CONFIDENTIAL

Members of the Enlarged Board of Appeal
of the European Patent Office
c/o Secretariat Room 206

Munich, 8 December 2014

To the Representatives of the Delegations to the Administrative Council
of the European Patent Organisation

And

To the External Members of the Enlarged Board of Appeal

On 3 December 2014, a member of the Boards of Appeal was escorted out of the Office by the Investigation Unit (0.6.1.1), a unit operating directly under the responsibility of the President. As the other members of staff were informed by Communiqué 64 on the Intranet on the same day, the President has imposed a "house ban" on him. It appears from this communiqué that the staff member is accused of having disseminated defamatory material.

A house ban may very well be considered as a *de facto* suspension, because the Board member can no longer perform his duties.

The provisions under which the above action has been taken, namely the Investigation Guidelines, do not - and cannot - provide a legal basis for such actions. According to Part I, their purpose is to establish, in cases of possible misconduct, the underlying facts on the basis of which the President can come to a reasoned assessment regarding the initiation of disciplinary proceedings.

Article 95 of Service Regulations provides that if an allegation of serious misconduct is made against a permanent employee and if the misconduct alleged is of its nature incompatible with his continuing in service, the "appointing authority" may decide to suspend him forthwith.

The appointing authority for this purpose is the Administrative Council (Article 11 (3) EPC). The President may propose such a disciplinary measure to the Administrative Council (Article 10(2)(h) EPC). It is however the Administrative Council as the disciplinary authority who has to decide on it (Article 11(4) EPC).

This specific distribution of roles is part of the concept of separation of powers and the independence of the Board members as enshrined in Article 23 EPC. However, in the present case, the President decided in lieu of the Administrative Council, for which no provision appears to exist.

To this is added the fact that his computer was confiscated by the investigation unit, which has given them access to possibly confidential information regarding the preparation and deliberation of cases by the member's board, without proper, legally sound guarantees.

The undersigned members of the Enlarged Board of Appeal are deeply concerned about this conduct which could affect the validity of the whole proceedings if the results of the enquiry were in fact to lead to disciplinary proceedings. They are aware that independence does not imply impunity.

The actions of the investigation unit on the orders of the President also appear to be a clear challenge to the judicial independence of the Boards of Appeal.

It is therefore urgently requested that the Administrative Council in its capacity as appointing and disciplinary authority ensures the independence of the Boards of Appeal, one of the pillars of the European patent system. What is needed is a clear limitation on the executive power, as far as the Boards of Appeal are concerned, in situations like the present, so as to avoid any impression of undue influence on their judicial work, contrary to the independence requirements of Article 6 of the European Convention on Human Rights.

Yours sincerely,

The following undersigned members of the Enlarged Board of Appeal

Gabriele Alt	Graham Ashley	Gianni Assi
Ingo Beckedorf	Fritz Blumer	Tamás Bokor
Bernhard Czech	Albert de Vries	Eugene Dufrasne
Franz Edlinger	Gunnar Eliasson	Kevin Garnett
Pascal Gryczka	André Klein	Thomas Kriner

Albert Lindner	Hugo Meinders	Rainer Moufang

Albert Lindner	Hugo Meinders	Rainer Moufang
Ulrich Oswald	Michael Poock	Giovanni Pricolo
Gaston Raths	Joseph Riolo	Marco Ruggiu
Werner Sieber	Fred van der Voort	Bianca ter Laan
Claude Vallet	Martin Vogel	Gérard Weiss
Stefan Wibergh	Manfred Wieser	Michael Harrison
Marie-Bernadette Tardo-Dino		Wolfgang Sekretaruk

cc Mr Benoît Battistelli

annex: Circular 342 with the Investigation Guidelines

Circular No. 342
(30 November 2012)

Guidelines for investigations at the EPO

Part I
Introduction

All employees of the European Patent Office (hereinafter referred to as "the Office") are responsible for their conduct in the performance of their duties in accordance with the provisions of Articles 14 and 24 of the Service Regulations. Other persons undertaking work in or on behalf of the Office are bound to similar standards by their contractual obligations.

In cases of possible misconduct, an investigation has to be carried out to establish the underlying facts on the basis of which the President can come to a reasoned assessment regarding the initiation of disciplinary proceedings or other corrective measures.

The guidelines in this Circular provide a framework for the conduct of such investigations at the Office. They establish the principles and procedures to be applied with respect to the initiation, conduct and outcome of the investigations and ensure the transparency of the process. They also serve as a guide for investigators in the conduct of investigations, and lay down rules about the investigative process and the roles, rights and obligations of the participants.

