MENDONÇA, Elvino de Carvalho; MENDONÇA, Rachel Pinheiro de Andrade. The bundled payments model generates incentives to anticompetitive acts by the health insurance companies. In: IBRAC. The Future of Antitrust. Ed. Singular. São Paulo, 2020.

THE BUNDLED PAYMENTS MODEL GENERATES INCENTIVES TO ANTICOMPETITIVE ACTS BY THE HEALTH INSURANCE COMPANIES

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I. Introduction

The health insurance companies in Brazil are applying the bundled payments model in substitution to fee-for-service model, with the aim to remunerates clinics of diagnostic medicine, hospitals and other kinds of health providers[1]. In the former model the provider is remunerated by a fixed price for a set of procedures, while in the second one the provider is remunerated by each procedure that he uses to do patient health care.

Three are the arguments to implement the new model from the point of view of the health insurers: (i) to decrease health inflation generated by the fee-for-service model; (ii) to divide the care risk of the patient among the health providers; and (iii) to improve the quality of medical and hospital care.

This new model has the aim to generate incentives for rational use of procedures in the medical and hospital care by the health providers. However, this model depends on the equilibrium between bargaining power of health insurance companies and health providers, and, depending on the equilibrium the consumer can be negatively affected by the decrease of medical procedures available.

However, from the point of view of health providers there is no clear understanding if this kind of model will be good for clinics, hospitals and doctors, mainly because the health insurers are usually integrated companies and have big market share in the relevant market of health plans as well as in the relevant market of health providers. By the way, CADE's

[1] According to the supplementary health care sector, the health insurers sell health plans to the costumers and buy health services from health providers in other to supply medical assistance to their beneficiaries.

jurisprudence has several concentration acts relating the acquisitions of providers by insurance health companies[2].

This paper will not discuss any regulatory aspect related to the best model to be applied in Brazil from the point of view of the beneficiaries of health plans. Our main objective is to analyze the anticompetitive aspects that can be generated by this kind of remuneration, when the health insurance company has dominant position in the relevant market.

II. The bundled payment model as an alternative to the fee-for-service model

The health inflation has been increasing above the break-even point for a long time, which has been generated conflicts between health insurers and health providers, since the remuneration implemented by each procedure (fee-for-service) has been generated incentives to the overuses of procedures by the health providers since then.

The National Health Agency from Brazil (ANS) elaborated a work group (WG) to study the remuneration models of health providers by the health insurers. The WG was compounded by the medical entities, health providers, health insurers and universities with the aim to study the alternative models to fee-for-service model, since the health insurers commonly use the fee-for-service model to remunerate their providers. The WG studied a lot of different models and made comparisons with the fee-for-service model.

According to ANS (2019)[3], in the fee-for-service model the health insurers pay providers by procedure and the sum of all procedures payments is the remuneration of health providers in the health care treatment. The fee-for-service model *is essentially characterized by the stimulus to competition among the health plan customers and by the remuneration for the quantity of services produced* [ANS (2019), page 20].

However, according to the specialized literature the fee-for-service model generates overuse of procedures, which increase the costs of health insurers and the health plan customers as well as generates unnecessary exposition of the customers to procedures that could be avoided and that can affect their health (example: radiological exams). Additionally, as the

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[2] The Amil acquired several hospitals and clinics of diagnosis medicine, mainly before his acquisition by the UnitedHealth Group in 2012. CA nº 08012.010094/2008-63. In the same way, Rede D`or acquired 10% of the Qualicorp Company in 2019.

[3]. Brasil. Guia para Implementação de Modelos de Remuneração baseados em valor. (Guideline to Implementation of the Remuneration Models based in value). ANS. 2019. Available at: http://www.ans.gov.br/images/Guia_-_Modelos_de_Remuneração_Baseados_em_Valor.pdf. Accessed: 2020.03.13.

focus of fee-for-service model remuneration is based in the quantity of procedures done, it is usual that the quality of services provided is neglected by health providers.

Therefore, the economic literature presents several models used by health insurers to remunerate their providers. These models of remuneration are only mechanisms of incentives to get the optimal equilibrium between insurance companies and health providers, as for example the bundled payment model. However, it is important to mention that the way these models are implemented can result in anticompetitive behaviors.

