



The role of independent productions in promoting cultural diversity

Group of Specialists on Media Diversity (MC-S-MD)

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Introduction

Independent audiovisual production benefits from a very favourable legal and political environment at the national and European level, which contributes to cultural diversity. However, it is important to consider the audiovisual sector as a whole. One should not neglect or underestimate the fundamental role played by broadcasters, and particularly those with a public service remit, in promoting cultural diversity and supporting independent audiovisual production. Such broadcasters are extensively engaged in supporting the production of cinematographic works and television programmes, contributing directly and indirectly to independent productions. Furthermore, they commission and acquire and broadcast a substantial proportion of independent productions, very often greatly exceeding the quota laid down by law.

Moreover, the media landscape, technology and consumer behaviour have changed. Broadcasters have to reach the audience via all forms of technology, including new media such as the Internet, mobile and other digital platforms. Digital rights are no longer sep-

arable: broadcasting as such will shortly be digital only; consumers increasingly make no distinction between linear and non-linear consumption, and young viewers in particular increasingly use only their personal computer.

Consequently, support for independent audiovisual production in this new media environment as a means of ensuring cultural diversity has to be provided on fair terms. In most countries, broadcasters are encountering growing difficulties in obtaining the rights to exploit audiovisual productions, for which they themselves have provided most of the funding, on the new media platforms. The terms of negotiation need to be clarified, and rights have to be acquired in relation to the risks taken. New models for terms of trade are needed, not simply distinguishing secondary rights but also finding the right balance between the needs of broadcasters in the digital age and the interests of independent producers in further commercial exploitation of audiovisual works, bearing in mind the extent of the fi-

ancial share of broadcasters and producers in a given production.

Generally speaking, any evaluation of the current situation should take into account the changing media environment, the new market realities, the features of the new audiovisual landscape and the complexity of the relationships between the various players involved.

At the eighth meeting of the MC-S-MD (15-16 September 2008) a revised version of the report was presented in order to draft a final text on independent productions. We chose to work firstly on *the context of the initiative*, which is the expression of the recent evolution of international and European legislation in the field (below), then examine the issue of the *definition of independent production* (page 6); its *competitiveness in a free-market* (page 8). In order to tackle the problem, we have *added a short comparative overview of direct and indirect support mechanisms for independent productions* from some Council of Europe member states (page 9).

The context of the initiative

The UNESCO Convention marks a significant advance in the affirmation of a new political will, moving us towards a break with purely commercial logic in relation to the highlighting and dissemination of cultural expressions (and therefore access to them, as well). In this context, the Convention gives a clear reminder of the need to support and promote independent productions. Article 6-2c of the Convention, relating to the "rights of parties at the national level", encourages UNESCO member states, when drawing up their cultural policies, to take "*measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services*". The concept of "ef-

fective access" seems to apply to economic and financial support measures for this kind of production, in order to ensure the equitable distribution and circulation of content. It should be noted that this concept may also be regarded as a "particularly novel and potentially controversial one", insofar as it "appears to apply to measures relating, for instance, to access of cultural content to the means of distribution, such as communication networks, electronic programming guides and other gateway technologies".¹ Similarly, Article 6-2d of the Convention invites UNESCO member states to take,

with this in mind, "measures aimed at providing public financial assistance", whether in the film industry sector or in respect of any other financing schemes for the production, promotion and distribution of audiovisual content, irrespective of its nature (TV or multimedia) or origin (public-service or private broadcasters).

The process of revision of the European "Television without Frontiers" Directive (TVWF) seems to reflect similar concerns, explicitly linked to the wish of several member states' delegations during the discussions in the Audiovisual Working Party to place the emphasis on the need to protect and promote European works, through incentives (encouraging co-production mechanisms and the distribution of content), and even to include in the

1. Cf. Verena Wiedemann, *Empowering Audiovisual Services for the Future*, in Nina Obuljen and Joost Smiers, *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work*, Institute for International Relations, Zagreb, 2006, p. 106.

text of the new directive practical measures to promote and support cultural diversity.

