

4.3. No need for practitioner involvement

Referring to G 1/04, the Enlarged Board of Appeal in G 1/07 (a decision concerning treatment by surgery) confirmed that whether or not a method is excluded from patentability under Art. 53(c) EPC cannot depend on the person carrying it out. The Enlarged Board in G 1/07 found that, although the findings in G 1/04 related to diagnostic methods, they dealt quite generally with the exclusion from patentability under Art. 52(4) EPC 1973 and were thus equally valid with respect to the other exclusion conditions contained in the new Art. 53(c) EPC.

In G 1/04 (OJ 2006, 334) the Enlarged Board held that whether or not a method is a diagnostic method may neither depend on the participation of a medical or veterinary practitioner nor on the fact that all method steps can also, or only, be practised by medical or technical support staff, the patient himself or herself, or an automated system (see also G 1/07). This also reflects the fact that technological advances are penetrating human and veterinary medicine and the related professions more and more. Moreover, no distinction is to be made in this context between essential method steps having diagnostic character and non-essential method steps lacking it.

In T 467/18 the board observed that it had been explicitly pointed out in G 1/04 and G 1/07 that the ability to delegate a method at best indicated whether a particular method could be considered to form part of the "core of the medical profession's activities".

In T 1680/08 the claim concerned a non-invasive method and apparatus for optimising the respiration for atelectatic lungs. The appellant submitted that a medical doctor would never be hampered by the claimed method as it was executed by a computer. The board however held that there was no term in Art. 53(c) EPC which would allow concluding that hampering of the practitioner's freedom was a prerequisite for the exclusion to apply in the individual case considered.

4.4. Surgical methods

G 1/07 (OJ 2011, 134) marked an important turning point in the boards' case law on the exclusion of surgical methods from patentability. The Enlarged Board rejected the practice followed by the EPO thus far of broadly construing interventions of a surgical nature, such as in decisions T 182/90 and T 35/99, namely that all methods involving irreversible damage to or destruction of living cells or tissues of the living body were regarded as non-insignificant interventions and thus as surgical treatments, irrespective of the underlying mechanism of the intervention (e.g. mechanical, electrical, thermal, chemical). However, the Enlarged Board did not redefine the term "treatment by surgery", but indicated the direction in which it expected future practice and case law to develop. According to G 1/07, the required new direction is that the exclusion from patentability should not be applied to methods in respect of which the interests of public health, of protection of patients and as a counterpart to that of the freedom of the medical profession to apply the treatment of choice to their patients does not call for their exclusion from patentability.