II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 11 December 2007

on State Aid C 47/06 (ex N 648/05) Tax credit introduced by France for the creation of video games

(notified under document number C(2007) 6070)

(Only the French text is authentic)

(Text with EEA relevance)

(2008/354/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) The French authorities notified the present aid measure on 20 December 2005.

(2) By letter of 25 January 2006, the Commission asked for additional information that was provided by letter of 15 February 2006.

(3) On 3 May 2006 a meeting took place between the Commission and the French authorities. Following the meeting, the French authorities made changes to the measure and informed the Commission accordingly by letter of 12 June 2006.

(4) On the basis of these changes, the Commission requested additional information by letter of 1 August 2006, to which the French authorities replied, after requesting a deadline extension, by letter of 18 September 2006.

(5) By letter of 22 November 2006, the Commission informed France of its Decision to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the tax credit for the creation of video games.

(6) France submitted its comments by letter of 22 December 2006, registered as received on 3 January 2007.

(7) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission called on interested parties to submit their comments on the measure under review.

[1] OJ C 297, 7.12.2006, p. 19.

[2] See footnote 1.

(8) The Commission received comments from the following interested parties:

— TIGA, by letter of 21 December 2006,

— EGDF, by letter of 22 December 2006,

— GAME, by letter of 3 January 2007,

— ADESE, by letter of 3 January 2007,

— APOM, by letter of 5 January 2007,

— ISFE, by letter of 5 January 2007,

— Ubisoft, by letter of 8 January 2007.

(9) The Commission received further comments but, since most of them were received after the one-month deadline following publication of the decision in the *Official Journal of the European Union*, it did not accept them.

(10) The comments submitted by the deadline set were forwarded to France by letter of 12 February 2007.

(11) By letter of 23 January 2007 and in preparation for a meeting with the Commission that was held on 29 January 2007, the French authorities informed the Commission of the changes made to the measure notified.

(12) The Commission asked for further information on 21 February 2007.

(13) By letter of 22 March 2007, the French authorities presented their observations on the interested parties' comments sent on 12 February 2007 and their replies to the questions sent on 21 February 2007.

(14) Meetings took place with representatives of EGDF and ISFE on 13 and 14 February 2007 respectively.

(15) On 31 July 2007 a meeting took place between the French authorities and the Commission after which the French authorities sent three letters to the Commission dated 5 October, 17 October and 7 November 2007 and informing it of the changes made to the measure notified.

2. DETAILED DESCRIPTION OF THE MEASURE ON THE DATE ON WHICH THE PROCEDURE WAS INITIATED

(16) The measure is a scheme, in the form of a tax credit, for supporting the creation of video games with a cultural dimension. On the date on which the procedure was initiated, the details of the scheme were as follows:

(a) *Eligible undertakings and video games*

(17) The eligible undertakings are video game manufacturers, namely video game development studios, whether independent undertakings or subsidiaries of publishers.

(18) Eligible games are defined as leisure software made available to the public on a physical medium or on-line and incorporating elements of artistic and technological creation; the latter cover not only PC and console video games but also mobile games, on-line games for one or more players, educational or edutainment software and, provided that they incorporate sufficient interactivity and creativity, cultural CD-ROMs. A threshold of EUR 150 000 for development costs has been set so as to exclude games not intended for large-scale marketing. In addition, to be eligible for the tax credit, the video games must satisfy a number of criteria.

(19) The first criterion is a negative one: video games containing pornographic or extremely violent sequences are not eligible for the tax credit.

(20) Eligible video games must also have a cultural dimension. For this, they must satisfy one of the following two criteria:

(a) either they must adapt an existing work from Europe's cultural heritage on the basis of a scenario written in French;

(b) or they must satisfy a criterion relating to the quality and originality of the concept and to their contribution to expressing Europe's cultural diversity and creation in the field of video games. This criterion will be assessed by examining the quality and originality of the content, the scenario, playability, navigation and interactivity as well as the visual, sound and graphic elements.

(21) Lastly, there is a European cultural criterion relating to the nationality of the creative collaborators: a system of points that are broken down by category and awarded according to whether the job is held by a national of a Member State of the European Union determines the European nature of video games and hence their eligibility for the tax credit. For the points system, account is taken not only of the collaborators employed directly by the game manufacturer but also of those working for any subcontractors.

(b) *Eligible expenditure*

(22) Eligible expenditure is defined so as to correspond to the expenditure on conception and creation. It does not include expenditure on debugging or downstream testing. It does include the following:

(a) personnel costs (wages and social security contributions) for:

1. the producer, the assistant producer, the artistic director and the technical director;

2. the individuals responsible for the scenario and dialogues, the design and the conception of game levels;

3. the persons responsible for programming;

4. the persons responsible for graphic design and animation;

5. the persons responsible for the sound environment.

(b) depreciation of assets other than buildings directly assigned to the creation of approved video games;

(c) other operating expenditure calculated at a flat rate of 75 % of personnel expenditure.

(23) Public subsidies received by the undertakings in respect of expenditure eligible for the tax credit will be deducted from the base for calculating the tax credit.

(c) *Tax credit mechanism*

(24) The tax credit rate is applied to the expenditure base as defined above. The rate is 20 % of eligible expenditure.

(25) The French authorities propose introducing a ceiling per undertaking in order to keep the tax cost of the measure under control. As things stand, they propose to set a ceiling of EUR 3 million. The annual budget expected for the scheme is put at some EUR 30 million.

