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The Hague, 25 October 2021

Number of enclosures:

Your reference:

Our reference: ACM/UIT/560604

Contact person:

Subject: ACM/20/039827 ACM's response to planned solidarity scheme 2021

Dear Mr,

On behalf of ZN (Zorgverzekeraars Nederland, an umbrella organization of ten health insurers in the Netherlands), you asked the Netherlands Authority for Consumers and Markets (ACM) for a response to the planned arrangements of health insurers to distribute proportionally various costs related to COVID-19 that are primarily associated with previously made arrangements between these health insurers and hospitals as included in an addendum to the contracts with these hospitals for 2021. Those arrangements have been included in an agreement, the 2021 Solidarity scheme (draft memo of July 29, 2021). You contacted ACM with an eye to the compatibility of these proposed arrangements with competition rules.

This is our response.

#### *Background*

In late 2020, ZN contacted ACM to inform ACM about the need for joint arrangements with the umbrella organizations for hospitals (NVZ and NFU) for the year 2021 with regard to mitigating the financial effects of the COVID-19 pandemic on medical specialist care (MSZ). According to the parties involved in these plans, such arrangements were necessary in order to guarantee the continuity of health care, today and in the future. In connection therewith, the health insurers indicated that they wished to redistribute the reimbursed costs to hospitals among themselves. The health insurers involved consider such an equalization scheme necessary because individual health insurers can be affected differently by the financial effects of the COVID-19 pandemic. Without any arrangements, the normal competitive positions of health insurers can be affected in such a way that the functioning of the health insurance market is permanently disrupted, potentially having spill-over effects on the health care delivery market.

In late July, the ZN members<sup>1</sup> involved reached an agreement about the contents of the solidarity arrangements for 2021 on the condition that ACM approved the scheme. They subsequently sent ACM a draft version of the arrangements (hereafter: *mutual solidarity scheme 2021*), and implemented several final changes in late September.

Since November 2020, ZN has kept ACM abreast of the decision-making process regarding the contents of the planned agreement, and it has, on multiple occasions, answered questions to clarify any uncertainties. During that period, ACM conducted a market study of its own, and, in that context, held in-depth discussions with individual health insurers about the need and consequences of the scheme. It also contacted the Dutch Ministry of Health, Welfare and Sport (VWS), the National Health Care Institute, and the Dutch central bank DNB. One of the reasons for doing so was to find out about any measures that had already been taken on the basis of the risk equalization scheme for 2021 for mitigating the potentially unequal financial impact of the COVID-19 pandemic on health insurers. In addition, ACM has consulted with the European Commission.

#### *The planned agreement*

The mutual solidarity scheme 2021 consists of two parts, and has a layered structure. Mutual equalization in part 2 will only occur if such is still necessary and the unequal impact among health insurers has not yet been taken away sufficiently in part 1 or via the risk equalization scheme.

In part 1, the health insurers wish to redistribute among themselves the costs that follow, respectively, from the financial arrangements that have been made with the hospitals for 2021, the COVID-19-related additional costs for 2021, the total contribution for 2021 under Section 33 of the Dutch Health Insurance Act (the so-called Catastrophe scheme), and the additional payments in connection with the arrangement in the scheme with the hospitals to guarantee in 2021 the same margins on expensive prescription drugs (DGM) as in 2020. With regard to all of these subparts, only the costs that fall outside a certain bandwidth or retention will be redistributed.

The second part<sup>2</sup> concerns a residual arrangement (safety net scheme), where the participating parties redistribute the financial effects of the COVID-19 pandemic after part 1, including all costs and benefits under the regular risk equalization scheme 2021 plus the costs and contributions under Section 33 Zvw, taking into account a bandwidth. In part 2 (the calculations of which will be made by the National Health Care Institute), the expected equalization result without COVID-19 is compared with the actual equalization result for 2021. If the difference between these two outcomes exceeds a certain threshold, the difference will be redistributed. The threshold value is a two-sided threshold: it can be exceeded both positively and negatively.

The duration of the scheme is 1 January 2021 until 1 January 2022. The scheme will automatically lapse after that date. The technical settlement of the agreement will take place in the subsequent years, as the effects of the equalization scheme will only become apparent later.

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<sup>1</sup> Health insurer EUCARE does not participate in the scheme.

<sup>2</sup> Health insurers ASR and ONVZ do not participate in this part.

The participating health insurers have substantiated and indicated that, compared with the solidarity scheme they concluded for 2020, the individual health insurers in 2021 bear considerably more financial risk. Furthermore, they also indicate that the arrangements are limited to what is strictly necessary. As such, sufficient incentives, the health insurers involved argue, remain in place for an efficient procurement of health care.

#### ACM's response

As indicated in its letter of October 2020, in which it responded to the planned solidarity scheme for 2020, ACM said that mutual agreements on financial equalization are not compatible with competition rules<sup>3</sup>. However, ACM at the time decided not to conduct a further investigation into this agreement because of the exceptional COVID-19-related situation, which involved substantial, unforeseen costs, and where non-redistribution thereof might result in a serious disruption of the general functioning of the health care system.

