

The required medical expertise and the health risk involved may not be the only criteria which may be used to determine that a claimed method actually is a "treatment by surgery" within the meaning of Art. 53(c) EPC. It appears that what is to be understood by "surgery" in the medical sense is to a large extent a matter of convention. Thus, in order to be surgical, it is not necessary that the intervention be invasive or that tissues be penetrated (T. 5/04). The scope of what is surgery may change with time and with new technical developments emerging, as was already acknowledged in decision T. 182/90.

In G. 1/07, with regard to the facts of the case, the Enlarged Board decided that a claimed imaging method, in which, when carried out, maintaining the life and health of the subject is important and which comprises or encompasses an invasive step representing a substantial physical intervention on the body which requires professional medical expertise to be carried out and which entails a substantial health risk even when carried out with the required professional care and expertise, is excluded from patentability as a method for treatment of the human or animal body by surgery pursuant to Art. 53(c) EPC.

4.4.4 "Treatment by surgery" in the case law since G 1/07

a) Surgical nature of a method step

In T. 992/03 of 4 November 2010, ^{129}Xe gas was used as part of the claimed method. The board referred to G. 1/07 according to which "there is an exclusion from patentability as a surgical method only if the health risk is associated with the mode of administration and not solely with the agent as such" and any anaesthetic effect of the ^{129}Xe gas thus did not fall under the exclusion.

b) Assessment of "substantial health risks"

In T. 663/02 the board held that the step of "injecting the magnetic resonance contrast agent into a vein remote from the artery" may be considered as representing a minor routine intervention which did not imply a substantial health risk when carried out with the required care and skill. Such acts would be ruled out from the scope of the application of the exclusion clause pursuant to Art. 53(c) EPC following the narrow understanding advocated by the Enlarged Board of Appeal (G. 1/04 and G. 1/07). A possible way of assessing health risks is to use a risk matrix permitting the levels of likelihood and health impact of a complication of a medical act with regard to a large number of patients to be combined, so as to obtain statistical health risk scores which may be used to decide what action should be taken.

However, in T. 1075/06 the board held that venipuncture of blood donors and the extraction of blood from a donor's body represent substantial physical interventions on the body which require professional medical expertise to be carried out and which entail a substantial health risk even when carried out with the required professional care and expertise. A method claim comprising steps encompassing such procedures is a method for treatment of the human body by surgery.