Part II
General provisions

Article 1
Field of application

(1) This Circular shall apply to all persons covered by Article 1 of the Service Regulations, including former employees of the Office.

(2) This Circular shall also apply to all persons who are not covered by paragraph 1 of this Article but who undertake work in or on behalf of the Office. Where direct application to such persons is not possible, the Office will seek application of the Circular using other means at its disposal.

(3) In the case of specific provisions regarding the investigative process in other applicable regulations, those specific provisions shall prevail.

Article 2
Definitions

For the purposes of this Circular, the following definitions shall apply:

(1) "Misconduct" means any failure to comply with obligations under the Service Regulations as defined in Article 93(1) of the Service Regulations.

(2) A "complainant" is any person alleging misconduct.

(3) A "subject" is any person who is alleged to have engaged in misconduct.

(4) "Investigative process" means the totality of the fact-finding procedures within the scope of this Circular, including the receipt and recording of complaints, the initial review, the preliminary evaluation, the investigation and the report on findings.

(5) "Investigation" means the process of determining the facts relating to an allegation of misconduct.

(6) "Parties" means all persons involved in the investigative process as complainants, subjects or witnesses.

(7) "Investigative unit" means the unit tasked with conducting the investigative process. This unit is located within Principal Directorate Internal Audit and Oversight.

Article 3
Principles in the conduct of an investigative process

(1) Investigators shall demonstrate respect for the parties in an investigative process at all times.

(2) The investigative process shall be carried out objectively, independently, impartially and free of undue interference, in accordance with the principle of proportionality and all other applicable provisions. Investigators shall seek to obtain and take into account all evidence which may reasonably have a bearing on the case.

(3) In the case of a real or apparent conflict of interest, the assigned investigators shall inform the Principal Director overseeing the investigative unit, who shall decide whether to replace the investigator for the investigative process concerned.

(4) Alleged misconduct by or an unmanaged conflict of interest of an investigator shall be reported to the Principal Director overseeing the investigative unit or to the President of the Office.

Article 4
Confidentiality

(1) In order to protect the integrity of the investigative process and the parties involved in it, all information about the investigative process or gained in connection with it shall be treated with strict confidentiality. For the

purposes of this Circular, this means that information shall be shared on a need-to-know basis only, in accordance with the applicable regulations and general principles of law.

(2) Complainants and subjects may seek advice and support from staff representatives or legal counsel, in which case they shall inform the investigative unit accordingly. They may also seek advice and support from members of their immediate family or from health professionals, in which case they do not have to inform the investigative unit. Where such advice is sought, the persons consulted shall keep the matter confidential.

(3) In order to protect the integrity of the investigative process and the parties involved in it, notifications made by the investigative unit to any party or parties involved in the process shall not, in general, include the names of any of the other parties involved.

(4) Investigators shall maintain and keep secure an adequate record of the investigative process and the information collected.

(5) The unauthorised disclosure of information pertaining to the investigative process or the identity of any person involved in the investigative process may constitute misconduct liable to a disciplinary procedure.

(6) The investigative unit shall inform all parties involved in the investigative process of the confidentiality of the process, and of the fact that disciplinary action may be taken against any person who, by intent or negligence, violates that obligation.

(7) The investigative unit shall inform the President of the Office of any ongoing investigative processes in cases involving a threat to the operations or governance of the Office or a considerable risk to the reputation of the Office.

(8) All parties involved in the investigative process shall continue to be bound by the obligations in this Article after they have left the service or the contractual relationship has ended.

(9) Nothing in this Article shall be construed to prevent any persons covered in Article 1 of this Circular from availing themselves of their rights to seek legal remedy as provided for under Title VIII of the Service Regulations.

Part III
Rights and obligations

Article 5
Reporting misconduct

(1) All persons covered by Article 1(1) and (2) of this Circular are encouraged to report possible misconduct. Allegations of misconduct may be reported to the person's line manager or to the investigative unit direct.

41

(2) Line managers who are informed of an allegation of misconduct shall report the allegation to the investigative unit.

(3) The investigative unit shall register all allegations and acknowledge receipt thereof.

(4) The investigative unit shall inform complainants about the progress of the investigation, unless it considers that providing such information would jeopardise the process, the interests of the Office or the rights of parties involved in the process.

(5) The raising of allegations of misconduct which are purposefully false or which are made with a reckless disregard as to whether they are false is prohibited and may constitute misconduct. The same applies to the giving of testimony or evidence.

(6) Complainants may not unduly influence the investigative unit in any way.

