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European Border and Coast Guard

An Analysis of Regulation 2016/1624 on the Allocation of Competences and
the Responsibility to Protect Fundamental Rights of Asylum-Seekers

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Summary

The European Border and Coast Guard was launched on October 6th, 2016. It was established through Regulation 2016/1624 and replaces the European Agency for the Management of Operational Cooperation at the External Borders of the Member States. The Agency is more known as Frontex.

The objective with this thesis is to examine two problems in Regulation 2016/1624 that was addressed at the negotiations to the Regulation. The first problem was that the Member States considered the delegated competences to the Agency being too wide and violated the allocation of competences in the Union Treaties. The second problem was that Regulation 2016/1624 did not define if the Agency has a responsibility to protect the fundamental rights of asylum seekers. This is examined through two research questions.

The first research question is whether the delegated competences to the European Border and Coast Guard in Regulation 2016/1624 is violating the Union Treaties. The second research question is whether the Agency has a responsibility to protect the fundamental rights of asylum-seekers.

In order to answer these questions, a description is given in Chapter 2 on the allocation of competences and on the fundamental rights of asylum-seekers. All fundamental rights of asylum-seekers derive from the non-refoulement principle. An analysis is given on the relationship between the allocation of competences and the responsibility of the Union to protect fundamental rights. In Chapter 3, an analysis is carried out on to the allocation of competences and the competences of the Agency. In Chapter 4, the responsibility of the Agency to protect fundamental human rights of asylum-seekers is analysed.

The conclusions are that the European Border and Coast Guard has competences that, in some aspects, violates the Union Treaties and that the Agency has a responsibility to protect the non-refoulement principle. The principle is *jus cogens*, compelling international law, from which no derogation is allowed.

Through these conclusions, another problem is detected. The Union cannot interfere in the executive powers of the Member States to issue decisions of entry, asylum or return, as this would violate the allocation of competences. However, the responsibility to protect the fundamental rights of asylum-seekers requires the Agency to intervene in these executive powers.

The dilemma is analysed in Chapter 5 and the conclusion is reached, that there is reason to argue that the responsibility to protect fundamental rights of asylum-seekers expands the competences of the Union. However, this is very likely to never be accepted by the Member States. This since it can be seen as a threat to the sovereignty of the Member States.

Sammanfattning

Den europeiska kust- och gränsbevakningsbyrån lanserades den 6 oktober 2016. Byrån etablerades genom förordning 2016/1624 och ersätter den europeiska byrån för förvaltningen av det operativa samarbetet vid Europeiska unionens medlemsstaters yttre gränser. Byrån är mer känd som Frontex.

Syftet med den här uppsatsen är att undersöka två problem i förordning 2016/1624 som lyftes under förhandlingarna till förordningen. Det första problemet var att medlemsstaterna ansåg att de delegerade befogenheterna till byrån var för breda och stred med fördelningen av befogenheter i unionsfördragen. Det andra problemet var att förordning 2016/1624 inte definierade om myndigheten har ett ansvar att skydda mänskliga rättigheter för asylsökande. Problemen undersöks genom två forskningsfrågor.

Den första forskningsfrågan är om de delegerade befogenheterna till myndigheten i förordning 2016/1624 står i strid med unionsfördragen. Den andra forskningsfrågan är om byrån har ett ansvar att skydda mänskliga rättigheter för asylsökande.

För att besvara dessa frågor ges en beskrivning i kapitel 2 på fördelningen av befogenheter och de mänskliga rättigheterna för asylsökande. Alla mänskliga rättigheter för asylsökande härstammar från non-refoulement principen. Här ges också en analys över förhållandet mellan fördelningen av befogenheter och unionens ansvar att skydda mänskliga rättigheter. I kapitel 3 genomförs en analys av fördelningen av befogenheter och byråns befogenheter. I kapitel 4 analyseras myndighetens ansvar att skydda mänskliga rättigheter för asylsökande.

Slutsatserna är att den europeiska kust- och gränsbevakningsbyrån har befogenheter som, i vissa aspekter, strider mot unionsfördragen och att byrån har ett ansvar att skydda non-refoulement principen. Principen är *jus cogens*, tvingande internationell rätt, och inga undantag kan göras från denna princip.

Genom dessa slutsatser, upptäcks ett annat problem. Unionen kan inte lägga sig i de verkställande makterna hos medlemsstaterna, t.ex. att utfärda beslut om tillträde, asyl eller att skicka tillbaka en person som sökt asyl. Detta skulle strida mot fördelningen av befogenheter. Men, ansvaret för byrån att skydda de mänskliga rättigheterna för asylsökande innebär att byrån måste lägga sig i dessa verkställande makter.

Dilemmat analyseras i kapitel 5. Slutsatsen är att det kan argumenteras att ansvaret att skydda mänskliga rättigheter expanderar unionens befogenheter. Dock, kommer detta troligen inte att accepteras av medlemsstaterna. Detta kan nämligen ses som ett hot mot medlemsstaternas suveränitet.

Preface

I och med att jag lämnar in detta examensarbete slutför jag nu mina studier i juridik vid Juristprogrammet på Lunds Universitet. Detta tillfälle skulle jag vilja ta för att tacka de människor som har hjälpt mig att göra detta möjligt.

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Elsa Edling

Abbreviations

1967 Protocol	Protocol Relating to the Status of Refugees
ARIO	Articles on the Responsibility of International Organizations
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CFSP	Common foreign and security policy
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	The Convention on the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ESMA	European Securities and Markets Authorities
EXCOM	Executive Committee of the Programme of the High Commissioner
Geneva Convention	United Nations Convention Relating to the Status of Refugees
ICCPR	International Covenant on Civil and Political Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

The political climate within the Union has undergone a radical change within the last years. It has shifted from protecting and helping asylum-seekers to increased focus on security and protection against terrorism. The European Border and Coast Guard with its expanded competences in external borders management is one of many measures taken in relation to this. The changes have been made rapidly and questions have been raised if the adopted measures are in compliance with Union Law and whether the non-refoulement principle is protected.

1.1 Background

The European Border and Coast Guard was launched on October 6th, 2016 and established through Regulation 2016/1624. The Agency replaces the European Agency for the Management of Operational Cooperation at the External Borders of the Member States. Both the new and old version of the Agency goes under the name Frontex. Regulation 2016/1624 expands the competences of the European Border and Coast Guard in the management of external borders. This includes the management of the high inflow of asylum-seekers seeking refuge within the Union.

A person fleeing its country is entitled to asylum if the person qualifies as a refugee. The requirements for being considered a refugee are laid down in the Convention Relating to the Status of Refugees (the Geneva Convention). The Geneva Convention also contains the non-refoulement principle, which requires that a refugee cannot be expelled or returned to a territory where the refugee's life or freedom can be threatened. This is the most important fundamental right in regards to asylum-seekers. All fundamental rights for asylum seekers derive from the non-refoulement principle.

In 2015, Europe saw a massive inflow of asylum-seekers. Pressure was put on the Member States, and Union law was not fit to handle the situation. At first, the Union was trying to help the asylum-seekers and focus was put on how to handle the inflow of them. The Paris attacks in 2015 were committed by persons crossing the external border with forged Syrian papers. This changed the focus within the Union from protecting asylum-seekers to protecting the Union from terrorism. More controls at the external borders were put up. As part of this, the European Border and Coast Guard with its new enhanced competences was established.

1.2 Objective

At the negotiations of Regulation 2016/1624 and in the following discussions on the European Border and Coast Guard, two problems were emphasized.

The first problem was that the Member States considered the delegated competences to the Agency as being too wide. The competences were regarded as threatening the sovereignty of the Member States. Through case law and in practice it has been established that the Union can delegate competences to bodies of the Union, such as the European Border and Coast Guard Agency. However, the Union institutions can only delegate competences that have been conferred from the Member States upon the Union institutions themselves. That the Union only possesses competences that has been conferred upon them is known as the allocation of competences and this is regulated in the Union Treaties. The delegated competences in Regulation 2016/1624 were argued to be in violation of the allocation of competences, and thereby violating the Union Treaties. The Union Treaties are primary law and regulations are secondary law. Secondary law is to be considered void if it violates primary law.

The second problem was that Regulation 2016/1624 was regarded as not protecting the fundamental rights of asylum-seekers. These concerns were raised by organisations such as United Nations High Commissioner for Refugees (UNHCR) and legal professors, e.g. Steve Peers. In the Regulation, the focus is put on safety, security and control. There are no provisions defining what responsibility the Agency has, to protect the non-refoulement principle. The fundamental rights of asylum seekers derive from the non-refoulement principle. Several organisations, such as Amnesty International and UNHCR, were alarmed that the fundamental rights of the asylum-seekers would not be protected in the work of the Agency.

The objective of this thesis is to examine these two problems: the wide competence of the Agency and the responsibility of the Agency to protect fundamental rights of asylum-seekers. In order to do this, this objective is divided into two parts. The first part of the objective is to examine the allocation of competences in the Union Treaties and the competences of the European Border and Coast Guard. The second part of the objective is to examine the fundamental rights of asylum-seekers and the responsibility of the European Border and Coast Guard to protect these fundamental rights.

1.3 Research Questions

To be able to fulfil the objective of this thesis, the two parts of the objective has been further narrowed down to two research questions.

The first research question is to assess if the competences delegated to the

European Border and Coast Guard in Regulation 2016/1624 is violating the Union Treaties. Within this question, attention is paid to the allocation of competences in the Union Treaties.

The second research question is to examine whether the Agency has a responsibility to protect the all fundamental rights of asylum-seekers. As explained in Title 1.1 Background, all fundamental rights of asylum-seekers derive from the non-refoulement principle. This implies that the two expressions “the fundamental rights of asylum-seekers” and “the non-refoulement principle” has, in principle, the same meaning. Throughout this thesis, both these expressions will be used and they should be read as entailing the same definition.

These two research questions deal with two different problems in Regulation 2016/1624; the allocation of competences and the responsibility of the European Border and Coast Guard to protect fundamental rights of asylum-seekers. This can be regarded as two very different matters. However, the analyses of the problem will show that they are intertwined and have effect on each other. It is difficult to do a proper analysis on one of the problems without an analysis on the second. Therefore, both problems will be examined within the scope of this thesis.

1.4 Methods and Material

For this thesis, a traditional legal dogmatic method is applied.

In regards to material, a wide variety has been used. For the more descriptive part on allocation of competences, the article “Some remarks on the Allocation of Competences between the European Union and its Member States” by Udo Di Fabio, published in *Common Market Law Review* was very useful. The article offered a deeper insight and understanding of the allocation of competences. Therefore it was, a good complement to the text book *European Union Law*, with Steve Peers and Catherine Barnard as editors, that only gave a very general overview of the basics of the allocation of competences. The Opinion of Advocate General Sharpston delivered on 21 December 2016 in Opinion Procedure 2/15 was also very helpful in getting a deeper understanding of the allocation of competences in general but especially the relation between shared and exclusive competences. The Opinions of the Advocate Generals lack legal binding force. However, they give a good overview and insight on the topic and the legal argumentation. They are often followed by the Court of Justice of the European Union (CJEU). Opinions are therefore good and trustful sources.

The article “The Principle of Non-refoulement and the Right of Asylum Seekers to Enter State Territory”, written by Vladislava Stoyanova and published in *Interdisciplinary Journal of Human Rights Law* was very useful when defining which fundamental rights asylum-seekers are

protected by. Roberta Mungianu's book *Frontex and non-refoulement: the international responsibility of the EU* also offered good guidance in regards to fundamental rights of asylum-seekers. Mungianu's book was also comprehensive on Frontex. However, the book is based on the earlier Frontex Regulation from 2011 (Regulation 1168/2011) and was published in the year 2016, before the adoption of Regulation 2016/1624. It therefore gives no guidance on Regulation 2016/1624, but since the Agency has stayed the same legal body the book was useful. However, only as long the changes in Regulation 2016/1624 were regarded.

The relation between allocation of competences and the responsibility of the Union to protect fundamental rights is very well examined and explained by Elise Muir in the article "Fundamental Rights: An Unsettling EU Competence" in *Human Rights Review*. Edouard Dubout's Chapter, "The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics", in the book *The Question of Competence in the European Union*, was also very helpful.

Comprehensive argumentation about Regulation 2016/1624 and the European Border and Coast Guard was not available in many printed sources. This is because the Regulation was adopted as late as October 2016, only nine months before the writing of this thesis. Good and comprehensive analyses on the Regulation could however be found in legal blogs such as *EU Law Analysis – Expert insight into EU law developments*. Especially the two articles "The Reform of Frontex: Saving Schengen at Refugees' Expense", written by Steve Peers and "Establishing the European Border and Coast Guard: all-new or Frontex reloaded?", written by Herbert Rosenfeldt gave a good insight into as well as an analysis of the problems in Regulation 2016/1624. The professor of EU and Human Rights Law Steve Peers is the editor of the blog *EU Law Analysis – Expert insight into EU law developments* and all articles are written by legal professors or lawyers. The articles in this blog is thereby highly reliable. In the thesis, focus has also been put on the provisions in the Regulation 2016/1624 itself, as the objective is to examine this Regulation.

On international law and the status of the non-refoulement principle, the articles "The jus cogens Nature of non-refoulement", by Jean Allain in *International Journal of Refugee Law* and "The Meso Level: Means of Interaction between EU and International Law. Customary International Law as Source of EU Law: A Two-Way Fertilization Route?", by Theodore Konstadinides in *Yearbook of European Law*, has been very useful. The articles explained the concept of *jus cogens* and carried out analyses on non-refoulement as *jus cogens*.

1.5 Delimitation

Whether Regulation 2016/1624 and the European Border and Coast Guard is violating the Union Treaties is a very wide subject. A complete

assessment would not be possible within the range of this graduate thesis and a delimitation to only the aspect of the allocation of competences have therefore been set. Focus is put on this aspect, since the wide competences of the Agency have been regarded as one of the biggest problems in Regulation 2016/1624.

An important note to make in regards to the allocation of competences is that only the Member States can confer competences to the Union. In the Union Treaties, it is not explicitly stated that bodies, such as agencies, can possess competences. Agencies of the Union is a phenomenon that has been developed through practice, not law. Through case law and the *Meroni doctrine* it is explained that the competences are delegated from the Union institutions to the agencies. This field of law and the *Meroni doctrine* is a very complex matter with few legal sources. Due to the limited time and resources that can be put into this thesis, a further analysis on the delegation of competences to agencies will not be given. Instead, only a shorter description will be presented.

The relation between the European Border and Coast Guard and the non-refoulement principles is yet another wide subject. This thesis will only further investigate if the Agency has a responsibility to protect the non-refoulement principle. A complete analysis on whether the Agency is violating the non-refoulement principle or how the Agency should act to ensure that the principle is followed is outside the scope of this thesis.

The European Border and Coast Guard is very closely related to the area of migration law within Union law. The area of migration law is known as the Common European Asylum System (CEAS). CEAS covers the regulations and directives that regulates everything from deciding on which Member State shall carry out the asylum procedure to stating minimum requirement for the living situations of asylum-seekers. This is an interesting area of law, but not one that is required to answer the research questions of this thesis. Because of this, no further description of CEAS will be given.

The thesis deals with Union law and problem at a Union level. Therefore, no closer examination of national law of any of the Member States is given.

1.6 Disposition

The disposition of this graduate thesis will start out with a more descriptive part in Chapter 2. This part will give an introduction to the interests behind the establishment of the European Border and Coast Guard (Title 2). Then explain the allocation of competences between the Union and Member States (Title 2.1) together with a definition of agencies and the delegation of competences to agencies (Title 2.1.4). This is then followed by an explanation on which fundamental rights the asylum-seekers have (Title 2.2). Lastly, the relationship between the allocation of competences and the protection of fundamental rights is examined (Title 2.3).

