The European Union's Broader Neighbourhood

Challenges and opportunities for cooperation beyond the European Neighbourhood Policy

Edited by
Sieglinde Gstöhl and Erwan Lannon

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Over the past decade the European Union (EU) has gradually developed the European Neighbourhood Policy (ENP) with its neighbours. At the same time, the 'neighbours of the EU's neighbours' have presented new challenges.

This book addresses issues surrounding the EU's broader neighbourhood, comprising the ENP countries and the neighbours of its neighbours. With specific focus on Saharan Africa, the Middle East and Central Asia, it discusses trans-regional policy issues that arise from the EU's relations with regions beyond the ENP. Based on an interdisciplinary, policy-oriented approach, this volume explores major political, legal, security and socio-economic challenges and identifies opportunities for cooperation across the EU's broader neighbourhood.

This book will be of interest to students, experts and scholars interested in EU affairs and politics, international relations, EU and international law, diplomacy and area studies.

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Routledge
Taylor & Francis Group

LONDON AND NEW YORK

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Preface

The 'broader neighbourhood' of the European Union (EU) refers to the concept of the 'neighbours of the EU's neighbours' which the European Commission introduced in the framework of the European Neighbourhood Policy (ENP). It mainly covers the countries of Saharan Africa, the Middle East and Central Asia: that is, the neighbours of the ENP countries. This book explores some of the major legal, political, security, economic and societal challenges that these regions – and thus also the EU and its Member States – face and identifies opportunities for cooperation and for better connecting Europe with its neighbours and their neighbours in order to find more efficient responses to the various challenges.

This edited volume builds on the presentations and discussions at the international conference 'The Neighbours of the EU's Neighbours: Legal, Political, Security and Socio-Economic Challenges beyond the ENP', which gathered scholars and practitioners to reflect on the European Union's broader neighbourhood at the College of Europe in Bruges, Belgium, in March 2013. The presentations were subsequently revised and updated, while new contributors joined the project. Most contributions were largely completed in the summer of 2014.

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Sieglinde Gstöhl and Erwan Lannon
Bruges, December 2014

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Abbreviations

AA	Association Agreement
AA-DCFTA	Association Agreement – Deep and Comprehensive Free Trade Area
ACP	African, Caribbean and Pacific countries
AFSJ	Area of Freedom, Security and Justice
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
AMU	Arab Maghreb Union
APF	African Peace Facility
AQIM	Al-Qaeda in the Islamic Maghreb
ATP	autonomous trade preferences
AU	African Union
BOMCA	Border Management Programme in Central Asia
BSEC	Black Sea Economic Cooperation
CADAP	Central Asia Drug Action Programme
CAREC	Central Asia Regional Economic Cooperation
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEFTA	Central European Free Trade Agreement
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CICA	Conference on Interaction and Confidence Building Measures in Asia
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
COTER	Council Working Party on Terrorism (International Aspects)
CSDP	Common Security and Defence Policy
CT	counter-terrorism
DAC	Development Assistance Committee
DCAF	Center for the Democratic Control of the Armed Forces
DCFTA	Deep and Comprehensive Free Trade Area
DCI	Development Cooperation Instrument
DG	Directorate General

DG DEVCO	European Commission Directorate General for Development and Cooperation – EuropeAid (previously DG DEV)
DoP	Declaration of Principles
EASO	European Asylum Support Office
EATL	Euro-Asian Transport Links
EBA	Everything-But-Arms initiative
EBC	externalization of border controls
EC	European Community/Communities
ECHO	European Community Humanitarian Office
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
ECU	Eurasian Customs Union
EDF	European Development Fund
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EEU	Eurasian Economic Union
EFTA	European Free Trade Association
EIB	European Investment Bank
EIDHR	European Instrument for Democracy and Human Rights
EMAA	Euro-Mediterranean Association Agreement
EMFTA	Euro-Mediterranean Free Trade Area
EMP	Euro-Mediterranean Partnership
ENC	Energy Community
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument
ENRTP	Thematic Programme for Environment and Sustainable Management of Natural Resources
EPA	Economic Partnership Agreement
ESS	European Security Strategy
EU	European Union
EUAVSEC	EU Aviation Security Mission
EUBAM	EU Border Assistance Mission
EUCAP	EU Capacity-building Mission
EUNAVFOR	EU Naval Force
EurAsEC	Eurasian Economic Community
EUSR	EU Special Representative
FDI	foreign direct investment
FoEME	Friends of the Earth Middle East
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

