

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" (G 1/07).

In T 2438/11 the claim was directed to a method for instrument alignment comprising steps whereby a surgical drill or mill was aligned with a target point. Said alignment was to take place in the patient's body, in direct physical contact with the bone. The board held that the very act of alignment, i.e. actively moving an instrument of this kind within the patient's body, was a substantial physical intervention on the body and thus a method step for treatment of the human body by surgery. The claimed method for instrument alignment, which explicitly included the (active) alignment step, also differed fundamentally from a mere (passive) position-tracking method of the kind at issue in T 836/08 (see below).

d) Surgical step not in the claim but covered by it?

In T 836/08, claim 1 concerned a method for tracking the position of the distal end of a bone guide wire, using a medical optical tracking and navigation system. The board found that, while this meant that the reference apparatus had to be attached to, and the wire introduced into, the bone, these steps were not part of the expressly claimed method. The fact that the method was performed after, or even during, a surgical intervention on the body did not mean that the claimed position-tracking method as such was a method of treatment by surgery.

The board decided otherwise in T 923/08: where a method for determining measurements of the human or animal body necessarily entailed a surgical step consisting of fixing to the human or animal body a measuring device indispensable for performance of the method, that step had to be deemed an essential feature of the method which was covered by such a method, even if none of the claimed method features expressly related to this step. Such a method was excluded from patentability under Art. 53(c) EPC. Moreover, such a surgical step could not be removed from the scope of the claimed method by means of wording stating that the surgically placed measuring device was already fixed to the body before the start of the method, or by means of a disclaimer, as this would breach Art. 84 EPC (1973).

In T 2102/12 the claim related to medical robotic systems. The appellant sought to protect a method performed by a device for determining and displaying distance information, the claimed method being performed contemporaneously and in parallel with an unclaimed, surgical process. The board held that these two "types" of method steps were inextricably interrelated. The board found, that the presently claimed method of intertwined non-surgical ("claimed") and surgical ("unclaimed") steps was not comparable to that underlying T 836/08.

In T 1631/17 too, the wording of the claim did not explicitly mention any method step that could be considered surgical within the meaning of Art. 53(c) EPC; however, the claimed method included such a step. The surgical method step in question fell within the claimed method in terms of both when and where it was done. The claimed method could not be