



# Promoting Integrity as an Integral Dimension of Excellence in Research

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## Fair procedures

### DOCUMENT DESCRIPTION

<b>Deliverable Number</b>	III.10
<b>Work Package</b>	WP III
<b>Task</b>	T III.10 [originally T III.7]
<b>Type</b>	Report
<b>Version</b>	1.1
<b>Number of Pages</b>	48
<b>Due Date of Deliverable</b>	Month 24, 31/08/2017
<b>Actual Submission Date</b>	Month 33, 03/05/2018
<b>Dissemination Level</b>	Public
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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 665926.

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## Introduction

This report relates to the empirical work conducted under the *Promoting Integrity as an Integral Dimension of Excellence in Research* (PRINTEGER) research project on research integrity and scientific misconduct.<sup>1</sup> It briefly presents the general requirements of fairness in procedures (Section 1), introduces the variety of structures in place for the follow-up of allegations of misconduct (Section 2), and reviews the specific requirements for the fairness of the procedures to follow up allegations of misconduct as derived from existing codes and legislation on research integrity, taking also into account insights from the practical adjudication of cases and relevant policy and legislative documents (Section 3). This report complements and builds upon the analysis of normative instruments presented in PRINTEGER Deliverable DIII.4, and aims to inform both training materials and policy recommendations prepared in the PRINTEGER project.

The corpus of instruments studied for the analysis of fair procedures is determined by the framing of the project, which privileges, but is not limited to, the geographical scope of the project's consortium.<sup>2</sup> The instruments studied have been reviewed and discussed by focusing on some of the generic features or requirements that relate to the notion of fairness, rather than on mapping or comparing the different regulatory or institutional approaches they mirror. These institutional approaches can be very diverse, as some European countries have central authorities dealing with research integrity or research misconduct, while others do not, and those who count on central authorities can still attribute them different roles.

As mentioned, the analysis presented has taken into account, mainly for the purposes of illustrating recurring problems and challenges, available information on the practice of procedures. It must be noted nonetheless that, as elegantly noted in a progress report on the situation in the United Kingdom (UK), *'[d]ata and information on allegations of misconduct remain imperfect'*, not only in said Member State, but generally in Europe.<sup>3</sup>

A terminological warning must be made explicit upfront. The variety of documents reviewed, generally integrated into different normative systems and originally elaborated in different European languages, inevitably conveys certain apparent terminological inconsistencies. For instance, whereas some documents refer to the individual putting forward allegations of misconduct as the 'reporter', others will prefer the 'informant', and still others (taking the perspective of the investigation procedure) use rather the 'accuser', or the 'complainant'. Although these terms are technically not fully equivalent, they will be used in the context of this report as potentially referring to the same person. Similarly, the individual to whom allegations refer might be referred to as the 'accused', but also, depending on the circumstances, the 'petitioner' (in case for instance of having requested

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<sup>1</sup> More information about PRINTEGER can be found at the project's website: <https://printeger.eu/>.

<sup>2</sup> Mainly composed of partners from Member States of the European Union, but also of non-Member States.

<sup>3</sup> Universities UK, 'The Concordat to Support Research Integrity: A Progress Report' (London, November 2016), 38.



an external opinion). Also, for the sake of simplicity, in this report the procedures discussed will generally be designated 'procedures for the follow-up of allegations of scientific misconduct', even if in practice the procedures at stake might refer to other notions such as breaches or violations of research integrity or good practice.

## 1. General requirements of fairness in procedures

The term 'fair procedures' is used in the present report to refer to policies or systems in place to deal with allegations of scientific misconduct, and more concretely to a design of such policies and systems that would meet basic requirements for the protection of the rights and interests of all parties involved. The parties involved can be individual researchers, but also institutions or other actors.

Procedures applicable to the follow-up of allegations of scientific misconduct must be in line with legal requirements applicable to the setting in which they emerge, but also, more generally, general legal requirements, and most notably fundamental rights requirements.

From a European Union (EU) law perspective, this indeed requires taking into account the standards established by the Charter of Fundamental Rights of the EU and the European Convention on Human Rights.

### 1.1 ECHR and case law of the ECtHR

Article 6 of the **European Convention on Human Rights (ECHR)** recognises the right to a fair trial, setting out a series of guarantees for individuals in the determination of their civil rights and obligations, or of any criminal charge against them. The scope of application of these guarantees is delimited by the notion of 'the determination of their civil rights and obligations or of any criminal charge against them', but this notion cannot be interpreted in a restrictive manner, in accordance with the object and purpose of the Convention.<sup>4</sup> The guarantees encompassed by Article 6 of the ECHR are: the right of access to a court;<sup>5</sup> the right to a fair hearing (notably including, as general rule, the right to a hearing in one's presence, the right to participate effectively, the principle of equality of

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<sup>4</sup> Noting that to some extent rights and obligations arising out of employment in the public service are excluded from Article 6, but that the extent of this exemption is increasingly limited: David Harris et al., *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2014), 386.

<sup>5</sup> In the context of administrative decisions, when decisions determining rights and obligations of individuals might be taken by the executive or some other body that is not a tribunal, Art. 6 of the ECHR requires the possibility of judicial review (or, in some cases, an appeal on the merits), by a body that complies with Art. 6; Harris et al., 392.



arms, the right to an adversarial trial, some rules for evidence, the right to have one's case properly examined, the right to a reasoned judgment, the principle of legal certainty); the right to a public hearing and the public pronouncement of a judgment; and the right to an independent and impartial tribunal established by law.

In some cases, Article 5 of the ECHR might also be relevant, on the right to liberty and security of the person, as well as Article 7, on freedom from retroactive criminal offences and punishment. Insofar as an alleged misconduct, or the very accusation of misconduct, might amount to a violation of a right to the ECHR, Article 13 also becomes relevant, as it establishes that everyone whose rights and freedoms as set forth in the ECHR are violated *'shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'*. Furthermore, all other ECHR provisions remain potentially relevant; in practice, Article 10 on the right to freedom of expression, and Article 8 on the right to respect for private life, come often into play.

An interesting judgment published by the ECtHR in 2009 concerned precisely a violation of both Article 6 (right to fair trial) and Article 10 (freedom of expression) of the ECHR.<sup>6</sup> The case was about M. Luigi Lombardi Vallauri, who taught philosophy of law at the Faculty of Law of the Università Cattolica del Sacro Cuore, in Milan, in addition to teaching also at the University in his native Florence.<sup>7</sup> In Milan, he did not have a permanent contract, but temporary contracts which were regularly renewed during a period of twenty years.<sup>8</sup> In 1998, Lombardi Vallauri had decided to apply for an open position at the university in Milan, and in this context had an informal discussion with a representative of the Congregation for Catholic Education, a body of the Holy See.<sup>9</sup> The representative concluded that the opinions of Lombardi Vallauri were not compatible with catholic doctrine, and made him an unsuited candidate to teach at the Università Cattolica del Sacro Cuore. In a letter, he alerted the Dean, informing him of the refusal of the Congregation to support Lombardi Vallauri's application. This decision was discussed at a meeting of the Council of the Faculty of Law, which concluded that it was therefore impossible to propose another contract to the applicant. During the meeting, there were emotional tributes paid to him by his colleagues, some of which expressed Lombardi Vallauri was one of the brightest teachers ever met, and a man of great cultural and human openness. There were also technical discussions about whether it was possible to formally

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<sup>6</sup> Judgment of the Court (Second Section) of the 20 October 2009, *Case of Lombardi Vallauri v. Italy*, ECLI:CE:ECHR:2009:1020JUD003912805.

<sup>7</sup> *Vallauri*, § 5.

<sup>8</sup> The implications of this fact were discussed in the judgment, with the ECtHR taking the position that, despite the formal precarity of the situation, the regular renewal of contracts meant that the applicant had a solid professional position granting him equivalent protection as regards to Article 10 of the ECHR as the one granted to professors with permanent contracts (§ 38). A Dissenting Opinion of Judge Cabral Barreto contested this assessment.

<sup>9</sup> *Ibid.*, § 8.



require a justification by the Congregation of the reasons beyond its decision; the professors considering it was not legally possible eventually won a vote on this matter.<sup>10</sup>

Lombardi Vallauri appealed before an administrative court, requiring the annulment of the decision of the Council of the Faculty of Law, and of the decision of the Congregation.<sup>11</sup> As the administrative court confirmed the validity of the decisions, he decided to take the case to the ECtHR. In its judgment, the Strasbourg Court noted that the university could have a legitimate interest in offering teaching inspired in catholic doctrine, but that such interest could not be given a weight that would override the procedural guarantees inherent to Article 10 of the ECHR, on freedom of expression.<sup>12</sup> In this context, the Court observed the Council of the Faculty had not informed the applicant about how his allegedly heterodoxal opinions impacted his teaching, which is something that had actually not been evaluated.<sup>13</sup> As a matter of fact, the applicant was never informed about the exact content of his presumably problematic opinions, which affected his right to contradict the assessment at the core of the decisions, and this despite the fact that during the Council of the Faculty some professors had insisted on the need to know the grounds justifying the Congregation's refusal.<sup>14</sup> The ECtHR thus concluded there had been an unjustified violation of Article 10 of the ECHR. Remarking that the domestic courts had not duly examined these issues, the Court also determined the applicant had not had effective access to a court, and there had also been a violation of Article 6 of the ECHR.<sup>15</sup>

Articles 6, 8 and 10 of the ECHR can be regarded as deeply interconnected. In a judgment concerning a scientist who claimed the three had been violated, the European Court of Human Rights found there had indeed been a violation of Article 10, and then on this basis asserted no separate issues arised under Article 6 or Article 8.<sup>16</sup> The case concerned Mr Hertel, author of a thesis submitted to the Zürich Institute of Veterinary Sciences.<sup>17</sup> Hertel had written a research paper based on a study of the effects on human beings of the consumption of food prepared in microwave ovens, which concluded that the measurable effects on human beings of food treated with microwaves included changes in the blood which appeared to indicate the initial stage of a pathological process such as occurs at the start of a cancerous condition.<sup>18</sup> In 1992, a quarterly journal in which his work was mentioned featured on the cover a picture of the Reaper with a microwave oven, with the title '*The danger of microwaves: scientific proof*'.<sup>19</sup> The Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances reacted by requesting to the courts the prohibition of associating any image that would suggest the idea of death with a

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<sup>10</sup> Ibid., § 8.

<sup>11</sup> Ibid., § 12.

<sup>12</sup> Ibid., § 55.

<sup>13</sup> Ibid., § 47.

<sup>14</sup> Ibid., § 53.

<sup>15</sup> Ibid., § 72.

<sup>16</sup> Judgment of the Court (Chamber) of 25 August 1998, *Case of Hertel v. Switzerland*, ECLI:CE:ECHR:1998:0825JUD002518194.

<sup>17</sup> *Hertel*, § 7.

<sup>18</sup> Ibid., § 8.

<sup>19</sup> Ibid., § 9.



representation of a microwave oven,<sup>20</sup> and lodged an application targeting specifically the activities of the applicant.<sup>21</sup> This eventually resulted in a ban imposed on Hertel by the Swiss courts, on pain of criminal sanctions (potentially including imprisonment), from stating that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it, indicating a pathological disorder and presenting a pattern that could be seen as the beginning of a carcinogenic process, and from using, in publications and public speeches on microwave ovens, the image of death.<sup>22</sup>

The ECtHR concluded such measure, although allegedly pursuing legitimate interests (more concretely, the rights of others, and the prevention of economic disorder),<sup>23</sup> could not be regarded as proportionate to the aim pursued, and constituted therefore a violation of Article 10 of the ECHR.<sup>24</sup> The Court based such assessment on the observation that the applicant had merely sent a copy of his research paper to the editors of the quarterly, and not taken part in other editorial decisions.<sup>25</sup> Thus, there was a disparity between the measure at stake and the behaviour it was intended to rectify.<sup>26</sup>

## 1.2 EU Charter of Fundamental Rights

In the **Charter of Fundamental Rights of the EU**, a key provision is Article 47, on the right to an effective remedy and to a fair trial. Article 47 establishes indeed that everyone whose rights and freedoms guaranteed by EU law are violated '*has the right to an effective remedy before a tribunal*', is '*entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*' and '*shall have the possibility of being advised, defended and represented*'. The requirement imposed by Article 47 on right to an effective remedy before a tribunal is more extensive than the requirement under Article 13 of the ECHR, which merely requires remedy before a national authority. Similarly, under Article 47 of the Charter the right to a fair hearing is not confined to disputes relating to the determination of criminal and civil rights and obligations, as under Article 6(1) of the ECHR.

Other relevant EU Charter provisions include Article 48, on the presumption of innocence and right of defence; Article 49, on principles of legality and proportionality of criminal offences and penalties, and Article 50, on the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Additionally, the Charter of Fundamental Rights of the EU enshrines in Article 41 a right to good administration, which, even if only applicable as such to administration by EU

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<sup>20</sup> Ibid., § 16.

<sup>21</sup> Ibid., § 20.

<sup>22</sup> Ibid., § 31.

<sup>23</sup> Ibid., § 40.

<sup>24</sup> Ibid., § 51.

<sup>25</sup> Ibid., § 48.

