

performed without immediately performing this intermediate step, and this was sufficient for it to fall under the exception in Art. 53(c) EPC (G 1/07, OJ 2011, 134).

In T 699/12 the board noted that according to the jurisprudence of the boards there was no uniform approach how to interpret method claims, in which no particular therapeutic/surgical step was claimed, although it derived from the context that such a therapeutic/surgical step would be present in relation to the claimed method. In T 699/12, the claimed method implied an irradiation of the patient, because otherwise a quantification of the dose delivery in the radiotherapy treatment of the patient would not be possible. However, when carefully considering the wording of the claims, there was no basis for identifying a step like an "intermediate treatment of irradiating the patient for therapeutic purposes" that was de facto not claimed. Hence, claim 1 could not be interpreted to include a step of irradiating the patient.

e) The apparatus claim is not a disguised method claim

In T 1798/08, although all claims were directed to a visual prosthesis, i.e. an apparatus, they were objected to by the opponent under Art. 53(c) EPC as relating to a surgical method. The features "suitable to be located on the body of the user outside a wall of the sclera and attached to the sclera" and "suitable to be located implanted in the eye behind the iris", the opponent argued, related to a method for treatment of the human or animal body by surgery and thus transformed the claim into a "disguised" method claim, even though it was notionally directed to a device.

The board dismissed this objection. It observed that Art. 53(c), second sentence, EPC specified that the provision did not apply to products. The claim category "products" included apparatus. Accordingly, the provisions of Art. 53(c) EPC did not normally apply to apparatus claims. The fact that some features of the claimed apparatus were functionally defined in relation to the body of the patient did not, in itself, transform the apparatus claim into a method claim (T 712/93, T 1695/07; see also T 1407/08).

f) Unpatentable claims for products that can only be produced in a surgical step

Pursuant to the second clause of Art. 53(c) EPC, the exclusion from patentability "shall not apply to products, in particular substances or compositions, for use in any of these methods."

In G 1/07 it was found that a single surgical method step was enough to regard a multi-step method as being excluded from patentability. It was not a question of whether a medical practitioner would then infringe the claimed method. In decision T 775/97 this approach was transferred to particular products. The claim related to a new product which had been produced from two components, both known per se, by means of a surgical step in the human body. The board in T 775/97 held that no European patent could be granted with claims directed to a new and even possibly inventive way of using materials or devices, in particular endoprostheses, involving a treatment by surgery. This was held to be equally true for product claims defined by a construction which was only arrived at in the human or animal body following a surgical method step.