
From: Ingve Stjerna
Sent: Wednesday, 9 July 2014 07:23
To: Sabine Hackspiel
Subject: InfoCuria information pages for proceedings C-146/13 and C-147/13
Attachments: Stjerna, The_requirements_of_Article_118_1_TFEU.pdf;
Stjerna, Die_Voraussetzungen_des_Artikels_118_1_AEUV.pdf

Dear Mrs Hackspiel,

I am writing to you in your capacity as the Director of the CJEU Research and Documentation Directorate (afterwards "RDD") directly since my the previous messages sent via the CJEU contact form in February and March 2014 remained unanswered.

I am an attorney at law in Germany, practising on the area of patent litigation. I am following closely the developments in relation to the EU "unitary patent". As you may know, there are currently two actions pending at the CJEU against the Regulations creating the "unitary patent" and the respective language regime, proceedings C-146/13 and C-147/13.

My request relates to the InfoCuria information pages of these proceedings which, as far as I understand, are the RDD's responsibility.

One section of the information provided on these pages is titled "Notes on Academic Writings". I understand that in this section, references are given to academic articles discussing aspects which are relevant in the respective proceedings. In relation to proceedings C-146/13 and C-147/13 there was – as far as I can see until the morning of 8 July 2014 – only one single article mentioned, namely

- Winfried Tilmann, Spain's Action against the EU Patent Package: Arguments and Counter-Arguments in Case C-146/13, *European Intellectual Property Review* 2014, p. 4 ff.

Although this reference now seems to have been removed, the following issues deserve attention and clarification nonetheless, as they are of a general nature.

Apart from Prof. Tilmann's article, there is a large number of further academic articles available discussing the "unitary patent" and aspects which have been brought forward by the parties in the mentioned proceedings, most of which have been published in renowned academic journals, for instance:

- Tihana Balagovic, Enhanced cooperation - Is there hope for the unitary patent?, *CYELP* 8 [2012] 299 ff.,
- Manuel Desantes Real, Le «paquet européen des brevets», paradigme du chemin à rebours : de la logique institutionnelle à la logique intergouvernementale, *Cah. dr. eur.* 2014, 577 ff.,
- Thomas Jaeger, Back to Square One? – An Assessment of the Latest Proposals for a Patent and Court for the Internal Market and Possible Alternatives, *IIC* 2012, 286 ff.,
- Thomas Jaeger, Hieronymus Bosch am Werk beim EU-Patent?, *EuZW* 2013, 15 ff.,
- Matthias Lamping, Enhanced Cooperation – A Proper Approach to Market Integration in the Field of Unitary Patent Protection?, *IIC* 2011, 879 ff.,
- Hanns Ullrich, Select from within the system: The European patent with unitary effect, *Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 12-11*,
- Christopher Wadlow, Hamlet without the Prince: Can the Unitary Patent Regulation Strut its Stuff without Articles 6-8?, *JIPLP* 2013, p. 207 ff.

This is only a brief and random selection of relevant academic papers, there are many more.

Against this background, I have the following questions:

- (1) What is the reason why none of these articles is listed in section "Notes on Academic Writings" of the InfoCuria page for proceedings C-146/13 and C-147/13?
- (2) What are the criteria which must be fulfilled for an article to be listed in section "Notes on Academic Writings" of an InfoCuria page?

- (3) How is the decision made to list an article in the “Notes on Academic Writings” section of an InfoCuria page? Does this follow some sort of formalized process and if so, how is this process structured?

Furthermore, the article by Prof. Tilmann from the European Intellectual Property Review (afterwards “EIPR”) 2014 which, until very recently, was cited as the only reference on the InfoCuria page of proceedings C-146/13 and C-147/13 has been published in January 2014. Prior to its listing, there was a citation of one other article by a Dutch author and written in Dutch language (I do not remember the author’s name and the article’s title) on the InfoCuria page of both proceedings. This was subsequently removed and replaced by Prof. Tilmann’s paper almost immediately after its publication in EIPR.