Article 6
Presumption of innocence and the right to defend oneself

(1) Subjects shall be presumed to be innocent throughout the investigative process and until such a time as the President of the Office, or the Administrative Council in cases where the Council is the subject's appointing authority, has taken a decision on whether misconduct has occurred.

(2) They shall have the right to defend themselves against allegations. This includes the right to present any evidence in their favour.

Article 7
Protection against retaliation and intimidation

(1) Any person who in good faith brings forward an allegation of misconduct, or who co-operates in the investigative process, shall be protected from retaliation and intimidation.

(2) Engaging in retaliatory or intimidatory activities against a person who, in good faith, raises an allegation, or who co-operates in the investigative process, is prohibited, and may constitute misconduct.

Article 8
Duty to co-operate

(1) All persons covered by Article 1(1) and (2) of this Circular shall be obliged to co-operate fully with the investigative unit.

(2) This obligation includes being available for meetings with the investigators, providing truthfully, and to the best of their ability and knowledge, all information which may reasonably have a bearing on the case, and answering all pertinent questions. It also includes the requirement to provide access to all relevant records, including those stored electronically.

(3) The destruction or manipulation of evidence, or attempts to destroy or manipulate it, the interference with or intimidation of witnesses or potential witnesses and the misleading of investigators are prohibited and may constitute misconduct, as may failure to co-operate without legal justification.

Part IV
The investigative process

Article 9
Overview

(1) The investigative process is an administrative fact-finding procedure. The purpose of an investigation is to establish whether there is sufficient evidence to support an allegation of misconduct, and if so, to identify the person or persons responsible.

(2) The investigative process is initiated when the investigative unit receives an allegation of misconduct.

(3) Furthermore, the President of the Office may at any time request an investigation.

(4) The investigative process is usually comprised of three phases: an initial review, a preliminary evaluation and a formal investigation.

(5) Once the investigative process has been completed, if the investigative unit concludes that there is sufficient evidence to support the allegation of misconduct, the case is referred to the respective appointing authority for decision. In cases where the President has requested the investigation in accordance with paragraph (3) of this Article, the President shall be informed of the outcome, regardless of whether the investigative unit concludes that there is sufficient evidence to support the allegation.

(6) Under normal circumstances, the investigative process shall be completed within a period of twelve months after receipt of the complaint.

Article 10
Initial review

(1) Upon receipt of an allegation, the investigative unit shall carry out an initial review to assess whether the alleged conduct would, if proven, amount to misconduct.

(2) This initial review shall establish whether the allegation falls within the remit of the investigative unit. It shall not include any fact-finding, or any assessment of the credibility of the allegation. It shall not prejudice the outcome of any future investigations.

(3) Under normal circumstances, initial reviews shall be completed no later than two months from the date of receipt of the allegation.

41

(4) If, as a result of the initial review, the investigative unit finds that the allegation, if proven, would not amount to misconduct, it shall close the investigative process. In cases where the President of the Office was informed of the allegation, the investigative unit shall inform him of this finding.

(5) The investigative unit shall inform the complainant in writing of this finding.

Article 11
Preliminary evaluation

(1) If the investigative unit determines that the allegations, if proven, would amount to misconduct, it shall carry out a preliminary evaluation.

(2) Preliminary evaluations involve collecting, preserving and securing basic evidence and assessing this evidence to determine whether an investigation into the allegation of misconduct is warranted.

(3) To that end, the investigative unit shall:

(i) establish the basic facts and secure basic evidence,
(ii) evaluate the credibility, materiality and verifiability of the complaint, and
(iii) identify any inconsistencies or outstanding questions.

(4) At the end of the preliminary evaluation, the investigative unit may decide to:

(i) close the preliminary evaluation if, on the balance of probability, the allegation is without merit or not supported by the facts,
(ii) refer the information for resolution to other units within the Office,
(iii) defer further investigations for a specific time period not exceeding 12 months pending further clarification of key facts, or
(iv) initiate an investigation as defined in Article 12 of this Circular.

(5) Should the investigative unit conclude, on the basis of the preliminary evaluation, that an investigation is unwarranted, it shall inform the complainant in writing of this finding. In cases where the President was informed of the allegation, the investigative unit shall inform him of this finding.

(6) The subject shall not normally be notified of the findings unless he - or any other person - was made aware of the fact that allegations against him were being evaluated. Other parties involved may be informed about the outcome if such information is deemed necessary to protect the reputation of the subject, or at the specific request of the subject.

