Autoriteit
Consument & Markt

ACM Policy Rule on arrangements as part of the movement called 'The right care in the right place' (in Dutch: 'De juiste zorg op de juiste plek')

1 Introduction

1. The Netherlands Authority for Consumers and Markets (ACM) is an independent regulator. ACM's mission is ensuring that markets work well for people and businesses. ACM enforces compliance with the Dutch Competition Act among undertakings, including health care providers and health insurers (hereafter: market participants).

2. The Dutch Competition Act seeks to ensure effective and fair competition. The basic principle is that market participants do not coordinate their market behavior, but instead differentiate themselves vis-à-vis their customers. This stimulates market participants to offer services that are more innovative, better, and more efficient. This will benefit society at large. Collaborations, including those between competitors, may also help towards more innovative, better and more efficient services. Cooperation and competition are not each other's opposites, and competition is not a goal in itself.

3. In the health care sector, cooperation is often necessary in order to be able to meet the wishes and needs of patients and of the insured. That is why the Dutch Competition Act therefore does not stand in the way of many forms of cooperation, for example, because the collaboration in question does not restrict competition at all, or only does so to a very limited extent, or because the benefits of that collaboration are passed on to patients and insured, and offset the negative effects of the restriction of competition. The Dutch Competition Act does set boundaries to collaborations. Patients, the insured, and market participants in the health care sector must be able to have confidence in health care markets functioning fairly. ACM sees to it that they do. That is how the ACM contributes to high-quality care, health care accessibility, and health care affordability.

The Right Care in the Right Place

4. The Taskforce 'The right care in the right place', by order of and chaired by the Ministry of Health, Welfare and Sport (VWS), studied in 2018 on how health care in the Netherlands could be organized differently. The Taskforce's report 'The right care in the right place. Who dares?' (in Dutch: '*De juiste zorg op de juiste plek. Wie durft?*') was one of the inspirations behind the conclusion of five administrative agreements between VWS and various stakeholders in the

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health care sector, in which they committed themselves to the desired transformation towards "the right care in the right place" (hereafter: JZOJP, which is the Dutch acronym).[1] In this initiative consisting of stakeholders active in health care and health care support services, people's everyday functioning is central. With that starting point in mind, the aim is to:

- *Prevent* health care (a more expensive form thereof or any at all),
- *Relocate* health care (as close to home as possible, and, if necessary, concentrated somewhat further away) and
- *Replace* health care services with, for example, e-health.

This will help people live their lives in a better way, and will help them function with their disease or disability. VWS wishes to help accelerate and spread this transformation.[2]

5. ACM sees that JZOJP is a movement that enjoys broad support among members of the public and among lawmakers and other politicians. In its enforcement of compliance with the Dutch Competition Act, ACM does not wish to be unnecessarily restrictive, and wishes to prevent a situation where arrangements regarding the prevention, relocation or replacement of health care that help realize the ideas behind JZOJP fail to get off the ground out of unnecessary fear for competition rules.

6. Based on the conversations that it has held with market participants, ACM understands that the JZOJP-movement is still in its early stages.[3] Market participants are still searching for the answer to the question of how to implement JZOJP in practice, and they are experimenting with ideas and plans. In that context, there is a need in the health care sector for clarification about what forms of cooperation within the JZOZP-movement do not risk a fine from ACM. By publishing this policy rule, ACM seeks to meet that need.

7. This policy rule contains several criteria, which offer market participants clarity about ACM's fining powers with regard to arrangements as part of JZOZP. By meeting those criteria, market participants are assured that ACM will not launch any investigations aimed at imposing a fine, if they enter into arrangements in order to improve health care in the Netherlands by helping realize the public interests of high-quality care, health care accessibility, and health care affordability.

[1] Administrative agreement regarding medical-specialist care 2019 through 2022, Administrative agreement regarding GP care 2019 through 2022, General agreement on district nursing 2019 through 2022, Administrative agreement on mental health care (GGZ) 2019 through 2022 and Administrative arrangements regarding paramedical care 2019-2022.

[2] For more information, see www.dejuistezorgopdejuisteplek.nl, among other websites.

[3] These conversations took place in the first half of 2019.