(26) An authorisation procedure is also in place for ascertaining that the criteria for selecting video games are met. An assessment is made by a committee of experts made up of representatives of the French administration and qualified individuals who are not necessarily active in the field of video games but who can represent other cultural disciplines. This group of experts will verify the eligibility of the undertaking and of the game, the nature of expenditure and compliance with the cultural criteria described in recitals 19, 20 and 21. It will give an opinion on the basis of which the Culture and Communication Ministry will issue its approval.

(27) The payment arrangements are as follows: the tax credit is set off against the corporation tax payable in respect of the first tax year closed after the date on which provisional authorisation is given for the launch of the project and then against the corporation tax payable in respect of each financial year during which eligible expenditure has been incurred. Final authorisation is given upon supply to the publisher. If final authorisation is not given within 24 months of provisional authorisation being given, the undertaking must repay the tax credit it has used. Lastly, where the amount of the tax reduction for a particular tax year exceeds the amount of tax due, the difference is refunded to the undertaking.

3. **REASONS FOR INSTITUTING THE PROCEDURE**

(28) In the first place, the Commission wished to ensure, in accordance with the judgment in *Matra* v *Commission* ([3]), that the measure under review did not contain any clauses that contravened the provisions of the Treaty in fields other than State Aid. In particular, it asked the French authorities whether French establishments of European undertakings were eligible for the tax credit, irrespective of their legal structure. It also wondered whether the exclusion of subcontracting expenditure could not be regarded as discrimination based on the location of the expenditure.

([3]) Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, point 41.

(29) The Commission also expressed doubts as to the compatibility of the measure under review with Article 87(3)(d) of the Treaty. First, it doubted whether the measure had a clearly cultural objective. While acknowledging that certain videos games could be regarded as cultural products, the Commission doubted whether the selection criteria applied meant that only video games that could be regarded as cultural products within the meaning of Article 87(3)(d) were eligible for the tax credit.

(30) The first cultural criterion proposed by the French authorities for selecting eligible video games is that the games should be an adaptation of an existing work from Europe's cultural heritage based on a scenario written in French. Some of the examples provided by the French authorities of video games that would satisfy this criterion seem to indicate that the criterion could be very broadly interpreted and would not, therefore, offer all the necessary guarantees that selected video games actually were an adaptation of an existing work from Europe's cultural heritage.

(31) Video games are also eligible if they satisfy a criterion relating to the quality and originality of the concept and to their contribution to expressing Europe's cultural diversity and creation in the field of video games. This criterion too can be broadly interpreted in that sports and/or simulation games in particular, which do not appear to have a manifestly cultural character, could be regarded as being eligible.

(32) The Commission also asked the French authorities to explain the criterion that was designed to exclude from the tax credit mechanism 'extremely violent' games.

(33) In order to assess the level of selection allowed by the eligibility test, the Commission requested a simulation based on production in recent years.

(34) The Commission also expressed doubts as to whether the measure was designed to meet the cultural objective laid down, and in particular whether it had a sufficient incentive effect, whether there were not other instruments more appropriate than the measure and whether it was proportional. On the last point, the Commission stated that an aid measure, to be proportional, had to be based on a correct definition of eligible costs. Now, the 'other operating expenditure' (excluding personnel costs and depreciation of assets other than buildings) are fixed at a flat rate of 75 % of personnel expenditure. The Commission doubted whether this calculation of 'other operating expenditure' made it possible to determine the costs actually incurred by eligible undertakings in creating video games.

(35) Lastly, the Commission noted that, by reducing the production costs of undertakings in this sector that were established in France, the tax credit was liable to strengthen their position relative to their European competitors. It wondered, therefore, whether the distortions of competition and the effects on trade were sufficiently limited so that the overall aid assessment was positive.

4. COMMENTS FROM INTERESTED PARTIES

(36) Ubisoft, TIGA ([4]), GAME ([5]), APOM ([6]) and EGDF ([7]) stress that, in their view, video games are cultural products. They emphasise that games in general are one of the oldest cultural traditions of mankind and underscore its interactions with other fields of culture, namely the cinema, music and the plastic arts. They present video games as being audiovisual products that can act on the imagination, way of thinking, language and cultural references of players, notably those in the 15-25 age category. According to them, video games reflect the cultural environment in which they are created via the use of language and humour, music, the environment (in particular, architecture and landscapes), and personalities (clothing, origin) or via the scenario, the themes or stories tackled, or playability. GAME, for example, stresses that German video games are often based in Germany or in Europe and take their inspiration from typically local stories (e.g. Siedler, which is a game of strategy that takes place in the sixteenth century). While US productions are often based in the United States and follow Hollywood tastes. Japanese games are often based on national myths and on the style of Japanese comic strips.

(37) The same third parties take the view that the impact of the measure on trade and competition will be limited and that the measure does not present any real risk for their national industries, notably in Germany and the United Kingdom. EGDF stresses in particular that, by permitting 20 % financing of between 15 and 30 projects over a period of two years, the measure as notified will create only a limited distortion as 1 500 video games are marketed each year in each Member State. In addition,

([4]) Trade association representing the business and commercial interests of games developers.
([5]) Bundesverband der Entwickler von Computerspielen e.V. (Federal German Association of Video Game Manufacturers).
([6]) Association des Producteurs d'Oeuvres Multimédia.
([7]) European Games Developer Federation.

TIGA notes that the main distortions of competition come from third countries, particularly Canada, where the authorities have a much more pro-active policy of support for their video game industry. Some of the third parties also emphasise the fact that this measure might have the effect of promoting video game production throughout the European Community. GAME agrees, but on condition that subcontracting costs can be included in eligible costs: otherwise, the beneficiary undertakings would be prompted to internalise their costs rather than having recourse to subcontracting.

