

LEGAL UPDATE

Net closing in on Care-BV construction

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Profit distribution in healthcare is a topic that continues to divide sentiments. In 2019, the emphasis was mainly on the risks. In a [description](#) in March, NZa and IGJ complained about deficient possibilities of exercising supervision on conflicts of interest and dubious financial transactions. In October, [the Minister informed the Upper and Lower Houses of Parliament](#) that Legislative Proposal 33618 'Increasing investment opportunities in specialist medical care' was being withdrawn: the priority would first need to be on improving the preconditions. A month later there was a [letter](#) in which the Minister set out in concrete terms what the sector could expect in that context.

What is the situation now?

At present, there are a number of situations in which profit distribution is simply allowed, from a purely legal standpoint. The legal blockade of article 5 of the Care Institutions (Accreditation) Act (Wtzi) does apply for accredited institutions that provide specialist medical care or intramural care, but not for a series of institutions that are accredited by operation of law (such as pharmacies, for instance) and institutions that provide extramural care, nor does it apply for subcontractors commissioned by accredited institutions (to read the regulation, click [here](#)). In the event of independent treatment centres, it is a standard construction that the institution with accreditation outsources the care, at cost price, to a private company without accreditation for which the profit distribution prohibition does not theoretically apply. For help and support in the social domain, the restrictions of the Wtzi do not apply at all, in fact.

What does the (A)Wtza mean?

It is expected that in the course of this year, the Care Providers (Admission) Act and the associated Amendment Act - together also referred to as: '(A)Wtza' - will be adopted (Parliamentary numbers [34767](#) and [34768](#)). The (A)Wtza introduces a reporting requirement and licensing requirement for care providers. The licence replaces the accreditation. The Wtzi will be largely dismantled and is still mainly concerned with the prohibition on profit distributions. What is also important is that the definition of institution is changing. An institution is no longer defined as an organisation with accreditation, but as an institution that provides care to which there is entitlement under the Healthcare Insurance Act (Zvw) or the Long-Term Care Act (Wlz).

The Minister stated the following on this in his Letter of 25 November:

'Another important aspect of the Wtza and the AWtza is that the requirements imposed on a care provider, including the prohibition of profit motive, are no longer linked to the licence, but have a direct effect. This prevents the regulator from being unable to enforce if the institution is not yet, or no longer, licensed. This means that a care provider can no longer evade enforcement by, for example, allowing the licence to expire.'

The question is whether this would not also immediately bring subcontractors who provide Wlz or Zvw care under the prohibition on profit distribution. The (A)Wtza legislative proposal does not seem to want to go that far yet. After the [Third memorandum of amendment](#), subcontractors do need to satisfy the transparency requirements, but do not yet fall under the prohibition on profit distribution as long as they do not do business directly with the health insurer or the care administration office. That would change if the amendments from Gerbrands and Hijink were adopted. Gerbrands wants to add to article 5 Wtzi a [provision](#) which explicitly states *'that an institution does not outsource the care to a for-profit subcontractor'* Hijink wants to entirely

[scrap](#) the possibility of formulating exceptions by order in council to the prohibition of a profit motive for certain institutions and is proposing a [provision](#) which states that an *institution shall not cause the provision of care by an organisation in which the director or directors have a direct or indirect financial interest*.

And what comes next?

Even if the amendments from Gerbrands and Hijink do not make it through Parliament, there is a chance that there will be legislation at a later stage that looks very much like this. In the [letter of 25 November 2019](#), the Minister announced that a new legislative proposal for a Care Providers (Ethical Management) Act (Wibz) would be submitted. That proposal should provide for *'conditions for dividend payment and the possible introduction of a standard for a socially acceptable maximum dividend payment'*. The Minister also has subcontractors in his sights:

'These conditions may include the financial health (such as solvency), the quality of care, governance and the term in which dividends may be paid out. The conditions for dividend payment in extramural care will apply to both main and subcontractors. The current prohibition on a profit motive in intramural care only applies to main contractors. With the legislative proposal for the Care Providers (Ethical Management) Act, we also want to introduce the possibility of imposing conditions for profit distribution by subcontractors in intramural care.'

This would therefore provide even more starting points for further standardisation, both for extramural care and for subcontractors in specialist medical and intramural care. Of course, stipulating conditions is not quite the same as a complete exclusion, but then there is at least a starting point in the law to substantially restrict profit distribution by subcontractors in the coming period.

Conclusion

Fifteen years ago, [the Minister wrote](#) that governance was primarily a matter of self-regulation for private-law institutions. Politics seems to have gone back on that view since. The new line is: first more supervision and only then possibly more freedom, for example in the area of profit distribution. For the time being, the emphasis is entirely on the first of those two elements ('more supervision'). It is advisable to anticipate these changes in good time.

This is a Legal Update by Wouter Koelewijn.

For more information:

Wouter Koelewijn
+31 30 25 95 553
wouterkoelewijn@vbk.nl