In this case, on the basis of the information you provided as well as of a market study of its own, ACM has again decided not to conduct a further investigation into the compatibility of the collective arrangements among health insurers with competition rules. In that context, it is relevant to note that ACM finds it sufficiently plausible that the mutual arrangements are necessary for guaranteeing the continuity of health care, both during and after the pandemic. In addition, it is important that, compared with 2020, health insurers bear substantially more risk for mitigating the impact of COVID-19. Also, it is essential that the arrangements are temporary, have a fixed term, and the period of equalization is limited to the calendar year 2021.

As indicated in its letter of July 22, 2021, in response to the joint arrangements of ZN, NVZ and NFU with regard to financial support of hospitals, ACM is of the opinion that, in late 2020, there were still (and were again) great uncertainties regarding the course of the pandemic in 2021. Against that backdrop of great uncertainty, it is important that hospitals are able to focus on the fight against COVID-19, while having the assurance that any COVID-19-related costs will be reimbursed. In order to provide that assurance, it is necessary that health insurers are able to make joint arrangements with hospitals in order to prevent coordination problems regarding who reimburses what costs, with potentially negative consequences for the continuity and quality of health care. ACM considers it highly likely that those joint arrangements would have come about with huge delays (or would not have come about at all) if health insurers did not have the opportunities to equalize the costs at a later point in time.

The draft agreement for 2021 shows that the scope of the costs that are redistributed in the first part of the agreement is significantly more limited than in 2020, which does justice to the fact that, compared with 2020, it has become easier to determine what costs are COVID-19-related costs. In addition, clearer arrangements have been made with hospitals with regard to what costs are

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<sup>3</sup> See ACM (2020, 27 October). ACM's response to the planned agreement on the distribution of the effects of the coronavirus (COVID-19) crisis among health insurers for 2020. Letter ACM/UIT/543322. [Hyperlink](#).

reimbursed. In addition, the scheme applies to a more limited number of health care sectors than in 2020: this one primarily focuses on the hospital sector because that sector has been hit hardest by the COVID-19 pandemic. In that context, in the various steps that have been included in part 1 of the agreement, bandwidths have been introduced or raised *before* the costs (and revenues) included therein are redistributed. This means that individual health insurers bear greater risk with regard to their health care expenditures than in 2020, and are able to benefit more from potential savings and revenues. In the draft agreement, the parties involved have clearly acted on the warning that ACM gave in the fall of 2020 in its response to the solidarity scheme for 2020, saying that health insurers must absorb the effects of the COVID-19 pandemic themselves as much as possible.

ACM understands the necessity for the inclusion of a residual arrangement in the scheme in the form of part 2 for significant costs outside a certain bandwidth caused by unforeseen developments. Following the consultations with ACM, ZN has increased this bandwidth. In ACM's opinion, the increased bandwidth, which corresponds to a potential difference of 50 euros in annual premiums between health insurers, is proportional and sufficient for maintaining the incentives for health insurers to procure health care efficiently and competitively with due attention to the COVID-19-related costs. On the basis of its own consultations with individual health insurers, ACM has found it sufficient that, in this year's extraordinary situation, such a bandwidth has a significant impact on the operations and competitive opportunities of multiple health insurers, large and small. This situation is also related to the fact that, as the flip side to the collective agreements with the hospitals that were necessary for the continuity of health care now and in the future, health insurers over the past two years did not have any opportunities to optimize their procurement policies further, meaning to implement changes to procurement agreements that turned out to have unfavorable effects. In this context, ACM finds it of the utmost importance that ZN has stated to ACM that health insurers and health care providers wish to return to regular individual contracting, with due attention to COVID-19.

Furthermore, ACM takes into consideration that participation in the collaboration is open to any health insurer, and is on a voluntary basis. Health insurers are also free *not* to take part in the agreement (or parts thereof).

In that context, ACM presumes that, as in 2020, health insurers do not make any arrangements within the planned collaboration that concern the process of setting the premiums, health care procurement, or other areas on which they compete that are not strictly necessary for the planned redistribution. ACM also assumes that they will not coordinate their conduct with regard to these areas. In that context, the exchange of business-confidential and competitively-sensitive information is limited to what is necessary for an effective distribution of the additional costs where health insurers share the required information only with a Trusted Third Party (TTP).

Finally, ACM expects that, like in 2020, any exchange of information that takes place within the context of this collaboration will be registered by the health insurers, and that the health insurers are able to grant ACM access to such a register upon request.

*Final remarks*

On the basis of the facts and circumstances as described by you and on the basis of ACM's own market study, ACM has decided not to launch a further investigation into the agreement's compatibility with competition rules. In that context, ACM has established that, in the draft agreement, the parties involved have acted in an apparent and clear manner on the warning that ACM gave in the fall of 2020 in its response to the solidarity scheme for 2020.

On a final note, I would like to extend my appreciation for the constructive manner in which you sought contact with us when drawing up the draft agreement, as a result of which, points for attention could, in that phase already, where necessary, be identified with an eye to competition rules.

Kind regards,

The Netherlands Authority for Consumers and Markets,  
on its behalf,

Bart Broers  
Director of ACM's Health Care Department