FTA	free trade agreement
GAFTA	Greater Arab Free Trade Area
GCC	Gulf Cooperation Council
GCTF	Global Counter-terrorism Forum
GDP	gross domestic product
GSP	Generalized System of Preferences
HDI	Human Development Index
HDR	Human Development Report
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission
IBM	Integrated Border Management
IBPP	Institution Building Partnership Programme
ICI	Financing Instrument for Cooperation with Industrialized and other High-income Countries and Territories
ICT	information and communications technology
IDP	internally displaced people
IFCA	Investment Facility for Central Asia
IFI	international financial institution
IfS	Instrument for Stability
IGAD	Intergovernmental Authority on Development
INOGATE	Interstate Oil and Gas Transportation to Europe Programme
IOM	International Organization for Migration
ISIL	Islamic State in Iraq and the Levant
JAES	Joint Africa–EU Strategy
JAP	Joint Action Programme
JHA	Justice and Home Affairs
JWC	Joint Water Committee
LDCs	least developed countries
MENA	Middle East and North Africa
MFF	Multiannual Financial Framework
MFN	most-favoured nation
MoU	memorandum of understanding
MPC	Mediterranean Partner Countries
NATO	North Atlantic Treaty Organization
NEC	Neighbourhood Economic Community
NGO	non-governmental organization
NSA/LA	non-state actors/local authority
OAU	Organization of African Unity
ODA	Official Development Assistance
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Cooperation in Europe
PCA	Partnership and Cooperation Agreement
PLO	Palestine Liberation Organization
PPP	public–private partnerships

PSGs	Peacebuilding and Statebuilding Goals
SALW	small arms and light weapons
SES	Single Economic Space
SIPRI	Stockholm International Peace Research Institute
SIWI	Stockholm International Water Institute
SPMME	Strategic Partnership with the Mediterranean and the Middle East
SSR	Security Sector Reform
TAIEX	Technical Assistance and Information Exchange
TEN-E	Trans-European Energy Network
TEN-T	Trans-European Transport Network
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRACECA	Transport Corridor Europe Caucasus Asia
TRIM	Transit and Irregular Migration Management
UAE	United Arab Emirates
UEA	Unified Economic Agreement
UFL	Unité de Fusion et de Liaison
UfM	Union for the Mediterranean
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTED	UN Counter-terrorism Executive Directorate
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon
UNODC	UN Office for Drugs and Crime
UNTSO	United Nations Truce Supervision Organization
US	United States
WBIF	Western Balkan Investment Framework
WMD	Weapons of Mass Destruction
WTO	World Trade Organization

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Introduction

Building bridges between the EU's immediate and broader neighbourhood

Sieglinde Gstöhl and Erwan Lannon

Introduction: the European Union's immediate and broader neighbourhood

On the eve of the Eastern enlargement of the European Union (EU), the European Security Strategy adopted by the European Council (2003: 8) stressed the need 'to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean'. The EU has, since then, been developing and implementing the European Neighbourhood Policy (ENP) with most of its eastern and southern neighbours. The first decade of this policy saw several geopolitically important events, among them the Russo-Georgian war of August 2008; the 'Arab Spring' which began in December 2010 and led to the ousting from power of long-time authoritarian rulers in Tunisia, Egypt and Libya and to civil wars in Libya and Syria; the 'Ukrainian Spring' in 2014 and the annexation of the Crimean peninsula by Russia which was followed by a violent conflict involving pro-Russian separatists in eastern Ukraine; and the Israeli military intervention in the Gaza Strip in the summer of 2014.

These events underlined again the interdependence and the vulnerability of the EU's neighbourhood. Spill-over effects from the ENP countries to their neighbours – be it the EU Member States to the north and west or the neighbours further to the east and south – are often unavoidable as a result of the transnational nature of many challenges. Supported by an influx of weaponry from the Libyan civil war, the 2012 Tuareg rebellion in northern Mali led in 2013 to a larger conflict involving several Islamist groups and finally to foreign military interventions and an EU training mission. The advent of the extremely brutal jihadist 'Islamic State of Iraq and the Levant' (ISIL), which in 2013 made rapid military gains in controlling parts of Syria and in 2014 led large-scale offensives in northern Iraq, demonstrated again the inter-connectedness of the EU's (immediate and broader) neighbourhood.

Security in the southern ENP countries also depends on security in the Sahel and the Horn of Africa as well as on the roles played by the Arab Gulf countries – and sometimes other regional actors such as Iran, Iraq and Turkey. The development of stability and prosperity for the EU's eastern neighbours also depends on Russia's foreign policy. The EU and its Member States, with their open

economies, cannot insulate themselves from the challenges in their neighbourhood because they are highly dependent on the security of trade and energy flows and because they are primary targets for immigration and all sorts of trafficking.