(38) By contrast, ISFE ([8]), which represents video game publishers (including Sony, Microsoft, Nintendo and Vivendi), argues that video games could not be regarded as cultural products but only as interactive entertainment products. Whereas a film viewer watches in silence, the main activity of a player is to interact in a personalised manner with the game, the story told by the game not being of any real importance. Unlike films, video games are not designed as a vehicle for ideas or cultural messages. Indeed, their main value resides in playability and in interaction with the player or players. ISFE stresses that video games must be regarded as software and not as audiovisual products. It also challenges the idea that the alleged artistic expenditure may represent more than 50 % of the expenditure on a video game's concept. According to ISFE, it is instead the software expenditure — clearly linked to playability — that exceeds all other expenditure and represents up to 70 % of production costs. ISFE also claims that the tax credit demonstrates a misunderstanding on the part of the French authorities of the real nature of video games.

(39) Nor does ISFE rule out the possibility that the measure may adversely affect competition by reducing the production costs of a group of video game manufacturers in France and by encouraging the redirection of investment from other Member States to France. It also takes the view that the tax credit will encourage the production of video games that will not reflect market demand and points to the risk of cross-subsidisation, with manufacturers using the aid obtained by them for their 'cultural' games to finance the manufacturer of purely commercial games. Nevertheless, ISFE approves the principle of support for video games in France but emphasises that the Community framework for State Aid for research and development and innovation would have been a more appropriate legal basis for such support ([9]).

(40) ADESE ([10]) makes similar comments. It takes the view that video games should be regarded primarily as computer programmes and not as audiovisual products, that the production costs of a video game are essentially technological and not artistic in nature and that, in this respect, research and development aid would be more appropriate. It also notes that the measure could have an adverse effect on competition and trade between Member States, and in particular on Spanish industry. Lastly, it emphasises the danger of a subjective assessment by the committee of experts responsible for applying the selection criteria as this could be a source of discrimination.

([8]) Interactive Software Federation of Europe.
([9]) OJ C 323, 30.12.2006, p. 1.
([10]) Asociación Española de Distribuidores y Editores de Software de Entretenimiento (Spanish Association of Distributors and Editors of Leisure Software).

5. FURTHER DETAILS PROVIDED AND CHANGES MADE BY THE FRENCH AUTHORITIES FOLLOWING THE INITIATION OF THE PROCEDURE

(41) Following the initiation of the procedure and contacts with the Commission, the French authorities notified a certain number of details and changes as regards the tax credit scheme.

(42) They confirmed that French permanent establishments of European undertakings could also qualify for the tax credit, irrespective of their legal status.

(43) As regards the criterion aimed at excluding 'extremely violent' games from the tax credit scheme, the French authorities also explained that the committee of experts responsible for identifying eligible games will base itself only on the existing pan-European classification system, PEGI ([11]), which describes in detail violent situations, and in particular extremely violent situations ('18+' video games). All games classified as '18+' under the PEGI system will be excluded from the tax credit scheme.

(44) The French authorities have also made radical changes to the selection test. While, to be eligible for the tax credit, a game must always have a development cost in excess of EUR 150 000 and must not include pornographic or extremely violent sequences, a number of major changes have been made

(45) The game must, from now on, be produced primarily with the help of European authors and creative collaborators.

([11]) Launched in 2003 by ISFE, PEGI (Pan-European Game Information) is a system for classifying video games that was created to align the different national systems in Europe. It has been approved by the European Commission.

(46) From now on, the game must also obtain a maximum of 14 points (out of 22) on the basis of the criteria set out in the table below:

Criterion	Number of points
1. Heritage	maximum 4 points
The game is an adaptation of a recognised work from Europe's historical, artistic or scientific heritage. or	4 points
The game is inspired by a film, an audiovisual work, a literary or artistic work or a European cartoon strip.	2 points
2. Original creation	maximum 2 points
The game is an original creation (originality of scenario/creativity of the graphic and sound environment).	from 0 to 2 points
3. Cultural content	maximum 8 points
The game is based on a narration.	3 points
The artistic expenditure [1] accounts for more than 50 % of the production budget.	2 points
The original version of the scenario ('bible of the game') is written in French.	1 point
The game is published in its original version in at least three official languages of the European Union.	1 point
The game deals with political, social or cultural issues of relevance to European citizens and/or reflects values specific to European societies.	1 point
4. European location of expenditure and nationality of creative collaborators	maximum 5 points
At least 80 % of the creative expenditure is located in the territory of the European Union.	1 point
The game involves the participation of European creative collaborators.	from 0 to 4 points
5. Editorial and technological innovation	maximum 3 points
The game includes between one and three innovations in the following six areas: man/machine interface, content generated by users, artificial intelligence, rendering, multi-player interactivity and functionalities, narrative structure.	from 0 to 3 points
Maximum number of points available	22 points

[1] Eligible expenditure for the tax credit corresponds to expenditure on conception and creation. Artistic expenditure covers the personnel costs (wages and social security contributions) for the producer, the assistant producer, the artistic director and the persons responsible for the scenario, the animation and the sound environment. It does not include the personnel costs for the persons responsible for programming, depreciation on assets other than buildings directly assigned to the creation of video games, and other operating expenditure.

(47) As they were required to do so by the decision initiating the procedure, the French authorities have carried out simulations based on the video games produced in France in 2005-2006. On the basis of the criteria described in that decision, the simulation indicates that 49 % of the games would have been eligible. On the basis of the new criteria described in recital 46,31 % of the video games would have been eligible.