The bundled payment model is an alternative model to fee-for-service from the point of view of health insurers because it conjugates several health exams in only one procedure. These models have the aim to fix a unique price for a set of exams with the intention to reduce the overuses of exams demanded by the physician. However, the economic literature shows that the related model generates incentives to occur the inverse, with negative effects from the point of view of patient.

III. The bundle payment model decreases the bargaining power of the health providers

As pointed in the last section, the main advantage of the bundled model to the health insurers as compared to the fee-for-service model is the rationalization of medical procedures use. However, from the costumer point of view, this can be considered the main disadvantage, since under this model health providers will necessarily prescribe less medical procedures than in the fee-for-service model and, as a consequence, beneficiaries can have their well-being negatively affected.

From the health providers point of view, which are the other important agents in the private health system, the bundled model has an adverse effect on their bargain power because the health providers lose the control of an important variable, which is the medical procedures, mainly in the presence of the concentrated market of health insurers[4] relatively to the concentration of health providers market, as can be seen in the supplementary health sector of Brazil.

The bundled payments model fixes a unique price to a set of exams. This fixed price is commonly calculated as an average of the individual exam prices, so that the average price will be necessarily between the lower and higher prices. So, with this structure, health providers

[4] The necessary relationship between health insurers and health providers is weighted by the market power of each one agent and, depending on the market structures of the relevant markets of health insurers and health providers, monopoly power and monopsony/oligopsony power can arise.

only will have incentives to supply exams that its cost is equal or lesser than the fixed price mentioned.

Exams with lesser individual prices are, in general, less technologically complex and are commonly supplied by a lot of competitors. Thus, the bundled payment model will attract a set of homogeneous firms that will supply less technologically complex exams, as for example ultrasonography and X-ray in the diagnostic medicine relevant market and will leave out of the market companies that supply exams more technologically complex. This phenomenon, called adverse selection, reduce the bargaining power of the health providers.

IV. The bundled payment model as maximum price table

According to the legal determination from ANS, all health insurer that intend to implement the bundled payment to their health providers must do in accordance with Unified Terminology in Supplementary Health Table – TUSS, which made the standardization of procedures.

The TUSS table does not suggests or imposes any kind of prices. Thus, the way that the exams will be compounded in the procedure and the way that the price will be chosen, should be object of negotiation between health insurer and the health providers. According to ANS, does not have any problem with any kind of remuneration model as long as the model violates the competition defense law, the autonomy of the health provider and it results in damage to patients.

However, the way that the exams are chosen to compound the procedures and the prices are fixed the bundled payments model generates incentives to anticompetitive acts by the health insurers, mainly because it aggregates several exams in only one maximum price, which can be understood as a maximum price table.

In general, the bundled payments model aggregates several exams with different costs in only one procedure with a unique price between the extremes. In this case, the health insurers will remunerate the health providers based on the average cost of exams and, from the point of view of the health providers, the maximum price payed by insurers will be the upper limit to the health providers.

Thus, the health provider only will have incentive to offer the exams until the point that preserve its profit margin and, as a result of adverse selection, only health providers that does not have choice will carry on working for the health insurer. So, if there will be competition in

the health insurance market, then health providers will be in a favorable condition to sell their services and there would not be maximum price, otherwise health providers will receive payment as lower as possible like a maximum price.

Thus, the insurance health company imposes a fixed price to a set of procedures for all health providers, and these ones are affected in their initiative freedom, since they can not sell their services because the insurance health companies have dominant position in the relevant market of health plans.

It is important to say that the fixed prices for a set of procedures imposed by the health insurers to different health providers only happens when the insurance health company has high market power, because this company is buying services from the providers and not selling to them.

Thus, the new model works like a maximum price table and generates a lot of acts that violates the economic order. First of all, the new model limits the initiative freedom of health providers, since they can not raise their remunerations above the ceiling price imposed in the table.

As a result of the initiative freedom limitation, the relevant markets of health providers become limited in their competition, mainly in terms of quality of service provided. It happens because the absence of price freedom decreases the incentives to improve the quality of service provided.

Like the minimum price table, the bundled payments model imposed by the insurance health companies also promotes the adoption of uniform or agreed business practices among competitors, since the ceiling price imposed by the price instrument represents the limit to competition among health providers. Additionally, the oligopsony power of the insurance health companies also damages the entrance of new companies as a health providers in the market and creates difficulties to the providers work.

V. CADE´s jurisprudence

The CADE´s jurisprudence about minimum price table is broad because CADE understands that minimum price tables limits the initiative freedom of companies and the competition freedom among competitors.