Although the European Commission (2006: 11) introduced the concept of 'the neighbours of our neighbours' in Central Asia, the Middle East or Africa early in the implementation phase of the ENP, not much has been achieved in this respect (see Lannon 2014). Insights into the importance of the EU's broader neighbourhood have, however, recently been gaining ground among both scholars and practitioners. Before the Vilnius Summit in November 2013, High Representative Catherine Ashton and Commissioner Štefan Füle reassured the Eastern ENP countries about the inclusivity of the Eastern Partnership: 'the cooperation within the Eastern Partnership, including through the Association Agreements, can be beneficial also for the regional cooperation and for the neighbours of the EU's neighbours' (European External Action Service 2013). According to Commissioner Kristalina Georgieva (2014), however, 'Europe's extended neighbourhood is likely to see more instability, and more risk'. Grevi (2014: 16) argues that 'the neighbourhood should be framed as an extended strategic space stretching from West Africa and the Sahel to Central Asia and Russia, via the broader Middle East' because '[t]his is an area where interdependencies run deep, geopolitical shifts are resetting power balances, and state fragility threatens regional stability'. And Biscop (2014: 9) claims that

> the EU has come to realise that 'the neighbours of the neighbours' are often as crucial to our interests. Five partially overlapping and strongly inter-related areas are of vital importance to European security: the eastern neighbourhood, the Mediterranean, the Sahel, the Horn of Africa, and the Gulf.

This introductory chapter asks why the broader neighbourhood of the European Union, stretching from the Sahel and the Horn of Africa over the Middle East to Central Asia, should be studied and why the EU might want to design a dedicated policy approach to these regions. It first clarifies the concepts of the 'neighbours of the EU's neighbours' and of the EU's 'broader neighbourhood'. The chapter then illustrates some of the main transnational challenges and the potential for building bridges, and introduces the structure of the volume. The chapter argues that analysing and designing a policy towards the broader neighbourhood is in the direct interest of the European Union – as well as in line with its propagated values – in enabling it to better respond to the many challenges emanating from these regions and to fully take advantage of the opportunities for cooperation.

The EU's broader neighbourhood: looking beyond the immediate neighbourhood

The European Neighbourhood Policy was designed to deal with the EU's 'immediate neighbourhood' on its southern and eastern borders. The 2002 European

Council Conclusions referred explicitly to Russia, Ukraine, Moldova, Belarus and the southern Mediterranean, while reaffirming at the same time the 'European perspective of the countries of the Western Balkans' (European Council 2002: 6). Russia ultimately refused to participate in the ENP and in 2004 the European Commission proposed to include the three southern Caucasus countries, Armenia, Georgia and Azerbaijan, in the ENP framework (European Commission 2004: 4).

However, more than 10 years after the policy's launching, some of the EU's immediate neighbours were still not fully included in this policy framework. In the southern Mediterranean, Algeria is still negotiating its first ENP Action Plan whereas Libya and Syria for the time being have no contractual relationships with the EU. In the eastern periphery, Belarus is in a similar situation while Armenia, although formally included in the ENP, decided in the run-up to the Vilnius Eastern Partnership Summit 2013 not to sign an Association Agreement including a Deep and Comprehensive Free Trade Area.

When the European Commission (2006: 11) proposed in 2006 to 'look beyond the Union's immediate neighbourhood' and to work with the neighbours of its neighbours, it did not define what it meant by this term although a reference was made to 'Central Asia', the 'Gulf' and 'Africa'. If one adopts a strictly geographical approach, the neighbours of the EU's neighbours comprise:

- Mauritania, Mali, Niger, Chad and Sudan in Africa;
- Iraq, Iran and Saudi Arabia in the Middle East; and
- Kazakhstan and Turkmenistan in Central Asia.

In light of the interconnected challenges, however, it seems more appropriate to take a wider geopolitical approach (Lannon 2014). The EU's 'broader neighbourhood' thus enlarges the scope of the analysis to at least some African countries, especially the Sahel and the Horn of Africa; the Middle Eastern countries not included in the ENP framework – the members of the Gulf Cooperation Council (GCC), Yemen, Iran and Iraq and to a certain extent Afghanistan; and the five Central Asian republics (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan).