Lastly, during the process of revision of the European Convention on Trans-frontier Television (ECTT), a certain amount of importance is being attached to issues of media pluralism, and it is necessary to follow the discussions on the revision of the TVWF with a view to harmonisation of the rules applicable in this field. It has, furthermore, been emphasised during previous discussions in the MC-S-MD that the issue of independent productions could also be the subject of new provisions in the Convention.

The Standing Committee (T-TT) considered during its 42nd meeting in October 2007 a proposal by its drafting Group (in charge of preparing the revision of the ECTT) to add the following provision to the current Article 10:

Article 10: Cultural Objectives. New paragraph 2

“European Parties shall ensure, where practicable and by appropriate means, that television broadcasters reserve at least 10% of their trans-

mission time, excluding the time appointed to news, sports events, games, advertising and teletext services, or alternately, at the discretion of the Party, at least 10% of their programming budget, for European audiovisual works created by producers who are independent of broadcasters.

This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five year of their production.”

New Paragraph 2, which is transposed from Article 5 of the AVMS Directive introduces a requirement for television broadcasters to support independent producers of European works. The drafting Group noted that this provision, which relates to the requirement of media pluralism, and although it is introduced by the wording “where practicable” puts an additional burden on non-EU Parties to the Convention. During its 42nd meeting the T-TT acknowledged this consideration but a

majority expressed itself in favour of the provision.

According to the relevant paragraphs in the draft explanatory report,

“The aim of this paragraph is to encourage the growth and development of the independent production sector.”

This will help to ensure that there are outlets and opportunities for the development of the creative talents of people in State Parties who are active in the cultural field, and to promote the diversity and plurality of the audiovisual material which is available to the European public.

It is for States Parties to determine, within the framework of their existing law and practice, how the independence of the producer of an audiovisual work should be defined. It is anticipated that, in doing so, States Parties will give due consideration to the needs of small and medium-sized producers. State Parties may also wish to authorize financial participation by co-production subsidiaries of television companies and other major service providers, but they should also pay due account to of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster, and the ownership of secondary rights.”

The relevant facts: the definition and role of independent audiovisual production

Now that the Information Society is in full swing, the production of audiovisual content has taken on strategic importance for states. “Independent production” appeared as a concept in the United States in the seventies, first defined in terms of access to prime-time slots and to funding systems. The European approach, in contrast, came about as states' monopolies of audiovisual media were gradually dropped over the subsequent decade, and private broadcasters emerged.

Although the situation of independent production differs from one state to another, we can nevertheless immediately identify some features that are common to all European countries. One is a definite interest among governments in maintaining and developing a viable independent audiovisual production sector, through multiple

mechanisms providing direct or indirect financial support.

Their interest seems to be justified mainly for cultural reasons: the commercial nature of the audiovisual market may bring difficulties in terms of creators' freedom of expression and reduce their chances of obtaining funding from broadcasters for their projects.

However, changes in the audiovisual landscape and the arrival on the market of new players (such as telecommunications operators, etc.) must also be taken into account. Moreover, public service broadcasters are indispensable partners, providing a great deal of support for independent audiovisual production.

Independent production is essential so that the requisite financial condi-

tions exist for the creation of an independent creative environment, in its turn ensuring a constant renewal of audiovisual programmes and content, as well as variety in opinions, ideas and means of cultural expression. Support for independent production is therefore of vital importance to achieving the objective of plural sources and opinions which is central to the rules of democracy. Independent producers have proved their ability to create a very wide range of audiovisual content, of a quality that is universally recognised (e.g. art/experimental cinema).

Independent audiovisual production is thus able to respond both to the public's expectations of diversity of content and to states' cultural, economic and political objectives as set at European level, such as diversity of

sources and content, protection of cultural identities and the development of a competitive audiovisual industry. Article 5 of the "Television Without Frontiers" Directive (retained without change by the new Audiovisual Media Services Directive) requires EU member states to ensure, "where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext and tele-shopping services, or alternately, at the discretion of the member state, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters." This European system does not represent, however a maximum, but rather a minimum share, and some EU member states have decided, according to the subsidiarity principle, to raise to higher level the share of independently produced content.

