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The European order for payment,

(hereinafter the "FRA") was established in 2007 and commenced its work on 1 March 2007,⁽¹⁾ marking a new era on the expansion of the EU policymaking scope on fundamental rights.

Although the protection of fundamental rights is an integral part of the legal system in the EU, this phenomenon has had a short lifespan. It is only since 1993 that primary law sets out that fundamental rights shall be respected (article 6(2) EU Treaty (formerly article F(2))). Despite that early promise, the principle of protecting fundamental rights in practice has not always enjoyed outright importance, and such rights have thus far not been the most important individual guarantees under Union law.

On the policy side, the promotion of fundamental rights only played a minor role within the EU until the Treaty of Amsterdam. The European Parliament has sought to promote human rights since at least the 1970s, through annual reports on different issues, debates and resolutions, insistence on increased funding for human rights and democratisation programmes, and sending of election monitors and parliamentary delegations,⁽²⁾ but its approach seems to be incoherent and fragmented, leaving a fundamental rights monitoring gap to be filled.

This essay will argue that there is a gap in the monitoring of fundamental rights in the European Union, since judicial protection of fundamental rights is neither consistent nor coherent enough, with the ECJ seemingly demanding varying degrees of protection of fundamental rights from member states and EU institutions. As well as being inconsistent, this practice also leads to uncertainty and confusion over the standard of fundamental rights protection in the EU, which leads to an erosion of protection on the part of the member states and the EU institutions. Furthermore, there is a gap in the protection of socio-economic rights, which have been assigned inferior treatment to their counterpart civil and political rights. This is especially worrying since the neglect of socio-economic rights would also have adverse consequences for the

intended to provide straightforward cross-border debt recovery, is undermined in Scotland by doubts and inconsistent practice at key stages

EU Fundamental Rights Agency: the missing link?

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Reading for pleasure

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Opinion column:
Stephen Gold

There is a future for the high street solicitors' firm, but it

realisation of civil and political rights.(3)

This paper will argue that the FRA has filled the gap of monitoring fundamental rights through a variety of methods which have enabled it to pinpoint where fundamental rights violations occur, through its establishment of a reliable, systematic and sizable pool of data, as well as co-ordinating with civil society to raise awareness about fundamental rights so as to promote monitoring of compliance by ordinary citizens in a proactive manner.

In the 1990s, the European Union developed a human rights policy based on the accession procedures with respect to those countries that wanted to join the EU. This policy's justification and effectiveness stemmed from the East European states' desire to accede. However, whilst the policy achieved some success, it did not answer the question of how to deal with the deficit in implementing human rights after accession.(4) The FRA's forerunner organisation, the European Monitoring centre on Racism and Xenophobia, which was established in 1997, offered to fill the void.(5) The Centre's prime objectives and tasks comprised of providing "objective, reliable and comparable data" in the field of racism, xenophobia and anti-Semitism in the EU.(6) However, in order to have a system of data collection and analysis capable of defining Union policy in the field of human rights, the representatives of the member states meeting on 13 December 2003, within the European Council – not the European Council itself – agreed to extend the mandate of the Centre to become a Human Rights Agency.(7)

The judicial enforcement of fundamental rights

The entry into force of the Lisbon Treaty marked a milestone in the protection of fundamental rights in the EU, as it became one of the most vital aspects of the Union's activities. However, it is notable that the founding Treaties made no references to fundamental rights, and the ECJ denied itself the competence to adjudicate (8) on the legality of decisions involving fundamental rights such as provided by the German constitution, as illustrated in Stork

will look very different from the present, and will require an entrepreneurial spirit combined with the best of new practice

Profile

This month's profile from the Society features Mark Thorley, convener of the Civil Legal Aid Team

Book reviews

Reviews of *The Inside Job* (Ambrose); *Prison Law* (Thomson)

President's column

The sep rep vote, the Law in Scotland and legal aid conferences all produced a lively response - and more on what makes the profession tick will be revealed with the survey results

(9) and Geitling.(10) Furthermore, the ECJ held in *Costa v ENEL* that Community law should take precedence over conflicting national law.(11) This judgment had the potential implication that EEC legislators could legislate unhindered by the restrictions imposed by fundamental rights provisions enshrined in the constitutions of the member states.

