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SUBJECT: Guidelines for Investigations at the EPO (Circular No. 342)

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for information)

SUMMARY

This document is submitted by the staff representatives via the President of the European Patent Office, in accordance with Article 9(2.2)(b) of the Administrative Council's rules of procedure (see CA/D 8/06).

The "Guidelines for Investigations at the EPO" (Circular No. 342) were unilaterally adopted by the President on 30 November 2012 and entered into force on 1 January 2013. These Guidelines have been contentious because they fail to provide a satisfactory framework for safeguarding the fundamental rights of persons subject to investigation.

The application of Circular No. 342 in practice has confirmed fears expressed by staff representatives prior to its introduction. The Circular has been used to transform the EPO into a "police state". The most relevant issues in this regard are summarised in the present document. In particular, it is noted that investigators are immune from any independent external control or oversight and there is no effective means for holding them to account for any irregular or otherwise disproportionate actions involving breaches of internal EPO regulations or national law.

The CSC turns to the Administrative Council as the supervisory body ultimately responsible for the oversight of the European Patent Office and requests the support of the Council in securing an independent external review of Circular No. 342 and its application. The aim of such a review should be to establish recommendations for amendment of the existing "Guidelines for Investigations at the EPO" in order to secure effective protection for the requirements of due process and the fundamental rights of EPO staff and other parties covered by the provisions of said Circular.

TABLE OF CONTENTS

Subject		Page
I.	STRATEGIC/OPERATIONAL	1
II.	RECOMMENDATION	1
III.	MAJORITY NEEDED	1
IV.	CONTEXT	1
V.	ARGUMENTS	2
A.	**BACKGROUND**	2
B.	**LEGAL CHALLENGES TO CIRCULAR NO. 342**	3
C.	**PROBLEMS WITH CIRCULAR NO. 342**	3
	1. Preliminary Observations	*3*
	2. A unilateral and ultra vires enactment of the President	*4*
	3. Legal deficiencies in Circular No. 342	*4*
	4. Organisational deficiencies	*4*
	5. Procedural deficiencies	*5*
D.	**CIRCULAR NO. 342 IN PRACTICE**	7
E.	**CIRCULAR NO. 342 AND HARASSMENT ALLEGATIONS**	9
F.	**SPECIFIC ISSUES RELATED TO THE EPO BOARDS OF APPEAL**	9
G.	**CONCLUSION**	10
VI.	ALTERNATIVES	11
VII.	FINANCIAL IMPLICATIONS	11
VIII.	LEGAL BASIS	11
IX.	DOCUMENTS CITED	11
X.	RECOMMENDATION FOR PUBLICATION	11
LIST OF REFERENCED DOCUMENTS		12

I. STRATEGIC/OPERATIONAL

1. Strategic

II. RECOMMENDATION

2. Not relevant

III. MAJORITY NEEDED

3. Not relevant

IV. CONTEXT

4. The present document is concerned with deficiencies in the "Guidelines for Investigations at the EPO" (Circular No. 342) and the need for an independent legal review in order to ensure effective protection of the requirements of due process and the fundamental rights of EPO staff.

V. ARGUMENTS

A. Background

The "Guidelines for Investigations at the EPO" (Circular No. 342) were unilaterally adopted by the President of the Office on 30 November 2012 and entered into force on 1 January 2013.

Prior to the promulgation of Circular No. 342, the Staff Committee nominees in the competent working group expressed concerns about the emerging proposal in a letter to the President dated 10 October 2012.

The draft proposal was submitted to the General Advisory Committee (GAC) on 30 October 2012 as GAC/DOC 21/2012. The opinion on the proposal from the members of the GAC nominated by the Staff Committee was negative and expressed various concerns to the effect that the proposal failed to ensure that investigations would be conducted in an independent, fair and proportionate manner which would comply with the requirements of due process and safeguard the rights of staff. This opinion was attached as Annex 1 to GAC/AV 21/2012 notified to the President on 7 November 2012.

The concerns of the Staff Committee nominees on the GAC were endorsed in a paper issued by SUEPO on 15 November 2012 (*"Investigation Guidelines = EPO becoming a Police State"*). In this paper, it was noted that attempts by the staff representation to clarify definitions and to provide safeguards for staff rights and to ensure the independence and impartiality of the process, had so far failed. It was noted that if the President continued with the implementation of the Guidelines as they stood he risked bringing an unnecessary end to social peace within the EPO.