After this, the thesis will focus on the European Border and Coast Guard and the allocation of competences in Chapter 3. First a short background on the Agency will be given (Title 3.1). Then the tasks of the Agency are presented, this to show what the Agency is entitled to do, or in other words, which competences it possesses (Title 3.2). In Title 3.3, the aspects of the tasks of the Agency that might cause problems in regards of Union competence is presented and analysed. A conclusion on the first research question is presented (Title 3.4).

In Chapter 4 the focus is put on fundamental rights. Here, an analysis is made on Union law and international law. It is assessed whether any of the legal sources within these areas of law can be used to argue that the European Border and Coast Guard has a responsibility to protect the fundamental rights of asylum-seekers. In Title 4.2.4 is also the protection of the Union against terrorism regarded. In Title 4.5, the Conclusion is reached that the Agency has a responsibility to protect the fundamental rights of asylum-seekers. This is because the non-refoulement principle is *jus cogens*, compelling international law.

Chapter 5 presents the conclusions on the two research questions. It is here assessed that another problem can be detected. The allocation of competences does not allow the Agency to properly carry out its responsibility to protect fundamental rights. This dilemma is analysed in Title 5.2. In Title 5.3, the final conclusion is reached. The final conclusion is that the responsibility to protect fundamental rights of asylum-seekers can expand the competences of the Agency. However, this will not be accepted by the Member States, since it can be regarded as a threat to the sovereignty of the Member States.

Before the Bibliography, a spreadsheet can be found in Supplement A. This spreadsheet gives the reader an overview of the different categories of competences allocated between the Union and the Member States. The spreadsheet shows where provisions dealing with the different policy areas in the categories of competence can be found.

2 The European Union

We Europeans should know and should never forget why giving refuge and complying with the fundamental right to asylum is so important. ...So it is high time to act to manage the refugee crisis. – Commission President Jean-Claude Juncker, State of the Union 2015.¹

We must defend ourselves against terrorism. ...tolerance cannot come at the price of our security... We need to know who is crossing our borders. That is why we will defend our borders with the new European Border and Coast Guard... – Commission President Jean-Claude Juncker, State of the Union 2016.²

The State of the Union is an annual speech held by the President of the European Commission to the European Parliament since 2010. It was instituted with the adoption of the Lisbon Treaty and its objective is to make the political life of the Union more democratic and transparent. In the speech, the Commission President addresses the events passed in the latest year and announces the political priorities for the coming years.³

The State of the Union gives a good overview of the political climate in the Union. A very striking change happened within the Union from 2015 to 2016, which is illustrated by the two quotes above. In 2015, focus was put on helping asylum-seekers and standing up for their fundamental rights.⁴ After recent terror attacks, the focus has shifted to preserving security within the Union. In the 2016 speech, terrorism is mentioned several times and focus is put on defending and protecting the borders. No mention is made of refugees and their fundamental rights.⁵

The development of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) into the European Border and Coast Guard is one of the measures taken in order to strengthen border control.⁶ The change

¹ Juncker, Jean-Claude. (2015, September 9) “State of the Union 2015: Time for Honesty, Unity and Solidarity”, European Commission [Transcript]. Retrieved from: <www.europa.eu/rapid/press-release_SPEECH-15-5614_en.htm>, accessed 2017-02-14.

² Juncker, Jean-Claude. (2016, September 14). “State of the Union 2016: Towards a better Europe – a Europe that protects, empowers and defends”, European Commission [Transcript]. Retrieved from: <www.europa.eu/rapid/press-release_SPEECH-16-3043_en.htm>, accessed 2017-02-14.

³ Institutional agreement, Framework Agreement on relations between the European Parliament and the European Commission, L 304/47, 20 November 2010, Annex IV, p. 5.

⁴ Juncker (2015).

⁵ Juncker (2016).

⁶ Rosenfeldt, Herbert. (2016 October 16). “Establishing the European Border and Coast Guard: all-new or Frontex reloaded?”, in blog: EU Law Analysis – Expert insight into EU law developments, by Peers, Steve, (ed.), retrieved from

came quickly with the first mention of amending the Frontex Regulation at the informal meeting on migration of the Heads of State or Governments on September 23rd, 2015.⁷ Only a year later, on October 6th, 2016, the European Border and Coast Guard Regulation 2016/1624 came into force and the Agency was launched. These quick changes and developments within the Union awoke concerns about the compliance with Union law and important international law, such as the non-refoulement principle.⁸

The new Frontex, in the form of the European Border and Coast Guard has been given greater competences than ever before. With the new mandate the Agency can act within the areas of freedom, security and justice, and interfere in the Member States' external border control. This raises concerns that the Union, through the European Border and Coast Guard, is acting outside of its own competences and endangering the sovereignty of the Member States, thereby not complying with the allocation of competence between the Union and the Member States.⁹

Since the focus has now shifted from helping and managing the asylum seekers crossing the borders to security, concerns have been raised in regards to the fundamental rights of the asylum seekers. As an asylum seeker fleeing from one's State of origin, one is entitled to international protection if one fulfils the criteria for a refugee. This is governed by Union law as well as in international treaties such as the Convention Relating to the Status of refugees¹⁰ (Geneva Convention) and the Convention for the protection of Human Rights and Fundamental Freedoms¹¹ (ECHR). Criticism has been directed at the Agency that they do not do enough in the field of fundamental rights of asylum seekers, thereby violating these fundamental rights and endangering the safety and lives of asylum seekers.¹²

The objective of this thesis is to examine these two problems. In order to attain this objective, two research questions have been set. The first research question is whether the competences delegated to the European Border and Coast Guard in Regulation 2016/1624 is in violation to the allocation of competences in Union Treaties.

<www.eulawanalysis.blogspot.de/2016/10/establishing-european-border-and-coast.html> accessed 2017-02-22.

⁷ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251/1, 16 September 2016, Preamble no. 1.

⁸ Rosenfeldt (2016).

⁹ Rosenfeldt (2016).

¹⁰ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <www.refworld.org/docid/3be01b964.html> accessed 2017-02-12.

¹¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <www.refworld.org/docid/3ae6b3b04.html>, accessed 2017-02-02.

¹² Rosenfeldt (2016).

The second problem, regarding the protection of fundamental rights for asylum seekers, is however another matter. In order to examine this problem a second research question has been set. Concerns have been raised that the Agency is violating fundamental rights. However, the Agency cannot be regarded as violating fundamental right if they have no responsibility to protect them, in the first place. Therefore, the third research question in this thesis is to examine what responsibility the Agency must protect the fundamental rights of asylum seekers.

To be able to answer these research questions and in order to give the reader a better insight to the research questions and the problems being examined in this thesis, Chapter 2 is more of a descriptive character. In Title 2.1, the allocation of competences will be explained. Here, the establishment of agencies and the delegation of competences to agencies is also described. This, in order to give the reader an insight in the matters that regards the first research question.

In the next part of Chapter 2, the focus will be shifted to the fundamental rights of asylum-seekers. In order to examine which responsibility the Agency has to protect fundamental rights of asylum-seekers, it must be examined from where the fundamental rights of asylum-seekers derive and what they entail. This is described in Title 2.3. Also, the relationship between the allocation of competences and the responsibility to protect fundamental rights of asylum-seekers is analysed. This analysis is needed in order to examine whether the extended competences of the Agency have an influence on their responsibilities to protect fundamental rights.

2.1 Allocation of Competences

In order to understand the allocation of competences between the Union and the Member States it is important to understand the principles of conferral, subsidiarity and proportionality. These three principles are central within Union law and make up the very foundation of the Union and the relationship to its Member States.¹³

The Union itself does not have *Kompetenz-Kompetenz*, meaning that the Union does not have competence to decide in which matters they have competence. This is instead decided and limited by the Member States as they confer competences to the Union through the Treaties.¹⁴ The principle of conferral entails that the Union cannot act beyond the competences the

¹³ Bradley, Kieran St C. (2014). "Legislating in the European Union", in: European Union Law, Barnard, Catherine and Peers, Steve (eds.), Oxford: Oxford University Press, 2014, pp. 104-105.

¹⁴ Di Fabio, Udo, "Some Remarks on the Allocation of Competences between the European Union and its Member States", *Common Market Law Review*, Vol. 39, 2002, pp. 1292-1294. See also C-376/98, *Germany v European Parliament and Council of the European Union*, EU:C:2000:544, para. 83 and 107.

Member States have agreed to confer, give, to the Union. The principle is stated in Article 1, 5.1 and 5.2 in the Treaty on European Union (TEU) but can also be found in several other provisions throughout the Treaties.

The principle of subsidiarity governs whether the Union should act within a competence. It is not applicable to the exclusive competence of the Union, since within this competence, the Union is always allowed to act. The subsidiarity principle states that power should be exercised as close as possible to the citizen. This means that the Union can only act when the action cannot be sufficiently achieved by the Member States but instead better achieved at Union level, thereby setting a limit to the competences of the Union.¹⁵ This principle is found in Article 1 and 5.3 TEU. Today, the national parliaments of the Member States can use the so called “yellow card procedure” to stop the adoption of a legislative act that they consider to be a violation of the subsidiarity principle.¹⁶

The third principle, the principle of proportionality, is defined in Article 5.4 TEU and entails that the Union shall always act in the least possible intrusive way to achieve their goals. The Union cannot act in a way that goes beyond what is necessary to achieve the objectives in the Treaties.¹⁷

The competences are divided into different categories. The main three categories are exclusive competence, shared competence and the competence to support, coordinate and supplement.¹⁸ The allocation of competences was earlier regulated in the case law of Court of Justice of the European Union (CJEU). Through the Lisbon Treaty, the case law was codified into TEU and the Treaty on the Functioning of the European Union (TFEU).¹⁹ All the categories of competences are stated in Article 2 TFEU. The different policy areas fall within the different categories of competence. Which area belongs to which category can be read in Articles 3 to 6 TFEU. Several of the policy areas are further regulated in more detailed provisions throughout TEU and TFEU. In Supplement A is a spreadsheet found, lists which policy area belongs to which category and the detailed provisions for the policy area (see Supplement A).

When deciding on a category of competence a legislative act shall be placed in, the legal base of the act must be assessed first.²⁰ In regards to Regulation 2016/1624 establishing the European Border and Coast Guard, Articles 77.2.b, 77.2.d and 19.2.c are set as legal base. These Articles are all under Title V Area of freedom, security and justice. The policy area of freedom, security and justice is found in Article 4.2.j TFEU and Regulation

¹⁵ Di Fabio, Udo (2002). See also C-376/98, *Germany v European Parliament and Council of the European Union*, EU:C:2000:544, para. 83 and 107.

¹⁶ Craig, Paul and De Búrca, Gráinne. (2015). *EU law: text, cases and materials*, 6th ed. Oxford: Oxford University Press, 2015, pp. 96-102.

¹⁷ Bradley (2014) p. 116.

¹⁸ Craig and De Búrca (2015) p. 73.

¹⁹ Bradley (2014) p. 107.

²⁰ Opinion of Advocate General Sharpston delivered on 21 December 2016 in Opinion procedure 2/15, EU:C:2016:992, para. 87-94.

2016/1624 falls under the category of shared competence. Below, a more thorough description will be given to each of the different categories.

When assessing the legal base, it is important to remember that it is not given that the Treaty Articles mentioned in the beginning of a Regulation, Directive or any other Union act is the correct legal base. The legal base can only be assessed on objective factors that include the aim and content of the measure, which can be amended through judicial review.²¹

2.1.1 Exclusive Competence

Within the areas where the Union has exclusive competence, only the Union can act, legislate and adopt legally binding acts. The Member States are only allowed to act when empowered by the Union or when they are implementing Union acts.²²

The Union has exclusive competence within the areas of the custom union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of the marine biological resources under the common fisheries policy and the common commercial policy. This is stated in Article 3.1 TFEU and this list is meant to be exhaustive.²³ Article 3.2 TFEU further states the Union's external exclusive competence, meaning when the Union has exclusive competence for the conclusion of an international agreement.²⁴

2.1.2 Shared Competence

The shared competences are defined in Article 4 TFEU. This category is residual, meaning that when no other competence is explicitly stated the area shall be assessed to fall within the shared competence. The areas within the shared competences are the internal market; social policy, for the aspects as defined in the Treaty; economic, social and territorial cohesion; agriculture and fishery, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice and common safety concerns in public health matters, for the aspect as defined in this Treaty.²⁵ Exactly how the competences are allocated is stated in more detailed provisions that are related to each area. The exact allocation of competences can therefore vary within this category depending on policy area.²⁶ See

²¹ Opinion of Advocate General Sharpston delivered on 21 December 2016 in Opinion procedure 2/15, EU:C:2016:992, para. 87-94.

²² Craig and De Búrca (2015) p. 78.

²³ Bradley (2014) pp. 107-108.

²⁴ Craig and De Búrca (2015) pp. 81-83.

²⁵ Craig and De Búrca (2015) pp. 83-84.

²⁶ Craig and De Búrca (2015) p. 85.

Supplement A for a spread sheet on where the more detailed provisions can be found.

In areas where the competence is shared, the Member State can only act within matters where the Union has not yet legislated or acted on.²⁷ The matters within the area, where the Union has acted are referred to as pre-empted.²⁸ When the Union has legislated in a way that covers a whole area, the area is in practice within the exclusive competence of the Union. It is important to clarify that the area is still not an exclusive competence as defined in Article 3. The areas in Article 3.1 are within the *a priori* exclusive Union competence. An area within shared competence where the Union has pre-empted the whole area can, in theory, be a shared competence again. This is because the Union can stop legislating within the area and withdraw the already adopted legislations. Therefore, a completely pre-empted area cannot be equalized with an exclusive competence in Article 3 TFEU.²⁹

The areas of research, technological development and space, development cooperation and humanitarian aid are explicitly mentioned in Articles 4.3 and 4.4 TFEU. Within these areas, the competence stays with the Member States even in matters in which the Union has legislated to avoid pre-emption in these particular areas.³⁰ They are also commonly referred to as parallel competences.³¹

Other excepted matters are essential State functions such as ensuring the territorial integrity of the State, the maintenance of law and order and the safeguarding of the national security of the Union Member States. This is regulated in Articles 4.2 TEU and 72, 73 and 77.4 TFEU. These matters fall under the area of freedom, security and justice in Article 4.2.j. The area cannot be fully regulated by the Union due to these Articles.³²

As earlier assessed Regulation 2016/1624 falls under Article 4.2.j TFEU. It is therefore important to make sure that Regulation 2016/1624 is compatible with Article 4.2 TEU and Articles 72, 73 and 77.4 TFEU. An assessment of this will be made under Title 3.3.

²⁷ Vranes, Erich, "Die EU-Außenkompetenzen im Schnittpunkt von Europarecht, Völkerrecht und nationalem Recht", *Juristische Blätter*, Vol. 133, 2011, p. 14.

²⁸ Bradley (2014) pp. 108-109.

²⁹ Opinion of Advocate General Sharpston delivered on 21 December 2016 in Opinion procedure 2/15, EU:C:2016:992, para. 59.

³⁰ Bradley (2014) pp. 108-109.

³¹ Foreign and Commonwealth Office: "EU law and the balance of competences: A short guide and glossary", The Government of the United Kingdom <www.gov.uk/guidance/eu-law-and-the-balance-of-competences-a-short-guide-and-glossary>, accessed 2017-01-24.

³² Mungianu, Roberta. (2016). *Frontex and non-refoulement: the international responsibility of the EU*. Cambridge: Cambridge University Press, 2016, pp. 19-20.

