

was used to obtain a distinct plant grouping, did not matter. This meant that the term "plant variety" was appropriate for defining the borderline between patent protection and plant breeders' rights protection irrespective of the origin of the variety.

4. Medical methods

4.1. Introduction

Art. 53(c) EPC states that European patents shall not be granted in respect of methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body; this provision shall not apply to products, in particular substances or compositions, for use in any of these methods. Thus, the exclusion of methods of treatment and diagnostic methods formerly referred to in Art. 52(4) EPC 1973 has been added to the two exceptions to patentability and reappears in the new Art. 53(c) EPC.

In three (almost) identical decisions G 1/83, G 5/83 and G 6/83 (OJ 1985, 60,64, 67), the Enlarged Board stated that the intention of Art. 52(4) EPC 1973 (now Art. 53(c) EPC) was only to prevent non-commercial and non-industrial medical and veterinary activities from being restrained by patent rights (see also T 245/87, OJ 1989, 171). In G 1/04 (OJ 2006, 334) the Enlarged Board of Appeal stated, with reference to diagnostic methods, that their exclusion from patentability seemed actually to be based on socio-ethical and public health considerations. In G 1/07 (OJ 2011, 134), a decision concerning treatment by surgery, the Enlarged Board noted that the exclusion under Art. 52(4) EPC 1973 (Art. 53(c) EPC) had been deliberately maintained by the legislator, thereby confirming the principle that medical and veterinary practitioners' freedom to use the best available treatments to the benefit of their patients, uninhibited by any worry that some treatment might be covered by a patent, should be protected by excluding these activities from patentability.

4.2. Differences and similarities in approaches to establishing whether a method for treatment by surgery or therapy or a diagnostic method involved

In the case law of the boards of appeal a distinction is sometimes made in the approach to methods for treatment by surgery or therapy on the one hand and diagnostic methods on the other. The leading cases are G 1/04 (OJ 2006, 334) concerning diagnostic methods, and G 1/07 (OJ 2011, 134) concerning treatment by surgery.

An important difference between the two approaches is that, whilst a method claim falls under the prohibition on patenting methods for treatment by therapy or surgery if it comprises or encompasses at least **one** feature defining a physical activity or action that constitutes a method step for treatment of a human or animal body by surgery or therapy (G 1/07), a much narrower interpretation of Art. 52(4) EPC 1973 was applied with regard to the exclusion from patentability of diagnostic methods in G 1/04 (see in this chapter I.B.4.6. "Diagnostic methods" – G 1/04).