(7) Under normal circumstances, preliminary evaluations shall be completed no later than three months after the date of receipt of the allegation.

Article 12
Investigation

(1) The investigation shall include the collection and analysis of all available pertinent information and evidence.

(2) Investigations shall be conducted promptly so as to preserve relevant information and documentation and prevent the continuation of the alleged misconduct or the occurrence of other incidents.

Part V
Procedural rules

Article 13
Use of outside investigators; assistance from other units

(1) The investigative unit may at any time request assistance from other units. These other units shall be bound by the same procedural rules and obligations as the investigative unit.

(2) If the circumstances so warrant, the investigative unit may decide to assign outside investigators to carry out the investigative process in part or in full. External investigators shall be bound by the same procedural rules as the investigative unit and shall work under the authority of the investigative unit.

Article 14
Protective and interim measures

(1) At any time during the investigative process, the investigative unit may recommend that the President of the Office take interim measures to safeguard the investigation or to protect a party to the investigation.

(2) When deciding on such measures, due account shall be taken of the legitimate concerns and interests of all the parties and the Office, the nature of the harm or potential harm to the complainant or witness, the degree to which delay may worsen the harm done or result in the harm becoming irreparable, and the seriousness of the matter. Such measures may include, but are not limited to, the temporary suspension, restriction of access to Office premises, documents or resources, transfer or re-assignment of one or more of the parties.

(3) Where interim measures are taken, the duration of the measures, which shall not exceed six months, shall be laid down in the decision. If, after the end of this period, the President of the Office considers that the circumstances requiring the interim measures still persist, further interim measures may be taken, up to a total duration of eighteen months.

(4) If interim measures are in force at the conclusion of the investigative process, the President of the Office shall render a decision on the outcome of the investigative process, including the suspension of interim measures,

41

no later than two months after the submission of the report according to Article 18 of this Circular.

(5) Interim measures shall not be of a punitive nature, nor shall they prejudice the outcome of the investigative process in any way.

Article 15
Notification of allegations

(1) The investigative unit shall inform the subject of the allegations, and of his rights and obligations under this Circular, in writing as soon as it is practicable to do so without jeopardising the investigation or the rights of the complainant or witnesses. Such notification shall occur no later than at the beginning of his interview as the subject of the allegation in accordance with Article 17 of this Circular.

(2) Line managers and other parties shall not normally be informed of the allegations. They may be contacted and questioned by the investigative unit in accordance with Article 17 of this Circular.

Article 16
Gathering of evidence

(1) The investigative unit may seek and collect all relevant evidence, including physical and electronic documents and records, physical items, witness statements and other pertinent information in accordance with the applicable provisions.

(2) The investigative unit may, in accordance with the applicable rules and procedures, access and search all resources and documents owned by the Office, including desks, offices, computers, mobile electronic devices, physical and electronic documents and data, and physical and electronic mail, and review the records of all communications through, or facilitated through, means and devices owned by the Office.

(3) If, in accordance with paragraph (2), the investigative unit wishes to access or collect evidence which is not available publicly or internally at the Office, the head of the investigative unit shall obtain prior written authorisation from the Data Protection Officer. The Data Protection Officer shall render a decision on the authorisation within five working days. The investigative unit may take all necessary steps to secure any evidence before obtaining the authorisation.

(4) The Data Protection Officer shall be present whenever the office space of a person working for the Office is accessed or searched. If the Data Protection Officer cannot be present, he shall assign a person who is not connected to the matter to be present in his stead.

(5) Requests to the Data Protection Officer for authorisation shall include all the information relevant to the decision, but, in order to protect the integrity of the subject and the investigative process, they shall not, in general,

include the name of the subject or the persons in possession of the data or mail.

(6) In the request and the decision authorising access, due respect shall be given to the privacy of the workspace of any person who works for the Office, which shall be weighed against the interests of the Office and stakeholders. Authorisation shall only be granted if the relevant information can reasonably be expected to be obtained in the manner envisaged, and if it cannot reasonably be obtained by less intrusive means.

(7) The investigative unit shall document all its evidence-gathering activities.

(8) In cases in which prior authorisation from the Data Protection Officer cannot be obtained in accordance with paragraph (3) of this Article without jeopardising the investigation or the access to evidence, the investigative unit shall document the reasons and considerations for accessing office space, data or mail. As soon as possible without jeopardising the investigation or the access to evidence, this documentation shall be submitted to the Data Protection Officer, who, within two weeks of the submission, shall give a reasoned opinion on whether the access would have been authorised in accordance with paragraph (6) of this Article.

