

Summary

On January 1 2006 the health care system has been changed in Netherlands, including the health care insurance system. The general insurance law has been changed and the Health Care Insurance Law is introduced. The core of the new health care insurance system outlines de compulsory base insurance for everyone. The mirror image of this compulsory insurance is the acceptance duty for insurance companies. Insurance companies offer the compulsory base insurance for a fixed, but varying amongst insurance companies, premium, and are not allowed to differentiate the premiums according to health risks. The acceptance duty and the ban on premium differentiation for health care insurance companies go together with a system of compulsory risk equalization. Because insurance companies have to accept each citizen for the base insurance, they run financial risks. As a result it is possible that one or several insurance companies have to insure high numbers of senior citizens, chronically ill or people with high health risks. In order to compensate those health care insurance companies, the Health Care Insurance Law provides the risk equalization system. Risk equalization divides the financial risks amongst all insurance companies equally. The funds for the coverage of the health care insurance are derived from the Health Care Equalization Fund. This fund is comprised of the income-dependant contribution of the insured, a compulsory employers' contribution and a contribution of the government. The equalization fund contributes, amongst others, to the risk equalization for insurance companies. Risk equalization can take place in advance (ex-ante) or in retrospective (ex-post). With ex-ante risk equalization the risks of the insured are estimated based on the health characteristics of the insured. In order to overcome and correct inaccuracies in the ex-ante equalization for the differences between the estimated and realized numbers of insured, the ex-post risk equalization is used. With ex-post risk equalization the division of funds for the insurance companies is adjusted in retrospect based on cost realizations. Ex-post risk equalization has to end ultimately in 2011. The recent changes in the Dutch health care system have raised a fair amount of questions in politics and the media. First, the Health Care Insurance Law is a mixture of public and private elements. A system is usually either private, in which all citizens have complete freedom, or public, in which there is no room for private parties. The preconditions of the Health Care Insurance law, like the insurance duty for citizens, the acceptance duty and the premium differentiation ban for insurance companies, are elements which are more compatible with a public health care insurance rather than a private one. Due to that, the Health Care Insurance Law seems to deviate on a couple of points from the altered general insurance law. With respect to a couple of things, the health care agreement differs from the general insurance law. Secondly, the risk equalization has probable conflicts with the European competition law, especially regarding governmental support. The Dutch Competition law is aimed at strengthening the competition on, amongst others, the health

care market. The main elements of this law are: the ban on competition limiting agreements, the ban on the abuse of (economic) power and the control on conglomerates. The European Competition law aims at, besides the main elements of the Competition Law, correcting the national legislation or administrative measures that disrupt competition, like the control on governmental support. The risk equalization system contains a form of governmental support that is perhaps not acceptable. Besides that it seems that the execution of the Health Care Insurance Law by commercial insurance companies clashes with the so-called Third Damage Insurance Guideline. In addition, a compulsory participation in the risk equalization system can be a measure to limit the entrance of foreign insurance companies in the Dutch health care insurance market. Thirdly, circumstances for health care insurance companies that were non-profit in the former health care system have changed in such a way that these small insurance companies, compared to large companies, may experience too many disadvantages in the new system. A former non-profit insurance company from The Hague, Azivo, believes that they receive too little compensation for expensive clients, and other insurance companies that do not need to be compensated, do receive compensation. According to this insurance company there is no fair competition in the health care insurance market and the risk equalization system is not acceptable. Azivo went to the European Court of Justice to fight the health care system. The Court still has to make its final judgment. The goal of the investigation is to examine whether the risk equalization system clashes with the European competition law and to investigate how the risk equalization system works in practice. Therefore, the problem statement of the research is: *'Does the risk equalization system in the new Health Care Insurance Law possibly clash with the competition law and how does the risk equalization system work in practice?'*

The emphasis of the research is on literature research in a theoretical context. The literature study and the legal resource investigation is based on an analysis of the applying law and legislation in national and European area, relevant jurisdiction and other scientific resources. The practical research part deals with the practical implications for insurance companies of the risk equalization system. Relevant organization, institutions and health care insurance companies are interviewed.

Research shows that the Dutch health care system raises a lot of questions in Europe. First of all because the Health Care Insurance Law consists of public and private elements. The new Dutch health care system is a social security system that is being executed by commercial health care insurance companies that are allowed to make profit. Imposing obligations to health care insurance companies is not by definition acceptable by the Third Damage Insurance Guideline and the European Competition Law. Some parts of the European Damage Insurance Guidelines justify an infringement to the instructions by calling

on 'the public interest' in general and based on article 54 of the Third guideline in particular. Article 54 needs to be interpreted broadly; in such a way that a private system according to the European Commission can partly or completely function as a public system, through which the legal preconditions in the Health Care Insurance Law can be justified when calling on the public interest. The obligatory participation of insurance companies in the risk equalization system can under European Competition law not be directly approved. The Risk Equalization Fund in the Risk Equalization System is amongst others financed by a contribution from the state and needs to be recognized as a governmental subsidy in the first sentence of the first paragraph of article 87 of the European Community-treaty. There is still a lot of debate whether this measure could be labeled as illicit governmental support. Governmental support can be illegal when the measure is regarded as incompatible with the common market. With respect to illicit governmental support, a couple of exceptions exist. Under certain circumstances governmental support can be justified for companies that deal with 'the management of economically relevant services'. The question is what can be labeled as 'the management of economically relevant services' and whether health care insurance companies can provide such services. When health care insurance companies are indeed performing 'the management of economically relevant services', health care insurance companies can receive governmental support based on the second paragraph of article 86 of the European Community-treaty. The governmental support is then compatible with the European Community-treaty, because this support is necessary for the management of the economically relevant service and the support does not influence the development of the trade in a manner that contradicts the importance of the European Community. However, according to health care insurance company Avizo the European Commission unlawfully tolerates a form of governmental support in the Dutch health care system. If the European Court agrees with Avizo, the consequence could be that the Dutch health care system needs to be modified from a private insurance into a public system: exactly the way it was before. As a result, the question remains whether the Dutch health care system is compatible with the competition law.