



Explanatory notes

Intensified attention for anticompetitive risks of hospital mergers

The Netherlands Authority for Consumers and Markets (ACM) studies the functioning of health care markets. In 2016 and 2017, we conducted studies into the effects of hospital mergers on health care quality, price, and volumes. We use the results of these studies to improve our merger control with regard to hospital care. In our merger control, which is based on the Dutch Competition Act, intensified attention is given to the anticompetitive risks of hospital mergers, in part because of said studies. This intensified attention is also found in the input we received from patients, health insurers, and competitor hospitals involved in these mergers. If the legislature decides to create additional safeguards for public interests in health care, ACM will then argue to incorporate these in the health-care-specific merger assessment. In the substantive design of this assessment, ACM emphasizes the need for concrete and clear standards, for example, with regard to quality and health care accessibility.

Introduction

The Netherlands Authority for Consumers and Markets (ACM, and prior to April 2013, the Netherlands Competition Authority, the NMa) has assessed mergers in hospital care since 2004. The hospital industry has seen many changes since then. Hospitals launched collaborations or decided to merge. Such mergers in particular have sparked off considerable debate in recent years. We are increasingly confronted with questions such as: “*But what benefits will this merger produce? Will patients be better off? Will quality improve or will prices of treatments go down?*”

How does ACM assess hospital mergers?

ACM tests mergers against the Dutch Competition Act. The competition-law merger assessment safeguards the public interest of effective competition, thereby helping realize accessible and affordable health care of high quality. When assessing planned hospital mergers, ACM estimates the effect of the change in the market structure that results from the merger between providers of hospital care (the ‘merger hospitals’). Price and quality are critical factors for competition. If the merger hospital attained a dominant position or strengthened one, it would be able to increase its prices considerably or reduce health care quality. In our assessments, we look at whether or not patients/insured are worse off as a result of a merger because of reduced competition. In that sense, the competition-law merger assessment is not a direct reflection of society’s desire for testing mergers against higher quality or lower prices. ACM equally does not test against aspects such as ‘manageability’ and ‘complexity of the organization’. ACM only assesses the *effects* of the merger on *competition*.

The effect of our oversight in hospital mergers

In ACM's oversight, the effects of our actions are central. To us, we measure our success as a regulator in the degree to which we are able to realize our mission "*creating opportunities and options for businesses and consumers*". We want to know the effects of our oversight by evaluating them afterwards. Using that knowledge, we can adjust, where necessary, the way we assess hospital mergers beforehand. That is the only way to remain an effective regulator.

In 2016, we commissioned research firm Significant to study [the quality effects of hospital mergers](#). That study revealed that hospital mergers do not have a demonstrable positive effect on health care quality. In 2017, we also studied the effects of hospital mergers on price and volume for the period of 2007-2014. The main conclusion of that study is that there are indications that point to, on average, a price increase of the health care offered by merger hospitals. This is a *relative* price increase, so compared with the price trends of hospitals that did not merge during that period. In addition, the volume trends of merger hospitals do not appear to evolve structurally differently. Moreover, based on these results, we are not able to conclude that the relative price increase is the result of increased market power of the merger hospitals.

We use the results of these studies to strengthen our merger control in hospital care.

Intensified attention for anticompetitive risks

Our understanding of how health care markets function is getting better and better. Three developments help us improve that understanding:

1. Stakeholders, such as health insurers and competitor hospitals, have *more attention* for anticompetitive risks of planned mergers, and provide more and more elaborate substantiations. On our part, we also seek to improve the profundity of such substantiations through the discussions we organize as part of our market investigations in connection with planned mergers.
2. *Practical experience among health insurers with mergers is expanding*, and insurers are able to substantiate their arguments with data analyses. As a result, health insurers make better substantiated claims about the effectiveness of their abilities to discipline, and about the expected effects of a planned merger. We have observed this in recent cases. That is why ACM can attach *greater importance* to the arguments put forward by market participants.
3. Our *knowledge of the functioning of the market* has increased in part because of the insights gained from the studies into the effects of hospital mergers on quality and price/volume. The results of those studies provide indications of anticompetitive risks. We subsequently incorporate these findings into our oversight.

