



Assessing mergers and collaborations in hospital care

Introduction

The hospital market is very dynamic at the moment. Specialization and concentration are seen as key approaches to promote health care quality and efficiency. Specialization and concentration of hospitals are realized through various legal structures, for example through collaborations or mergers.

By publishing this document, the Netherlands Authority for Consumers and Markets (ACM) wishes to give the hospital market more clarity about the application of the Dutch Competition Act in this dynamic environment.

In this document, ACM explains the basic principles of oversight in the hospital market. ACM's role will be discussed, as well as the roles of other parties that are involved in this process, followed by the question of whether there is a difference between ACM's merger reviews and its assessments of collaborations.

What is ACM's view on competition in hospital care?

Consumers are central to ACM's thinking. This central position of consumers is reflected in its prioritization policy, oversight style, and selection of instruments. In its choice of making the interests of consumers central to its philosophy, ACM believes that consumers themselves generally know best what their interests are and how these can be served best.

This principle also applies to hospital care. Consumers of hospital care are patients as well as insured individuals who pay premiums. In practice, patients are represented by interest groups and client councils. Patients and insured want accessible, high-quality, and affordable health care, but how much value patients and healthy premium-payers attach to such aspects may differ. In the Dutch health care system, there is one market participant that should be weighing those three previously mentioned interests. That market participant is the health insurer. Consumers in the Netherlands are required to take out a health insurance with an insurer. On behalf of its clients (the insured), health insurers buy health care from hospitals, taking into consideration quality, price, and accessibility, and, in that sense, represent the insured. The central position of consumers means in practice that ACM attaches great value to the input of representative organizations of patients and health insurers.

The Dutch health care system consists of hospitals, patients, and health insurers. Hospitals offer health care services, patients buy these health care services, and the insured pay for these services through their premiums paid to insurers. Both patients and health insurers play a key part in disciplining adverse behavior of hospitals. Patients are able to vote with their feet, for example, by choosing a different provider if they are no longer satisfied with the quality of a certain hospital. Health insurers negotiate with hospitals, and strengthen their bargaining



position, for example, by no longer contracting their health care services (or parts thereof). At the same time, health insurers compete with other insurers for the favor of the insured.

In 2012, new incentives were incorporated into the system. The market's funding structure underwent further changes. As a result, it pays off more than before for health insurers to negotiate effectively with hospitals. By implementing these changes, the Minister of Health, Welfare and Sport aimed to stimulate health insurers to buy health services at the best possible price-quality ratio. By doing so, they would embrace the role, more than before, they had been assigned by the system. ACM has found that, in recent years, more and more attention has been given to buying hospital care services at the best possible price-quality ratio, and that health insurers are making progress in that area.

Key aspects of ACM's assessments

The purpose of ACM's assessments of collaborations and mergers in hospital care services is to prevent harm to buyers (patients and insured/insurers). Examples include premium increases, quality reductions and/or reduced accessibility for consumers directly resulting from reduced competition between health care providers. Collaborations or mergers may be beneficial to the interests of patients or the insured, but this is not a foregone conclusion.

When answering the question of whether harm is expected to be inflicted, ACM takes the input of patients and insurers very seriously. To ACM it is important to know the effects of a specific merger or collaboration they identify. After all, patients and insurers are the ones that are directly affected by the consequences. However, ACM will not unquestioningly accept whatever patients and insurers will say. At the end of the day, ACM has the final say over whether or not a collaboration or merger is allowed.

ACM will thus evaluate any argument that patient organizations and health insurers put forward. If all buyers indicate, supported with reasons, that they do not expect any adverse effects, ACM considers that an important consideration. However, if various buyers predict different possible effects, it will usually lead to ACM launching further investigations.

A possible scenario is that buyers, to a limited extent, do suffer from drawbacks (reduced choice, higher prices/premiums), but that, in their estimation, the benefits outweigh those drawbacks. If those benefits are sufficiently substantial, sufficiently certain, and specifically linked to the collaboration/merger, they will be taken into account by ACM. When weighing the benefits and drawbacks, ACM also takes into account in its final assessment the health care-specific knowledge and experience of fellow regulators NZa (the Dutch Healthcare Authority) and IGZ (Dutch Health Care Inspectorate).

Finally, ACM emphasizes that it dismisses collaborations that solely aim to negotiate higher prices with health insurers. ACM assumes that such collaborations cannot yield any benefits to patients and insured.