(48) As for the definition of eligible costs, the French authorities have extended the tax credit scheme to subcontractors, stating that subcontracting costs could be included in eligible costs up to an amount of EUR 1 million per project. They have also agreed no longer to fix 'other operating expenditure' (i.e. excluding personnel costs and depreciation) at a flat rate equal to 75 % of personnel expenditure but to include only the operating expenditure that can actually be imputed to the creation of eligible video games.

(49) Lastly, the French authorities have undertaken to re-notify the scheme within four years of the date of its entry into force.

6. ASSESSMENT OF THE MEASURE

6.1. Classification as State Aid

(50) Article 87(1) of the Treaty states: 'Save as otherwise provided for in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

(51) The measure under review in this decision consists of a tax credit that is set off against the corporation tax normally payable by beneficiaries. There is, therefore, no doubt that this measure is granted through State resources.

(52) The measure is designed to reduce the production costs of beneficiaries and clearly constitutes an advantage that is also selective in so far as only video game manufacturers are eligible. It constitutes, therefore, a selective advantage that could distort competition within the meaning of Article 87(1) of the Treaty.

(53) In addition, according to the information on market shares which has been provided by the French authorities and is available only for video game publishers, the leading three French video game publishers, namely Ubisoft, Atari and VU Games, accounted for 6,4 %, 3,5 % and 4,4 % respectively of the corresponding market in 2005, which is made up of the United Kingdom, Germany, France, Spain and Italy. The studios in France, for which the measure is intended, account for only a small proportion of the turnover of these publishers (25 % in the case of Ubisoft, 10 % in the case of Atari and 2 % in the case of VU Games). They nevertheless represent a not-insignificant proportion of these publisher's market shares in the five Member States mentioned. The measure clearly has an impact on intra-Community trade.

(54) In the light of the foregoing, it has to be concluded that the measure in question constitutes State Aid within the meaning of the Treaty.

6.2. Lawfulness of the aid

(55) On 31 January 2007, when the draft law on modernisation of television broadcasting and on the television of the future was debated, the French Parliament adopted the draft article introducing the tax credit, which had been notified to the Commission and on the basis of which the Commission had initiated the investigation procedure. The Law was published in the *Journal Officiel* on 7 March 2007. However, the French authorities confirmed that the implementing decrees would not be adopted before the Commission had taken its final decision.

(56) The Commission can conclude, therefore, that the aid measure has not been implemented and that the French authorities have thus complied with their obligations under Article 88(3) of the Treaty.

(57) The French authorities also undertook to amend the draft law and the draft implementing decrees in order to introduce the changes indicated in Section 5.

6.3. Compatibility of the aid with the common market

(58) First, acting in accordance with the principle established by the Court in *Matra* [12], the Commission must ensure that the conditions governing access to the tax credit do not contain any clauses that contravene the provisions of the Treaty in fields other than State Aid and in particular that they do not contain any discrimination on the ground of nationality.

(59) It should be noted here that the measure does not contain any restriction as to the nationality of the personnel employed or the location of the eligible expenditure. The French authorities have included subcontracting expenditure in eligible costs to the extent of EUR 1 million and have confirmed that this expenditure was eligible, irrespective of whether the subcontractor was established in France or in another Member State.

(60) The scheme is open to video game manufacturers established in France, including permanent French establishments of European undertakings, as the French authorities confirmed in the comments they submitted following the decision to initiate the procedure. The Commission takes the view that, in the light of French tax rules, restricting the tax credit to undertakings thus defined is inherent in the condition of being a taxable person in France for the purposes of corporation tax and is, therefore, justified by the tax nature of the aid measure.

(61) The Commission can conclude, therefore, that the aid measure does not infringe the provisions of the Treaty in areas other than State Aid.

[12] See footnote 3.

(62) Second, regarding the compatibility of the measure with the Community State Aid rules, the Commission notes that the French authorities notified the measure under Article 87(3)(d) of the Treaty. As the Commission indicated in its decision to initiate the procedure, the compatibility of this measure with that Article should be examined on the basis of the following questions:

1. Is the measure geared to achieving a genuine objective of promoting culture?

2. Is the measure designed in such a way as to achieve its cultural objective? In particular:

   (a) Is it an appropriate instrument or are there other, more appropriate instruments?

   (b) Does it have a sufficient incentive effect?

   (c) Is it proportional? Could the same result not be achieved with less aid?

3. Are the distortions of competition and the effects on trade limited in such a way that the overall aid assessment is positive?

Existence of a cultural objective

(63) On the general question as to whether video games can be regarded as cultural products, the Commission would note that Unesco recognises the video game industry as a cultural industry and the role it plays in the field of cultural diversity ([13]). It also takes note of the arguments put forward by certain third parties and by the French authorities, and in particular those according to which video games can act as a vehicle for images, values and themes that reflect the cultural environment in which they are created and may act on the ways of thinking and the cultural references of users, especially among young people. It would also note in this connection that Unesco has adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions ([14]). In addition, the Commission takes note of the increasingly wide dissemination of video games among the different age categories and socio-professional categories as well as among men and women.

(64) It transpires that the main objective of video games is to provide interactive entertainment, as stressed by the ISFE. However, this does not prevent certain video games from also having a cultural dimension, as in the case of certain theatrical forms where interaction with the public also takes place. Similarly, the fact that video games can be regarded as software rather than as audiovisual products in no way affects the fact that some of them can also be regarded as cultural products within the meaning of Article 87(3)(d) of the Treaty. It has to be concluded, therefore, that certain video games may constitute cultural products ([15]). In any event, this was explicitly recognised in the decision to initiate the procedure ([16]).