The ECJ sought to clarify this issue in *Handelsgesellschaft*, when it ruled that fundamental rights formed "an integral part of the general principles of European Community law", and that inconsistency with fundamental rights could form the basis of a successful challenge to a European law.(12)

In spite of its efforts, the ECJ has been criticised for imposing a lower standard of protection on EU institutions than it does against other institutions appearing before the court,(13) and for being more demanding towards member states for protection of fundamental rights whilst being more lenient towards acts of the Community institutions. (14) Thus, the approach of the ECJ signifies both inconsistency and incoherence with regard to fundamental rights protection, creating a gap in monitoring of the fundamental rights.

However, the ECJ has long required the Community to respect fundamental rights, and the European Council has emphasised many times the importance of respect for human rights.(15) The applicants' relative success in staff and competition law cases challenging EU administrative acts for their violation of fundamental rights, such as the right to non-discrimination,(16) freedom of expression,(17) and freedom of religion,(18) is reflective of the ECJ's commitment to respect for fundamental rights.(19)

But despite that relative success, the court is rather less willing to strike down EU legislation when it is not compatible with fundamental rights. Although it seems that the ECJ has come to recognise the fundamental rights aspect of secondary law, especially in cases of Community legislation affecting economic rights,(20) rather than

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official opening of
the upgraded
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new website
dedicated to the
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Feeling the squeeze

With the first of the
planned court
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McQueen, SCS chief
executive, on future
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reforms

Litigation: a numbers
game

The Taylor Review of
Expenses and
Funding of Civil
Litigation has been
broadly welcomed,
but there are those
who challenge the
fairness of some of
its more radical
proposals

offering its unconditional protection the court has adopted a pragmatic approach in these cases by interpreting legislation as a proportional limitation, as opposed to a complete violation, of fundamental rights.(21) Accordingly, although the ECJ has developed its fundamental rights-related jurisprudence, it still has some way to go before it could be considered to be satisfactorily protecting fundamental rights, thus leaving a monitoring gap.

The FRA in this regard can fulfil an important role of co-operating with EU legislators in the form of drafting opinions on the situation of fundamental rights in the EU, and proposing appropriate recommendations on how best to form policies which respect fundamental rights rather than conflict with them. This approach will ensure that the FRA will proactively increase the awareness of the relevant institution within the EU, which could prevent the conflicting of EU legislation and fundamental rights at a much earlier stage,(22) thereby alleviating the need to hope for a favourable judgment from the ECJ. Thus it promotes a system of pre-emptive monitoring, by sounding out to the EU legislators what could potentially lead to a violation of fundamental rights, so that the need for further monitoring down the line would not arise.

Furthermore, averting any potential conflict between EU legislation and fundamental rights at an early stage will ensure that the ECJ is not faced with sensitive and controversial decisions such as the Bosphorus case, where the ECJ could only offer limited protection to fundamental rights.

Furthermore, irrespective of how efficient the ECJ may be in its judicial protection of fundamental rights, it is not sufficient to rely on it as the sole protector of fundamental rights. Ignorance, lack of resources, ineffective representation, inadequate legal standing and insufficient remedies all have the capacity to thwart the judicial enforceability of fundamental rights,(23) thus creating a gap in monitoring. In this regard, the FRA's systematic monitoring of fundamental rights through its data

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There is no excuse for in-house legal departments not keeping track of work, and costs, in these days of matter management software

Charities and the changing legal landscape

Advising charities is less of a niche area than many solicitors assume, due to issues now arising as the funding landscape changes

Heir finding: the sensitive side

Tracing missing heirs can be a sensitive business, and it is the personal touches that mark out the businesses that win the beneficiaries' trust

gathering, data analysis, and its advisory and networking roles, acts as a protective net for those who may not have access to justice for the reasons mentioned above, thereby covering an important gap in judicial enforceability of the rights of those who may not have access to justice.

