# Table of Contents

Preface xi

List of Abbreviations xvii

Acknowledgements xix

Introduction 1

I  The Semantics of Public Health Systems 1
   [A]  The History of Public Health Systems 1
   [B]  The Geography and Typology of Public Health Systems 3
       [1]  Bismarck or Beveridge? 3

II  Public Health Systems: What Role for the EU? 5
   [A]  The Primary Law Competence Allocation in the Domain of
        Health 5
   [B]  The Primary Law Competence Allocation in the Domain of
        Social Security 6
   [C]  The Primary Law Competence Allocation in the Domain of
        Common Commercial Policy 7

PART I  Unravelling the Demand Side of Public Health Systems: The Patient as a
        Worker or as a Consumer? 13

CHAPTER 1  Healthcare as a Benefit under Social Security Coordination and the Worker
          as a Patient 15
          §1.01  Social Security Coordination: History, Principles and Material Scope 16
Table of Contents

§1.02 Social Security Coordination and the De-territorialization of Healthcare: Regulation 1408/71 19
§1.03 The Coordination Route as the Tidemark of National Control over Cross-Border Access to Healthcare 22

CHAPTER 2
Healthcare as a Service under Article 56 TFEU and the Patient as a Consumer 27
§2.01 As a Prerequisite: Healthcare as a Remunerated Service within the Scope of Articles 56 Et Seq. TFEU 27
§2.02 Payments for Healthcare as Market-Like Transactions 29
§2.03 The Three Case Law Generations of Cross-Border Access to Healthcare 34
§2.04 First Generation-Breaking Down the First Wall: Prior Authorization Policies as Obstacles to the Free Movement Rules 37
§2.05 Second Generation: Regulating Deregulation and Conducting the Conduct of National Healthcare Provision 40
[A] Emigrating from Benefits-in-Kind, Social Insurance Systems in Order to Receive Intramural Care 40
[1] The Case of Geraets-Smiths and Peerbooms 40
[a] Distinguishing between Intramural and Extramural Care 43
[b] Scrutinizing the Contractual Arrangements of Benefit-in-Kind Systems 43
[c] Determining the National Healthcare Basket 44
[d] Valuing Waiting Time for Treatment 46
[2] Reaffirming and Reforming: The Case of Müller-Fauré and van Riet 46
[a] The ‘National Argument’ 47
[b] The Actual Findings of the Court 48
[B] The Most Archetypal NHS as a Case-Study for Patients’ Mobility: The Case of Watts 51
[2] The Notion of ‘Undue Delay’ 52
[5] The Extent of Reimbursement 56

CHAPTER 3
The Patients’ Mobility Case Law Acquis as a Source of Silent Harmonization 61
§3.01 Introduction 61
Table of Contents

§3.02 Patient Mobility: A Case of Regulatory Competition 62
  [A] Regulatory Competition for Extramural Care 63
  [B] Regulatory Competition for Intramural Care 66

§3.03 The Wider Implications of Waiving or Remodelling Prior Authorization Rules 68
  [A] Prior Authorization Schemes as the Gatekeepers of Territoriality with Regard to Patients’ Mobility 68
  [B] Prior Authorization Schemes as the Gatekeepers of Territoriality with Regard to Healthcare Providers’ Mobility 70


§3.05 Public-Private Divide: Institutional or Functional? 78

§3.06 Pricing Healthcare: Fragmenting or Homogenizing Healthcare Systems? 80

§3.07 Third Generation of Case Law: Paving the Way to Directive 2011/24/EU 86

CHAPTER 4
Healthcare Provision for the (Migrant) Patient on the Basis of Secondary Law: From Coordination to Harmonization or Both? 91

§4.01 Introduction 91

§4.02 The Aimed Degree of Harmonization 94

§4.03 The Substantial Provisions 97
  [A] The Applicable Lex Fori 97
  [C] The End of the Intramural/Extramural Care Division 100
  [D] ‘Public Health’ Considerations: Finally Regulated 101
  [E] (Voluntary) Quality and Safety Standardizing: Sowing the Seeds of a Hybrid Regulatory Pattern 104


PART II
Unravelling the ‘Supply Side’ of Public Health Systems: The Regulatory and Redistributory State under EU Law 111

CHAPTER 5
The Regulatory State and the Free Establishment of Healthcare Providers 113

§5.01 Introduction 113

§5.02 The Personal Scope of the Freedom of Establishment 116

§5.03 The Material Scope of the Freedom of Establishment 117

§5.04 The Case Law of the Court of Justice of the EU in Relation to Healthcare 119


[a] Rules Reserving the Task of Carrying Out Certain Medical Activities to a Category of Professionals Holding Specific Qualifications 119

[b] Ownership Rules 120


[1] Regulatory Prerequisites for the Contracting Out of Healthcare Services 127


[C] Regulatory Limits on the Legal Form of Healthcare Providers 137

[D] Regulatory Measures Restricting Welfare Entities from Investing Privately in Another Member State 140

[E] Compulsory Affiliation of Individuals to Public Welfare Entities Impeding the Establishment of Private Rivals from Other Member States 143

§5.05 Some Interim Conclusions 145

CHAPTER 6
The State as Insurer and/or Purchaser of Healthcare and the Rules on Competition 147

§6.01 Introduction 147

§6.02 Competitiveness and Health Insurance Systems’ Governance 148

§6.03 The Predominant EU Health Insurance Model 155

[A] Redistribution versus Capitalization 155

[B] The Three Pillars of Social Insurance 156

§6.04 Funding Healthcare: Core Solidarity Activities within the Context of First and Second Pillar Social Security Provision as the External Border of EU Competition Law 163

[A] The Notion of ‘Economic Activity’ within the Ambit of EU Competition Law as a Conditio Sine Qua Non for Its Application 163

[B] ‘Imperium’ as Opposed to Economic Activity 165

[C] Social Solidarity as Perceived and as Elaborated on by the EU Judiciary 166

[D] The Criterion of Social Solidarity: A Deviation from the Potentiality Höfner Test? 169
§6.05 Funding Healthcare: The Operation of First and Second Pillar Health Insurance Activities under Market Conditions

[A] Supplementary Optional Social Insurance Funds Operating on the Basis of the Principle of Capitalization

[B] Supplementary Compulsory Social Insurance Funds Operating on the Basis of the Principle of Capitalization

[C] Private Second Pillar Health Funds Operating on the Basis of a Risk Community

[D] Some Interim Conclusions

§6.06 Purchasing Healthcare: From ‘Internal’ to ‘External’ Solidarity?

[A] Purchasing Activities within Social Insurance Systems: The Case of AOK Bundesverband


[C] Public Healthcare Purchasing and the Sub-contracting of Ancillary Services: The Case of Ambulanz Glöckner

[D] Public Healthcare Providers and Purchasers beyond the Financial and Regulatory Field of Social Insurance: Solidarity Decomposed

§6.07 Healthcare Provision: A Remunerated Service of Non-economic Character?