Challenges of the EU's broader neighbourhood

The ENP faced at its launch many challenges ranging from the management of borders and trade, investment and infrastructure networks to 'threats to mutual security, whether from the trans-border dimension of environmental and nuclear hazards, communicable diseases, illegal immigration, trafficking, organised crime or terrorist networks' (European Commission 2003: 6). In response to these challenges, the 'Wider Europe' strategy (ibid.: 3) declared that

> *[t]he EU has a duty*, not only towards its citizens and those of the new member states, but *also towards its present and future neighbours* to ensure

continuing social cohesion and economic dynamism. The EU must act to promote the regional and subregional cooperation and integration that are preconditions for political stability, economic development and the reduction of poverty and social divisions in our shared environment [emphasis added].

Yet the neighbours of the EU's neighbours in the Middle East, the Sahel and the Horn of Africa as well as in Central Asia are often plagued by similar or even more serious problems and in many cases these challenges are closely interlinked. Compared to the ENP countries, values tend to be less shared with the EU in the neighbours of its neighbours. In particular the African continent has been suffering from political instability and state failures, but also from extreme poverty, food insecurity, humanitarian crises and piracy. Security threats such as weapon proliferation, terrorism, trafficking and organized crime as well as regional – open or frozen – conflicts are challenges known in all regions of the EU's broader neighbourhood.

The EU's Sahel Strategy, for example, acknowledges 'the challenges of extreme poverty, the effects of climate change, frequent food crises, rapid population growth, fragile governance, corruption, unresolved internal tensions, the risk of violent extremism and radicalisation, illicit trafficking and terrorist-linked security threats' (Council of the European Union 2011: 1). The EU's Central Asia Strategy identifies 'common regional challenges such as organised crime, human, drugs and arms trafficking, terrorism and non-proliferation issues, intercultural dialogue, energy, environmental pollution, water management, migration as well as border management and transport infrastructure' (Council of the European Union 2009). The neighbours of the EU's neighbours are also relevant for shaping the future of the EU's relations with the ENP countries. The EU's broader neighbourhood 'is an area whose evolution will make a big difference to Europe and where the EU can have a distinct impact in promoting reform and stability in cooperation with regional and international partners' (Grevi 2014: 12).

The European Union has – in contrast with its relationships with the ENP countries – very different policy frameworks of cooperation in place with the neighbours of its neighbours. This lack of a strategy has led to fragmentation within the regions as well as to the neglect of explicit linkages between the EU's direct and broader neighbours in response to common challenges (see Gstöhl 2014). As a result, the EU often fails to leverage regional connections. Whereas the EU has to some extent developed cooperation with Africa, it punches below its weight in the Arab world and is at best a marginal player in Central Asia. As argued elsewhere, the European Union needs a broader strategic vision with regard to the neighbours of its neighbours (ibid.). This involves a political assessment of its interests and comparative advantages in a region and of the coherence of these relationships with its overall foreign policy strategy. If the EU does not take into account the interconnections between the regions, conflicts may arise between different regional strategies. For instance, the EU's

Sahel Strategy emphasizes security cooperation with Algeria, while the ENP stresses political conditionality with regard to democracy and human rights standards in this country (Mattelaer 2014); and the EU has repeatedly criticized Ethiopia for flawed elections but instead of suspending its budget support to the government, the EU has increased its support despite further democratic setbacks because the country is a strategic regional ally (Vines and Soliman 2014).

Recent events have increasingly challenged the assumption of a gradual convergence of the neighbouring countries to the EU, while other regional powers (such as a more assertive Russia, Turkey or Iran) are seeking to extend their influence across the – at times shared – neighbourhood. If the EU is going to join in the geopolitical game in its broader neighbourhood, it must address the growing expectations regarding the export of stability, peace and prosperity. To be sustainable, the attempt 'to expand the zone of prosperity, stability and security' beyond the borders of the EU (Ferrero-Waldner 2006: 139) cannot stop with the first ring of neighbours. The strategic focus must go beyond the ENP countries to embrace the Sahel and the Horn of Africa, Central Asia and the Gulf countries (Duke 2011: 83). The EU's neighbourhood policy needs to become more geopolitical. The EU's capacity to draft a strategic approach to the neighbouring countries and their neighbours will affect its future influence in these regions and its capacity to act as a global player.

Opportunities for cooperation and building bridges

As the following chapters will show, many challenges such as border controls, irregular migration, and EU return and readmission practices call for closer international cooperation not only for security reasons but *inter alia* also because they raise concerns about fundamental rights. The fight against terrorism in the EU's broader neighbourhood equally requires a holistic vision, in particular a comprehensive development and security approach which includes measures aimed at the prevention of radicalization. The European Union's strategic role with regard to the neighbours of its neighbours is strongest in Saharan Africa but generally speaking its influence, largely based on missions under the Common Security and Defence Policy (CSDP), weapons-related measures and international efforts for more security governance, is still rather limited. Certain CSDP missions in the same region could be linked up to achieve synergy effects, as could the EU Special Representatives. Moreover, EU agencies in the field of operational cooperation on police and justice could reinforce cooperation with their counterparts in the neighbourhood.