According to SUEPO, it was of paramount importance that any investigation guidelines for the EPO were defined in a manner that:

- Provided adequate safeguards for the independence and impartiality of the process;
- Clearly defined the rights of staff in a manner consistent with the laws of the host states;
- Provided procedural rules and safeguards to protect staff rights and ensure impartiality and fairness in the implementation of the process;
- The burden of proof was on the EPO to demonstrate clearly that the staff member was guilty of misconduct;
- It was also necessary to clarify the meaning of "misconduct" in a manner which was fair and clear to staff and which prevented an arbitrary interpretation on a case by case basis.

SUEPO took the view that the proposal of the President submitted to the GAC did not meet these requirements. In particular, concern was expressed that the proposed Investigation Guidelines as they stood could be misused to target individuals and be instrumentalised to attack staff members perceived as "under-performers".

Despite the negative opinion expressed by the Staff Committee nominees on the GAC, the proposal was signed off by the President on 30 November 2012 following a number of minor amendments of an essentially technical and/or editorial nature.

Following the adoption of Circular No. 342 by the President, the Central Staff Committee (CSC) submitted the document CA/33/13 dated 12 March 2013 to the Administrative Council via the President of the European Patent Office in accordance with Article 9(2.2)(b) of the Council's rules of procedure.

In this document, the CSC drew the attention of the Council to various contentious issues relating to Circular No. 342. It was noted *inter alia* that the Investigative Guidelines gave excessive powers to the President of the EPO and to the Investigation Unit and failed to provide staff with basic protection against self-incrimination, incrimination of family members and violation of private property, including the home. The CSC requested an independent legal evaluation of Circular No. 342 and the related Circular No. 341 to determine whether their provisions were in compliance with international human rights conventions, and whether they afforded EPO staff a level of protection equivalent to that provided in the EPO contracting states against arbitrary interference with privacy, family, home and correspondence.

In February 2014, in a document entitled "Governance of the EPO" the CSC addressed the Administrative Council as the supervisory body of the EPO and requested support for re-establishing a proper balance in the Organisation's governance and for restoring a better working environment within the Office. In this document, the CSC once again attempted to draw the attention of the Council to its concerns relating to Circular No. 342. The CSC requested that the document be submitted to the Council in accordance with Article 9(2.2)(b) of the its rules of procedure. However, the President declined to submit the document to the Council.

B. Legal challenges to Circular No. 342

Circular No. 342 and the related Circular No. 341 were the subject of numerous Requests for Review pursuant to Article 109 of the EPO Service Regulations. These Requests for Review were rejected by a decision of the President dated 8 April 2013 which included a legal opinion purporting to address various concerns which had been raised in relation to the impugned Circulars.

Thereafter internal appeals were filed but, at the time of writing, these appeal cases remain undecided.

In the meantime, at least one Complaint in which the lawfulness of Circular No. 342 is challenged is pending before the ILOAT.

C. Problems with Circular No. 342

1. Preliminary Observations

In the context of the European Patent Organisation, the European Patent Convention (EPC) has the status of "primary law". The "Service Regulations for permanent employees of the European Patent Office" (known as the" or "*Codex*" or "*Beamtenstatut"*) constitutes a body of "secondary law" adopted by the governing body of the Organisation, i.e. the Administrative Council.

The competence to adopt and to amend the Service Regulations is vested solely and exclusively in the Council under Article 33(2)(b) EPC. The President is merely empowered to take all necessary steps to ensure the functioning of the EPO, including the adoption of internal administrative instructions and information to the

public (see Article 10(2)(a) EPC).

A “Circular” is a non-legislative instrument of general application which is intended to provide implementing rules for a specific hierarchically superior provision or provisions of the Service Regulations. Under normal circumstances, a “Circular” is promulgated by the Office Administration following the adoption of a corresponding amendment to the Service Regulations by the Administrative Council.

Following the applicable hierarchy of norms, the EPC prevails over the Service Regulations which, in turn, take precedence over Circulars and similar documents.

In the event that the President intends to introduce, change or amend regulations that lie within the legislative competence of the Council, he has to submit a proposal to the Council. He is not competent to introduce such regulations of his own motion without the prior approval of the Council.

2. A unilateral and **ultra vires** *enactment of the President*

Circular No. 342 does not provide implementing rules for any hierarchically superior provision or provisions of the Service Regulations. Despite being promulgated in the form of a “Circular”, it is effectively an autonomous and parallel regulation which insofar as it possesses the character of a juridically superior legal norm (i.e. equivalent to the provisions of “secondary law” as defined above) constitutes a *de facto* amendment of the Service Regulations.