2.1.3 Competence to Support, Coordinate or Supplement

This category is found in Article 2.5 TFEU. These areas cannot be harmonized and do not prevail the Member States. The areas are stated in Article 6 TFEU and are protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection and administrative cooperation. Within this category, the Union can only adopt legal acts that are supported by the Treaties.³³

These three categories of competences cover most of the Union acts but there are also two areas that fall outside of these categories. The first one is the economic, employment and social policy. This area shall be coordinated in accordance with arrangements in the Treaties between the Union and the Member States, e.g. through guidelines, as stated in Article 2.3 and 5 TFEU.³⁴

The common foreign and security policy (CFSP) is the second area that does not fall within the three categories earlier mentioned. This is dealt with in Article 2.4 TFEU and Title V TEU. The decision-making within CFSP is done by the European Council and executed by the High Representative for Foreign Affairs and Security Policy together with the European Parliament, the Commission and the CJEU.³⁵ This is to give this area a more intergovernmental level.³⁶

The allocation of competences is an important area within Union law. However, the Union Treaties only regulate which and how the competences are conferred to the Union and its main institutions. Since the European Border and Coast Guard is an agency, a description must be given on how agencies is established and how the Union institutions can delegate competences upon its agencies. Therefore, the establishment of agencies and the delegation of competences to agencies is further examined in the following section.

2.1.4 Delegation of Competences to Agencies of the European Union

The European Border and Coast Guard is an agency of the Union. Agencies play an important institutional role in the Union today. They are often a big help to the Commission as the agencies can cover the more technical and bureaucratic part of the executive power. Agencies are also appreciated by the Member States since they prefer giving competences to the agencies where the Management Board consists of representatives from the Member

³³ Craig and De Búrca (2015) pp. 86-88.

³⁴ Craig and De Búrca (2015) pp. 88-89.

³⁵ Craig and De Búrca (2015) pp. 89-90. Bradley (2014) pp. 109-110.

³⁶ Craig and De Búrca (2015) pp. 89-90.

States instead of expanding the Commission's competences. The Commission represents the interest of the Union. Through agencies and the Management Board it is easier for Member States to make sure their own interests are considered.³⁷ The Commission is supportive of agencies but they also argue for the limitation of agency powers as to not undermine the executive function of the Commission.³⁸

There is no official definition for agencies but they can all be defined as permanent bodies under Union public law that are established by the institutions through secondary legislation. All agencies have been established through a regulation³⁹ and have their own legal personality.⁴⁰ Today there are about 34 Union agencies.⁴¹

In regards to the establishment of agencies, no provision in the Treaties can be found that allows this. However, there are several provisions that take agencies and their powers for granted.⁴² Agencies are mentioned in Articles 263, 265, 267, 277 TFEU.⁴³ Since there is no explicit competence for the Union to establish agencies it must be assessed that an implied competence to do this exists.⁴⁴

The legal base for the establishment of agencies was first often claimed to be the so-called flexibility clause, Article 352 TFEU, and later the harmonisation clause, Article 114 TFEU. The use of these Articles has been accepted by the CJEU. The case law of today can be used to support that almost any sectorial provisions can be used as legal base when establishing agencies.⁴⁵ For Regulation 2016/1624, Articles 77.2.b., 77.2.d and 79.2.c are used as the legal base. This should be regarded as in compliance with the case law of the CJEU.

The competences of the agencies have been delegated to them by the Union.⁴⁶ Delegation is regarded lawful, in so far as it is not expressly prohibited.⁴⁷ Article 290 regulates the delegation of powers to the

³⁷ Tridimas, Takis. (2012). "Financial Supervision and Agency Power: Reflections on ESMA" in: *From Single Market to Economic Union: Essays in Memory of John A. Usher*, Shuibhne, Nic; Gormley, Niamh and W, Lawrence (eds.). Oxford: Oxford University Press, 2012, pp. 63-64.

³⁸ Craig and De Búrca (2015) pp. 69-70.

³⁹ Chamon, Merijn, (2016). *EU agencies: legal and political limits to the transformation of the EU administration*. Oxford: Oxford University Press, 2016.

⁴⁰ Chamon (2016) pp. 5-10.

⁴¹ European Union. (2017, March 9). "Agencies and other EU bodies". Retrieved from: <www.europa.eu/european-union/about-eu/agencies_en>, accessed 2017-01-23.

⁴² C-270/12, *United Kingdom v Parliament and Council (ESMA)*, EU:C:2014:18, para. 79.

⁴³ C-270/12, *ESMA*, para. 80-81.

⁴⁴ Chamon, Merijn, (2016). *EU agencies: legal and political limits to the transformation of the EU administration*. Oxford: Oxford University Press, 2016, p. 134.

⁴⁵ Chamon (2016) p. 152-153.

⁴⁶ Chamon (2016) pp. 1-2.

⁴⁷ See Case T-333/99 *X v European Central Bank*, EU:T:2001:251, para. 102 and the Opinion of Advocate General Léger in C-301/02 P *Tralli v European Central Bank*, EU:C:2005:91, para 29.

Commission, but agencies are not mentioned. This seems to point to the conclusion that delegation of power cannot be made to agencies. Despite this, the agencies of the Union are well established and the delegation of power to them is an important factor for the effective functioning of the Union.⁴⁸ Often, the *Meroni doctrine* is used to justify and explain under which conditions competences can be delegated to agencies. The doctrine stems from the case 9/56 *Meroni* but has been further developed through other cases.⁴⁹ The *Meroni doctrine* has been discussed and interpreted in different ways by legal scholars. The most important conclusions in the case 9/56 *Meroni* was that powers being delegated to an agency must be powers the delegating authority itself possesses.⁵⁰

A description of the allocation of competences, the establishment of agencies and the delegation of competences to the agencies have now been given, thereby the laying out of the descriptive parts for the first research question has been done.

This leads to the second research question on whether the Agency has a responsibility to protect the fundamental rights for asylum-seekers. To answer this research question, the fundamental rights of asylum-seekers must be further described. In the following section, it is explained from where the fundamental rights of asylum-seekers derive and what they entail.

2.2 Fundamental Rights of Asylum-Seekers

The term asylum stems from Greek and Latin and means place of refuge, sanctuary or safe from violence.⁵¹ Asylum today is usually used for the protection offered to people fleeing from persecution in their State of nationality. Asylum is also referred to as international protection. To be given such protection a person must qualify as a refugee.⁵²

The term refugee is defined in Article 1 in the Geneva Convention. A refugee is a person that has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and is outside his or her State of nationality. A

⁴⁸ Hofmann, Herwig CH. (2014). "General principles of EU law and EU administrative law" in: European Union Law, Barnard, Catherine and Peers, Steve (eds.). Oxford: Oxford university Press, 2014, p. 201.

⁴⁹ 9/56 *Meroni v ECSC High Authority (Meroni)*, EU:C:1958:7 and Craig and De Búrca (2015) p. 69.

⁵⁰ 9/56 *Meroni*, p. 150.

⁵¹ Online Etymology Dictionary, search word: asylum, <www.etymonline.com/index.php?term=asylum> accessed 2017-03-07.

⁵² European Commission, Migration and Home Affairs. (2017, March 9). "Who qualifies for international protection". Retrieved from: <www.ec.europa.eu/home-affairs/what-we-do/policies/asylum/refugee-status_en>, accessed 2017-03-07.

refugee cannot make use of the protection in his or her State of nationality.⁵³ The time limit of events happening before January 1st, 1951 through the adoption of the Protocol Relating to the Status of Refugees (1967 Protocol) is not applicable anymore.⁵⁴

In Union law, international protection can also be given to persons facing the death penalty or execution, torture or serious and individual threat due to an external or internal armed conflict. Such persons qualify as people entitled to subsidiary protection.⁵⁵

This thesis deals with persons crossing the external borders as asylum-seekers. This is not the same as a refugee since an assessment must be made before a person can be regarded a refugee.⁵⁶ A migrant is a person who has left his or her State of origin. When moving to a new country the person will there be referred to as an immigrant.⁵⁷ Both these terms are too wide for the scope of this thesis since they include economic migrants that are moving to the Union for work as well as students, trainees, volunteers, and other, so-called legal migrants.⁵⁸ No person is illegal and therefore the term “illegal immigrants” will not be used.⁵⁹

The most important fundamental right for asylum seekers is the principle of non-refoulement.⁶⁰ This principle is found in Article 33 of the Geneva Convention. It is defined as a ban for all Contracting States to send a refugee back to a territory where the refugee’s life or freedom is in danger for any reasons qualifying the asylum seeker as a refugee. The non-refoulement principle is the foundation for all other fundamental rights for

⁵³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <www.refworld.org/docid/3be01b964.html>, accessed 2017-02-12, Article 1.

⁵⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <www.refworld.org/docid/3ae6b3ae4.html>, accessed 2017-02-12, Article I.

⁵⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20 December 2011, Articles 2.e and 15.

⁵⁶ Peers, Steve. (2014). “Immigration and asylum”, in: *European Union Law*, Barnard, Catherine and Peers, Steve (eds.). Oxford: Oxford university Press, 2014, pp. 792-796.

⁵⁷ Diffen, “Immigrant vs. Migrant”, search word: immigrant vs. migrant, <[www.diffen.com/difference/Immigration vs Migration](http://www.diffen.com/difference/Immigration_vs_Migration)>, accessed 2017-03-09.

⁵⁸ Peers (2014) pp.788-792.

⁵⁹ “‘No human is illegal’: linguists argue against mislabelling of asylum-seekers”, *The Guardian*, December 6, 2015, <www.theguardian.com/us-news/2015/dec/06/illegal-immigrant-label-offensive-wrong-activists-say>, accessed 2017-03-09.

⁶⁰ Guild, Elspeth. (2016). “The Complex Relationship of Asylum and Border Controls in the European Union”, in: *Reforming the Common European Asylum System*, by Chetail, Vincent; De Bruycker, Philippe and Maiani, Francesco (eds.). Leiden; Boston: Brill Nijhoff, 2016, pp. 39-41.

asylum seekers.⁶¹

In ECHR, the non-refoulement principle is inherent in Article 3 on the prohibition of torture.⁶² The principle is also found in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁶³ and International Covenant on Civil and Political Rights (ICCPR)⁶⁴.⁶⁵ In Union Law, Article 19 in the Charter of Fundamental Rights of the European Union (the Charter) states the non-refoulement principle.

The right to non-refoulement is absolute in the ECHR, and should therefore be an absolute right within Union law as well.⁶⁶ Article 19.2 in the Charter corresponds to Article 3 ECHR and must therefore be interpreted in the same way, this in accordance with Article 52.3 in the Charter. That the right to non-refoulement is absolute has been recognised by CJEU in the ruling C-404/15 *Aranyosi*⁶⁷. This implies that a State must assess a person's claim to be under international protection.⁶⁸ Article 19 in the Charter is applicable both on refugees as well as immigrants under subsidiary protection.⁶⁹

The non-refoulement principle entails a right to seek asylum.⁷⁰ In the Charter the right to asylum is stated in Article 18. Roberta Mungianu, Assistant Professor at the Faculty of Law at the University of Copenhagen, argues that the non-refoulement principle also includes a responsibility outside State territory, when the State exercise de jure or de facto control, effective control, over places or borders. She supports these claims with case law from the European Court of Human Rights (ECtHR).⁷¹

⁶¹ Buckel, Sonja, "Die Rechte der Illegalisierten, Konstitutionsalisierungskämpfe in Räumen extraterritorialer Rechtlosigkeit", *Zeitschrift für Menschenrechte*, Vol. 7, Issue 1, 2013, pp. 70.

⁶² ECtHR, *Soering v. United Kingdom*, no. 14038/88, 7 July 1989, para. 88.

⁶³ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <www.refworld.org/docid/3ae6b3a94.html>, accessed 2017-02-09.

⁶⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <www.refworld.org/docid/3ae6b3aa0.html> accessed 2017-02-09.

⁶⁵ Reneman, Marcelle. (2014). "EU Asylum Procedures and the Right to an Effective Remedy" in the series: *Modern Studies in European Law*, Volume 46. Oxford: Hart, 2014, pp. 2-3.

⁶⁶ Boeles, Pieter. (2017, January 14). "Non-refoulement: is part of the EU's qualification Directive invalid?", in blog: *EU Law Analysis – Expert insight into EU law developments*, by Peers, Steve, (ed.), retrieved from <www.eulawanalysis.blogspot.de/2017/01/non-refoulement-is-part-of-eus.html>, accessed 2017-02-23.

⁶⁷ C-404/15, *Aranyosi*, EU:C:2016:198.

⁶⁸ Reneman (2014) pp. 2–3.

⁶⁹ Boeles (2017).

⁷⁰ Stoyanova, Vladislava, "The Principle of Non-Refoulement and the Right of Asylum-Seekers to Enter State Territory", *Interdisciplinary Journal of Human Rights Law*, Vol. 3, Issue 1, 2008, p. 5.

⁷¹ Mungianu (2016) pp. 163-166. ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, no. 61498/08, ECHR 2010-II and ECtHR, *Hirsi Jamaa and Other v. Italy*, no. 27765/09, ECHR 2012-II.

Vladislava Stoyanova, post doc at Lund University, argues that the asylum procedure must be conducted on State territory to be regarded as fair and effective, since the applicant has the right to appeal the decision of the asylum procedure. An actual access to appeal in front of national courts can only be guaranteed if the asylum procedure is carried out on State territory. The asylum procedure can therefore not be conducted on the State's borders or outside of the State territory, e.g. in international zones. The applicant is also entitled to legal aid and an interpreter.⁷²

The Geneva Convention does not contain any detailed provisions or standards for the assessment of refugee status.⁷³ There are guidelines from the United Nations High Commissioner for Refugees (UNHCR) and Executive Committee of the Programme of the High Commissioner (EXCOM) on asylum procedures but these are not binding. Case law from ECtHR only gives some directives on some aspects of the asylum procedure and its compliance with the non-refoulement principle.⁷⁴

This allows for a wide discretion among States on how to constitute the asylum procedure. In many States, the focus is no longer on fulfilling the principle of non-refoulement, instead the asylum procedure is designed to protect borders and assure that people that do not attain asylum get deported. This was highlighted by the accelerated asylum procedures that are getting more and more common throughout different States.⁷⁵

Two of the terrorists behind the Paris attacks in November 2015 entered Europe as asylum-seekers. They had been registered in Greece using fraudulent Syrian documents to get through border control. This has increased the pressure on performing thorough controls and attaining security at the external borders. Many asylum-seekers arrive with no or false documentation. Many of them also claim to have another nationality, especially Syrian, to speed up the asylum process and have a bigger chance of being granted asylum. To determine the nationality of poorly documented asylum seekers is one of the biggest challenges for the European Border and Coast Guard.⁷⁶

A description on the fundamental rights of asylum seekers is needed for the examination of the second research question in this thesis. The Union has a responsibility through the Treaties and the Charter to protect fundamental rights.⁷⁷ The question remains, whether this protection is also applicable on the European Border and Coast Guard. A further assessment on this will be given in Chapter 4.

⁷² Stoyanova (2008) pp. 5-6.

⁷³ Reneman (2014) pp. 4-5.

⁷⁴ E.g. UNHCR, *Handbook* (n 7) and EXCOM Conclusion no 8 (XXVIII) 1997, Determination of Refugee Status.

⁷⁵ Reneman (2014) p. 5.

⁷⁶ Frontex, "Risk Analysis 2016", ref. no: 2499/2016, pp. 7-8.

⁷⁷ TEU Art. 6, Charter Art. 51.1.

However, it must also be examined how the allocation of competences is affected by the responsibility of the Union to protect fundamental rights. Therefore, an analysis on the relationship between the allocation of competences and the responsibility to protect fundamental rights is carried out in the next section.

2.3 Allocation of Competences and the Responsibility to Protect Fundamental Rights in Union Law

The principle of conferral assures that the Union is not given too much power and becomes a supranational organisation. The principle protects the sovereignty of the Member States. How the competences are allocated in the Treaties can be described as a catalogue defining different policy areas and under which category of competence they lay.

