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**Datasheet for the decision
of 21 June 2011**

Case Number: T 1354/10 - 3.3.10

Application Number: 05076641.9

Publication Number: 1762272

IPC: A61Q 19/00

Language of the proceedings: EN

Title of invention:

Use of a vinic alcohol in personal care products, cosmetics
and perfumes

Applicant:

Botica Comercial Farmacêutica S.A.

Opponent:

-

Headword:

Method for producing personal care products/BOTICA COMERCIAL
FARMACEUTICAL

Relevant legal provisions:

EPC Art. 56

Keyword:

"Inventive step (no): alternative process - solution obvious
from closest state of the art"

Decisions cited:

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Catchword:

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Case Number: T 1354/10 - 3.3.10

D E C I S I O N
of the Technical Board of Appeal 3.3.10
of 21 June 2011

Appellant: Botica Comercial Farmacêutica S.A.
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 29 January 2010
refusing European patent application
No. 05076641.9 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: P. Gryczka
Members: C. Komenda
D. S. Rogers

Summary of Facts and Submissions

I. The appeal lodged on 30 March 2010 lies from the decision of the Examining Division posted on 29 January 2010 refusing European patent application No. 05 076 641.9 published under the publication No. 1 762 272.

II. The decision under appeal was based on the claims according to the then pending main and auxiliary request submitted on 14 December 2009. Independent claim 1 of the main request read as follows:

"1. Method for producing a composition for personal care products, cosmetics and perfumes showing specific olfactory features, characterized by the following steps:

- a) producing a must including ethylic alcohol by fermentation of only grapes (*vitis vinifera* sp);
- b) distillation of the must such that molecules characterizing the material used as fermentation source are carried along with the ethylic alcohol,
- c) combining the vinic alcohol resulting from steps a) and b) with a concentration from 0,1% to 90% by weight, on the basis of the total weight of the composition, and at least one material selected from the group consisting of a fragrant aromatic composition, an essential plant oil, a preserving substance, a vitamin, an antioxidant agent, an anti-inflammatory agent, a vegetable extract, an inorganic photoprotector, an organic photoprotector, a component having an oily nature, a surfactant, a thickening agent, a moistening ingredient, a humidifier, a coloring substance, and suspended particles."

III. The Examining Division found that the subject-matter of the claims according to the then pending requests did not involve an inventive step in the sense of Article 56 EPC.

In its decision the Examining Division relied on document

(1) EP-A-0 196 340.

In particular the Examining Division held that starting from document (1) as closest state of the art the problem consisted in the provision of an alternative process to provide ethanol that makes a positive contribution to the final olfactory sensual perception of a fragrance or cosmetic composition. As it was known from document (1) that ethanol, which has been in contact with fermented grapes has favourable olfactory properties, the skilled person would have considered directly using the ethanol resulting from the fermentation of grapes instead of replacing this ethanol by industrial ethanol. Consequently, the subject-matter of claim 1 of the then pending main request was considered not to involve an inventive step.

IV. The Appellant submitted in writing that the vinic alcohol received according to steps a) and b) of the claimed method was different from the ethanol derived from contacting industrial ethanol with the wine residue of a grape wine production as disclosed in document (1), since the wine residue did not contain the same characterizing molecules as the vinic alcohol

obtained by distillation of the must. Therefore, the subject-matter of claim 1 involved an inventive step.

- V. The Appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 5 of the Main Request filed during oral proceedings before the Examining Division on 14 December 2009.
- VI. The oral proceedings before the Board were held on 21 June 2011 in the absence of the Appellant, who had informed the Board on 20 June 2011 that he would not attend the oral proceedings. At the end of the oral proceedings the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.
2. Articles 123(2), 84 and 54 EPC

The Examining Division found that the subject-matter of claim 1 fulfilled the requirements of Articles 123(2) and 54 EPC and did not raise any objections with regard to Article 84 EPC. In the light of the conclusions on inventive step (see below) the Board sees no reason to raise any objections under these articles.

