

In **T.36/83** (OJ 1986, 295) the board held that, in the treatment of comedones, a distinction could be made between an antibacterial effect (therapeutic) and a cosmetic effect. The use of the term "cosmetic" was held to be sufficiently precise, although the cosmetic treatment according to the application might also incidentally involve a medical treatment.

In **T.469/94** the board found that the claimed, non-therapeutic effect of choline and the therapeutic effect of choline were not inseparably linked or correlated but, on the contrary, were readily distinguishable because, first, they involved two undoubtedly distinct groups of persons (or patients), specifically, on one hand, patients known to have a muscular disease, muscular injury or epilepsy and, on the other hand, healthy persons who would receive no therapeutic benefit from the treatment. Second, the times necessary for appreciating the different effects (days for the therapeutic effect and minutes or hours for the non-therapeutic effect) would appear to be so different that no unwanted overlap of the therapeutic and non-therapeutic treatment could occur. Therefore, the board held that the claim in question was directed to a non-therapeutic method.

In **T.1916/19** the claimed methods and uses related to providing an anti-microbial effect to skin. In the view of the examining division this inherently implied a prophylactic treatment of several diseases since skin disinfection will always remove pathogenic bacteria. However, the board held that there were at least some identifiable realisations of the method which were clearly non-therapeutic such as removing non-pathogenic bacteria responsible for unpleasant body odour.

#### 4.5.3 Disclaimer for escaping the exception to patentability under Article 53 c) EPC

One way of escaping the exception to patentability is a disclaimer, but the claim featuring the disclaimer must then meet all the EPC requirements (see also in this chapter **I.B.4.4.5**). In **T.774/89** the board accepted the patentability of using a medication to increase milk production in cows, because it was evident that the success of the treatment did not depend on the animals' state of health, and the insertion in the claim of the term "non-therapeutic" served as a disclaimer, excluding the therapeutic effects of the medication.

According to **T.1635/09** (OJ 2011, 542), the following applies to claims encompassing both therapeutic and non-therapeutic uses: a disclaimer "non-therapeutic" allows for the exclusion of therapeutic uses from a claim encompassing both therapeutic and non-therapeutic uses in such a way that they are substantively separable, so that the remaining subject-matter is no longer covered by the exception to patentability under **Art. 53(c) EPC**. However, such a disclaimer cannot be employed to define as non-therapeutic a use which – like that at issue in this case – necessarily includes one or more therapeutic steps, since the question whether or not a claimed use is therapeutic can be decided only in the light of the activities carried out, or the effects achieved, in the course of that use.

In **T.385/09** the addition of the disclaimer "non-therapeutic" was accepted by the board, even though the difference between a therapeutic and non-therapeutic application of the method was not explicitly explained in any other manner. However, the board was satisfied that the application did contain teaching of a method which might have been regarded as