This raises the following questions:

- (4) What is the reason why Prof. Tilmann’s article was put on the InfoCuria pages of proceedings C-146/13 and C-147/13 so quickly after its publication while other relevant articles remain unmentioned even months and years after their publication?
- (5) Why was the reference to the previously listed Dutch article removed from “Notes on Academic Writings” instead of leaving it listed as an additional source of information?

As to the backgrounds of Prof. Tilmann’s mentioned article in EIPR, are you aware of the fact that this is a paper which seems to have been commissioned by the German Federal Ministry of Justice, involving the disclosure of confidential court documents to Prof. Tilmann and their public discussion in said article? This is indicated by statements from both Prof. Tilmann and the responsible person from the German Federal Ministry of Justice, cf. my attached article addressing this issue (p. 1, cipher II.). As Prof. Tilmann’s article strongly argues that the actions in proceedings C-146/13 and C-147/13 should be dismissed, further questions arise:

- (6) Do you regard it as appropriate to list on the InfoCuria pages an article which has seems to have been written “undercover” on behalf of a party to the proceedings and is therefore likely biased in favor of this party?
- (7) If so, would you not see this as a problem with regard to the public’s trust in the impartiality of the European Court of Justice that its RDD has no problem with referring interested persons to articles which are putting forward government positions, disguised as neutral academic statements?
- (8) Against all the aforementioned circumstances, is it a coincidence that of the large number of available articles on topics discussed in proceedings C-146/13 and C-147/13 the only reference cited on the InfoCuria pages for these proceedings was, until very recently, one – maybe even the only one – strongly advocating that the actions should be dismissed?

I apologize for the length of this message and for the number of questions raised in it. As mentioned at the beginning, I have tried to get some of them clarified in the past in two e-mail requests sent to the CJEU Administration via the general contact form at <http://curia.europa.eu> on 13 February and 2 March 2014, which were not replied to.

I would be grateful if you could assist me on the issues raised and let me know the RDD’s answers to the mentioned questions which, I hope, may help to better understand the reasons for at least some of the mentioned incidents.

With kind regards
Ingve Stjerna

Dr. Ingve Björn Stjerna, LL.M. (Gewerbl. Rechtsschutz)
Rechtsanwalt
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From: Sabine Hackspiel
Sent: Friday, 11 July 2014 17:45
To: Ingve Stjerna
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13
Attachments: Dr Stjerna.pdf

Dear Dr. Stjerna,
Please find enclosed a reply to your message.
Best regards

Sabine Hackspiel
Director
Research and Documentation
Court of Justice of the European Union
L 2925 Luxembourg
Tel. [REDACTED]
e-mail: [REDACTED]

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20 April 2015
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*Directorate of
Research and Documentation*

Herrn Rechtsanwalt
Dr. Ingve Björn Stjerna, LL.M.
Düsseldorf, Germany

Friday 11th July 2014

Dear Doctor Stjerna,

Thank you very much for the interest shown in the operation of the Court of Justice's website.

In your e-mail of July 9th you raise a number of questions concerning the availability of notes to the Court's cases in that site which I would like to answer.

First of all, let me confirm that, as you point out, whereas the responsibility for the information featuring in the Court's website is shared between several of its services (depending on the nature of the information at issue), the information regarding notes to its cases which may be found there indeed falls within my Directorate's responsibility.

Your e-mail contains a list of articles on the unitary patent published in well-known academic journals. You ask, in that context, why none of those articles features in the section 'notes on academic writings' of the infoCuria page for cases C-146/13 and C-147/13. The explanation for this is simple and pertains to the very logic which underlies the aforementioned section of the infoCuria page. This is not conceived as aiming to cover exhaustively all writings (or even the most relevant ones) on the subject of the case under which they feature but rather only those specifically dealing with the case concerned. There is indeed a crucial distinction made between, on the one hand, such notes focusing on given cases and more general articles, which may be found through the Court's library catalogue, which is also available online. This is the case, for that matter, with most of the articles mentioned in your list.