Gap in monitoring of socio-economic rights

The EU Charter of Fundamental Rights contains various socio-economic rights, which distinguishes it from other Conventions such as the ECHR. The result, it has been suggested, is that the “EU Charter makes no distinction between civil and political rights and economic, social and cultural rights”.(24) Although that seems to be an accurate statement at first glance, at a deeper level it can be seen that some of the economic and social rights have been given inferior treatment,(25) by being accorded qualified status as well as being subjected to national laws and practices in a way that is less true of civil and political rights.(26) Furthermore, there is a strong tendency in the vast majority of Community documents to focus on “social policy”, designed to promote “social protection” or overcome “social exclusion”, rather than to focus on “social rights”,(27) thus leaving a huge gap in monitoring of fundamental rights, since the judicial protection of these rights is not as good as the protection of civil and political rights.

However, the EU Charter includes a non-regression clause, (28) which stipulates that the Charter cannot be used to justify a lower level of protection than that recognised by “Union law, international law and international agreements to which the Union and all member states are party”, including the ECHR. To this end, the FRA could acknowledge in its monitoring of economic and social rights that while such caveats may be relevant to the interpretation of the rights involved, such national laws and practices should be read down to the extent that they are incompatible with the right in question, as generally interpreted or formulated or applied in other international norms which are applicable to the situation. So far, the FRA’s monitoring of such rights and obligations arising from the EU Charter has been

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aims to raise
awareness of legacy
potential - and to
raise the drafting
firm's profile

Law, but not as we
know it

Don't be left behind
in the evolutionary
race, was the
constant theme of
this year's Law in
Scotland
conference. But
there was plenty of
good advice for
those willing to face
change

All the permutations

Latest criminal
cases, including
multiple charges;
breach of the peace
and statutory
offences; deaf
accused; dock
identification

encouraging, and seems to bridge a long-deserted gap in
monitoring compliance with economic and social rights.(29)

Monitoring of fundamental rights

The FRA is established on the basis of a Council Regulation 168/2007 of 15 February 2007, with the objective “to provide the relevant institutions, bodies, offices and agencies of the Community and its member states when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competences to fully respect fundamental rights”.(30)

The FRA has no legislative or regulatory powers, no quasi-judicial competences in the sense of an ombudsman,(31) and no authority to adopt legally binding decisions with effect on third parties. Pursuant to article 3(3) of the Regulation, the FRA may only monitor fundamental rights issues in the EU and its member states when implementing Community law. In this regard, the FRA’s mandate is significantly narrower than that of the former Monitoring Centre, which had the ability to monitor the activities of the member states outside the European Union. The upshot of this provision is that the FRA is only able to act in respect of those activities which are governed by the EC Treaty or the EAEC Treaty. Therefore, the Regulation’s scope does not extend to activities in the areas of police and judicial co-operation in criminal matters, which gives rise to sensitive implications with respect to the protection of fundamental rights. To this end, far from covering a gap, the FRA leaves a vacuum in its monitoring of a very important area which can be susceptible to human rights violations.

However, the FRA may draft opinions relating to third pillar measures under the EU Treaty, as long as they are requested by an EU institution.(32) Although this is a step in the right direction, it restricts the FRA’s scope to monitor effectively the situation of fundamental rights relating to third pillar measures on a coherent and consistent basis. In essence, by not being able to monitor those third pillar

The truth, the whole truth...

There is a disturbing trend of unspecified "police intelligence" being cited in support of a premises licence review

Shale gas: a complex process

The Scottish legal framework for the extraction of shale gas requires a number of stages to obtain the necessary rights and consents

Expenses up to date?

The entire UK tax regime for employee expenses and benefits should be reviewed, according to an interim report from the Office for Tax Simplification

Scottish Solicitors' Discipline Tribunal

Reports of cases relating to John

activities unless expressly invited to do so, the FRA is subordinated to the assessment of various EU institutions as to which measures it can monitor or draft an opinion on and at what particular points. This practice not only compromises the integrity of the FRA as a body which could monitor the situation of fundamental rights in the areas of police and judicial co-operation in criminal matters, but also compromises its ability to properly and competently monitor whether fundamental rights have been respected.