(65) The Commission would also note that, like any derogation from the general rule spelt out in Article 87(1), the derogation in Article 87(3)(d), must be interpreted in a restrictive fashion. And so for the production of cinematographic and audiovisual works, the Commission communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works states that, for this derogation to apply, 'Each Member State must ensure that the content of the aided production is cultural according to verifiable national criteria (in compliance with the application of the subsidiarity principle)' ([17]).

(66) This principle must be applied in the present case and it should, therefore, be ascertained that the French authorities have drawn up verifiable national criteria for ensuring that the video games eligible for the tax credit have a cultural content. It is precisely because it had doubts about the criteria initially applied by the French authorities that the Commission initiated the investigation procedure in respect of the tax credit.

(67) The new selection test should, therefore, be examined in order to check whether it is consistent with the principle set out in recital 65.

([13]) See the Unesco website, and in particular the pages relating to the cultural industries and their role as a focal point for culture in the future: http://portal.unesco.org/culture/en/ev.php-URL_ID=2461&URL_DO=DO_TOPIC&URL_SECTION=201.html

([14]) Convention adopted at the General Conference of Unesco on 20 October 2005 and incorporated into Community law by Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (OJ L 201, 25.7.2006, p. 15) (the text of which can be consulted at: http://unesdoc.unesco.org/images/0014/001429/142919f.pdf).

([15]) Such a conclusion in no way prejudges the classification or description of video games resulting from national or international standards.

([16]) Recital 39.

([17]) COM(2001) 534 final (OJ C 43, 16.2.2002, p. 6).

(68) To be eligible, a video game must obtain at least 14 out of 22 points. In line with the reasoning applied by the Commission in its Decision of 22 November 2006 concerning State Aid N 461/2005 (the UK Film Tax Incentive decision) ([18]), it is necessary to identify among the different criteria involved in the selection test those that can be regarded as relevant when it comes to assessing the cultural content of video games and to ensure that the number of points attached to these criteria is sufficient to ensure that the content of eligible video games can be regarded as cultural within the meaning of Article 87(3)(d) of the Treaty.

(69) The first part of the test contains two criteria relating to heritage and may be regarded as having a cultural content. This is clearly the case with the criterion for which four points are awarded if the game is an adaptation of a recognised work of Europe's historical, artistic or scientific heritage. The criterion for which two points are awarded if the game takes its inspiration from a film, an audiovisual, literary or artistic work or a European cartoon strip has a less pronounced cultural content since it depends on the cultural level of the work on which the video game draws. This is, however, reflected in the smaller number of points attached to this criterion, which is therefore proportional and can consequently be accepted.

(70) The second part of the test awards up to two points depending on the originality of the video game. Account is taken of the scenario and of the creativity of the graphic and sound environment. It transpires that the creativity in audiovisual products is generally regarded as an important aspect of products with a cultural content. Moreover, creativity is an essential part of the definition of cultural expressions given in the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions ([19]). Furthermore, use of the criterion of 'original creation' is advocated by the *Conseil supérieur de la propriété littéraire et artistique* (CSPLA) in France in order to distinguish a multimedia work from software ([20]). Lastly, the simulation carried out by the French authorities also shows that this is a genuinely selective criterion since only 13 video games out of the 74 manufactured in France in 2005 and 2006 were awarded one or two points. This is a reflection of the effectiveness of this criterion in achieving the cultural objective being pursued.

(71) The third part of the test is entitled 'cultural content'. The criterion which awards three points to video games based on a narration can be regarded as a cultural criterion: it requires the video game to be based on a scenario and a story, thereby excluding pure simulation games (e.g. sport or combat games), the cultural nature of which would be debatable. Preference can thus be given here to video games which are closer to films and the cultural content of which thus seems more evident.

(72) The criterion that awards two points to video games with a production budget 50 % of which is devoted to artistic expenditure may also be regarded as a relevant cultural criterion in that it is an indication of the special importance attached in the production of a video game to the design, scenario, dialogue and music, which are important aspects of any conclusion to the effect that, overall, a video game has a cultural content. With such a criterion, therefore, preference can be give to such games as opposed to those that are more technical, such as sports games or games of pure simulation, where the cultural aspect is less evident. The aforementioned Unesco Convention also refers to the artistic dimension when defining cultural content ([21]).

(73) ISFE has expressed doubts that 50 % of a game's production expenditure can be artistic in nature, stressing that software expenditure generally accounts for 70 % of production costs. This argument does not call into question but, on the contrary, would reinforce the validity of the criterion in so far as it would provide confirmation that this criterion makes for a stricter selection of video games.

(74) In any event, the Commission would note that the difference between the figures provided by ISFE and the assertion by the French authorities that certain games can be characterised by artistic expenditure that accounts for more than 50 % of production costs can be explained by the different types of expenditure included. For instance, expenditure eligible for the tax credit corresponds only to the expenditure on conception and creation. It does not include all the production expenditure and excludes, for example, expenditure on debugging and downstream testing, and this might have the effect of increasing the share of artistic expenditure.

(75) It should also be pointed out that the French authorities provided precise examples of detailed budgets for video game manufacturing which show clearly that artistic expenditure may account for the bulk of expenditure. This is also corroborated by the comments from certain third parties, including APOM, which stresses that

([18]) OJ C 9, 13.1.2007, p. 1.

([19]) Article 4, point 3: ' "Cultural expressions" are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.'

([20]) CSPLA study (*Commission sur les aspects juridiques des œuvres multimédias*) of 26 May 2005: 'The legal regime for multimedia works: Copyright and legal certainty of investors'.

