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**Datasheet for the decision
of 12 October 2010**

Case Number: T 1005/09 - 3.3.09

Application Number: 03767838.0

Publication Number: 1571924

IPC: A23L 1/304

Language of the proceedings: EN

Title of invention:

Mineral balance product and method for its production

Applicant:

Naturansa Ky Olavi Huikari

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 84, 123(2)

Relevant legal provisions (EPC 1973):

-

Keyword:

"All requests: clarity (no)"
"Added subject-matter (yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 1005/09 - 3.3.09

DECISION
of the Technical Board of Appeal 3.3.09
of 12 October 2010

Appellant: Naturansa Ky Olavi Huikari
Lehdesniityntie 3 D 68
FI-00340 Helsinki (FI)

Representative: Järveläinen, Pertti Tauno Juhani
Heinänen Oy Patent Agency
Airport Plaza
Äyritie 8 D
FI-01510 Vantaa (FI)

Decision under appeal: Decision of the Examining Division of the
European Patent Office announced orally on
22 September 2008 and posted 9 October 2008
refusing European patent application
No. 03767838.0 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: W. Sieber
Members: N. Perakis
F. Blumer

Summary of Facts and Submissions

I. European patent application No. 03767838.0 was filed in the name of Olavi Hukari (now Naturansa Ky Olavi Hukari) as PCT/FI03/00974, claiming priority from the FI application No. U20020509 of 20 December 2002 and was published as WO 04/56206. The application was refused by a decision of the examining division announced orally on 22 September 2008 and issued in writing on 9 October 2008.

II. The decision was based on a main request and two auxiliary requests filed with a letter dated 22 July 2008. Each Claim 1 of these requests related to a (final) product obtained in that perennial plant tissue was analysed, combusted to mineral residue from which organic compounds and nitrogen were removed. The product should "restore the natural mineral composition that optimizes intracellular metabolism in plants, animals as well as humans".

The examining division refused the patent application *inter alia* because the subject-matter of the independent claims of all requests did not fulfil the requirements of Articles 84 and 83 EPC. In particular, it was held that the wording in Claim 1 of each request was speculative and comprised numberless possibilities of selecting/testing of plant tissues having a desired mineral content when combusted in order to finally optimise the intracellular metabolism in plants, animals and humans. Extensive investigations and research work were necessary to evaluate the mineral requirements for intracellular metabolism of any plant, animal or human tissue, and to optimise it.

III. On 3 December 2008 the applicant lodged an appeal against the decision of the examining division and paid the appeal fee on the same day.

Together with the statement setting out the grounds of appeal the appellant filed on 13 February 2009 a new main request and auxiliary requests 1 and 2, and requested that the decision of the examining division be set aside and a patent be granted on the basis of one of these requests. In support of its arguments it also filed two additional documents (Enclosures A and B).

IV. In a communication dated 21 May 2010, accompanying the summons to oral proceedings to be held on 12 October 2010, the board indicated that the subject-matter of all requests on file appeared to lack clarity.

V. With its letter of reply dated 12 August 2010 the appellant filed new requests (a main request and two auxiliary requests) replacing the previous requests on file.

Claims 1 and 7 of **the main request** read as follows:

"1. A product for use in foodstuffs to restore the natural mineral composition that optimizes intracellular metabolism in plants, animals as well as humans, characterized in that

- the raw material is tree,
- which raw material is visually analyzed,

- which raw material is selected to include trees having grown to an external form according to its genetic genotype,
- which raw material is combusted to a mineral residue,
- having neither organic compounds nor nitrogen, and
- the product has a mineral composition that complements and balances the mineral needs to ensure a balanced supply of the ultramicro minerals needed for intracellular metabolism according to the user's genotype."

"7. A method for producing a mineral balance product strengthening the natural intra-cellular mineral balance, characterized in that a carefully pre-selected tissue (1) of trees, having grown in accordance with its genotype is used as a basic raw material,

- which raw material is visually analyzed,
- which raw material is selected to include trees having grown to an external form according to its genetic genotype,
- which raw material is combusted to a mineral residue,
- having neither organic compounds nor nitrogen."