Furthermore, the Agency does not have a mandate to examine the conformity of EU legal acts to fundamental rights standards. Rather, it has an "observatory monitoring" role,(33) as opposed to a "legally normative monitoring" role.(34) The Council of Europe also clearly states that "monitoring within the meaning of the Agency's competences comprises merely information gathering and the preparation of comparative reports".(35) This has led to some suggestions that, as an observatory body, the FRA can act as a "surveillance mechanism" with the objective of exercising "disciplinary power".(36) However, the Agency's lack of clear mandate to monitor compliance with fundamental rights, and to report on cases of breaches and violations, severely restricts its ability to develop a monitoring system whereby the timespan between any given breaches or violations and the subsequent rectification of those violations by the breaching body is vastly reduced. In this respect, the Agency does not seem to cover a gap in monitoring compliance with fundamental rights.

However, although the Agency has an "advisory monitoring" mandate which is limited to collecting and analysing information and offering technical assistance,(37) through its systematic, consistent and coherent data collection and analysis, it can still make a crucial contribution in setting out normative trends within its existing mandate. Indeed, von Bogdandy and von Bernstorff came to similar conclusions by stating that "the political power of the Agency is based to a great extent on the possibility to develop these standards, thereby contributing to the emergence of a common European perception of

Graham Lints;
Douglas William
Spence

Room at the top?

Is there a place for in-house lawyers on their employers' boards? How much are they valued by their employers? ILG members have been surveyed on these and other questions

Here comes the flood?

An attempt by the Keeper to mitigate the impact of the PMP Plus decision on property intended as common areas in developments has been rejected by the Lands Tribunal for Scotland

SGM decision kills "sep rep"

Report on the key debate, and the other business transacted, at the September special general meeting of

fundamental rights issues".(38) Thus, the emergence of a European perception of fundamental rights will cover the monitoring gap by raising the expectations of civil society to receive a better standard of fundamental rights protection from their political institutions, and an acceptance on the part of those institutions to strive for such better standards of fundamental rights protection and promotion.

The FRA's tasks

The tasks of the FRA can be categorised into the following four areas: first, to collect and analyse information and data of high scientific value as a foundation for forming EU fundamental rights policies; secondly, to disseminate the aggregated information; thirdly, to offer advice to political institutions; and fourthly, to establish a link between the relevant actors and institutions in the field of fundamental rights protection, to function, as the European Parliament put it, as "a network of networks".(39)

Data collection and analysis

With regard to data collection and analysis, the FRA is able to draw on data collected by various national and international research and monitoring institutions,(40) which will help it determine the prioritisation of future EU policies. This aspect of the FRA's responsibility is fundamentally important, providing greater scope for the establishment of common indicators and analytical standards. This allows for a consistent method of data collection and thus improved comparability,(41) which will enable the FRA to ascertain where fundamental rights have been respected and where they have not, so as to formulate advice to the relevant body as to how to remedy the situation.

Alston observed that the EU was in dire need of the "establishment of detailed, systematic and reliable information base, the development of a pool of knowledge, as well as the promotion of effective coordination of many actions already being taken in the community level",(42) in order for the EU to realise its commitment to human rights

the Society

Outsourcing: the straight and narrow

As possibilities increase in relation to outsourcing of different functions of legal firms, the Society has prepared advice and guidance for those considering the option

How not to win business: a guide for professionals

The ninth in our tongue-in-cheek series is "Freeze at the thought of cold calling"

Properly engaged?

Claims on the Master Policy have arisen where a more rigorous approach to terms of engagement could have prevented them. Here are some illustrative points to bear in mind

protection.(43) The Agency's efficient system of data collection and analysis and the format within which it operates seem to be filling the monitoring of compliance gap, which prior to the Agency's establishment was blighted by inconsistency and incoherence in data collection and information base, as Alston alluded to (see note 42). By remedying the inconsistency and incoherence, the system will create a human rights protection standard which is both visible and predictable, leading to legitimate expectation by the public and sense of responsibility by member state institutions with regard to human rights protection.