The Union's right to act in regards to fundamental rights cannot be found within this catalogue. The two main sources for fundamental rights within the Union are the Charter and the general principles of the Union. The Charter became binding through the signing of the Lisbon Treaty in 2009 and the general principles have been developed through the case law of the CJEU. In 1969, CJEU concluded that fundamental rights are an integral part of the general principles of Union law.⁷⁸ Article 6 TEU states that the Union recognises the rights, freedoms and principles in the Charter. The same Article also states that the Charter shall not extend the competences of the Union. The application of the Charter is also limited in Article 51.1 to when Member States act within the scope of Union law. In regards to action of Union bodies, the Charter is applicable, but limited by the subsidiarity principle. Article 51.2 in the Charter also states that the Charter does not establish any new competences or task, or modify existing competences or tasks for the Union. The idea behind making the Charter binding was not to extend the competences of the Union.

CJEU often go far to protect fundamental rights, sometimes even beyond what the Union's political institutions have provided for in the Union legal order. Union fundamental rights reaches further than other Union law areas since it goes directly into domestic law and interpersonal relations. It opens a possibility for the Union to intrude in domestic law. The interaction between Article 5 TEU on conferred and allocated competences does not correspond to fundamental rights. The role the protection of fundamental rights has today seems to stretch the possibility for the Union to intervene.⁷⁹

⁷⁸ Groussot, Xavier; Pech, Laurent and Thor Petursson, Gunnar, "The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication", Eric Stein Working Papers, Issue 1, 2011, p. 3.

⁷⁹ Muir, Elise, "Fundamental Rights: An Unsettling EU Competence", Human Rights Review, Volume 15, 2014, pp. 27-30.

The Union can establish a level of protection in policy fields that are not within any of the competences of the Union in Articles 3-6 TFEU. Elise Muir, Associate Professor at Maastricht Faculty of Law, argues that this appears in three different situations. A level of protection in policy fields that are not within any of the Union competences can be argued to be established when fundamental rights are indirectly addressed in Union legislation. The second situation is when fundamental rights are directly mentioned in the Treaties, such as protection of data in Article 16 TFEU and protection against discrimination in Article 19 TFEU. This allocation of competence to legislate on the reach of Union anti-discrimination has been discussed and criticised. The third situation is when fundamental rights relates to areas of Union competences but these fundamental rights are not directly or expressly mentioned. This is often the case within the area of migration and criminal law. Instruments, such as regulations, directive or similar, implemented by the Union in these areas have a level of fundamental rights.⁸⁰

There is a tension between the doctrine of allocation of competences and the fundamental rights protection within the Union. The principle of conferred competences offers very little guidance in the field of Union fundamental rights.⁸¹ It is stated in Article 6.1 TEU as well as in Article 51.2 in the Charter that the provisions in the Charter shall not, in any way, extend the competences of the Union as defined in the Treaties. It can however be argued that these provisions have little influence in practice.

Edouard Dubout, professor of European Law at the University Paris-Est, argues that it is beyond doubt that the protection of fundamental rights exceeds the limits of the allocation of competences.⁸² Article 2 TEU states that the Union is founded on the respect for human rights. However, in Opinion 2/94 it was assessed, that the Union has little competence to actually protect fundamental rights.⁸³ The more recent Opinion 2/13 also addressed the difficulties within Union law and the protection of fundamental rights.⁸⁴ The Union has been given the wide aim to protect fundamental rights without the means to fulfil this aim.⁸⁵ However, in order to fulfil the aim, the Union has in some aspects found the means. In the case law of CJEU several cases can be found were the Court allows for the application of Union law in order to protect fundamental rights even in

⁸⁰ Muir (2014) pp. 33-36.

⁸¹ Muir (2014) pp. 35-36.

⁸² Dubout, Edouard, "The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics", in: *The Question of Competence in the European Union*, by Azoulay, Loïc (ed.). Oxford: Oxford University Press, 2014, p. 211.

⁸³ Opinion 2/94 *Accession by the Communities to the European Convention on Human Rights*, EU:C:1996:140.

⁸⁴ Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.

⁸⁵ Dubout (2014) pp. 193-194.

situations outside the scope of the competences of the Union.⁸⁶ Some of these cases are 29/69 *Stauder*, 11/70 *Internationale Handelsgesellschaft*, 5/88 *Wachauf*, C-260/89 *ERT*, C-555/07 *Küçükdeveci* and C-34/09 *Ruiz Zambrano*.⁸⁷ These cases mostly deal with actions of the Member States, that are outside the competences of the Union, where the CJEU concludes that in these situations, Union law on fundamental rights protection must be followed by the Member State.

The European Border and Coast Guard is a body of the Union, not a Member State, and it must be assessed whether the obligations on the Agency to protect fundamental rights entitles the Agency to act in areas of national competences in order to fulfil this obligation. In order to do such an assessment, it must first be assessed if the Agency has a responsibility to protect fundamental rights. Within this thesis, the focus is put on fundamental rights of asylum-seekers. This is assessed in Chapter 4. A further assessment on the possibility for the Union to act outside its competences due to the responsibility to protect fundamental rights will be carried out in Chapter 5.

⁸⁶ Dubout (2014) pp. 194.

⁸⁷ 29/69, *Stauder*, EU:C:1969:57. 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114. 5/88, *Wachauf*, EU:C:1989:321. C-260/89 *ERT*, EU:C:1991:254. C-555/07, *Küçükdeveci*, EU:C:2010:21. C-34/09, *Ruiz Zambrano*, EU:C:2011:124.

3 The European Border and Coast Guard

3.1 Background of the European Border and Coast Guard

The European Border and Coast Guard is an agency of the European Union. The Agency was earlier known as the European Agency for the Management of Operational Cooperation at the External Border of the Member States of the Union (Frontex). It was established through a regulation adopted in 2004, which was later amended in 2007 and 2011.⁸⁸ Throughout this thesis the earlier Frontex regulation will be referred to as the 2011 Frontex Regulation⁸⁹. Regulation 2016/1624 replaced the earlier Frontex Regulation, expanded the competences of the Agency and its name was changed to the European Border and Coast Guard.⁹⁰

The European Border and Coast Guard is still referred to as Frontex and the constitutional setting remained the same. The Agency is a decentralised, regulatory and independent Union body with legal personality.⁹¹ Mungianu argues that Frontex has been delegated the Union's international legal personality, since the Agency can conclude working agreements with national authorities of third countries.⁹²

The Agency is represented by an executive director, Febrice Leggeri since 2015.⁹³ The executive director is appointed by the Management Board after proposal from the Commission.⁹⁴ The executive director shall be independent and not take instructions from any government or body. However, the executive director must act within the competences of the Commission.⁹⁵ The Management Board is responsible for taking the

⁸⁸ Peers, Steve. (2015, December 16). "The Reform of Frontex: Saving Schengen at Refugees' Expense?", in blog: EU Law Analysis – Expert insight into EU law developments, by Peers, Steve, (ed.), retrieved from www.eulawanalysis.blogspot.de/2015/12/the-reform-of-frontex-saving-schengen.html accessed 2017-02-25

⁸⁹ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1, 22 November 2011, (2011 Frontex Regulation).

⁹⁰ Regulation 2016/1624 preamble 11. Frontex. (2017). "Legal basis". Retrieved from: www.frontex.europa.eu/about-frontex/legal-basis/, accessed 2017-03-03.

⁹¹ Rosenfeldt (2016).

⁹² Mungianu (2016) pp. 34-35.

⁹³ Frontex. (2017). "Executive Profiles". Retrieved from: www.frontex.europa.eu/about-frontex/organisation/executive-profiles/, accessed 2017-02-28.

⁹⁴ Regulation 2016/1624 Article 69.

⁹⁵ Mungianu (2016) p. 35.

strategic decisions of the Agency. It consists of one representative from each Member State and two representatives from the Commission.⁹⁶

The European Border and Coast Guard consists of the Agency and the Member States' national authorities responsible for border management and border control. The European integrated border management shall be a shared responsibility between them.⁹⁷ This is the first time the concept of "shared responsibility" on border control is explicitly used in Union law.⁹⁸

3.2 The Tasks of the European Border and Coast Guard

The Agency has kept most of its earlier tasks but has been given a more supervisory role and wider competences.⁹⁹ This is illustrated by the new competence of the European Border and Coast Guard to establish a "technical and operational strategy for European integrated border management" which the national authorities must comply with.¹⁰⁰ This shows that the Agency has been given a more supreme role and an increased influence on border management within the whole Union.

The tasks of the Agency are to monitor migratory flows and, based on the collected data, set up risk analyses to predict the numbers and the movements of the asylum-seekers. This is used to decide where and when joint operations should be set up.¹⁰¹ Vulnerability assessments are a new task. Through vulnerability assessments the ability of a Member State to tackle challenges at their external borders are examined.¹⁰² These assessments can lead to binding recommendations from the executive director. If the recommendations are not followed the Council can adopt an implementing measure requiring the Member State to cooperate with the Agency.¹⁰³ This is the most controversial new feature in Regulation 2016/1624 and is commonly referred to as the "right to intervene".¹⁰⁴ See more about this under Title 3.3.4 "Situations at the external border requiring urgent action".

⁹⁶ Regulation 2016/1624, Articles 62-63.

⁹⁷ Regulation 2016/1624, Articles 3.1 and 5.1.

⁹⁸ International Commission of Jurists, ECRE and Amnesty International: "Joint briefing on the European Border and Coast Guard Regulation", retrieved from www.amnesty.eu/content/assets/Docs_2016/ReportsBriefings/EBCGReg_Joint_briefing.pdf, accessed 2017-03-02.

⁹⁹ Peers (2015).

¹⁰⁰ Regulation 2016/1624 Article 3.

¹⁰¹ Casella Colombeau, Sara. (2017). "Frontex and its role in the European Border Regime", in: Migration, squatting and radical autonomy, by Mudu, Pierpaolo and Chattopadhyay, Sutapa (eds.), Abingdon, Oxon; New York, NY: Routledge, 2017, pp. 40-41.

¹⁰² Regulation 2016/1624, Article 3.1. Rosenfeldt (2016).

¹⁰³ Regulation 2016/1624 Articles 13 and 19.

¹⁰⁴ Regulation 2016/1624 Article 19. Rosenfeldt (2016).

Wider and more official competences have been given to the Agency to perform search and rescue operations for persons in distress at sea during border surveillance operations since Regulation 2016/1624 integrates the Sea External Borders Regulation.^{105 106} The Member States can receive technical and operational support with migration management at hot spot areas from the Agency through migration management support teams. The teams consist of European Border Guard teams, European return interventions teams or experts from the Agency and they can assist with e.g. screening, registering and providing information to the asylum-seekers.¹⁰⁷ Liaison officers are placed in the Member States acting on behalf of the Agency working towards cooperation and communication between the Agency and the Member States.¹⁰⁸ Liaison officers can also be placed in third countries to monitor the management of the external borders.¹⁰⁹

The European Border and Coast Guard coordinates and organises joint operations at the request of a Member State. The Agency can also assist Member States by launching rapid border interventions when the Member State is facing specific and disproportionate challenges.¹¹⁰ The rapid border interventions are launched within a shorter amount of time than the joint operations since the executive director only has three working days to set up the operational plan and the border guards are deployed within five days from the rapid reaction pool.¹¹¹ The rapid reaction pool is a new feature of Regulation 2016/1624 and consists of 1500 border guards that are put at the disposal of the Agency from the Member States.¹¹² To ensure coordination and organisation of return operations as well as providing technical and operational assistance in form of return interventions is also within the Agency's mandate, but only at the request of the Member State.¹¹³ For all operations, one or more experts from the Agency are placed as coordination officers in the Member State to assure that the operation is correctly conducted and in accordance with the operational plan.¹¹⁴

¹⁰⁵ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189/93, 27 June 2014, (Sea External Borders Regulation).

¹⁰⁶ European Parliament (2016, October). "European Border and Coast Guard system" [Briefing, EU legislation in Progress]. Retrieved from: [www.europarl.europa.eu/RegData/etudes/BRIE/2016/589845/EPRS_BRI\(2016\)589845_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589845/EPRS_BRI(2016)589845_EN.pdf), accessed 2017-02-16, p. 1. Regulation 2016/1624 Article 8.1.f.

¹⁰⁷ Regulation 2016/1624 Articles 8.1 and 18.

¹⁰⁸ Regulation 2016/1624 Article 12.

¹⁰⁹ Regulation 2016/1624 Article 55.

¹¹⁰ Regulation 2016/1624 Articles 8.1 and 15.

¹¹¹ Regulation 2016/1624 Articles 16-17.

¹¹² European Commission. (2015, December 15) "A European Border and Coast Guard to Protect Europe's External Borders", [Press Release], www.europa.eu/rapid/press-release_IP-15-6327_en.htm accessed 2017-02-14.

¹¹³ Regulation 2016/1624 Articles 28 and 33.

¹¹⁴ Regulation 2016/1624 Articles 22.

European Border and Coast Guard teams consist of guest officers seconded from the different Member States and are deployed in joint operations, rapid border interventions and migration management support teams. Member States shall make border guards available so that they can be used in operations.¹¹⁵ For return interventions tailor-made European return intervention teams are used.¹¹⁶ They are gathered from the pools of forced-return monitors, forced return escorts and return specialists.¹¹⁷ With Regulation 2016/1624 the Agency is now entitled to own its own equipment.¹¹⁸ Because of this the Agency has become less dependent on the Member States.¹¹⁹ The European Border and Coast Guards teams can only act under the instructions of the host Member State.¹²⁰ The coordinating officer can also communicate views from the Agency on these instructions. These views must be considered and followed as far as possible.¹²¹

In regards to third countries the Agency can facilitate and encourage, in some cases even coordinate, technical and operational cooperation between Member States and third countries. The Agency may cooperate with the national authorities of the third countries on returns and conclude working agreements with the national authorities of the third countries.¹²² The working agreements clearly state that they are not international treaties and do not fulfil any international obligations of the Union.¹²³

The enhanced mandate of the European Border and Coast Guard focuses on controlling the management of the external borders to increase the security within the Union.¹²⁴ The Paris attacks in 2015 were committed by people crossing the borders pretending to be Syrian refugees, this raised awareness of which danger asylum-seekers can bring.¹²⁵ The increased security and control together with other measures is causing fewer asylum-seekers making their way into the Union. This results in fewer asylum applications. The massive number of asylum applications and the obligation to provide food and shelter to the asylum applicants has been a burden for the Member States. That fewer asylum-seekers reaches the Union can be regarded as motivation for the Member States to unify and adopt Regulation 2016/1624 within only a year, despite border control usually being a sensitive subject for which the Member States do not want to confer competences to the Union.¹²⁶

¹¹⁵ Regulation 2016/1624 Articles 20-21.

¹¹⁶ Regulation 2016/1624 Articles 32 and 33.

¹¹⁷ Regulation 2016/1624 Articles 29-33.

¹¹⁸ Regulation 2016/1624 Article 39.

¹¹⁹ Mungianu (2016) p. 31.

¹²⁰ Regulation 2016/1624 Article 40.

¹²¹ Regulation 2016/1624 Article 21.

¹²² Regulation 2016/1624 Article 54.

¹²³ Mungianu (2016) pp. 34-35.

¹²⁴ Rosenfeldt (2016).

¹²⁵ Frontex, "Risk Analysis 2016", ref. no: 2499/2016.

¹²⁶ Rosenfeldt (2016).