In view of the fact that Circular 342 was never subject to scrutiny and approval by the Council pursuant to Article 33(2)(b) EPC but was unilaterally promulgated by the President, it must be regarded as a unilateral and *ultra vires* act of the President which has no satisfactory legal basis in the EPC or the ServRegs.

3. Legal deficiencies in Circular No. 342

Circular No. 342 fails to provide adequate safeguards to ensure the independence and impartiality of the investigative process. It also fails to clearly define the rights of staff in a manner consistent with the laws of the host states. The deficiencies in Circular No. 342 are considered here under two main aspects: organisational and procedural.

4. Organisational deficiencies

The investigative unit is directly and wholly subordinate to the President and thus lacks the organisational independence which would be necessary to ensure the independence and impartiality of the investigative procedure.

The investigative unit forms part of the Principal Directorate Internal Audit and Oversight (PDIAO) and its lack of organisational independence is evident from item IV.5 of the EPO Charter for Internal Audit and Oversight which reads as follows:
*"PDIAO's work shall be carried out **on the President’s behalf** (or on behalf of the Supervisory Board of the Funds). **The Head of PDIAO shall report administratively to the President, be directly subordinate to him alone and be answerable to him for disciplinary purposes.**"* (emphasis added)

The appointment and dismissal of the Head of PDIAO (PD 0.6) is completely and solely under the discretion of the President which is yet another factor indicative of the inherent lack of independence of this unit and its complete subordination to the

President.

On this basis it is apparent that existing institutional arrangements are insufficient to ensure the independence and impartiality of the investigative process and involve conflicts of interest which have the potential to prejudice the outcome and/or undermine the impartiality and integrity of any investigation.

5. Procedural deficiencies

- Circular No. 342 foresees two triggers for the investigative process:

  a) an allegation of misconduct (Art. 9(2)), or

  b) a request by the President (Art. 9(3)).

  With respect to allegations of "misconduct", the Guidelines make no distinction between matters which should properly fall within the remit of the line manager (i.e. related to conduct at work), and other types of misconduct such as harassment or criminal matters (e.g. fraud) which would normally come under the remit of the Personnel Department or external agencies such as the police. The absence of any such distinction implies that all possible types of "misconduct" are now to be reported and dealt with centrally by Internal Audit, which, as noted above, operates directly and exclusively under the authority of the President without any other external oversight.

- According to Arts. 10 and 11, allegations of misconduct are subject to initial review and preliminary evaluation before an investigative process is started. This is not the case for requests by the President which do not require a suspicion of misconduct or any other justification. There is nothing in the Guidelines to prevent the President from investigating whomever he wants for whatever reason he may choose and without any obligation to inform the subject of the investigation.

- Circular No. 342 does not recognise the right to remain silent. On the contrary: according to Art. 8(1) *"All persons covered by ... this Circular shall be obliged to co-operate fully with the investigative unit"*. According to Art. 8(3), *"failure to co-operate without legal justification"* may constitute misconduct and hence expose the person concerned to disciplinary proceedings. Neither the Service Regulations nor the Guidelines provide any legal basis for non-co-operation: the duty to co-operate thus seems absolute and there are no guidelines to clarify what might be considered legitimate grounds for non-cooperation.

- According to Art. 17(6), the subject of an investigation does not have the right of legal assistance of his or her own choosing (e.g. from outside the office) during hearings. This is in contradiction to Article 6, paragraph 3(c), of the ECHR.

- Circular No. 342 foresees the search and seizure of all data and materials owned by the Office or present on its premises. There is no effective protection against access to private material (e.g. personal mobile phones) or confidential information (e.g. medical file, appeals procedures) other than, in some specific cases, a requirement for prior authorisation of the Data Protection Office which can be dispensed with if this would risk to "jeopardise the investigation". Aggravating is also that the role of the Data Protection is only of a consultative and advisory nature (cf. Art. 19 EPO DPG) and that he or she is subordinate of the President.