Despite the neighbours' economic heterogeneity, the EU has continuously endeavoured to develop trade relations via unilateral, bilateral and regional instruments. There is potential for a more systematic development of linkages between the EU and the different neighbours as well as among them, for instance by connecting (emerging) free trade areas and by supporting sub-regional economic integration. In addition, the EU should promote pro-development policies that include all stakeholders, especially for fragile states. Development

cooperation should focus not only on poverty eradication but also on human security, including gender equality and women's empowerment.

Sectoral cooperation in fields such as energy, transboundary waters or infrastructure networks is crucial for many dimensions – socio-economic, political, security and environmental. Here the EU can play a stronger role by supporting cooperation across neighbours, by financing investments connecting the regions and by adopting a clear stance on issues of governance when geopolitical and/or economic interests are at stake. The resource-rich countries in the EU's (broader) neighbourhood tend to be autocratic regimes and the EU needs to find a more credible way to cope with governments where its value-based policies, such as the promotion of democracy and human rights, have little traction. As argued by Keukeleire (2014), a genuine understanding of the EU's broader neighbourhood requires adopting an 'outside-in' perspective which goes beyond a Eurocentric view and attempts to integrate the perspective of the countries or regions concerned.

The EU's current frameworks of cooperation in the broader neighbourhood appear to be looser from west to east: while in Africa multilateralism (with the Cotonou Agreement) prevails in conjunction with an emerging inter-regionalism (the Economic Partnership Agreements), cooperation in the Middle East is characterized by emerging inter-regionalism (EU–GCC free trade agreement) and bilateralism (Iran, Iraq and Yemen) and in Central Asia solely by bilateralism (Gstöhl 2014). Not only do these frameworks lack an overarching strategic approach but also the interconnections between the regions could and should be strengthened. Building sustainable bridges across the regions could, for instance, include the insertion of regional cooperation clauses in the EU financial instruments; a 'neighbours of neighbours' cross-border cooperation programme; the connection of infrastructure (transport, energy, water, etc.) and trade networks across the regions; or a linking of the regional EU strategies and embedding them in an overall strategy for the broader neighbourhood (ibid.). A pragmatic 'EU Strategy on the Neighbours of the Neighbours' which draws on the existing instruments of cooperation and focuses on building bridges across the regions could, in the long run, work towards the aim of transforming the current 'arc of instability' in the EU's broader neighbourhood into a 'second ring of friends' beyond the ENP.

Conclusion

This brief introduction has illustrated why the broader neighbourhood of the European Union, stretching from the Sahel and the Horn of Africa over the Middle East to Central Asia, should be studied and why the EU might want to adopt a specific policy approach. A strategy beyond the immediate neighbourhood is in the interests of the EU in enabling it to better respond to the manifold challenges and to take advantage of the opportunities of cooperation with the ENP countries and their neighbours. These opportunities comprise not only economic, political and security interests but also the promotion of values such as democracy, fundamental rights and gender equality as well as trade liberalization, regional cooperation and integration.

The volume is thus divided into three parts. Part I addresses political, legal and security challenges such as migration and border controls, strategic issues and the fight against terrorism. Part II deals with economic and societal challenges, including EU trade relations and development cooperation with the broader neighbourhood, gender issues and democracy promotion. Part III focuses on the opportunities for better connecting the neighbours of the EU's neighbours with Europe and with the ENP countries. The topics include sub-regional economic integration in the EU's broader neighbourhood and the financing of investments in cross-regional infrastructure as well as cooperation in the fields of energy and trans-boundary waters. Finally, the concluding chapter draws some lessons and formulates policy proposals based on the findings.

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Part I

Political, legal and security challenges

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1 The externalization of border controls towards the EU's broader neighbourhood

Challenges of consistency

Valeria Bonavita

Introduction: the externalization of border controls as a challenge to the consistency of the EU's fundamental rights protection regime

In its Communication 'A Strategy on the External Dimension of the Area of Freedom, Security and Justice' (AFSJ), the European Commission (2005b) made geographic prioritization one of the guiding principles for initiatives in this area. While full-spectrum coordination in AFSJ matters should be concentrated on candidate and neighbouring countries of the European Union (EU), targeted cooperation in specific policy domains, such as border management, should be the rule *vis-à-vis* other countries.