In Steve Peers' assessment on the proposal for the new European Border and Coast Guard in December 2015, he states that two major flaws can be found. One is in regards to the allocation of competences between the Union and the Member States. The European Border and Coast Guard is given too wide competences within the area of border controls. They are exceeding the Union's competences, which is politically unprincipled. At the same time, not enough is done within the area of asylum and fundamental rights since not enough focus is put on humanitarian needs.¹²⁷ To see whether this statement holds with the final version of Regulation 2016/1624 an assessment needs to be done, which is given below. Much points to that Steve Peers' statement on the proposal also holds true for the final version of Regulation 2016/1624, in that the new European Border and Coast Guard "...seek to save the Schengen system, at the expense of the refugees".¹²⁸

3.3 Allocation of Competences and the European Border and Coast Guard

With the new expanded mandate of the European Border and Coast Guards new concerns have been raised that too wide competences have been conferred. This problem has been raised by European law scholars, the International Commission of Jurists, the European Council on Refugees and Exiles (ECRE), Amnesty International and UNHCR. UNHCR recommended a clearer, more coherent and pragmatic distribution of responsibilities between the Union and the Member States.¹²⁹

Many Member States saw the new competences of the European Border and Coast Guard as a violation to national sovereignty.¹³⁰ The enhanced involvement is by some seen as steps towards making the Union a supranational organisation.¹³¹ It must therefore be examined whether the Agency is acting outside the conferred competences upon the Union. In order to carry out this examination, it must be assessed in which category the competences of the Agency are. For this the legal base of Regulation 2016/1624 must be assessed.

¹²⁷ Peers (2015).

¹²⁸ Peers (2015).

¹²⁹ Peers (2015), Rosenfeldt (2016), European Parliament (2016). See also Rijpma, J. (2016) "The proposal for a European Border and Coast Guard: evolution or revolution in external border management?", EP Policy Department, <[www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU\(2016\)556934_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf)>, accessed 2017-02-16.

¹³⁰ "Migrant Crisis: EU launches new border force plan", BBC, December 15, 2015, <www.bbc.com/news/world-europe-35093827>, accessed 2017-02-15.

¹³¹ Mungianu (2016) pp. 16-18.

3.3.1 The Legal Base of Regulation 2016/1624

The legal base for Regulation 2016/1624 is stated to be Article 77.2.b, 77.2.d and 79.2.c TFEU. For this thesis, these Articles will be accepted as the legal base for Regulation 2016/1624. A complete legal assessment whether these are the correct legal bases are outside the scope of this thesis.

Article 77.2.b allows for checks and monitoring of persons crossing the external borders, while Article 77.2.d allows the adoption of measures to gradually establish an integrated management system for external borders. In Article 79.2.c the adoption of measures to remove and expel persons residing without permission is allowed. These provisions are all under the Title V Area of freedom, security and justice and under the competence of the Union.

In regards to the allocation of competences, the area of freedom, security and justice is found within the shared competence in Article 4.2.j TFEU. Shared competence entitles the Union to legislate as far as it is in compliance with the principles of subsidiarity and proportionality. However, limitations on the Union's competence in this area can be found in Article 4.2 TEU and Articles 72,73 and 77.4 TFEU.¹³²

Article 4.2 TEU obligates the Union to respect essential State functions such as ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. Article 72 TFEU puts extra emphasis on that within the area of freedom, security and justice the Union's action shall have no effect on the competences of the Member States in maintaining law and order and safeguarding national security. This includes border control.¹³³ Article 73 TFEU allows for the cooperation between Member States in matters of safeguarding national security. Finally, Article 77.4 states that the Union shall not affect the geographical demarcation of the Member States' borders. These essential State functions belong to the sole competence of the Member States. A further assessment on these competences is carried out in Title 3.3.2.

Another area that is outside the shared competences of the Union and the Member States are executive powers. Executive powers, such as allowing entry, issuing asylum and return decisions, belong solely to the competence of the Member States. The Union cannot interfere in these powers.¹³⁴ Whether the Agency is interfering with these executive powers is assessed in Title 3.3.2.

The provision that caused most debate and concern in Regulation 2016/1624 was Article 19, Situations at the external borders requiring urgent action. This competence is commonly referred to as "the right to intervene". Through Article 19 the Agency can intervene in situations where the

¹³² Mungianu (2016) pp. 19-20.

¹³³ Mungianu (2016) pp. 26-27.

¹³⁴ Rosenfeldt (2016).

Member States is unable or unwilling to act. This despite that the Member State has not requested assistance.¹³⁵ A further description and assessment on Article 19 and the “right to intervene” is given in Title 3.3.3.

To assess whether the Agency is acting outside the conferred competences, these exceptions to the shared competences and the “right to intervene” in Article 19 will be further examined and compared to which competences the Agency have. Firstly, the essential State functions will be further examined. An analysis will be carried out whether the Agency is interfering with these essential state functions to such a degree that it is a violation to the Union Treaties.

3.3.2 Essential State Functions

The limitation on the Union’s competence in Article 4.2 TEU and 72 TFEU is the most important exceptions to the Union’s competence within the area of freedom, security and justice.

3.3.2.1 Article 4.2 TEU and Article 72 TFEU as Expressions of Member State’s Competences

Article 4.2 TEU is an important provision. It states that the Union shall respect the essential functions of the states, such as ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. However, it must be assessed whether Article 4.2 TEU regulates competences of the Member States. In *Sayn-Wittgenstein* the CJEU stated that Article 4.2 implies that the Union must respect the “national identity” of the Member States and assure that it is not threatened by Union law.¹³⁶ It has been argued that “national identity” is not the same as Member State competence and that the Article does not have any effect on the allocation of competences.¹³⁷ The CJEU has e.g. in the case *Malgozata* allowed exceptions to the free movement principle to protect the Lithuanian language since the language was regarded as an important part of Lithuania’s identity.¹³⁸

The exact role and impact of Article 4.2 TEU on the allocation of competences is hard to define, due to the wording of “shall respect”.¹³⁹ However, one can argue that Article 4.2 TEU limits the competences of the

¹³⁵ Peers (2015).

¹³⁶ C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, EU:C:2010:806.

¹³⁷ Dobbs, Mary, “Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?”, *Yearbook of European Law*, Vol. 33, No. 1, 2014, p. 300.

¹³⁸ C-391/09, *Malgozata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, EU:C:2011:291, para. 84-87.

¹³⁹ Dobbs (2014) p. 316.

Union.¹⁴⁰ Since the Article has been used by the CJEU, this implies that it shall be given legal force.¹⁴¹ How the Article has been interpreted and its historical context, also points towards that it affects the allocation of competences.¹⁴² Article 4.2 TEU is also placed between Article 4.1 TEU, that states that competences that has not been conferred to the Union stays within the Member States, and Article 5 TEU that defines the principle of conferral, subsidiarity and proportionality. This strengthens the link between Article 4.2 TEU and the allocation of competences.¹⁴³ It is settled that the Article limits the application of Union law.¹⁴⁴

Through this it can be argued that the areas within Article 4.2 TEU are outside the application of Union law. This implies that the Union has no competence in these areas. Article 4.1 TEU states that competences not belonging to the Union, belong to the Member States. It must thereby be assessed that Article 4.2 TEU expresses exclusive competences of the Member States. The interpretations, historical context and the placement of the Article strengthen the argument that the Article is an expression of the allocation of competences. If the Union intervenes with the territorial integrity, maintenance of law and order or safeguarding of national security, as stated in Article 4.2 TEU, this must be considered a violation to the allocation of competences. This since it has here been assessed that the Article expresses competences belonging to the Member States.

Article 72 TFEU states that the competence of the Union to act within the area of freedom, security and justice shall not affect the Member States responsibilities to maintain law and order and to safeguard internal security. Since it is stated that it is the responsibility of the Member States to carry out these functions, they must be regarded as within the competences of the Member States. This provision is very similar to Article 4.2 TEU and it would be in line with the above argumentation to assess that also in Article 72 is the maintenance of law and order and the safeguarding of internal security within the competence of the Member State.

3.3.2.2 Influence of the Agency on Essential State Functions

Since the maintenance of law and order and the safeguarding of internal security include border control, it can be argued that a European system of border guards that works at the disposition of the European Border and Coast Guard would be a violation of the allocation of competences.¹⁴⁵ The Union can establish rules on border controls but it cannot be in control of

¹⁴⁰ Dobbs (2014) p. 301.

¹⁴¹ Dobbs (2014) p. 317.

¹⁴² Guastafarro, Barbara, "Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause", *Yearbook of European Law*, Vol. 31, No., 1 2012, p. 308.

¹⁴³ Gustaffero (2012) p. 288.

¹⁴⁴ Dobbs (2014) p. 301.

¹⁴⁵ Mungianu (2016) pp. 42-44.

the borders or require the Member States to carry out operations. This would violate Article 4.2 TEU and Article 72 TFEU.¹⁴⁶ To avoid such a violation Regulation 2016/1624 clearly states that the Member States shall establish national strategies for integrated border management, the Member States shall retain primary responsibility for the management of their external borders and that the European Border and Coast Guard teams are to follow the instructions of the host Member State.¹⁴⁷ The host Member State is the State where the operation is carried out.¹⁴⁸

However, it can be questioned whether these competences actually remain within the primary responsibility and sole competence of the Member States. The European Border and Coast Guard establishes a technical and operational strategy for European integrated border management.¹⁴⁹ The national strategies of the Member States must be in line with this technical and operational strategy and follow the Agency's definition of European integrated border management.¹⁵⁰ The management of the external borders by the Member States must also be in accordance with the technical and operational strategy.¹⁵¹

For every operation, carried out by the Agency, an operational plan is established.¹⁵² The operational plan can be seen as a decision made at Union level since it is adopted by Frontex and the Member States.¹⁵³ The operational plan is established by the Agency and the Member State together but it still gives the Agency a big influence in how the Member State shall maintain law and order and safeguard internal security at their external borders.¹⁵⁴ The instructions of the host Member State must be in accordance with the operational plan and the Agency may communicate views on instructions which the host Member State shall follow as far as possible.¹⁵⁵

Through the operational and technical strategy together with the operational plan, the European Border and Coast Guard is given a very big influence on the Member States' maintenance of law and order and safeguarding of national security at their external borders. Therefore, Regulation 2016/1624 is violating Article 4.2. TEU, Article 72 TFEU and the allocation of competences.

As stated in Title 3.3.1 Article 73 TFEU is also an exception to the competences of the Union within the area of freedom, security and justice. An assessment must thereby also be made in regards to Article 73 TFEU.

¹⁴⁶ Mungianu (2016) pp. 42-44.

¹⁴⁷ Regulation 2016/1624 Articles 3.3, 5.1 and 21.1.

¹⁴⁸ Regulation 2016/1624 Article 2.5.

¹⁴⁹ Regulation 2016/1624 Article 3.2.

¹⁵⁰ Regulation 2016/1624 Article 3.3.

¹⁵¹ Regulation 2016/1624 Article 5.2.

¹⁵² Regulation 2016/1624 Articles 16.2, 17.6, 19.5, 28.2 and 33.3.

¹⁵³ Mungianu (2016) p. 69.

¹⁵⁴ Regulation 2016/1624 Articles 16, 17, 19, 28, 33,

¹⁵⁵ Regulation 2016/1624 Article 21.

Article 73 TFEU entitles the national authorities of Member States to cooperate in administrative measures regarding national security. This, however, does not entail that the Union cannot cooperate and coordinate in matters regarding national security as long as the Union is acting within its own competence.¹⁵⁶ The Agency still has a large influence on border management of the Member States through the technical and operational strategy for European integrated border management.¹⁵⁷ The Agency is therefore not only reinforcing, assessing and coordinating national forces; they are setting up the framework for how the border management in the Union shall be conducted by the Member States. By these means, they are taking control of the Member States and assuring that they act efficiently according to Union standards.¹⁵⁸ The Member States are still allowed to cooperate among themselves outside of the Union but even then, they must act in compliance with the Agency's strategy and tasks.¹⁵⁹ The Agency therefore gets a supreme role and it can be argued that the Member States' discretionary powers in border control are taken from them.¹⁶⁰

The last of the exceptions to the Union competence within the area of freedom, security and justice is Article 77.4 TFEU that states that the Union cannot affect the Member States competence on the geographical demarcation of their borders, in accordance with international law. Nothing in Regulation 2016/1624 affects this.

The conclusion in regards to the essential state functions in Article 4.2 TEU and 72 TFEU is that Regulation 2016/1624 interferes with them to such a degree that a violation of the allocation of competences in the Union treaties must be assessed. Also, in regards to Article 73 TFEU is the competences of the Agency too wide. This is however only one aspect of the competences in Regulation 2016/1624 that can be in violation of the Union Treaties. In the next section is an assessment made in regards to the executive powers of the Member States, such as the issuing of decisions of entry, asylum and return.

3.3.3 The Executive Powers of the Member States

During 2015 only every fifth migrant was properly identified by border controls.¹⁶¹ Several Member States could not administer the high numbers of asylum-seekers and used a so called "wave-through" approach letting the

¹⁵⁶ Mungianu (2016) pp. 27-30.

¹⁵⁷ Regulation 2016/1624 Article 3.

¹⁵⁸ Peers (2015).

¹⁵⁹ Regulation 2016/1624 Articles 3 and 8.2.

¹⁶⁰ Rosenfeldt (2016).

¹⁶¹ "Migrant Crisis: EU launches new border force plan", *BBC*, 15 December 2015.

"Frontex: EU border agency to get huge budget hike as boss warns of failings with migrant fingerprint checks", *The Bureau of Investigative Journalism*, September 18, 2015, <www.thebureauinvestigates.com/2015/09/18/refugee-crisis-frontex-border-agency-budget-increase-fingerprint-check-failings/>, accessed 2017-02-15.

asylum-seekers pass the external borders and giving them the possibility to move freely in the Union, since the internal borders have been removed.¹⁶² To tackle this problem the Agency's role in migration management has been widened.¹⁶³

Allowing entry and issuing asylum and return decisions are executive powers that are strictly within the Member State's own exclusive competence. Since the Agency can support the Member States in border management the Agency has great influence and can be regarded as interfering with these executive powers. In Regulation 2016/1624 almost no detailed provisions are given on how and to what degree the Agency can give support in this regard. This is something that raises a serious concern on which influence the competences of the Agency can have.¹⁶⁴

The competences of the European Border and Coast Guard that are problematic in regards to the Member States' executive powers is related to joint operations, migration management teams and return operations.

In joint operations, it can be argued that the Agency is interfering with allowing entry and issuing asylum decisions. Joint operations are launched at the request of a Member State to face upcoming challenges, illegal immigration, present or future threats to the external border, handling cross-border crime and to provide technical and operational assistance to control the borders.¹⁶⁵ As assessed earlier the European Border and Coast Guard has a big influence on the handling of the external borders due to the technical and operational strategy and their big influence on the operational plan. In joint operations, the operational plan is drawn up by the executive director of the Agency, and the host Member State must agree to the plan.¹⁶⁶ The operational plan shall include procedures to direct persons in need of international protection, asylum-seekers, to the competent national authorities for appropriate assistance.¹⁶⁷ In this provision, no limitations on these procedures can be found. It can be argued that there is a big risk that these procedures will in practice amount to the European Border and Coast Guard teams allowing the asylum-seekers entry to the host Member State. Since it is stated that only people in need of international protection are to be protected, it can also be argued that this entitles the Agency to make an assessment on which persons need international protection, or expressed differently, which persons are entitled to go through an asylum procedure. Only the Member State is allowed to assess who can be allowed entrance to their territory and who can apply for asylum, since these are executive powers of the Member States. This is one example on how the Agency is interfering with the executive powers of the Member State to such a degree that it cannot be regarded as compatible with the allocation of competences.

¹⁶² European Parliament (2016) p. 2.

¹⁶³ Rosenfeldt (2016).

¹⁶⁴ Rosenfeldt (2016).

¹⁶⁵ Regulation 2016/1624 Article 15.1.

¹⁶⁶ Regulation 2016/1624 Article 16.2.

¹⁶⁷ Regulation 2016/1624 Article 16.3.1.