The CADE´s jurisprudence also has been classified the minimum price table as an act denominated uniform business practices among competitors. This anticompetitive act is

generated by associations and unions and it is typified as anticompetitive acts in the Brazilian competition law (law nº 12,529/2011[5], art. 36, I to IV[6] c/c II[7] of §3º).

There are a lot of administrative investigations in the CADE´s jurisprudence talking about minimum price tables when the anticompetitive act is implemented by associations in different sectors.

In the health sector there are some administrative investigations relating physician associations and insurance health associations as well as relating health providers and health associations. In the former cases the administrative investigations occur because the physician associations imposed minimum prices to the insurance health companies, while in the second ones the administrative investigations occur because the insurance health associations imposed maximum price to the health providers, inclusively to the physicians.

In relation to the minimum price tables as a violation of economic order, CADE condemned the Medicine Regional Conseil of São Paulo, São Paulo Medical Association and São Paulo Union of Physicians because they imposed the Brazilian Hierarchical Classification of Medical Procedures (CBHPM) table[8] to the health insurers, fixing minimum prices to physicians, to hospitals and exams.

In the same way, CADE also condemned the Medical Association of Divinópolis and Unimed Divinópolis because they imposed the same CBHPM table to the insurance health companies[9] and generated the same violations of economic order, as for example uniform business practices among competitors[10].

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[5] Available at: http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

[6] Art. 36. The acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved:
I - to limit, restrain or in any way injure free competition or free initiative;
II - to control the relevant market of goods or services;
III – to arbitrarily increase profits; and
IV - to exercise a dominant position abusively.

[7] § 3 The following acts, among others, to the extent to which they conform to the principles set forth in the caput of this article and its clauses, shall characterize violations of the economic order:
...
II - to promote, obtain or influence the adoption of uniform or agreed business practices among competitors;

[8] Administrative investigation nº 08012.006647/2004-50.

[9] Administrative investigation nº 08012.000432/2005-14.

[10] Several other administrative investigations related to minimum price tables in the health sector: 08012.005374/2002-64; 08012.008477/2004-48; 08012.004020/2004-64; 08012.005135/2005-57; 08012.006552/2005-17; 08012.007833/2006-78; and 08012.002866/2011-99.

As an example of maximum price table condemnation by CADE, it is important to mention the case where the association of health insurers (UNIDAS)[11] imposed a maximum price table to health providers. In this case, the association worked like as a monopsonist and the anticompetitive act happened because the insurance health companies fixed the buy prices jointly.

CADE`s jurisprudence has given special attention to the coordinated effects of price tables and, because of it, CADE has condemned a lot of associations by anticompetitive acts denominated uniform or agreed business practices among competitors and several groups of firms in the cartel practices. In both cases, the practice is identified through the identical minimum and maximum price tables for all competitors.

However, the price tables mechanism can also be used as an instrument of anticompetitive conducts in the unilateral act context. In this case, the health insurer has high market share and the prices imposed are not equals for all health providers but is fixed in accordance with discriminatory methodology.

VI. Conclusion

This paper brought important aspects to reflect about the bundled model as remuneration model to the health providers, mainly where there is a big difference in the market structure between the relevant market of health providers and relevant market of health insurers, mainly because the adoption of this kind of way of remuneration decreases the bargaining power of the health providers.

As pointed, from the health insurers point of view fee-for-service model generates overuse of procedures and the bundled model solve this problem because part of the cost of treatment is divided with the health providers. However, from the health providers point of view the bundled model increases their effort in terms of treatment, amplify their treatment risk and decreases their control about the gains when compared with the fee-for-service model. Thus, the bundled model increases the bargaining power of health insurers as compared to the health providers.

According to the paper, the bundled model in the environment where the health insurers has dominant position in the relevant market of health plans works like as a maximum price table and violates the art. 36, I of Law nº 12,529/2011 (Brazilian Competition Law), since it

[11] Administrative investigation nº 08012.005135/2005-57.

imposes the ceiling price for a set of heterogeneous exams, getting limit to the initiative freedom of health providers and getting limit to the competition freedom among competitors, since they can not sell their services by higher price than the ceiling price.

Additionally, the bundled model used to remunerate health providers also violates the §3, I from art. 36 of the Brazilian Competition Law because it is an instrument to promote the adoption of uniform or agreed business practices among competitors.