Moreover, broadcasters often go voluntarily well beyond the percentages set out in the Directive. The 2005 Graham Report² on the impact of European and national measures on the promotion and distribution of televised programmes, emphasizes that it is the public service broadcasters who have been the greatest investors in new productions. It also says that they have broadcast the largest proportion of non-national European and independently-produced works.

Furthermore, recital 31 of Directive 97/36/CE, clearly states, non-limitatively, that

"[...] Member states, in defining the notion of 'independent producer', should take appropriate account of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights"³

This approach leaves it to member states to establish, if necessary,

2. Impact Study of Measures (Community and National) concerning the promotion of distribution and production of TV programmes provided for under Article 25 (a) of the Television without Frontiers Directive, Graham Final Report, 24 May 2005.

3. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0036:EN:HTML>.

maximum or minimum levels for each of the three criteria, and even to add other criteria. The preference for the relevant legal provisions to be based on the subsidiarity principle has not been altered in the slightest by recital 49 of the new Audiovisual Media Services Directive.⁴

These criteria are provided for the guidance of member states. It is the task of each country to define what constitutes an independent producer, taking into account its economic circumstances and the structure of its audiovisual market. Moreover, a distinction needs to be made between the issue of the ownership of secondary rights and the notion of independence; the two are not directly linked. As described at the outset, convergence of technology does not make it possible to separate rights, simply by distinguishing linear from nonlinear exploitations. New terms of trade will have to define exploitation windows, bearing in mind the extent of funding of the production by the various players, and even common commercial exploitation with revenue-sharing models. In other words, there is not one single way of defining independent producers, and the rights issue may even prove the most difficult to resolve.

This is probably why the concept of "independent producer" seems extremely difficult to define in practice, since it covers not only a specific professional status, but also a certain level of know-how. The producer is responsible for not only recruiting the creative team and obtaining the technical and financial resources needed to make a production, but also taking the project to completion and promoting it. Thus, the producer has a twofold responsibility as both entrepreneur and publisher/creator of audiovisual content.

4. Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities Text with EEA relevance: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:01:EN:HTML>.

Today, the economic influence of independent productions is relatively limited, despite strong competition in that particular market and the emergence of a tendency for production businesses to merge. Thus turnover in the independent production sector (11 billion euros in 2004) is still four times lower than that achieved by broadcasters (48 billion euros in 2004), although the trend is positive where programmes with a short shelf-life are concerned.

The volume of independent productions might still increase, as demand for content grows in future. The diversification of audience expectations is due to the success of highly specialised "niche" channels, the switch from terrestrial to digital (multiplying the numbers of broadcasting frequencies available), and the new technologies making possible both interactivity and flexible use of different media (Internet, DVD, etc).

Yet, it could be more pertinent to examine the structure and size of the market, and the characteristics of independent production, than to compare the respective turnover figures of broadcasters and independent producers. While the independent production sector varies considerably from one country to another, there is also a great diversity of genres. There are two distinct categories of producers. Independent companies producing stock programmes in such fields as drama/fiction, documentary and animation are different from those producing programmes with a short shelf-life, such as entertainment and variety/games, which have far more resources and often belong to large media groups. It is not always correct to consider matters in terms of independent production being synonymous with small production companies and diversification. Broadcasters commission a significant volume of programmes from major production companies which are often parts of large media groups.

Independence in theory?

The effective existence of diversified independent production makes possible genuine plurality in the field of audiovisual creation and content. It seems vital to support a variety of world views in order to offer the wide range of viewpoints essential to democracy and the shaping of public opinion.

The maintenance and development of diversified independent production make it possible to prevent vertical integration/concentration of the players involved in production and distribution from reaching the point at which there would be a reduced guarantee of diversity of opinions. Cultural diversity and the renewal of concepts and ideas are facilitated by keeping apart the major players involved in the production and distribution of audiovisual works.

Independent producers point out, however, several difficulties, namely:

An economic and editorial dependence

From an economic point of view, the production of an audiovisual work requires a significant financial investment. Despite the existence of direct assistance (for production, writing and promotion), producers often express the need for more flexible financing schemes.