A similar problem arises in the migration management support teams. Migrations management support teams can be requested by a Member State that is facing disproportionate migratory challenges at particular hot spot areas of their external borders due to large, mixed migratory flows. The request can be made to the European Border and Coast Guard as well as other agencies, such as European Asylum Support Office (EASO).¹⁶⁸ Hot spot areas are areas where the Member States and the Union cooperate to manage an existing or potential disproportionate migratory challenge due to a large increase of arriving migrants at the external borders.¹⁶⁹ The executive director sets up a reinforcement package that is to be agreed upon by the concerned Member States.¹⁷⁰ The Commission sets up the terms for the coordination between the agencies and Member States.¹⁷¹ The European Border and Coast Guard can support the Member States in identification, registration, debriefing and fingerprinting of the third country nationals.¹⁷² The Agency can also provide information and refer the asylum-seekers to the competent national authority. The provision does state that this must be done in full respect for fundamental rights but once again no limitation on these procedures is set in regards to the allocation of competences.

These procedures can be used for allowing entry and will have a big impact on the asylum procedure of an asylum-seeker since it is the Agency that identifies, registers and debriefs the asylum-seeker. Once again it can be argued that the influence of the Agency on the issuing of entry decisions and the asylum procedure is too big and not in compliance with the allocation of competences. It is also argued by Steve Peers, that the provisions for the European Border and Coast Guard in regards to migration management support teams do not clarify that decisions on asylum and return are within the sole competence of the Member States.¹⁷³

Return operations will be made more efficient and coherent through the establishment of a European Return Office within the Agency. The European Return Office will organise European Return Intervention Teams that will return illegally staying third country nationals. A standard European travel document for return will be set up to ensure a wider acceptance of returnees by third countries.¹⁷⁴

The Agency is not allowed to enter into the merits of the return decisions.¹⁷⁵ The return decisions cannot be altered in any way, as this decision is still within the competence of the Member States.¹⁷⁶ Unlike the provisions regarding joint operations and migration management support teams, it is

¹⁶⁸ Regulation 2016/1624 Article 18.

¹⁶⁹ Regulation 2016/1624 Article 2.10.

¹⁷⁰ Regulation 2016/1624 Article 18.2.

¹⁷¹ Regulation 2016/1624 Article 18.3.

¹⁷² Regulation 2016/1624 Article 18.4.a.

¹⁷³ Peers (2015).

¹⁷⁴ European Commission (2015).

¹⁷⁵ Regulation 2016/1624 Article 28.1.

¹⁷⁶ European Parliament (2016) pp.3-4.

clearly stated, in Article 28.1 in Regulation 2016/1624, that the issuing of return decisions is within the sole competence of the Member State. However, it can still be argued that the Agency has a big influence on the return operations. Migration management support teams are allowed to offer technical and operational assistance and prepare and organise return operations.¹⁷⁷ The Agency shall draw up a rolling operational plan for return operations. In this rolling operational plan the Agency can decide, on its own initiative, to include the dates and destinations of the return operations the Agency itself considers necessary.¹⁷⁸ On its own initiative, the Agency can also propose to Member States to coordinate or organise return operations.¹⁷⁹ This does give the Agency a great influence on when, how and how many return operations shall be organised. A demand for a high number of return operations can influence the Member States to issue more return decisions. Because of this the influence of the European Border and Coast Guard on the Member State's executive power to issue return decisions can be regarded as problematic in regards to the allocation of competence.

The European Border and Coast Guard has too big an influence on the Member State's executive powers to issue entry and asylum decisions. These executive powers belong to the sole competence of the Member States and the influence the Agency has cannot be regarded as compatible with the allocation of competences and a violation the Union Treaties.

The issuing of return decisions is also an executive power belonging solely to the Member States. In Regulation 2016/1624 it is clearly stated that the Agency cannot enter into the merits of return decisions.¹⁸⁰ It can, however, still be argued that the Agency has an influence on the issuing of return decisions, an influence that can be regarded as problematic in regards to the allocation of competences.

During the negotiations, concerns were raised in regard to a new competence of the Agency. This competence is commonly referred to as the "right to intervene".¹⁸¹ In Regulation 2016/1624 this is found in Article 19 and the right to intervene occurs in "Situations at the external border requiring urgent action". In the next section this competence will be further described and assessed.

3.3.4 Situations at the External Borders Requiring Urgent Action

Regulation 2016/1624 introduces the so called "right to intervene" for the European Border and Coast Guard in situations at the external border

¹⁷⁷ Regulation 2016/1624 Article 18.4.c.

¹⁷⁸ Regulation 2016/1624 Article 28.2.

¹⁷⁹ Regulation 2016/1624 Article 28.1.

¹⁸⁰ Regulation 2016/1624 Article 28.1

¹⁸¹ Peers (2015).

requiring urgent action. This entitles the Agency to intervene in situations where the Member State is unable or unwilling to act and has not requested assistance.¹⁸² The main reason to the establishment of this Article is that Greece did not have enough capacity to handle the high inflow of migrants.¹⁸³ This provision has been the cause of heavy debates due to its very sensitive politically nature. The provision awakens memories of the Second World War when foreign forces entered sovereign States' territories without their consent. The "right to intervene" is seen as a threat to the sovereignty of the Member States.¹⁸⁴ It can also be seen as a violation of Article 4.2 TEU that explicitly states that the Union shall ensure the territorial integrity of the State. As assessed in Title 3.3.2.1, Article 4.2 TEU shall be regarded as expressing competences of the Member States.

A situation at the external border requiring urgent action occurs when a Member State did not follow the recommendation after a vulnerability assessment or is facing specific and disproportionate challenges at the external borders without requesting or supporting joint operation, rapid border intervention or migration management support teams from the European Border and Coast Guard.¹⁸⁵

Through an implementing act of the Council, following a proposal from the Commission, the Agency is authorised to take various measures which is binding upon the Member State. The measures can enfold rapid border interventions, migration management support teams at hot spot areas, joint operations, use of technical equipment or to organise return interventions.¹⁸⁶

In order to be able to carry out the measures of the implementing decision, an operational plan must be drawn up. For the operational plan the Member State's consent is required.¹⁸⁷ It can be regarded that the Member State has a duty to consent to the operational plan since the Member State must comply with the implementing decision. After giving consent, the operation is under the host Member State's command and control and the host Member State can therefore be held responsible, liable, for the operation. Rosenfeldt, Research Assistant and PhD candidate at University of Passau, argues that since the consent of the Member State is required for the operational plan, no real "right to intervene" is established.¹⁸⁸

A sanction system has been established through the amendments of Article

¹⁸² European Commission (2015).

¹⁸³ Wolff, Sarah (2016, October 31). "The new European Border and Coast Guard: much ado about nothing?", Clingendael, Netherlands Institute of International Relations. Retrieved from: <www.clingendael.nl/publication/new-european-border-and-coast-guard-much-ado-about-nothing>, accessed 2017-04-13.

¹⁸⁴ Peers (2015).

¹⁸⁵ Regulation 2016/1624 Article 19.1.

¹⁸⁶ Regulation 2016/1624 Article 19.

¹⁸⁷ Regulation 2016/1624 Article 19.

¹⁸⁸ Rosenfeldt (2016).

29 in the Schengen Borders Code¹⁸⁹. A Member State that does not consent to the operational plan after an implementing decision has been adopted can temporarily be excluded from the Schengen area.¹⁹⁰ Article 29 in the Schengen Borders Code gives neighbouring Member States the possibility to close their internal border when the actions of another Member State can set the functioning of the Schengen area at risk or cause a serious threat to public policy or internal security. A sanction for not showing solidarity has been established.¹⁹¹ In Article 80 TFEU it is stated that the principle of solidarity governs the Union's asylum law and that measures to give effect to this principle can be adopted.

Since the consent of the Member State to the operation plan is required, no real "right to intervene" is established and a violation to the allocation of competences cannot be assessed. However, the implementing decision from the Council is binding upon to the Member State and a sanction has been introduced, that can be used against the Member States that does not consent to the operational plan.¹⁹² Article 19.8 also states that the concerned Member State shall comply with the Council decision. This can be used to argue that no real right for the Member State to not consent to the operational plan exists. The Member State is put under pressure and threatened by the sanctions. In practice the Member State is thereby forced to consent to the operational plan. The Member State must let the European Border and Coast Guard and concerned Member States enter its territory and allow the measures in the Council decision to be carried out. Through this, the Union is not ensuring the territorial integrity of the State and violating Article 4.2 TEU. This makes Article 19 on situations at the external borders requiring urgent action highly problematic in regards to the allocation of competences.

3.4 Conclusions on the Competences of the Agency

In this Chapter, it has been assessed that the Agency violates Article 4.2 TEU and 72 TFEU. The competences of the Agency are too wide in regards to Article 73 TFEU. In the executive powers of the Member States to issue decisions on entry and asylum, the interference of the Agency is a violation the Treaties. The influence of the Agency on the issuing of return decisions, shall be regarded as problematic in regards to the allocation of competences. Lastly, Article 19 in Regulation 2016/1624 is argued to be highly problematic in regards to the allocation of competences and might violate

¹⁸⁹ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189/93, 27 June 2014.

¹⁹⁰ Regulation 2016/1624 Article 19.10.

¹⁹¹ Rosenfeldt (2016).

¹⁹² Rosenfeldt (2016).

the Union Treaties.

The European Border and Coast has through this been delegated competences that the Union institutions does not possess. Thereby is the *Meroni doctrine* not followed. In regards to the delegation, it must thereby be assessed that it has not been done correctly.

It must be assessed that Regulation 2016/1624 violates the Union treaties. The competences that has been regarded in the Chapter and the interference of the Agency are not in compliance with the allocation of competences and the Union Treaties. The conclusion can be drawn to that if the legality of the expanded competences in Regulation 2016/1624 were to be reviewed by CJEU as in accordance with Article 263 TFEU, the CJEU would conclude the Regulation void in line with Article 264 TFEU. The expanded mandate in Regulation 2016/1624 would be considered a violation to the Union Treaties.

Therefore, the first research question is answered. In the next Chapter, focus will be on the fundamental rights of asylum-seekers and the objective is to answer the second research question on whether the European Border and Coast Guard has a responsibility to protect the fundamental rights of asylum-seekers.

4 The Responsibility to Protect Fundamental Rights of Asylum-Seekers

The responsibility of the European Border and Coast Guard to protect fundamental rights of asylum-seekers is an important question. Strong criticism has been directed towards Regulation 2016/1624 since it does not clearly state what responsibility the Agency has, to protect these fundamental rights. Concerns regarding this have been raised by organisations such as UNHCR and Amnesty International.¹⁹³ Steve Peers has stated that the accountability of the Agency for violations of fundamental rights is an issue.¹⁹⁴ This question is of importance since without a responsibility to protect the fundamental rights of asylum-seekers, the Agency cannot be required to assure that the fundamental rights of asylum-seekers are being upheld and not violated. In this thesis, only the question on whether the Agency has a responsibility to protect the fundamental rights of asylum-seekers is assessed. A further examination on whether the Agency in its current actions is violating fundamental rights of asylum-seekers is outside the scope of this thesis.

In order to make an assessment on the responsibility of the European Border and Coast Guard to protect the fundamental rights of asylum-seekers, several legal sources within Union law as well as within international law must be regarded. To make it easier for the reader to follow the argumentation a clear division has been made within this Chapter. In Title 4.1, only descriptions of the legal sources are given. This part is further divided into several subparts, describing the legal sources one at a time. In the next part, Title 4.2, the argumentation on whether the legal source can be used to argue that the Agency has a responsibility to protect fundamental rights of asylum seekers is presented. This part is divided into the same subparts as Title 4.1.

4.1 Description of the Legal Sources on the Responsibility to Protect Fundamental Rights

In this part of the thesis, the different sources in international law and Union law will be described. They have been divided into different subparts.

¹⁹³ International Commission of Jurists, ECRE and Amnesty International: “Joint briefing on the European Border and Coast Guard Regulation”.

¹⁹⁴ Peers (2015).

Firstly, the legal sources within international law will be described; secondly, the legal sources within Union law.

4.1.1 International Law

International law is an important source in regards to fundamental rights. Within this part, different legal sources in international law that deal with fundamental rights of asylum seekers will be described.

4.1.1.1 The Geneva Convention

The Geneva Convention is the most important Convention in regards to fundamental rights of asylum-seekers. In Article 33 in this Convention, the non-refoulement principle is stated. As described earlier, all fundamental rights for asylum-seekers derive from the non-refoulement principle.

However, the Union is not a Party to the Geneva Convention.¹⁹⁵ The Convention can therefore, not be used as ground for stating that the European Border and Coast Guard has a responsibility to act in compliance with the non-refoulement principle. With only this Convention as source, it cannot be argued that the Agency has a responsibility to protect the fundamental rights of asylum-seekers. However, the non-refoulement principle is stated in other sources of international law.

4.1.1.2 International Customary Law and *Jus Cogens*

International customary law are practices of international law that are well established and used by several states and organisations. However, customary international law can be superseded if special customary law is developed. Customary international law is also superseded by the conclusion of treaties.¹⁹⁶

Jus cogens refers to parts of customary international law that cannot be superseded. *Jus cogens* can roughly be translated into “compelling law”.¹⁹⁷ A principle or norm that is *jus cogens* is a peremptory norm of international law that is binding on States and international organisations. In regards to this thesis, it is important to put extra attention to the fact that also international organisations are bound by *jus cogens*.¹⁹⁸

This implies that the Union, being an international organisation, is bound by principles or norms that are *jus cogens* and must act in accordance with this

¹⁹⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <www.refworld.org/docid/3be01b964.html> accessed 2017-02-12.

¹⁹⁶ Hossain, Kamrul, “The Concept of Jus Cogens and the Obligation Under The U.N. Charter”, *Santa Clara Journal of International Law*, Volume 3, Issue 1, Article 3, 2005, p. 78.

¹⁹⁷ Hossain (2005).

¹⁹⁸ Allain, Jean, “The jus cogens Nature of non-refoulement”, *International Journal of Refugee Law*, Vol. 13, No. 4, 2001, pp. 537-541.

principle at all times.¹⁹⁹ For a principle to be *jus cogens* it must be customary international law and *opinio juris*. A principle or norm is *opinio juris* when it is practiced by States and it must be assessed that the States themselves considers the principle or norm being binding due to it being *jus cogens*.²⁰⁰ In title 4.2.1.2, an assessment is made on whether the non-refoulement principle is *jus cogens*.

Within the source of international customary law, attention must also be paid to the Vienna Convention on the Law of Treaties which is another important source within international law. It deals with conflicts between treaties and defines the concept of international customary law.²⁰¹ Article 53 in the Vienna Convention on the Law of Treaties²⁰² states that a treaty that conflicts with *jus cogens* becomes void and terminates.

4.1.1.3 Articles on the Responsibility of International Organisation

Within international law, guidance on whether the European Border and Coast Guard is responsible to protect fundamental rights can be found in the Articles on the Responsibility of International Organisations (ARIO) that are adopted by the International Law Commission. The International Law Commission is a subsidiary organ of the UN General Assembly. ARIO does not reflect international customary law and is therefore not legally binding but it has been used by national courts and ECtHR. It therefore has legal value.²⁰³

Article 7 in ARIO states that if an organ to a State is placed at the disposal of an international organisation, the international organisation can be held responsible for that organ's conduct if they exercise *effective control* over that conduct.²⁰⁴ It must therefore be assessed whether the Union, being an international organisation and acting through the European Border and Coast Guard, exercises effective control over the conduct of the border guards in a European Border Guard Teams, and other teams of the Agency within their operations. The border guards in the European Border and Coast Guard teams consists of border guards from border guard organs of the Member States. Thereby, Article 7 can be applicated on the actions of the European Border and Coast Guard Agency. An assessment of whether the Agency has *effective control* in the operations of the Agency will be made in Title 4.2.1.3.

¹⁹⁹ Allain (2001) pp. 533-558.

²⁰⁰ Allain (2001) pp. 538-541.

²⁰¹ Hossain (2005) pp. 73-78.

²⁰² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, pp. 75-78, available at: www.refworld.org/docid/3ae6b3a10.html, accessed 10 May 2017.

²⁰³ Mungianu (2016) pp. 59-60.

²⁰⁴ Mungianu (2016) p. 61.

