

#### 4.4.1 One surgical step in a multi-step method

Opinion G 1/04 (OJ 2006, 334) made it clear that a method claim falls under the prohibition of Art. 52(4) EPC 1973 if it includes at least one feature defining a physical activity or action that constitutes a method step for treatment of the human or animal body by surgery or therapy.

In G 1/07 the Enlarged Board upheld this principle confirmed in opinion G 1/04 (OJ 2006, 334). This principle is not only formally justified by the fact that the exclusion under Art. 53(c) EPC does not contain any limitation as to the defined methods being excluded only when claimed as such. More importantly, it is also justified as to substance, i.e. it enables the legislative purpose served by the exclusion to be achieved (see in this chapter I.B.4.1.).

#### 4.4.2 Treatment by surgery not limited to surgery for a therapeutic purpose

In G 1/07 (OJ 2011, 134) the Enlarged Board of Appeal concluded that neither the legal history nor the object and purpose of the exclusions from patentability in Art. 53(c) EPC would justify a limitation of the term "treatment by surgery" to curative surgery (overruling T 383/03). Such a limitation would be contrary to the ordinary understanding of the word "surgery" as referring to the nature of the treatment rather than its purpose, and contrary to the fact that Art. 53(c) EPC defines three separate alternative exclusions thereby suggesting that these are not merely identical in scope. The Enlarged Board of Appeal observed in G 1/07 that the comparison between T 383/03 and T 1172/03 showed how inconsistent the decisions to be made could become if the term "treatment by surgery" was seen as limited to therapeutic surgery only. The term "treatment by surgery" is therefore not to be interpreted as being confined to surgical methods pursuing a therapeutic purpose (G 1/07). As stated in the Guidelines (Guidelines G-II, 4.2.1.1 – March 2022 version), the term "surgery" thus defines the nature of the treatment rather than the purpose.

#### 4.4.3 Towards a new concept of "treatment by surgery"

In G 1/07 the Enlarged Board of Appeal disagreed with the EPO's practice of broadly interpreting the surgical character of interventions.

A narrower understanding of "treatment by surgery" was required. Any definition of the term "treatment by surgery" must cover the kind of interventions which represent the core of the medical profession's activities, i.e. the kind of interventions for which their members are specifically trained and for which they assume particular responsibility. Such a narrower understanding rules out uncritical methods involving only a minor invention and no substantial health risks.

It is for the departments of first instance and the boards to define the boundaries of a more narrowly construed concept of "treatment by surgery", based on the technical reality of the individual case under consideration.