These three developments have resulted in *intensified attention* on ACM's part for anticompetitive risks of hospital mergers. This means that we may establish anticompetitive problems more often, and thus potentially block hospital mergers sooner.

It should be noted that, if ACM establishes an anticompetitive problem, the merger hospitals will have the opportunity to demonstrate the benefits of their planned merger. This can be done through a so-called *efficiency defense*. In such an efficiency defense, parties argue that the merger's benefits, for example for health care quality, offset the expected harm to competition. However, the bar is set high for this kind of defense. In the Netherlands, and at the European level, such a defense has so far rarely been accepted.

“Why not introduce price caps in every merger in order to eliminate the risks of price increases?”

The objective of our merger control is to watch over the market structure. The objective is not to have price regulation. Also, we do not believe that price caps are the silver bullet when it comes to anticompetitive risks.

“Why won’t ACM just block all merger hospitals from this point onwards?”

We will continue to assess mergers on a case-by-case basis. Next to the fact that the Dutch Competition Act does not offer any legal basis for blocking mergers in advance, we believe that a total ban may result in a situation where mergers that do produce positive effects for patients and insured will never materialize. Moreover, the results of these studies do not give reason to block all hospital mergers in advance.

Room for public interests in health care

We recognize the desire among lawmakers and the public for *extra* safeguards for the public interests of affordability, accessibility, and quality, which have been explicitly identified as such for health care, or for *additional* interests such as ‘the human dimension’. If the legislature chooses to do so, ACM will then argue to make these interests explicit, and to incorporate them in the *health-care-specific merger assessment* (in Dutch: zorgspecifieke zorgtoets). The substantive design of this assessment should be based on clear standards, for example, with regard to quality and health care accessibility.

The current health-care-specific merger assessment is especially a *procedural* assessment, which is carried out by the Dutch Healthcare Authority (NZA). The NZa primarily assesses whether or not the merger parties have properly involved their clients, the insurers, and staff in the preparatory phase of the merger. The [bill amending the Health-care Market Regulation Act](#) proposes to transfer this assessment, in addition to the competition-law assessment, to ACM, and offers opportunities to strengthen this assessment *in terms of substance* by ministerial regulation in order to safeguard public interests in health care. The bill thus expands the regulatory toolkit in health-care merger assessments.

The bill also provides for a simultaneous execution of the health-care specific merger assessment and the competition-law assessment (the first phase thereof). A health-care-specific merger assessment that is designed based on substance will offer room to take into consideration other public interests than effective competition. That does not take away the fact that weighing anticompetitive risks against benefits (quality benefits or otherwise) is and remains a challenge for competition oversight. In addition to concrete, clear standards set by the legislature, the assessment of claimed benefits (quality benefits or otherwise) also calls for cooperation with agencies that have health-care specific knowledge and expertise, such as the NZa, the Dutch Health and Youth Care Inspectorate (IGJ) and the National Health Care Institute (ZiN).

Working together towards effective and efficient oversight

In any merger process, other parties besides ACM play a role, too. In addition to the hospitals themselves, those are, among others, health insurers, the Ministry of Health, Welfare and Sport (VWS) and other regulators in the health care sector. We consider it *our collective responsibility* to improve merger control in hospital care. That is why ACM in early-2018 will organize roundtable discussions with these stakeholders in order to talk about oversight of hospital mergers. Possible topics include:

- *The effectiveness of control instruments of health insurers in their role as buyers of health care*
- *Options for improving internal governance*
- *Opportunities for focused collaborations among health care providers in order to produce health care benefits*
- *The role of unambiguous and accessible quality indicators and clear standards*
- *The challenges in the assessment of anticompetitive risks against quality benefits (claimed or otherwise)*