4.1.2 Union Law

Also within Union law, several different sources must be regarded to make a complete assessment on the responsibility of the European Border and Coast Guard to protect fundamental rights of asylum-seekers. As in the previous part, the different sources are divided into subparts.

4.1.2.1 The Charter

The Union takes responsibility to protect fundamental rights through the Charter.²⁰⁵

The non-refoulement principle is stated in the Charter in Article 19. The Charter is primary law and shall be followed when the Union is acting.²⁰⁶ Article 51.1 in the Charter clearly states that the provisions in the Charter are addressed to the bodies of the Union. Since the European Border and Coast Guard is a body of the Union, the Charter is applicable to all actions of the Agency. However, the principle of subsidiarity must be regarded.²⁰⁷ A further analysis on the subsidiarity principle will be carried out in Title 4.2.2.1.

4.1.2.2 General Principles

The Union takes responsibility to protect fundamental rights through the general principles of Union law. The general principles sit below primary law such as the Union Treaties and the Charter but above secondary law such as regulations. They can be used to interpret Treaty Articles and have an important role within Union law.²⁰⁸ The general principles have been developed through case law of the CJEU and fundamental rights are an integral part of them.²⁰⁹

In Article 6.3 TEU it is explicitly stated, that the ECHR constitutes general principles. Article 3 ECHR states the non-refoulement principle and the principle must therefore be considered a general principle.

4.1.2.3 Regulation 2016/1624

In Regulation 2016/1624 several references are made to the non-refoulement principle and fundamental rights for asylum seekers. In Article 1, it is stated that the Agency shall act in full respect of fundamental rights. Article 34 is dedicated to the protection of fundamental rights and sets up a fundamental rights strategy. The Article states:

²⁰⁵ Article 6 TEU. See also Groussot; Pech and Thor Petursson (2011) p. 3.

²⁰⁶ Article 6.1 TEU and Charter Article 51.1.

²⁰⁷ Charter Article 51.1.

²⁰⁸ Craig, de Búrca (2015) p. 111.

²⁰⁹ Groussot; Pech and Thor Petursson (2011) p. 3.

“The European Border and Coast Guard shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, relevant international law – including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol and obligations related to access to international protection, in particular the principle of non-refoulement principle.”

It is thereby explicitly stated in the Article that the Agency must, in all its tasks, act in accordance with the non-refoulement principle.²¹⁰

Further Articles in Regulation 2016/1624 that deals with fundamental rights of asylum-seekers are especially Articles 35, 70, 71 and 72. Article 35 puts up the code of conduct and states that fundamental rights shall be respected. In Article 70 a consultative forum is set up as a platform for relevant organisations, such as UNHCR, to assist the Agency with advice in fundamental rights matters. Article 71 states that the fundamental rights officer shall monitor the compliance with fundamental rights and promote respect of fundamental rights. Lastly Article 72 set up the complaint mechanism, which is a new feature in Regulation 2016/1624. Through the complaint mechanism any person that is directly affected and considers themselves being subject of a breach of fundamental rights within operations of the Agency can submit a complaint in writing to the Agency.²¹¹

These Articles deal with fundamental rights in Regulation 2016/1624. In Title 4.2.2.3, an assessment will be carried out whether this Regulation can be used as source for arguing that the European Border and Coast Guard has a responsibility to protect the fundamental rights of asylum seekers.

4.1.3 The Relation between International Law and Union Law

Article 3.5 TEU states that the Union is bound by international law. In the case law of the CJEU it has also been established that international customary law binds the Union.²¹² This is also strengthened by the fact that the Union has an international legal personality.²¹³

²¹⁰ Regulation 2016/1624 Article 34.

²¹¹ Regulation 2016/1624 Articles 35 and 70-72.

²¹² Opinion of Advocate General Kokott in C-398/13 P *Inuit Tapiriit Kanatami v Commission*, ECLI:EU:C:2015:190, para. 86.

²¹³ Konstadinides, Theodore, “The Meso Level: Means of Interaction between EU and International Law. Customary International Law as Source of EU Law: A Two-Way Fertilization Route?”, *Yearbook of European Law*, Vol. 35, No. 1, 2016, pp. 516-517.

4.2 Responsibility of the European Border and Coast Guard to Protect Fundamental Rights of Asylum-Seekers

In the previous part, all relevant sources within international law and Union law has been presented and described. Within this part, all these legal sources will be presented again but this time an assessment in regards to the legal source will be carried out. The assessment aims to answer whether the European Border and Coast Guard has a responsibility to protect the fundamental rights of asylum-seekers.

4.2.1 International Law

Here an assessment on the different legal sources within international law will be carried out. The same division into subparts as above has been made also within this part.

4.2.1.1 The Geneva Convention

As stated earlier, the Union is not a Party to the Geneva Convention.²¹⁴ The Convention on its own can therefore, not be used for arguing that the Agency must follow the non-refoulement principle and thereby has a responsibility to protect fundamental rights of asylum seekers. However, the Convention has had a strong influence on international customary law and therefore, a complete assessment must be made in regards to international customary law and whether the non-refoulement principles can be regarded as binding upon the Union and its bodies.

4.2.1.2 International Customary Law and *Jus Cogens*

As stated in Title 4.1.1.2, international customary law plays an important role within the field of international law. The most important part of international customary law is *jus cogens*. The features and definition of *jus cogens* has already been given. In this part an assessment will be made on whether the non-refoulement principle is *jus cogens*.

Jean Allain, assistant Professor of Public International Law at American University in Cairo, Egypt, argues that the non-refoulement principle is *jus cogens*. Allain bases this on the fact that the principle has been widely practiced and followed by several States and organisations ever since the fall of the Soviet Union, thereby being international customary law.²¹⁵

²¹⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <www.refworld.org/docid/3be01b964.html> accessed 2017-02-12.

²¹⁵ Allain, Jean, (2001) pp. 533-558. For examples on State practice see e.g.

However, the question remains whether the States and organisations follow the non-refoulement principle because they believe it to be *jus cogens*.

According to Jean Allain, with base in the Conclusions of the UNHCR, the non-refoulement principle is considered to be *jus cogens* by the States and organisation that practice it.²¹⁶ That the non-refoulement principle is not always followed by States or organisations does not cause it to lose its nature of *jus cogens*. This has been established by the International Court of Justice (ICJ) in the case *Nicaragua*.²¹⁷ The non-refoulement principle is *jus cogens* and thereby binding upon all States and international organisations. This implies that the Union is bound by the non-refoulement principle even though they are not Parties to the Geneva Convention. Since the European Border and Coast Guard is a Union body that acts for the Union, this also applies to the Agency.

The UNHCR has stated that the non-refoulement principle is *jus cogens*. UNHCR states that some non-state actors are also bound by the principle, among them, Frontex is explicitly mentioned. This was stated by the UNHCR in 2014.²¹⁸ Even though Frontex now has a new regulation and has been developed into the European Border and Coast Guard it remains the same body.²¹⁹ The non-refoulement principle is thereby binding on the Agency.

As earlier stated it is important to consider the Vienna Convention on the Law of Treaties within the area of international customary law as a source within international law. Advocate General Sharpston argues that the Vienna Convention is part of the Union's Legal order.²²⁰ It must therefore be assessed that Article 64 is applicable on Union law. This implies that if any part of Union law is in conflict with *jus cogens*, it must be regarded as void and be terminated. *Jus cogens* must be assessed to prevail Union law.

Therefore, the European Border and Coast Guard is responsible to act in compliance with the non-refoulement principle and protect the fundamental rights of asylum-seekers, regardless of what is stated in Union law such as

Stenberg, Gunnel. (1989). Non-expulsion and non-refoulement: the prohibition against removal of refugees with special reference to articles 32 and 33 of the 1951 convention relating to the status of refugees. Uppsala: Iustus, 1989.

²¹⁶ Allain (2001) pp. 538-539. Executive Committee Conclusion 79, 'General Conclusion on International Protection', 1996.

²¹⁷ Case concerning *Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports, 1986, 98.

²¹⁸ UN High Commissioner for Refugees (UNHCR), UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final (April 2014), available at: <http://www.refworld.org/docid/535649094.html> [accessed 20 May 2017].

²¹⁹ Rosenfeldt (2016).

²²⁰ In Opinion of Advocate General Sharpston in C-508/08 *European Commission v Malta*, EU:C:2010:392, para. 4, Sharpston states that Vienna Convention is part of EU legal order.

the Charter or Regulation 2016/1624. However, in order to make a complete assessment, the analyses will also examine whether the Union has a responsibility to protect fundamental rights through Union law. It is important that every source is thoroughly assessed.

4.2.1.3 Articles on the Responsibility of International Organisations

ARIO Article 7 states that an international organisation can only be held responsible when they are regarded as having *effective control* of the operation that is carried out by the international organisation and the states. *Effective control* refers to the operational command and control.

Mungianu argues that based on the 2011 Frontex Regulation, Frontex cannot be seen as having *effective control*.²²¹ This is because the host Member State gives the instructions and in the 2011 Frontex Regulation the view of the coordinating officer is merely to be considered.²²² However, the instructions must be in accordance with the operational plan that can be seen as a decision made at Union level since it is adopted by Frontex and the Member States.²²³ In the 2011 Frontex Regulation no technical and operational strategy is mentioned.²²⁴

According to Mungianu, ARIO requires that the international body is the only body to exercise direction and control. Otherwise, the international organisation cannot be in *effective control*.²²⁵ It can be argued that through the changes presented in Regulation 2016/1624 the control of the Agency has increased. The views of the coordinating officer must now be followed as far as possible.²²⁶ Through the technical and operational strategy the Agency is also given a bigger influence on the Member State's action and instructions during the different operations. The Member State must always follow the strategy, even when issuing instructions.²²⁷ The operational plan in Regulation 2016/1624 is also made binding on the Member State and the Agency.²²⁸ In the 2011 Frontex Regulation the operational plan is not binding, instead the Agency shall ensure that it is implemented.²²⁹

The new mandate could be seen as enlarging the Agency's control over the instructions from the host Member State to the European Border Guard Teams. However, as Mungianu argues, ARIO requires that the international body is the only body to exercise direction and control.²³⁰ This is not case with the operations of the Agency. The host Member State still has some

²²¹ Mungianu (2016) pp. 69-70.

²²² Mungianu (2016) p. 69 and 2011 Frontex Regulation Article 3c.2.

²²³ Mungianu (2016) p. 69.

²²⁴ 2011 Frontex Regulation.

²²⁵ Mungianu (2016) pp. 69-70.

²²⁶ Regulation 2016/1624 Article 21.2.

²²⁷ Regulation 2016/1624 Articles 3 and 5.

²²⁸ Regulation 2016/1624 Article 16.3.

²²⁹ 2011 Frontex Regulation Article 3a.3.

²³⁰ Mungianu (2016) pp. 69-70.

control over the operational plan and the instructions during the operation, even in situations at the external border requiring urgent action. Even in these operations the host Member State must agree on the operational plan and is the one issuing the instructions.²³¹

Using only ARIO as source, the answer to the second research question is that the Agency does not have a responsibility to protect fundamental rights. However, ARIO is not customary international law, it only has legal value.²³² The non-refoulement principle, being *jus cogens*, is, on the other hand, legally binding.²³³ That obligation must therefore, be assessed to supersede Article 7 in ARIO.

4.2.2 Union Law

In this part, the different legal sources within the Union is further examined. An argumentation is presented on whether the legal sources can be used to argue that the European Border and Coast has a responsibility to protect fundamental rights of asylum seekers.

4.2.2.1 The Charter

The non-refoulement principle is stated in the Charter Article 19. The Charter is primary law and shall be followed when the Union is acting.²³⁴ Since the Union acts through the European Border and Coast Guard, the Charter can be assessed as applicable also on the Agency. However, the application of the Charter on the Union's bodies is limited by the subsidiarity principle.

For Member States the Charter is only applicable when they are implementing Union law.²³⁵ A lot of research have been made in this area to define when a Member State is implementing Union law. However, in regards to the application of the Charter on the Union and the limitation set by the subsidiarity principle, few sources can be found. An argumentation is therefore needed in regards to whether applying the non-refoulement principle in Article 19, in the Charter, on the Agency is violating the subsidiarity principle.

The subsidiarity principle implies that power shall be exercised as close as possible to the citizens. This entails that the Union can only act when the goal can be achieved more effectively on Union level than by the Member States.²³⁶ The goal within this matter is that the non-refoulement principle is

²³¹ Regulation 2016/1624 Articles 19 and 21.

²³² Mungianu (2016) pp. 59-60.

²³³ Allain (2001) pp. 533-558.

²³⁴ Article 6.1 TEU.

²³⁵ Charter Article 51.1.

²³⁶ Di Fabio, Udo (2002) p. 1294. See also C-376/98, *Germany v European Parliament and Council of the European Union*, EU:C:2000:544, para. 83 and 107.

followed.

The non-refoulement principle entails the fundamental rights to enter a State, apply for asylum and not to be returned until it has been established that the person does not qualify as a refugee. These are executive powers, and for them to be executed as close as possible to the citizen, they should be executed by the Member State itself.

It can therefore on one hand, be argued that to be in compliance with the subsidiarity principle these executive powers should be exercised by the Member States and not by the Union. The asylum-seeker is applying for asylum in the State and it is therefore reasonable that this application should be taken care of by the State itself. This would entail that the Charter is not applicable. The European Border and Coast Guard would not be bound by the non-refoulement principle in the Charter in that case and have no responsibility, with grounds in the Charter, to protect the fundamental rights of the asylum-seekers.

On the other hand, it can be argued that the subsidiarity principle is fulfilled. Being granted asylum in one Member State allows for free movement within the whole Union, since the internal borders have been removed.²³⁷ The approval of an asylum application is something that affects all Member States and all Union members. The execution of asylum procedures and the protection of fundamental rights in regards to the non-refoulement principle is presently done by the Member States. However, this is not working properly. In many Member States the asylum procedures take several years and are, in many cases, not properly carried out. In Hungary, the asylum seekers are put in camps at the State's borders.²³⁸ There have also been several examples in Greece and Italy, where asylum-seekers were not granted access to asylum procedures.²³⁹ This could be used to argue that the protection of fundamental rights for asylum-seekers is not sufficiently achieved by the Member States. It would therefore be justified to put it on Union level to assure that the non-refoulement principle is followed and that the fundamental rights for asylum seekers are protected. This entails that the subsidiarity principle is fulfilled and the European Border and Coast Guard can be regarded as having responsible to protect the non-refoulement principle with grounds in the Charter.

However, to be able to carry out a complete assessment on whether Article 19 on the non-refoulement principle is applicable on the European Border and Coast Guard, the allocation of competences must be considered. It must be assessed whether the Charter is applicable on the Union in situations where the Union does not have competence. A further assessment on the

²³⁷ European Parliament (2016) p. 2.

²³⁸ "Hungary to detain all asylum seekers in container camps", *The Guardian*, March 7, 2017, <www.theguardian.com/world/2017/mar/07/-hungary-to-detain-all-asylum-seekers-in-container-camps>, accessed 2017-05-08.

²³⁹ "Greece fined for violating asylum seekers' rights", *EU Observer*, October 21, 2014, <www.euobserver.com/justice/126171>, accessed 2017-05-08.

complexity between the allocation of competences and responsibility to protect fundamental rights in Union law is given in Chapter 5.

4.2.2.2 General Principles

As already assessed, ECHR constitutes general principles of Union law. Article 3 ECHR states the non-refoulement principle and therefore, the principle must be regarded as being a general principle within Union law.

In regards to ECHR being general principle of Union law it is important to remember that the right to non-refoulement is absolute in the ECHR, and it should therefore be an absolute right within Union law as well. This implies that derogation from the principle is not allowed, and that it should be complied with at all times.²⁴⁰

However, the same problem as with the Charter arises. An assessment in regards to the allocation of competences must be made in order to decide whether Union law is applicable on the actions of the Agency that must be carried out in order to protect the non-refoulement principle. Once again, the reader must be directed to the assessment in Chapter 5.