([21]) According to point 2 of Article 4, ' "cultural content" refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.'

the creative features of a video game nowadays play a preponderant and substantial part in the works concerned and that the technological and software features are simply tools at the service of these creative features and, on average, account for only a small proportion of the cost price. Lastly, the Commission notes that so-called software expenditure can fluctuate with the console cycles and may indeed be higher at the beginning of a cycle.

(76) For the reasons set out above, the criterion based on the share of artistic expenditure in the budget appears as a relevant criterion for assessing the cultural content of video games in the case under review.

(77) The criterion awarding one point if the game deals with political, social or cultural issues of relevance to European citizens and/or reflects values specific to European societies is itself also relevant in so far as those values are the expression of Europe's cultural identities.

(78) As regards the two language criteria (original version of the scenario in French, and original version of the game published in at least three languages of the European Union, including French), which award two points in total, it should first be noted that they are virtually always met in the case of the games covered by the simulation presented by the French authorities and that, in this respect, they are relatively non-discriminatory. Second, certain reservations can be expressed regarding their actual relevance when it comes to assessing the cultural content of a video game. Without in any way challenging the fundamental cultural importance of language, it would seem that this plays a less essential role in the cultural nature of a video game than, for example, in the case of a film or a book. It would seem that the language of a video game can be changed without affecting the integrity of the work, something which is not the case with the dubbing of a film or the translation of a book.

(79) The fourth part of the selection test comprises the criteria linked to the location of expenditure and the nationality of the creative collaborators. Although the contribution made by European creative collaborators may have an indirect effect on the European cultural nature of a video game, the location- and nationality-related criteria still have no direct link to the cultural content of eligible video games given the characteristics peculiar to the video game sector. In its 'UK Film Tax Incentive' decision, the Commission came to the same conclusions regarding similar criteria applied by the UK authorities in connection with a tax credit scheme.

(80) The fifth part of the test comprises the criteria related to editorial and technological innovation, which are more directly concerned with the software components of video games, the non-cultural nature of which has, in any case, been underscored by ISFE. This argument can be accepted and there is no reason to regard these criteria as being relevant when it comes to assessing the cultural content of eligible video games.

(81) It thus transpires that 14 out of a maximum of 22 points (12 points if the language criteria are not taken into account) are awarded in connection with criteria that can reasonably be regarded as aiming to promote culture within the meaning of Article 87(3)(d) of the Treaty. They therefore account for more than half of the available points. The Commission has also considered the extreme hypothetical situation where a game would be awarded maximum points for the criteria which may be regarded as not being relevant from a cultural viewpoint and for the language criteria. Such a game would be awarded 10 points. And so, it would still need to obtain a further 4 points on the basis of the criteria that are relevant from a cultural viewpoint in order to exceed the 14-point eligibility threshold. In any event, this 'extreme hypothetical situation' would not seem to arise all that frequently: of the 74 video games covered by the simulation provided by the French authorities, only 7 fall into that category, of which 6 were eligible but were all awarded more than 4 points on the basis of the relevant cultural criteria (and 6 points on the basis of the language criteria).

(82) In addition, the Commission notes that this new selection test based on a number of detailed criteria reduces the risk of subjectivity in the assessment of video games carried out by the committee of experts.

(83) Lastly, the Commission would point out that the new selection test proposed by the French authorities is more restrictive than the test notified initially. For example, on the basis of the criteria described in the decision implementing the procedure, the simulations provided by the French authorities show that 49 % of video games manufactured in France in 2005-2006 would have been eligible, as against 31 % on the basis of the current test. As the Commission emphasised in its decision initiating the procedure, 'if the measure resulted in support for the manufacturer of a large proportion of video games, it might then appear that it had been deflected from its avowed objective of promoting culture and that it could therefore have an industrial objective' ([22]). Given the characteristics peculiar to the video game sector, the fact that close on 30 % of games are selected indicates that the objective of the measure is not simply an industrial objective of providing support for a specific sector.

([22]) Paragraph 42.

(84) It has, therefore, to be concluded that the French authorities have drawn up verifiable national criteria guaranteeing that the content of video games eligible for the tax credit is truly cultural and that the aid measure thus meets a genuine objective of promoting culture.

Is the measure designed in such a way as to meet this cultural objective?

(85) The Commission must make sure that the measure is appropriate, that it has a sufficient incentive effect and that it is proportional.

Appropriate instrument

(86) On this first point, the French authorities have explained that, in their view, the tax credit is the most appropriate instrument for meeting the objective being pursued. They have looked into the possibility of notifying this measure under the Community framework for State Aid for research and development and innovation, something also suggested by ISFE, but they ruled it out notably because, with this legal basis, the measure could not be linked to the cultural content of video games and there was no way of ensuring some diversity in the supply of video games. Nor would it have been possible under the framework to grant the same level of aid as the tax credit. The Commission acknowledges that, as designed, the tax credit actually allows public support to be channelled to games with a cultural content and that, in this regard, it appears to be an appropriate tool for achieving the cultural objective being pursued. The Commission would also stress that it has already come to the conclusion in previous decisions that measures in the form of a tax credit are compatible on the basis of Article 87(3)(d) of the Treaty ([23]).

Incentive effect

(87) The analysis of the video game market reveals a trend towards concentration of supply that is detrimental to independent production studios and hence to the diversity of supply ([24]). The video game market is, to a large extent, a global market on which games for consoles account for two thirds of sales. It is dominated largely by manufacturers of game consoles, who impose on video game manufacturers an authorisation and licensing system that accounts for up to 20 % of the game's final price.