<sup>26</sup> Ibid., § 50.





institutions, bodies, offices and agencies, includes useful guidance on what is to be regarded as procedural fairness under EU law. Article 41(1) foresees indeed that *'[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time'*, and Article 41(2) specifies that such right includes:

*'(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*

*(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*

*(c) the obligation of the administration to give reasons for its decisions'.*

It can be argued that researchers are only rarely criminally charged for scientific misconduct.<sup>27</sup> Fundamental rights requirements, nonetheless, also apply in non-criminal procedures and beyond the imposition of punitive sanctions – notably those derived from Articles 6 and 13 of the ECHR, and from Articles 41 and 47 of the EU Charter of Fundamental Rights.

More generally, it is worthwhile recalling once more that the fairness of procedures is only one of the dimensions to be taken into account when regulating procedures for the follow-up of allegations of scientific misconduct. Other important principles include, for instance, academic freedom.<sup>28</sup>

## 2. A variety of structures

To better understand the way in which procedures for the follow-up of allegations of misconduct operate in practice, as well as the challenges related to guaranteeing their fairness, it is useful to briefly consider the current diversity of approaches to research integrity frameworks in Europe.<sup>29</sup> The structure in place in each framework has indeed significant implications for the established procedures, and for the way in which they are defined.

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<sup>27</sup> Amongst the most publicised cases stand out for instance the convictions of the Australian researchers Caroline Barwood and Bruce Murdoch; see, for instance, on this case: *"Brazen" UQ Research Fraudster Caroline Barwood given Suspended Sentence*, *ABC News*, 25 October 2016, <http://www.abc.net.au/news/2016-10-25/uq-dr-caroline-barwood-avoids-jail-on-fraud-charges/7963178>; *Former University of Queensland Professor Bruce Murdoch Charged over Alleged Fake Parkinson's Research*, *ABC News*, 30 June 2015, <http://www.abc.net.au/news/2014-12-12/university-of-queensland-professor-on-fraud-charges/5964476>.

<sup>28</sup> On academic freedom, see Section 1.1. of PRINTEGER Deliverable III.4.

<sup>29</sup> On this subject, see also: Göran Collste, *'Principles and Approaches in Ethics Assessment: Research Integrity'* (Stakeholders Acting Together on the Ethical Impact Assessment of Research and Innovation (SATORI), June 2015), 8.



In general, a shared principle is that at least some procedures must be in place in all institutions involved in research or research support (or at least in organisations conducting research), which are thus expected to have their own, institutional procedures – if not for all, for some cases of misconduct or breaches of research integrity.

In some European countries, nevertheless, there are additionally central or regional bodies, with diverse competences and degrees of independence from research organisations and from other authorities, which exercise external functions such as providing guidance, reviewing decisions taken at the first institutional level, or dealing directly with some investigations and taking decisions.<sup>30</sup> These bodies might be alerted systematically or only on a case by case basis by other institutions dealing with allegations of misconduct. When these ‘external’ bodies exist, they shall also have their own procedures.

Some notable examples of ‘external’ bodies dealing with research integrity are:

- In Finland, the **Advisory Board on Research Integrity** (*Tutkimuseettinen neuvottelukunta*, TENK)<sup>31</sup> (1991), appointed by the Ministry of Education and Culture. The TENK provides statements regarding decisions made by institutions (including decisions not to initiate inquiries), following requests introduced by interested parties. The TENK does not intervene when there are violations of the norms of a specific academic discipline, unless they constitute a fraud as described in the **Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland**;<sup>32</sup> it does not address alleged violations of the law, such as copyright law or patent law; and does not comment on matters of opinion, on schools of thought, or on issues of professional ethics.<sup>33</sup>
- In Austria, the **Austrian Agency for Research Integrity** (*Österreichische Agentur für wissenschaftliche Integrität*, OeAWI)<sup>34</sup> (2008), responsible for investigating alleged cases of scientific misconduct in Austria, evaluating the severity of violations, and proposing consequential measures to institutions. The investigation of cases and the evaluation of violations are assigned to a Commission for Research Integrity, an independent body composed of non-Austrian scholars.
- In the UK, although there is no overall statutory regulation of research integrity or scientific misconduct, there is the **UK Research Integrity Office** (UKRIO)<sup>35</sup> (2006), an independent charity, offering advice and support to further good

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<sup>30</sup> Some of these agencies’ existence was triggered by local research integrity scandals, and is in different ways inspired in the work of the United States (US) Office of Research Integrity (ORI).

<sup>31</sup> More information: <http://www.tenk.fi/en/investigation-of-misconduct-in-finland>. The TENK was established by Decree 1347 of 15 November 1991

<sup>32</sup> Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland, Guidelines of the Finnish Advisory Board on Research Integrity 2012 [hereafter, ‘Finnish RCR Guidelines’].

<sup>33</sup> Finnish RCR Guidelines, 29.

<sup>34</sup> More information: <http://www.oeawi.at>.

<sup>35</sup> More information: [ukrio.org](http://ukrio.org).



practice in academic, scientific and medical research. The UKRIO does not have investigatory powers.

- In Denmark, the **Danish Committee on Research Misconduct** (*Nævnet for Videnskabelig Uredelighed*) (DCRM)<sup>36</sup> (1992, operating until 2017 as the Danish Committees on Scientific Dishonesty), an independent body which handles investigations of allegations of research misconduct at the national level.<sup>37</sup> The DCRM has exclusive competence to deal with such cases; if a research institution is involved in such a case, it must, after an initial assessment, forward it to the DCRM. Research institutions have the obligation to handle cases of questionable research practice, and decide on those.
- In Flanders, the **Flemish Commission for Research Integrity** (*Vlaamse Commissie voor Wetenschappelijke Integriteit*, VCWI)<sup>38</sup> (2013): its main task is to provide general advices on research integrity on request or by its own initiative; when requested by a party in a local procedure, it provides a second advice (different from an appeal) about complaint files on research integrity initially handled by research institutions.
- In the Netherlands, the **Netherlands Board for Research Integrity** (*Landelijk Orgaan voor Wetenschappelijke Integriteit*, LOWI) (2003).<sup>39</sup> The LOWI acts as an independent body, and advises on request the Boards of its affiliated institutions on preliminary (that is, which can or not be confirmed after the LOWI's advice) decisions on possible violations of principles of research integrity. When it rules that a petition for opinion will not be considered or is unfounded, there is no follow-up; when it regards the petition as well-founded and follows up with an opinion it requests the advised Board to make available a copy of its final decision.<sup>40</sup>
- In Norway, the **National Commission for the Investigation of Research Misconduct**<sup>41</sup> (*Granskingsutvalget*) (2007): it may investigate allegations of serious research misconduct, and issue a public statement on whether any research misconduct has occurred or not. The imposition of sanctions rests with research institutions.

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<sup>36</sup> More information: <https://ufm.dk/en/research-and-innovation/councils-and-commissions/The-Danish-Committee-on-Research-Misconduct>. In Denmark, a new law on research misconduct came into force on 1 July 2017: Act no. 383 of 26 April 2017 on research misconduct etc.

<sup>37</sup> While the Danish Agency for Science and Higher Education under the Ministry of Higher Education and Science has the task of promoting research integrity.

<sup>38</sup> More information: <http://www.vcwi.be>. See also: *Vlaamse Commissie voor Wetenschappelijke Integriteit Reglement* (entered into force on 11 January 2016).

<sup>39</sup> A new Regulation is applicable to LOWI since March 2018: *Het Reglement Landelijk Orgaan Wetenschappelijke Integriteit 2018* [hereafter, 'Reglement LOWI']. More information: <https://www.lowi.nl>.

<sup>40</sup> The Netherlands Board on Research Integrity (LOWI), 'Annual Report 2015' (Amsterdam, February 2016), 8.

<sup>41</sup> More information: <https://www.etikkom.no/en/our-work/about-us/the-national-commission-for-the-investigation-of-research-misconduct/>.



Thus, in relation to the investigation of allegations of misconduct, these ‘external’ bodies might have their own procedures for investigation, exercise a control upon the investigations carried out at institutional (first) level by others, provide assistance for the handling of such investigations, or influence indirectly those procedures by providing general guidance on research integrity and scientific misconduct. Only some of them, and in some cases, will be responsible for carrying out the investigation and deciding on appropriate measures.

### 3. Fair procedures in research integrity codes and legislation

Codes and legislation specifically devoted to research integrity sometimes establish procedures for the follow-up of allegations of scientific misconduct, and sometimes do not establish such procedures directly, but put forward recommendations or obligations to be taken into account by other actors when setting them up. This Section reviews some of the most prominent features of the way in which these instruments address the design of procedures. The notion of ‘codes and legislation’ has been interpreted here broadly, to encompass the wide range of ad-hoc documents that may determine applicable procedures (codes of conduct, rules of procedure, ‘misconduct strategies’, etc.).

It is important to highlight, nevertheless, that beyond the letter of any such instruments, and even in the cases in which they do not refer to them, some general principles applicable to rules of procedure might be directly applicable. This is notably the case, in public institutions, by virtue of administrative proceedings provisions.<sup>42</sup> In this sense, for instance, the **Danish Code of Conduct for Research Integrity**<sup>43</sup> is accompanied by an annex with *‘Recommendations for responding to breaches of responsible conduct of research’*, which explicitly clarifies that these recommendations must be *‘viewed and interpreted in accordance with Danish legislation such as Danish administrative law, e.g. on status as party to the case, access to information, etc.’*<sup>44</sup>

The features reviewed here have been selected on the grounds of their connection with general legal requirements on fairness, as well as their salience in discussions surrounding the design of ‘fair procedures’ for the follow-up of research misconduct.

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<sup>42</sup> Observing this implies, in the Norwegian context, respecting impartiality rules, the need to grant appellants and defendants the opportunity to comment on the case, rules on the right of access, rules on rights as a party to a case, the need to take decisions without undue delay, the right under certain conditions to make oral statements, the right to be represented by a lawyer, and a duty of secrecy about private issues: Norwegian Ministry of Education and Research, ‘Consultation Paper – Research Ethics in Norway’, 2015, 19.

<sup>43</sup> Danish Code of Conduct for Research Integrity, Danish Ministry of Higher Education and Science, Copenhagen, November 2014 [hereafter, ‘Danish Code of Conduct’].

<sup>44</sup> Danish Code of Conduct, 23.



The review of normative instruments on research integrity has been complemented with insights from the adjudication of cases, as well as policy and legislative documents such as the *Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches on Union law* published by the European Commission in April 2018,<sup>45</sup> which aims at strengthen whistleblower protection across the EU.

### 3.1 On the necessity of procedures

There have been numerous calls for research organisations to develop and establish procedures on how to deal with misconduct.<sup>46</sup> The **Singapore Statement on Research Integrity**<sup>47</sup> proclaims procedures for responding to allegations of misconduct and other irresponsible research practices shall be put in place by all *'[r]esearch institutions, as well as journals, professional organizations and agencies that have commitments to research'*.<sup>48</sup> In its 2015 **Conclusions on Research Integrity**<sup>49</sup> the Council of the EU invited *'research organisations and Member States to find appropriate channels for the examination of alleged misconduct towards researchers and, if appropriate, institutions where research misconduct takes place'*.<sup>50</sup> In the UK, the **Concordat to Support Research Integrity**<sup>51</sup> establishes that it *'is imperative that when an allegation of research misconduct arises suitable procedures are in place to deal with it effectively and fairly'*.<sup>52</sup>

The existence of central structures or bodies does not as such liberate institutions from being obliged (or recommended) to have procedures in place.

The 2014 **Danish Code of Conduct for Research Integrity** puts forward recommendations for establishing a basic platform for institutions to deal with suspicions of breaches of responsible conduct of research, intended to co-exist with the central national body dealing with research misconduct. Concretely, it states that *'Institutions are responsible for ensuring that a system for addressing well-founded suspicions of breaches of responsible conduct of research is in place at the institutional level'*.<sup>53</sup>

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<sup>45</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches on Union law*, COM(2018) 218 final, Brussels 23.4.2018.

<sup>46</sup> For instance: Science Europe, 'Research Integrity in the European Policy Landscape: Open Letter by Science Europe Governing Board', 15 December 2016, 2.

<sup>47</sup> Singapore Statement on Research Integrity, developed at the 2nd World Conference on Research Integrity, 21-24 July 2010, in Singapore, as a global guide to the responsible conduct of research.

<sup>48</sup> Responsibility § 12 of the Singapore Statement on Research Integrity.

<sup>49</sup> Council of the EU. 'Council Conclusions on Research Integrity, adopted by the Council at Its 3431st Meeting Held on 1 December 2015'. Brussels, 1 December 2015.

<sup>50</sup> Ibid., para. 6.

<sup>51</sup> Concordat to Support Research Integrity, Universities UK, July 2012 [hereafter, 'UK Concordat'].

<sup>52</sup> UK Concordat, 18.

<sup>53</sup> Danish Code of Conduct, 20.



The 2017 **Estonian Code of Conduct for Research Integrity**<sup>54</sup> states that *‘research institutions have the right to decide what the fair and proportional reaction is to breaches of principles of research integrity and which procedural rules are the most appropriate for dealing with suspicions of breaches’*.<sup>55</sup>

In sum, thus, there is a general agreement on the need for research institutions to have their own procedures for the follow-up of allegations of research misconduct. This can be phrased in normative instruments as an obligation (institutions *must* have such procedures in place), or as a right to determine the which procedures are best suited (institutions *can* decide the details of such procedures).

Codes and legislation on research integrity typically do not address the issue of justifying the need for *sui generis* procedures for the follow-up of allegations of research misconduct, that is, the fundamental question of whether relevant investigations could (or should) be carried out through other existing procedures, such disciplinary procedures or via ordinary judicial mechanisms.

