

therapeutic (cooling of cows in a heat stress), but also teaching of a method which was clearly not therapeutic (cooling of healthy cows for luring them to the milking stall).

In T 767/12 non-therapeutic and therapeutic methods for normalising infradian rhythm were considered indistinguishable. A disclaimer intended to restrict the claim to "non-therapeutic" methods was considered unallowable for lack of clarity under Art. 84 EPC (G 1/03, G 1/16) since it rendered the scope of the claim void.

4.6. Diagnostic methods

Under Art. 53(c) EPC diagnostic methods practised on the human or animal body are also excluded from patentability. However, the boards construe the exception applicable to diagnostic methods more narrowly than that applicable to surgical and therapeutic methods (G 1/04). In G 1/04 (OJ 2006, 334) the President of the EPO had referred fundamental questions relating to the interpretation of the term "diagnostic methods practised on the human or animal body" to the Enlarged Board of Appeal. The Enlarged Board of Appeal emphasised that its interpretation of the scope of the exclusion from patentability under Art. 52(4) EPC 1973 in respect of diagnostic methods practised on the human or animal body would remain valid under the EPC 2000.

4.6.1 Opinion G 1/04 and its application in case law

a) What constitutes "diagnostic methods"

In G 1/04 the Enlarged Board gave the term "diagnostic methods" a narrow interpretation: in order that the subject-matter of a claim relating to a diagnostic method practised on the human or animal body falls under the prohibition of Art. 52(4) EPC 1973, the claim is to include the features relating to: (i) the diagnosis for curative purposes *stricto sensu* representing the deductive medical or veterinary decision phase as a purely intellectual exercise, (ii) the preceding steps which are constitutive for making that diagnosis, and (iii) the specific interactions with the human or animal body which occur when carrying those out among these preceding steps which are of a technical nature.

The Enlarged Board of Appeal pointed out that the surgical or therapeutic nature of a method claim could be established perfectly by a single method step without contravening Art. 84 EPC 1973. Diagnostic methods, however, differed in this respect from the methods of surgery and therapy. The method steps to be carried out prior to making a diagnosis as an intellectual exercise were related to examination, data gathering and comparison. If only one of the preceding steps which were constitutive for making such a diagnosis were lacking, there was no diagnostic method, but at best a method of data acquisition or data processing that could be used in a diagnostic method (see T 385/86). It followed that, whilst the surgical or therapeutic nature of a method claim could be achieved by a single method step, several method steps were required to define a diagnostic method due to the inherent and inescapable multi-step nature of such a method.

These required method steps (G 1/04) consist of: (i) the examination phase involving the collection of data, (ii) the comparison of these data with standard values, (iii) the finding of