(88) In addition, the market is characterised by a fragmentation of technical standards and a lack of interoperability. Demand is determined by regular renewal and destruction, on average every six years, of household video game equipment (consoles and PCs).

(89) Accordingly, the video game industry is forever in a start-up phase, with very short production cycles and substantial investment. Moreover, production costs can be written off on the publishing market, unlike, for example, the production costs of films, which can also be written off against broadcasting rights or DVD sales.

(90) In this connection, according to the information provided, the French video game industry is, as a general rule, characterised by small production studios (fewer than 200 employees) that do not have sufficient financial capacity and are, therefore, dependent on publishers for financing their activities. The system whereby development studios are remunerated by publishers is a function of sales, once the production costs advanced by publishers have been met. The French authorities have emphasised that the number of 'cultural' video games that could have met the selection test for the tax credit has been falling steadily since 2000. As an example, they stress in particular that fewer and fewer video games have had a historical context (Versailles, Pompei, Egypt) since the production studio specialising in this genre, Cryo Interactive, closed down.

(91) A tax credit based on the criteria described in Section 5 of this Decision should promote the production of video games with a cultural content as opposed to games that are purely for entertainment in that it would reduce the former's production costs. There is, therefore, reason to conclude that the measure is liable to have a sufficient incentive effect relative to its objective.

Proportionality

(92) The Commission notes that the aid intensity is only 20 %, which is relatively low compared with the aid intensities normally authorised in the cultural field. For instance, the intensity normally authorised for the cinema or audiovisual production is 50 %.

([23]) See, for example, the Decision of 16 May 2006 in Case N 45/06 — Tax credit for phonographic production (OJ C 293, 2.12.2006, p. 6) and the Decision of 22 March 2006 in Cases NN 84/04 and N 95/04 — Aid schemes for the cinema and the audiovisual sector (OJ C 305, 14.12.2006, p. 12).

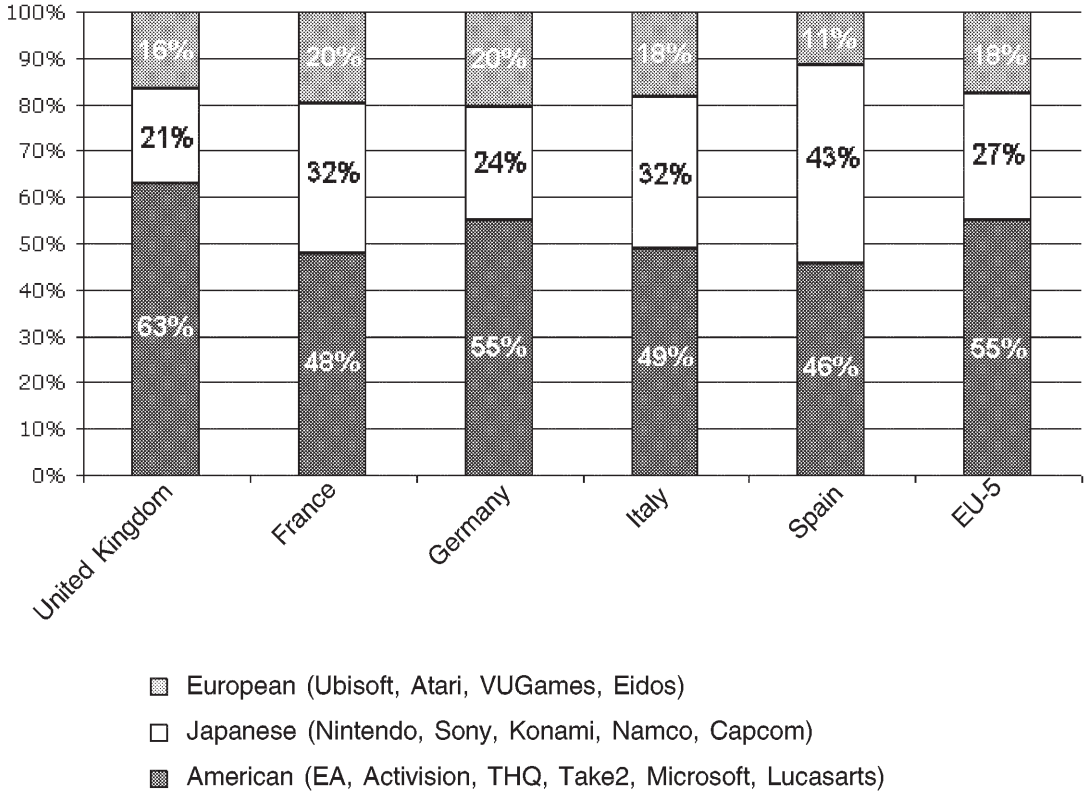
([24]) Sources: Digital broadband content — the online computer and video game industry, OECD, DSTI/ICCP/IE(2004)13/FINAL, published on 12 May 2005; report by Mr Fries for Mr Francis Mer, Minister for Economic, Financial and Industrial Affairs, and Ms Nicole Fontaine, Minister responsible for Industrial Affairs: Proposals for developing the video game industry in France (22 December 2003).

(93) The Commission would also note that the eligible costs base is correct and defined in detail: thus, only operating expenditure excluding personnel costs and depreciation of assets other than buildings actually incurred by the aid beneficiary will be taken into account. This type of expenditure is no longer set at the flat rate of 75 % of personnel costs.

(94) It should, therefore, be concluded that the measure is also proportional. Moreover, since only the costs effectively incurred in the manufacture of eligible games is taken into account, the concern expressed by ISFE regarding the risk of cross-subsidisation between cultural and commercial games is no longer justifiable.