Recent statistics show that, unlike in the last decades of the twentieth century, incoming migration flows currently transit through the territory of the EU's neighbouring countries but originate further away (Eurostat 2014: 4–5, 7). When it comes to Africa, for example, the source of such flows lies in the sub-Saharan region.[1] While the observation of such change in migratory trends did not discourage European institutions from carrying on with the pursuit of a policy of active engagement *vis-à-vis* the countries of the European Neighbourhood Policy (ENP) on migration and mobility, it nonetheless imposed a reconsideration of the EU approach towards the 'neighbours of the neighbours' in matters of migration and border controls. Whereas the ENP has been widely dealt with by scholars (see for instance Fargues 2013), little attention has been paid to the EU's engagement towards its broader neighbourhood in this policy area. The purpose of this contribution is to explore those avenues while keeping a watchful eye on issues of consistency and ultimately legitimacy. This study is thus placed at the crossroads of two intertwined debates: on the one hand, it deals with the external dimension of the Area of Freedom, Security and Justice; on the other hand, it strives to assess the consistency – at the horizontal level at least – between the internal and the external aspects of the EU's policies in this field. The main focus is on the quest for consistency between the internal and external dimensions of EU fundamental rights protection and the impact of the EU's

Charter of Fundamental Rights (CFR) on the external dimension of the AFSJ. The concept of horizontal consistency is herein employed according to the definition given by Tietje (1997: 213), who points out that consistency has the negative meaning of absence of contradictions, as opposed to the concept of coherence which entails the existence of positive connections and mechanisms aimed at actively avoiding inconsistencies. Coherence is a matter of degree, and therefore a relative concept, whereas consistency is a static and absolute one: concepts of law can be more or less coherent, but they cannot be more or less consistent – either they are or they are not.

This chapter seeks to assess to what extent and how the EU is currently putting in place mechanisms for the externalization of border management towards its broader neighbourhood as part of the external dimension of the AFSJ and whether such an external policy is consistent with the EU's internal regime of fundamental rights protection. The analysis shows that the question remains open as to whether current forms of cooperation amount to a sufficient critical mass for claiming that border control responsibilities are even partially externalized towards the neighbours of the EU's neighbours; further assessment is needed. However, the current state of affairs does not preclude looking at such forms of cooperation through the lens of policy consistency and, by implication, legitimacy. By building upon the lessons learned from the EU's cooperation in the domain of border management with countries such as Libya, the analysis in this chapter shows that externalizing border controls through either operational arrangements or development cooperation instruments negatively affects the EU's capacity to abide by its internally established regime of fundamental rights protection, including relevant provisions of international law. The chapter does not attempt an analysis of the EU Member States' role in the externalization of border controls. Recent EU practices in this domain remain the sole focus of the research and the findings do not take into account national policies. The conclusions are therefore limited in scope as the Member States continue to be ultimately responsible for the operational management of the EU's external border controls.

This chapter will first provide the reader with a definition of externalization of border controls (EBC) as transfer of responsibility towards third countries, thus leaving aside other forms of EBC such as sub-contracting or burden-shifting. While doing so, the chapter will already give a first glimpse at the impact that different forms of EBC might have on rights related to migration and asylum. Second, the contribution will investigate the EU's cooperation with the neighbours of its neighbours in the field of border management. With this aim, two categories of instruments will be taken into account. On the one hand, the operational arrangements between EU agencies and the neighbours of the EU's neighbours, such as those established between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) and Mauritania, will be analysed. On the other hand, avenues of capacity-building through the EU's development cooperation instruments will be explored. Finally, in order to limit the speculative nature of the arguments

presented, the EU's practice of EBC towards the neighbours of its neighbours will be looked at against the background of the EU's cooperation with Libya in the fight against irregular migration. While Libya is not a neighbour of the EU's neighbours but an ENP country, the analysis of the EU's cooperation with Libya in the fight against irregular migration serves the purpose of this chapter for two reasons: on the one hand, Libya is a country of transit of migratory flows towards the EU's external borders; on the other, EU–Libya bilateral cooperation represents a precedent which unmistakably points towards externalization. Analysing this cooperation allows to establish how the EU puts in place mechanisms of externalization and to point out how such patterns may be duplicated in relation to the neighbours of the European Union's neighbours.