Claims 1 and 7 of **auxiliary request 1** differed from Claim 1 of the main request only in that the wording "which raw material is combusted to a mineral residue, having neither organic compounds nor nitrogen" was replaced by:

- "which raw material is combusted to a mineral residue, into which water is added and from which desiment (*sic*) is removed; in order to have a product with neither organic compounds nor nitrogen".

Claims 1 and 7 of **auxiliary request 2** read as follows:

"1. A final product including a product to restore the natural mineral composition that optimizes intracellular metabolism in plants, animals as well as humans, characterized in that

- the raw material is tree,
- which raw material is visually analyzed,
- which raw material is selected to include trees having grown to an external form according to its genetic genotype,
- which raw material is combusted to a mineral residue,
- having neither organic compounds nor nitrogen,
- the final product being a combination of the product to restore the natural mineral composition and a natural carrier material prepared from natural products, and
- the final product has a mineral composition that complements and balances the mineral needs to ensure a balanced supply of the ultramicro minerals needed for intracellular metabolism according to the user's genotype."

"7. A method for producing a final product including a mineral balance product strengthening the natural intra-cellular mineral balance, characterized in that a carefully pre-selected tissue (1) of trees having grown in accordance with its genotype is used as a basic raw material,

- which raw material is visually analyzed,

- which raw material is selected to include trees having grown to an external form according to its genetic genotype,
- which raw material is combusted to a mineral residue,
- having neither organic compounds nor nitrogen,
- the final product being produced by combining a product to restore the natural mineral composition and a natural carrier material prepared from natural products, and
- as a result producing the final product having a mineral composition that complements and balances the mineral needs to ensure a balanced supply of the ultramicro minerals needed for intracellular metabolism according to the user's genotype."

VI. In a further letter dated 29 September 2010 the appellant provided further evidence (two photos) to support its arguments.

VII. Oral proceedings were held before the board on 12 October 2008. During the proceedings the appellant filed a third auxiliary request with Claims 1 and 7 reading as follows:

"1. A product for use in foodstuffs to restore the natural mineral composition that optimizes intracellular metabolism in plants, animals as well as humans, characterized in that the product is obtained by a method:

- the raw material is tested,
- which raw material is screened and weighed,
- which raw material is mineralized to a mineral residue,

- having neither organic compounds nor nitrogen, and
- into which water is added,
- the acidity is regulated, and
- into which a natural product is added."

"7. A method for producing a mineral balance product strengthening the natural intra-cellular mineral balance, characterized

- which raw material is screened and weighed,
- which raw material is mineralized to a mineral residue,
- having neither organic compounds nor nitrogen.
- into which water is added,
- the acidity is regulated, and
- into which a natural product is added."

VIII. The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of the main request, the first auxiliary request or the second auxiliary request (all these requests as filed with the letter dated 12 August 2010) or on the basis of the third auxiliary request as filed during the oral proceedings before the board.

IX. The relevant arguments presented by the appellant in its written submissions and at the oral proceedings may be summarised as follows:

- The claimed invention related to a product-by-process which was a "mineral balance product" aiming at strengthening the natural intra-cellular mineral balance and to a method for its production. The invention was based on the fact that ash from a tree

contained all the micro and ultramicro minerals the tree has had during its lifetime in natural form and in natural quantities. Thus, the basic idea of the claimed invention was to overcome the lack of micro and ultramicro minerals using nature's own method and resources.