Are the distortions of competition and the effects on trade limited in such a way that the overall aid assessment is positive?

(95) On the basis of the figures provided by the French authorities, it transpires that the main competitors on the video game market are Japanese or North American manufacturers. Thus, the market shares of European publishers in 2005 on the main Europe on markets never exceed 20 %, averaging 18 %, as the following graph shows:



(96) These figures are corroborated by the list of the 50 most popular games in France in 2006 provided by ISFE: 21 of them are published by Japanese firms, 19 by US firms and 10 by European firms. They are also borne out by the ranking of video game manufacturers by turnover, prepared by the European Audiovisual Observatory in 2003 and showing that the four market leaders are Japanese and US firms.

(97) It stands to reason that the market shares of French publishers, who indirectly benefit from the tax credit in so far as they publish video games manufactured by the studios eligible for the tax credit, are smaller: in 2005 the three main French publishers, Ubisoft, Atari, and VUGames, accounted for 6,4 %, 3,5 % and 4,4 % respectively of the publishing market for video games comprising the five Member States indicated in the above graph. Moreover, the studios of those publishers that are established in France account for only a small proportion of their market shares: 25 % for Ubisoft (or 1,6 % of the market comprising those five Member States), 10 % for Atari (or 0,35 %) and 2 % for VUGames (negligible share).

(98) It should also be emphasised that a relatively small proportion of the video games manufactured in France will be subsidised: the simulation carried out for video games manufactured in France in 2005-2006 shows that only 30 % of them could, in theory, be eligible for the tax credit.

(99) The point should also be made that the associations of video game manufacturers that submitted comments following the initiation of the procedure, and these include TIGA, GAME, APOM and EGDF, also underscored the small impact of the measure on their national industries. For instance, EGDF, which represents 500 studios in 10 Member States, stressed in particular that, as notified, the measure will, by permitting 20 % financing of between 15 and 30 projects over two years, create only a small distortion as 1 500 video games are marketed each year. These comments are all the more significant in that they concerned the project described in the decision initiating the procedure and the scope of which has since been reduced.

(100) The measure could have had a potentially negative effect on trade identified by GAME in that the subcontracting costs were not included in eligible costs in France's initial proposal. This would have prompted the beneficiaries to internalise their costs instead of resorting to subcontracting, which is common in this sector. This could have been detrimental in particular to firms established in other Member States and thus to intra-Community trade. However, this negative effect is ruled out in so far as the French authorities have agreed to include subcontracting costs in eligible costs up to a limit of EUR 1 million per project.

(101) The Commission takes the view that this limit, which is justified for budgetary reasons, is acceptable in the case under review in so far as, in practice, it is not liable to affect most of the video games manufactured in France. According to the information provided by the French authorities, 64 of the 74 video games covered by their simulation had a production budget of less than EUR 2 million, eight had a budget of between EUR 2 million and EUR 5 million, and two had a budget in excess of EUR 5 million. Given the average size of a production budget, a ceiling of EUR 1 million for subcontracting expenditure does not appear liable to significantly hamper recourse to subcontracting. Depending on changes in the production budgets for video games in France, the Commission reserves the right to review this ceiling when the aid measure is re-notified within four years of its implementation, in line with the commitments entered into by the French authorities.

(102) In addition, the Commission considers that the impact of the tax credit on competition will be all the more limited in that the video game market is a large market worth some USD 21 billion in 2003 and one that is enjoying high long-term growth put at 13 % a year and one on which prices are relatively fixed.

(103) Lastly, the Commission notes that two of the third parties pointed to the potentially adverse affect of the measure on trade and competition. ISFE stated that the measure might trigger a transfer of investment to France while ADESE underscored the potentially negative effect of the measure on the industry in Spain in particular. They did not, however, provide any statistics or detailed explanation enabling the Commission to assess this potential risk. The Commission also notes that ISFE and ADESE represent video game publishers and distributors. As explained in recital 37, the associations of producers which represent the direct competitors of the potential aid beneficiaries concluded that such a risk for competition could be ruled out. The Commission also takes the view that the development studios eligible for the tax credit are not in a position to exert market power over publishers as stated in recital 90. In its comments, Ubisoft, one of the leading French publishers, stressed the equally beneficial nature of the aid since those publishers' financial risks could also be reduced by lowering the production costs of video games and since supply on a European scale could be developed.

(104) The Commission considers that the amount of the tax credit is not such as to affect industrialists' decisions on where to locate their investment, given the other parameters of such decisions, including employment and remuneration conditions. With particular respect to the measure's effect on the industry in Spain, the Commission notes on the basis of the graph given in recital 95 that European publishers' market share is lowest in that country. Contrary to the claim by ADESE and since it did not provide more detailed data, it can be considered that this aid measure is not liable to have a greater impact in Spain than in the other Member States.

(105) In the light of the foregoing, the Commission takes the view that the aid will not have the effect of strengthening the market power of beneficiary firms or of hampering dynamic incentives for market operators but, on the contrary, it will increase the diversity of supply on the market. There are grounds, therefore, for concluding that the distortions of competition and the effects on trade that the measure will have are limited so that the overall aid assessment is positive. Accordingly, the tax credit for the creation of video games is compatible with the common market on the basis of Article 87(3)(d) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measure planned by France with a view to introducing a tax credit for the creation of video games is compatible with the common market under Article 87(3)(d) of the Treaty.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 11 December 2007.

For the Commission
Neelie KROES
Member of the Commission