The **National Policy Statement on Ensuring Research Integrity in Ireland** exceptionally specifies explicitly that *‘any procedures for disciplining a staff member of a University must be specified in the statute of that University’*, and that such statutory process *‘is the only process through which an employee of a University may be disciplined for any reason’*.<sup>56</sup>

Interestingly, codes and policy documents on research integrity often argue in favour of the need for a special treatment of research integrity by referring to the relevance of self-regulation, in the sense of the need to leave scientific matters affecting academics and scientists in the hands of peers. At the same time, however, it can be seen that the same codes and legislation paradigmatically exclude from the scope of misconduct anything related to scientific matters as such, which then leaves open the question as to why would specifically scientists be needed in order to address non-scientific matters, unless one wants to argue that what they address is a certain type of misconduct about which only scientists know.

### 3.2 On the necessity of fairness

The **Global Science Forum of the Organisation for Economic Co-operation and Development (OECD)** has emphasised that *‘[q]uestions of fairness are particularly*

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<sup>54</sup> Estonian Code of Conduct for Research Integrity, Tartu, 2017 [hereafter, ‘Estonian Code of Conduct’]. Elaborated as a cooperation between Estonian research institutions, the Estonian Academy of Sciences, the Estonian Research Council, and the Ministry of Education and Research.

<sup>55</sup> Estonian Code of Conduct, 17.

<sup>56</sup> Irish Policy Statement, 18.



*important when dealing with misconduct, because the investigation process is a quasi-legal one; that is, it has many of the attributes of criminal or civil procedures, but is reduced in complexity and is meant to function more quickly*.<sup>57</sup> The OECD Global Science Forum has also stressed the potential severity of the impact of investigations, possibly *'amounting to the destruction of a scientist's reputation and career'*. In this sense, it has advocated that *'[p]recise definitions, policies and procedures for misconduct investigations are needed to prevent the perception (or, worse, the reality) of a "witch hunt"'*.<sup>58</sup> By doing so, the Global Science Forum stresses that beyond general requirements for fairness there is a genuine need for fairness in light of the possible consequences and misperceptions connected to the investigation of potential misconduct.

The OECD Global Science Forum also published a **Practical Guide for Investigating Research Misconduct Allegations in International Collaborative Research Projects**<sup>59</sup> which lists among its 'Overarching Principles for Investigating Research Misconduct Allegations in International Collaborative Projects' the principle of *'fairness'*.<sup>60</sup> Such principle is further elaborated in the practical guide detailing that it implies that the investigation *'should be conducted in a manner that is fair to all parties and in accordance with relevant laws'*, that persons accused *'must be given full details of the allegation(s) in writing and allowed a fair process for responding to allegations, asking questions, presenting evidence, calling witnesses, and providing responses to information presented'*, and that witnesses shall be allowed *'to be accompanied by or seek advice and assistance from anyone of their choosing'*.<sup>61</sup> Somehow confusingly, the Guide also lists as another Overarching Principles for Investigating Research Misconduct Allegations in International Collaborative Projects' the principle of *'integrity'*, described as including the idea that *'Investigations into research misconduct allegations must be fair'*.<sup>62</sup>

The All European Academies (ALLEA) **European Code of Conduct for Research Integrity**<sup>63</sup> equally refers to the need to incorporate into investigation processes the principles of integrity and fairness, as an element of the principle of integrity, together with others such as the need for investigations to actually be carried through a conclusion, or protecting the rights of whistleblowers. The principle of fairness is described as requiring investigations to be carried out *'with due process and in fairness to all parties'*; guaranteeing that persons accused are given full details of the allegation(s) and allowed *'a fair process'* for responding and presenting evidence; making sure action is taken which

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<sup>57</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), 'Best Practices for Ensuring Scientific Integrity and Preventing Misconduct', 2007, 9.

<sup>58</sup> Idem.

<sup>59</sup> Organisation for Economic Co-operation and Development (OECD) Global Science Forum, Investigating Research Misconduct Allegations in International Collaborative Research Projects: A Practical Guide, April 2009 [hereafter, 'OECD Practical Guide for International Collaborative Research'].

<sup>60</sup> OECD Practical Guide for International Collaborative Research, 6.

<sup>61</sup> Idem.

<sup>62</sup> Idem.

<sup>63</sup> All European Academies (ALLEA), The European Code of Conduct for Research Integrity: Revised Edition (Berlin, 2017) [hereafter, 'European Code of Conduct']. The Code was originally developed by the European Science Foundation and ALLEA in 2011; it was presented in its revised version in March 2017. All following references to the Code are to its revised version.



is proportionate to the severity of the violation, that appropriate restorative action is taken when researchers are exonerated of an allegation, and that anyone accused is presumed innocent until proven otherwise.<sup>64</sup>

The **European Science Foundation (ESF)** stressed in 2010 the need for *'[p]rocesses advertised to denounce and to deal with suspected cases of scientific misconduct at both local and national level'* to be *'fair and transparent'*, connecting these two requirements to the purpose of making sure all stakeholders trust these processes, and cooperate with institutional actors.<sup>65</sup>

The **National Policy Statement on Ensuring Research Integrity in Ireland**<sup>66</sup> lists under the principle of *'fairness'* the following requirements for the processes of investigation and determination of research misconduct: investigation should be conducted in a manner that is *'fair to all parties'*, and in accordance with relevant laws; persons accused must be given full details in writing and allowed a *'fair process'* for responding, and to have a representative or work colleague present for any associated meeting or interview; proportionate action should be taken against persons found to have committed misconduct; and any action taken should be subject to a right of appeal.<sup>67</sup>

According to the **Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland**,<sup>68</sup> the most crucial factors ensuring the fairness of the procedure to all parties are: the fairness<sup>69</sup> and the impartiality of the process, the hearing of all the involved parties, and the competence and expediency of the process.<sup>70</sup>

All in all, it might be asserted there is a general convergence in the analysed instruments regarding the need for procedures to be fair, even if there is limited conceptual consistency on the exact substance of the fairness of procedures.

### 3.3 On compliance with the procedures

It might be commonly assumed that procedures, once in place, shall operate and work properly. Codes and legislation, in any case, do not generally place any particular

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<sup>64</sup> European Code of Conduct, 9.

<sup>65</sup> European Science Foundation (ESF) Member Organisation Forum on Research Integrity, 'Fostering Research Integrity in Europe' (Strasbourg: 2010, n.d.), 23.

<sup>66</sup> National Policy statement on Ensuring Research Integrity in Ireland, developed by the Irish Universities Association in collaboration with a series of organisations, 2014 [hereafter, 'Irish Policy Statement'].

<sup>67</sup> Irish Policy Statement, 17.

<sup>68</sup> Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland, Guidelines of the Finnish Advisory Board on Research Integrity 2012 [hereafter, 'Finnish RCR Guidelines'].

<sup>69</sup> Probably a tautology, at least to some extent.

<sup>70</sup> Finnish RCR Guidelines, 34-35.





emphasis on this matter, even if in practice it could be argued that in some circumstances it might deserve attention.<sup>71</sup>

The **UK Policy and Guidelines on Governance of Good Research Conduct** specify with some detail the sanctions and penalties to be imposed by research councils on research organisations that fail to comply with their obligations related to the investigation of cases. For failures related to individual cases, funding research councils reserve the right to revoke awards and/or reject existing applications; for more systematic failures, research councils reserve the right, in addition, to impose any sanctions in respect of specific cases, to suspend any further applications from that organisation.<sup>72</sup>

In some systems with ‘external’ bodies and agencies, it might be possible to request advice or an intervention from such body to make sure investigation – or lack thereof – meets applicable standards.

### 3.4 Visibility and transparency

A number of instruments underline that procedures for the follow-up of allegations of misconduct shall not only exist, but also be visible - in the sense of well-publicised and accessible - and transparent - in the sense of being clear, understandable, and predictable.

The **OECD Global Science Forum** identified as a *desideratum* for ensuring scientific integrity and preventing misconduct that ‘*pertinent principles, rules, and procedures should be clearly defined and well publicised*’.<sup>73</sup> The Global Science Forum has specified these ‘*should include the definitions of misconduct, and the steps for receiving and processing allegations*’, asserting that this ‘*promotes fairness (in both perception and reality)*’.<sup>74</sup>

The **European Science Foundation (ESF)** emphasised in 2010 that ‘*[t]here need[s] to be clearly understood procedures for making and receiving allegations*’.<sup>75</sup> The **Danish Code of Conduct for Research Integrity** establishes that ‘*Systems for addressing these matters*

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<sup>71</sup> An interesting example for reflection could be plagiarism accusations that were made publicly against a Minister of Science in Croatia in 2016, in the context of which journalists stated that actually the same accusations had already been submitted to a higher education ethics committee five years before, but that the committee had been inactive between 2011 and 2014, and thus nobody had been alerted; see: Nenad Jarić Dauenhauer, ‘Plagiarism Probe Opened into Croatia’s New Science Minister’, *Chemistry World*, 3 November 2016, <https://www.chemistryworld.com/news/plagiarism-probe-opened-into-croatias-new-science-minister/1017637.article>.

<sup>72</sup> RCUK Policy and Guidelines, 9-10.

<sup>73</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), ‘Best Practices for Ensuring Scientific Integrity and Preventing Misconduct’, 4.

<sup>74</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), 7.

<sup>75</sup> European Science Foundation (ESF) Member Organisation Forum on Research Integrity, ‘Fostering Research Integrity in Europe’, 23.



[that is, ensuring that well-founded suspicions of breaches of responsible conduct of research put forward in good faith are addressed adequately] *should be clearly described and easily accessible*.<sup>76</sup>

The **National Template for the Complaints Procedure**<sup>77</sup> supported by the Dutch Association of Universities in the Netherlands (VSNU) to streamline procedures at Dutch universities stresses the importance of having clear procedures.

According to the **Estonian Code of Conduct for Research Integrity**,<sup>78</sup> research institutions must create '*clear guidelines for reporting on possible breaches of principles of research integrity and defines clearly who should be approached in the case of suspicions and questions*'.<sup>79</sup>

### 3.5 Clearly delimited scope and limitations

Procedures shall not only be clear in the sense of being intelligible, but also definite in delimiting their scope and its limitations. This refers notably to delimiting with precision to which practices they apply, carried out by whom, in which contexts, but also how are defined and delimited sanctionable practices – a general legal principle is that no one can be sanctioned if such sanction was not predictable. Codes on research integrity can have a very broad scope of application, aiming for instance to reach all research in a country, which creates even more necessity for procedures to narrow down clearly to what they apply exactly.

#### 3.5.1 Material scope and time limitations

The **Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland**<sup>80</sup> are particularly detailed in this regard, specifying they apply to research and publications, but also '*other types of written works in conjunction with academic work, irrespective of their form of publication*', as well as academic theses submitted for a Master's degree or a higher academic degree, including the higher degrees in the universities of applied sciences.<sup>81</sup> They also state that '*[r]esearch misconduct and disregard for the responsible conduct of research will not expire*', but that institutions can

<sup>76</sup> Danish Code of Conduct, 21.

<sup>77</sup> '*Landelijk model klachtenregeling*'.

<sup>78</sup> Estonian Code of Conduct for Research Integrity, Tartu, 2017 [hereafter, 'Estonian Code of Conduct']. Elaborated as a cooperation between Estonian research institutions, the Estonian Academy of Sciences, the Estonian Research Council, and the Ministry of Education and Research.

<sup>79</sup> Estonian Code of Conduct, 18.

<sup>80</sup> Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland, Guidelines of the Finnish Advisory Board on Research Integrity 2012 [hereafter, 'Finnish RCR Guidelines'].

<sup>81</sup> Finnish RCR Guidelines, 34.



decide not to conduct an investigation when ‘*a significant amount of time has passed*’ and the investigation would no longer affect ethically sustainable research practices, research quality assurance or the legal protection of other parties.<sup>82</sup>

### 3.5.2 Part-time researchers

An issue deserving special attention is the question of part-time scientists, and more specifically the question to what extent universities are responsible for the scientific integrity of their part-time employees.<sup>83</sup> The **LOWI** has repeatedly examined the matter, first to argue that ‘extracurricular activities’ may fall under the scope of the applicable Dutch code on academic practice provided these activities can be classified as science practice, and later to nuance that actually matters depend on the selected scope of the specific procedure and possible agreements made with the part-time scientist involved.<sup>84</sup> In light of its experience in dealing with this kind of cases, the LOWI has recommended that ‘*explicit arrangements be made for part-time appointments with regard to the academic responsibility of the institution and for example also regarding the use of academic titles for activities that fall outside the framework of the part-time appointment*’.<sup>85</sup>

### 3.5.3 Delimiting misconduct

As is widely known, there is no general agreement in Europe on a definition of misconduct, and there are, additionally, concerns about the lack of clear definitions in different systems.<sup>86</sup>

According to the OECD Global Science Forum’s **Practical Guide for Investigating Research Misconduct Allegations in International Collaborative Research Projects**, in general the procedure(s) used for such investigations should ‘*[d]efine the scope and limitations for investigations and include (agreed) definitions of misconduct*’.<sup>87</sup>

It can be argued that it is not only necessary for clear definitions to exist and be made explicit in relevant codes or legislation: beyond legal requirements on predictability,

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<sup>82</sup> Idem.