Differences between assessments of mergers and collaborations

In the system of the Dutch Competition Act, mergers and collaborations are treated differently. Mergers that exceed certain turnover thresholds must be notified of. With regard to collaborations, on the other hand, the principle of self-assessment applies.

At the end of the day, assessments in both categories essentially consist of the same elements. If an ACM investigation reveals that patients and insured do not, on balance, suffer from adverse effects as a result of a collaboration or merger, ACM will not stand in the way. However, if the investigation does find harm, ACM will block the merger or penalize the collaboration. ACM wishes to emphasize that collaborations are not subjected to stricter rules than are mergers.

What does this mean for arrangements as part of collaborations?

As mentioned earlier, collaboration assessments (including collaborations in health care) are to be carried out through self-assessment. Health care providers must assess by themselves whether or not specific arrangements they make are harmful to insurers that buy health care services from them, or to the patients to which they offer their health care services. ACM can assess ex post whether a collaboration meets these conditions, and it can intervene if this is not the case.

ACM is an open regulator. If there are any questions or uncertainties, ACM gladly sits down with providers, insurers and patient organizations. For example, if it is unclear whether a specific collaboration is allowed (for example, if a health insurer expresses a different opinion), ACM can give specific guidance, for example, by issuing an informal opinion.

Hospitals

Hospitals themselves are obviously able to assess what benefits and drawbacks to patients and the insured are associated with a specific collaboration. However, to ACM, it is just as important to know what effects health insurers and patients identify. What are the benefits and drawbacks with regard to the collaboration that health insurers and patients identify, and how do they weigh them? If the benefits of a collaboration outweigh the drawbacks (the anticompetitive effects), health care providers should be able to convince health insurers and patients thereof, ACM argues.

ACM expects of health insurers to document the opinions of insurers and patient organizations regarding these plans. For example, this may be a letter in which the insurer or patient organization explains, supported with reasons, why it supports or opposes the collaboration.

Under the Dutch Competition Act, any potentially anti-competitive arrangements may be allowed if they meet the following criteria:

1. Concrete benefits are associated with the collaboration;



2. Patients/insurers are allowed the resulting benefits to a sufficient extent, and these benefits exceed the drawbacks of the restriction of competition;
3. The arrangement is necessary to realize these benefits, and do not go beyond what is necessary (for example, these benefits could not have been realized by any of the undertakings individually);
4. Enough room for competition will remain in the market afterwards.

If ACM inquires with the collaborating hospitals about their collaboration, it usually suffices to show a file, which would cover the abovementioned conditions, demonstrating that the buyers (insurers and patients), supported with reasons, consider the benefits to be bigger than the drawbacks in order to convince ACM that the collaboration is allowed under the Dutch Competition Act. In this context, the more convincingly and unanimously health insurers/patient organizations endorse a collaboration, the less reason there is for ACM to doubt the collaboration. However, the final decision is for ACM to make.

Insurers and patient organizations

As mentioned earlier, it is important to ACM what effects health insurers and patient organizations (such as client councils at hospitals) identify with regard to a collaboration. ACM believes it is essential that health insurers and patients organizations actively voice their opinions, supported with reasons, whether or not at the request of the collaborating hospitals. If insurers and patient organizations identify any risks in a specific collaboration, and health care providers do not take these into account, ACM encourages health insurers and patient organizations to pass on such indications to ACM.

What does this mean for mergers?

When assessing a concentration's implications, the arguments put forward by insurers and patient organizations will be central. The quantitative analyses based on patient flows with regard to the extent to which the merger hospitals exert competitive pressure on each other primarily act as a first scan. These may reveal, for example, that it is not unlikely that a specific concentration will result in an antitrust problem. If, however, it turns out that, based on these analyses, an antitrust problem may exist, that information will be used as input for discussions with insurers and patient organizations.

Hospitals

Hospitals are required to fill out the notification form for concentrations, in which they can explain why they believe the merger will not lead to any antitrust problems. Based on the information included in the notification form, ACM will, in most cases, consult with market participants such as insurers and client councils about what effects the merger may have in their view, and whether they identify any risks. Hospitals that wish to merge may anticipate such consultations by contacting the insurers and client councils that are most relevant to them, and to ask about their views, before they present their merger plans to ACM. By including such information in the notification form, ACM can get a clear picture of the



positions of buyers regarding the merger, and use it in its discussions with buyers.

Insurers and patient organizations

ACM will inquire with insurers and patient organizations what benefits and drawbacks, in their view, are associated with the merger, and how they weigh these benefits and drawbacks. ACM will ask these market participants in particular to support their positions well.