From an editorial point of view, producers are sometimes subject to certain constraints in order to meet broadcasters' expectations and thus benefit from their support. These constraints relate particularly to content (subject matter), format or genre (combination of genres).

But the role of broadcasters in funding independent audiovisual production and in editorial terms should not be played down by portraying them as no more than content distributors. In certain countries broadcasters, and particularly those with a public service remit, have very precise obligations under national legislation to promote cultural diversity, and they invest

heavily in independent audiovisual production. They thus enable the sector to consolidate and prosper. Consequently, it would seem appropriate for broadcasters to be in a position to define the content which they broadcast. Editorially, it has been argued – and not without reason – that producers have to meet the expectations of broadcasters, not vice versa.

It has been argued also that, as a result of the decline in advertising revenue and the inadequacy of national and European funding schemes for independent productions, the volume of in-house audiovisual productions (made by broadcasters themselves) is growing, and the volume of investment in new independent productions is falling.

On the other hand, in countries such as the United Kingdom, the volume of independent productions is growing and that of in-house production is decreasing.

In addition, the reduction, or even the elimination, of certain sources of funding for broadcasters could result in their investing less in new independent audiovisual productions. The existence of a strong public broadcasting service has made it possible to develop a strong European audiovisual industry that can hold its own against the industries of large producer countries in other parts of the world.

The rights issue

Producers argue that the situation as described above entails multiple negative effects, as it can give rise to, among other things, a dominant position for broadcasters during negotiations on the assignment of rights relating to independent productions. The assignment of the rights in their entirety to the broadcasters may deal a crucial blow to independent producers' economic viability, depriving them of their ability to access new markets,

to attract investment and to continue producing.

Broadcasters argue that in many European countries they are encountering growing difficulties in obtaining the rights (particularly Internet streaming and catch-up services) to exploit audiovisual productions, for which they themselves have provided most of the funding. Mention may be made of Council of Europe Recommendation CM/Rec (2007) 3 on the remit of public service media in the information society, which considers that non-linear on-demand services are part of the essential offer of public service broadcasters. Moreover, in some situations, the rights secured by broadcasters do not reflect their financial input.

In many countries, negotiations between broadcasters and independent producers are governed by the principles of “contractual freedom” and “rights being proportional to the risks taken”. Preventing broadcasters from exploiting secondary rights would make it impossible for them to recoup their investment and would cause them to reduce their financial contribution to the production. It is necessary to take into account the respective financial contributions and the risks taken by each party. To the extent that producers make a financial contribution and undertake some of the risk, it is quite normal that they should hold some of the rights. Moreover, there are cases in which broadcasters provide all the funding for a production and the producers benefit from incentives such as a share in the profits. At the end, it is necessary to find a solution that is fair for all concerned.

The ownership of secondary rights relating to content, although it can be one of the crucial criteria for the purposes of the definition of independent production activities, is nevertheless one of its most controversial aspects, to which a cautious approach should be taken.

Lack of transparency and visibility in respect of the origin of a production (independent producer or broadcaster’s own production) at the time of broadcasting

Among the ways of fostering independent production, we could mention:

- » Ensuring independence from broadcasters through public financial support (varying the sources of public funding);
- » Giving the necessary support and encouragement to the development of independent distributors. It is important to support and develop independent distribution which will be able to offer a variety of productions;
- » Ensuring the transparency of the origin of productions;
- » Broadcasting quotas (as in France, in particular) applying to independent European productions, making it possible to offer the audience a variety of European and national programmes and to protect television schedules from an invasion by cheaper American programmes.
- » In an effort to create genuinely independent audiovisual production, the introduction by public institutions in certain states of support schemes (such as direct or indirect support for film production at regional, national and European levels), quotas (e.g. a quota of independent productions to be broadcast), or even compulsory in-

vestment in independent production by broadcasters.

