

plant or a set of genetic information. In contrast, a plant defined by single recombinant DNA sequences is not an individual plant grouping to which an entire constitution can be attributed within the above meaning. A plant defined in this way is not a concrete living being or grouping of concrete living beings but an abstract and open definition embracing an indefinite number of individual entities defined by a part of its genotype or by a property bestowed on it by that part (G 1/98, T 189/09, T 547/10).

In T 1208/12 the board held that a claim for a hybrid plant seed produced by a cross of two types of Brassica plants, was directed to an excluded plant variety. The board held that the technical situation underlying the present case was different from that in G 1/98 and that the claims were not for a seed or plant merely defined by the presence of a single recombinant DNA sequence. The definition of the claimed subject-matter thus did not fit the concept set out in G 1/98 of "an abstract and open definition embracing an indefinite number of individual entities defined by a part of its genotype or by a property bestowed on it by that part". In the case at hand, the subject-matter defined a seed or a plant which necessarily belongs to a particular plant grouping which complies with the definition of plant variety pursuant to R 26(4) EPC, i.e. it relates exclusively to individual plant groupings to which an entire constitution can be attributed.

### 3.1.2 Limits to patentability

In G 1/98, the Enlarged Board concluded that, where specific plant varieties were not claimed individually, the claim was not excluded from patentability under Art. 53(b) EPC, even if it might potentially embrace plant varieties. The Enlarged Board took the view that Art. 53(b) EPC 1973 defined the borderline between patent protection and plant variety protection. The extent of the exclusion for patents was the obverse of the availability of plant variety rights. Since plant variety rights were only granted for specific plant varieties and not for technical teachings which could be implemented in an indefinite number of plant varieties, it was not sufficient for the exclusion from patent protection in Art. 53(b) EPC 1973 to apply that one or more plant varieties were embraced or might be embraced by the claims of the patent application (see also T 475/01).

The Enlarged Board further held that Art. 64(2) EPC 1973 should not be taken into consideration when a claim to a process for the production of a plant variety was examined, in conformity with the established case law according to which the protection conferred by a process patent is extended to the **products obtained directly by the process**, even if the products are not patentable per se (see chapter II.A.7.1.).

Finally, the Enlarged Board held that the exception to patentability in Art. 53(b), first part of sentence, EPC 1973, applied to plant varieties irrespective of the way in which they were produced. Therefore, plant varieties containing genes introduced into an ancestral plant by recombinant gene technology were excluded from patentability. The underlying reason for this was that the exclusion in Art. 53(b) EPC 1973 was designed to exclude from patentability subject-matter which was eligible for protection under the plant breeders' rights system. It did not make any difference for the requirements under the UPOV Convention or under the Regulation on Plant Variety Rights, whether a variety was obtained by traditional breeding techniques or genetic engineering. The argument that