<sup>83</sup> Already noting in 2005 that ‘[a]lthough the scale at which abuses occur is not precisely known, a large number of problems have been revealed in recent years regarding contract research, sponsoring, and “sidelines” engaged in by researchers’: Johan Heilbron, ‘Scientific Research: Dilemmas and Temptations (Second Edition)’ (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2005), 9.

<sup>84</sup> The Netherlands Board on Research Integrity (LOWI), ‘Annual Report 2016’ (Amsterdam, February 2017), 3.

<sup>85</sup> The Netherlands Board on Research Integrity (LOWI), 3.

<sup>86</sup> Noting agreement on the fact that there are ‘difficulties for adopting clear definitions in the area’: Science Europe, ‘Advancing Research Integrity Practices and Policies: From Recommendation to Implementation (Workshop Report: Brussels, 22 February 2017)’, 4.

<sup>87</sup> OECD Practical Guide for International Collaborative Research, 8.



researchers might also require extra guidance, especially if the general purpose is not just that they do not incur in sanctionable practices, but more widely that they fully embrace research integrity.

The Research Councils UK / **RCUK Policy and Guidelines on Governance of Good Research Conduct**<sup>88</sup> state that research organisations must put in place a system including '*[c]lear policy and guidance on what is acceptable and not acceptable*' in line with all relevant codes.<sup>89</sup>

### 3.5.4 Scientific controversies as an external limitation

A critical issue in many instances is to clearly delineate the boundaries between an investigation on research misconduct, on the one hand, and scientific disputes, on the other. Procedures on research misconduct typically refer to the fact that they shall not be used to address scientific disagreements, or questions related to research quality. Procedures shall in principle not lead to any finding of misconduct when the issue relates exclusively to a scientific controversy.<sup>90</sup>

Some national approaches explicitly exclude scientific discussions from the notion of misconduct.<sup>91</sup> This is for instance relevant in Denmark, in the context of the work of the **Danish Committee on Research Misconduct**. For instance, in a case investigated by the Danish Committee on Research Misconduct in 2015 concerning a range of issues in 15 scientific articles, the Committee found the defendant not guilty of scientific dishonesty *inter alia* because part of the complaint was outside its scope of action, as it concerned the research quality of a scientific product, or the validity or truth of scientific theories.<sup>92</sup>

Having said that, even if scientific disputes are to be formally separated from investigations on misconduct, it is nevertheless still possible that during procedures related to misconduct some bodies might provide advice on how to adequately deal with scientific disputes. In this context, for instance, the LOWI published an opinion on a case in which the petitioner disagreed with on some features of a study (the scope, relevant literature, and conclusions) with interested parties. The LOWI assessed that the case was '*not about research integrity but rather concerns a difference of opinion between researchers*'.<sup>93</sup> It did also proclaim, however, that although it did not deem it unreasonable that at some point the interested parties had decided to stop responding to the persistent

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<sup>88</sup> Research Councils UK (RCUK), RCUK Policy and Guidelines on Governance of Good Research Conduct, February 2013, as updated in July 2015 and April 2017 [hereafter, 'RCUK Policy and Guidelines'].

<sup>89</sup> RCUK Policy and Guidelines, 4.

<sup>90</sup> See, for instance, LOWI Advies 2014, nr. 7.

<sup>91</sup> The Danish Agency for Science, Technology and Innovation, 'National Systems for Handling Cases of Research Misconduct: Report Based on a Survey Conducted in the Fall of 2012 with 15 Respondents from Various Countries', January 2013, 6.

<sup>92</sup> Danish Committee on Research Misconduct, Decision of 26 June 2015 on a number of points of scientific dishonesty in 15 scientific articles.

<sup>93</sup> LOWI, Summary of LOWI Opinion 2015-04, 1. Original Opinion: LOWI Advies 2015, nr. 4.



criticism, this decision should have been communicated clearly so the petitioner was '*not left in the dark*'.<sup>94</sup>

### 3.6 Access to preliminary advice

In spite of the general attention given to the need for procedures to be visible and transparent, some instruments recommend or mandate the existence of specific mechanisms allowing to obtain preliminary advice on whether a conduct constitutes misconduct to be reported or not.

The **UK Concordat** recommends that '*employers of researchers provide a named point of contact or recognise an appropriate third party to act as confidential liaison for whistleblowers or any other person wishing to raise concerns about the integrity of research being conducted under their auspices*', clarifying '*[t]his need not be the same person as the member of staff identified to act as first point of contact on research integrity matters*'.<sup>95</sup>

The **National Template for the Complaints Procedure** supported by the VSNU gives particular importance to the need to separate functionally the confidential advisor and the research integrity commission.

The Recommendations of the **Danish Code of Conduct for Research Integrity** identify as one of the necessary elements of procedures, '*in order to ensure coherent and effective handling of suspicions of breaches of responsible conduct of research at the institutional level*' relates to '*Preliminary advice concerning a suspicion of a potential breach: Anyone with a well-founded suspicion that a breach of responsible conduct of research has occurred should have the opportunity to request personal, impartial and professional advice concerning the suspicion, e.g. through a 'named person' or similar*'.<sup>96</sup>

This possibility to obtain preliminary advice can be interpreted as serving the interests of the individual who doubts whether some conduct is misconduct or not, especially in the systems where there would be an obligation to report misconduct. It can also, nevertheless, serve the interests of the other individual (notably those whose conduct is regarded as suspicious, but maybe is not misconduct) and the institution (by working as a filter).

### 3.7 Preliminary decision on the launch of an investigation

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<sup>94</sup> Idem.

<sup>95</sup> UK Concordat, 19.

<sup>96</sup> Danish Code of Conduct, 22.



Some procedures mark in a clearly distinct manner inside investigations a first phase of assessment on whether a more formal investigation should be launched or not.

The **UK Policy and Guidelines on Governance of Good Research Conduct** foresees that allegations of unacceptable research conduct should first be considered through a research organisation's procedures for preliminary informal investigation. If the allegation is not accepted, the Guidelines state an opportunity for response should be provided to the individual who brought it forward, in case they believe that they have been misunderstood or key evidence has been overlooked.<sup>97</sup>

In this context, it appears crucial to pursue the right balance between ensuring the proper follow-up of allegations that require such follow-up, and stopping unfounded or inadmissible allegations in time to minimise the possible negative impact of launching investigations.

### 3.8 Right and/or duty to report suspected misconduct

The reporting of suspected misconduct can be primarily framed as a right or as an obligation.

#### 3.8.1 The right to report suspected misconduct

The right to report suspected misconduct may be regarded as intrinsically linked to the existence and availability of relevant procedures. In general, where there exist procedures for the follow-up of allegations of misconduct, allegations might be brought forward by anyone, without any limitation.

In line with the **VSNU National Template for the Complaints Procedure**, for instance, anybody who suspects a researcher employed by or under the responsibility of the university has committed a violation of academic integrity can submit a complaint to the independent Academic Integrity Committee of that university (which can be a permanent or temporary committee).

The **UK Policy and Guidelines on Governance of Good Research Conduct** advance that all individuals working in research should feel able to raise concerns about standards of research conduct *'with the relevant senior person in the RO [Research Organisation] responsible for assuring good research conduct'*.<sup>98</sup>

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<sup>97</sup> RCUK Policy and Guidelines, 8.

<sup>98</sup> *Ibid.*, 4.



### 3.8.2 A duty to report suspected misconduct?

The **Singapore Statement on Research Integrity** purports one of the responsibilities of researchers is to *'report to the appropriate authorities any suspected research misconduct, including fabrication, falsification or plagiarism, and other irresponsible research practices that undermine the trustworthiness of research, such as carelessness, improperly listing authors, failing to report conflicting data, or the use of misleading analytical methods'*.<sup>99</sup> It assumes therefore that there is a duty for researchers to report suspected research misconduct, while at the same time failing to clearly delimit its boundaries (research misconduct being potentially any 'irresponsible research practice' capable of undermining the trustworthiness of research).

The **UK Concordat** sets out that researchers must *'handle potential instances of research misconduct in an appropriate manner; this includes reporting misconduct to employers, funders and professional, statutory and regulatory bodies as circumstances require'*.<sup>100</sup>

The obligation to report can be expressed in negative terms as a mandate not to cover misconduct. The **Code of Ethics of the Researchers of the Czech Academy of Sciences**<sup>101</sup> establishes, for instance, that researchers do *'not defend, conceal or justify conduct that contravenes the principles set forth in this Code, not even on the basis of necessary obedience and loyalty'*.<sup>102</sup> The same Code also expresses that researchers do *'not hesitate to notify the relevant authorities of violations of ethics in scientific-research work, if aware of them'*.<sup>103</sup>

In line with the **Estonian Code of Conduct for Research Integrity**, researchers would have the responsibility to report and 'be open' about suspicions of breaches, asking for advice in case of doubt:

*'How to react to probable breaches of principles of research integrity? (...) The researcher informs colleagues or the research institution about probable breaches of principles of research integrity and, if in doubt, asks for advice. (...) The researcher is open and gives explanations about all suspicions concerning his/her breach of principles of research integrity.'*<sup>104</sup>

The OECD Global Science Forum's **Practical Guide for Investigating Research Misconduct Allegations in International Collaborative Research Projects** sets out

<sup>99</sup> Responsibility § 11 of the Singapore Statement on Research Integrity.

<sup>100</sup> UK Concordat, 18.

<sup>101</sup> Code of Ethics of the Researchers of the Czech Academy of Sciences, as supplemented by Addendum No. 1 from 22 April 2010, Addendum No. 2 from 16 December 2014, and Addendum No. 3 of 15 December 2016 [hereafter, 'Czech Code of Ethics'].

<sup>102</sup> Czech Code of Ethics, I(e).

<sup>103</sup> Czech Code of Ethics, I(n).

<sup>104</sup> Estonian Code, p. 17.



that procedures shall incorporate a '[d]uty to report poor conduct in research'.<sup>105</sup> This duty goes presumably beyond the duty to report research misconduct, as it refers to 'poor conduct', which could be a wider notion.<sup>106</sup>

Beyond researchers, other individuals involved in research practice, funding or support might have different reporting duties. The **Scientific Misconduct Strategy of the European Research Council (ERC)**<sup>107</sup> establishes for instance an obligation for members of the ERC Scientific Council or ERC Executive Agency (ERCEA) staff to inform in writing the ERCEA Director and the Chair of a Standing Committee on Conflict of Interests, Scientific Misconduct and Ethical Issues (CoIME) of their knowledge or suspicion 'without delay' whenever they become aware of any scientific misconduct concerning an ERC applicant or project.

The main consequence of configuring a duty to report suspected misconduct, if embedded in research integrity regulation, is to potentially elevate the non-reporting of misconduct to another instance of misconduct (more precisely, of 'meta-misconduct', understood as a sanctionable practice defined by the lack of appropriate action in the face of sanctionable practices). To some extent, it can also be described as formulating a duty of delation.

### 3.9 Possibilities for anonymous reporting

There are divergent approaches in codes and legislation, but also in policy documents, regarding the possibility to accept anonymous allegations of misconduct. This issue is sometimes conflated with the protection of whistleblowers, even though they should ideally be treated as separate issues: whistleblowers, in order to be granted protection, typically require to be identified, even if their identity might need to be kept confidential (which is not the same as being anonymous). Often, documents refer to 'whistleblowers' between quotation marks, implying reference is made in general to individuals wishing to bring forward allegations in a confidential manner.

In some systems, regarding whistleblowers some more general legal obligations on their protection might apply. The **UK Policy and Guidelines on Governance of Good Research** sets out that research organisations must have in place procedures for whistleblowers 'in line with *The Public Interest Disclosure Act (1998) and associated legislation*', to guarantee individuals making allegations in good faith are protected and supported.<sup>108</sup>

The **OECD Global Science Forum** advances as one of the key questions to answer when designing procedures for allegations on misconduct whether whistleblowers can be given

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<sup>105</sup> OECD Practical Guide for International Collaborative Research, 8.

<sup>106</sup> The notion is not further specified in the Practical Guide.

<sup>107</sup> European Research Council (ERC), Scientific Misconduct Strategy, 5 October 2012.

<sup>108</sup> RCUK Policy and Guidelines, 4.





anonymity and be protected from retaliation, without generating spurious/frivolous allegations.<sup>109</sup>

In line with the **Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland**,<sup>110</sup> allegations of violations of responsible conduct of research must be communicated in writing to the rector, and *'cannot be made anonymously'*.<sup>111</sup> Nonetheless, the can also initiate an investigation of allegations that *'have come to their attention from other channels'*,<sup>112</sup> which presumably allows for the taking into account of anonymous allegations.

The **LOWI** has advocated against allowing complainants to maintain complete anonymity in cases concerning possible violations of the principles of research integrity.<sup>113</sup> Moreover, it has suggested that when at institutional level anonymous complaints are allowed, these might nevertheless require 'great caution', as they might interfere with the requirements of transparency, the right of defense, and the right of both parties to be heard.<sup>114</sup>

A document promoting research integrity published by **Science Europe** stated that the fact many whistleblowers experience negative consequences in their personal and professional lives is something occurring *'[s]omewhat unfairly'*<sup>115</sup> – leaving open the question of whether that could also happen somehow fairly. More recently, has been put on the table the fact that the term *'whistle-blower'* could have in itself negative connotations, together with the suggestion of using the term *'witness'* instead.<sup>116</sup>

From an individual rights perspective, the possibility to report in an anonymous way shall be considered in light of the possible obligation to report suspicions of misconduct, and the difficult situations in which individuals might find themselves if they do comply with such an obligation in certain circumstances without any protection of their identity. Such protection, nonetheless, could be pursued also through strict confidentiality.