- » Ensuring effective distribution: it is necessary to support and encourage the development of independent distributors with a view to a more diversified distribution network.
- » Encouraging co-production, although this entails an accumulation of risks: the language barrier, the traditional difference in the standard formats of audiovisual content, and technical constraints (the soundtrack, for example, must only contain the special effects and the original soundtrack, without any dialogue).

These measures – such as setting broadcasting and investment quotas and support mechanisms – are not new and/or already exist. The existing European and national legal frameworks support independent production and ensure cultural diversity. What is required is to implement them correctly.

Discussing the real scope of such measures means raising here again one of the most difficult aspects of the issue of supporting diversity of content, through the direct or indirect promotion of independent productions. Bearing in mind the sensitive aspects of the question of secondary rights, this report will take note of the main arguments that exist, but without claiming to examine the problem in greater detail or to come closer to resolving it.

On the one hand, such measures could not be effective unless account is taken of the fact that the independent producer has three potential profit sources: the profit quota, and, in the long term, the exploitation of video recordings and other spin-off products, as well as the opportunities that exist on the world market. But if a producer is deprived of the benefits of secondary rights, access to long-term profit sources – which are the most important in terms of financial benefits – is blocked.

On the other hand, it has been also noted, not without reason that the preference for subsidiarity prescribed by European legislation in the context of the definition of independent productions is based on fairly contrasting practice by member states in this field. The reasons for the cautious line taken by the European legislator in this respect thus stem from the specific mechanisms and current context of each individual national audiovisual market.

In practice, any mandatory, or even exhaustive, regulations in this sphere (maximum prices, quotas, etc.) could entail a substantial risk of lower investment by broadcasters in new independent productions. The result would be the strict opposite of the desired effects of encouraging plurality of content and promoting the diversity of cultural expressions, with access to the market becoming possible for content in art/experimental, underground or communitarian style.

A comparative overview of some direct and indirect support mechanisms for independent production

In order to understand the logic and the impact of such support mechanisms, it is vital to begin with a brief

overview of the different *definitions of “independent production”* adopted by member states. The different national

approaches very much determine the *choice of support and promotion mechanisms*.

Table 1. The three types of national approach on the basis of the criteria adopted for the purposes of definition

Member state	Ownership of production company	Effective editorial independence	Quantity of programmes supplied to the same television broadcaster	Secondary rights owned
Belgium: Flemish Community	•			
Belgium: French Community	•		•	

Table 1. The three types of national approach on the basis of the criteria adopted for the purposes of definition

Member state	Ownership of production company	Effective editorial independence	Quantity of programmes supplied to the same television broadcaster	Secondary rights owned
Finland	●		●	
France	●		●	●
Greece		●		
Ireland	●	●		
Italy	●		●	
Luxembourg	●			
Portugal	●		●	●
Spain	●			
United Kingdom	●	●		

Criteria for the definition of an independent producer⁵

No commitment: Austria, Denmark, Germany and Sweden

Recital 31 (now renumbered 49) of the directive laid down four specific criteria for the definition of independent productions, but allowed member states to opt to use them more appropriately to the context of their national market, in pursuance of the principle of subsidiarity. This explains why five European Union member states (Austria, Denmark, Germany and Sweden) did not consider it helpful to include in their domestic law an explicit definition of the concept, given that, in this particular situation, the criteria set by recital 49 remain directly applicable, together with domestic legal practice and the decisions of the Contact Committee, which operates within the European Commission.

Flexibility: Belgium (Flemish-speaking Community), Greece, Ireland, Luxembourg, the Netherlands, Spain

This approach seems to favour, *inter alia*, *qualitative-type criteria*, such as the producer's effective editorial independence, defined in Irish law, for instance, as the "capacity to exercise control over the actors, production staff, equipment and facilities used in the production"⁶

5. In this context, see the Final Report by David Graham and Associates Ltd: Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programmes Provided for Under Article 25(a) of the TV Without Frontiers Directive, European Commission, Directorate-General Information Society and Media, 2005, p. 91.

6. *Ibidem*, p. 92.