Definition of externalization of border controls

The concept of the externalization of border control management, which is frequently used in the discourse on asylum and migration policy, can be broken down into two main aspects: the EU's practice of outsourcing or relocating border control procedures outside its territory (EBC as sub-contracting), and the EU's policy of making and holding third countries *de facto* accountable, through a transfer of responsibilities (EBC as transfer of responsibilities), for delivering its own preferred policy outcomes concerning border controls, including anti-trafficking and management of migratory flows and ensuing consequences in relation to abidance by applicable international obligations (Slominski 2012: 24–26). This section will introduce some examples of the mechanisms characterizing these two dimensions of EBC and highlight their shortcomings.

Externalization as sub-contracting

Externalization as sub-contracting entails a practice whereby border management is not operated at the EU's external borders but is relocated further away, usually within the territory of third countries with which the EU cooperates. When intended as sub-contracting, extraterritorialization of border management procedures can also take the form of cooperation with private entities such as, for instance, air carriers. While externalization through sub-contracting of entry-related procedures is excluded from the scope of this study due to the scarcity of such EU practice in relation to the neighbours of its neighbours, it will nonetheless be briefly dealt with for the purpose of outlining the main differences and commonalities with externalization as transfer of responsibilities.

As mentioned above, carrier sanctions are an example of cooperation with private entities which results in the sub-contracting of border control procedures. The responsibility for verifying whether or not passengers who intend to enter the EU's territory fulfil all applicable document and visa requirements and are thus legally entitled to cross the Union's external border inbound is delegated to transport companies. A powerful incentive for carriers is represented by the fact that, should the latter perform inadequate controls resulting in unauthorized

entries, they will be subject to pecuniary fining and forced to return undocumented passengers.[2] A second avenue of externalization as sub-contracting consists in exporting surveillance and identification techniques and skills to the countries of departure or transit with a view to protecting the Union's borders through a network of Immigration Liaison Officers seconded to those countries (Council of the European Union 2004). Another example of sub-contracting is the establishment of protected entry procedures: this system allows individuals who wish to claim asylum in a EU country to approach an embassy, rather than having to risk the dangerous journey to the country itself. The embassy assesses their claims, and if they are approved the individual can travel safely to the host country.

Despite technical differences, these examples of externalization of border controls via sub-contracting mechanisms all feature a certain degree of institutionalization whereby the EU's counterpart, be it air carriers or third countries' border control authorities, is made formally responsible for ensuring that subjects crossing the EU's external border are legally entitled to do so. The same degree of institutionalization cannot be observed in relation to the mechanisms of externalization as transfer of responsibility that will be analysed below and which are the ones that the European Union operates in relation to the neighbours of its neighbours. However, it is worth noting that the externalization by sub-contracting does not exclude risks in relation to the treatment of potential asylum-seekers to the extent that it is not necessarily accompanied by specific arrangements for safeguarding access to international protection by the subject concerned prior to the physical entry of the latter into the territory of the relevant country.

A recent study on carrier sanctions and Immigration Liaison Officers by McNamara (2013) examines the relations between externalization, judicial competence and effective protection of fundamental rights. State responsibility for externalized migration controls is assessed through the lens of the jurisdiction of the European Court of Human Rights (ECtHR). ECtHR jurisprudence has made it clear that it is the exercise of physical power and control over a person by the state which is pivotal to deciding on its jurisdiction over the claim, that is to say that jurisdiction is engaged only to the extent that the Court finds that physical power and control by the state have been 'effective'. This threshold of 'effective' control which has emerged from the Court's jurisprudence is a demanding hurdle to the extent that only if state control is found to be 'effective' can the state be held responsible for the full range of rights contained within the European Convention on Human Rights (ECHR).

Pending the EU's accession to the Convention, the same considerations appear to be relevant in relation to the Union's possible externalization practices. The question can, however, be raised as to whether the ECtHR can keep abreast of these controls. The difficulty of assessing their extent positively affects the states' capacity to evade jurisdiction and thus avoid fundamental rights responsibilities. One possible interpretation of recent jurisprudence is that the ECtHR is moving toward a broader way of construing jurisdiction. It is in this context that

externalized controls have come under renewed scrutiny. A prevailing opinion is that the ECtHR will be able to protect those asylum-seekers who encounter externalized control (McNamara 2013: 3–4). However, an alternative reading of the ECtHR's jurisprudence suggests that the hurdle of extraterritorial jurisdiction is so demanding that states manage to avoid it despite exercising extensive control over migrants. Notwithstanding this considerable control, examination by the ECtHR is likely to result in a failure to satisfy the 'effective' control threshold. Responsibility can thus be avoided while extraterritorial control is retained. The control level held by the state is still capable of guaranteeing a denial of entry to individuals in need of international protection. If jurisdiction is not engaged, then this externalized migration control represents a divergence between state control and state responsibility. Taking the threshold for jurisdiction of the ECtHR as a starting point, McNamara (2013: 13) suggests making a distinction between externalization on the one hand and the external dimension on the other. States, oftentimes with facilitation from the European Union, pursue one of these two alternatives. Externalization affords the state stronger and more direct control over the entry of the migrant into the territory of an EU Member State than the external dimension, where the control is indirect and weaker.