(9) With regard to accessing evidence located outside the Office premises which contains personal information about an individual and is neither owned by the Office nor publicly available, the investigative unit must abide by all the applicable provisions of local law, or obtain prior written permission from the individual concerned. In cases where such permission cannot be obtained, or requesting permission would jeopardise the investigation or access to the evidence, the investigative unit may resort to the assistance of the relevant local authorities.

Article 17
Interviews

(1) At any time in the investigative process, the investigative unit may, at its discretion, interview persons who may have information relevant to the investigation.

(2) A person may be interviewed on more than one occasion during the course of an investigation, and shall be obliged to co-operate pursuant to Article 8 above.

(3) Invitations to interview shall be issued in writing. The invitation shall inform the interviewee of his rights and obligations under this Circular.

(4) Interviews shall be conducted in one of the official languages of the European Patent Organisation, where possible in the preferred official language of the interviewee. Interviewees may reply in their preferred official language.

(5) Interviews shall be conducted by at least two investigators.

41

(6) The complainant and the subject may be accompanied during interviews by an Office employee of their choice. This employee may be neither a member of the investigative unit nor in any way connected to the matter under investigation, and must be readily available to attend.

(7) Any person accompanying a person to an interview shall observe the confidentiality of the process and shall not interfere in the interview or investigative process. The presence of such an accompanying person shall not relieve the person being interviewed from his obligation to give his full co-operation.

(8) A person may inform his line manager that he has been called for interview by the investigative unit so as to explain his absence. He may not, however, pass on any information about the investigation to him.

(9) During or after the interview, a record of the interview shall be prepared in the language or languages in which the interview was held. The interviewee shall be given a reasonable opportunity to review the record. The record shall be signed by all interview participants. Alternatively, the investigators may prepare an audio recording of the interview. The recording shall be transcribed and the transcription given to the interviewee for information and comment.

Article 18
Report on findings

(1) At the conclusion of an investigation, the subject shall be provided with a written summary of the findings. In cases where the Data Protection Officer has, pursuant to Article 16(8), given a negative opinion on evidence-gathering activities, this negative opinion shall be attached to the summary. The subject shall have the opportunity to respond in writing to the findings within a period of at least five working days, depending on the complexity of the matter.

(2) All responses shall be duly considered. The investigative unit may amend its findings based on these responses. The subject shall be notified of any such amendments.

(3) The investigative unit shall then submit a written report on the findings of the investigation ("the report") to the President of the Office. Where the subject's appointing authority is the Administrative Council, the full report shall also be submitted to the Chairman of the Council.

(4) The report shall include:

(i) an analysis of the relevant facts;
(ii) the conclusions of the investigative unit, based on a preponderance of the evidence;
(iii) any recommended corrective measures, including whether disciplinary proceedings in accordance with Title VII of the Service Regulations should be initiated against the subject.

(5) The investigative unit shall attach to the report:

(i) all relevant evidence, including witness statements;
(ii) the Data Protection Officer's authorisation to the access data or mail or his reasoned opinion in respect thereof, in accordance with Article 16(3), (5) or (8) of this Circular;
(iii) the full response and comments of the subject and, where applicable, the complainant.

(6) Upon submission of the report, the complainant shall be notified of the outcome of the investigative process. Such notification shall not include any information capable of revealing the identity of witnesses or third parties connected with the process.

(7) The subject shall receive a copy of the report if and when, on the basis of the report, disciplinary proceedings are initiated.

(8) The investigative unit may, upon request, send an anonymised version of the report to the Board of Auditors.

(9) The report does not constitute an act or decision within the meaning of Article 108(1) ServRegs. This shall in no way prejudice the right of an employee to have recourse to the available means of redress against any decision taken on the basis of the report as provided for in Title VIII of the Service Regulations.

Part VI
Statute of limitation and entry into force

Article 19
Statute of limitation

The investigative unit shall normally decline to initiate an investigative process if, at the time of receipt of the complaint, more than three years have passed since the last alleged incident of misconduct. The investigative unit may derogate from this rule where the circumstances are such that a waiver of the three-year limitation is warranted.

Article 20
Final provisions

(1) This Circular shall enter into force on 1 January 2013.

(2) This Circular shall also apply to the review of any allegations lodged before that date if, at the date of entry into force, no investigator has been assigned to the case.

(3) Complaints which are already being investigated at the date of entry into force shall be treated in accordance with the provisions applicable at the time of filing of the complaint.

41

(4) The implementation of this Circular shall be reviewed regularly, beginning no later than 24 months after its entry into force.

Benoît Battistelli
President