A strict line: Belgium (French-speaking Community), Finland, France, Italy, United Kingdom

Giving priority to *quantitative criteria*, and particularly the criterion of ownership of the production company, this approach is intended to ensure that the shares of an independent production company owned by the broadcasters, or the shares of a broadcasting company owned by the independent producers do not exceed a maximum threshold which ranges from 25% (Netherlands) to 15% (France) of all the shares. Similarly, a criterion often adopted is the quantity of programmes supplied to a single television broadcaster. In Finland, for instance, the maximum quantitative threshold is set at 90% of the programmes supplied to one and the same broadcaster over a total time-span of three years, whereas in France the proportion (80% of the programmes) is calculated more strictly, taking into account *inter alia* the hourly volume of programmes.

Independent production support and promotion mechanisms

Another consequence of a subsidiarity-based legal system is that member states have latitude to adopt measures that are **stricter** than those prescribed by the European directive, should they consider it necessary to do so.

As independent audiovisual production always seems to involve an imbalance between the technical, logistical and human resources and the facilities and funds available to the independent producer and to the broadcaster,

all the EU member states have used this latitude to protect and promote independent producers and productions.

Here again, three courses of action are open: quantitative incentives, qualitative incentives or direct or indirect financial support.

Quantitative incentives

Six member states (Finland, France, Italy, the Netherlands, Spain and the United Kingdom), for example, use higher quota system, applied either to total turnover or to the programme schedules of the public-service broadcaster, often synonymous with the historical operator or its beneficiaries: 11.5% of the total turnover of the French public-service broadcaster, France Télévisions, has to be used to finance independent productions, whereas Italy's public-service broadcaster, RAI, must reserve 20% of its prime-time broadcasting hours for independent productions.

Qualitative incentives

These kinds of incentive are often intended to protect and promote national cultural expressions, in those member states which require public-service broadcasters in particular to provide broadcasts and programme schedules reflecting the cultural and linguistic diversity of the different communities living in a given territory. These incentives evenly apply to both in-house and independent productions.

The Greek public-service broadcaster, ERT, for example, has to comply with a 25% quota of prime time reserved for

programmes and content in the Greek language, whereas the Netherlands has a similar system, but with two different quotas (50% for public-service broadcasters, but only 40% for privately-owned broadcasters).

France, finally, combines both kinds of incentives: it imposes a 40% quota for French content on all broadcasters, public and private alike, and a second obligation to invest 16% of total turno-

ver in independent productions (20% for private broadcaster Canal Plus).

Direct or indirect financial support

Subsidies, tax rebates and other state assistance are the conventional forms of support for the cinema and audiovisual sector, both in-house and independent. However, there are also some specific mechanisms for providing financial support to art/experimental-

type productions, such as an obligation to invest or to make financial contributions to a national cinematographic fund (Austria, Finland, Portugal).

In France, for instance, private broadcasters are obliged to invest a minimum annual quota of 3.2% of their net turnover in the financing of films, of which at least 75% must be made by independent teams.

Conclusions

The importance of the role played by independent producers for consolidation and fostering authentic and free access of creators in a highly competitive market such as the audiovisual one has been acknowledged and recognised both by UNESCO and European legal instruments. However, in practice their independence often seems to be undermined by a double system of constraints, both economic and editorial, towards distributors – public and private – and financing schemes.

In this particular context and given the fact the Council of Europe offers a

wider, pan-European approach of the issue which is not only limited to the reality of the Internal Market in the European Union, we consider that the debate would be greatly enhanced, in the medium and long term, by any further initiative fostering flexible and profitable methods of cooperation and exchange of information and know-how, such as a review or compendium of best practice cases in the matter. Moreover, we consider that many of the inherent difficulties at stake can be successfully avoided through more flexible and less bureaucratic models of co-operation, such as

regional co-production initiatives and boards, with a special aim towards the cinema industry.

Yet, whilst the problem of independent audiovisual production seems to be at the very core of the issue of diversity and pluralism of content, at the moment, it would seem premature to envisage drafting a recommendation or other similar legal instrument of the Council of Europe on the issue, although we are expected to believe that the debate should continue and the evolution of the sector be constantly monitored at an expert group level.

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