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Is non-medical surgery patentable?

Methods for treatment of the human body by surgery are generally excluded from patentability under Article 53(c) EPC. In decision G01/07, the Enlarged Board of Appeal (EBA) of the European Patent Office recently decided on a referral putting forward several questions concerning the patentability of methods of treatment of the human body by surgery, especially in a case where the treatment itself, although including a significant physical intervention on the body, is not of a curative nature *per se*.

The EBA decided that the patentability exclusion for treatments by surgery is not limited to curative surgery only, that is surgical methods or method steps pursuing a therapeutic purpose. On the contrary, the exclusion of Article 53(c) EPC generally applies to treatments by surgery practised on the human body, irrespective of its purpose. Consequently, any claim including an embodiment which is a surgical method within the meaning of Article 53(c) EPC cannot be left to encompass that embodiment.

However, the EBA also stated that not necessarily any physical intervention on the human or animal body must always be regarded as a treatment by surgery, contrary to the broad definition of surgery given in the EBA's earlier decision G 1/04. The EBA now opines that it is the *ratio legis* of the exclusion of Article 53(c) EPC to free the medical profession from constraints by patents. Thus, only surgical treatments "which represent 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" should be excluded from patentability.

The EBA left it open for the lower instances of the EPO to develop a "new concept of surgery" in a strictly medical sense and to decide on a case-by-case basis whether a claimed method, although by its nature being clearly surgical, would still not be excluded from

patentability because of its medical insignificance.

It remains to be seen in future cases how the EPO examiners and Appeal Boards develop a concept of (patentable) medically insignificant treatments by surgery, and how they are distinguished from (excluded) surgical methods in a strictly medical sense.