In view of the EU's prospected accession to the ECHR, the shortcomings of externalization in terms of both procedural and substantive protection of migrants' fundamental rights bring about the issue of the consistency between the internal and the external dimensions of the European Union's fundamental rights protection regime.

Externalization as transfer of responsibilities

This contribution focuses on a more nuanced form of externalization, namely making third countries *de facto* partially responsible for the EU's desired outcomes in the domain of border management, particularly in the area of migration and asylum, by providing technical and financial assistance. As far as asylum-seekers are concerned, two options sum up this approach: the sharing of responsibilities *vis-à-vis* the migrant and the idea of affording international protection as close as possible to the regions of origin, also known as 'regional protection'. These two concepts are based on the idea of achieving a more balanced distribution of the burden of asylum claims by requiring third countries' authorities to take responsibility for dealing with those claims. Regional protection in particular refers to the EU's policy of engaging those countries that are situated near the departure areas of migration flows.

Inspired by the principle of solidarity, this approach is not necessarily bad in itself, but because of the way it is implemented by the EU it seems to reflect a desire to cast off rather than share responsibilities, thus engaging in burden-shifting. In this regard, one of the most critical aspects concerning EBC as a transfer of responsibilities is exemplified by the cooperation that can be established by the EU bodies charged with migration and asylum-related issues – FRONTEX and the European Asylum Support Office (EASO) – and third

countries. While legally empowered to engage in cooperation with third coun-
tries, these agencies are seldom inclined to consider that not all third countries
that are strategically relevant in the management of borders and migration flows
offer sufficient guarantees in relation to fundamental rights protection, particu-
larly when compared with the standards provided by the regime currently in
force within the territory of the European Union, which draws on both the CFR
and the ECHR.

As the EU's agency responsible for border management, FRONTEX has con-
cluded multiple working arrangements with third states, including several ENP
countries as well as neighbours of the EU's neighbours.[3] With the entry into
force of the 2011 FRONTEX Regulation, the agency has acquired even more
competences to engage third states in its activities (European Parliament and
Council of the European Union 2011: art. 14). For example, the agency is able to
place its own liaison officers in third countries and can implement 'assistance
projects' there (European Parliament and Council of the European Union 2011).
Despite the fact that art. 14 of the FRONTEX Regulation emphasizes the need
for the agency to engage in forms of international cooperation which are respect-
ful of migrants' fundamental rights, those third countries with which the agency
has a strategic interest in concluding working arrangements are non-EU Member
States and are therefore not bound by the CFR nor – in most cases – by the
ECHR (Alegre *et al.* 2009: 14, 16–17; Gammeltoft-Hansen 2010: 2–6). This
means that those countries are not obliged to abide by the provisions enshrined
in the European fundamental rights protection regime. Moreover, even countries
that are signatories to international instruments, such as the ECHR or relevant
UN Conventions, still deserve a critical scrutiny of the adequacy of their prac-
tical implementation of those instruments before FRONTEX cooperates with
them.

The risk that FRONTEX engages with national authorities that are not suffi-
ciently committed to and bound by fundamental rights obligations is not to be
underestimated. By externalizing border controls to these authorities, even only
by exchanging information and providing border control capacity-building, the
EU runs the risk of subsidizing practices which do not meet the standards of EU
fundamental rights protection. However, as the next section will show with
regard to the working arrangements concluded by FRONTEX with Mauritania,
the risk is not easy to assess given that the terms of the cooperation are not made
public and are therefore not subject to inter-institutional scrutiny, particularly as
far as the European Parliament is concerned.

The EASO is in turn mandated to establish relations with third countries on
the exchange of information and capacity-building exercises in the areas of
asylum and reception conditions. Art. 49(2) of the EASO's founding regulation
calls on the office to facilitate operational cooperation between the Member
States and third countries within the framework of the EU's external relations
policy (European Parliament and Council of the European Union 2010). Given
the recent establishment of the office in 2010 and the broad nature of the above
provision, it remains to be seen how EASO's capacity-building role, which could