- For the claimed invention healthy trees were used as raw material. The selection of healthy trees was based on visual examination and detection of disturbances of their natural balance. This could be done by the person skilled in the art who was familiar with forest biology and the mineral balance of healthy and sick trees.
- Analysing the raw material in the laboratory could not in practice be performed with good reliability and would not lead to results that would be satisfactory.
- The combustion step was defined to have conditions that made it possible to attain a mineral residue. This might be performed e.g. by using combustion temperatures of 700-950°C.
- The claimed invention enabled the separation of ultramicro minerals needed in healthy life or life according to a certain genotype by separating the unnecessary substances from the ash and by improving the separation by water addition and desiment (*sic*) removal.
- The claimed procedure ensured a balanced supply of ultramicro minerals for generation of tissues. This was only possible by obtaining the mineral from cells of trees that had lived in accordance with their genotype. In this context it was known that such ultramicro minerals should be present in a concentration of about one hundred billionth and one

ten billionth; a lower concentration caused disturbances of the cellular metabolism; a higher concentration led to poisoning reactions.

- The photos filed as well as the figures of the application (Figures 2a-2f) visualised disturbances of cellular metabolism in trees (a pine), i.e. a change in their external appearance caused by lack of minerals.

Reasons for the Decision

1. The appeal is admissible.

Clarity under Article 84 EPC

(main request, auxiliary requests 1 and 2)

2. The subject-matter of **Claim 1** of the main request and auxiliary requests 1 and 2 concerns a product which is defined by its preparation method (product-by-process). In addition to the process step, the product must meet the following requirement:

"the product/final product has a mineral composition that complements and balances the mineral needs to ensure a balanced supply of the ultramicro minerals needed for intracellular metabolism according to the user's genotype".

- 2.1 This requirement attempts to define the claimed product in terms of the result to be achieved which amounts in essence to a desired property the product should have. This leaves the determination of the concrete technical features, namely the mineral content of the product, to

the person skilled in the art. In order to achieve this result the claim merely refers to rather vague process steps. These process steps mean for a person skilled in the art that he or she would have to conduct numerous experiments of combusting visually analysed/selected trees in order to find a mineral composition that ensures a balanced supply of the ultramicro minerals needed for intracellular metabolism according to a user's genotype. The lack of clarity is further aggravated by the fact that the user may be a plant, an animal or a human. The board, in agreement with the examining division, considers that extensive investigations and research work would be necessary to evaluate and optimise and/or balance the mineral requirements of the intracellular metabolism in such different living beings as plants, animals or humans, let alone for any imaginable genotype thereof.

2.2 Finally, the application as filed also provides no guidance to the skilled person on how to arrive at the concrete technical features of the product for which protection is sought. Furthermore, no prior art is cited in the application as filed which could assist the skilled reader in positioning the claimed invention in a concrete technical context. The only example disclosed is a schematic description of a manufacturing process which in itself is vague.

2.3 In summary, the feature in Claim 1 pertaining to the result to be achieved does not meet the requirements of Article 84 EPC.

3. Apart from the feature objected to above, some of the process features referred to in Claim 1 also do not meet the requirements of Article 84 EPC.
- 3.1 Thus, Claim 1 requires that the raw material, i.e. a tree, be submitted to an analysis, in particular a visual analysis, with a view to selecting a specific type of it.
 - 3.1.1 However, the application as filed discloses neither the specific aim of this analysis, namely which type of tree has to be selected, nor the criteria which should be applied in order to perform such an analysis. Consequently, the visual analysis is unclear.
 - 3.1.2 The appellant argued that this analysis aimed at selecting only healthy trees which have grown to an external form according to their genetic genotype. The board, however, notes that this information does not form part of the original disclosure. As regards the appellant's reference to visualised disturbances of trees in Figures 2a-2f, it is evident to the board that these figures relate to a completely different issue. Figures 2a-2c visualise a change in external appearance caused by lack of minerals and the development of such change in a pine. Figures 2d-2f visualise a fast correction of dysplasia after the tree has got minerals that were lacking before (page 6, lines 19-23 of the application as filed).
 - 3.1.3 The appellant also argued that a person skilled in the art who was familiar with forest biology would be able to carry out such a visual analysis. This explanation is in the board's view not relevant for the issue of