4.2.2.3 Regulation 2016/1624

Strong criticism was directed at Regulation 2016/1624 by UNHCR, Amnesty international, the International Commission of Jurists and the European Council on Refugees and Exiles. Regulation 2016/1624 does not clearly state what responsibility the Agency has, to protect fundamental rights of asylum seekers.²⁴¹

Regulation 2016/1624 consists of several provisions that refer to fundamental rights and the non-refoulement principle.²⁴² This shows that the Union, through the European Border and Coast Guard, is willing to take responsibility to protect fundamental rights. However, concerns have been raised, that the focus on fundamental rights within Regulation 2016/1624 is nothing more than empty statements with a weak relation to the actual practice of the European Border and Coast Guard.²⁴³

Nonetheless, these provisions are in the Regulation and should therefore have the same legal value as any other provision in the Regulation. They should be valued and acted upon accordingly to in practice as well. This implies that the Agency should have a responsibility to act in accordance with and to protect the fundamental rights of asylum-seekers. However, once again the allocation of competences must be regarded and the reader is

²⁴⁰ Boeles, Pieter (2017).

²⁴¹ International Commission of Jurists, ECRE and Amnesty International: "Joint briefing on the European Border and Coast Guard Regulation".

²⁴² Regulation 2016/1624 Articles 26, 34, 35, 70, 71, 72 and 74.

²⁴³ Casella Colombeau (2017) pp. 42-43.

therefore directed to Chapter 5.

4.2.3 The Relation between International Law and Union Law

As earlier assessed the Union is bound by international law. CJEU has even stated that the Union is bound by international customary law. The relation between *jus cogens* and Union law is a complex matter. Lawyers have argued before that Union law trump *jus cogens* due to the *lex specialis* rule. The Treaties being more specialised law would therefore prevail *jus cogens*.²⁴⁴ This can be questioned since the very basis of *jus cogens* is that it cannot be subject to restraints from one State or organisation.²⁴⁵

The foundation of *jus cogens* is that it is a norm from where no derogation is allowed. This must be considered applicable upon Union law. Union law that conflicts with *jus cogens* must therefore be considered void. This is also in line with the assessment in Title 4.2.1.2 on the Vienna Convention on the Law of Treaties. The responsibility for the European Border and Coast Guard to protect fundamental rights of asylum-seeker through *jus cogens* is therefore to be established to supersede Union law. However, also in this aspect the allocation of competences must be regarded and the reader is therefore directed to Chapter 5.

4.2.4 Protection against Terrorism and the Responsibility of the European Border and Coast Guard to Protect Fundamental Rights of Asylum-Seekers

The underlying reason for expanding the mandates of Frontex and develop it into the European Border and Coast Guard was to protect the Union from terrorism, as stated in the introduction to Chapter 2. Several scholars consider the protection of terrorism and the protection of fundamental rights of asylum-seekers as being two conflicting interests and the problem with Regulation 2016/1624 is that too much focus is put on the interest to protect the Union from terrorism.²⁴⁶

However, it can be argued that the Agency having a responsibility to protect the fundamental rights would also be in line with the interest to protect the Union against terrorism. The responsibility to protect the fundamental rights of asylum-seekers would include that the European Border and Coast Guard must ensure that all asylum-seekers are allowed entry to the State, thereby being properly registered instead of just “waved-through” or sent away at

²⁴⁴ Konstadinides (2016) p. 514.

²⁴⁵ Konstadinides (2016) p. 516.

²⁴⁶ Peers (2015).

the borders. The Agency would also be responsible to assure that the asylum-seekers are given a proper asylum assessment which would make it easier to identify false documentation and ensure that only persons in need of asylum are also granted asylum. With the Agency ensuring that return decisions are properly carried out, persons that could be of any threat would be sent back to their country or being correctly sentenced. The interest to protect the Union against terrorism and protecting the fundamental rights of the asylum seekers must therefore not stand in conflict with each other.

4.3 Conclusions on the Responsibility of the Agency to Protect Fundamental Rights of Asylum-Seekers

To conclude, there is reason to argue that the European Border and Coast Guard has a responsibility to protect the fundamental rights of asylum-seekers, even though it would mean interfering with the competences of the Member States. The violations against the fundamental rights of asylum-seekers needs to be taken care of. The Member States are not doing enough and the European Border and Coast Guard are in an excellent position to ensure that handling the asylum-seekers is done in full compliance with the non-refoulement principle. The Agency has people on the ground, it sets up the technical and operational strategy that all Member States are bound by, it has a big influence on the operational plan and on the instructions, that are given out to the border guards at the external borders. The fundamental rights of asylum-seekers are very important and must be handled as more than empty statements. The non-refoulement principle is binding and the Agency must protect this principle and the fundamental rights of the asylum seekers.

The answer to the second research should is that the European Border and Coast Guard has a responsibility to protect the fundamental rights of asylum-seekers. This is based on international law and the fact that the non-refoulement principle is *jus cogens*.

However, yet another assessment must be made. That the Agency has a responsibility to protect the fundamental rights of asylum-seekers implies that in order to upheld this responsibility the Agency must intervene in executive functions such as the issuing of decisions to entry, asylum and return. As earlier assessed in regards to the first research question on the competences of the Agency, these executive functions belong solely to the competences of the Member States. That the Agency intervenes in these functions is a violation to the Union Treaties and threatens the sovereignty of the Member States. A further assessment must therefore be made on the relation between the allocation of competences in Union law and the responsibility to protect the fundamental rights in international law. This assessment is carried out in Chapter 5.

5 Conclusions and Discussion

5.1 Objective and Research Questions

The objective of the thesis has been reached. The problems that arose at the negotiations of Regulation 2016/1624 has been examined and the research questions have been answered.

The first of these two problems were that the Member States considered the delegated competences to the European Border and Coast Guard being too wide. The research question on whether the competences delegated to the Agency in Regulation 2016/1624 is violating the Union Treaties is answered in Chapter 3. The competences are not in compliance with the allocation of competences and Regulation 2016/1624 is, in some aspect, violating the Union Treaties.

The second problem was that Regulation 2016/1624 was regarded as not protecting the fundamental rights of asylum seekers. These concerns were raised by organisations such as UNHCR and legal professors, e.g. Steve Peers. The second research question on whether the Agency has a responsibility to protect the non-refoulement principle is answered in Chapter 4. Through international law, since the non-refoulement principle is *jus cogens*, the Union has a responsibility to protect the fundamental rights of asylum-seekers.

These conclusions however, raise a new problem:

Through the answer to the first research question it is established that the Union has no competence to intervene in the executive powers of issuing decision of entry, asylum and return. These executive functions belong solely to the competence of the Member States, and if the Union interferes it is a violation of the Union treaties. Such a violation is a threat to the sovereignty of the Member States.

Through the answer to the second question a responsibility is put on the Agency to protect the fundamental rights of asylum-seekers. This is grounded in binding international customary law, *jus cogens*. To fulfil this responsibility the Agency must interfere in the executive powers to issue decisions of entry, asylum and return. This type of interference is considered a violation to the Union Treaties and a threat to the sovereignty of the Member States.

A conflict between the allocation of competences in Union law and the non-refoulement principle being *jus cogens* in international law has occurred.

5.2 The Agency's Responsibility to Protect Fundamental Rights of Asylum-Seekers and the Sovereignty of Member States

The responsibility of the European Border and Coast Guard to protect the fundamental rights of asylum-seekers would require the Agency to interfere in executive powers of the Member States, such as issuing entry, asylum and return decisions. This violates the allocation of competences in the Union Treaties as assessed in Chapter 3. This also implies that a responsibility to protect the fundamental rights of asylum seekers cannot be based on any legal source within Union law. Therefore, the Charter or Regulation 2016/1624 cannot be used as ground for arguing that the Agency has a responsibility to protect fundamental rights of asylum-seekers. However, this argumentation cannot be used in regards to international law.

The non-refoulement principle is *jus cogens* and thereby binding. The European Border and Coast Guard has a responsibility to protect the fundamental rights of asylum-seekers. But for the Agency to act accordingly to this responsibility it would mean that they are violating Union law. They would be interfering in competences that belong to the Member States, thereby threatening the sovereignty of the Member States.

Two arguments can be used to argue that the responsibility to protect the non-refoulement principle should prevail Union law. This first argument is that, as assessed in Title 4.2.1.2 and 4.2.3, *jus cogens* supersede Union law. The second argument is that, following the argumentation of Elis Muir in Title 2.3, fundamental rights can stretch the competences of the Union.

As assessed in Title 2.3 there are several cases where the CJEU has concluded that Union law on fundamental rights is applicable on the actions of Member States. Even in situations where the actions are outside the competences of the Union.²⁴⁷ The question is whether the same conclusion can be reached in regards to when a body of the Union, such as the European Border and Coast Guard, acts outside the competences of the Union in order to fulfil the responsibility to protect fundamental rights.

In Title 2.3 Muir argues that fundamental rights can expand the scope of Union law in three situations.²⁴⁸ Here, the third situation is of interest. The Union has competences within the area of border control, see Articles 77 and 79 TFEU. The responsibility to protect fundamental rights of asylum-seekers relates to this area but in regards to these competences, this responsibility is not expressly regulated. Through international law it has been assessed that the Agency has the responsibility to protect fundamental

²⁴⁷ Dubout (2014) pp. 194.

²⁴⁸ Muir (2014) pp. 33-36.

rights of asylum seekers. Also in Union law is the protection of fundamental rights for asylum-seekers regarded as the non-refoulement principle is stated in Article 19 in the Charter. This is thereby a situation where the competence of the Union can be expanded.

It is stated in Article 6.1 TEU and Article 51.2 that the Charter shall not extend the competences of the Union. However, one of the founding principles for the Union is to respect fundamental rights and an important aim of the Union is that these rights are protected.²⁴⁹ The CJEU has allowed for the expansion of the application of Union law in regards to action of Member States.²⁵⁰ The Union also aims to be more than an economic union and to justify its existence by claiming to guarantee stability and prosperity.²⁵¹ The focus on being more than an economic Union is also showed in Commission President Juncker's speech the State of the Union in 2015, where he said: "*We Europeans should know and should never forget why giving refuge and complying with the fundamental right to asylum is so important.*" The CJEU and the Union has allowed for the expansion of competences in order to protect fundamental rights in the actions of Member State. It should be argued that the same expansion of competences can be made also in the actions of the Union. Thereby, it should be regarded that the competences of the Agency can be expanded and the Agency can interfere with the executive powers of the Member States in order to protect the fundamental rights of asylum seekers.

However, these arguments would never be accepted by the Member States. The political climate in regards to the allocation of competences between the Union and Member States is an ever-pending situation. At times, there have been developments that enhanced supranationalism, as the agreement in 1967 on direct elections to the Assembly (now European Parliament).²⁵² As well as other times where the focus had been on the sovereignty of the Member States and the will to stop the Union from becoming a supranational organisation, such as the establishment of the subsidiary principle at the entering into force of the Maastricht Treaty in 1993.²⁵³

At the moment, the political climate is focused on the national sovereignty of the Member States, as seen with e.g. Brexit, where the United Kingdom has activated Article 50 TEU and is leaving the Union.²⁵⁴ A conferral of competences to the Union to take an even bigger role in the executive powers of the Member States is therefore very unlikely.

²⁴⁹ Dubout (2014) pp. 193-194.

²⁵⁰ Dubout (2014) p. 194.

²⁵¹ Dubout (2014) p. 211.

²⁵² Craig and De Búrca (2015) pp. 2-22, see especially p. 7.

²⁵³ Craig and De Búrca (2015) pp. 2-22, see especially p. 11.

²⁵⁴ "A renewed nationalism is stalking Europe", *Financial Times*, July 11, 2016, <www.ft.com/content/53fc4518-4520-11e6-9b66-0712b3873ae1>, accessed 2017-05-08.

5.3 Final Conclusion

The true conflict of interest in regards to border control is not the protection against terrorism and the protection of the fundamental rights of asylum seekers. These are interests that can be reached collectively. The real conflict of interests for the European Border and Coast Guard is between the protection of fundamental rights of the asylum seekers and the protection of the sovereignty of the Member States.

Supplement A

- Please note that these spreadsheets are only to give guidance on where some of the provisions within an area can be found, these lists are not exhaustive.

Exclusive competence		
Art. 2.1 TFEU: <i>only the Union may legislate and adopt legally binding acts</i>		
Art. 3.1 TFEU - Customs union - The establishing of the competition rules for the functioning of the internal market - Monetary policy for the Member State whose currency is the euro - The conservation of marine biological resources under the common fisheries policy - Common commercial policy	TEU	TFEU Art. 28, 30-37
		Art. 101-109
	Art. 3.4	Art. 136-138
		Art. 13, 38, 43.2-43.3.
		Art. 206-207
Art. 3.2 TFEU The Union shall also have exclusive competence for the conclusion of an international agreement when: - its conclusion is provided for in a legislative act of the Union or - is necessary to enable the Union to exercise its internal competence or - in so far as its conclusion may affect common rules or alter their scope	TEU	TFEU Art. 216-219

Shared competences		
<p>Art. 2.2 TFEU: ...<i>the Union and the Member States may legislate and adopt legally binding acts</i></p> <p>- Matters within these areas can be pre-empted by the Union. In some of the detailed provisions is pre-emption limited.</p>		
Art. 4.1 TFEU		
The category of shared competence is residual		
Art. 4.2 TFEU - Internal market - Social policy, for the aspects defined in this Treaty - Economic, social and territorial cohesion - Agriculture and fisheries, excluding the conservation of marine biological resources - Environment - Consumer protection - Transport - Trans-European networks - Energy - Area of freedom, security and justice - Common safety concerns in public health matters, for the aspects defined in this Treaty	TEU	TFEU
	Art. 3.3	Art. 13, 26-27
		Art. 151-161
	Art. 3.3	Art. 14, 174-178
		Art. 13, 38-44
	Art. 3.3	Art. 11, 191-193
		Art. 12, 169
		Art. 13, 90-100
		Art. 170-172
		Art. 194
	Art. 3.2, 4.2	Art. 67-89
	Art. 168,5-5	
Parallel (shared) competence		
<p>– <i>Some of the shared competence cannot be completely pre-empted, instead some competence will always stay with the Member State</i></p>		
Art. 4.3 TFEU - Research - Technological development - Space	TEU	TFEU
	Art. 3.3	Art. 13, 179-188 Research and technological development
		Art. 13, 189 Space
Art. 4.4 TFEU - Development cooperation - Humanitarian aid	TEU	TFEU
		Art. 186 Cooperation with third countries
		Art. 208-211 Development cooperation
		Art. 212-213 Economical, financial and technical cooperation with third countries
		Art. 214 Humanitarian aid

Competence to support, coordinate or supplement		
Art. 2.5 TFEU: ... <i>the Union shall have competence to support, coordinate or supplement the actions of the Member States, without thereby superseding them in these areas</i>		
- These areas shall not be harmonized as stated in Article 2.5 TFEU.		
Art. 6 TFEU	TEU	TFEU
- Protection and improvement of human health		Art. 168
- Industry		Art. 173
- Culture	Art. 3.3	Art. 167
- Tourism		Art. 195
- Education, vocational training, youth and sport		Art. 165-166
- Civil protection		Art. 196
- Administrative cooperation		Art. 197

Competence to coordinate economic, employment and social policy		
Art. 2.3: <i>The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty</i>		
Art. 5 TFEU	TEU	TFEU
- Economic policy		Art. 120-126, 175
- Employment policy		Art. 145-150
- Social policy		Art. 151-161

Common Foreign and Security Policy (CFSP)		
Art. 2.4 <i>The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.</i>		
Art. 2.4. TFEU	TEU	TFEU
- Common Foreign and Security Policy	Art. 23-41	Art. 218, 275
- Common Defence Policy	Art. 42-46	

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