- Circular No. 342 expressly foresees access to evidence located outside the Office premises (Art. 16(9)). It is stipulated that for this the investigate unit *"must abide by all the applicable provisions of local law or* [sic !] *obtain prior written permission from the individual concerned"*. In view of the duty to co-operate fully (see above), it would seem that such written permission cannot be refused without exposing the subject of the investigation to the risk of further allegations due to a purported "failure to co-operate". Hence it would seem that Circular No. 342 effectively accords EPO investigators the ability to seize and search private property located outside of the Office premises without regard of national law, i.e. by effectively coercing the subject of the investigation to give his or her "permission" for such actions.
- The results of the investigation form the basis for further decisions ultimately taken by appointing authority, which in most cases will be the President. If the investigative unit concludes that allegations of fraud, misconduct or harassment are "substantiated", this could lead to disciplinary proceedings and ultimately dismissal. According to Art. 18(4)(ii), the investigative unit will base its conclusions "on a preponderance of the evidence", i.e. a merely greater than 50% likelihood that fraud, misconduct or harassment has occurred. This is an unacceptably low standard of proof given the potentially serious consequences.
- According to Article 18(7) "the subject of an investigation shall receive a copy of the report if and when, on the basis of the report, disciplinary proceedings are initiated", meaning that an investigative report on a person may exist without his or her knowledge of the contents. Such a lack of transparency would not seem acceptable in any contracting state.
- Another major deficiency in Circular No. 342 is the lack of any effective means of redress in the case of unlawful, abusive or otherwise disproportionate actions on the part of the investigative unit. According to Art. 18(9) Circ. 342, the report does not constitute an act or decision within the meaning of Article 108(1) ServRegs and thus cannot be independently appealed. Under this provision, the redress available to a staff member adversely affected by the actions of the investigative unit is limited to the means of redress against any decision taken on the basis of the report. This results in a situation in which the investigators can act with impunity during the investigative process as they are effectively immune from any independent external control or oversight.

In CA/33/13, the Central Staff Committee (CSC) expressed doubts as to whether Circular No. 342 is in accordance with Art. 12 of the Universal Declaration of Human Rights, according to which: *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

The CSC requested the Administrative Council to commission an independent legal evaluation of Circulars 341 and 342 in order to answer the following questions:

> *(a) are Circulars 341 and 342 in compliance with international human rights conventions, and*
>
> *(b) do Circulars 341 and 342 afford staff of the EPO a level of protection against arbitrary interference with his or her privacy, family, home or correspondence that is equivalent to that provided in the EPO Member States?*

To date the requested independent legal evaluation has not taken place.

D. Circular No. 342 in practice

The application of Circular No. 342 in practice has confirmed the worst fears expressed by staff representatives and SUEPO prior to its introduction. Following its entry into effect, the Circular has effectively been used to transform the EPO into a "police state". The most relevant issues in this regard are summarised below.

- The criteria for determining what would constitute misconduct at the preliminary investigation phase seem very low - at least for the "politically-motivated" cases (i.e. those designed to target staff representatives and other perceived critics of the Office Administration).
- The hearing of the accused person typically takes place towards the end of the investigation, often after a significant number of witnesses have been heard and hundreds of pages of material have been accumulated. Finding the accused person innocent at this stage would mean these efforts have been wasted. In other words, the procedure is conducted in a manner which encourages the investigative unit to find the "subject" guilty.
- The interview with the "subject" is not conducted as a neutral and impartial "fact-finding" exercise in which the presumption of innocence is respected contrary to Art. 6 Circ 342. In practice, a presumption of guilt appears to prevail and the interview is typically conducted in the manner of an aggressive interrogation with the aim of coming to a confession. It seems that the investigators are trained in and employ the "Reid technique", (see Wikipedia: Reid interrogation technique).
- The accused person is typically informed in a vague and imprecise manner of the original allegations, contrary to Art. 15(1) Circ. 342. The identity of the accuser is not necessarily disclosed. This renders it difficult if not impossible to prepare for an "interview" and thus impairs the right to defence recognised in Art. 6(2) Circ 342. Conducting an investigation in this manner is contrary to the principles of due process as established in ILOAT jurisprudence (cf. Judgments Nos. 3200, …….).
- If the original allegations are weak, the interview seems to serve as a "fishing expedition" to find further material which can be used as a basis for raising fresh charges against the subject. It is not uncommon to find additional allegations being incrementally added to the charge sheet as the investigation progresses.
- Any refusal to comply with the instructions of the investigators, even in cases where these instructions lack an identifiable legal basis or are otherwise disproportionate, is considered to constitute "non-cooperation" which is subsequently deemed to merit additional disciplinary action.

Apart from the foregoing, it is noted that the provisions of Circular No. 342 appear to be used on a regular basis to circumvent or usurp higher-ranking provisions of the ServRegs and/or to override the provisions of the Data Protection Guidelines (DPG).