2 The cartel prohibition

8. The so-called 'cartel prohibition' has been laid down in Section 6, paragraph 1, of the Dutch Competition Act, and it stipulates that all "a*greements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited.*"

9. The basic rule of this cartel prohibition says that competitors are prohibited from concluding price-fixing agreements, sharing customers or catchment areas, jointly restricting sales or capacity, or holding bid-rigging meetings prior to tender processes. However, arrangements between market participants that are not each other's competitors may also, depending on the specific situation's circumstances, restrict competition. This is the case, for example, if a supplier of a specific type of medical equipment prohibits its buyers to sell products of competitor suppliers. In various guidelines, ACM has provided guidance about all of these kinds of distortion of competition.[4]

10. When applied to collaborations in the context of JZOJP, the above means that market participants are able to collaborate in order to prevent health care (or more expensive forms thereof), to relocate health care, and to replace health care, as long as such collaborations are designed in such a way that they produce benefits for patients and the insured, in both the short and long term. What should be avoided, is that arrangements made within the context of JZOJP result in arrangements that primarily benefit the incumbent market participants themselves, and hardly benefit patients and the insured, or even not at all.

In what situations does the cartel prohibition not apply?

11. Many forms of collaborations in health care are allowed. First of all, this is the case when arrangements between competitors do not have the object or effect to restrict competition appreciably. This will be the case if arrangements concern subjects that do not relate to competition or if there are arrangements between competitors that may affect competition indirectly, but only to a limited extent.

12. As an example, arrangements regarding purely medical quality levels or arrangements regarding administrative procedures, generally speaking, do not restrict competition. This also applies to arrangements between health care providers that aim to compile an up-to-date overview of available capacity (for example, beds), so that patients are able to get the right follow-up care fast. Arrangements about seconding employees, too, will, in most cases, not

[4] ACM recently published two general guidelines, one about arrangements between competitors and one about arrangements between suppliers and buyers. More specifically for the health care sector, ACM in 2010 also published general guidelines (in Dutch).

restrict competition.

13. Another relevant aspect is the more general *statutory exception to the cartel prohibition* (Section 6, paragraph 3 of the Dutch Competition Act) for arrangements that lead to so-called 'efficiency improvements', and that are, on balance, beneficial for patients and the insured. When applied to collaborations in health care, the cumulative criteria for an exception to the cartel prohibition stipulate that:
    a. there must be concrete benefits associated with the collaboration;
    b. a fair share of these benefits fall to the health care buyers, patients, and the insured;
    c. these arrangements are necessary for realizing these benefits, and they do not go beyond what is necessary;
    d. sufficient competition remains in the market in question.

14. This exception can, for example, apply to collaborations between competitors in the same geographical area regarding complex forms of medical-specialist care. As long as the benefits of such collaborations outweigh the negative effects on competition, they are allowed.[5] In addition, arrangements between competitors regarding activities that market participants cannot operate either profitably or efficiently by themselves will, in most cases, also not restrict competition, provided that the arrangements do not go beyond what is necessary, for example, arrangements about night care.

15. Also, collaborations between market participants that are not each other's competitors and that are active in different markets are usually allowed. For example, arrangements between various network partners will, in most cases, not have the object or effect to restrict competition appreciably. Think of arrangements between a hospital and primary-care providers about ensuring that medical-specialist care at home can be offered safely. Arrangements regarding referrals are, in most cases, not a problem either, even if network partners agree on providing their care only through the collaboration or on referring only to each other. The anticompetitive risks of such arrangements increase when market shares exceed 30 percent. Depending on the exact circumstances, such 'exclusivity arrangements' may have an exclusionary effect, and limit choices for patients and the insured.[6]

16. Arrangements of a different order, but which also do not constitute a restriction of competition, are arrangements that are made within the context of a so-called *follower strategy*. An individual health insurer in a certain region can make arrangements with different health

[5] See ACM's informal opinion of 15 July 2016 about collaborations in complex cancer care between hospitals in the greater Utrecht area.

