

Surgical Methods: the EPO Enlarged Board Decides

Under the European Patent Convention (EPC), methods of treatment by surgery are not patentable. It has never been clear how far this exclusion extends, and the EPO Boards of Appeal (TBA) appeared to disagree in their decisions.

The Enlarged Board of Appeal (EBA) has now clarified the issue – at least partially.

It considered a case claiming a method to obtain data for making a diagnosis, involving injecting an agent into the heart. The method itself did not treat the subject.

The EBA considered whether a method for a diagnostic purpose is excluded from patentability if it encompasses physical intervention with the body. It took into account that the intervention may not itself maintain life or health.

The EBA decided that “surgery” is not confined solely to therapeutic methods. Instead, the EBA decided that a method is not patentable if it includes a physical intervention step which entails a substantial health risk, and if maintaining the life and health of the subject is of paramount importance. It found that, for the case under consideration, injection into the heart involved a substantial health risk and thus was not patentable.

In contrast, destructive treatments, where the deliberate or incidental end result is the death of the subject, are not excluded as “surgery”. Of course, such methods may well give rise to other objections!

The most important part of the decision states that minor interventions, involving safe, routine techniques, would be patentable. Unfortunately, the EBA expressly declined to define what might constitute such “minor interventions”. The EBA stated that this would change with time, and should be left to the case law of the TBA to define in more detail.

The EBA confirmed that, if a claim included a surgical treatment step, that step must be removed from the claim. This can be done using a disclaimer of the prohibited subject matter.