, the above analysis would suggest that the console, the cartridge, the disk or the tape on which the game is stored would be subject to the GATT, whereas the software code as such would be covered by the GATS. The WTO Appellate Body has ruled on several occasions that certain aspects of a product may be relevant under a GATT perspective whereas for other aspects the GATS may be applicable.¹²⁴

4.2. GATS classification of digital games

If we assume that the GATS rather than the GATT is applicable to trade when the information is stored on a carrier medium or the digital information is distributed online, then the next question is the proper classification of digital games software within the GATS sub-sectors. Again the answer to this question has important implications for the applicable level of trade liberalisation since several WTO Members refrained, for cultural reasons, from accepting any commitments for market access and national treatment for audiovisual services in their individual list of commitments and provided for sweeping exceptions from the MFN obligation in this area.

Here again the views of the United States and the European Communities and their respective allies are very far apart. Whereas the European Communities emphasise similarities of digital games and other content-related software with audiovisual services,¹²⁵ the US rejects this view. For the US, under the condition that the GATT cannot be made applicable,¹²⁶ entertainment games, including digital games, must be classified under the categories of telecommunication services and/or computer and related services.¹²⁷

According to Article I GATS, all internationally traded services are covered by the GATS except those supplied in the exercise of governmental authority. From this it follows according to the Appellate Body “that a Member may schedule a specific commitment in respect of *any* service”.¹²⁸ Within the GATS, the Services

¹²³ Sacha Wunsch-Vincent, WTO, E-commerce and Information Technologies. From the Uruguay Round through the Doha Development Agenda. A Report to the UN ICT Task Force, New York: United Nations ICT Task Force, 2005, at p. 134.

¹²⁴ In its *Canada - Periodicals* and *EC - Banana* judgments, the Appellate Body held that GATT and GATS are not mutually exclusive. WTO, Appellate Body Report, *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 June 1997, at para iv; WTO, Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 9 September 1997, at para iv.c.1.

¹²⁵ See European Union, Questionnaire on Services in the Recreational Software Sector, available at http://ec.europa.eu/avpolicy/docs/ext/multilateral/gats/conrs_en.htm; see also Wunsch-Vincent, *supra* note 127, at p. 36.

¹²⁶ The US introduced this suggestion strategically for the case that their primary objective, i.e. to classify “entertainment games” as goods, cannot be attained. See *ibid.* at p. 121. See also WTO, Work Programme on Electronic Commerce, Submission by the United States, WT/GC/W/493/Rev.1, 8 July 2003, at para 3.

¹²⁷ Wunsch-Vincent, *supra* note 122, at p. 120.

¹²⁸ WTO, Appellate Body Report, *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, at para 180 (emphasis in the original).

Sectoral Classification List (document W/120)¹²⁹ is used as a structural framework for the classification of services.¹³⁰ Document W/120 was prepared by the WTO Secretariat and served during the Uruguay Round as a guideline for the classification of services for most countries.¹³¹ This structure provides a list of 12 sectors of services which are subdivided into a total of 60 sub-sectors. The sub-sectors are classified with reference to their corresponding number under the Provisional Central Product Classification of the United Nations (CPC).¹³² Although the classification and definitions provided by the Provisional CPC are not binding for the WTO Members they nevertheless play an important role when it comes to the interpretation of entries in a Member's individual list of commitments.

The relevance of the Provisional CPC for the interpretation of a Member's list of commitments and its relationship to the WTO document W/120 has been emphasised by the WTO Appellate Body (AB) in its landmark decision in *US – Gambling*.¹³³ The dispute concerned gambling and betting services provided from Antigua and Barbuda via the Internet to customers in the US (the so-called remote supply of gambling services). Before the Panel and the AB the United States claimed that it had not included "gambling and betting services" into its schedule of specific commitments. The US argued that it understood "gambling and betting services" as being a subcategory of "sporting", which it had exempted from the coverage.¹³⁴ The AB investigated at length whether the Panel was right that "gambling and betting services" are covered by sub-sector 10.D of the US schedule. The AB first observed¹³⁵ that GATS schedules like other provisions of WTO law must be interpreted according to the rules of the Vienna Convention on the Interpretation of Treaties (VCLT)¹³⁶. Considering Article 32 VCLT, the AB noted that the WTO document W/120 could be used as a "supplementary means of interpretation" of the US schedule.¹³⁷ The AB further held that the classification used in document W/120 was based on the Provisional Central Product Classification of the United Nations. On the basis of good faith interpretation the AB concluded that the US also based its GATS schedule on W/120 and the CPC classification.¹³⁸ In its next step, the AB noted that sub-sector 10.D cross-referenced with Group 964 of the Provisional CPC. Since this classification clearly says that "gambling and betting services" are a subcategory of "other recreational services"

¹²⁹ Multilateral Trade Negotiations. The Uruguay Round Group of Negotiations on Services, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991.

¹³⁰ WTO, Council for Trade in Services, Audiovisual Services, Background Note by the Secretariat, S/C/W/40, 15 June 1998, at p. 1.