- clarity, since, firstly, this information is not part of the original disclosure and, secondly, such a visual analysis is empirical, subjective and not reproducible with the required reliability, and therefore cannot constitute a clear and technically acceptable method.
- 3.2 Claim 1 requires that the "raw material is selected to include trees having grown to an external form according to its genetic genotype". The term "include" encompasses the possibility that trees having **not** grown to an external form according to their genetic genotype can also be used in the production of the claimed product as long as trees having grown to an external form according to their genetic genotype are also used, i.e. "included". This appears to be in contradiction to the appellant's explanation given in the context of "visually analyzed", namely that only healthy trees are selected which have grown to an external form according to their genetic genotype (see point 3.1.2 above).
4. The subject-matter of **claim 7** of the main and auxiliary requests 1 and 2 concerns the method for the production of a mineral balanced product. The clarity objections raised in point 3 above with regard to the product claims apply *mutatis mutandis* to the subject-matter of the process claims. Additionally the term "carefully" used to define the pre-selection of the tissue of trees is vague and has no specific meaning, nor is it further explained in the application as filed. Consequently, this term introduces lack of clarity in the claimed subject-matter.

***Added subject-matter under Article 123(2) EPC
(main request, auxiliary requests 1 and 2)***

5. The subject-matter of the above claims comprises the combination of the following features:

- the raw material is a tree,
- the raw material is visually analysed,
- the raw material is combusted to a mineral residue,
- (the mineral residue) having neither organic compounds nor nitrogen.

5.1 The board notes that some of these features are disclosed in isolation in the application as filed:

- the raw material being a tree (page 6, lines 19-23; although one could even argue that that passage does not relate to the raw material at all),
- the mineralisation of the raw material by combustion (Claim 8 as filed),
- the absence of organic compounds and nitrogen from the mineral product (page 5, lines 6-7).

Their combination is, however, nowhere disclosed in the originally filed documents.

5.2 Furthermore, there is no support in the application as filed for the feature that the raw material is visually analysed.

The coincidental disclosure of the word "visualize" on page 6, lines 19-23 relates exclusively to the observation of dysplasia in trees, which dysplasia is

corrected by the provision of minerals (see point 3.1.2 above). This disclosure bears no relation to the screening step of the raw material to be used for the production of a mineral composition.

5.3 Consequently, the subject-matter of claims 1 and 7 of the main request and auxiliary requests 1 and 2 does not fulfil the requirements of Article 123(2) EPC.

6. In view of the above, the main request and auxiliary requests 1 and 2 are not allowable (Articles 84 and 123(2) EPC).

Admissibility of the third auxiliary request

7. The third auxiliary request was filed at the oral proceedings before the board in an attempt to overcome the objections raised against the main request and auxiliary requests 1 and 2 with regard to lack of clarity and added subject-matter.

7.1 For a new request to be admissible at this late stage of the procedure, it must at least be *prima facie* allowable. However, it is evident to the board that the subject-matter of Claims 1 and 7 of the third auxiliary request introduces new issues with regard to lack of clarity and added subject-matter.

7.2 Firstly, the process of Claim 7 and the process used to define the product of Claim 1 is not disclosed in the originally filed application. According to the appellant, the process is based on the disclosure on page 5, line 34 to page 6, line 17 of the application as filed. However, the process described in this

passage is much more specific than the process referred to in Claims 1 and 7 of the third auxiliary request. In fact, some of the process steps listed in the application as filed have been omitted from the process referred to in the new claims. Thus, the process referred to in Claims 1 and 7 amounts to an unallowable intermediate generalisation of the more restricted, originally disclosed process (Article 123(2) EPC).

7.3 Furthermore, the process *prima facie* lacks clarity (Article 84 EPC), because the terminology used, e.g. the testing of the raw material, the screening, the mineralisation, the regulation of the acidity, the natural product, either has no clear meaning or represents a vague definition for which the application as filed provides no clarification whatsoever.

7.4 For these reasons the board did not admit the third auxiliary request into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

R. Schumacher

W. Sieber