This addresses, I believe, the second and third questions in your e-mail. To be listed in the section 'notes on academic writings' of the Court's website, an article must, in fact, constitute a doctrinal note focusing specifically on a case (or set of cases) before the Court. Pieces which do not meet this condition are treated as full-fledged articles and feature instead in the Courts' library catalogue. Each time a new issue of a periodical arrives to the Court and is examined for the purposes of identifying relevant new articles or notes on EU law, this choice is made. Only pieces identified prima facie as dealing specifically with a case (or set of cases) before the Court are referenced in the section 'notes on academic writings' in infoCuria. This also answers the fourth question in your e-mail.

You ask, in addition, why is it that the reference to an article in Dutch was removed from 'notes on academic writings' and replaced by the one by Prof. Tilmann, subsequently removed as well. We have found no trace of a Dutch article on the cases at issue having ever been in infoCuria. As for the piece by Prof Tilman, it was considered appropriate to remove it from the website. However, following its initial removal, it recently reappeared on the Court's website for a short period. This was due to a technical problem which has now been solved and the reference suppressed.

As regards, finally, questions 6 to 8 in your e-mail, I thank you for your remarks but assure you that the selection of articles featuring in the section 'notes on academic writings' of infoCuria is conducted on the basis of purely objective criteria. As for the concerns you express, I believe the explanations given above show there is no inference to be drawn from the presence or absence of any given piece of writing on the Court's website. The suppression of Prof. Tilman's note from infoCuria illustrates this, I believe, clearly enough.

Hoping this set of considerations might clarify the different points raised in your e-mail, I remain, with best regards,

Yours sincerely



Sabine Hackspiel
Director
Research and Documentation Directorate

From: Ingve Stjerna
Sent: Friday, 18 July 2014 13:18
To: Sabine Hackspiel
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13

Dear Ms Hackspiel,

thank you very much for your reply of 11 July 2014 (afterwards "your letter") which helps to better understand some of the issues in question. Having studied your letter in detail, some further points have arisen on which I would like to ask for your comment:

In relation to questions (1) to (3) in my e-mail below, you indicate that it was not the purpose of section "Notes on Academic Writings" of the InfoCuria page to list there the most relevant articles dealing with aspects which play a role in the case in question, but that it was only for those articles "specifically dealing with the case concerned" and constituting "a doctrinal note focusing specifically on a case (or set of cases) before the Court."

- (1) Against this background, is my understanding correct that in order to be eligible for a listing in section "Notes on Academic Writings", an article must expressly have as a subject the proceedings in question? If so, are there any further requirements as to the contents of such an article, e. g. does it have to discuss the arguments raised in these proceedings? What are the properties establishing the character as a "doctrinal note" as you call it?

In your letter, you further say that there was no trace that the Dutch article I mentioned in my e-mail below was ever listed in the "Notes on Academic Writings" sections of the pages in question. One would expect that the system feeding the InfoCuria pages has a file history (or some sort of other record) documenting any changes made to the information displayed there.

- (2) Assuming that this is the case, is my understanding correct that your records show that apart from Prof. Tilmann's article in EIPR 2014, 4 ff., no other reference(s) was/were ever listed in section "Notes on Academic Writings" of the InfoCuria pages for proceedings C-146/13 and C-147/13?

As regards said article by Prof. Tilmann, you explain in your letter that it was considered appropriate to remove it from the website.

- (3) Why was this article suddenly considered inappropriate after the decision had been made to list it, the latter indicating that it was initially regarded as perfectly fit for purpose?

As a final point, you indicate in your letter that Prof. Tilmann's article was removed, then reappeared on the InfoCuria pages for a short time, before it was finally "suppressed".

- (4) Could you please tell me the exact date on which the article was initially put on the InfoCuria page for proceedings C-146/13 and C-147/13 for the first time? When was it removed from there/"suppressed" for the first time?

Again, thank you very much for the valuable feedback you have provided so far and for the time you have taken to explain the structure underlying the information displayed on the InfoCuria pages. I would be grateful for your additional input on the aforementioned aspects, hoping that this will help to overcome the few remaining uncertainties.