[6] See the general guidelines for the health care sector (in Dutch), published by ACM in 2010 as well as the guidelines for health care groups, published by ACM in cooperation with the Dutch Healthcare Authority (NZa).

providers and other market participants about, for example, relocation or replacement of health care services. If a health care provider is satisfied with the arrangements made, it can ask other health insurers to follow those arrangements. Health insurers can also announce (for example in public or in its contracting policy) to have the intention, in general, to follow any contractual arrangements offered by health care providers insofar those are in the interests of their insured. As long as the health care provider is the one that issues the request for following, and individual health insurers are also able to disregard the request, it is allowed. After all, both health care providers and health insurers retain their freedom of contract.

17. Another type of arrangement that falls under the freedom of contract is *selective contracting* by health insurers. An individual health insurer can decide on its own not to contract a health care provider, for example, because the latter does not bring any added value to the contracted selection of health care services, or because sufficient health care has already been contracted in order to meet the duty of care. A health care insurer decides this on their own.

18. Finally, the cartel prohibition does not apply to arrangements that have limited capability of affecting competition. This so-called *bagatelle exception* (Section 7 of the Dutch Competition Act) stipulates that the cartel prohibition does not apply to arrangements involving no more than eight undertakings, and the combined turnover of which is relatively limited[7]. The cartel prohibition also does not apply to arrangements between undertakings with a combined market share of 10 percent or less.

Self-assessment

19. Market participants that wish to find out in what ways they are allowed to collaborate should first assess by themselves what arrangements are allowed (*self-assessment*). To that end, they can consult[8] the various guidelines and other forms of guidance that ACM has published, and, if necessary, also seek external advice regarding the competition-law assessment of planned initiatives. If market participants have concrete plans, and still have questions about the risks of certain JZOZP-related arrangements, even after a self-assessment, they can sit down with ACM. If there is a broader, societal interest, ACM will gladly help.

[7] The combined total turnover from services can be 1.1 million euros at the most.

[8] See the overview page about collaborations in health care (in Dutch) on ACM's website.

3 Scope of this policy rule

20. In this policy rule, ACM has laid down the basic principles behind its oversight over arrangements[9] regarding the prevention, relocation or replacement of health care services as part of JZOJP. This concerns, for example, arrangements between health care providers themselves, between health insurers themselves, or between a combination of health care providers (one or more) and health insurers.

21. Market participants that have plans about making arrangements that they believe may restrict competition to a greater than limited extent are able to choose to comply with the criteria laid down in this policy rule. This also applies to market participants that wish to make arrangements that may have relatively significant effects on competition, for example if multiple regional competitors are involved, or if one or more of the market participants involved enjoy a strong market position. As long as they meet the criteria laid down in this policy rule, they will not risk any fine.

4 Five criteria

22. ACM will not use its fining power, if market participants meet each of the following five criteria when making JZOJP-related arrangements:

    1. The arrangements are based on *a factual and public, regional snapshot*;
    2. Health care providers, health care buyers, and patients (or their representatives) are *fully involved*;
    3. The objectives are *concrete, measurable, verifiable,* and are described in terms of *quality, accessibility and affordability of health care*;
    4. It has been substantiated that the arrangements *do not go beyond what is necessary* for the realization of these objectives;
    5. The objectives, the arrangements, and the substantiation of the necessity thereof are made *public*.

23. If market participants potentially violate the competition rules with certain JZOJP-related arrangements, yet meet the criteria laid down in this policy rule, ACM will not launch any investigations aimed at imposing a fine. With this policy rule, ACM wishes to prevent market participants from abandoning JZOJP-related initiatives because they are uncertain about ACM's oversight. This policy rule binds ACM only in cases where the JZOJP-related

[9] In this document, ACM uses the terms 'arrangement' or 'arrangements'. This also includes plans, initiatives, the joint determination of health care profiles or what other names market participants may give to their arrangements as part of the JZOJP-movement.

arrangements meet all of the abovementioned criteria.

24. The aforementioned criteria are discussed in greater detail below.

Criterion 1: The arrangements are based on a factual and public, regional snapshot

25. Market participants must base their JZOJP-related arrangements on a factual regional snapshot, and must describe the relationship between that regional snapshot and their JZOJP-related arrangements. In other words: market participants must explicitly state how their JZOJP-related arrangements offer solutions in light of one or more challenges that they believe emerge from the factual regional snapshot on which they base their arrangements.