¹³¹ The document W/120 was prepared by the WTO Secretariat and served during the Uruguay Round as a guideline for the classification of services for most countries. According to the WTO Appellate Body, the 1993 Scheduling Guidelines of the WTO (Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001, S/L/92) "express a clear preference for parties to use W/120 and the CPC classifications in their Schedules". See WTO, Appellate Body Report, *US – Gambling*, supra note 128, at para 203.

¹³² United Nations, Statistical Office, Provisional Central Product Classification, Statistical Papers, Series M No. 77, New York, 1991.

¹³³ WTO, Appellate Body Report, *US – Gambling*, supra note 128.

¹³⁴ *Ibid.* at para 158.

¹³⁵ *Ibid.* at paras 159–160.

¹³⁶ Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.

¹³⁷ WTO, Appellate Body Report, *US – Gambling*, supra note 128, at para 196.

¹³⁸ *Ibid.* at paras 183–184.

the AB concluded that “gambling and betting services” were covered by the US entry regarding “recreational services”.¹³⁹

In *US – Gambling* the AB clarified that “the sectors and subsectors in a Member’s Schedule must be mutually exclusive”.¹⁴⁰ Hence, a service cannot fall within more than one different sector or sub-sector. Of the existing 60 sub-sectors there is none that would specifically fit digital games. Since digital games combine aspects of audiovisual media, software and telecommunications, *prima facie* audiovisual services (sub-sector “D” of “2. Communication Services”), computer and related services (sub-sector “B” of “1. Business Services”) and telecommunication services (sub-sector “C” of “2. Communication Services”), seem to be the ones most likely to be relevant for their GATS classification.¹⁴¹ Considering the AB’s ruling in *US – Gambling*, the question is how to determine the exclusively applicable classification of a service that *prima facie* is classifiable under more than one category.

By analogy to rules applicable to the interpretation of the Harmonised System in the realm of the GATT,¹⁴² one could suggest choosing the classification under the sub-sector which is most likely to reflect the *essential character* of the service.

Looking for the “essential character” of digital games, a classification under “computer and related services” seems to be excluded since this is a sub-category of business services. Digital games (as defined above) are more adequately described in terms of entertainment or education services or, more generally, as leisure services, than in terms of business services.¹⁴³ What about a classification under telecommunication services? Digital games played online certainly depend on communication infrastructure and networks such as the Internet providing for broadband connectivity as a precondition for real-time interaction between players. However, if the service at issue is described as playing a video game online, the telecom character of the service seems to be less essential than the content of the game. In comparison to the huge creative, intellectual and financial investments that are necessary to develop and market game content, the telecommunication component required to provide access and connectivity seems to be secondary. Following this line of excluding argumentation, audiovisual services are the remaining category. In our view one could conclude that the essential character of a video game played online is better expressed by a classification under audiovisual services than under computer and related services or telecommunication services. From the six subcategories listed under the heading “D. Audiovisual services” the first five are related to motion picture, radio and television services and the sixth subcategory reads “f. Other”. Consequently, this last category seems to be the only one available for a country willing to commit in the field of digital games.¹⁴⁴ It should be recalled, however, that very few WTO Members accepted any commitments in the sector of audiovisual services.¹⁴⁵ The European Communities and their Member States, Canada, Switzerland and other

¹³⁹ Ibid. at paras 198–208.

¹⁴⁰ Ibid. at para 180.

¹⁴¹ Wunsch-Vincent, *supra* note 127, at p. 74.

¹⁴² On the rules of interpretation governing the HS, see Van den Bossche, *supra* note 116, at p. 430.

¹⁴³ Wunsch-Vincent, *supra* note 127, at p. 74.

¹⁴⁴ For a similar view, see *ibid.* at pp. 29–30.

¹⁴⁵ On the commitments after the end of the Uruguay Round and the current state of commitments, see Martin Roy, “Audiovisual Services in the Doha Round: Dialogue de Sourds, The Sequel?” (2005) *Journal of World Investment and Trade*, 6:6, pp. 923–52, at p. 924. See also Wunsch-Vincent, *supra* note 122, at pp. 88–89 and pp. 96–97.

WTO Members who are keen to maintain their sovereignty in the field of cultural policy abstained from taking any GATS commitments for audiovisual media.¹⁴⁶ This is because accepting a GATS commitment has far-reaching consequences, since pursuant to Article XXI GATS any later modification of a schedule is rather burdensome if not prohibitive.¹⁴⁷ Although the Preamble of the GATS provides that Members are free “to regulate, and to introduce new regulations, on the supply of services”, this flexibility exists only under the condition that a country is not bound by commitments listed in its schedule.

4.3. WTO conformity of subsidies and tax break schemes

A preliminary appraisal of existing governmental measures to support the digital games sector revealed that state aid (including direct payments to the games industries and indirect support via licence fees for PSBs expanding into the Internet) and tax breaks are the most frequently used schemes. The answer to the question regarding the conformity with WTO law of any of these measures depends on the applicability of the GATT or the GATS rules.