Have a good weekend,
Ingve Stjerna

Dr. Ingve Björn Stjerna, LL.M. (Gewerbl. Rechtsschutz)
Rechtsanwalt
Fachanwalt für gewerblichen Rechtsschutz,
Certified Specialist for Intellectual Property Law

From: Ingve Stjerna
Sent: Tuesday, 5 August 2014 07:58
To: Sabine Hackspiel
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13

Dear Ms Hackspiel,

Could you kindly let me know when I can expect your reply to my message below? In your letter of 11 July 2014, you have confirmed that the issues in question fall within the competence of the Research and Documentation Directorate, so you should be in a position to address them.

In view of the current holiday season, I will wait for your feedback for some more days.

Kind regards
Ingve Stjerna

From: Sabine Hackspiel
Sent: Wednesday, 20 August 2014 19:42
To: Ingve Stjerna
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13

Dear Dr. Stjerna,

I regret that, due to the absence of different colleagues at this time of the year, a reply to your message of July 18 will be given in early September.

Thank you for your understanding

Best regards

Sabine Hackspiel

From: Sabine Hackspiel
Sent: Friday, 12 September 2014 19:57
To: Ingve Stjerna
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13
Attachments: Dr. Stjerna.pdf

Dear Dr. Stjerna,

Please find enclosed the reply to your message of July 18.

Best regards
Sabine Hackspiel
Director
Research and Documentation
Court of Justice of the European Union
L 2925 Luxembourg

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*Directorate of
Research and Documentation*

Herrn Rechtsanwalt
Dr. Ingve Björn Stjerna, LL.M.
Düsseldorf, Germany

Friday 12th September 2014

Dear Doctor Stjerna,

Thank you for your e-mail of July 18th. In it, you raise a new set of questions with regard to which I can give you the following additional general elements :

The purpose of the section ‘notes on academic writings’ is to provide references to doctrinal comments on the case law of the three European Union courts.

In substance, for a note to be listed in this section of the Court’s site it must meet three requirements:

- it must be published in a periodical which the Court’s Library subscribes to (or in a “Festschrift” or other publication in the Library)
- it must be prima facie identifiable by our staff as a doctrinal note dealing specifically with a case or a set of cases of the European Union Courts
- it must prima facie provide a minimum of legal analysis and go beyond a simple summary or reproduction of the decision which constitutes its object.

According to these criteria, more than 2500 references to case notes are inserted in the database every year. It goes without saying that it is not possible to have an in depth analysis or evaluation of the content of each note at the time of selection. Errors may occur and, if they are noticed later on, need to be corrected.

Concerning the technical aspects raised in your second and fourth questions, the system feeding the Infocuria page does not permit the tracing of old entries which have been suppressed from the databases feeding the site.

Hoping these clarifications may help you in overcoming the few remaining uncertainties which you expressed concerning the operation of the Court's website, I remain, with best regards

Yours sincerely



Sabine Hackspiel
Director
Research and Documentation Directorate

From: Ingve Stjerna
Sent: Monday, 22 September 2014 08:05
To: Sabine Hackspiel
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13

Dear Ms Hackspiel,

thank you very much for your letter of 12 September 2014. I am surprised that it took you two months to reply to my few questions, all the more since your brief message leaves most of them unaddressed and instead rather provides statements of a more general nature.

As to my first set of questions on what is required for an article to be listed in section "Notes on Academic Writings", you explain that this was dependent on three conditions, namely that (1) it would have to be published in a periodical subscribed to by the Court's library, (2) the library staff would have to be able to identify it as a doctrinal note on case law of the Union courts, and (3) it would have to go beyond a mere summary and contain a minimum of legal analysis.

On my second question, you state that it would technically not be possible to trace old entries which were subsequently "suppressed" from section "Notes on Academic Writings", so that it was not possible to identify the article which was replaced by that of Prof. Tilmann.

In terms of my third question concerning the reasons for the removal of Prof. Tilmann's article after, initially, its listing had apparently been considered appropriate, you seem to indicate that this was an "error" and that the article was removed as a matter of "error correction".

With regard to my fourth question on the exact timing of the listing and removal of Prof. Tilmann's article, you appear to be saying that this could not be traced, due to the technical limitations already referred to in relation to my second question.