26. In the report of the Taskforce JZOJP, the administrative agreements, and in various initiatives of VWS, the determination of a factual snapshot about what is needed in a specific region, municipality or district is considered a starting point for JZOJP.[10]

27. This criterion in the policy rule is in keeping with the arrangements that market participants in the health care sector made themselves in the administrative agreements. In accordance with these administrative agreements, a regional snapshot must paint a factual picture of the social and health situation of the region in question, and of the challenges that that region faces. ACM does not decide how large a region must be nor how comprehensive such a snapshot must be.

28. In the administrative agreements, it has been agreed that, if a factual regional snapshot fails to emerge, “the health care buyers (health insurers, health care offices, and municipalities) will take the initiative of creating one, and make sure, together with health care providers, professionals and patient organizations, that this will happen”. From the above, ACM deduces that a broad mix of organizations is desirable when creating a regional snapshot. It is conceivable to ACM that the initiative of creating a regional snapshot begins among a few market participants. In ACM’s opinion, this does not have to be the health care buyer.

29. Market participants can exchange information that is needed for creating a factual, regional snapshot. If such exchanges involve business-confidential information that may have an effect on mutual competition, they will have to state as to why this exchange of information is necessary for the creation of a factual, regional snapshot. In advance, ACM deems the exchange of current and future tariffs not to be necessary in that context.

[10] See for example the administrative agreement on medical-specialist care 2019 through 2022 (in Dutch) of 4 June 2018: “Between the administrative commitment at a national level, and the practical implementation of the right care in the right place, it is necessary that market participants make a factual snapshot of the social and health situation and challenges in a regional, municipality or district.”

Criterion 2: Health care providers, health care buyers and patients (or their representatives) are fully involved

30. ACM leaves it up to the market participants involved, depending on the substance of the JZOJP-related arrangements, to determine with what market participants it is necessary to make arrangements. As directly involved parties, health care providers, health care buyers, and patients (or their representatives) are affected by arrangements as part of the JZOJP-movement, and may have divergent interests. Full involvement from each of these groups will ensure that, when making the arrangements, the market participants will take into account the different perspectives and interests. That increases the likelihood that their JZOJP-related arrangements will serve the public interests in health care.

Full involvement

31. By full involvement, ACM means that health care providers, health care buyers, and patients (or their representatives) are involved on a substantive level early on in the creation process and discussions on the different plans, proposals, scenarios, and the definitive arrangements. In that process, the market participants that make the arrangements will document the input of the different stakeholders.

32. If market participants decide not to include certain input when making a JZOJP-related arrangement or if the arrangements deviate from the input of one or more stakeholders involved, the market participants will state this, and will justify their decision to do so. They will communicate this to the stakeholder(s) involved.

33. Merely the approval of a JZOJP-related arrangement without involvement from any of the three types of market participants is not sufficient for designating this as ‘full involvement’.

Supra-institutional, regional perspective on the patients’ interests

34. Market participants are able to decide at their own discretion what patients (or their representatives) are to be involved. However, that involvement must transcend the institutional interests, and safeguard a regional perspective on the patients’ interests.

35. Involvement of just the client councils of the health care providers involved is not enough. Depending on the nature and substance of the JZOJP-related arrangements, senior associations, patient associations, citizen organizations and citizen collectives (for example health care co-operations, district and neighborhood co-operations) and/or individual patients can also be involved, among other groups. Target groups that may reasonably have an interest in the JZOJP-related arrangements, as well as target groups with a demonstrable interest that have indicated to market participants that they wish to be involved, will be invited

by market participants or given the opportunity to be involved.

Criterion 3: The objectives are concrete, measurable, verifiable, and described in terms of quality, accessibility and affordability of health care

Concrete objectives

36. ACM finds it important that JZOJP-related arrangements make health care truly better, considering the public interests of quality, accessibility, and affordability of health care. To that end, market participants need to describe what concrete benefits the JZOJP-related arrangement in question aims to realize and/or what problems it prevents.

37. The description is to be phrased in such a way that the objectives are measurable and verifiable afterwards, both for the market participants involved as well as for the relevant stakeholders. This can be done on the basis of external studies, but this is not required. The basic principle is that market participants make it clear what they concretely wish to achieve with the collaboration.