3. Inventive step (Article 56 EPC)
 - 3.1 Claim 1 of the application in suit is directed to a method for producing a composition for personal care products, cosmetics and perfumes, which uses ethanol

that is free of the pungent odour of conventional ethanol. Such a method is already known from document (1). In accordance with the decision under appeal the Board accepts this document as representing the closest state of the art.

3.2 Document (1) is directed to a method for removing the pungent odour of conventional ethanol thereby producing a modified ethanol which is suitable for the preparation of high quality fragrance or cosmetics (page 2, lines 13 to 21). The pungent odour of ethanol is removed by contacting conventional ethanol with a fermentation residue of grape fruit, which is left from a grape wine manufacturing process, thereby to produce an extracted liquid ethanol phase and refining the extracted liquid by distillation (page 2, lines 22 to 36 and page 4, lines 3 to 6). In Examples 5 and 6 this modified ethanol is combined in amounts of 80% by weight and 95% by weight, respectively, with a rose type perfume oil to prepare a fragrant composition.

3.3 Having regard to this prior art document, the technical problem underlying the application in suit was to provide an alternative process for removing the pungent odour of conventional ethanol in order to make it suitable for use in personal care compositions or cosmetics and perfumes.

3.4 As a solution to this problem the patent in suit proposes the method according to claim 1, which is characterised by the fact that the ethanol is distilled directly from the fermented grape must.

- 3.5 Since the distillation of fermented grape must is a known method for producing alcoholic beverages the Board has no doubts that such a distillate does not show any pungent odour that is observed with conventional ethanol. Therefore, the Board accepts that the solution proposed in claim 1 of the application in suit successfully solves the technical problem mentioned above (see paragraph 3.3 *supra*).
- 3.6 It remains to be decided whether or not the proposed solution to the technical problem mentioned above (see paragraph 3.3 *supra*) is obvious in view of the state of the art.
- 3.7 Document (1) explains on page 4, lines 22 to 25 that the modified ethanol obtained after distillation of the extracted liquid phase is free from pungent odour and is invested with a pleasant fermentation odour originating from the wine residue. Thus, document (1) teaches that by distillation of the extracted liquid molecules are carried along with the ethanol, which are responsible for the particular pleasant odour of a must of fermented grapes. As the fermented grape must already contains ethanol, a skilled person, when looking for an alternative process to eliminate the pungent odour of industrial ethanol, would have distilled the ethanol together with the molecules carrying the pleasant fermentation odour directly from the fermented grape must, a process, which is already well-known for the production of alcoholic beverages. Thus the skilled person would arrive at the claimed invention without having to exercise any inventive activity.

3.8 The Respondent argued that the wine residue, which is extracted in document (1), no longer contained the molecules characterizing the source of fermentation, since these molecules were only present in the liquid phase of the must and were carried along with the ethanol only when the ethanol was distilled directly from the must. The ethanol received according to the process of document (1) would not be the same as the vinic alcohol of the application in suit.

However, claim 1 of the application in suit merely claims that the distillation has to be carried out such that molecules characterizing the material used as fermentation source are carried along with the ethanol without specifying any of these molecules. Therefore, any molecules that are present in the must obtained by the fermentation of only grapes fall within this definition, irrespective of whether they are in the liquid phase or in the wine residue. As stated in document (1) the resulting alcohol is imparted with the characteristic fermentation odour which is due to the presence of molecules derived from the material used as a fermentation source. As according to step b) of the claimed process the fermented must is subjected to distillation, this is obviously done in the presence of the solids forming the wine residue according to document (1). Therefore, the molecules characterizing the material of the fermentation source could also come from these parts of the must. Therefore, the argument of the Appellant is not convincing.

3.9 For these reasons, the Board concludes that the subject-matter of claim 1 does not involve an inventive step in the light of the teaching of document (1).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

C. Rodríguez Rodríguez

P. Gryczka