As to the requirements for listing an article in section "Notes on Academic Writings", the statements provided in your letters of 11 July 2014 and 12 September 2014 seem not to be fully consistent with information given by the Research and Documentation Directorate (RDD) on the same issue earlier this year. I have been informed that in an earlier reply on the question what these requirements are, the RDD has advised that to be eligible for listing, apart from focusing on a specific case, an article must not comment on sensitive procedural issues or disclose positions and arguments of the parties to the proceedings in question. As your letters of 11 July 2014 and of 12 September 2014 are silent insofar, is my understanding correct that such requirement of non-disclosure of sensitive procedural issues and party positions does not exist and did not exist at the time when the decision was made to list the article by Prof. Tilmann?

Furthermore, as to the timing of the initial listing and subsequent removal of Prof. Tilmann's article you have stated in your letter of 11 July 2014 that "following its initial removal, the article reappeared on the Court's website for a short period" (my emphasis). How is it possible to make that statement if, as you now claim in your letter of 12 September 2014, your system does not allow to trace the date and time of listings?

I would be grateful if you could clarify these aspects.

Kind regards
Ingve Stjerna

From: Ingve Stjerna
Sent: Monday, 6 October 2014 07:33
To: Sabine Hackspiel
Cc: Ruediger Stotz
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13
Attachments: Dr Stjerna.pdf; Dr. Stjerna.pdf

Dear Ms Hackspiel,

since my e-mail of 18 July 2014, nearly three months have passed while the questions raised therein remain essentially unanswered. The same applies to the additional issues raised in my e-mail of 22 September 2014. I will wait further for feedback and answers until the end of this week, i. e. until Friday, 10 October 2014. Should I not receive any reply by then, I will assume that you do not intend to provide further answers.

In his function as the responsible Director-General, I also copy Prof. Stotz on this e-mail in case he should not yet be familiar with our previous correspondence and the subject matter in question.

Kind regards
Ingve Stjerna

From: Sabine Hackspiel
Sent: Monday, 13 October 2014 12:41
To: Ingve Stjerna
Cc: Ruediger Stotz
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13
Attachments: Dr Stjerna.pdf

Dear Dr. Stjerna,
Please find enclosed the reply to your message of september 22d.

Best regards
Sabine Hackspiel

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*Directorate of
Research and Documentation*

Herrn Rechtsanwalt
Dr. Ingve Björn Stjerna, LL.M.
Düsseldorf, Germany

Monday 13th October 2014

Dear Doctor Stjerna,

Thank you for your e-mails of September 22nd and October 6th in which –yet again– you address the issue of the information available in the Court’s website as regards the proceedings in cases C-146/13 and C-147/13.

Having already given you rather detailed answers to the numerous questions you asked in this context, I shall emphasize that this will be the last set of explanations that I shall provide on this subject.

The criteria for an article to be listed in section ‘Notes on Academic Writings’ of the Court’s website have been set out clearly in my letter of September 12th. Surely, there might be objective reasons which may render it inappropriate to list certain notes despite the fact that they *prima facie* meet those criteria. As I am quite sure you will understand, it is, however, impossible to identify *a priori* all those objective reasons in an exhaustive manner.

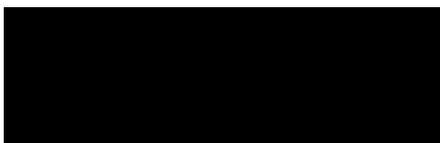
As I have already pointed out, it is not possible, for practical reasons pertaining to the way the process of selection of notes is organized, to systematically verify in all cases the actual presence of such objective reasons for each individual note selected. Nonetheless, if and when we identify those reasons at a later stage we draw, it goes without saying, the necessary consequences.

Experience shows, in this context, that this kind of situation may arise notably as regards notes focusing on pending proceedings. In light of this and given also that, as stressed in my previous letter, a case-by-case examination of all notes is simply not workable, the decision has recently been taken that notes coming within this category – into which Professor Tilmann’s note falls – are not, as a matter of principle, to be listed in the Court’s website.