From an institutional perspective, accepting anonymous allegations can be regarded as imposing a special care to protect the accused from undue interferences with their rights, which could in that case come from a variety of actors and for a variety of reasons, including potentially from outside of academia.<sup>117</sup>

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<sup>109</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), 'Best Practices for Ensuring Scientific Integrity and Preventing Misconduct', 10.

<sup>110</sup> Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland, Guidelines of the Finnish Advisory Board on Research Integrity 2012 [hereafter, 'Finnish RCR Guidelines'].

<sup>111</sup> Finnish RCR Guidelines, 36.

<sup>112</sup> Idem.

<sup>113</sup> The Netherlands Board on Research Integrity (LOWI), 'Annual Report 2015'.

<sup>114</sup> Idem.

<sup>115</sup> Science Europe Working Group on Research Integrity - Task Group Knowledge Growth, 'Seven Reasons to Care about Integrity in Research' (Brussels: Science Europe, June 2015), 6.

<sup>116</sup> Science Europe, 'Advancing Research Integrity Practices and Policies: From Recommendation to Implementation (Workshop Report: Brussels, 22 February 2017)' (Brussels: Science Europe, May 2017), 5.

<sup>117</sup> It can be recalled in this context that researchers' rights to be protected include their academic freedom, but also for instance their right to freedom of expression, in particular where issues of public interest are



The European Commission's *Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches on Union law*<sup>118</sup> can be regarded as a useful reference to better understand legal issues surrounding whistleblower protection in Europe. Taking as a starting point that the protection currently granted in the EU is currently fragmented and uneven, the Proposal sets out principles to guide Member State action when introducing or reviewing normative, institutional and judicial frameworks to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest.

The Proposal would apply to persons<sup>119</sup> reporting breaches of EU law in a series of specific fields (such as protection of the environment, nuclear safety, public health, or privacy and personal data protection). It does not include references to scientific research, and its applicability to issues related to research integrity and scientific misconduct would be in principle limited only to some specific instances, if any – that is, to the cases in which misconduct would constitute a breach of EU law falling within one of the identified fields.<sup>120</sup> The Proposal's preamble notes nevertheless that each time a new EU act for which whistleblower protection might be relevant, consideration could be given to expanding the scope of the Directive.<sup>121</sup>

The European Commission's Proposal grants special attention to the prevention of retaliation against whistleblowers, and to the need to provide effective protection to them when facing such conduct. Its Explanatory Memorandum observes that where potential whistleblowers '*do not feel safe to come forward with the information they possess, this translates into underreporting*', and therefore also into 'missed opportunities' to protect the public interest.<sup>122</sup>

In this context, the Proposal establishes that all forms of retaliation are forbidden and should be sanctioned,<sup>123</sup> and that whistleblowers suffering retaliation should have access to free advice and adequate remedies (including interim relief such as measures against harassment, or preventing dismissal). Additionally, as retaliatory measures are likely to be presented as being justified on grounds other than the reporting,<sup>124</sup> the burden of proof would be reversed so whenever a person or organisation adopts measures against whistleblowers they shall be the ones proving they are not acting in retaliation (as

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concerned (see, on this, for instance: Judgment of the Court (Second Section) of 1 December 2009, *Case of Karsai v. Hungary*, ECLI:CE:ECHR:2009:1201JUD000538007).

<sup>118</sup> COM(2018) 218 final.

<sup>119</sup> For the exact delimitation of the proposed personal scope, see Art. 2 of the proposed Directive.

<sup>120</sup> The preamble does indirectly link whistleblower protection to issues of 'ethics and integrity' by noting that information about reporting procedures may '*be included in courses and trainings on ethics and integrity*' (see Recital (47) of the proposed Directive).

<sup>121</sup> See Recital (19) of the proposed Directive.

<sup>122</sup> COM(2018) 218 final, 1.

<sup>123</sup> Examples of prohibited forms of retaliation are provided in Art. 14 of the proposed Directive, and include suspension, lay-off and dismissal; demotion or withholding of promotion; coercion, intimidation, harassment or ostracism at the workplace; damage, including to the person's reputation, and blacklisting.

<sup>124</sup> See Recital (70) of the proposed Directive.



opposed to obliging the whistleblower to prove that the measures were indeed taken in retaliation).

### 3.10 Tackling 'bad faith' allegations

The concerns surrounding anonymous allegations can be placed inside a broader preoccupation with the possibility of allegations brought forward for the wrong reasons, that is, not for the purpose of protecting science or research integrity, but to impact negatively the accused.

The OECD Global Science Forum's **Practical Guide for Investigating Research Misconduct Allegations in International Collaborative Research Projects** states nobody should suffer any penalty for making an allegation of research misconduct in good faith, '*but action should be taken against persons found to have made allegations in bad faith*'.<sup>125</sup> The Practical Guide does not specify which kind of action should be taken in the latter case, or how to establish bad faith.

The 2009 **Ethics Code for Scientific Research in Belgium**<sup>126</sup> establishes that to accuse somebody wrongly knowingly of an unethical conduct constitutes, in itself, is unethical conduct.<sup>127</sup> This thus extends the possible ways of behaving unethically.

The Recommendations of the **Danish Code of Conduct for Research Integrity** recommend that '*complaints strictly brought forward in bad faith (as harassment) should in themselves be considered a breach of responsible conduct of research*'.<sup>128</sup> This expands the very definition of breaches of responsible conduct of research.

According to the **Estonian Code of Conduct for Research Integrity**: '*The researcher avoids baseless malevolent or self-seeking accusations against colleagues and considers such accusations contradictory to integrity of research*'.<sup>129</sup> Here, also, baseless malevolent or self-seeking accusations are framed as in contradiction to research integrity. It is unclear however why only accusations against colleagues are to be regarded as such, as it would seem to imply baseless malevolent or self-seeking accusations against researchers in other institutions are not a problem.

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<sup>125</sup> OECD Practical Guide for International Collaborative Research, 7.

<sup>126</sup> Code d'éthique de la recherche scientifique en Belgique / Ethische code voor het wetenschappelijk onderzoek in België [hereafter, 'Belgian Ethics Code'], Académie Royale des Sciences, des Lettres et des Beaux Arts de Belgique, l'Académie Royale de Médecine de Belgique, la Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten et la Koninklijke Academie voor Geneeskunde van België, with the support of the SPP Politique scientifique / POD Wetenschapsbeleid, 2009.

<sup>127</sup> Belgian Ethics Code, 4.

<sup>128</sup> Danish Code of Conduct, 23.

<sup>129</sup> Estonian Code, 17.



In sum, codes and legislation on research integrity and scientific misconduct can depict as scientific misconduct the improper use of procedures for the follow-up of allegations of misconduct.

The **UK Policy and Guidelines on Governance of Good Research** points out that *'all staff must be protected from malicious allegations'*.<sup>130</sup> From this standpoint, the document puts forward that *'[f]ailing to deal appropriately with malicious allegations, which should be handled formally as breaches of good conduct'*, constitutes *'improper dealing with allegations of misconduct'*, to be treated as unacceptable conduct.<sup>131</sup> This combines the phenomenon just described (characterising the improper use of procedures as misconduct) with phenomenon of defining 'meta-misconduct' practices: it is not only a breach of good conduct to maliciously put forward an unfounded allegation of breach of good conduct, but it is also a breach not to deal properly with the malicious allegation, which is a breach that needs thus to be adequately addressed as such.

From a legal perspective, it could be questioned whether the launching of malevolent accusations of scientific misconduct should necessarily be considered a scientific misconduct issue, or rather be addressed through other legal frames. Such actions do more likely evoke more general forms of misconduct as libel and defamation, or violation of professional duties and liabilities.

The European Commission's Proposal on whistleblower protection includes safeguards aimed at discouraging malicious and abusive reports. In particular, it conditions the granting of protection to the requirement that the reporting persons had reasonable grounds to believe, at the time of reporting, that the information provided was true.<sup>132</sup> Protection is not lost, however, where the person made an inaccurate report in honest error.<sup>133</sup> Equally, the reporting persons are entitled to protection if they had reasonable grounds to believe that the reported information fell within the scope of the instrument, even if that was actually not the case.<sup>134</sup>

### 3.11 Rights of the accused

The individual to whom refer the allegations of misconduct shall be given a series of rights, which can be linked to the general legal requirements applicable to fair hearings

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<sup>130</sup> RCUK Policy and Guidelines, 4.

<sup>131</sup> Idem.

<sup>132</sup> COM(2018) 218 final, 12. Such a reasonable belief should be presumed unless and until proven otherwise (Recital 60 of the proposed Directive).

<sup>133</sup> Idem.

<sup>134</sup> Idem.



and proceedings.<sup>135</sup> Generally speaking, they concern the accused's right to be heard, which is intrinsically connected to a right to receive information in order to prepare possible interventions or submissions. All this can also be regarded as connected to the EU Charter of Fundamental Rights reference in Article 41(2)(b) to the right of every person to have access to their file.

The **OECD Global Science Forum** has put forward that those devising misconduct procedures shall consider the following questions in relation to this matter:

*'How can the accused defend him/herself? Does he/she have access to documents, testimony? Can the accused confront accusers and witnesses? Can the accused be assisted by a lawyer during the proceedings? Does the accused have a right to question the composition of the investigating body? Can one set of allegations give rise to more than one investigation ("double jeopardy")? In general, how do the rights of the accused compare to those in a criminal or civil proceeding?'*<sup>136</sup>

According to the Recommendations of the **Danish Code of Conduct for Research Integrity**, *'in cases of qualified grounds for the suspicion, the case should be submitted for further investigation in accordance with institutional procedures and the parties to the case should be informed immediately'*.<sup>137</sup> Moreover, the Recommendations note that *'The parties to the case should be highly involved in processing the case by being allowed to comment on the investigational material and by being continually informed of the status of the case'*.<sup>138</sup> In any case, the **Danish Committee on Research Misconduct** must ensure that all cases are adequately informed, and thus obtain all necessary information. This means that the Committee has to carry out consultations in accordance with the Danish Act on public administration, giving the accused a chance to provide a statement.

The **UK Policy and Guidelines on Governance of Good Research Conduct** foresee that *'[t]he person against whom allegations are made'* is given details of the allegations in writing, including the nature of the evidence against them, and that *'individuals must be given reasonable time and opportunity to respond'*.<sup>139</sup> Additionally, they establish that in the cases where *'serious consequences might result from any proven charge (including for example the possibilities of dismissal, demotion, removal of rights as a researcher or public pronouncement on their professional failings) the individual has the right to professional representation and/or assistance, including legal representation'*.<sup>140</sup>

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<sup>135</sup> The European Commission's Proposal on whistleblower protection clarifies that those concerned by reports shall fully enjoy their rights under the EU Charter of Fundamental Rights, *'including the presumption of innocence, the right to an effective remedy and to a fair trial, and the rights of the defence'* (COM(2018) 218 final, 12).

<sup>136</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), 'Best Practices for Ensuring Scientific Integrity and Preventing Misconduct', 10.

<sup>137</sup> Danish Code of Conduct, 22.

<sup>138</sup> Ibid., 23.

<sup>139</sup> RCUK Policy and Guidelines, 9.

<sup>140</sup> Idem.



The VSNU **National Template for the Complaints Procedure** only foresees communication to the complainant and the accused once the Executive Board, with due observance of the recommendation of the Academic Integrity Committee, has adopted an initial opinion.

### 3.12 Protection of the accuser

In practice, it appears as especially important to protect the individual who has brought forward the allegations of misconduct. This is particularly visible in the case law of the ECtHR, which stresses the need to protect those who file accusations of scientific misconduct against defamation complaints,<sup>141</sup> as well as specifically the need to protect individuals when they criticise the institution in which they work,<sup>142</sup> the concept of academic autonomy notably encompassing the academics' freedom to express their opinion about the institution or system in which they work.<sup>143</sup> The Strasbourg Court has, as a matter of fact, stressed that individuals working in an institution can be the best placed to act in the public interest by alerting their employer about illegal conduct or wrongdoing,<sup>144</sup> which serves as a reminder of the fact that by protecting the individual who brings forward allegations is also protected in the public interest in having suspected misconduct investigated.

The Recommendations of the **Danish Code of Conduct for Research Integrity** recommend that '*persons bringing forward suspicions in good faith ('whistle-blowers') are protected from reprisals*'.<sup>145</sup>

The **UK Policy and Guidelines on Governance of Good Research Conduct** construes reprisals against whistleblowers as '*improper dealing with allegations of misconduct*', to be treated as unacceptable conduct.<sup>146</sup>

### 3.13 Nature of the investigating and deciding bodies

The configuration of the bodies investigating and/or deciding on allegations of misconduct can be very varied, depending for instance on whether they are internal to a

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<sup>141</sup> See, in this sense: Judgment of the Court (Third Section) of 23 February 2007, *Case of Boldea v. Romania*, ECLI:CE:ECHR:2007:0215JUD001999702.

<sup>142</sup> See, in this sense: Judgment of the Court (Second Section) of 23 June 2009, *Case of Sorguç v. Turkey*, ECLI:CE:ECHR:2009:0623JUD001708903.

<sup>143</sup> See, in this sense: Judgment of the Court (First Section) of 8 October 2015, *Case of Kharlamov v. Russia*, ECLI:CE:ECHR:2015:1008JUD002744707.