38. Market participants can exchange information for the purpose of drawing up the objectives. If, in that process, business-confidential information is exchanged that may have an effect on mutual competition, they will have to explain as to why this exchange of information is necessary. In principle, ACM deems the exchange of current and future tariffs not to be necessary in that context.

Criterion 4: It has been substantiated that the arrangements do not go beyond what is necessary for the realization of the objectives

Anticompetitive arrangements do not go beyond what is necessary

39. JZOJP-related arrangements that restrict competition must not restrict competition more than is necessary for the realization of the objectives. In order to comply with this criterion of the policy rule, market participants must substantiate why they believe that the JZOJP-related arrangements, insofar these restrict competition, are necessary for those objectives, and therefore cannot be realized without those arrangements or with less restrictive arrangements.

Market entry, and expansion of activities

40. A basic principle of the Dutch Competition Act is that an arrangement must not restrict, hinder or impede in any other way the entry onto and/or expansion of activities on the market. ACM wishes to prevent that, as a result of JZOJP-based arrangements, current or potential competitors are put at a disadvantage, with possible negative effects on the quality, accessibility and affordability of health care.

41. ACM understands that, with some JZOJP-related arrangements, it may be necessary for a certain provider to have the certainty of a specific contracted volume for a specified period. That may be necessary for profitably realizing a planned reduction or to be able to invest profitably in case of an expansion of its selection of services. Depending on the magnitude of the planned reduction and/or the level of the necessary investments, market participants may decide on a period that is proportional in that context. ACM assumes that, as a rule, it will not be necessary for this period to last longer than three years.

42. This restriction to a maximum of three years explicitly concerns specific arrangements that restrict, hinder or impede in any other way the entry onto and/or expansion of activities on the market, and does not apply to arrangements as part of JZOJP in general.

Criterion 5: The objectives, the arrangements, and the substantiation of the necessity thereof are made public

Public accountability

43. With this criterion, ACM seeks to have those who have made the JZOJP-related arrangements give public account: what arrangements have been made, why are those good in terms of quality, accessibility and affordability of health care, and why are these arrangements necessary for those objectives?

44. By making these public, market participants make clear on basis of what considerations and substantiations the JZOJP-related arrangements have been made, and what measurable objectives belong to them.

45. The objectives, the arrangements, and the substantiation of their necessity must be made public on the websites of the market participants involved. In that context, ACM assumes that market participants design the accountability process in such a way that they, as soon such is possible, also make clear to what degree and in what way the objectives have been realized. As such, publication also offers opportunities for the sharing of *best practices*.

5 Complaints and indications

46. If ACM receives a complaint about a possible violation of the Dutch Competition Act that is connected to JZOJP-related arrangements, it will be obliged to handle this complaint. This may result in ACM launching an investigation into a concrete case. ACM can also launch an ex officio investigation if it receives indications about possible anticompetitive effects of JZOJP-

related arrangements, or possible harmful effects for patients and the insured.

47. If such an investigation were to reveal that the JZOJP-related arrangements constituted a violation within the meaning of the Dutch Competition Act, then the solution to the competition problem would be central to ACM's next steps. ACM will abandon any actions that aim to impose fines if market participants have met the criteria in the policy rule, but it can seek adjustments to the JZOJP-related arrangements. In that context, ACM will take into account the specific circumstances of that particular case. If the market participants do not implement the desired adjustments, ACM will be able to force them to do so through an order subject to periodic penalty payments or a binding instruction.

Questions about the application of the policy rule in concrete cases

48. Market participants can test their JZOJP-initiatives against the criteria of this policy rule themselves. Each year, ACM will select a couple of cases in order to be able to give further practical guidance in light of the criteria of this policy rule. This guidance will be published on ACM's website. Market participants can obviously also contact ACM themselves if, in a concrete case, they are unsure about whether or not they meet the criteria in this policy rule.

49. This policy rule will be cited as: ACM Policy Rule on arrangements as part of the movement called 'The right care in the right place'.

50. This decision will come into effect on the day after the publication date of the Dutch Government Gazette in which it is published.

The Hague, 17 December 2019

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

T.M. Snoep
Chairman of the Board