Disseminating of information by FRA

One of the main tasks of the FRA as stipulated in the Founding Regulation is "to develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights".(44) The FRA publishes thematic reports drawn from its analytical research and surveys,(45) as well as developing its own communication strategy in an attempt to raise public awareness of fundamental rights issues.(46) By raising public awareness, the FRA creates a new level of expectation of fundamental rights protection by civil society (47) from their respective judiciary and elected representatives. In doing so, the FRA effectively delegates monitoring of fundamental rights to communities to hold their representatives to account on rights issues and consequently to develop a fundamental rights-oriented political culture. Therefore, the FRA fills the fundamental rights monitoring gap through enabling the people on the ground to proactively monitor the situation and to act, either through judicial enforcement in the short term, or through voting in general elections, in the long term.

FRA's advisory role

Thirdly, the FRA is responsible for offering political advice to the relevant authorities in formulating and implementing policy. The FRA may also assist political institutions in the form of opinions, conclusions and reports where assistance has been requested (48) by an EU institution, and if so, the product of that assistance can be

Ask Ash

Advice column: a colleague is poking fun because I'm overweight

Sep rep: what now?

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From the Brussels office

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Law reform roundup

Recent work of the Law Reform

incorporated into the EU legislative process.(49)

Therefore, if the FRA seizes the opportunity to build a close relationship of mutual trust and co-operation with the EU legislative bodies, it can help fill the monitoring gap by affecting policy so that it is more fundamental rights-oriented and more geared towards fundamental rights protection. This was illustrated by the French Council Presidency's decision in 2008 to commission an opinion by the Agency on the fundamental rights conformity of a draft framework decision on the use of passenger name records for law enforcement purposes.(50) Toggenburg has argued that such "opinions" may oblige the requesting institution to provide reasons if it decides to disregard them,(51) suggesting that the FRA's opinions can have real impact on fundamental rights protection in such circumstances.

The FRA's networking

Fourthly, article 8(2)(a) of the Founding Regulation emphasises the need for the FRA to conduct institutionalised co-operation with "National Human Rights Institutes" in EU member states as a precondition for the effectiveness of its activities. According to this mandate, the FRA can work alongside national human rights institutions, the Council of Europe, OSCE, United Nations and other international organizations,(52) as well as promoting a more rigorous co-operation amongst those bodies themselves. This particular structure enables the FRA to draw on the experience, expertise and pool of data of other bodies in the field of fundamental rights. The FRA can use those tools to improve its own practice of monitoring and data collection, as well as using a diverse pool of data to formulate credible and invaluable opinions on the issues of fundamental rights to relevant EU institutions. This in turn will foster a systematically consistent method of ensuring that respect for fundamental rights is reflected in the practice and policies of the EU institutions and member states.

This is reflected in the Agency's task to consult with civil society at the national, European and international level via a cooperation network called the "Fundamental Rights

Department,
including criminal
justice; Lobbying Bill;
deregulation;
common investment
funds; European
criminal opt-out

Platform". This initiative serves to pool the existing knowledge to ensure the development of new agencies, as well as furthering the implementation of fundamental rights at a national level.(53) This type of co-operative model of knowledge sharing, analysis and inclusive dialogue is likely to have a positive influence on the perception of crucial actors and could therefore impact on the monitoring of fundamental rights across member states. However, the European Parliament's hope that through this structure of networking the FRA would function as "a network of networks" presupposes a high degree of co-ordination and coherence. The existing system seems fragmented and incoherent, mainly due to the varying levels of compliance of NHRIs in some of the member states.(54) This makes the envisaged role of the Agency as "a network of networks" difficult and therefore compromises its ability to promote and protect fundamental rights across member states in a coherent manner.

The FRA's independence

The provisions of article 16 of the Regulation establishing the Agency stipulate that it shall fulfil its tasks in "complete independence", which distinguishes the Agency from other Union agencies.(55) Accordingly, in line with the Paris Principles,(56) the Agency's management board should be composed in such a way so as to ensure its complete independence from the institutions of the Union as well as the member states.