<sup>144</sup> See, in this sense: Judgment of the Court (Fourth Section) of 19 January 2016, *Case of Aurelian Oprea v. Romania*, ECLI:CE:ECHR:2016:0119JUD001213808.

<sup>145</sup> Danish Code of Conduct, 23.

<sup>146</sup> *Idem*.



research organisation, or ‘external’. They could for instance be stable or ad-hoc bodies, and be composed of only internal or external staff, or a mix of both. There are a series of characteristics that are most often put forward: the need for members to have a certain degree of knowledge on the academic discipline in which the misconduct is supposed to have taken place, the need to have a certain degree of knowledge on research integrity and scientific misconduct (including, sometimes, of procedures themselves), and the independence and impartiality of the bodies.

### 3.13.1 Scientific expertise and expertise in misconduct

The **UK Concordat** affirms that it is *‘the responsibility of employers to ensure that any person involved in investigating such allegations has the appropriate knowledge, skills, experience and authority to do so’*.<sup>147</sup>

The Recommendations of the **Danish Code of Conduct for Research Integrity** stress that *‘[t]he investigators should possess professional competences within the specific fields of research and thorough knowledge of responsible conduct of research. Preferably, one or more investigators should have prior experience with cases concerning research misconduct and/or breaches of responsible conduct of research’*.<sup>148</sup>

The persons involved in investigating allegations might be individuals contacted on an ad-hoc basis for the investigation of a specific case.

The **ERC Scientific Misconduct Strategy of the European Research** sets out that the CoIME may, if necessary, *‘consult other members of the ERC Scientific Council and ERCEA staff and/or nominate external experts for appointment by the ERCEA Director who would act as advisors to the ERC in dealing with specific cases of scientific misconduct’*.<sup>149</sup>

The **VSNU National Template for the Complaints Procedure** establishes that whenever an Academic Integrity Committee is set up it should provide a balanced representation of the different academic areas of the university, and that preferably one of its members should be a jurist.<sup>150</sup> The Template also foresees it is possible to expand temporally the Committee with experts, whether affiliated or not to the institution, and it is also possible but not compulsory for the Committee to request further advice of still other experts, again whether affiliated or not to the institution.<sup>151</sup>

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<sup>147</sup> UK Concordat, 18.

<sup>148</sup> Danish Code of Conduct, 23.

<sup>149</sup> ERC, 2.

<sup>150</sup> *Landelijk model klachtenregeling*, Art. 4(a). Additionally, the Committee shall be formally supported by a jurist.

<sup>151</sup> *Landelijk model klachtenregeling*, Art. 4(a) and Art. 4(c).



### 3.13.2 Independence and impartiality

Independence and impartiality are requirements that apply to tribunals in the situations falling under Article 6 of the ECHR.

The OECD Global Science Forum's **Practical Guide for Investigating Research Misconduct Allegations in International Collaborative Research Projects** spells out as one of the structural requirements for investigation procedures that they should be structured as to ensure the independence of the investigation.<sup>152</sup>

The Recommendations of the **Danish Code of Conduct for Research Integrity** stress that '[t]he persons involved in addressing the suspicion and handling the investigation should be impartial'.<sup>153</sup>

In principle, the fact that an investigation is carried out by an 'external' (central) body, outside of a research organisation, could be beneficial for the independence and impartiality. In practice, however, it needs to be taken into account that such bodies and agencies might not be structurally fully independent from research organisations, and that they must in any case rely on the expertise of academics from such organisations. Therefore, additional safeguards might need to be put in place.

In Austria, the **Austrian Agency for Research Integrity** assigns a series of functions to the Commission for Research Integrity, an independent body consisting of non-Austrian scholars.<sup>154</sup>

In line with the **Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland**,<sup>155</sup> for institutional-level investigations the rector shall establish an investigation committee with '*the necessary expertise in the academic discipline in question, as well as the legal or other expertise required*', with at least two members external to the organisation conducting the investigation.<sup>156</sup>

### 3.14 Publicity and confidentiality of the procedure

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<sup>152</sup> OECD Practical Guide for International Collaborative Research, 8.

<sup>153</sup> Danish Code of Conduct, 23.

<sup>154</sup> Doris Wolfslehner and Erich Griessler, 'Ethics Assessment in Different Countries: Austria' (Stakeholders Acting Together on the Ethical Impact Assessment of Research and Innovation (SATORI), June 2015), 12.

<sup>155</sup> Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland, Guidelines of the Finnish Advisory Board on Research Integrity 2012 [hereafter, 'Finnish RCR Guidelines'].

<sup>156</sup> Finnish RCR Guidelines, 37.





Codes and legislation on research integrity advocate for both the publicity and the confidentiality of procedures for the follow-up of allegations of misconduct, imposing or recommending different types of solutions for their articulation.

According to the Recommendations of the **Danish Code of Conduct for Research Integrity** *'[i]nvestigation procedures should be made public'*.<sup>157</sup> The same Recommendations, however, also suggest that *'the identities of the parties are kept confidential to the extent possible'*.<sup>158</sup>

Obligations and guidance on these issues sometimes takes into account the different stages of procedures. Typically confidentiality will be deemed particularly important until the procedure has reached a conclusion on the existence or inexistence of misconduct, a moment in which publicity objectives might become prevalent.

### 3.14.1 Confidentiality before the procedure?

The **LOWI** has highlighted as *'a dilemma in enforcing confidentiality'* the question of what to do with allegations of misconduct made public by somebody (for instance via the media, or through the Internet) before any formal filing of a complaint has taken place.<sup>159</sup> Strictly speaking, there is no breach of confidentiality under any procedure until the procedure has started. Nevertheless, even if technically it cannot be concluded that there has been a failure to respect confidentiality, the LOWI does consider that *'[g]iven the purpose of confidentiality, this course of action by the applicant is not appropriate, because this action has the exact same effect as breaching the duty of confidentiality, namely to tarnish the good name of another'*.<sup>160</sup>

### 3.14.2 During the procedure

The OECD Global Science Forum's **Practical Guide for Investigating Research Misconduct Allegations in International Collaborative Research Projects** highlights as an 'overarching principle' for investigating research misconduct the principle of *'confidentiality'*.<sup>161</sup> This does not imply, however, that such confidentiality will be absolute. As a matter of fact, the Guide details the principle as merely entailing that the procedure *'should be conducted as confidentially as possible'*, and that disclosures to third

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<sup>157</sup> Danish Code of Conduct, 23.

<sup>158</sup> Idem.

<sup>159</sup> The Netherlands Board on Research Integrity (LOWI), 'Annual Report 2016', 4.

<sup>160</sup> Idem.

<sup>161</sup> OECD Practical Guide for International Collaborative Research, 6.



parties, even if possible, should be made *'on a confidential basis'*.<sup>162</sup> The Guide also stipulates confidentiality should be maintained only provided it does not compromise the investigation of the allegation, health and safety, or the safety of participants in research, and that if the investigating organisation and/or the staff have legal obligations to inform third parties of research misconduct allegations, those obligations must be fulfilled.<sup>163</sup>

### 3.14.3 After the conclusion of the procedure

Once procedures have concluded, there might be requirements imposing the decisions to be made public. The rationale underlying such publicity might relate to different priorities, including the objective of facilitating wider awareness of what is deemed misconduct, thus facilitating learning by other actors. This objective can be pursued through the publication of anonymised decisions.

Another possible objective pursued by the publicity of decisions, however, might be to ensure that proven cases are publicly known, which would be potentially particularly useful when researchers move from one system to another, to contribute to wider awareness of for instance future funders or employers.<sup>164</sup>

Another element to be taken into account is the right for public judgments under Article 6 of the ECHR.

In the Netherlands, the **LOWI** publishes online its anonymised opinions. Nevertheless, it claims it *'has not and will not comment, either to the press or to other parties, on whether it has reviewed or is reviewing a particular matter'*, and this despite being contacted regularly by the press.<sup>165</sup>

**LOWI's** anonymisation of decisions includes the fact that references to persons and institutions involved are omitted, but goes beyond that to prevent indirect identification. The anonymity requirement is regarded as particularly important as its opinions actually constitute advice provided to institutions which will decide on the allegations of misconduct, and thus they could be dealing with mere possible violations of research integrity that, in retrospect, could not be recognised as correct or justified.<sup>166</sup> The **LOWI** has stressed, nevertheless, that to preserve the anonymity of the parties involved it is necessary that parties do not take actions that would allow for identification. In this sense, institutions are advised not to provide through their websites direct links to anonymised **LOWI** opinions in which their institution's name was purposefully omitted.<sup>167</sup>

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<sup>162</sup> Idem.

<sup>163</sup> Idem.

<sup>164</sup> In this sense: Science Europe, 'Advancing Research Integrity Practices and Policies: From Recommendation to Implementation (Workshop Report: Brussels, 22 February 2017)', 9.

<sup>165</sup> The Netherlands Board on Research Integrity (LOWI), 'Annual Report 2014' (Amsterdam, June 2015), 7.

<sup>166</sup> The Netherlands Board on Research Integrity (LOWI), 'Annual Report 2016', 5.

<sup>167</sup> Idem.



The VSNU **National Template for the Complaints Procedure** establishes that within six weeks of the adoption of final decisions cases will be published anonymously on the VSNU website, unless the verdict is that the case is inadmissible.

In Demark, the decisions of the **Danish Committee on Research Misconduct** are also made available in anonymous form on a web page.<sup>168</sup>

When decisions are to be made public, it is particularly important that all parties involved are aware beforehand of the extent of such publicity.

The template facilitated by the **Norwegian National Commission for the Investigation of Research Misconduct** to report suspicions of research misconduct<sup>169</sup> includes the following statement:

*'The undersigned is also in agreement that all documents relating to the case that come into the possession of the Commission for the Investigation of Research Misconduct will be publicly available (except where confidentiality applies) by the time the Commission has completed its consideration of the case, pursuant to the acts and regulations which apply to the Commission'.<sup>170</sup>*

In its accompanying *'Information on procedure and publication of cases reported to the National Commission for the Investigation of Research Misconduct'*, it is noted that:

*'[w]hen the report form is received by the Commission's secretariat, it will be a public document subject to the provisions of the Freedom of Information Act confidentiality and the provisions of the Freedom of Information Act regarding availability. The Commission will, as a rule, exclude the case from public access until it has completed its deliberations, but the Commission may also decide during the process to make it public'.<sup>171</sup>*

In France, a report based on a review of existing practices surrounding research integrity found that a majority of institutions preferred not to be obliged to make public the results of their investigations, or any adopted sanctions.<sup>172</sup> This was perceived as the best

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<sup>168</sup> <https://ufm.dk/en/research-and-innovation/councils-and-commissions/The-Danish-Committee-on-Research-Misconduct/decisions/decisions>.

<sup>169</sup> Available at: <https://www.etikkom.no/en/our-work/about-us/the-national-commission-for-the-investigation-of-research-misconduct/report-suspicion-of-research-misconduct/> [last accessed March 2018].

<sup>170</sup> See p. 1 of the mentioned template.

<sup>171</sup> *Ibid.*, 4.

<sup>172</sup> Pierre Corvol, 'Bilan et propositions de mise en œuvre de la Charte nationale d'intérêt scientifique', juin 2016, 19.



solution to reach a salutary appeasement of the scientific communities at the end of the procedures.<sup>173</sup>

In some systems, the publication of individual decisions is not encouraged, while the sharing of information on decisions through other means is promoted.

The **ERC** strategy on scientific misconduct provides for record keeping and reporting of cases in the ERCEA annual activity report, and in the ERC Scientific Council Annual Report.<sup>174</sup>

In the UK, the **Concordat to Support Research Integrity** establishes that funders of research, employers and other organisations adhering to the document should work together to produce annual narrative statement on research integrity, based on input from all signatories. In this context, some of them make their input publicly available.<sup>175</sup>

More generally, should be also considered the possibility for later access to records of cases and the information contained in files.

The **OECD Global Science Forum** suggests considering a series of questions in relation mainly to the possibility for information to be published in the media:

*What are the conditions of access by journalists and the public to the outcomes and records of investigations? When are names named (those of the accuser and accused, and/or other persons involved in the investigation)? If no finding of misconduct is made, can the exonerated scientist require that a formal exoneration be published? How do requests for information relate to “sunshine” or freedom-of-information-type laws? Is it feasible to institute restrictions on speaking to journalists (a “gag order”) during the investigation?<sup>176</sup>*

### 3.15 The determination of misconduct

The crucial issue which procedures have to elucidate in practice is whether the contested conduct constitutes or does not constitute misconduct, or whichever other applicable notion as defined in the relevant procedures.

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<sup>173</sup> In the original French, ‘*un salutaire apaisement des communautés scientifiques*’ (idem).

<sup>174</sup> European Research Council (ERC), ‘Annual Report on the ERC Activities and Achievements in 2015, Prepared under the Authority of the ERC Scientific Council’, 2016, 63.

<sup>175</sup> See, for instance: European Research Council (ERC), ‘Annual Report on the ERC Activities and Achievements in 2015, Prepared under the Authority of the ERC Scientific Council’, 2016, 63.

<sup>176</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), ‘Best Practices for Ensuring Scientific Integrity and Preventing Misconduct’, 10.