This is particularly clear in relation to medical issues, where the investigative unit takes the position that it does not recognise medical certificates issued by external medical practitioners but only the opinion of medical practitioners acting on behalf of the EPO.

In relation to the Data Protection Guidelines, it is noted that these contain a series of

derogations applicable to "investigative processes" which can be invoked to negate the rights which the data subject would normally enjoy. Article 14 DPG (*"Rights of the data subject"*) explicitly accords precedence to Circular No. 342, stating in par. (8) that *"[w]here the provisions of this Article conflict with the provisions for internal investigative processes, the provisions on internal investigative processes shall prevail"*.

Data subjects whose rights are infringed by the actions of the investigative unit do not appear to have any effective means of redress. In one recent case, the Data Protection Officer declined to investigate a complaint alleging breaches of internal data protection guidelines and German criminal law and simply referred the matter to the Disciplinary Committee that, in turn, failed to deal with the issues which had been raised in an appropriate manner.

Communication involving staff representatives (e.g. emails) have been analysed by the investigation unit. This destroys the trust relationship between staff and their representation and is contrary to the role of the staff committee members (Article 34 SR). Staff represntatives are hampered to act in the interest of staff, when communication between staff and staff representatives is accessible to investigators. Any access, analysis or use of information involving staff committee members need additional safeguards and authorisation by an independent body.

As already noted above, the investigators can act with impunity during the investigative process as they are immune from any independent external control or oversight and there is no effective means for holding them to account for any irregular or otherwise disproportionate actions involving breaches of internal EPO regulations or national law.

Circular No. 342 presents the investigative procedure as an impartial and objective "administrative fact-finding" exercise. The application of the Circular in practice tells another story.

The "interview" is typically an aggressive interrogation with the aim of obtaining a confession, which then will then be used to "construct" a case against the accused person and subsequently invoked as "evidence" in the later disciplinary procedure. Far from being a neutral and objective presentation of facts, the report of the investigative unit is typically a highly subjective and biased narrative which contains a pre-judgment of the matter according to which the subject is pronounced "guilty" in advance of any disciplinary proceedings.

The overall impression is that rather than being used in an objective and impartial manner to investigate concrete incidents of alleged "misconduct", Circular 342 is being employed in a selective and politically biased manner as an instrument for targeting individuals who for whatever reason are perceived by the Office Administration as being "inconvenient". In this context, the investigative process appears to be used as pretext in order to discover as much material and "construct" as many charges as possible in order to justify disciplinary action against such persons. This is apparent from the manner in which the investigative unit typically adds allegations to the "charge sheet" in an incremental manner during the investigation.

The manner in which Circular No. 342 has been used by the Office Administration to date, in particular to circumvent or usurp higher-ranking provisions of the ServRegs and/or to override the provisions of the Data Protection Guidelines (DPG), suggests that it is an instrument which has been deliberately designed and deployed to facilitate the concentration of power in the hands of the President and his "inner circle" with an apparently flagrant disregard for prerequisites of due process and the rule of law.

E. Circular No. 342 and harassment allegations

Circular No. 341 (Part. II, Art. 2(2)) foresees that "*A single incident can constitute harassment if it is so severe that it has a negative impact on the overall working environment.*" This has turned out to be a very convenient basis for raising accusations of harassment in politically-motivated cases targeting staff representatives.

From the "2013 Activity Report" issued by the investigative unit, it would appear that following the introduction of Circulars No. 341 and 342, there are no longer any cases of harassment in the EPO, other than by staff representatives (item 22). This is a clear indication that Circular 342 is not being employed to carry out impartial and objective investigations into alleged misconduct, but is being used by the Office Administration in a selective and politically biased manner as an instrument for targeting individuals who for whatever reason are perceived as being "inconvenient".

F. Specific issues related to the EPO Boards of Appeal

Under the terms of Circular No. 342, the President is empowered to unilaterally order investigations against senior employees appointed under Article 11(2) and (3) EPC, i.e. Vice-Presidents and Members of the Boards of Appeal, without any prior requirement to inform or to request the approval of the competent appointing authority (i.e. the Administrative Council). There is no indication that the power purportedly accorded to the President in this respect was lawfully delegated to him by the Council. In fact, it would appear that he unilaterally arrogated it to himself in an *ultra vires* manner.