The General Assembly resolution of 1993 sets out the criteria with respect to the Agency's tasks, their independence and their operational methods.(57) It stipulates that human rights institutions be given as broad a mandate as possible to protect and promote human rights, (58) and the FRA duly benefits from this provision as the Regulation refers to article 6(2) EU.(59) The Agency's independence enables it to draft opinions which are objective, consistent and credible, since it will not be influenced by any political institutions of the EU or indeed the member states themselves. The Agency's credibility, derived from its independent nature, could in turn lead to

EU institutions requesting its opinion on issues of fundamental rights. This in turn could help the Agency exert greater influence in the EU's legislative process and thereby influence policy making. This aspect of the Agency's contribution to the protection and promotion of fundamental rights could cover an important monitoring gap, as its efforts will be reinforced through proactive measures (e.g. shaping policy that respects fundamental rights), rather than reactive measures of damage limitation.

However, the fact that the Agency is only mandated to deal with fundamental rights issues in the EU and its member states when implementing Community law (60) casts a shadow over the agency's structure as an independent human rights institution, since the Agency is not mandated to pronounce itself *ex officio* in the course of legislative procedures but may only do so on request of an EU institution. Although article 28 of the Regulation allows certain candidate countries and countries with which a stabilisation and association agreement has been concluded to participate in the Agency. It does not necessarily mitigate the effect of article 3(3), which erodes the FRA's independence and may compromise its monitoring functions.

Conclusion

The Fundamental Rights Agency has covered an important gap in the monitoring of compliance with fundamental rights in the European Union since its establishment in 2007. The Agency uses its systematic, consistent and coherent data collection and analysis methods in order to make a crucial contribution by setting out normative trends within its existing mandate. The political power of the Agency is based to a great extent on the possibility of developing these standards, thereby contributing to the emergence of a common European perception of fundamental rights issues. Thus, the emergence of a European perception of fundamental rights will cover the monitoring gap by raising the expectations of civil society to receive a better standard of fundamental rights protection from its political institutions, and an acceptance on the part of those

institutions to strive for better standards of fundamental rights protection and promotion. The FRA is also able to draw on data collected by various national and international research and monitoring institutions, which will help it determine the prioritisation of future EU policies. This aspect of the FRA's responsibility provides greater scope for the establishment of common indicators and analytical standards, which allows for a consistent method of data collection and thus improved comparability – thus enabling the FRA to ascertain where fundamental rights have been respected and where they have not, so as to formulate advice to the relevant body as to how to remedy the situation.

One of the main tasks of the FRA is “to develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights”.(61) The FRA publishes thematic reports drawn from its analytical research and surveys,(62) as well as developing its own communication strategy in an attempt to raise public awareness of fundamental rights issues.(63) By raising public awareness, the FRA creates a new level of expectation of fundamental rights protection by civil society,(64) from its respective judiciary and elected representatives. By doing this, the FRA allows civil society to be more vigilant of fundamental rights violation, enabling people on the ground to monitor violations effectively.

Jahed Morad, LLB, LLM is a barrister of the Bar of England & Wales. He is also the co-founder and vice-chair of the International Association of Afghan Lawyers, which promotes human rights and justice sector reform in Afghanistan.

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(40) Art 6.

(41) Art 4(1)(a) and (b).

(42) P Alston, J H H Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in Alston (ed) *The EU and Human Rights*, OUP, 1999.

(43) The Treaty of Amsterdam (1997) provided for the first time that "the EU is founded on the principles of liberty, democracy, human rights and the rule of law", as well as providing that "the Treaty requires the Court of Justice, in so far as it has jurisdiction, to apply human rights standards to acts of Community institutions".

(44) Art 4(1)(d).

(45) Art 4(1)(f).

(46) Art 4(1)(e).

(47) Art 4(1)(e). The annual report on fundamental rights issues, highlighting example of good practice in the protection and promotion of fundamental rights also allows the FRA to shape the public perception of fundamental rights issues in Europe.

(48) Art 4(1)(c) and (d).

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(55) The 20th Recital makes specific reference to the UN principles for independent human rights institutions (Paris Principles).

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(57) Resolution 48/134 of the UN General Assembly of 20 Dec 1993, UN Doc. A/RES/48/134.

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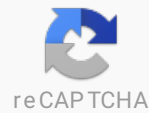
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