### 3.15.1 Applying a broad or a narrow interpretation

Beyond the letter of any possible definition of misconduct, must be taken into account also the way in which such definition is - or could be - interpreted in the context of an investigation. In this sense, for instance, the European Data Protection Supervisory (EDPS) advocated in an assessment of the procedure on how to deal with information on scientific misconduct at the ERCEA that the notion shall be interpreted in a broad sense, and *'be applicable whenever such a behaviour may jeopardise the value of science and in particular the reputation of scientists in the scientific community, as well as of the bodies funding or hosting these scientists'*.<sup>177</sup> The EDPS noted there is no commonly agreed definition of scientific misconduct in EU Law, but argued nevertheless that it *'covers a large variety of possible cases of fraud and more'*.<sup>178</sup>

On the other hand, however, it can be argued that a determination of misconduct might potentially constitute a restriction on the freedom of academics to carry out research and to publish their findings, which must imperatively be submitted to careful scrutiny in accordance with the case law of the ECtHR.<sup>179</sup>

Moreover, in light of Article 7 of the ECHR, on freedom from retroactive criminal offences and punishment, and general constitutional principles of criminal law, punishments and sanctions can only be meted out for clearly circumscribed deeds, in line with strict interpretation rules. Vague incriminations bear the danger of arbitrariness.

### 3.15.2 Establishing the subjective element of misconduct

In some European countries, the most commonly applied definition of misconduct includes a subjective requirement, implying the need for the perpetrator to have engaged in misconduct intentionally, or with gross negligence or negligence.<sup>180</sup> In a similar vein, some definitions explicitly exclude honest errors or 'mere mistakes'.<sup>181</sup> In the normative frameworks in which such a subjective dimension is required for the determination of research misconduct and/or sanctionable practices, it is crucial to assess the existence of

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<sup>177</sup> European Data Protection Supervisor (EDPS), 'Opinion on a Notification for Prior Checking Received from the Data Protection Officer of the European Research Council Executive Agency Regarding the "Procedure on How to Deal with Information on Scientific Misconduct"' (Brussels, 9 July 2014), 1.

<sup>178</sup> European Data Protection Supervisor (EDPS), 1.

<sup>179</sup> See, in this sense: Judgment of the Court of 15 March 2012, *Case of Aksu v. Turkey*, ECLI:CE:ECHR:2012:0315JUD000414904.

<sup>180</sup> Most notably, Scandinavian countries; referring to Austria, Sweden, Switzerland, Norway, Denmark and to some extent Luxembourg: The Danish Agency for Science, Technology and Innovation, 'National Systems for Handling Cases of Research Misconduct: Report Based on a Survey Conducted in the Fall of 2012 with 15 Respondents from Various Countries', 6.

<sup>181</sup> *Idem*.



culpability requirements, notably by separating ‘mere mistakes’ from dishonesty – and to do so on the basis of evidence. This appears to be particularly problematic in practice.

The **OECD Global Science Forum** has emphasised that ‘*determining whether an inappropriate action was deliberate, i.e., of establishing intent*’<sup>182</sup> is one of the main factors complicating in practice ‘*the establishment of an optimal mapping between the offence and the method/venue for dealing with it*’.<sup>183</sup> In this light, it advises that the design of misconduct procedures should identify what the applicable standard of proof, and, in cases ‘*where intentional misconduct is hard to distinguish from unintentional carelessness in carrying out research*’, clarify how investigators shall establish intent.<sup>184</sup>

The OECD Global Science Forum’s **Practical Guide for Investigating Research Misconduct Allegations in International Collaborative Research Projects** establishes that procedures ‘*should identify the minimum level of intent required for a case of research misconduct*’, as well as ‘*the minimum burden of proof the investigation must meet when assessing the act and the intent with which it was committed for reaching a conclusion of research misconduct*’.<sup>185</sup>

In a 2015 case, for instance, the **Danish Committee on Research Misconduct** found the defendant not guilty of scientific dishonesty in relation to the misrepresentation of information in a scientific article about the species and number of animals used and the construction of data illustrated in a figure, despite a lack of source data for zero values, which should have been listed, but that this could not by itself justify suspicion of scientific misconduct.<sup>186</sup>

The **National Policy Statement on Ensuring Research Integrity in Ireland** states that ‘*as a rule*’ it must be demonstrated that misconduct was committed ‘*intentionally, knowingly or recklessly*’, and that proof must be based on the preponderance of evidence.<sup>187</sup>

The **Norwegian National Commission for the Investigation of Research Misconduct** dealt with an interesting case from a business school, where was at stake whether there was plagiarism in a doctoral thesis approved following its presentation in 2004. The National Commission unanimously concluded that there was plagiarism in the thesis, but was split on the issue of whether the procedures employed by the defendant in the thesis were grossly negligent, and that scientific misconduct was thus present: the majority thought that was so, but a minority believed that there was no basis for calling the conduct grossly negligent. After the opinion was announced, in 2012, the case was appealed to the Ministry of Education and Research. An external ad-hoc appeals committee was

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<sup>182</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), ‘Best Practices for Ensuring Scientific Integrity and Preventing Misconduct’, 4.

<sup>183</sup> *Idem*.

<sup>184</sup> *Ibid.* 10.

<sup>185</sup> OECD Practical Guide for International Collaborative Research, 10.

<sup>186</sup> Danish Committee on Research Misconduct, Decision of 26 June 2015 on the construction of data, etc. in a scientific article.

<sup>187</sup> Irish Policy Statement, 18.



appointed to hear the appeal. Joining the Commission's minority, this ad-hoc committee concluded in 2013 that the researcher could be blamed for his acts, but not to the degree required by the legal norm, and that he had not been scientifically dishonest, arguing that a lower due diligence requirement was in place at the time in question, that the researcher had cited sources in accordance with normal practice at his school, and that he was mistaken about research ethics standards.<sup>188</sup>

It is important to underline that not all codes and legislation attribute explicitly relevance to the existence of intent. In some cases, attention can be given to somehow related notions such as a determination of the 'honesty' or 'lack of honesty' of the researcher.<sup>189</sup>

In the Netherlands, the **LOWI** has made clear that there is no need to prove any intention to commit plagiarism in order to characterise a conduct as plagiarism. In this sense, it has explained that '*[i]ntention is merely an additional factor that can help to identify plagiarism, not rule it out*'.<sup>190</sup> The LOWI has also pointed out that such an additional factor might be discerned implicitly from either the scale of the plagiarism, or the copying of sections of texts that include the same references to secondary sources.<sup>191</sup>

### 3.16 Sanctions

Codes and legislation on research integrity and research misconduct seldom identify or even describe possible sanctions in detail; often, they might provide some illustrative possible sanctions but leave the door open for other possible sanctions. In some cases, they impose or recommend sanctions for some types of misconduct, while discouraging the sanctioning of certain potentially contested practices.

Generally speaking, research institutions may impose sanctions such as remediation, warning/reprimand, supervision, suspension from research related work, retraction, withdrawal of title, or withdrawal of internal funding support; funding agencies such as withdrawal of funding, supervision attached to future funding, or a prohibition from submitting applications; national committees or related bodies might also impose similar sanctions.<sup>192</sup> This might occur solely on the basis of specific misconduct procedures, or in combination with other procedures such as disciplinary procedures.

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<sup>188</sup> Norwegian Ministry of Education and Research, 'Consultation Paper – Research Ethics in Norway', 22.

<sup>189</sup> See, in this sense (suggesting also a relevant distinction between the cases where '*the researcher is honest but does not maintain good research practices*', and those where '*the research is so irresponsibly conducted that the researcher's integrity is at risk*': Royal Netherlands Academy of Arts and Sciences (KNAW), Committee on Scientific Research Data, 'Responsible Research Data Management and the Prevention of Scientific Misconduct (Advisory Report)' (Amsterdam, 2013), 13.

<sup>190</sup> The Netherlands Board on Research Integrity (LOWI), 'Annual Report 2015', 4.

<sup>191</sup> *Idem*.

<sup>192</sup> The Danish Agency for Science, Technology and Innovation, 'National Systems for Handling Cases of Research Misconduct: Report Based on a Survey Conducted in the Fall of 2012 with 15 Respondents from Various Countries', 17.



From a procedural perspective, it is important to note that sanctions are not always determined by the body responsible for investigating allegations of misconduct. The **UK Policy and Guidelines on Governance of Good Research Conduct** refer to a series of sanctions that can be adopted by UK research councils on the basis of a finding of misconduct resulting from *'any internal investigation(s) carried out by an institution, court proceedings, disciplinary proceedings, or other proceedings heard by a competent tribunal'*.<sup>193</sup>

The **Singapore Statement on Research Integrity** does not impose on research institutions the obligation to sanction research misconduct, simply noting instead that *'[w]hen misconduct or other irresponsible research practice is confirmed, appropriate actions should be taken promptly, including correcting the research record'*.<sup>194</sup>

The **UK Concordat** asserts that employers of researchers are responsible for taking appropriate steps to remedy any situations arising from an investigation on research misconduct, which *'can include imposing sanctions, correcting the research record and reporting any action to regulatory and statutory bodies, research participants, funders or other professional bodies as circumstances, contractual obligations and statutory requirements dictate'*.<sup>195</sup> The document also points out that employers should however be mindful that *'minor infractions, where there is no evident intention to deceive, may often be addressed informally through mentoring, education and guidance'*.<sup>196</sup>

The Recommendations of the **Danish Code of Conduct for Research Integrity** state that: *'If the institutional investigation concludes that a breach of responsible conduct of research has taken place, it is the responsibility of the institution(s) where the research has been carried out and/or where the researcher is employed to impose relevant sanctions'*.<sup>197</sup>

When sanctions are imposed, these should in principle be proportionate, consistent, and predictable – there is at least general agreement on this in codes and legislation.

The **OECD Global Science Forum** suggests considering, when designing or revising a misconduct procedure, questions related to whether disciplinary measures can be put in place during the investigation (e.g., suspension of the research, or withholding of a grant), the existence of a *'reasonable and consistently applied relationship between the seriousness of the misconduct and the severity of the imposed punishment'*,<sup>198</sup> the possibility to recommend measures *'to protect science and the public interest'* such as the retraction of tainted publications, and other measures,<sup>199</sup> and whether action can be taken with regard

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<sup>193</sup> RCUK Policy and Guidelines, 10.

<sup>194</sup> Responsibility § 12 of the Singapore Statement on Research Integrity.

<sup>195</sup> UK Concordat, 18.

<sup>196</sup> Idem.

<sup>197</sup> Danish Code of Conduct, 23.

<sup>198</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), 'Best Practices for Ensuring Scientific Integrity and Preventing Misconduct', 10.

<sup>199</sup> Idem.





to persons who should have exercised better supervision, *'even if they have not actively committed misconduct'*<sup>200,201</sup>

**ESF** has argued *'[t]here needs to be a statement on the types of sanctions that can be imposed, ensuring that they are appropriate'*, and that *'[t]here also needs to be agreement not only on types of sanctions, but on who can recommend them and who has responsibility for enforcing them'*.<sup>202</sup> This implies that there are thus requirements of clarity and predictability that apply also for sanctions and their enforcement.

The **Estonian Code of Conduct for Research Integrity** establishes that *'If breaches, including malevolent accusations, are discovered, the research institution applies sanctions agreed upon in relation to the person who breaches research integrity or presents a malevolent accusation'*.<sup>203</sup>

The **Code of Ethics of the Researchers of the Czech Academy of Sciences** establishes that when an investigation determines a *'violation of the ethics of scientific conduct'* a report on the resolution of the dispute shall be circulated to all participants, and *'include measures leading to rectifying the problem'*.<sup>204</sup> The Code adds that in justifiable cases other instruments such as the regulation of the labour code may be employed.<sup>205</sup>

In line with the Guidelines for **Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland**,<sup>206</sup> when an institutional-level investigation finds that the misconduct constitutes a violation against the responsible conduct of research, measures must be taken to publish the findings of the final report *'in a manner deemed appropriate by the committee'* and *'when possible, at least in the publication channel where the fraudulent research findings or results based on fraudulent means have already been published'*.<sup>207</sup> Additionally, violations can lead to other (always proportionate) sanctions that the rector is *'justified or obligated to impose on the basis of, for instance, legislation pertaining to administrative, criminal, labour or contract law'*.<sup>208</sup>

As these examples illustrate, sanctions are presented in varied ways: sometimes emphasis is placed on the person who must be sanctioned, while others focus on rectifying a specific problem, or even still on generally protecting science and the public interest. The underlying rationales for sanctions, or their absence, are however rarely discussed.

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<sup>200</sup> Idem.

<sup>201</sup> It must be noted that this latter possibility would require taking into account since the beginning of the procedure its fairness in relation to these persons.

<sup>202</sup> European Science Foundation (ESF) Member Organisation Forum on Research Integrity, 'Fostering Research Integrity in Europe', 25.

<sup>203</sup> Estonian Code of Conduct, 18.

<sup>204</sup> Czech Code, VII(c).

<sup>205</sup> Idem.

<sup>206</sup> Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland, Guidelines of the Finnish Advisory Board on Research Integrity 2012 [hereafter, 'Finnish RCR Guidelines'].

<sup>207</sup> Finnish RCR Guidelines, 39.

<sup>208</sup> Idem.



In practice, it is not easy to obtain information on sanctions actually imposed, as some investigating bodies with publicly reporting duties are not the bodies actually imposing (or deciding not to impose) sanctions.