Finally, as regards the last – technical – point you raise in your e-mail of September 22nd, it is a fact that our system does not allow us to trace the references of notes suppressed from our records. If it is possible to state that, following its initial removal, Professor Tilmann’s note reappeared on the Court’s website for a short period, this is because people tend to have a recollection of events that don’t happen frequently in their normal daily routine, such as, for the staff in charge of the Court’s case note database, the suppression of data or the unexpected reappearance of data suppressed. It is also normal that this recollection does not include the exact date when such events occurred. This is why I am also quite confident that it is exact to say that no other article concerning the proceedings in cases C-146/13 and C-147/13 has been suppressed from the Court’s website.

I trust that you will understand that we cannot in all propriety take this discussion any further.

Yours sincerely,



Sabine Hackspiel
Director
Research and Documentation Directorate

From: Ingve Stjerna
Sent: Monday, 20 October 2014 08:08
To: Sabine Hackspiel
Cc: Ruediger Stotz
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13

Dear Ms Hackspiel,

thank you very much for your letter dated 13 October 2014.

First of all, please allow me to briefly summarize my understanding of your comments:

In relation to my question concerning the position communicated by the Research and Documentation Directorate (RDD) – in writing – earlier this year that it was an essential requirement for an article to be listed in section “Notes on Academic Writings” that it must not comment on sensitive procedural issues or disclose positions and arguments of the parties to the proceedings in question, you merely reply that you had set out the listing criteria “clearly” in your letter of 12 September 2014. As the three criteria you mentioned in that letter do not include the aforementioned aspect, I understand that it is your position that there is and never was such requirement as mentioned before, despite the RDD’s earlier statement to the contrary.

With regard to my question how it was possible to say that Prof. Tilmann’s article had appeared on the Court’s website only “for a short period” if, as you have indicated in your letter of 12 September 2014, the listing date and listing time of such articles were not recorded, you state that this resulted from the fact that the staff in charge of the database in question would have a specific recollection of Prof. Tilmann’s article, as its suppression was an “unusual event” for them. Therefore, I understand that your respective statement is based on memories reproduced by members of your staff of events which have taken place months ago.

Finally, you remark in your letter that with regard to this “recollection” – i. e. said memories of your staff – it would be “exact to say” that prior to the listing of Prof. Tilmann’s article, there was no other article listed concerning proceedings C-146/13 and C-147/13. I have meanwhile come across the article which I saw listed in section “Notes on Academic Writings” of proceedings C-146/13 and C-147/13 at the beginning of this year before it was replaced by Prof. Tilmann’s. It is the paper by Speyart, H.M.H.: *Is er nu eindelijk een Unieoctrooi-pardon: “Europees octrooi met eenheidswerking”?*, *Nederlands tijdschrift voor Europees recht* 2013, p. 135 ff.

You indicate that your letter of 13 October 2014 would be the last statement that you are prepared to give “on this subject” and that you could “not in all propriety take this discussion any further”, stating that you had provided “rather detailed answers to the numerous questions” already. As a matter of fact, whether you reply to my requests or not is, of course, entirely up to you. However, you should understand that what I am trying to do now for more than three months is to obtain from you clarification on the circumstances underlying the listing of Prof. Tilmann’s article on the Court’s website which, if I may say so, appears to be as remarkable as the background of its preparation itself. That this has meanwhile developed into a discussion is largely due to your statements which rather seem to aim at “muddying the waters” instead of providing true explanations. It should be in your own interest and in that of the RDD to avoid any doubts in the impartiality of your work. I regret to say that the explanations you have offered so far raise more questions than they resolve.

If you allow me one final question: Do you know Prof. Tilmann personally?

I will wait for any further feedback from your side until the end of this week, i. e. until 24 October 2014. Should I not hear back from you, I will assume that you are indeed not prepared to provide any further comments.

Kind regards
Ingve Stjerna

From: Ingve Stjerna
Sent: Monday, 27 October 2014 08:06
To: Sabine Hackspiel
Cc: Ruediger Stotz
Subject: RE: InfoCuria information pages for proceedings C-146/13 and C-147/13

Dear Ms Hackspiel,

after I did not receive any further comments from you yet, I assume that the explanations provided in your letters of 11 July 2014, 12 September 2014 and 13 October 2014 contain your complete statement on the aspects in question and that you do not wish to provide further clarification.

Kind regards
Ingve Stjerna