A Petition dated 21 November 2013 was submitted to the Administrative Council by the Association of the Members of the Boards of Appeal (AMBA) in advance of the Council's December 2013 meeting. In this Petition, AMBA drew the Council's attention to *"new personnel regulations recently coming into force or proposed by the President [which] potentially interfere with the independent decision making by the board members"*. According to AMBA these measures provided "further ammunition" for legal challenges to the independence of the Boards of Appeal and were such as to generally undermine the public's confidence in the independent functioning of the Boards.

The Petition presented a number of specific objections to Circular No. 342 noting *inter alia* that the EPC restricted the exercise of disciplinary authority over Board members solely to the Administrative Council (Article 11(4) EPC) whereas the Investigation Guidelines implemented by the President put the full control of all activities of the newly created investigative unit exclusively into the hands of the President. There was no requirement to inform either the Administrative Council, the Chairman of the Enlarged Board of Appeal or the Presidium of the Boards of an investigation against

a Board member which would inevitably affect the functioning of the Boards.

AMBA further noted that it had submitted its views on these points to the GAC but with no perceivable result. The Petition concluded with a request to the Administrative Council to ensure that, in order to maintain the judicial independence of the Boards of Appeal, the investigative unit operating under the "Guidelines for Investigations" might not undertake any investigation actions against members of the Boards of Appeal.

Following the imposition of a "house ban" on a member of the Boards of Appeal by the President on 3 December 2014 relying on Circular No. 342 as the purported legal basis, the Enlarged Board of Appeal (EBA) addressed a letter of complaint to the Administrative Council on 8 December 2014 which *inter alia* raised concerns about the application of Circular No. 342 to members of the Boards of Appeal. This letter of complaint was supported by a number of external members of the EBA who are members of the national judiciaries of the EPO contracting states.

A further development in this regard has been the adoption of decision CA/D 18/15 by the Administrative Council during its December 2015 meeting. This decision amended Article 95(3) ServRegs to allow appointees of the Administrative Council (i.e. members of the Boards of Appeal) to be suspended on reduced pay for periods of up to 24 months (or even longer in "exceptional cases"). Such a suspension could be ordered in the context of an investigation initiated by the President without requiring any consultation with or approval of the Enlarged Board of Appeal.

The aforementioned amendment to Article 95(3) ServRegs thus permits the Administrative Council acting on its own motion or in concert with the President to suspend a member of the Boards of Appeal indefinitely.

Hence, CA/D 18/15 when considered in combination with Circular 342 appear to create a situation in which the already fragile independence of the Boards of Appeal has been completely undermined.

G. Conclusion

In CA/33/13, the Central Staff Committee (CSC) requested the Council to commission an independent legal evaluation of Circular No. 342 to determine whether its provisions were in compliance with international human rights conventions, and whether they afforded EPO staff a level of protection equivalent to that provided in the EPO contracting states against arbitrary interference with privacy, family, home and correspondence. To date the requested independent legal evaluation has not taken place.

In view of the lack of progress made in this regard, the Central Staff Committee turns to the Administrative Council as the supervisory body ultimately responsible for the oversight of the European Patent Office and once again requests the support of the Council in securing an independent external review of Circular No. 342.

The aim of such a review should be to establish recommendations for amendment of the existing "Guidelines for Investigations at the EPO", in particular to ensure that the requirements of due process and the fundamental rights of staff are respected and accorded effective protection.

VI. ALTERNATIVES

5. Not relevant

VII. FINANCIAL IMPLICATIONS

6. Not relevant

VIII. LEGAL BASIS

7. Not relevant

IX. DOCUMENTS CITED

8. None

X. RECOMMENDATION FOR PUBLICATION

9. Yes.

LIST OF REFERENCED DOCUMENTS

- Circular No. 342
- EPO Charter for Internal Audit and Oversight
- Letter from the CSC to the President dated 10 October 2012.
- GAC opinion dated 7 November 2012
- SUEPO paper of 15 November 2012:
  “Investigation Guidelines = EPO becoming a Police State” (su12112mpe)
- CA/33/13 dated 12 March 2013
- CSC draft entitled "Governance of the EPO" (CA/xxx/14) dated 12 February 2014
- Decision of the President dated 8 April 2013 rejecting the Request for Review against Circulars 342 and/or 341
- Investigative unit "2013 Activity Report"
- AMBA Petition 21 November 2013
- EBA letter of 8 December 2014 and accompanying letters of support from external EBA members (national judges)
- CA/D 18/15