If the GATT were to apply, Article III(2) GATT prohibits discriminatory taxation of like products. A government providing for tax cuts exclusively for domestic games products would thus violate the national treatment obligation under the GATT. Non-discriminatory tax cuts on games products would be scrutinised under the Agreement on Subsidies and Countervailing Duties (SCM). The SCM provides for a distinction between prohibited and actionable subsidies. According to Article 3(1) SCM, prohibited subsidies are export subsidies and import substitution subsidies. All other types of subsidies are actionable if they have adverse effects on the interests of other Members. An interesting question is whether a (non-discriminatory) tax break is a subsidy under the SCM. The definition of a subsidy in Articles 1 and 2 SCM consists of three elements: (1) a financial contribution by a government; (2) a benefit thereby conferred; and (3) specificity. The WTO dispute settlement authorities have applied the concept of “financial contribution” broadly. Panels have found that interest reductions and deferrals or interest forgiveness are financial contributions.¹⁴⁸ The WTO Appellate Body held in *US – Foreign Sales Corporations* that a government revenue, otherwise due, that is not collected, is also a financial contribution.¹⁴⁹ Hence, it seems likely that WTO Panels and the Appellate Body would consider tax cuts a financial contribution within the meaning of Article 1.1 SCM.

Considering our above analysis, it is probable that a government measure supporting the development, production or distribution of digital games content will be subject to the GATS. Under the GATS, the non-discrimination and market access principles have a much weaker impact than under the GATT. According to Article XVII GATS, a Member is only obliged to apply the principle of national treatment (NT) and to open its markets to those sub-sectors and divisions of sub-

¹⁴⁶ See Christoph Beat Graber, “The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?” (2006) *Journal of International Economic Law*, 9:3, pp. 553–574.

¹⁴⁷ Van den Bossche, *supra* note 116, at pp. 490–91.

¹⁴⁸ WTO, Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, at para 7.31, and WTO, Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, at para 7.446. See also Van den Bossche, *supra* note 116, at p. 563.

¹⁴⁹ WTO, Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R, adopted 4 February 2002, at para 90.

sectors which are listed in its individual list of commitments. If a Member has inserted a sector into its individual list, it is consequently obliged to grant NT to like foreign services and service suppliers, unless it has provided in the column NT of its schedule a limitation of this obligation. Special subsidy or tax privileges granted to domestic suppliers would be examples of limitations of the NT obligation. With regard to possible limitations of market access (to be inscribed in the respective column), Article XVI(2) GATS provides for an exhaustive list of market access restrictions a Member is not allowed to apply. These restrictions are primarily of a numerical or quantitative nature. Currently, there exist no specific rules on subsidies with the GATS.¹⁵⁰

Regarding the MFN obligation, Article 2(2) GATS offers the possibility to WTO Members to exempt those measures that are listed in the Member's list of exemptions. Around 50 WTO Members have listed MFN exemptions in the field of audiovisual media, which typically relate to co-production agreements for films, the MEDIA programme of the EU, tax benefits, or simplified entry procedures for natural persons.¹⁵¹

5. Conclusion

The above analysis has revealed that countries in Europe, Asia and Northern America operate schemes, which directly or indirectly support the development, production or distribution of digital games. In the realm of the European Union, arguments of cultural diversity have been used to justify exemptions from the general ban on subsidies in EC competition law. At the level of international law, the new UNESCO Convention on Cultural Diversity (CCD) has rapidly become the reference point for discussions related to cultural diversity. Considering the discursive approach to culture applied by the CCD, we agreed that digital games belong to the sphere of culture. However, from this determination it does not follow that governmental measures promoting cultural diversity are automatically legitimate. In line with the principles of political economy, we take the view that government interventions in the digital games markets are legitimate only where such interventions are necessary to equalise market failures. Hence, it would first be necessary to determine whether there are market failures in a given market. Such a determination should be based on statistical data, which is not currently available. We suggest investing in research aimed at producing the required empirical information as a means to combat protectionism.

Existing obligations of the WTO Agreements do not seem to prevent governments from supporting domestic games industries. Taking into account the current deadlock in the Doha Development trade negotiations, this is not going to change soon. With a view to fairly balancing the principles of trade liberalisation and cultural diversity in the field of digital games, we therefore suggest that governments providing state aid to digital games industries voluntarily abide by a necessity test for cultural policy measures. Accordingly, a support measure should

¹⁵⁰ Although Article XV GATS calls upon Members to develop disciplines to avoid trade-distortive effects of subsidies, this is still a leftover. See Pierre Sauvé, "Completing the GATS Framework: Addressing Uruguay Round Leftovers" (2002) *Aussenwirtschaft* 57:3, pp. 301-341, at pp. 324-333; Pietro Poretti, "Waiting for Godot: Subsidy Disciplines in Services Trade", in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds.), *GATS and the Regulation of International Trade in Services*, Cambridge: Cambridge University Press, 2008, pp. 466-488.

¹⁵¹ See Roy, *supra* note 145, at p. 930.

meet two requirements. Firstly, it should be effectively aimed at protecting and promoting one of the goals protected by the CCD¹⁵² and, secondly, it should be necessary for that purpose. In the latter respect the availability of alternative, less trade-restrictive measures would have to be considered.

¹⁵² On the goals of the CCD, see Graber, *supra* note 19.