Reviewing cases dealt with by the ERC, it is possible to find as examples of measures adopted in cases of plagiarism measures such as the sending of a letter warning the author of a proposal *'about the inappropriateness of extensive rephrasing from other authors'*,<sup>209</sup> or the sending of another letter letting another applicant know *'that proper acknowledgement of sources was expected'*.<sup>210</sup> A letter of reprimand was also sent to a reviewer who had evaluated a proposal and subsequently provided to the proposal's author some inside information on the discussions held during the evaluation, which was judged as possibly *'in breach of the contract for independent experts'*.<sup>211</sup> In another case reported by the ERC, no action was taken because, in spite of having concluded after due consideration that a specific behaviour detected in an application regarding a discrepancy in the order of authorship *'was to be considered ethically incorrect'*, the evaluation of the proposal was negative.<sup>212</sup>

Experts have voiced that more *'guidelines on what sanctions might be applied according to different degrees of severity might be helpful'*, and also that *'depending on the severity of the misconduct'*<sup>213</sup> it might be advisable to foresee for guilty persons to be 'rehabilitated' after a certain period, which thus would preclude imposing sanctions that would be an obstacle to such rehabilitation.

### 3.17 Possibility of appeal

The possibilities for appeal following a decision made in the context of the follow-up of an allegation of misconduct can be linked to the right of access to a court protected under Article 6 of the ECHR.

The systems for appeal in cases of research misconduct are varied, although in general three different possibilities can be identified: appeal at the institutional level (through the

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<sup>209</sup> European Research Council (ERC), 'Annual Report on the ERC Activities and Achievements in 2015, Prepared under the Authority of the ERC Scientific Council', 63.

<sup>210</sup> Ibid., 64.

<sup>211</sup> European Research Council (ERC), 'Annual Report on the ERC Activities and Achievements in 2016, Prepared under the Authority of the ERC Scientific Council', 2017, 68. Allegedly, this could have also been addressed as a breach of a contractual duty of confidentiality.

<sup>212</sup> European Research Council (ERC), 'Annual Report on the ERC Activities and Achievements in 2015, Prepared under the Authority of the ERC Scientific Council', 64.

<sup>213</sup> Science Europe, 'Advancing Research Integrity Practices and Policies: From Recommendation to Implementation (Workshop Report: Brussels, 22 February 2017)', 9.



mechanisms of the research institution in question), appeal to an external body, and lack of formal appeal system.<sup>214</sup>

In 2010, **ESF** proclaimed that '*[a]s in all legal and quasi-legal proceedings, there should be an instance of appeal*', adding that the permissibility of appeals, the types of appeal, and the processes for appeal should be clearly stated in any procedures.<sup>215</sup>

The decisions of the Norwegian **National Commission for the Investigation of Research Misconduct**, for instance, might be appealed against to the Ministry of Education and Research.<sup>216</sup>

In any case, and depending on the qualifications and facts (civil, labour, competition or administrative law) judicial recourse against decisions by research institutions are in principle open, even if these decisions were made or informed by specialised bodies.

### 3.18 Efficient conclusion

The requirement of efficient conclusion can be regarded as subsumed in general principles of good administration, and as encompassing the requirement for the procedure to come to an end, but also to come to an end within a reasonable amount of time.

The **LOWI** has in a number of occasions emphasised the importance for procedures to reach definitive conclusions. In this sense, it has maintained that '*complaint procedures must at a certain point reach a definitive end, in part in the interests of legal certainty*'.<sup>217</sup> This implies that decisions must at some point be regarded as having gained 'formal force of law, *as it were*',<sup>218</sup> and that it is not possible to submit *repeat complaints*, that is, complaints on an already investigated matter, unless there are *nova*, a notion to be strictly interpreted<sup>219</sup> (the advancing of new arguments not being regarded as producing *nova*).<sup>220</sup>

### 3.19 Reaching out to other authorities or institutions

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<sup>214</sup> The Danish Agency for Science, Technology and Innovation, 'National Systems for Handling Cases of Research Misconduct: Report Based on a Survey Conducted in the Fall of 2012 with 15 Respondents from Various Countries', 16.

<sup>215</sup> European Science Foundation (ESF) Member Organisation Forum on Research Integrity, 'Fostering Research Integrity in Europe', 25.

<sup>216</sup> § 29 of the Norwegian Public Administration Act.

<sup>217</sup> Summary of LOWI Opinion 2015-06.

<sup>218</sup> *Idem*.

<sup>219</sup> Summary of LOWI Opinion 2015-05.

<sup>220</sup> Summary of LOWI Opinion 2015-06.



In the context of procedures for the follow-up of scientific misconduct, it might be possible – or even compulsory - for the concerned institution to refer the case to other authorities, or the courts.<sup>221</sup>

This obligation or possibility can be explicitly foreseen either at some stage of the unfolding of the procedure, or after its conclusion.<sup>222</sup>

In line with the Guidelines for **Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland**,<sup>223</sup> when an institutional-level investigation finds somebody responsible of a violation against the responsible conduct of research, if the person works in a research organisation other than the one in which the allegation has been handled or receives external research funding, the employer or the funding organisation must be notified of the decision.<sup>224</sup>

Participants to a Workshop organised by **Science Europe** agreed on the idea that *'once a case is proven, funders, publishers, and institutions would benefit from being informed so that they may implement their own processes'*.<sup>225</sup>

The **National Policy Statement on Ensuring Research Integrity in Ireland** establishes that institutions adhering to the statement commit to *'reporting the findings of any proven cases of research misconduct arising from a formal disciplinary process to the relevant authorities including, for example, funding bodies and publishers'*.<sup>226</sup> The Policy Statement also notes that *'if the allegation is of a particularly serious nature and materially affects the running of a programme of research, it may be a contractual stipulation, or considered prudent in the circumstances, that the research performing organisation should advise the funder of the situation at an earlier stage'*,<sup>227</sup> without clarifying when or how the funder shall be informed in case no misconduct could be proven.

### 3.20 Restoring reputations

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<sup>221</sup> In the case of the Australian researchers Murdoch and Barwood, for instance, they ended being criminally convicted because after an initial internal investigation their University, from which they had resigned, referred the matter to a competent authority dealing with crime and corruption; see, for instance: Marilyn MacMahon, 'Tougher Action Needed in the Fight against Scientific Fraud', *The Conversation*, 8 November 2016, <https://theconversation.com/tougher-action-needed-in-the-fight-against-scientific-fraud-68076>.

<sup>222</sup> Additionally, the fact the possibility might not be explicitly foreseen does not mean it is excluded – on the contrary, it is always generally a possibility to take the issue to courts (for instance through liability procedures).

<sup>223</sup> Responsible Conduct of Research and Procedures for Handling Allegations of Misconduct in Finland, Guidelines of the Finnish Advisory Board on Research Integrity 2012 [hereafter, 'Finnish RCR Guidelines'].

<sup>224</sup> Finnish RCR Guidelines, 39.

<sup>225</sup> Science Europe, 'Advancing Research Integrity Practices and Policies: From Recommendation to Implementation (Workshop Report: Brussels, 22 February 2017)', 5.

<sup>226</sup> Irish Policy Statement, 19.

<sup>227</sup> *Idem*.



It is commonly perceived that, in spite of any relevant fairness requirements, and in particular in spite of any relevant confidentiality obligations, in practice the reputation of those accused of misconduct might be negatively affected by the mere fact that an investigation took place.

The **OECD Global Science Forum** has maintained that an important question is to consider the specific steps that might be taken to restore a damaged reputation, as well as *'a project that may have been delayed or disrupted during an investigation'*.<sup>228</sup> Additionally, it has suggested giving attention to the possible existence of provisions for protecting 'innocent bystanders', *'such as graduate students whose projects may be terminated even if their work had nothing to do with the misconduct committed by the principal investigator'*.<sup>229</sup>

The **UK Policy and Guidelines on Governance of Good Research Conduct** note that if, following any investigations, an individual is found not to have committed an act of research misconduct, or the allegation is withdrawn, the institution must protect the interests of the individual, and *'make the outcome clear to all who have been involved'*, which notably means that if the allegation was made publicly, *'the institution must make public the outcome of the investigation'*.<sup>230</sup>

## 4. Concluding remarks

This report has reviewed requirements related to the 'fairness' of procedures applicable to the follow-up of allegations of scientific misconduct. Exploring general requirements applicable to the fairness of procedures, as well as codes and legislation on research integrity and research misconduct, we have highlighted a series of common concerns, as well as some more disputed issues. We have also stressed that in practice the variety of structures for the follow-up of allegations have an impact on the concrete design of procedures, thus also contributing to explain the co-existence of different approaches to how to operationalise 'fairness'.

Defining clearly the scope of scientific misconduct and its determination (and/or of research integrity, if scientific misconduct is to be construed as including at least partially 'violations' or 'breaches' of research integrity) emerges once again as a key issue. The need and legal constraint to delimit what lies within the scope of these concepts has already been repeatedly highlighted.<sup>231</sup> It is important here to stress that such delimitation would not only benefit the compatibility of European approaches, and the consistent application

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<sup>228</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), 'Best Practices for Ensuring Scientific Integrity and Preventing Misconduct', 10.

<sup>229</sup> Global Science Forum of the Organisation for Economic Co-operation and Development (OECD), 10.

<sup>230</sup> RCUK Policy and Guidelines, 10.

<sup>231</sup> See, for instance: European Science Foundation (ESF) Member Organisation Forum on Research Integrity, 'Fostering Research Integrity in Europe', 23.



of European standards,<sup>232</sup> but also contribute to the fairness of procedures by supporting transparency and predictability.

In this concluding section, we would like to emphasise two important points to be taken into account, most notably, from the perspective of assessing possible policy action in the area: first, the fact that ‘fairness’ requirements shall not be envisaged as separate and independent features of procedures, but envisioned from a more global perspective, and, second, the idea that some procedural requirements can encourage a certain reflexivity that would, eventually, be beneficial also in terms of ‘fairness’. Additionally, a final reflection invites to consider the approaches to whistleblower protection in the analysed instruments.

The first issue concerns the need to understand fairness as a general quality of procedures that is not determined solely by some specific features, but rather their combination and interplay. This implies that there might be some possible different combinations that would all meet in some way the fairness requirements, and that the different aspects of ‘fair procedures’ reviewed shall not be thought of in isolation, as they can affect each other. In this sense, for instance, establishing a general duty to report misconduct might require the possibility to accept anonymous reporting, to avoid generating difficult situations for researchers.

The second point relates to the possibilities for procedures to generate, by their functioning, knowledge that would improve their ‘fairness’. This is most notably achievable by supporting the increased transparency of the procedures, including clarity on their scope, notably by including obligations in terms of openness about the procedures and their outcomes.

From a legal perspective, the absence of a clear definition of misconduct (or equivalent notions) in applicable law could be mitigated by the existence of ‘case law’ or at least a corpus of decisions which progressively define its contours, thus contributing to legal certainty.<sup>233</sup> In practice, it appears that such interpretative work is however not taking place in all European normative frameworks, or not taking place with enough regularity and visibility as to allow reaching a significantly improved understanding of what is to count as a violation of research integrity and/or scientific misconduct. There is, additionally, only limited case law from courts on these matters.

In Norway, similar concerns were echoed during the consultation process that led to a new legal instrument in 2017. The Norwegian Ministry of Education and Research pointed out indeed that, despite the existence of a National Commission for the Investigation of Research Misconduct, such Commission had only investigated ‘*a handful of cases*’, linking this fact to the persistence of ‘*considerable doubt about the interpretation of the (...)*’

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<sup>232</sup> In 2015, in its Conclusions on Research Integrity the Council of the EU called for ‘*the consistent application of the Code in EU-funded research*’: Council Conclusions on Research Integrity, para. 9.

<sup>233</sup> The reference to applicable law shall be understood here without prejudice to the divergences between the Anglo-Saxon and Continental-European legal systems.



*definition of scientific misconduct seven years after the Commission was established*'.<sup>234</sup> In the Netherlands, the **LOWI** uses its obligation to share annual reports on its activities to distil some of the lessons on the scope of misconduct that can be derived from its opinions,<sup>235</sup> it could be described as a reflective exercise useful for its own learning, but also for learning by other actors.

Finally, some thought shall be given to the relation between the analysed 'fairness' requirements and the question of whistleblower protection. As epitomised by the Proposal published by the European Commission in April 2018, strengthening whistleblower protection can be perceived as ultimately pursuing the prevention of breaches of law, and thus the protection of the public interest. Whereas the ECtHR has, in this line, regularly emphasised the need to protect academics and scientists especially when they voice out or put forward cases of misconduct or malpractice, instruments on research integrity and scientific misconduct appear to almost systematically distrust individuals bringing forward allegations of misconduct, or at least to throw shadows of suspicion on the possible good faith of their accusations, offering them limited avenues for support. While it is true that allegations (founded or unfounded) can dramatically impact the life and career of the accused, practice appears to show that bringing forward allegations can also have serious consequences to the individual who decided to take such step, independently of concrete retaliating measures. Taking into account that some systems impose on scientists and academics a duty to report suspected misconduct, it could seem more appropriate for procedures not to distrust by default those who use them, unless, as a matter of fact, they would mistrust themselves and their own capacity to deliver real 'fairness'.

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<sup>234</sup> Norwegian Ministry of Education and Research, 'Consultation Paper – Research Ethics in Norway', 29. The Consultation Paper highlighted also as a particularly serious problem the apparent conflation of the qualification of plagiarism in a research ethics context with intellectual property rules; Norwegian Ministry of Education and Research, 32.

<sup>235</sup> See, for instance, on plagiarism: The Netherlands Board on Research Integrity (LOWI), 3.



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